

PETITIONER:

HAJI MOHAMMED ISHAQ MD. SK. MOHAMMED & 3 OTHERS

Vs.

RESPONDENT:

MOHAMED IQBAL & MOHAMED ALI & ORS.

DATE OF JUDGMENT 04/04/1978

BENCH:

UNTWALIA, N.L.

BENCH:

UNTWALIA, N.L.

SARKARIA, RANJIT SINGH

KAILASAM, P.S.

CITATION:

1978 AIR 798

1978 SCR (3) 571

1978 SCC (2) 493

ACT:

privity of Contract-Conduct of Parties-Plaintiffs supplying goods on his own direct-Defendants also accepting the goods and making payments as well-Whether there is an implied contract and a privy.

Pleadings-Amendment of Pleadings not permissible if it could completely change the original defence-civil Procedure Code Order VI Rule 17 Additional evidence also not permissible in such cases-Order XLI Rule 27 Civil Procedure Code.

HEADNOTE:

The Plaintiff respondent is a registered Partnership firm carrying on business at Nipani. 630 bags of tobacco were despatched by the plaintiff, between the 11th and 21st January 1952, to the appellant-defendants who were old customers of one Sri Abdul Rahim Nabisaheb Bhagwan, who "prevailed upon the plaintiff to supply the tobacco to the defendants and also said that he would see that the defendants duty paid (Sic) for the same". The consignor in all the Railway Receipts except one was one Sri G. K. Manavi and in one railway receipt of 129 bags, the consignor was the plaintiff firm. The consignees were self. The railway receipts were endorsed to defendants' firm. The goods were accepted by the defendants. On demands being made from time to time for payment of the price, the defendants paid Rs. 20,000/- by four cheques of Rs. 5000/- each. Later they gave ten more cheques of Rs. 49000/- out of these, five cheques of the amount of Rs. 25,000/- were honoured, but the rest of the cheques for Rs. 24,000/- were dishonoured. Small sums were further paid by the defendants in cash. The balance of the price which remained due from them was Rs. 75,477-12-9. Adding interest to the said amount, the total amount came to Rs. 90,102-12-9. Remitting Rs. 102-12-9 the plaintiff filed a suit for the recovery of the balance of Rs. 90,000/-. The pleas in the written statement were that there was no privity of contract between them and the plaintiff, the orders were placed for the supply of 630 bags of tobacco with Sri Abdul Rahim Nabi Saheb Bhagwan who handed over a Bijak and not with the Plaintiff for Rs. 1,21,154-12-9, all the cheques were drawn in the name of Rahim and were handed over to him and the payment of the

cheques were stopped on account of the slack season. The Trial Court decreed the suit on its finding that the goods were sold to the defendants by the Plaintiff through Rahim who acted as the defendants' agents, and thus there was a privity of contract established between the plaintiff and the defendants. The defendants took up the matter in appeal to the High Court and after three years, they filed applications seeking amendment of their written statement and permission of the Appellate Court to adduce additional evidence under Order 41 Rule 27 Civil Procedure Code. The High Court by its order dated 10-10-58 allowed the appeal, set aside the judgment and remitted back the case to the trial Court to retry it after giving opportunities to the plaintiff to adduce further evidence and left the matter of amendment of the written statement and the additional evidence to that Court. In appeal to this Court and by a consent order made on the 29th March 1963, the order of the High Court was set aside and it was asked to dispose of the applications of the defendants for permission to amend their written statement and to adduce additional evidence and thereafter to decide the appeal on the evidence adduced in the trial court. The High Court by its present judgment under appeal dt. 18-9-1964, declined the prayers of the defendants for amendment of their written statement and adducing additional evidence. The High Court did not agree with the finding of the Trial Court that Rahim acted as the agent of the defendants but held that the defendants

572

had originally placed their orders for supply of tobacco with Rahim, but a new implied contract came into existence by conduct of the parties inasmuch as the goods were actually supplied by the plaintiff on its own account; were accepted as such by the defendants who became liable to pay the price of the goods to them.

Dismissing the appeals by certificate the Court

HELD : 1. The appellants' appeal was completely devoid of substance.

[574 H. 574 A]

(a) In view of the pleadings between the parties and the evidence adduced the finding of the Trial Court that Rahim acted as the agent of the defendants was not sustainable.

[575 D-E]

(b) The plea pleaded was as it is called in law, an implied contract brought about by the conduct of the parties namely, the supply of the goods by the plaintiff and their acceptance by the defendants. It was a pleading of direct contract of sale between the plaintiff and the defendants brought about by their conduct. A contract of sale means an agreement to sell or sale. [576 C-D]

(e) Initially the express contract for supply of the goods was between the defendants and Rahim. The fact whether Rahim acted as the plaintiff's agent or the defendants' is immaterial. What is clear is that the orders placed with Rahim were in fact executed by the plaintiff by supply of goods to the defendants. It was so done on account of the plaintiff from its own warehouse as well as from Manavi's warehouse, Defendants by their clear conduct of accepting the goods and never repudiating any of the numerous letters and telegrams of the plaintiff demanding the money from them on the assertion that the goods were despatched by the plaintiff and the defendants should pay the money, clearly showed that a direct contract which in law is called an implied contract by conduct was brought about between them. Whatever may be the jural relationship between the plaintiff and Rahim, Rahim and the defendants and in whatever manner

he acted as a go-between-man, between the plaintiff and the defendants, what is clear is that eventually and finally the supply of the goods by the plaintiff was to the defendants on its own account and not on account of Rahim. The defendants clearly and unerringly accepted the goods as such and became liable to pay the whole of the price directly to the plaintiff. A part was paid and the liability to pay the balance was definitely incurred by them. [577 D-G]

2. The High Court has rightly refused the prayers of the appellants. The amendment of the written statement sought was on such facts which, if permitted to be introduced by way of amendment, would have completely changed the nature of their original defence. It would have brought about an entirely new plea which was never taken up either at the time of the dealings between the parties or in the original pleadings. The additional evidence sought to be adduced was in respect of the facts stated in the amendment petition. The High Court rightly rejected all those petitions. [575 B-D]

JUDGMENT:

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2468 of 1968.

From the Judgment and Decree dated 18-9-1964 of the Mysore High Court in Regular Appeal No. (B) of 1956.

Dr. Y. S. Chitale, Haji Sheikh, A. H. Safi, K. J. John and D. IV. Mishra for the appellants.

R.B. Datar and Farhat (Miss) Qadri for the Respondent.

The Judgment of the Court was delivered by UNTWALIA J. This is a defendant's appeal by certificate. It arises out of a suit filed by the plaintiff-respondent in the Court of the Civil Judge, Belgaum in the State of Karnataka for recovery of Rs. 90,000/the balance of the price of 630 bags of tobacco supplied by it to the defendants. The suit was decreed by the Trial Court and finally the decree has been affirmed by the Karnataka High Court.

The plaintiff is a Registered Partnership firm carrying on business at Nipani, District Belgaum. Defendant No.1 is the father of defendants 2 to 4. They also carry on a partnership business under the name and style of Haji Mohammed Ishaq Mohammed Gulam Saheb. They manufacture Bidi in their factory known as the Modern Bidi Factory and have their Head Office in Katni in the State of Madhya Pradesh. The case of the plaintiff in the plaint was a simple one. It despatched by Railway 630 bags of tobacco between the 11th and 21st January, 1952 from Nipani to Katni. The consignor in all the Railway Receipts except one was one Shri G. K. Manavi and in one. Railway Receipt of 129 bags the consignor was the plaintiff firm. The consignees were self. The Railway Receipts were endorsed to the defendants' firm by the consignors. Shri Babalal, one of the partners of the plaintiff firm, went personally to Katni, with the Bijak No. 12 dated 12-11-1952 and handed over two Railway Receipts and the, Bijak for the total amount of Rs. 1,21,154.12.9 to the defendants. The other Railway Receipts were sent by the plaintiff to the defendants by Registered post. The goods were accepted by the defendants. On demands being made from them from time to time for payment of the price, the defendants paid Rs. 20,000/- by four cheques of Rs. 5,000/- each. Later they gave ten more

cheques of Rs. 49,000/-, out of which, five cheques of the amount of Rs. 25,000/- were honoured but the rest of the cheques for Rs. 24,000/- were dishonored. Small sums were paid by the defendants in cash. The balance of the price which remained due from them was Rs. 75,477.12.9. Adding interest to the said amount, the total amount came to Rs. 90,102.12.9. The claim in the suit was for the round figure of Rs. 90,000/- remitting Rs. 102-12.9. In paragraph 5 of the plaint, however, it was mentioned :

"The Defendants are old customers of one Shri Abdul Rahim Nabisaheb Bagwan.

He prevailed upon the plaintiff to supply the tobacco to the Defendants and also said that he would see that the Defendants duly paid for the same. To some extent he has helped the plaintiff in the recovery of their dues from Defendants."

In the main, the pleas set up by the defendants in their written statement were that there was no privity of contract between them and the plaintiffs they had placed orders for the supply of 630 bags of tobacco with Shri Abdul Rahim Nabisaheb Bagwan and he had handed over a Bijak, and not the plaintiff for the amount of Rs. 1,21,154.12.9. The cheques numbering 14 in all were drawn in the name of Rahim and were handed over to him. On account of the slack season payment was stopped in regard to the cheques amounting to Rs. 25,000/- The plaintiffs allegation that Babalal, one of its partners had come to

574
Katni and handed over certain Railway Receipts and the Bijak, was denied. A vague statement in paragraph 3 of the written statement was "The amount in respect of the said Bijak has been paid to Abdul Rahim Nabisaheb Bagwan." No details as to the dates, manner or amounts of payments of the balance of the amount to Rahim were mentioned in the written statement.

The Trial Court decreed the suit on its finding that the goods were sold to the defendants by the plaintiff through Rahim who acted as the defendants' agent and thus there was a privity of contract established between the plaintiff and the defendants. The judgment of the Trial Court was delivered on the 31st of October, 1955 The defendants took up the matter in appeal to the High Court. After about three years, they filed applications in the High Court in the months of September and October, 1958 seeking amendment of their written statement and permission of the Appellate Court to adduce additional evidence under Order 41 Rule 27 of the Code of Civil Procedure. The High Court in the first instance disposed of the appeal by its judgment and order dated the 10th of October, 1958. It set aside the judgment of the Trial Court, remitted back the case to it to retry it after giving opportunities to the plaintiff to adduce further evidence, and left the matter of amendment of the written statement and the additional evidence to that Court. Plaintiff came up to this Court and by a consent order made on the 29th March, 1963 the order of the High Court was set aside and it was asked to dispose of the applications of the defendants for permission to amend their written statement and to adduce additional evidence and thereafter to decide the appeal on the evidence as adduced in the Trial Court. The present judgment under appeal was delivered by the High Court on the 18th of September, 1964. It declined the prayers of the defendants for amendment of their written statement and adducing additional evidence. The High Court has upheld the decree of the Trial Court but on somewhat

different grounds. The High Court did not agree with the finding of the Trial Court that Rahim acted as the agent of the defendants. It held that the defendants had originally placed their orders for supply of tobacco with Rahim but a new implied contract came into existence by conduct of the parties inasmuch as the goods were actually supplied by the plaintiff on its own account; were accepted as such by the defendants who became liable to pay the price of the goods to them. The vague case of the defendants that they had paid the price to Rahim remained unsubstantiated and further there was neither any case nor any evidence to show that Rahim in his turn had paid to the plaintiff the balance of the price of the goods.

Mr. Y. S. Chitale, learned counsel for the appellants took us through the relevant pieces of documentary and oral evidence; the pleadings of the parties and pressed their applications for amendment of the written statement and adducing of additional evidence. He further submitted that the High Court has found a new case for the plaintiff which was never pleaded and the judgment of the High Court as it is, fit to be interfered with on that account too. In our opinion the appellants'

575
appeal was completely devoid of substance. We did not think it necessary even to call upon the respondents to reply to the appellants' argument.

Rahim was examined as a witness on behalf of the defendants in the Trial Court as DW 1 on the 12th of October, 1955 and after examining a few more witnesses the evidence of the parties was closed on that very date. Rahim made some strange and peculiar statements in his deposition in support of the defendants and introduced some entirely new facts which were never disclosed to the plaintiff in any of the letters written during the course of the business or in reply to the lawyer's notice or in their written statement. He introduced a story of some kind of partnership between him and one of the partners of the plaintiff and Manavi. Even then no prayer was made by the appellants in the Trial Court for amending their written statement or for permission to adduce any further evidence. About three years later, as stated above, they filed their applications in the High Court for the purposes aforesaid. In our judgment the High Court has rightly refused the prayers of the appellants. The amendment of the written statement sought was on such facts which, if permitted to be introduced by way of amendment, would have completely changed the nature of their original defence. It would have brought about an entirely new plea which was never taken up either at the time of the dealings between the parties or in the original pleadings. The additional evidence sought to be adduced was in respect of the facts stated in the amendment petition. The High Court rightly rejected all those petitions and we need not mention in any detail the reasons thereof.

We agree with the High Court that in view of the pleadings between the parties and the evidence adduced, the finding of the Trial Court that Rahim acted as the agent of the defendants was not sustainable. We further agree that the contemporaneous letters and telegrams exchanged between the defendants and Rahim in the months of November and December, 1951 did show that the defendants had originally placed orders for the supply of tobacco with Rahim. But even so, the stand of the defendants that the plaintiff had supplied the goods to them on Rahim's account and not on its own was rightly rejected by the High Court. While generally agreeing with it in its approach to the real points at issue

in the case, we will very briefly indicate our difference of approach in regard to a few minor matters.

The learned Judge of the High Court who delivered the leading judgment in the appeal is not quite correct in saying that the plaint averments do not show how the contract between the plaintiff and the defendants was formed; whether there was any express contract or an implied contract to be inferred from the conduct of the parties. It is also not quite accurate to say that what was required to be found was whether an implied contract to pay for the goods supplied could be inferred from the facts proved in the case. It seems to us that it is because of this reason that the other learned Judge constituting the Bench finally hearing the appeal concurred in the order in the following terms :

576

"I agree with the Order proposed by my learned brother. On the facts found by him, with which I agree, the inference of an implied contract is obvious."

As already stated the simple case of the plaintiff is that it had supplied 630 bags of tobacco to the defendants; received only a part of its price and the balance of about Rs. 90,000/- remained due. It is true that no express contract, as understood in law, was pleaded in the plaint. But what was clearly pleaded was supply of goods by the plaintiff on its own account; acceptance of them by the defendants as such; part payment to the plaintiff and the balance remaining due to it. The case pleaded, therefore, was, as it is called in law, an implied contract brought about by the conduct of the parties, namely, the supply of the goods by the plaintiff and their acceptance by the defendants. In the 5th paragraph of the plaint, extracted above, what was stated was that the transaction of supply of goods by the plaintiff to the defendants was brought about through the instrumentality of Rahim as the defendants were his old customers and Rahim prevailed upon the plaintiff to supply the goods (on credit) to them. He helped the plaintiff in the recovery of their dues from the defendants to some extent. The plaintiff was entitled for the recovery of the balance. It was thus a pleading of direct contract of sale between the plaintiff and the defendants brought about by their conduct. A contract of sale means an agreement to 'sell or sale'.

It is not necessary to encumber this judgment with unnecessary citations of the case law on the point. We may with advantage only quote a passage from Chitty on Contracts, twenty-third edition, pages 9-10, para 12 :

"Express and implied contracts. Contracts may be either express or implied. The difference is not one of legal effect but simply of the way in which the consent of the parties is manifested. Contracts are express when their terms are stated in words by the parties. They are often said to be implied when their terms are not so stated, as, for example, when a passenger is, permitted to board a bus; from the conduct of the parties the law implies a promise by the passenger to pay the fare, and a promise by the operator of the bus to carry him safely to his destination. There may also be an implied contract when the parties make an express contract to last for a fixed term, and continue to act as though the contract still bound them after the term has expired. In

such a case the court may infer that the parties have agreed to renew the express contract for another term. Express and implied contracts are both contracts in the true sense of the term, for they both arise from the agreement of the parties, though in one case the agreement is manifested in words and in the other case by conduct. Since, as we have seen, agreement is not a mental state but an act, an inference from conduct, it follows that the distinction between express and implied contracts has every little importance, even if it can be said to exist at all."

577

We found absolutely no substance in the argument of the appellants to assail the finding of the High Court that the plaintiff had supplied the goods on its own account to the defendants and that plaintiff's partner Babalal had handed over the Patti No. 12 (Bijak) Ext. 85 to the defendants at their place of business at Katni along with the two Railway Receipts. The High Court has further found that the subsequent Railway Receipts were sent by registered post by the plaintiff and in several letters and telegrams the plaintiff demanded the payment of the price of the goods supplied from the defendants. No where Rahim was justifiably in the picture. The High Court has further pointed out the reason as to why about 501 bags of tobacco were supplied from the warehouse of Manavi who became the consignor in the several Railway Receipts, Manavi supplied the goods on plaintiff's account. It has further been found that the cheques drawn by the defendants in the name of Rahim were all endorsed by him in favour of the plaintiff and ultimately to the knowledge of the defendants the payment of the part of the price was by the defendants to the plaintiff. No goods were supplied on account of Rahim. No part payment was really and actually made to him and the defendants were liable to pay the balance of price to the plaintiff.

On the facts found, there is no difficulty in assuming or even inferring that initially the express contract for supply of the goods was between the defendants and Rahim. The fact whether Rahim acted as the plaintiff's agent or the defendants' is immaterial. What is clear is that the orders placed with Rahim were in fact executed by the plaintiff by supply of goods to the defendants. It was so done on account of the plaintiff from its own warehouse as well as from Manavi's warehouse. Defendants by their clear conduct of accepting the goods and never repudiating any of the numerous letters and telegrams of the plaintiff demanding the money from them on the assertion that the goods were despatched by the plaintiff and the defendants should pay the money, clearly showed that a direct contract which in law is called an implied contract by conduct was brought about between them. Whatever may be the jural relationship between the plaintiff and Rahim, Rahim and the defendants and in whatever manner he acted as a go-between-man, between the plaintiff and the defendants, what is clear is that eventually and finally the supply of the goods by the plaintiff was to the defendants on its own account and not on account of Rahim. The defendants clearly and unerringly accepted the goods as such and became liable to pay the whole of the price directly to the plaintiff. A part was paid and the liability to pay the balance was definitely incurred by them.

For the reasons stated above, we hold that there is no

substance in this appeal. It is accordingly dismissed with costs.
S.R.

Appeal dismissed.

578

JUDIS