Moti Lal Jhun Jhunia vs Mool Chand on 31 July, 1950

Equivalent citations: AIR1952ALL242, AIR 1952 ALLAHABAD 242

JUDGMENT

Malik, C.J.

1. This is a plaintiff's appeal in a suit for damages. The lower Court decreed the plaintiff's suit for Rs. 1,327-8-0. The plaintiff had, however, claimed as damages Rs. 11,872-7 0. This appeal is for the balance, i. e. Rs. 10,644 15-0 only. On 2nd December 1941 there was a contract between the plaintiff and the defendant by which the defendant agreed to purchase ten cases of katan silk, Panchtara Brand No. 13.15 at the rate of Rs. 30-6-6 per pound, the date of delivery being 18th December 1941. According to the custom of the market the buyer was entitled to two days grace.

2. The case of the plaintiff is that on the due date he sent a wire to the defendant to take delivery of the ten cases but that the defendant put it off till the Amawasya Day which was the 20th of December. On 20th December, the plaintiff got from the Central Bank of India 14 cases, 8 half and 6 full, of katan silk for delivery to the defendant. Up to here the facts are not in dispute, The plaintiff's further story was that he had sent these cases to the defendant but that the defendant had refused to take them. This story has been disbelieved by the lower Court, and it has not been seriously pressed before us in appeal.

3. The plaintiff thereafter gave notice to the defendant that he would sell the oases unless the defendant immediately took delivery and paid for the same. On 30th December 1941, the defendant sent to the plaintiff the following telegram :

> "Seen notice "Aj" no notice received before, contents absolutely incorrect, no delivery contemplated nor offered within the transaction wagering no liability may sell at your own risk. Moolchand."

On the same day, the plaintiff sold the oases and the sale proceeds amounted to Bs. 17,932-0-6, out of which, after giving credit for 5 per cent, commission to the auctioneer, the plaintiff received a sum of Rs. 17,035 7 0. At the price mentioned in the contract the amount payable by the defendant came to Rs. 28,801-13-3. The plaintiff, claimed the difference as damages. The lower Court was, however, of the opinion that, as the goods had not been appropriated to the purchaser defendant the seller was not entitled to re-sell the goods at the defendant's risk, and that be was, therefore, entitled only to the difference between the contract price and the market price on the date of the breach.

4. The point for decision in this appeal is whether the damages are to be computed at the rate prevailing on the date fixed for delivery or they are to be calculated at the difference between the

contract price and the price realised at the re-sale Where the title to the goods has not passed and there is no clause in the agreement giving the seller a right to re-sell the goods and there is a breach of the contract, the plaintiff can only claim the difference between the contract rate and the rate prevailing on the date of the breach. If, however, the title to the goods us passed, the seller is entitled to claim the difference between the contract price and the price realised at the re-sale, provided he has sold the goods within a reasonable time and after due notice. The question in this case is whether the plaintiff is entitled to realise the difference between the contract price and the price realized at the re-sale as there was a clause in the contract giving the plaintiff the right to re-sell. The relevant clause in the contract is as follows:

> "We shall take delivery on the due date. If we do not take delivery on the due date, you shall have power to sell the goods and we shall be liable to pay the loss which may have been incurred in respect thereof."

It is not denied that the plaintiff firm had many more cases of katan silk Panchtara, in their possession on the date of the contract, and the contract, therefore, was of unascertained goods and by description. The law requires that where unascertained goods have been sold by description, then the title would pass only if the goods have been unconditionally appropriated to the contract by the seller with the consent of the buyer. The relevant portion of Section 23(1), Sales of Goods Act is as follows:

> "Where there is a contract for the sale of unascertained ..... goods by description and goods of that description and in a deliverable state are unconditionally appropriated to the contract... by the sellac with the consent of the buyer . . . the property in the goods thereupon passes to the buyer. Such issent may ba express or implied, and may be given either before or after the appropriation is made."

5. On the date of the contract, there can be no doubt that the goods were unascertained, and they were sold by description. But the plaintiff took out from the Bank on the due date the required quantity of silk yarn for delivery to the defendant. The question, however, remains whether it can be said that there own an express or implied assent by the buyer authorising the seller to appropriate the goods towards the contract. Reliance is placed on the case of Furby v. Hoey, (1947) l ALL E. r. 236. In that case the learned Chief Justice observed at p. 238 :

> "If a man enters a shop and, seeing a bottle Of gin, points to it and Bays: "Please sell me that bottle, and the shopman gives it to him, there is then a sale of a specific chatsel. If he says--the gin being under the counter, or elsewhere--"Please let me have a bottle," and the shopman takes one out and hands it to him, and he accepts it, there is an appropriation from his stock with the buyer's express consent. If the buyer writes or telephones or sends his servant and says: 'Please send me or let me have a bottle", he is leaving it to the shopman to appropriate a bottle out of his stock to the customer, and as soon as the shopman does so the sale is complete. The customer has, by his conduct, impliedly assented to the appropriation."

6. The illustration given by the learned Judge makes it clear that in a case where the selection is left by the buyer to the seller and the seller makes the selection, it must be deemed that he has done so with the implied consent of the buyer, whereas, in this case there is nothing in the contract which gives the right, expressly or impliedly, to the seller to appropriate the ten cases of katan silk, or to get them from the Bank and send them to the buyer. There can, therefore, be no question of an implied consent. The relevant portion of the contract is as follows:

> "We have purchased today ten cases of katan silk ..... from you ..... due date being ..... We shall take delivery on the due date."

It was quite open to the buyer to insist on going to the godown or to the Bank where the goods were kept and making his own selection of the ten oases that he wanted to buy. In a case where no option is given to the seller to select the goods for delivery to the buyer, we do not see how it can be said that there was any express or implied consent to entitle him to appropriate the goods to the contract, so that the title to the goods should pass to the buyer.

7. It is however, not necessary to consider the question, whether the title to the goods had or had not passed, at any length. The contract gave the plaintiff a right to re sell on defendant's failure to take delivery. The seller bad sent for the goods from the Bank, had sent intimation to the buyer asking him to come and lake delivery of the same, and, after the buyer's refusal to take delivery, he had sold the goods. In a similar case, a Full Bench of the Calcutta Sigh Court in Moll Schutte and Co. v. Luchni Chand, 25 cal. 505 decided that the plaintiff was entitled to recover the difference between the contract price and the price fetched at re-sale. The terms of the contract in that case and in the case before us are very similar. The defendant had entered into a contract to bay ten cases of tobacco from the plaintiff. The goods were shipped by steamer to Calcutta. When the goods arrived at their destination the defendant refused to take delivery of them. In the contract there was a term to the following effect:

> "I herewith pledge myself to pay for them before delivery within 30 days after arrival of the bill of lading from Europe, failing which you are authorised to re sell the goads or any portion of them, or at your option cancel this indent, and you have absolute discretion as to when and how to re-sell the goods."

The question arose whether the plaintiff who had re-sold the goods was entitled to claim the damages that he had suffered by re-sale or he was only entitled to claim the difference of the prices on the date of the contract and on the date of the breach. Maclean C. J. who delivered the judgment of the Bench observed as follows:

> '"I base my decision on the terms of the contract between the parties. Here the parties, two mercantile men, perfectly competent to, contract, have nude their own bargain, and one of the terms of that bargain is that if there were any such default on the part of the purchaser as is mentioned in Clause 1 (as there was) the vendor was to have the right tore-sell the goods, and any loss or deficiency arising from smb. re-sale, with interest thereon at the rate of 12 per cent. per annum, was to be paid by

> the purchaser to the vendor. We are told upon fete authority of the passage in the case to which I have referred, and upon that authority alone, that such a re-sale is bad, and that the course which the vendor (the plaintiff) took in this case was not justified under the contract. I am quite unable to assent to that view. There is nothing in the contract which is contrary to public policy. It is perfectly good contract. It is not an unreasonable contract for two mercantile men to have made, and having made it why should not effect be given to it? It is said that the term "re-sell" can only apply to a case where the property has passed to the purchaser, and that that term pro-supposes a previous valid and effectual sale. iN the ordinary acceptation and use of the term shere was a sale to the defendant, and the bargain was that if he did not pay the purchase-money the plaintiff might re-sell the goods and hold the defendant responsible lor any loss. There is nothing in the contract about the property having or not having passed, or that the re-sale was only to be made if it had passed."
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> This decision was followed by this Court in Basdeo v. John Smidt, 22 ALL. 55, by the Madras High Court in Best v. Haji Muhammad Sait, 23 Mad. 18 and by the Lahore High Court in Bubby Hurry and Co. v. M. Hertz and Co. Ltd., 4 Lah. 215 at p. 222, where the learned Chief Justice Sir Shadi Lal observed as follows:
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> "The only difference between respondents' right to re-sell under the statute and their right under the agreement is that in the former case it could only be exercised if the property in the goods had passed to the appellants at the time of the breach of contract, while in the latter case it could be exercised irrespective of whether such property had or had not passed."

A clause giving a right to re-sell on the buyer's failure to take delivery would otherwise become meaningless where the property in the goods had not passed and the buyer need never complete his contract, if on the due date the market price and the contract price happen to be the same. In spite of the fact that the seller had entered into a contract for sale, he would have no remedy against the buyer and he must find other customers for his goods at his own risk.

8. It must, however, be clear that the goods that were sold were the gooda that were meant for the buyer. The seller cannot fasten the liability on the defendant of sale of any goods that has resulted in a loss. He must establish that the goods that he re-sold were the goods which so far as he was concerned, he had appropriated towards the contract and had intended to deliver to the defendant. The point arose before the Calcutta High Court in Angullia and Co. v. Sassoon and Co., 39 cal. 568 where the decision of the Full Bench in Moll Schutte and Company's case (25 cal 505) was considered and distinguished. Messrs. Angullia and Co. purchased sugar from Messrs. E. D. Sasson and Co. 125 tons was sold and had not been separated from the block, and the question arose whether the seller had the right to sell any 125 tons claiming the difference in the price. Distinguishing the Full Bench decision in Moll Schutte s case it was held that the decision in that case was different as the vendors had done all in their power to make the specific goods the subject-matter of the contract. In the case of Angullia and Co. v. Sassoon and Co. if the seller had sold the entire stock excepting the 125 tons which he had kept for delivery to the buyer and on

buyer's failure to take delivery had sold the 125 tons at a loss, we have no doubt the decision in Moll Schutte's case, would have been followed. In the case before us, just as in Moll Schutte's case, the buyer had not consented to the appropriation of the goods and the property in the goods had not passed to the buyer, but the sellers had done all in their power to make the specific goods the subject-matter of the contract. After the seller got the cases from the Bank for delivery to the defen. dant he offered those cases to him but the defendant refused to take delivery. There can, therefore, be no doubt that the goods re-sold were the specific goods meant for the defendant and the plaintiff had done all in his power to make the specific goods the subject-matter of the contract.

9. We are, therefore, of opinion that the caae was wrongly decided by the lower Court. We allow the appeal, modify the decree of the lower Court and decree the plaintiff's suit with costs in both the Courts.