

1952

*Present : Pulle J. and L. M. D. de Silva J.*

URBAN COUNCIL, MATALE, Appellant, and H. WEERASINGHE,  
Respondent

*S. C. 69—D. C. Matale, 338*

*Contract—Tender—Execution of a further contract—Circumstances when it is necessary as a condition.*

Tenders for the erection of certain buildings were called for by the defendant. The tender notice stated that the successful tenderer should be prepared to enter into an agreement with the defendant and to deposit a certain portion of the tendered amount in the name of the defendant for the due completion of the contract within a period of 5 months from the date of signing the contract; if the successful tenderer declined to enter into an agreement within 10 days of notification of the acceptance of the tender, his tender would be cancelled and the deposit forfeited. The plaintiff's tender was accepted.

*Held*, that a binding contract for the erection of buildings could have arisen only on the execution of a formal agreement between the plaintiff and defendant.

"If the documents or letters relied on as constituting a contract contemplate the execution of a further contract between the parties, it is a question of construction whether the execution of the further contract is a condition or term of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through."

**A**PPEAL from a judgment of the District Court, Matale.

*H. V. Perera, Q.C.*, with *T. B. Dissanayake* and *G. L. L. de Silva*, for the defendant appellant.

*N. E. Weerasooria, Q.C.*, with *H. W. Jayewardene* and *P. Ranasinghe*, for the plaintiff respondent.

*Cur. adv. vult.*

December 12, 1952. L. M. D. DE SILVA J.—

The plaintiff in this case sues the Urban District Council of Matale for damages for breach of a contract which he says that the Council entered into with him. The chief question which arises is whether there is a binding contract between the parties and if this question is answered in the negative the plaintiff's action fails. As we are of that opinion we do not propose to discuss any other questions.

The facts are accurately stated in the judgment of the learned District Judge and we recapitulate here only such facts as are necessary for the purpose of the conclusions we have arrived at.

By a tender notice dated the 7th June, 1949, tenders for the erection of certain buildings on two sites A and B were called for by the defendant council. Paragraph 3 of the notice was to the following effect :—

“ Successful tenderers must be prepared to enter into an agreement with the Chairman, Urban Council, Matale, and will be required to deposit a sum equal to 5% of the tendered amount in the name of the Chairman, Urban Council, Matale, at the Council Office for the due completion of the contract at the rates quoted and within a period of 5 months from the date of signing the contract. Should the successful tenderer decline to enter into an Agreement within 10 days of notification of the acceptance of the tender, his tender will be cancelled and the deposit forfeited.”

The “ Form of Tender ” on which tenderers were required to tender, and on which the plaintiff tendered, contained the following clauses :—

“ And.....do hereby undertake to have the whole of the work comprised in Group ‘ B ’ which are described in the drawings and specifications complete within the period of 5 months from the date of the signing of the agreement hereinafter referred to, and.....undertake to employ only Ceylonese labour in the execution of this contract . . . .

And.....further undertake in the event of this tender being accepted, to execute when called upon by the Chairman, Urban Council, Matale, to do so, an Agreement for the due performance of the works, and before the Agreement is signed to deposit a sum equal to 5% (five per cent.) of the accepted tender amount in the Bank of Ceylon in the name of the Chairman, Urban Council, Matale, and to mortgage and hypothecate the same as security or to execute a bond with a bank approved by the Chairman, Urban Council, Matale, as security in favour of the Urban Council, Matale, for the due and satisfactory completion of the whole of the said works as well as such additional work as may be ordered, and for the maintenance in complete repair of the whole of the works for the space of six months from the date of completion thereof and for the payment of all claims to which the Urban Council of Matale may be entitled to under the provisions of the Agreement. ”

A document called the “ Condition of Tender ” contained the following clause :—

“ If a tenderer within 10 days of his being noticed to do so by the Chairman, Urban Council, Matale, declines or fails to enter into an Agreement on the basis of his tender and/or fails to deposit the security or execute the bond referred to in paragraph 13 of these conditions, the tender deposit will be forfeited.”

The plaintiff tendered for both groups and his tenders were accepted.

The buildings referred to in the tender notice as those which had to be erected on site A are referred to in this judgment as site A buildings and those to be erected on site B as site B buildings. A formal “ agreement ” for erection of buildings on site B as contemplated by the document referred to was executed but before this was done the parties agreed that the buildings to be erected thereon were to be site A buildings and that the buildings to be erected on site A were to be site B buildings. The formal agreement has not been produced and we are not aware whether the variation referred to was embodied in it. Be that as it may, site A buildings were constructed on site B and the plaintiff does not in this case make any claim upon the contract which arose on the formal agreement. No similar formal agreement for the erection of buildings on site A has been entered into. After the completion of the buildings on site B the plaintiff requested the defendant to permit him to erect buildings on site A. The defendant endeavoured to obtain the necessary sanction from the Local Government Board but did not succeed in obtaining it. As a consequence of this the plaintiff has been prevented from erecting the buildings on site A and has brought this action to recover damages for breach of contract. We are of the opinion that in these circumstances, however unfortunate it may be, there is no binding contract in respect of site A between the plaintiff and the defendant.

The law upon this matter has been stated by Parker J. (afterwards Lord Parker) in *Van Harzfeldt-Wildenburg v. Alexander (1912) 1 Ch. 284*, “ It appears to be well settled by the authorities that if the documents or letters relied on as constituting a contract contemplate the execution of a further contract between the parties, it is a question of construction whether the execution of the further contract is a condition or term of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case there is no enforceable contract either because the condition is unfulfilled or because the law does not recognise a contract to enter into a contract. In the latter case there is a binding contract and the reference to the more formal document may be ignored. The fact that the reference to the more formal document is in words which according to their natural construction import a condition is generally if not invariably conclusive against the reference being treated as the expression of a mere desire ”. Lord Parker was there dealing with a sale of land in England but we see no reason why the principles laid down in the passage quoted should not be applied more widely. It appears to us in the case before us that the documents from which

passages have been quoted earlier indicate that a binding contract for the erection of buildings was to arise only on the execution of a formal agreement. For example, the failure on the part of the plaintiff to enter into a formal agreement if called upon to do so by the Chairman was to be penalised by the forfeiture of the deposit. We are not called upon to decide whether this forfeiture clause is enforceable but the clause indicates to some extent the intention of the parties. The stipulation is that the deposit is to be forfeited and appears to exclude any intention that damages for breach of contract by the plaintiff (or anyone else) are to be payable at any time before the execution of the formal agreement.

A further point urged by counsel for the appellant which has considerable force is that the period within which the work had to be completed was according to the tender notice "five months from the date of the signing of the contract" and that this period could not be ascertained until the formal agreement was signed. It was contended that this period for completion was a vital term and that it was necessary that it should be definitely determined before a contract could be said to have arisen. There is force in this argument. But in any case the words indicate that the parties did not intend to be bound by a contract for the erection of buildings before a formal agreement was signed.

It was contended by counsel for the respondent that no formal agreement was necessary to give rise to a contract for building on site A. With this argument we are unable to agree for the reasons already given. It was further contended that when parties agreed that site A buildings should be erected on site B and site B buildings on site A the formal agreement was superseded by an entirely new contract which covered both sites. But this argument overlooks the fact that the variation in respect of sites and buildings took place before the formal agreement was entered into. This is clear from the evidence of the plaintiff. Moreover, as already stated, as the formal agreement entered into has not been produced we cannot even say that the variation was not embodied in it. The variation has to be regarded as a variation of the terms of the tenders accepted and the necessity for formal agreements was not avoided thereby.

We are of the view that upon the documentary and oral evidence no binding contract for the erection of buildings on site A has arisen and that it could have arisen only upon the formal agreement referred to in these documents being executed.

For these reasons we set aside the decree entered by the District Court and dismiss the plaintiff's action. As the right which the plaintiff claimed to erect buildings on site A was not resisted before this case was instituted on the point of law on which this appeal succeeds or even in the court below and also having regard generally to the merits we think it proper that each party should bear its own costs both on appeal and in the court below.

PULLE J.—I agree.

*Decree set aside.*