AITKEN SPENCE & CO. LTD.
v.
JAMES APPUHAMY

SUPREME COURT
SAMERAWICKRAME, J. ISMAIL J. AND WEERARATNE J.
S.C. NO. 13/80
C.A. (S.C.) 242/74 F
D.C. COLOMBO NO. 76103/M
01 DECEMBER 1980

Delict — Warranty — Duty to minimise damages — Sale of Goods Ordinance section 15(1).

Where a seller warrants the fitness of the goods supplied for the purpose for which it is required the principle is that the goods must be merchantable and remain fit for a reasonable length of time. Where a bowser mounted on a chassis was damaged as a result of defective fabrication by a crack within 9 months of use it cannot be said the vehicle was reasonably fit for its purpose — section 15(1) Sale of Goods Ordinance.

While the law requires a plaintiff to take all reasonable steps to mitigate the loss consequent on the defendant's wrong, the plea must be taken in the pleadings for it to be considered.

APPEAL from judgment of Court of Appeal
A. C. Gooneratne Q.C. with *C. Ganesh* and *Miss N. Abeyagunawardene* for defendant-appellant.
E. R. S. R. Coomaraswamy with *R. R. Sureschandra* and *D. Rajaratnam* for plaintiff-respondent.

Cur. adv. vult

10 December 1980
WEERARATNE J.

This application came up before us on Special Leave to Appeal being granted by the Supreme Court to the Defendant-Respondent-Petitioner.

It would be convenient to detail the relevant facts and documents relating to this appeal.

The Plaintiff-Appellant-Respondent (hereinafter referred to as the "Firm") agreed to fabricate two petroleum bowsers, each having a capacity of approximately 1,800 gallons, according to the specification on document D1, and mount them on two Mercedes Benz truck chassis to be provided by the Defendant-Respondent-Petitioner (hereinafter referred to as the "Petitioner".)

The evidence of Athula Rodrigo, the Engineer and Works Manager of the Firm reveals that he was aware that the said trucks

were intended to be run on the winding Mahiyangana and Bibile roads. The witness had inspected the chassis in the company of the Petitioner and had taken the relevant measurements. The Petitioner, sometime in August 1970, paid for and took delivery of the bowser which was mounted on the chassis provided by him. However, even though the second bowser had already been fabricated by the Firm, the Petitioner was unable to supply the Benz chassis due to some delay in obtaining it.

Meanwhile the Petitioner, by his letter dated 18th August 1970 (D2), informed the Firm that :—

> "The Agents and distributors of the Mercedes Benz Company are of the opinion that the tank should be mounted on 2 wooden chassis runners, clamped down to the frame by relevant U. Bolts — thus ensuring a more equitable distribution of the load on the front and rear Axles when the loaded vehicle is on operation. Kindly let me know when it will be convenient for you to undertake this work and at what price."

The Benz Bowser was not in use at the time the above letter (D2) was sent. The Firm replied by letter dated 21st August 1970, D(3) :—

> "Your Bowser has been mounted in a similar manner to that of the Petroleum Corporation Bowsers, ensuring an equal distribution of load on both the front and rear Axles. However if you wish we can mount the other Bowser on wooden chassis runners as suggested by you, but we are not in a position to undertake this work on the bowser that is presently with you. ....."

Then by his letter (D4), dated 11th October 1970, the Petitioner stated :—

> "The Agents and Distributors of the Mercedes Benz Company have pointed out the defect in the mounting of this tank without wooden chassis runners for an equitable distribution of weight on both axles. In their recent experience they have pointed out to me that the chassis frame and the hubs have been defected in the process of operation. Added to this advice from the Agent it is my experience that one of my Bowsers mounted in a similar way initially the chassis frame was fractured in operation.

Kindly confirm that it will be in order for me to operate this vehicle which has been now weighed and registered for the road."

The Firm in its reply (D5), dated 23rd October 1970, to the above letter stated that the Petitioner had, from the commencement of the work on the first bowser, witnessed the work in progress and was satisfied with the fabrication and mounting of the bowser. In this connection there was evidence on record that the Petitioner possessed no specialised knowledge on the type of work mentioned. In the above letter it was further stated that the Firm was advised prior to the commencement of the work that the chassis may not bear a load of 1,800 gallons of liquid fuel and that it was suggested that a 1,500 gallon bowser be mounted. In this connection S. C. Perera, who was at the time Chief Engineer, Diesel & Motor Engineering Company, stated in evidence that the Mercedes Benz Company specifies a carrying load. He said that the capacity load of the vehicle in question would be 13,850 lbs. and that it must not exceed more than 10% of the specified amount, which when added, there is a capacity load of 15,000 lbs. A 1,800 gallon capacity of petrol he computed as 12,780 lbs. (a gallon being 7.1 lbs). This is much less than the capacity authorised by the Agents, Messrs. Deisel & Motor Engineering Company. The said letter goes on to set out the two factors on which the firm's advice was based, namely :—

(a) The condition of the Mahiyangana road, and

(b) The mounting of the 1,800 gallon tank.

In regard to (a) Mr. Rodrigo stated in evidence that he refused to carry out the Petitioner's suggestion (of wooden chassis runners) because he was sure of the mounting done by him, and it was perfectly safe even on the Mahiyangana road. In fact the evidence of Mr. S. C. Perera, a highly qualified Engineer of considerable experience is that the Mahiyangana road surface is not bad, but that it is a very winding road. He further stated that every time a bend had to be negotiated, the vehicle would have to be reversed. The Engineer Perera advised wooden chassis runners because according to him the cross members either of the bowser or the lorry body would rest only at certain points of the chassis which between the two wheels is rather weak. He emphasised that the wooden runners would take a certain amount of load.

In regard to (b) relating to the mounting of a 1,800 gallon tank, the evidence of Mr. Perera, adverted to in detail earlier, indicates that there was no risk in a tank of 1,800 gallon capacity when mounted on the said Benz chassis.

In his letter (D6) dated 1st November 1970, the Petitioner stated that the Firm had assured him that the mounting will be satisfactory. He reiterated that his only complaint was that the tank was not mounted on wooden chassis runners. He accordingly requested the Firm "to accept responsibility on their mounting or in the alternative to have this tank mounted on chassis runners." In which case he was prepared to take responsibility for operation of the bowser. At this stage the vehicle was still not in use. The Petitioner finally requested an early reply on the subject of the alteration of the mounting. There was no reply to the above letter from the Company. In this connection the Firm's Engineer stated in evidence, "We were sure of the mounting, " and that it was perfectly safe even on the Mahiyangana road.

The correspondence closes with the Petitioner's letter to the Firm (D7), wherein the former states that the petroleum bowser fitted by the Firm was badly damaged and referred the latter to his letter (D2) dated 18th August 1970, wherein he objected to the manner in which the bowser was fitted to the chassis. To this the Firm replied by (D8) dated 23rd July 1971 stating that it was their contention that they considered the 1,800 gallons too heavy for its chassis. In this connection there is clear evidence of Engineer Perera of Messrs. Deisel & Motor Engineering Company, the agents of Mercedes trucks, as set out earlier, that a 1,800 gallon capacity load of petrol could be carried on the chassis. The Firm at this late stage stated that it was prepared to fix wooden runners as required at an additional cost. It was unfortunate that in reply to the Appellant's letter (D2) as early as the 18th August 1970, requesting the Firm to quote the price for undertaking that work, the Plaintiff promptly replied by letter (D3) that it was not possible to do so in respect of that bowser and chassis.

It would be recollected that the second bowser which the Firm had agreed to make for the Appellant had already been fabricated, but could not be mounted since the latter had been unable to provide the chassis. This led to the Firm filing action against the Petitioner to recover the sum of Rs. 8,650/- being the value of the bowser less an advance of Rs. 1,000/- due to the Appellant with legal interest, for the Appellant's failure to take delivery of the said bowser. The Petitioner denied liability and claimed a sum of Rs. 33,500/- in reconvention.

The learned trial Judge dismissed the Firm's action and judgment was entered in favour of the Petitioner in a sum of Rs. 28,750/- with costs. The firm appealed from this order.

The submission of Counsel on both sides before the Court of Appeal centred round the question as to what was the cause of the damage to the petroleum bowser fabricated and mounted by the Firm on a contract entered into with the Petitioner.

The relevant issues raised *inter alia* at the trial in regard to that question are :—

7. Was the Plaintiff aware that the two bowsers were to be used by the Defendant to bring petroleum from the Kolonnawa depot to his depots at Mahiyangana and Bibile?

9. Was the chassis to which the first bowser was fitted damaged in about July 1971, as a result of incorrect fabrication of the bowser of the Plaintiff?

10. If so, is the Defendant entitled to recover the damage suffered

    (a) to his chassis

    (b) cost of repairing the said damage.

11. Did the Defendant inform the Plaintiff that as a result of the damage to the first bowser that he is unable to take delivery of the second bowser?

12. If so, is the Defendant entitled to a refund of a sum of Rs. 1.000/- paid by way of deposit for the second bowser?

The learned Judge of the Court of Appeal stated that the evidence of Athula Rodrigo, the Firm's Engineer was that the load of petrol was to be taken from Kolonnawa to the Defendant-Respondent's sheds at Mahiyangana and Bibile. *They are winding roads* and responsibility to fit the bowser to use it on these roads was his. The learned Judge quite properly accepting this evidence states, "It seems to me clear from this evidence, that the purpose for which the bowser was required was disclosed by the Defendant-Respondent to Rodrigo and he undertook to supply a bowser that was fit for the purpose required." Witness Rodrigo has also conceded that the Defendant-Respondent was not an expert on this matter.

On the question as to whether the chassis to which the bowser was fitted was damaged as a result of incorrect fabrication by the Firm, the learned Judge of the Court of Appeal stated that Counsel for the Firm submitted that the bowser which was fabricated was reasonably fit for the purpose for which it was required, relying on Section 15(1) of the Sale of Goods Ordinance. The Learned Court of Appeal Judge, in dealing with this submission stated that according to document (D7) the vehicle was registered and road-worthy on 11th October 1970, and that the Petitioner informed the Plaintiff on 16th July 1971 (D1) that the chassis supplied by the Firm is badly damaged. The learned Judge went on to state, "It would seem to me that the vehicle had been operating on the road for a period of over nine months," and that where a seller warrants the fitness of the goods supplied for the purpose for which it is required, the principle is that the goods must be merchantable and remain fit for a reasonable length of time, citing *Atiyah* in his work on "The Sale of Goods" (3rd Edition P.72). The judgment continues, "In this case, it would not be unreasonable to take the view that the vehicle was reasonably fit for its purpose." Mr. A. C. Gooneratne submitted before us that the learned Judge of the Court of Appeal has erred in regard to the application of Section 15(1) of the Sale of Goods Ordinance, which he stated was in his favour. He submitted that to regard nine months as "a reasonable length of time," for a Petroleum Bowser mounted on a Mercedes Benz chassis purchased for the sum of Rs. 59,000/-, mounted with a bowser costing Rs. 9,650/- would be a completely wrong assumption, used as it was only from early October 1970 to mid July 1971. In this connection it would be remembered that according to the evidence of Engineer Rodrigo, the Works Manager of the Firm, the fabrication and mounting was made to suit the said roads on which it was scheduled to travel. Mr. E. R. S. R. Coomaraswamy, learned Counsel for the Firm in submitting that the Court of Appeal gave 3 reasons for giving judgment to the Firm, argued that he could gain relief on any one of those grounds. We are unable to agree with his contention that the use of the said vehicle for nine months would constitute "a reasonable length of time", for the vehicle to be considered fit for its purpose. Mr. S. A. W. Perera, the Works Manager of Messrs. Bonars (Ceylon) Ltd., which firm had repaired the damaged bowser stated in evidence that, "there was a substantial crack in the chassis" and that as a result there was a 50% depreciation in value.

The judgment next refers to a submission made by Mr. Coomaraswamy, learned Counsel for the Firm, that even on the assumption that there was a breach by the Firm of the condition

or warranty as to fitness, "the Petitioner had failed to take reasonable steps *to mitigate his loss*". In this connection the Judgment contains references to letters sent to the Firm by the Petitioner to the effect that the latter had always been advised to mount the bowser on wooden runners as they would take on a certain amount of the load and therefore minimise the damage to the chassis (letter D2). This the Firm refused to do, and further refused to accept responsibility for any subsequent damage that may occur (letters D3 and D4). He further stated that he himself had experience of one of his bowsers mounted in the fashion done by the Firm being fractured in operation. The learned Court of Appeal Judge posed the question as to what ought to have been the behaviour and conduct of the Petitioner when placed in these circumstances. He refers to "Mayne and Mc Gregor on Damages" (12th Edition) Section 148).

> "The extent of the damage resulting from a wrongful act whether tort or breach of contract, can often be considerably lessened by well-advised action on the part of the person wronged. In such circumstances the law requires him to take all reasonable steps to mitigate the loss consequent on the Defendant's wrong."

The learned Judge then states that the test is that of a reasonable and prudent man, who if placed in those circumstances, if he had misgivings about the manner of mounting of the bowser would take steps to minimise the damages by having the bowser mounted on wooden runners and therefore sue the seller for damages. He further states that assuming that the absence of wooden runners was the cause for the damage, the Petitioner, by his own conduct has brought the loss upon himself.

Mr. Coomaraswamy submitted that the client knew the situation all along and should take responsibility for the damages. This proposition is not sound in law having regard to the evidence and the documents placed before us. When the Petitioner referred to the opinion of the Agents and Distributors of the Mercedes Benz in regard to wooden chassis runners in his letter (D2), the Firm relied entirely on its contention that this bowser had been mounted in a similar manner to that of the Petroleum Corporation bowsers. The Firm did not at any time express any doubts about the manner in which they proposed to fabricate and mount the bowser. In short they thought that they had done a perfect job and rested content. The Firm was the Petitioner's expert and did not

find it necessary to accede to the request for wooden chassis runners. The Petitioner was a layman to these engineering matters and continued to act upon the assurances of the Firm that their mounting of the bowser was satisfactory.

Quite apart from what has been stated above, the **question of mitigation of damages has been averred in the pleadings.**

Mr. Coomaraswamy next argued before us that the Petitioner has failed to establish a nexus between the damage to the chassis and the breach of the contract. In this connection Mr. Coomaraswamy submitted that there were three possibilities. He referred to :—

(a) The absence of wooden runners.

In this connection, according to the evidence, the Firm had disregarded the Petitioner's repeated request for wooden chassis runners as advised by the agents of Mercedes Benz, relying as they did on the fact that the Petroleum Corporation bowsers were not so equipped. Even when the Petitioner, in his letter (D4) to the Firm stated that, ".....added to this advice from the agents it is my experience that one of my bowsers ... mounted in a similar way initially, the chassis frame was fractured in operation..." The Firm however was unbending, leaving the Petitioner to rely on their assurances.

(b) the second point was in regard to the question of a 1,800 gallon tank capacity bowser. In regard to this the Firm relied solely on the point that the chassis could not bear the weight of a 1,800 gallon tank. The evidence of the then Chief Engineer, S. C. Perera of the Diesel & Motor Engineering Company, as shown earlier, does clearly establish that a 1,800 gallon tank which is equivalent to 12,780 lbs. is less than the capacity authorised by this Company. The trial Judge quite properly accepted the evidence of S. C. Perera. We accordingly do not think that the 1,800 gallon tank aspect of this matter is another possibility, as submitted by Mr. Coomaraswamy.

(c) In regard to his third point that the road was a bad one, we have the evidence of Athula Rodrigo, the Firm's Engineer, :— "We were sure of the mounting." He further conceded that even on the Mahiyangana road it was perfectly safe. Engineer S. C. Perera who was Chief Engineer, Deisel & Motor Engineering stated in evidence that

the Mahiyangana road surface was not bad, but it was winding and involved much reversing on the several bends.

The witness Rodrigo conceded in evidence that on the winding Mahiyangana road a shorter length of bowser was more suitable, and that it was his duty to get the maximum width in order that the length may be shortened and that there would be a greater stability to the vehicle. Rodrigo however fabricated a 6 X 16 foot bowser despite his evidence that on a 7 ½ feet wide chassis, one can have a bowser between 7 to 8 feet in width as long as it did not jut out of the tyres. The Appellant had told Rodrigo that the Agents of Mercedes Benz recommended a **widened width** mounted on wooden chassis runners clamped by "U" bolts. Rodrigo's evidence was that he was not prepared to do so because he did not think it necessary even though he agreed that a wider width would accommodate a shorter length of bowser, which would have made the vehicle safer on that length of winding roads of Mahiyangana and Bibile. Rodrigo persisted in taking that risk.

S. A. W. Perera, the Works Manager, Messrs. Bonars (Ceylon) Ltd., where the vehicle was repaired stated in evidence that the estimate for the repairs was Rs. 2,750/-. The appellant paid this sum. The Appellant had paid Rs. 59,000/- for the chassis. This witness conceded that as a result of the crack in the chassis the strength of the chassis would have been weakened and the depreciation would be about 50%. Hence the lorry would be worth about Rs. 29,000/- to Rs. 30,000/- after the damages.

A Court can draw the inference as to what was the cause of the damage. The learned Trial Judge has accepted the evidence of Engineer S. C. Perera and arrived at a finding that the Plaintiff Firm was responsible for the damage to the vehicle. We see no reason to disagree with that finding.

In regard to the second bowser, we are not satisfied that the fabrication was sound, since the winding Mahiyangana and Bibile roads warranted an enlarged breadth of the bowser thus permitting a shortened length which in some measure facilitated negotiation of the many bends.

We set aside the judgment and decree of the Court of Appeal in favour of the Plaintiff Firm in the sum of Rs. 8,650/-, and affirm the judgment of the trial Judge subject to what is hereinafter

stated. The learned trial Judge has allowed the Petitioner's claim in reconvention in a sum of Rs. 28,750/-. The Firm has fabricated the bowser, but the Petitioner has not taken delivery of it on the ground that it was not sound. In this connection, however, we cannot be certain that if placed on wooden runners it would not have been satisfactory. The Firm accordingly is entitled to some payment to meet the cost of fabrication, of the bowser.

Taking these factors into consideration, we think that the Petitioner should get something less than a sum of Rs. 28,750/- as conceded by Counsel for the Petitioner. We accordingly give judgment in favour of the Petitioner in a sum of Rs 25,000/- with costs in this Court and the Court of Appeal.

G. T. SAMERAWICKREME, J. — I agree

I. M. ISMAIL, J. — I agree

Plaintiff's claim dismissed

Defendants claim reduced and allowed.