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**(1980) 10 MAD CK 0003**  
**In the Madras High Court**  
**Case No : Appeal No. 709 of 1976**

The National Co-operative Sugar Mills Ltd. APPELLANT  
Vs  
Albert and Company RESPONDENT

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**Date of Decision :** 28-10-1980

**Acts Referred:**

Sales of Goods Act, 1930 — Section 11, 20

**Citation :** AIR 1981 Mad 172 : (1981) ILR (Mad) 1

**Hon'ble Judges :** Sengottuvelan, J;Ramanujam, J

**Bench :** Division Bench

**Advocate :** K. Venkataswami and K. Govindarajan, for the Appellant;

**Final Decision :** Dismissed

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## **Judgement**

Ramanujam, J.—The Plaintiff in Original Suit No. 336 of 1973 on the file of the Sub-Court, Madurai, who has failed in that Court is the

Appellant herein.

2. The Appellant/Mill filed the. suit for recovery of a sum of Rs. 18,500 as damages for the breach of a contract which it had entered into with the

Defendant on 30th March, 1972. The Appellant's case as set out in the plaint is that on 30th March, 1972 the Defendant's representative

attended the Sales, Committee meeting held by the Plaintiff at Madurai District Central Co-operative Bank Limited, Madurai for fixing the price of

sugar and gave a written tender on that day to purchase 500 bags of E. 30 sugar at Rs. 262 per bag. The said tender was accepted by the Plaintiff

and the acceptance was duly communicated to the Defendant's representative who deposited then and there a sum of Rs. 5,000 representing Rs.

10 per bag as advance, agreeing to pay the balance of the sale price by 10th April, 1972 and take delivery of the entire 500 bags of E.30 sugar

thereafter. Since the Defendant did not remit the balance of sale consideration till 8th April, 1972 a telegram was sent by the Plaintiff to the

Defendant calling upon the Defendant to remit the balance of the cost of the sugar before 10th April, 1972 and lift the goods before 20th April,

1972. The Defendant in his reply telegram assured the remittance shortly. Thereafter the Plaintiff extended the time for payment and for

performance of the contract by the Defendant till 20th April, 1972 and the Defendant was asked to perform his part of the contract by 20th April,

1972. But the Defendant by a telegram through his lawyer on 29th April, 1972 repudiated the contract on the ground that the contract is not a

concluded contract and therefore, the Defendant is not bound to pay the sale consideration. Subsequently the price of sugar had fallen and the

Plaintiff had sold the sugar at a price ranging from Rs. 215 to Rs. 217 per bag exclusive of excise duty and, therefore, the Plaintiff has been put to a

loss at the rate of Rs. 47 per bag and the total loss suffered by the Plaintiff as a result of the Defendant's breach of the contract is Rs. 23,500

Deducting a sum of Rs. 5,000 paid as advance by the Defendant the balance of Rs. 18,500 is payable by the Defendant as and by way of

damages for his breach of contract.

3. The Defendant resisted the suit contending that there was no concluded contract between the Plaintiff and the Defendant on 30th March, 1972

as alleged in the plaint, that the Defendant never agreed to take delivery of the goods before 30th April, 1972, that there was no specific

agreement to remit the full price on or before 10th April, 1972 and that the fixing of time for payment of the price and for taking delivery of the

goods has been done unilaterally by the Plaintiff long after the Defendant submitted his tender and the same was accepted. Thus according to the

Defendant there was no consensus between the parties as to the, time for payment of the balance of sale consideration and as to the time for taking

delivery and that there is no question of the Defendant committing breach of the contract which has not been duly concluded. The Defendant also

reserved his right to recover the advance amount of Rs. 5000 paid by him to the Plaintiff.

4. On these pleadings the Court below set out the following three issues for consideration:

1. Whether it is true that the Defendant has committed breach of contract as alleged by the Plaintiff?
2. Is the Plaintiff entitled to claim damages? If so, to what amount?
3. To what relief?

Under issue No. 1, the Court below held that since there was no concluded contract between the Plaintiff and the Defendant on 30th March, 1972

under exhibit A-2, the tender given by the Defendant's representative, there is no question of any breach of any contract and in view of the said

finding on Issue No. 1 the rest of the issues were found against the Plaintiff and the suit was dismissed.

5. In this appeal the learned Counsel for the Plaintiff/Appellant contends that the Court below is in error in holding that there is no concluded

contract established on the materials on record and that in fact exhibit A-2, the tender submitted by the Defendant's representative, and the

subsequent correspondence between the parties clearly establish the fact that there was a concluded contract on 30th March, 1972 between the

Plaintiff and the Defendant to purchase 500 bags of E-30 sugar at the rate of Rs. 262 per bag and that it is only in pursuance of such completed

contract a sum of Rs. 5,000 was deposited by the Defendant. It is pointed out that exhibit A-3, the telegram which was sent on 8th April, 1972,

would clearly indicate that the Defendant agreed to pay for the goods for the purchase of which he has submitted the tender on 10th April, 1972

and take delivery of the same, and but for such an agreement the telegram would not have referred to the date 10th April, 1972. It is also pointed

out by the learned Counsel that on 30th March, 1972 itself the contract has been concluded and only the payment of the price and delivery of the

goods have been postponed and therefore the contract cannot be said to be inchoate or incomplete. In this case exhibit A-2, which is the tender

submitted by the Defendant's representative to purchase 500 bags of E-30 sugar at the price of Rs. 262 per bag does not refer to the time for

payment of the price though, the Plaintiff would say that the tender was accepted and the Defendant was asked to pay the price and take delivery

of the goods on 10th April, 1972. There is, however, no document in support thereof. Admittedly the communication by the Plaintiff accepting the

tender of the Defendant is oral and there is no document by which the Plaintiff

has communicated the time for payment of the price and for taking delivery of the goods to the Defendant. Curiously no oral evidence also has been adduced in this case either by the Plaintiff or by the Defendant.

Apart from the submission of the tender and its acceptance, that there was a further discussion as to the time for delivery and for payment of the price should have been brought to light at least in the oral evidence. It cannot be disputed that it is the Plaintiff, who has come forward with a specific case that on 30th March, 1972 the Defendant agreed to pay the sale consideration and take delivery of the goods on 30th April, 1972 and, therefore, it is for him to establish that fact by adducing concrete and positive evidence. However, the Plaintiff has felt satisfied itself by producing exhibit A-2, the tender submitted by the Defendant's representative. As already stated the tender is silent as to the time for payment of the price and for taking delivery of the goods. A contract of sale cannot be said to be complete unless the parties to the contract have agreed as to the time for payment of the sale price and for taking delivery of the goods. It is true under exhibit A-3, the Plaintiff has called upon the Defendant to pay the sale price before 10th April, 1972 and make arrangement to take delivery of the goods by 20th April, 1972. But unless there is an earlier agreement between the parties as to the time for payment of the price and for taking delivery of the goods the Plaintiff cannot unilaterally fix the time for payment of the goods and for taking delivery of the same and cannot cancel the contract again unilaterally after the Defendant has committed default in payment of the price and taking delivery of the goods as called upon within the date fixed by the Plaintiff. On the materials on record we cannot say that the plea of the Plaintiff that the Defendant agreed to pay the price and take delivery of the goods by 10th April, 1972 has been proved.

6. Section 11 of the Sale of Goods Act says unless a different intention appears from the terms of the contract, stipulations as to time of payment are not deemed to be of the essence of a contract of sale. Even, if the time for payment is fixed under the contract that cannot be taken prima facie to be the essence of the contract of sale as contemplated by Section 11 of the Sale of Goods Act unless there is a stipulation to the contrary in the contract itself. The time cannot be taken to be the essence of the contract in a

case where the contract itself does not stipulate the time for payment of the price. It is well-established that it is only in cases where the time is the essence of the contract the vendor can cancel the contract for nonpayment of the price within the time stipulated. In this case in exhibit A-2 the Defendant has not fixed any time for payment of the price and this shows that the time is not the essence of the contract, and thus the Plaintiff, who has chosen to cancel the contract as the Defendant has not paid the sale consideration within the time stipulated by him unilaterally is not entitled to cancel the contract. This is one of the reasons given by the court below for non-suing the Plaintiff.

7. There is also a further aspect to be taken note of in this case. Section 20 of the Sale of Goods Act proceeds that in case where there is an unconditional contract for the sale of specific goods in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment of the price or the time of delivery of the goods, or both, is postponed. In this case exhibit A-2, the tender submitted by the Defendant's representative does not refer to the time for payment of the price and the time for taking delivery of the goods. However, according to Section 20 the property in goods should be taken to have passed to the Defendant and the Plaintiff will be entitled to claim only unpaid vendor's lien but the Plaintiff in this case has not proceeded on that basis. Admittedly no notice has been given before the resale of the sugar which the Defendant failed to take delivery in pursuance of the contract and the Plaintiff has admittedly sold the consignment of 500 bags of E. 30 sugar treating the stocks as its own. This also will show that the contract is not a concluded one as contended by the Plaintiff/Appellant. Thus on a due consideration of the matter we hold that the Plaintiff is not entitled to claim damages firstly on the ground that there was no concluded contract and as such there could not have been any breach thereof committed by the Defendant and secondly on the ground that even assuming that there was a concluded contract the materials on record would show that it was the Plaintiff who has committed the breach by terminating the contract taking the time as the ground that the Defendant did not pay the price and take delivery of the goods by 20th April, 1972.

8. For the foregoing reasons this appeal has to be dismissed and is therefore dismissed. Under the circumstances there will be no order as to costs.