
(1957) 11 AP CK 0028
In the Andhra Pradesh High Court
Case No : Appeal No. 820 of 1952

Dhulipudi Namayya

APPELLANT

Vs

The Union of India

RESPONDENT

Date of Decision : 09-11-1957

Acts Referred:

Contract Act, 1872 — Section 19, 20, 22, 53

Government of India Act, 1915 — Section 30, 30(1), 30(3)

Government of India Act, 1935 — Section 175, 175(1), 175(3)

Citation : AIR 1958 AP 533

Hon'ble Judges : Maheswaram, J; Krishna Rao, J

Bench : Division Bench

Advocate : G. Balaparameswari Rao and K. Satyanarayana, for the Appellant;
a(sic) E. Venkatesam, for the Respondent

Judgement

Krishna Rao, J.—This is a defendant's appeal from the judgment and decree of the Court of the Subordinate Judge, Visakhapatnam, decreeing the plaintiff to recover Rs. 10,332-10-0 as damages breach of a contract. The plaintiff is the Union of India represented by the Garrison Engin(sic) (M.E.S.), Visakhapatnam and the defendant is contractor residing at Kakinada.

The suit contract was for the work of pa(sic) ing, conveying and loading into railway wag certain generating sets and machinery, which belonged to the Government and were lying the Floating Dock Area at Kakinada. In J(sic) 1949, the Garrison Engineer, Visakhapatnam issued a notice Ex. A-3 inviting lump-sum (sic) ders from approved contractors for that was to be completed within one month from the (sic) of the order to commence, which was proper to be placed on or about 29-7-1949.

He received tenders from five contractors 28-7-1949, the last late fixed for the purpose, of them, the defendant's tender for Rs. 7,1 Ex. A-4 dated 27-7-1949, was the lowest. Ex. read with the amendments thereto set out (sic) list both of which have been signed by the defendant, is in the following terms:

To the Governor-General of India-Ha(sic) examined and perused the following document

1. Specifications signed by the G. E., Viz patnam.
2. Drawing detailed in the specifications,
3. Schedules A. B. C and D attached the
4. M. E. S. Schedule of prices for works repairs to buildings, etc., 1817 (hereinafter and (sic) I. A. F. W. 2249 referred to as the "MES" schedule) together with amendments Nos. 1 to 4 of May 1949,
5. General conditions of contracts I.A.F.W. (sic)49, together with amendments Nos. 1 to 13. We agree to execute all the work referred to (sic) the said documents upon the terms and conditions contained or referred to therein and (sic) detailed in the General Summary below, and (sic) carry out such deviation as may be ordered, (sic)de Condition 7 of I.A.F.W. 2249 up to a maximum of 50 per cent and further agree to refer 1 disputes as required by condition 58 to the sole (sic)bitration of an M.E.S. Officer to be nominated (sic) the S. E., Poona whose decisions shall be final, inclusive and binding.

GENERAL SUMMARY.

It cost of buildings etc., (which means works (sic), as per amendment)-form schedule A 5184-Add 38 per cent (thirty eight per cent only) infractor"s percentage-1970 - 7154-88. For the np sum of Rs. 7,155/- (Rupees seven thousand the hundred and fifty five only).

2. On 2-8-1949, the Garrison Engineer acted the tender by signing the following easement on it.

The above tender has been accepted by me behalf of the Governor-General of India for the lump sum of Rs. 7,155/- rupees seven thousand and one hundred and fifty five only,

(sic) also sent a letter, Ex. A-6, communicating the eptance to the defendant. The defendant re-red Ex. A-6 on 5-8-1949 but did not commence (sic) work in spite of reminders from the Garrison (sic)gineer. After entering into some correspondence beginning with Ex. A-9 dated 11-8-1949 he (sic)ed in Ex. A-26 dated 20-10-1949, that he would (sic)mence the work only if iron materials and (sic)nes were supplied to him by the Garrison (sic)gineer on no cost basis. The Garrison Engineer lined to supply them on the ground that under (sic) terms of the contract no materials were to supplied.

On 26-10-1949, the Commander of the Royal (sic)an Engineers gave a notice Ex. A-10, to the (sic)ndant cancelling the contract with effect (sic) 10-11-1949 for not performing it by the (sic)ed date, as provided for in Cl. 53(c) and (d) the conditions in I.A.F.W. 2249 governing the (sic)ract. Thereafter the work was got executed November-December, 1949 through another (sic)ractor P.W. 2 at an

extra expenditure of Rs. (sic)-2-0 as compared with the defendant's tender.

The plaintiff claimed in the suit this amount an additional sum of Rs. 750-8-0 provided for (sic). 50 of the conditions in I.A.F.W. 2249 as sensation for delay in completing the work.

3. The main defences were that the contract not a completed one but was still at the (sic) of negotiations between the parties, that in event the contract was not valid as it did comply with the requirements of S. 175(3) of Government of India Act, 1935, that it was (sic)ed by mutual mistake as to the nature of work, and that the Garrison Engineer ren(sic) performance impossible by refusing to (sic)y a crane and iron materials.

Objection was also taken to the quantum of (sic)ges claimed. The learned Subordinate Judge (sic) all these points against the defendant, (sic)g that Ex. A-4 along with the endorsement (sic) acceptance by the Garrison Engineer, P.W. (sic)stituted a completed contract and satisfied the requirements of S. 175(3) of the Government of India Act and that there was no mutual mistake or impossibility of performance. He according decreed the suit and the defendant has come up in appeal.

4. Sri G. Balapameswari Rao, the learned counsel for the appellant, has reiterated all the contentions which were unsuccessfully urged in the lower Court. The first point taken by him is that there was no completed contract. In order to appreciate his argument, it is necessary to read P.W. 1's letter of acceptance, Ex. A-6 which runs thus :

I hereby accept your tender, dated 28th July, 1949 for the above work for the lump sum of Rs. 7,155/- (Rupees seven thousand one hundred and fifty five only).

Please lodge with the Garrison Engineer, Vizagapatnam, the security deposit of Rs. 720/-(Rupees seven hundred and twenty only) within seven days of receipt of this letter. It is suggested that the security deposit be in the form of War Bonds and Defence Savings Certificates.

This letter will also form part of the contract agreement and you are requested to sign and return two of the copies enclosed herewith immediately to this office.

You will please contact Superintendent Gd. I. (M.E.S.), Coconada, who will hand over site to you.

Work order to commence work is also enclosed in triplicate for your signature and early return of two copies.

The learned counsel says that there was no absolute and unqualified acceptance of the defendant's tender or proposal under Ex. A-4 and that Ex. A-6 amounts to a counter offer by P.W. 1, the Garrison Engineer, which had to be accepted by the defendant before there could be a completed contract. The basis for this contention is his construction of Ex. A-6 which according to him, imports a new

term that the defendant should give a security deposit of Rs. 720/-.

He contends further that as P.W. 1 called upon the defendant by Ex. A-6 to sign and return two copies thereof and of the work orders and as this was admittedly not done by the defendant, the parties did not conclude a binding contract.

5. We are unable to agree with the learned counsel's construction of Ex. A-6. No doubt the endorsement of acceptance on Ex. A-4 was signed by P.W. 1 behind the back of the defendant and the question as to the nature of the acceptance has to be determined with reference to P.W. 1's communication thereof under Ex. A-6. But a plain reading of Ex. A-6 shows that there was an unqualified acceptance of the defendant's tender.

The furnishing of security by the defendant was not expressed as a condition, which was required to be fulfilled by the defendant before his tender was accepted, It was only a collateral requirement which P.W. 1 tried to introduce with a view to enforce the performance of the contract. This is made clear from the fact that in Ex. A-7 one of the two work orders enclosed with Ex. A-6 for the defendant's signature, the proposed date of handing over was mentioned as 5-8-1949 and the proposed date of commencement of the work was 6-8-1949.

In Ex. A-6 dated 2-8-1949, the defendant was given 7 days' time after receiving it for furnishing the security. The intention was clearly that he could furnish the security after commencing the work. No doubt according to Cls. III and V of the notice Ex. A-3 the tender documents were to be issued to and tenders were invited from only contractors on the M.E.S. approved list and P.W. 1 says that he asked for the security deposit as the defendant was not on the approved list at the time.

But the qualification that the tendering contractor should be on the approved list was obviously waived, when the tender documents were issued to the defendant and when P.W. 1 accepted the defendant's tender. It is in the defendant's evidence that he had done M.E.S. contract since 1944 to the tune of several lakhs of rupees. This might have been the reason why the qualification of being on the approved list was not insisted upon in his case.

The defendant vaguely says in his evidence that he could not begin the contract work, without making the deposit and signing the papers required by the authorities. But there was not even a suggestion to P.W. 1 that the defendant would not have been allowed to commence the work, unless he made a deposit and signed the papers mentioned in Ex. A-6. Subsequent to Ex. A-6 in his letter Ex. A-15 dated 18-8-1949 and A-19 dated 26-8-1949 to the defendant, P.W. 1 was pressing the defendant to commence the work and complete it in time.

There was no mention in them of the defendant's furnishing the security deposit and signing the acceptance letters and work orders. These were apparently regarded by P.W. 1 as minor formalities and the defendant seems to have taken the same view, because in his reply Ex. A-17 dated 24-8-1949 to P.W. 1's letter

Ex. A-15 he stated that he would begin the work on 29-8-1949 and pay the security deposit on that date.

Thus neither from the terms of Ex. A-6 nor from the attendant circumstances can it be said that the acceptance under Ex. A-6 was subject to the defendant furnishing the security deposit and signing the documents mentioned in Ex. A-6. We may usefully refer in this connection to the case of Sir Mahomed Yusuf Ismail, Bart. Vs. The Secretary of State for India in Council, There, the appellant made an offer in a letter, to lease certain premises for a post office on a monthly rental of Rs. 175/- for a period of 10 years. In his reply, the Presidency Postmaster accepted the offer and added that an optional clause should be inserted in the lease giving the post office the option to renew the lease for another 5 years. It was held that there was a clear acceptance of the appellant's offer and, that the request regarding the optional clause was a counter offer, which had no effect on the acceptance of the appellant's offer, unless in its turn it was accepted by the appellant.

Thus, the mere fact that a new and a collateral term is annexed to an absolute acceptance would not affect the formation of the contract on the basis of the original offer which is unconditionally accepted. As observed in the case of AIR 1949 211 (Federal Court)

If after a contract is concluded and its terms settled further negotiations are started with regard to new matters, that would not prevent full effect being given to the contract already existing, unless it is established as a fact that the contract was rescinded or varied with the consent of both the parties or that both parties treated it as incomplete and inconclusive.

Once completed, the contract can be got rid (sic) only with the concurrence of both parties.

It was open to the defendant here to have refused to give the security deposit and to have insisted that his offer, which was accepted, was to execute the work without furnishing any security. Actually he did not demur against the demand for security and agreed to furnish it, his reply Ex. A-17 dated 24-8-1949.

6. We shall next deal with the contention that a binding contract was not concluded (sic) reason of the defendant not signing and returning 2 copies of Ex. A-6 and of the work order which have been marked as Exs. A-7 and A The questions that arise for consideration are whether the parties were ad idem even wither the defendant completing these documents a whether his doing so was contemplated by the parties and was a condition precedent to a bir(sic)ing contract.

It is well settled that an absolute acceptance of an offer would not make a binding contract in fact, it does not extend to all the terms the contract under negotiation or if it is of a provisional arrangement subject to the cor(sic)tion that a further agreement would be execution between the parties. (See Hussey v.

Horne-Pay (1879) 4 AC 311 (C) and Winn v. Bull, (1877 Ch D 29 (D)).

It is also well settled that in order to decide these matters, the entire negotiations and correspondence on which the contract depends must be considered. In the present case, it can possibly be said that the agreement which came into existence upon the acceptance of Ex. A-4 does not cover all the terms essential for the contract. Clauses V, X and XII of the initiation for orders, Ex. A-3 put the defendant on notice at the outset that he had to "be very carefully deliver a bona fide tender" after fully acquiring himself with the nature of the work and conditions for performing it.

In pursuance of Ex. A-3, the defendant agent D.W. 1 applied for and obtained the order forms Ex. A-1 from P.W. 1's office at Visal patnam on 26-7-1949. They were given back the defendant's signatures on the same day P.W. 1's office. Ex. A-1 consists of a file of pages and the defendant has signed it at page 6, 7, 8, 9, 32 and 34. The nature of the work the conditions governing the contract have fully set out or referred to in these papers.

The tender document, Ex. A-4, is at page 7 of the file and we find from its preamble that the defendant examined and perused all material documents. In view of this admission there is no substance in the criticism that a set of the drawings and of I.A.F.W. 2249 were admittedly not furnished to the defendant with the tender documents and that the defendant has not signed schedules B to D.

These documents are specifically mentioned in the preamble to Ex. A-4. P.W. 1 definitely states that the drawings were made available for his use at his office. We have no doubt that other documents would have been similarly available, if the defendant had wanted to use them. The work orders, Exs. A-7 and A-8, were sent along with the communication of acceptance. Ex. A-6 did not add anything to the terms of the bargain.

They are merely working sheets of calculations, based on Ex. A-4 and on Schedule page 8 of Ex A-1. The direction in Ex. A-7 that the defendant should carry out the work by 5-9-1949 is consistent with the one month's time allowed by CI. 2 of the "Preliminary and General Conditions" signed by the defendant at page 34 of Ex. A-1. Thus it is clear that all the material terms of the contract were covered by Ex. A-4.

The defendant's convenient story that he affixed his signature to the tender forms without perusing or examining them cannot be accepted, as he was an experienced M.E.S. contractor and had the assistance of his agent D.W. who knew English. The documents establish that upon the acceptance of Ex. A-4, the parties were *ad idem* on all the material terms of the contract and that no terms were left over to be met by the defendant's signing the copies of Exs. A-6 to A-8.

6a. On the question whether the agreement formed by the acceptance of the

defendant's tender was provisional and subject to the execution of another formal document, the averment in the plaint was that no separate agreement was intended or contemplated and this was traversed in the defendant's written statement.

The position of the law on the subject has been summarised by Parker J. in *Von Hatzfeldt v. Illdenburg*, 1912-1 Ch. 284 at p. 288, in the following passage which has been approved by the Judicial Committee in AIR 1924 156 (Privy Council), AIR 1933 29 (Privy Council)

It appears to be well settled by the authorities that if the documents or letters relied on as instituting a contract contemplated the execution of a further contract between the parties, it is a question of construction whether the execution of the further contract is a condition or term of the bargain or whether it is a mere extension of the desire of the parties as to the manner in which the transaction, already agreed, will in fact go through.

In the former case there is no enforceable contract either because the condition is unfulfilment or because the law does not recognise a contract to enter into a contract. In the latter case there is a binding contract and the reference to more formal document may be ignored.

In the present case there is nothing either in the Ex. A-3 or in the tender documents to indicate that the parties contemplated going through formalities before the contract could be binding on them. Sri G. Balaparameswari Rao relies this connection on the following evidence of 1 in cross-examination:

The signatures of the acceptance letter sent me to the defendant and in the work orders the up the formal contract between the parties... I know that a contract entered into with the Government is to be evidenced by a written contract... In all cases of military contracts the tender, acceptance the tender, acceptance letter signed by the contractor and the work orders similarly signed form the basis of the formal contract between the contractors and the Government... I asked for the acceptance letter and order duly signed so that the formal contract may be concluded. That was my intention.

Immediately after the first sentence quoted, he has also said:

In order to make a contract as completed contract it is not necessary that the work orders or the letter of acceptance should be received back from the contractor with his signatures then. The letter of acceptance signed by the contractor and work orders similarly signed by him do not form part of the contract agreement. Ex. A-6, paragraph (3) read "this letter, will also form part of the contract agreement and you are requested to sign and return two of the copies enclosed herewith immediately to its officer" (The witness explains that a contract is concluded the moment the contractor receives acceptance letter from the Garrison Engineer). The work orders, etc., are records necessary

for the execution of the contract and for the purpose of billing the contract afterwards.

P.W. 1 has not referred to any provisions of law or in the negotiations between them to support either of his conflicting view on the question whether the signing of the acceptance letter and the work orders by the defendant was necessary to conclude the contract. Reading his evidence, as a whole it is manifest that he was giving only his own uncertain impressions as to what was required by the law. In the circumstances, his evidence can be of no avail to substantiate the learned counsel's contention that the unconditional acceptance of the defendant's tender did not have the effect of concluding the contract. The learned counsel next relies on Cl. 1(a) of I.A.F.W. 2249 which reads:

1. Definitions, etc. (a) The "contract" means the document forming the tender and acceptance thereof, together with the documents referred to therein including these conditions, schedules A, B, C, D and/or General Summary attached to the form of tender, the M.E.S. schedule the specifications and the drawings and all these documents as applicable taken together shall be deemed to form one contract and shall be complementary to one another.

He says that the documents referred to in the acceptance are part of the contract and therefore all the documents referred to in Ex. A-6 had to be completed by the defendant before the contract could be concluded. But the primary meaning given in the above said clause to the word "contract" is that it consists of the documents of tender and acceptance. The other documents are to be taken along with them in so far as they are "applicable". If the work orders had varied the terms of the bargain, they would have come within the category of "applicable" documents and their completion by the defendant would have been necessary. But we have already noticed that this was not the case. We therefore see no substance in the contention that the contract was not concluded owing to the defendant's failure to sign and return the acceptance letters and the work orders.

7. The next submission of the learned counsel is that the contract was not valid as it did not comply with the requirements of S. 175(3) of the Government of India Act, 1935. In order to appreciate the points raised it will be useful to set out the provisions of S. 175 of the Government of India Act 1935 and of the corresponding provisions of 8. 30 of the Government of India Act, 1915 which it replaced. Section 175 of the Government of India Act, 1935 reads:

1. The executive authority of the Dominion and of a Province shall extend, subject to any act of the appropriate legislature, to the grant, sale, disposition or mortgage of any property vested in His Majesty for the purposes of the Government of the Dominion or of the Province, as the case may be, and to the purchase or acquisition of property on behalf of His Majesty for those purposes respectively and to the making of contracts.

2. All property acquired for the purposes of the Dominion or of a Province, as the case may be, shall vest in His Majesty for those purposes.

3. All contracts made, in the exercise of the executive authority of the Dominion or of a Province shall be expressed to be made by the Governor-General, or by the Governor of the Province, as the case may be and all such contracts and all assurances of property made in the exercise of that authority shall be executed on behalf of the Governor-General or Governor by such persons and in such manner as he may direct or authorise.

Section 30 of the Government of India Act, 1915 reads :

1. The Governor-General in Council and any local Government may, on behalf and in the name of the Secretary of State in Council, and subject to such provisions or restrictions as the Secretary of State in Council, with the concurrence of a majority of votes at a meeting of the Council of India, prescribes, sell and dispose of any real or personal estate whatsoever in British India, within the limits of their respective Governments, for the time being vested in His Majesty for the purposes of the Government of India, or raise money on any such real estate by way of mortgage, and make proper assurances for any of those purposes, and purchase or acquire any property in British India within the said respective limits, and make any contract for the purposes of this Act.

2. Every assurance and contract made for the purposes of this section shall be executed by such person and in such manner as the Governor-General in Council by resolution directs or authorises, and, if so executed, may be enforced by or against the Secretary of State in Council for the time being.

3. All property acquired in pursuance of this section shall vest in His Majesty for the purposes of the Government of India.

8. There is a consensus of opinion among the different High Courts that these provisions are mandatory and exclude oral contracts and require the contract to be embodied in writing which ex facie shows that the contract was entered into by the Government or on behalf of the Government. But the decisions are at conflict on the question as to what amounts to compliance with these requirements, particularly as to whether a formal deed is necessary or whether the contract can be spelled out of correspondence and other informal documents.

The conflict was noticed but did not arise for determination in the case of K. Perumal Mudaliar Vs. Province of Madras, We do not consider it necessary to refer to all the decisions in which the question was considered, as no decision binding upon us has been brought to our notice. It is sufficient for our purpose to cite the case of S.C. Mitra & Co. v. Governor-General of India in Council, ILR (1950) 2 Cal 431 at pp. 435, 437 438 (J). There the facts were that the plaintiff firm brought the suit against the Governor-General in Council for the unpaid price of a certain number of baskets which had been duly delivered or tendered in response to the orders placed by the Director of Industries, Bengal.

This officer had the authorisation of the Government of India to enter into

contracts. Bu(sic) in his letter, by which he placed the orders, h (sic)signed as only "Director of Industries, Bengal and the Governor-General was not mentioned. The Government contended that the suit contracts were void and unenforceable because the technicalities prescribed by S. 175(3) were not complied with. This contention was upheld by Chatterjee J. who said :

It is to be observed that S. 30(1) of the Government of India Act, 1915, corresponded some extent to S. 175(1) of the Act of 1935. By S. 30(3) of the Act of 1915 only required that every contract shall be executed by such person in such manner as the Governor-General in Council, by resolution, directs or authorises. Section 175(3) of the Act of 1935 goes further and demands that the contract must be expressed to be made by the Governor-General. Power to make(sic) contract is conferred by S. 175(1) of the Government of India Act.

Under sub-s. (3) all contracts made in exercise of the executive authority of the Dominion shall be expressed to be made by the Government General... There is no conflict of authority as to whether a contract, in order to satisfy(sic) the conditions of S. 175 or its predecessor part S. 30 must be incorporated in a formal deed. In Secy. The Secretary of State for India Vs. Yadavgir Dharamgir, a Bench(sic) of the Bombay High Court held that, in order to bind the Secretary of State, the deed must be executed in his name and by the proper(sic) authority.

In Secretary of State for India in Council Vs. Bhagwandas Goverdhandas, another Bench of the same High Court took the opposite view(sic) and held that it is not necessary that a contract in order that it may comply with S. 30 of the Government of India Act of 1915, must be by and under seal and it may be entered into by correspondence. The same view has been taken in Devi Prasad Sri Krishna Prasad Ltd. and Another Vs. Secretary of State,

In my opinion, although the provisions of old S. 30 or the present S. 175 of the Government of India Act are mandatory and all contracts on behalf of the Secretary of State or the Government of India or the Dominion, in order to be enforceable, must be in writing and in the name(sic) of the appropriate authority, it is not essential(sic) that it should be incorporated in a formal deed(sic) or be under seal. It is sufficient compliance with the statute if the contract is evidenced by respondent or by a tender and its acceptance(sic) or by other documents of a less formal nature(sic) provided the prescribed requisites are fulfilled(sic) therein.

We are in agreement with the view of the learned Judge as to the effect of S. 175(3). In my opinion, a contract mentioned in the section can be validly made by correspondence or by the deed and its acceptance or by informal document but it must be expressed to be made by the Governor-General or the Governor of the Province(sic) and must be executed on behalf of the Governor-General or Governor by such person and in manner as he may direct or authorise.

9. We have to consider whether the defendant's tender Ex. A-4 together with P.W. 1's(sic) endorsement of acceptance thereon would satisfy(sic) these requirements. There is no evidence by particular mode of executing such contracts (sic)s been

prescribed by the Governor-General nor is any mode stipulated by the defendant in record to the suit contract. Although the commutation of the acceptance was necessary in law conclude the contract so as to bind both the parties, there was nothing to prevent P.W. 1 (sic)m completing the requisite contract document signing the endorsement earlier on 2-8-1949.

That Ex. A-4 was intended to be a formal document is clear from the note attached to it which states that the amendments to the document had to be initiated by both the parties. (sic) the question whether P.W. 1 was a person authorised to execute such contracts on behalf the Governor-General, the evidence of P.W. 1;hat he has been authorised to accept tenders of the value of Rs. 40,000/- and this was not allenged in his cross-examination.

As we have already indicated, Ex, A-4 has be read along with the list of amendments reto at page 9 of the file Ex. A-1 which has been signed by the defendant. Ex facie the (sic)der is expressed to be made to the Governor-General and to be accepted on behalf of the Governor-General. No doubt the acceptance is expressed to be made by the Governor-General but only by P.W. 1 on behalf of the Governor-General. But we do not consider that this is a (sic)ct of substance. Reading the document as a (sic)le, we hold that the contract is expressed to made by the Governor-General and has been (sic)uted on his behalf by P.W. 1 who had the nessary authorisation.

10. In this view, it is unnecessary for us to with the alternative contention on behalf of Government that even if Ex. A-6 is construed conditional acceptance the defendant agreed the condition by his letter Ex. A-17 dated 24-19 and the resulting contract which came into (sic)ence by the correspondence satisfies S. 175(3) is valid. We agree with the learned Subordinate Judge that the contract evidenced by Ex. complies with the requirements of S. 175(3) the Government of India Act 1935.

11. The contract is next assailed on the and that it is vitiated by a mutual mistake, not seriously suggested by the learned counsel that there is any scope for invoking S. 20 of Contract Act, which provides that where the parties to an agreement are under a (sic)ke as to a matter of fact essential to the (sic)ment, the agreement is void. The reason is there is no foundation whatsoever in the (sic)nce for supposing that as far as P.W. 1 is learned, he was under any mistake about the of facts concerning the contract. The argu(sic) is merely that the appellant was labour under a mistake as to the nature of the work done.

But this would not entitle him to avoid the act, as is clear from S. 22 of the Contract Act. It is urged that the appellant did understand the nature of the work before (sic)ade the tender, because a copy of the draw-(sic) which depicts the necessary packing cases of appendix I which gives a detailed des(sic) on of the machinery to be handled were given to him and he got them only as per 1's letter Ex. A-15 dated 18-8-1949 and Ex. dated 31-8-1949 after he asked for them But (sic)d the means to know everything about the if he had been

ordinarily diligent. Ex. 1 erred to in the "Preliminary and general conditions" signed by the defendant though it is mentioned as Ex. A due to a clerical error. That he perused the drawing was acknowledged by the defendant in the preamble to Ex. A-4.

Hence there can be no question of his tender having been obtained from him by any misrepresentation or fraudulent non-disclosure of the facts, so as to entitle him to avoid the contract under S. 19 of the Contract Act Even after he inspected the machinery as stated by him in his letter Ex. A-9 dated 11-8-1949, he undertook to do the work by his letter Ex. A-17 dated 24-8-1949. His assertion in the witness-box that although he was an experienced M.E.S. contractor, he submitted the tender without perusing the necessary documents only shows the lengths to which he is prepared to go in order to escape liability. We see no substance in this part of the defence.

12. The last ground of attack against the contract is that performance thereof was rendered impossible by P.W. 1's refusal to supply a crane and the necessary iron materials. The learned counsel points out from the description of the machinery in Appendix I that some of them weighed as much as 5 tons and that it would have been impossible to handle them without a crane. He also points out from P.W. 1's evidence that iron was a controlled article in 1949 and that paragraph 12 of the "Preliminary and general conditions" at page 34 of Ex. A-1 mentioned that assistance may be given to the contractor for obtaining necessary permit for controlled articles. But the appellant wanted cranes and iron materials without payment for them as is clear from his letter Ex. A-26 dated 20-10-1949 in which he asked for them at "no cost basis".

There was no justification whatever for such a demand because it was clearly stated in Schedules B and C of the tender documents that no articles would be supplied to him. P.W. 1 also definitely informed the appellant by Ex. A-15 dated 18-8-1949 that he had to provide himself with the necessary equipment or machinery. The appellant's reply was Ex. A-17 undertaking to begin the work on 29-8-1949. Thus the principle of S. 53 of the Contract Act has absolutely no application to the facts. According to P.W. 1's evidence the use of a crane was not essential for the work, although it might have minimised a lot of labour and helped in the early completion of the work. P.W. 2's evidence shows that when he was subsequently entrusted with the work he did it in time without the use of the crane.

He is corroborated in this respect by P.W. 3 the officer who supervised his execution of the work. The learned counsel's criticism is that P.W. 2 has got no account books in respect of the work, although he was assessed to income tax in the year 1949-50. But this is not a sufficient ground to reject his evidence which is consistent with the evidence of P.Ws. 1 and 3. The appellant himself has admitted in his evidence that he saw P.W. 2 doing the work and did not see a crane being used. We are therefore unable to accede to the appellant's contention that it was impossible to do the work without a crane.

His alternative contention that the time allowed to him was too short to do the work without the assistance of a crane is equally without substance, as it is not supported by any independent evidence. Throughout the correspondence he had not complained of inadequacy of time or asked for extension of time. This part of the defence is clearly an after-thought. We have no hesitation in rejecting his plea as to impossibility of performance.

13. Finally there remains the question as to the quantum of damages to which the plaintiff is entitled. In the plaint, a sum of Rs. 9,582-2-0 was claimed as the additional expenditure incurred for getting the work performed by a new contractor P.W. 2 and a sum of Rs. 750-8-0 was claimed as damages caused by delay in the completion of the work. The evidence showed that these figures were arithmetical errors for Rs. 9,617/- and Rs. 715-8-0, respectively making the total 0-2-0 less i.e., Rs. 10,332-8-0.

The defence put forward in the written statement, besides a denial of the existence of the contract was that both these items of damages were not true. The main evidence on the matter was the oral evidence of P.W. 1 which was supported by P.W. 2 and by the final bill Ex. A-12 prepared by the M.E.S. in respect of the contract. The learned Subordinate Judge accepted P.W. 1's evidence and passed a decree for the amount of both the items of damages, together with subsequent interest and costs.

14. There is no dispute that if as we have found above, a valid contract was concluded, the defendant committed breach. For by his letter, Ex. A-26, dated 20-12-1949 he refused to carry out the work unless the plaintiff agreed to his new conditions that a crane and certain iron materials were supplied to him on no costs basis. After this, the plaintiff was manifestly entitled to treat the contract as at an end and it is not necessary to consider whether the plaintiff could have also terminated the contract on the ground mentioned in his letter Ex. A-10 dated 26-10-1949 that the defendant did not complete the work within the agreed time.

The plaintiff is entitled to recover from the defendant in the words of S. 73 of the Contract Act, compensation for any loss or damage caused to him by the breach, which naturally arose in usual course of things from such a breach or which the parties knew, when they made the contract, to be likely to result from the breach of it, but not for any remote and indirect loss or damage sustained by reason of the breach.

15. The rule applicable for determining the amount of damages for the breach of a contract to perform a specified work is that the damages are to be "assessed at the pecuniary amount of the difference between the state of the plaintiff upon the breach of the contract and what it would have been if the contract had been performed and not the sum which it would cost to perform the contract, though in particular cases the result of either mode of calculation may be the same." See *Wigsell v. School for Indigent Blind*, (1882) 8 QBD 357 (N). It is therefore clear

that the measure of compensation is the increased cost of the work to the plaintiff on account of having got it done by another contractor.

The evidence of P.W. 1 is that after the defendant's contract was terminated, the next lowest tenderer, Prabhakar and Co., who had quoted 621/2 per cent., over the M. E. S., schedule of rates, was not prepared to do the work. Therefore the work was entrusted to P.W. 2 the third lowest tenderer, who had quoted 165 per cent., over the M. E. S. rates i. e., nearly double the rates quoted by the defendant. The work comprised three items viz., transporting the machinery, supplying packing boxes and supplying crates and their respective quantities were estimated in Schedule A as Rs. 402.50, Rs. 4553.05 and Rs. 229.33 under the M. E. S. rates. But this was not a final estimate as deviations up a maximum of 50 per cent., were contemplate and provided for in the contract Ex. A-4 with the defendant himself.

Deviations were actually made in getting the work executed through P.W. 2, the quantity the item of supplying packing boxes being increased to Rs. 6618.78 & the quantity of the item supplying packing crates being increased to Rs. 556.92 under the M. E. S. rates. On the ba(sic) of 165 per cent., margin demanded by P.W. he had to be paid Rs. 20,067/- for the work deviated. The amount that would have be paid to the defendant who had quoted a mar(sic) of 35 per cent., would have amount to Rs. 10,450. The difference of Rs. 9617/- which had to paid to P.W. 2 was claimed as the addition expenditure incurred by the plaintiff.

16. The first objection of Sri G. B(sic) parameswari Rao is that the amount spent the work has not been satisfactorily proved adducing the best evidence such as the bo(sic) registers and work memos and other maters correspondence which must be in the possess of the plaintiff and P.W. 2. But there can no doubt that P. W. 2 was paid the Rs. 20,0(sic) and odd for doing the work, as this fact is (sic) ken to by both P.Ws. 1 and 2 and is consist with Ex. A-12. If the defendant disputed correctness of any of the measurements or ca(sic)lations he ought to have called for the necessary documents from the plaintiff, which he (sic)ed to do. The learned Subordinate Judge (sic) that a memo of calculation was filed by the (sic)ernment Pleader there and that no dispute raised before him as regards its correctness, consider this objection to be untenable.

17. The second objection is that the plaintiff did not make any attempt to mitigate damage, but on the other hand swelled the s(sic) This objection is taken both with reference the propriety of having got the work done P.W. 2 and the propriety of the deviations, was undoubtedly the duty of the plaintiff mitigate the damage caused by the defend breach. Although, Cl. 53 of I. A. F. W. 2249 vides that after the contract is cancelled, work may be got done at the contractor's and expense, under Cl. 51 the contract is (sic)erned by the general law. The plaintiff ca(sic) claim to be compensated for any loss which due to his own failure to behave reason after the breach. The principles applicable stated at pages 399 to 401 of Indian Contract Specific Relief Acts by Pollock and Mullah Edition, 1944) on the authority of a numb English cases thus:

The question must always be whether was done was a reasonable thing to do, h(sic) regard to all the circumstances, and one is what a prudent person uninsured, i. e. having a claim for compensation or inde(sic) on any one would do under the same cl(sic) stances.

The test is, "what a prudent man might reasonably done if the whole expense was t(sic) on himself." But the rule must be applied discretion because the party who was already the wrong by breaking his contract is not tled to impose new and extraordinary duty the aggrieved party. The plaintiff must not acted in a way legitimately open to blam(sic).

18. So far as the deviations are conc(sic) they naturally arose from the contract b(sic) they were specifically provided, for in Ex the criticism is that the deviations are not prov(sic) to have been necessary, as P.W. 1 merely serts that they came within the scope of the (sic)rk, without explaining why the original esti(sic)te in respect of packing boxes and crates was and to be defective and why it had to be de(sic)rted from to the ultimate detriment of the (sic)endant. But under clause 7 of I. A. F. W. 19, the accepting officer was authorised to make nations in his discretion and the contractor (sic)s not entitled to question their necessity. The defendant cannot better his position by committed a breach of the contract. As there is noth(sic) to show that the deviations were effected la fide, the defendant cannot be heard to say (sic)t the necessity for them is not established.

18a. With regard to the entrustment of the (sic)k to P.W. 2 the criticism is that as the ori(sic)al tenders had lapsed the normal procedure inviting fresh tenders ought to have been owed and that in any event the work ought have been got done at rates higher than (sic)se quoted by the next lowest tenderer, Pra(sic)kar and Co. The answer on behalf of the plaintiff is that as the execution of the work already been delayed by about 3 months, it of reasonable to expect him to suffer further (sic)y by calling for fresh tenders. For not enting the work to Prabhakar and Co., relief is placed on P.W. 1's assertion that this (sic) was not prepared to do the work. But it also elicited from P.W. 1.

I did not interview any of the contractors made the tenders. There is the letter from second lowest tenderer that he was not pre(sic) d to do the work. That letter is not filed Court... The second lowest (sic)er was that of Prabhakar and Company, (sic)e came to me in connection with that tender, (sic)e agent of Prabhakar and Company was (sic)viewed. I do not know his name.

(sic)e is absolutely no explanation as to why the (sic)ed letter of Prabhakar and Co. which is (sic) to support the view that the plaintiff did act in an unreasonable manner, has not been (sic)uced. The legitimate inference is that if (sic)uced it would have been unfavourable to the plaintiff. The important fact to be borne in is that in entrusting the work to P.W. 2, (sic) 1 got it done at nearly double the rates (sic)ed by the defendant without sufficiently (sic)pting to get it done at intermediate rates correspondence in connection with enforc(sic) the defendant's contract proceeded in a (sic)ely fashion and it is not shown as to how

(sic)xecution of the work suddenly became ur(sic) and how further delay was injurious to the (sic)iff after the defendant's contract was ter(sic)ed.

(sic) the difference had been small, as in the (sic)of Prabhakar and Co., it might have been (sic)ably be said that the delay on account of (sic)g for fresh tenders was not worth-while (sic) before deciding to get the work done at (sic) the rates originally bargained for, the (sic)iff ought to have exercised more circum(sic)on. We do not consider that a prudent would have adopted the course of incurring (sic) the expenditure without making every (sic)le effort to get Praghakar and Co. or some contractors to do the work even though (sic)ight have resulted in some delay. P.W. 1 (sic)no easily satisfied that prabhakar and Co., not prepared to do the work and he precipice (sic) entrusted the work to P.W. 2.

As we have already noticed, proof that Prabhakar and Co., declined to do the work depends only on P. W. 1's oral assertion in circumstances in which corroboration by documentary evidence must have been readily available. Taking all the facts into consideration, we are of opinion that the plaintiff failed in his duty of mitigating damages and that the proper measure of damages is the difference in expenditure which would have been incurred at the rates offered by Prabhakar and Co. The amount of damages will be calculated and awarded accordingly. The parties will file a memo of calculation on this basis.

19. As regards Rs. 715-8-0 claimed as compensation for the delay in the completion of the work. P.W. 1 himself says that it is sought to be recovered as a penalty. There is absolutely no evidence to show that any loss or injury was caused to the plaintiff on account of the delay. It Is well settled that Courts will give damages for breach of contract only by way of compensation for loss suffered and not by way of punishment. We therefore disallow the plaintiff's claim for Rs. 715-8-0 as it is clearly a penalty.

20. In the result the appeal is allowed to the extent mentioned above, with proportionate costs in this Court. As regards costs in the lower court the defendant will pay the plaintiff costs proportionate to the amount decreed to the plaintiff. The lower Court's order as to costs will be modified accordingly.