PATNA HIGH COURT

Santi Sahu

Vs

Sheogulam Sahu

A.F.O.D. No. 126 of 1948

(Sinha and Dayal, JJ.)

12.07.1957

JUDGMENT

Sinha, J.

1. The question raised in this case is whether the plaintiffs-respondents, were entitled to sell the goods sold by them to the defendants, the defendants having pledged the same goods as security for payment of the money advanced by the plaintiffs for buying the goods. The Court below has decreed the suit, and hence this appeal by the defendants.

2. The facts, put in brief, are that, in June, 1943, corresponding to sometime in Jeth, 1350 Pasli, defendant No. 1, as karta of his family, constituting of himself and the other defendants, approached the plaintiff No, 1, who carries on business on his behalf as well as on behalf of the other plaintiffs, and requested him to purchase for the defendants Tisi (linseed) and to keep in the plaintiffs' arhat. The defendants agreed to pay interest on the money advanced by the plaintiffs for the purchase of Tisi at the rate of 12 annas per cent. per month and arhat charges at the same rate. The plaintiffs' case is that it was agreed that, in case the Tisi was not disposed of by the defendants by the end of September, 1943, the plaintiffs were entitled to sell the same and to appropriate the sale proceeds to their dues together with interest and arhat charges, and pay the surplus, if any, to the defendants. It is said that, in pursuance of that agreement, the plaintiffs purchased Tisi for the defendants as per account given in the plaint. The defendants did not sell the Tisi by the end of September, and the price of Tisi began to fall. On plaintiffs' insistence to sell the Tisi and pay off the dues of the plaintiffs, the defendants requested the plaintiff No. 1 for a month's time, and also executed a moahdanama for Rs. 3,100/-by way of indemnity bond to idemnify the plaintiffs against any loss. The defendants, even thereafter, took no steps to sell the Tisi, and the price of Tisi continued falling. The plaintiffs, thereupon, served a notice on the defendants on the 4th February, 1944 (Exhibit 5) demanding the plaintiffs' dues as per schedule given in the plaint. The notice was served, and the defendants sent a reply dated the 28th February, 1944 (Exhibit 6), and they asked for some more time; but they took no steps for selling the Tisi. The defendants further deposited with the plaintiffs a sum of Rs. 2,900/- and requested the plaintiffs to buy for them another lot of 445 bags of Tisi. An agreement was entered into between the parties for selling the same within 30th Baisakh, 1351 Fasli. A memorandum as

regards 445 bags was drawn up and signed by the defendants (Exhibit 4 dated the 24th March, 1944) in which interest and arhat charges were stipulated to be paid by the defendants at the rate of 1 per cent. per month. Some time elapsed and the price of Tisi continued going down, and the plaintiffs grew apprehensive and served another notice dated the 26th April, 1944 (Exhibit 5a) asking the defendants to take steps to clear the dues of the plaintiffs and sell the Tisi within seven days of the date of receipt of that notice, failing which the plaintiffs were to sell it and realise their own dues from the proceeds. The defendants took no heed and sent a reply that the defendants were not in a position to sell the Tisi at the prevalent market rate. The plaintiffs, being unable to wait any longer, started selling the Tisi to recognised firms from Bhado, 1351 Fasli, according to the market rate then prevalent. All the transactions were entered into the plaintiffs' Bahi Khata, and, after selling the Tisi, the plaintiffs sustained a loss of Rs. 6,3207-/3 as per account given in the plaint which formed the subject-matter of the suit.

3. The defense of defendant No. 7 is that he had no concern with the business of defendant No. 1, nor had he any concern with the properties of the defendant. He alleged partition between himself and the other defendants, and stated that there was no ancestral business of the family of the defendants, as alleged in the plaint. Defendants 1 to 6 endorsed the defense of defendant No. 7, and stated that no power was given to the plaintiffs to sell the Tisi unless so directed by the defendants; that there was no agreement to sell the Tisi at the end of September, 1943; on the contrary, they asserted that the agreement was that the Tisi would be sold only when the defendants would ask the plaintiffs to do so; that the moahdanama was executed under pressure and undue influence; that no time was asked for by the defendants after the execution of the moahdanama, but in spite of it the plaintiffs served a notice on the defendants; and that the memorandum was also executed by the defendants in favor of the plaintiffs under undue influence, and the rate of interest and arhat charges at the rate of 1 per cent. per month was a penal rate and the defendants were not bound by it. In short, the defense is that the plaintiffs had no right or authority to sell either the first lot of 961 bags of Tisi or the second lot of 445 bags. It was also faintly urged that the Tisi of the defendants had not been sold and was kept in the arhat of the plaintiffs and. therefore, no cause of action had accrued to the plaintiffs.

4. The Court below has found that the various circumstances mentioned in the judgment show that the defendants' Tisi was sold as per schedule given in the plaint, that defendant No. 7 was joint with the other defendants, and the story of separation was a myth, and that there was no proof that any agreement was entered into between the parties for sale of the Tisi by the end of September, 1943, Pasli as alleged by the plaintiffs so far as the first lot was concerned. But the Court held that the plaintiffs were entitled, after they had given sufficient notice to the defendants, to sell the goods under Section 176 of the Contract Act, and, therefore, the plaintiffs were justified in claiming the balance of their dues together with interest and cost from the defendants. So far as the second lot was concerned, it was held that the contract was a good contract between the parties, and the plaintiffs had rightly sold the second lot to pay themselves off. The Court below also found, however, that there was a mistake of Rs. 133/- in the accounts given in the plaint, and, therefore, the claim should be reduced by that amount.

5. Mr. U. N. Sinha, learned Counsel on behalf of the appellants has submitted two points for the consideration of this Court- (1) whether there was any agreement between the parties to the effect that the first lot of Tisi namely, 961 bags, could be sold by September, 1943, and (2) whether the plaintiffs were entitled to sell the first lot.

6. These two points can be considered very briefly in view of the document produced by the defendants from their own custody and the whole case can be rested on that document. This is exhibit A, which is styled as Bijak. It has to be remembered that no reference was made to this document in the plaint, nor in the evidence by the plaintiffs. There was no reference again made to this document in the written statement. If what the document is alleged to have contained was originally there, it was a very good evidence to show that there was no right in the plaintiffs to sell the first lot of Tisi. The evidence in the case started on the 19th December, 1947, and for the first time reference was made to this document in the cross-examination of P. W. 5, the Munib of the plaintiffs, on the 10th January, 1948; but still, till then, no reference was made to the relevant writing in the document. Again, no reference was made to this document in the evidence of any of the witnesses for the defendants, except in the evidence of D. W. 7 on the 26th January, 1948 and for the first time it appears, the attention of the cross-examining lawyer was drawn to the relevant passage in the said document. Before I consider this document any further, I would like to mention the relevant contents; it reads as follows:

> "Tisi musa ka nuksani wo tari lagne ka nuksani ham dendar nahi hain. Bazar bhao ghatne par bench dene ka haq hamara 'na' raha." (The relevant word is underlined (here in ' ') by me which is translated as follows: We are not liable to pay the damages caused to linseed by rats and dampness of ground and we have no right to sell it if the market price goes down."

This document is supposed to have been made over to the defendants by or on behalf of the plaintiffs. This fact is not denied. This document does not bear the exact date; it mentions only as follows:

> "Chitha of Jugal Sao Raj Ram of Baghi, 1350 Fs., proprietor Shanti Sah of Baghi." It also contains the credits and debits in respect of 961 bags. It refers to the memorandum dated the 16th December, 1943 in respect of Rs. 3,100/- on the credit side. So, this document must have come into existence only after the 16th December, 1943, although the original agreement regarding the first lot was sometime in June,. 1943. During the cross-examination of defendant No. 1 (D. W. 7), it was suggested that the letter 'na' before the word 'raha' in the Bijik was an interpolation at the instance of and in favor of the defendants by anybody who may have read out the document to the defendants.

For some reason, which is not quite easily explainable, this document was not considered by the court below, there being no reference to it in the judgment at all, and as this document was produced in court almost at the close of the plaintiffs' case, it appears this document escaped the notice of the lawyers of the parties at the time of argument. In this Court, however, an affidavit has been filed on behalf of the plaintiffs-respondents to the effect that this document had been tampered with and the word 'na' had been introduced at a later stage and that the word 'na' was not in it originally, and we have been addressed by the parties in regard to their respective cases so far as this document is concerned. On a look at this document, I feel convinced that the word 'na' has been introduced in this document at a later stage, and that is apparent from the fact that that letter (varnacular matter omitted) is in thicker ink and appears to have been re-written on

some other previous writing. It should also be remembered that this Bijak was given by or on behalf of the plaintiffs to the defendants, and it absolves the plaintiffs from liability of any loss caused by damage on account of rats and dampness of the ground; and it refers to the contingency of the price of Tisi going down. In that event when the price of Tisi went down, the more natural thing to expect was that the plaintiffs should have said that in that contingency they would have the right to sell the Tisi and not that they would have no right to sell the same. I feel no doubt, therefore, that this document, as it originally stood, contained an express stipulation giving right to the plaintiffs to sell the Tisi in case its price went down. As this document was not in the possession of the plaintiffs and was a mere Bijak given by plaintiffs and, therefore, it appears that, although originally there was no such agreement, sometime after the memorandum dated the 16th December, 1943 (Exhibit 3), when the prices had started going down, there was an agreement between the plaintiffs and the defendants giving the plaintiffs the right to sell in case the price of Tisi went down. On this finding, in my opinion, the plaintiffs were entitled to sell the Tisi, as they have sold, and the suit has been rightly decreed by the court below.

7. In my view, however, the court below was also right in relying upon the provisions of Section 176 of the Contract Act for coming to the conclusion that, after reasonable notice had been given to the defendants, the plaintiffs as pawnees of the goods were entitled to sell the goods. Section 176 reads as follows:

> "If the pawnor makes default in payment of the debt, or performance, at the stipulated time of the promise, in respect of which the goods were pledged, the pawnee may bring a suit against the pawnor upon the debt or promise, and retain the goods pledged as a collateral security; or he may sell the thing pledged, on giving the pawnor reasonable notice of the sale.

If the proceeds of such sale are less than the amount due in respect of the debt or promise, the pawnor is still liable to pay the balance. If the proceeds of the sale are greater than the amount so due, the pawnee shall pay over the surplus to the pawnor".
Mr. Sinha, on behalf of the appellants, contended that there was no question in this case of the application of the provisions of Section 176 of the Contract Act inasmuch as the position of the plaintiffs was not the position of pawnees. Section 148 of the Contract Act is relevant in this connection, and the provisions of that section are as follows:

> "A 'bailment' is the delivery of goods by one person to another for some purpose, upon a contract that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them. The person delivering the goods is called the 'bailor'. The person to whom they are delivered is called the 'bailee'.
> Explanation:- If a person already in possession of the goods of another contracts to hold them as a bailee, he thereby becomes the bailee, and the owner becomes the bailor, of such goods although they may not have been delivered by way of bailment." .

Section 172 of the Contract Act says-

> "The bailment of goods as security for payment of a debt or performance of a promise is called 'pledge'. The bailor is in this case called the 'pawnor'. The bailee is called the 'pawnee'." In the present case, the Tisi belonged to the plaintiffs. The defendants bought the Tisi from the plaintiffs, and the price of it was advanced by the plaintiffs. The defendants, in their turn, by agreement with the plaintiffs arranged that the goods would remain with the plaintiffs, who were to be paid interest on the money advanced as also the arhat charges for keeping the goods of the defendants in the plaintiffs' arhat.

In this view of the arrangement between the parties, which is admitted if must be held that there was bailment within the definition of the words in Section 148 of the Contract Act, and in the circumstances the law must presume that there was delivery of the goods by the defendants to the plaintiffs after the defendants had bought the goods from the plaintiffs; and, upon the defendants' own case, the goods were kept in the godown of the plaintiffs as security for payment of the debt advanced by the plaintiffs. In that view of the matter also, in my opinion, the plain, tiffs, having given reasonable notice to the defendants, were entitled to sell the goods under Section 176 of the Contract Act.

8. The English law on the subject is the same as provided for by Section 176 of the Contract Act, and in the case of *Pigot v. Cubley*[1], the relevant portion of the placitum runs as follows:

> "Where goods are deposited as security for the repayment of a loan of money on a future day certain, though without any express stipulation that the pawnee shall have power to sell in default of payment on the day, - Semble that such a power of sale is implied by law from the nature of the transaction. - But, where there is no stipulated day for payment, or where the stipulated time has been rendered indefinite by a subsequent agreement between the parties, - it is not competent to the pawnee to sell without a proper demand and notice."

The view which I have taken is also supported by the authority of the case in *Kunj Behari Lal v. Bhargava Commercial Bank, Jubbulpore*[2], *(2)*), where it is said that the pawnee should give reasonable notice of his intention to sell as provided for by
Section 176 of the Contract Act. Mr. Sinha has referred the Court to the case of *Firm Tejpal Jamna Das v. Ernest V. David*[3] a Privy Council Case, and the placitum, which brings out the decision, is as follows:

> "When monies are advanced to importers for the purposes of their trade and the goods are placed in the godown of the lenders, it is an exceedingly likely course of business that the goods should be regarded as security for the advances, but the fact that the arrangement was really that has to be proved."

In the present case, the position is admitted that the defendants had arranged with the plaintiffs for the latter to advance loan for buying the first lot of Tisi and that the defendants had replaced the goods in the arhat of the plaintiffs. This was an arrangement by way of security.

9. There is still another point of view from which this case could be looked at, but, as that aspect has not been argued before this Court, I do not propose to deal with that matter except to say this that the provisions contained in Sections 46, 47 and 54 (2) of the Sale of Goods Act appear to me to be relevant which respectively deal with Unpaid Seller's Right, Seller's Lien and the Seller's Right to re-sell goods of perishable nature on giving notice.

10. In the circumstances mentioned above, the appeal must be dismissed with costs.

Dayal, J.

11.I agree.

Appeal dismissed.

Cases Referred.

[1](1864) 15 CB (NS) 701: 143 ER 960
[2] ILR 40 All 522: (AIR 1918 All 363)
[3]32 Cal WN 1146