

Sitaram Srigopal vs Smt. Daulati Devi (Dead) By Heirs And ... on 10 January, 1979

Equivalent citations: AIR1979SC1225, (1979)4SCC351, 1979(11)UJ203(SC), AIR 1979 SUPREME COURT 1225, 1970 4 SCC 351, 1979 UJ (SC) 203, 1979 (4) SCC 351, (1980) 3 MAHLR 15

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Bench: O. Chinnappa Reddy, R.S. Sarkaria

JUDGMENT

R.S. Sarkaria, J.

1. This appeal by certificate is directed against a judgment, dated December 6, 1968, of the Calcutta High Court. The relevant facts giving rise to this appeal are as follows:

2. On July 29, 1950, Tulsiram Shaw (since deceased) carrying on business under the name and style of "Tulsiram Bhagwandas" purchased certain specific goods for Rs. 35,100/- under Lot No. 32 in an auction held on July 27, 1950 at Panagarh by M/s. Egbert Andrews & Co., auctioneers, under instructions of the Government of India. The major item of these goods in Lot No. 32 comprised of 1540 pieces of "value sluice water flanged and drilled to B.S.T.C. 4". The book value of this item was stated to be Rs. 88,454/ and that of the remaining goods Rs. 5,170/14/-. The reserved valuation at the auction sale was Rs. 35,000/-.

3. On August 26, 1950, Tulsiram Shaw sold those specific goods for a gum of Rs. 35,200/- to the partnership firm of Sitaram Srigopal. The latter paid the entire price in cash to the former Tulsiram Shaw further promised to hand over the release order of the goods and/or delivery order by August 28, 1950, to enable the firm to take delivery of these goods from Panagarh. Tulsiram neglected or refused to deliver the said release order in spite of demands by Sitaram Srigopal.

4. On the preceding allegations, Sitaram Srigopal instituted a suit in the High Court of Calcutta against the original defendant, Tulsiram Shaw, on January 15, 1951, for specific performance by the defendants to deliver the said specific goods on the ground that these goods were not readily available in the market and were of some big value and, therefore, damages would not afford adequate relief for the loss of the goods. In the alternative, the plaintiff claimed refund of the price of Rs. 35,200/- with interest at 6% per annum and a further sum of Rs. 1,32,559/- as damages being the difference¹ between the contract price and the market price of the goods on the date of the breach, namely, the end of August 1950.

5. The suit was resisted by the original defendant, who, in his written statement, pleaded that he was, at all material times, ready and willing to deliver the release order to the plaintiff and had in fact offered to do so, but the latter requested the defendant to cancel the contract and refund the amount of Rs. 35,200/- by cheque on September 21, 1950, but the plaintiff declined to accept it.

6. During the pendency of the suit, the original defendant died on November 15, 1959 and his widow, Smt. Daulata Devi (respondent 1 herein and his only for, Bhagwan Das Shaw (respondent 2 herein) were impleaded as defendants in place of the deceased.

7. On April 12, 1960, respondent 2, Bhagwandas Shaw, filed an additional written statement in which he took additional pleas.

8. The suit originally came up for hearing before G. K. Mitter J. on March 8, 1957, when some witnesses were examined. It next came up before the learned Judge on March 11, 1957, for examination of further witnesses. Counsel for the defendants, however, failed to appear. The learned Judge, therefore, closed the case and passed a decree for Rs. 35,200/- with interest and costs, against the defendants.

9. On being moved by an application, the judgment and the decree was recalled and the suit was again tried by A. K. Mokerjee J , who, by his judgment, dated 23rd and 26th August, 1965, decreed the suit for the refund of Rs. 35,200/ , with interest at 6% per annum, from August 26, 1950 up-to-date and for a further sum of Rs. 63,445/- as damages with interest and costs.

10. The Appellate Bench of the High Court, after a reappraisal of the evidence on record, came to the conclusion that the goods in question at the time of the sale were "old and second hand goods but in fair condition". The Bench reasoned: "If the goods were really new, the reserved price would not have been nearly half the book value at a public sale." The Bench found it "impossible to believe (hat they were in brand new condition". It was, there fore, impossible to fix the market price of the goods of such second hand quality upon evidence relating to the sale of brand new goods. In its opinion, "the evidence produced by the witnesses for the plaintiff did not prove the market price of the goods (of such second hand quality) at the relevant time" and the only possible conclusion is that the market price of the goods was a price at which they were sold and purchased in July August, 1950". On these premises, the Bench was of the opinion "that the procedure adopted by the learned Judge in the Court below, namely, the taburation of prices mentioned by the witnesses and then taking the lowest price is not warranted by law and the result arrived at by him is not a correct approximation of the market price." In the result, the Bench partly allowed the appeal, and while affirming the decree of the mat court with regard to the refund of Rs. 35,200/ , with interest at 6 per cent per annum, dismissed the plaintiff's claim for damages, which in the opinion of the Bench, were not suffered by him.

11. Hence, this appeal by the plaintiff against the dismissal of his claim to damages.

12. We have heard the learned Counsels for the appellant and examined, with his assistance, the evidence on the record. Ascertainment of the plaintiff's claim for damages turned on a

determination of two points, namely: (1) what was the condition of the goods at the time of the sale in favour of the plaintiff? (ii) What was the market value of the goods of that quality and condition in August 1950, when the alleged breach of the contract took place? Regarding No. (i), the plaintiff had, besides examining its partner, Hanuman Prasad Mody (P W 8), examined Dalal Kishan Basu (P. W. 3), Maganlal Patel (P. W 4), Jagmohan Kandra Parekh (PW 5) and Hari Prasad Diwananta (PW 70) P.W. 3 was an Assistant in the office of the Directorate of Supplies and Disposals, Calcutta At the relevant time in 1950, it was his duty to arrange for the auction of these goods which, accordingly has been declared as surplus goods" by E.S D. Panagarih The witness disclosed that the book value of these goods in Lot 32, was Rs. 88,454/-, while their reserve price was fixed at Rs. 30,000/ . The witness, however, had no personal knowledge of about these prices. He deposed to these facts on the basis of the information derived from the documents (Ex. Q54 and Ex. Q92) which did not mention about the quality and nature of these goods. The witness conceded that he did not personally know the condition of the goods concerned. Nor did he say on the basis of any record that the goods earmarked for auction in Lot No. 32 were categorised as 'surplus goods' as 'distinguished from "salvaged goods". He admitted that he did not belong to the Commodity Section who prepare the lists of "surplus" and "salvaged" goods for disposal. Asked about the condition of the goods, the witness said that since the goods had been taken out of Shed No. 29,, "they must have been in a good condition". This was merely an opinion of the witness based on guess work, and not derived from any note in any official record about the condition of the goods. P.W. 3 further stated that five sluice valves were set apart for sale to Benaras Hindu University which in his opinion, must have been in "brand new condition." The evidence of PW. 3 being merely an opinion based on guess-work and not personal knowledge, was rightly not accepted by the Appellate Bench of the High Court.

13. P.W. 4 was a businessman who claimed to have inspected the 1500 sluice valves soon before the auction, when they were lying in rows and found them in good condition. He, however, admitted that the sluice valves were lying enclosed in packets and he judged their condition from outside without opening any packet.

14. PW. 7, Didwana, another businessman who claimed to have attended the auction, sharply contradicted P.W. 4 on this point and said that the goods were not lying covered with packing and were "absolutely new".

15. P.W. 5, Parekh, was the auctioneer who conducted the auction sale on behalf of the Government. According to him, the goods comprised in Lot. No. 32 were lying under semi-shed No 29, and were according to his impression, "surplus goods" which meant new goods-fresh goods as distinguished from "salvaged goods" for disposal, which are "unserviceable". P. W. 5 further admitted that no warranty was given as regards the quality, character and condition of the goods for auction, which was on "As is and where is" basis. According to P.W. 5, the goods looked new. This was merely his impression which he formed from a superficial examination.

16. As rightly observed by the Court below, this opinion of the witness was not based on any document. It was only his own impression reproduced from memory, unaided by any record, about twelve years after the auction of the goods. It was therefore, hazardous to accept his mere word of mouth.

17. While the oral evidence of the aforesaid witnesses was discrepant, infirm and conjectural, there are several uncontroverted circumstances in this case that point to the conclusion that the goods in question were old and second hand goods. Firstly, they were purchased by the Defence Department several years before their disposal by auction, probably during World War II. Secondly, their book value as entered in the Government records, was Rs. 88,454/- , while for the purpose of disposal by auction their 'reserved price' was fixed by the Finance Committee concerned at Rs. 35,000/- only, which was substantially less than one-half of the book value. Thirdly, the auction purchaser Tulsiram Bhagwandas, resold the goods about one month after the auction- purchase, for Rs. 35,200/- which was only Rs. 100/- more than the amount for which he had purchased it. Tulsiram being a business man dealing in such type of goods must have been aware of the prevailing market value. Had there been any substantial difference between the auction price & the market value of the goods of similar quality & condition, no prudent businessman, in the absence of any paramount, compelling necessity, would have resold the goods practically at the same price at which he had purchased it a few weeks earlier. There is nothing on record to show that this resale by Tulsiram in favour of the plaintiff was made under the compulsion of unavoidable circumstances or was motivated by considerations other than those which operate on the mind of a business-man selling his goods in the normal course of business.

18. For reasons aforesaid, we are in agreement with the Appellate Bench of the High Court, that the sluice valves in question, comprised in Lot No. 32, were not "brand new goods", but were old second-hand goods.

19. Regarding Point No. (ii) : The plaintiffs produced no evidence to establish the market value of second-hand goods of that quality and condition, The plaintiffs, however, examined three witnesses to show the market price of sluice valves of these specifications and make.

20. The first witness examined on this point was PW. 1, A.N. Rajan. He was a scientist and owner of several patents in tele-communication. His evidence was to the effect, that on December 28, 1950, he received an order from Messrs Bell's Asbestos Ltd., for despatching two pieces of brand new sluice valves to Always. The witness produced that order (Ex. A) in which the sale price was not at all mentioned. The witness, however, stated that the sale price charged was Rs. 98/- per piece. In this connection, he tendered a document which, according to him, was a type-written copy of a bill. This bill was not proved but was marked for identification. He referred to an entry (Tx.B1) in Sales-Tax Register, which he said was maintained under his supervision. In this entry, the figure '196' is mentioned and against it '56' is written. According to the witness, the figure '196' indicates the price which was charged for the two pieces of brand new sluice valves sold by him, while '56' denotes the Ledger Folio Number. The witness however, did not produce his Ledger or other account books which might have shown the rate at which the goods were sold. Further, he admitted that he did not charge any sales tax from the purchaser of these two sluice valves, as the latter was a registered dealer. Rajan admitted that part from the account books, the cheque received from Messrs Ben's Asbestos Ltd. towards the price of these two sluice valves, would have corroborated his word of mouth. But no attempt was made to produce any such cheque or letter written by the purchaser. The witness conceded that Rs. 98/- per 'sluice valve flanged and drilled B. S. T. C. in December 1950 was his selling price and that he was not concerned with the market rate "because market people may

charge more or charge less". As nightly held by the Court below, even if it is assumed that the rates charged by Rajan for two pieces of brand new sluice valves, were the ruling market price in December 1950, it was no evidence of the market price of old, second hand sluice valves of the same quality and condition as in Lot No. 32, in August 1950.

21. P.W. 2, M. Subramaniam alias M. S Mani, an employee of Bells Asbestos Ltd. was examined to prove the order (Ex. A) produced by P.W. 1. The witness (P. W 2) thought that the order was placed; that it was in his hand; that it was an open order and the price was not mentioned in it. The witness had no personal knowledge of the price charged by the sellers. Taus, P.W.S, did not give any evidence with regard to the market price.

22. P. W. 4, Maganlal Patel, claimed to have purchased another Lot of corrugated sheets, at the auction held on July 29, 1950 He stated that sometime after the purchase of the sluice valves by Tulsiram Bhagwandas, the witness went twice or thrice to the latter to purchase 4" sluice valves. Tulsiram demanded Rs. 100/- per piece. The witness did not purchase the valves. The witness was dealing in similar goods and was maintaining account books; but did not produce them.

23. P. W 7 also vaguely stated that the price of import to sluice valves was Rs. 80 to Rs. 100 per piece. He also did not produce his account books or any document in support of his ipse dixit.

24. P.W. 6, D. K. Majumdar was an important witness. He was a Commercial Assistant in W. H, Deeth & Co., Calcutta. In 1950, his duty was to go out in the market to collect indents. Deeth & Co. was the representative of Newman Mander & Co. Ltd and some other British manufacturers of Sluice/Steam valves and Cocks, He identified the signature of Mr. M. Chatterjee on the letter (Ex. M) dated March 27. 1952 and stated that the rate of sluice valves B. S. T. C. 4" quoted therein was 78 Section 7 each, delivery F.O.B. British Port.

25. The High Court has pointed out - and we think rightly that this letter, Ex. M is not a quotation but a mere statement made in 1952 in a letter written to the plaintiff in reply to the latter's query, as to the market price of such goods in August 1950. Majumdar (P.W. 9) has admitted that he did not personally deal with this latter or its subject matter, which was dealt with by Mr. Chakravarty personally, who alone could vouch for the correctness of its contents. The witness candidly conceded that he could not confirm the correctness of the rates given in this letter, without reference to the other documents which were not in his possession at the time of his examination.

26. P. W. 6 further referred to the catalogue (EXS. N1 and N2) of Newman Mender & Co. Ltd. This catalogue on the face of its, showed that it was issued in 1945. The learned Judges of the High Court therefore, rightly did not rely on it. They have observed that there is nothing to show that the sluice valve shown in figure 541 in this catalogue is of the same description as those mentioned in Lot No. 32, because P. W. 6 was unable to affirm this fact.

27. It is clear from the above conspectus that the evidence produced by the plaintiff was not cogent, convincing and reliable to establish, either that the goods comprised in Lot No. 32 were in brand new condition, or the market price of goods of similar specifications in August 1950. In view of the

circumstantial evidence on the record, the court below was not wrong in holding that the market price of the goods in question in August 1950 was the same at which they were purchased by the plaintiff from Tulsiram Bhagwan Dass and consequently, the plaintiff was not entitled to any damages, apart from the refund of Rs. 35,200/- which was the price paid by him.

28. No. other point has been argued before us.

29. In the light of the above discussion, the appeal fails and is hereby dismissed with costs.