

[PRIVY COUNCIL.]

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Present : Viscount Haldane, Lord Sumner, and
Lord Parmoor.

DE SOYSA *v.* THE ATTORNEY-GENERAL.

D. C. Colombo, 35,374.

Sale of arrack rents—Notification to prospective buyers that renters would be given licenses to distil arrack for their rents—Reference in conditions of sale to sale of arrack by wholesale by renters—Several documents forming one contract—Evidence Ordinance, s. 91—Action against Government for breach of contract by not granting licenses—Is the only remedy an appeal to the Governor?—Ordinance No. 10 of 1844, s. 9—Conseusus ad idem.

The appellant purchased, on March 25 and April 19, 1912, the arrack rents for the Negombo and Anuradhapura Districts for the years 1912-1913. On March 4 a circular letter was issued by the Government to prospective purchasers of arrack rents (including the plaintiff) which stated, *inter alia*, that renters would be allowed

¹ See (1907) 9 N. L. R. 98.—*Ed.*

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licenses to distil their own arrack for the use of their own rents, but that no license would be granted to distil arrack in any but stills already established. At this date the appellant had already established two stills in Ceylon, and held in respect of them licenses to distil arrack.

In the conditions of sale there was the following condition:

"Licenses to sell arrack by retail at the taverns enumerated shall be granted to such persons as the purchasers may desire The purchaser shall also be allowed to establish storehouses at the under-mentioned places. In addition to the above storehouses, the purchaser shall be permitted to sell arrack wholesale at not more than four places."

The appellant claimed the right to two distillery licenses, which was at first unconditionally refused, but he was subsequently informed that the licenses would be issued if he signed a letter accepting distillery licenses on condition that the arrack distilled should be supplied only to arrack taverns established in the two districts and for the sale of arrack by retail, and that he should not sell by wholesale.

Held, that the appellant was entitled to the distillery licenses enabling him not only to supply arrack for retail sale at the taverns, but also to sell wholesale at not more than four places selected under the prescribed conditions, and that as there was a breach of contract the appellant was entitled to damages.

A written contract referred to in section 91 of the Evidence Ordinance may be contained in several documents.

The appellant is not deprived of his cause of action by the right of appeal to the Governor in Council under Ordinance No. 10 of 1844. The Government cannot say that the only remedy, in case the Government refused to carry out the contract, is an appeal to itself.

The fact that difference of opinion has arisen as to the proper construction of the contract does not show that there was no consensus *ad idem* between the parties.

THE facts appear from the judgment. For the judgment of the Supreme Court see *18 N. L. R. 430*.

June 26, 1917. Delivered by LORD PARMOOR:—

The appellant, in September, 1910, purchased certain arrack rents in the districts of Negombo and Puttalam, in Ceylon, for the period from January 1, 1911, to June 30, 1912. On September 21, 1910, he applied for permission to establish two distilleries on his own lands, known as Kochchikade and Walauwawatta. This permission was granted, and the appellant did establish a distillery at Kochchikade, erecting there two stills. On June 30, 1911, the appellant was granted licenses under the provisions of Ordinance No. 10 of 1844, as amended by Ordinance No. 13 of 1891, to distil arrack at the two stills. These licenses were granted in Form A of Schedule IV. of Ordinance No. 10 of 1844.

On February 23, 1912, a notice was published in the *Government Gazette* in Ceylon that a Board would sit in March for the purpose of opening and considering tenders for the purchase of arrack rents in various districts, including Negombo and Anuradhapura. This notice stated that forms of conditions of sale could be obtained, and that the privilege, which would be sold under the conditions, was the right to sell arrack only by retail, and did not include the right to sell toddy. On March 4, 1912, the Acting Controller addressed to the appellant a letter in reference to the notice of sale of arrack rents. There is no question raised as to the authority of the Acting Controller to send this letter, and to bind the Government by its terms. The fifth paragraph of the letter is as follows:—

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“(5) In the event of your purchasing any arrack rents, you will be allowed licenses to distil your own arrack for the use of your own rents, but no license will be granted to distil arrack in any but stills already established or used in Ceylon, *i.e.*, no license to establish fresh stills will be granted, as already notified.”

At this date the appellant had already established two stills in Ceylon, and held in respect of them licenses to distil arrack.

It does not appear at what date the conditions of sale in respect of the various districts were issued, but the terms of the conditions of the sale applicable to Negombo are set out in the appendix, and similar conditions applied to Anuradhapura. The important condition is 9:—

“Licenses to sell arrack by retail at the taverns enumerated in the list hereto marked A shall be granted, on the application of the purchaser, to such persons as he may desire, provided that the sites be approved by the Government Agent. The purchaser shall also be allowed to establish storehouses at the under-mentioned places, but such storehouses shall be used exclusively for supplying taverns, and the purchaser shall not be at liberty to sell in quantities of less than three gallons at a time at any such storehouse.

“In addition to the above storehouses, the purchaser shall be permitted to sell arrack wholesale at not more than four places selected by him, and approved by the Government Agent, on obtaining a separate license in respect of the storehouse or storehouses situated at each of the said places under the provisions of the Ordinance No. 10 of 1844; but he shall not be at liberty to sell by retail at any of these storehouses, unless he shall have obtained a special license for that purpose from the Government Agent.”

The appellant became purchaser under the conditions of sale of the Negombo and Anuradhapura rents for the sums respectively of Rs. 300,306 and Rs. 58,036. In each case he was declared the purchaser of the said privilege at the above respective prices, making a payment by way of deposit. The purchaser, under the conditions

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of the sale, might or might not have a right to a distillery license, but the privilege purchased includes, not only the right to a grant of license to sell arrack by retail at the defined taverns, but, in addition, the right to be permitted to sell arrack at not more than four places under the stated conditions. Their Lordships cannot accept the argument urged on behalf of the respondent that the permission to sell arrack wholesale at not more than four places is in the nature of a limitation, or that it is allowable to read the condition as though the words had been "the purchaser shall not be permitted to sell arrack wholesale at more than the four selected places." After purchasing the privilege contained in the conditions of sale in Negombo and Anuradhapura, the appellant claimed the right to two distillery licenses under the terms of the letter of March 4, 1912.

On July 22, 1912, the appellant made a formal application for a license to distil in his stills situated at Kochchikade. This application was unconditionally refused on July 31, 1912, in a letter from the Government Agent, Western Province. There was a subsequent correspondence between the proctors of the appellant and the Colonial Secretary. The proctors claimed that, under the conditions of sale of the rents, the appellant was entitled to wholesale licenses to sell arrack from godowns in the usual manner, in addition to the retail licenses to sell arrack at the taverns, and that he proposed to provide himself with arrack from his own stills for that purpose. On October 12, 1912, the Acting Colonial Secretary writes to the proctors "that the Government absolutely contests the legal position you assume in your letter." After an attempt to compromise, without prejudice, the appellant ultimately declined to sign a letter accepting distillery licenses on the condition that the arrack distilled should be supplied only to the arrack taverns established in the said districts and for the sale of arrack by retail, and that he should not sell by wholesale, or in any manner whatsoever dispose of the arrack at the said stills, or either of them, except for the purposes aforesaid. The questions to be determined in the appeal are whether the Government came under contractual obligation to issue distillery licenses to the appellant, and, if they did, what is the extent of the obligation? The Judge of the District Court decided against the appellant. This decision was affirmed in the High Court, but the High Court did not concur in all the grounds on which the Judge of the District Court based his judgment.

Before considering the main subject of the appeal, their Lordships would express their concurrence with the opinion expressed in the High Court that section 91 of the Evidence Ordinance gives no sanction to the view that a written contract, referred to in that section, must be contained in a single document. A written contract may be contained in several documents, and in the present case, if there is a contract, it is not the less binding that it is contained in the letter of March 4, 1912, the tender of the appellant, the

conditions of sale, and the acceptance of the tender of the appellant. They concur further in the opinion that the appellant is not deprived of his cause of action by the right of appeal to the Governor in Council under Ordinance No. 10 of 1844, or that the Government can be heard to say that the only remedy, in case the Government refused to carry out the contract, is an appeal to itself. Apart from the question of damage, the evidence is documentary, and their Lordships have not thought it necessary to review the evidence of Mr. Weigel, since, in their opinion, it is not relevant to the questions brought before them for decision.

Their Lordships are of opinion that the letter of March 4, 1912, the conditions of sale, the appellant's tender, and its acceptance constitute a contract which includes a term to the effect of paragraph (5) in the letter. No doubt a difference of opinion has arisen as to the proper construction of this contract, but their Lordships cannot assent to the view that, because this difference has arisen, there has been no consensus *ad idem* between the parties. It is said that at no time the appellant applied for or was willing to accept the only license which Government was willing or bound to grant; but this depends on the construction of the contract. If the application made by the appellant on July 22, 1912, is for a license, which the Government, was not bound to grant, then the refusal of such license would not constitute a breach of the Government obligation, and the appellant would fail, not on the ground that there had been no contract, but that he had made a claim which the terms of the contract did not support. It becomes necessary, therefore, to consider what is the nature of the obligation which the Government undertook, and whether the alleged refusal constitutes a breach of that obligation.

The words in the letter of March 4, 1912, on which the appellant relies, are: "In the event of your purchasing any arrack rents, you will be allowed licenses to distil your own arrack for the use of your own rents." It was argued on behalf of the appellant that the licenses referred to in the letter are the ordinary distillery licenses granted under the Ordinance No. 10 of 1844, as amended by No. 13 of 1891, and that rents included not only the right to a grant of licenses to sell arrack by retail at the taverns, but also that the purchaser should be permitted to sell arrack wholesale at not more than four places selected by the purchaser and approved by the Government Agent, on obtaining a separate license in respect of the storehouses or storehouse situate at each of the said places, under the provisions of the Ordinance No. 10 of 1844. The license for which the appellant applied on July 22, 1912, was a license to distil under Ordinance No. 10 of 1844, and the refusal of the Government Agent of such a license contains no suggestion that the license applied for was a different license from that referred to in the letter of March 4, 1912. The license ultimately offered to the appellant

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on the condition of his signing the enclosure in the letter of October 23, 1912, is in the ordinary form of a distillery license under Ordinance No. 10 issued by the Government Agent of the Western Province, with a special condition limiting the purposes for which the appellant would be enabled to distil. The counsel for the respondent did not direct the attention of their Lordships to any authority under which distillery licenses could be issued at the material date, except the Ordinance No. 10 of 1844. Their Lordships accordingly hold that the licenses referred to in the letter of March 4, 1912, are licenses grantable under the Ordinance No. 10 of 1844. The granting of such licenses is in reality a necessary preliminary before the appellant is entitled to distil spirits in the stills erected by him, and, in the absence of such licenses, the appellant would have been liable to the penalty of an illicit distillation imposed under the terms of the Ordinance No. 10. It follows that the letter from the Government Agent on July 31, 1912, unconditionally refusing to grant a distillery license to distil under Ordinance No. 10 of 1844, constitutes a breach of the obligation undertaken by the Government in the letter of March 4, 1912, at the time of the sale of the arrack rents of Negombo and Anuradhapura.

A further question arises as to the meaning of the words "for the use of your own rents." It was contended on behalf of the respondent that these words limited the use of the distilled arrack to the supply of arrack sold by retail at the taverns, and excluded the supply of arrack to be sold wholesale at the selected places; and that, when subsequently an offer was made to the appellant to grant a distillery license on his giving an undertaking only to use it for the supply of arrack for retail sale at the taverns, the appellant was not justified in refusing to accept a distillery license with this limitation, or that, in any event, the conduct of the appellant affected the amount of damages to which he was entitled.

Their Lordships fully accept the account of the arrack-renting system so lucidly explained in the judgment of the District Judge, and approved by the Judges in the High Court. It appears that the purchaser was called "the renter," and that the renter acquired the right to sell arrack by retail in all the taverns within his rental farm. Every tavern had to be licensed by the Government Agent, and accordingly the renter acquired by purchase the right to all the licenses the Government Agent would issue for the taverns on his farm, according to the provisions of the Ordinance No. 10 of 1844 as amended, which was then in force. Assuming, however, that in ordinary practice "rents" only carried the right to sell arrack by retail in all the taverns within the rental farm, that does not solve the question of the obligations undertaken by the Government in the letter of March 4, 1912, taken in connection with the conditions of sale applicable to the districts of Negombo and Anuradhapura.

Number 9 of these conditions of sale not only grants the concession that licenses to sell arrack by retail shall be issued on the application of the purchaser, but, in addition, that the purchaser shall be permitted to sell arrack wholesale at not more than four selected places under the prescribed conditions. In their Lordships' opinion the word "rents" in the letter is not limited to a portion only of the privileges purchased by the appellant under the conditions of sale, but includes both the right to a permission to sell arrack wholesale under the stated conditions and the right to licensees to sell arrack by retail, with the result that the appellant was entitled to a distillery license enabling him not only to supply arrack for retail sale at the taverns, but also to sell wholesale at not more than the four selected places under the prescribed conditions. It may be doubtful how far the later correspondence is admissible, except on the question of damage; but the terms of the undertaking, which the appellant refused to sign, make it clear that throughout the respondent refused to issue a distillery license, unless the appellant undertook to limit its use to the supply of arrack by retail, and that this refusal was in breach of the obligations which the Government had undertaken.

Their Lordships are of opinion that the decrees of the District Court dated April 19, 1915, and of the Supreme Court dated November 4, 1915, ought to be set aside and this appeal allowed, and that the case should be remitted to the District Court for assessment of the proper amount of damages, unless the parties can agree to them. The respondent must pay to the appellant his costs of this appeal and of the appeal to the Supreme Court, and the general costs of the action, but the costs of the issue as to damages with the costs of the assessment of the damages must be in the discretion of the District Court. Their Lordships will humbly advise His Majesty accordingly.

Set aside.

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