



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

922 SECOND APPEAL NO. 235 OF 1994

NITIN MANIKCHAND KOTECHA
VERSUS
ANIL ASARAM KHANDAGALE

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Mr. A. S. Bajaj, Advocate for Appellant

Mr. D. S. Bhapkar h/f Mr. V. D. Salunke, Advocate for the respondent

CORAM : R. M. JOSHI, J.

DATE : 21st FEBRUARY, 2025

PER COURT :-

1. This appeal under Section 100 of the Code of Civil Procedure takes exception to the judgment and decree dated 08/11/1993 passed in R.C.A. No. 60/1989, whereby the First Appellate Court reversed the judgment and decree passed by the Trial Court in Spl.C.S. No. 25/1986 of dismissal of the suit and ultimately granting the decree in favour of the plaintiff.

2. Parties are referred to as 'plaintiff' and 'defendant' for the sake of convenience.

3. While admitting appeal by order dated 29/11/1991, this Court has framed substantial question of law as to the nature of transaction in respect of immovable property.

4. The plaintiff filed suit before the Trial Court with averment that he had purchased a jeep for total consideration of Rs.97,500/-. It is case that the defendant assured him for transferring the said vehicle in his name after the entire loan which was obtained against the vehicle is repaid. Plaintiff claims that from time to time total sum of Rs. 46,100/- is paid by him to the defendant. It is further averred that on 15/01/1984 defendant came to the plaintiff and sought the said jeep for the purpose of personal use for couple of days. Though the defendant took the said jeep on his assurance, he did not return the said jeep to him. It is a case of the plaintiff that plaintiff was always ready and willing to accept the said jeep by paying balance consideration. There is allegation that defendant neither accepted the amount nor returned the jeep. It is alleged by the plaintiff that the defendant used the said jeep carelessly and that the said jeep has become useless. In view of this, the plaintiff claimed to have right to seek recovery of the part consideration paid to the defendant.

5. This contention is opposed by the defendant filing written statement it is denied that the amount of Rs. 46,100/- is received by the defendant towards part payment of the consideration of the jeep. It is claimed by the defendant that in fact plaintiff is liable to pay amount towards the hire agreement. Counter claim is filed seeking sum of

Rs.10,000/- from plaintiff.

6. Issues were framed at Exhibit 12. Parties led evidence. Plaintiff examined himself at Exhibit 18. He also examined Mehtabsing and Tulshiram as his witnesses. Defendant led his evidence so also led evidence of other three witnesses. Learned Trial Court dismissed the suit so also the counter claim. The First Appellate Court reversed the said findings and decreed the suit filed by the plaintiff to the extent of Rs. 34,100/- along with interest at the rate of 12% per annum from the date of suit till date of realization.

7. Learned counsel for the defendant submits that from the contents of the plaint it is clear that the plaintiff has received the possession of the jeep in question and has stated in paragraph 3 of the plaint, he was using the said jeep as a owner thereof. Thus, it is his submission that suit filed by the plaintiff is for repudiation of the contract and for return of the part consideration paid to the defendant under Section 60 of the Sale of Goods Act (for short 'the Act'). It is his submission that the said provision would apply only to the cases wherein there is no actual handing over of the position of the goods in the such transaction.

8. Learned counsel for the plaintiff opposed the said submission

by contending that proceeding filed under the wrong provision cannot become sole ground for its dismissal. He placed reliance on the judgment of Hon'ble Supreme Court in case of ***P. K. Palanisamy Versus N. Arumugham and Another, 2009(9) SCC 173***, wherein it is held that wrong mentioning of the provision would not a ground for rejection of the proceedings. It is his further contention that plaintiff is entitled to damages and hence suit would be tenable.

9. Perusal of the plaint does not show that the suit is for recovery of damages. In paragraph 8 of the plaint it is specifically stated that since the jeep in question has become useless, the plaintiff has a right for repudiation of the contract and for return of the part consideration. It is thus clear that the suit is not filed for damages but suit is for repudiation of contract and for refund of the part consideration.

10. Section 60 of the Act which reads thus:

*"60. Repudiation of contract before due date.—
Where either party to a contract of sale repudiates the contract before the date of delivery, the other may either treat the contract as subsisting and wait till the date of delivery, or he may treat the contract as rescinded and sue for damages for the breach."*

11. This provision clearly indicates that the provision would apply before due date and till the goods in question are delivered to the purchaser. In this regard it is relevant to take note of averments in

paragraph 3 of the plaint, wherein it is specifically stated by the plaintiff that as agreed, the possession of the jeep was given to the plaintiff and since then he was using the same as a owner. These pleadings are also sufficient to demonstrate that pursuant to agreement for sale of vehicle, its possession is handed over to the plaintiff after receipt of part consideration by defendant. In such case, question arises as to whether it was open for the plaintiff/ purchaser to repudiate the contract, for the alleged incidents/acts of defendant post delivery of possession. This becomes more relevant, in view of the fact that the suit is not filed by plaintiff for claiming damages on account of careless use of vehicle by the defendant but return of part consideration is sought by repudiating the contract.

12. In order to bring the suit of plaintiff for recovery of damages, there ought to have been pleadings and proof of actual damages. In absence thereof this Court is unable to accept the contention of the learned counsel for the plaintiff that suit is for recovery of damages. The nature of transaction in this case therefore does not pertain to the contract of sale of goods but an alleged act of defendant independent to the said contract.

13. The First Appellate Court has failed to take into consideration the pleadings of the plaint and case sought to be made by the plaintiff

before the Trial Court in proper perspective. It has also ignored provision of Section 40 of the Act. The judgment and decree impugned therefore does not sustain. As a result of this, the substantial question of law deserves to be answered in favour of defendant.

14. As a result of above discussion, appeal stands allowed. Judgment and decree is set aside. The decree passed by the Trial Court of dismissal of the suit stands restored.

(R. M. JOSHI, J.)

ssp