

(1956) 08 MAD CK 0012
In the Madras High Court

Maddala Thathiah

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 09-08-1956

Acts Referred:

Citation : (1956) 69 LW 835 : (1956) 2 MLJ 584

Hon'ble Judges : P.V. Rajamannar, C.J

Bench : Division Bench

Judgement

P.V. Rajamannar, C.J.—This is an appeal against the judgment and decree of Ramaswami Gounder, J., dismissing the appellant's suit in

C.S. No. 380 of 1949, for the recovery of a sum of Rs. 34,063-7-3 from the Dominion of India as the owner of the Madras and Southern

Mahratta Railway represented by the General Manager of that Railway. The plaintiff claimed that amount as damages consequent on a breach of

contract alleged to have been committed by the defendant. The material facts are not in dispute. In pursuance of an invitation by the Madras and

Southern Mahratta Railway for tenders for the supply of jaggery to the railway grainshops the plaintiff submitted on 27th January, 1948, a tender in

the prescribed form offering to supply 14,000 imperial maunds of cane jaggery, Chittore variety, first sort, during the months of February and

March, 1948, at the rate of Rs. 11-4-0 per imperial maund. The defendant in a letter addressed by the Deputy General Manager of the Railway

dated 20th January, 1948, accepted the plaintiff's tender and called upon the plaintiff to remit a sum of Rs. 7,900 in cash to the paymaster and

cashier of the Railway at Madras on or before 7th February, 1948, as security deposit for the proper fulfilment of the contract and intimated that

on receipt of advice of such remittance the official order will be placed with him. The plaintiff accordingly paid the said amount and the defendant

by letter from the Deputy General Manager of the Railway dated 16th February, 1948, placed an order with the plaintiff for the supply of the entire

quantity of 14,000 maunds to be delivered in four instalments of 3,500 maunds each on 1st March, 1948, 22nd March, 1948, 5th April, 1948,

and 21st April, 1948. The programme of delivery was altered later by a letter dated 28th February, 1948, as follows : 3,500 maunds between 1st

and 4th March, 1948; 3,500 maunds by 22nd and 25th March, 1948; 3,500 maunds between 5th and 8th April, 1948 and 3,500 maunds

between 21st and 24th April, 1948. The plaintiff supplied the first instalment of about 3,500 maunds, as required by the defendant, and the

defendant accepted the same. On 8th March, 1948, the Deputy General Manager of the Railway addressed a letter to the plaintiff which runs as

follows:

Please note that the balance quantity of jaggery outstanding on date against the above order is treated as cancelled and the contract closed.

The plaintiff protested against this action of the defendant and stated that he had invested more than a lakh of rupees to perform the contract and

that he was ready and willing to supply the goods as per the terms of the contract. But the defendant refused to reconsider the matter and stated

that the defendant was well within its rights in cancelling the contract. It is common ground that at no time did the defendant explain the reason for

the cancellation and that he always took the stand on the following clause in the tender:

This Administration reserves the right to cancel the contract at any stage during the tenure of the contract without calling upon the outstandings on

the unexpired portion of the contract.

The plaintiff thereupon filed the suit out of which this appeal arises, alleging that the said clause was null and void and no effect should be given to it,

as the clause was entirely repugnant to the existence of a valid contract between the parties, that the said clause would be against public policy and

against justice, equity, and good conscience and further submitted that even assuming the defendant had a right of cancellation, it could be

exercised only for sufficient and valid reasons and not arbitrarily. The plaintiff

therefore charged the defendant with breach of contract and claimed damages for such breach in the sum of Rs. 34,063-7-3 calculated at the rate of Rs. 3-4-0 per maund, being the difference between the market rate and the contract rate on the date of breach (8th March, 1948), on the quantities still to be delivered under the contract. The defendant denied that the clause in question was for any reason invalid or unenforceable and stated that the defendant was not guilty of any breach of contract and the plaintiff had no cause of action to sustain the suit. The defendant also disputed the quantum of damages. Two issues were framed, namely:

1. Is the reservation clause in paragraph 2 of the suit contract enabling the defendant-railway to cancel the suit contract without assigning any reason legally enforceable and
2. To what damages, if any, is the plaintiff entitled?

The suit was tried by Ramaswami Gounder, J., who held that the clause in question was valid and enforceable and that there was nothing to compel the railway to exercise the power of cancellation conferred by that clause only for valid and sufficient reasons. On this finding he dismissed the suit with costs. Hence this appeal by the plaintiff.

2. Mr. V. Tyagarajan, learned Counsel for the appellant, contended that the clause above mentioned, if it is construed as nullifying the rights and obligations of parties under a concluded contract, was null and void, that such a term was not supported by consideration, and that in any event the clause must be justly and reasonably applied. He conceded that the clause would be valid if it is understood to apply to a case where the defendant had not placed an order for the supply of a definite quantity. He referred in this connection to passages from leading text-books on contract law which distinguish two classes of tender. Cheshire discussed the two classes with the following preface:

Suppose that a corporation invites tenders for the supply of certain specified goods to be delivered over a given period. A trader puts in a tender intimating that he is prepared to supply the goods at a certain price. The corporation, to use the language of the business world, accepts the tender.

What is the legal result of this acceptance?

After observing that the question whether the acceptance by the corporation is an acceptance in the legal sense so as to produce a binding contract

can be answered only by examining the language of the original invitation to tender, the learned author says:

There are at least two possible cases. First, the corporation may have stated that it will definitely require a specified quantity of goods, no more

and no less, as for instance, where it advertises for 1,000 tons of coal to be supplied during the period January 1st to December, 31st. Here the

acceptance"" of the tender is an acceptance in the legal sense, and it creates an obligation. The trader is bound to deliver, the corporation is bound

to accept, 1,000 tons, and the fact that delivery is to be by instalments as and when demanded does not disturb the existence of the obligation.

Secondly, if the corporation advertises that it may require articles of a specified description up to a maximum amount, as, for instance, where it

invites tenders for the supply during the coming year of coal not exceeding 1,000 tons altogether, deliveries to be made if and when demanded, the

effect of the so-called acceptance of the tender is very different. The trader has made what is called a standing offer. Until revocation he stands

ready and willing to deliver coal up to 1,000 tons at the agreed price when the corporation from time to time demands a precise quantity. The

acceptance"" of the tender, however, does not convert the offer into a binding contract, for a contract of sale implies that the buyer has agreed to

accept the goods. In the present case the corporation has not agreed to take, 1,000 tons or indeed any quantity of coal. It has merely stated that it

may require supplies up to a maximum limit.

In this latter case the standing offer may be revoked at any time provided that it has not been accepted in the legal sense. The contract is complete

as soon as a requisition for a definite quantity of goods is made. Each requisition by the offeree is an individual act of acceptance which creates, a

separate contract.

3. In Chitty the position is thus stated:

40. Tender. - A tender to supply goods up to a certain quantity at a certain price is an offer to supply on those terms if and when the offeree

chooses to give an order and thus, qua, that order, creates a binding contract. Even where the probable quantities which may be required have

been specified in the invitation to tender, the offeror has no remedy if the offeree does not give any orders at all or fails to order up to the specified

quantities, although the offeror is bound to deliver the specified goods as and when ordered by the offeree.

4. In the present case the tender can be read as implying a open offer of 14,000 imperial maunds of jaggery at a particular rate for delivery during

the months of February and March, 1948. The mention of the quantity would then only mean that up to that limit the plaintiff must be prepared to

supply. It would not impose a corresponding obligation on the Railway to place an order for the entire quantity. The Railway may place an order

for say 5,000 or 6,000 maunds and subsequently refrain from placing any further orders. The plaintiff then can have no legal grievance. The

acceptance of the tender contained in the letter from the Railway dated 29th January, 1948, should be understood only as an acceptance of the

terms, that is, the rate per maund, etc. If nothing further had happened after that letter, the Railway would have been well within their rights even if

they had not placed an order for a single maund. Actually, however, by their letter dated 16th February, 1948, the Railway placed a definite order

for the entire quantity of 14,000 maunds to be delivered on particular dates. Though subsequently there was a variation as to the dates of delivery,

the order for the entire quantity remained. In law there was a concluded contract between the plaintiff and the defendant for the supply of 14,000

maunds. The contention of the appellant is that if the effect of the disputed clause is to confer on the defendant the right to cancel such a concluded

contract before the contract was performed in its entirety, the clause would be repugnant to the contract and should be disregarded. In support of

his contention learned Counsel for the appellant referred us to the well-known rule of construction that where there are two clauses in a contract so

totally repugnant to each other, the former is to be received and the latter rejected thus:

If there be a personal covenant and a proviso that the covenantor shall not be personally liable under the covenant, the proviso is repugnant and

void. Vide Chitty on Contracts, page 162.

5. Learned Counsel also relied on the following decision. In *Furnivall v. Coombes* 134 E.R. 756, A covenanted with C, D, E and F to do certain

repairs to a church and the latter covenanted with A that they would well and truly pay, or cause to be paid, unto A the sum specified. After this

covenant, the deed contained a proviso:

Provided always that nothing in these presents contained, shall extend, or be deemed, adjudged, construed, or taken to extend, to any personal

covenant of, or obligation upon, the said several persons parties thereto, of the third part, or in anywise personally affect them...in their private

capacity.

It was held that the proviso was utterly inconsistent with the covenant, and being at variance with it must be rejected as repugnant. In *Watling v.*

Lewis (1911) 1 Ch. 414, the same principle was applied where there was a covenant by certain trustees to pay a sum of ₹2,000 in respect of a

mortgage and to indemnify the plaintiff from all claims and demands on account of the mortgage, and also a provision that there should not be any

personal liability on them. It was held that the covenant to pay and indemnify cannot be destroyed by the qualifying provision. *Warrington, J.*,

observed:

The result is, I think, that first there is a covenant to pay the money and to indemnify, and then the parties have attempted to qualify that covenant

by using words the effect of which, if effect is to be given to them, would be to destroy the personal liability. That being so the words they have

used can have no effect at law and the liability remains.

6. Mr. C. Govindaraja Ayyangar learned Counsel for the respondent, on the other hand, took up the position that a clause which is not totally

repugnant but which only limits the operation of a prior covenant would be valid, and contended that in the present case the clause in question was

such a limiting provision. He referred us to the same passage in *Chitty* on which the appellant's counsel relied but laid stress on the following

qualification of the general rule:

But if the proviso merely limits the personal liability under the covenant, without destroying altogether the obligation created by the earlier clause,

the two are to be read together and effect is to be given to the intention of the parties as disclosed by the deed as a whole.

The rule with the qualification has been authoritatively expounded by the judicial committee of the Privy Council in *Forbes v. Git* (1922) 1 A.C.

256, thus:

The principle of law to be applied may be stated in few words. If in a deed an earlier clause is followed by a later clause which destroys altogether

the obligation created by the earlier cause, the later clause is to be rejected as repugnant and the earlier clause prevails. In this case the two clauses

cannot be reconciled and the earlier provision in the deed prevails over the later. Thus if A covenants to pay 100l and the deed subsequently

provides that he shall not be liable under this covenant, that later provision is to be rejected as repugnant and void, for it altogether destroys the

covenant. But if the later clause does not destroy but only qualifies the earlier, then the two are to be read together and effect is to be given to the

intention of the parties as disclosed by the deed as a whole. Thus if A covenants to pay 100l and the deed subsequently provides that he shall be

liable to pay only at a future named date or in a future defined event or if at the due date of payment he holds a defined office, then the absolute

covenant to pay is controlled by the words qualifying the obligation in manner described.

The learned trial Judge was evidently inclined to the view that the clause fell within the exception to the rule, that is, that the clause was not

repugnant to the other terms of the contract but was a basic condition on which the entire contract rested. With respect to the learned Judge, to

call the provision a condition is a misnomer. In *Forbes v. Git* (1922) 1 A.C. 256, the illustrations which Lord Wrenbury gives clearly show that the

limitation contemplated is not one that has the effect, actually or possibly, of destroying the contract altogether but only provides for contingencies

subject to which the covenant is enforceable. They are all contingencies which are certain and objective and do not include a condition which is no

more than the whim and fancy of a party. A provision that a covenant to pay a sum of money would become enforceable only at a future named

date for instance, is not dependent on the arbitrary option of a party. Or that the liability becomes enforceable on the happening of a defined event.

But the effect of the clause in question in the present case comes, to this, that there is an enforceable contract subject to the condition that it is open

to one of the parties to say that it is not enforceable. Learned Counsel for the respondent was unable to cite any authority to support the validity of

such a clause as the present.

7. Mr. Tyagarajan put his case in another way. He argued that if a term of the contract gave the power to one of the parties to rescind the contract

such power can only be exercised on valid and sufficient grounds. Otherwise it would not be a valid provision. He relied on two decisions of the

Bombay High Court in this connection. In *Chunilal Dayabhai & Co v. The Ahmedabad Fine Spinning and Weaving Co., Ltd.* I.L.R.(1921) 46

Bom. 806 the defendants contracted with the plaintiffs to supply certain piece goods produced by the defendants; the contract contained the

following provision:

If you (Defendants) are not in a position to deliver the goods or if there be any dispute in respect of the goods or if the company do not give

delivery for any reason the utmost that will be the result will be that the "soda" will be cancelled but we (Plaintiffs) shall not ask for damages arising

from the same from you in any way.

Out of 151 cases covered by the contract the plaintiffs took delivery of 90 cases. Then the defendants declined to give further delivery without

giving any reason for such refusal. In an action brought by the plaintiffs to recover damages for breach of contract, the defence was that the

defendants were not obliged to give any reason according to the terms of the contract for refusing to complete the delivery. It was held that above

clause could not be read as meaning that the parties agreed that if the defendants simply refused to give delivery, the plaintiffs were bound to

accept such a refusal without being able to claim damages if they wish to do so. Macleod, C.J., observed:

It seems to me that the clause evidently means that some reason must be given by the defendants which would justify their refusing to give delivery,

and that they were not entitled merely to say that the contract was off because they did not wish to deliver any more goods under it. Therefore, if

the parties agreed in certain events that the contract should become void, that would not mean that one of the parties could himself bring about the

state of affairs which would avoid the contract. So that in this case it was not competent for the defendants merely to say that they did not wish to

give any further delivery, and that, therefore, the contract should be cancelled without any claim for damages arising in favour of the plaintiffs.

Mulla, J., followed the same principle in *Chotalal Lallubhai Vs. Champsey*

Umersey and Sons, . There the plaintiffs agreed to sell 25 bales of Japanese yarn to the defendants. The contract contained a clause, namely, To cancel or not to cancel the sold goods for any of the reasons solely depends upon you (Plaintiffs).

On a refusal of the defendants to pay for and take delivery of the goods, the plaintiffs sued for the price or in the alternative, for damages. One defence was that as the contract gave an option to the plaintiffs to rescind the contract for any reason whatsoever, there was no agreement in law.

The learned Judge held that the clause meant that the plaintiffs would have the power to determine the contract if they could assign a good reason for so doing. The argument on behalf of the defendants was that the option to rescind the contract was not made dependent on the happening of any specified contingency but it was an option to terminate the contract for any reason whatsoever and it was, therefore, void for want of mutuality.

The learned Judge did not accept the argument because in his opinion the option could be exercised only for good reasons. He went on to observe:

Similarly in the present case, if the plaintiffs refused to deliver the goods without assigning any reasons, they would, I think, be liable to the defendants for breach of the contract unless they assigned some reason which would justify their refusal to give delivery. I do not think that the stipulation in the contract in the present case, namely ""to cancel or not to cancel the sold goods for any reasons depends upon you"" destroys the mutuality necessary for the formation of a contract, I think that the writing, Exhibit B, contains all the elements of a contract, and that the stipulation referred to above confers upon the plaintiffs the power to determine the contract if they could assign good reason for so doing.

There is no doubt in this case that the clause does not indicate that the Railway should give any reasons, still less, valid and sufficient reasons, for the cancellation of the contract. We do not think it right to import a qualification to the right of cancellation that it should be for proper and sufficient reasons. The clause purports to confer an absolute and arbitrary power on one of the parties to cancel the contract. If that be so, the observation of Mulla, J., that such a term would be void and unenforceable directly applies. Ramaswami Gounder, J., brushed aside the above observation as

a mere obiter dictum. We cannot agree with him that there is nothing in Chotalal Lallubhai Vs. Champsey Umersey and Sons, , to warrant the

proposition that an absolute power of cancellation of a contract cannot be validly reserved in favour of one of the parties to it. On the other hand

the decision is an authority for that proposition.

8. Mr. Govindaraja Ayyangar contended that an absolute and arbitrary power to; cancel the contract reserved by one party can be validly

exercised without assigning any reason whatever. In support of his contention he referred us to passages, in two leading text books. In Leake's

Law of Contracts (8th Edition) we have the following statement of the law:

A promise cannot be conditional on the mere will of the promisor; for by promising to do a thing only in case it pleases himself he is not bound to

anything.... But a contract may be made terminable at the will of one of the parties, and will be valid until so determined; as in the case of a

partnership at will which may be determined arbitrarily and without reason assigned.

Anson (20th Edition) deals with the point in the following way. At page 310 the general rule is stated thus:

A contract may contain within itself the elements of its own discharge, in the form of provisions express or implied, for its determination in certain

circumstances. These circumstances may be the non-fulfilment of a condition precedent; the occurrence of a condition subsequent; or the exercise

of an option to determine the contract, reserved to one of the parties by its terms.

The third circumstances is thus developed at page 313:

Thirdly, a continuing contract may contain a provision making it determinable at the option of one of the parties upon certain terms. Such a

provision is implied by custom in the ordinary contract of domestic service, which can be terminated either by a month's notice or the payment of a

month's wages. Similar terms may be incorporated in other contracts between employer and employed, either, expressly or by the usage of a

trade; and even where the duration of a written contract is on the face of the instrument, indefinite and unlimited, such a provision may sometimes

be implied from the nature of the contract. Thus a partnership for no fixed term is determinable by notice.

9. It appears to us obvious that this third circumstance can only come into play in the case of a "continuing contract." A mere sale of particular goods can in no sense be a continuing contract, as a contract of domestic service or a contract of a partnership. In such cases a contract might provide that it may be determined at the option of one of the parties upon certain terms. But in other cases of concluded contracts which are in no sense continuing, though the time for performance may extend over a longer or shorter period, the law does not permit one of the parties to say that there is no contract subsisting or enforceable. The learned Judge held that the power conferred on the Railway under that clause was absolute and unfettered by any qualification and could be exercised at any stage. If that be so, we have no hesitation in holding that the clause is void and unenforceable. Learned Counsel for the respondent was unable to cite any decision or text writer in support of his contention that such a clause was valid.

10. It follows that the dismissal of the suit by the learned Judge was wrong and should be set aside. In the view he took on the first issue, the learned Judge did not deal with the second issue, namely:

To what damages, if any, is the plaintiff entitled?

This issue must be decided before a final adjudication is made. The appeal is allowed and the suit remanded to the trial Court for further disposal after dealing with the second issue. Costs to abide the final result.

11. The Court-fee paid on the memorandum of appeal will be refunded to the appellant.