
TISARA PACKAGING INDUSTRIES LTD**Vs.****ATTORNEY GENERAL**

SUPREME COURT
ALUWIHARE, J.
JAYAWARDENA, J.
FERNANDO, J.
SC/CHC/APPEAL/17/2010
HC/CIVIL/123/05(1)
AUGUST 2, 2018

Breach of contract—Waiver of rights—Onus of proof of waiver Contractual obligations—Damages

The Commissioner General of the Department of Educational Publications in the Ministry of Education had entered into an agreement with the defendant to print certain books. The defendant failed to meet the deadline to complete the order, as a result of which the Commissioner General was compelled to commission three other printing agencies to print the remainder. The Commissioner General sent a letter of demand seeking to recover the cost incurred to print the remaining copies. As there was no positive response to the letter of demand, action was instituted before the Commercial High Court claiming damages for breach of contract. At the trial, the defendant did not raise any issues or dispute the facts. The contention of the defendant was that partial performance of the contract was not in breach of the contract and the contract came to a mutually agreed termination as implied by the plaintiff's conduct. The High Court delivered judgment in favour of the plaintiff.

Held:

1. Even though a waiver could be implied by conduct, an intention to waive a right or benefit to which a person is entitled is never presumed. The presumption is against waiver and the onus of proof of waiver is on the person who asserts it. This burden has not been discharged by the defendant.
2. Breach of procedures stipulated under tender guidelines by public officials has no impact on the contractual obligations of the parties arising out of the agreement between them. Such a breach may only expose errant public officials to disciplinary action.

Cases referred to:

1. Fernando v. Samaraweera (1951) 52 NLR 278 at 285

APPEAL from the Judgment of the Commercial High Court of Colombo.

cur. adv. vult.

October 18, 2019

ALUWIHARE, J.

The Plaintiff-Respondent (hereinafter sometimes referred to as “Plaintiff”), instituted the original action in the High Court of the Western Province holden in Colombo on 1st July 2005, claiming damages amounting to Rs. 8, 005, 536. 88 with legal interest from the Defendant-Appellant (hereinafter sometimes referred to as “Defendant”) for breach of contract.

On 3rd August 1999, the Defendant entered into an agreement with the Commissioner General of the Department of Educational Publications in the Ministry of Education (hereinafter “Commissioner General”) to print the following school text books;

- i. සිංහල කියවීම් පොත 1 ශ්‍රේණිය
- ii. තින්දු ධර්මය (දෙමළ) 8 ශ්‍රේණිය
- iii. World Through English (P.B.) 10
- iv. ගණිතය (සිංහල) 9 ශ්‍රේණිය

This agreement is marked “P1” and the clauses which are relevant for the present case are as follows;

- (1) 1 වන උපලේඛනයෙහි දැක්වෙන පෙළපොත් දක්වා ඇති කාල සීමාව තුළ මුද්‍රණකරු විසින් මුද්‍රණය කොට සැපයිය යුතුය. මෙකී කාල සීමාව වෙනස් කිරීමේ බලය අධ්‍යාපන ප්‍රකාශන කොමසාරිස්තුමා සතුය.
- (7) සැපයීමට ගිවිසගත් පිටපත් සංඛ්‍යාව වෙනසක් නැතිව එම සංඛ්‍යාව මුද්‍රණකරු විසින් අධ්‍යාපන ප්‍රකාශන කොමසාරිස් වෙත සැපයිය යුතුය. (...)
- (8) නියමිත දින හෝ ඊට පෙර හෝ මුද්‍රණකරු විසින් ගිවිසගත් ප්‍රමාණයට අනුකූලව තමාගේ වියදමින් එකී පෙළපොත් මුළු ප්‍රමාණයම අධ්‍යාපන ප්‍රකාශන කොමසාරිස්ගේ පොත් ගබඩාවට ගෙනැවිත් භාරදිය යුතුය.
- (14) මිලෙහි උච්චාවචනයක් නිසා හෝ වෙනත් හේතුවක් නිසා හෝ අමතර ගෙවීමකට කටර ඉල්ලීමක් හෝ මුද්‍රණකරු විසින් නොකරනු ලැබේ.
- (15) මෙහි 1 වන උපලේඛනයෙහි සඳහන් කාලසීමාව තුළ පෙළ පොත් සම්පාදනය කොට භාර දීමට මුද්‍රණකරු අසමත් වුවහොත් එසේ ප්‍රමාදවන

එක් දිනකට පහත විස්තර පරිදි මුද්‍රණය දඩ මුද්‍රණය වශයෙන් නොව වන්දි වශයෙන් මුද්‍රණකරු විසින් ශ්‍රී ලංකා ජනරජයට ගෙවිය යුතුය. (...)

(21) මෙම ගිවිසුමෙහි කොන්දේසි සහ විස්තරයන්ට අදාළව අධ්‍යාපන ප්‍රකාශන කොමසාරිස් සෑහීමකට පත්වන අයුරු මුද්‍රණකරු විසින් ගිවිසුමේ ඉලඳ සියලුම පොත් සැපයීමට අපොහොසත් වූ විටක දී එවැනි අපොහොසත් වීම හේතුවෙන් ගෙවන උද්ගත වන අතිරික්ත පිරිවැයෙහි හෝ සිදු වූ අලාභයෙහි හෝ සම්පූර්ණ මුද්‍රණ මුද්‍රණකරුගෙන් අයකර ගැනීමට ශ්‍රී ලංකා ජනරජයේ ආණ්ඩුවට බලය ඇත්තේ ය.

(23)1 වන උපලේඛනයෙහි සඳහන් කාලසීමා තුළ දී ගිවිසුමේ අයුරු පෙළපොත් සම්පාදනය කොට සැපයීමට මුද්‍රණකරු අපොහොසත් වුවහොත් පහත සඳහන් කොන්දේසිවල දැක්වෙන අයුරු ශ්‍රී ලංකා ජනරජයට ක්‍රියා කළ හැකි බවට මුද්‍රණකරු තවදුරටත් එකඟ වන්නේ ය.

(අ) කිසිම වන්දියක් නොමැතිව ගිවිසුම සමාප්ත කිරීම.

(ආ) මෙම පෙළපොත් මුද්‍රණය කිරීමේ කාර්යය වෙනත් කිසිවෙකුට පවරා එවැනි තත්වයක් උද්ගතවීමෙන් ඇතිවන ප්‍රතිවිපාකයක් වශයෙන් ශ්‍රී ලංකා ජනරජයේ ආණ්ඩුවට විදේශ ගැනීමට සිදුවන පිරිවැයෙහි අතිරික්තය මුද්‍රණකරුගෙන් අයකර ගැනීම.

(ඇ) අය කැන්පතුව රාජසන්තක කිරීම.

In terms of the agreement, the Defendant agreed to print 380, 000 copies of the book “World Through English” for Rs. 14, 568, 321/= and to deliver the said copies to the Commissioner General of the Department of Educational Publications on or before 30. 11. 1999. The said book consisted of 160 pages and was a given a unit price of Rs. 38. 34/=. However, the Commissioner General subsequently reduced the number of pages to 136 and the Defendant-Appellant agreed to print the same number of copies taking Rs. 32. 58/= as the new unit price . . .

It is the contention of the Plaintiff that the Defendant failed to meet the deadline and complete the order. The Defendant had only succeeded in printing 120, 400 copies and even those copies had been delivered past the deadline. As a result of the default, the Commissioner General was compelled to commission three other printing agencies to print the remainder.

Orders had been placed with Wishwalekha printers, AJ printers and Samayawardhana printers to print respectively, 100, 000 copies (Rs. 71. 55/= per copy), 49, 910 copies (Rs. 69. 25/= per copy) and 50, 000 copies (Rs. 78. 07/= per copy) of the text book. The total cost

incurred to print the remaining copies amounted to Rs. 8, 005, 536/=. The final receipts and invoices pertaining to each order are marked from “P2” - “P7”.

Exercising rights stipulated in clauses (15), (21) and (23) of the agreement, the Commissioner General, on behalf of the State, sought to recover the aforesaid Rs. 8, 005, 536/= from the Defendant by way of a letter of demand, as it was the Defendant’s default that caused additional expenses. Having failed to secure the recovery by way of a letter of demand, the Attorney General instituted action in the High Court of the Western Province holden in Colombo.

The matter proceeded to trial on 15 issues raised on behalf of the Plaintiff-Respondent. The Defendant-Appellant, however, did not raise any issues.

Case for the Plaintiff was presented through the witness Wasantha Kumara Perera, Commissioner (Finance) of the Educational Publications Department and the documents “P1” to “P10” were marked and produced through this witness. The Defendant, in their written submissions filed before this court had conceded that the Defendant did not challenge the documents marked and produced as “P2” to “P9”.

The Manager of the Defendant Company (K. A. A. V. Nishantha) and the Accountant of the Company (L. D. S. Wickrama), testified on behalf of the Defendant and produced the documents “01” to “03”. The learned High Court Judge in delivering the judgement, answered all issues raised in favour of the Plaintiff.

The learned counsel for the Defendant submitted that the facts are not in dispute, however, he stated that he only wishes to canvass the conclusions reached by the learned trial Judge. As such, I do not wish to dwell on the facts in detail.

At the trial, the Defendant contended that the agreement was terminated by mutual consent and not pursuant to a breach. According to their version, a consensus was reached between the Commissioner General and the Defendant to terminate the contract and hand over the Art work, Positive and Press copy to the Commissioner General. However, evidence explaining reasons for such consensus, or the purported consensual termination has not been led before the High Court. Instead, the Defendant had sought to establish their position relying on “Guidelines on Government Tender Procedure” wherein it is stated that a party will not

be entitled to receive final payment until the completion of the contract. They have marked the final invoice sent to the Commissioner General dated 26th July 2000 (marked “V1”) and have contended that they would not have received the final payment if they, as alleged, were in breach of the contract.

By the same token, they have pointed out that the Commissioner General has not taken any steps to blacklist them as a ‘defaulting contractor’ in terms of the said Guidelines-which, according to them, reinforce the contention that there was no breach of contract. Additionally, they have also referred to the fact that the Plaintiff had not taken steps to appropriate the security bond given as Guarantee to the agreement, further adding weight to the fact that no breach had taken place. The gravamen of the submission of the learned counsel for the Defendant was that, the learned trial Judge was in error in not considering the totality of the evidence led in the correct perspective, and if the learned trial Judge had not misdirected himself, he ought to have come to the conclusion that the Defendant was not in breach of the agreement “P1 “.

Thus, the only issue that this court is called upon to decide is **whether the Defendant in fact had not breached the agreement “P1”**, based on the grounds raised by them: that the belated partial supply and non supply of the balance copies of the textbook by the Defendant were not treated as a default or as a breach of contract by the Department (Plaintiff), and that such conduct on the part of the Department amounts to a mutual termination of the agreement “P1”.

It was pointed out that the Department of Educational Publications being an organ of the State, was required to adhere to the Guidelines on Government Tender Procedure. In terms of the said Guidelines, it was pointed out, that the Department was required to serve a written notice requiring the Appellant to show cause as to why the Appellant should not be included in the list of “defaulting contractors” and that this requirement is mandatory under the Guidelines referred to above. It was further pointed out that no such notice was served on the Appellant by the Department.

It was also contended that the matter does not end by sending a “show cause” letter, but a series of consequences flow, following a show cause letter. In terms of the Government Tender Guidelines, no further contracts should be granted to such defaulting contractor; no payments should be

made without deducting any dues and any Performance Bond given as security could be appropriated etc.

The learned counsel for the Appellant pointed out that as far as the Defendant-Appellant was concerned, none of these procedures were put in motion by the Department against them. It was also pointed out that it is in evidence that the Appellant was neither issued with a show cause letter nor was blacklisted as a contractor.

The learned counsel for the Defendant contended that the Defendant was awarded other contracts, their performance bond was not appropriated for the non-supply of the text books, and no deductions were made from the payments that were made to the Appellant in relation to the other contracts awarded to the Defendant. In this regard, attention of this court was drawn to the admission by the witness who testified on behalf of the Respondent, that the Defendant was not blacklisted as a contractor; three other contracts were awarded to the Defendant subsequent to the agreement “P1”, violating Regulation 159 of the Tender Guidelines; making the final payment of the contract before the supply was completed; non-appropriation of the performance bond; sending the letter of demand (“P10”) 5 years after the alleged breach etc.

In the course of the submissions, the learned counsel for the Defendant referring to the conduct of the Plaintiff as aforesaid, submitted that the cumulative effect of those factors is a clear indication that non-supply of the required number of books by the Defendant under agreement “P1”, was not treated as a default or a breach of contract by the Plaintiff.

The learned Additional Solicitor General on behalf of the Plaintiff argued that the failure on the part of the officials of the Educational Publications Department to take action against the Defendant in terms of the Government Tender Guidelines may amount to dereliction of duty on the part of the officials of the Department, but those factors by themselves would not prove that the Defendant had not breached the terms of the agreement “P1”.

In fact, the learned trial Judge has considered this issue, namely non-compliance with the Government Tender Guidelines, not blacklisting the Appellant, and entering into fresh contracts with the Appellant even after the Defendant defaulted or breached the agreement (“P1”). The learned trial Judge had quite correctly held that the failure on the part of the Government officials to take any steps in performing their official

duties referred to above, which could be a result of administrative lapses on the part of the public officials, does not absolve the Defendant from contractual obligations cast on them as per the agreement “P1”, entered into by and between the Plaintiff and the Defendant.

With regard to the assertion of the Defendant that the parties mutually terminated the agreement “P1”, the learned trial Judge had observed that if that was the case, the Defendant could have specifically asserted so in their response to the letter of demand (“03”) or in the answer filed by the Defendant. The Defendant, the learned trial Judge observed, had done neither. The learned trial Judge had concluded that the assertion that the parties had terminated the agreement mutually, is only an afterthought on the part of the Defendant. He had gone on to conclude that no acceptable evidence has been placed before the court to deduce that the Defendant had been released from the obligations arising out, of agreement “P1”. This, the court observes, is a finding of fact by the learned trial Judge and I am of the view that the learned trial Judge was entitled to form that opinion and I see no fault on the part of the learned High Court Judge in arriving at such a conclusion.

In light of the above, the contention by the Defendant that they, by their belated partial performance of the contract and non-supply of the balance textbooks, did not breach/are not in default of the contract “P1”, but that the contract has come to a mutually agreed termination as implied by the conduct of the Plaintiff, requires further scrutiny.

The Defendant avers that, by the conduct of the Plaintiff enumerated heretofore: i. e. not serving notice to show cause, not blacklisting the Defendant, awarding subsequent contracts and making payments without any deductions in the form of a penalty to the Defendant, and not appropriating the performance bond, the Plaintiff had tacitly released the Defendant from obligations and relinquished further rights arising from the contract “P1”, by mutually agreeing to discharge the contract.

Even though a waiver could be implied by conduct, the intention of a creditor, (the Plaintiff in the present contract) to voluntarily renounce his/ her obligations, is never presumed or inferred, but has to be established through clear evidence. Basanayake J. (as His Lordship then was) has elaborated on this in *Fernando v. Samaraweera*,¹

An intention to waive a right or benefit to which a person is entitled is never presumed. The presumption is against waiver . . . the

intention to waive a right or benefit to which a person is entitled cannot be lightly inferred, but must clearly appear from his words or conduct. The onus of proof of waiver is on the person who asserts it.

This is resonated in C. G. Weeramantry's, "*Law of Contracts*" (1967 edition) at page 716 where it is stated that, "the reason for the time honoured dictum that '*waiver must be clearly proved*' (*nemo facile praesumitur donare*) is that persons are not lightly held to have abandoned their rights."

Therefore, contentions based on administrative lapses, invoices for certain other contracts between the same parties ("V1"), and a document prepared by the Defendant Company subsequent to the commencement of the trial-purportedly a "Reconciliation of Account" ("D1") - demonstrating a sum of money paid to the Defendants for a different contract with certain deductions made-hardly discharge the onus of proof on the Defendant to clearly establish an intention of voluntary relinquishment of rights by the Plaintiff.

As such, I reject the argument on behalf of the Defendant-Appellant that a waiver of obligations is implied through the conduct of the Plaintiff-Respondent, bringing the agreement "P1" to a mutually agreed termination.

Further, the duty cast on the public officials by the Tender Guidelines to adhere to the procedures stipulated under those Guidelines, in my view, are purely administrative, a breach of which may expose the errant public officials to disciplinary action being taken against them. Breach of such procedures, by itself, has no impact on the contractual obligations of the parties, arising out of the agreement between them ("P1"), in the instant case.

However, it is important to note that there is a stark paucity of any evidence, even marginally insinuating, that the Defendant did in fact print the agreed number of copies-as they undertook under clauses (1), (7) and (8) - on or before the deadline. They (Defendant) have attempted to absolve themselves from the liability to pay damages by pointing to lapses in the Plaintiff's conduct without clearly denying the Plaintiff's allegation that they (Defendant) failed to uphold their contractual obligation to print and supply the agreed number of copies by 30th November 1999.

In his judgment, the learned High Court Judge has made a similar observation on page 5 of the judgment;

In his judgment, the learned High Court Judge has made a similar observation on page 5 of the judgment;

කෙසේ වෙතත් පැමිණිල්ලේ සාක්ෂි පවසා ඇත්තේ එකඟ වූ පොත් ප්‍රමාණයෙන් පොත් 120,400 පමණක් නියමිත දින වන 1999.11.30 වන දින පසු වී භාර දුන් බවයි. විත්තියේ සාක්ෂි එකඟ වූ පොත් ප්‍රමාණය නිවැරදිව, නියමිත දිනට භාර දුන් බව කියා පිටින්තේ නැත.

The learned High Court Judge has further noted the admissions made by the witnesses for the Defendant;

විත්තියේ සාක්ෂිකාර විරාජීත් නිශාන්ත නම අය 2008.09.02 වැනි දින 7 වන පිටුවේදී මෙම ප්‍රශ්නය පැන නැගුන පොතේ කොටසක් හැර අනෙක්වා ඔක්කොම මුද්‍රණය කළ බව කියා සිටී. මෙම පොතේ කොටසක් හැර මුද්‍රණය කළ බව කීම තුළම මෙම නඩුවට සම්බන්ධ පොතට අදාළව පැහැර හැරීමක් වූ බව ඉන් පෙනී යයි. (...) නැවත එම පිටුවේ දී ම මෙම නඩුවට සම්බන්ධ පොතට අදාළව පැහැර හැරීමක් වූ බව ඉන් පෙනී යයි. (...) නැවත එම පිටුවේදී ම මෙම නඩුවට සම්බන්ධ පොතෙහි කොටසක් නියමිත දිනට මුද්‍රණය කර ගැනීමට නොහැකි බව පිළිගෙන ඇත. එම සාක්ෂිකරුම එදින 13 පිටුවේදී පිටපත් 380,000ක් මුද්‍රණයට දුන් බව පිළිගෙන, ප්‍රමාදයක් වූ බවත්, ඉන් 120,400 ප්‍රමාදවී භාර දුන් බවත් පිළිගෙන ඇත. (...) විත්තියේ දෙවන සාක්ෂිකාර සඳුන් චිත්‍රම 2008.02.01 වැනි දින 5 වන පිටුවේ පවසන සාක්ෂි අනුව ද පෙනී යන්නේ 1999.11.30 වන විට පැ. 1 ගිවිසුම අනුව එහි සඳහන් සියලු පොත් භාර දී නැති බවයි.

As the brief lays bare, the Defendant has failed to substantiate their position that they were not in breach of the agreement. They have neither produced evidence establishing that they fulfilled their obligations nor have they controverted the evidence led by the Plaintiff to this effect. Their submissions have been largely limited to lapses in the Plaintiff's *conduct viz a viz the "Guidelines on Government Tender Procedure."*

In respect of the submission on the "final invoice", the learned High Court Judge has observed that the final invoice marked as "V1" has been prepared by the Defendant after the case was instituted. More importantly the said invoice relates to the printing of Mathematics Books commissioned under a different agreement and it does not in any manner seek to alleviate the alleged breach of the agreement put in suit. In relation to the contention on the security bond, the learned High Court Judge has noted that the Defendant has failed to produce any evidence sustaining their claim, nor a copy of the bond itself to assist the court to appreciate their stance.

Having considered the evidence presented by the Plaintiff, and being satisfied of the same, the learned High Court Judge has entered judgement in the Plaintiff's favour;

මේ අනුව එකඟ වී ඇති පොතේ ප්‍රමාණයෙන් පොත් 120,400ක් පමණක් ප්‍රමාද වී භාර දුන් බවටත්, ඒ අනුව ගිවිසුම ප්‍රකාරව එකඟ වන ලද පොතේ ප්‍රමාණය මුද්‍රණය කිරීමට අපොහොසත්ව විත්තිකරු වගකීම පැහැර හැර ඇති බවටත්, පැමිණිල්ල පවසන කාරණා වැඩි බරින් පිළිගත හැකිය.

The Defendant has come before this court impugning the said judgement on the ground that the learned High Court Judge has erred in attaching liability to the Defendant to pay damages. However, there is nothing on the face of record to indicate that the learned High Court Judge has erred, misdirected or failed to consider evidence when delivering the judgment.

Accordingly, I agree with the learned High Court Judge's decision that the Defendant, by breaching clauses (1), (7) and (8) of the agreement ("P1") dated 3rd August 1999, is liable to pay Rs. 8, 005, 536. 88 and legal interest to the Government of Sri Lanka as damages for breach of contract, in terms of clauses (15), (21) and (23) of the said agreement. As such, I affirm the judgement of the learned High Court Judge dated 17th November 2009 and accordingly dismiss the Appeal.

JAYAWARDENA, J. - *I agree.*

FERNANDO, J. - *I agree.*

Appeal dismissed.

Judgment by: Buwaneka Aluwihare, J.

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