THE FORD MOTOR COMPANY OF CANADA LIMITED ..... APPELLANT;

1967

*Mar. 3, 7
May 23

AND

STEVE HALEY ..... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

*Sale of goods—Warranty by manufacturer—Sale through intermediary—Failure of equipment in respect of fulfilment of warranty—Measure of damages—Onus to establish remaining value.*

Three trucks manufactured by the appellant company were purchased by the respondent to haul gravel on a construction job. To conform with the appellant's agency arrangements, the deal was put through in the name of an intermediary as vendor although the latter had no actual part or interest in the transaction. The deal was made directly with the appellant by its local truck and fleet sales manager. A finance company financed the purchase and subsequently sued the respondent on the contract and recovered judgment. In that action the respondent joined the appellant as a defendant by way of counterclaim, alleging breach of warranty and claiming damages.

Both the trial judge and the Court of Appeal found that the appellant had warranted that the trucks "would be satisfactory for hauling gravel". The trial judge found that although the respondent experienced difficulty with the trucks, the evidence did not establish that the trouble was due to defects in the trucks except as to one item for which he awarded the respondent damages in the sum of $1,500.

The Appellate Division reversed the trial judge as to two of the trucks and awarded the respondent damages in the sum of $23,177.52 being the price paid by the respondent for these two trucks. On appeal to this Court, the appellant argued that the onus was on the respondent to prove his damages as being the difference between the purchase price and the actual value of the trucks he got, there being some evidence that the two trucks in question, although unfit for the purposes for which they were purchased, had some merchantable value, and the appellant contended that it was incumbent on the respondent to establish that value in order to determine the amount of damages to which he was entitled.

*Held:* The appeal should be dismissed.

The Court agreed with the holding by the Court of Appeal that there was a complete failure of the trucks in respect of the fulfilment of the warranty that they "would be satisfactory for hauling gravel". The Court also agreed that the onus was on the appellant to establish the value, if any, remaining in the two trucks and that it had failed to do so. *Massey Harris Co. Ltd. v. Skelding*, [1934] S.C.R. 431, applied.

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*PRESENT: Abbott, Martland, Judson, Hall and Spence JJ.

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APPEAL from a judgment of the Supreme Court of Alberta, Appellate Division[1], allowing an appeal from a judgment of Manning J. Appeal dismissed.

*D. O. Sabey* and *C. D. O'Brien,* for the appellant.

*D. H. Bowen, Q.C.,* and *D. J. Horne,* for the respondent.

The judgment of the Court was delivered by

HALL J.:—The facts relative to this appeal are fully set out in the reasons for judgment of Johnson J.A. for the Appellate Division of the Supreme Court of Alberta[1]. To summarize, the respondent purchased three new Ford T850 Tandem Trucks manufactured by the appellant and in storage at Edmonton for a total of $39,566.87. To conform with the appellant's agency arrangements, the deal was put through in the name of Universal Garage as vendor although Universal Garage had no actual part or interest in the transaction. The deal was made directly with the appellant company by Mervyn Charles Noltie, its truck and fleet sales manager at Edmonton. The purchase was financed through Traders Finance Corporation Limited whose finance charge was $5,568.13, making the total payable by the respondent the sum of $45,135. Traders Finance subsequently sued the respondent on this contract and recovered judgment against him for $48,944.29 on July 10, 1962. In that action the respondent joined the appellant as a defendant by way of counterclaim, alleging breach of warranty and claiming damages in the sum of $21,000 and other relief. The trucks were purchased to haul gravel on the Cold Lake Airport construction job.

Both the learned trial judge and Johnson J.A. in the Appellate Division found that the appellant had warranted that the trucks "would be satisfactory for hauling gravel". The learned trial judge found that although the respondent experienced difficulty with the trucks, the evidence did not establish that the trouble was due to defects in the trucks except as to one item for which he awarded the respondent damages in the sum of $1,500.

[1] (1966), 57 D.L.R. (2d) 15 (*sub nom. Traders Finance Corp. Ltd. v. Haley*).

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The Appellate Division, after a full review of the evidence, reversed the learned trial judge as to two of the trucks and awarded the respondent damages in the sum of $23,177.52 being the price paid by the respondent for the red and green trucks. I am satisfied that on the evidence which was not dependent on findings of credibility, the Appellate Division was fully justified in drawing inferences and arriving at conclusions differing from those arrived at by the learned trial judge.

There is now no dispute as to the warranty. The substantial question is as to the quantum of damages to be awarded the respondent. The Appellate Division, following the decision of this Court in *Massey Harris Co. Ltd. v. Skelding*[1], said:

> The onus being on the respondent to establish the value, if any, remaining in these two trucks, and having failed to establish this, the damage that the appellant is entitled to recover is the purchase price to the appellant of the red and green trucks. These trucks no doubt earned money for the appellant; there is no evidence as to how much this was. Having regard to the amount of repairs paid by the appellant, the money lost while these trucks were laid up due to breakdowns, and the trouble and expense that the appellant was put to because of them, it is doubtful if the net earnings exceeded the amount of the losses. If the onus is on the respondent to establish any value remaining in the trucks, it should follow that the onus was also upon the respondent to show that the trucks' earnings were greater than the loss caused by the numerous breakdowns. No such evidence was adduced.
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> The appeal is allowed and the amount of the damages is increased to the amount of the price paid for the red and green trucks. The appellant is entitled to his costs on the appropriate scale both here and in the Court below.

The appellant contends that the Appellate Division erred in awarding the full purchase price as damages and argues that the onus was on the respondent to prove his damages as being the difference between the purchase price and the actual value of the trucks he got, there being some evidence that the two trucks in question, although unfit for the purposes for which they were purchased, had some merchantable value, and the appellant contends that it was incumbent on the respondent to establish that value in order to determine the amount of the damages to which he was entitled.

This same argument was made in the *Massey Harris v. Skelding* case relied on by the Appellate Division.

[1] [1934] S.C.R. 431, [1934] 3 D.L.R. 193.

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Duff C.J., in delivering judgment for the Court, said:

We cannot accept this view. Having regard to the nature of the warranties and the complete failure of the tractor in respect of the fulfilment of the warranties, which the evidence, accepted by the learned trial judge, discloses, we think that, *prima facie,* the loss incurred by the respondent amounted to the full purchase price; and that it was incumbent upon the appellants to adduce evidence in support of their contention that the damages so measured should be reduced by reason of the possession of the tractor of some merchantable value.

We cannot agree with the interpretation by the Appellate Division of the decision in this Court in *Nolan v. Emerson-Brantingham Implement Co.*, [1921] 2 W.W.R. 416; 60 Can. S.C.R. 662. There the trial judge held that in respect of the tractors (model "L") which he found had no value for the purposes for which they were bought, and had also no merchantable value, no diminution of damages could be allowed. A critical examination of the judgments shews that a majority of this Court accepted the view that on this ground the learned trial judge was right in assessing the damages in respect of these tractors at the amounts paid for them. This was really the basis of the decision in this Court.

Was there in the instant case the complete failure of the trucks in respect of the fulfilment of the warranty that the trucks "would be satisfactory for hauling gravel"? The Appellate Division held that there was this complete failure and that the onus was on the appellant to establish the value, if any, remaining in these two trucks and that it had failed to do so.

Mr. William Alton Reid, parts and service manager at Maclin Motors, a Ford dealership in Calgary where most of the repairs were made while the respondent was using the trucks in question and who knew the trucks, testified for the appellant. He told of the trucks being repaired in May 1960 and held by Maclin Motors pending payment of the repair bill for some 15 to 17 months, and that some months later he went to Olds where he saw the trucks and at that time they "were completely run down". There was no other evidence as to the value of the trucks then or at any other time. The onus in this regard was on the appellant; *Massey Harris v. Skelding, supra.* It is to be noted that the counterclaim against the appellant was commenced on October 5, 1960, which was while the trucks were being held by Maclin Motors.

The respondent did do considerable hauling with the two trucks and as to having made some profit therefrom he says all the moneys he received were paid on the conditional sales contract as shown in the statement of claim. The amount there credited is $6,636.80. In addition it was

shown by a summary of exhibits in the appellant's factum that the respondent expended $2,206.69 on repairs to the red truck and $1,540.43 on the green truck while in the same period the appellant company paid $1,851.86 for repairs to the red truck and $1,170.83 on the green truck.

The appellant argued that these repairs were necessitated principally by the fact that the trucks were overloaded. In this connection it is significant that when Noltie was selling the trucks to the respondent he was told by the respondent that "we were mainly interested in tandem trucks, that we, that had the capacity of hauling twelve yards of gravel or sand and that they were going off highway, dusty off highway conditions" and it was following this that Noltie gave the warranty found by the learned trial judge. The conditional sales contract shows that the trucks were to be used on the Cold Lake Airport job and to work 20 hours a day.

The learned trial judge in his judgment said, referring to the difficulties the respondent was having with the trucks:

> Subject to the exception I will deal with below, I do not think that there is evidence that establishes that the trouble was due to defects in the trucks; more likely the trouble was due to improper use of the trucks; as, for example, setting the governor of at least one of the trucks at 2,750 revolutions per minute which was too low a speed for this motor and would cause a good deal of "lugging" in the motor and thereby put an undue strain upon it.

Johnson J.A. for the Appellate Division deals with this statement as follows:

> With the exception which I will later refer to, there is no direct evidence that the two trucks, the red and the green, were abused or improperly handled by the crews who operated them. The evidence is all to the contrary. All the appellant's trucks were operated along with Bilida's under Bilida's foreman Nelson. He supervised the maintenance of these trucks as well as the ones owned by his employer and his evidence is that the Ford trucks were maintained in the same manner as were the International trucks which required only normal repairs. Several of the operators were called and gave evidence. Subject to the exception which I have already mentioned, there is nothing to indicate that these trucks were abused or improperly handled.
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> The exception to which I have referred is the evidence of a driver of the green truck who said that in the three to three and a half months that he drove this truck after the Cold Lake job had finished, the governor was set so as to permit not more than 2,750 r.p.m.'s. I think it is not unfair to say that most of the evidence of the defence tending to show that these trucks were improperly operated was built upon this statement,—the assumption being that not only this truck but the other trucks were operated in a similar manner. Bearing in mind the evidence of several witnesses that the vibration on these trucks was so great that the

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tachometer which measures the revolutions per minute was frequently out-of-order, this evidence should, I think, have been examined more carefully than it was. But when the evidence of the witness Sharp is considered, this evidence becomes incredible. Mr. Sharp, a highly trained motor expert and an employee of the respondent at the time trouble was experienced with these trucks, examined by the Court, said:

> "Q. As I understand it you feel that the proper revolutions per minute, proper number of revolutions per minute at which this motor should be driven is 3,400 to 3,600?
> A. To be driven it would be 3,400 r.p.m.
> Q. When it was driven?
> A. Yes.
> Q. And if it should have been driven at around 2,750 you have doubt as to whether the motor would run at all?
> A. Not that the motor would run at all, however if the governor was set at 2,750 r.p.m. I don't believe you would have any power, in fact I know you would not have enough power to get that load moving, or any load moving."

Assuming that there is some probative value in the statement that this motor was driven at 2,750 r.p.m.'s, there is no evidence that any other motor was driven at this low rate or that this motor was driven at a similar r.p.m. at any other time. As I have said, failure of the transmission of these trucks was attributed to this cause even when, as in the case I have previously referred to, the respondent's Service Adjustment Claim showed the cause to be a faulty pump shaft.

Considerable evidence was led to show the effect that overloading these trucks would have on the motor and transmission. The evidence of what proper loading would be is not too satisfactory. If these trucks were overloaded, the fact remains that they were supposed to be equal to or better than the International trucks that the appellant had considered buying. Bilida operated similar International trucks alongside the appellant's trucks and carried similar loads without difficulty or trouble.

Elgin Ewing, a former mechanic of the respondent and a witness for the company at the trial, in an undated letter to the appellant but written when the Edmonton Airport work was being done, said:

> "I stopped at the Nisku project and picked up duplicate figures on your load weights which were completely in accordance with good truck operation."

At the trial he explained that he misinterpreted the information he had received but there can be no doubt that at the time he considered the appellant was not being treated fairly by the respondent.

The evidence fully supports this statement.

The appeal should accordingly be dismissed with costs.

*Appeal dismissed with costs.*

*Solicitors for the appellant: Chambers, Saucier, Jones, Peacock, Black, Gain & Stratton, Calgary.*

*Solicitors for the respondent: Duncan, Bowen, Craig, Smith, Brosseau and Horne, Edmonton.*