

COLLECTOR OF CUSTOMS & ORS.

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v.

PEDNEKAR AND COMPANY (PRIVATE) LIMITED (IN LIQUIDATION) & ANR.

March 31, 1976

[H. R. KHANNA AND P. K. GOSWAMI, JJ.]

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Sale of Goods Act (3 of 1930), s. 20—Time of passing of property in goods.

Constitution of India, 1950, Art. 226—When may be invoked.

Practice—Raising new contention, if permissible.

The first respondent, an importer and dealer in sewing machines, was granted an import licence for importing industrial sewing machines and spare parts. After importing some goods through the Bombay port, the first respondent was permitted by the Customs Authorities to import the rest through the Calcutta port, and the first respondent entered into contracts with Japanese companies for supply of a certain number of industrial sewing machines and oscillating rock shafts. Being in some financial difficulty the first respondent approached the 2nd respondent, and the latter stood guarantee to Bankers at Delhi enabling the first respondent to open the necessary letter of credit. Thereafter, while the goods contracted for from the Japanese companies were on the high seas, there was an agreement by which the first respondent agreed to sell to the second respondent at a future date, certain quantities of sewing machines, heads and oscillating rock shafts. When the goods arrived at Calcutta, the Customs authorities took the view that the goods were ascertained and specific goods, that the property in them had passed to and vested in second respondent by reason of the agreement to sell, so that at the time of importation the goods were not covered by the licence in favour of the first respondent and ordered confiscation of the goods and the imposition of a penalty. The first respondent thereupon moved the High Court and the High Court held against the appellant.

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In appeal to this Court, the appellant-Collector of Customs, also raised the contentions that though everything ostensibly was done by the 1st respondent, the real importer was the 2nd respondent and that, therefore, the importation was unauthorised; and that the High Court had no jurisdiction to interfere under Art. 226, with the order of the Customs authority.

Dismissing the appeal,

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HELD: (1) It is not possible to hold on the facts of this case, that the property in the goods passed to the second respondent at the time of the agreement, and the High Court was right in holding that the property in the goods did not pass to the buyer till the time of delivery of the goods in Bombay. [977E, G-H]

(a) The agreement to sell related not to the entire consignment of the goods which were being imported by the first respondent but only to part of those goods even though it was a major part. Out of 208 dozen rock shafts which were imported, 200 dozen were to be sold to the 2nd respondent. There was nothing to prevent the first respondent from selecting for itself any 8 dozen rock shafts out of the consignment. The place of delivery was the second respondent's godown in Bombay, and therefore, the property in the goods could not pass in favour of the second respondent until after the arrival of the goods in Bombay and the 200 dozen rock shafts to be delivered to the 2nd respondent were separated. So far as the sewing machines were concerned, the property in them could also not pass to the buyer before the passing of the property in rock shafts as the contract was one indivisible contract. No specific goods in a deliverable state were attached to the contract when it was made. [977E-G]

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A (b) In many genuine commercial transactions guarantee can be arranged by a party importing or exporting goods under a valid licence. The mere fact of financial guarantee by the second respondent to a banker for the purpose of enabling the first respondent to open a letter of credit, without anything more, would not convert the guarantor (2nd respondent) to be the owner of the property, the moment the contract was entered into, if the terms therein pointed to the contrary. [978A-B]

B (2) It was never the contention of the Customs authorities that the importation of the goods was not done by the 1st respondent or that the 1st respondent's contracts with the Japanese suppliers were sham. Therefore the appellant cannot be permitted to raise the contention that the real importer was the 2nd respondent. [977E-G]

C (3) The 1st respondent's licence was not an Actual User Licence and therefore the 1st respondent could sell the imported goods to others. The legal issue in the case was whether property had passed to the 2nd respondent at the time the agreement was entered into between the respondents and if on the terms of the agreement along with relevant facts and circumstances, the customs authorities had committed a manifest error of law apparent on the face of the order, the High Court's jurisdiction to interfere under Art. 226 is attracted. [978G-979B]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1434-1435 of 1968.

D Appeal from the Judgment and Order dated 6th April 1967 of the Calcutta High Court in Appeal from Original Order No. 175 of 1963 and 177 of 1963.

G. L. Sanghi and Girish Chandra, for the Appellant.

H. K. Puri and M. C. Dhingra, for Respondents.

E The Judgment of the Court was delivered by

GOSWAMI, J.—These two appeals are on certificate by the Calcutta High Court from its common judgment of April 6, 1967, in Appeal Nos. 175 and 177 of 1963.

F Respondent No. 1 prior to its liquidation was a private limited company carrying on business as an importer and dealer in sewing machines. On or about April 16, 1958, the respondent was granted an import licence by the Joint Chief Controller of Imports and Exports, Bombay, by which it was authorised to import industrial sewing machines together with spare parts to the extent of 5 per cent of the total value of the goods to be imported. The total value of the imports authorised was Rs. 47,406/-. The respondent could under the licence import the goods through any port in India. Out of the permitted value under the licence, goods worth about Rs. 9,919/- were imported by the respondent through the Bombay port. The respondent then wanted to arrange the rest of the import through the Calcutta port. At the request of the respondent the Customs authorities of Bombay gave a release order in respect of the remaining goods to be imported in terms of the aforesaid licence through the Calcutta port.

H By an indent of November 11, 1958, the respondent placed orders with M/s Fuji Trading Company Limited, Osaka, Japan, for supply of 162 pieces of industrial sewing machine head "Raruna Brand" and

208 dozen of oscillating rock shafts. By two other indents of December 3, 1958, the respondent sent orders to M/s Alickson & Company, Osaka, for the supply of 59 sets of industrial sewing machine head "Prosper Brand" and certain industrial sewing machine parts. All these three indents were accepted by the two Japanese Companies in due course. M/s Fuji Trading Company Limited shipped the goods against orders placed with them on January 30, 1959, by S. S. Sydney Maru. M/s Alickson & Company also shipped the goods covered by the indents placed with them on January 28, 1959, by S. S. State of Andhra.

The respondent apparently had some financial difficulties for releasing the goods at Bombay, as, according to it, it did not have sufficient credit with the Bombay Bank "to open the letter of credit with payment of a nominal margin only". The respondent, therefore approached the Bombay and Calcutta Cycle Company (briefly the Cycle Company), a partnership firm, which also used to carry on business as dealers in sewing machines and had previous dealings with the respondent. The Cycle Company agreed to guarantee the letter of credit if it were opened through their Bankers at Delhi. The respondent agreed to do so and thereupon at the request of the Cycle Company the Mercantile Bank Limited of Delhi agreed to act as the respondent's Bankers and also to allow the respondent to open the letter of credit. Thereafter on or about December 29/30, 1958, the respondent opened with the Mercantile Bank Limited, Delhi, a letter of credit being L. C. No. 101/1085. The respondent advanced a sum of Rs. 2884.50 np by way of marginal deposit to the extent of 10 per cent of the value of the letter of credit and the necessary Bank charges.

On February 20, 1959, while the said goods were on the high seas there was an agreement between the respondent and the Cycle Company by which the respondent agreed to sell and the Cycle Company agreed to buy at a future date certain quantities of industrial sewing machine heads and oscillating rock shafts. The contract of sale may be quoted *in extenso* :

"SALE CONTRACT"

We Messrs. Pednekar and Co. Private Ltd., 172, Girgaon Road, Bombay-4, hereby agree to sell in forward sale 'Industrial' Sewing Machine Heads and parts thereof to Messrs. Bombay & Calcutta Cycle Co. of 48, Popatwadi, Kalbadevi Road, Bombay, on the following terms and conditions :

Items and quantity:	221 pcs. Industrial Sewing Machine Head TA-1 Model complete with knee Lifter, accessories box Bobbin winder made in Japan.	
	200 dozen Oscillating Rock Shaft "Coto" brand made in Japan.	
Rates and value :	221 pcs. Industrial Sewing Machine Heads @ 305/- per machine	Rs. 67,405/-
	200 dozen Oscillating Rock Shaft @ Rs. 24/- per dozen	Rs. 4,800/-
	TOTAL	Rs. 72,205/-

- A** Payment: The sum of Rs. 13,300/- already received by the sellers from the buyers (Rs. 7000/- received on 19th June, 1958, Rs. 2300/- received on 7th July, 1958, and Rs. 4,000/- received on 22nd December, 1958) will be adjusted against the above payment. The sum of Rs. 56,000/- (Rs. fifty six thousand only) will be paid by the buyers as and when required before the delivery of the goods and the balance sum of Rs. 2,905/- will be paid by the buyer after the delivery of the goods to them in good condition in their godown.
- Place of delivery: Buyers' Godown at Bombay.
- Time of Delivery: June-July 1959.
- C** Sales Tax: Buyers will issue 'K' Form (Bombay Sales Tax) against sellers Bill for the goods.

For Pednekar & Co. Private Ltd.
Sd/- Managing Director

Bombay, dated 20th February, 1959.
We confirm.

- D** For Bombay & Calcutta Cycle Co.
Sd/- Partner".

- E** S. S. State of Andhra and S. S. Sydney Maru arrived at the port of Calcutta on February 26 and February 27, 1959, respectively. The respondent instructed the Bankers to engage M/s Mackinnon Mackenzie & Co. Pvt. Ltd. (briefly the Clearing Agents) as Agents for clearing the goods arriving by the said two ships. The Bankers were also asked to despatch the shipping documents to the Clearing Agents. The Bankers carried out these instructions and the Clearing Agents filed with the Customs authorities, Calcutta, bills of entry in respect of the aforementioned goods for consumption in the name of the respondent. On the requisition of the Customs authorities several documents, as required, were supplied to them. Informations as to who guaranteed for the letter of credit, who retained the documents and who paid for the goods were also supplied to the Customs authorities by the Clearing Agents as desired.
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- G** On October 28, 1959, the Assistant Collector of Customs for Appraisement issued a show cause notice on the respondent under section 167(8) and section 167(37) of the Sea Customs Act, 1878, read with section 3(2) of the Imports and Exports (Control) Act 1947 relating to the goods that arrived by S. S. Sydney Maru. On November 18, 1959, an exactly similar show cause notice was served upon the respondent by the Assistant Collector of Customs in respect of the goods arrived by S. S. State of Andhra. In these notices it was alleged that the importation of the goods in question had been made by the Cycle Company without any valid import licence in their favour and not by the respondent and that the Cycle Company was the real owner of the goods. It was further alleged that the respondent had aided and abetted in the unauthorised importation of the goods by the Cycle Company. There was a further charge that the respondent had transferred the licence in favour of the Cycle
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Company. It was alleged in the show cause notice of October 28, 1959, that the licence in any case did not cover the importation of oscillating rock shafts. The respondent was asked to show cause within 14 days of receipt of the respective notices as to why the goods should not be confiscated and why a penalty should not be imposed on the respondent for being concerned in the unauthorised importation of the said goods. The respondent was also asked in the first show cause notice to show cause why oscillating rock shafts of the value of Rs. 1373.19 np should not be confiscated under section 167(37) of the Sea Customs Act and why a penalty should not be imposed on the respondent. The respondent submitted its explanation repudiating the allegations. The respondent further contended that the oscillating rock shafts were spare parts of which clearance could be allowed to the extent of 5 per cent of the face value of the licence. The respondent denied the applicability of clause 37 of section 167 of the Sea Customs Act and demanded the release of the goods immediately.

On December 17, 1959, the Assistant Collector addressed a letter to the respondent which is described as an additional show cause notice. The substance of the allegations made in this letter is that the goods in question were ascertained and specific goods and that the property in the goods had passed from the respondent to the Cycle Company by reason of the agreement for forward sale dated February 20, 1959, and that the property in the goods had already vested in the Cycle Company at the time of importation so that the goods were not covered by the licence submitted by the respondent. The respondent was asked to make further submissions within a fortnight from receipt of this letter. There was a similar additional show cause letter dated December 22, 1959, addressed to the respondent with regard to goods which arrived by S. S. State of Andhra. The respondent sent a reply to the additional show cause notices. The respondent denied in its explanation that the property in the goods had passed to the Cycle Company before the goods were cleared.

On March 18, 1960, the Deputy Collector of Customs passed an order by which the goods which arrived by S. S. State of Andhra were confiscated under section 167(8) of the Sea Customs Act read with section 3(2) of the Imports and Exports (Control) Act, 1947. A personal penalty of Rs. 350/- was also imposed on the respondent as well as on the Cycle Company. Thereafter on March 23, 1960, the Deputy Collector of Customs passed another order by which the goods which arrived by S. S. Sydney Maru were confiscated and a personal penalty of Rs. 1000/- was imposed on the respondent as well as on the Cycle Company.

The above is the background which led to two writ applications in the High Court against the aforesaid two orders under article 226 of the Constitution of India which the respondent filed against the appellants impleading also the Cycle Company as respondent No. 4 therein.

The learned single judge of the High Court dismissed the respondent's writ applications except with reference to the oscillating rock

- A shafts. According to the learned judge these shafts were properly imported under section 2, Part V, Item 76(a) of the Import Trade Control Policy Book, but these shafts also except 8 dozen were liable to confiscation in view of his decision against the respondent in respect of 200 sewing machine heads. The respondent then appealed to the Division Bench of the High Court. The Division Bench allowed the appeals by setting aside the judgment of the single judge without disturbing at the same time the aforesaid portion of the judgment regarding oscillating rock shafts. The High Court granted certificates to appeal to this Court under article 133(1)(a) of the Constitution of India to the appellants.
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- C We may note in passing that during the pendency of the proceedings before the High Court, the respondent was wound up by an order of the High Court of Bombay and necessary substitution was made.

- D We are only concerned in these appeals with the confiscation of 200 sewing machine heads and of 200 oscillating rock shafts. Since there had been no appeal by the appellant against that part of the order of the single judge with regard to the importation of 8 oscillating rock shafts, Mr. Sanghi has, rightly, not addressed us in respect of the same.

- E Mr. Sanghi at the commencement of his argument submitted, to quote his own words, that "the main thrust of the show cause notice was the realness of the transaction". In other words, he wanted to raise the question, which had also been unsuccessfully pressed into service before the Division Bench that though everything ostensibly was done by the respondent the real importer in the case was the Cycle Company and the respondent merely lent his name. The Division Bench, in our opinion, rightly rejected the submission holding that that was a completely new case which had not been made out either before the adjudicator or before the learned single judge. The Division Bench further rightly held as follows :—

- F "It was never the contention of the Customs authorities that the importation of the goods was not done by the petitioner and that though everything is ostensibly done by the petitioner the real importer is B. C. Cycle Company. In the show cause notice there is no allegation made on the part of the Customs that the contract with the Japanese supplier was a sham or that the petitioner's contract with the B. C. Calcutta Cycle Co., was also a sham transaction."
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We are, therefore, unable to agree with Mr. Sanghi that he can be permitted to raise this question of a "make-believe" transaction by the respondent.

- H The only question, therefore, that arises for decision in this case and on which Mr. Sanghi has addressed us is as to the question whether property in the goods had passed to the Cycle Company when the contract had been entered by the respondent with it, that is to say, prior to the arrival of the goods at Calcutta port for clearance.

We may even quote what was stated in the additional show cause notice : A

“Thus it appears that the sale contract which purports to be an ‘agreement to sell’ is actually a sale and that the property in the subject goods vested with M/s Bombay & Calcutta Cycle Co., at the time of importation.”

The learned single judge answered the question in the following words :— B

“In this case the goods were specific goods in a deliverable state as already held. There was nothing in the contract indicating that the property in the goods would pass to the buyer at a later stage. Therefore, under section 20 of the Sale of Goods Act, the property passed at the time of the contract of sale and it was immaterial that time for payment of price and also time for delivery were postponed.” C

The Division Bench, on the other hand, after extensively dealing with all the facts and circumstances of the case including the terms of the contract, came to the conclusion that—

“...no property could pass before the goods were delivered at the Bombay godowns of the B. C. Cycle Company.” D

The controversy has to be resolved by reference to sections 18, 19 and 20 of the Sale of Goods Act, 1930.

It is, in our opinion, not possible to hold that the property in goods passed at the time of agreement dated February 20, 1959. The contract to sell related not to the entire consignment of the goods which were being imported by the respondent but only to part of those goods, even though it may be a major part. Out of 208 dozen rock shafts which were imported, 200 dozen were to be sold by the respondent company to respondent No. 2. There was nothing to prevent the respondent company from selecting for itself any eight dozen rock shafts out of the whole consignment. The place of delivery of the goods was buyer's godown in Bombay. The property in the goods could not pass in favour of respondent No. 2 until, after the arrival of the goods in Bombay, two hundred dozen rock shafts to be delivered to the buyer were separated. So far as industrial sewing machines were concerned, the property in them could also not pass to the buyer before the passing of the property in rock shafts as the contract between the respondent company and the buyer was one indivisible contract. The High Court, in our opinion, rightly held that the property in the goods did not pass to the buyer till the time of the delivery of the goods in Bombay. No specific goods in a deliverable state were attached to the contract when it was made. E
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Mr. Sanghi submits that the fact that the Cycle Company was principally financing the whole transaction and stood guarantee to the Bankers in Delhi enabling the respondent to open a letter of credit for the importation of the goods clearly indicates that, notwithstanding the place of delivery in the contract, the parties intended that the H

- A imported goods were appropriated to the contract when the same was made. In many genuine commercial transactions guarantee can be arranged by a party importing or exporting goods under a valid licence. The mere fact of financial guarantee to a Banker for the purpose of opening a letter of credit, without any thing more, would not convert the guarantor to be the owner of the property the moment the contract was entered if the terms therein pointed to the contrary.
- B We are unable to hold that the mere fact of the Cycle Company being the guarantor with regard to the financial arrangement, which the respondent made with the Bankers in Delhi, would lead to the inescapable conclusion that the property in the goods had passed to the Cycle Company at the time when the contract was made. The correspondence between the respondent and the Cycle Company, that between the parties and the Banker and the arrangements for clearing the goods through the Calcutta Clearing House relied upon by
- C Mr. Sanghi, do not lead to a contrary conclusion.

- D It is clear that the respondent had a valid import licence under the cover of which it imported the goods from Japan and, as we have held above, the property in the goods had never passed during the importation as alleged by the Customs authorities.

- E The entire controversy before the adjudicator was with reference to the importation of the goods by the Cycle Company which fact was sought to be established against the respondent from the legal position urged with regard to the passing of property to the Cycle Company at the time the contract had been made on February 20, 1959. Mr. Sanghi submits that if, on the facts and circumstances, conduct of the parties and the correspondences during the relevant period taken with the advance of finance and guarantee of the Cycle Company, the adjudicator came to the conclusion that the property had passed and the goods were liable to confiscation and the conclusion was *prima facie* reasonable the High Court had no jurisdiction to interfere with the order under article 226 of the Constitution.
- F This would be true, says counsel, even if the High Court could on the same facts and circumstances take another view in the matter. We are unable to accede to the submission.

- G We are dealing with an order of confiscation of certain goods imported under a licence granted to the respondent. It was never disputed that it was a valid licence. It was also not an Actual User licence. The respondent, therefore, could sell these imported goods to others. The whole matter, therefore, turned on the legal issue as to whether property had passed at the time the respondent had entered into the contract for the sale of the imported goods. Even the Customs Authority in its additional show cause notice made particular reference to section 20 of the Sale of Goods Act and pointed out that :—

- H “the ownership in the goods under consideration appears to have passed on to M/s Bombay & Calcutta Cycle Co. right from the time the sale contract was concluded.”

When, therefore, on the terms of the contract along with other relevant facts and circumstances which had to be looked into by the adjudicator for application of section 20 of the Sale of Goods Act, he committed a manifest error of law apparent on the face of the order the High Court's jurisdiction to interfere under article 226 of the Constitution is clearly attracted. The submission of Mr. Sanghi is, therefore, without any force.

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In the view we have taken regarding passing of property in the goods we need not deal with Mr. Sanghi's submission with reference to the provisions of warranty under section 12 of the Sale of Goods Act.

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The orders of confiscation of the goods and penalties imposed are invalid and the High Court was right in quashing the same by issuing the appropriate writs.

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In the result the appeals are dismissed with costs.

V.P.S.

Appeals dismissed.