

**Buldeo Doss Vs. Howe**

**Buldeo Doss Vs. Howe**

**SooperKanoon Citation :** [sooperkanoon.com/861430](http://sooperkanoon.com/861430)

**Court :** Kolkata

**Decided On :** Jul-23-1880

**Reported in :** (1881)ILR6Cal64

**Judge :** Richard Garth, C.J. and ;Pontifex, JJ.

**Appellant :** Buldeo Doss

**Respondent :** Howe

**Judgement :**

Richard Garth, C.J.

1. I think that, under the circumstances, the defendants were justified in refusing delivery of the goods. It has been contended, that as the goods were ascertained, and the time for their delivery and for payment of the price had been postponed, the property in them had passed to the plaintiff (sections 78 of the Contract Act); and that, consequently, the defendants' only remedy was to resell them after notice to the buyer under Section 107 of the same Act. Now, that section is headed 'Re-sale,' and it provides under what circumstances the vendor of ascertained goods has a right to resell them. But that is not the vendor's only remedy; and I can see no reason why Section 55, which provides for the rescission of contracts in certain events, should not apply to the present case.

2. We are bound, I think, to determine questions of this kind, so far as we can, by reference to the Contract Act, and not to English law; and Sections 51 to 58

appear to contain general provisions, which are applicable to all cases of reciprocal promises.

3. In this case, whether the property in the goods had passed or not, the parties had, undoubtedly, reciprocally promised, --the plaintiff to pay the price, and the defendants to deliver the goods, on a given day; and it is found by the Court below, that time was of the essence of the contract. In such a case Section 55 provides, that if the buyer is not ready and willing to pay the price at the time agreed upon, the seller has a right to rescind the contract, and to refuse to deliver the goods; and I consider that, upon the rescission, the property in the goods sold reverted in the seller. It has been contended that the surplus money, paid to the defendants on the occasion of the delivery of the first twenty chests, was a part-payment of the price of the remaining thirty chests, which prevented the application of Section 55. But it has been found as a fact by the lower Court, that the delivery of the twenty chests was not ' a delivery of part of the goods in progress of delivery of the whole.' And whether this was so or not, I do not see why Section 55 should not apply; the plaintiff having the right, of course upon the rescission of the contract to receive back the small balance due to him from the defendants. I think, therefore, that the judgment of the Court below should be confirmed, and that the plaintiff should pay the costs of this reference.

#### **Pontifex, J.**

4. I think that, under the circumstances stated, the defendants had a right to rescind and refuse delivery. The facts of further time having been given, and the plaintiff having agreed to pay godown rent for such further time, show, in my opinion, that time was of the essence of the amended contract, and bring the case within Section 55 of the Contract Act. But it is argued, that Section 55 applies only to contracts when the 'property in the goods sold does not pass to the buyer; that here the goods were ascertained, and by the proper construction of the contract the property in them passed to the plaintiff, and that Section 107 declares the remedy of the vendor under such circumstances.

5. No doubt, Section 107 declares one remedy, but it is only a partial remedy, for the purchaser might be insolvent and the market depressed, in which case it would be small satisfaction for the vendor to resell. Besides, Section 55 contains in itself words ' or so much of it as has not been performed,' which, in my opinion, show, that it was intended to apply to cases where the property in the goods passed by the contract, as much as to contracts where the property did not pass. And Section 39 contains similar words.

6. If there had been any machinery for the purpose in the Small Cause Court procedure, the defendants ought to have paid the small balance in their hands into Court. As there was no such machinery, and as the sum is insignificant in amount, I think that it ought to be disregarded, though of course the defendants are liable to repay it to the plaintiff.

**SooperKanoon - India's Premier Online Legal Search - [sooperkanoon.com](http://sooperkanoon.com)**