M/S. Marwar Tent Factory

Vs

Union of India and Others

Civil Appeal No. 4586 of 1989

(Sabyasachi Kukharji, B. C. Ray JJ)

09.11.1989

JUDGMENT

RAY, J. -

1. Special leave granted. Arguments heard.

2. This is an appeal against the judgment and order passed in R.F.A. (OS) No. 3 of 1983 on March 14, 1983 by the High Court of Delhi dismissing the civil writ petition in limine against the judgment and decree rendered by Chawala, J in suit No. 50 of 1972 on February 12, 1982.

3. The matrix of this case is stated hereunder :

> The appellant M/s Marwar Tent Factory is a firm having its registered office at Jodhpur (Rajasthan) and dealing in the manufacture and sale of tents and tarpaulins. The firm is a regular supplier of these goods to the defence services of India.

4. On March 13, 1986 tenders were invited for the supply of tents by the Directorate General of Supplies and Disposals, respondent 2. Accordingly, the appellant submitted a tender which was accepted by the officer of the Directorate General of Supplies and disposal on behalf of the President of India. The said contract was of two kinds of tents. 'Flies Inner' and 'Flies Outer. The agreed rate for the 'Flies Outer' was Rs. 225 per tent and the quantity was 19,100. In accordance with the said terms of the contract the goods were to be inspected at the premises of the firm at Jodhpur and after the same being passed by the Inspector, the goods has to be despatched to the Commandant, COD, Kanpur. It was further agreed between the parties that 95 per cent of the price payable on proof of despatch and production of the goods in good condition by COD, Kanpur.

> On October 14, 1968, one consignment of 1500 tens was COD, Kanpur by the appellant under railway receipt No. 502671 dated October 14, 1968 and 95 percent of the price was paid by demand drafts dated October 17, 1968 and May 19, 1969. The Commandant, COD, Kanpur reported that 224 tents out of a sale consignment had not been received at Kanpur and consequently a sum of Rs. 51,912 (being the full price of those 224 tents inclusive of sales tax) was deducted from the amounts due to the appellant under another contract.

6. The appellant made repeated requests and sent repeated reminders for payment of the said sum of Rs. 51,912 from the respondent but without any effect. As such, the appellant filed a suit being Suit No. 50 of 1972 in the High Court at Delhi for recovery of the said principal sum as well as interest

on the principal sum as well as interest on the principle. The appellant further claimed interest on two other consignments as the price of the said consignments was paid after a great delay. The two consignments were of 700 and 1400 tents despatched on August 10, 1968 and August 27, 1968 respectively. Though 95 per cent of the price was paid, the balance 5 per cent amounting to Rs. 24,357 was not paid till December 1, 1971 despite repeated requests and reminders. The said payment of Rs. 24,357 was wrongfully delayed by about three years and a sum of Rs. 8525 was, therefore, claimed as interest @ 12 per cent per annum from January 1, 1969 to December 1, 1971 on the said amount. The total claim of the appellant was Rs. 74,792 i.e. Rs. 51,912 principal sum and Rs. 14,535, as interest on this and Rs. 8525 as interest on the sum of Rs. 24,357 wrongfully withheld for three years.

7. A Joint statement was filed by respondents 1, 2 and 5 as their interests were identical. The defence was that 224 tents were received short under railway receipt No. 502671 and the sum of Rs. 51,912 was rightly deducted from the payment due to the appellant under other contracts.

8. Respondents 3 and 4 also filed a joint written statement stating inter alia that only 11 tents were delivered short under railway receipt No. 502671 for which the admitted liability was to tune of Rs. 2475. This sum had been paid to the COD, Kanpur by debit adjustment.

9. T. P. S. Chawala, J. by his judgment and order dated February 12, 1982 though dismissed the claim of the appellant substantially but insofar as the amount Rs. 2475 regarding the shortage of 11 tents admitted by respondents 3 and 4 was concerned, decreed the said sum in favour of the appellant with interest @ 12 per cent per annum from April 1, 1972 till the date of judgment and further interest @ 6 percent from the date of judgment till relisation of the amount. Against the said judgment and decree the appellant preferred an appeal being R.F.A (OS) No. 3 of 1983 before the Division Bench of the said High Court of Delhi by order dated March 14, 1983. The instant appeal on special leave has been preferred by the appellant against the aforesaid judgment and decree.

10. The crucial question that requires consideration in this appeal is whether 1500 tents which were loaded in the railway wagons on October 14, 1968 at Jodhpur for delivery to respondent 5, the Commandant, COD, Kanpur under railway receipt No. 502671 were actually delivered to respondent 5. It has been held by the trial court i.e. learned Single Judge, High Court, Delhi that the tents were carried in three wagons up to Agra. The railway line from Jodhpur to Agra was a meter guage. Thereafter, from Agra to Kanpur which is broad gauge line the tents were put into four broad gauge wagons at Agra for onward transmission to Kanpur, as evident from the transmission register. It has been found that the railways could not establish the delivery of 224 tents under railway receipt No. 502671 to Commandant, COD, Kanpur from the unloading register. The shortage certificate issued by the railways corroborates the entries in the unloading register. The particulars of the consignment are set out in the heading of this document. The railway receipt is No. 502671 and the names of the sender and consignee are also mentioned. The Tariff Officer, Commandant, COD, Kanpur filed a claim with the railways on February 10, 1969 for 224 packages received short and this claim was made under railway receipt No. 502671. The plea of the railways was that the shortage was of 11 tents and not of 224 tents. It has been found by the trial court that this plea has been falsified by the unloading register, the shortage certificate and the reconciliation statement as also the report made by their Traffic Inspector of December 9, 1970. Accordingly, it was held that under railway receipt No. 502671 the appellant delivered the full quantity of 1500 tents to the railways but the latter failed to deliver 224 tents out of this consignment to the Commandant, COD, Kanpur and as such the railways are estoppel from contending that it was under some other railway receipt. The trial Court however, held that no decree could be passed against the railways because

the plaint did not contain any claim for loss or non-delivery against the railways. Secondly, the suit against the railways was barred by time and thirdly since no notice under Section 78-B of the Indian Railways Act was served on the railways by or on behalf of the appellant. The appellant, however, submitted that the title of the goods passed on to respondent 5, Commandant, COD, Kanpur, the moment the tents were lodged on rail head, Jodhpur as the terms of delivery under the contract was FOR, Jodhpur. For any short delivery of the goods made by the railways at Kanpur, the appellant was not responsible and respondent 5, under the terms of the contract is not entitled to deduct the price of the short delivery of tents i.e. 224 tents. It was for the Commandant, COD, Kanpur to claim damages from the railways and the Commandant had actually made a claim as stated hereinbefore to the railways in respect of the short delivery. The the learned Single Judge, however, found that the abbreviation FOR meant Free on Rail meaning simply that the cost of the carriage of the goods up to the railway wagon is included in the price and must be borne by the seller and the cost of carriage thereafter is to be borne by the buyer. It has also been held that the risk in the goods would not pass at Jodhpur as expressly stipulated in the general conditions of contract contained in Form DGS & D-68. These were made applicable by clause 7 in the schedule of acceptance of tender. Special emphasis was laid to condition No. 4 entitled "responsibility of contractor for executing the contract". The the learned Judge has with reference to sub-clause (10) of this condition held that the goods shall remain in every respect at the risk of the contractor until their actual delivery to the consignee at the stipulated place and as such the risk of the appellant remains until the goods were actually delivered to the Commandant, COD, Kanpur. The argument as regards condition No. 14 of the general connotations of contract as well as its sub-clause (2) entitled "passing" of property" was negatived on the ground that the risk was governed by condition 4(1) of the general conditions of contract. The claim before the railways being time barred and also not notice under Section 78-B of the Indian Railways Act having been served on the railways within the stipulated period, the appellant could not claim for damages for breach of contract and for the price of the tents not delivered. However, in respect of the price of 11 tents the shortage of which was admitted by the railways and for which a sum of Rs. 2475 was paid to respondent 5 by the appellant, it was decreed with the interest @ 12 per cent per annum from April 1, 1972 till the date of passing of the decree and also further allowed interest on the said sum @ 6 per cent per annum thereafter till the date of payment. The respondents, however, did not question the finding of the trial court regarding the short delivery of 224 tents at the railway station at Kanpur. Admittedly, there has been a short delivery of 224 tents out of the consignment of 1500 tents loaded at Jodhpur railway station in the railway wagon under the said receipt No. 502671.

11. In order to decide and fix the responsibility for passing of the decree in respect of the sum of Rs. 51,912 being the full price of 224 tents inclusive of sales tax deducted from the amount due to the appellant under another contract by respondent 5, it is pertinent to consider the question when the property in goods passed from the seller to the buyer at Jodhpur when the goods were loaded in railway wagons for delivery to the consignee at Kanpur. The learned Counsel for the appellant drew our attention to condition No. 11 of the schedule of acceptance of tender dated February 29, 1968. It has been mentioned therein that the terms of delivery was FOR, Jodhpur i.e. free on rail at Jodhpur railway station. It has also been mentioned that before the goods are loaded on railway wagons for delivery to respondent 5 at Kanpur, the Inspector I.G.S. North India will inspect the same at firm's premises at Jodhpur and after approval the said goods will be despatched to its destination by placing them in the railway wagons at Jodhpur railway station and the railway receipt has to be sent to the consignee under registered cover immediately after despatch of the stories with full details. It is also stipulated that 95 percent of the price of the goods will be paid by respondent 5 on receipt of the railway receipt and the inspection note and the balance 5 percent will be paid after the same

reached at the destination in good condition. Referring to this term for delivery under clause 11 of the schedule of acceptence of tender, it has been urged by the learned counsel for the appellant that the delivery was complete at Jodhpur when the goods were loaded in the goods train for delivery to respondent 5 at Kanpur and property in the goods passed to the buyer as soon as the goods were despatched by railway at Jodhpur. Thereafter, the risk in respect of the goods despatched remained with the consignee. The appellant, the consignor is entitled to get the entire price of the 224 tents which were short delivered by respondents 3 and 4 to respondent 5 at Kanpur in view of the clear finding by the trial court that though the entire consignment of 1500 tents was actually loaded in the railway wagons for despatch to the consignee, respondent 5. Respondent 5 duly filed a claim to the railways, respondents 3 and 4 for the short delivery to the tune of 224 tents immediately after taking delivery of the goods. In order to decide the question as to whether the rights in the goods passed from the seller to the buyer i.e. from the appellant to respondent 5 as soon as the goods were loaded in railway wagons at Jodhpur and the railway receipt was sent to the consignee, it is pertinent to refer to the meaning of the words, f.o.r Jodhpur. In Halsbury's Laws of England, 4th Edition (Volume 41) at page 800, para 940 it has been mentioned that :

> "Under a free on rail contract (f.o.r) the seller undertakes to deliver the goods in to railway wagons or at the station (depending on the practice of the railway) at his own expense, and (commonly) to make such contract with the railway on behalf of the buyer as is reasonable in the circumstance prime facie the time of delivery f.o.r. fixes the point at which property and risk pass to the buyer and the price becomes payable."

12. In Benjamin's Sale of Goods (2nd edn.), at para 1799 it is stated as under :

> "Stipulations as to time of "delivery" Provisions as to the time of deliver in an f.o.b. contract are taken to refer to the time of shipment and not to the time of arrival of the goods; and this may be so even though the provision in question contemplates the arrival of the goods by a certain time. Thus in Frebold and Stuznickel (Trading as Panda O.H.D.) v. Circle Products Ltd. ((1970) 1 Lloyd's Rep 499) German sellers sold toys to English buyers f.o.b. Continental port on the terms that the goods were to be delivered in time to catch the Christmas trade. The goods were shipped from Rotterdam and reached London on November 13; but because of an oversight for which the sellers were not responsible the buyers were not notified of the arrival of the goods until the following January 17. It was held that the sellers were not in breach as they had delivered the goods in accordance with the requirements of the contract by shipping them in such a way as would normally have resulted in their arrival in time for the Christmas trade".

13. The question as to the meaning of f.o.r. contract fell for consideration in the case of Girija Proshad Pal v. National Coal co. Ltd. (AIR 1949 Cal 472) P. B. Mukharji, J. as his Lordship then was observed in para 11 as follows :

> "The words f.o.r. are well known words in commercial contracts. In my judgment they mean when used to qualify the place of delivery, that the sellers liability is to place the goods free on the rail as the place of delivery. Once that is done the risk belongs to the buyer."

14. Reference may also be made in this connection to the decision of this Court rendered in CST v.

Husenali Adamji & Co. (1959 Supp 2 SCR 702 : AIR 1959 SC 887) in that case under the terms of the contract the respondent company whose place of business was situate in Chanda in the erstwhile Central Provinces had to load diverse quantities of 'savar' logs on railway wagons and to despatch the same from Chanda and other railway stations in the Central Provinces to Ambernath, a town in the erstwhile Province of Bombay. Clause 2 of the contract reserved the right of the consignee to examine the goods on arrival at Ambernath and to reject the same if they were found, in the opinion of the factory manager, not to conform with the specifications. Clause 6 also provided that the goods shall be measure under the supervision of the factory's representative, the decision of the factory manager, not to conform with the specifications. Clause 6 also provided that the goods shall be measure under the supervision of the factory's representative, the decision of the factory manager at Ambernath would be binding on the contractor and by clause 7 the prices of the goods shall be 'FOR Ambernath'. The question arose was as to when and where the property in the logs passed from the respondent to the consignee and whether the respondent was liable to pay sales tax under the provisions of the Central Provinces and Berar Sales Tax Act, 1947. The sales tax department levied the tax on the respondent on the respondent on the ground inter alia that the property in the logs passed from the respondent to the factory consignee under Section 23 of the Indian Sale of Goods Act, 1930 when the logs were loaded in the wagons at railway stations within the Central Provinces and the railway receipts taken in the name of the factory were forwarded to the latter. It was held : (SCR head note, p. 703)

> "[T]hat on a proper construction of the contract as a whole the intention of the parties was that the respondent would sent the logs by rail from the different stations in the Central Provinces to Ambernath where the factory manager would inspect, measure and accept the same if in his opinion they were of the description and the quality agreed upon. Consequently, as the respondent sent the logs and left it to the factory to appropriate to the contract such of them as they accepted as of contract quality and description, the property in the logs did not pass to the buyer by the mere deliver to the railway for carriage but passed only at Ambernath when the logs were appropriated by the factory with the assent of the seller within the meaning of Section 23 of the Indian Sale of Goods Act, 1930."

15 It is also convenient to refer to the provision of Section 23(2) of the Indian Sale of Goods Act, 1930. This sub-section provides that :

> "(2) 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 right of disposal, he is deemed to have unconditionally appropriated the goods to the contract."

16 In the instant case, in view of the terms and conditions of the embodied in clause 11 of the schedule of acceptance of tender regarding the place of delivery 'f.o.r. Jodhpur', the property in the goods passed immediately on from the seller after delivering the goods and loading the same in the railway wagons at Jodhpur for transmission to the buyer, the consignee, without reserving any right of disposal. The seller is deemed to have unconditionally appropriated the goods to the contract only under Section 26 of the said Act, the goods remained at seller's risk until the property therein is transferred to the buyer. As stated earlier that the property in goods has been transferred to the buyer by the seller by delivery of the goods and loading the same at Jodhpur in railway wagons. In this connection reference may be made to Section 39(1) of the said Act. Considering the aforesaid provisions of the sale of Goods Act, 1930 as well as the terms and conditions of delivery i.e. 'f.o.r.

Jodhpur' the irresistible conclusion that follows is that the property in the goods together with the risk passed from the seller to the buyer i.e. from consignor to the consignee as soon as the goods were loaded in the railway wagons at Jodhpur as per the terms of delivery i.e. f.o.r Jodhpur. Therefore, the finding of the trial court that the risk throughout remained with the appellant until the goods were actually delivered to the Commandant, COD, Kanpur is wholly wrong and illegal. The further finding of the trial court that the risk was governed with the condition No. 4(1) of the schedule of acceptance of tender and the property in the goods i.e. the tents did not pass until the same were actually delivered to the Commandant, COD, Kanpur and the Commandant, COD, Kanpur was not liable for loss of the tents during the period of transit by the railways is also illegal and bad. As stated hereinbefore on consideration of the place of delivery as well as the terms of delivery embodied in clause 11 of the schedule of acceptance of tender, the property in the goods along with the risk in the goods passed from the appellant to respondent 5 when the goods were delivered and despatched by railway wagons at Jodhpur i.e. FOR, Jodhpur. The consignee, Commandant, COD, Kanpur is therefore, liable for the price of 224 tents which was deducted by him from the other bills of the appellant. The findings of the trial court which were confirmed by the Division bench of the high court are, therefore, liable to be set aside and the claim of the plaintiff-appellant should be decreed.

17. As regards the claim of interest on the unpaid price of 224 tents amounting to Rs. 51,912 for the period from January 1, 1969 to December 1, 1972 @ 12 per cent annum, the courts below disallowed the claim on the findings that no claim for the price of the goods had been made against the railways, nor any notice under Section 78-B of the Indian Railway Act had been served on respondents 3 and 4, and the suit was barred by limitation against the railways. We have already held hereinbefore that the appellant is entitled to get not only the price of the goods but also the interest thereon for not making the payment of the price of the goods within a reasonable time. The interest @ 12 percent per annum was claimed by the plaintiff-appellant on Rs. 51,912 being the price of 224 tents for the period from January 1, 1969 to December 1, 1971 It is appropriate to refer in this connection to the relevant provision of section 61(2) of the Sale of Goods Act, 1930 (Act 3 of 1930) which reads as follows :

> "61(2) In the absence of a contract to the contrary, the court may award interest at such rate as it thinks fit on the amount of the price -
>
> (a) to the seller in a suit by him for the amount of the price-from the date of the tender of the goods or from the date on which the price was payable,
>
> (b) to the buyer in a suit by him for the refund of the price in a case of a breach of the contract on the part of the seller-from the date on which the payment was made."

18. In the instant case, undoubtedly, it has been found by the courts below that the short delivery of 224 tents occurred during the transmit of the said goods by the railways. It is also an admitted fact that respondent 5, the Commandant, COD, Kanpur deducted the price of the said 224 tents from the other bills of the contractor i.e. the appellant and did not pay the same. The appellant has claimed interest in respect of the price of the said goods being not paid to the appellant within a reasonable time from the date of delivery of the goods i.e. for the period from January 1, 1969 to December 1, 1971. Respondent 5 did not dispute the claim of the appellant in this regard. His only plea was that in the notices under Section 80 of the Code of Civil Procedure served on the respondents the claim of interest was not made and as such the claim of interest could not be allowed. In the case of B. B. Bose v. National Coal Trading Company (AIR 1966 Pat 346) the plaintiff filed a suit for recovery of

price of goods sold to the defendant. Before filing the suit the plaintiff served a demand notice on the defendant. In the demand notice Ex.2, no claim for interest was put by the plaintiff. It was urged on behalf of the defendant that there was no stipulation for payment of interest in case the price remained unpaid in the contract and as such the plaintiff could not claim any interest on the unpaid amount. This was negatived by the High Court, Patna and it was held : (AIR. 351)

> "That is, no doubt, true, but the demand clearly was for the outstanding balance price of coal which the plaintiff had supplied to the defendant. The supplies had been effected up to June 26, 1954, and in the normal course, the price ought to have been paid by the defendant within a reasonable time of the deliveries, but the payment had been delayed for nearly three years and plaintiff was obliged to institute the present suit for recovery of the price. In such circumstances, it was within the discreation of the court to award interest to the plaintiff at a reasonable rate on the amount of the price under Section 61(2) of the Sale of Goods Act. The price was undoubtedly payable when the notice of demand (Ex.2) was served by the plaintiff upon the defendant, and there can be no doubt that the rate of 6 per cent per annum which the court awarded was a reasonable rate."

19. Similar question cropped up for decision in the case of M. K. M. Moosa Bhai Amin, Kota v. Rajasthan Textile Mills Bhawanimandi (AIR 1974 Raj 194). In this case the plaintiff filed the suit for price of the goods delivered as well as for interest on the unpaid price. The claim regarding interest was disallowed by the District Judge on the ground that there was no stipulation for payment of interest in case the price of the goods supplied remained unpaid. It was contended on behalf of the plaintiff that even in the absence of the contract, the plaintiff was entitled to reasonable interest under Section 61(2) of the Sale of Goods Act, 1930. The supply had been effected up to September 18, 1962 and in normal case the price of the goods ought to have been paid by the defendant within a reasonable time of the deliveries but the payment had been delayed for nearly a year which compelled the plaintiff to bring the suit for recovery of the price. It has been held that in such circumstances, the lower courts should have exercised discreation in favour of the plaintiff and awarded interest on the amount of the price of the goods under Section 61(2) of the Sale of Goods Act. The High Court of Rajasthan allowed interest @ 6 per cent per annum which was considered to be a reasonable rate of interest.

20. On a conspectus of all the decisions referred to before as well as the provisions of Section 61(2) of the Sale of Goods Act, we are constrained to hold that the plaintiff is entitled to get a decree of interest on the unpaid price from January 1, 1969 to December 1, 1971 @ 6 per cent per annum which is considered to be a reasonable rate of interest, as claimed by the plaintiff-appellant.

21. In the premises aforesaid the appeal is allowed and the judgments and the decree of the courts below insofar as they rejected the claims regarding the price of 224 tents and interest thereon are set aside. The plaintiff-appellant's claim for the price of the said goods as well as interest thereon @ 6 per cent per annum for the period from January 1, 1969 to December 1, 1971 is hereby decreed. The appeal is thus allowed with costs quantified at Rs. 4000. The claim for interest @ 6 per cent per annum for the period from January 1, 1972 till date of payment of amount unpaid is allowed.

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