

(1927) 08 MAD CK 0017
In the Madras High Court

Raju Naidu

APPELLANT

Vs

Kanakku Pillai alias Ramaswami Pillai

RESPONDENT

Date of Decision : 22-08-1927

Acts Referred:

Contract Act, 1872 — Section 96

Citation : 108 Ind. Cas. 77 : (1928) 27 LW 23 : (1928) 54 MLJ 116

Hon'ble Judges : Srinivasa Aiyangar, J;Curgenven, J

Bench : Full Bench

Judgement

Srinivasa Aiyangar, J.—Though a number of interesting and difficult questions bearing on the law of contracts were raised in the course of

the discussion of this second appeal, it comes about that the appeal can be disposed of on a comparatively narrow point. The plaintiff is the

appellants He instituted the suit primarily against the 1st defendant for the recovery of certain amounts alleged to have been overpaid by him under

a contract and for damages for breach of contract. The contract itself was in writing bearing date 19th Dec, 1919. Under it a sum of Rs. 5,514-4-

0 was settled as the price payable in respect of 8050 bunches of plantains and this amount was agreed to be paid by instalments on various dates.

The plaintiff and defendants 2 and 3 who were also parties to the contract agreed to pay interest on the amount of each instalment at 1 per cent

from the date of default. It is in evidence that on or about the 4th May, 1920, the plaintiff went to the 1st defendant and asked him leave to cut and

remove the remaining bunches of plantains. it is really undisputed that on that occasion the 1st defendant refused to allow the plaintiff to cut any

more bunches of plantains until and unless he paid the 1st defendant the whole of the balance due under the contract. It must be observed before

we proceed that the last instalment payable by the plaintiff and defendants 2 and 3 to the 1st defendant under the contract was the sum of Rs.

1,514-4-0 and the date fixed for the payment of the same was 11th April. 1920. It is also undisputed that on or about the 4th of May, a sum of

Rs. 500 odd still remained due and unpaid out of this amount. The question that naturally arises for determination first in such a case is whether the

dates fixed for the payments of these amounts could be regarded as being of the essence of the contract. If that question had to be finally decided,

we might have felt some difficulty in coming to a satisfactory conclusion. Both the lower courts have held that time was not of the essence of the

contract. Mr. Varadachariar however argued that on a proper construction time should be regarded as having been made of the essence of the

contract by the parties. However, it is not necessary to determine that question because Mr. Varadachariar, the learned vakil for the respondent

has argued the question even conceding that the time should be regarded as being not of the essence of the contract. The plaintiff's case was that

till the 4th May, he had overpaid the 1st defendant having regard to the number of bunches already cut and removed by him and defendants 2 and

3, and that he was ready and willing to pay the balance but that the 1st defendant however refused to allow the plaintiff to cut any more bunches

until and unless the whole of the balance was paid up. The District Munsif in the trial Court gave a decree to the plaintiff but on appeal his decree

was reversed and the plaintiff's suit was dismissed.

2. On appeal before us Mr. Govindaraghava Aiyar on behalf of the plaintiff-appellant contended that on the refusal of the first defendant to allow

the plaintiff to cut any more bunches of the plantains there was a breach as time was not of the essence of the contract and that therefore the

plaintiff was entitled to damages. He argues that subsequent to this breach by the first" defendant the first defendant and defendants 2 and 3

colluded with each other for the purpose of defrauding the plaintiff of his just rights and made up a fraudulent settlement between themselves and

that such settlement could not affect the plaintiff. The plaintiff's cause of action is based on the alleged breach of contract by the 1st defendant and

it is only if we should take the view that the first defendant did commit a breach of contract, any further questions which have been argued before

us could possibly arise. The position then was this, the last day for the payment of the last instalment under the agreement had long ago passed, namely, the 11th April, 1920. There was still a balance due and payable. The first defendant said unless such balance was also paid up he would not allow the plaintiff to cut and remove the bunches. Though time was not of the essence of the contract, still the plaintiff was at that date a person who had already committed at any rate a breach of covenant with regard to the time fixed for the performance of the contract. Assuming therefore that, time not being of the essence of the contract, it was not open to the first defendant to rescind the contract merely because the plaintiff failed to pay the last instalment on the due date, still Mr. Varadachariar argued that under the terms of Section 96 of the Indian Contract Act the first defendant was entitled to refuse to perform the contract and deliver the goods because the time appointed for payment had arrived before the delivery of the goods and therefore the right given to the vendor in such circumstances by that section had accrued to the first defendant seller. In the first part of that section it is provided that if there was an agreement to deliver the goods and take payment afterwards the seller is bound to deliver the goods and has no lien and the second clause of that section provides that if the buyer becomes insolvent before delivery of the goods or if the time appointed for payment arrives before delivery of the goods the seller may retain the goods for the price. It must be observed that what the section provides is not any cancellation or rescission of the contract or any right consequent thereon but a new kind of right given to the seller if the contingency should arise as provided in the section. If the buyer should become an insolvent before delivery of the goods is made, then the right is given to the seller to keep the goods in lieu of price, that is, he may elect practically to cancel the remainder of the contract, but there will be no outstanding rights or obligations in respect thereof. Similarly, if, before delivery of the goods is effected, the time for payment under the contract had arrived and therefore the purchaser was at default already with regard to the payment of the price, then also this right is given to the seller to keep the goods in lieu of the price. Mr. Govindaraghava Aiyar argued that this section must be properly construed as merely referring to ascertained goods or to goods which under the law must be regarded as already sold to the purchaser or, in other words, goods, the property in

which must be deemed to have passed to the purchaser. There is no warrant for narrowing the construction of this clause in that manner. All that

the section speaks of is delivery of the goods and goods have to be delivered whether according to the contract they are ascertained or

unascertained at the time of the contract. Mr. Varadachariar has referred us in this connection to *ex parte Chalmers In re Edwards* 8 Ch. App.

289. In that case the learned Judge held that when the purchaser became an insolvent, the obligation on the seller ceased to effect any further

delivery according to the contract and at p. 292 Mellish, L. J. clearly states that for that purpose it would make no difference whatever that the

goods were not specific goods, and referring to the case of *Valspy v. Oakeley* 16 Q. B. 941 the learned Judge says that that case is conclusive to

show that it does not make any difference whether the goods were specific or ascertained or not and the learned Judge also agreed with that view.

In fact the principle underlying Section 96 is merely the application to a particular case of the principle underlying Section 51 of the Indian Contract

Act. No party to a contract need perform his part of the contract when the other party to the contract is not ready and willing to perform his part

of the contract. If therefore the date fixed for the payment has already expired, then it is clear that the person who has made default cannot

possibly be described "as a person who is ready and willing to perform his part of the contract because his contract itself is a contract to pay on a

particular date and even if time was not of the essence of the contract, still in order to make himself out to be ready and willing he was bound at

least to tender the amount of the balance when called upon to do so. This he refused to do and thereupon the first defendant was entitled to refuse

to perform his part of the contract, namely, that of allowing the plaintiff to cut any more Bunches in his garden. I did not understand Mr.

Govindaraghava Aiyar to attempt any answer to this argument based on Section 96 of the Contract Act except that on a proper construction the

case referred to in that section must be limited to specific ascertained goods, and, as already observed, there is no warrant for narrowing the

construction of that section in that manner. There is also no legal principle that it should be so narrowed down. If there is a person who has failed

to pay on the due date, then he is really a person that has failed to carry out his part of the contract and the other party according to this section

then acquires a right of setting off the goods against the price and in that view therefore the finding in this case should be that there was no breach

of contract at all by the first defendant because he was in the circumstances entitled to refuse to deliver any more goods.

3. In that view it becomes unnecessary to discuss any question raised which had reference to the point whether payment to one of the joint

promisees alone would have the effect of discharging the obligations under the contract. It is therefore unnecessary to express any opinion with

regard to it and there is no necessity certainly of having the question referred to the consideration of a Full Bench as suggested by Mr.

Govindaraghava Aiyar because we are satisfied that that question does not arise for the determination of this appeal. In the result therefore the

second appeal is dismissed with costs.

Curgenven, J.

4. I agree that however the other question raised in the hearing of this appeal might have been decided, the plaintiff has no cause of action and the

first defendant did not commit breach of the agreement Ex. I. This contract consisted in a joint undertaking by the plaintiff and the 2nd and 3rd

defendants to pay a sum of money in certain instalments, the last instalment falling to be paid on the 11th April, 1920. Some instalments were paid

after the due date and on the 4th of May, 1920, when the plaintiff claimed to proceed with the cutting of the plantains, there was still a considerable

sum outstanding. The question is whether, time not being of the essence of the contract, it was open to the first defendant to insist on the payment

of the balance before permitting the cutting of the remainder of the bunches of plantains. The answer to this question appears to me to be clearly

contained within the terms of Section 96 of the Contract Act, namely, that if the time appointed for payment arrives before the delivery of the

goods the seller may retain the goods for the price. The only objection which I think arises to be dealt with as to the application of this section is

that the goods contemplated under it must be ascertained. The section reproduces the English Law of Contract upon the subject and it has been

held by Mellish, L. J., in Ex parte Chalmers. In re Edwards (1873) 8 Ch. App. 289, on the authority of an earlier case, Valpy v. Oakley (1851)

16 Q. B. 941 that in closely similar circumstances delivery being withheld in view

of the insolvency of the vendee, the circumstances that the goods were not specific goods, that is to say, not ascertained, would make no difference to the application of the principle. Mr. Govindaraghava Aiyar's argument comes to this, that the plaintiff would have been entitled to cut the plantains because up to the moment of severance they were not ascertained goods, but that, having cut them, although, they were perishable goods, he would not be entitled to remove them because by cutting them the goods became ascertained and the provisions of Section 96 would apply. I can see no reason for drawing a distinction of this unreasonable character, nor can I see ground in the language of the section to hold that it does not apply to cases in which the goods have not been ascertained. I agree accordingly that the 1st defendant committed no breach of the contract and therefore that no action would lie. Accordingly I agree with the order proposed by my learned brother.