PETITIONER:
P.S.N.S. AMBALAVANA CHETTIAR AND CO. LTD AND ANR.

Vs.

RESPONDENT:
EXPRESS NEWSPAPERS LTD., BOMBAY

DATE OF JUDGMENT:
10/11/1967

BENCH:
BACHAWAT, R.S.
BENCH:
BACHAWAT, R.S.
WANCHOO, K.N. (CJ)
MITTER, G.K.

CITATION:
1968 AIR 741 1968 SCR (2) 239

ACT:
Indian Sale of Goods Act (3 of 1930), ss. 18 and 54(2)--Sale of unascertained goods--When property passes--Repudiation of contract-Vendor's right of resale when arises.
Indian Contract Act (9 of 1872), ss. 73 Illus. (c) and 176 --Scope of.

HEADNOTE:
On 13th November 1951, the respondent agreed to sell to the appellants a stock of 415 tons of newsprint in sheets then lying in the respondent's godown. On 26th November, the parties varied the contract by agreeing that the appellants would buy only 300 tons out of the. stock of 415 tons. After taking delivery of a part of the newsprint, the appellants refused to take delivery of the balance and repudiated the contract on 29th March 1952. On 21st April the respondent, after notice to the appellants. resold the balance at a lesser rate. The suit flied by the respondent claiming from the appellants the deficiency on resale was decreed.
In appeal to this Court,
Held: (1) The claim was unsustainable.
(a) As the respondent was not a pledge of the newsprint, the respondent had no right to sell the goods under s. 176 of the Indian Contract Act. 1872. [242H]
(b) A seller can claim as damages the difference between the contract price and the amount realised on resale of the goods where he has the right of resale under s.. 54-(2) of the Indian Sale of Goods Act. 1930. But this statutory power of resale arises only if the property in the goods has passed to the buyer subject to the lien of the unpaid seller. Under s. 18 of the Sale of Goods Act. it is a condition precedent to the passing of property under a contract of sale that the goods are ascertained. In the present case, when the contract was originally entered into for the sale of 415 tons there was an unconditional contract for the sale of specific goods in a deliverable state and the property in those goods then passed to the appellants. But the effect of the variation was not to make the appellants and respondent joint owners of the stock of 415 tons. Nor was it merely to relieve the appellants from

their liability to take 115 tons. The effect was to annul the passing of the property. so that. as from 26th November the property in the entire stock of 415 tons belonged to the respondent. The result was that in place of the original contract for sale of specific goods a contract for sale of unascertained goods was substituted. No portion of the stock of 415 tons was appropriated to the contract by the respondent with the appellants' consent before the resale. Therefore, on the date of resale. the property in the goods had not passed to the buyer (appellants) and the respondent had no right to resell.1243A. E. F-H; 244A-B] Gillett v.Hill,, (1834) 2 C & M 535; 149 E.R. 871, applied. (2) As no time was fixed under the contract of sale for acceptance of the goods, under s. 73 of the Indian Contract Act, the respondent was entitled to the difference between the contract price and the market price on 29th March 1952, the date of repudiation, as damages. [244E-C]
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JUDGMENT:
CIVIL APPELLATE JURISDICTION: Civil Appeals Nos. 165 and 166 01 1965.

Appeals from the judgment and decree dated May 7, 1960 of the Madras High Court in O.S.A. Nos. 25 and 52 of 1956.

S.V. Gupte, Naunit Lal and R. Thiagarajan, for the appellants (in both the appeals).

N.C. Chatterjee, S. Balakrishnan for R. Ganapathy lyer, for the respondent (in both the appeals).

The Judgment of the Court was delivered by

Bachawat, J. The dispute arises out of a contract between the appellants and the respondent entered into on November 13, 1951. The terms of this contract were recorded in writing in the form of a letter written by the respondent to appellant No. 1 and set out below:

"Messrs. P.S.N.S. Ambalavana Chettiar and Company Ltd.,
260, Angappa Naicken Street, Madras.
Dear Sirs,
We confirm having purchased from you and the Madras Paper Marketing Company, Madras, 500 tons of Russian Newsprint as per the following description :--
About.70 per cent in reels of 34 inches width.
" 15 per cent in reels of 22 inches width.
" 15 per cent in reels of 36 inches width.
at annas 9 per lb. Ex-Wharf Bombay duty, etc., paid. The buyers are to take delivery within four days of the offer of delivery. Any wharfage, etc., up to the fourth day of the offer of delivery will be on seller's account and thereafter on buyer's account.
We have also sold you about 415 tons of Russian newsprint in sheets in size of about 30"X 42" (760 mm X 1085 mm) ex-godown, Madras at Re. 0-9-6 per lb.
We will keep the stock of sheets in our godown on your account free of rent.
We shall advance you moneys against this

newsprint at annas 8 per lb. This advance will carry interest at 5 per cent per annum. We will also charge you the exact amount of insurance which we pay to our Insurance Company against the goods.

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We shall pay Rs. 5,60,000 to your Bankers in Bombay and take delivery of the 500 tons of newsprint from the harbour in Bombay. Accounts wilt be made on the basis of the above arrangement and whatever one party is liable to pay to the other will be adjusted subsequently.

Thanking you,

Yours faithfully,
For Express Newspapers Limited
Director."

The document shows that the respondent agreed to buy from the appellants 500 tons of Russian newsprint in reels at 9 annas per lb., ex-wharf Bombay, and to take delivery of the goods on payment of Rs. 5,60,000. At the same time, the appellants agreed to buy from the respondent 415 tons of Russian newsprint in sheets then lying in a godown in Madras at 9 annas 6 pies per lb. upon the term that the appellants would pay the insurance charge and also interest at 5 per cent per annum on an amount equivalent to the price of the goods calculated at 8 annas per lb. The understanding was that the appellants would within a reasonable time take delivery of the goods bought by them in instalments and the accounts would be finally adjusted on the completion the deliveries. It may be mentioned that appellant No. 2 carried on business under the name and style of Madras Paper Marketing Company.

On November 26, 1951, the parties orally agreed that instead of 500 tons the respondent would buy 300 tons of newsprint in reels and that instead of 415 'tons the appellants would buy 300 tons of newsprint in sheets and the terms of the contract dated November 13, 1951 would stand varied accordingly.

On December 5, 1951, the respondent took delivery of 300 tons of newsprint in reels on payment of Rs. 3,18,706-9-10 and a sum of Rs. 57,816-13-2 remained due to the appellants on account of the price of these goods. From November 29, 1951 up to February 27, 1952, the appellants took delivery of 122324 lbs. of newsprint in sheets on payment of.Rs. 63,032-15-9 to the respondent. Subsequently, the appellants refused to take 'delivery of the balance 547501 lbs. of newsprint in sheets. Counsel for the parties agreed before us that March 29, 1952 was the date when the appellants repudiated the contract. On April 21, 1952 after giving notice to the appellants the respondent resold the balance goods to one G.R. Lala at 61/2 annas per lb.

On April 18, 1952, the appellants filed in the High Court of Madras C.S. No. 175 of 1952 claiming from the respondent

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Rs. 57,816-13-2 on account of the balance price of 300 tons of newsprint in reels and interest thereon. The respondent admitted the claim for the balance price. On July 30, 1952, the respondent filed in the High Court of Madras C.S. No. 262 of 1952 claiming a decree for Rs. 62,266-13-2 on account of the balance price of 122324 lbs., the deficiency 'on resale of 547501 lbs. of the newsprint in sheets, interest and insurance charges after setting off the sum of Rs. 57,816-13-2 due to the appellants. The principal defence of the appellants was that the contract with regard to 415 tons

of newsprint in sheets was cancelled in November, 1951 and that appellant No. 2 was not a party to this contract. The appellants also denied the factum and validity of the resale. The two suits were tried. by Rajagopala Ayyangar, J. He dismissed C.S. No. 175 of 1952 and decreed C.S. No. 262 of 1952. From these two decrees, the appellants filed two appeals in the High Court of Madras. A Division Bench of the High Court dismissed the two appeals. The present appeals have been filed on certificates granted by the High Court.

The two Courts concurrently found that (1) appellant No. was a party to the contract of purchase of 415 tons of newsprint in sheets, (2) on November 26, 1951 the parties orally agreed that instead of 415 tons the appellants would buy 300 tons of the newsprint and (3) there was no cancellation of the contract as alleged by the appellants. These findings are not challenged. The two Courts concurrently found that the resale held on April 21, 1952 was genuine and was effected at a proper price on due notice and after proper advertisement. Mr. Gupte attempted to challenge these findings, but we see no reason to interfere with them. The principal argument advanced by Mr. Gupte was that the property in the goods resold on April 21, 1952 had not passed to the appellants and the resale was consequently invalid. We are inclined to accept this argument.

It is to be noticed that the contract did not envisage any loan of money by ,the respondent to the appellants on the security of the newsprint in sheets. The payment of Rs. 3,18,706-9-10 was made by the respondent towards part discharge of its liability for the price of the newsprint in reels. No. doubt, the contract stated: "We shall advance you moneys against this newsprint at annas 8 per lb. This advance will carry interest at 5 per cent per annum." But the real import of this clause was that the appellants would pay interest at 5 per cent per annum on an amount equivalent to the price of the newsprint in sheets calculated at 8 annas per lb. The respondent was not a pledge of the newsprint in sheets and had no right to sell the goods under s. 176 of the Indian Contract Act, 1872. The real question is whether the respondent had the right to resell the goods under s. 54(2) of the Sale of Goods Act, 1930.

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The seller can claim as damages the difference between the contract price and the amount realised on resale of the goods where he has the right of resale under s. 54(2) of the Sale of Goods Act. The statutory power of resale under s. 54(2) arises if the property in the goods has passed to the buyer subject to the lien of the unpaid seller. Where the property in the goods has not passed to the buyer, the seller has no right of resale under s. 54(2). The question is whether the property in the 300 tons of newsprint in sheets had passed to the appellants before the resale.

On November 13, 1951, the respondent agreed to sell to the appellants tile stock of 415 tons of newsprint in sheets then lying in the respondent’s godown in Madras. There was an unconditional contract for the sale of specific goods in a deliverable state and the property in the goods then passed to the appellants. But on November 26, 1951, the contract was varied in a material particular. The parties, agreed that the appellants would buy only 300 tons of the stock of 415 tons of newsprint then lying in the respondent’s godown. The result was that in place of the original contract for sale of specific goods a contract for sale of unascertained goods was substituted.

Rajagopala Ayyangar, J. held that the effect of the

variation of the contract on November 26, 1951 was that the appellants and the respondent became joint owners of the stock 45 tons. In our opinion, this was not the correct legal position. The parties did not intend that the appellants would buy undivided share in 415 tons of newsprint. On November 26, 1951 the bargain between the parties was that the appellants would buy and the respondent would sell 300 tons out of the larger stock of 415 tons.

The appellate Court held that the property in the entire 415 tons passed to the appellants who were subsequently reviewed from their liability to take 115 tons and that the respondent could resell any 300 tons out of the larger stock of 415 tons. We are unable to accept 'this line of reasoning. It is true that originally the property in the entire 415 tons had passed to the appellants. But the result of the variation of the contract was to annul the passing of property in the goods. The effect of the bargain on November 26, 1951 was that the respondent would sell and deliver to the appellants any 300 tons out of the larger stock of 415 tons. As from November 26, 1951, the property in the entire stock of 415 tons belonged to the respondent. The parties did not intend that as from November 26, 1951 the property in any individual portion of the stock of 415 tons would remain vested in the appellants.

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Section 18 of the Sale of Goods Act provides that where there is a contract for the sale of unascertained goods no property the goods is transferred to the buyer unless and until the goods are ascertained. It is a condition precedent to the passing property under a contract of sale that the goods are ascertained. The condition is not fulfilled where there is a contract for sale of a portion of a specified larger stock. Till the portion is identified and appropriated to the contract, no property passes to the buyer. In Gillett v. Hill(1), Bayley, B. said:

> "Where there is a bargain for a certain quantity extra greater quantity, and there is h power of selection in the vendor to deliver which he thinks fit, then the right to them does not pass to the vendee until the vendor has made his selection, and trover is not maintain able before that is done. If I agree to deliver a certain quantity of oil as ten out of eighteen tons, on one can say Which part of the whole quantity I have agreed to deliver until a selection is made. There is no individuality until it has been divided."

No portion of 415 tons of the newsprint lying in the respondent's godown was appropriated to the contract by the respondent with the appellants's consent before the resale. On the date of the resale, property in the goods had not passed to. the buyer Consequently, the respondent had no right to resell the goods under s. 54(2). The claim to recover the deficiency on resale is not suitable.

The respondent to claim as damages the difference between the contract price and the market price on the date of the breach. Where no time is fixed under the contract of sale for acceptance of the goods, the measure of damages is prima facie the difference between the contract price and the market price on the date of the refusal by the buyer to accept the goods, see Illustration (c) to s. 73 of the Indian Contract Act. In the present case, no time was fixed in the contract for acceptance of the-goods. On March 29,

1952, the appellants refused to accept the goods. The respondent is entitled to the difference between the contract price and the market price on March 29, 1952. Counsel for both parties requested us that instead of remanding the matter we should assess the damages on this basis and finally dispose of the matter. We have gone through the materials on the record and with the assistance of counsel, we assess the market price of the Russian newsprint in sheets on March 29, 1952 at 8 annas per lb. Counsel on both sides agreed to this assessment. The claim of the respondent for Rs. 6,7)8-5-1 on account of interest and Rs. 1,119-6-0 for insurance charges is admitted

(1) (1834) 2 C&M. 535:, 149 E.R. 871,873.

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before us by Mr. Gupte. On this basis, the final position is as follows:

	(Rupees)
Price of 122324 lbs. at 91 1/2 annas per lb. less Rs. 63,032-15-9	9,596-14-3
Difference on 547051 lbs.at 11/2 annas per lb.	51,286-0-6
Interest	6,795-5-1
Insurance charges	1,119-6-0
Total amount due to the respondent	68,797-9-10
Deduct amount due to the appellants	57,816-13-2
Balance due to the.respondent	10,980-12-8

In the result, Civil Appeal No. 165 of 1965 is allowed in part, the decrees passed by the Courts below are varied by substituting therefore a decree in favour of the respondent against the appellants for a sum of Rs. 10,980-12-8 with interest thereon at 6 per cent per annum from July 30, 1952. The decrees for 'costs passed by the Courts below are affirmed. There will be no order as to costs in this Court. Civil Appeal No. 166 of 1965 is dismissed. No order as to cost thereof.

V.P.S. C.A. 165 of 1965 allowed in part.
C.A. 166 of 1965 dismissed.

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