EN

Case law

Case Details

National ID: VIII 92/06

Member State: Germany

Common Name:link

Decision type: Other

Decision date: 29/11/2006

Court: BGH (Supreme court)

Subject:

Plaintiff:

Defendant:

Keywords:

Directive Articles

Consumer Sales and Guarantees Directive, Article 1, 1. Consumer Sales and Guarantees Directive, Article 1, 2. Consumer Sales and Guarantees Directive, Article 2, 1.

Headnote

Giving a guarantee of quality with respect to a sold good in the terms of § 444 2nd case BGB – as well as giving a guarantee in the terms of § 276(1)(1) BGB – at least equals the warranting of a quality under the old law of sales (§ 459(2) BGB [old version]). Thus, giving a guarantee requires (as did the warranted quality) that the seller has bindingly accepted contractual liability for the sold good having the agreed quality.

Whether the seller's statements with respect to the mileage of a second-hand car qualify as a quality statement (§ 434(1)(1) BGB) or as guarantee of quality (§ 444 2nd case BGB) is to be decided taking into account the typical interests of both contract parties concluding a contract of sale over a second-hand car. If the car is sold privately, the statement of a certain total mileage is to be understood as a quality statement and not as a guarantee of quality. With respect to private car sales, one can only assume a tacitly given guarantee, if special circumstances beyond the statement of a certain mileage cause the legitimate expectation of the buyer that the seller wanted to accept strict liability for the truth of his statement. The peculiarities of a sale on the internet via an eBay auction alone do not justify such an expectation.

If a contract of sale contains a general caveat emptor clause and at the same time a certain quality is agreed, the contract generally is to be interpreted to the effect that the caveat emptor clause does not apply to any lack of the agreed quality (§ 434(1)(1) BGB) but only to those defects consisting in the purchased good not being suitable for the use intended under the contract (§ 434(1)(2) no. 1 BGB) or not being suitable for the customary use and its quality not being usual in things of the same kind and the buyer not having to expect this quality in view of the type of the purchased good (§ 434(1)(2) no. 2 BGB).

Facts

The plaintiff demands the unwinding of a contract of sale on a motorbike from the defendant. In October 2003, the defendant started an internet auction on eBay, offering the motorbike in dispute. In the article description he stated: "Mileage (km): 30.000" and pointed out:

"Naturally, the bike is being sold under no liability for defects […]".

The plaintiff bought the motorbike for a purchase price of EUR 5.900. The vehicle's speedometer – which was not recognisable in the photo added to the article description on the internet – indicates the vehicle's velocity in mph (miles per hour) as well as in km/h (kilometres per hour). No express unit of measurement was printed next to the mileage counter. Upon inspection of a motor vehicle assessor appointed by the Regional Court, the counter reading was 30.431,1. According to the undisputed report of the assessor, this reading referred to miles, equalling 48.965,25 km. The plaintiff initiated civil proceedings to obtain the repayment of the purchase price amounting to EUR 5.900, compensation for legal expenses amounting to EUR 363,42 and interest to a rate of 5 percentage points above the basic rate of interest with respect to EUR 5.900 since 5 October 2003 and with respect to EUR 363,42 since 26 April 2004, all of this versus the return of the motorbike. In addition he applied for the judicial declaration that the defendant was in default of acceptance with respect to the motorbike. The Regional Court had fully upheld the claim. The appeal of the defendant had been rejected by the Higher Regional Court.

Legal issue

The FCJ has modified the judgement of the appellate court and referred some parts of it back to the appellate court for new decision.

The plaintiff was entitled to rescind the contract of sale under § 437 no. 2, 1st case BGB, since the motorbike is defective. The discrepancy between the agreed mileage of 30.000 km and the actual mileage of more than 48.000 km constitutes - a was correctly assumed by the appellate court – a defect under § 434(1)(1) BGB which is not trivial in the terms of § 323(5)(2) BGB.

The further requirement for a rescission of a contract under § 437 no. 2, § 326(5) BGB (the seller not being obliged to perform under § 275(1)-(3) BGB) is met, since the discrepancy between the agreed and the actual mileage is an irreparable defect. Although the replacement by another, equivalent motorbike is not prima facie excluded due to the fact that the contract was a sale of specific goods, the replacement of a second-hand vehicle by an equivalent vehicle is only possible in exceptionally rare cases. That this possibility (i. e. an equivalent replacement bike) existed in the case at hand has neither been stated by a party, nor has it otherwise become apparent.

The appellate court has correctly assumed that the defendant cannot successfully invoke the agreed caveat emptor clause.

Contrary to the opinion of the appellate court, however, this does not result from the fact that the defendant had given a guarantee for the mileage being 30.000 km and thus could not invoke an agreement excluding or limiting the buyer's rights arising from a defect (§ 444, 2nd case BGB), since the defendant has not given a guarantee that the mileage of the motorbike actually was 30.000 km.

Giving a guarantee of quality with respect to a sold good in the terms of § 444 2nd case BGB – as well as giving a guarantee in the terms of § 276(1)(1) BGB – at least equals the warranting of a quality under the old law of sales (§ 459(2) BGB [old version]). Thus, giving a guarantee requires (as did the warranted quality) that the seller has bindingly accepted contractual liability for the sold good having the agreed quality. In case of a guarantee having been given, this liability extends to the obligation to pay damages, even in cases in which the seller is not responsible for he lack of the agreed quality (§ 276(1(1) BGB) or buyer has no knowledge of a defect due to gross negligence (§ 442(1)(2) BGB). With regard to these far-reaching legal consequences, the courts have to be restrictive in assuming such a liability, especially in cases where it would have to be held to have been tacitly accepted.

Whether the seller has given a guarantee for a certain quality of the sold good is indeed a factual question of judicial interpretation of the contract, which can only be restrictedly reassessed by the court deciding over an appeal on a point of law with respect to an infringement of the established rules of interpretation, logic, experience or procedure. This reassessment yields the result that the appellate court has taken into account the interests of both parties and thus has not violated the principle of an impartial interpretation leading to a fair and equitable solution.

However, the question whether the statement of a certain mileage merely qualifies as a statement of quality (§ 434(1)(1) BGB) or a guarantee of quality (§ 444 2nd case BGB) is to be answered under consideration of the typical interests the typical interests of both contract parties concluding a contract of sale over a second-hand car. According to the hitherto existing judicature of the senate it has to be differentiated whether the seller is a second-hand car dealer or a person acting privately. If the seller is a second-hand car dealer, the situation is typically dominated by the fact that the buyer relies on the experience and expert knowledge of the dealer he himself usually is lacking. He thus can rely on the seller accepting the liability for the truth of his statements with respect to the quality of the vehicle made in the knowledge of the buyer's reliance.

Whether this legal assessment is to be fully maintained after the legal position of the private buyer of a second-hand car has been strengthened in the course of the modernisation of the law of obligations or the requirements of a guarantee of quality rather have to be reformulated in a more restrictive manner, does not have to be decided here, since the principles developed for the professional sale of second-hand cars cannot be transferred to the private and direct sale between consumer.

This is because the assumption that the buyer relies on the superior experience and expert knowledge of the seller and thus interprets the seller's statements as a guarantee usually does not apply to this situation. Rather, the interests of the buyer are countered by the equally legitimate interest of the seller not having to be liable for facts he cannot reasonably assess due to his merely unprofessional knowledge. Without further indications, the buyer cannot rely on the seller being able to assess whether the reading of the mileage counter correctly displays the actual mileage of the vehicle. From the mere statement of the mileage in the article description the buyer thus cannot deduce that the seller was willing to accept the strict liability for the truth of his statements and thus having to pay damages without even being responsible for the defect. In the described situation the buyer can therefore can not assume that a guarantee was given, even if the seller has not expressly stated that he did not want to accept liability for the stated mileage.

If the buyer in a private sale of a second-hand vehicle wants to obtain a guarantee for the mileage, he has to request an express declaration to this effect. A tacitly given guarantee can only be assumed, if special circumstances beyond the statement of a certain mileage cause the legitimate expectation of the buyer that the seller wanted to accept strict liability for the truth of his statements.

Decision

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