

Majety Balakrishna Rao Vs. Mooke Devassy Ouseph and Sons

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Court : Andhra Pradesh

Decided On : Dec-03-1957

Reported in : AIR1959AP30

Judge : Umamaheswaram, J.

Acts : [Sale of Goods Act, 1930](#) - Sections 2, 2(14), 25, 25(1), 54, 54(2), 56, 60, 61 and 61(1); [Contract Act, 1872](#) - Sections 73

Appeal No. : Appeal No. 221 of 1953

Appellant : Majety Balakrishna Rao

Respondent : Mooke Devassy Ouseph and Sons

Advocate for Def. : T. Kutti Krishna Menon, ;V. Balakrishan Eradi, ;K. Ramachandra Rao and K. Venkateswara Rao, Advs.

Advocate for Pet/Ap. : Sankara Sastri, ;V. Rajagopala Mudaliar and ;K.V. Rangachari, Advs.

Disposition : Appeal partly allowed

Judgement :

Umamaheswaram, J.

1. This is an appeal brought by the plaintiff as against the judgment and decree at the District Judge of West Godavari at Eluru dismissing his suit for recovery of damages for breach, of a contract dated 29th September 1950. According to the plaintiff, the defendant gave an order for a wagon load of black gingelly by a telegram dated 29-9-1959 and that the price was fixed at Rs. 84-3-0 per bag of 164 Lbs. F. O. R, Eluru.

The plaintiff, who accepted the order, on the same day applied to the M. and S. M. Railway for a wagon and a railway wagon was allotted on 15th October. The goods, viz., 251 bags of gingelly were loaded in the wagon on the same day. The railway receipt was obtained in the name of the plaintiff and endorsed to the Central Bank, Eluru. He also drew a hundi for the amount of the price on the defendant and delivered it to the Bank.

After the plaintiff sent a telegram intimating the dispatch of the goods, the defendant by an ante-dated postcard informed the plaintiff that the latter may not book the goods if not already despatched. Another ante-dated post card was sent by the defendant stating that the goods would not be accepted as the plaintiff had delayed in sending the consignment. The wagon reached Cochin on 26th October and the defendant refused to pay the hundi and take delivery of the goods.

Further correspondence passed between the parties and the plaintiff through P. W. 1 arranged for the resale of the goods. The suit was instituted by the plaintiff for recovery of Rs. 4144-8-9 as damages on the basis of the prices fetched at the resale. He claimed the freight charges, demurrage, commission and brokerage paid at the time of resales.

2. The defendant resisted the suit on the ground that the plaintiff alone committed default inasmuch as he did not consign the goods immediately after the order was placed on him. He contended that the contract was validly terminated by him and that he was consequently not liable to pay any damages. He further pleaded that even assuming that he had committed the breach of the contract, he was not liable to pay damages on the basis of the prices realised at the resales held by P. W. 1.

3. Seven issues were framed by the District Judge. He found in paragraph 6 of the judgment that the case of the defendant that the goods should be immediately booked and delivered was not true, that the plaintiff took all the necessary steps to fulfil his part of the contract and that the contract was not validly terminated by the defendant.

In paragraph 7, he found that the plaintiff had no right 'to resell the goods either under the contract or under law', that on the date of the breach viz., 16-10-1950, the market price was higher than the contract price and that the plaintiff was consequently not entitled to any damages. He overruled the plea of the defendant that the Court had no jurisdiction to entertain the suit. In the result, he dismissed the plaintiff's suit. The appeal has consequently been preferred by the plaintiff to this Court.

4. The questions that arise for decision are those covered by issues 4 and 5. Sri K. Ramachandra Rao, the learned advocate for the respondent, stated at the opening that he was not challenging the findings of the District Judge in regard to issues 1 to 3 viz., that the respondent had committed the breach of the contract. So, the only question that has to be decided is whether the plaintiff has established his claim to recover damages, railway freight, demurrage, commission and other expenses of resale.

5. Sri Sankara Sastri, the learned advocate for the appellant, strenuously contended that the contract dated 29-9-1950 related to a sale of specific goods, that the title to the goods passed to the defendant on the plaintiff accepting his order and that the plaintiff was entitled to exercise a right of resale on the defendant committing the breach of contract. In order to appreciate his argument it is necessary to set out a few relevant facts. On 29-9-1950, the defendant sent a telegram Ex. A-20 to the plaintiff in the following terms :

'Received. If immediately bookable despatch one wagon Kumpellu cheaply eighty four eight.'

He confirmed the telegram by a letter and directed the plaintiff to wire the result after booking. The plaintiff thereupon sent a wire thus :

'Received. Purchased Wagon Karupapillu Eighty Four Eight Booking.....'

By his letter marked as Ex. A-22, he wrote in the following terms :

'We have purchased for you black gingelly at Rs. 84-8-0 per hag of 164 Lbs. to be booked to rail at Eluru and came to this village. We have intended for a wagon. As soon as it is allotted we will book the goods and send them.....'

Though according to the correspondence set out above, the plaintiff states that he had purchased the goods and despatched them in the wagon, but the Managing Partner of the plaintiff's firm, who was examined as P. W. 2, deposed that on 29-9-1950 the plaintiff's firm had 281 bags of gingelly and that they supplied 251 bags out of that quantity. He stated that on the date of loading, they had more than 281 bags of gingelly.

In the course of the cross-examination, he stated that the plaintiff did not purchase any goods on 29-9-1950 as they had sufficient stock with them and that the expression 'purchased' used by them in the correspondence was only a business term. It is therefore clear from his evidence which I accept, that the subject-matter of the contract was not specified goods as defined in Section 2(14) of the Indian Sale of Goods Act, hereinafter referred to as the Act.

According to the definition, 'specific goods' means goods identified and agreed upon at the time a contract of sale is made. I have no doubt that the goods, which were despatched in the wagon, were not actually identified. The mere fact that they were capable of identification does not bring it within the terms of the definition. As the goods were not identified and agreed upon at the time when the contract was made viz., 29-9-1950, they are generic or unascertained goods within the meaning of the Act.

In this view, I am unable to accept the contention of the learned Advocate for the appellant that the terms of Section 20 or Section 21 of the Act apply to the case. I am clearly of opinion that as the contract was for the sale of unascertained goods, section 23 is attracted. The question for consideration is whether there was an unconditional appropriation within the meaning of Sections 23(2) and 25(1) of the

Act. Section 23(2) runs as follows :

'Where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee (whether named by the buyer or not) for the purpose of transmission to the buyer, and does not reserve the rights of disposal, he is deemed to have unconditionally appropriated the goods to the contract,'

Section 25(1) is as follows :

"Where there is a contract for the sale of specific goods or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of disposal of the goods until certain conditions are fulfilled. In such cases, notwithstanding the delivery of the goods to a buyer, or to a carrier or other bailee for the purpose of transmission to the buyer, the property in the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled.'

6. The Point for consideration in the appeal is whether, when the plaintiff delivered the goods to the carrier, i.e., railway company, for the purpose of transmission to the buyer, he reserved the right of disposal and consequently there was no unconditional appropriation of goods to the contract. As stated supra, the plaintiff had obtained the railway receipt in respect of the goods in his own name. He endorsed the railway receipt in favour of the Central Bank, Eluru and delivered the hundi with a direction that the railway receipt should be delivered to the buyer only when the hundi was honoured and the price of the goods was paid.

According to Sri K. Ramachandra Rao, the learned advocate for the respondent, the fact that the railway receipt was taken in the name of the seller himself is Prima facie evidence that he intended to reserve the right of disposal of the goods and that the title would pass to the buyer only when he honoured the hundi and paid the price of the goods.

In support of his contention he strongly relied upon a decision of the Division Bench of this Court in *State of Madras v. Venkataramaniam and Sons*, : AIR 1959 AP23 (A). The learned Judges held that the fact that the goods had undergone the

selective process, weighed and were delivered to the common carrier for transport did not show that there was an unconditional appropriation.

They further held that the question whether the appropriation was unconditional turned upon the construction of Section 25 of the Sale of Goods Act i.e., whether the seller reserved the *jus disponendi*. They observed that as the railway receipt, which is a document of title, was taken out in the name of the seller, he must be deemed to have manifested an intention to remain the owner and to retain control over the goods till the buyer made the payment through the bank. They added ;

'If on the other hand the seller books the goods to self the appropriation can be said to have been affected only when full payment is made to the seller.'

I am inclined to hold that the facts of this case are directly governed by the Bench decision.

7. The learned advocate for the respondent further relied on a decision of the Bombay High Court reported in *Ford Automobiles v. Delhi Motor Co.*, AIR 1923 Bom 125 (B). This decision was no doubt delivered prior to the passing of the Indian Sale of Goods Act. The learned Judge discussed the principles of English law and held that the railway receipts stand on the same footing as bills of lading and that the fact that the railway receipt was taken in the name of the seller was *prima facie* evidence that he intended to reserve the right of disposal.

He referred to the decision in *Mirabita v. Imperial Ottoman Bank*, (1878) 3 Ex. D 164 at p. 172 (C). The second rule extracted by the learned Judge from the judgment of Cotton L. J. in *Mirabita v. Imperial Ottoman bank* (C) (*supra*) is as follows :

'If, however, the vendor, when shipping the articles which he intends to deliver under the contract, takes the bill of lading to his own order and does so not as agent, or on behalf of the purchaser, but on his own behalf, it is held that he thereby reserves to himself a power of disposing of the property, and that consequently there is no final appropriation, and the property does not on shipment pass to the purchasers.'

8. The question as to when the seller is deemed to reserve the right of disposal is discussed by Mr. Benjamin in his treatise on the Law of Sale of Personal Property, 5th Edition, at p. 359. The learned author states as follows :

'The cases which illustrate the reservation of the right of disposal arise chiefly where parties at a distance from each other contract by correspondence, and where the seller wishes to secure himself against the insolvency or default of the buyer.'

He points out that although the seller might write to the buyer and specify the packages and marks identifying the goods and although he may accompany this with an invoice, stating that the specific goods are shipped for buyer's account and in accordance with the buyer's order, making his election final and determinate, the property in the goods will nevertheless remain in the seller till the bill of lading has been endorsed and delivered to the buyer.

9. In *The Prinz Adalbert*, 1917 AC 586 (D), Lord Sumner dealt with the general law where the seller pledged the bill of lading with a banker. The relevant observations are at pages 589 and 590 and are as follows ;

'Possession of the indorsed bill of lading enables the acceptor to get possession of the goods on the ship's arrival. If the shipper, being then owner of the goods, authorises and directs the banker, to whom he is himself liable and whose interest it is to continue to hold the bill of lading till the draft is accepted, to surrender the bill of lading against acceptance of the draft, it is natural to infer that he intends to transfer the ownership when this is done, but intends also to remain the owner until this has been done. Particular arrangements made between shipper and consignee may modify or rebut these inferences

This decision was followed by the Supreme Court in *Commr. of Income-tax, Madras v. Mysore Chromite Ltd.*, : [1955]27ITR128(SC) (E). Das, J. (as he then was) held that the property in the goods passed in London where the bill of lading was handed over to the buyer's bank against the acceptance of the relative bill of exchange. It was pointed out that the payment by the Eastern Bank Limited, Madras, was nothing but an advance made by them to their own customer on the

security of the goods covered by the bill of lading.

10. That the rule applicable to delivery of goods by carriers by sea is equally applicable to delivery of goods by carriers by land and to Canal Boat Companies is pointed out by Mulla, J. at page 129 in AIR 1923 Bombay 125 (B) by reference to the decisions in Dutton v, Solomonson, (1803) 3 B and P 582 : 127 E. R. 314 (F) and Fragano v. Long, (1825) 4 B and C 219 : 107 E. R. 1040 (G).

According to the learned Judge, there is no difference in principle between taking the bill of lading and the railway receipt in the name of the seller. The same view was taken by the Lahore High Court in Sundar Singh v. Gulab Singh, AIR 1927 Lah 269 (H).

11. The identical question came up for decision before the Patna High Court after the passing of the Indian Sale of Goods Act in Governor General of India in Council v. Joynarain, AIR 1948 Pat 36 (I). Referring to Section 25(2) of the Act, Meredith, J. observed as follows at p. 37 :

'Though this provision is expressed as relating to the shipment of goods, the same principle will apply to their transmission by rail; see Firm Ugarchand Gajanand v. Firm Motiram Ghanshamdas, AIR 1938 Sind 18 (J); AIR 1923 Bombay 125 (B) and AIR 1927 Lah 269 (H). In the last mentioned case it was held that where goods are sent by railway, the railway receipt being addressed to self to be delivered to the purchaser only on receipt of the price of the goods, the property in the goods does not pass to the purchaser till the price is paid.'

The same view was taken by the Allahabad High Court in Ram Karan Das v. Sardar Singh, 1950 All L. J. 145 (K) and by the Assam High Court in Ramniwas v. Commr. of Taxes, Assam, AIR 1952 Assam 178 (L). The decisions are all uniform that the rule which applies to the bills of lading is equally applicable to railway receipts.

The actual difference between delivery to a common carrier and delivery on board a vessel is however pointed out by Mr. Benjamin in his treatise on Sale, which is extracted at page 114 of the Indian Sale of Goods Act and Partnership Act by

Pollock and Mulla, Second edition, in the following words :

'Where goods are delivered, by the seller in pursuance of an order to a common carrier for delivery to the buyer, the delivery to the carrier passes the property, he being the agent of the buyer to receive it, and the delivery to him being equivalent to a delivery to the buyer.'

'Where goods are delivered on board a vessel to be carried, and a bill of lading is taken the delivery by the seller is not a delivery to the buyer, but to the captain as bailee for delivery to the person indicated by the bill of lading, as the one for whom they are to be carried.'

But, if the railway receipt or the bill of lading is taken in the name of the seller, it is regarded in English law as *prima facie* reservation of the right of disposal of the goods by the seller. Sri Sankara Sastri, the learned advocate for the appellant, has not pointed out a single decision to show that there is any distinction in principle in regard to reservation of title in respect of a bill of lading and a railway receipt.

12. Sri Sankara Sastri invited my attention to the decision reported in *Siddique and Co. v. Rangiah Chettiar*, 1947-2 Mad LJ 79 : (AIR 1948 Mad 122) (M). It has no bearing on the facts of this case inasmuch as the contract therein related to the sale of specific goods in a deliverable state and the goods were not entrusted to any common carrier or a railway company. The next decision cited by him, *Madras State v. Ramalingam and Co.* AIR 1956 Madras 695 (N), has also no bearing on the facts of this case.

It was held by the learned Judges on an interpretation of Section 25 (2) and (3) of the Act that the title to the goods passed in the Madras State inasmuch as the price was paid by the negotiating bankers on the receipt of the shipping documents, the bill of lading and the bill of exchange as the agent of the buyer.

13. Sri Sankara Sastri, however, raised an interesting and difficult question of law based on the specific language of Section 25(2) of the Act. He contended that inasmuch as the Legislature specifically enacted Sub-secs. (2) and (3) only in

regard la bills of lading and not railway receipts and provided that if the goods are deliverable to the order of the seller or his agent, the seller is prima facie deemed to have reserved the right of disposal, no such presumption or prima facie reservation of the right of disposal would arise in the case of a seller taking the railway receipt in his own name.

There is considerable force in this contention. This argument has not been noticed in the several decisions decided after the passing of the Act except by the Assam High Court in AIR 1952 Assam 178 (L). The answer furnished at page 183 is not very convincing. As I am bound by the decision of the Division Bench of this Court in : AIR 1959 AP23 (A) and as the several decisions referred to supra take the same view I hold that the title in the goods did not pass to the buyer as contended by the appellant, I, therefore, agree with the District Judge that the appellant was not entitled to resell the goods I under the terms of Section 54(2) of the Act.

14. Following the decision in Motilal v. Mool Chand, : AIR1952 All242 (O), I hold that the appellant is only entitled to claim the difference between the contract rate and the rate prevailing on the date of the breach by way of damages.

15. The finding arrived at by the learned District Judge that the goods sold by P. W. 1 between 8-11-1950 and 30-11-1950 were not the goods of the plaintiff is however, in my opinion, erroneous. The correspondence shows that when the defendant refused to take delivery of the goods, he instructed Chakola Lonappan Paul of Cochin to dear the goods from the wagon and dispose of them.

Intimation was given to the defendant under Ex. A-39 D/- 4-11-1950 that the plaintiff had given orders to Chakola Lonappan Paul of Cochin to sell the goods in open market. Exhibit A-55 is the letter sent by the plaintiff to Messrs. Chakola Lonappan Paul firm. P. W. 1 was examined on behalf of the plaintiff to show that the sales were accordingly held as evidenced by Exs. A-1 to A-16.

The mere fact that Exs. A-3, A-9, A-11 and A-12 did not disclose the name of the plaintiff, does not lead to the conclusion that the goods of others, were sold under those documents. P. W. 1 is quite specific that all the 251 hags cleared from the wagon were separately stocked and were sold under exhibits A-1 to A-16. I accept

his evidence and hold that what was sold under Exhibits A-I to A-16 were the goods of the plaintiff despatched under the suit contract.

There is no satisfactory evidence on behalf of the respondent to show that the sales were not duly conducted by P. W. 1 or that the price realised did not represent the market rates on the dates of those sales.

16. Sri Sankara Sastri next contended that ' even assuming that the appellant was not entitled to resell the goods under Section 54(2) of the Act, the prices realised at those sales might be taken as representing the market, rates on those dates and damages awarded on that footing. In support of this argument. he relied upon the decision of the Madras High Court in Muthukrishna Reddiar and Sons v. Madhavji Devichand and Co. Ltd., : AIR1953 Mad777 (P).

It was held by the learned Judges that the price realised at the resale might be taken as the true value of the damaged goods if there was no unreasonable delay on the part of the purchaser in selling the goods. It was further held that the damages must be assessed on the basis of the market-value prevailing at the place of delivery.

The question to be considered in the present case is whether there was no unreasonable delay on the part of the plaintiff in selling the goods and the market rate prevailing on the date of resale represents the market rate as on the date of the breach. As the goods were resold only on and after 8-11-1950 after the market had considerably fallen, I am inclined to agree with the District Judge that those rates should not be adopted as representing the market rate as on the date of the breach of the contract.

17. I however do not agree with him that the date of the breach was 16-10-1950 and that the market price was higher than the contract price. He proceeded on the erroneous view that the market rate prevailing at Eluru as on the date of the breach should be taken into account.

He ought not to have relied on the terms of the telegram Exhibit B-4 in which the plaintiff wrote that the market rate for black gingelly at Eluru as on 17-10-1950 was

Rs. 85/8/0 or Rs. 86/-. He ought to have determined, as held in : AIR1953 Mad777 (P), the market rate of the goods as at the place of delivery on the date of the breach.

18. Before dealing with the question as to the date of the breach, it is necessary to dispose of a preliminary objection raised by Sri K. Ramachandra Rao, learned advocate for the respondent, based on the decision in *Angulliah and Co. v. Sassoon and Co.* ILR 39 Cal 568 (Q). At p. 579, Sir Lawrence Jenkins held as the plaintiffs claim for damages rested on resale, the Court should not have awarded damages on a totally different basis.

He expressed the opinion that if the defendant challenged the plaintiff's right to claim damages on the basis of resale, he should immediately apply for amendment of the plaint and claim damages on the difference between the contract price and the market price on the date of the breach. This decision was not followed by the Bombay High Court in *Narsinggirji Manufacturing Co. v. Budansaheb*, AIR 1924 Bom 390 (R). Macleod, C J. observed at p. 391 as follows :

'In the next place, the fact that the plaintiff claimed as the measure of damages the difference between the price, which he realised on the resale of goods and the contract price, would, in my opinion, be no reason for the Court to refuse to award damages according to the correct measure. With all due respect to the Judges who decided ILR 39 Cal 568 (Q), it seems to us that it, is going too far to hold that when a plaintiff has made a mistake in demanding damages on a wrong basis, the Court must refuse to set right the mistake by directing the damages to be calculated in the proper way unless the plaint i; amended,'

I am inclined to follow the liberal view of the Bombay High Court in preference to that of the Calcutta High Court. Out of abundant caution, Sri Sankara Sastri made an oral application to permit him to amend the plaint if I was inclined to accept the Calcutta view. But, as I am in agreement with the Bombay view that even without an amendment the Court is entitled to award the proper measure of damages if there is sufficient evidence on record, I think it is unnecessary to direct the amendment of the plaint.

19. The next question which has to be determined is one of fact as to when the breach of the contract took place. The learned District Judge found that the breach took place on 16-10-1950 when the defendant intimated to the plaintiff that he need not send the goods. Having carefully perused the evidence, I am not inclined to agree that the breach took place on that day and that the market rate of the goods as on that date should be taken into account.

The correspondence makes it clear that the defendant ordered one wagon kumpellu and that the plaintiff immediately applied for a wagon. After the wagon was allotted on 15th October, the goods were loaded and sent to Cochin. The goods were received at Cochin on 26th October. The intimation given by the defendant under Exs. A-28 and A-29 that he would not receive the goods was before the due date of performance.

It was open to the plaintiff either to accept the intimation given by the defendant or to keep open the contract till the date of performance. On 26th October, the plaintiff sent a wire to the defendant under Ex. B-5 requesting the defendant to pay the price of the goods and honour the hundi. On 28-10-1950, he wrote to the defendant to accept the delivery. A further telegram was sent on 29th October, that the wagon was not cancelled and that the defendant should take delivery without hesitation. The defendant sent a reply wire marked as Ex. A-37 on 31st October in the following terms :

'Your letter addressed Trichur reached Cochin camp yesterday as desired and authorised examined both files arrived decision follows up to demurrage about five hundred despatch delay loss three rupees per bag comes seven hundred and fifty altogether one thousand two hundred fifty from that you suffer five hundred ourselves seven hundred fifty hence instructed Bank receive less five hundred this decision only considering our future relationship please note this without prejudice to the legal rights of either side.'

As the plaintiff was not agreeable to the new terms proposed in Ex. A-37 he requested Chakola Lonappa Paul of Cochin to clear the goods and sell them. Reading the correspondence as a whole, I am inclined to take the view that the breach of the contract had taken place only after the goods reached Cochin and

the defendant refused to take delivery and sent Ex. A-37 i.e. on or after 31st October. The date of Exhibit A-28 or Exhibit A-29 under which the defendant intimated that he would not accept the goods should not be taken as the date of breach inasmuch as the plaintiff-seller had not accepted the rescission of the contract by the defendant. The facts of this case are directly governed by the decision in *Phillpotts v. Evans*, (1839) 5 M and W 475 : 151 E. R. 200 (S), which is given as second illustration at page 243 in Pollock and Mulla's Indian Sale of Goods Act and Indian Partnership Act, second edition, The headnote in (1839) 151 E. R. 200 (S) correctly sets out the decision and is in the following terms :

Where A contracted for the purchase of wheat, to be delivered at Birmingham as soon as vessels could be obtained for the carriage thereof; 'and subsequently (the market having fallen) gave the seller notice that he would not accept it if it were delivered, the wheat being then on its transit to Birmingham.'

Held, in an action against A for not accepting the wheat, that the proper measure of damages was the difference between the contract price and the market price on the day when the wheat was tendered to him for acceptance at Birmingham and refused; and not on the day when the notice was received by the seller.'

At page 823, Mr. Benjamin in his treatise on the Law of Sale of Personal Property, 8th edition, refers to this case and states as follows :

'Lord Campbell said, in relation to (1839) 151 E.R. 200 (S) that it had been properly decided, but that the Exchequer of Pleas had not determined in that case that the seller would not have had the right of treating the bargain as broken, if he had chosen to do so, as soon as the buyer gave him notice that he would not accept the goods, without being compelled afterwards to make a tender of them; and that the true point, decided in *Ripley v. M'Clure*, (1849) 4 Ex. 345 (T) was that a refusal by the buyer to accept in advance of the arrival of the cargo he had agreed to purchase was not necessarily a breach of contract, but that, if unretracted down to the time when the delivery was to be made, it showed a continuing refusal, dispensing the seller from the necessity of making tender.'

Following this decision, I hold that the time for ascertaining the damages for non-acceptance is the date when the goods were finally refused to be taken delivery of by the defendant.

20. Sri K. Ramachandra Rao, the learned advocate for the respondent, contended that as no specific date of delivery had been fixed under the terms of the contract, it was not open to the plaintiff to avail himself of the terms of Section 60 of the Act and wait till the date of delivery and that the date of repudiation under Exhibit A-28 should be taken as the date of the breach of the contract. He referred in this connection to the decision in *Millett v. Van Heek and Co.* (1921) 2 KB 369 (U).

What was held by the Divisional Court (Bray and Sankey JJ.) in that case was that when a contract provided for delivery within a reasonable time after a future date, it was not a contract for delivery at a fixed time within the meaning of Section 51, Sub-section (3) of the Sale of Goods Act, 1893. The learned Judges of the Court of Appeal reserved their opinion on that question. Atkin L. J., however observed at p. 378 that it was difficult to see why it should be said that the contract for delivery at times which could be determined by a Jury was not a contract for delivery at fixed times. He added:

'It seems to me that a meaning could be given to the words, 'if no time was fixed,' by reading them as referring to a contract such as to deliver goods on demand or to deliver goods as required by the purchaser.'

The expression used in Section 60 of the Act is not exactly the same as that contained in Section 51(3) of the Act. The expression employed is the 'date of delivery'. I am inclined to take the view on the facts of this case that the terms of Section 60 apply inasmuch as the defendant repudiated the contract before the date of delivery i.e., the wagon of goods reached Cochin. I am not inclined to agree with Sri Ramchandrarao's contention that as no specific or definite date of delivery was fixed the terms of Section 60 do not apply.

21. Even assuming that the terms of Section 60 do not apply and that the contract should be regarded as one to be performed within a reasonable time. I am inclined to apply the decision in (1921) 2 KB 369 (U) and hold that the damages

are to be fixed in reference to the time for performance of the contract subject to questions of mitigation. At p. 377, Atkin L. J. observed as follows:

'But it is said that, if no times have been expressed in the contract, and the contract would be construed by law as one for delivery by reasonable instalments over a reasonable time, even though those times might be ascertained as a question of fact by the jury, the plaintiff suing may not merely have an option, but is compelled, to fix his damages in reference to the market price at the time when the repudiation takes place.

That, it seems to me, would introduce an anomaly entirely without any kind of principle to justify it. I am satisfied that the code never intended to make that distinction or to vary what was the rule of law at the time when it was passed, a rule which has been recorded in countless decisions since the doctrine of repudiation of contract has received its development in *Frost v. Knight*, (1872) 7 Ex. 111. (V), namely, that the damages are to be fixed in reference to the time for performance of the contract subject to questions of mitigation.'

The Court of Appeal confirmed the view of the Divisional Court as to the measure of damages. When the defendant refused to accept delivery except on the terms mentioned in Exhibit A-37 dated 31st October, the plaintiff had requested Chakola Lonappa Paul to take delivery and sell the goods. It appears from the telegram sent by Chakola Lonappa Paul marked as Exhibit A-7 that the market rate of gingelly as on 2-11-1950 was Rs. 80/- per bag.

I am inclined to adopt that figure as the market rate on the date of the breach. The defendant has not adduced any evidence to show that the plaintiff could have mitigated those damages. Calculating the damages on that footing, the plaintiff would be entitled to recover 251x Rs. 4-8-0 per bag i.e., Rs. 1129-8-0.

22. The next question which has to be determined is whether the plaintiff is entitled to the railway freight incurred by him as special damage under Section 61 of the Act. Sri K. Ramachandra Rao contended that there was no pleading in regard to the railway freight. I am not inclined to accept his contention as the sum of Rs. 4144-8-9 claimed in the plaint includes this amount.

The mere fact that the plaintiff had not claimed this sum under the specific head of 'special damages' does not, in my opinion, preclude him from claiming that amount. There is no doubt that the contract was F. O. R. and the defendant was bound to pay these charges at the time of taking delivery. The damages are such which the parties knew when they made the contract to be likely to result from breach of it, and are special damages within the meaning of Section 61 of the Act.

In *Ramalingam Chettiar v. Gokuldas Madavji and Co.*, AIR 1926 Mad 1021 (W), the cartage charges for taking the goods from Virudupatti to Tuticorin were allowed. Similarly, in *Madhusudan Koer v. Badridas*, AIR 1920 Cal 426 (X), the cost of freight and bags was allowed. Following these decisions, I am inclined to allow the plaintiff's claim in regard to the railway freight i.e., a sum of Rs. 758-4-0.

23. In regard to demurrage charges paid by the plaintiff, I am inclined to agree with the contention of Sri K. Ramachandra Rao that they cannot be allowed inasmuch as the plaintiff was bound to clear the goods when the defendant refused to take delivery. Similarly, in regard to the commission and brokerage paid by the plaintiff at the time of resale, I hold that the plaintiff cannot claim those charges as I have found that he was not entitled to exercise the right of re-sale under Section 54(2) of the Act. In the result, I hold that the defendant would be liable to pay Rs. 1129-8-0 and Rs. 758-4-0 with interest from the date of plaint upto the date of payment.

24. The decree of the lower Court is set aside, and there will be a decree in favour of the plaintiff as indicated above. As the appeal is partly allowed, the parties will receive and pay proportionate costs throughout.

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