(1929) 12 BOM CK 0018

Bombay High Court

Case No: O.C.J. Appeal No. 1 of 1929 and Suit No. 1255 of 1928

Nagardas Mathuradas		APPELLANT
	Vs	
N.V. Velmahomed		RESPONDENT

Date of Decision: Dec. 9, 1929

Acts Referred:

- Contract Act, 1872 - Section 113, 118

Citation: AIR 1930 Bom 249 : (1930) 32 BOMLR 454

Hon'ble Judges: Blackwell, J; Ambertson Marten, J

Bench: Division Bench

Final Decision: Allowed

Judgement

Blackwell, J.

This suit as originally framed was a suit to recover the sum of Rs. 3,841-10-0 upon the basis that the defendant employed the plaintiffs as his commission agents on pakki adat terms. Alternatively, the suit was for the price of goods sold and delivered. Counsel before us have agreed that the case has been fought out upon the footing of a suit for the price of goods sold and delivered. The defence was that the defendant had rightly rejected the goods, and there was a counter-claim for the sum of Rs. 835-12-2 for the expenses alleged to have been incurred by the defendant in respect of the goods in question. [After referring to the issues, His Lordship proceeded :]

2. The learned Judge hold that the defendant rejected the goods, and that subsequent to that rejection by him his marks were put on the bags which were then taken from Chamar Godi to the Alexandra Docks. The learned Judge came to the conclusion that this was an exercise of ownership by the defendant over goods which he had previously rejected, that exercise of ownership being inconsistent with the rights of the plaintiffs, and upon this footing the learned Judge awarded Rs. 1,200 for damages to the plaintiffs for conversion of goods, that sum being the

amount realized on the sale of the goods pending the suit for whom it might concern, the Judge holding that the sum so realized was a fair estimate of the value of the goods.

3. It must, however, be observed that a claim for damages for conversion had not been raised either on the pleadings or during the trial. Counsel at the bar informed us that the first time that any question of damages for conversion was mentioned was when the judgment which had been reserved was subsequently delivered. There have been no amendments of the pleadings, no issue has been raised, and counsel on neither side have been afforded any opportunity of dealing with the case on this basis-In my opinion, before a Judge delivers a judgment, which is not covered by and is inconsistent with the pleadings before him and the issues raised, he ought to insist upon an amendment of the pleadings, and, if necessary, to direct a further issue or issues to be raised, and to afford, counsel an opportunity of dealing with the Base upon the pleadings so amended and the fresh issue or issues 30 raised. Nothing of the kind happened in this case, and with very great deference to the learned Judge, in my opinion, his judgment cannot be supported for this reason, apart from other reasons, which I will proceed to mention.

4. From that judgment the plaintiffs have appealed. The main ground of their appeal is to be found in paragraph 10 which is to the effect that the learned Judge ought to have held that the dealings with the goods by the defendant''s servants constituted an acceptance of the goods and that the defendant was bound to pay the price. The defendant has raised cross-objections, the main o-rounds being those to be found in paras. 2 and 4, Para. 2 is in these terms: " The learned Judge having held that the defendant did not accept the goods, ought to have dismissed the suit with costs". Para. 4 is as follows. " The learned Judge ought not to have granted relief to the plaintiffs on a cause of action not made out in the plaint and not put forward at any stage of the proceedings".

5. Before coming to the contract in this ease, it may be mentioned that the parties had had previous dealings with one another in 11 konda current quality" which is also the class of goods forming the subject matter of the present suit. The occasions for those dealings are set out in the second paragraph of the judgment of the learned Judge, and I need not refer to them in detail. It is to be observed that several of those purchases were at fourteen annas, and that they took place in the earlier part of the year before the contract with which we are concerned.

6. I come now to refer particularly to the correspondence leading up to the present contract, and the letters in pursuance of which the goods were supplied.

7. [His Lordship after referring to the correspondence proceeded:] The important question of fact arising on this appeal is this: what happened to these goods when they arrived at Chamar Godi Bunder in the country craft ? The learned Judge has held that the defendant had an opportunity of examining the goods at Chamar Godi

where the country crafts were unloaded, that his men did examine them, that the defendant after that examination there made rejected the goods by a letter dated May 3, 1928, to which I will refer later, and that thereafter the defendant''s marks were put on the bags, and they were taken to the Alexandra Bocks. That constituted, in the judgment of the learned Judge, as I have already stated, a wrongful conversion of those goods, by the defendant.

8. The question for our consideration is whether this finding of the learned Judge that the defendant''s man examined the goods at Chamar Godi, and that the defendant rejected them by the letter of May 8 and subsequently caused his marks to be put on the bags, is in fact justified by the evidence oral and documentary in this case. [After referring to the evidence His Lordship proceeded :]

9. On this documentary and oral evidence, differing with respect from the learned Judge, the conclusion to which I would come is that there was in fact no examination of these goods at all at Chamar Godi Bunder, that the defendant''s man put the defendant''s marks on the bags and sent them from there to the docks, that the defendant''s munim examined the goods at the docks, and then purported to reject them by the- letter of May 3, 1928.

10. I turn now to refer to the relevant sections of the Indian Contract Act. Section 113 is in these terms :-

Where goods are sold as being of a certain denomination, there is an implied warranty that they are such goods as are commercially known by that denomination, although the buyer nitty have bought them by sample, or after inspection of the bulk.

11. The explanation to that section is not material for the purposes of this case. The only other relevant section is Section 118, which is as follows ;-

Where there has been a contract, with a warranty, for the sale of goods which, at the time of the contract, were not ascertained or not in existence, and the warranty is broken, the buyer may accept the goods or refuse to accept the goods when tendered, or keep the goods for a time reasonably sufficient for examining and trying them, and then refuse to accept them; provided that during such time he exercises no other act of ownership over them than is necessary for the purpose of examination and trial.

In any case the buyer is entitled to compensation from the seller for any loss caused by the breach of warranty ; but, if he accepts the goods and intends to claim compensation, he must give not ice of his intention to do so within a reasonable time after discovering the breach of the warranty.

12. Having regard to the fact that we have been referred to certain English cases, to which I shall make reference shortly, it is desirable here to mention that in Section 118 of the Indian Contract Act no distinction has been drawn between conditions

and warranties-a distinction which is well marked in the English cases and in the Sale of Goods Act of 1893. On the contrary the word " warranty" is used in Section 118 in the sense of condition as well as warranty.

13. Mr. Munshi in the course of his argument contended, first, that he refused to take delivery on May 3, 1928, when the goods were at Ohamar Godi Bunder, and he submitted that if he so rejected the goods and was entitled to reject them, the contract was at an end, that the property remained with the seller, and that therefore no suit for the price of goods would lie. Having regard to the conclusion to which I have come, that there was no rejection at Chamar Godi Bunder, this argument of Mr. Munshi is no longer open. Upon the assumption that that argument was not open to him, Mr. Munshi fell back on Section 118, and he admitted that if the goods were not rejected at Chamar Godi Bunder and had been kept by the defendant for the purpose of examination, then the question would be whether there had been an exercise of ownership over the goods.

14. I may here usefully refer to the English case of Wallis, Son & Wells v. Pratt & Hayim [1910] 2 K.B. 1003. That was a decision of the Court of Appeal, there being a dissenting judgment of Lord Justice Fletcher Moulton, which was subsequently approved of by the House of Lords on appeal, (See [1911] Section C. 394). The main point emerging from that dissenting judgment and from the opinions of their Lordships in the House of Lords to which it is useful to refer in the present case is this,-that if a buyer orders goods of a certain description, and the seller delivers goods of a different description, it is open to the buyer to reject them. But if he does not reject a) [1910] 2 K. B. 1003. but keeps the goods, even if he does so in ignorance of the fact that they are of a description different from that provided for by the contract, he is debarred from rejecting the goods thereafter, and can only fall back upon a claim for damages, as upon a breach of warranty.

15. Mr. Coltman put his case in the course of the argument in this way. He submitted that whether the goods tendered were of the contract description or not was really immaterial, if in fact, as he contended, the defendant had exercised ownership over the goods which were delivered. In my opinion Mr. Coltman is right in this argument, It is clear from the evidence-and indeed it has not been really disputed-that the defendant had an opportunity of examining these goods at Ohamar Godi Bunder, and on the evidence I have come to the conclusion that although he had that opportunity he did not exercise it; and that instead of exercising it he put his marks on those goods and transferred them to the docks. Putting marks on bags as the defendant did is a serious matter so far as the original owners of the goods are concerned. The marks indicate that there has been an appropriation of those goods under a contract of sale. The placing of marks on the bags is, in my opinion, an act which is clearly inconsistent with the continued ownership of those bags by the original owners. If, after the bags had been so marked the plaintiffs wished to deal with them thereafter by way of sale in the

market, they would of course have to rebag them. Accordingly the conclusion at which I have arrived is this,-''that not having examined the goods on arrival at Chamar Godi Bunder the defendant took his chance as to whether the goods were or were not of the contract description. Having put his marks on the bags he cannot in my opinion afterwards be heard to say that there has been a breach of a condition entitling him to reject, and his only remedy in those circumstances would have been to give the notice contemplated by Section 118 of the Indian Contract Act that he intended to claim damages.

16. I would here refer to a case of Chapman v. Morton (1843) 12 L.J. Ex. 292. In that case Lord Abinger in the course of his judgment said as follows (p. 294):-

The defendant''s acts were to a certain extent equivocal, and therefore we must look at the rest of his conduct for explanation. Now, he may have had a right to repudiate the contract if the goods did not answer the sample ; but here, by selling them, ho deals with them as his own. If he intended to renounce the contract, he should have given distinct notice to the plaintiffs that he repudiated the goods ; that he would not accept them ; that he was compelled, indeed, under the circumstances, to land them, but that he would sell them on such a day, and at such a place, and would hold the proceeds at their disposal. He does not take this course, but plays fast and loose, declaring that he will not accept the goods; but, at the same time, preventing the plaintiffs from dealing with them as theirs.

17. Those remarks appear to me to be appropriate to the facts of the present case. It is common ground that the defendant did not load these goods on the ship in which he had space available for them. On the contrary he shipped oil cakes in place of the goods. The defendant was out of Bombay. It would appear to so that the defendant''s mehta was, as Lord Abinger said in the case mentioned above, playing fast and loose. Possibly he did not like to take upon himself the responsibility of rejecting the goods immediately upon arrival at Chamar Godi Bunder. Accordingly, he permitted the defendant''s marks to be placed thereon, transported them to the docks, and purported to reject them thereafter. In my opinion he should either have rejected the goods on arrival at Chamar Godi Bunder, or have given notice that he was going to claim compensation. He clearly cannot have it both ways, first treating the goods as belonging to the defendant by putting the defendant''s marks thereon, and then rejecting them thereafter,

18. I would also refer to the case of Perkins v. Bell [1893] 1 Q.B. 193. That was a judgment of the Court of Appeal delivered by Lord Justice Section L. Smith, and there are certain very useful passages in that judgment on the question of the proper place for inspection of goods and rejection. In the course of his judgment Lord Justice Smith said (p. 197) :-

We find no evidence in this case to dislodge the presumption which prima facie arises, that the place of delivery is the place for inspection. To hold otherwise) would

be to expose the vendor to unknown risks, impossible of calculation, when the contract was entered into.

19. Later on in his judgment that learned Judge said:-

The evidence given shows that the bulk could be inspected in the sacks in the trucks at the station. The suggestion that the barley had to be shot before inspection is untenable, and there is no evidence to support it.

20. Further on he said (p. 198) :-

When the defendant took possession of the barley at the station and ordered it to his sub-vendees, the property in the barley passed to him, and his right of rejection was then gone.

21. In the case before us it is common ground that the place of delivery was Chamar Godi Bunder. There is no evidence in the case that any other place had been agreed upon as the proper place for inspection. Accordingly, I would hold that the proper place of inspection was Chamar Godi Bunder. Applying the words of the learned Lord Justice in the case to which I have referred, "to hold otherwise would be to expose the vendor (the plaintiffs in this case) to unknown risks " which they cannot reasonably be expected to have assented to, such as the putting of marks on the bags, their removal to the docks, and the tearing of the bags and the damage that is likely to ensue as the result of such removal. Accordingly, I think it plain as a matter of law on the facts of this case that if the defendant desired to exercise his right of inspection and rejection, he was bound to do so at Chamar Godi Bunder.

22. It may also be noted that the defendant in fact credited the plaintiffs with the price of those goods in their books when those goods arrived. It is true that subsequently, viz., on. May 7, a later entry was made in which it was stated that the previous credit, entry had been made by mistake. It is, however, in my opinion, significant that this credit entry was made, and the fact that it was so made is, in my opinion, an indication that the defendant''s munim was playing fast and loose in that he first exercised dominion over the goods, and later purported to reject them.

23. The conclusion at which I have already arrived is enough to dispose of this case. I would, however, refer briefly to the other question which arose for consideration viz., whether in fact the goods delivered were in accordance with the contract. [His Lordship referred to the evidence and concluded:]

24. Accordingly if it had been necessary to determine this matter, I myself should have arrived at a conclusion different from that at which the learned Judge arrived, and on the evidence and the correspondence and all the circumstances have held that the goods tendered were in fact of the contract quality.

25. In the result this appeal should, in my opinion, be allowed with costs and the cross-objections dismissed with costs.

Marten, C.J.

26. I agree. But out of respect to the learned trial Judge I will state shortly my reasons for arriving at a different conclusion from him. In the first place, I think it clear that the decree for damages for conversion cannot stand, as eon-version was never pleaded, or put in issue, or argued.

27. Next, assuming for the sake of argument that the goods delivered were not of the contract quality, yet the defendant has to admit that the goods were taken delivery of at Chamar Godi Bunder, and that his mukadam and servant put the defendant''s marks on the goods, and that they were carted to the Alexandra Docks alongside the steamer Assyria for shipment to England. That being so, there was, in my opinion, an acceptance of the goods in law despite the alleged rejection contained in the letter of May 3, 1928. Marking the goods and sending them to Alexandra Docks for foreign shipment were, in my opinion, acts of ownership which were not necessary for the purpose of examination and trial u/s 118 of the Indian Contract Act, So, too, the proviso for compensation for breach of warranty does not apply as no notice u/s 118 was ever given by the defendant.

28. Then as regards the alleged rejection by the letter of May 3, this letter itself shows that the marks had already been put on and that the goods were alongside the steamer Assyria. This alleged rejection then was too late., for the defendant by the acts of his servant had already accepted the goods. [After referring to the evidence on this point his Lordship concluded:]

29. The defendant having thus lost his right of rejection and being unable to claim compensation in the absence of the necessary notice u/s 118, it follows in my judgment that he must pay the price of the goods. Nor do I think there is any hardship in this. Looking at the initial correspondence I very much doubt whether in fact the defendant did not receive the goods he had really contracted for. It is, however, unnecessary for me to go into that point. I would decide the case against the defendant irrespective of it.

30. I would accordingly allow this appeal, and direct the decree to be discharged except in so far as it dismisses the counter-claim, and directs the defendant to pay the plaintiff''s costs of the counter-claim, and of speaking to certain minutes. And I would instead pass a decree as claimed, and direct the defendant to pay the costs of the suit throughout, including the costs of this appeal. I would dismiss the cross-objections with costs.