

British Paints (India) Ltd. Vs Union of India (UOI)

Court: Calcutta High Court

Date of Decision: Dec. 3, 1970

Acts Referred: Contract Act, 1872 " Section 55, 72
Sales of Goods Act, 1930 " Section 11

Citation: AIR 1971 Cal 393 : (1972) 2 ILR (Cal) 370

Hon'ble Judges: Sarma Sarkar, J; S.K. Chakravarti, J

Bench: Division Bench

Advocate: Rabindra Mohan Mukherjee and Hrishikesh Ganguly, for the Appellant; P.K. Sengupta and Suproakash Banerjee, for the Respondent

Final Decision: Dismissed

Judgement

S.K. Chakravarti, J.

This appeal is at the instance of the plaintiff in a suit for damages for breach of contract against the Union of India.

The Union of India invited tenders for the supply of paints of the description compound recolouring Olive Green Scamic 314 for faded tents to

Specification Ind/ 32/7037. The plaintiff offered a tender being sample No. 30/100. The laboratory did not consider the sample to be upto the

mark, but the higher authorities of the Defence Department accepted this tender, and placed an order with the plaintiff for supply of 500 Cwt. of

this article and the price was fixed at Rs. 256/-F.O.R. Calcutta per Cwt. According to the contract the goods were to be inspected by the

Inspector at Calcutta, and if he was satisfied that these were upto the mark, then the same could be despatched by the plaintiff on receipt of the

inspection notes. The original date of delivery was fixed on 15th of October, 1952, but the plaintiff stated that it might not be in a position to do so

as it had to indent some of the ingredients from U K., and on their successive applications for extension of time, time for supply was finally

extended upto the 30th of April 1953. 9 Cwt. of this article was inspected on the 16th October 1952 and accepted and despatched on the 5th

December 1952. The second lot consisting of 591/2 Cwt. was inspected on the 16th March 1953, and was rejected on the 22nd April 1953, and

again offered after some reconditioning on the 30th April 1953, and rejected on the 19th May 1953. The third lot of 150 Cwt. was inspected on

the 30th March 1953 and accepted and despatched on the 17th April 1953. The fourth lot consisting of 188 Cwt. was inspected on the 13th April

1953, and was rejected on the 7th May 1953. The last lot consisting of 931/2 Cwt together with 591/2 Cwt. constituting the second lot, were

inspected on the 30th April 1953, and rejected on the 19th May 1953. Therefore, the defendant had accepted 159 Cwt., and the balance of 341

Cwt. constitutes the disputed item. The defendant terminated this contract on the ground that the delivery was not made by the 30th April by its

letter dated the 1st of May 1953 (Ext. 20). Before the receipt of this letter, Mr. Bogh (P. W. 1) the Technical Director of the plaintiff company

went over to Kanpur to find out how the test was carried on them and he was given every opportunity to see that on the 1st of May 1953. On his

coming back, the letter of cancellation of the contract was gone into, and the plaintiff requested the Kanpur authorities where the tests were to be

done, to enable its chemist Mr. Ghosh to come and see for himself why the goods were rejected. Mr. Ghosh (P. W. 3) came there in the third

week of May 1953, and with the help of Drs. Ranganathan and Balakrishnan (D. Ws. 1 & 5) he saw how the test was carried on. The

reconditioned sample which he had brought was tested by the authorities at Kanpur, at the request of the plaintiff by its letter the 22nd May 1953,

(Ext 23), and on the 30th May the Kanpur authorities wrote to the Inspector in Calcutta, with copy to the plaintiff, that this reconditioned sample

was ""found to conform to the quoted particulars in all respects and is therefore acceptable"" (Ext. 24). There was further correspondence between

the plaintiff and the defendant re: the acceptance of the goods but the defendant by its letter dated the 30th September 1953 (Ext. 51) intimated

that its decision as conveyed by its letter dated the 1st of May 1953 was final and cannot be altered and further that the stores offered by the

plaintiff ""were not in accordance with the terms of the Contract for quality"". Thereafter the plaintiff served the usual notices on the defendant and

the matter had also been referred to arbitration. The Arbitrators however found that under the terms of the contract, the Inspector's decision was

to be final and binding on the parties, and. as such, held that they had no jurisdiction to enter into this question of the rejection of the supplies on the

ground that this did not conform to the required specification. The main ground of the plaintiff is that the test made by the Kanpur authorities was

not in accordance with the agreement inasmuch as they ""were carrying out the test by comparing the supplied material with a tinted slip prepared

some months ago with the paint from the said sample No. 30/ 100"" and not in the same manner and at the same time as provided for in the

Agreement. It was further alleged that the Inspector carried out the inspection capriciously and not in accordance with the said specification. The

plaintiff further alleged that the materials were specially manufactured for the purpose of this tender and could not be resold in the market and

claimed a sum of Rupees 88,496/- as damages inclusive of storing charges on the basis of the price at which the plaintiff agreed to supply together

with a sum of Rs. 5,228/- by way of interest. The total claim was thus laid at Rs. 93,724/-. The Union of India contested the suit alleging that time

was of the essence of the contract and further that the tests at Kanpur were carried on in accordance with the rules, and that the Inspector's

reports were not at all arbitrary, and that the supplies were not accepted as the same were not of the requisite quality. The learned Subordinate

Judge at Alipore held in favour of the defendant on all the points involved, and dismissed the suit. Hence this appeal.

2. Now under the terms of that Agreement "the Inspector's decision as regards rejections aforesaid shall be final and binding on the parties" in this

case, as we have already pointed out, the Inspector's reports (Exts. 26-28) are to the effect that the articles are not according to the specification

and the shade is lighter than the sample of 30/100" and "did not match also the standard olive green scamic 314." Prima facie, therefore, the

plaintiff will be bound by it and its claim to damages cannot be entertained. Mr. Rabindra Mohan Mukherjee learned Advocate appearing on

behalf of the appellant submits that the Inspector did not apply his mind to the point and merely dittoed what was written by the authorities at

Kanpur and, as such his Reports are perverse and arbitrary and cannot bind the parties. In the next place, it has also been urged that the tests

which had been made at Kanpur were not in accordance with the Contract, in view of the facts that the tests were not carried on with reference to

the accepted sample 30/100 at the time of examination of the contents of the further supplies, but with tints made at a distant time. It has also been

urged that the sample 30/100 had already been destroyed.

3. Now, if the contentions or either of them are accepted, then it must be held that the Inspector's reports would be arbitrary, and it would be

open to the plaintiff to challenge the order of rejection prima facie passed on that basis, and the order of rejection would not stand.

4. The Inspector in question, Colonel Pillay (D. W. 7) has been examined in this case and his evidence would disclose that he did apply his mind.

He waited for 3 to 4 days to make up his mind after obtaining the reports from Kanpur and appears to have taken other factors also into

consideration. There is no reason to disbelieve his testimony in this respect. There were not proper facilities for testing in Calcutta, and the

procedure appears to be to send the same to Kanpur for testing, and on getting their reports, the Inspector in Calcutta was to decide whether the

goods were to be accepted or not. Moreover, the tests at Kanpur were carried on by experts namely. Dr. Ranganathan and Dr. Balakrishnan (D.

Ws. 1 and 5), and if the Inspector acted on the basis of such reports, it cannot be said that he did not apply his mind thereto. In the circumstances,

we must overrule the contention of Mr. Mukherjee in this respect. Mr. Mukherjee has also drawn our attention to the decision of the Madras High

Court in *Bombay Burma Trading Co. v. Aga Mahomed* (1911) ILR Mad 453 . In that case the decision was not made with reference to the

measurements at all which it was necessary to do. Therefore, that decision would not help the plaintiff.

5. As regards the tests at Kanpur it would appear from the evidence of Dr. Ranganathan and Dr. Balakrishnan and specially of the latter that every

time a sample of the supply came, they carried on the tests with reference to the sample 30/100 and that they did so even in the case of these three

rejected supplies. They have emphatically denied that the sample 30/100 had been destroyed. Mr. Bogh who called on them on the 1st of May

1953 did not at all ask them as to whether that sample 30/100 had been destroyed or not. He only wanted to see how the test was done and it

was not necessary therefore, to bring out the sample 30/100 which was kept in safe custody, Bo to say, to show the method of testing. Mr, Bogh

in his cross-examination had stated that that sample had been destroyed. As a matter of fact no such complaint in writing was made to the

authorities concerned. Mr. I. B. Ghosh the Chief Chemist of the plaintiff firm of course states that he was told that the sample had been destroyed.

This fact has been denied by Drs. Ranganathan and Balakrishnan, and the learned Judge appears to have preferred the testimony of the latter

gentleman, to that of Mr. Ghosh. We see no reasons to differ from him in the assessment of his evidence. They are responsible Officers and under

the rules so long as the Contract is alive they are bound to keep It and it is only when much later they came to know that the Contract had been

cancelled, they destroyed the sample. As a matter of fact, when Mr. Ghosh called on the Kanpur authorities in May 1953 he took with himself a

reconditioned sample. It would appear from the evidence that some amount of black carbon was put in to make the colour a bit darker and

thereafter that passed the test. When the second batch of 591/2 Cwt. had been rejected, the plaintiff wrote to the authorities concerned that they

would supply these things after reconditioning. This fact would also disclose that the supplies which had been made and rejected did not conform

to the required specification. It would further appear from the evidence of Mr. Bogh and Mr. Ghosh that they did not carry on the tests in their

own laboratories with any cotton Dosuti. As a matter of fact, Mr. Bogh was not aware what cotton Dosuti was, and he asked for a sample of that

from the Kanpur authorities. Therefore, the fact that according to the plaintiff's own technical men, these three supplies in question were up to the

specification, cannot override the opinion of the Kanpur authorities. Under the terms of the Contract, the test is to be made by applying the sample

to a piece of cotton dosootie or sheeting used in the manufacture of tents"". That was not done at all by the plaintiff. Mr. Mukherjee has also made

a grievance of the fact that the Kanpur authorities had carried on the test with a piece of scoured cotton dosootie and not an unsecured one. The

evidence of Dr. Balakrishnan would show that they always carry on the test on scoured cotton dosootie and it is cotton dosootie which is mostly

used in the manufacturing of tents. Scoured cotton dosootie is also cotton dosootie and in the circumstances it cannot be said that the test carried

on by the Kanpur authorities on scoured cotton dosootie would be inconsistent with the terms of the contract.

6. Mr. Mukherjee has laid stress on the fact that the plaintiff had also got the rejected supplies tested by an expert Mr. Monk (P. W. 2) and his

report and evidence would disclose that the rejected articles were of the same quality as the tender sample 30/100, a duplicate of which had been

kept in the plaintiff firm. Mr. Monk carried on his test in the absence of the defendant. He did so also more than three years after the articles had

been made and his own evidence would disclose that the articles were not exactly of the same quality as before, something having already

evaporated. He also did not apply the same to any scoured cotton dosootie or any sheeting used in the manufacture of tents. What is worse, he

took samples from each of the rejected barrels, and make a hotchpot of the same, and then made the comparison. The plaintiff had already written

to the defendant to offer the 591/2 Cwt. after reconditioning and it is quite likely that it was so done. Therefore, we cannot accept the evidence of

Mr. Monk in this respect. What is more, as we have already pointed out, the Kanpur authorities had made the tests in accordance with the rules,

and found the quality not upto the mark, and the Inspector's report is based on that, and the Inspector also applied his mind to it, and the

Inspector's report in this connection is final and conclusive, and cannot be overruled by Mr. Monk's opinion.

7. It has further been urged by Mr. Mukherjee that the delivery has been made in time and that the defendant had voluntarily or involuntarily

waived the quality and therefore was not competent to reject the supplies. It would appear that Mr. Ghosh went to Kanpur with the reconditioned

sample and the Kanpur authorities found it acceptable. Mr. Mukherjee, therefore, submits that the defendant was not therefore right in cancelling

the Contract and in refusing to give them any further time to recondition the rejected goods in accordance with the approved sample. Now, the

Contract was cancelled on the 1st of May 1953 and the Contract had been made with the Director-General of Supply. The Kanpur authorities

cannot extend the time of delivery, and therefore, this point also fails. At no stage was there any waiver of the quality.

8. In this connection Mr. P.K. Sengupta learned Government Advocate points out that the plaintiff did not give sufficient time for inspection even.

It would appear from Section 17(2) of the Indian Sale of Goods Act that if the purchase was being made on the basis of a sample, some

reasonable time must be given to the purchaser to find out if the goods offered were in accordance with the sample. It would further appear from

the evidence that after the goods were manufactured, the plaintiff was to send an intimation to the Inspector in Calcutta and he would take samples

and then send the same to Kanpur and there it must be tested and the test alone would take at least three days. All these were within the

knowledge of the plaintiff. The plaintiff, however, offered the reconditioned second supply and the 4th and 5th instalments on the 30th April by its

letter dated the 29th and the delivery date being the 30th April there was no sufficient time to inspect.

9. Mr. Mukherjee has very strenuously contended that time was not of the essence of the Contract and that the respondent was not entitled

therefore to cancel the Contract on the 1st of May on the alleged default to make delivery of the goods by the 30th April. It would appear from the

Contract itself that time was specifically made of the essence of the Contract. Mr. Mukherjee submits that inasmuch as the time had been extended

from time to time, it would appear therefrom that the Union of India did not consider the fixed time to be a condition precedent in this case, and, at

the most, it was a warranty and nothing more and the action of the Union of India in cancelling the Contract unilaterally was an anticipatory breach,

and would entitle the plaintiff to damages. In *Gomathinayagam Pillai and Others Vs. Pallaniswami Nadar*, it has been laid down that "Intention to

make time of the essence of the contract may be evidenced by either express stipulations or by circumstances which are sufficiently strong to

displace the ordinary presumption that in a contract of sale of land stipulations as to the time are not of the essence." in this particular case, as we

have already pointed out, there was an express stipulation that time would be of the essence of the Contract. It is no doubt a fact that the original

time for delivery in the Contract namely 15th of October 1952 was extended from time to time or the application express or implied of the plaintiff

upto the 30th of April 1953. In its telegram as also letter dated the 2/3rd March 1953 the defendant made it quite clear that there would be no

further extension of time. in AIR 1922 178 (Privy Council) it has been held by the Privy Council that when after the seller of goods has failed to

deliver them at the agreed time the buyer has agreed to an extension of time for delivery, the effect of Section 55 of the Indian Contract Act is that

the buyer is entitled to damages computed in the ordinary way, if the seller fails to deliver within the extended time. in Orissa Textile Mills Ltd. and

Another Vs. Ganesh Das Ramkishun, it has been held that generally speaking stipulations regarding time for delivery of the goods are deemed to

be of the essence of the Contract in mercantile transactions and that where time is of the essence of the Contract and is extended, the extended

date is also of the essence of the Contract. Mr. Mukherjee, with his usual fairness, has placed before us the aforesaid two decisions and has also

relied on AIR 1925 188 (Privy Council) . and more particularly on Hindustan Construction Company Vs. The State of Bihar, . In Burn & Co."s

case the Privy Council, on an interpretation of the terms of the Contract, came to the conclusion that the intention of the parties when the Contract

was made, was that time should be of the essence of the Contract. in the Hindusthan Construction Co."s case the court, on an analysis of the terms

and specially in view of the facts, that there was a provision for daily damages after the default is made, and the State of Bihar which had the option

of determining the Contract did not avail itself of the option, held that time was not of the essence of the Contract. The facts in that case are entirely

different from the facts, of the present case wherein the plaintiff had asked for extension of time again and again and the defendant had reluctantly

to agree thereto. Even, in this decision it has also been laid down that an Intention to make time of the essence of the Contract must be expressed

in explicit and unmistakable language in the agreement itself and if by any means such an intention is not explicit, it may be inferred from the

antecedent conduct of the parties and surrounding circumstances but not from the subsequent conduct of the parties after the Contract was made.

We are, therefore, of opinion that in this particular case time was of the essence of the Contract and this time would also include the extended time

as agreed upon by both the parties. This term in the agreement was a condition precedent and not a mere warranty.

10. Mr. Mukherjee has also relied on Section 23 of the Sale of Goods Act and submits that as in the month of May the Kanpur authorities found

the reconditioned sample to be acceptable. Section 23 would apply. He relies also on the case of Brij Raj v. Gobind 88 Ind Cas 230 : (AIR 1925

Lah 581). Now in this particular case there has not been any appropriation by the defendant of the goods to the Contract after the 30th of April

1953. Therefore, neither Section 23 nor Brij Raj"s case would help the plaintiff. in this case the Contract was cancelled originally by letter dated

the 1st of May 1953 (Ext. 20) as the goods were not delivered by the 30th of April 1953. It was made more explicit by its letter dated the 30th of

September 1953 (Ext. 51). in that letter it has been stated that the stores offered by the plaintiff were not in accordance with the terms of the

Contract for quality and were therefore, rejected. At one stage of the arguments, it was urged on behalf of the appellant that as the Inspector's

reports regarding the goods were not available on the 1st May 1953, the authorities had no materials before it under which it could cancel the

Contract. in *Nune Siwayya v. Maddu* 62 IA 89 it has been held by the Privy Council that in a suit for damages for breach by repudiation of the

Contract for the sale of goods, the defendant can rely upon any grounds for repudiation which existed when he repudiated; he is not confined to

the ground which he then stated. After the Inspector's reports were made available and showed that the goods were not in accordance with the

tender, it was up to the Union of India to take up that ground as well. Mr. Sengupta in this connection has already drawn our attention to Ext. 3-C

the condition of Contract. Now the term "delivery" as denned therein means "Delivery by the dates specified in the acceptance of tender of stores

which are found acceptable by the Inspector and not the submission of stores which are not to the required standard or which are not delivered by

due dates." in this particular case, the goods were not properly delivered by the 30th of April 1953. The goods were not up to the standard, and

there was no sufficient time given to Union of India for inspecting the same, as we have already pointed out.

11. Mr. Mukherjee has also submitted that as the defendant also claimed liquidated damages, the defendant was not entitled to cancel the

Contract. We are not in a position to accept this contention. In Ext. 3-C it has been specifically laid down that if any stores are rejected, the

Secretary shall be at liberty to (a) to allow the Contractor to resubmit the stores within a time specified by himself, (b) buy the quantity of the stores

rejected by others of a similar nature elsewhere at the risk and cost of the contractors etc. or (c) terminate the contract and recover from the

contractor the loss the purchaser thereby incurs. Therefore, it was within the rights of the defendant to terminate the contract. The defendant has

not made any attempt to recover the loss if any, he has suffered for the default of the plaintiff. By Ext. 20 the defendant while cancelling the

Contract for the supply of the further materials had merely asked the plaintiff to note that right to recover liquidated damages for delayed supply

was reserved. There was no claim actually made for liquidated damages. In the subsequent letter (Ext. 51) no such claim was even referred to. In

the circumstances, this objection must be overruled.

12. The result, therefore, is that we find that in this case time was of the essence of the contract and that the time was extended up to the 30th of

April 1953 by the mutual consent of the parties and that the goods had not been offered or delivered in time, and were also not of the requisite

quality. The defendant, therefore, was within its rights to repudiate the contract for the supply of the remaining portion of the goods, and this appeal

therefore, must fail.

13. At the same time we must note that we do not find that there has been any deliberate negligence on the part of the plaintiff. They had difficulties

of their own, inasmuch as they had to import some of the ingredients, and the defendant itself was also responsible for some delay, inasmuch as, in

the month of January, it suddenly directed the defendant to supply the goods in galvanized sheets. If the plaintiff's men had gone over to Kanpur by

the 30th April on getting the rejection slip of the second lot, then further troubles might have been avoided. Unfortunately however. Its

representatives went to Kanpur after the cancellation of the Contract, and it is quite clear from the evidence, that the goods were required very

urgently for Military purposes and it was not possible for the defendant to wait any further. We, therefore, dismiss this appeal, but direct that each

party will bear its own costs.

Sarma Sarkar, J.

14. I agree.