

(1984) 10 KL CK 0023
In the High Court Of Kerala
Case No : A. S. No. 90 of 1980

Secretary Dept. of Irrigation and Others	APPELLANT
Vs	
M/s. Millars Machinery Co. Ltd.	RESPONDENT

Date of Decision : 24-10-1984

Acts Referred:

Constitution of India, 1950 — Article 133
Contract Act, 1872 — Section 38, 51, 53, 55
Sales of Goods Act, 1930 — Section 42, 55

Citation : (1985) KLJ 734

Hon'ble Judges : Varghesb Kalliath, J;M. Fathima Beevi, J

Bench : Division Bench

Advocate : N. N. Venkatachalam, for the Respondent

Final Decision : Dismissed

Judgement

Varghese Kalliath, J.—This is an appeal by the defendants. The plaintiff supplied to the defendants a hot mix plant. The defendants paid only 90% of the price. They refused to pay the balance 10% of the price. Hence the suit. The trial court decreed the suit. Now the defendants appeal before this Court. Defendant No. 1 invited offers for the supply of 6 numbers of hot mix plants. The plaintiff offered to supply the plant by their letter dated 22-1-1973. The 2nd defendant accepted the offer. He placed an order with the plaintiff for the supply of 2 numbers of hot mix plants. Subsequently the order was modified to confine it to one unit.

2. The component parts of the hot mix plant were despatched in two lots. The delivery was effected in March 1975. The invoice price of the hot mix plant is Rs 3,69,888/-. One of the terms of the agreement of sale provided that the defendants have to pay 90% of the value on taking delivery of the plant and the balance 10% after the successful completion of the trial run. The case of the plaintiff is that the defendants did not promptly pay the 90% of the price even after taking delivery. According to the plaintiff much delay has been caused in

making the payments. Any how, there was no dispute between the parties when they reached the court as regards the payment of 90% of the price of the plant. The plaintiff submits that the erection of the plant was completed in July 1975 and an initial test run was given on 7-8-1975. The defendants suggested that the plant required some minor adjustments and rectification of certain defects. The plaintiff was ever ready to rectify the minor defects in the plant and also, willing to effect certain minor modification suggested by the defendants. They were prepared to rectify the defects along with the final commissioning of the plant. The final commissioning of the plant required the active co-operation of the defendants. It involved some expenses to be borne by the defendants. The defendants have to provide the man and materials for the commissioning of the plant. According to the defendants, it required large amounts.

3. The defendants were unduly postponing the commissioning of the plant. According to the plaintiff they were postponing the commissioning of the plant on trivial and silly grounds. The plant was kept by the defendants in open air unprotected from the inclement weather. The unjustifiable delay caused by the defendants in the matter of commissioning the plant caused loss to the plaintiff. The plaintiff sent a registered lawyer notice calling upon the defendants to pay the balance price amount. Ultimately the plaintiff laid the suit for recovery of an amount of Rs-69, 31042 the balance price amount with interest.

4. The defendants contended that they are not liable to pay the amount claimed in the suit. They submitted that the plaintiff was not prompt in delivering the plant in time. According to the defendants in spite of the delay caused in the supply, they paid 90% of the price as per the term of the agreement.

5. The defendants maintained the case that the plaintiff is entitled to -the balance 10% of the price only if final commissioning of the plant to the satisfaction of the defendants is made. It is contended that the final commissioning would be carried on only after rectifying the defects pointed out by the defendants. They also urged that they are not bound to make arrangement for the final commissioning of the machine when the initial defects pointed out by them remained un-rectified. The defendants have taken a stand that they are not bound to invest large amounts for the final commissioning of the plant unless and until they are satisfied that the mistakes pointed out by them are rectified. This stand had been taken on account of the fact that large quantities of bituman and other accessories costing lakhs of Rupees had to be collected and kept ready for the commissioning and the trial run of the plant.

6. The defendants also raised the point that the plaintiff has defaulted in supplying a paver finisher machine to the defendants. They maintained that paver machine is also necessary for a trial run of the hot mix plant. Since the plaintiff did not supply the paver machine, it was not possible for the defendants to fix a date for the trial run.

7 It is not disputed that final commissioning of the plant never took place. The

plant was delivered in March 1975. 90% of the price was paid. The period of guarantee was for one year. The counsel for the appellant feebly argued that the title to the plant has not passed to the buyer and there is no indication or acceptance of the plant. Passing of the property in the goods is relevant for the issue to be resolved in this case and so we have to advert to that question. There is no case set up in the pleadings of the defendants that they have not accepted the plant. As stated earlier the plant was delivered in March 1975 and the seller has received 90% of the price. To determine whether the property has passed, we look to the intention of the parties and for the ascertainment of their intention the statute has its Rules. Section 42 of the Sale of Goods Act reads thus:-

42. Acceptance - The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, he retains the goods without intimation to the seller that he has rejected them.

Section 42 of the Sale of Goods Act provides first that acceptance can be explicit by the buyer intimating the seller that he has accepted the goods. The Section also provides that an acceptance can be presumed under certain circumstances. (1) When the goods have been delivered to the buyer and he does any act in relation to them which is inconsistent with the ownership of the seller, there is a presumed acceptance. (2) Again when after a lapse of a reasonable time if the buyer retain the goods without intimating the seller that he has rejected them then also law presumes that the buyer has accepted the goods. Admittedly there is no rejection of the plant by the defendants. Considerable time has lapsed and even though the seller demanded for the balance price at no time the defendants put forward a case that they have not accepted the goods on delivery of the same by the plaintiff. We hold that this is a case where the property in the goods has passed from the seller to the buyer and the payment of the 10% balance price is made to depend upon the fulfilment of certain condition.

8. Section 55 of the Sale of Goods Act provides that where under a contract of sale, the property in the goods has passed to the buyer and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller is entitled to sue the buyer for the price of the goods.

9. One of the questions that is relevant to be decided in this case is whether the defendants were justified in insisting the rectification of the, alleged defects before giving a date for the final trial run. The plaintiff's case is that the defects are very trivial and that it could be rectified along with the preparation for the final trial run and that, that was the appropriate time for curing such defects. The plaintiff never said that they are not prepared to rectify the minor defects in the plant. They only insisted that the rectification of the defects could be done along with the final trial run. They took this stand for two obvious reasons viz., that they never wanted their technicians to be sent first for curing the trivial defect

and then for the final trial run and for the reason that it was not appropriate to correct the defects at the time of commissioning of the plant. The trial court has found that the stand taken by the plaintiff was absolutely reasonable. From the letters produced by the plaintiff, which will be referred to later, it can be seen that they were ready to rectify the defects. The counsel for the respondents very rightly pointed out that what the plaintiff wanted was only a date for the final trial run. This of course requires on the part of the defendants, preparation for the final commissioning of the plant incurring some expenditure. Whatever it be, the plaintiff wanted only a date for the final commissioning so that they can arrange their technician to go over to Kerala in advance for rectification and commissioning of the plant.

10. Now the case was argued by the counsel for the defendants mainly on the ground that the plaintiff was not justified in asking the defendants to agree for a final commissioning of the plant without rectification of the defects. The counsel for the respondents submits that this case has been developed by the defendants as a defence to the suit without the least bonafides. According to the counsel for the respondents, the true cause for postponing the commissioning of the plant can be seen from the reply notice given by the defendants. The reply notice is Ext. D12. It is dated 4-9-1976. The Chief Engineer has given his explanation for not commissioning the hot mix plant. The only reason stated is given hereunder in his own words. "Hot Mix Plant is not commissioned because M/s Millars Machinery Company defaulted their supply of paver finisher which the hot mix plant was to feed". This reply is a pointer to the real case of the defendants. The counsel for the defendants of course made an attempt to build a case on this point as well. We shall consider this point first.

11. Question of supply of paver finisher: At the time when the plaintiff demanded the co-operation of the defendants for the final commissioning of the hot mix plant; the counsel for the respondents submits, that there was no obligation subsisted on the part of the plaintiff to supply a paver finisher. He submits that though the plaintiff supplied a paver finisher under a different contract the defendants rejected the same stating that the machine was not as per the design given by the defendants. The obligation under the said contract according to the counsel for the respondents was discharged and no obligation on the part of the plaintiff remained under that contract. It is an admitted case that 90% of the price of the hot mix plant was paid to the plaintiff by the defendants by adjusting the amount to be refunded by the plaintiff on account of the rejection of the paver finisher by the defendants. It is seen that an amount of Rs. 2,11,325/- was adjusted towards payment of the 90% value of the hot mix plant as the amount due to the defendants on account of the rejection of the paver finisher. This fact makes it very clear that the defendants had absolutely no right to insist the plaintiff to supply a paver finisher. It is apposite to note that the contract for the supply of hot mix plant is absolutely independent of the contract to supply paver finisher. There was no linking of the two contracts. The defendants cannot maintain a valid defence on the ground of non supply of paver finisher. The

defendants cannot successfully justify their action of non co-operation in the matter of final commissioning of the plant on the ground that the plaintiff did not supply the paver finisher to the defendants. We are bound to remember in assessing the merit of the alternate case of the defendants that this was the main case, perhaps the only case of the defendants, till they reached the Court.

12. Now, we have to examine the justification of the defendants in inordinately postponing the final commissioning of the plant on the ground that the defects pointed out by the defendants were not rectified by the plaintiff. This aspect has to be examined by considering the letters produced by the parties. We have admitted as additional evidence certain letters produced by the appellants and marked those letters as Exs. B-13 to B-25 vide order on C.M.P.Nos. 4731 of 1981, 33528 of 1983 and 23400 of 1984. We are not referring to all the letters produced before the court. We may refer to some of the letters sent by the plaintiff and the defendants.

13. Ext. B-3 is the order for supply of the hot mix plant. This letter is by the Chief Engineer, Irrigation, Trivandrum. It is dated 30-6-1973. In this letter, it is said: "Demonstration:- Should be done by the company"s Erection Engineer free of cost. All facilities such as unskilled labour, fuel, aggregates etc. will be arranged by this Department. The Departmental staff nominated will be trained during erection and demonstration free of charge in the operation of the plant. Necessary operation manual and maintenance schedules will be furnished in duplicate free of charge". The machinery was supplied in March 1975. A test trial run was conducted on 7th August 1975. Ext. B-6 is a letter from the plaintiff to the Executive Engineer, National Highway Division, Alleppey. This letter is dated 13-8-1975. In this letter the plaintiff has undertaken to give a trial run and demonstration for a period of 15 days as and when required by the defendants. In this letter, it has been made clear that this trial run is in addition to the trial run already conducted in the presence of Executive Engineer on 7th August 1975. Ext. B-13 is another letter from the plaintiff to the Chief Engineer, National Highway, Trivandrum, wherein the plaintiff admits certain defects when the test run of the plant was conducted on 7-8-1975, The plaintiff has noted the defects and stated that "the- Executive Engineer, National Highways had suggested few minor modification improvements, to better the operation of the plant, which are briefed below;

(1) The doors of the 3 bin feeder will be modified so that there will be continuous flow of material. The slipping of the conveyor belt was observed only during the first trial run conducted on 25-7-75. Now, one belt is working satisfactorily.

(2) In the initial stages, little material scattered near the cold elevator. Once: the material is stored near the cold elevator, the buckets auto-matically start scooping. We can re-adjust the speed so that the spilling of the material will be reduced to the minimum.

(3) New wooden planks for. the platform of the feeder will be provided before the

final demonstration.

(4) Guard will be provided for the belt as required.

(5) The Thermometer was not supplied during the despatch since it may get damaged A new Thermometer will be supplied.

[6] Tool box will be provided when the demonstration starts.

[7] The cyclone and exhaust fan are of suitable size. Moreover the unit is provided to remove the dust. But the stones washed by the rains the effectiveness of the unit could not be observed. We will assure you of the suitability and efficiency of the unit.

[8] Hot elevator takes full lead. Necessary rectification is carried out.

[9] Lagging for the Bituman pipe will be provided.

The plaintiff undertook in this letter to carry out the modifications/ improvements suggested by the Executive Engineer before the final commissioning of the plant.

14. Ext. B-14 is a letter written by the Executive Engineer, National Highways Division to the plaintiff. This letter reveals the case of the defendants in very strong terms. We quote:

The proposed continuous demonstration can be carried out only when paver finisher is made available by you as huge quantity of mix turned out in the hot mix plant can be laid on the roads surface using the paver. Further the performance of the paver has also to be tested and the same could be carried out simultaneously along with the performance of the hot mix plant.

You are requested to expedite the final trial run of the plant after the supply of the paver finisher and rectification of the defects pointed out in hot mix plant.

It is clear that the defendants have taken the stand that final trial run of the plant can be conducted only after the supply of the paver finisher. In Ext B-16 the Chief Engineer has stated thus:-

In the absence of a paver, the hot mix plant supplied to the Executive Engineer, N. H. Division. Alleppey also could not be tested satisfactorily.

In the circumstances. I request you to arrange to supply the paver finisher immediately as otherwise I will be constrained to proceed against you.

Ext. B-16 is dated 17-9-1975. The plaintiff has sent a letter Ext. B-23 on 24th September 1975 wherein the plaintiff has assured that before the final demonstration all the modifications and rectifications of the plant will be carried out to the satisfaction of the defendants and that the defendants have to fix a date for the final trial run. There is another letter Ext. B-24 from the plaintiff to the Chief Engineer (General) Buildings and Roads, Trivandrum, wherein the plaintiff stated thus;

Now that the monsoon is almost over, we request you to let us know when you want us to send our people for final commissioning of the plant.

The Chief Engineer, National Highways, Trivandrum sent a letter Ext. B-17 dated 24-10-1975. In this letter the Chief Engineer has asked the plaintiff to rectify the defects noticed and to arrange the final trial run of the plant. The plaintiff sent a letter to the Chief Engineer on 10-11-1975. That letter is Ext. A-3. In Ext. A-3 letter the plaintiff has stated very clearly that they have already assured that all the defects will be set right during the final test and commissioning of the plant at work site. It is further stated in Ext, A-3 that the plaintiff had requested the Chief Engineer and the Executive Engineer to confirm the date for commissioning the plant. The plaintiff also told Chief Engineer that the commissioning of the plan will be arranged on receipt or the confirmation from the Chief Engineer that the aggregates, bituman and equipment like tipper trucks, road rollers and other essential machineries are made available by the department. In this letter the plaintiff also made it clear that the plant will be commissioned for the agreed period of 15 days and requested the Chief Engineer to confirm whether all the arrangements have been made at the work site. The plaintiff again sent a letter Ext. A-6 dated 6-12-1975 requesting the defendants to give the plaintiff reasonable time to depute their technicians for the final commissioning of the plant. We quote part of this letter:

You have stated that there are heavy rains now" and the bituman work cannot be done. We would request you to kindly confirm that you are now having fair weather and the bituman work is possible. Please give us reasonable time to depute our technicians for the final commissioning of the plant

Ext A-8 is a letter sent by the plaintiff to the Chief Engineer (General) Buildings and Roads. Trivandrum. It is dated 20-12-1975. In this letter the plaintiff has requested the defendants to confirm the final date of commissioning of the plant. The plaintiff also told the Chief Engineer that the plaintiff has already waited for three months namely; October, November and December and in case there was any further delay, they are entitled to the balance 10% payment of the plant. Again the plaintiff sent letters Exts. A-9. A-10 and A-11. These letters were sent to the Engineers concerned. All these letters are dated 6-1-1976. In reply to these letters, the Executive Engineer has taken the stand that the defects pointed out have to be rectified and that only after rectifying the defects the final trial run could be taken. It has to be noted that this letter also does not indicate that the rectification cannot be done simultaneously with the commissioning of the plant. As stated earlier the plaintiff was ever willing to rectify the defects and according to the plaintiff, since the defects were minor in character, it could be rectified at the time of the final commissioning. In Ext. B-18 also the Executive Engineer is reiterating the request for replacement of the paver finisher.

15. In Ext. B-18 letter. the Executive Engineer has stated: "I once again request you to please arrange to replace your defective paver with your II Model without any more delay as pointed out by C. E.. Irrigation by letter No P3 7096/71 dated

17-9-1975.

16. We shall refer to three more letters. These three letters were produced by the defendants as additional documents. Ext B-19 is a letter by the Chief Engineer to the plaintiff. In this letter the Chief Engineer tells the plaintiff that the orders for the supply of hot mix plant has been placed by the Chief Engineer, Irrigation and the consignee is the Executive Engineer, National Highway, Alleppey under the Chief Engineer, National Highways and Superintending Engineer. National Highway Circle, Ernakulam. and that no correspondence should be addressed to the Chief Engineer. Buildings & Roads. Ext. B-20 is a letter dated 29-1-1976 by the Chief Engineer. National Highways, Trivandrum. This letter is addressed to the plaintiff. It is very clearly stated in the letter that the commissioning of hot mix plant can be arranged only with a paver finisher and said: it is unfortunate to note that you have not replaced the defective paver as agreed by earlier in spite of the repeated requests from this department as well as from the Chief Engineer, Irrigation". He further requests the plaintiff to replace the defective paver at an early date. We would repeat here that the defendants had absolutely no right at this point of time to insist replacement of a defective paver. The Chief Engineer is writing this letter Ext. B-20, as if a contract for supply of a paver finisher is subsisting. This letter again reveals that the real cause for not arranging for final commissioning of the hot mix plant was the non supply of a paver finisher and not the minor defects of the hot mix plant pointed out by the defendants. The other letter we want to refer is Ext. B-21. In Ext B-21. the Executive Engineer put forward a case of the defects of the plant, as a reason for not arranging for the final commissioning of the plant

17 The definite case of the plaintiff at the time of the supply of the hot mix plant, and also after the initial test run is that the minor defects pointed out by the defendants at the time of initial run could not be rectified by the time of final commissioning of the plant. The plaintiff made it very clear that it was not necessary to send Technicians twice, first to rectify the minor defects pointed out and then once again for the purpose of final commissioning of the plant. In fact the defendants have not stated at any time in their letters that the defects pointed out at the time of initial trial run were substantial defects even though the plaintiff in their letters, refer to the defects as only minor defects.

18. On an appreciation of the evidence and from the pleadings, we are also satisfied that the defects pointed out at the time of trial run were not of substantial character. In these circumstances on an overall evaluation of the evidence, we have to hold that there was absolutely no justification for the defendants for not arranging for the final commissioning of the plant. We hold that the performance of the obligation of the plaintiff under the contract in the matter of final commissioning of the hot mix plant has been prevented by the defendants by not arranging for the final commissioning as per the terms of the contract.

19. Now. we have to examine the legal effect of the conduct of the defendants in

this case.

20. The counsel for the appellant argued that the commissioning of the plant is a condition, and that the non-fulfilment of that condition, whatever might be the reason and whoever contributed to its failure plaintiff's claim for the full price is not sustainable. He expanded his argument saying that a mere expression of readiness and willingness for commissioning the plant, even assuming it is true and bonafide. does not suffice and it is only the actual commissioning of the plant as a fact accompli alone would enable the plaintiff to sustain his claim for the balance price amount.

21 We think that there is no warrant for this view. The true import of the terms in the contract in regard to the final commissioning of the plant and the trial run for 15 days embodies, a reciprocal duty and obligation on the part of the defendants The plaintiffs promise is to successfully commission the plant and a trial run for 15 days and the defendant's duty is to arrange for the final commissioning of the machine and to pay the balance price after the successful commissioning of the plant.

22. There is ample authority for the proposition that if a promisor is prevented by the promisee from performing his part of the contracts, he should be deemed to have performed it. It has to be noted that discharge of a contract by breach may occur, not only where one party disables. himself from performing the contract, but also where he prevents completion of the contract by the other party. The courts are most ready even to imply a condition even if there is no express condition in the contract, that each party undertakes to do all that is necessary to enforce performance of the contract. It is quite lawful and legal where performance has been prevented by the promisee, the contract is taken as satisfied and the promiser can validly sustain a claim for the full remuneration or price. In certain cases where the contract cannot be fulfilled without co-operation of the party in default and if the party in d fault repudiates the contract, the other party may be forced to accept the repudiation and sue for damages. The case we are dealing, is a case where the plaintiff has been prevented by the defendants to discharge the obligations of the- plaintiff under one of the terms of the contract and in the situation the court has to take the contract as satisfied. The plaintiff can validly sustain a suit for the price of the hot mix plant.

23. The ptanitiff's learned counsel Sri. N.N. Venkitachalam referred to us the House of Lords decision in Mackay v. Dick and another (6 AC. 251). A digging machine was sold and delivered for price. The contract of sale contained certain conditions, one of. which was that the machine should be capable of excavating a specific quantity of clay in a fixed time on a "properly opened-up face" at the railway cutting at Carfin. The machine failed, at another cutting place to excavate the required quantity, It was then removed to the Carfin, railway cutting and tried at a face not "properly opened-up" Then also it failed. It was found that the machine failed because of the hurdles and handicaps placed by the buyer in the way of the seller satisfying him about the capacity of the machines amounted,

recording to the House of Lords a prevention of the discharge of the promise made by the seller. Their Lordships of the House of Lords observed:

I think it may safely be said, as a general rule, that where in a written contract it appears that both parties have agreed that something shall be done, which cannot effectually be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect. What is the part of each must depend on circumstances.

The head note in the above case runs thus:

8If, in the case of a contract of sale and delivery, which makes acceptance of the thing sold and payment of the price conditional on a certain thing being done by the seller, the buyer prevents the possibility of the seller fulfilling the condition, the contract is to be taken as satisfied.

We have already found that the buyer in this case prevented the seller, the possibility of the seller fulfilling the condition of the contract. We have, therefore, to hold that the contract is satisfied.

24. This principle of constructive performance of the obligation was recognised in *Roberts v. Bury Improvement Commissioners* (1869) LRSC Page 300 and 329. It was a case of a building contract. The plaintiff agreed to construct a building for the defendants. It was provided that an Architect should furnish the plans and drawings for the construction of the buildings. There was failure on the part of defendants and their Architect to supply the requisite plans and other things necessary to enable the plaintiff to commence the work. The plaintiff's performance was excused. Their lordships enunciated the law thus:

The rule of law applies which exonerates one of two contracting parties from the performance of a contract when the performance of it is prevented and rendered impossible by the wrongful act of the other contracting party

25. Benjamin on Sale refers to the decision in *Hotham v. East India Company* [1767] 1 ITR 638 at page 645 [C]

It was evident from common sense that if the performance of a condition precedent by the plaintiff had been rendered impossible by the neglect or default of the defendant, it is equal to performance.

The performance of a condition precedent in a contract is, excused where the other party had prevented its performance, or has done something which puts it out of his power to perform his part of the contract.

26. No man can complain of another's default to do something which he has himself made impossible. The principle is not limited to acts of direct or wilful prevention, but extends even to default or neglect in doing or providing any thing which a party ought under the contract to do or provide, and without which the other party cannot perform his part. As stated earlier if the prevention by the

default goes on'y to one particular term or condition of the contract, the party so prevented from fulfilling the term or condition is entitled to treat it as fulfilled.

27 In *Measures Brothers Ltd. v. Measures* [1910] 2 Chancery 248 at 258 Kennedy L. J. observed:-

It is elementary justice that one of the parties to a contract shall not get rid of his responsibilities thereunder by disabling the other contractor from fulfilling his part of the bargain.

Chitty on Contract page 246, 20th Edn.

For where the right to demand performance of a certain act depends on the execution by the promisee of a condition precedent or prior act, the readiness and offer of the latter to fulfil the condition and, the discharge or hindrance of its performance by the promisor are in law equivalent to the completion of the condition precedent and will render the promisor liable upon his contract.

So if the buyer prevents the possibility of the seller fulfilling a condition of the contract that certain things shall be done by the seller, the contract is to be taken as satisfied.

J, F Wilson in his "Principles of law of Contracts" has put this rule as a duty of "co-operation" which rest on each party to a contract; a duty to facilitate the performance of the contract.

28 The dictum laid down in *Mackay v. Dick* was the subject matter of a learned article ""contractual co-operation and implied term" in *Modern Law Review* Vol.31, 1968 by J.F. Barrous. The learned author has said that the statement of law by Lord Blackburn in *Mackay v. Dick* is an austere proposition". He tells that the proposition goes no further than to impose a duty to act if an express term of the contract cannot be fulfilled without that act being done. In the opinion of the learned author the rationale of the principle "duty to co-operate" is based on the principle of estoppel also. "Aman will not be heard to blame another for something brought about by himself.

29. The rule in *Mackay v. Dick* is fully reflected in Sections 51 and 53 of the Indian Contract Act. Section 55 of the Indian Contract Act reads thus:

When a contract contains reciprocal promises, and one party to the contract prevents the other from performing his promise, the contract becomes voidable at the option of the party so prevented: and he is entitled to compensation from the other party for any loss which he may sustain in consequence of the nonperformance of the contract.

30. Apart from the principle of constructive performance embodied in Section 53, the plaintiff having made an offer of performance of the condition to the defendants and the offer not having been accepted in the sense that the defendants neglected to make arrangement for the final commissioning of the plant. The plaintiff is not responsible for the non performance within the meaning

of Section 38 of the Contract Act. In this context the plaintiff did not lose their primary right under the Contract namely to enforce it in full as per its terms *ex facie*. Apart from all English and Indian authorities, there is the well accepted principle of equity that "no person shall take advantage of his own wrong."

31. The common law principle laid down in *Mackay v. Dick* is also the law in India. A. I. R. 1958 A. P. 504 a Division Bench of the Andhra Pradesh High Court consisting of Subba Rao C. J. and Ranganadham Chetty J. have accepted and applied the rule laid down in *Mackay v. Dick*. The Punjab High Court also in AIR 1957 Punjab 141 accepted and approved the rule in *Mackay v. Dick*. Pollack & Mulla in Indian Contract Act holds the view that the Rule in *Mackay v. Dick* "is in substance the rule not only of the common law. but of all civilized law". Sanjva Rao, another author on Law of Contract also holds the view that "the law as enacted in this Section holds (Section 53) in identical with the English Law that prevention by one party is constructively tantamount to fulfilment by the other". The same principle is embodied in Section 395. Restatement of Contract (U. S. A.)- See *United State v. Speck* 102 U. S. 64. We have found that the defendants by their conduct prevented the performance of the condition by the plaintiff in regard to commissioning of the plant and the trial run for 15 days. We hold that the plaintiff has constructively fulfilled the condition and the plaintiff is entitled to the balance price. In the result we find no merit in the appeal. The appeal is dismissed with costs.

Immediately on the pronouncement of the Judgement, the counsel for the appellant made an oral application of leave to appeal before the Supreme Court under Article 133 of the Constitution. We do not think that the case involves a substantial question of law of general importance and that in our opinion no question need to be decided by the Supreme Court in this case.