1984 April 19

[L. LOIZOU, HADJIANASTASSIOU & MALACHTOS, JJ.]

STAMATIS TH. PAPAVASILIOU,

Appellant-Plaintiff,

v.

MICHALIS KLEANTHOUS & ANOTHER,

Respondents-Defendants.

(*Civil Appeal No.* 5233).

Sale of goods—Quality or fitness of the goods supplied for any particular purpose—Implied warranty or condition as to—Sale of second-hand article—Purchaser selecting it himself, after inspecting it, without making known to sellers its description or the particular purpose for which it was required—Purchaser injured when said article exploded whilst he was in the process of cutting it—Findings of trial Court that purchaser could not invoke the provisions of section 16 *of the Sale of Goods Law, Cap.* 267 *and that the sellers were not negligent as no latent or other defect of the article sold was proved, warranted having regard to the evidence before him.*

This was an appeal by the plaintiff against the dismissal of his action against the defendants for damages in respect of personal injuries he had sustained when an axle he had purchased from them exploded whilst the appellant was in the process of cutting it by means of an electrically operated lathe. The claim was based both on contract and on tort. The trial Judge having believed the version of the defendants was satisfied that "the plaintiff purchased from the defendants a second-hand article which he, himself, selected and which he had ample opportunity to inspect without making known to defendant 2 either its description or the particular purpose for which it was required"; and that, therefore, appellant could not invoke the provisions of s.16* of the Sale of Goods Law, Cap. 267 and that his claim based on contract should fail.

* Section 16 is quoted at pp. 204–205 post.

Regarding the claim on tort the trial Judge concluded that there was no evidence whatsoever proving that the defendants were in any way negligent towards the plaintiff as no latent or other defect of the article was proved; and that appellant's claim on tort should, also, fail.

Upon appeal by the plaintiff:

Held, that this Court has not been persuaded that the findings of the trial Court were erroneous or that there are sufficient grounds for disturbing such findings on appeal; that, on the contrary, it is of the opinion that, having regard to the evidence, such findings were warranted and that it was reasonably open to the trial Court to arrive at its conclusions; accordingly the appeal must fail.

Appeal dismissed.

Appeal.

Appeal by plaintiff against the judgment of the District Court of Limassol (Loris, P.D.C.) dated the 18th August, 1973 (Action No. 2712/70) whereby his action against the defendants for damages in respect of personal injuries sustained by him when an axle he had purchased from the defendants allegedly exploded whilst he was in the process of cutting it by means of an electrically operated lathe.

P. Pavlou, for the appellant.

M. Papas, for the respondents.

Cur. adv. vult.

L. Loizou J. read the following judgment of the Court. This is an appeal by the plaintiff against the judgment of the District Court of Limassol dismissing his action against the defendants (respondents) for damages in respect of personal injuries he had sustained when an axle he had purchased from them allegedly exploded whilst the appellant was in the process of cutting it by means of an electrically operated lathe.

The appellant is a lathemar and runs his own workshop in Limassol. Defendant 1 is a merchant dealing in redundant army articles such as scrap iron, different kinds of metal goods, tools etc. which he buys in bulk and keeps in a large camp on the Polemidhia road where he also has his office.

The appellant's claim was based both on contract and on

tort. It was alleged in the Statement of Claim that the respondents were negligent in that they sold to the appellant a dangerous thing without warning him of such danger which they knew or ought to have known. In the alternative it was alleged that the injuries were caused to the appellant by reason of the breach of contract and/or of the express and/or implied terms thereof by the respondents who had expressly and/or impliedly contracted to sell to the appellant an axle which was fit to be used as such and/or to be cut and/or be altered whereas they sold to him an axle which was unfit and/or dangerous if used or cut or handled in any way.

Before the action was heard special and general damages were agreed by the litigants at £1,350.- on a full liability basis and the hearing proceeded on the issue of liability only.

The version of the appellant as disclosed by the evidence adduced and given in the judgment of the trial Court is as follows:

The appellant for four years preceding the accident was buying from the respondents different articles such as axles, pieces of copper and aluminium and the like. In the morning of the 25th February, 1970, he visited defendants' office accompanied by his brother. Respondent 1 was not there but his wife (respondent 2) was. He told her that he wanted to buy an axle 4" in diametre in order to cut and shape it into a spare part for a tractor. Respondent 2 called her employee one Parthenios Charalambous (D.W.3) who, together with the appellant and his brother went to the yard where the axles and other articles were kept and from a heap of axles the appellant sorted out one that suited him for the purpose he wanted it and took it. They went back to the office and the employee weighed it in the presence of respondent 2 and the appellant was debited with the price. He took the axle to his workshop where he put it on an electrically operated lathe and started cutting it in order to shape it as required. In the process of cutting it the appellant stopped the machine in order to check the axle and at that moment an explosion occurred and the axle was cut in two pieces. As a result of the explosion appellant was injured in the right eye. As to how he was injured the appellant gave two versions. In his examination-in-chief he said that inside the axle there was a bronze ring (rodella) which, as a result of the explosion, was

flung off and hit him in the eye; but in cross-examination he said that the bronze ring hit him on the forehead and as he was bending down the compressed air from inside the axle with foreign particles hit him in the eye. With regard to this axle the appellant further stated in his evidence that there are axles that are compact and others that are hollow but that the axle he purchased from the respondents was supposed to be compact iron. The two ends of the axle were blocked by two pieces of iron on either side (exhibits 2 and 2A) which formed a sort of blockage (poma) with screws but he could not find out if the axle was hollow containing compressed air because its surface was rusty and that a hollow axle containing compressed air is, in his opinion, dangerous when cut by means of a lathe.

As stated earlier on it is common ground that on the day in question the first respondent was not present at his place of work when the appellant visited his camp in order to buy the axle but with regard to the system of work he follows in selling the various articles he stated in evidence that when a prospective purchaser visits his camp in order to buy anything he tells him to go himself and find what he needs and after the article is selected by the purchaser it is weighed and the price paid for it. Pausing here for a moment we might mention that this evidence of respondent 1 is supported by the evidence of two witnesses called by the appellant himself, P.W.3, A. Loukianou and P.W.4, Yiannakis Panteli. Both these witnesses have been carrying on the same occupation as the appellant and had regular dealings with respondent 1. They both confirmed that whenever they went to buy axles or other items from the respondent he asked them to go into the yard and select whatever they wanted and after they did so the respondent weighed the article and they paid him according to its weight.

Respondent 2, the wife of respondent 1 who, as stated earlier on, was absent and she was present in the office in his place said in evidence that the plaintiff accompanied by a brother of his, who happened to be the best man of the respondents, visited her at her office and that he went and selected a piece of iron from the yard and that all she did was to weigh it for him. She said that the article in question was eight okes and at the request of appellant's brother, her best man, she recorded this in her books as a credit sale. She denied that the appellant either told her

what he wanted or what he was going to use the article for and she insisted that he, himself, selected what he wanted and that all she did was to weigh it for him. She also denied and, so did the employee Parthenios, that he had accompanied the plaintiff to the camp where the axles were. In fact the employee denied that the plaintiff bought anything in his presence from the defendants on that particular day.

With regard to the purchase of the article the learned trial Judge believed the version of the defendants. He was satisfied that "the plaintiff purchased from the defendants a second-hand article which he, himself, selected and which he had ample opportunity to inspect without making known to defendant 2 either its description or the particular purpose for which it was required". In the circumstances, the learned trial Judge concluded that appellant could not invoke the provisions of s.16 of the Sale of Goods Law, Cap.267 and that his claim based on contract must fail.

S.16(a) of The Sale of Goods Law reads as follows:

"16. Subject to the provisions of this Law and of any other Law for the time being in force, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows:

(a) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he is the manufacturer or producer or not) there is an implied condition that the goods shall be reasonably fit for such purpose:

Provided that, in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose;

(b) Where goods are bought by description from a seller who deals in goods of that description (whether he is the manufacturer or producer or not), there is an implied

condition that the goods shall be of merchandable quality:

Provided that if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed;

.....".

As to the accident the Court accepted that what the appellant purchased was an axle and that whilst he was in the process of cutting it on his electrically operated lathe a loud noise was heard and that parts of the axle were flung and as a result the plaintiff was injured. But as to the reason of the so-called explosion the Court was not satisfied on the evidence that it was caused by compressed air.

This is what the learned trial Judge had to say with regard to these findings:

"From the evidence of the plaintiff - which I accept on this issue - I am satisfied that the axle in question, parts of which are exhibits before me, is the axle purchased by the plaintiff from the defendants.

I am also satisfied, accepting the evidence of plaintiff and that of his employee (P.W.2) on this point, that what they have termed as an explosion occurred in the plaintiff's workshop whilst the plaintiff was in the process of cutting the aforesaid axle by means of his electrically operated lathe. I am satisfied that a loud noise was heard and that exhibits 2 and 2A were flung off but the crucial issue which falls for determination is the reason of the so-termed explosion.

In his examination-in-chief the plaintiff attributed the explosion to the presence of compressed air within the hollow part of the axle in question. In cross-examination though, when asked about the reason of the explosion he replied: 'I do not know why the explosion occurred.' Georghios Charalambous (P.W.2) a 19 year old young man now serving in the National Guard was an apprentice latheman working with the plaintiff in February, 1970, when this accident occurred. This witness in his examination-in-chief attributed the explosion to the presence of compressed air within the hollow axle as well. He was not sure

about it though; thus when asked by the Court he replied: 'It must have contained compressed air'. So in connection with the presence of compressed air in the axle - the alleged cause of the accident, there is before me - (a) the evidence of the plaintiff in chief contradicted by his own testimony in cross-examination and (b) the evidence of his apprentice latheman at the time; this latter evidence is not positive and tantamounts to mere surmise. There is no other evidence showing that there was compressed air in the axle in question and in particular scientific evidence showing positively presence of compressed air in the axle and attributing to such presence the explosion in question or in any other way explaining the cause of same. In this respect I cannot lose sight of the fact that Andreas Loukianou (P.W.3) a latheman with 18 years experience when asked whether a hollow axle would contain compressed air replied: 'If it was welded, air may have remained inside, but if the ends were closed by screws no air would remain inside.'

In this connection it should be further noted that it was the allegation of the plaintiff throughout that exhibit 1 in its original form had a screw on either side forming a sort of blockage (poma).

Thus there is no evidence before me,

(a) that compressed air was present within the axle rendering the axle a dangerous object

(b) as to the reason of the aforesaid 'explosion' which might as well have been caused by the improper adjustment of the axle on the electrically operated lathe and/or improper manipulation in the process of cutting and shaping the axle in question.

Under the circumstances it cannot be seriously alleged that the axle in question was dangerous per se, and, therefore, a warning on behalf of the defendants was indispensable. In fact, there is no evidence whatsoever proving that the defendants were in any way negligent towards the plaintiff as no latent or other defect of the article sold was proved before me."

And the learned trial Judge concluded that appellant's claim on tort must also fail.

On appeal learned counsel argued his case both with regard to the claim based on contract and on tort. But he, nevertheless, stated that he felt that he had a better case on the claim on contract.

The gist of his argument on the issue of negligence was that the respondents were negligent because they sold a dangerous chattel knowing that the purchaser was a latheman who would inevitably cut it, without giving any warning to him. Also in not investigating or examining the origin and nature of the things he was selling as axles particularly in view of the fact that he was buying also redundant articles from the military authorities.

With regard to the claim based on contract he challenged the trial Court's finding in accepting the version of the respondents as to the circumstances the article was purchased and submitted further that the respondents were liable to the appellant for breach of the warranty as to fitness and merchandability of the article sold envisaged by s.16 of the Sale of Goods Law because they either expressly or by implication knew the purpose for which the appellant was purchasing the articles in question or, alternatively, that the possibility that he would cut or otherwise interfere with it was reasonably forseeable.

Learned counsel argued at some length one of his grounds of appeal to the effect that whereas in the statement of claim the date of purchase of the article in question was given as the 25th February, 1970, in the defence it was alleged that the purchase took place "on a day in May, 1970" and that, therefore, it was probable that the respondents were referring to a different occasion. But going through the evidence on record it is abundantly clear that both plaintiff and defendants, without any objection on the former's part, referred to the 25th February, 1970, as the date of the purchase and no question was raised as to the probability of any mistake as to such date nor were the respondents ever asked that the sale they were referring to might have taken place on any date other than the 25th February, 1970. This being the position we do not think that we can reasonably assume that the parties were referring to different occasions. The more so since it is common ground that the respondent 1 had visited the appellant at the clinic where he was

treated as an in-patient until the 1st April, 1970 i.e. long before May, 1970.

The other grounds of appeal concern issues of credibility of witnesses and the evaluation and weight of the evidence adduced and were aimed at disturbing such findings so as to bring the case within the exceptions to s.16 of the Sale of Goods Law in the sense that the appellant had made known to the respondents the particular purpose for which the article purchased was required and relied on their skill and judgment and that the article was defective or, in the alternative, to bring the article purchased within the description of things intrinsically dangerous or, in other words, that it was dangerous per se.

Having carefully considered the arguments advanced by learned counsel we have not been persuaded that the findings of the trial Court were erroneous or that there are sufficient grounds for disturbing such findings on appeal. On the contrary, we are of the opinion that, having regard to the evidence, such findings were warranted and that it was reasonably open to the trial Court to arrive at its conclusions.

In the result this appeal fails and it is hereby dismissed with costs.

Appeal dismissed with costs.