Raman Ezhuthassan Vs. V. Devassi

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Court : Kerala

Decided On : Mar-12-1957

Reported in : AIR1958Ker380

Judge : K.T. Koshi, C.J. and; Varadaraja Iyengar, J.

Acts : Contract Act, 1872 - Sections 150, 160 and 161

Appeal No. : A.S. Nos. 44 and 46 of 1955 (E)

Appellant : Raman Ezhuthassan

Respondent : V. Devassi

Advocate for Def. : T.S. Venkiteswara Iyer and; C.S. Ananthakrishna Iyer, Advs.

Advocate for Pet/Ap. : Sankara Menon and; P.V. Paul, Advs.

Disposition : Appeal allowed

Judgement :

Varadaraja Iyengar, J.

1. These two appeals arise respectively out of two connected suits O. S. 183 of 1123 and O. S. 154 of 1124 on the file of the Trichur District Court relating to a contract of hire of an engine. The plaintiffs 1 and 2 and the sole defendant in both the suits are the same. The common 2nd plaintiff is the appellant in both the

appeals.

2. The plaintiffs 1 and 2, Sankaran and. Raman Ezhuthassan were the owners of a 12--14 H. P. Stcn Hornsby Engine having purchased it second-hand and were working their 'Sivaram Rice Mill Vilangan'' therewith. They gave this engine and its accessories on hire to the defendant Devassy, under Ext. A agreement executed by him on 14-51123, for a period of three months commencing 15-5-1123 for purpose of draining water from certain 'Kole Nilam.'

Under Ext. A terms the defendant had to pay towards hire a total sum of Rs. 900/- of which ene-half was payable at date of agreement and the other half a month later, on 15-6-1123, The defendant acknowledged that the engine was in good working order and covenanted to return the same properly fitted and in running condition at the plaintiff's premises and at his own expense on the termination of the hire on 15-8-1123.

Default recurring in this, the defendant undertook to pay the plaintiff a sum of Rs. 7000/- as value of the engine and further sums at the rate of Rs. 15/- per day of detention, towards the plaintiffs' loss of profits. It was the plaintiffs' case that even though Ex. A mentioned mat the 1st instalment of Rs. 450/- was paid on the date of the agreement only Rs. 300/- thereof were paid. The defendant did not also pay the second instalment of Rs. 450/- on the due date. 15-6-1123.

The plaintiffs therefore laid suit on 4-8-1123 as O. S. 547 of 1123 on the file of the Trichur Munsiff's Court for realisation under the two heads as above of a sum of Rs. 600/- with interest thereon. In the contest which the defendant raised in this suit on 30-10-1123, he pleaded full payment of Rs. 450/- so as to leave no balance as due under the first instalment.

He also denied the plaintiffs' right to call for the second instalment dues inasmuch as the engine could not be and actually was not worked for the purpose he took it for more than one and a half months owing to a defect of gas leak from which it suffered. Indeed, on that account the engine had been already returned to the plaintiffs on 29-6-1123.

3. On 19-11-1123 the plaintiffs filed their second suit O. S. 183 of 1123 on the file of the Trichur District Court. Here they averred that the defendant did not return the engine on 29-6-1123 as claimed in his written statement in the previous case. He had on the other hand only dumped into the plaintiffs' premises, certain parts of the engine and its accessories and that even, not on 29-6-1123 but after the institution o their first suit.

On account of this default to return the engine intact the defendant had incurred liability to the extent of Rs. 7000/- being the value of the engine as estimated in Ext. A and also for a further sum of Rs. 990/- by way of damages for loss of profits at the rate of Rs. 15/- per day from 15-8-1123 till suit and for the future at the same rate, again as provided for in Ext. A.

The plaintiffs accordingly claimed specific recovery from the defendant of the engine or in the alternative for its value of Rs. 7000/- along with compensation for loss of profits as per calculation above indicated. In the written statement in this case the defendant somewhat modified his previous position as to the return of the engine.

He claimed that the engine in respect of all its main parts though not in whole was duly returned on 29-6-1123, and it was only the plaintiffs' refusal to hand back Ext. A agreement as cancelled that caused the defendant to withhold the rest. However these balance parts were left with Nara-yanan Ezhuthassan (D. W. 7) a relation of the plaintiffs on his promise to bring about a compromise settlement with the plaintiffs.

But the plaintiffs prevented such settlement by rushing to court with this suit and applying for and obtaining order of attachment before judgment of the engine parts in the custody of D. W. 7 and finally getting the same released to themselves. The question of recovery of the engine or its value under decree of court did not therefore arise. And as the engine had failed to fulfil its function under the hire contract, the defendant's obligation thereunder to account to the plaintiffs for loss of pro-fits arising from non-return on particular date did not attach and the claim in the plaint for loss of profit) was in consequence not sustainable.

4. The first suit O. S. 547 of 1123 of the Trichur Munsiff's Court was on motion of parties transferred to the Trichur District Court and renumbered there as O. S. 154 of 1124 for the purpose of joint trial and disposal with the second suit O. S. 183 of 1123. The common evidence was taken and the main judgment written in the latter suit.

In the result the learned Additional District Judge before whom the cases came on, dismissed both the suits on basis of his findings firstly that not alone Rs. 300/- but the entire first instalment of Rs. 450/- had been paid by the defendant to the plaintiffs tinder Ext. A. Secondly, that the engine which was the subject of hire under Ext. 'A was defective on account of gas leak for the purpose of baling water for which it had been let arid the plaintiffs were accordingly guilty of breach of bis implied warranty of fitness.

The consequence was that the defendant stood absolved of all further obligations under Ext. A, whether in respect of the payment of the second instalment or the return at all of the engine at the plaintiff's premises. The engine had anyhow come back to the plaintiffs though in two sets and them was no question therefore of recovery of the fen-gine. The question of wrongful detention and damages therefore, did not also arise in the circumstances.

5. Before proceeding to consider the merits of the appeals it is necessary to notice a preliminary objection raised on behalf of the defendant-respondent that the appeals were not maintainable because they were filed by the 2nd plaintiff alone without the 1st plaintiff, joint claimant on the party array whether as co-appellant or respondent. The argument was plausible without more. But it soon appeared that the first plaintiff had, even while the suits were pending, given up all his interests in favour of the 2nd plaintiff. The preliminary objection therefore fails.

6. Coining to the merits we notice, to begin with, that the relief in the first suit is in appeal confined to the recovery of the second instalment of Rs. 450/- the plaintiffs having apparently accepted the finding off the court below in regard to the full payment of the first instalment. We also find that apart from the question regarding costs in the court below the reliefs claimed in the second suit are in appeal classified under three counts as below :

(i).

Repair charges for theengine

Rs.

326

As.

8

Ps.

4

(ii).

Compensation at the rateof Rs 15/- per dav from 15-8-1123till 27-2-1124 when the engine was repaired and reinstalled.

2880

0

0

(iii).

Difference in price orsale of the engine minus what is relinquished by plaintiffs.

100

0

0

Total.

3306

8

4

The explanation for this apparent change of (front lay on the fact that with the filing of the suit the engine parts in the custody of Dw. 7 were seized and taken from him under order of attachment before judgment and then entrusted to the custody of the plaintiffs under further order. Thereafter they got an estimate through commissioner of court for repairs to the engine at the amount mentioned in the first count.

Subsequently the plaintiffs reported to court that the engine was repaired and reinstalled on 27-2-1124, viz., the outer date referred to in the second count and prayed for and obtained permission to sell the engine for Rs. 5000. The plaintiffs were thus able to quantify their total loss of profits as under the second count. The third count represented a portion of the capital loss incurred. We will now take up the appeals one by one.

7. The only question here is, as we have already noticed whether the plaintiffs are entitled to recover the second instalment of lure of Rs. 450. Learned Counsel for the plaintiffs-appellants urged that the court below was wrong in finding that the engine suffered from any defect and any how it was not open to the defendant in the face of the express terms in Ext A to plead such cause for exemption.

According to learned Counsel the Court below had misled itself in thinking that there was at all any implied warranty in the circumstances of the case and adjudging the plaintiffs' claim on such basis. Now it is clear that the hirer of a chattel must pay the rent agreed upon for the use of the chattel hired.

And if the hiring be for a definite period he is not discharged from his obligation to pay the price for the full period by returning the chattel to its owner before the expiration of that period ex-cept when the owner on receiving the chattels back treats their return as ending the contract, In fact the defendant was taking this position when he first pleaded the return of the engine with the plaintiff's consent on 29-6-1123. But the defendant had to shift his ground in view to what had really

happened, viz., the return of certain parts only, though constituting a main portion of the engine and that again without the plaintiffs' consent,

It was here that the unfitness of the engine for the particular purpose of bailing water and consequent breach of warranty of fitness became important. And the question became difficult when the contract as here did not contain in express terms any warranty but on the other hand contained an express obligation.

8. The question how far there is an implied warranty of fitness in cases of contract of hire is rather a difficult question. If in the agreement for the hire of a specific res the bailee rests upon his own judgment, there can be no question of the bailor's liability on any implied condition of fitness but if he relies on the bailor's judgment to furnish an article for a declared purpose then there may be an implied warranty.

In the leading case on this subject of Hyman v. Nye, (1881) 6 QBD 685 (A) decided in 1881, where the plaintiff hired from the defendant, a job-master, tor a specified journey, a carriage, a pair of horses and a driver and during the journey a bolt in the under-part of the carriage broke, the horses became startled and the carriage was upset and the action was laid against the defendant for negligence. Lindley and Mathew, JJ., held that it was the duty of the defendant to supply a carriage as fit for the purpose for which it was hired as care and skill could render it and the evidence was not such as to show that the breakage could not have been prevented by any care or skill In the course of the judgment, Lindley, J., observed:

'Nor does it appear to me to be at all unreasonable to exact such vigilence from a person who (makes it his business to let out carriages for hire. As between him and the hirer the risk of defects in the carriage, so far as care and skill can, avoid them, ought to be thrown on the owner of the carriage.

The hirer trusts him to supply a fit and proper carriage; the latter has it in his power not only to see that it is in a proper state, and to keep it so, and thus protect himself from risk, but also to charge his customers enough to cover his expenses." And Mathew, J., observed :

'The plaintiff trusted him to select the carriage, horses, and driver, and there seems to me nothing unreasonable in charging the defendant wjth a duty which it was certainly in his power to fulfil, and which from his business he could be presumed to have bound himself to take the proper steps to perform strictly.'

In the next case of Robertson v. Amazon Tug and Lighterage Co., (1881) 7 QBD 598 (B) the plaintiff, a master mariner, contracted with the defendants for a lump sum to take a certain specified steam tug of the defendants and tow six barges from Hull to the Brazils. The engines of the steam tug were damaged and out of repair at the time of the contract, but neither party was then aware of this.

As a result, the time taken by the voyage was increased and the defendants' profit was less than it would otherwise have been. Bramwell, L. J., dissenting, thought that the duty of care in hiring was the same as in other contracts when one man furnishes a specific thing to another which that other is to use.

Brett and Cotton, L. JJ., disagreed with this view and held that as the contract related to a specific res there was no undertaking that it was reasonably fit for the purpose for which it was hired. Brett, L. J., observed :

'That is the great distinction between a contract to supply a thing which is to be made and which is not specific, and a contract with regard to a specific thing. In the one case you take the thing as it is, in the other the person who undertakes to supply it is bound to supply a thing rea-sonably fit for the purpose for which it is made.' And Cotton, L. J., observed :

'If the vessel were not at the time of the contract ascertained and known to both parties, probably tho contract would imply such a warranty as relied on by the plaintiff. But the contract made with reference to a known vessel in my opinion stands in a very different position.

In such a case, in the absence of actual stipulation, the contractor must, in my opinion, be considered as having agreed to take the risk of a greater or a less efficiency of the chattel about which ho contracts.'

The real conflict that has arisen since these two decisions is as to the precise terms in which this warranty is to be described. Paton on Bailment in the Common Law (1952) has analysed the authorities to show that there are three views as to the nature of the implied term :

(a) the owner is under a duty to take reasonable care to make the res reasonably safe for the purpose for which he knows that it has been hired :

(b) the owner is under a duty to supply a res that is reasonably safe, the only defence being that the defect is a latent one which could not be discovered by any care or skill :

(c) there is an absolute guarantee or fitness, and finally states that the weight of authority seems to favour the last view.

As regards the law in India Pollock and Mulla in their Commentaries on the Indian Contract Act, 7th Edn., p. 489 no doubt observe that the English decisions upon the hiring of particular kinds of property turn rather on questions of implied warranty, or unexpressed terms of the contract, and must be used with great caution for the establishment of any general rules particularly in view to' the quite positive language of the second paragraph of Section 150, 'It the goods are bailed for hire the bailor is responsible for such damage whether he was or was not aware of the existence of such faults in the goods bailed.'

Nevertheless it seems to us that on this question of hire of specific chattel where the hirer does not depend upon the skill and judgment of the latter, there is alike in India as in England no question of implied fitness of the chattel for particular purpose. Compare the scope of the implied warranty of condition as to quality of fitness under section 16 of the Indian Sale of Goods Act.

9. In this case the hirer-defendant had the opportunity of inspection of the engine and was apparently satisfied as to its fitness when he acknowledged its good condition in Exhibit A. He was willing while the engine was in his custody to look to the repairs at his own expense.

He paid half the total hire in advance and undertook without qualification to pay the balance half on the expiry of one-third of the term again with interest from date of default. The mention in Ext. A of the purpose for which the defendant was hiring the engine would appear to be rather to preclude the defendant from putting the engine to other use than get the plaintiffs to warrant its fitness for particular purpose. As observed in Halsbury's Laws of England, 3rd Edn., Vol. 8, p. 122.

'It is not enough to say that it would be reasonable to make a particular implication, for a stipulation ought not to be imported into a written contract unless on considering the whole matter in a reasonable manner it is clear that the parties must have intended that there should be the suggested stipulation. If the contract is effective without tho suggested term and is capable of being fulfilled as it stands, generally speaking an implication ought not to be made.'

It follows, therefore, that the assumption of the learned Judge below that there was under Ext. A an implied warranty of fitness for the purpose of baling water and for breach thereof the plaintiffs had forfeited their claim for the secnnd instalment 'of hire is obviously incorrect.

10. We are also not clear that the defendant has established in the case that the engine was really unfit on account of its defect for the purpose concerned. For, the attempt, in evidence was to establish that the engine failed even in the second week after its hire though in the pleadings the defendant admitted the functioning of the engine for 1 1/2 months till 29-6-1123. .

Yet it was only on 25-7-1123 when the defendant sent his reply notice that he first intimated the plaintiffs of the defect in the engine and its non-user from 29-6-1123 when he 'returned the engine to the plaintiffs with their consent.' But this case of return was itself qualified later to cover only return of parts.

The truth would seem to be that the water from the 'Kole Nilams' was drained within one half the hire period of three months and the defendant having already paid one-half the entire hire by way of advance, wanted to be rid of further obligations and so sought a way out, deviously as it happend. On the whole, we are not satisfied that the defendant has made out any circumstance for absolving

him from his obligation to pay the sum of Rs. 450/-fixed as the second instalment of hire under Ext. A.

11. We therefore allow this appeal with costs and grant a decree in. favour of trie 2nd plaintiff for a sum of Rs. 450/- ith interest at 6 per cent. from this day. The appellant will also get the costs incurred by the plaintiffs in the lower court but proportionate only to the success in this court. The defendant will suffer his costs throughout.

12. A. S. 44 of 1955 : The question here is as to the measure of damages for the non-return by the defendant to the plaintiffs of the engine in whole or on stipulated day. Learned Judge below thought that the defendant was not under any obligation to return the engine because of its failure, as he found it, to fulfil the purpose of its hire in breach of the plaintiffs' implied warranty of fitness, So according to the Judge the plaintiffs should be thankful if part at least was returned.

We have found already that there was no such implied warranty nor for the matter of that any lack of fitness. But even assuming that a hired chattel does not subserve the purpose of its hire is there positive authority for saying that the hirer is not ound to return the same to the owner or according to his directions and in the condition in which he took it. As observed in Halsbury 3rd Edn., Vol. 2 at P. 126 :

'He (hirer) must also return the chattel hired at the expiration of the agreed term. But if the performance of his contract to return the chattel becomes impossible because it has perished, this impossibility (if not arising from the fault of the hirer or from some risk which he has taken upon himself) excuses him'. Section 160 of the Indian Contract Act says:

'It is the duty of the bailee to return, or deliver according to the bailor's directions, the goods bailed, without demand, as soon as the time for which they were bailed has expired, or the purpose for which they were bailed has been accomplished'. Nothing is said as to what is to happen if it is found that the article is not fit to be used for the purpose for which it was hired. In Isufalli Hassanally v. Ibrahim

Dajaboy ILR 45 Bom 1017: (AIR 1921 Bom 191(1)) (C), it was held that all that the bailee is bound to do is to give notice to the bailor of the default.

But the assumption was that there was a breach of warranty. Moreover the authority relied on viz.. Chew v. Jones, (1847) 10 LT 231 (D), held only that if a horse hired for a journey broke down it was enough to leave the horse at the nearest stable and give notice thereof to the owner and did not really lay down any general rule. We think that in the nature of the contract of bailment the duty should normally be laid on the bailee to deliver back the goods bailed even if the purpose of bailment is not accomplished.

13. There can he no doubt that the duty under Ext. A of the defendant to return the engine was absolute. For, the defendant had undertaken to fit the engine back in the plaintiffs' premises and leave it in the running condition it originally was in after the three months' period of hire was over by 15-8-1123.

Admittedly the defendant left part only of the engine in the plaintiffs' premises whether it be on 29-6-1123 as the defendant says or after 4-8-1125 the date of the first suit as the plaintiffs contend, And it took till 27-2-1124 for the plaintiffs to get the engine fitted once again and that after fresh expense incurred over missing parts and 'repair charges. The question is what is the extent of the remedy available to the plaintiffs in the circumstances.

The original frame of the remedy was in the alternative for recovery of possession of the engine or its assessed value of Rs. 7000/- in case possession cannot be had, together in any case with damages for its detention at the rate of Rs. 15/-per day from 15-8-1123. But the engine might be deemed to have been tendered by the defendant and accepted by the plaintiffs on 27-2-1124 when it was brought back to fitness in the hands of the plaintiffs.

So the relief by way of recovery as such became otiose. It might have been open to the plaintiffs soon after to have amended the plaint and ask for inclusion of the repair charges as well as depreciation, viz., the first and third counts in the relief column in the appeal memorandum. But the plaintiffs did not do so. No amendment was prayed for in appeal either. The result is we cannot now entertain

these counts and we disallow them accordingly.

14. We are then left with the second count in the appeal memorandum viz., damages for all the period of detention between 15-3-1123 till 27-2-1124 and at the rate of Rs. 15/- per day totalling Rs. 2880. There can be no doubt that the plaintiffs as the injured party are entitled to damages for the wrongful deprivation of their engine during all this interval. But in estimating such damages it should (not be forgotten that the defendant though guilty of I detention as against the plaintiffs was not himself putting the engine to use.

In such cases the rule is settled that the 'hiring charge' is not the proper basis for estimate of the plaintiff's loss. See for a discussion of the principle Strand Electric Engineering Co. v. Brisford Entertainments, 1952-2 OB 246(E) and for an application thereof Narasimhan Potti v. Easwara Iyer, 'ILR (1956) Trav-Co 324 (F). In this view the hire rate of Rs. 10/- per day which Ext. A term would work out, cannot admit of acceptance. And much less the rate of Rs. 15/- per day contended for by the plaintiffs on foot of the defendant's undertaking in Ext. A for, that clause must have been put in only 'in terrorem* and not as any genuine precsti-mate of loss.

Learned counsel for the defendant-respondent pointed out in this connection the evidence of the 2nd plaintiff himself as Pw. 1 that the engine while in the plaintiffs' hands had been husking 701) paras of paddy per month at the rate of one anna per para, so as to yield a monthly gross income of about Rs. 40/- but there was no data from which to calculate the net profits on this basis.

On the whole we think we can adopt with fairness to both sides the return on the capital investment by way of interest at a fair rate as the quantum of the plaintiffs' loss on this account. Adopting a 6 per cent return on the engine value which we take to be Rs. 5000/- we arrive at Rs. 25/-per month and putting the period of detention be-tween 15-8-1123 till 27-2-1124 at roughly six months, the plaintiffs may be taken to have lost a 'total income of Rs. 150/- on account of the wrongful act of the defendant,

15. We therefore direct the defendant to pay the 2nd plaintiff Rs. 150/- with interest at 6 per cent from this date. The defendant will pay the costs of this aopeal proportionate to this sum of Rs. 150.

The defendant will also pay the costs of thetrial court but proportionate to the sum of Rs. 5150/-viz,, the value of the engine as realized plus thedamages allowed herein. The defendant will sufferhis own costs throughout. The appeal will standallowed to the above extent and dismissed otherwise.D.H.Z.