

1945

Present: Kenneman S.P.J. and Jayatileke J.

JAYASENA, Appellant, and COLOMBO ELECTRIC
TRAMWAYS AND LIGHTING COMPANY, LIMITED,
Respondent.

227—D. C. Colombo, 13,898.

Contract—Sale of chattel of a description which it is in the course of the seller's business to supply—The words "of a description"—Include the meaning "of a class or kind"—Test for sale of article under its trade name—Sale of Goods Ordinance (Cap. 70), s. 15 (1).

Section 15 (1) of the Sale of Goods Ordinance enacts: "Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose, provided that in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose."

The defendant Company who were agents for an instrument called the Ediphonc sold to the plaintiff an instrument known as Telediphonc for the purpose of recording and reproducing the charges of the Judges of the Supreme Court to Juries in the course of their criminal jurisdiction.

On the evidence it was established that the two instruments were of the same class or kind although the process for recording was different in the two cases.

Held, that for the purposes of section 15 (1) of the Sale of Goods Ordinance the words "of a description" include the meaning "of a class or kind."

Held, further, that the test of an article having been sold under its trade name within the meaning of the proviso to section 15 (1) of the Sale of Goods Ordinance is: Did the buyer specify it under its trade name in such a way as to indicate that he is satisfied, rightly or wrongly, that it will answer his purpose, and that he is not relying on the skill or judgment of the seller, however great that skill or judgment may be?

A PPEAL from a judgment of the District Judge of Colombo. The plaintiff claimed judgment for Rs. 4,670 with interest and costs in respect of an instrument called Telediphonc which was sold to him by the defendant Company and which was found on experiment to be defective and unsuited for the purpose for which it was brought. The chief question in the case was whether there was an implied condition as to fitness, under section 15 (1) of the Sale of Goods Ordinance. The District Judge held that the defendant Company knew full well why the Telediphonc was needed and the purpose it was intended to serve. He further held that it was clear that the buyer (plaintiff) relied on the seller's (defendant Company's) skill and judgment in the matter. He,

however, held that the Telediphone was not an instrument of a description which it was in the course of the business of the defendant Company to supply and, on this point, dismissed plaintiff's action.

H. V. Perera, K.C. (with him *M. M. Kumarakulasingham*), for the plaintiff, appellant.—Plaintiff brought this action to recover the consideration paid by him to the defendant Company for an instrument known as the Telediphone which failed to fulfil the purpose for which it was purchased. The question is whether the sale was subject to an express warranty or, if not, to an implied warranty. Although the letter P1 containing the express warranty was not addressed to the plaintiff, yet, it is submitted, the seller adopted the guarantee given by the maker of the instrument and therefore became liable on the footing of an express warranty. In the alternative, the sale was subject to an implied warranty under section 15 (1) of the Sale of Goods Ordinance (Cap. 70). Admittedly the Company knew the purpose the Telediphone was intended to serve. Even though the purchaser examined the instrument the implied warranty holds good—29 *Halsbury (Hailsham ed.)*, p. 65, note (q).

The fact that one examines the goods purchased does not destroy the implied warranty if the buyer depends on seller's judgment—*Wallis v. Pratt*¹, *Benjamin on Sale 7th ed.*, p. 656. The District Judge came to a wrong conclusion when he held that the Telediphone was not an instrument of a "description which it was in the course of the business of the defendant Company to supply". The seller must be a dealer in that class of goods—*Turner v. Mucklow*², *Benjamin on Sale, 7th ed.*, p. 654. He might be a dealer in a particular type for the first time. Admittedly the defendant Company were dealers in Ediphones. The Telediphone was only an improved model of the Ediphone. There is no case, apparently, which decides the precise meaning of the word "description" as used in section 15 (1). *Baldrey v. Marshall*³, however, throws some light on this question. See also *Pricst v. Last*⁴. If the vendor was acting as a dealer of this class of goods then he would be liable on an implied warranty if the article was found unfit for the purpose for which it was purchased.

N. Nadarajah, K.C. (with him *G. Thomas*), for defendant, respondent.—The defendant Company was not acting as a principal but merely obliging certain parties when it imported the instrument from the manufacturer. The Company was merely plaintiff's agent for supplying an article. There is no contract of sale—*Gordon & Gotch v. Rodrigo*⁵; *Vaitialingam v. Holland-Colombo Trading Society*⁶; *Darley Butler & Co. v. Saheed*⁷. Even assuming that the transaction in this case amounted to a contract of sale it is submitted that the Telediphone was not an article of a "description which it is in the course of the seller's business to supply"—*Burnby v. Bollett*⁸.

[JAYETILEKE J.—If the Telediphone is of the same class as the Ediphone then the Company were dealers in that class of goods.]

¹ (1911) A.C. 394.

² 6 L. T. (N.S.) 690.

³ (1925) 1 K. B. 260.

⁴ (1903) 2 K. B. 148.

⁵ (1920) 30 N. L. R. 417.

⁶ (1932) 34 N. L. R. 169.

⁷ (1923) 25 N. L. R. 353.

⁸ (1847) 16 M. & W. 644.

“Description” means descriptive of a particular article—*Wren v. Holt*¹; *Medway Oil and Storage Co. v. Silica Gel Corporation*²; *Stroud's Judicial Dictionary*, p. 512; *Varley v. Whipp*³; *In re Gutta Percha & India Rubber Co. of Toronto*⁴.

The Telediphone was a novel instrument which the Company never supplied before. They did not deal in that class of goods. The evidence shows that the Telediphone was an electrical instrument whereas the Ediphone was a mechanical one. It is further submitted that an implied warranty may be excluded expressly—*29 Halsbury (Hailsham ed.) p. 66; Dickson v. Zizinia*⁵; *Benjamin on Sale, 6th ed., pp. 747, 748*. The plaintiff asked the Company to return the instrument to the manufacturers and to get another in place of it. This reinforces the contention that the contract was one of agency.

M. M. Kumarakulasingham replied.

Cur. adv. vult.

September 19, 1945. KEUNEMAN S.P.J.—

In his plaint the plaintiff alleged that the defendant Company sold to him, as a result of negotiations on his behalf by Segarajasingham, an instrument for recording and reproducing the spoken word known as a Telediphone with its necessary equipment and adjuncts. Plaintiff alleged that to the knowledge of the defendant Company this instrument was purchased for the purpose of recording and reproducing the charges of the Judges of the Supreme Court to Juries in the course of their criminal jurisdiction. The plaintiff maintained that the sale was subject to an express warranty on the part of the defendant Company and was further subject to an implied warranty that the instrument was reasonably fit for the purpose mentioned. The instrument was found on experiment to be defective and unsuited for the purpose mentioned, due to faulty workmanship and/or materials or to the unsuitability of the same to local conditions. Plaintiff claimed judgment for Rs. 4,670 with interest and costs.

The defendant Company in their answer averred that they undertook to import for the plaintiff from the makers, viz., Thomas A. Edison Inc., a specified article, to wit, a Model 24 Telediphone. They admitted that they were aware of the purpose for which the instrument was being purchased but denied that the sale was subject to any express or implied warranty by the defendant Company.

It appeared in the evidence that the defendant Company who were agents for an instrument called the Ediphone approached the Chief Justice with a view to securing a contract for the installation of that instrument in the Courts. The Ediphone was, however, considered unsuitable for the purpose because it could not record a long charge to the Jury without constant changes of cylinders and the consequent interruptions to the summing-up by the Judge. Thereafter the defendant Company wrote P1 dated November 3, 1937, to the Chief Justice, stating

¹ (1903) 1 K. B. 610.

² 33 Com. Cases 195, 196.

³ (1900) 1 Q. B. 513.

⁴ L. R. (1909) 2 Ch. D. 10 at p. 14.

⁵ (1851) 10 C. B. 602.

that they had heard from their suppliers that this shortcoming "could readily be taken care of by the Telediphone equipment which records electrically through an amplifier and can be used with a microphone". The defendant Company referred to Model 24 "which is provided with two cylinders making it possible to provide continuous recording" with the result that one cylinder can be changed while the other is recording. The defendant Company added that "the apparatus gives clear reproduction and this reproduction is secured through the medium of the Standard Secretarial Model Ediphone, the same type that is used for correspondence work".

This letter was known to Segarajasingham, who was Chief Stenographer to the Supreme Court, and thereafter plaintiff became interested in the purchase of this instrument, and throughout the negotiations Segarajasingham acted as agent for the plaintiff. Eventually it was agreed between the plaintiff and the defendant Company that the plaintiff should purchase the instrument subject to a satisfactory trial demonstration and a fortnight's free trial. The first demonstration proved a success, but later the instrument was found to be deficient as regards reproduction. It was thought, however, that this defect could be remedied and the purchase was completed on August 2, 1938. In fact the defect was never remedied, and it has been proved that the instrument is even now not fit for the purpose for which it was purchased. Apparently the cause of the defect was the faulty manufacture of the crystals used. The bakelite varnish used on the crystals should not have "cold flowed" but in fact, owing to the effect of the tropical temperature or to some other cause, the varnish did in fact "cold flow" and became a "glutinous mess" which interfered either with the recording or with the reproduction.

The first point which arose in the case was whether this transaction was a contract of sale or merely an order on the defendant Company to import a specified article. The District Judge held that, though the transaction began with an order by the plaintiff to the defendant Company to import the machine, the facts also showed that there was a subsequent sale by the defendant Company to the plaintiff. This finding has been disputed by Counsel for the defendant Company but the finding of the District Judge is supported by the evidence and I think must be upheld.

The next question was whether there had been an express warranty that the instrument was reasonably fit for the purpose intended. The District Judge decided the point against the plaintiff, respondent, who disputed that finding in appeal. The evidence, however, as accepted by the District Judge, supports that finding. Undoubtedly the letter P1 contains the phrase "The apparatus gives clear reproduction" and this may be taken to be a warranty or a condition. But P1 was addressed by the defendant Company to the Chief Justice and it cannot be regarded as a representation to plaintiff. In P3, written to plaintiff's agent Segarajasingham, the only phrase applicable is "The makers of the machine guarantee the mechanism against faulty workmanship." This relates to a guarantee by the makers of the machine and cannot be regarded as a warranty or condition undertaken by the defendant Company.

The real question in the case was whether there was an implied condition under section 15 (1) of the Sale of Goods Ordinance, Cap. 70; which runs as follows:—

“ Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller’s skill or judgment, and the goods are of a description which it is in the course of the seller’s business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose :

“ Provided that in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose ”.

With regard to this matter the District Judge held that the defendant Company knew full well why the Telediphone was needed and the purpose it was intended to serve. In fact this was admitted by the defendant Company. He further held that it was clear that the buyer (plaintiff) relied on the seller’s (defendant Company’s) skill and judgment in this matter. This finding was disputed by the defendant Company but in my opinion the evidence clearly supports the finding. The District Judge, however, held that the Telediphone was not an instrument of a description which it was in the course of the business of the defendant Company to supply. On this point the District Judge dismissed the plaintiff’s action. The attack by plaintiff’s Counsel was mainly directed against this finding, and it is necessary to consider the argument more fully later on. The District Judge also held that in any event this transaction was not merely a sale of a specified article under its trade name, and that the proviso to section 15 (1) did not apply. This again was disputed by the defendant Company but on examination of the evidence I am satisfied that the District Judge was right on this point. As Bankes L.J. put it in *Baldry v. Marshall*¹.—“ In my opinion the test of an article having been sold under its trade name within the meaning of the proviso is: Did the buyer specify it under its trade name in such a way as to indicate that he is satisfied, rightly or wrongly, that it will answer his purpose, and that he is not relying on the skill or judgment of the seller, however great that skill or judgment may be ? ”.

I now return to the question whether the Telediphone was an instrument of a description which it was in the course of the defendant Company’s business to supply. The chief point taken by the plaintiff was that the defendant Company were agents for the Ediphone and supplied it in the ordinary course of their business, and that the Telediphone was an instrument of the same “ description ”.

Defendant Company’s witness Swain made the point that the firm had considerable experience of the Ediphone but had no previous experience of the Telediphone. The difference between the two is described as follows:—

“ The Ediphone is a mechanical device for recording by sound waves The Telediphone is an electrical apparatus. The Ediphone records mechanically. The Telediphone is an electrical

¹ (1925) 1 K. B. 260.

recording. The two work on entirely different principles. The Ediphone works close and the Telediphone is for recording at a distance. The Telediphone records at a distance because the recording is electrical. 2 ft. 6 in. is the utmost distance you can record on an Ediphone ”.

Later in cross-examination he said—

“The reproducing is done on an Ediphone machine. The thing is reproduced on the Ediphone machine. The spoken word is recorded on a cylinder. In the case of the Ediphone the recording is mechanical. In the case of the Telediphone it is electrical. That is at that stage. But when you come to the stage of reproducing it for the purpose of typing, the reproduction is on the same principles both in the case of the Ediphone and Telediphone. The same cylinder is used in both cases. To adjust and control is the same when the typist wants to type with headphones. It is reproduced in the same way. The recording in one case is purely electrical. Soon as the Judge speaks, the microphone conveys it to the machine. The recording is automatic ”.

The main points of difference are—(1) that the Telediphone records electrically while the Ediphone records mechanically; (2) that the Telediphone records at a distance while the Ediphone records only within the distance of 2 ft. 6 in.; (2) follows upon (1).

As against this there are points of resemblance between the two machines. They are both instruments for recording and reproducing the human voice. In both cases the record is made on a cylinder as a result of sound waves. The process by which the recording is done is different but the reproduction is secured in the same way in both cases. In fact the Ediphone apparatus is used for reproduction in the case of the Telediphone also. (See P1.) In my opinion the resemblances far outweigh the differences between the two instruments and relate to points of greater substance.

What is meant by the word “description” in section 15 (1)? In his comment on the corresponding English section 14 (1) *Benjamin on Sale* says—“The seller must also deal with the class of goods sold”. (I quote from the 6th Edition, p. 716.) I think that for the purposes of section 15 (1) we may treat the words “of a description” as including the meaning “of a class or kind”. On the evidence I think it has been established that the two instruments are of the same class or kind although the process for recording is different in the two cases. I think that the Telediphone may be regarded as an improvement upon the Ediphone and that it does not fall into an entirely different class.

It is indeed possible in certain cases that the word “description” may have either a broader or a narrow meaning than the word “class”; see *In re Gutta Percha and India Rubber Company of Toronto's Application*¹. This case related to an application under the Trade Mark Act: a distinctive trade mark, a Maltese Cross, had been taken out by the opponents who manufactured all sorts of rubber goods, except boots and shoes. The applicants applied to register trade marks with the same distinctive trade mark for boots and shoes. It was held that the opponents' trade mark was for the same “description of goods”.

¹ *L. R. (1909) 2 Ch. Div. 10.*

In this connection Cozens Hardy M. R. said—

“ It has also been decided that the words ‘ description of goods ’ are not to be read solely with reference to the class in which the registration is effected. ‘ Description of goods ’ may be narrower than the whole class but it may also be wider, in this sense, that it may include articles in a different class. The matter must be looked at from a business and commercial point of view ”.

I may mention that the word “ class ” here refers to the special classes of goods mentioned in the Trade Marks Ordinance in respect of which registration could be made. A trade mark had to be registered as belonging to particular goods or classes of goods, and refusal to register may be extended to goods of the same description.

I am not sure that this comment is applicable to the Sale of Goods Ordinance, but in any case I am of opinion that even looked at from a narrow or a broad point of view the Ediphone and the Telediphone should be regarded as goods of the same “description”. The difference in the process of recording appears to me a detail and not a fundamental change in the character of the instrument so as to constitute two different “ descriptions ” of goods. At any rate the evidence in the case leads me to the conclusion that the Telediphone is to be regarded from a business or commercial point of view as the Ediphone writ large.

In my opinion the District Judge has come to a wrong conclusion on this point. His judgment is set aside and judgment entered for the plaintiff as prayed for with costs in both Courts.

JAYATHIRAKE J.—I agree.

Appeal allowed.

