

The Board Of Trustees Of The Port Of ... vs Bengal Corporation Pvt. Ltd. on 31 July, 1978

Equivalent citations: AIR1979CAL142, AIR 1979 CALCUTTA 142

JUDGMENT

Hazra, J.

1. This is an appeal against the decree of the learned trial Judge dated June 20, 1971 for rupees 10,447.64 being the balance price of goods sold and delivered and the balance of security deposit.
2. At the hearing of the appeal before us the respondent, decree-holder, the plaintiff in the suit did not appear. The Advocate on record of the respondent stated that he did not receive any instructions to appear and wanted leave to retire. We gave him such leave, and he retired.
3. In this appeal the question of implied terms as to quality or fitness of the goods under Section 16 of the Sale of Goods Act, 1930 has been raised. To appreciate the points which arise for our consideration I will first state briefly the facts and circumstances under which the suit was filed by Bengal Corporation Private Ltd., shortly Bengal Corporation against the Commissioners for the Port of Calcutta, Shortly Port Commissioners.
4. In response to invitation by the Port Commissioners for tenders for supply of wire ropes conforming to British Standard Specification, Bengal Corporation offered to supply goods of Japanese origin. The terms of the offer of the Bengal Corporation included (a) Bengal Corporation would supply with each consignment manufacturer's and Lloyds Test Certificates; (b) The goods would conform to B. S. S. 302/621 of 1957; (c) The Port Commissioners at their own costs would be entitled to have independent inspection of the goods before shipment. The offer of Bengal Corporation was accepted by the Port Commissioners and several orders were placed from time to time for supply of wire ropes.
5. The suit relates to two orders, both dated March 14, 1963 viz., Order No. 2113/50 for one reel of 5600 ft. and order No. 2114/50 for another reel of 4000 ft. On February 7, 1964. Bengal Corporation sent to Port Commissioners (a) Lloyds, Test Certificate; (b) Manufacturer's Test Certificate and (c) Test Certificate of the Indian Dock Labourers Regulation 1948. On March 3, and 4, 1964 the above two reels were supplied by the Bengal Corporation to the Port Commissioners. The goods were kept in the store of Port Commissioners and parts were taken out as required for use in crane. While in use the goods were found to be defective. On June 19, 1964, the Engineer-in-Charge of the Dockyard reported to the Inspecting Engineer "1707 meter of wire rope collected from C/Store and about 593 meter of wire rope used in different cranes as noted below : On 19 P.P. Cr. at 1 GRJ the hoist wire

rope replaced thrice (i.e. 30-3-1964; 7-5-1964) and on 24 SPCr at 4 GRJ hoist wire rope replaced twice (i.e. on 15-5-1964 and 7-6-1964) due to forming birds cage on the rope."

6. On Aug. 17, 1964, Port Commissioners reported to Bengal Corporation that the wire ropes failed within two weeks on an average. The average life of the wire ropes used in cranes were stated to be between 2 and 2 1/2 years. It was stated on behalf of Port Commissioners that the entire length of the wire rope has been used up on account of frequent failure of this wire rope on cranes due to formation of bird's cage (inner strands coming out of the outer strands). The fault was ascribed due to defective winding of the strands during manufacture.

7. It appears that Bengal Corporation wrote to Japanese manufacturers regarding the defect in the wire ropes. On Sept. 29, 1964 Bengal Corporation wrote to Port Commissioners that the manufacturers were of opinion that "perhaps the cause of deformation is due to careless handling."

8. There are several correspondence between the parties. It is not necessary to state the same in detail. The suit was filed on April 22, 1966 by Bengal Corporation claiming Rs. 9,477.64 as balance price of goods sold and delivered and for Rs. 1000 as balance of security deposit. Interest was also claimed on the balance of the goods sold and delivered and also on security deposit.

9. In the written statement, Port Commissioners, said that the plaintiff, at the time of the orders and making of the contract well knew that the defendant required two reels "for use in cranes." It was also stated that there was an implied condition of the agreement that the said two reels should be free from any defect rendering them unfit for use in cranes. The case of the defendant was that in breach of the express or implied condition or warranty, the plaintiff supplied two reels of wire ropes which did not correspond with the agreement and condition or warranty as to quality and fitness. The two reels failed while in use on the cranes due to formation of bird's cage (inner strands coming out of the outer strands). The defendant was compelled to use the said two reels of the defective wire ropes to unload food-grains as quickly as possible to relieve the food scarcity. The defendant claimed that they were entitled to set up the breaches of condition which they were compelled to treat as breaches of warranty against the plaintiff in diminution or extinction of the price of Rs. 9477.33 claimed for the two reels of wire ropes.

10. Several issues were raised at the trial. On the question whether the plaintiff knew at the time of placing of the orders that the defendant required the said wire ropes for use on the cranes, the learned Judge observed :

"The plaintiff must be held to have been imputed with the knowledge that these wire ropes were required for use on cranes in the facts and circumstances of the case."

11. The learned Judge referred to Regulation 30 (1) (b) of the Dock Regulations which deals with the testing of wire ropes before 'hoisting or lowering' and observed :

"Hoisting or lowering can only be in connection with the use on cranes."

12. The learned Judge held:--

"Since the plaintiff knew that the manufacturers had to provide a certificate in compliance with this Regulation 30 (1) (b) of the Dock Regulations and such a certificate was in fact supplied, the plaintiff must be held to have the knowledge that these wire ropes were needed for use on cranes."

The learned Judge, however, held that on the pleading and evidence, the defendant is not entitled to invoke the provisions of Section 16(1) of the Sale of Goods Act. The learned Judge further held that the defendant is not entitled to invoke the implied condition of "merchantable quality" under Section 16(2) of the Act. On behalf of the appellant, the Port Commissioners later on (substituted in the appeal as The Board of Trustees of the Port of Calcutta), Mr. R.L. Sinha appearing with Mrs. Chauchoria has challenged this finding of the learned Judge, According to the learned counsel the implied condition as to quality or fitness under S, 16 is applicable in the facts of this case. In any event, he contends that Section 16(1) is attracted; if not, Section 16(2). He also contends that for breach of warranty the appellant is entitled to diminution of price.

13. In view of the argument of the learned counsel for the appellant the question is whether Section 16 of the Sale of Goods Act, 1930 applies under the facts of this case. This section corresponds to Section 14 of the English Sale of Goods Act, 1893, (56 and 57 Vic. c. 71).

14. Section 16 deals with implied condition as to quality or fitness. I will first read relevant portion of Section 16.

"Section 16 : Subject to the provisions of this Act and of any other law for the time being in force, there Is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows :--

(1) Where the buyer, expressly or by implication makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he is the manufacturer or producer or not), there is an implied condition that the goods shall be reasonably fit for such purpose; Provided.....

(2) Where goods are bought by description from a seller who deals in goods of that description (whether he is the manufacturer or producer or not), there is an implied condition that the goods shall be of merchantable quality :--

Provided that, if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed"

Under Sub-section (1), the requirements which must be satisfied to import a condition that the goods shall be reasonably fit for any particular purpose are that the buyer must make known to the seller the particular purpose for which the goods are required, in the circumstances showing, the seller realised or ought to have realised that the buyer was relying on the seller's skill or judgment and the goods shall be of a description which it is in the course of the seller's business to supply. In such a case, there is an implied condition that the goods shall be reasonably fit for such purpose.

15. Sub-section (2) relates to all sales by description. Under this Sub-section to import a condition that the goods are of merchantable quality, the goods must be bought by description and seller must deal in goods of that description. The goods of that description implies goods of the same kind as those bought, The words "that description" refer to and mean the actual description by which the goods which are the subject matter of the contract were bought. (See *Ashington Piggeries v. Hill (Christopher)* (H. L. (E)) (1971) 2 WLR 1051 at p. 1093 per Lord Diplock).

16. The word "merchantable" can only mean "commercially saleable", If the description is a familiar one it may be that in practice only one quality of goods answers that description then, that quality and only that quality is merchantable quality (See *Hardwick Game Farm Case* (1969) 2 A.C 31 at p. 75, per Lord Reid).

17. Bearing in mind the meaning and effect of 9-16 as stated above, I will now consider whether Section 16 applies under the facts of this case. Is the learned Judge correct in his view that Section 16 does not apply in the instant case?

18. On the facts of this case, the learned Judge found that the wire ropes supplied by the sellers were of non-rotating type and buyer made known to the seller the purpose for which the wire ropes were required, The purpose was for use in cranes. There is no doubt that this was the particular purpose for which the ropes were required. The learned Judge also accepted that this was so, but held that the buyer did not rely on seller's skill or judgment, The learned Judge observed :--

"There is no pleading that the buyer made known to the seller the purpose for which the goods were required so as to show that the buyer relied on the seller's skill or judgment. There is no pleading that the goods are of a description which it is in the course of the seller's duty to supply."

The learned Judge also held that there is no oral or documentary evidence that the buyer relied on seller's skill or judgment or that the goods were of a description which it was in the course of plaintiff's business to supply.

19. With regard to this finding of the learned Judge, Mr. R.L. Sinha has contended that absence of pleading that buyer relied on seller's skill or judgment is not fatal. In any event, substance of the matter and not the form should be looked at. Section 16 of the Sale of Goods Act was in issue; and evidence was laid.

20. Mr. Sinha has relied on the decisions of the Supreme Court in Nagu-bai Ammal v. B. Shama Rao, and Bhagwati Prasad v. Chandramaul, . It seems to me that the above submissions of Mr. Sinha should be accepted under the facts and circumstances of this case.

21. There is no doubt that the question of applicability of Section 16 was raised on behalf of the Port Commissioners at the trial. It appears that several questions were put to the plaintiff's witness Paban Guha in cross-examination on the point that the buyer depended on the skill and judgment of the seller. I will set out some of the questions and answers in this regard.

"Q. 152: You find from your letter dated 10th December, 1962 that you are selecting Japanese wire ropes and offering the goods?/yes.

Q. 153 : And you also recommended these goods, you find in that document by saying 'above wire ropes offered by us are manufactured by the leading manufacturer in the line in Japan, Messrs. Teikoku Sangyo Co. Ltd., Osaka whom we represent in India as sole agent'?/Yes.

Q. 155 : And you are recommending those manufactured rope in fulfilment of this tender?/ Yes.

Q. 156: And on the basis of your selection the defendant accepted your offer by their letter at p. 7 of the admitted brief of documents /Yes, the defendant accepted the offer made by us." Question was also put to the plaintiffs witness whether the defendant required the wire ropes of the specification mentioned according to British Standard Specification 302/621 of 1957 and the answer was "Yes." (Paban Guha Q. 149).

The same witness was asked whether the plaintiff was a dealer in wire ropes. He answered in the affirmative and said : "We are the agents" (Q. 141). From the evidence tendered it appears that the buyer accepted the recommendation of the plaintiff that the goods manufactured by the Japanese manufacturer would conform to British Standard Specification for use in cranes and on the basis of buyer's selection of goods the seller accepted the offer. It has also been proved that the plaintiff company is the dealer of the wire ropes and agentg of the Japanese manufacturers. Therefore, in my opinion, the learned Judge was not correct in his view that there is no evidence that the buyer relied on the seller's skill and judgment, or that the goods were of description which it was in the course of plaintiff's business to supply. Both the parties went to trial with full knowledge that question of applicability of Section 16 was in issue. They had ample opportunity to adduce their evidence thereon and had fully availed themselves of the same. In the circumstances, the absence of a specific pleading that the buyer made known to the seller the purpose for which the goods were required so as to show that the buyer relied on the seller's skill or judgment or that the goods were of description which it was in the course of seller's business to supply was a mere irregularity which resulted in no

prejudice to the parties. (See *Nagubai Ammal v. B. Shama Rao* .

22. The observation of the Supreme Court in *Bhagwali Prasad v. Chandramaul*, may also be quoted here :--

"If a plea is not specifically made not yet it is covered by an issue by implication, and the parties knew that the said plea was involved in the trial, then the mere fact that the plea was not expressly taken in the pleadings would not necessarily disentitle a party from relying upon it if it is satisfactorily proved by evidence."

I will now turn to the legal aspect of the matter.

23. With regard to the law on the point, the learned Judge has referred to the decision of the Judicial Committee in *R. T. Grant v. Australian Knitting Mills Ltd.*, AIR 1936 PC 34 :

1936 AC 85 and has quoted the observation of Lord Wright :--

"It is clear that the reliance must be brought home to the mind of the seller, expressly or by implication. The reliance will seldom be express, it will usually arise by implication from the circumstances."

I think I should quote in this connection the speech of Lord Buckmaster in *Manchester Liners Ltd. v. Rea Ltd.*, (1922) 2 AC 74 at p. 79:--

"If goods are ordered for a special purpose, and that purpose is disclosed to the vendor, so that in accepting the contract he undertakes to supply goods which are suitable for the object required, such a contract is, in my opinion, sufficient to establish that the buyer has shown that he relies on the seller's skill and judgment." The words "so as to show" in Section 16 mean "in the circumstances showing". (See *Halsbury's Laws of England*, Third Edition, Vol. 34, Article 77 page 51, footnote (e)).

23-A. I will quote here the observation of Lord Sumner in the decision of the House of Lords in *Manchester Liners, Ltd. v. Rea Ltd.*, (1922) 2 AC 74 at p. 90 :--

"The words of Section 14(i) are 'so as to show,' not 'and also shows.' They are satisfied, if the reliance is a matter of reasonable inference to the seller and to the Court."

24. Mr. Sinha has invited our attention to the decision in *Mash & Murrell Ltd. v. Joseph I, Emanuel Ltd.*, (1961) 1 WLR 862 at p. 867 where Diplock, J. has followed the decision in (1922) 2 AC 74, According to the learned Judge, the well known case of *Manchester Liners Ltd. v. Rea Ltd.* (1922) 2 AC 74 establishes the proposition that if the particular purpose is made known by the buyer to the seller, then unless there is something in effect to rebut the presumption, that in itself is sufficient to raise the presumption that he relies upon the skill and judgment of the seller. (See (1961) 1 WLR 862

at p. 867).

25. I will note in this connection that Lord Reid in the latest decision of the House of Lords on the point in *Hardwick Game Farm v. S. A. P. P. A. (H. L. (E))* : (1969) 2 AC 31 p. 81 : (1968) 3 WLR 110 explained the statement of law enunciated by Lord Wright in *Cammell Laird* (1934) AC 402, 403 (referred to in *Grant's case*, 1936 AC 85 : (AIR 1936 PC 34) in the way as hereunder :--

"Lord Wright might appear to be going further when he said in *Cammell Laird* (1934) AC 402, 403 : 'Such a reliance must be affirmatively shown : the buyer must bring home to the mind of the seller that he is relying on him in such a way that the seller can be taken to have contracted on that footing. The reliance is to be the basis of a contractual obligation.' But I do not think that he meant more than that in the whole circumstances a reasonable man in the shoes of the seller would have realised that he was being relied on."

26. Mr. Sinha has referred to a decision of the Bombay High Court in *Rabindrasingh Shankarsingh Thakur v. Hindusthan General Electric Corporation Ltd.*, . In that case it was also held that communication of the particular purpose from the buyer to the seller may be inferred from the description of the goods given by the buyer to the seller or from the circumstances of the case. The buyer, however, must rely on seller's skill or judgment.

27. Having regard to the law on the point as laid down in the above mentioned cases, it seems to me that not only it has been proved, in the instant case, that the wire ropes were required for use in cranes, but also all essential facts exist showing that the defendant buyer relied on plaintiff seller's skill or judgment for supply of such goods and that the goods were of description which it was seller's duty to supply as agent of the Japanese manufacturers. In this respect, I have taken into consideration the relevant facts, evidence and circumstances of the case and also the legitimate inferences from the facts admitted or proved. In this case, the wire ropes were sold for the particular purpose, namely, for use in cranes and as such the plaintiff seller must have undertaken that wire ropes should be fit for that purpose. At the time of purchase of goods for a particular purpose, very seldom the purchaser tells the seller "Look. I am relying on your judgment and skill that the goods would be fit for the particular purpose for which the same are required". I am inclined to think that if the seller was told that the goods were required for a particular purpose such statement suffices to show that the buyer relied on seller's skill or judgment without any further evidence on this point. In any event, in the instant case, there was ample evidence on behalf of the defendant Port Commissioner that reliance was made on the skill and judgment of the plaintiff seller and the plaintiff chose the Japanese manufacturers as their principal for manufacture of the particular type of wire ropes according to British Standard Specification for use in cranes and the defendant buyer relied on the choice of the plaintiff in this respect. This being so, there was an implied condition that the wire ropes should be reasonably fit for the declared purpose. (See *Bristol Tramways & Carriage Co. Ltd. v. Fiat Motors, Ltd.* (1910) 2 KB 831 at p. 837).

28. For the above reasons, in my view, Section 16(1) of the Sale of Goods Act applies under the facts of this case and, I am unable to share the same view as taken by the learned trial Judge on this point.

29. On the facts of this case, it appears that two reels of wire ropes were admittedly defective. The learned Judge has found "that the wire ropes supplied did reveal a defect at certain point of time after it has been used". The learned Judge said that there was "a tacit recognition on the part of the plaintiff that there was some defect on the wire ropes supplied". The evidence on behalf of the defendant is that the wire ropes last normally about two to three years. (Sankar Das Mitra Q. 52). But in the two reels of wire ropes, which were the subject matter of the suit, the inner strand came out from the outer strand and "bird's cage" formed within short time of its use, on an average within two weeks' time. There is no reason to disbelieve this part of the case of the defendant which has been proved both by oral and documentary evidence. The learned trial Judge has also accepted this case of the defendant. What follows then? It follows that the defendant wanted to buy wire ropes which could be used in the defendant's cranes and the life of such wire ropes should be two three years on an average. Paban Guha the witness called on behalf of the plaintiff also admitted that it is impossible to imagine that the wire ropes will fail within weeks' time. I will set out hereunder two questions with answers of Paban Guha in cross-examination, "Q. 190: I suggest that the wire ropes of 2.1/8" x 2.1/4" circumference, the subject matter of dispute, failed in course of use on cranes within two weeks, on an average, due to formation of bird-cage, that is, inner strand coming out of the outer strand and for unwinding of strands?/ That is impossible.

Q. 191 : That is impossible?/ It is impossible to imagine that wire-rope will fail within 2 weeks' time". But this impossible event has happened in this case. This has been proved by the defendant Port Commissioners.

30. Question here arises who caused the defect? Was it manufacturing defect? Or, was the defect caused due to mishandling by the defendant?

31. On this aspect Mr. R.L. Sinha contends that in cross-examination of the defendant's only witness Sankar Das Mitra. there was no suggestion that the wire ropes were not defective There was no suggestion that bird's cage formed due to mishandling by the defendant. There was no suggestion that the cranes were defective, There was no suggestion that grooves in the drum were defective or pulleys were defective. Only suggestion to the witness with his answer thereto was as follows :

"Q. 320: I am suggesting to you that the proper functioning of a crane or formation of bird's cage or inner strands coming out of the outer strands depends upon the proper handling of the crane or proper handling of the wire ropes?/ I do not agree with you."

32. On the question of defects, the case of the plaintiff was that "the manufacturers are of opinion that perhaps the cause of deformation is due to careless handling." The word "perhaps" in the context means that the plaintiff was merely guessing. The plaintiff could not produce any report from the Japanese manufacturers as to the cause of such defects. The plaintiff was allowed to inspect and to take photograph of the damaged wire ropes lying in the yard of the Port Commissioners. This will appear from the letter dated October 28, 1964 by the defendant to the plaintiff. It also appears that samples of damaged goods were sent to Japan by the plaintiff and reply was received from the Japanese manufacturers. This will be evidence from the question and answer of Paban Guha, the plaintiff's witness, set out here under:

"Q. 220 : Can you suggest any reason why you did not receive any report from your manufacturers?/ They wrote back to us that the samples were very small in size and hence those could not be tested. They wanted much bigger size for facilitating testing.

Q. 221 : Where is that letter from your manufacturer?/ That letter is in the file. That has not been produced in court."

Thus, the plaintiff has withheld from Court the letter received by them from the manufacturers.

33. Mr. Sinha has argued that when the wire ropes were defective it is not for the buyer to prove how the defect occurred. I think the contentions made by Mr. Sinha have great force and I am inclined to accept the same. I am inclined to take the view that the defect was not caused due to mishandling of the goods. It seems to me that the wire ropes were defective at the time of the delivery of the same to the defendant.

34. For the reasons stated above Section 16(1) of the Sale of Goods Act apply in the facts of this case.

35. Now, on question of applicability of Section 16(2) I am also unable to share the same view with the learned trial Judge that Section 16(2) does not apply. In my view it does. The goods supplied by the seller were not of merchantable quality. It is true that merchantable quality has not been denned in the Sale of Goods Act. No exhaustive definition has been laid down in any judicial decisions. But, following the definition given by Farewell, L. J in Bristol Tramways Co.'s case : (1910) 2 KB 831 at pp. 839-840, this Court in G. Mckenzie & Co. (1919) Ltd v Nagendra Nath Mahalanabish : (1946) 50 Cal WN 213 (2) at P. 217 said :

"When an article is sold by description, it may be regarded as a sale of an article of that description, which is free from any latent defect which, if known at the time, will make it unmerchantable."

36. I will quote here the tests laid down in Randall v. Newson; (1876-77) 2 QBD 102 at p. 107:

"If a man sells an article he thereby warrants that it is merchantable,--that it is fit for some purpose. If he sells it for that particular purpose, he thereby warrants it for that purpose." In Bristol Tramways, etc. Carriage Co. Ltd. v. Fiat Motors Ltd. (1910-2) KB 831, 841, Farwell, LJ gave another explanation of the phrase 'merchantable quality' which I would like to quote here:

"The phrase in Section 14(2) is, in my opinion, used as meaning that the article is of such quality and in such condition that a reasonable man acting reasonably would after a full examination accept it under the circumstances of the case in performance of his offer to buy that article whether he buys for his own use or to sell again."

In Grant's case: 1936 AC 85 at p. 99-100 : (AIR 1936 PC 34 at p. 40), Lord Wright observed :

"Whatever else merchantable may mean, it does mean that the article sold, if only meant for one particular use in ordinary course, is fit for that use; merchantable does not mean that the thing is saleable in the market simply because it looks all right; it is not merchantable in that event if it has defects unfitting it for its only proper use but not apparent on ordinary examination: that is clear from the proviso, which shows that the implied condition only applies to defects not reasonably discoverable to the buyer on such examination as he made or could make." In view of the law quoted above, it seems to me that the goods supplied by the seller were not of merchantable quality as the same were not suitable for the purpose for which the same were required. The goods were bought by description and the seller should have supplied the same reasonably fit for use in cranes.

37. According to the letter of the defendant dated August 17, 1964, the average life of such ropes should have been two to two-half years; but, in fact, the same could be used for much less period. The proviso to Section 16(2) also does not apply; because, Section 16(2) deals with defects which ought to have been revealed upon examination. In this case, the defects were latent defects which could not be detected on apparent examination of the goods in Japan, The defect in the wire ropes could only be detected after their use in cranes,

38. With regard to manufacturer's test certificate and Lloyds Test Certificate Mr. Sinha contends that although, the learned Judge admitted the same as exhibits in spite of objection and held against the appellant but the contents of the certificates ought to have been proved. According to him, the proviso to Section 16(2) does not apply; because, there is no evidence of examination of such goods before delivery. The person who gave the Lloyds Test Certificate has not been called to prove the contents of the certificate. It seems to me that Mr. Sinha is justified in his comments in this respect, The correctness of the test certificates or the Lloyds report has not been proved. In any event, as the defective nature of the goods was not apparent on ordinary examination, and could not be detected before use in cranes, the proviso to Section 16(2) is not attracted. Therefore, there was implied condition that the goods should be of merchantable quality, but the two reels supplied by the seller were not so. In the above view of the matter Section 16(2) can also be invoked by the defendant buyer.

39. The only other point which remains is the question of remedy for breach of warranty by the seller under Section 59 of the Sale of Goods Act. Such breach gives rise to the claims of damages on the part of the buyer. The case in the written statement is that the defendant was compelled to use the said two reels of defective wire ropes to unload food-grains as quickly as possible to relieve food scarcity.

40. On behalf of the appellant Mr. Sinha submits that the appellant is entitled to diminution of price. It is a clear case of breach of warranty or breach of condition as to quality or fitness of two reels of wire ropes supplied and it has given rise to a claim for damages on the part of the defendant buyer. Exact measurement of the amount of damage is not possible in this case. Mr. Sinha, however, has prepared a chart from exhibit 3-A which is the stock-ledger of the wire ropes of the Calcutta Port Commissioners and submits that although the defendant is entitled to much more than 50% of

reduction of price, he will claim at least 50% of the reduction of price. He has referred to the decisions of the Privy Council in *A. V. Joseph v., R. Shew Bux*, 23 Cal WN 601 : AIR 1918 PC 149, *Maneckji Pestonji Bharucha v. Wadilal Sarabhai and Co.*, AIR 1926 PC 38 and the decision of this Court in *Gambhirmull Mahabir Prasad v. The Indian Bank Ltd.*, and contends that at least 50% of reduction of price should be allowed to the defendant on the basis of the replacement of wire ropes. There is no doubt that the defendant-appellant has suffered damage by reason of supply of defective wire ropes and as such the defendant buyer is entitled to claim damages. It also seems to me that it is difficult to come to a definite figure as to exact measurement of damages. It seems to me, however that the fact that the damages are difficult to estimate and cannot be assessed with certainty or precision does not relieve the plaintiff-respondent of the necessity of paying damages for the breach. The amount of the claim is small in this case. The chart prepared from exhibit 3-A, the stock-ledger of wire ropes of the Calcutta Port Commissioners, throws considerable light on the question of damages. It seems to me to be acceptable. The assessment of damages, however, cannot be made with any mathematical accuracy. On the principles laid down in the above Privy Council decisions and on the law stated in Halsbury's Laws of England, Third Edition, Vol. 11, Article 394, page 226 referred to in the judgment of Sankar Prasad Mitra, J. (as he then was) in *Gambhirmull's case*, I think, I should allow the appellant the benefit of every reasonable presumption as to loss suffered and I will allow diminution of the price of the goods to the extent of 50%.

41. In this respect I will also follow the principle laid down in the Bench decision of this Court in *Pravu-dayal Agarwala v. Ramkumar Agar-wala*, where it was held that even in a case where nominal damage is awarded this does not connote that trifling amount is to be assessed. What is to be the amount of nominal damage depends on the facts of each particular case. On the facts of this case, in my view, 50% of diminution of price would not be unreasonable or excessive,

42. In this view of the matter, the appeal is allowed in part. The decree passed by the learned trial Judge is varied to the following extent.

With regard to the balance price of the goods sold and delivered the respondent will be entitled to one-half of Rs. 9447.64 i.e. Rs. 4738.82. The respondent, however, will be entitled to entire amount of security deposit, viz., Rs. 1,000/-. Thus, the total amount of the decree in favour of the plaintiff-respondent is reduced from Rupees 10,477.64 to Rs. 5,738.82. The respondent will be entitled to interest on the sum of Rs. 5,738 at 6% per annum from the date of the filing of the suit, viz.. April 22, 1966 till payment and the decree is modified accordingly. The recorded Advocate on behalf of the appellant will hold the amount lying in his hands pursuant to the order dated August 7, 1971 until the decretal amount with cost in favour of the plaintiff respondent is satisfied and, thereafter, he would be at liberty to return the balance amount to the Board of Trustees of the Port of Calcutta.

With regard to the cost, the plaintiff-respondent will be entitled to one-half of the costs of the suit. The defendant appellant will be entitled to one half of the cost of the appeal.

Certified for two counsel throughout.

Ramendra Mohan Datta, J.

43. I agree.