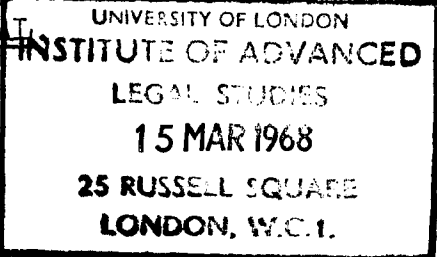


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1967/4

IN THE PRIVY COUNCILNo 37 of 1965ON APPEALFROM THE BRITISH CARIBBEAN COURT OF APPEALB E T W E E N:

1. R. P. DOOBAY
2. N.P. DOOBAY and
3. JAISRI RAN, jointly and severally (Defendants) Appellants

- and -

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MOHABEER

(Plaintiff)
Respondent

CASE FOR THE RESPONDENT

Record

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|----|--|---|
| 20 | <p>1. This is an appeal, by leave of that Court, from a Judgment of the British Caribbean Court of Appeal delivered on the 5th April 1965 and the Order of the same date made pursuant thereto allowing an appeal from the Judgment of the Supreme Court of British Guiana (Mr Justice Crane) delivered on the 5th May 1964 and the Order entered thereon dated 8th June 1964 whereby it was adjudged and ordered that the Appellants should pay the Respondent the sum of \$ 9,500 with costs on the claim in this action and that the Respondent should pay the Appellants the sum of \$ 3,500 with costs on the counterclaim therein. By its Judgment and Order the Court of Appeal affirmed the Judgment on the claim with costs but varied the order on the Counterclaim by substituting the sum of \$ 240 for the sum of \$ 3,500 but making no order as to the costs of appeal on the counterclaim.</p> | <p>p.40
pp 33 - 36
p 37
pp 20 - 29
p 29</p> |
| 30 | <p>2. By a written hire-purchase agreement dated 27th September 1961 the Appellants agreed</p> | <p>p 36
p 37
pp 41 - 46</p> |

Record

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to hire from the Respondent a rice mill at a total hire purchase price of \$ 14,500 payable by instalments of \$ 3,000 down and 3 further instalments of \$ 2,000 \$ 2,000 and \$ 7,500 payable on specific dates before 1st December 1962.

pp 1 - 3

pp 9 - 11

pp 10 - 11

pp 6 - 7

3. The Appellants paid the first instalment of \$ 3,000 and a further instalment of \$ 2,000 but thereafter made no further payments and on the 7th December 1962 the Respondent by specially indorsed writ claimed the outstanding balance of \$ 9,500 as the price of goods sold and delivered. By an amended Statement of Claim the Respondent claimed the said sum as being the balance of the amount due and owing under the said hire purchase agreement the said amendment being contained in paragraph 4 of the amended Statement of Claim.

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4. By their Defence and Counterclaim dated 8th April 1963 the Appellants admitted entering into the said hire purchase agreement and alleged that the Respondent had covenanted that the said mill was in order and could produce 100 bags of rice per day, that the Respondent was to supply further parts for the said mill and that the Respondent undertook to get his expert to rectify the said mill. The Appellants alleged that the Respondent was guilty of breach of warranty and counterclaimed damages being

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(1) \$ 9,800 damages for breach of the agreement or alternatively

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(2)(a) \$ 5,000 paid to the Respondent under the said agreement.

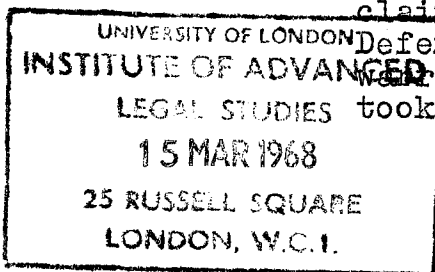
(b) \$ 1,500 the cost of installation of the said mill

(c) \$ 3,300 the cost of an engine to propel the said mill.

p 8

5. By the Reply and Defence to Counterclaim the Respondent joined issue upon the Defence and denied that he was in breach of warranty and upon these pleadings the trial took place.

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5. At the trial on the 2nd April 1964 the learned Trial Judge ruled that it was for the Appellants to prove the alleged breach of warranty the other material issues being admitted.

7. Evidence in support of the Appellants case was given by the First named Appellant, by one Angus William Whyte, and by one Birjune Algoo. The Respondent called no evidence.

pp 12 - 16
pp 16 - 18
p 18

10 8. The First Appellant's evidence was to the effect that in September 1961 he inspected the said mill with the said Whyte, that the said mill was not working, that two experts would be coming to examine the said mill and to put it in working order and that in reliance on the fact that two experts would be coming to put it in order the Appellants agreed to hire purchase the said mill. He alleged that the cost of installing the said mill on concrete foundations was \$ 1,500 and that
20 \$ 3,519. 95. (as set out in exhibit A) and that a few months later he paid the first instalment of \$ 2,000 but that prior to the said payment the Respondent had assured him on a ferry boat that the experts were coming to repair the said mill. He further said that he bought a pulley for \$ 137 to get the said mill to work but that it never did so and that he offered to return the said mill to the Respondent who refused to accept it back.
30 He finally alleged that the said mill worked but broke up the rice and that he had paid two men \$ 640 in respect of 80 bags of padi broken up at \$ 8 per bag. In cross examination he admitted that he had been milling rice since January 1962 but had never seen or operated a multi-staged mill of the type the subject matter of the action. He further admitted that the Appellants signed the hire purchase agreement about 2 weeks after the original agreement and after delivery of the said mill and that on the day he first inspected the
40 mill he signed the document exhibit C and that subsequently all the Appellants signed the document exhibit (O) and that he himself knew he was thereby signing to the terms of agreement for the said mill.

pp 13 - 16

p 41

pp 14 - 16

p 46

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9. The witness Whyte gave evidence that he inspected the said mill with the First named Appellant and that a demonstration was given but

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Record

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that part of the said mill was not working properly namely the padi-separator and that the Respondent agreed to put the said mill in working order and that the First-named Appellant agreed to buy it. The witness said that he installed the said mill in the First named Appellant's premises but that it would not work and further said that subsequently on a ferry boat, in the First named Appellant's presence, the Respondent said he expected to get two experts to look after the said mill. He agreed in cross-examination that the engine of the said mill turned over at the original inspection and after installation.

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P 18 10. The witness Algoo confirmed the First-named Appellant's evidence that he had been paid \$ 240 for 30 bags of damaged padi.

p 22. 39-47 11. On the evidence the Learned Judge found that at the time of inspection the Respondent did represent that he would procure an expert to repair the mill and that the mill was defective and that the representation was a substantive part of the contract and induced the making of it. The Learned Judge further found that there was an implied warranty that the said mill should be reasonably fit for the purpose for which it was hired and that the Respondent was in "breach of the implied warranty (or condition) of fitness". The Learned Judge found that the Appellants had affirmed the contract and waived any rights they might have had to repudiate the same but were entitled to sue for damages. Having rejected the claim for \$ 5,000 paid to the Respondent he rejected the claim for \$ 1,500 installation cost as not being properly established and rejected the claim for \$ 640 as not having been pleaded or claimed by amendment and because it was damage which the Appellants could have avoided. He allowed however the claim for \$ 3,500 (the cost of the engine).

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12. Both parties appealed against the order of the Learned Judge and The Court of Appeal affirmed the Learned Judge's findings as to liability holding that there was not a total failure of consideration but that the

Respondent was liable for damages for breach of warranty. The Court of Appeal further held that the cost of the installation of the said mill and the provision of an engine therefore were the responsibility of the Appellants in any event and that there was no claim made (on the pleadings or in evidence) for the cost of putting the said mill in working order. The Court of Appeal further held that the only item of damage proved by way of loss of custom was the \$ 240 refunded (to the witness Algoo) in respect of broken padi which sum was not claimed in the pleadings. The Court of Appeal therefore varied the order on the Counterclaim as hereinbefore set out.

p.36 24-27
p.36 27-31

13. The Respondent humbly submits that the Judgment of the Court of Appeal was correct and that the present appeal ought to be dismissed for the following among other

R E A S O N S

- 20 (1) BECAUSE the cost of the installation of the said mill was the Appellants responsibility in any event, whether or not there was a breach of warranty, and was not damage flowing from such a breach.
- (2) BECAUSE the cost of the provision of an engine to run the said mill was the Appellants responsibility in any event, whether or not there was a breach of warranty, and was not damage flowing from such a breach.
- 30 (3) BECAUSE the only item of damage proved to have been suffered by the Appellants was the sum of \$ 240 paid to the witness Algoo in respect of broken padi.
- (4) BECAUSE for the reasons therein given the Judgment of the Court of Appeal was correct.

ALUN T. DAVIES

J. G. LEACH

No. 37 of 1965

IN THE PRIVY COUNCIL

ON APPEAL

FROM THE BRITISH CARIBBEAN COURT

OF APPEAL

B E T W E E N:

1. R. P. DOOBAY
2. N. P. DOOBAY and
3. JAISRI RAM
jointly and
severally Appellants

- and -

MOHABEER Respondent

CASE FOR THE RESPONDENT

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Solicitors for the
Respondent.