1949 *Present:* **Windham J. and Gratiaen J.**

ATTORNEY-GENERAL, Appellant, *and* JUNAID, Respondent

S. C. 364—D. C. Tangalle, 5,407

Contract—Commercial contract—Implied obligation—Circumstances when it will be inferred—Business efficacy.

Plaintiff entered into a contract with the Assistant Government Agent, Hambantota, for the transport and storage of salt collected in the Hambantota District during the year 1945. He agreed *inter alia* that the transport of bags of salt from the collection centres and emptying the salt from the bags into heap spaces on the platform should be at the rate of not less than 2,375 bags of salt *per diem*. Payment was to be made by the Assistant Government Agent at the rate of Rs. 182.75 per 1,000 bags. Plaintiff made all the necessary arrangements and placed himself in a position to handle the prescribed minimum quantity of bags each day, but, after a certain date, the quantities of salt made available to the plaintiff for transport and storage fell far short of the daily minimum of 2,375 bags. In the circumstances, plaintiff claimed from the Crown damages on the ground that the Crown had failed to fulfil its alleged obligation to supply him daily with at least 2,375 bags of salt to be handled under the contract.

Held, that the Crown was under an implied obligation to make available to the plaintiff a minimum quantity of 2,375 bags of salt a day for transport and storage to the same extent as the plaintiff was under a duty to handle that quantity if supplied. The Crown's default in supplying this minimum quantity on any day constituted a breach of contract entitling the plaintiff to claim damages to compensate him for the consequent loss sustained by him.

APPEAL from a judgment of the District Court, Tangalle.

R. R. Crossette-Thambiah, Solicitor-General, with *G. P. A. de Silva*, Crown Counsel, for the defendant appellant.

N. E. Weerasooria, K.C., with *Vernon Wijetunge*, for the plaintiff respondent.

Cur. adv. vult.

October 26, 1949. GRATIAEN J.—

This is an action against the Crown for damages for breach of contract. On 1st November, 1944, the Assistant Government Agent, Hambantota, invited tenders from private contractors for the transport and storage of salt collected in the Hambantota District during the calendar year.

[1] *(1915) 1 C. W. R. 46.* [2] *(1912) 15 N. L. R. 154.*

The notice specified the nature of the services to be performed, and stipulated *inter alia* that " the transport of bags of salt from collection centres and emptying the salt from the bags into heap spaces on the platform *should be at the rate of not less than 2,375 bags of salt per diem* ". Tenderers were required to submit their quotations at " *a rate per 1,000 bags*".

The plaintiff's tender was accepted by the Tender Board and in due course on 26th January, 1945, a formal agreement was signed by the plaintiff on his own account and by the Assistant Government Agent, Hambantota, on behalf of the Crown. The relevant terms of the document read as follows:—

" 2. The Contractor agrees to the transport and storage of salt collected at Maha and Kohalankala Lewayas during the year 1945 at the rate given below.

Rs. 182.75 per 1,000 bags (Rupees one hundred and eighty-two and cents seventy-five per one thousand bags.)
The services include—

(*a*) Furnishing vehicles for transport of salt, stitching bags filled with salt, loading stitched bags of salt into vehicles (carts and lorries) at collection sites, transporting such salt to platform sites, unloading bags of salt into trollies at platforms, pushing trollies, unloading bags of salt, emptying the bags of salt into heap spaces on platform stacking salt, and shaping heaped salt, pegging, roping and covering salt heaps with cadjans, as directed by the officer in charge. (Materials necessary for the service will be supplied by the Salt Department).

(*b*) The transport of bags of salt from the collection centres of each lewaya and emptying the salt from the bags into heap spaces of the platforms should be at a rate of not less than 2,375 bags of salt per diem. Payment will be made by the Assistant Government Agent on the production of a voucher certified by the Salt Superintendent.

(*c*) The Contractor is required to employ a sufficient number of both labourers and vehicles in the service as at (*a*) above to enable transport of the necessary amount of bags per diem (in all other details connected with the services the instructions of the officer in charge should be followed).

" 7. The Contractor hereby agrees to carry out the work to the entire satisfaction of the Assistant Government Agent, Hambantota. If it is found that the vehicles and the labour provided by the Contractor at any one centre or at any one time are insufficient to execute the services in Clause 2 above, the Assistant Government Agent shall notice the Contractor to provide the additional vehicles and labour forthwith. Should the Contractor fail to provide the additional vehicles and labour demanded of him, the Assistant Government Agent shall be at liberty to engage the additional labour and vehicles at any rate of pay. Should the cost of such vehicles and labour so

engaged be more than the amount agreed to be paid to the Contractor, the Contractor hereby agrees to pay to the Assistant Government Agent the excess of such costs together with damages at the rate of Rupees ten (Rs. 10) only for each day or any part thereof.

" 8. The Contractor agrees that on his failure to deliver at the platform centres the full quantity of calt as stipulated in Clause 2 above, he shall be liable to a forfeiture at cents ten (-/10) per bag as liquidated damages on the deficit and further the said Assistant Government Agent shall be at liberty after giving four days notice to the Contractor in writing to arrange for the transport and storage of the said salt bags in respect of which he is in default from the collection centres to the platform centres.

" 16. In case the Contractor shall fail, neglect or refuse to do the aforesaid services within the time and in the quantities stipulated in Clause 2 of this agreement, the said Assistant Government Agent may, if he thinks fit, after giving seven days notice to the Contractor in writing determine and terminate the contract created by these presents and in the event of such determination, the Contractor shall forfeit to the said Assistant Government Agent on behalf of His Majesty the King, the sum of rupees two hundred only (Rs. 200) he has deposited as security with the Assistant Government Agent for the due performance and fulfilment of this contract in addition to the sums he may have become liable to pay under clauses 5, 6, 7, 8 and 9 of this contract."

During the early period of the contract large quantities of salt required to be dealt with by the plaintiff, but for reasons apparently beyond his control (but nevertheless irrelevant on the question of his liability as a defaulting party) he was unable to handle the prescribed minimum of 2,375 bags each day. For this failure the stipulated penalty was duly exacted from him by the Crown. He was also warned by the Assistant Government Agent to engage more labour and to keep to the terms of the contract. Thereafter he placed himself in a position to handle the prescribed minimum quantity of bags each day, but largely I think due to a failure on the part of a collecting contractor and perhaps to other circumstances as well, the quantities of salt made available to the plaintiff for transporting and storage after 4th August fell far short of the daily minimum of 2,375 bags.

In these circumstances the plaintiff claimed from the Crown a sum of Rs. 10,847 as damages on the ground that the Crown had failed to fulfil its alleged obligations to supply him with at least 2,375 bags of salt to be handled under the contract. For a second cause of action he claimed a refund of a sum of Rs. 983.20 representing the penalties exacted from him for his earlier defaults. This latter part of his claim was rejected by the learned District Judge, and no appeal has been filed against his finding on the point. Only the question of the Crown's liability on the first cause of action arises for our consideration.

The view taken by the learned District Judge was that " the plaintiff had no right to demand that by necessary implication the defendant should supply him with 2,375 bags a day. In terms of the contract

however the plaintiff was entitled to employ labourers and vehicles sufficient to carry 2,375 bags a day, and if he employs labourers and vehicles sufficient to carry that number and was not given work for them or insufficient work for them he was entitled to recover that loss from the defendant ". After a very careful analysis of the evidence of this later basis of liability, he entered judgment in favour of the plaintiff for a sum of Rs. 5,794.73. The present appeal is from this judgment.

I am in agreement with the learned Solicitor-General that the Crown cannot be held liable in damages on the grounds indicated by the learned Judge. The plaintiff's claim must clearly stand or fall on the question whether, upon a proper interpretation of the agreement dated 26th January, 1945, the Crown was under an implied contractual obligation to supply him with 2,375 bags a day for transport and storage to the same extent as the plaintiff was admittedly under a duty to handle that quantity if supplied. I shall therefore proceed to examine the terms of the agreement.

The formal document nowhere *explicitly* imposes obligations of any kind upon the Crown. The language employed does not even state in so many terms that the Crown was under a duty to pay the plaintiff at the stipulated rate for services actually and properly performed. There can be little doubt, however, that such an obligation does arise by necessary implication. Is it also unreasonable to hold that, corresponding to the plaintiff's explicit obligation on pain of a stipulated penalty to be ready to handle a minimum quantity of 2,375 bags of salt each day, there was an implied duty cast on the Crown to supply the plaintiff with that minimum quantity ?

In *The Attorney-General v. Abram Saibo* [1] a Divisional Bench of this Court was called upon to interpret an agreement between the General Manager of Railways and the defendant that the latter should supply rice for one year at a specified price " in such quantities as may from time to time be required for the general service of the railway ". The agreement did not explicitly state that the General Manager was under an obligation to order or to pay for any rice. It was decided however that by necessary implication the Crown was obliged by the terms of the contract to place all its requirements for rice with the defendant. The Court applied the rule laid down in *The Moorcock* [2] that it was necessary to draw this inference " from the presumed intention of both the parties *with the object of giving to the transaction such business efficacy as they both must have intended that it should have* ".

It is, I think, important to note that the contract which is now under consideration is a bilateral contract the terms of which are expressed to have been agreed upon by both the plaintiff and the Assistant Government Agent, and that both parties signed the document as contracting parties. In *Pordage v. Cole* [3] A and B had mutually agreed that B should pay A a stipulated sum of money for his land. The Court held that these

[1] *(1915) 18 N. L. R. 417.*

[2] *14 P. D. 64.*

[3] *85 English Reports 449*

words amounted to a corresponding implied covenant by A to convey the lands. "*For agreed is the word of both*". To my mind this line of argument is appropriate to the present case.

Once the principle of interpretation has been elucidated, it is of course of little assistance to examine a number of decided cases in which a submission that an implied obligation should be read into the language of a particular contract was either accepted or ruled out. Each transaction must necessarily be considered in the light of the general rule that an obligation imposed by necessary implication can only be admitted where it "*prevents such a failure of consideration as cannot have been within the contemplation of either party*". (*Hamlyn v. Wood* [1]; *The Times of Ceylon Co. Ltd. v. The Attorney-General* [2].)

In this case the parties had agreed that the plaintiff should, in a district where man-power and transport facilities were admittedly scarce, provide each day an organisation sufficient to handle a minimum quantity of 2,375 bags of salt a day. In return for those services he was to be paid not a lump sum calculated in a manner commensurate with the cost of procuring such an organisation but merely to receive payment at a rate calculated according to the actual number of bags handled. I fail to see how it would be possible to give "business efficacy" to such a bargain unless there is read into the contract an obligation on the part of the Crown to supply the quantity of salt which the other contracting party was under a duty to handle. The contention for the Crown seems to be that it was open to them, having put the plaintiff to all the expense of employing labour and transport sufficient for 2,375 bags to give him, say, fifty bags (or perhaps no bags at all) on any particular day and to pay him only for the quantity actually handled at the stipulated rate (or nothing, as the case may be). With the greatest respect, I should imagine that a reasonable and experienced man of business would regard such a proposition as very strange indeed. It would certainly be impossible as a business proposition for a contractor to submit a tender for a transaction of this nature at an economic rate on this basis. This case is concerned with a commercial contract and should, as far as the language permits, be construed "with reference to the commonplace tests which the ordinary business man conversant with such matters should adopt". (per Macmillan J in *Yorkshire Dale Co. v. Minister of War Transport* [3]). When the Crown undertakes an incursion into the fields of commerce, the same test must serve as the standard. I observe that in the following year the Crown called for tenders in respect of similar services on the express understanding that the Crown was not committed to supply any daily specific quantity of salt per day. In that event the tenderer would have at least known exactly where he stood, and his quotation would no doubt have been prepared with special reference to the risk involved.

In my opinion the Crown was under an implied obligation to make available to the plaintiff a minimum quantity of 2,375 bags of salt to be handled by him under the contract, and any other interpretation

[1] (*1891*) *2 Q. B. 488.* [2] (*1936*) *38 N. L. R. 430.*
[3] (*1942*) *111 L. J. K. B. at page 518*

of the terms of this particular contract would result in " such a failure of consideration as could not have been within the contemplation of either party ". The Crown's default in supplying this minimum quantity on any day constituted a breach of contract entitling the plaintiff to claim damages to compensate him for the consequent loss sustained by him.

I agree with the learned Solicitor-General that it would normally have been desirable to send the case back for a reassessment of damages on the true basis of liability which is somewhat different from that on which the learned Judge had condemned the Crown to compensate the plaintiff. In the present case, however, this would involve both parties in needless expense, because I am satisfied that the sum which should be awarded to the plaintiff would, if correctly computed, have exceeded the amount for which judgment has been entered in his favour. The learned Judge in fixing damages has taken into account only the additional expenditure incurred by the plaintiff in fulfilling his part of the bargain. The other important item of *loss of profits* resulting from the Crown's default has not been considered. As the plaintiff has not appealed against the inadequacy of the damages awarded him, I would dismiss the appeal with costs.

WINDHAM J.—I agree.

Appeal dismissed.