

Sitaram Srigopal

Vs

Smt. Daulati Devi (Dead) by Heirs and Legal Representatives and Another

Civil Appeal No. 1710(N) of 1969

(R. S. Sarkaria, O. Chinnappa Reddy JJ)

10.01.1979

JUDGMENT

SARKARIA, J. -

1. This appeal by certificate is directed against a judgment, dated December 6, 1968, of the Calcutta High Court. The relevant facts giving rise to this appeal are as follows :

1a. On July 29, 1950, Tulsiram Shaw (since deceased) carrying on business under the name and style of "Tulsiram Bhagwandas" purchased certain specific goods for Rs. 35,100 under Lot No. 32 in an auction held on July 27, 1950 at Panagarh by M/s. Egbart Andrews and Co., auctioneers, under instructions of the Government of India. The major item of these goods in Lot No. 32 comprised of 1540 pieces of "valves sluice water flanged and drilled to B.S.T.C. 4 inch. The book value of this item was stated to be Rs. 88,454 and that of the remaining goods Rs. 5,170/14. The reserved valuation at the auction sale was Rs. 35,000.

2. On August 26, 1950, Tulsiram Shaw sold those specific goods for a sum of Rs. 35,200 to the partnership firm of Sitaram Srigopal. The latter paid the entire price in cash to the former. Tulsiram Shaw further promised to hand over the release order of the goods and/or delivery order by August 28, 1950, to enable the firm to take delivery of those goods from Panagarh. Tulsiram neglected or refused to deliver the said release order in spite of demands by Sitaram Srigopal.

3. On the preceding allegations, Sitaram Srigopal instituted a suit in the High Court of Calcutta against the original defendant, Tulsiram Shaw, on January 15, 1951, for specific performance by the defendant to deliver the said specific goods on the ground that these goods were not readily available in the market and were of some big value and therefore, damages would not afford adequate relief for the loss of the goods. In the alternative, the plaintiff claimed refund of the price of Rs. 35,200 with interest at 6% per annum and a further sum of Rs. 1,32,559 as damages, being the difference between the contract price and the market price of the goods on the date of the breach, namely, the end of August, 1950.

4. The suit was resisted by the original defendant, who, in his written statement, pleaded that he was, at all material times, ready and willing to deliver the release order to the plaintiff and had in fact offered to do so, but the latter requested the defendant to cancel the contract and refund the amount of Rs. 35,200 by cheque on September 21, 1950, but the plaintiff declined to accept it.

5. During the pendency of the suit, the original defendant died on November 15, 1959, and his

widow, Smt. Daulati Devi (respondent 1 herein) and his only son, Bhagwandas Shaw (respondent 2 herein) were impleaded as defendants in place of the deceased.

6. On April 12, 1960, respondent 2, Bhagwandas Shaw, filed an additional written statement in which he took additional pleas.

7. The suit originally came up for hearing before C. K. Mitter, J. on March 8, 1957, when some witnesses were examined. It next came up before the learned Judge on March 11, 1957, for examination of further witnesses. Counsel for the defendants, however, failed to appear. The learned Judge, therefore, closed the case and passed a decree for Rs. 35,200, with interest and costs, against the defendants.

8. On being moved by application, the judgment and the decree was recalled and the suit was again tried by A. K. Mookerjee, J., who, by his judgment, dated August 23/26, 1965, decreed the suit for the refund of Rs. 35,200 with interest at 6% per annum, from August 26, 1950 up to date and for a further sum of Rs. 63,445 as damages with interest and costs.

9. The appellate Bench of the High Court, after a reappraisal of the evidence on record, came to the conclusion that the goods in question at the time of the sale were "old and second-hand good but in fair condition". The Bench reasoned : "If the goods were really new, the reserved price would not have been nearly half the book value at a public sale". The Bench found it "impossible to believe that they were in brand new condition". It was, therefore, impossible to fix the market price of the goods of such second-hand quality upon evidence relating to the sale of brand new goods. In its opinion "the evidence produced by the witnesses for the plaintiff did not prove the market price of the goods (of such second-hand quality) at the relevant time" and "the only possible conclusion is that the market price of the goods was a price at which they were sold and purchased in July-August, 1950". On these premises, the Bench was of the opinion "that the procedure adopted by the learned Judge in the court below, namely the tabulation of price mentioned by the witnesses and then taking the lowest price is not warranted by law and the result arrived at by him is not a correct approximation of the market price". In the result, the Bench partly allowed the appeal, and while affirming the decree of the trial Court with regard to the refund of Rs. 35,200, with interest at 6 per cent per annum, dismissed the plaintiff's claim for damages, which in the opinion of the Bench, were not suffered by him.

10. Hence, this appeal by the plaintiff against the dismissal of his claim to damages.

11. We have heard the learned counsel for the appellant and examined, with his assistance, the evidence on the record. Ascertainment of the plaintiff's claim for damages turned on a determination of two points namely : (i) What was the condition of the goods at the time of the sale in favour of the plaintiff ? (ii) What was the market value of the goods of that quality and condition in August 1950, when the alleged breach of the contract took place ? Regarding (i) the plaintiff-firm had, besides examining its partner, Hanuman Prasad Mody (PW 8), examined Dalal Kishan Basu (PW 3), Maganlal Patel (PW 4), Jagmohan Kadra Parekh (PW 5) and Hari Prasad Didwania (PW 7). PW 3 was an Assistant in the Office of the Directorate of Supplies and Disposals, Calcutta. At the relevant time in 1950, it was his duty to arrange for the auction of these goods which according to him had been declared as "surplus goods" by E.S.D., Panagarh. The witness disclosed that the book value of these goods in Lot 32, was Rs. 88,454 while their reserve price was fixed as Rs. 35,000. The witness, however, had no personal knowledge of or about these prices. He deposed to these on the

basis of the information derived from the documents (Exs. Q 54 and Q 92) which did not mention about the quality and nature of these goods. The witness did not mention about the quality and nature of these goods. The witness conceded that he did not personally know the condition of the goods concerned. Nor did he say on the basis of any record that the goods earmarked for auction in Lot 32 were categorised as "surplus goods" as distinguished from "salvaged goods". He admitted that he did not belong to the Commodity Section who prepares the lists of "surplus" and "salvaged" goods for disposal. Asked about the condition of the goods, the witness said that since the goods had been taken out of Shed No. 29, "they must have been in good condition". This was merely an opinion of the witness based on guesswork, and not derived from any note in any official record about the condition of the goods. PW 3 further stated that five sluice valves were set apart for sale to Banaras Hindu University which, in his opinion, must have been in brand new condition. The evidence of PW 3 being merely an opinion based on guesswork and personal knowledge, was rightly not accepted by the appellants Bench of the High Court.

12. PW 4 was a businessman who claimed to have inspected the 1,500 sluice valves soon before the auction, when they were lying in rows and found them in good condition. He, however, admitted that the sluice valves were lying enclosed in packets and he judged their condition from outside without opening any packets.

13. PW 7, Didwania, another businessman who claimed to have attended the auction, sharply contradicted PW 4 on this point and said that the goods were not lying covered with packing and were "absolutely new".

14. PW 5, Parekh, was the auctioneer who conducted the auction-sale on behalf of the Government. According to him, the goods comprised in Lot No. 32 were lying under Semi Shed No. 29, and were according to his impression, "surplus goods" which meant new goods fresh as distinguished from "salvaged goods" for disposal, which are "unserviceable". PW 5 further admitted that no warranty was given as regards the quality, character and condition of the goods for auction, which was on "As is and where is" basis. According to PW 5, the goods looked new. This was merely his impression which he formed from a superficial examination.

15. As rightly observed by the Court below, this opinion of the witness was not based on any document. It was only his own impression reproduced from memory, unaided by any record about three years after the auction of the goods. It was therefore, hazardous to accept his mere word of mouth.

16. While the oral evidence of the aforesaid witnesses was discrepant, infirm and conjectural there are several uncontroverted circumstances in this case that point to the conclusion that the goods in question were old and second-hand goods. Firstly, they were purchased by the Defence Department several years before their disposal by auction, probably during World War II. Secondly, their book value as entered in the Government records, was Rs. 88,454 while for the purchase or disposal by auction their 'reserved price' was fixed by the Finance Committee concerned at Rs. 35,000 only which was substantially less than one-half of the book value. Thirdly, the auction-purchaser, Tulsiram Bhagwandas, resold the goods about one month after the auction-purchase for Rs. 35,200 which was only Rs. 100 more than the amount for which he had purchased it. Tulsiram being a businessman dealing in such type of goods must have been aware of the prevailing market value. Had there been any substantial difference between the auction price and the market value of the goods similar quality and condition, no prudent businessman in the absence of any paramount compelling necessity, would have resold the goods practically at the same price at which he had

purchased it a few weeks earlier. There is nothing on record to show that this resale by Tulsiram in favour of the plaintiff was made under the compulsion of unavoidable circumstances or was motivated by consideration other than those which operate on the mind of the businessman selling his goods in the normal course.

17. For reasons aforesaid, we are in agreement with the appellate Bench of the High Court, that the sluice valves in question, comprised in Lot No. 32 were not "brand new goods" but were old second-hand goods.

18. Regarding Point No. (ii) - The plaintiffs produced no evidence to establish the market value of second-hand goods of that quality and condition. The plaintiffs however, examined three witnesses to show the market price of sluice valves of these specifications and make.

19. The first witness examined on this point was PW 1, A. N. Rajan. He was a scientist and owner of several patents in telecommunication. His evidence was to the effect that on December 28, 1950, he received an order from Messrs. Bells Asbestos Ltd. for despatching two pieces of brand new sluice valves to Allwaye. The witness produced that order (Ex. A) in which the sale price was not at all mentioned. The witness, however, stated that the sale price charged was Rs. 98 per piece. In this connection, he tendered a document which, according to him, was a type-written copy of a bill. This bill was not proved but was marked for identification. He referred to an entry (Ex. 2) in Sales Tax Register, which he said was maintained under his supervision. In this entry, the figure '196' is mentioned and against it '56' is written. According to the witness, the figure '196' indicates the price which was charged for the two pieces of brand new sluice valves sold by him, while '56' denotes the Ledger Folio Number. The witness however, did not produce his Ledger or other account books which might have shown the rate at which the goods were sold. Further, he admitted that he did not charge any sales tax from the purchaser of those two sluice valves, as the latter was a registered dealer. Rajan admitted that apart from the account books, the cheque received from Messrs. Bells Asbestos Ltd. towards the price of these two sluice valves would have corroborated his word of mouth. But no attempt was made to produce any such cheque or letter written by the purchaser. The witness conceded that Rs. 98 per sluice valve flanged and drilled B.S.T. C. in December, 1969 was his selling price and that he was concerned with the market rate "because market people may charge more or charge less". As rightly held by the Court below, even if it is assumed that the rates charged by Rajan for two pieces of brand new sluice valves, were the ruling market price in December 1950, it was no evidence of the market price of old, second-hand sluice valves of the same quality and condition as in Lot No. 32, in August 1950.

20. PW 2, M. Subramaniam alias M. S. Mani, an employee of Bells Asbestos Ltd. was examined to prove the order (Ex. A) produced by PW 1. The witness PW 2 thought that the order was placed; that it was in his hand; that it was an open order and the price was not mentioned in it. The witness had no personal knowledge of the price charged by the sellers. Thus, PW 2, did not give any evidence with regard to the price.

21. PW 4, Maganlal Patel, claimed to have purchased another lot of corrugated sheets, at the auction held on July 29, 1950. He stated that sometime after the purchase of the sluice valve by Tulsiram Bhagwandas, the witness went twice or thrice to the latter to purchase 4 inch sluice valve. Tulsiram demanded Rs. 100 per piece. The witness did not purchase the valves. The witness was dealing in similar goods and was maintaining account books but did not produce them.

22. PW 7 also vaguely stated that the price of imported sluice valves was Rs. 80 to Rs. 100 per

piece. He also did not produce his account books or any document in support of his ipse dixit.

23. PW 6, D. K. Majumdar was an important witness. He was a Commercial Assistant in W. H. Deeth and Co., Calcutta. In 1950, his duty was to go out in the market to collect indents. Deeth and Co. was the representative of Newman Mander and Co. Ltd. and some other British manufacturers of sluice/steam valves and cocks. He identified the signature of Mr. N. Chatterjee on the letter (Ex. M) dated March 27, 1952 and stated that the rate of sluice valves B.S.T.C. 4 inch quoted therein was 78 S-7 each, deliver F.O.B. British Port.

24. The High Court has pointed out and we think rightly that this letter (Ex. M) is not a quotation but a mere statement made in 1952 in a letter written to the plaintiff in reply to the latter's query as to the market price of such goods in August 1950. Majumdar PW 6 has admitted that he did not personally deal with this letter or its subject-matter, which was dealt with by Mr. Chakravarty personally, who alone could vouch for the correctness of its contents. The witness candidly conceded that he could not confirm the correctness of the rates given in this letter, without reference to the other documents which were not in his possession at the time of his examination. PW 6 further referred to the catalogue (Exs. N1 and N2) of Newman Mander and Co. Ltd. This catalogue on the fact of it, showed that it was issued in 1945.

25. The learned Judges of the High Court therefore, rightly did not rely on it. They have observed that there is nothing to show that the sluice valve shown in figure 541 in this catalogue is of the same description as those mentioned in Lot No. 32, because PW 6 was unable to affirm this fact.

26. It is clear from the above conspectus that the evidence produced by the plaintiff was not cogent, convincing and reliable to establish either that the goods comprised in Lot No. 32 were in brand new condition, or the market price of goods of similar specifications in August 1950. In view of the circumstantial evidence on the record, the court below was not wrong in holding that the market price of the goods in question in August 1950 was the same at which they were purchased by the plaintiff from Tulsiram Bhagwandas and consequently, the plaintiff was not entitled to any damages, apart from the refund of Rs. 35,200 which was the price by him.

27. No other point has been argued before us.

28. In the light of the above discussion, the appeal fails and is hereby dismissed with costs.

</html