

IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT
ACCRA - A.D. 2017

CORAM: ATUGUBA, JSC (PRESIDING)
DOTSE, JSC
YEBOAH, JSC
GBADEGBE, JSC
BENIN, JSC

CIVIL APPEAL
NO: J4/38/2013

27TH JULY, 2017

PYNE & ASSOCIATES
PLAINTIFF/RESPONDENT/APPELLANT

VRS

AFRICAN MOTORS
DEFENDANT/APPELLANT/RESPONDENT

JUDGMENT

DOTSE, JSC:-

On the 12th day of July 2017, this court delivered judgment in this case by which we unanimously dismissed the appeal herein lodged by the Plaintiffs/Respondents/Appellants, hereafter referred to as the Plaintiff. We however reserved the reasons for our decision, which we hereby give.

RELIEFS CLAIMED BY PLAINTIFFS

The Plaintiffs by their amended writ of summons claimed against the Defendants/Appellants/Respondents, hereafter referred to as the Defendants, the following reliefs:-

- a. Specific damages from loss of profit from inability to use vehicle and continuing loss since October, 2005.
- b. The difference between the sale value and in the defective condition, or in the alternative
 - (i) \$32,000
 - (ii) Interest on each sum from November 2004 till date of final payment or
 - (iii) Replacement of a brand new vehicle of similar make

FACTS OF THE CASE

The Plaintiffs, a construction company registered under the laws of Ghana claimed the reliefs referred to supra against the Defendants, who inter alia carried on business of selling four wheel vehicles. According to the Plaintiffs, by a contract executed between them and the Defendants in or about October 2005, the Defendants sold a brand new Suzuki Vitara XL-7 vehicle registered as No. GE 2864 V for a sum of \$32,000.

According to the plaintiffs, the contract was contained in a standard contract form and was completed with the details of the transaction and duly executed by the parties. The Plaintiffs asseverated that, at the time of the execution of the contract, the Defendants were aware of the nature of the business of the Plaintiffs, in that they travelled extensively and hence needed a rugged vehicle. They further asseverated that, being a brand new vehicle, there was a further implied condition that the vehicle would be fit for

the purpose for which it was purchased, i.e. for the extensive travel of the Plaintiffs on rugged terrains throughout the country.

In fulfillment of the contract, the defendants duly supplied and delivered the vehicle to the Plaintiffs.

It was however the case of the Plaintiffs that, the vehicle that was delivered to them was not fit for the purpose for which it was acquired, nor was it of a satisfactory quality and as such, there was a breach of the conditions of the contract of sale that had been entered into between the parties.

DEFECTS COMPLAINED OF BY THE PLAINTIFFS ON THE VEHICLE

Some of the defects the plaintiffs complained about included the following:-

1. Vibrations in the body and front panel of the vehicle as a result of a structural defect.
2. The 4-wheel drive system was malfunctioning and its compact disc system was defective.

The Plaintiffs considered the said defects as breach of the conditions of sale of the vehicle and therefore returned the vehicle to the Defendants by letter dated 11th October 2005. This letter has been tendered in these proceedings as exhibit A. Out of abundance of caution, it is considered worthwhile to quote verbatim, the opening and concluding paragraphs of the said letter.

“GRAND SUZUKI VITALA XL REG. NO. GE 2864V

*I refer to the above vehicle which was purchased by the above company and was delivered **to us on 22nd November 2004. Unfortunately I do not wish to accept a relatively new vehicle that is bedeviled with so many problems as stated below.**”*
Emphasis supplied

After recounting the defects that have already been referred to supra, coupled with some of the Plaintiff's experiences with the Defendants personnel, the letter was concluded thus:-

“Following from the above, I return the vehicle to African Motors for a replacement as I cannot accept a new vehicle with so many problems.

Yours faithfully

V. Naane Esi Pyne

Managing Director” emphasis

The Defendants on their part, whilst admitting the contract of sale between them and the Plaintiff's in respect of the vehicle, contended that the contract contained a warranty clause, which provided a one year service of fixing defects in the vehicle free of charge. According to the Defendants, the only problems the Plaintiffs brought to their attention were the following:-

1. Noise in the dash board
2. Scratchy Cd-player
3. Inability to use the four-wheel drive (4WD)

The Defendants therefore contended that, pursuant to the warranty on the sale of the vehicle, all the above complaints were repaired free of charge as and when requested.

It was also the case of the Defendants that, after using the vehicle for about 6 months, i.e. in or about June 2005, the Plaintiffs complained about the four wheel drive not functioning properly, but as usual same was repaired satisfactorily at no cost to the plaintiffs.

It was subsequent to the above defects and or complaints that the Plaintiffs yet again brought the vehicle to the Defendants for repairs, complaining

about noise in the vehicle. After the repairs of the vehicle, the Defendants invited the Plaintiffs for a test drive, but there was stoic silence from them. It was after this that the Plaintiffs wrote to the Defendants giving indications that they were rejecting the vehicle.

At this stage, it may be useful to take note of the following timelines of material events in this case.

1. Vehicle was delivered to Plaintiffs on 22nd November 2004
2. Plaintiff discovered vibrations in the vehicle almost immediately
3. First servicing of vehicle took place on 2nd December 2004
- 4. 3rd June 2005 - Plaintiff's requested the Defendants to transfer ownership of the vehicle to them, see Exhibit B.**
5. 22nd July 2005 - detection of the malfunctioning of the 4WD and a report to the Defendants.
6. 11th October 2005 - Plaintiffs rejected the vehicle and asked for replacement.

DECISION BY THE HIGH COURT, ACCRA

After trial during which representatives of both parties testified and were cross-examined the learned High Court Judge delivered judgment in which she upheld the claims of the Plaintiffs.

The learned trial Judge referred extensively to sections 13, 49 and 50 of the *Sale of Goods Act, 1962 (Act 137)* in the judgment at the High Court. It is therefore considered worthwhile to quote in extenso the following sections of the Sale of Goods Act, 1962 (Act 137).

The reference to the said Sections of Act 137 is the only way by which the decisions of the trial and the 1st Appellate court will be properly understood and put in context.

Section 13 - Quality and Fitness of Goods

(1) “Subject to the provisions of this Act and any other enactment 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) There is an implied condition that the goods are free from defects which are not declared or known to the buyer before or at the time when the contract is made:

Provided that there is no such implied condition-

(i) where the buyer has examined the goods, in respect of defects which should have been revealed by the examination;

(ii) in the case of a sale by sample, in respect of defects which could have been discovered by a reasonable examination of the sample;

(iii) where the goods are not sold by the seller in the ordinary course of his business, in respect of defects of which the seller was not, and could not reasonably have been aware.

(b) Where the goods are of a description which are supplied by the seller in the course of his business and the buyer expressly or by implication makes known the purpose for which the goods are required there is an implied condition that the goods are reasonably fit for that purpose.

(2) The condition implied by paragraph (a) of subsection (1) is not affected by any provision to the contrary in the agreement where the goods are

of a description which are supplied by the seller in the ordinary course of his business and the condition implied by paragraph (b) of subsection (1) is not affected by any provision to the contrary in the agreement unless the seller proves that before the contract was made the provision was brought to the notice of the buyer and its effect made clear to him.

- (3) An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade.
- (4) An express warranty or condition does not negative a warranty or condition implied by this Act unless inconsistent therewith.
- (5) The provisions of this section apply to all goods delivered in purported pursuance of the contract and extend to all boxes, tins, bottles or other containers in which the goods are contained.

Section 49—When Buyer has Right to Reject.

- (1) **Subject to the provisions of this Act the buyer is entitled to reject the goods and to refuse to pay, or as the case may be, to recover, the price where**
 - (a) **the seller is guilty of a breach of a fundamental obligation; or**

- (b) the seller is guilty of a breach, not being of a trivial nature, of a condition of the contract, whether the breach is in respect of all of the goods or, subject to subsection (2), of part only; or
 - (c) the buyer has entered into the contract as a result of fraudulent or innocent misrepresentation on the part of the seller.
- (2) Where there is a contract for the sale of goods which are to be delivered by instalments, then—
- (a) if each installment is to be separately paid for, subsection (1) shall apply to each instalment separately:

Provided that where there are persistent and grave breaches by the seller in respect of two or more instalments the buyer may treat the whole contract as repudiated.

Provided further that nothing in this paragraph shall affect the buyer's rights under paragraph (c) of subsection (1);

(b) in any other case, such a breach as is referred to in subsection (1) in respect of one or more instalments shall be treated for the purpose of that subsection as though it were a breach in respect of the whole contract.

Section 50 - Effect of Rejection

- (1) Where goods are delivered to the buyer and he rejects them, having the right so to do, he is not bound to return them to the seller, but it is sufficient if he intimates to the seller that he rejects them.
- (2) After the buyer has intimated to the seller that he rejects the goods the seller is entitled to have the goods placed at his disposal:

Provided that where the buyer has paid the price or any part thereof he may retain the possession of the goods until the seller repays or tenders the amounts he has received from the buyer.”

HIGH COURT DECISION

Basing herself on the above provisions, the learned trial Judge in the High Court delivered herself thus:-

“The Plaintiff bought the vehicle from the defendants believing in all honesty that she was buying a vehicle that fit the description and that would meet her needs. She knew that she was getting a vehicle that was free from defects. **She was perfectly within her rights to reject the goods under the Sale of Goods Act as quoted above.**

The defendants attempted to rectify the faults on several occasions, but by their own showing as testified by their own witnesses, the fault still persisted, **was she not then entitled to reject the vehicle and ask for a refund?** It is on record that the Defendants replaced the CD player; they also corrected the four-wheel drive mechanism. It was the “rattling” noise or the vibration that she still complained that they the defendants could not rectify. Indeed, Mr. Addison of the DVLA confirmed that he heard a “rattling” noise, but in his opinion it could be fixed with grease. It is also on record that the vehicle was used by the Plaintiff for about one year, from 22nd November 2004 to 11th October 2005. However, I have taken into consideration the fact that the Plaintiff kept drawing the defendant’s attention to the faults on the vehicle and **in all fairness the defendants tried to rectify and indeed did rectify some of the complaints. The vehicle went in and out of the plaintiff’s workshop for several periods.** It has not been denied that the vehicle has been in the defendant’s show room since October 2005. Clearly, the plaintiff had rejected the vehicle and

the defendants had possession all this time, it is my view that they ought to have taken steps to mitigate this obvious anomaly by disposing of the vehicle and refunding the plaintiffs money to her.

I therefore find that the Plaintiff is entitled to a refund of the amount she paid to the defendant company less fifteen percent (15) depreciation for the period that the vehicle was with her. Additionally, it is evident that the vehicle was involved in an accident, although not major, still depreciated the value of the vehicle.

I therefore order that the defendant refunds the cost of the vehicle purchased to the Plaintiff the sum of thirty two thousand dollars (\$32,000.00) or its cedi equivalent less 15% depreciation.

Interest on the said sum with effect from October 2005 awarded on the sum in accordance with C. I. 52.

I decline to award the specific damages claimed for reasons ascribed above.

Cost of GH¢2,500.00 awarded." *Emphasis supplied*

Aggrieved and grossly dissatisfied with the decision of the trial High Court, the Defendants successfully appealed against the decision of the High Court to the Court of Appeal.

JUDGMENT OF THE COURT OF APPEAL

On the 24th of November, 2011, the Court of Appeal in a unanimous decision set aside the judgment of the High Court dated 12th December 2008.

Some of the salient points that influenced the decision of the Court of Appeal can be gleaned from their reasoning as stated as follows:-

“From exhibits “A and C” it is categorically clear that the Defendant delivered the vehicle to the Plaintiff on 22nd November, 2004 and it was on 10th October, 2005 when the Plaintiff returned it. I have found as a fact that at the time the Plaintiff returned the car, the warranty had elapsed. The issue of warranty is therefore not relevant to the determination of the instant appeal. **The part of the ground 1 of the appeal which is germane to the determination of this appeal is whether or not the trial High Court Judge erred in law when she held that the Plaintiff legally rejected the vehicle, the subject matter of the instant appeal when it returned it to the Defendant’s showroom in October 2005.**

The Plaintiff bought the vehicle on 22nd November 2004 per way bill No. 0006769. On 3rd June, 2005 the Plaintiff wrote Exhibit ‘B’ to the Defendant to transfer ownership of the vehicle to it with immediate effect. The Plaintiff wrote for the transfer of the vehicle to be made after it had used same for 6 months, 13 days and by the said letter, it did not complain about any defect in the vehicle. For emphasis, I will reproduce the content of Exhibit ‘B’ which was written by the Plaintiff to the Defendant.

“PYNE & ASSOCIATES (GH) LTD.

Ref: PAI/VEH/AM/09
The Sales Manager
Africa Motors
Accra

3rd June 2005

Dear Sir,

TRANSFER OF OWNERSHIP

Suzuki XL7

CHASIS NO. JSAHT X 92 VOO 205262

Engine No. H27 A-134642

Ref No. GE 2894V

The above described station wagon was purchased, paid for and delivered to us on 22 November 2004 vide way-bill AM No. 0006769.

We would be grateful if you could transfer ownership to us Payne and Associates Ghana Limited with immediate effect.

Yours faithfully

V.N.E.PYNE

For: Managing Director”

The Plaintiff wrote to complain about the non-functioning of the four wheel drive mechanism on 11th October 2005 and according to it, it detected the fault in July 2005. From Exhibit ‘A’, the Plaintiff stated that it discovered the fault in the four wheel driver mechanism barely three months before writing the letter on 11th October 2005. In the same letter, the Plaintiff further complained that it noticed that there was so much vibration in the body of the vehicle soon after delivery.

The question to pose is if the plaintiff noticed the vibration in the body of the vehicle soon after delivery and did not complain but demanded for transfer to be effected in its name after keeping the vehicle for over 6 months can he turn round to complain and say that as a result of one defect, it was returning it? **I think time is a material element for consideration where a party seeks to repudiate a contract where the property in the goods had passed.**

In this case, there was no different intentions in the contract that the property in the goods will not pass to the Plaintiff after delivery. Section 26 (2) of the Sale of Goods Act, 1962 (Act 137) which deals with transfer of title provides that:-

“Unless a different intention appears the property in the goods passes, under a contract of sale when they are delivered to the buyer.”

In the case of Rockson v Armah (supra), this Court speaking through Francois J. A held thus:-

“A long period of retention must be equated with acceptance, the transfer of the property in the goods and the assumption of all risks. What is a reasonable time is a question of fact and may vary with the circumstances of a case, but retention for a month has been condemned as unreasonable in relation to a second hand car”. Emphasis

After that lucid and clear exposition of the law, Dennis Adjei J.A speaking on behalf of the Court of Appeal then explained what could be deemed reasonable or unreasonable time for the purposes of computing whether a buyer has acted reasonably in retaining ownership in the goods delivered after becoming aware of defects in same. This is how the Court of Appeal answered that problem.

“I am of the considered opinion that keeping the vehicle for almost 11 months that is from November, 2004 to October 2008 is a long period of retention and must be equated with acceptance, the transfer of the property in the goods and the assumption of all risk. **The purported repudiation of the contract by the Plaintiff is therefore defeated by the long retention of the vehicle.**” Emphasis

Basing themselves on the above statements inter alia, the Court of Appeal concluded the judgment in the following words:-

“I am of the considered opinion that the Plaintiff becoming aware of the defect in the vehicle but keeping same for almost 11 months had exercised his own judgment in the matter and elected to continue with the purchase. It was a risk that it took and it is bound by it’s elections. See the case of Thornett and Fehr v Beers and Sons [1919] 1 KB 486.”

However, the Plaintiffs also felt aggrieved and dissatisfied with the decision of the Court of Appeal, and accordingly appealed against same.

GROUNDINGS OF APPEAL TO THE SUPREME COURT

- i. “That the Court of Appeal misled itself when it failed to consider the provision of Section 49 of the Sale of Goods Act, 1962, Act 137 which permits a buyer to reject goods and recover the price.
- ii. That the Court of Appeal misled itself when it failed to consider the provisions of Section 13 of the Sale of Goods Act, 1962, Act 137.
- iii. That the Court of Appeal misled itself when it held that the Plaintiff returned the vehicle as a result of one defect.
- iv. That the Court of Appeal misled itself when it held that because Plaintiff had retained the vehicle for six months, 13 days before demanding for a formal transfer of title in its name and at the time of writing a letter to the Defendant had seen the fault; that is the vibration in the body of the vehicle but did not avoid the transaction, plaintiff would not be allowed to repudiate the contract.
- v. That the judgment is against the weight of evidence adduced at the trial.

- xi. Additional grounds of appeal will be filed upon receipt of the record of appeal.

We have carefully analysed all the grounds of appeal referred to supra, and are of the considered opinion that these could have been subsumed under one broad ground, to wit *“The Court of Appeal erred in its interpretation of the relevant sections of the Sale of Goods Act that are germane to this case.”*

We have also considered in detail the statements of case filed by learned Counsel for the parties herein. In our determination of the appeal herein, we are of the considered opinion that learned Counsel for the Plaintiffs has not appreciated the legal principles involved in the determination of the rights of the Plaintiffs as regards their rights of rejection of goods and recovery of the purchase price as well as lack of appreciation of the basic ingredients of section 13 of the Sale of Goods Act which deals with *Quality and Fitness of Goods. Sections 49 (1) (a) (b) and (c) refers.*

The Plaintiffs, it must be understood knew why they purchased this type of four wheel vehicle. According to them, it was to enable them travel on rugged terrain and long distances. Thus, they had the responsibility and opportunity if they were really conscious of that, to have inspected and examined the vehicle before accepting same. This is because, the nature of the four wheel drive mechanism was crucial to their choice of that type of vehicle to purchase.

See the unreported Supreme Court decision in the case of ***Andreas Bschor GMBH & Co. KG v Birim Wood Complex Limited CA. No J4/9/2015 dated 22nd March 2016 per Pwamang JSC and Georgia Hotel Limited v Silver Star [2012] 2 SCGLR at 1283 per Adinyira JSC.***

In our considered view, the defects from which the vehicle suffered were not latent defects, and could have been easily detected if the Plaintiffs had taken

advantage of their rights to inspection and examination as is granted under the law. From our examination of the appeal record, it is clear that even though the vehicle appeared to have been riddled with some defects, these cannot legitimately be deemed as latent, or hidden which an inspection or examination would not have exposed or revealed. The Plaintiff's own representative stated that *"the four wheel drive was working but the other problems were still there so I wrote to them"*.

When we consider the chronology of events and their sequence, it seems clear that the Plaintiffs waived their rights under the sale of Goods Act by their conduct in continuing to use the vehicle after becoming aware of the defects. Perhaps they must have been satisfied that the defects have been repaired satisfactorily, hence their continued use and even request to have it transferred into their name.

Indeed, after critically examining the salient principles of Section 13 of the Sales of Goods Act, we cannot but agree with our very respected brother Pwamang JSC in the ***Andreas Bschor GMBH & Co. KG V Birim Wood Complex*** supra, when he stated thus:-

"The grounds for the condition as to fitness for purpose to be applicable are that the seller should sell the goods in normal course of his business and the buyer should have made the seller aware of the purpose for what he requires the goods."

See also ***Yirenkyi v Tormekpey [1987-88] 1 GLR 533 CA.***

Indeed, we cannot rest our judgment without reference to the locus classicus on merchantability and fitness for purpose as was laid down by Best C.J. in the case of ***Jones v Bright (1820) 130 ER 1167 at 1171*** where he stated thus:-

*“It is the duty of the court in administering the law to lay down rules calculated to prevent fraud, to protect persons necessarily ignorant of the qualities of a commodity they purchase, and to make it the interest of manufacturers and those who sell, to furnish the best article that can be supplied.... I wish to put the case on a broad principle. **If a man sells an article he thereby warrants that it is merchantable - that is fit for some purpose** - if he sells it for some particular purpose, he thereby warrants it fit for that purpose.”* Emphasis

The facts and circumstances of this case show clearly that the Defendants have been well known in the business of selling four wheel drive vehicles of the type in contention.

Based upon the said principle as espoused in the **Jones v Bright case**, supra, the Supreme Court in the **Andreas Bschor case supra**, broadly construed *Section 13 (1) (b) of Act 137* and gave effect to the provisions by including any sale where there is an element of irregularity by showing that the seller has been selling goods of that description as part of his business, whether it is his main business or not.

See also the dictum of Wood C.J. in the case of **Continental Plastics Engineering Co. Ltd. v I.M.C Industries-Technik GMBH [2009] SCGLR 298**.

Under the circumstances of this case, we are therefore of the considered opinion that, the retention of the vehicle by the plaintiff from November 2004 until October 2005 before attempting to reject same constitutes acceptance. The legal consequences are that, the property in the vehicle has passed to the plaintiff, and at the time he purported to reject same and requested the Defendants to sell same and refund their monies to them, the Defendants no longer owned the property.

CONCLUSION

The appeal therefore fails and is accordingly dismissed. We therefore affirm the decision of the Court of Appeal dated 24th November 2011.

It was for the above reasons that we dismissed the appeal herein on the 12th day of July 2017.

COURT) **V. J. M. DOTSE**
(JUSTICE OF THE SUPREME

COURT) **W. A. ATUGUBA**
(JUSTICE OF THE SUPREME

COURT) **ANIN YEBOAH**
(JUSTICE OF THE SUPREME

COURT) **N. S. GBADEGBE**
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