In my opinion the failure to consider the version of the appellant amounts to a breach of a legal requirement entitling the appellant to appeal on a ground of law. I grant the appeal. The costs of appeal is fixed at Rs. 31·50.

Appeal allowed.

1960 *Present :* **Weerasooriya, J., and H. N. G. Fernando, J.**

THE ATTORNEY-GENERAL, Appellant, *and* THE NORTH CEYLON BUILDERS AND CONTRACTORS LTD., Respondent

S. C. 17—D. C. Anuradhapura, 4984

Contract—Wrongful interference by third party—Performance of contract thereby prevented—Rights and liabilities of the parties.

Plaintiff company entered into a contract with the defendant (an Irrigation Engineer) on 4th June 1956 to transport and lay " rip-rap " (metal or stones) on a section of the bund of a tank before 31st August 1956. The value of the contract was no less than Rs. 45,900. Clause 6 of the agreement provided that the defendant could cancel the agreement if the plaintiff failed to make reasonable progress with the work.

Although the defendant was bound under the contract to give possession of the site to the plaintiff company to carry out its work, he was prevented from doing so on account of intimidation and wrongful interference by third parties. Consequently the Company was prevented from making any progress with the work. The defendant therefore, cancelled the contract on 26th July, 1956.

Held, that the defendant was entitled to terminate the contract on the ground that no reasonable progress had been made with the work, however unfortunate and reprehensible the causes of that situation were. The intimidation and wrongful interference by third parties did not constitute prevention of performance of the contract on the part of the defendant for whom the work was to be executed.

APPEAL from a judgment of the District Court, Anuradhapura.

V. Tennekoon, Senior Crown Counsel, for the defendant-appellant.

No appearance for the plaintiff-respondent.

Cur. adv. vult.

February 22, 1960. H. N. G. FERNANDO, J.—

In this action the Plaintiff Company successfully sued the Attorney-General for damages for alleged breach of a contract between the Plaintiff-Company and the Irrigation Engineer, Padaviya, for the transport and laying by the Company of " rip-rap " (metal or stones) on a section of the Padaviya Tank bund.

In terms of the contract the Irrigation Engineer by his letter of 19th June 1956 requested the Plaintiff Company to commence immediately the work specified in the contract. Accordingly the Plaintiff Company sent three lorries to the site on 24th June 1956 carrying the necessary materials and labourers. On the following day the Company's employees erected three cadjan sheds for occupation by the employees during their stay at the site. It seems clear that the site was land in the occupation of the Irrigation Department on behalf of the Government.

At about 5 p.m. on 25th June 1956 a crowd of Sinhalese people surrounded the camp site and told the Company's employees (who were presumably Tamil people) that they would not be allowed either to stay or to work at the site. The employees were assaulted and otherwise harassed by the crowd. When the employees tried to interview the Engineer he too was abused by the crowd. According to a letter P10 of 27th June 1956 addressed by the Plaintiff Company to the Director of Irrigation, the Company's employees were harassed and driven out of the site and were advised by the Irrigation Engineer to leave the site for their own safety. In reply the Company was informed by P11 of 7th July 1956 by the Director of Irrigation that " subsequent developments have occurred as a result of which the performance of the contract had been rendered difficult ". Subsequently by P12 of 26th July 1956 the Irrigation Engineer " noted that it is impossible for you to carry out your obligations under the agreement " and informed the Company that he had " no other alternative but to take action under clause 6 of the agreement ". This clause is in the following terms :—

" If the Contractor fails to make reasonable pogress with the said work or fails to do the said work satisfactorily the Engineer may at any time at his discretion cancel this agreement and the contractor shall not be entitled, by reason of such cancellation to claim any damages from the Government or the Engineer ".

The third clause of the agreement required the Plaintiff Company to complete and hand over the work on or before 31st August 1956. Considering that the agreement was signed on 4th June 1956 and that in terms of it the Company was requested on 19th June to commence work immediately, and taking into account the value of the contract (Rs. 45,900), it was quite reasonable for the Irrigation Engineer to decide on 26th July to take action under Clause 6 of the contract. At that time no progress with the work had in fact been made and it must have appeared most unlikely that even if work were to start at once the contract could be completed before 31st August 1956. The learned District Judge however rejected the defence that the cancellation was validly made because the Plaintiff Company had failed to make reasonable progress with the work. The learned Judge took the view that having regard to the circumstances in which the Company's employees were compelled to leave the site on 26th June 1956, " it would neither be fair nor reasonable to say that no reasonable progress had been made ".

Reference is necessary in this connection to the Company's letter P10 of 27th June 1956 in which the Company inquired from the Director of Irrigation " what steps you propose to take to enable us to carry out our work under the contract with security to life and property of our employees ". The letter further stated that " the Government will be failing in their obligations towards us if no sufficient protection is afforded to us to carry out our work ". The District Judge thought that the decision to terminate the contract was unreasonable because it was taken without first offering to the Company's employees the " security " which the Company had requested and thus rendering it possible for the Company to carry out the contract. It is clear that what the Plaintiff Company contemplated was that the Government should afford protection to the Company's employees at the site by maintaining an adequate Police Force. In fact a temporary Police Station had been installed at Padaviya early in July 1956, but the Irrigation Department did not inform the Company of this fact. Here too the District Judge thought that the Irrigation Engineer should have informed the Company of the presence of the Police in Padaviya and invited them to resume work. The Company's counsel had submitted at the trial that " principles of good conduct " required the Irrigation Engineer to convey this information and this invitation to the Company.

While I agree that the work may probably have been resumed perhaps some time in July 1956 if information concerning the establishment of a Police Station had been conveyed to the Company, I do not agree that there was any contractual obligation to convey such information or that the failure to convey it can be relied on by the Company as an excuse for not commencing the work when apparently commencement would have been possible.

In *Porter v. Tottenham Urban District Council*[1] the plaintiff had contracted with the defendants to erect a building on a site provided by the defendants. The owner of the soil of the road which gave access to the site, by making an unfounded claim that the road was not a public highway, delayed the building operation. It was held that the defendants were not liable for wrongful interference on the part of a third party. Hudson on Building Contracts (7th Edition page 210 *et seq.*) refers to several possibilities of prevention of performance of a contract on the part of a person for whom work is to be executed. But there is no instance cited where circumstances such as those which arose in the present case have been held to constitute prevention of performance. The Irrigation Engineer undoubtedly had a duty under the contract to hand over the site to the Plaintiff Company in order that the Plaintiff Company may carry out its contract. But the act of the Sinhalese residents of Padaviya, in threatening and intimidating the Company's employees, did not constitute a default on the part of the Engineer in carrying out his obligation to give possession of the site. Undoubtedly,

[1] *(1915) 1 K. B. 776.*

interference with and intimidation of the Company's employees might have been prevented or minimised by the presence of the Police at Padaviya. Even though it may be correct that the Government owes a duty to protect its citizens, that is a duty to be performed by the Police Department and I doubt much whether any civil suit will lie against the police Department for a failure to carry out that duty. Still less can it be said that an Irrigation Engineer owes an implied contractual duty to the other contracting party to protect its employees against such interference. It follows that one cannot imply a contractual duty to inform the other contracting party that such interference is not anticipated. If it be correct that work could have been resumed some time in July 1956 because of the presence of the Police, that was a matter concerning which the Plaintiff Company should have informed itself and reached its own decision.

So far as the rights and liabilities under the contract are concerned the simple question decided by the irrigation Engineer when he terminated the contract on 26th July 1956 was that no reasonable progress had been made with the work, and in fact no progress had been made at all, however unfortunate and reprehensible the causes of that situation.

The learned District Judge observes in his judgment that the Plaintiff Company was not so much concerned in claiming damages as in vindicating its position that the Company was not in the wrong or the guilty party. My opinion that the Irrigation Engineer was entitled in terms of the agreement to terminate the contract on 26th July 1956 does not carry with it any implication that the Company's failure to make reasonable progress with the work was in any way blameworthy. On the contrary, my brother and I would like to express our regret that unlawful and deplorable conduct on the part of third parties prevented performance by the Company of a contract which it was anxious to fulfil.

For the reasons stated the decree appealed from has to be set aside and the Plaintiff Company's action dismissed with costs in both Courts.

WEERASOORIYA, J.—I agree.

Appeal allowed.