
(1970) 02 MAD CK 0019

In the Madras High Court

Case No : Appeal No. 149 of 1961 and O.S. Appeal No. 116 of 1966

Manickam Chettiar (Died) and Others

APPELLANT

Vs

State of Madras

RESPONDENT

Date of Decision : 24-02-1970

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 2 Rule 2
Constitution of India, 1950 — Article 229, 299(1)
Contract Act, 1872 — Section 2

Citation : AIR 1971 Mad 221 : (1971) ILR (Mad) 354 : (1971) 84 LW 58

Hon'ble Judges : K. Veeraswami, C.J.;Somasundaram, J

Bench : Division Bench

Judgement

Somasundaram, J.—The facts giving rise to these two appeals are these: On 25-11-1955, the State of Madras (hereinafter referred to as

the plaintiff) represented by the Director of Medical Services, invited tenders for the supply of articles of diet etc. to the City Hospitals for a period

of one year commencing from 1st of April 1956 and ending with the 31st March 1957. This notice had as its annexure, a schedule which showed

the articles required and the approximate quantity estimated and needed for each hospital in the city. On an acceptance of the tender, the tenderer

had to execute a stamped agreement Manickam Chetty, the respondent in O.S.A. 116 of 1966 (hereinafter referred to as the defendant) offered

to supply, besides other items, (1) 13,33,500 lbs. of boiled hand-pounded rice at Re. 0-3-5 per lb; (2) 63960 tons of gingili oil at Re. 0-12-91/2

per lb. and (3) 1,1151 tons of casuarina firewood at Rs. 57-14-0 per lb. He had also sent along with this tender, an amount of Rs. 9100 as

earnest money which was liable to be forfeited to Government in the event of failure on his part to fulfil the contract. He also agreed to bind himself

to the other conditions prescribed in the tender notification. Since he did not send the certificate of Income Tax verification and the certificate

showing a clearance of the sales tax as contemplated by clause 16 of the conditions of tender, by letter dated 25-11-1956 he was called upon to

produce these certificates before the 5th February 1956. Meanwhile, the Government, by G. O. No. 944 Health, dated 12-3-1956, permitted the

Director of Medical Services, to accept the defendant's tender and the latter in his turn on 14-3-1956 accepted his tender for the supply of the

abovesaid three items, viz., hand-pounded rice, gingili oil and casuarina firewood, at the rates quoted by him. He also directed him to make a

security deposit of ten per cent of the total value of the supplies undertaken and to enter into a stamped agreement.

2. On 26-3-1956, after the receipt of the above letter of acceptance from the Director, the defendant wrote to him stating that because of the

delay in the acceptance, he was unable to make arrangements in advance for the supply of hand-pounded rice and that he would only be in a

position to supply the other two items as undertaken. The Director, in his turn, drew his attention to clause 23 in the Tender Conditions, which inter

alia provided for a cancellation of the contract accompanied by a forfeiture of the earnest money, followed by a claim for damages which would be

the difference between the price which was accepted and the price ultimately paid by the hospital authorities for the procurement of the articles

concerned. The defendant sent a reply to this letter, stating that it was never his intention to wriggle out of the contract and requesting for a month's

time for the supply of the handpounded rice. He also wanted permission for the supply of polished mill-rice of fine quality till then.

Meantime indents were made to him by the different hospitals for the supply of the articles in respect of which his tender was already accepted.

The Kasturba Gandhi Hospital for women and children sent him an indent on 25-3-1955 for 100 lbs. of gingili oil and one ton of firewood, and

against this, the defendant had supplied only the firewood called for. He did not supply the gingili oil. By a memo dated 3-4-1956, he was

informed, that if he did not supply them before 4-4-1956, they would resort to local purchases which would lead to the recovery of the difference

of cost from him. On 29-1-1956, the General Hospital had indented for the supply of 60 bags of hand-pounded rice on or before 4-4-1956. He

did not supply this item. so, on 6-4-1956, by Ex. P. 16 he was informed that if the supply was not made immediately, they would resort to local

purchases at his risk. On 11-4-1956, after receipt of these indents from these hospitals, the defendant addressed a letter to the Director of

Medical Services, intimating him that he had made arrangements to begin the supplies from 12-4-1956, and stating that he had informed this fact to

all the local hospitals from whom he had received indents. He further requested the Director to stop the local purchases at his risk.

3. On 12-4-1956, the Dean of the Stanley Hospital informed him by a letter dated 10-4-1956, that due to his default, departmental purchase of

rice of 200 lbs. was made from one Thanikachala Nadar at Re. 0-4-3 per lb. and that as such a sum of Rs. 104-2-3 being the difference in cost

was recoverable from him. On 16-4-1956, the defendant supplied 1,929 lbs. of hand-pounded rice as against a demand of 6000 lbs. to the

Stanley Hospital, and by Ex. P. 20 he was informed that if the balance was not supplied before the 19th of that month, they would resort to local

purchases at his risk. On 2-4-1956, the Women and children's Hospital had indented for the supply of 30 bags of boiled hand-pounded rice and

200 lbs. of gingili oil on or before 7-4-1956. The defendant supplied only ten bags of rice and 68 lbs. of gingili oil till 24-4-1956. This hospital

informed him that if the articles were not supplied before 24-4-1956, they would arrange for local purchases. On 1-4-1956, the Royapettah

Hospital made an indent for the supply of hand-pounded boiled rice and this was not supplied. So, this hospital had purchased four bags of rice on

11-4-1956 departmentally and written the letter Ex. P. 24 to him. Meantime, the Director, by Ex. P. 21, permitted the defendant to pay security

deposit amount at 5 per cent of the total value, instead of at 10 per cent as originally required. Thus, during this period, the different hospitals

proceeded on the footing that acceptance of the defendant's tenders by the Director amounted to a concluded contract.

4. When the matters thus stood, on 25-4-1956, the defendant suddenly issued the notice. Ex. P-25, stating that the entire matter was only at the

stage of negotiation, that the contract was not concluded, that the contemplated stamped agreement was not executed. that the conditions were

one-sided and unilateral, lacking in mutuality. He further called upon the Director to return to him the amount of Rs. 9100 deposited as tender

deposit, besides Rs. 8568-831/2 being the value of the materials already supplied by him to the different hospitals. On 15-5-1956, the

Government passed an order directing the Director to send the reply to the defendant's advocates asking them to show cause within a specified

time as to why action should not be taken under clause 23 of the conditions of Tender for the non-performance of the contract. The defendant sent

another letter on 24-7-1956 and by Ex. P. 29 the Director again informed him that there was a concluded contract because the tender was

accepted by the department on 14-3-1955 and that pursuant to this acceptance, the defendant himself had commenced supply of goods as

undertaken by him. the defendant then issued the notice Ex. P. 30 on 7-9-1955 under S. 80 C.P.C. demanding Rs. 17,668-8-3, the earnest

money plus the value of the articles supplied. The State informed him that the threatened suit was awaited, and by notice dated 2-3-1957, the

Director cancelled the contract forfeited the earnest money and informed him that the damage suffered by the Department would be recovered

from him after the same was ascertained. But before this letter reached him, the defendant instituted the suit O. S. No. 497 of 1957 in the City

Civil court, Madras, claiming the sum of Rs. 17,662-8-3 as due to him. the State resisted this claim, stating that the contract was a concluded one,

that there was a breach of the contract by the present defendant, that under clause 23 they were entitled to forfeit the earnest money and recover

the damages sustained by them from the local purchasers and that as such he was not entitle to any decree as prayed for by him. The second

Assistant Judge, City Civil Court, agreed with the contentions thus advanced by the State and on 1-8-1960 dismissed the suit filed by the present

defendant. This decision is now challenged by him in A. S. 149 of 1961.

5. Subsequent to the dismissal of this suit, the State on 23-11-1961 filed the present suit, C. S. 87 of 1961, on the original side of this court for

recovering and amount of Rs. 93,401-5-4 with interest at 6 per cent from the date of suit. The basis of this claim was the difference in the

departmental purchases for the several hospitals, from the rates at which they were purchased and the rates at which the defendant offered to

supply. The amounts due to the defendant for the supplies actually made by him, were deducted from the amount thus arrived at. The defendant in

the written statement resisted this claim on the following grounds: (1) The claim is barred under O. 2, Rule 2, C.P.C. because it was not made and agitate in O. S. 497 of 1957; (2) The contemplated stamped agreement did not come into existence and the contract is also not valid and enforceable, because it is not in consonance with the provisions of Art. 299 of the constitution of India. (3) Factually and legally, there was no concluded and enforceable contract, because there was only an invitation for an offer and counter-offer and everything was only in the stage of negotiation. (4) The terms and conditions are wholly one-sided and unilateral and as such it is valid.

6. Kunhamed Kutti J. held that this is a case of a standing offer, where the contract comes into existence as and when the State indents with the defendant for the supply of any particular item undertaken by him and that as such the defendant would be liable only for the non-supply of the articles thus indented for by the local hospitals during the period. He further held that the contract is not bad for any non-compliance with the provisions of Art. 299 of the Constitution of India. He also held that the claim is not barred under O. 2, Rule 2. C.P.C. On his finding that the State would be entitled only to the difference between the contract rate and the market rate of the articles purchased by the department under the indents placed with the defendant prior to 25-1-1956, calculation memos were filed, and these memos showed that the defendant had incurred an additional expenditure of Rs. 4303-15-4 on account of the hand-pounded rice, Rs. 557-11-9 on account of the gingili oil and no excess on account of the casuarina firewood. For the supplies already made, the defendant was to be paid an amount of Rs. 8281-15-6. Since this was in excess of the amount payable by the State by way of damages, the learned Judge did not pass any decree in favour of the State as prayed for, but he dismissed the suit with a direction that parties should bear their respective costs. The correctness of this decision is now canvassed by the State in O. S. A. 116 of 1966.

7. For deciding the contentions raised, it is necessary to construe the true nature of the contract between the parties. The relevant conditions of tender as found in Ex. B-2, at page 78 of the printed papers, are as below:

1.

2. Though the Schedule of the articles gives separately the estimated requirements of each hospital, a single tender should be submitted in respect of each article for the consolidated requirement of all the City hospitals taken together.

3.

4. The number or quantity of articles entered in the schedule is the probable number or quantity which the Dean/Superintendent of the hospital may require to be supplied and may be more or less according to actual requirements. Notwithstanding the estimate of the probable quantity or number, the Dean/Superintendent has the right to order any quantity or number, of the articles mentioned in the schedule as may from time to time be required or not to order any quantity or number of any such articles at all.

5.

6.

7.

8. During the terms fixed by the contract and except as herein provided, the Government will not purchase from any person or persons other than the contractor or from any company or corporation, all or any of quantity of goods or materials agreed to be supplied by the contractor.

9.

10.

11. Each tender must be accompanied by a deposit equal to 5 per cent of the total aggregate value of the articles tendered for as earnest money.

12.

13.

14.

15.

16.

17. The acceptance of the tender will be communicated to the successful tenderer in writing.

18.

19. In the case of a successful tenderer, the earnest money deposited may, at the direction of the Assistant to the D.M.S. be adjusted towards the

security deposit payable by him under clause (20) below. The successful tenderer will also be required to deposit on or before the date herein

fixed for the execution of the agreement, a security of ten per cent of the total value of the supplies undertaken.

20. The successful tenderer will be required to enter to a stamped agreement with the Director of Medical Services, the draft of which may be

seen at the office of the Director of Medical Services within 15 days from the receipt of intimation by him that his rates have been accepted.

21. The D.M.S. will within a period of three months from the date of commencement of the contract, be at liberty to terminate, without assigning

any reason whatever, the contract, either wholly or in part, on one month's notice. The contractor will not be entitled to any compensation

whatsoever in respect of such termination.

22.

23. If the successful tenderer fails to execute the agreement and/or deposit the required security within the time specified, or withdraws his tender

after the intimation of the acceptance of his tender has been sent to him or fails to comply with condition No. 16 above or owing to any other

reason he is unable to undertake the contract, his contract will be cancelled and the earnest money deposited by him along with his tender forfeited

to Government, and he will be liable for all damages sustained by the Dean/Superintendent by reason of such breach, including the liability to pay

any differences between the prices accepted by him and these ultimately paid by the hospital authority for the procurement of the articles

concerned. Such damages shall be assessed by the Dean/Superintendent whose decision is final and the amount so assessed is recoverable by

proceedings under the Madras Revenue Recovery Act, 1864 (Act II of 1864), as an arrear of land revenue.

24 to 28.

29. The loss to Government, if any, incurred on account of the purchases rendered necessary elsewhere by failure, neglect or refusal on the part of

the contractor to supply according to the terms of the agreement, will be recovered from him.

Page 89 of the printed papers (Ex. B-4) contains the stamped agreement which was to be executed by the defendant, and this agreement is

between the Governor of Madras and the contractor. By Ex. B-5, the defendant had submitted his tender and by clause 3 he had agreed to abide by the conditions in the tender notice. He had also agreed for the forfeiture of the earnest money in the event of his failure to undertake the contract. The Government, by G. O. 944. Health dated 12-3-1956, had permitted the Director to accept the tender, and the latter had in fact accepted it on 14-3-1956. On 2-4-1956 he had requested for a month's time to supply the hand-pounded rice and also prayed for permission to supply mill-made rice to them. On 11-4-1956, he had informed the Director that he had made arrangements to begin the supply from 12-4-1956 and he had requested him to stop the departmental purchases that were being made at his risk. On 16-4-1956, he had supplied 1929 lbs. of hand-pounded rice with the Stanley Hospitals as against an indent of 6000 lbs. On 2-4-1956, he had supplied 10 bags of this rice to the Children's hospital. In the letter written by him on 26-3-1956, to the director, he had complained of delay on the part of the Department to accept his tender and he had stated therein that there was an increase in the price of rice at that time. True, the contemplated stamped agreement which was to be executed on an acceptance of the tender, did not come into existence. But, the absence of such a document does not affect the matter in any manner. Seth Bikhraj Jaipuria Vs. Union of India (UOI), and Union of India (UOI) Vs. A.L. Rallia Ram, lays down the principle that there can be a contract by correspondence. The execution of a formal document is not absolutely essential, provided the other conditions are satisfied. S. Rajam. Vs. The Indian Union, Ministry of Rehabilitation, New Delhi, , to which one of us was a party, lays down the principle thus:

While the requirements of Art. 299 of the Constitution of India are mandatory and should be complied with, in order that an agreement entered into by a private party with the Government in the exercise of its executive power be enforceable, it is not necessary that there should be drawn up a formal document as such. But, there can be a valid contract entered into by correspondence, provided the two requirements, viz., (1) It should be expressed to be made by the Governor of the Province and (2) it should be executed on behalf of the Governor by such persons and in such manner as he might direct or authorise, are complied with.

8. The Government in the instant case before us, have permitted the Director of Medical Services, by G. O. 944 Health, dated 12-3-1956, to

accept the respondent's tender. By G. O. 3574 dated 25-11-1955, the Government have further empowered the Director to redelegate his

powers to incur or sanction items of contingent expenditure etc., to his gazetted assistants. One such item was the acceptance of tenders in respect

of diet articles referred to in G. O. 184 dated 15-1-1953. Appendix III of Volume II of the Madras Financial Code sets out a list of authorities

empowered to execute contract deeds etc., on behalf of the Governor as directed by him under Art. 299(1) of the Constitution. Item 15 therein at

page 11 relates to contracts and other instruments relating to the Medical Department, and they could be executed by the Director of Medical

Services. Thus, when the Director issued notice inviting tenders for the supply of these articles and when he intimated to the respondent his

acceptance as per Ex. P-11, he was doing so pursuant to the right conferred upon him by the Governor under Article 299(1) of the Constitution.

The contract agreement, Ex. P-8, which was to be executed, also shows that it was between the contractor and the Governor of Madras

represented by the Director of Medical Services "acting for and on behalf of any by the order and direction of the Governor of Madras". Thus, the

contract in this case is not (sic) for non-compliance with Art. 299(1) of the Constitution of India.

9. Mr. Thyagaraja Iyer appearing for the defendant contends that from the terms and conditions of the Tender notice and the other

correspondence, we can spell out only a case of a standing offer on the part of the defendant to supply the several items at the rates mentioned by

him in his tender and that it becomes a concluded contract on each and every occasion when the State indents upon him for the supply of any

particular item or quantity required by them. Kunhamed Kutti J. has agreed with him, and with all respect for the learned Judge, we are unable to

hold that this is a case of a standing offer as contended by the defendant. "Contract" as defined in clause (h) of S. 2 of the Indian Contract Act, is

an agreement enforceable at law. The defendant's offer to supply the dietary articles at certain rates, was accepted by the Director after reference

to Government. This acceptance creates a valid contract or agreement enforceable in law. It is contended that the contract in question is not

bilateral, but only unilateral, because there is no obligation on the part of the Government to purchase any of the articles agreed to be supplied by

the defendant. There is a clause in the Tender notice to the effect that the Government cannot purchase any of these items from any one else during

the period. The rule that an offer is made irrevocable by acceptance, is illustrated by the case *the Great Northern Rly. Co. v. Witham*, (1873) 9

CP 16. The Railway Company in this case had advertised for tenders for the supply of stores, such as, they might think fit to order for one year.

The defendant made a tender offering to supply them for that period at certain fixed prices, in the following manner: "I hereby undertake to supply

to the Company for 12 months with such quantities..... all or any of the several articles named in the attached specification as the company's

store-keeper may order from time to time at the price said opposite to each article respectively". The company accepted his tender. Some orders

were given and they were duly executed by him. He failed to excuse himself from the purpose of this agreement by saying that the contract was

unilateral, the company not being bound to give him the order. He contended that there was no consideration for the defendant's promise to supply

the goods inasmuch as there was no obligation on the company to give an order to him. Keating, J. held "The company had given the order and

had consequently done something which accounted to a consideration for the defendant's promise". Brett, J. expressed that there was no

substance in the contention that the contract was only unilateral, in the following manner:

I do not however understand what objection that is to a contract. Many contracts are obnoxious to the same complaint. If I say to another "if you

will go to York, I will give you hundred pound's that is in a certain sense a unilateral contract. He has not promised to go to York. But, if he goes,

it cannot be doubted that he will be entitled to receive the hundred pounds. His going to York at my request is a sufficient consideration, for my

promise. So, if one says to another "if you will give me an order for iron or other goods, I will supply it at a given price", and if the order is given,

there is a complete contract which the seller is bound to perform. There is in such a case ample consideration for the promise. This is a matter for

every day's practice, and I think it will be wrong to countenance the notion that a man who tenders for the supply of the goods in this way is not

bound to deliver them when an order is given. I agree that this judgment does not decide the question whether the defendant might have absolved himself from the further performance of the contract by giving notice. Thus, though there was no binding contract on the part of the company to order any goods, there was a sufficient consideration for the defendant's promise to supply the goods. The contract in such case cannot be void on the ground that it is unilateral.

10. In the case *Percival Ltd. v. London County Council Asylum and Mental Deficiency Co.*, (1918) 87 LJ KB 677 a firm of contractors had

signed a tender addressed to the Asylum Committee, whereby they agreed on the acceptance of the tender to supply all or any of the goods

named in the Schedule, if and to the extent the same should be ordered by the Committee and in any quantity. It was also provided that the

quantities stated in the Schedule were those which were estimated as the probable requirements for the period of the contract. But, the Committee

might at their option require the supply and delivery under any item in the schedule of goods in excess of the quantity specified in such item and the

goods were to be delivered at the Asylum in such quantities, at such time and in such manner as the Committee or the steward might order from

time to time. The Committee did not order the amount specified in the schedule to the tender form, and the contractors claimed that they were

entitled to supply goods to the full amount therein specified. It was held that on the true construction of the contract contained in the document of

tender, the Committee were under no obligation to order any of the goods, but that the firm of contractors were bound to deliver the goods

specified as and when they obtained orders for them from the Committee. Atkin J. held that it was not a firm contract to take the whole of the

goods that were required. He observed as below:--

These tenders have been the subject of litigation before now and they vary in form. But, one knows that it is quite common for large bodies that

require supplies for an year to ask for tenders and to obtain them, and it sometimes happens that the effect of the form of the tender with an

acceptance is to make a firm contract by which the purchasing body undertakes to buy all the specified material from the contractor. On the other

hand, one knows that these tenders are very often in a form under which the

purchasing body is not bound to give the tenderer any order at all. In other words, the contractor offers to supply goods at a price and if the purchasing body chooses to give him an order for goods during the stipulated time, then he is under an obligation to supply the goods in accordance with the order; but, apart from that, nobody is bound. There is also an intermediate contract that can be made in which, although the parties are not bound to any specified quantity, yet they bind themselves to buy and pay for all the goods that are in fact needed by them. Of course, if there is a contract such as that, then there is a binding contract, which will be broken if the purchasing body in fact had not needed some of the articles, the subject of the tender, and did not take them from the tenderer.

The contract which he had to consider in that case came within category No. 1. The second item referred to by him will be a case of a standing offer, and the instant case before us will be the one referred to by him as the third kind. The parties here are not bound to any specified quantity. But they bind themselves to buy and pay for all the goods that are in fact needed by them. In such a case, there is a binding contract. He further observes as below:

I have no doubt that in a case of this kind, where a man is asked to tender in advance for large quantities, he must in the ordinary course expose himself to certain liabilities in advance and it may seem from one side that the contractor should be bound on one side, but that the purchasing body should not be bound on the other. But, the answer is that that is the contract the parties chose to make and certainly it is not in my experience and unusual contract, because (1873) 9 CP 16 and the other cases afforded instances for the last forty years, of this kind of contract being entered into by business people. No doubt, they rely on the matter going through the ordinary course very much in the terms of the contract. Sometimes it happens they are disappointed. That is a business risk, which, as it seems to me, a person who signs a contract in express language must put up with".

11. In his book on Contracts, Vol. I. 23rd Edn. para 53 Chitty deals with the matter thus:--

Great difficulty arises in construing a tender to supply, for example, "such

quantities (not exceeding a specified amount) as you may order." A

person to whom such a tender is submitted, does not incur any liability merely by "accepting it". He only becomes liable when he places an order

for goods""--Vide (1918) 87 LJ KB 677 and he would not in the absence of a stipulation to that effect, be bound to place any order at all--vide C.

F. Churchword v. R., (1865) 1 QB 173; R. v. Demars, 1900 AC 103. The parties submitting the tender can also withdraw before a definite order

is placed, if the tender means ""I will supply such quantities as you may order"--vide (1873) 9 CP 16. But, he will not be entitled to withdraw if the

tender means "I hereby bind myself to execute any orders which you may place and if this promise is supported by some consideration.

12. The defendant in this case has bound himself to execute any orders which the State might place from time to time. Therefore, in these

circumstances, he will not be entitled to withdraw the contract. Mr. G. Ramaswami, the learned Additional Government Pleader appearing on

behalf of the State, contends, on the authority of Ford v. Newth, 1901 1 KB 683, Metropolitan Electric Supply Co. Ltd. v. Ginder 1901 2 Ch

799 and the Full Bench decision of this Court in Venkatachalam Pillai Vs. Sethuram Rao alias Lakshmikantha Sastriar and Another, , that there

can never be a case of a standing offer as contended by the defendant, but there is a clear case of a concluded contract between the parties, giving

a cause of action for damages when there is a breach. In 1901-1 KB 683 in an answer to an advertisement. A had offered to supply to the

Municipal Corporation for twelve months, certain goods at specified prices and this offer was accepted. Later, he applied to the Committee to

release him from the contract stating that there was no completed agreement. Darling J. held that the advertisement, tender and the acceptance

constituted a contract, because there was an obligation to order from A, such of the goods included in his tender as the Council might require

during the period of twelve months, and the Council would not be justified in treating his tender as a mere price list and ordering the goods which

they required from any one whom they might choose. Therefore, there was a contract. In the next case, 1901 2 Ch 799 the defendant had signed a

form of request to the plaintiff company to supply them with electric energy subject to the following terms--(1) the consumer agrees to take the

whole of the electric energy required for the premises mentioned below from the company for a period of not less than five years, and (2) the

charge of electric energy be 4 1/2d, per Board of Trade unit. There was no covenant by the company to supply, nor by the defendant to take, any

energy. The defence was that the language of the contract was affirmative and not negative and that there was no enforceable agreement. Buckley

J. held as below--

The technical distinction being made, that if you find the word "not" in an agreement (I will "not" do a thing) as well as the words "'I will'", even

although the negative term might have been implied from the positive, yet the court refusing to act on an implication of the negative, will act on the

expression of it. I can only say that I should think it was the safe and the better rule to look in all such cases to the substance and not to the form.

The language here is that the consumer agrees to take the whole of the electric energy required for the premises from A. The company was bound

to supply under the statute if asked. The consumer asks. The result is that the thereupon had a right as against the plaintiff, to be supplied. They

were contracting not affirmatively for the supply of something but negatively that the defendant would not take from somebody else. There is no

affirmative contract here to take anything at all. Ginder does not agree that he will take any energy from the plaintiffs. He says that he will take the

whole of the electric energy required. It is like and requires no energy. The only thing that he was contracting to do was that if he took electric

energy, he would take it from the plaintiffs. It seems to me the whole essence of the contract is that which is not expressed in the words "I agree",

but which by implication is really the only thing existing, a contract that he will not take from somebody else. He agrees to take the whole from A,

which necessarily implies that he will not take from B, as a matter of consideration thereof, not by express words, but by necessary implication. I

think there is here an agreement not to take from others''''.

13. With these observations, he held that the request was in substance a contract not to take energy from any other person and that it could be

enforced by injunction and that the contract was valid so far as it created rights between the parties for a term of years. Venkatachalam Pillai Vs.

Sethuram Rao alias Lakshmikantha Sastriar and Another, , is a case where a

covenant in the sale deed was in the following terms:

If it happens that you or your heirs have to sell the property to others, then you must sell it to the plaintiff or his heirs for the above price and also

for such prices as may be determined by arbitrators in respect of any building that may be constructed upon the land." In a suit by the plaintiff for

specific performance, it was held that there was not merely a standing offer to re-sell, and tendering the purchase money, but there was a

completed contract to resell and purchase even on the date of sale. In the case *Sakalaguna Nayudu v. Chinna Munnuswami Nayakar*, AIR 1928

PC 174, the counter-part of the sale deed provided that the vendee should reconvey the property to the vendor after a period of 30 years from

that day in case the vendor was to have the property again and upon his paying a sum of Rs. 10,000. It is thus clear that the vendor had the option

of repurchasing the property or not. Their Lordships held that it was not a case of a mere standing offer by the vendee, which could ripen into a

contract, to buy and sell only on the acceptance of that offer by the vendor by tender of the purchase money. On the other hand, it was distinctly

held that there was a completed contract between the parties even on the date of the counter-part document (27th January 1871).

14. The whole concept of a standing offer is want of mutuality. But, here in the instant case before us, there is mutuality and as such the contract is

complete. Therefore, no question of any standing offer arises in this case, and the contract is complete the moment the tender was accepted, by the

Director of Medical Services.

15. Clause 21 of the Tender Form enables the Director of Medical Services, within a period of three months from the date of commencement of

the contract, to terminate the same either wholly or in part without assigning any reason, by giving one month's notice. This clause further states

that the contractor will not be entitled to compensation whatsoever in respect of such a termination. On behalf of the defendant, it is urged that the

contract in the instant case is bad because of this clause, which has the effect of positively destroying the contract altogether at the whim and fancy

of one of the parties. *Union of India (UOI) Vs. Maddala Thathiah*, is relied on for this purpose. This is a case where the General Manager of a

Railway invited tenders for the supply of jaggery to the railway grainshop. The

administration reserved in the agreement a right to cancel the contract at any stage during the tenure of the contract without calling up the outstandings on the unexpired portion of the contract. The contractor submitted his tender for the supply of 14000 maunds as mentioned in the Tender. By a letter dated 20-1-1948, the Deputy General Manager accepted it stating that the Official order would be placed on receipt of the remittance of security. There was a note that delivery should be effected on four different dates, viz., (a) 1st March, (b) 22nd March, (c) 5th April and (d) 21st April 1948. But on 8-3-1948 the Deputy General Manager informed the respondent that the balance quantity of jaggery outstanding on date against the previous order was to be treated as cancelled. The contractor then filed this suit for damages. The General Manager in defence relied on the stipulation in the contract that he was at liberty to terminate the contract at any stage. Negating this defence, their Lordships held that such a clause has the effect of actually or positively destroying the contract altogether at the whim and fancy of one of the parties and that it should be rejected as unenforceable. They further held that once an order was placed for supply on such dates, that order amounted to a binding contract, making it incumbent on the respondent to supply the jaggery in accordance with the terms of the order and making it incumbent on the Deputy General Manager to accept the jaggery delivered in pursuance of the order. Thus it was a case where an order was in fact placed and this case does not help the present case either way. True, clause 21 is there. But, it has to be read along with clause 8 of the Tender, which precludes the Government from purchasing from any person or persons other than the tenderer all or any of the quantities of the goods or materials agreed to be supplied by the contractors. That apart there has been no such termination of any contract either fully or partially in exercise of any right conferred by clause 21 of the contract.

16. The annexure to the Tender Notice sets out the articles required by each hospital and also the quantity required. The defendant had offered to supply 13,33,800 lbs. of hand-pounded rice at Rs. 0-8-5 per lb., 63,960 tons of gingili oil at Rs. 0-12-91/2 per lb. and 1151 tons of casuarina firewood at Rs. 57-14-0 per ton. He had submitted this tender and the same had been accepted by the Government. He had also supplied as per

the contract some quantities to some hospitals. Only on 25-4-1956 he issued the notice Ex. P-25 stating that there was no concluded contract.

Clearly there is a concluded contract between the parties the contract being, the defendant agreeing to sell the items mentioned by him in the tender

at the rates given by him to the different hospitals as and when ordered, and the Government agreeing not to purchase these articles during the

period from any one else. The contract entered into between the parties was entire in substance and nature, and it is not severable and divisible.

Section 2(c)(d) of the Indian Contract Act states that when at the desire of the promisor the promisee has done or abstained from doing, or does

or abstains from doing, or promises to do so or abstain from doing something such act or abstinence or promise is called a consideration for the

promise. The Government in this case invited orders for the supply of the goods and the tenderer offered to supply the goods at specified rates as

and when ordered as per the terms of the conditions of the tender notice. This offer is accepted by the Government. The result is that there are

mutual sets of promises forming consideration for each other. The seller promises to supply the goods as and when an order is placed. The buyer

promises that he will not buy from any other person, goods required by the hospital. This promise to abstain from buying from anybody is sufficient

consideration within the meaning of Section 2(d) of the Contract Act. On behalf of the defendant, it is further urged that under the terms of the

contract, the hospital authorities need not place any order at all for any goods and so there is no mutuality and that this would make it a case of

standing offer. This clause wherein the Government undertakes not to buy from anybody, the goods required. This means that wherever

Government requires the goods and whenever they have to purchase, they have to purchase only from the respondent. Thus, there is a concluded

contract even at the inception. When such is the case, no question of any standing offer will ever arise for consideration.

17. Next it is contended that when the contract was repudiated, the Government did not accept the breach immediately and that they should have

continued to place orders till the actual termination of the contract. When a person repudiates his obligation under the contract, two courses are

open to the other party. viz., (1) not to accept the breach and wait till the time of performance and enforce it, and (2) to accept the breach and sue

for damages for breach. In this case, the Government have accepted the breach by not placing orders with the defendant and by buying the goods

from others. When the defendant, in the termination notice, had made it clear beyond all ambiguity, in unequivocal terms, that he would not supply

the goods, it is not now open to him to contend that despite this notice the Government should have continued to place orders on him.

18. With respect we disagree with the findings of Kunhamed Kutti J. and hold that there was a concluded enforceable contract between the parties

and that the defendant had committed breach, giving a cause of action for damages. The learned Judge has considered the question of damages on

the basis that this is a case of a standing offer. He has said that what the plaintiff is entitled to will be the difference between the contract rate and

the market rate for the articles purchased by the department under indents placed by the hospital prior to 25-4-1956, though the actual purchase

of some of the articles was subsequent to that date. The quantum or quantity of articles totally purchases by the different hospitals from 1-4-1956

till 31-3-1957 were set out in column 2 of the statement appended to the plaint. Column (3) showed the quantity supplied by the defendant. The

excess or smaller expenditure incurred by the Government shown in these statements was arrived at by calculating the difference between the

amount paid for purchase from other sources and the expenditure that would have been incurred by the Government if the defendant had made the

entire supplies at the contract rate. He further held that the plaintiff would be entitled to get only the sum total of the abovesaid amounts less the

smaller expenditure incurred under firewood. The parties were directed to file memos of calculation in the light of the aforesaid findings given by

him. The memo showed the following items: On account of the purchase by the hospitals from outside agencies, the State had incurred an

additional expense of Rs. 4303-15-4 on account of hand-pounded rice; Rs. 557-11-0 on account of gingili oil and no excess on account of

casuarina firewood. The defendant had supplied articles worth Rs. 8281-15-6. Since this amount was in excess of the amount payable to the State

by way of damages the learned Judge dismissed the suit directing the parties to bear their respective costs. Thus, the basis adopted by the learned

Judge for determining the damages is not correct and we have held that the defendant has committed breach in respect of a contract, complete and

concluded. The question of damages will have to be determined and decided with reference to the terms of the contract agreed to between the parties. We set aside the findings of the learned Judge and remand the suit to the trial court for further disposal after dealing with issues 6 and 7 in the light of our findings and observations.

19. The defendant, as plaintiff in O. S. No. 497 of 1957 on the file of the City Civil Court Madras had claimed Rs. 9100 paid by him to the plaintiff as earnest money plus Rs. 8568-8-31/2 value of the articles supplied to the hospitals as per the indents made. The learned Judge has dismissed his suit stating that he had committed breach of the contract and as such he was not entitled either to the reimbursement or to the return of the earnest money. The State has given credit to an amount of Rs. 8281-15-6 towards the value of the articles actually supplied by the defendant. True, the contract provides for the forfeiture of the earnest money. But, since we have held that the defendant is liable to pay damages for the breach, we are of the view that he need not be penalised in both the ways, by forfeiture of the earnest money and by awarding damages for the breach. We set aside the decree passed by the learned Judge in O. S. No. 497 of 1957 and grant a decree in favour of the plaintiff therein for Rs. 9100 plus Rs. 8281-15-6 with proportionate costs.

20. A. S. 149 of 1961 is allowed with costs to the extent indicated above O. S. 116 of 1966 is also allowed as indicated above, with costs and the trial court shall provide for the costs in the suit and in the appeal after determining the quantum of damages. The State will be entitled to adjust the amounts due from it under the decree in O. S. 497 of 1957 and recover the balance of the total amount to be decreed in its favour in the other suit.

21. Order accordingly.