

(1941) 04 MAD CK 0016
In the Madras High Court

Sha Moolchand Kesarimull

APPELLANT

Vs

Associated Agencies, a Firm of Merchants

RESPONDENT

Date of Decision : 24-04-1941

Acts Referred:

Citation : AIR 1942 Mad 139 : (1942) ILR (Mad) 33 : (1941) 54 LW 217 : (1941) 2 MLJ 281

Hon'ble Judges : Alfred Henry Lionel Leach, C.J.; Venkataramana Rao, J

Bench : Full Bench

Judgement

Alfred Henry Lionel Leach, C.J.—The appellant sued on the Original Side of this Court to recover a sum of Rs. 7,920 claimed as damages

for breach of contract. The appellant also asked for an order directing specific performance of part of the contract and put his claim for damages

there in the alternative. The nature of the contract, however, precludes any decree for specific performance being granted and the claim for

damages alone calls for consideration. Mr. Justice Gentle who tried the suit came to the conclusion that there had been no breach of the contract

by the respondents, but the appellant himself had broken it.

2. The contract is partly type-written and partly printed and is dated the 5th July, 1939. A printed form commonly used by the respondents, who

are a firm of merchants carrying on business in Madras was used, but the main provisions were inserted by means of a type-writer at the beginning

of the document. By the type-written portion, the appellant agreed to buy and the respondents agreed to sell sixty bottles of quicksilver, each

bottle to contain 34.5 kilograms net. The quicksilver had to be obtained from Italy and it was stipulated that there should be a shipment of half the

quantity in July and half in August, 1939. The type-written portion of the document includes these terms:

Price--₹ 16-12-0 per steel bottle, C.I.F. Madras.

Terms.--Document against sight payment.

3. It is a C.I.F. contract and if the document had stopped at the end of the type-written portion there could be no doubt that the appellant would

have made himself liable to pay for each consignment as soon as the bill of lading and the other shipping documents were presented to him,

irrespective of the arrival of the goods. Mr. Rajah Aiyar on behalf of the appellant has rightly conceded this, but he relies on the following statement

in paragraph 3 of the printed conditions:

On arrival of the steamer, by which the goods have been shipped, the indesor shall take up the documents. The documents shall be delivered

against payment only.

He says that this clause gave him liberty to refuse to pay until the goods had actually arrived in Madras. The case for the respondents is that the

printed clause is in direct conflict with the type-written portion of the document and that the typewritten portion must prevail.

4. The goods comprising the first consignment were duly shipped from Italy, but the ship never arrived in Madras. The goods were placed on

board a German vessel and was at sea when the present war broke out on the 3rd September, 1939. The vessel was apparently in the vicinity of

Mormagao in Portuguese territory on the out-break of hostilities and sought, refuge there. The August portion of the contract was duly shipped on

a Dutch vessel and arrived in Madras on the 19th September, 1939. On the 18th August, 1939, the respondents wrote to the appellant informing

him that they had received the relevant shipping documents with regard to the first consignment and they would be sending their invoice for the

amount due in respect of the goods in the course of the week. The invoice and the relative shipping documents were forwarded to the appellant the

next day and on the 23rd August, the respondents wrote to the appellant enclosing a copy of the invoice which had been certified by the customs

and asked him to pay the amount into the Eastern Bank, Ltd, Madras. On the same day, the manager of the Eastern Bank, Ltd., wrote to the

appellant informing him that he had received instructions to collect the amount

and requested him to make arrangements for payment. The appellant took no notice of these communications. On the 8th September, 1939, the respondents wrote to him demanding payment within 24 hours and informing him that on his failure to comply with the demand, the contract would stand cancelled and he would be held responsible for the damages which might be incurred as the result of his non-compliance with the demand. This letter brought a reply from the appellant two days later, in which he stated that he would make arrangements for payment to the bank as soon as the steamer had arrived in port. He did not challenge the validity of the respondents' demand for immediate payment.

5. When the second consignment arrived on the 19th September, 1939, the appellant, through an advocate, wrote to the respondents claiming that delivery should be given to him, but the respondents refused to do so on the ground that the contract had been cancelled by reason of the appellant's breach in respect of the first consignment. Thereupon the appellant filed this suit. He maintained that he was fully justified in refusing to pay for the first consignment until the ship carrying the goods had reached Madras, and that as there had been no breach of contract on his part he was entitled to delivery of the goods which had been consigned in August, and had arrived here in September. He also averred that even if there had been a breach of the agreement on his part, the breach was not of a nature which warranted the respondents cancelling the contract, and therefore he was entitled in law to delivery of the second consignment. The learned Judge decided against the appellant on all his contentions.

6. The contract is a C. I. F. contract, whether it is to be construed in the way the appellant would have it construed or in the respondents' way.

The effects of a C.I.F. contract are full); stated in the judgment of Kennedy, L.J., in *Biddel Bros. v. E. Clemens Horst Co.* (1911) 1 K.B. 934.

which received the approval of the House of Lords (1912 A.C. 18. The tender of the goods under a C.I.F. contract is effected by the tender of

the bill of lading and accompanied, in case the goods have been lost in transit, by the policy of marine insurance, which it is the seller's duty to take

out for the protection of the buyer. As the result of the decision in *Biddel Bros. v. E. Clemens Horst Co* (1911) 1 K.B. 934 it is now settled law

that in the absence of any stipulation with regard to the time for payment, the

payment must be made when the bill of lading and other necessary

shipping documents are presented to the buyer, provided, of course, that the goods have been shipped within the stipulated period and the

documents are presented at a reasonable time.

7. If the type-written and printed portions of the contract can be read together, effect must, of course, be given to all the provisions, but if the

printed portion cannot be reconciled with the type-written portion the type-written portion must prevail. See *Gu mm. Tyre* (1864) 33 L.J. Q.B. 97

and *Glynn v. Margetson & Co.* (1893) A.C. 351. In *Glynn v. Margetson & Co.* (1893) A.C. 351 the House of Lords had to construe a charter

party, and in his judgment in this case Lord Herschell said:

Where general words are used in a printed form which are obviously intended to apply, so far as they are applicable, to the circumstances of a

particular contract, which particular contract is to be embodied in or introduced into that printed form, I think you are justified in looking at the

main object and intent of the contract and in limiting the general words used, having in view that object and intent.

8. Lord Halsbury agreed and in so doing laid stress on the principle stated by Lord Ellenborough in *Robertson v. French* (1803) 102 E.R. 779 : 4

East 130 where Lord Ellenborough said:

The words superadded in writing (subject indeed always to be governed in point of construction by the language and terms with which they are

accompanied), are entitled nevertheless, if there should be any reasonable doubt upon the sense and meaning of the whole, to have a greater effect

attributed to them than to the printed words, inasmuch as the written words are the immediate language and terms selected by the parties

themselves for the expression of their meaning, and the printed words are a general formula adapted equally to their case and that of all other

contracting parties upon similar occasions and subjects.

9. The same principle has been accepted in India. See *Paul Beier v. Chotalal Javerdas* I.L.R.(1904) 30 Bom. 1 and *Mohanlal Kashinath v.*

Krishna Premji & Co. (1927) 30 Bom.L.R. 415.

10. Therefore Clause 3 of the printed terms of this contract must be given effect to if this can be done without doing violence to the type-written

portion, but not otherwise. Before turning to examine in detail the two portions of the document, I would mention that this contract was entered into at a time when war clouds were gathering. The goods had to be obtained from Italy, a direction from which some of the war clouds were coming. The printed form represented the usual conditions on which the respondents did business in normal times. Therefore it can be well understood that in entering into the contract the, sellers insisted that the buyer should pay the price as soon as the bill of lading and other relevant documents were presented to him. The intention of the parties must be gathered from the words used, but in deciding what was the intention the Court is not called upon to ignore the surrounding circumstances.

11. I have already indicated that in my opinion the type-written portion of the document, if read alone, entitled the respondents to present the bill of lading and other documents to the appellant when they did and that the presentation required him to pay then and there for the goods represented by the documents. Reading the type-written portion in conjunction with the printed portion I am of the opinion that there is a direct conflict. The expression ""at sight"" means on demand, and therefore the words ""document against sight payment"" can only mean that the appellant was to pay when the documents were presented to him. The printed portion relied upon by the appellant stipulates that the appellant should only be required to pay after the arrival of the steamer in Madras. Mr. Rajah Aiyar has suggested that the two portions can be reconciled by reading them as embodying these conditions : (1) the appellant should not be required to pay until the goods arrived (2) after arrival the appellant should pay as soon as the shipping documents were presented to him. I cannot accept this construction. In the type-written portion of the document, which is the governing portion, there is an unqualified statement to the effect that goods must be paid for at sight, that is, whenever the shipping documents were presented. The subsequent printed condition is a negation of this condition. The learned Judge has read the contract in this way and I am in full agreement with what he has said. The parties could, of course, have contracted that payment should not be demanded until after the arrival of the goods, but this they have not done, and no doubt the war clouds were responsible for the respondents refusing to do business in these goods on

the condition to be found in Clause 3 of their printed form. The appellant having refused to pay the price of the goods comprised in the first

consignment when the documents were presented to him and payment demanded means it that he broke the contract and therefore can have no

claim in respect of that consignment.

12. It remains to decide whether the appellant had the right of demanding that delivery should be made of the goods consigned in August, 1939. In

Maple Flock Co., Ltd. v. Universal Furniture Products (Wembley) Ltd. (1934) 1 K.B. 148 Lord Hewart, C.J.. in delivering the judgment of the

Court of Appeal pointed out that in deciding whether there has been a repudiation of the contract, regard must be had first, to the ratio

quantitatively which the breach bears to the contract as a whole, and secondly the degree of probability or improbability that the breach will be

repeated. In the present case Gentle, J., considered that the reasons given by the appellant for refusing the first consignment was a breach which

the respondents might well expect to be repeated with regard to the second half of the consignment and I see no reason for dissent from this

opinion. The first consideration referred to by Lord Hewart, C. J., also applies here. The breach which took place when the appellant refused to

pay for the first consignment was a refusal to perform the contract to the extent of one half. When there is a contract for the sale of goods to be

delivered in two instalments and the buyer wrongly refuses to take delivery of the first instalment the breach of contract is so extensive that the

seller is entitled to cancel the contract and be compensated for any loss suffered by him. In Honck v. Miller (1881) 50 L.J. Q.B. 529 : L.R. 7

Q.B.D. 92 the Court of Appeal held that a seller was entitled to cancel a contract when the buyer had refused to take delivery of goods

representing one-third of the total sold under the contract. The considerations which applied in the Mersey Steel & Iron Co., Ltd. v. Naylor,

Benson & Co. (1884) 9 A.C. 434 do not arise here, but Honck v. Miller (1881) 50 L.J.Q.B. 529 : L.R. 7 Q.B.D. 92 has direct bearing. I hold

that the contract was lawfully cancelled by the respondents and consequently the appellant had no claim to the goods which comprised the second

consignment.

12. For these reasons I would dismiss the appeal with costs. I also consider that

there should be a certificate for two counsel.

Venkataramana Rao, J.

13. I agree with my Lord the Chief Justice that the view of Gentle, J., on both the points is correct and the appeal should be dismissed with costs.