

IN THE COURT OF APPEAL OF SEYCHELLES

Reportable

[2021] SCCA 37 13 August 2021
SCA 65/2018
(Appeal from CC 30/2012)

Vijay Construction (Pty) Ltd

(rep. by Mr. Bernard Georges)

Appellant

and

Eastern European Engineering Limited

(rep. by Mr. Serge Rouillon)

Respondent

Neutral Citation: *Vijay Construction (Pty) Ltd v Eastern European Engineering Limited*
(SCA 65/2018) [2021] SCCA 37 (Arising in CC 30/2012)
13 August 2021

Before: Twomey JA, Tibatemwa-Ekirikubinza JA, Dingake JA

Summary: Delivery of goods, method of delivery, transfer of ownership

Heard: 2 August 2021

Delivered: 13 August 2021

ORDER

Appeal dismissed with costs.

JUDGMENT

DR. O. DINGAKE, JA

INTRODUCTION

1. In this matter, the Appellant Vijay Construction (Pty) Ltd (“Vijay”) is appealing the decision of the Supreme Court in *Eastern European Engineering Ltd v Vijay Construction*

(Pty) Ltd which was in favour of the Respondent (then Plaintiff), Eastern European Engineering Limited (“EEEL”).

BACKGROUND

2. The dispute in the Supreme Court was regarding purchase and delivery of cement batching plant and block making machine. In brief, the Respondent averred that the Appellant had not paid for the batching plant and the block machine and the Trial Court ordered the Appellant to pay the costs of the equipment. The Appellant averred that it did not have the block machine in its possession and that it was not actually delivered to them. The Appellant is not pursuing the issue whether payment was made or not in the Court of Appeal.

GROUND OF APPEAL

3. The Appellant, being dissatisfied by the decision of the Supreme Court has lodged an appeal with this court. The Ground of Appeal in the Notice of Appeal states:

“The Learned trial Judge erred in her finding that delivery of part of the batching plant had been effected to the Appellant when it is clear from the uncontroverted evidence of the witnesses Patel and Jean that part of the plant was never delivered and the Appellant was physically prevented from taking possession of it” (emphasis added)

4. The relief sought from the Court of Appeal is to reduce the sum awarded to the Respondent by USD56,449.50 being the cost of the undelivered part of the plant.
5. The Appellant’s Counsel submits in the Heads of Argument at paragraph 2 that, “*Further, it is not disputed that the Appellant took possession of the batching plant*”. Paragraph 3 reiterates the issues that were in dispute between the parties: i) whether in fact the Appellant had taken possession of the block-making machine; ii) whether the Appellant had paid for the machines.

6. With respect to the batching machine, which is not the issue here, it is not disputed that Appellant took possession of the batching machine. This is also supported by the testimony of Mr Patel. He testified that batching plant and block machine are two separate and different machines (page 49 of the Court of Appeal Bundle). When asked whether Vijay actually took possession of those two pieces of equipment, Mr Patel stated that they took possession of the batching plant and were using it, but the block machine “*was kept in the container as it is, because it was not required. We did not have platform to produce blocks*” (page 55 of the CA Bundle). Mr Patel further stated that when Vijay left the site due to the termination of contract they took only the batching plant and with regards to the block machine he stated that, “*It was in the container and we were not allowed to touch by the security guard of Savoy*” and that he does not know where the block machine is today (pages 55-56).

STATEMENT OF ISSUES

7. When the matter was argued before us, and as indeed was also the case in the court below, the Appellant concedes that legally it is the owner of the two pieces of machinery and that in terms of Article 1603 and Article 1606 “*[i]t is probably the case that legal delivery*” was made at the time of the agreement or the signature of the Act of Handover.
8. However, relying on the evidence of Mr Patel, the Appellant contends that Vijay “*was barred from the site and its workers taken hostage*”. It was further submitted that the evidence of the police officer Jean that the machinery was still on site much later “*serves to show that the delivery was simply de jure and not de facto*”. Mr Patel during cross-examination also agreed that once Vijay signed the Act of Handover, the ownership was transferred to Vijay (page 67 of the Court of Appeal Bundle).
9. The Counsel for the Appellant in the Heads of Argument paragraphs 6-7 state the Trial Judge erred in her finding at paragraph [39] of the Judgment that she was satisfied that Vijay “*was and is not concerned with the removal of the block machine from the site of the Savoy*” and that it “*abandoned the block machine on the site of the Savoy*”.

10. Learned Counsel for the Appellant, Mr Georges, contends that the evidence available to the Trial Judge did not support her finding. Learned Counsel submits that the Act of Handover passed the ownership to the Appellant and may have concluded delivery of the two machines (emphasis added), however evidence does not point to either abandonment or lack of concern on the part of Appellant.
11. Mr Georges, learned Counsel for the Appellant, contends that the Trial Judge also stated at paragraph [39] that, “*According to Mr. Jean, it would seem that the block machine is still on site*”. According to the Appellant either the Respondent relies on the fact that the Act of Handover made the Appellant the official owner or it does not; and in the latter case the owner would still be the Respondent and could have had a theft case. Consequently the Appellant submits that “*the fact that the Respondent had tried to have its cake and eat it*” should have alerted the Trial Judge to suspect its evidence and find that it had not proved its case on balance of probabilities.
12. Mr Georges, leaned Counsel for the appellant concludes that the more plausible is the version of the Appellant, namely that it did not take possession of the machine because it had no need for it while it was on site, but was denied access after the termination of the contract to collect it and therefore it should be excused from paying part of the sum claimed to represent the fact that it never obtained the benefit of “*half of the plant it had purchased*”.
13. With regards to the issue of delivery Counsel for the Respondent in the Skeleton Arguments relies on Articles 1603, 1604 and 1606 of the Civil Code and, in summary, states that it appears that the Appellant was in control of the equipment and were using it as part of the contract yet they chose to leave it behind when they left the site. He further submits that it is not clear what happened to the block machine and that there was indeed a report by Respondent to the police that the equipment was taken by the Appellant.
14. Learned Counsel for the Respondent further states that the site was at all times under the control and supervision of the Appellant until the termination of the contract with trucks

and machinery coming in and out every day. The Respondent's Counsel submits that once there was the handing over of the machinery under the handover document the machinery became the property of the Appellant and Vijay were from that point responsible for the security and control of the equipment.

15. Having regard to the above, it seems to us that the main issue that falls for determination is whether the delivery of the block machine to the Appellant had taken place, with the result that the Appellant was obliged to pay for the same.

The Law

16. Chapter IV of the Seychelles Civil Code relates to the Obligations of the Seller, including provisions regarding delivery. Relevant provisions:

Article 1603

There shall be two principal obligations, the obligation to deliver and the obligation of warranty of the thing sold.

Article 1604

Delivery is the transfer of the thing sold to the control and possession of the buyer.

Article 1606

The delivery of movable property is effected:

By actual delivery;

Or by the handing over the keys of the building in which it is found;

Or by the mere consent of the parties if the transfer cannot be made at the moment of the sale or if the buyer was already in control in another capacity.

Article 1608

The costs of delivery shall fall upon the seller and those of the removal upon the buyer, unless there is agreement to the contrary.

Article 1624

The question as to who, the seller or the buyer, shall bear the loss or the deterioration of the thing sold before delivery takes place shall be decided in accordance with the rules laid down in the Title Contracts and Agreements in General. (emphasis added)

17. Provisions under Title Contracts and Agreements in General relevant to the delivery (obligation to give) state:

Article 1136

The obligation to give shall imply the duty to deliver the thing and to preserve it until delivery, under penalty of damages payable to the creditor.

Article 1137

The obligation to take care and preserve the thing, whether the agreement has as its object the advantage of one of the parties or their joint advantage, shall bind the person who is in charge of it to show in respect of it reasonable care.

This obligation shall be more or less extensive, depending upon the kind of contracts the effects of which in this respect shall be explained under the appropriate Titles.

Article 1138

The obligation to deliver the thing shall arise by the mere consent of the contracting parties.

It shall confer the ownership upon the creditor and shall carry with it the risk as from the moment when delivery was due, even if the delivery has not yet been effected, unless the debtor has been served with notice to deliver; in that case, the thing shall remain at the risk of the latter.

Analysis

18. Under Article 1604 delivery is the transfer of the thing sold to the control and possession of the buyer.
19. Article 1606 of the Civil Code provides that delivery can be effected by i) by actual delivery; or ii) by the handing over the keys of the building in which it is found; or iii) by the mere consent of the parties if the transfer cannot be made at the moment of the sale or if the buyer was already in control in another capacity.
20. In the present case the machinery was actually physically delivered to the construction site (method (i)) as stated by Mr Patel himself. He stated that the block machine was not used by Vijay and it was in container and container was on Savoy site (page 55 CA Bundle). Furthermore, Mr Egorov, the Appellant's witness, stated that the site was not controlled by EEEL and it was controlled by Vijay and that for the security purpose it was reasonable to hand the machinery over and deliver it to Vijay (pages 107-108 of the CA Bundle). If the machinery was not physically removed from the container, but the Respondent for instance gave the Appellant key/access to it, this can also satisfy Article 1606 method of delivery by 'the handing over the keys of the building in which it is found' (keys to the container).

21. On the evidence tendered in the lower court it is difficult to agree that the delivery did not take place merely because Vijay chose not to open container and not to take the block machine as they had no use for it. Mr Patel testified that Vijay were not allowed to touch the container by the security guard of Savoy, however, this reply related to the events that happened after the termination of contract.
22. Transfer of ownership prior to the delivery is also in line with other provisions of the Civil Code. Article 1624 clearly provides that the risks (loss or deterioration) for the thing sold before delivery can be borne either by seller or by buyer. Article 1138 illustrates that ownership, which carries with it the risk may pass from the seller to the buyer even if the delivery has not yet been effected. Generally the ownership passes together with the risk.
23. It is clear from the totality of the evidence that the machinery was physically delivered and transferred to the control and possession of the Appellant by being physically present on the construction site, to which, prior to the termination of the contract, Vijay as it seems, had full access to and control over.
24. Article 1608 also provides that the costs of delivery shall fall upon the seller and those of the removal upon the buyer, unless there is agreement to the contrary. In our respectful opinion it was not up to the Respondent to further deliver again the container with block machine to the Appellant once they were not allowed on site, it was up to the Appellant to take its possessions, block machine being one of them.
25. We agree with the submissions of learned Counsel for the Respondent that since the ownership, risk and responsibility for the block machine had been transferred to the buyer, the Appellant, at the time of signing the Act of Handover or at least when container was delivered on site, the seller is no longer responsible for it.
26. In the premises we conclude that the Respondent, in its capacity as a seller of the block machinery should not bear loss for the failure of the Appellant to take possession of the

goods delivered to the site, of which the Appellant was in control prior to the termination of contract.

27. In all the circumstances of this case the Trial Judge did not err in her finding that delivery of the block machine was done in terms of article 1603 of the Civil Code of Seychelles Act.
28. We agree that delivery was done by either of the methods specified under Article 1606 and the Appellant's alleged inability to take physical possession of the block machine occurred after the delivery already taken place, therefore the seller already discharged its duty to deliver and shall be entitled to the contract price as was awarded by the Supreme Court.
29. In the result, this appeal is without merit and it is dismissed with costs.

Dr. O. Dingake, JA

I concur

Dr. M. , JA

I concur

Dr. L. Tibatemwa-

Ekirikubinza, JA

Signed, dated and delivered at Ile du Port on 13 August 2021.

