

S. Harnam
Singh
v.
The Deputy
Custodian
General of
Evacuee
Property,
New Delhi
and others
—
Khosla, J.

register produced before me. It was after this that the petitioner sought allotment in this village and behind Arjan Singh's back he was given Harjit Singh's land. Arjan Singh had much better claim to this land than Harnam Singh petitioner and that being so, it cannot be said that any injustice has been done to the petitioner.

On these grounds, this petition must fail and I must dismiss it with costs.

LETTERS PATENT APPEAL

Before Bhandari, C.J. and Bishan Narain, J.

FIRM PAHARIA MAL-RAM SAHAI,—*Defendants-
Appellants*

versus

BIRDHI CHAND JAIN AND SONS,—*Plaintiffs-
Respondents*

Letters Patent Appeal No. 16 of 1952.

1956

Jan. 4th

*Sale of Goods Act (III of 1930)—Sections 23 and 25—
Sale of Goods—Goods sold to be despatched by the seller
to the buyer—Seller himself the consignor and the con-
signee—Receipt sent to the Bank to be delivered to the
buyer on payment of the price and buyer informed—Buyer
refusing to pay the price as goods could not be traced and
lost—Property in goods whether passed to the buyer—
Buyer, whether liable for the price of the goods.*

*Held, that the property in goods passed to the buyer
when the goods were sent out of the godown of the seller
to the transport company and that the seller was entitled to
recover their price from the buyer.*

*Letters Patent Appeal under Clause 10 of the Letters
Patent, from the decree of the Hon'ble Mr. Justice Kapur,
dated the 17th day of April, 1952, reversing that of Shri
Harbans Singh, 2nd Additional District Judge, Delhi, dated
the 31st July, 1950, which affirmed the decree of the Sub-*

ordinate Judge, 1st Class, Delhi, dated the 14th April, 1949, and decreeing the plaintiff's suit, leaving the parties to bear their own costs throughout.

H. L. SARIN, for Appellants.

D. N. AWASTHY, for Respondents.

JUDGMENT

BISHAN NARAIN, J.—This is an appeal under Bishan Narain, clause 10 of the Letters Patent from the judgment of a J. Judge of this Court sitting in Single Bench. The facts out of which this appeal has arisen are these. Firm Paharia Mal-Ram Sahai, Paper Merchants of Jullundur City, agreed to purchase three bales of "Ahmadabadi Walaiti" white paper of $\frac{26 \times 28}{51 \text{ lbs}}$ or $\frac{28 \times 34}{68 \text{ lbs}}$ at Re. 0-14-1 per lb. on the 17th June, 1947. The goods were to be delivered from Delhi godown. This agreement was entered in the account books of the plaintiff firm Birdhi Chand Jain and Sons, Paper Merchants of Delhi. The seller some time later *informed the buyer that the paper of $\frac{26 \times 28}{51 \text{ lbs}}$ was out of stock and on the 23rd July, 1947, the buyer wrote back to say that the paper of $\frac{28 \times 34}{68 \text{ lbs}}$ may be supplied. The exact words used by the buyer were "*wohi teen ganthen rawana kar deven*" (despatch those very three bales). Then certain correspondence followed between the parties as to whether the goods were to be sent to Jullundur by train or by road in a lorry and ultimately on the 31st July, 1947, the buyer instructed the seller to send the goods by goods train if possible, otherwise they may be sent by lorry. Accordingly the goods were despatched on the 8th August, 1947, by lorry through the Parbhat Transport Company, Limited, under a receipt wherein both the consignor and the consignee were the seller of the goods. The receipt with invoice, etc., was sent to the

Firm Paharia Punjab National Bank, Jullundur, with instructions
Mal-Ram that the receipt should be delivered to the buyer on
Sahai payment of the price of the goods. On the same day
 v. the selling firm informed the buyer that the goods had
Birdhi Chand been so despatched and to take delivery and also debit-
Jain and Sons ed the account of the purchasing firm by the amount of
 _____ the invoice. The Bank presented the documents to
Bishan Narain, Paharia Mal-Ram Sahai but they refused to pay for the
J. goods and take the delivery of the receipt as they found
 that they were unable to trace the goods. It appears
 that ultimately the goods were lost. Certain corres-
 pondence followed between the parties and ultimately
 the present suit was filed by Birdhi Chand Jain and
 Sons, Paper Merchants, Delhi, for the recovery of
 Rs. 1,487-12-6 as price of the goods and other miscel-
 laneous expenses. The purchasing firm contested the
 suit. The main contest between the parties was
 whether the property in the goods at the time that they
 were lost was with the seller or the buyer. The trial
 Court as well as the Additional District Judge, Delhi,
 held that the property in the goods remained with the
 selling firm on the ground that the appropriation to the
 contract was not unconditional as the plaintiff firm had
 consigned the goods to itself. The Single Judge, how-
 ever, reversed these decisions and decreed the plain-
 tiff's suit holding that the goods were appropriated to
 the contract when the plaintiff firm received the defen-
 dant's letter dated the 23rd July, 1947, and therefore
 the property in the goods had passed to the buyer be-
 fore they were lost in transit. It is against this judg-
 ment that the present Letters Patent Appeal has been
 filed.

The only point that requires decision in this appeal is whether property in the goods ever passed to the buyer before they were lost because if the property had passed by that time to the buyer then he must pay for the goods, otherwise not. For this purpose it is necessary to find out the intention of the parties to the agreement.

The terms of the contract are given in the entry made by the defendant firm in plaintiff's books. These terms show that the seller had to supply three bales of white paper of Ahmadabadi Walaiti quality at Rs -|14|1 per lb. ex-Delhi godown. It was also settled that these three bales will be either of 28×34 or 26×28 size with corresponding change in weight. There is no express term in this contract as to how these goods will be ascertained or when the property in the goods will pass to the buyer. All that is provided is that the contract will be performed by supply of goods at the Delhi godown.

Firm Paharia
Mal-Ram
Sahai
v.
Birdhi Chand
Jain and Sons
Bishan Narain,
I.

To meet such cases the Courts in England adopted certain rules of construction of more or less technical nature to carry into effect the intention of the parties. These rules have been adopted by the legislature in India in Sale of Goods Act, 1930. Sections 18 to 25 of the Sale of Goods Act lay down these rules with a view to assist Courts to find out when the parties intended to pass the property in goods to the buyer. It must, however, be remembered that all these rules are only rules of construction and in each case the intention of the parties must be ascertained and then acted upon.

In the present case obviously the sale was of unascertained goods. In the specification of sizes and weights it was open to the parties to make one or the other as the size to be supplied under the contract. Such a contract cannot be said to be for sale of specific goods as these goods were not identified and agreed upon at the time of the contract (*vide* section 2(14) of the Sale of Goods Act). When there is a contract for sale of unascertained goods, it is necessary that they should be identified and ascertained before the contract can be performed. If the parties agree that the contract goods shall be taken from some specified larger stock, then there is no identification of the goods as

Firm Paharia contract goods till they are ascertained on severance
Mal-Ram and in this connection a mere notional severance is
Sahai not sufficient. It was argued by Shri D. N. Awasthy
 v. on behalf of the seller that the effect of buyer's letter,
Birdhi Chand dated the 23rd July, 1947 was that three bales were
Jain and Sons unconditionally appropriated to the contract and there-
 fore property in goods passed to the buyer as laid
Bishan Narain, down in section 23(1) of the Act and for this purpose
J. he relied on the words "*wohi teen ganthen rawana kar deven.*" This argument prevailed with the Single Judge. With respect, however, I am unable to agree. These words relate to the description of the goods to be supplied, namely the size 28×34 and have no reference to any particular bales. The defendant firm wrote this letter in response to the seller's letter that under the contract either of the two sizes mentioned therein was to be supplied but that the size 26×28 was out of stock while the size 28×34 was still available. It is the seller's case that at the time of the contract the goods were shown to the buyer but he did not put any marks of his on the bales. Thus there was not even a notional severance of these bales by this time. Its effect was only that the buyer accepted the suggestion of the seller that three bales of 28×34 size should be supplied in performance of the contract. It is well settled that before property in the goods passed to the buyer the individuality and identity of the goods to be delivered under the contract should be established. This letter did not obviously have that effect. There was no appropriation of any particular three bales of the size 28×34 to the contract and therefore the conditions laid down in section 23(1) of the Act for passing of the property were not satisfied in the present case.

Now, property in unascertained goods passes to the buyer when there is an unconditional appropriation of them in a deliverable state to a contract by the

seller or by the buyer with the express or implied as-
 sent of the other party to the contract (*vide* section
 23(1) of the Act). This appropriation is often to my
 mind different and distinct from delivery of goods,
 although in most cases the proof of such an appropri-
 ation is by actual or constructive delivery of the goods
 to the buyer. In the present case the goods were
 deliverable to the buyer ex-Delhi godown. The seller
 wrote on the 26th July, 1947, that the goods could
 not be booked by train and if the buyer so required
 the goods might be sent by lorry. The buyer after
 some enquiries instructed the seller by letter, dated
 the 31st July, 1947, to send the goods by train if pos-
 sible, otherwise they should be sent by lorry. Ac-
 cordingly contract goods were sent by lorry. In these
 circumstances, the buyer must be held to have im-
 pliedly assented to the appropriation made by the
 seller when he removed the goods from his godown,
 and took them to the lorry. Under the contract it
 was open to the buyer to take delivery of the goods
 from Delhi godown after selecting the bales from the
 stock and when he instructed the seller to send them
 by lorry to Jullundur he knew that the seller must
 necessarily select these bales from a stock in the go-
 down and then despatch them. At the time when the
 goods were removed from the godown there was ir-
 revocable and unconditional appropriation of the
 goods to the contract and it appears to me that if later
 on the seller had changed the bales then it would have
 been in breach of the contract and if the goods had
 been destroyed after they had left the godown then
 the buyer's goods would have been destroyed and not
 the seller's goods. This matter has been discussed
 by Williston on Sales in Volume II, page 77. The rule
 of law in this book has been stated thus :—

Firm Paharia
 Mal-Ram
 Sahai
 v.
 Birdhi Chand
 Jain and Sons
 ———
 Bishan Narain
 J.

“If 100 barrels of flour are ordered from a
 distance, the seller must first segregate 100
 barrels, in which he will carry the goods

Firm Paharia
 Mal-Ram
 Sahai
 v.
 Birdhi Chand
 Jain and Sons
 ———
 Bishan Narain,
 J.

either in his own trucks, or others, hired for the purpose, to the station of the carrier, from which they are to be shipped to the buyer. It must also be assumed that the buyer knows that this procedure will be followed. Why should not the property pass when the barrels are first segregated or when they are put into the trucks, rather than when they are delivered to the carrier? The reason is sometimes given that they are still in the seller's control prior to delivery to the carrier. This is doubtless so, but, as has been seen, effective appropriation may be made even though goods are still in the exclusive possession and control of the seller. The true answer seems rather to be this, that where several things are to be done by the seller to the goods, it is to be assumed that the parties intend the appropriation to be deferred until the last of these acts has been done."

Applying this rule to the present case it is clear that the seller had done all that he had to do under the contract when he took these three bales out of his godown to be carried to the Transport Company for transmission to Jullundur and that being so the property in the goods passed to the buyer. While the goods were being taken to the motor stand the buyer could have demanded them and the seller was bound to deliver them on receipt of the price of the goods. This conclusion is also in consonance with the principle laid down as far as 1825 by Bayley, J., in *Bloxam v. Sanders* (1). Moreover in the present case the seller informed the buyer that the contract goods had been sent by lorry. Thus the buyer had notice of the appropriation of the goods to the contract but he never objected to the same. Therefore it must be

(1) (1825) 4 B. and C. 941

held on this ground also that he assented to the ap-propriation of these three bales which were sent by lorry to Jullundur. Section 23(2) of the Sale of Goods Act has no application to the present case because the goods were not sent by the seller to Jullundur in pursuance of any contract but under subsequent instructions given by the buyer.

Firm **Paharia**
Ma. Ram
Saha
 v.
Birdhi Chand
Jain and Sons
 ———
Bishan Narain
 J.

It was, however, urged on behalf of the buyer that the goods were sent by the seller who obtained a receipt from the Transport Company in his own favour. Thus the goods were sent by the seller to Jullundur reserving his right of disposal. Consequently the appropriation was conditional on payment of price by the buyer and that being so the property in the goods did not pass to the buyer till the condition of payment of price was fulfilled and as that was not done the property in the goods never passed to the buyer. On the basis of this reasoning it was urged that the goods of the seller were lost in transit and not those of the buyer and for this purpose reliance was placed on section 25(1) of the Act which according to the learned counsel fully applies to this case. On the other hand the plaintiff's (seller's) case is that the goods were unconditionally appropriated to the contract when the bales were taken out of the godown and the subsequent conduct of the plaintiff firm could not divest the buyer of those goods. It was further argued that by taking the receipt in his own favour the plaintiff firm being in physical possession of the goods was exercising its lien only under sections 46 and 47 the Sale of Goods Act.

Shri Harbans Lal Sarin, the learned counsel for the buyer, has strenuously argued while construing section 25(1) of the Act that whenever goods are sent through a carrier or any other bailee to the buyer but the right of delivery is retained by the seller till payment of price then the property in the goods does

Firm Paharia not pass to the buyer till the price has been paid.
Mal-Ram According to the learned counsel whenever right of
Sahai disposal is retained by the seller till the payment of
 v. the price of the goods the property in the goods must
Birdhi Chand necessarily remain with him till the condition of pay-
Jain and Sons ment of price is fulfilled. Such a construction of section
 ——— 25(1) is not, in my opinion, warranted by the words
Bishan Narain, employed in this section. As I read this section the
J. property in the goods does not pass to the buyer if by
 the terms of the contract or by the terms of the ap-
 propriation of goods right of disposal is reserved until
 certain conditions are fulfilled. In other words, if
 the parties specifically agree at the time of the con-
 tract or at the time of appropriation that property in
 the goods shall not pass till their price is paid, then
 till such a payment seller remains owner of the goods.
 There is no such contract in the present case. It
 must be remembered that in section 25(2) it is laid
 down that if goods are deliverable by the shipper to
 the order of the seller then presumably the seller re-
 serves the right of disposal and the appropriation is
 only conditional. Thus it may be presumed in a case
 where the seller retains the right of disposal of goods
 when sending them outstation that he intends to re-
 tain the property in them with himself. This prin-
 ciple is summarised in the well-known treatise on the
 Law of Sale of Personal Property by Benjamin at page
 384 (Eighth Edition) in these words :—

“The conclusion that *prima facie* the seller reserves the right of disposal, when the bill of lading is to his order or that of his agent, may be rebutted by proof that in so doing he did not intend to retain control of the property; and it is a question of fact what the real intention was. Thus the facts of the case evincing generally an intention to transfer the property, and in particular

the fact that the seller puts the bill of lading at the disposal of the buyer, subject only to payment of the price, may show that the seller's intention is merely to preserve his lien."

Firm Paharia
Mal-Ram
Sahai
v.
Birdhi Chand
Jain and Sons

If it were otherwise, the seller could never exercise his right of lien because as long as the goods were in his possession or under his control it can be said that the goods still vested in the seller. The seller's lien depends on actual possession and not on title and it can be exercised only when the property in the goods has passed to the buyer. If the contention of the learned counsel for the buyer was to be accepted then the seller could never exercise his right of lien as long as he was in possession of the goods. It is, therefore, necessary to find out the intention of the seller when he really took the receipt in his own favour from the Transport Company and in this connection I may point out that I have already held that the property in the goods had passed when the bales were sent out of the godown. It appears to me that in such a case the property in the goods having passed to the buyer the seller by taking the receipt in his own favour was merely exercising his right of lien on the goods. In this connection I may refer to *The Parchim* (1), in which case in similar circumstances their Lordships of the Privy Council came to the conclusion that the property had passed to the buyer. Their Lordships observed thus :—

Bishan Narain,
J.

"Their Lordships have come to the conclusion, after carefully considering all the facts, that it was the intention of the parties to the contract that the property in the cargo should pass to the buyer upon shipment, but that the buyer was not intended to have

(1) (1918) A.C. 157

Firm Paharia
Mal-Ram
Sahai
v.
Birdhi Chand
Jain and Sons

Bishan Narain,

5.

possession of the cargo, or of the bills of lading which represented the cargo, until actual payment at due date of the purchase price. With the exception of the form of the bills of lading, everything points to this conclusion."

In the present case also all the circumstances are in favour of the conclusion that the property in the goods had passed to the buyer. The receipt taken from the Transport Company was sent to the Bank for delivery to the buyer on receipt of the price of the goods and only in case of default of the buyer it was to be returned to the seller. The seller also sent a letter to the buyer direct intimating that the goods had been sent by the Parbhat Transport Company and the receipt from that Company had been sent to the Punjab National Bank and requested the buyer to pay the price to the Bank and take delivery of the goods. Moreover the seller made an entry in his account books showing that under the contract the price of the goods was due from the buyer. Thus the seller's conduct shows that according to him he had performed all the terms of the contract and all that remained was to realise the price of the goods from the buyer. In these circumstances the irresistible conclusion is that the property in the goods passed to the buyer when they were sent to the Transport Company and that the fact that receipt was made deliverable on seller's orders merely retained seller's lien. In this view of the matter, it must be held that the goods of the buyer were lost in transit and the seller is entitled to their price.

Before concluding this judgment, I may say that a great many decisions were brought to our notice by the learned counsel for both sides and it was not easy to reconcile them all, but I have not considered it

necessary to refer to them as, in my opinion, the ques- Firm Paharia
tion involved in this appeal depends on the intention Mal-Ram
of the parties expressed in the contract or to be in- Sahai
ferred therefrom or from the conduct of the parties v.
and relying on these matters I have come to the con- Birdhi Chand
clusion that the decision of the learned Single Judge Jain and Sons
decreeing the plaintiff's suit is correct. _____
Bishan Narain,
J.

For the reasons given above this appeal fails and is dismissed. In the circumstances of the case, however, I order that the parties shall bear their own costs throughout.

BHAHDARI, C. J.—I agree.

Bhandari, C.J.

CIVIL WRIT

Before Bhandari, C.J. and Bishan Narain, J.

SHRI BISHAN LAL KUTHIALA,—*Petitioner*

v.

THE INCOME-TAX OFFICER, SPECIAL CIRCLE,
AMBALA CANTONMENT, ETC.,—*Respondents*

Civil Writ No. 326 of 1955.

Income Tax Act (XI of 1922)—Sections 5(7A) and 22(4)—Whether repugnant to the provisions of Article 14 of the Constitution and hence ultra vires.

1956

March 19th

Held, that the provisions of section 5(7A) of the Income-tax Act which empower the Commissioner to set up a Special Circle, are not repugnant to the provisions of Article 14 of the Constitution, first, because the powers exercised by the Income-tax Officer of a Special Circle are not different in any way from those exercised by an Income-tax Officer of another circle and secondly, because an assessee who is aggrieved by his order has the same rights of appeal, revision and review as are available to the other assessees.

Held, that section 22(4) of the Income-tax Act, as amended, is not repugnant to Article 14 of the Constitution. It merely provides that before an Income-tax Officer proceeds to call for the world income of an assessee, he should