

(1955) 07 BOM CK 0004
In the Bombay High Court
Case No : Suit No. 46 of 1954

Navnital and Co. and Others

APPELLANT

Vs

Kishanchand and Co.

RESPONDENT

Date of Decision : 11-07-1955

Acts Referred:

Contract Act, 1872 — Section 10, 31

Citation : AIR 1956 Bom 151

Hon'ble Judges : Desai, J

Bench : Single Bench

Advocate : K.K. Desai and C.J. Shah, for the Appellant; M.V. Desai and Lulla, for the Respondent

Judgement

1. The plaintiffs sue to recover damages from the defendants for breach of two contracts for the sale and delivery of cotton yarn. It is the plaintiffs' case that the first plaintiffs carry on business of export and import in Bombay & that in the matter of the contracts in suit they acted for and on behalf of plaintiffs 2 to 5 who carry on business in cotton yarn and piece-goods in Singapore in the name and style of Manalal Gowindji & Co.

On 16-11-1950 two contracts were entered into between the defendants and the first plaintiffs acting on behalf of their overseas friends Messrs. Manalal Gowindji & Co. One contract was for the sale by the defendants to the overseas firm of 50 bales of cotton yarn at Rs. 34/- per bundle of ten pounds F. O. B. Cochin on terms and conditions recorded in a letter dated 16-11-1950.

A similar contract for the sale of 100 bales of cotton yarn was entered into between the same parties on the same terms except that in the first contract credit was to be valid upto the end of February 1951 whilst in the other contract credit was to be valid upto the end of March 1951. According to the plaintiffs the defendants failed to perform their part of the two contracts and delivered only 30 bales of cotton yarn after considerable delay.

There was some correspondence between the parties in the course of which the defendants Stated that their vendors, Messrs. Alagaopa Textiles (Cochin) Ltd. had failed to perform their part of the contracts with the defendants and the defendants were consequently absolved from all obligation under their contracts with the plaintiffs.

They also stated in that correspondence that the contracts were conditional on the Alagappa Textiles (Cochin) Ltd. delivering the goods to the defendants and the Mills having failed to do so the defendants in their turn had become entitled to cancel their contracts with the plaintiffs.

2. It is not necessary to summaries the pleadings in this case since issues were raised On behalf of the defendants in respect of only two of the contentions taken up in their pleading and of the two contentions one, relating to the illegality of the contracts, was abandoned by Mr. M. V. Desai, learned counsel for the defendants, after the hearing of the suit had proceeded for some time.

The only issue and the only question that remains for my determination in this case is whether the two contracts were absolute, i.e. created absolute obligation on the defendants to deliver the goods, or whether the contracts were conditional, i.e., contingent upon Messrs. Alagappa Textiles (Cochin) Ltd. in their turn performing their part of their contracts with the defendants.

3. Both the contracts are substantially in the same terms had it will suffice if I set out here only one of them. The contract is as follows:

"We have to advise having sold to your overseas friends Messrs. Manalal Gowindji & Co., 46, Saffling St., Singapore, 50 bales of cotton yarn 40/1 at Rs. 34 per bundle of 10 lbs. F.O.B. Cochin. The goods have been purchased by us from Messrs. Alagappa Textiles (Cochin) Ltd. for January delivery and will be shipped to your friends as soon as delivered to us.

You are requested to pay us a deposit of Rs. 5,000/- in the meantime and the L/C from your overseas friends must reach us within 7 days of the date of this contract. The credit is to be valid upto the end of February 1951 and should provide partial shipments."

4. It is not disputed that the defendants had in their turn entered into contracts for the purchase of similar quantities of yarn with Messrs, Alagappa Textiles (Cochin) Ltd. Nor is it disputed that the Mills failed to perform their part of the contracts with the defendants. The argument pressed before me on behalf of the defendants is that the defendants never contemplated to enter into any absolute contracts with the plaintiffs.

They strongly rely on the words in the second sentence of the contract, "the goods have been purchased by us from Messrs. Alagappa Textiles (Cochin) Ltd. for January delivery and will be shipped to your friends "as soon as they are delivered to us".

It was strongly argued before me by Mr. M. V. Desai, learned counsel for the defendants, that the defendants, by the expression used in these contracts, undertook to ship the goods to the foreign friends of the first plaintiffs only as soon as the goods were delivered to them by the mills and that unless the mills delivered the goods to the defendants no obligation could arise on the part of the defendants to ship them.

5. The construction sought to be placed on behalf of the defendants raises a neat point of interpretation of the contracts. On behalf of the plaintiffs reliance was placed on certain decisions of the Privy Council and our Supreme Court and of the Appeal Court of this High Court. I shall presently refer to those decisions and state the principle to be gathered from them.

But on a question of construction of a contract I should in the first Instance, examine the language used by the parties themselves in the contract and try to gather the obligations created by their own words. The construction of one contract by a Court can afford but little guidance for the construction of another contract of a similar nature unless the expressions used and the facts and surrounding circumstances are the same or practically identical.

6. Now the rule of Judicial interpretation, as laid down and used in our Courts, is that every assertion or promise or declaration of whatever kind has to be interpreted on the principle that the right meaning of any expression is that which may be fairly presumed to be understood by it. This rule is the genus of most rules of construction..

It was said on behalf of- the defendants that to accept the construction urged by them would be to give effect to what would be reasonably stipulated by a person who was to get the goods from a third party and that in view of the times prevailing and the restrictions imposed by Control Orders it could never have been the intention of the defendants unconditionally to agree to deliver the contract goods to the plaintiffs; and it was for that purpose, so the argument proceeded, that reference was made in one contract to the purchase by the defendants of similar goods from Messrs. Alagappa Textiles (Cochin) Ltd. and to the condition "as soon as delivered to us" in the two contracts.

There can be no doubt that the aim of every judicial interpretation is to see that such meaning is given to the language used that both the actual intention of the promisor and the actual expectation of the promisee coincide. There is, however, no such invariable or absolute rule and a promisor may well find himself under an obligation to give a promisee either too much or too little.

In general the supposed intention of a party cannot be regarded because the interpretation has after all to be of the manifest Intention of both the parties. There are special exceptions to this rule with which I am here not concerned and I must proceed to examine what obligations the parties have put on paper.

7. The contracts are for the sale of future goods. Both the contracts are similarly

worded and are simple and of a common type. The goods are clearly and sufficiently described in the first sentence. Then follows the debated provision which appears to me to deal only with the mode of performance of the contracts.

The controversy in main has raged on the words "will be shipped to your friends as soon as delivered to us" which It was said rendered the contracts conditional. But I do not see any element of contingency in these words. All that the defendants safeguarded themselves against by these words was in respect of the mode or method of performance of the contracts. Delivery could be given by them as soon as the goods were delivered to them by the Mills.

That delivery could have been made in February if for instance the Mills though bound to deliver the goods to the defendants in January delivered the goods in February but in time to enable the defendants to ship the same and avail of the credit which was to remain open till the end of February.

It is to be observed that the contracts do not contain any express and specific term as to the time of delivery. What the sellers say in the contracts is that they in their turn have purchased the goods for January delivery from the Mills and will deliver the same to the buyers as soon as they receive delivery of the goods from their sellers.

Then there is the last sentence in the contract which provides for the credit being kept valid upto the end of February in case of the first contract and upto the end of March in case of the other contract. It is also notable that in the last sentence of the contract the defendants say that credit should provide for partial shipment.

Therefore, by this last sentence they safeguarded themselves against partial delivery being made to them by their own sellers; the Mills, and stipulated in their turn for giving partial delivery of the goods under the two contracts to their buyers.

Now every contract has to be read as a whole-find doing so I find it impossible to read into the words "as soon as delivered to us" any term of contingency or any condition precedent to the creation of any obligation to perform their part of the contracts by the defendants, as argued by Mr. M. V. Desai.

These words, to my mind, only regulate the manner or mode of performance and do not deal or regulate the very obligation to perform the contract. It is true that the intention of the parties is sometimes expressed in inapt or clouded terms and not expressly and explicitly stated.

It is also true that sometimes from the nature of the transaction and from some words actually to be found in the contract itself the Court, may reach the conclusion that the contracting parties must have intended a particular term or condition as part of the contract.

It is well established that where a contract is in writing no unexpressed condition should, however, be considered as implied in the contract except such term as

was necessary in order to give the transaction such efficacy as both parties must have in all reason Intended it to have.

The general rule is that if the contract can be fulfilled as it stands and is effective no term or condition by implication should be imported-into it simply because it may seem reasonable that there should have been such a term in the contract.

In case of the contracts before me I am unable to see anything which permits of any such implied condition being read in the contracts as having been in the contemplation of the parties. The obligation to perform the contracts appears to me to be unconditional and absolute. To put a different construction on these words and to permit them to control the obligation created by the two contracts would be virtually to make out a new contract for the parties.

Again no Court has an absolving power. I am unable to construe these contracts as expressing an intention that delivery by the Mills was the foundation on which the parties contracted; nor am I able to see any such condition by implication.

I may perhaps add that if it was the intention of the parties that the defendants were to deliver the goods and the plaintiffs were to receive the goods only if the defendants got delivery of the goods from their own sellers, the mills, there was nothing to prevent the parties from expressing their intention in words of sufficient clarity.

It would have been an easy thing for the defendants to state in the two contracts that their promises were made conditionally or that the goods would be delivered to the plaintiffs only If the mills delivered the goods to them.

In effect learned counsel for the defendants has asked me to read the words "as soon as delivered to us" as equivalent to the expression "only if delivered to us". That is the construction which I am unable to put on the contracts read as a whole.

8. An Instructive case on this head and one often relied on in commercial cases of the nature before me is -- "Hurnandrai v. Pragdas" AIR 1923 PC 54 (A) decided by their Lordships of the Privy Council in 1922. There the respondent firm entered into a contract of sale of bales of cotton goods to be manufactured by a certain mills and the written contract provided that "the goods are to be taken delivery of as and when the same may be received from the mills; the delivery to be caused and given in full by December 1938".

The mills failed to supply the goods and consequently the sellers could not deliver the whole quantity of the goods as specified in the contract to the buyer, the appellant before their Lordships. The Bombay High Court held on a construction of the contract that it was not an absolute but conditional contract, the obligation being conditional on the goods being received from the mills.

Their Lordships of the Privy "Council rejected that construction and Lord Sumner in delivering the judgment of the Board pointed out that to construe the words

"as and when received" to mean "if and when received" would be to convert the words which fixed quantities and times for delivery by instalments into a condition precedent to the obligation to deliver at all and virtually make a new contract.

Obviously the words which came up for interpretation before their Lordships regulated the manner of performance. They did not reduce or fix the quantity sold either to a mere maximum or limit the same to such goods as the mills might supply to the defendants during the year mentioned in the contract. Their Lordships also pointed out that it was incumbent on the Court to put itself in a frame of mind which would make it possible for it to understand how commercial minds work.

But at the same time they took care to sound a note of warning that it was not for the Court to decide what risks a commercial man would take while entering into a contract. The decision of their Lordships is also instructive inasmuch as it suggests the manner of approach of the Court in dealing with such commercial contracts.

Their Lordships in effect pointed out that it would be always open to a party to stipulate for the sale of goods absolutely and take the risk of his not being able to receive the goods from his own seller; or if he is cautious party to contract for the sale of goods conditionally by expressly stating that the goods would be delivered only if they were delivered to him by his own seller. But what particular risks a seller of goods has taken in a particular contract can only be deduced from the clear words of the contract itself.

9. A contract somewhat similarly worded came up for consideration before their Lordships of the Supreme Court in *Ganga Saran Vs. Ram Charan Ram Gopal*, . There the defendant entered into a contract with the plaintiff to supply 61 hales of cloth of certain specification manufactured by the New Victoria Mills at Kanpur. In the agreement It was stated that the defendant would continue to send the goods to the plaintiff as soon as they were prepared upto 17-11-1947.

He also promised to go on supplying the goods to the plaintiff as soon as they were supplied to the defendant by the mills. The bales were not supplied and on the plaintiff suing for damages the defendant contended that the contract was frustrated because the mills had failed to supply the goods to the defendant. One of the contentions raised by the defendant was that the contract was conditional on the mills supplying the goods to the defendant and the mills having failed to do so the defendant was absolved from all his obligations to supply the goods to the plaintiff.

The view taken, on a construction of the contract was that the delivery of the goods was not made contingent on their being supplied to the defendant by the mills. It was observed that the parties never contemplated the possibility of the goods not being supplied at all and that the words "prepared by the mills" were only a description of the goods to be supplied and the expressions "as soon as

they are delivered" and "as soon as they are supplied to us by the mills" simply indicated the process of delivery.

A reference was made in the judgment of the Supreme Court to the decision of the Privy Council to which I have already adverted. Their Lordships agreed with the reasoning of the Privy Council and observed that the considerations which had prevailed with the Privy Council must govern the construction of the contract before the Supreme Court.

10. A similar contract came up for consideration before the Appeal Court in "F. Ranchhodas v. Nathmal Hirachand and Co. AIR 1949 Bom. 356 (C). There the defendants contracted with the plaintiffs to sell some pieces of parachute cloth of January/February shipment, "the goods to be given delivery of when they arrived". The defendants failed to deliver the goods and the plaintiff sued to recover damages for breach of the contract.

The question arose whether this was an absolute contract or a contract conditional on the arrival of the goods in India. It was held that this was an absolute contract and when the parties provided that the goods were to be delivered when they arrived they were dealing with the mode of performance and not with the question of their very obligation to perform the contract.

11. Mr. K.K. Desai, learned counsel for the plaintiffs has relied on all these three decisions as enunciating certain general principles which the Court applies in construing commercial contracts of the type under consideration. Of course, on a question of construction of a contract no decision can be regarded as of binding authority simply because the language used is similar to the language used in another contract.

But there are observations in the decisions to which I have already referred which are instructive and afford considerable guidance on the manner in which the Courts consider commercial contracts of this nature and the distinction that is always drawn on the one hand between expressions in a contract which relate merely to the mode or manner of performance of the contract and on the other hand expressions which affect the very obligation to perform the contract or to put it somewhat differently expressions indicating the foundation or basis of the contract.

12. Mr. M.V. Desai, learned counsel for the defendants, has urged that in the contracts which came up for consideration in those cases time was expressly fixed for delivery of the goods which it was said has not been done in the case of the contracts before me and, therefore, the words in these contracts relating to the fact of the goods having been purchased by the defendants from Messrs Alagappa Textiles (Cochin) Ltd., for February delivery and the words "will be shipped to your friends as soon as delivered to us" must be read not as dealing with the mode or method of performance of the contract or the process of delivery but as introducing a condition precedent in the contract to the creation of an obligation on the part of the defendants to deliver the goods.

I find myself unable to accept the rather fine distinction sought to be drawn on behalf of the defendants. I am primarily not concerned with the contracts which came up for consideration in those decisions. I am really concerned with the ascertainment and application of the general principles which found favour with the Courts in those cases.

Applying the principles enunciated in those cases to the contracts before me I have reached the conclusion that the expression in Question cannot be given the meaning urged before me by learned counsel for the defendants and that in their proper context they must be read as dealing with the mode or manner of performance of the contract and not as affecting the very obligation to perform the contract.

The obligation was not conditional but absolute. The mode or manner of performance consisted of the fact that delivery could be given by the defendants to the plaintiffs as soon as the goods were delivered to the defendants by the Mills. It also consisted of the fact that partial shipments could be made by the defendants.

13. My findings on the issues are:

Issues Nos. 1 and 2: Abandoned by the defendants.

Issues Nos. 3 and 4: in the affirmative.

Parties are agreed that as the issues as to the breach of the contracts are decided against the defendants the date of breach must be held to be 31-3-1951.

14. The suit is referred to the Commissioner for assessment of damages on the footing that the breach of contract took place on 31-3-1951. Costs and further directions reserved.

15. Order accordingly.