

Present: Lascelles C.J. and Middleton J.

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KEKULAWELA v. THE ATTORNEY-GENERAL.

340—D. C. Colombo, 31,856.

Contract—Condition precedent—Agreement to supply bricks—Payment to be made on production of receipts—Right to payment without production of receipts.

Plaintiff sued the defendant for the value of bricks supplied to the General Manager of the Ceylon Government Railway under a contract. One of the clauses of the contract between the plaintiff and the General Manager was to the effect that payment was to be made upon the plaintiff producing receipts duly signed by the Railway Storekeeper or his representative.

The District Judge held that the plaintiff did in fact deliver the bricks, and gave judgment for the plaintiff, though he produced no receipt from the storekeeper or his representative.

Held, reversing the judgment of the District Judge, that the production of the receipt was a condition precedent to the plaintiff's right to payment, and that it was not open to the plaintiff to prove delivery by any other means.

LASCELLES C.J.—No technical words are required to make a stipulation a condition precedent; that is, a stipulation on which the right to receive payment depends. The question must depend upon the nature of the contract and the acts to be performed by the contracting parties

In a transaction where the opportunity for error and fraud with regard to the quantity and quality of bricks delivered were so numerous, it was natural that the parties should agree upon some person whose receipt should be the only evidence of delivery of bricks equal to sample.

THE facts are fully set out in the judgment of the Chief Justice (Lascelles C.J.) as follows:—

This is an appeal by the Attorney-General from a judgment of the District Court of Colombo condemning him as representing the Crown to pay to the plaintiff Rs. 950 and interest, being the price of

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bricks claimed to have been supplied by the plaintiff in pursuance of certain contracts with the General Manager of the Ceylon Government Railway.

By the contract marked P 1 dated December 22, 1908, the plaintiff undertook to supply the bricks mentioned in the schedule in such quantities as might from time to time be required for the general service of the Ceylon Government Railway from January 1 to December 1, 1909, of the quality described in the schedule and equal to a sample deposited with the General Manager.

Clause II. of the agreement provided that delivery should be made at the places and at the price specified in the schedule upon orders signed by the General Manager or his Assistant or by the Railway Storekeeper.

Clause III., on the construction of which this appeal principally depends, is in the following terms:—" That the General Manager agrees with the aforesaid contractor that payments shall be made to the contractor for the bricks supplied under the contract by means of crossed cheques at the General Office of the Railway on the 15th day of the month following that in which the bricks have been supplied upon his producing receipts duly signed by the Railway Storekeeper or his representative, and on production of claim vouchers properly prepared in accordance with forms to be supplied on application at the Office of the Railway Storekeeper and duly certified by the said Railway Storekeeper; and it is further agreed that no claim shall be entertained unless preferred in proper time and on or before the 15th day of January of the year following that in which the charge was incurred."

By the contract P 2 dated December 16, 1909, the terms of which are identical with those of P 1, the plaintiff undertook to supply bricks from January 1 to December 1, 1910.

The case for the plaintiff shortly stated is that he was required to supply 50,000 bricks by order P 3 dated October 4, 1909, and that he began deliveries of the bricks at the lakeside stores on November 25; that the deliveries were evidenced by a series of receipts or cart notes (marked P 5 to P 14) given to his boatmen and carters by Harridge, who was in charge of the lakeside stores; that the plaintiff on January 26, 1910, when he had completed the order, took these cart notes or receipts to Mr. Speldewinde, the Railway Extension Storekeeper, for the purpose of obtaining the receipts required by the contracts; that Mr. Speldewinde declined to grant the receipts; and that the General Manager, in the absence of a receipt from Mr. Speldewinde, has declined to pay for the bricks delivered.

Mr. Speldewinde deposed that when the plaintiff brought the cart notes to him on January, 26 he, Mr. Speldewinde, went to the lakeside stores and found that no bricks had in fact been delivered by the plaintiff under the order, and that he therefore declined to grant a receipt for them.

The District Judge has found that the 50,000 bricks were in fact delivered by the plaintiff, and has given judgment for him accordingly.

The Attorney-General appealed.

Walter Pereira K.C., S.-G. (with him *Akbar, C.C.*), for the appellant.

Sampayo, K.C. (with him *Schneider*), for the respondent.

The following authorities were cited at the argument:—*Benjamin on Sale*, 5 ed., p. 272; *Brogdon v. Marriott*;¹ *Milner v. Field*;² *Clarke v. Watson*;³ *Thursel v. Balbirne*;⁴ *Morgan v. Birnie*;⁵ *Worsley v. Wood*;⁶ *Rangcr v. Great Western Railway Company*;⁷ *Hatham v. East India Company*.⁸

Cur. adv. vult.

January 12, 1912. LASCELLES C.J.—

His Lordship set out the facts and continued:—

From this judgment the Attorney-General now appeals, contending in the first place, that under clause III. of the contract the production of a receipt duly signed by the Railway Storekeeper or his representative is a condition precedent to the plaintiff's right to payment; and in the second place, that the District Judge's finding with regard to the delivery of the bricks is erroneous.

The first ground of appeal was in issue at the trial, but I gather from the way in which the District Judge disposed of this issue that the point was not very strenuously pressed. "I do not think," the District Judge says, "it will be seriously contended for the defence that the plaintiff will not be entitled to payment in the absence of the receipts referred to, if it is established that he has in fact delivered the bricks to the Government; the position taken up for the defence is that the non-production of such receipts proves the non-delivery of the bricks."

The Solicitor-General referred us to a series of decisions mostly relating to building contracts, in which it was held that, where the production of a certificate is made a condition precedent to payment, this condition cannot be dispensed with, except where there is fraud or collusion or in certain special circumstances which are not to be found in relation to this contract. In *Milner v. Field*² Pollock C.B. held that where by the contract itself the certificate of a surveyor is made a condition precedent, even if it be withheld by fraud, that is only the subject of a cross action. *Clarke v. Watson*,³ *Roberts v. Brett*,⁹ *Thursel v. Balbirne*,⁴ *Morgan v. Birnie*,⁵ *Hatham v. East*

¹ 2 *Bingham N. S.* 473 and 3 *Bingham* 88.

² (1850) 5 *Ex.* 829.

³ (1865) 34 *L. J. N. S. C. P.* 148.

⁴ (1838) 2 *M. & W.* 786.

⁵ 9 *Bingham* 672.

⁶ 6 *Term. Rep.* 720.

⁷ (1854-56) 5 *H. L. R.* 73.

⁸ 1 *Term. Rep.* 639, 645.

⁹ (1865) 34 *L. J. N. S.* 241.

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India Company,¹ *Ranger v. Great Western Railway Company*,² *Worsley v. Wood*,³ and other authorities were also relied on by the Solicitor-General.

Mr. Sampayo contended that in the contracts in question the receipt of the storekeeper was not a condition precedent to payment, but merely a direction as to the mode of payment given for departmental convenience, and that there was no analogy between the certificate of a builder or architect and the receipt contemplated by clause III. of the contracts. A builder or architect, it was argued, was an expert who performed duties similar to those of an arbitrator with reference to the agreement; whilst a Government storekeeper occupied a different position.

I confess that for the purpose now in hand I am unable to differentiate the two cases. In a building agreement, where payment depends upon the quantity and quality of work done, it is necessary for the protection of the employer, and to avoid disputes, to agree on some practical method of ascertaining these matters. The parties, therefore, agree to accept the certificate of a builder or an architect. In contracts like these now sued on for the delivery of goods up to a certain standard at different places within an extensive area, the same considerations may apply. The present case is an illustration of the disputes and almost inevitable difficulties which arise when the delivery of goods, in a transaction of this nature, is sought to be proved by receipts and cart notes given by minor officials and by the oral evidence of boatmen and carters. The object of providing that payment should depend on the storekeeper's receipt is to avoid these difficulties and the confusion which is inseparable from them, and to provide a method by which the right of the contractor to receive payment shall be finally determined.

The position of a storekeeper on whose receipt payment for goods delivered is to be made seems to me, in a transaction such as that now under consideration, to be the same as that of the architect or surveyor in a building contract.

He is presumably a person who possesses the necessary qualifications to check deliveries and to decide whether the goods are up to standard.

No technical words are required, as was pointed out in *Hatham v. East India Company*,¹ to make a stipulation a condition precedent; that is, a stipulation on which the right to receive payment depends. The question must depend upon the nature of the contract and the acts to be performed by the contracting parties.

The natural construction of the language of clause III. of the contracts appears to me to be that payment is dependent upon the storekeeper's certificate, and this conclusion is confirmed by a consideration of the nature of the service contracted for. The

¹ 1 *Term. Rep.* 639, 645.² (1854-56) 5 *H. L. R.* 73.³ 6 *Term. Rep.* 720.

contract was for the supply of bricks to a large Government Department, the quantity of bricks to be supplied was undefined, and they were to be delivered at any place within the gravets of Colombo upon the orders of the General Manager or of his Assistant, by whom payment was to be made, or on the orders of the Railway Storekeeper. In a transaction where the opportunity for error and fraud with regard to the quantity and quality of bricks delivered were so numerous, it was natural that the parties should agree upon some person whose receipt should be the only evidence of delivery of bricks equal to sample.

This, I hold, is what they did. I think it is clear that the plaintiff agreed that the right to payment depended upon production of the Railway Storekeeper's receipt, and that he cannot now be allowed to prove delivery by any other means.

It was suggested in argument that Harridge might be considered to be the Railway Storekeeper's representative, and that the production of the cart notes signed by him was a sufficient compliance with clause III. But it is quite clear from the plaintiff's own evidence that he regarded Mr. Speldewinde as the person on whose receipt he was to receive payment.

For the above reasons, I think it is clear that under clause III. of the contracts P 1 and P 2 the production of receipts signed by the Railway Storekeeper was a condition precedent to the plaintiff's right to recover payment, and that on the authorities cited by the Solicitor-General no other evidence is admissible in support of his claim.

The appeal, in my opinion, must be allowed, and the action dismissed with costs here and in the District Court.

MIDDLETON J.—

This is an action by a contractor against the Government for the value of 50,000 bricks alleged by him to have been delivered in the Government Stores, but of which those responsible on the part of the Government deny his delivery.

The issues were as follows:—

- (1) Upon what terms of contract did the plaintiff supply bricks?
- (2) Did the plaintiff supply the bricks referred to in paragraphs 3 and 5 of the plaint or any bricks at all from November 25, 1909, to January, 1910?
- (3) Did the plaintiff fail to produce receipts in terms of the contract?
- (4) Is the plaintiff entitled to such receipts?
- (5) Is the plaintiff entitled to payment without producing such receipts?

The District Judge in a long and careful judgment has found that the bricks were in fact delivered and gave judgment accordingly.

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The Attorney-General appealed, and it was contended by the learned Solicitor-General on his behalf that in the terms of the contract P 1 sued upon the Government were not liable to pay for the bricks in question until receipts duly signed by the Railway Storekeeper or his representative had been produced by the plaintiff; that the plaintiff had in fact admitted and the District Judge had found that such receipts had not been produced, and upon the authority of *Benjamin on Sale*, p. 578, 5th ed., citing *Brogdon v. Marriott*,¹ *Milner v. Field*,² *Clarke v. Watson*,³ *Thursel v. Balbirne*,⁴ *Morgan v. Birnie*,⁵ *Worsley v. Wood*,⁶ *Ranger v. Great Western Railway Company*,⁷ sought a reverse of the judgment, contending that under section 146 of the Civil Procedure Code the learned District Judge ought to have dealt with and decided the case on the 5th issue before going into the facts.

On the facts also the Solicitor-General contended that the judgment was wrong, and argued that on two points not touched on by the learned District Judge he was entitled to judgment. The points were that the evidence of Mr. Hancocks and of his notes taken at the time of an interview with the plaintiff, coupled with the evidence of his clerk and interpreter (De Mel), proved that the evidence of the plaintiff's witness Rupesinghe was false, and that the plaintiff had bolstered up his case of delivery on the false evidence of Rupesinghe in the absence of a clerk named Carolis, who had died on January 10, 1910.

It was further contended that a book (P 4) of counterfoils produced by Rupesinghe might very well have been concocted by that witness partly from true sources.

It was also argued that receipts P 5 to P 14 produced by Harridge were not to be relied on, as the evidence of Human and Speldewinde proved that Harridge could not have been in attendance at the lakeside stores at the date when they purported to have been signed by Harridge.

For the respondent the judgment of the District Judge was strongly supported, and it was sought, on the authority of *Hatham v. East India Company*,⁸ to distinguish the contract there from those to which the cases relied on for the Crown applied.

It was argued that Mr. Hancocks and his witness De Mel might have been mistaken in the impression they arrived at from what was said by plaintiff to him; that Mr. Human could not swear that Harridge was entirely absent from his office on the dates referred to; that the plaintiff had been acting as contractor with Government for many years, and that it was most improbable that for this paltry sum of Rs. 960 he would have supported this claim by fraud and perjury such as alleged.

¹ 2 *Bingham N. S.* 473 and in error 3 *Bingham* 88. ⁵ 9 *Bingham* 672.

² (1850) 5 *Ex.* 829.

⁶ 6 *Term. Rep.* 720.

³ (1865) 24 *L. J. N. S. C. P.* 148.

⁷ 5 *H. L. Rep.* 72.

⁴ (1838) 2 *M. & W.* 786.

⁸ 1 *Term. Rep.* 639, 645.

The covenant relied on for the defendant was in the following terms:—" And the General Manager agrees with the aforesaid contractor that payment shall be made to the contractor for the bricks supplied under this contract by means of crossed cheques at the General Office of the Railway on the 15th day of the month following that in which the bricks have been supplied upon his producing receipts duly signed by the Railway Storekeeper or his representative....."

It was practically admitted in the argument that the documents produced by the plaintiff could not properly be said to have been receipts signed by the Railway Storekeeper or his representative in the sense as regards the Railway Storekeeper understood by both parties.

No issue was agreed upon, which raised the question whether the plaintiff having taken all possible steps to obtain the receipts it was impossible for him to do so owing to the neglect and default of the Government's agents which might, according to the judgment of Ashburn J. in *Hatlam v. East India Company, ubi supra*, have been equal to performance of a condition precedent.

The question whether it was a condition precedent has to be determined, according to the same learned Judge, by the nature of the contract the acts to be performed by the contracting parties and the subsequent facts disclosed in the record which have happened in consequence of the contract.

The instrument was for the delivery of a large number of bricks, to be of a standard agreed upon in quantities as required at places to be named, and uncertainty might well arise, as it has arisen here, whether the bricks have been duly delivered.

It is not unreasonable to suppose that such a contingency was contemplated, and that the intention of the Government was to protect itself against possible fraud or gross negligence by making its payment for the bricks contingent on the production of the receipts of its own agents as specified in the contract. It gave its own agent, with the consent of the plaintiff, the power of refusing to pay for the bricks unless the receipts stipulated for were produced by the plaintiff. This was the principle upheld by the Lord Chancellor in *Ranger v. Great Western Railway Company, ubi supra*. The evidence and the decision of the learned District Judge, which I consider to be in accordance with the facts disclosed on the record, considerably influenced my mind in favour of the plaintiff; but I feel bound to hold, in accordance with the authorities relied on for the appellant, that the stipulation in the contract was a condition precedent to the payment by the Government of the price of bricks delivered.

In my opinion, therefore, the appeal must be allowed with costs, and judgment entered for the defendant in the District Court also with costs.

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