

APPELLATE CIVIL.

Before Mr. Justice Broadway and Mr. Justice Zafar Ali.

BAL KISHAN-BASHESHAR NATH (DEFENDANTS)

Appellants

versus

S. M. FAZAL ELAHI (PLAINTIFF) Respondent.

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Nov. 9.

Civil Appeal No. 2128 of 1922.

C.I.F. contract for sale of goods—general rule as to time when property in the goods passes—modified by intention of parties, where delivery (of shipping documents) is to be made against payment only—Suit for price—whether competent.

The plaintiff entered into a C.I.F. contract to sell certain English goods to the defendants and having shipped the goods, relying upon the defendants' signature to the indents and acceptance of the drafts, sued the defendants for the price. The bills of lading made out to the order of the sellers, had been sent endorsed in blank to the agent of the sellers who was, however, directed to deliver the bills of lading to the defendants only *against payment*, and *not merely on acceptance* of the said drafts.

Held, that although it may be said (as a broad proposition) that in the case of C.I.F. contracts the property in the goods passes as soon as those goods are shipped, the question is always one of intention, and if the seller retains the power of disposal (*ius disponendi*) it cannot be said that he intended the property to pass.

Held further, that in the above circumstances the seller must be held to have intended to retain the property in the goods until payment of the drafts, his suit for the price of goods was therefore incompetent and (in absence of amendment of plaint) must be dismissed.

Delaurier v. Wyllie (1), and *M'Dowal v. Snowball* (2), cited in Aitkin's Sale of Goods, page 161, followed.

Benjamin on Sale, 6th Edition, page 420, *Marji Jeta v. Honnavar Puthu Hari Pai* (3), *Karachi Steam Roller Flour*

(1) 17 R. 173 (2) 7 F. 35.

(3) (1915) 31 I. C. 334

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Mills v. Indo-Continental Agency (1), *Rustamji v. Haji Hussein Lari* (2), *Nazarali Samsuddin v. Malwa and Company* (3), *Ford Automobiles, Ltd. v. Delhi Motor Engineering Co.* (4), *Raghu Nath Das-Ram Sarup v. Ghamandi Lal-Narain Das* (5), *Gulab Rai-Sagar Mal v. Nirbhe Ram-Nagar Mal* (6), *Finlay Muir and Co. v. Radhakissen Gopikissen* (7), *Lilladhar Jairam Narranji v. George Wreford* (8), and *Bank of Morvi, Ltd. v. Baerlein Brothers* (9), referred to.

First appeal from the decree of Diwan Som Nath, Senior Subordinate Judge, Delhi, dated the 31st May 1922, directing the defendant to pay to the plaintiff the sum of Rs. 4,892.

M. S. BHAGAT and GOBIND RAM, for Appellants.

SARDHA RAM and BISHEN NATH, for Respondent.

JUDGMENT.

BROADWAY J.

BROADWAY J.—This appeal has arisen out of an action brought by S. M. Fazal Elahi against the firm of Basheshar Nath-Balkishen Das for the recovery of a sum of Rs. 5,837-15-0.

The plaintiff's claim was based on two indents dated the 8th January 1920 and signed by the defendant firm for the supply of certain tweeds which the plaintiff was to procure from England.

These indents were drawn up in the form in use by the Delhi Piece-Goods Association, *vide* Exhibits P. 3, P. 4 and P. 5 (pages 4—10 of the Paper Book).

The plaintiff alleged that the indents had been complied with and that the defendant firm had been duly supplied with the relative invoices and shipment samples or patterns; and further that drafts drawn

(1) (1916) 37 I. C. 7.

(2) (1919) 59 I. C. 515.

(3) (1919) 64 I. C. 943.

(4) (1922) 70 I. C. 138.

(5) (1925) 86 I. C. 794.

(6) (1923) I. L. R. 4 Lah. 423.

(7) (1909) I. L. R. 36 Cal. 736.

(8) (1892) I. L. R. 17 Bom. 62.

(9) (1923) I. L. R. 48 Bom. 374.

by the shippers on the defendant firm had been accepted by the said firm but not retired on due dates. It was further alleged that the contract goods had arrived and were lying with the National Bank of India, Limited, at Delhi at the defendants' risk, the defendant firm having failed to take delivery of the same against payment.

The plaintiff claimed a lien on these goods as an unpaid seller and prayed for a decree for the amount stated above as the price of the said goods.

The defendant firm admitted the execution of the two indents but pleaded that they were mere offers which had to be accepted before the contracts were complete, and that no valid acceptance had been made. It was further pleaded that the invoices and shipment patterns had been returned to the plaintiff, and that the drafts drawn by the shippers had been accepted under a misapprehension. It was also urged that the plaintiff was not entitled to sue for the price of the goods either in law or under the terms of the indents, and that the plaintiff, not having retired the drafts as "drawee in case of need" could not transfer the property in the goods which were also not in accordance with the contract.

Finally, it was urged that the plaintiff had no *locus standi* to sue, as he was only an agent. The trial Court settled the following issues:—

- (1) Were the two suit contracts bindingly entered into between the parties ?
- (2) Have plaintiffs no *locus standi* to bring this action ?
- (3) Were the drafts accepted inadvertently, if so how does it affect the claim ?

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- (4) Were plaintiffs ready and willing to perform their part of the suit contracts and did defendants break them ? If so, how and when ?
- (5) Had the property in goods passed to the defendants ?
- (6) If so, does not the suit lie for price of goods under law or indent terms ?
- (7) Are defendants estopped from raising any or all the pleas incorporated in the above issues on account of their conduct, if any, and in view of the terms of the suit contracts ?
- (8) At what rate of exchange the amount due to the plaintiffs should be calculated ?
- (9) To what amount in all for price and goods, interest and other charges, if any, are plaintiffs entitled ?

and finding the defendant firm was liable, granted the plaintiff a decree for a sum " of Rs. 4,892 with proportionate costs and a lien on the suit goods till repayment of the amount decreed with future interest at Rs. 8 *per cent. per annum* till realization on that amount." Against this decree the defendant firm have preferred this appeal.

Only two points have been argued at the Bar. First, it has been contended that the *offers* made in the indents never having been *accepted* no completed contract had been entered into between the parties; and secondly, it was urged that there had been no such ' appropriation ' of the goods as could have or had transferred the property in them to the defendant firm and that the suit to recover the price was therefore incompetent.

The first question need not detain us long. It has been proved beyond doubt that the goods were shipped in accordance with the said indents, and that, in due course, the relative invoices and shipment patterns were made over to the defendant firm by the plaintiff. The defendant firm also accepted the drafts when forwarded to them by the National Bank of India, Limited, and in these circumstances I have no hesitation in agreeing with the trial Court's finding that the contracts were completed ones.

In order to decide the second question it is necessary to go into certain details. The goods ordered by the defendant firm are what are known as "stock goods." On receipt of the two indents the plaintiff placed the orders with the firm of Messrs. G. Atherton and Company of Liverpool. Atherton and Company in due course shipped the goods, the bills of lading being made out in their own name, and sent them with the necessary drafts to the National Bank of India, Limited, at Delhi who as their agents were to deliver the shipping documents to the defendant firm *against payment*. The bills of lading were endorsed in blank.

The contracts were c. i. f. contracts and it was urged by Mr. Sardha Ram for the plaintiff-respondent that in such contracts the property in the goods passed to the buyer as soon as the goods were shipped and that therefore the finding of the trial Court that the property in the suit goods had passed to the defendant firm was correct.

Taken as a broad proposition I have no doubt that in the case of c. i. f. contracts the property in the goods may be said to pass as soon as they are shipped, but the question is always one of intention,

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and if the seller retains the power of disposal or the "jus disponendi" it cannot be said that he intended the property to pass.

"If the seller takes a bill of lading making the goods deliverable to himself or to his agent at the port of discharge, thus retaining the power of disposal of the goods, the property and risk will remain with him. But if he endorses and sends the bill of lading to the buyer, the property and risk will thereupon pass to the buyer" see *Delaurier v. Wyllie* (1) and *M'Dowal v. Snowball* (2) cited in Aitkin's Sale of Goods, page 161.

On the other hand if the seller takes a bill of lading making the goods deliverable to the buyer, the property and risk ordinarily passes to the buyer on shipment of the goods.

After an examination of "Benjamin on Sale," 6th Edition, page 420 *et seq* and the following authorities referred to by counsel, *viz.*, *Marji Jeta v. Honnavar Puthu Hari Pai* (3), *Karachi Steam Roller Flour Mills v. Indo-Continental Agency* (4), *Rustamji v. Haji Hussein Lari* (5), *Nazarali Samsuddin v. Malwa and Company* (6), *Ford Automobiles, Ltd. v. Delhi Motor Engineering Co.* (7), *Raghunath Das-Ram Sarup v. Ghamandi Lal-Narain Das* (8), *Gulab Rai-Sagar Mal v. Nirbhe Ram-Nagar Mal* (9), *Finlay Muir & Co. v. Radhakissen Gopikissen* (10), *Lilladhar Jairam Narranji v. George Wreford* (11), and *Bank of Morvi, Ltd. v. Baerlein Brothers* (12), I consider

(1) 17 R. 173.

(2) 7 F. 35.

(3) (1915) 31 I. C. 334.

(4) (1916) 37 I. C. 7.

(5) (1919) 59 I. C. 515.

(6) (1919) 64 I. C. 943.

(7) (1922) 70 I. C. 138.

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(9) (1923) I. L. R. 4 Lah. 423.

(10) (1909) I. L. R. 36 Cal. 736.

(11) (1892) I. L. R. 17 Bom. 62.

(12) (1923) I. L. R. 48 Bom. 374.

that the following rules will be of assistance in the case :—

(1) In the case of a contract for the sale of unascertained goods ordinarily, shipment on board a ship of or chartered for the buyer, is a sufficient appropriation to pass the property.

(2) If the seller when shipping the goods takes the bill of lading to his own order and does so not as agent or on behalf of the buyer, but on his own behalf, he thereby reserves to himself a power of disposing of the property and there is thus no final appropriation and the property does not, on shipment, pass to the buyer.

(3) If, in order to secure the contract price, the seller sends the bill of lading with a bill of exchange attached, with directions that the bill of lading is not to be handed over to the buyer till acceptance or payment of the bill of exchange, the appropriation is not absolute, but until acceptance or payment of the bill of exchange or tender of the price, is conditional only, and until such acceptance or payment or tender, the property in the goods does not pass to the buyer.

(4) If the seller discounts a draft upon the buyer with a Bank and authorises the Bank to make over to the buyer a bill of lading to the order of the seller and endorsed in blank by him upon the buyer's acceptance of the draft, the seller must be held to intend to transfer the property in the goods when the draft is accepted, but to retain the property in the goods till such acceptance.

Now in the present case the bills of lading were taken to the order of Atherton and Company, the sellers, and were sent, endorsed in blank, to the National Bank of India, Limited, at Delhi together

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with relative drafts attached. It is clear that the Bank was acting as the agents of the sellers and had been directed to deliver the bills of lading to the buyer *against payment, and not merely on acceptance* of the said drafts.

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In these circumstances it seems to me that the sellers must be held to have intended to retain the property in the goods until the payment of the drafts and that therefore the property in the suit goods did not pass to the buyers on their acceptance of the said drafts.

In this view of the case it is clear that the suit for the price of the goods was incompetent and must fail.

The drafts have not been retired by the plaintiff and the goods have not yet been sold. No application for the amendment of the plaint was or has been asked for and therefore this appeal is accepted and the suit dismissed with costs throughout.

ZAFAR ALI J.

ZAFAR ALI J.—I agree.

N. F. E.

Appeal accepted.