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

C.A. Case No.259/2000 (F)

D.C. Colombo Case
No.10003/MR

Coconut Research Board,
Bandirippuwa Estate, Lunuwila.
PLAINTIFF

-Vs-

1. Forbes and walkers Ltd,
   No.46/38, Navam Mawatha,
   P.O. Box 60, Colombo 02.
2. W. J Patrick Lowe & Sons,
   Mudukatuwa, Marawila.

DEFENDANTS

AND

Coconut Research Board,
Bandirippuwa Estate, Lunuwila.
PLAINTIFF-APPELLANT

-Vs-

Forbes and walkers Ltd,
No.46/38, Navam Mawatha,
P.O.Box 60, Colombo 02.
1st DEFENDANT-RESPONDENT

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|---|---|---|
| BEFORE | : | A.H.M.D. Nawaz, J. |
| COUNSEL | : | Indula Ratnayake SC for the Plaintiff-Appellant |
| | | Geoffrey Alagaratnam P.C with Senuri de Silva for the 1st Defendant-Respondent |
| Decided on | : | 21.09.2018 |

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

The Plaintiff-Appellant (hereinafter sometimes referred to as "the Plaintiff") instituted this action on 13.08.1990 against the 1st Defendant-Respondent (hereinafter sometimes referred to as "the 1st Defendant") and the 2nd Defendant in the District Court jointly and severally averring that:-

a. The 1st Defendant was functioning as a broker at the material time.

   On or about 10.08.1987, the Plaintiff called for tenders in the form marked **P1** for the sale of coconuts. Clause 3.8 in **P1** provided that "*if the brokering firm does not make payments within the stipulated periods or if the buyer does not remove the nuts within the period specified in the contract any loss incurred by the Coconut Research Board (CRB) should be borne by the brokering firm*".

b. The 1st Defendant made an offer to the Plaintiff by document **P2** (p.37) wherein the 1st Defendant stated that it was in a position to negotiate the sale of coconuts in the quantities and the prices stated therein. The Plaintiff averred that this offer was accepted by a letter dated 20.08. 1987 marked **P3**-(p.38).

c. Prior to the document **P3** on 14.08. 1987, the 1st Defendant acting as a broker sold the coconuts on behalf of the Plaintiff to the 2nd Defendant by contract marked **P4.**

d. As the 1st Defendant failed to effect payment and collect the coconuts, and 1st Defendant and 2nd Defendant having thus violated the contract entered into **(P4),** the Plaintiff was compelled to sell the coconuts to a 3rd party at a lesser value-para 8 & 9 of the plaint p.33.

e. As a result of the breach of contract by the Defendants, the Plaintiff suffered losses in a sum of Rs.153,745/85 and thus a cause of action arose to the Plaintiff to sue them to recover the said sum.

The 2nd Defendant did not file proxy and thus the case was fixed *ex parte* against the 2nd Defendant.

The 1st Defendant filed an amended answer and it set forth its position thus:-

a. The 1st Defendant was only a broker and as such was not liable on the contract entered into between the Plaintiff (seller) and the 2nd Defendant (buyer).

b. The document **P1** has no relevance to the transaction in question and in any event does not bind the 1st Defendant.

c. Document **P4** which is admittedly the contractual document and upon which the Plaintiff's purported cause of action is based expressly excludes the 1st Defendant liability in the event of any breach by the buyer and the action cannot be maintained against the 1st Defendant.

d. The Plaint of the Plaintiff was prescribed in law.

The learned Additional District Judge by his judgment dated 16.03.2000 held against the Plaintiff and dismissed the case against the 1st Defendant on the ground that the cause of action was based on **P4** and that 1st Defendant who acted as broker at the material time was not a party to **P4** and not liable upon breach of P4 by the 2nd Defendant. However, the learned Additional District Judge further held that the 2nd Defendant was liable for the breach of **P4**. Accordingly he ordered that the amount prayed for by the Plaintiff and legal fees be paid by the 2nd Defendant.

Aggrieved by the judgment of the Additional District Judge of *Colombo* the Plaintiff has preferred this appeal to set aside the judgment of the learned Additional District Judge that was entered in favor of the 1st Defendant.

In order to ascertain the correctness of the decision of the District Court it becomes necessary to draw attention to the evidence led in this case.

**The Evidence before the District Court**

One M.R.P.S. Liyanagama, an Assistant General Manager of the Plaintiff Board and D.J.S.N. Nalliah of M/s Daniel and Company testified on behalf of the Plaintiff and marked in evidence documents **P-1-P14.**

The 1st Defendant did not adduce any evidence. However the 1st Defendant cross examined the Plaintiff's witnesses.

**Plaintiff's cause of Action is based on the contract P4**

Upon a perusal of the plaint it is quite clear that the Plaintiff's cause of action was premised upon the document P4.

The Plaintiff states in paragraph 6 of its plaint that the 1st Defendant, a brokering firm on behalf of the Plaintiff sold the 4th quarter produce of the Rathmalagara Estate consisting of 173,200 coconuts to the 2nd Defendant by contract bearing No.107/737 and date d 14.08.1987, which was marked **P4**.

Paragraph 9 of the Plaint further states that in terms of contract **P4** the Plaintiff ought to have received Rs.433,814.04 and that as a result of the breach of **P4** and the resale od coconuts, the Plaintiff received a sum of Rs.153,462.67 less than what it should have received.

Paragraph 10 reiterates this by stating "in consequence of the Defendants' breach of the contract **P4,** the Plaintiff suffered damages in a sum of Rs. 153745.67".

Paragraph 12 addressing the cause of action states:-

> *"as a result, the Plaintiff states that a cause of action has arisen to the Plaintiff to recover the said sum together with costs jointly and severally from the Defendants."*

Upon a perusal of the plaint it becomes very clear that the cause of action to recover moneys claimed is based on the alleged breach of contract **P4** by the 1st Defendant.

This position is further strengthened by the evidence of. P.S. Liyanagama who admits at page 10 of the proceedings of 15.10.1998 that the contract upon which the cause of action was based on the contract P4-(p.76).

Furthermore in re-examination (p.12) of the same proceedings (p.78 of the brief) the witness again admits to a question from his own counsel at follows:-

> Q: My learned friend suggested to you in cross examination that the Plaintiff seeks relief in terms of contract **P4** (shown **P4**) has the Plaintiff sought relief in terms of P4?
>
> A: Yes

Thereafter one could see the Counsel for the Plaintiff posing a leading question to the witness as if in a bid to show that the Plaintiff was relying on both **P1** and **P4.**

Paragraph 5 of the Petition of Appeal mirrors this attempt:

> *"the Plaintiff marked P1, P2, P3, P4 which were documents showing contractual nature of the claim of the Plaintiff and P5-P14 which were the other pertinent documents."*

The learned President's Counsel for the 1st Defendant-Respondent contended that this is a new position which was not taken up in the plaint nor was evidence led to such effect and therefore the attempt to expand the basis of the cause of action in Appeal cannot be countenanced.

**Plaintiff cannot approbate and reprobate**

The Plaintiff relies on contract **P4** for the relief it seeks. The corollary would then follow. The Plaintiff must either accept the entire contract P4 or reject it in its entirety. The law does not permit a person to take benefit of a document and at the same time repudiate the the document or any part of it as may be beneficial for his case. This is encapsulated in the popular expression-one cannot blow hot and cold.

In the case of *Ceylon Plywoods Corporation v. Samastha Lanka G.N.S.M & Rajya Sanstha Sevaka Sangamaya* (1992) 1 Sri L.R 157 Sarath Slva, J. at p.163 states as follows:-

*"The workmen by making their application to the Labour Tribunal were attempting to circumvent the terms and conditions of the circular after having received the benefits due upon it . A legal procedure in the nature of an application to the Labour Tribunal in terms of Section 31B (1) cannot be resorted to for such a purpose. The doctrine of approbate and reprobate (**quad approbo and non reprobo**) is based on the principle that no person can accept and reject the same instrument."*

This equitable principle has been reiterated in a number of English cases including ***Barclays Bank Trust Co. Ltd v. Bluff*** 1981 3 All ER 232 and in ***Bartlam v. Evans*** 1936 1KB 202 at p.211. In his dissenting judgment Greer L.J in ***Bartlam*** states as follows:-

*"It was put by one of my brethren on the ground that a man is not entitled to reprobate that which he has already approbated. In my view, that principle has no application to this case, because it is based on this, that a man may not at one moment take an advantage of some agreement or some fact and at a later moment when it suits him reprobate that which he has approved."*

On this reasoning if the Plaintiff rejects **P4** as their contractual basis, there is no cause of action and their action should be dismissed. On the other hand if the Plaintiff accepts **P4** as they have done in the pleadings and evidence, then they cannot reject any part of the contract and are bound to accept the whole contract.

A perusal of the contractual document brings out an important aspect.

**Exemption of liability of the 1st Defendant by P4**

The contract **P4** specifically exempts liability of the 1st Defendant under the contract in the event of breach of same by the buyer. Under the margin note 'Delivery' the contract specifically states, *"The seller holds the rights to re-sell the nuts if not removed within the stipulated period and any differences in the price will have to be borne by the buyer."*

Thus the contract **P4** specifically exempts the 1st Defendant from liability in the event of a breach by the buyer and it is the buyer alone who undertakes to bear the loss arising from differences in price if the seller is required to re-sell the goods in the event of a default on the part of the buyer.

The Plaintiff attempts to rely on P1 in holding the Defendants liable for the loss arising from the re-sale of the goods to the third party. This is on the basis that **P1** dated 01.06.1984 related to the conditions upon which the tender procedure was effected. Clause 3.8 in **P1** provided that, "*if the brokering firm does not make payments within the stipulated periods or if the buyer does not remove the nuts within the period specified in the contract any loss incurred by the coconut research Board (CRB) should be borne by the brokering firm*"-p.35.

**P4** the contractual document has not in any way referred to **P1** or subjected it to the terms and conditions set out in **P1** in terms of liability in the event of default. In light of this ambiguity, **P4** the contractual document upon which the cause of action is based stands alone and should be given effect to.

By **P4**, the agent has dropped out of the transaction and no liability can be imposed upon the 1st Defendant for breach of contract on the part of the 2nd Defendant.

**The Plaintiff cannot now shift the cause of action away from P4**

The Civil Procedure Code and the precedents have unequivocally established that once a Plaintiff pleads in its plaint a particular set of facts as its cause of action, it cannot in the course of the trial attempt to alter or vary the cause of action.

The second explanation to Section 150 of the Civil Procedure Code states as follows:-

> "*The case enunciated must reasonably accord with the party's pleading i.e. plaint or answer, as the case may be. And no party can be allowed to make at the trial a case materially different from that which he has placed on record, and which his opponent is prepared to meet....*"

This principle has been endorsed in *Thalwatte v. Somasunderam* 1996 BALJ vol.VI Part II and 14 and *Uvais v. Punyawathie* (1993) 2 Sri L.R 46 at page 52.

The Plaintiff before District Court sought to raise as Issue No.1 the question of whether the 1st Defendant made an offer by P2 and whether it was accepted by the Plaintiff by letter **P3**. Furthermore in evidence Plaintiff sought to establish that the terms of the tender **P1** is the basis upon which the 1st Defendant made the offer **P2** and thereby attempted to make **P1** part of the contract. As the learned President's Counsel for the 1st Defendant-

Respondent submitted, this approach would be tantamount to an attempt to avoid the admitted contractual obligations set forth in **P4** and exclusion clause contained therein and instead rely on a purported contract arising by P2 and **P3**.

I hold that having made out that P4 is the contractual document, it does not lie in the mouth of the Plaintiff to peg its cause of action on P2 and **P3**.

**P2 and P3 read together cannot constitute a contract by and between the Plaintiff and the 1st Defendant**

The learned State Counsel argued that the scheme of tender **P1** is the document upon which the parties intended to contract for same to be binding on the 1st Defendant. I must state that **P1** is not signed nor is it accepted by the 1st Defendant in any manner as containing any contractual terms upon which the 1st Defendant is bound. Secondly neither is **P1** incorporated in the contract **P4** upon which the cause of action is based.

In the circumstances, If **P1** is a component part of the contract, it would be incorporated as an implied term of contract. The onus lies on the Plaintiff to have displayed the precise manner in which the 1st Defendant agreed to the terms contained in **P1**. However, the Plaintiff during the trial before the District Court has failed to prove how **P1** was incorporated as part of the contract nor how it was brought to the attention of the 1st Defendant. It has to be noted that **P1** is dated 01.06.1984 and the contract which is in dispute was entered into August 1987 after a lapse of more than three years since **P1**.

On an application of the contractual principles it is clear that a contract cannot be entered into by way of an exchange of **P2** and **P3**.

According to the Plaintiff, the 1st Defendant responded to a notice which called for tenders and was published by the Plaintiff. Issue No.1(a) raised by the Plaintiff goes as follws:

*"Did the Plaintiff call for tenders for sale of the 4th quarter coconut yield of Rathmalgama Estate by notice of tender dated 10.08.1987?"*

Firstly, this issue describes a notice of tender which is not **P1**. Secondly in order to even remotely infer that **P1** was part and parcel of the particular Notice of Tender, reference

should be made to **P1** in the Notice of Tender. However the Plaintiff has not proved that **P1** was part and parcel of the notice of tender. The Plaintiff has merely sought to allege that the tender was in accordance with the scheme **P1** dated three years previously.

The failure to produce and mark the Notice of Tender must lead the Court to draw an adverse inference against the Plaintiff in answering the question as to whether the tender notice was based on **P1**. The illustration (f) to Section 114 of the Evidence Ordinance states as follows:-

*"evidence which could be and is not produced would if produced, be unfavourable to the person who withholds it."*

The Plaintiff had alleged that the document **'P2'** is an "offer" made by the 1st Defendant. However **'P2'** does not refer to the document **P1** in any manner whatsoever or to any other specific notice of tender and even if P2 can be construed to be an offer, it does not bind the 1st Defendant to the terms of **P1.** If this position is correct as per Contract Law the notice of tender would constitute an "Invitation to Treat" as it were a public notice calling for further negotiations. Anson's Law of Contract 29th Ed. P 33 describes an Invitation to treat as one that contemplates further negotiations to take place and furthermore if it is a statement or act of this nature, it is not intended to be binding. Therefore in any event the 1st Defendant cannot be bound by the notice of tender as it is not an offer which is definitive of the binding contractual terms. In Rule 7 of the *Restatement of the English Law of Contract* by Andrew Burrows, it is stated that the following are usually invitations to trear and not offers-

(a) The display of goods for sale
(b) An advertisement of goods for sale'
(c) An invitation to tender

In another codification of contract law-*Contract Rules-Decoding English Law Neil Andrews* in Article 10 states that an invitor requesting tenders does not normally commit himself to award a tender to any of the invitees-see *J Cartright, Formation and Variation of Contracts (London, 2014), 2-24.*

Anson's Law of Contract 29th Ed. P 33 defines "Offer" as follows "An Offer is an intimation by words or conduct of a willingness to enter into a legally binding contract, and which in its terms expressly or impliedly indicates that it is to become binding on the offeror as soon as it has been accepted by an act, forbearance, or return promise on the part of the person to whom it is addressed to."

Therefore **P2** would not constitute an offer as is understood in the Law of Contract. The law distinguishes between an offer that is capable of being accepted and a mere statement by way of quoting a price. In the case of *Harvey v. Facey* (1893) AC 552 court held that even where the Plaintiff had written "will you sell us Bumper Hall Pen Telegraph lowest price," and the Defendant replied lowest price for Bumper Hall Pen 900 pounds, this statement by the Defendant was held to be only an indication of price and not an offer that can be accepted.

Similarly, in *Clifton v. Palumbo* 1944 2 AER 497 the court held that the Defendant's statement "I am prepared to offer you my Lythem Estate for 600,000 Pounds was held not to constitute an offer".

Relying on the above authorities it was argued that the 1st Defendant's letter of 14.08.1987 (P2) which states simply that "and we are pleased to advise you that we are in a position to negotiate sales as follows..." is not an offer but only an indication of the possible negotiable price for the coconuts and in fact it is not even a confirmed price.

This argument is irresistible and supportable in contract law and by that analogy if **P2** is not an offer, then the Plaintiff's letter **P3** cannot constitute an acceptance of **P2**. Furthermore, in any event **P3** makes no reference to P1 but only to a letter dated 17.06.1984. There was no evidence led as to the nature of the contents of this letter dated 17.06.1984 which has neither been produced nor marked in evidence.

Further **P3** cannot be foisted as part of the contract where **P4** is clear.

Even if it is submitted that **P2** constitutes an offer, it is observed P2 is dated 14.08.1987. **P2** is admitted to be a contractual document by the Plaintiff where the broker has bound the

2nd Defendant (buyer) and the Plaintiff in contract. For a contract to exist it is axiomatic that both an offer and acceptance are essential ingredients.

It is contradictory for the Plaintiff to rely on **P3** which was issued on 20.08.1987. After **P4** the contract was concluded to signify acceptance. It is even more contradictory as **P3** states that, "kindly submit contract documents within a week along with a remittance of 10% of the contract value".

Therefore no contract has been formed by and between the parties by an exchange of **P2** and **P3**. On the evidence it is more reasonable to conclude that **P4** is the contract upon which the Plaintiff relies upon as P3 cannot add fresh terms to a concluded contract as admitted by the witness of the Plaintiff in page 12 of the proceedings dated 14.08.1987. Thus as per the terms of **P4** the 1st Defendant is excluded from any liability.

**In a nutshell the following salient elements emerge.**

a. The 1st Defendant being a broker and not having expressly and or impliedly undertaken to be bound by the terms of document **P1**, is not liable in law for the default of the buyer introduced by him.

b. The Plaintiff's case is based on **P4**, as borne out by the Plaint itself and the evidence and documents. The Contract P4 expressly exempts liability of the 1st Defendant and holds the 2nd Defendant (buyer) responsible for the Plaintiff as his principal for defaults of the 2nd Defendant.

c. The Plaintiff cannot approbate and reprobate the contract **P4** and must therefore accept the clause excluding liability of the 1st Defendant.

d. No proof had been adduced as to how document **P1** on which the Plaintiff seeks to rely can be associated with the contract P4 as it is not referred to in **P2** or **P3** and as **P4** contradicts P1.

e. The Plaintiff cannot in any event now seek to base his cause of action on an agreement other than **P4**.

In the circumstances I hold that the Plaintiff did not make out a case of breach of contract against the 1st Defendant and the learned Additional District Judge of Colombo came to the right decision by dismissing the action of the Plaintiff against the 1st Defendant in his judgment dated 16.03.2000.

I therefore affirm the judgment and dismiss the appeal of the Plaintiff-Appellant.

JUDGE OF THE COURT OF APPEAL