Ram Kumar Vs. P.C. Roy and Co. (India) Ltd.

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Court : Kolkata

Decided On : May-05-1949

Reported in : AIR1952Cal335

Judge : Chatterjee, J.

Acts : Contract Act, 1872 - Section 56

Appeal No. : Original Suit No. 777 of 1944

Appellant : Ram Kumar

Respondent : P.C. Roy and Co. (India) Ltd.

Advocate for Def. : Sankar Banerjee and ;Talukdar, Advs.

Advocate for Pet/Ap. : A.C. Mitra and ;Bhabra, Advs.

Disposition : Suit dismissed

Judgement :

Chatterjee, J.

1. This is a suit for the recovery of Rs. 32,500/- being damages for breach of contract.

2. A gentleman by the name of Hazarimull Agarwalla carried on business in' the name & style of Sree Jagadish Rice & Oil Mills at Forbesgunge in the district of Purnea in Bihar. He was the karta & manager of a joint Hindu family which carried on business in that name.

3. The case made in the plaint is that it was agreed that Hazarimull Agarwalla would sell & the deft, would purchase 2,500 maunds of rice on inter-alia the following terms & conditions: (a) The deft, would pay the price of rice at 28/-per maund. (b) The deft, would pay also two annas per maund, as expenses for cartages & loading, (c) The deft, would pay Rs. 62/- per hundred new bags, (d) Delivery would be given at the plff's. mill.

(2) It is alleged in the plaint that the deft, postponed taking delivery of the goods to which the plff. assented. On 20-9-1943 the plff. called upon the deft, to take delivery of the goods vithin fifteen days but the deft, failed & neglected to take delivery of the goods & this suit has been instituted, for damages being the difference between the value of the goods at the contract rate & the price prevailing on or about 5-10-1943.

(3) In its written statement the deft. Co. pleaded that it was implied from the nature of the contract that the 2,500 maunds of rice would have to be despatched by rail from Purnea for export out of the province of Bihar to Bengal. The deft. states that it made diligent efforts to obtains wagons or wagon priorities but the same were not available. The plff. failed & neglected to apply for the necessary permit to enable him to give delivery of the contracted goods. In any event, the deft. Co. was prevented from obtaining delivery of the goods for exporting the same from Bihar by reason of Govt. Orders & Notfns. issued under the Defence of India Rules. By reason of such Orders-& Notifications, the contract was rendered void & the deft. Company was not liable to take delivery of the goods. The Govt. of Bihar requisitioned. 12,500 maunds of rice lying with the Jagadish Rice & Oil Mills which included the rice in question. Therefore the contract became impossible of performance or was rendered void.

4. The following issues were raised:

1. What were the terms of the contract between the parties?

2. Was the plff. under any obligation to arrange for wagons or permits?

3. Was the deft. Company bound to make diligent efforts to secure wagons? If so, did it do so?

4. Was it intended by the parties that the goods would have to be despatched by rail or export from Purnea to Bengal? Was that the basis of the contract?

5. Is the deft. Co. excused from the performance of the contract or was the contract rendered void or illegal or did it become impossible of performance owing to:-

(a) Notification issued under the D. I. Rules.

(b) Orders of Govt. or District Magistrate, Purnea.

(c) Fixation of ceiling price.

(d) Requisition of the stock of the rice.

(e) Non-availability of wagons.

6. What sum, if any, is due to the plff.?

5. Issue No. 1: There can hardly be any dispute as to the terms of the contract between the parties. They are contained in the bundle of correspondence which is admitted. On 12-7-1943, the deft. Co. wrote to the plff. firm as follows:-

'P. C. Ray & Co. (India) Ltd.

Timber & Rice Merchants.

4, Lyons Range,

Calcutta, 12-7-1943.

Reference No. 27/7/43.

To,

Messrs. Sree Jagadish Rice & Oil Mills,

Forbeshgunge,

Purnea.

Dear Sirs,

We learn from our representative Mr. S. M. Bose that you are willing to do rice business with us. We beg to state that we are prepared to purchase rice from you provided you guarantee to supply usual quality & weights.

For the first few transactions we will deposit & instruct the Imperial Bank, Purnea to pay you in full against Railway Receipts. Later you will have to send us R/R as usual for collection through a Bank.

We agree to pay -121- to -/3/- per maund as F.O.R. Charges & cost of New gunny approximately Rs. 62/- per 100 bags.

We can offer you for No. 1 quality Rs. 28/- & No. 2 quality Rs. 26/- if you inform us by argent telegram your acceptance.

Yours faithfully,

P. C. RAY & CO. (INDIA) LTD.,

Sd/- Illegible,

Managing Director.'

On 15-7-1943 the plff. replied to the said letter. L. N. 1296. 15-7-1943

The Managing Director,

P.C. Ray & Co. (India) Ltd.,

Calcutta.

Dear Sir,

We are just in receipt of your letter of the 12th inst. In accordance to that, we beg to inform you that we can supply you with quality No. 1 at the rate of Rs. 28/- per maund. mill delivery. We will no doubt charge annas two per md. as Loading & Cartage etc. But for the wagons, you have to arrange for yourselves. As there is a great paucity -of empties here, we do not undertake to furnish you with R/Rs, which please note & oblige. As regards the bags, we agree with you. We have no stock of the 2nd quality. Waiting for your esteemed orders.

Yours faithfully,

Sd/- (Illegible).'

6. On 17-7-1943, the deft. Co. sent the following telegram to the Jagadish Rice & Oil Mills:

'Your letter 15th: we accept first quality 2,500 maunds at Rs. 28/- have applied for wagons please arrange.'

7. It is thus clear that there was a contract to sell quality No. 1 rice at Rs. 28/- per maund on the terms mentioned in the letter of 15-7-1943.

8. Issue No. 2: I find that the plff. was under no obligation to arrange for wagons. The letter of 15th July as accepted on 17th July makes it clear that the deft. co. would have to arrange for the wagons. The plff. wrote to the deft, that there was great paucity of empties & the plff. could not undertake to furnish the deft, with the Railway receipts. With regard to permits, I shall deal with the same letter.

9. Issue No. 3: I am satisfied that the deft. Co. was bound to make diligent efforts to secure wagons & that it did so. I accept the evidence of Mr. Prithis Chandra Roy, the Managing pirector of the deft. Company, as also that of his employee Sudhendu Mohan Bose. I find that the deft. Co. did its best to secure wagons but in fact none was available in the circumstances stated by them. (His Lordship went through the evidence and answered issue No. 3, in the affirmative. His Lordship then proceeded).

10. Issue No. 4: This is the vital issue in this case, because the defence of frustration depends on the finding on this issue. After taking into account the correspondence & the evidence adduced in this case, I have no hesitation in answering the issue in the affirmative.

11. Hazarimull died on 25-10-1944 leaving four sons; Ramkumar is the eldest & he is the karta of the joint family & as such, he is carrying on the business of the joint family. He has given evidence in this case. He says that Mr. Bose saw him at the mill at Porbesgunge. Bose took from him certain samples & there were talks about rates. This gentleman says that Bose had never told him why he was buying this rice or to whom he would supply this rice or to which place this rice would be despatched. I do not believe this evidence. (Going through evidence his Lordship continued). I am satisfied that Bose told Babu Hazarimull that he wanted the rice for supply to Rlys. in Bengal & he had had a discussion with regard to wagons or transport facilities.

12. It is significant that the Munim Gomostha who was at Porbesgunge when the negotiations were made & who is stil in the service of the plff. has not been called. The relevant contracts have been produced which show that on 21st & 22nd July the deft. Company had entered into contracts with the East Indian Railway & the Bengal & Assam Railway. The Contract with the E. I. Railway, dated 21-7-1943, is for 10,000 maunds at Rs. 38/- per maund inclusive of new bags, delivery at Howrah.

13. There is a statement in that contract that the Railway administration would assist the deft. in securing wagons but did not guarantee supply. The contract with the Bengal & Assam Railway specifies 10,000 maunds at Rs. 29/- per maund packed in new gunny bags F. O. R. Forbesgunge & its neighbouring stations subject to

movement being permitted by Bihar Govt. The mention of Forbesgunge in the contracts proves that this rice from the plff. was being purchased for the supply to those Rlys. Both the parties knew that this rice was being purchased by the deft. Co. from the plff. at Forbesgunge for the purpose of supplying to the Rlys. in Bengal. It was not really' a contract for the sale of ready goods at the plff's. Mill at Forbesgunge. The foundation of the transaction was the availability of transport. That was the basis of the contract. The letter dated July 15, does not stop by merely quoting the quantity & rate & mill delivery but it adds 'We will no doubt charge annas two per maund as loading is cartage, etc. But as for the wagons you have to arrange for yourselves. The deft, was responsible for arranging wagons & not the plff. but that does not mean that the availability of wagons for despatch of the rice was not the basis of the contract.

14. Issue No. 5: This issue involves the question of frustration of the contract. Both the learned counsel have exhaustively dealt with the relevant authorities & I am obliged to both of them for the assistance I have received. It is no good referring to the old cases because the doctrine of frustration has developed to a large extent as the result of recent decisions.

'Frustration is a developing concept; like negligence, its categories are never closed but are as wide as the categories of human conduct. Its effect is immediate, automatic; it gullotines a contract & the contract without the option of either party - accrued rights subsisting is dissolved. If the parties later purport to act under it they are really making a new contract. The Ct., applying enlightened common sense to do justice, decides wnether the contract is at an end.'

(Webber, 'The Effect of War on Contracts', Edn 2. p. 435).

15. The learned counsel for the plff. Mr. A. C. Mitra has cautioned me against making a new contract for the parties as has asked me not to imply any terms which would mean substituting a fresh contract between the parties & that in any event the doctrine cannot be invoked in this case at the parties were aware of transport difficulties at the relevant time.

16. Mr. Mitra has drawn my attention to the observation of Lord Loreburn in the 'Tamplin Steamship Co. v. Angio-Mexican Petroleum Products, Co'. (1916) 2 A. C. 397. There the learned Lord Chancellor pointed out that the Ct. should examine the contract & the circumstances in which it was made in order to see whether from the nature of it the parties must have made their bargain on the footing that a particular thing or state of things should continue to exist. If they must have done so then a term to that effect would be implied, although it was not expressly mentioned. Learned counsel argued that in this case there is no express intention of the parties & it was an unqualified obligation to take delivery of the goods at the plff's. mill & 'the Court has no 'dissolving power' & no term or condition should be implied.

17. Various theories have been advanced to justify the doctrine of frustration viz: (1) the theory of implied terms, (2) the theory of the destruction or disappearance of the foundation of the basis of the contract, (3) the theory of failure of consideration, (4) the theory of common mistake,(5) the theory of quasi-contract, (6) the theory of supervening impossibility & (7) the theory of doing what is just & reasonable because the parties failed to deal with the matter.

18. It is not necessary to decide which is the correct theory because, as Lord Simon has pointed out in the 'Constantine case', whichever way the doctrine is put the legal consequence is the same. It is urged that the balance of judicial authorities is in favour of the theory of the implied term, That is what Lord Simon pointed out in the Constantine's case (1942) A. C. 154, at p. 163. The 'Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd.' (1943) A. C. 32 at p. 47 & the observations of Lord Porter in the Denny Mott v. James B. Fraser', (1944) A. C. 265 at p. 281: are relevant in this connection. The theory of implied term has been criticised by competent critics & nowhere more forcibly than by Lord Wright in the 'Denny Mott' case. Sir Frederick Pollock has pointed out that the theory of implied terms displays an 'inherent artificiality.' (Pollock on Contract, edn. 12, p. 225.) None of the judgments of the House of Lords or of the Court of Appeal in England is binding on this Court but they are entitled to the highest respect. There are two judgments of the Judicial Committee of the P. C. in the 'Hirji Mulji v. Cheong Yue Steamshlt), Co. Ltd., 1926 A. C. 497 & Twentsche Overseas Trading Co. Ltd. v. Uganda Sugar Factory Ltd., 1945-1 MLJ 417: A I R (1945) P C 144. These judgments are binding on this Ct.

19. With great respect, I agree with Lord Wright what the theory of implied terms or conditions affords really no explanation. 'It only pushes back the problem a single stage. It leaves the question what is the reason for implying a term. Nor can I reconcile that theory with the view that the result does not depend on what the parties might, or would as hard bargainers, have agreed. The doctrine is invented by the Court in order. to supplement the defects of the actual contract. The parties did not anticipate fully & completely, if at all, or provide for what actually happened. It is not possible, to my mind, to say that, if they had thought of it, they would have said: 'Well, if that happens, all is over between us.' On the contrary, they would almost certainly on the one side or the other have sought to introduce reservations or qualifications or compensations. As to that the Court cannot guess. What it can say is that the contract either binds or does not bind. It is a separate matter whether some ancillary relief should be given, as for a failure of consideration consequent on the frustration, as was held to be proper in 'Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd'. (1943) A. C. 32. To my mind, the theory of the implied condition is not really consistent with the true theory of frustration. It has never been acted on by the Court as a ground of decision, but is merely stated as a theoretical explanation.' 'Denny Mott v. James B. Fraser', (1944) A. C. 265 at p. 275.

20. Frustration depends on what has actually happened & its effect on the possibility of performing the contract. Where one party claims that there has been frustration & the other party contests it, the Court has got to decide the issue 'ex post facto' on the actual circumstances of the case.

'The data for decision are, on the one hand, the terms and construction of the contract, read 'n the light of the then existing circumstances, and on the other hand the events which have occurred. It is the court which has to decide what is the true position between the parties.'

'Denny Mott's' case 1944 A. C. 265 at p. 274. Lord Sumner observed in the 'Hirji Mulji' case (1926) A. C. 497 that the legal effect of the frustration of the contract does not depend on the intention of the parties or their opinions or even knowledge as to the events which brought about the frustration but upon its occurrence in such circumstances as to show it to be inconsistent with the further prosecution of the adventure. In my view this principle is applicable in this case.

21. I should refer to two Indian decisions where parties were excused from the performance of contract because the goods could not be transported due to wagon restrictions. In 'Kunjilal v. Durga Prosad', 24 C. W. N. 703 Rankin J. followed the case of 'Anglo Russian Merchant Traders v. Batt and Co., (1917) 2 K. B. 679 & held that although the parties were fully aware of the restrictions imposed by the Govt. on the supply of Railway wagons, the obligation under a contract of sale of foodsrains upcountry for transmission to Calcutta was not absolute. In that case the buyer sued for damages for failure to supply the goods. In order to give business efficacy to the transaction Rankin J. implied a condition into the contract & inasmuch wagons were not available he held that the contract was void being impossible of performance & that the buyer was not entitled to recover any compensation from the seller. The same view was taken in 'Gundayya v. Subbayya', 51 M. I. J. 663. In this case I do not agree that in order to give the contract its business efficacy it is a necessary implication that the buyers undertook an absolute obligation to pay for & take delivery of the goods, whether permits or Railway facilities were or were not obtained.

22. The absence of specific provision in the contract providing for the contingencies which have happened is immaterial. The true conception of the doctrine of frustration has been emphasised by Lord Wright in the following pregnant words:

'This whole doctrine of frustration has been described as a reading into the contract of implied terms to give effect to the intention of the parties. It would be truer to say that the Ct. in the absence of express intention of the parties determines what is just. Something of the same sort happens in the many cases where what is reasonable in a matter not dealt with by the express agreement of the parties, is so treated by the Court as to be imported into the contract. It is, as we shall see later the incurable habit of commercial men in their contracts not to anticipate expressly or to provide for all that may happen.' (Legal Essays & Addresses, p. 258.)

23. The main object of the contract was the transhipment of the goods from Bihar to Bengal by Railway & in my opinion having regard to the events that have happened the basis of the contract has been overthrown. In the absence of express intention of the parties I have to determine what is just & reasonable in view of the non availability of wagons for transport & the difficulties created by the restrictions or emergency crders. It may be now accepted as settled law that when people enter into a contract which is dependant for its performance on the continued availability of a specific thing & that availability comes to an end by reason of circumstances beyond the control of the parties, the contract is dissolved. According to Lord Wright the expression 'frustration of the contract' is an elliptical expression. The fuller & more accurate expression is 'frustration of the adventure or of the commercial or practical purpose of the contract'. In my view, the commercial or practical purpose of this contract was defeated or overthrown by the refusal on the part of the Govt. to issue permit & by the non-availability of the transport facilities & the restrictions & embargoes put by the Govt. & ultimately by requisition of the stock of the plff. The real object of the contract as contemplated by the parties was the purchase or employment of the goods for a ; articular purpose & therefore the doctrine of frustration can be imported & if necessary, the requisite terms can be implied.

24. In 'Krell v. Henry', (1903) 2 K. B. 740, the contract made no reference at all to the coronation or to the procession. Yet a term relative to the taking place of the coronation on the due date was imported into the contract. Similarly events defeating

the real purpose of the contract which was the object of the parties to accomplish discharge them from its performance. Following the judgment of Lord Justice Bowen in the 'Moor Cock case', (1889) 14 P. D. 64 terms can be implied or read into a contract in order to give it business efficacy so as to make it workable.

25. Mr. Mitra has argued that doctrine of frustration cannot be invoked in the case of a contract for sale of unascertained goods. He has referred me to the judgment of McCardie J. in 'Blackburn Bobbin & Co. Ltd. v. Allen & Sons Ltd', (1918) 1 K. B. 540 which was affirmed by the Court of Appeal in 'Law Report' (1918) 2 K.B. 467. With great respect to McCardie J., I must hold that the view is untenable. Russell J. took the contrary view in 'In Re. Badische Co. Ltd.', (1921) 1 Ch 331. I am fortunately absolved from the task of deciding whether McCardie J. is right or Lord Russell is right. The Judicial Committee of the P. C. has made the law clear in a very recent judgment 'Twentsche Overseas Trading Co. Ltd. v. Uganda Sugar Factory Ltd.', (1945) 1 ML J 417: A. I. R. 1945 P. C. 144. In that case, Lord Wright delivered the judgment of the Board & he held that the doctrine of frustration can apply to a contract for unascertained goods. There the noble Lord pointed out that frustration, is a sort of shorthand. It means that a contract has ceased to bind the parties because the common basis on which by mutual undertaking it was based has failed. It is more correct to say, not that the contract has been frustrated but that there has been a failure of what in the contemplation, of. both parties would be an essential condition or purpose of the performance. The question whether frustration has occurred or not depends on the nature of the contract, the surrounding circumstances & the events which have occurred. I am aware of the caution which Lord Wright has administered in that case & I have approached this, case with good deal of circumspection. But having, regard to the nature of the transaction the surrounding circumstances & the commercial purpose of this contract I have no hesitation in holding t at the doctrine of frustration can be invoked in this, case.

26. Before I conclude, I ought to refer to a passage in the judgment of 'Hirji Mulji v. Cheong Yue Steamship Go. Ltd.', (1926) A. C. 497. Lord Sumner in his judgment observed that the doctrine; of frustration is explained in theory as a condition or term of the contract implied by the law 'ab initio in order to supply what the parties would, have inserted had the matter occurred to them ort the basis of what is fair & reasonable having regard to the mutual interests concerned, & of the mam objects of the-contract. And then the learned Lord added an observation which has been followed in later cases:

'It is irrespective of the individuals concerned their temperaments & failings, their interest & circumstances. It is really a device, by which the-rules as to absolute contracts are reconciled with a special exception which justice demands.'

This observation has been followed by Lord Maugham in the 'Constantine case', (1942) AC 154 at p. 170 & by Lord Wright in 'Denny Mott case', (1944) A C 265 at p. 275.

27. The facts here are undisputed shortly after the contract was concluded the District Magistrate of Purnea issued an order obviously undertime Defence of India Act on 19-7-1943. That shows that the Provincial Govt. had imposed a ban or restriction on the transport of foodgrains outside-the province. Permit could be obtained for transport & the merchants were directed to-produce all their contracts of foodgrains with. Bengal up to that date. That clearly meant merchants in Bihar or

in Purnea. Nothing has been shown that this order was complied with. On 5-8-1943 a press note was issued by the Govt of Bihar which shows that the embargo on exports from Bihar regarding foodgrains was re-imposed from 1-8-1943. Again, any seller requiring the permit has to take certain steps. I have already held that on or about the 1st August there were discussions between the parties with regard to these restrictions & difficulties regarding transport. I have referred to the steps taken by the deft, company & the correspondence that passed. On August 8, the plff. informed the deft, that goods had been kept at Garh Baniali but no wagons had come. On the 16th August application was made-by the defendant company for permit to the Director of Food Supplies, Bihar which elicited an unfavourable response as I have already indicated. On September 6, the deft, company informed the plff's pleader that no delivery could be obtained without a permit & that application had been made for permit. In September ceiling prices had, been fixed by the Bengal Govt. That created not her difficulty. On 20-9-1943 plff's pleade wrote to the deft, company asking the deft, to take delivery within 15 days. On November 23, the Bihar Govt. turned down the application for export permit. It is clear that the plff. did not insist on the notice of the 20th September but waived the same. That is why on the 26th November the plff. informed the deft, company that the Govt. of Bihar had requisitioned the requisite stock. On 16-2-1944 a letter came from the plff. to the deft, company which shows that the plff. was trying his best to circumvent the requisition & the deft, company was solemnly asked to take delivery of the 2500 maunds of rice within a fortnight. That letter shows that till 16-2-1944 the contract had been treated as subsisting by the plff. By that date the requisition had completely destroyed the contract & made its fulfilment impossible. No authority is really needed for that proposition but one case has been cited by Mr. Takuldar 'In re An Arbitration between Shipton, Anderson and Co. v. Harrison Bros and Co.', (1915) 3 K. B. 676. I decide issue No. 5 in the affirmative.

28. With regard to issue No. 6, the plff. is not entitled to any decree. The suit is dismissed with costs. Certified for two counsel.