(1952) 12 MAD CK 0006

In the Madras High Court

Case No : Appeal No. 194 of 1949

G.A. Galia Kotwala and Co. Ltd. APPELLANT

Vs

K.R.L. Narasimhan and Brother RESPONDENT

Date of Decision : 11-12-1952

Acts Referred:
Contract Act, 1872 — Section 56

Citation : AIR 1954 Mad 119 : (1955) ILR (Mad) 302 : (1953) 2 MLJ 372

Hon'ble Judges : Mack, J;krishnaswami Nayudu, J

Bench : Division Bench

Advocate : S. Ramachandra Ayyar, for the Appellant; V.N. Venkatavaradachari, for the Respondent

Final Decision : Partly Allowed

Judgement

Krishnaswami Nayudu, J.—This appeal arises out of a suit for damages for breach of contract. The plaintiffs, who are the appellants are

merchants carrying on business at Coimbatore, the defendants being merchants of Salem and manufacturers of tapioca starch. The plaintiffs'' case

is that in January and February 1946 the defendants entered into three contracts for the supply of 35 tons, 50 tons and 100 tons of tapioca starch

to the plaintiffs at Rs. 15-8-0 per cwt. F. O. R. Sankarldrug, Sankaridrug being in Salem district, and as against the said three contracts the

defendants received from the plaintiffs a sum of Rs. 10,000 on 21-2-1946. The sale and purchase of tapioca were subject to the Starch Control

Order of 1945 and licence was necessary for selling the commodity. Since under the contract the goods were to be despatched outside the district

to Ahmedabad, Indore, Bombay and other places in addition to a licence under the Starch Control Order an export permit from, the Collector of the District was necessary under the Madras Tapioca (Movement Control) Order. The plaintiffs state that the necessary export permits from the

authorities were applied for by the defendants on account of the plaintiffs & that such permits were received in May 1946, but the defendants got

them wrongfully cancelled with the evil intention of resiling from the contract and with a view to sell the goods at a higher rate and that thereby they

committed a breach of contract.

2. The defendants deny that there was any completed enforceable contract and state that the plaintiffs, considering that the price of tapioca starch

was rising, agreed to pay a higher rate and eventually went back on their promise and therefore the defendants were compelled to cancel the

application for export permit on 17-5-1946, though if only the plaintiffs were prepared to stand by their promise the defendants could have

renewed the same even on 17-5-1946. The defendants further contend that there was no breach or cancellation of the contract and that the

contract became impossible of performance when the transport of tapioca was banned.

3. The lower Court found that the contracts between the parties were complete but that the suit contracts became impossible of performance on

the part of the defendants for want of export permits and railway facilities in respect of the goods agreed to be sold and dismissed the suit.

4. In appeal, the finding of the lower Court as to there being completed contracts capable of enforcement has not been questioned by the

defendants-respondents. The question therefore for decision is whether there has been a breach which would entitle the plaintiffs to damages. The

appellants confined their contentions only to the breach committed by the defendants in respect of the supply of 35 tons under the first order and

25 tons under the second order, as in respect of these alone that the licences from the Textile Commissioner were granted; and in view of there

being no licence for the remaining goods, the appellants could not press their appeal. The contracts in this case are concluded by correspondence.

The correspondence with regard to the first contract started from the 15th January and ended on 30-1-1946. The second contract is dated 25-1-

1946. On 15-1-1946 by Ex. A. 1 the defendants write to the plaintiffs referring to their previous personal conversation and confirming acceptance to supply two wagon loads at Rs. 15-8-0 per cwt. F. O. R. Sankaridrug R. S. and adding for the order form to be sent to them to enable them to

get the licence from the Textile Commissioner, Bombay and permits for export from the Collector of the District. There has been further

correspondence with reference to the first contract relating to the price, the plaintiffs insisting on Rs. 15-4-0, the defendants having already quoted

Rs. 15-8-0 and maintaining it. The price appears to have been settled finally on 30-1-1946 by Ex. A. 33 whereby the first contract was

concluded. In the meanwhile on 22-1-1946 the Collector of Salem promulgated the following order, Ex. B. 4:

As the Commissioner of Civil Supplies has asked the issue of permits to export tapioca and its products outside the province or district to be

suspended no permit will be issued from this office now.

In pursuance of Ex. A. 1 the defendants applied both to the Textile Commissioner, Bombay, and to the Collector of the District for the licence and

the export permit respectively and while the licence from the Textile Commissioner was granted, the defendants did not receive the export permit.

The defendants were making strenuous attempts to secure the export permit reminding the authorities of the considerable loss that they would be

put to by reason of the delay in granting export permits as is seen from Ex. B. 16 dated 27-2-46.

5. On 9-3-1946 the Collector of Salem issued another order, Ex. B. 6, which announced that permits would be issued to export tapioca chips and

flour or starch to places outside the district or province upto the quantities possessed by the merchants on 12-2-1946, and merchants were asked

to submit applications to the Salem Collector''s office with full particulars regarding the names of the consignees. It was also stated that permits

would be issued after they were got verified and that no stocks that were produced subsequent to 12-2-1946 would be permitted to be exported

under any circumstances. A copy of this order was sent to the defendants by the Collector of Salem. From Ex. A. 38, a letter written by the

defendants to the plaintiffs on 12-3-1946 it is seen that the defendants applied, as soon as they received the Salem Collector''s letter (Ex. B. 6), for

six permits for export of 72 tons. Subsequent to that the plaintiffs'' representative and the defendants appear to have met and there was a request on the part of the defendants for varying the price at which they agreed to supply under the contracts, they having asked for higher rates. But it

does not appear that the plaintiffs had agreed to an increase of rate There is no doubt that the market prices of tapioca starch were increasing after

the date of the contracts in January. The order of suspension of the issue of export permits promulgated on 22-1-1946 Ex. B. 4, was modified by

the subsequent order, Ex. B. 6, whereby the Collectors were instructed to grant permits for such of the stocks as were held by the merchants upto

12-2-1946. It is clear that the defendants had more than 60 tons of tapioca starch powder in stock on 12-2-1946 as would be evident from their

letter Ex. A. 17 dated 23-2-1946 to the plaintiffs, subsequent to the release order Ex. B. 6 there appears to have been an enquiry held by the

revenue officials as to the stock held by the merchants prior to 12-2-1946 and the defendants'' stock also bad-been verified by the Revenue

Divisional Officer the stock of the defendants being at Sankari, Salem, as is seen from the letter of the defendants to the plaintiffs dated 18-4-

1946, Ex. A''. 40. The learned Subordinate Judge is therefore correct in observing that there was a reasonable chance of the defendants obtaining

the necessary permit from the Collector of Salem in respect of at least 35 tons of tapioca starch which, according to the defendants, was part of

the stock which they had on hand on 12-2-1946 for the purpose of delivering it in fulfilment of the first contract. But, there is no evidence, as

observed by the learned Subordinate Judge, that the defendants had sufficient stock on hand on 12-2-1946 to enable them to satisfy the Collector

of Salem that they could fulfil also their obligation to deliver 25 tons of tapioca starch under the second contract, though the defendants had already

the licence in respect of the Textile Commissioner, Bombay who was the starch controller. The position, therefore, was that there was no ban on

the grant of permit to the extent of 35 tons possessed by the defendants, as they had admittedly more than 60 tons of powder on that date, the

remaining being apparently set against the contracts to other individuals and there was no prohibition against the export of 35 tons under the first

contract to the places designated by the plaintiffs. That is, there was no absolute prohibition of the export of these 35 tons outside the district of

Salem.

6. It has therefore to be ascertained whether it was due to the default on the part of the defendants that this contract to supply 35 tons could not be

given effect to. It is admitted that on 17-5-1946 the defendants withdrew the application, which they had made for issuing export permits even in

respect of the 35 tons, and the question is, were the defendants justified in so withdrawing the application. While the plaintiffs state that in fact

permits were issued by the Collector of Salem, but they were cancelled by the defendants with a view to sell the contracted goods at higher rates

to third parties, there is no evidence to show that the Collector Of Salem did in fact issue export permits and the defendants cancelled the same;

but in view of the admission of the defendants, it is clear that they themselves withdrew the application with the result that no opportunity was given

to the authorities for either granting or refusing the permits. The plaintiffs sent a telegram on. 18-5-1946, Ex. A. 25, warning the defendants that

they were trying to cancel the permits with a view to sell the stocks at higher rates locally and informing them that proceedings would be taken for

any such action on the part of the defendants. There is also evidence, even on the defendants'' own admission in Ex. A. 26, that they had sold the

stocks locally by 24-5-1946, and the withdrawal is admitted by the defendants to have been due to the plaintiffs not agreeing to the higher rates

demanded by the defendants as evidenced from the pleadings, the correspondence and the evidence of D. W. 1. The point is whether the

defendants having been under an obligation to supply at the rate of Rs. 15-3-0 per cwt. were entitled to insist on higher rates, even though the

market prices at the time of the performance of the contract rose above the contract rate. There can be no question that it was not open to the

defendants to resile from the contract on the ground of the failure of the plaintiffs to pay enhanced rates and that would be sufficient to make the

defendants responsible for the non-performance of the contract and make them liable in damages in respect of the 35 tons under the first contract.

7. But it is contended that the contract had become impossible of performance by reason of the banning of the transport of tapioca. The Madras

Tapioca (Movement Control) Order required a permit from the Collector of the district for the export of the tapioca outside the province. There

was therefore no total prohibition of exports, but exports were made subject to the issue of permits from the authorities. That such permits were issued for exporting tapioca outside the province is evident from the previous transactions of the defendants. The difficulty, however, arose after

22-1-1946 when the granting of these permits was suspended by an order of the Commissioner of Civil Supplies under Ex. B. 4. That order made

it clear that the suspension was only temporary as it stated that the issue of permits was suspended ""now"" meaning ""then"". But, even the order

suspending the grant of permits was modified by Ex. B. 6 and the prohibition against the grant of permits was removed in respect of such stock as

the merchants could show that they had prior to 12-2-1946. There was therefore nothing preventing the authorities from granting an export permit

in respect of the 35 tons under the first contract for which, the defendants had already applied and which application they withdrew on 17-5-1946.

On that date, there was no order of Government which prevented the Collector of Salem from granting export permit in respect of these 35 tons. If

the defendants had not withdrawn the application, there was every likelihood of the permit having been granted.

8. But the defendants rely on Ex. B. 7, a memo issued by the Reception Tahsildar,. Salem, which stated that the merchants or firms dealing in

tapioca and its products should not export tapioca and its products outside the district until further orders and that tapioca should not also be

converted into commercial, products. Exhibit B. 7 also contains a special memo of the Reception Tahsildar dated, 1-4-45 which says that it was

brought to the Collector''s notice that tapioca merchants were vigorously continuing to produce sago which had no market in Salem district and

informs the merchants that tapioca should be consumed within the district and they should not export tapioca or its products outside the district in

any form in future. This is relied upon as imposing an absolute ban on the export of any tapioca, outside the district notwithstanding the order of

release in respect of the quantities held prior to 12-2-1946 under Ex. B. 6. We are unable to hold that this memo of the Reception Tahsildar has

the effect of nullifying the order of the Collector. As is seen from the press note issued by the Madras Civil Supplies Department and referred to in

Ex. A. 23, the-difficulties of the merchants, who had manufactured tapioca for the purpose of export, were taken into consideration and it was for

helping bona fide merchants to export such quantities, as they possessed on 12-2-1946 that the order mentioned in Ex. B. 6 was promulgated.

The memo of the Reception Tahsildar Ex. B. 7, was only a warning to the merchants not to continue manufacturing tapioca, as there was no

chance of their obtaining permits outside the province, which must necessarily have been issued, since in spite of the two orders, Exs. B. 4 and B.

G, the merchants were probably continuing to manufacture tapioca for purposes of export. We have no doubt that Ex. B. 7 has. not the effect of

modifying or varying the partial removal of the ban contemplated under Ex. B. 6. It is therefore not open to the defendants to rely on Ex. B. 7 for

the purpose of showing that the contract had become impossible of performance.

9. It is contended on behalf of the defendants that from the nature of the suit contract being an F. O. R. contract it was the duty of the buyer to

obtain the permits and they having not performed their part of the contract, the defendants were not bound to supply the goods unless the plaintiffs

produced export permits and in addition supplied wagons to enable the defendants to load the goods at the Sankaridrug railway station. Whatever

may be liability under the law as to either the seller or the buyer obtaining the required permit in a contract of this nature, if it was an implied or

express condition of the contract between the parties that the defendants should obtain the permits, any legal obligation on the part of the plaintiffs,

if really it is on them to obtain the same, would not excuse the defendants from complying with their undertaking to apply and obtain the permit. In

Ex. A. 1, the defendants asked the plaintiffs to send the order so as to enable the defendants to apply for not only the licence from the Textile

Commissioner, Bombay, but also the export permit from the Collector of the District. There is no doubt that under Ex. A. 1 the defendants have

taken upon themselves the responsibility of obtaining the necessary permit and in pursuance of that they had applied for the permits and had been

vigorously pursuing their efforts to secure them as is seen from the correspondence that passed between the parties, namely, Exs. A. 33 and B. 8,

where the defendants say that they wrote to the Commissioner of Civil Supplies in spite of Ex. E. 4 to issue the permit, Ex. A. 34, where the

defendants say that they have written a D. O. to the Commissioner of Civil Supplies, and Ex. B. 16 addressed to the Commissioner of Civil

Supplies where the defendants impressed upon the Commissioner about the loss caused to them by the delay in the non-issue of permit, and the subsequent conduct of the defendants in pursuing their efforts to secure the permits allowing their stock to be inspected by the tahsildar after Ex. B.

6 and applying for permits for such stock as they held on 12-2-1946. Therefore, there can be no doubt that not only did they agree to apply but

they did apply and sincerely and vigorously pushed their efforts to secure the permits realising that it was on their part the obligation to obtain the

permits lay. It is also evident from their admission that being an F. O. R. contract it was their look out to secure the permits. In the two letters

written by them to the plaintiffs. Ex. A. 20 dated 5-3-1946 and Ex. A. 39 dated 14-3-1946, they informed the plaintiffs that the Tahsildar had

verified the stock and that they were awaiting the permits soon, but requested the co-operation and assistance of the plaintiffs even though the

terms were F. O. R. but that nothing prevented the plaintiffs helping the defendants in the interests of their own business and co-operating with

them. Under the terms of the contract, it is abundantly clear that the parties understood that being an F. O. R. contract, it was the sellers concern

to apply for and obtain permits, and that, in any event under the terms of the contract, it was the sellers-defendants that had to apply for the

permits and obtain the same. The obligation being theirs, the defendants were not justified in withdrawing the application for issue of permits and

disabling themselves from getting a permit, while it was their duty to use all reasonable diligence in securing the same. Further in the very nature of

the contract and the facts and circumstances of this case, of the two parties, the defendants alone were in a position to apply for the exoort

Dermits. and even if the contractual obligation be otherwise, which, however is not the case, it is the defendants that could alone apply for permit.

By reason of the order removing the suspension of the issue of permit to the extent of the stock of goods held by the merchants up to 12-2-1946,

the defendants alone, who were in possession of the stock and who agreed to sell could satisfy the authorities that any portion of the stock they

had were manufactured and held by them prior to 12-2-1946. In the peculiar circumstances of this case and the requirements of the order under

Ex. B. 6, the defendants only could make the application for permits and, realising the situation in which they were placed, they rightly applied for

the permits and allowed the stock to be inspected and verified by the revenue officials. In this case, therefore, we have no hesitation in holding that the duty of applying for the permits at any rate in respect of the 35 tons with which only we are concerned, was undoubtedly on the defendants.

10. The learned Subordinate Judge, however, held that in the suit contract, it is for the buyer to get the licence. This conclusion was based mainly

on the decision in -- ''H. O. Brandt and Co. v. H. N. Morris & Co.'', (1917) 2 KB 784 (A). In that case, the plaintiffs, who carried on business in

Manchester, gave to the defendants, who were chemical manufacturers in Manchester, a bought note dated 3-9-1914, which was addressed to

the defendants. The note stated ""we have this day bought from you 60 tons of pure aniline oil"", and it was signed ""H. O. Brandt & Co."". There was

evidence that during war time the destination of goods intended for export must be made known. The defendants having failed to deliver the oil, the

plaintiffs sued for non-delivery. The suit contract was held to be one for monthly deliveries over five months, ""f. o. b. Manchester"", since after the

contract was made the export of aniline oil was prohibited by an Order of Council, and this prohibition was in existence during the greater part of

the five months, but licences to export were being granted in certain cases. It was held that the obligation of applying for a licence lay upon the

buyers and not upon the sellers. Scrutton L. J. in distinguishing the earlier decision of that Court in -- ''In re Anglo Russin Merchant Traders and

Batt (John) & Co. (London)'', (1917) 2 KB 679 (B), where tha contract was a. c. and f. contract, observed:

In this case it becomes necessary to go further and to decide whether in this f. o. b. contract the obligation to obtain a licence in case there should

after the making of the contracts be a prohibition against export, lies upon the sellers or the buyers.'' In my opinion, it lies upon the buyers. The

buyers must provide an effective ship, that is to say, a ship which can legally carry the goods. When the buyers have done that the sellers have to

put the goods on board the ship. If that is so, the obtaining of a licence to export is the buyers* concern. It is their concern to have the ship sent out

of the country after the goods have been put on board, and the fact that under S. 8, Customs and Inland Revenue Act, 1879, as amended by

Section 1, Customs (Exportation Prohibition) Act, 1914, a prohibition against export includes a prohibition against bringing the goods on to any

quay or other place to be shipped for exportation does not cast the duty of obtaining the licence on the sellers. Bringing the goods on to the quay is merely subsidiary to the export which is the gist of the licence. In my view, therefore, in a contract of this kind it is for the buyer to get the licence.

The lower Court adopted the reasoning in this decision and purported to apply it to the present case by placing the duty to arrange for the wagons

upon the plaintiffs and stated that in the absence of the railway wagons, it was not possible for the defendants to deliver the goods at the rail way

station and that the railway wagons could not be had unless the railway authorities were shown the Collector''s export permit. We are unable to

see how the question of the availability of the wagons or otherwise arises in the present case, since nowhere in the correspondence is there any

indication that the defendants were prevented from carrying out their part of the contract by reason of the non-availability of the railway wagons.

The lower Court failed to note that in the decision cited above, there was no prohibition on the date of the contract, and the buyer therefore could

not have expected to arrange for a licence as it could not form part of the bargain. In an f. o. b. contract unlike in an f. o. r. contract a ship has to

be found before the goods could be exported whereas in an f. o. r. contract the railway authorities generally receive the goods for despatch as and

when wagons are available; but it cannot be laid down as an absolute proposition of law that in all cases, whether in an f. o. b. or f.o.r. contract,

where either the ships or the wagons are required, it is the duty of the buyer to secure export permits where a prohibition exists against export

without a licence. As to whose is the duty will mainly depend upon the terms and the nature of the contract as also whether the prohibition was in

force on the date of the contract or supervened subsequently and other facts and circumstances of each case. We consider that in -- ''(1917) 2

KB 679'' (B) the facts are more analogous to the instant case. . In that case by a contract made in London, the appellants sold to the respondents,

both parties being resident in England, 50 tons of aluminium ""to be shipped by steamer to Vladivostock at a price including cost and freight;

payment to be by cash against documents in London."" At the date of the contract there was to the knowledge of both parties, a prohibition against

the export of aluminium from England except on licence granted by the British Government. The question that arose for decision in that case was

what was the obligation of the sellers under the contract? Viscount Reading C. J. observes:

It is admitted by both parties that some obligation must be implied in the contract. In my opinion the implied obligation is no higher than that the

sellers shall use their best endeavours to obtain a permit. That is a term which is necessary to give to the contract such business efficacy as both

parties must have intended, when they entered into the contract that it should have, within the principle laid down by Bowen L. J. in the --

''Moorcock'', (1889) 14 PD 64 (C). That statement of the principle has not been affected by any subsequent case, and it has always been

''accepted as correct. The difficulty lies in the application of the principle to the particular case.

It was further held that there was no absolute obligation on the part of the sellers to obtain'' a licence, since a shipment contrary to the prohibition

would be illegal, and an absolute obligation to ship could not be enforced. It was further found in that case that though a party to a contract may

warrant that he will obtain a licence, no such term can be implied on the facts of that case. Viscount Reading C. J. says:

The reasonable view of the contract, in my opinion, having regard to the statement in -- ''(1889) 14 PD 64 (C)'' is that the sellers sold subject to

their being able to ship under a licence and that they impliedly undertook to use their best endeavours to obtain a licence. The umpire has found

that they used their best endeavours, the failure to ship being due to their inability to obtain a licence, and therefore there has been no breach of

contract.

As in the case in -- ''(1917) 2 KB 679'' (B) in the present case, there was a prohibition at the time when the parties entered into the contract and it

can reasonably be held that the sellers agreed to sell subject to being able to export the goods to the destinations mentioned in the contract which

implied an obligation on their part to apply for and obtain the necessary licence. If the defendants had used their best endeavours and did whatever

was reasonably required and if eventually they did not succeed in securing the licence, it must be held that the defendants had performed their part

of the obligation as regards the export permits. It is clear that the defendants in this case had not only applied for export permit, but had been

sincerely endeavouring their utmost to secure the same, and if they had not withdrawn their application, which they did in May 1946, but allowed the application to be disposed of either in favour of the granting of the permit or otherwise, they would have absolved themselves from any blame

in the export permit not being granted, because the granting or otherwise of the export permit rested with an outside agency over whom none of

the parties have any control.

11. It was further argued that the application for export permit was made soon after the contract and the defendants had waited for a considerably

long time till May 1946 and they were not bound to wait indefinitely and keep the contract open and as businessmen they could be expected to

wait only for a reasonable time. We entirely agree that in commercial contracts, where the contract becomes impossible of performance by reason

of a state of war or by an act of the ""executive Government, or the contract which would otherwise be expected to be ordinarily performed, is

delayed by reason of certain regulations imposed by the Government making the performance of such contract dependent upon the grant of licence

or permit, the parties need not wait for an indefinite period in the hope of the relaxing of the control orders or the granting of licence & permit. In --

''MiJlar & Co, Ltd v. Taylor & Co, Ltd, (1916) 1 K. B. 402 (D), where the plaintiffs contracted to supply the defendants with confectionary for

export & after the contract war against Germany was declared and the exportation of confectionary was forbidden & the plaintiffs repudiated the

contract and brought an action for the value of the goods sold and delivered by them to the defendants and the defendants counter claimed for

breach of contract, it was held that that was not a case of trading with the enemy, and the contracts had not been annulled but suspended and the

plaintiffs should have waited a reasonable time before repudiating the contract, and the defendants were entitled to recover on their counter claim.

Warrington L. J. observes :

Now, as I have already said, the particular contract which we have to consider is one which was to be performed within a reasonable time. Has

the act of State in fact rendered the contract impossible of performance within a reasonable time? It plainly has not; it expired on August 20, before

the time had arrived within which, even according to the ordinary practice in peace time, the contract would have been performed, and there is

nothing to indicate that it would have been impossible to perform this contract after the removal of the prohibition on August 20. The plaintiffs- -the

defendants in the counter claim the plaintiffs in the action - have chosen to run the risk that of course they were entitled to do, and if the prohibition

had lasted so long that the contract in fact turned out to be impossible of performance then they would have been right. Having taken the course of

not waiting the reasonable time before they chose to treat the contract as at an end, they had to take the consequences of it having turned out as it

in fact has turned out, that the contract was capable of performance.

In that case, it was further held that the proclamation did not dissolve the contract, but only suspended it for a reasonable time.

12. In the present case there was no suspension of the grant of permits until 22-1-1946 by Ex. B. 4 and the suspension only lasted at any rate in so

far as the goods covered by the first contract was concerned, till the date of Ex. B. 6, that is 9-3-1946. The suspension was removed by that

order and after Ex. B. 6, the defendants made a fresh application and continued to endeavour to secure the permit and suddenly they decided to

withdraw the application which, if they had not done, might have resulted in the grant of permit. The question therefore of whether they had already

waited a reasonable time does not arise for consideration in this case, as the ground on which they withdrew the application is that the plaintiffs did

not agree to higher rates.

13. As regards the defence of the impossibility of performance, or strictly speaking the defence of discharge by frustration, it may be necessary to

consider whether that defence would be open on the facts of this case and in view of the conduct of the defendants in withdrawing their application

(or permit. The doctrine of frustration is not a rule of positive or substantive law, but a rule which is made applicable to interpretation of contracts

to find out whether the contract has become frustrated, that it has either become impossible of performance, or though possible of performance,

has become useless and ineffective. The result is the parties to the contract are discharged from their obligations under the contract. This common

law principle of frustration has received Statutory recognition by its incorporation in the Indian; Contract Act in Section 56 which is as follows :

An agreement to do an act impossible in itself is void. A contract to do an act which, after the contract is made, becomes impossible or by reason of some event which the promisor could not prevent, unlawful becomes void when the act becomes impossible or unlawful.

In Pollock on Contracts, 13th Edn. by P. H. Winfield the principle is stated as follows at p. 232:

After the formation of a contract, certain sets of circumstances arise which, owing to the fault of neither party, render fulfilment of the contract by

one or both of the parties impossible in any sense or mode contemplated by them. These sets of circumstances have been more or less denned by

the Courts and are held by them to release both parties from any further obligation to fulfil the contract.

If the doctrine of frustration applies to a particular case, there could not be any breach of contract. The discharge of a contract by frustration is not

the result of an act or volition of a party to it nor the carrying out of a condition, express or implied, in a contract, but the presence of already

existent or supervening of certain set of circumstances, which excused the performance of the contract and discharges the same. It amounts to an

automatic dissolution of the contract not dependent upon the attitude of the parties to the contract. In a case, where a defence of frustration is

raised, what the Court has to consider is not whether one party or the other has done anything from which his responsibility for any breach of

contract could be ascertained, but to see whether the circumstances pleaded did exist which could reasonably be considered as sufficient to hold

that the parties are absolved from their obligations under the contract.

14. The doctrine of frustration has assumed importance in commercial contracts due to the introduction of control orders by executive authorities

for the purpose of defence of the realm, especially during the war. Where there is absolute prohibition as to sale, the fact that there is such a

legislation is sufficient to make the defence of frustration complete. But, where, as in this case, an enactment of the nature of the Madras Tapioca

(Movement Control) Order is in force, which prohibits exports of ''starch'' outside the district or Province except on permits the prohibition is not

absolute and complete, but qualified, the qualification being that a permit will be necessary before such an export could be made. In such a case it

has to be examined whether the party, on whom the obligation rested to apply for and obtain the permit, has discharged his obligation. It will not be open in such a case for a party whose duty it is to apply for permit, to refuse to apply for permit, or to withdraw the application, as in the

present case, and then plead that the contract has become discharged by reason of the prohibition against export relying upon the control order.

There was no refusal of permit in the present case, but no opportunity was given to the authorities to grant a permit in view of the defendant''s

conduct in withdrawing the appliation. The absence of a permit to export in this case could'' reasonably be considered to be the consequence of

the defendants'' withdrawal of the application. The defendants'' in-ability to perform the contract therefore is due to their own default and it would

not be open for them to plead frustration.

15. In -- AIR 1935 128 (Privy Council) , Lord Wright, in delivering the judgment of the Board, observes that ""the essence of ''frustration'' is that it

should not be due to the act or election of the party"" and quotes a passage from the speech of Lord Suraner in -- ''Bank Line v. Capel'', (1919) A.

C. 435 (F), which is as follows:

.... I think it is now well settled that the principle of frustration of an adventure assumes, that the frustration arises without blame or fault on

either side. Reliance cannot be placed on a self-induced frustration; indeed, such conduct might give the other party the option to treat the contract

as repudiated.

16. The frustration, which is pleaded in this case, if any, is caused by the default of the defendants in not allowing the application for permit to be

disposed of by the authorities and keeping open an opportunity of securing the permit. There is also evidence in this case to show that permits have

been granted in certain cases and it has not been shown that the export permit for the first contract would not at all events have been granted. The

reason for withdrawal of the application is not that there was no possibility of securing the permit, or that the authorities stopped granting permits

even to the stocks of goods which were stocked prior to 12-2-1946; but it is for the totally untenable reason of the failure on the part of the

plaintiffs to increase the price. We have, therefore, no hesitation in holding that the responsibility for the breach of the contract is on the part of the

defendants and the plaintiffs are entitled to damages for the breach only in so far as the failure to supply the 35 tons of tapioca starch under the first contract.

17. As regards the quantum of damages, the contract rate is Rs. 15-8-0 and we consider that 17-5-1946 may reasonably be fixed as the date of

the breach, that is the date on which the defendants committed default in withdrawing their application for the export permit. The evidence as to the

market rate prevailing on or about 17-5-1946 consists of that of P. W. 1 and of the defendants'' partner, who is examined as D. W. 1. P. W. 1, an

independent merchant of Madras, says that on 20-5-1946 he bought tapioca flour at Rs. 39-8-0 per bag of 1 cwt. the rate working out at Rs. 26

per cwt. This evidence receives support from the relative bill and receipt signed by the seller, Ex. A. 41, Ex. A. 42 is of July 1946. The rate was

Rs. 36 per 1 1/2 cwt. The other evidence in this case is varying and we are of opinion that the evidence of P. W. 1 is reliable and the rate in Ex. A.

41 can be accepted as the market rate for the commodity prevailing on the relevant date. It may be mentioned here that Ex. A. 41 is a transaction,

of 20-5-46 of goods despatched from Salem to Madras and P. W. 1 says that the vendor in Ex. A. 41 had a permit. This dispels any doubt, if

there was any that in fact the authorities'' Were granting export permits for tapioca outside the district and it affords further proof of the want of any

justification on the part of the defendants to withdraw their application and mane themselves incapable of obtaining the permit to the detriment of

the plaintitts'' interests. It is pointed out that the rate of Rs. 26 per cwt. would also include cart hire from the manufacturer''s place to the railway

station and a sum of Rupee one per cwt may reasonably be deducted from the price for cart hire and the market price on the date of the breach

can safely be fixed at Rs. 25 per cwt. The difference between the contract rate and the market rate for 35 tons is Rs. 6650 ana this amount the

plaintiffs are entitled to recover from the defendants.

18. The plaintiff paid a sum of Rs. 10,000 on 21-2-19-16 against the suit contracts. The plaint includes a claim for recovery of this Rs. 10,000.

But the defendants pleaded in their written statement that the payment of Rs. 10,000, though made after the suit contracts and admittedly at the

request of the defendants, did not really pertain only to the suit contracts but also for the supply of 50 tons, an order for which was given on 22-6-

1945, that there was delay on the plaintiffs'' part for over six months in specifying the place of destination and that therefore the defendants had

incurred loss and they counter claimed a sum of Rs. 6000 besides their claim to deduct Rs. 2000 being the price of 65 bags of tapioca supplied

against the order for 50 tons of the 22nd June 1945. The plaintiffs in their reply statement denied any liability for damages as regards the 65 bags,

but stated that they were prepared to give credit for a sum of Rs. 1560, which they stated was the price of 65 bags at Rs. 16 per cwt. and would

be willing to accept the balance. The defendants did not pay the court-fee on the counter-claim as required and they filed a memo in court on 20-

8-1947 stating that the counter claims made in the written statement for damages and for price need not be enquired into and that they were not

pressed as defences to the suit and that therefore they were not paying any court-fee. There was therefore no counter claim which the court had to

consider. It is conceded that the defendants did not subsequently even file any suit for damages and any claim for damages is now time barred. But

the claim of the plaintiffs for refund of Rs. 10,000 after deducting the price of 65 bags should, however, be gone into. An issue was raised as to

whether the plaintiffs are entitled to recover the same. The learned Subordinate Judge, however, found in our opinion erroneously, that the plaintiffs

would not be entitled to the said sum in this suit, but entitled to a refund of the same in any settlement of the outstanding accounts between the

plaintiffs and the defendants. In view of the withdrawal of the counter claim, there is no defence to the plaintiffs'' right to rerover back the advance

and the plaintiffs voluntarily have expressed their readiness to pay for the order of 65 bags supplied by the defendants. There has been some

divergence as to the rate agreed upon in respect of this contract, the defendants'' partner as D. W. 1 stating that it would be about Rs. .25 whereas

the plaintiffs'' case is that it was Rs. 16 per bag. P. W. 2, who is the plaintiffs'' manager admits that the 1945 contract was for Rs. 20 per cwt.

though he would further add that the price was reduced to Rs. 16 per cwt. as the stuff supplied was inferior in quality. There is no evidence as to

the inferiority of the stuff and the defendants are entitled to the contract rate of Rs. 20 per cwt. and the value of 65 bags would be Rs. 1960/-: The

plaintiffs are entitled to a refund of Rs. 10000 deducting Rs. 1960, that is Rs. 8040, and they are entitled to interest on this amount from the date of plaint at six per cent per annum.

19. The appeal is allowed in part and there will be a decree in favour of the plaintiffs for the sum of Rs. 8040, Rs. 6650 that is Rs. 14690 with

interest at six per cent, per annum from the date of plaint to the date of payment. The piaintiffs and the defendants will pay and receive

proportionate costs here and in the Court below.

