

## ABEYRATNA

v.

## THE ATTORNEY-GENERAL

COURT OF APPEAL.

TAMBAIAH, J. AND T. D. G. DE ALWIS, J.

C.A. 374/76 (F).

D.C. COLOMBO 77752/M.

SEPTEMBER 24, 25, 1984.

*Contract – Building contract entered into by builder on assumption induced by agent of contracting Board – Failure of assumption to materialise – Devaluation – Changed conditions and claim for enhanced payment.*

The plaintiff contracted with the Tender Board of the Ministry of Education to construct some office buildings for the Education Office in Kurunegala at low rates acceptable to the Tender Board on the assumption (induced by Ratnayake, the Superintending Engineer of the Department of Education) that he could buy the necessary materials from the Government Stores at government prices. But this assumption did not materialise. There was delay in completing the constructions. Extensions of time were given and in the meantime the rupee and pound sterling were devalued causing prices to escalate further. The plaintiff completed the contract and claimed extra payment.

Held –

The assumption induced by Ratnayake that materials could be obtained from the Government Stores at government prices and the failure of the Government to make available the necessary materials and the devaluation of currency created a fundamentally changed situation and justified plaintiff's claim for an enhanced payment over the contract price. A new contract by the State could be implied to pay the additional sum over and above the contract price.

Cases referred to :

- (1) *Bush v. Whitehaven Trustees* (1888) 52 J.P. 392.
- (2) *Davis Contractors Ltd. v. Fareham Urban District Council* [1955] 1 All ER 275, 277.
- (3) *F. A. Tamlin SS Co. Ltd. v. Anglo-Mexican Petroleum Products Co. Ltd.* [1916] 2A. C. 403.

APPEAL from the District Court of Colombo.

*Nimal Senanayake, P. C. with Nalin Abeynaike, Mrs. A. B. Dissanayake, Miss Tharanga de Silva and R. Jogendran for the plaintiff - appellant.*

*S. W. B. Wadugodapitiya, Additional Solicitor-General for the defendant – respondent.*

November 15, 1984.

**TAMBIAH, J.**

- The admitted facts in the case are that the Director of Education invited tenders in 1966 for the construction of office buildings for the Education Office in Kurunegala, that all the contractors, including the plaintiff, had quoted higher rates which the State was unwilling to pay, that the modified tender submitted by the plaintiff-appellant was accepted by the Tender Board of the Ministry of Education, that the contract (P1) between the plaintiff and the Director of Education was signed on 29.9.66 in terms of which the construction had to be completed on or before 29.6.67 and the contracted amount for the said work was Rs. 172,761/10 cts., that the plaintiff was given extensions twice and the building was completed on 23.7.69 and that there was a devaluation of the Rupee on 17.11.67.

As a building contractor, the plaintiff says that he had undertaken other contracts as well for the Government – the building of the Kegalle Hospital for 12 lakhs and the Kegalle Education Office for 3 lakhs.

The plaintiff's evidence is that all the contractors, including him, who tendered for this work had quoted rates higher than the government rates, that thereafter there was a discussion between him and Mr. Ratnayake, who was then the Superintending Engineer of the Department of Education and also a member of the Tender Board. At the discussion, he told Mr. Ratnayake that prices of materials had gone up and it was difficult to undertake the contract at the rates given by the Department, and Mr. Ratnayake told him that he will get down the necessary materials from the Government Stores at government prices. In the letter P24 dated 23.3.69, he reiterated his position that he undertook the contract because he was assured that the necessary equipment would be provided by the government. In short, his position was that he was persuaded to undertake the contract at lower rates because of the assurance given that materials would be supplied to him from the Government Stores at low costs.

Mr. Ratnayake, a witness for the State, admitted that he spoke to the plaintiff and asked him whether he was willing to take over the work according to the estimates of the Department; that the quotations of all the contractors were higher than the Department's quotations; that the plaintiff undertook the contract on lower

quotations than those submitted by him. He denied that he told the plaintiff that if he undertook the contract, he would supply materials to him. According to him, materials were available in the market. He did not encourage the plaintiff to undertake the contract.

After the site was handed to the plaintiff, he commenced work and he had difficulty in obtaining materials. In the letters P2 and P5 written by the plaintiff, he complained that iron required for beams and the roof was not available in the market or at the Steel Corporation and requested that they be supplied from the Government Stores. The letter P3 dated 2.6.67 written by the Director of Education, Kurunegala, to the Secretary, Ministry of Education, referred to the request of the plaintiff that he be supplied with iron from the Government Stores and states that as the plaintiff is attempting to complete the work within the financial year, arrangements be made to have them supplied to him. The letter P 34 written by the Engineer, School Buildings, to the Secretary, Ministry of Education, refers to the fact that the amount of each tender was above the departmental estimate, that the plaintiff agreed to complete the work for the estimated amount, and proceeds to state that the period of completion was extended on several occasions since the imported materials such as iron, asbestos sheets, glass, sanitary equipment and cement were not available in the open market and that although the contractor had taken action to import them from abroad, the Department and the Steel Corporation have failed to supply the same.

In November, 1967, an event not in contemplation at the time the contract was entered into took place, namely, the devaluation of the Rupee. The plaintiff was able to bring the work up to foundation level only. The Treasury received representations from many Government Departments that Contractors and Suppliers have asked for increased costs for supplies and services consequent on the devaluation of the Pound Sterling and of the Ceylon Rupee. The Treasury Circular dated 9.2.68 (P31) was issued to all Permanent Secretaries and Heads of Departments. Inter alia, it stated that if any claim for upward revision of prices based on factors such as increase in wages or costs of raw materials are made, the requests were to be examined by the Tender Board of the Ministry, and the Permanent Secretary on the advice of the Board may authorise an increase. The Circular gave guidelines to officers who were called upon to deal with claims of Contractors for increased payments.

The plaintiff wrote the letters P8, P9, P11 and P12 and asked for an additional payment of 20%, as, on account of the devaluation, prices of goods in the market had trebled, and he requested that either the goods be supplied to him at the original prices or he be paid the additional payment, otherwise, he will be forced to abandon the work and go in for a settlement. He then received the letter P13 from the Acting Superintending Engineer writing for the Secretary, Ministry of Education, stating that a "decision would be taken to change the rates in due course". By letter P14, the plaintiff asked for a specific reply to his request for additional payment and he received the reply P15 from the Acting Superintending Engineer, writing for the Secretary, Ministry of Education, that "action is being taken to increase the contracted amount. I would be informing you no sooner a decision is taken". The Engineer, School Buildings, wrote him the letter P16 and stated that his request for additional payment had been replied to by the Ministry and ended by saying that he would be glad if the plaintiff could re-commence work without any further delay.

Thereafter the plaintiff wrote the letter P17 and pressed for an early decision in regard to enhanced payment and referred to the fact that when he undertook the contract he was promised a permit to import sanitaryware, glass, and other equipment, but he had not received the permit as yet, that though he was promised on 28.5.67, that all iron would be supplied from the Government Stores, even after the lapse of two years, he has not received them, that work was being continued at great loss and if he continued, he would be a bankrupt. He asked for permission to use wood instead of iron for the roof. He pressed for early payment of the additional payment, otherwise, he would have to halt the work. The 1st extension of time was then granted to him till 20.11.68 by letter P20

The plaintiff then wrote the letter P22 to the Permanent Secretary in which he stated that he has come to know that he had approved a payment of 15% more and requested an increase by at least 25%, as the rates he quoted for materials and costs of labour were far below the amounts he had actually expended. The 2nd extension of time till 31.1.69 was granted to him by letter P23.

The plaintiff wrote the letter P24 to the Regional Director of Education, Kurunegala, and stated that as iron was not forthcoming from the Government Stores, to continue the work he had to purchase iron at exorbitant prices caused by the devaluation of the Rupee; that because he was informed that a decision regarding his request for additional payment will be sent, he therefore continued with the balance work and requested a payment of 20% more as has been paid to other contractors; that because of losses, he thought of abandoning the work but did not do so because of the request of the Superintending Engineer and the Director of Education, Kurunegala; that extension of time was given him because his work was satisfactory and there were excusable reasons for the delay; that unless the additional payment is paid on or before 31.03.1969, he would halt the rest of the work and take legal action to claim damages. In the letter P 34, written by the Engineer, School Buildings, for the Director of Education, Kurunegala, to the Secretary, Ministry of Education, the former refers to the contractor's request for additional payment and states "you have informed by letter dated 11.03.1968 that a decision would be taken regarding the change of rates. The contractor was informed accordingly and after several discussions he has taken steps to complete the work satisfactorily by finding the required material somehow or other as soon as possible"

The work was completed and even after completion, the plaintiff continued to write to the authorities the letters P26-P30 requesting additional payment, but without success.

It was the case of the plaintiff that consequent to the devaluation of the Rupee, there was a marked increase in the prices of materials and costs of labour, that he was given the impression that the additional amount asked for would be paid to him, and he continued and completed the work because of this impression given him that he would receive enhanced payment. The plaintiff claimed Rs. 33,190 as additional payment for work done and completed, after the devaluation.

Issues 1 and 2 raised on behalf of the plaintiff are—

1. Did the Director of Education at the relevant time impliedly or expressly agree to pay an increased contract price?
2. Did the plaintiff perform the contract on such implied or express undertaking?

The case for the State was—

- (1) That there were no shortages during the original period of the contract; material was available both at the commencement and during the period originally stipulated for its completion. The letters P2 and P5 were written after the due date of completion of the contract.
- (2) The letters D1-D5 to the plaintiff written between November, 1966 and May, 1967 show that the plaintiff had abandoned work for 7 months when material was available, and the Director of Education, Kurunegala, was complaining of undue delay.
- (3) The plaintiff should have completed the work before devaluation in November 1967, and because of his delay, he cannot now seek to obtain relief as a result of devaluation. The Tender Board decided (D8) "that the work was due to be completed on 20.06.1967. The devaluation was in November 1967. Hence the contractor is not entitled for an additional payment due to the devaluation of the Rupee".
- (4) The letter P13 only informed the plaintiff that a decision in regard to change of rates is under consideration and not that a decision to vary the rates has been made. All that P15 attempts to convey is that once the decision is taken, it will be conveyed to the plaintiff, which, means, a decision had yet to be made. That the plaintiff himself understood P13 and P15 to mean that the matter was under consideration is borne out by his letter P17. If at all, P13 and P15 contained only a promise to consider, not a promise to pay the additional payment.
- (5) The circular P31, issued by the Treasury to Heads of Departments contains administrative directions in general terms and sets out guidelines to officers who deal with claims of contractors for enhanced payments. The plaintiff cannot base his claim on this circular; it contains no promise, undertaking or assurance for the payment of enhanced amounts.

The learned trial Judge has arrived at the following findings :—

- (1) The plaintiff accepted the contract on quotations lower than the quotations in his tender because of the promise of Ratnayake that materials could be obtained from the Government Stores.
- (2) Due to the non-availability of necessary iron and wires and other materials in the local market, the plaintiff's work was delayed. The plaintiff could not have completed the work on 29.06.1967 and the plaintiff is not responsible for this.
- (3) Letters P13 and P15 made the plaintiff to understand that the additional amount would be paid, without telling him directly whether he would get it or not, and thereby induced him to work.

The learned trial Judge having posed the question—"The only question that has to be considered in this case is whether the plaintiff is entitled to demand a higher amount due to the devaluation of the sterling pound and the rupee"—concluded—"a mere statement of one party that a higher amount could be paid does not make it a contract. If the terms of the contract entered between the Department and the plaintiff are altered, it has to be done with the consent of both parties. It does not appear that there is such a contract. The plaintiff cannot obtain an enhanced amount". He answered issues 1 and 2 in the negative.

Learned President's Counsel submitted that the finding of the learned District Judge is that the plaintiff would not have undertaken the building contract but for the assurance given by Ratnayake that materials would be supplied from the Government stores. This was the basis or footing upon which the contract was made and the basis or footing of the contract was so changed that the contractor was no longer bound by the contract price and he was entitled to the payment of an extra sum of Rs. 33,190. He said that the case came within the principle of *Bush v. Whitehaven Trustees* (1).

The report of this case is not available but the facts and decision in *Bush's case* are sufficiently set out in the judgment of Denning, L. J. in *Davis Contractors Ltd. v. Fareham Urban District Council* (2)—

"The facts were these : In 1886 Bush agreed with the trustees to build a water-main in the Lake District for £1,335. The contract was made in June and the work was to be done in the next four months, which were the dry summer months. Bush made his tender on that

footing. The trustees were to give him possession of the site as and when required, but they failed to do so. The land was not all available until October 6. The result was that the work had to be done in the wet winter months instead of the dry summer months. Bush claimed an extra payment on that account. His difficulty was that there was an express clause in the contract saying that, if the site was not made available in time, the contractor should be entitled to an extension of time but not to any increase of payment; but the courts got over that clause. The jury found that the conditions of the contract were so completely changed, in consequences of the defendants' inability to hand over the site in the time required, as to make the special provisions of the contract inapplicable. On that finding it was held by this court that Bush was entitled to a further £600 over and above the contract price. Lord Vasher, H. R. said (2 Hudson's B. C., 4th Edn. at p131) that—

"the condition of things had been so altered after the making of the original contract (they had been so greatly altered) that it was not reasonable, or right, or fair, or just to hold that the original contract was made with regard to these circumstances."

He held that in the new situation Bush had a claim for a fair remuneration for the work done, in other words, to a quantum meruit."

In *Davis' case Morris, L. J.* (at p. 281) has quoted a passage in the speech of *Earl Loreburn in F. A. Tamlin SS Co., Ltd. v. Anglo-Mexican Petroleum Products Co. Ltd.* (3).

"But a court can and ought to examine the contract and the circumstances in which it was made, not of course to vary, but only to explain it, in order to see whether or not from the nature of it the parties must have made their bargain on the footing that a particular thing or state of things would continue to exist. And if they must have done so, then a term to that effect will be implied, though it be not expressed in the contract . . . . . In most of the cases it is said that there was an implied condition in the contract which operated to release the parties from performing it, and in all of them I think that was at bottom the principle upon which the court proceeded. It is in my opinion the true principle, for no court has an absolving power, but it can infer from the nature of the contract and the surrounding circumstances that a condition which is not expressed was a foundation on which the parties contracted."

Let me examine the circumstances in which the contract was made. Here was a contractor whose tender was above the estimates of the Department of Education. He was persuaded by Mr. Ratnayake to undertake the building contract at the estimates of the Department and he was assured by Mr. Ratnayake, himself a member of the Tender Board, that the required materials to build would be supplied to him from the Government Stores at low prices. He undertook the contract because of this undertaking or assurance; otherwise he would not have. This was the footing or foundation upon which the parties contracted. Though this footing or foundation was not expressed in the contract, having regard to the circumstances in which the contract was entered into, a term to that effect has to be implied or inferred.

I cannot accept the contention of learned Additional Solicitor-General that Ratnayake gave this assurance in his private capacity and not on behalf of the State. He was a member of the Tender Board and acted as agent of the Tender Board. The Board knew that the plaintiff's first tender quoted rates higher than the Government rates.

The required materials from the Government Stores were not supplied; nor were they available in the local market. The plaintiff could not complete the building within time; the fault was not his. In November '67, an event, not caused by the contractor, took place. He was caught up in the devaluation and the prices of materials and labour charges soared. He completed the building, having purchased the materials at enhanced prices.

The plaintiff was entitled to assume that the footing upon which he entered into the contract would continue, namely, that materials from the Government Stores would be available at low costs. The State failed to make available the necessary materials, and this created a fundamentally different situation. The footing of the contract was so changed that it will be unjust to hold the plaintiff bound by the contract price. He is entitled to be released from the contract price and recover the extra amount he had incurred, over and above the contract price.

The plaintiff wrote the letters P8, P9, P11 and P12 and requested an additional payment of 20%, as, due to the devaluation of the rupee, prices of goods had shot up. He received the reply (P13) that a decision would be taken in due course, to change the rates. To his

further request for a specific reply, he was told (P15) that action was being taken to increase the contract price and he would be informed the moment a decision was taken. Twice he asked for extension of time to complete the building, and the extensions were given. It was within the power of the State to have terminated the contract when the plaintiff failed to complete the contract within the period stipulated, but it did not. The plaintiff carried on and completed the construction. The finding of the learned Judge is that the letters P13 and P15, though they did not expressly tell him he would be paid, made the plaintiff understand that the additional sum would be paid and thereby induced him to work.

"It may happen that the contract has been abandoned, or that the circumstances contemplated by it have become so changed that the conditions have become inapplicable. In such a case, if the builder or contractor has been encouraged to go on with the work, a new contract by the building owner or employer to pay a quantum meruit may be implied from such of the facts as are applicable." (*Halsbury's Laws of England, 3rd Edn. Vol. 3, pp. 435, 436, para. 819*).

The State failed to fulfil its undertaking to supply the required materials from the Government Stores. The circumstances contemplated by the parties become so changed that the provision in the contract as to the amount payable become inapplicable. The letters P13 and P15 encouraged the plaintiff to go on with work and he did so and completed it. A new contract by the State may be implied to pay the plaintiff the additional sum he claimed, over and above the contract price.

The answer to issue 1 should be "Yes, impliedly" and to issue 2 should be "Yes, on such implied undertaking".

The appeal is allowed with costs. The plaintiff will be entitled to judgment in a sum of Rs. 33,190 as prayed for.

T. D. G. DE ALWIS, J. – I agree.

*Appeal allowed.*