

**IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC
OF SRI LANKA**

Distilleries Company of Sri Lanka Limited
No. 110, Norris Canal Road,
Colombo 10.

DEFENDANT-APPELLANT

C.A 236/1997(F)
D.C. Colombo 10536/MR

Vs.

A. S. Mohammed Hassan
No. 33, Tippu Sahid Street,
Mount Road, Madras.
India carrying on business under the name
style and firm of A.P. Agencies of No. 33,
Tippu Sahid Street, Mount Road, Madras,
India.

PLAINTIFF-RESPONDENT

BEFORE: Anil Gooneratne J.

COUNSEL: Shibly Aziz P. C with Daya Pelpola
Instructed by Presanna Gunawardena for Defendant-Appellant

Plaintiff-Respondent absent and unrepresented

ARGUED ON: 19.05.2011

DECIDED ON: 27.07.2011

GOONERATNE J.

This was an action filed in the District Court of Colombo, based on a breach of contract. The District Judge of Colombo entered judgment in favour of the Plaintiff-Respondent on or about 23.4.1997 and awarded a sum of Indian Rs. 1,071,310/14 payable by the Defendant-Appellant in Sri Lankan currency being the equivalent of the above sum of Indian Rupees, at the current rate. Parties proceeded to trial in the Original Court on 13 issues. Plaintiff-Respondent and the Defendant-Appellant entered into a written contract (P4) whereby the Defendant Company agreed to purchase 5 million liters of portable rectified spirits, subject to terms and conditions of the contract.

The case of the Plaintiff is that Plaintiff supplied and delivered to the Defendant company two consignments of the rectified spirits in the months of July and August 1988, a quantity of 500,000 liters and 747,810 liters of rectified spirits respectively. Payments were to be made in terms of the contract, by means of an irrevocable letter of credit amounting to 85% of the C & F value of each consignment and the balance to be paid by the Defendant-Appellant (15%) on delivery. It is contended by the Plaintiff-Respondent that the Defendant-Appellant Company paid the Plaintiff 85% of the C & F value of the two consignments of rectified spirits, but failed

and neglected to pay the balance 15%. The Plaintiff also contends that he was willing and able to deliver to the Defendant Company the balance quantity of 5 million liters of potable rectified spirit but the Defendant wrongfully and in breach of the contract refused and failed to accept delivery and wrongfully and in breach of the terms and conditions of the contract, repudiated the contract.

On the date of hearing though the Registrar of this court duly noticed the parties of the date of argument the Plaintiff-Respondent was absent and unrepresented. However learned President's Counsel for Defendant-Appellant made submissions before this court and assisted this court in the disposal of this appeal.

It was submitted by learned President's Counsel that the Plaintiff was in breach of contract as the Plaintiff failed to make right and true delivery of the said quantity of spirits in terms of the delivery schedule contained in the contract. (vide P7 – special conditions of tender – item 4 and P3 clause 6). It was further submitted on behalf of the Appellant that the spirits supplied by the Plaintiff was at variance the sample submitted by him along with the tender prior to the contract. The spirits supplied failed to conform with the specifications of the contract. As such Defendant-appellant was entitled to treat the contract as terminated and thus released of

all obligations and liabilities under the contract. By reason of Plaintiff-Respondent of not supplying the balance quantity of 3,756,688 liters and quality defects in same the Defendant-appellant was compelled to import from south Africa such quantity of portable spirits as would render the said quantity of 1,243,312 liters of spirit capable of use.

The position of the Defendant-Appellant briefly was

- (a) Plaintiff only supplied 1,243,312 liters of portable spirits
- (b) Even the above quantity of 1,243,312 liters of portable spirits did not conform to the terms and conditions of the contract.
- (c) Plaintiff had failed and neglected to supply the balance quantity of 3,756,688 liters of portable spirits.
- (d) In view of (c) above the quantity of portable spirits which were supplied (1,243,312 liters) by Plaintiff could not be made use of and as such Defendant-Appellant had to import a quantity of portable spirits from South Africa.
- (e) In order to import a quality of portable spirits from South Africa, Defendant Company had to spend a sum of Rs. 2,535,765/-
- (f) In view of Plaintiff's breach of his failure to supply the balance quantity 15% of balance quantity a sum of Rs. 2,417,717/- had been retained by the Defendant Company. As such the Defendant Company had to bear the cost of Rs. 1,18,048/- to get down the spirits from South Africa. (giving credit to the amount retained)

In view of all the matters in (a) to (f) above, Defendants had prayed for a counter claim in a sum of Rs. 1,18,048/-. One of the important matters that need to be considered in this appeal is whether the Plaintiff has failed and neglected to supply the required quantity of portable spirits in terms of

the contract, more particularly according to the delivery schedule of the contract, and if so whether the Plaintiff-Respondent could be excused in law, for the reason that notwithstanding an excusable delay Plaintiff was able and willing to supply the balance quantity, and on that basis judgment of the District Court could be affirmed?

The learned President's Counsel drew the attention of this court to certain items of evidence to support his case and demonstrate that Plaintiff had breached the vital terms of this contract. I would refer to those items of evidence as follows of Plaintiff.

Q: Although the first shipment was to be two million liters, did it in fact come in one shipment?

A: First shipment in 500,000 liters

Q: Second shipment

A: 700,000 liters

Q: Why did you break up like this?

A: Because they needed the spirits urgently

(folio 121/122 of proceedings of 15.12.1992)

Q: Prior to your sending the 500,000 liters of spirits, the Corporation also requested you to send the balance 1.5 million liters of spirits

A: The Corporation informed me that they wanted the goods immediately and therefore to send them

Q: Did they not tell you in June 1988 to send 500,000 liters and the balance 1.5 liters of spirits?

A: Yes – (Telex marked D2)

Q: In that telex they have asked you to ship the balance 1.5 million liters immediately

A: Yes

Q: and they have also stated there that their stock position is critical.

A: Yes.

Q: Prior to that on the 15th of June 1988 they indicated to you that the balance 1.5 million liters should be sent before end of July.

Y: Yes.

Q: That telex of 15th June you replied by telex dated 18th June 1988?

A: Yes

Q: Which you mark D4

A: Yes

Q: In that you say that the balance quantity is readily available in the distillery vats and we assure you to send the same before July end.

A: Yes

Q: You also stated you deeply regret the unavoidable delay?

A: Yes

(folios 183/184-186 of proceedings of 6th July 1994)

This court observes that the above evidence suggest there was an urgent need to have the spirits delivered to the Defendant-Appellant. The above evidence support that position, which also suggest an unavoidable delay as admitted by Plaintiff. I am mindful of the contents of documents D2 & D4

Q: According to the preamble of the agreement rectified spirit had to be supplied in a certain manner as set out there?

A: Yes

Q: In P2 in paragraph 1 it is specially stated 5 million liters.

A: Yes

Q: Coming to paragraph 4 of P7 (A2) the five million liters supplied had to be delivered in accordance with the terms set out therein

A: Yes

Q: The first two million liters had to be shipped within sixty days from date of establishing the L.C

A: Yes

Q: The second two million liters had to be delivered within 180 days from the establishment of L.C

A: Yes

Q: Did you deliver the two million liters on this contract?

A: No

Q: In this contract the time of delivery of the spirit is a material and a relevant factor?

A: Yes

Q: You will admit P1, P2, P7, P6

A: Yes

Q: According to the reading of the said documents the date of delivery is an obligation that you had to fulfill

A: Yes

(folios 155, 156, 157, 158, 159 & 160 of proceedings 3.6.1994)

The above evidence no doubt suggest that delivery had to be done according to a time schedule, and it is an important condition in the contract.

Q: Your position is that 85% of the rate of such consignment has been paid to you

A: yes

Q: That was obtained by you on the L.C established.

A: It is a condition in the L.C that if I hand over shipping documents I will be paid 85%.

A: It is stated that the balance 15% will be paid on delivery of the rectified spirit.

A: Yes

Q: upon right and true delivery?

A: yes

Q: You have already admitted you have to deliver two million liters on this L.C?

A: I did not send two million liters on one shipment.

Q: Even in two shipments, have you sent two million liters to the Corporation?

A: I have sent 1.2 million liters. In the first instalment I sent five hundred and thereafter 750,000 liters.

Q: You now admit that what was sent was 1.2 million liters and not two millions liters of rectified spirits to the Corporation?

A: About twelve lakh liters.

Q: L.C that was issued i.e P9 was in respect of two million liters?

A: Yes.

Q: If you had delivered two million liters you would have been entitled to that sum of money?

A: yes.

Q: In the L.C itself it is mentioned 11,445,000/- Indian rupees?

A: Yes, for the two million liters.

Q: In terms of the conditions of delivery, you had to despatch two million liters within sixty days from the date of establishing the L.C?

A: Yes

Q: That is specifically stated in the contract and in the letter of award P3?

A: Yes

Q: and, in that letter of award it is mentioned that the balance 15% you would be entitled on the right and true delivery of the rectified spirits?

A: Yes.

Q: You were unable to obtain the amount payable to you on P9 because you failed to deliver two million liters of spirits?

A: That is for two million liters.

A: If you supplied two million liters, you would have been entitled to the amount?

A: Yes.

Q: Since you did not fulfill the delivery of that spirit, you are not entitled to that amount?

A: No.

Q: In P9 there is provision for part shipment?

A: Yes.

(folios 169, 170 of proceedings 3.6.1994)

The above evidence of Plaintiff suggest that delivery was not done properly and not done according to the time schedule which is part and parcel of the contract.

Document P7 – clause 6 reads thus ...

DELIVERY

Delivery of the full Tender quantity of five million litres of Potable Rectified Spirits shall be effected in the following manner.

First 2,000,000 Litres to be shipped within 60 days from the date of establishing the Letter of Credit.

Second 2,000,000 Litres to be shipped within 180 days from the date of establishing the Letter of Credit, but atleast thirty (30) days after despatch of the first shipment.

Third of 1,000,000 Litres to be shipped within 180 days from the date of establishing the Letter of Credit, but atleast thirty (30) days after despatch of the second shipment.

Terms of payment under Clause 3 of P7 reads thus...

TERMS OF PAYMENT

- (a) Payment will be made of 85% (eighty five percent) C. & F. or F.O.B. value of each consignment.
- (1) by means of a irrevocable Letter of Credit established with the People's Bank/Bank of Ceylon, negotiable in the country of the Tenderer. Such Letter of Credit will provide for payment to be made against the Original Negotiable Shipping documents which include:

- (a) Three copies of the Commercial Invoice
- (b) Three copies of the clean freight pre-paid Bill of Lading.
- (c) Certificate of Inspection provided for in clause (14) of the General Conditions of Tender.
- (d) Certificate of country of origin.
- (e) Certificate of quality/quantity from the manufacturer.
- (f) Certificate of dispatch of copy documents direct to the State Distilleries Corporation.

OR

(2) Against the presentation of the same documents as mentioned above through the supplier's Bankers in Sri Lanka.

- (b) Balance 15% (fifteen percent) will be paid upon right and true delivery of the Rectified Spirits, free from defects to the Corporation in accordance with specifications.
- (c) The terms of payment, viz 85% at sight and 15% on delivery will be changed under any circumstances. The Corporation however, will release the balance 15% no sooner it satisfies itself to the quality and quantity of the rectified spirits and packing received.
- (d) The Letter of Credit will be established only after the due compliance by the Tenderer of the provisions of clause 16 (a) of the General Conditions of the Tender.
- (e) The Tender Board reserves to itself the right to place orders either on C. & F. or F.O.B. basis.

I would at this point advert to the fact that the contract between the parties are contained not in one solitary documents but in several documents which contain vital terms and condition. Contract consists of documents marked in evidence P1 to P8. The special conditions of tender

marked P7 and clause 4 of same gives the delivery schedule. Therefore the time limit within which portable spirits are to be delivered would be of essence. Plaintiff-Respondent has failed to deliver the spirits according to the above delivery schedule. Evidence reveal that Plaintiff-Respondent was able to deliver only 2 consignments of spirits of 495,502 liters and 747,810 liters which reached the Defendant-Appellant on 16.7.1988 and 14.8.1988 respectively. Plaintiff had therefore defaulted to supply the balance quantity of 3,756,688 liters of spirits, according to the schedule in document P7 (clause 4). The above evidence of Plaintiff suggest that Plaintiff does not deny the time of delivery and dates of delivery are obligations to be fulfilled under the contract.

At this stage of my judgment, before I proceed to comment on the judgment of the Original Court I prefer to consider the following extracts from the text on Law of Contracts Chitty 29th Ed, where time stipulations are considered to be of essence.

Pgs. 1240/1241/1242

Time made expressly or implicitly “of the essence.” Time is of the essence:

Paragraph 21-013

- (1) Where the parties have expressly stipulated in their contract that the time fixed for performance must be exactly complied with, or that time is to be “of the essence.”
- (2) Where the circumstances of the contract or the nature of the subject-matter indicate that the fixed date must be exactly complied with, e.g. the purchase of a leasehold house required for immediate occupation, the sale of business land or

premises, such as a public-house as a going concern, the sale of a reversionary interest; the exercise of an option for the purchase or repurchase of property, or for determining a lease under a 'break' clause or an option to acquire a leasehold interest in futuro (since in these cases, "the parties on the exercise of the option, are brought into a new legal relationship"); "mercantile contracts, " such as a contract for the sale of goods where a time is fixed for delivery, or for the sale of shares liable to fluctuate in value (where the contract stipulated a time for payment), or a charterparty under which the owner is given the right to withdraw the vessel in default of "punctual payment" of hire. However, the mere fact that the contract can be labeled "mercantile" or "commercial" does not determine the issue. The question is whether the time specified in the particular clause was (expressly or by necessary implication) intended by the parties to be essential, e.g. because they needed to know precisely what were their respective obligations. Thus, where the buyers were required to give 15 days' notice of readiness of the vessel so that the sellers could then nominate the port for loading, the House of Lords held time to be of the essence: performance by the buyer was a condition precedent to the seller's ability to perform his obligation. (However, under the Sale of Goods Act 1979, s.10, 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 the contract of sale.)

The learned District Judge on one hand accept the position in his judgment that the Plaintiff did not keep to the delivery schedule and failed to deliver the balance quantity, but state further that the Defendant-Appellant by extending the letter of credit up to 31.10.1988 and up to 30.11.1988 was willing to accommodate the Plaintiff. It is my view that an extension of the letter of credit should not be understood to mean that the Plaintiff is excused

of his contractual obligations. Learned District Judge is in error by considering the mere extensions of letter of credit. One must not lose sight of the fact that even with the extension Plaintiff failed to deliver. Letter D7 of 30.12.1998, Plaintiff was informed that further extensions cannot be given. No doubt Defendant-Appellant accommodated the Plaintiff, but even with such extension Plaintiff failed to fulfill his part of the contract. This court holds that the District Judge erred on this point since the law cannot be understood to grant extensions or accommodate the Plaintiff in this manner, since the reading of the entire contract contained in several documents, no doubt suggest that the delivery schedule is of essence and time of delivery would matter for the Defendant Company involved in the business of manufacturing spirits. The Trade and nature of the business is such that time of delivery is a vital condition and the Plaintiff in evidence did not controvert such position to state that there was no urgency. District Judge has failed to consider documents D1 & D4 Our country would follow the English Common Law principles which take a strict approach rather than the Court of Equity which generally take 'time' to be of essence but consider an exceptional situation to grant relief to a party in default.

Sir John Romily M.R observed "at law time is always of the essence of the contract. When any time is fixed for the completion of it, the

contract must be completed on the day specified, or an action will lie for breach of it” Parkin vs. Thorold (1852) 16 Beav 59, 65.

It is apparent that this is a contract of Sale of Goods and as regards quantity, quality, sample etc. provisions of the Sale of Goods Ordinance would prevail. However I did not find any specific issue suggested according to the provisions of the Sale of Goods Ordinance, though a breach of contract generally is suggested in issue Nos. 9 & 10. The evidence led at the trial suggest that the Defendant Company had been complaining about contamination and defects of the spirits supplied. I have considered the contents in documents D5, D6, P28 & D13. It appears that on receipt of the 1st & 2nd consignment of spirits Plaintiff was informed in writing of the contamination and defaults. The learned District Judge’s observation on the fact that the sample submitted correspond with the consignment of spirit, on a consideration of the entirety of evidence, seems to be a misdirection on the part of the District Judge. Document P2 state that the parties agreed in respect of the pre-shipment inspection that “such inspection shall not relieve the tenderer of his obligation provide for under the tender”, indicates that one cannot reach a conclusion as to quality only at the pre-shipment stage.

Defendant-Appellant also take up the position that Plaintiff-Respondent failed to deliver the due quantity of spirits as per samples notwithstanding several opportunities and extensions given by the Appellant. Learned District Judge does not refer to this at all. The complaints also emerge from defective packing, as the paint on the exterior of the drums had cracked and was peeling off. Letter of 14.12.1998 emphasis the fact of a 'smell' in the spirits. The Trial Court Judge's observations that the consignment was found acceptable prior to shipment at the point of loading cannot be suddenly found in wanting in odour cannot be applied to a case of this nature, since the purpose of buying spirits are known to the seller and clear by implication. I would prefer to consider and apply the following case law gathered from Charlesworth "Business Law – 15th Ed. pgs. 320-322

A., a milk dealer, supplied F. with milk which F. and his family consumed. Even though A. had taken all reasonable precautions to prevent contamination of the milk, it contained typhoid germs which infected F.'s wife who died as a result. Held, the purpose for which the milk was supplied was sufficiently made known to A. by its description; since it was clearly unfit for human consumption A. was liable for breach of condition; *Frost v. Aylesbury Dairy Co. Ltd.* (1905) 1 K.B. 608.

- (i) the buyer must have a reasonable opportunity of comparing the bulk with the sample (s. 15(2)(b)); and
- (ii) the goods must be free from any defect rendering them unmercantable, which a reasonable examination of the sample would not reveal (s. 15(2)(c)). A buyer is not expected to carry out every test that might be practicable. "Not

extreme ingenuity, but reasonableness, is the statutory yardstick” (per Edmund Davies J. in *Godley v. Perry*, see below).

G., a boy of six, bought a plastic catapult from P., as stationer. G. used the catapult properly but it broke in his hands as it was made in an indifferent manner and part of it ruptured G’s eye. P. had bought a quantity of these catapults from B., a wholesaler, by sample and P.’s wife had tested the sample, before placing the order, by pulling back its elastic. Held. G. could recover from P. because (a) the catapult was not fit for its purpose; and (b) it was not of merchantable quality. Further, P. could recover from B, since the defect of the goods could not be discovered by reasonable examination of the sample (s.15(2)(c)): *Godley v. Perry* (1960) 1 W.L.R. 9.

I had the benefit of perusing the written submissions filed on behalf of the Appellant and I am very much inclined to incorporate the following obtained from those submissions which I have no reason to doubt. I am in agreement with the views expressed. An extract from the judgment of the learned District Judge reads thus:

“The Plaintiff has impressed me as a witness who was always willing to satisfy the defendant even beyond his contractual obligations. He was at all times mindful of this contractual obligations. He does not appear to be a person who had even the slightest intention of cheating the defendant by shipping poor quality of rectified spirits”.

I agree with the submissions that there was no intention to cheat or need to establish that Plaintiff “intended to cheat” the Defendant. Nor was there any issue as to whether Plaintiff “was willing to satisfy the Defendant even beyond contractual obligations”.

As regards the question of termination of contract or repudiation. Trial Judge observes that contract was terminated not on ground of time schedule but for different reasons. As submitted by Appellant.

The Defendant was entitled under the contract to retain 15% of the balance payment until right and true delivery of the spirits, free from defects of the said spirits, free from defects in accordance with the specifications as per the tender dated 4.1.1988 as stated by the Judge himself at page 1 of the judgment. There was no delivery of the balance quantity from the first consignment at all or within the time stipulated. The learned Judge (and the Plaintiff) having accepted that there was a failure to supply the spirits within the timeframe, the matter should have ended there.

There is no issue regarding termination or repudiation of contract. Plaintiff does not seek relief for wrongful termination or repudiation.

The pre shipment inspection does not relieve the tenders obligation to provide spirits as per the tender document referring to specification. The evidence led by plaintiff of witnesses Francis Fernando, Abeysekera and Chief Chemist Wijeratne would demonstrate the quality of spirits and that there was a bad odour from it. There was evidence that though Plaintiff undertook to supply spirits from his factory he was unable to do so and had to obtain supplies from other sources. Defendant was at all times entitled to assume or led to believe that supplies were from Plaintiff's factory but it was not so at some point of time. Failure of the products to

accord with the samples was therefore clearly and obviously not according to samples as it was being sourced from different sourcing by Plaintiff and not from his factory. Therefore one could assume that Plaintiff lost control of the products supplied at a certain point of time. The trial Judge's observations on this aspect to be that there had been no misrepresentation as it does not relate to a material fact and no falsehood being uttered gives the impression to me that he has been misdirected as the supply from a different source would mislead the Defendant-Appellant and amount to a variance with the sample. It is no doubt lack of compliance with the required specifications. I cannot accept trial Judge's observations on this point, it cannot be pushed through so lightly.

I am not in agreement with the conclusions reached by the learned District Judge. The evidence led before the Original Court no doubt suggest a breach of contract on the part of the Plaintiff. Material aspects breached are the failure to deliver spirits in terms of the time schedule. Plaintiff's own evidence does not dispute failure to do so. The other being a breach of implied conditions as to quality and fitness and sale by sample. Our Sale of Goods Ordinance deals with a case of this nature. In all the

above circumstances I set aside the judgment of the District Court of Colombo, and allow this appeal only in terms of sub paragraphs (a) & (b) of the prayer to the Petition of Appeal. Subject to above appeal allowed.

Appeal allowed.

JUDGE OF THE COURT OF APPEAL