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

In the matter of an Appeal in terms of Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka read with Section 754 of the Civil Procedure Code.

C.A. Case No. 1312/1999 (F)

D.C. Galle Case No. 5546/M

Southern Region Transport Board

No. 171, Matara Road,

Galle.

DEFENDANT-APPELLANT

Sri Lanka Transport Board

Kirula Road, Colombo 05.

Substituted DEFENDANT-APPELLANT

-Vs-

Nandasena Gamage

No. 551/14, Eldeniya,

Kadawatha.

PLAINTIFF-RESPONDENT

BEFORE	:	A.H.M.D. Nawaz, J.
COUNSEL	:	Suranga Wimalasena, SSC for the Defendant-Appellant Prinath Fernando for the Plaintiff-Respondent
Decided on	:	05.06.2018

A.H.M.D. Nawaz, J.

This case turns on the question of whether there was between the parties in the case a contract of sale for 10 metric tons of scrap Aluminium or the contract was for 21 metric tons of scrap Aluminium. The learned Additional District Judge of *Galle* by his judgment dated 07.04.1999 held that the contract between the Plaintiff and the Defendant in the case was for a sale of 10 metric tons of scrap Aluminium and allowed the claim of the Plaintiff on the premise that there had been a breach of contract on the part of the Defendant Transport Board. The story goes as follows:

The Defendant-Appellant (hereinafter sometimes referred to as "the Defendant") - Southern Region Transport Board advertised in newspapers for tenders to buy, among other things, around 10 metric tons of scrap Aluminium. The paper advertisement **(P1)** was published on 15.01.1988. 13 days later, the Plaintiff-Respondent (hereinafter sometimes referred to as "the Plaintiff") submitted his bid **(V1)**. The Plaintiff submitted a bid **(V1)** after having filled in a standard form that had been issued by the Southern Region Transport Board-the Defendant-Appellant. Along with an unfilled standard form to submit the bid, another document **(V2)** containing conditions had already been given to the Plaintiff. Any prospective buyer (bidder) of scrap Aluminium would have to obtain a standard bid form and **V2** (the list of conditions), before he could make his bid to buy the scrap Aluminium. The prospective bidder (buyer) would have to deposit a sum of Rs. 100/- as non-refundable and another sum of Rs.5,000/- as refundable deposits and it was thereafter that the tender documents-the standard form to be filled in and **V2**-the documents containing the conditions would be issued to the prospective bidder.

In other words the standard bid form which had to be filled in by the prospective buyer/bidder and **V2** (the document imposing a list of conditions) were given together to the prospective buyers (bidders) before they could perfect the standard form and submit a properly perfected bid to the Defendant Southern Region Transport Board-*see* page 75 of the appeal brief.

The list of conditions **(V2)** that had been given to the prospective bidder quite interestingly contained a clause-*i.e.*, clause 6 to be exact, which stipulated that the prospective buyer would have to purchase more or less the stipulated quantity. In other words, looking at the advertisement which called for tenders to buy 10 metric tons of scrap Aluminium, one would gather from its import that the list of conditions imposed a condition that the bidder would have to buy more or less than 10 metric tons of scrap Aluminium, if the need arose.

One metric ton of scrap Aluminium attracted a price of Rs. 31,331/-. The bidder, if successful, would pay a sum of Rs. 31,331/- per metric ton. This would constitute the factual template within which the resolution of the issues immanent in the case has to be made. Nandasena Gamage-the Plaintiff-Respondent who was admittedly an experienced businessman filled in the standard form given by the Defendant and submitted his bid-**V1** on 28.01.1998. Between the paper advertisement (**P1** dated 15.01.1988) which called for bids and the bid from Nandasena (**V1** dated 28.01.1988), Nandasena stated in his testimony that he visited a depot, albeit unspecified by name, to inspect the stock of scrap Aluminium which the Defendant Transport Board was intending to sell. Before he made the bid, he had visited a depot which housed a pile of scrap Aluminium for sale.

It was after an inspection of the pile that he filled in the standard bid form and submitted it to the Defendant Board. The bid dated 28.01.1988, just sets out that he would be buying scrap Aluminium at a sum of Rs. 31,331/- per metric ton. No quantity of scrap Aluminium was specifically mentioned in this bid. In other words when he submitted the bid **(V1)**, nowhere did he add a condition that he was offering to buy only 10 metric tons of scrap Aluminium. But it has to be recalled that the list of conditions that had been given to him **(V2)** imposed a condition that he might have to buy more or less than 10 metric tons of scrap Aluminium. **V2**-the list of conditions that contained the above condition had been signed by the Plaintiff-*see* page 75 of the appeal brief. Nowhere did the Plaintiff say that he would not buy on this condition. It was the seller's condition that they might increase the saleable stock of scrap Aluminium to be

above 10 metric tons but when the Plaintiff offered to buy by way of his tender *(the bid)* dated 28.01.1988, he must be taken to have made his offer on the Defendant's conditions, which the Plaintiff was well aware of.

No counter offer from the Plaintiff

He could have resiled from these conditions and made his offer on his own terms but he did not. If he had had made an offer with his own conditions it would have amounted to a counter offer. If he had specified as to how much he was willing to buy, that would have also amounted to a counter offer. But the Plaintiff did not make such a counter offer.

Acceptance of the offer to buy

After the Plaintiff had submitted the bid dated 28.01.1988, a letter dated 03.02.1988 was sent by the Defendant to the Plaintiff-*see* **P3**. This letter called upon the Plaintiff to pay a sum of Rs. 657,951/-, which constituted the price for a total stock of 21 metric tons of scrap Aluminium at the rate of Rs. 31,331/- per metric ton. In other words the Defendant was selling the Plaintiff 21 metric tons of scrap Aluminium. It was an acceptance of the offer to buy 21 metric tons of scrap Aluminium.

The letter directed him to deposit the sum (Rs. 657,951/-) with the District Accountant of the Defendant Transport Board within 5 days of the receipt of the letter and remove the stock within 14 days after payment. The letter also drew the attention of the Plaintiff, more particularly to clause 6 of the list of conditions that had been given to him-namely, he was liable to take on any amount of scrap aluminium, which could be more or less than 10 metric tons. According to the Defendant, the contract of sale was for 21 metric tons of scrap Aluminium.

Response of the Plaintiff to P3

The Plaintiff responded to **P3** (the letter of acceptance or awarding of the tender) by making a payment of only a sum of Rs. 375,972/-. In other words he made a payment only for a stock of 12 metric tons of scrap Aluminium. This payment had been made on

16.02.1988-*see* the receipt issued to the Plaintiff marked as **P4**. A little less than a week later namely on 22.02.1988, the Southern Region Transport Board (the Defendant) wrote to the Plaintiff that the tender that had been awarded to him was cancelled and his deposit of Rs.375,972/- could be refunded at the office of the District Accountant of the Defendant.

The Plaintiff responded by despatching a letter dated 21.04.1988 **(V8)** and requested that his deposit be reimbursed on or before 30.04.1988 and a legal officer of the legal division of the Southern Region Transport Board wrote to the legal officer of the Plaintiff by **(V6)** that the Defendant was willing to refund the money back to the Plaintiff and he could come to have the reimbursement obtained on 29.04.1988 with necessary documents.

Thus the documents speak for themselves and raise the issue of contract interpretation. In the following year namely on 10.2.1989, the Plaintiff instituted this action against the Defendant to recover a sum of Rs.1,33, 7750/-, legal interest and further interest.

Based on the above facts, the question arises whether there was a contract between the parties for a sale of 10 metric tons of scrap Aluminium or more than that quantity. In other words, did a contract for a sale of 21 metric tons of scrap Aluminium come into existence between the parties or was it only for a stock of 10 metric tons as the learned Additional District Judge of *Galle* has found? One of the issues raised on behalf of the Plaintiff was whether a contract existed between the parties for 10 metric tons-*see* Issue No 3. This issue has been answered in the affirmative.

The Southern Region Transport Board (the Defendant) preferred this appeal against the judgment of the learned Additional District Judge of *Galle* and as I said before, on the facts established, principles of contract law surface to the fore in this case and in my view the facts in this case could be compartmentalised within the notions of offer and acceptance-two essential requisites to the validity of a contract between two parties. Lord Wilberforce described the complementary ideas of offer, acceptance and consideration thus:-

> *"English Law, having committed itself to a rather technical and schematic doctrine of contract, in application takes a practical approach, often at the cost of forcing the facts to fit uneasily into the marked slots of offer, acceptance and consideration."-see* ***New Zealand Shipping Co. Ltd., v. A.M. Satterthwaite & Co. Ltd.,*** [1975] AC 154 at 167, [1974] 1 AII ER 1015 at 1020.

Lord Wilberforce in the Privy Council in the above case which is also known *sub nomine* ***The Eurymedon*** acknowledged that not all contractual situations are easily analysed in terms of offer and acceptance, for example jumping on an (old style) London double-decker bus-*see* ***The Eurymedon*** *(supra)* [1975] AC 154 at 167.

It is worth contrasting the view of Lord Wiberforce in the aforesaid Privy Council decision that arose from New Zealand with that of Lord Diplock in the House of Lords' decision in ***Gibson v. Manchester City Council CC*** [1979] 1 WLR 294. Lord Diplock said in Gibson *"there may be certain types of exceptional contracts which do not fit neatly into the normal analysis of offer and acceptance but that the exchange of correspondence was not one of them."* In other words a straitjacket of offer and acceptance may prove elusive in certain types of contract but it may not be so when contracts are concluded by an exchange of letters.

In fact Steyn, LJ said in ***Trentham (Percy) Ltd v. Archital Luxfer*** [1993] 1 Lloyd's Rep 25 at 27 (CA):-

> *"Offer and Acceptance will in the vast majority of cases represent the mechanism of contract formation. It is so in the case of a contract alleged to have been made by an exchange of correspondence. But it is not necessarily so in the case of a contract alleged to have come into existence as a result of performance."*

In my view this is a pragmatic affirmation from the English Courts that one needs to apply the analysis of offer and acceptance in negotiations by correspondence and since there has been an exchange of correspondence between the parties in this case, it is once again apposite to itemise chronologically the transactions and correspondence

between the parties. I would also summarize my conclusions vis-à-vis some of the items. In a nutshell they would go as follows:-

P1. Paper advertisement calling for tender-this would amount to an *invitation to treat*-This was in January 1988.

A standard form tender form (which finally became a perfected tender/bid or offer V1) and **V2** were first obtained by the Plaintiff from the Defendant and **the standard form** was thereafter filled and submitted as the *offer to buy or the bid*-**V1. V2** contains a list of conditions.

V1. The Bid submitted by the Plaintiff having filled in the particulars that he was making the offer to purchase scrap Aluminum at the rate of Rs.31,331/- per metric ton. This would be **the offer to buy. The Plaintiff specified no quantity though.**

V2. V2 contains Clause 6-a condition that the stock to be bought may rise above 10 metric tons.

P3. Letter by which the Defendant informed that the Plaintiff's offer to buy was accepted for 20 metric tons of scrap Aluminum-*Conclusion of the contract.*

P4. The receipt that indicates that the Plaintiff paid only for 12 metric tons of scrap Aluminum-*Breach of contract by repudiation.*

P5. 22.02.1988-the communication from the Defendant that the awarding of tender was cancelled. The Plaintiff should collect his deposit of Rs. 375,972/- -*The repudiation was thus accepted and contract terminated by the Defendant.*

V8. 21.04.1988-The Plaintiff's lawyer wrote to the Legal Officer, Southern Region Transport Board calling for the refund of Rs. 375,972/- and this letter also claims interest at 30 percent *per annum* on the said sum with effect from 01.05.1988, if the deposit is not refunded.

V6. 27.04.1988-the Legal Officer, Southern Region Transport Board wrote to the Legal Officer for the Plaintiff stating that the Board had decided to refund the money back to the Plaintiff.

Paper Advertisement-an invitation to treat

It is trite law that a paper advertisement calling for tenders in this case constituted an invitation to treat. An invitation to treat occurs where one party (in this case Southern Region Transport Board) invites the public to make an offer and the bid (tender) submitted by the Plaintiff (V1) was really the offer to buy.

Codification of Contract Law-Restatements

Two leading academics in their superlative attempts to codify English contract law published their *Restatements* in 2016, though in somewhat different formats and both address basically the same audience of practitioners, judiciary, academics and students. In his *Contract Rules: Decoding English Law*, Neil Andrews, Professor of Civil Justice and Private Law, University of Cambridge pithily describes invitations to treat. He states that unlike an offer, a mere invitation to treat is an opportunity for further dealings before a contract can be formed-*see* Article 15 at page 28 in *Contract Rules: Decoding English Law by* Neil Andrews (2016). In the other codification entitled *A Restatement of the English Law of Contract* (2016) by Andrew Burrows-Professor of the Laws of England, University of Oxford, he defines an invitation to treat in Article 7(4) as an expression, by words or conduct, of a willingness to negotiate.

Article 7(5) itemises the following to be invitations to treat and not offers.

(a) Display of goods for sale;

(b) An advertisement of goods for sale;

(c) An invitation to tender.

As a general rule, a request for tenders is regarded as an invitation to treat so there is no obligation to accept any of the tenders put forward. The tenders themselves are offers,

and a contract comes into existence when one of them is accepted-*see* ***Spencer v. Harding*** (1869-1870) LR CP 561.

Thus the advertisement placed by the Defendant fell within Article 7 (5)(c) and the perfected tender **(V1)** became the bid or offer to buy.

Apart from ***Spencer v. Harding*** *(supra)*, for the proposition that every bid is an offer-*see The Law of Contract* by Treitel (11th edition, 2003 at p.3). *Chitty on Contracts*, 32nd Ed, defines an offer as "***an expression of willingness to contract on specified terms*** *made with the intention that it is to become binding as soon as it is accepted by the person to whom it is addressed*" (para 2-003). Even Article 7(3) of *A Restatement of the English Law of Contract* (2016) by Andrew Burrows defines offers as containing terms:-

> *An offer is an expression, by words or conduct, of a willingness to be bound by specified terms as soon as there is acceptance by the person to whom the offer is made ('the offeree').*

Then what are the terms on which the Plaintiff made his offer to purchase the scrap Aluminium? By the time the Plaintiff made the offer, he had in his possession **V2**-the list of conditions given by the Defendant, out of which clause 6 prescribed that the stock to be purchased may rise above 10 metric tons. Other than these conditions that the Plaintiff was in possession of, the Plaintiff did not prescribe or attach any conditions of his own to the bid he was submitting and so he must be treated to have made the offer on the terms of the Defendant namely the stocks to be bought may rise above 10 metric tons. I must state that the conditions imposed by the Defendant in **V2** were incorporated by reference into the offer made by the Plaintiff.

The Plaintiff never testified that he had not read **V2.** This factor strengthens the objective assessment that one has to make of the offer to purchase scrap Aluminium namely it was made subject to the term that the offeree (the Defendant) might sell him Aluminium above 10 metric tons. There was also no other condition which the Plaintiff inserted in his own tender (offer/bid) to the effect that he was restricting his offer to buy only up to 10 metric tons of Aluminium or 12 metric tons of Aluminium.

What was then the acceptance of this offer? By **P3** dated 3rd February 1988 the Defendant wrote to the Plaintiff that they were accepting the offer to buy, which was fixed at 20 metric tons of Aluminium. When the Defendant thus wrote to the Plaintiff by **P3**, a contract came into being for the sale of 20 metric tons of scrap Aluminium. The attention of the Plaintiff was drawn in **P3** to clause 6 of the list of conditions.

A contract, being a legally enforceable agreement thus bound the Plaintiff to a contract of sale for 20 metric tons of scrap Aluminium at the rate of Rs.31,331/- per metric ton.

But on 16th February 1988 the Plaintiff made a payment of only a sum of Rs.3,75,972/-, which was the price for a stock of 12 metric tons of scrap Aluminium. The contract of sale was entered into for 20 metric tons but the Plaintiff paid for only 12 metric tons of scrap Aluminium. What was the import of this underpayment?

In my view, there was a breach of contract of sale for 20 metric tons of scrap Aluminium that had already come into existence between the Plaintiff and the Defendant. A contract is said to be breached when one party performs defectively, differently from the agreement, or not at all (actual breach), or indicates in advance that they will not be performing as agreed (anticipatory breach).

Here was a contract which mandated the Plaintiff to pay for 20 metric tons of scrap Aluminium, but he paid only for 12 metric tons of scrap Aluminium. This constitutes an actual breach of the contract.

Effect of Breach

When there is a breach of contract, whether it be actual or anticipatory, the contract is not automatically discharged. The innocent party can usually choose whether or not to terminate. As Viscount Simon stated in ***Heyman v. Darwins Ltd.,*** (1942) AC 356; (1942) 1 AII ER 337 (HL):-

> *"Repudiation by one party standing alone does not terminate the contract. It takes two to end it, by repudiation, on the one side, and acceptance of the repudiation, on the other."*

In other words, a breach entitling a party to terminate a contract does not automatically cause the contract to be terminated. Instead, the innocent party has a choice ("the right to elect"): he can choose to terminate the contract ("accept the renunciation or repudiation") and sue for damages, or he can affirm the contract and sue for damages or, where appropriate, debt (on the latter when a contract has been kept alive). The House of Lords in ***'The Simona'*** (1989) AC 788 confirmed the fundamental proposition that where a party's breach justifies the innocent party in terminating the contract, the latter has a choice: he can accept the repudiation and thus terminate the contract and sue for damages, or he can affirm the contract and sue for damages. Neil Andrews points out in Article 163 of his *Contract Rules: Decoding English Law* that there is an exception to this "elective" or non-automatic termination in the context of insurance contracts-*see* page 302.

A majority of the House of Lords in ***White & Carter v. McGregor*** (1962) AC 413 held that the innocent party might sometimes have the capacity to keep open the contract (the right to 'affirm the contract'), and complete his side of the bargain. He can then sue for the agreed price. But there are later cases that have qualified this and prevented the innocent party from burdening the other party with unwanted performance-*see* ***Isabella Shipowner SA v. Shagang Shipping Co. Ltd., ('The Aquafaith')*** 2012 EWHC 1077 (Comm).

So in this instance the repudiation of the contract came in the way of an underpayment for 12 metric tons, quite contrary to the actual quantity agreed upon by the parties. But the innocent party being the Southern Transport Board (the Defendant) did not want to affirm the contract and sue for damages: rather they chose to accept the renunciation or repudiation and terminate the contract. Their response was to cancel the tender.

The Defendant Board intimated to the Plaintiff by a letter dated 22.02.1988 **(P5)** that the contract was at an end. By way of **P5** the Plaintiff was informed that the tender that had been awarded to him was cancelled. He was further instructed to collect his deposit of Rs.3,75,972/- from the accountant. Unfortunately the learned Additional

District Judge of *Galle* treated the underpayment as a performance of the contract by the Plaintiff-a reasoning which does not stand to reason having regard to the facts and law.

The underpayment amounted to a renunciation or repudiation of the contract on the part of the Plaintiff and the Defendant had a choice whether to accept it and sue him for damages or affirm the contract and sue him for damages. The Defendant chose the former but he did not proceed to sue. Ironically the contact breaker became the Plaintiff in this case. The repudiation by the Plaintiff by way of an underpayment and its acceptance by the Defendant brought about the termination for breach. Article 163 of Neil Andrews' *Contract Rules, Decoding English Law* explains how the decision to terminate for breach could be manifested.

(i) Exercise of the choice by the innocent party whether to affirm or to terminate the contract requires no particular form. However, the innocent party must successfully communicate his decision to the guilty party, or at least that party must be left in no possible doubt from the circumstances concerning the innocent party's decision.

(ii) The decision to affirm or to terminate can be manifested (a) expressly or (b) impliedly. In situation (b), the innocent party's decision can be inferred from conduct, exceptionally, even from silence, but only if the inference can be clearly and safely be drawn from the relevant context.

The letter cancelling the tender dated 22nd February 1988 which is plain as a pikestaff clearly manifested the decision of the Defendant to terminate the contract.

The Plaintiff too affirmed this position further by his Attorney-at-Law writing to the legal officer, Southern Region Transport Board that in addition to the refund of Rs.3,75,1972/- he would seek interest at 30 percent *per annum* on the said sum. In other words, except for the element of interest that the Plaintiff was seeking, he could not have been in doubt as to the termination of the contract. Again by **V6** dated 27.04.1988, the legal officer, Southern Region Transport Board wrote to the legal officer for the

Plaintiff that the Board was willing to refund the money back to the Plaintiff. This letter did not though respond to the question of interest, which the Plaintiff had demanded.

Remedies

An award of damages is the usual remedy for a breach of contract. It is an award of money that aims to compensate the innocent party for the financial losses they have suffered as a result of the breach. I have taken the view that it is the Southern Region Transport Board that suffered as a result of the breach of contract occasioned by the Plaintiff. But it was the Plaintiff who came to Court and won an award of damages in his favour.

The learned Additional District Judge of *Galle* took the view that the contract of sale between the parties was only for 10 metric tons of scrap Aluminium. This is a conclusion which he could not have reached having regard to the fact that the Plaintiff paid for 12 metric tons of scrap Aluminium. The learned Additional District Judge of *Galle* fell into error when he quite erroneously treated the underpayment as performance. It was a defective performance which amounted to a breach of the contract to pay for 21 metric tons of scrap Aluminium.

I have taken the view having regard to the contractual principles of offer and acceptance that the offer to buy incorporated the condition that the buyer (the Plaintiff) was consenting to buy the increased quantity of 20 metric tons that the seller decided upon and when the Defendant wrote **P3** dated 3rd February 1988, the offer to buy was accepted for a sale of 20 metric tons of scrap Aluminium.

If, as the learned Additional District Judge concluded that the contract was for 10 metric tons, it begs the question-*i.e.*, why did the Defendant pay for 12 metric tons of scrap Aluminium? The Defendant could have affirmed the contract by accepting the underpayment and sued the Defendant for damages. The Defendant did not proceed to do so and instead they wrote to the Plaintiff requesting him to take back the money. This was an acceptance of the repudiation of the contract by the contract breaker, who

in my view was the Plaintiff. The Defendant quite unequivocally treated the contract as discharged and it was so treated as at an end.

None of these principles were borne in mind by the learned Additional District Judge of *Galle* and thus there was a misdirection of facts and law that vitiates the judgment dated 07.04.1999. The pleadings disclose that the Plaintiff has already obtained the deposits that he had made with the Accountant of the Defendant and thus the Defendant does not have to make any restitution to the Plaintiff-*see* paragraph 14 of the amended answer dated 10th October 1991. If at all, the common law remedy of damages was available only to the Defendant Board and not to the Plaintiff. The Defendant though did not choose to sue the Plaintiff for damages nor has it sought any damages in the answer. Once again the want of a cross claim for damages in the answer is no doubt traceable to a misappreciation of the principles of contract law on the part of the pleader. The amended answer has only sought the dismissal of the plaint. The Plaintiff had no cause of action to institute this action against the Defendant as he was clearly in breach of his contractual obligations.

For the reasons stated above, I set aside the judgment of the learned District Judge of *Galle* dated 07th April 1999 and proceed to allow the appeal with costs.

JUDGE OF THE COURT OF APPEAL