APPELLATE CIVIL

Before R. N. Mittal, J.

THE POST GRADUATE INSTITUTE,—*Defendant-Appellant*

versus

M/S. GHAZIABAD TEXTILES NAVA GANJ,—*Plaintiff-Respondent.*

Regular First Appeal No. 195 of 1975

January 6, 1976.

Indian Contract Act (IX of 1872)—Sections 2 and 73—Tender accepted for supply of maximum quantity of goods during a certain period — Orders for supply of specified quantity from time to time — Whether constitute different contracts — Purchaser making risk purchase due to non supply of a part of the goods—Loss suffered by the purchaser — Whether can be adjusted against the price of the goods received — Damages — Whether can be assessed without proof of market price.

Held that the acceptance of a tender regarding the price and maximum quantity of goods to be supplied by the suppliers constitutes a continuing offer and not a contract. Regarding the supply of goods, the tender becomes a contract only after an order is placed by the purchaser for a specified quantity of goods. The purchaser is at liberty to convert the continuing offer into contracts by placing orders from time to time. Therefore, orders for supply of specified quantity of goods in accordance with the terms of the tender constitute different contracts.

(Para 6).

Held that a claim for damages for breach of contract is not a claim for a sum presently due and payable and the purchaser is not entitled to recover the amount of such claim by appropriating other sums due to the seller. There can be no set-off of an unascertained amount. The claim of the purchaser even though assessed by him at a particular amount, if disputed by the seller, still remains a disputed right to claim and not an ascertained debt. Appropriation of such a claim against any sum of money due and payable to the seller would be without the authority of law and in that sense without jurisdiction. To give this power of adjudication to the purchaser would be to constitute him a judge in his own cause. Even if the purchaser suffers any loss on account of non-supply of the goods by the seller, he cannot adjust the loss himself and it becomes his duty to institute a suit for recovery of the amount or to claim a set-off. He cannot, thus, take the powers of the Court in his own hands and retain the payments which he is liable to pay to the seller.

(Para 7)

Held that in order to determine the damages, the difference between the contract price and the market price on the date when the breach takes place, has to be determined. It can be done only if the market price on the date of breach of the agreement is determinable. If there is no evidence of the market price, then the party which claims damages, shall not be granted the same.

(Para 9)

Regular First Appeal from the decree of the Court of Shri Raj Kumar Gupta, Senior Sub Judge, Chandigarh, dated the 29th day of January, 1975, granting the plaintiff a decree for the recovery of Rs. 7,345 with costs and dismissing the suit of the plaintiff to the extent of Rs. 3,142-50 N.P.

Anand Swaroop, Senior Advocate with M. L. Bansal, Advocate.

G. R. Majithia, Advocate with Amarjit Singh, Advocate and

R. K. Aggarwal, Advocate.

JUDGMENT

R. N. Mittal, J. :

(1) This judgment will dispose of R.F.A. Nos: 195 and 299 of 1975, which arise out of the same judgment.

(2) Briefly the case of the plaintiff is that it is a partnership firm registered under the Indian Partnership Act. The defendant issued an advertisement in the Tribune dated February 27, 1970, for the supply of bandages, surgical gauze and absorbent cotton wool. The plaintiff submitted its tender on March 19, 1970, for the supply of 8,000 Kgs. of absorbent cotton wool, in rolls of 400 grams each, 1,50,000 metres of surgical gauze etc. The defendant accepted the tender submitted by the plaintiff and placed an order dated March 27, 1970, for the supply of 4,000 kgs. of absorbent cotton wool. The plaintiff supplied 8,400 rolls of absorbent cotton wool in rolls of 400 grams each under goods receipt dated April 21, 1970, and 1,600 rolls under goods receipt No. 866 dated April 21, 1970. The defendant received the goods on April 22, 1970. Bills for Rs. 25,032 and Rs. 4,768 were sent by the plaintiff to the defendant for the aforesaid goods, which were to be paid within thirty days from the date of the receipt of the goods. The defendant did not make the payment within thirty days in accordance with the terms of the contract between the parties. On enquiry by the plaintiff from the defendant, it was revealed that an objection had been taken by it about the net weight of the cotton wool. The plaintiff, who had been

hard pressed for money, agreed to compensate the defendant for the weight of the outer cover of 10,000 rolls and despatched 850 rolls more of 400 grams each free of cost, on May 26, 1970. It was accepted by the defendant. Thereafter, the defendant paid Rs. 26,657.50 Paise as the price of 10,000 rolls of cotton wool at the rate of Rs. 2.98 per roll of 400 grams each. It is stated by the plaintiff that Rs. 3,142.50 Paise were withheld illegally by the defendant as the price of the weight of the inter-leaf paper. The defendant, on April 8, 1970, placed an order for one lakh metres of surgical gauze with the plaintiff. It started supplying the same in piece-meal. It is alleged that two bills of the value of Rs. 3,807 and Rs. 2,538 are outstanding against the defendant in respect of the said supply. Consequently, the plaintiff instituted a suit against the defendant for the recovery of Rs. 10,487.50 Paise. The suit was contested by the defendant. The defendant admitted that it placed an order for the supply of 4,000 Kgs. of cotton wool absorbent at the rate of Rs. 2.98 Paise per roll of 400 grams net weight. It, however, stated that 10,000 rolls of cotton wool were received but their weight was less and was not in accordance with the contract entered into between the parties. According to the defendant, the payment for the material actually supplied amounting to Rs. 26,657.50 was made to the plaintiff. The defendant further stated that the plaintiff supplied 843 rolls of cotton and not 850 rolls as alleged by the plaintiff to compensate the defendant for the short supply made by it in pursuance of the defendant's order. The defendant admitted that it placed an order for the supply of one lakh metres of surgical gauze with the plaintiff. According to the defendant, the plaintiff failed to supply the goods within the stipulated period of thirty days and, therefore, the payment was withheld for the goods supplied. It is further stated that the defendant had to purchase the goods in the market at the risk of the plaintiff and that an amount of Rs. 28.36 is due from the plaintiff. On the pleadings of the parties the Court framed the following issues :—

1. Whether the plaintiff is a partnership firm duly registered under the Indian Partnerhisp Act and the person suing is shown as a registered partner in the Register of Firms ?
2. Whether the weight of the overleaf or inter-leaf paper of the cotton rolls was to be included for the purposes of calculating the price of the goods ?
3. Whether the defendant illegally withheld the payment of Rs. 3,142.50 Paise as alleged in paragraph 10 of the plaint ?

4. Whether the defendant is not liable to make payment of Rs. 3,807 and Rs. 2,538 for the supplies made by the plaintiff ?

5 Whether the defendant was entitled to withhold the said payments for reasons mentioned in para 11 of the written statement ?

6. Whether the defendant is not bound to return the security deposit of Rs. 1,000 to the plaintiff ?

7 Relief.

The trial Court held that the plaintiff is a partnership firm duly registered under the Indian Partnership Act and the person suing is shown as a registered partner in the Register of Firms, that the weight of the overleaf or interleaf paper of the rolls was not to be included for the purposes of calculating the price of the goods and that the plaintiff was not entitled to the amount of Rs. 3,142.50 Paise. It further held that the defendant is liable to make payment of Rs. 3,807 and Rs. 2,538 for the supply of surgical gauze to the plaintiff, that the defendant was not entitled to withhold the aforesaid payment and that the defendant was bound to return the security deposit of Rs. 1,000 to the plaintiff. In view of the aforesaid findings the trial Court decreed the suit of the plaintiff to the tune of Rs. 7,345.

(3) Two appeals have been filed against the judgment and decree of the trial Court—one by the Post Graduate Institute of Medical Education and Research, Chandigarh, the defendant (R.F.A. No. 195 of 1975), and the other by M/s Ghaziabad Textiles, Naya Ganj, Ghaziabad, the plaintiff (R.F.A. No. 299 of 1975). I shall first take up R.F.A. No. 195 of 1975 filed by the defendant.

(4) Mr. Anand Swaroop, learned counsel for the appellant, has vehemently argued that the learned trial Court has erred in deciding issue No. 4 against the appellant. He has argued that the appellant placed orders for supply of surgical gauze *vide* orders dated April 8, 1970 (Exhibit D3), September 24, 1970 (Exhibit D4) and February 4, 1971 (Exhibit D5). He submits that the plaintiff failed to supply a part of the quantity of the gauze ordered *vide* order dated April 8, 1970, and failed to carry out the orders dated September 24, 1970, and February 4, 1971. He further submits that the defendant had to purchase the surgical gauze from the market and had to suffer a loss in purchasing it, which the plaintiff was liable to pay to it. I have heard

the learned counsel for the parties at a considerable length and given a thoughtful consideration to the argument of the learned counsel. In order to determine the aforesaid question, a reference shall have to be made to tender notice, the tender and the letter of acceptance. In compliance with the tender notice, the plaintiff submitted a tender (Exhibit P-3) on March 19, 1970. The conditions of tender were not given in the tender notice. It was, however, stated in it that the forms containing detailed terms/conditions and description of the required goods could be had from the office of the Director. In the tender all the conditions, on which the supplies were to be made, had been given. In clause (11), it is stated that quotations will be regarded as constituting an offer or offers open to acceptance on whole or in part or parts at the discretion of the Director for a period of six months from the due date fixed for receipt of the tenders. In clause (13), it is mentioned that the time for and date of delivery or despatch stipulated in the supply orders shall be deemed to be the essence of the contract and should the contractor fail to deliver or despatch any consignment within period prescribed for such delivery or despatch in the supply order, then without prejudice to his rights otherwise the Director shall be entitled to recover from the contractor a sum of 2 per cent of the contract price of such consignment for each and every month or a part of a month during which the supply or despatch of such consignments may be in arrears or alternatively at the option of the Director he shall be entitled to purchase such consignments elsewhere on the account and at the risk of the contractor or to cancel the contract in which case security shall stand forfeited. The tender was accepted by the defendant *vide* letter dated March 27, 1970 (Exhibit D1). This letter has been written by the Director of the defendant to the plaintiff and it is stated therein that the tender of the plaintiff has been accepted for supply of cotton wool absorbent and gauze surgical. It is also stated that the delivery period was 30 days from the receipt of firm order. It is further provided that the price of cotton wool absorbent shall be "at the rate of Rs. 2.98 per roll of 400 grams net" and that of gauze surgical "at the rate of Rs. 4.70 each *than* of 18 metres". Though the receipt of the said letter is denied by the plaintiff, but from the perusal of the orders placed by the defendant on the plaintiff, dated April 8, 1970, September 24, 1970, and February 4, 1971, it is clear that the aforesaid letter reached the plaintiff and it supplied the goods in terms of that letter. In the circumstances, it cannot be accepted that the said letter was not received by it. A reading of the aforesaid documents clearly establishes, firstly, that the quotations submitted by the plaintiff were to be considered as constituting an offer

or offers open to acceptance by the defendant; secondly, that the offer was to remain open for one year [though it is mentioned in clause (11) that the offer was to remain open for a period of six months, but if the tender is read with the letter of acceptance dated March 27, 1970, it is celar that the offer was to remain open for a period of one year], thirdly, that the plaintiff had to supply goods within a period of 30 days from the receipt of the order from the defendant; and fourthly, that in case the plaintiff failed to supply the goods, the defendant could purchase them from the market at the risk of the plaintiff.

(5) Mr. G. R. Majithia, learned counsel for the plaintiff, has submitted that the defendant could not itself determine amount of damages on account of non-supply of the goods by the plaintiff, that the orders placed by the plaintiff constituted different contracts and that if any breach was committed by the plaintiff, the defendant could recover damages by filing suit or claiming set off. The defendant according to him could not make adjustments of the alleged loss from the payments which were to be made by the defendant to the plaintiff. He also argues that the defendant has not led any evidence as to what was the prevailing price of the aforesaid commodity when the purchases were made by the defendant at the risk of the plaintiff. In view of the aforesaid contentions, the questions, which arise for determination are :—

(1) Whether the orders placed by the defendant with the plaintiff constituted one contract or different contracts.

(2) In case the plaintiff failed to supply the goods, whether the remedy of the defendant was to institute a suit for damages or claim set off or could it determine and adjust the amount itself towards the payments to be made by it to the plaintiff on account of the goods supplied by the plaintiff.

(3) Whether the Court could assess the damages though there was no evidence as to what was the price of goods in the market on the date of breach of agreements.

(6) The contention of Mr. Anand Swaroop regarding first point is that the three orders placed by the defendant on the plaintiff constituted one contract whereas Mr. Majithia contends that they constituted three different contracts. I have already reproduced the terms of the tender, which has been accepted by the defendant. It is specifically provided in clause (11) that the acceptance of the tender shall

be treated as an offer. I have also observed above after taking into consideration the tender and the letter of acceptance that the offer had to remain open for a period of one year. The tender was regarding the price of the goods and the maximum quantity of goods, which the plaintiff was liable to supply to the defendant. A reading of the above mentioned documents establishes that the tender and its acceptance constituted a continuing offer and not a contract. Regarding the supply of the goods, the tender became a contract only after the order was placed by the defendant on the plaintiff. In this view, I get support from the observations of a Division Bench of the Chief Court of Punjab reported as *Kundan Lal and others* v. *The Secretary of State for India in Council* (1). In that case, the Commissariat Department invited tenders for the supply of such quantity of gram as it might require for a period of 12 months. The defendant sent a tender to supply the gram for that period at a certain fixed price in such quantities as the department might order from time to time. The plaintiff placed order for certain quantity of gram which the defendant failed to supply. The plaintiff rescinded the contract and brought an action for damages for non-delivery against the defendant. The learned Bench observed that the tender made by the defendant and accepted by the plaintiff was not a contract by itself, but, created a series of continuing offers on the part of the defendant which plaintiff was at liberty to convert into contract by giving orders in accordance with the terms of the tender. I am in respectful agreement with the observations of the learned Division Bench. In the aforesaid circumstances, the orders placed by the defendant on the plaintiff *vide* letters dated April 8, 1970, September 24, 1970 and February 4, 1971, became contracts as soon as they were received by the plaintiff. These three orders will, therefore, constitute different contracts.

(7) It is an admitted case that the plaintiff failed to supply a part of the goods against the order placed on April 8, 1970. It is also admitted that no goods were supplied against the orders dated September 24, 1970 and February 4, 1971. According to the terms of the contract, the goods were to be supplied within thirty days from the receipt of the orders. Thus the breach of agreements took place in or about the second week or May, 1970, fourth week of October, 1970 and first week of March, 1971. The defendant purchased the goods from M/s Nemco National Medicine Company, Amritsar, at the Punjab contract rates and Government Medical Store Depot, Karnal, at the Haryana contract rates, on different dates from October 26, 1970 to

(1) 72 Pb. Record 1904.

May 5, 1971. The price of the goods which the defendant was liable to pay, has been adjusted by it against the excess paid by the defendant for purchase of the goods from the aforesaid dealers. The question that arises is whther the defendant could adjust the loss suffered by it against the payments due from it to the plaintiff itself, or it had to institute a suit for recovery of the same. The matter is now settled by the Supreme Court in *Union of India* v. *Raman Iron Foundry* (2). In that case, the Central Purchase Organisation of the Government of India entered into a contract for purchase of stores from the contractors. There was clause (18) in the contract wherein it was provided that whenever any claim for the payment of a sum of money arose out of or under the contract against the contractor, the Government was entitled to recover such sum by appropriating in whole or in part, the security, if any, deposited by the contractor, and in the event of the security being insufficient, the balance and if no security had been taken from the contractor, the entire sum recoverable would be recovered by appropriating any sum then due or which at any time thereafter might become due to the contractor under the contract or any other contract with the Government. While interpreting the said clause, Bhagwati, J., speaking for the Court, observed that a claim for damages for breach of contract is not a claim for a sum presently due and payable and the purchaser is not entitled, in exercise of the right conferred upon it under clause (18) to recover the amount of such claim by appropriating other sums due to the contractor. Reference in this connection was also made by Mr. Majithia to *M/s Marwar Tent Factory* v. *Union of India and another* (3). In that case there was a clause in the agreement for claiming set-off. While deciding a similar question, the Court observed that there can be no set-off of an unascertained amount. The claim of the purchaser even though assessed by it at a particular amount, if disputed by the contractor, still remains a disputed right to claim and not an ascertained debt. It further observed that the appropriation of such a claim against any sum of money due and payable to the contractor would be without the authority of law and in that sense without jurisdiction. It also observed that to read the power of adjudication would be to constitute the purchaser a judge in its own cause. The aforesaid observations fully apply to the present case. Even if the defendant suffered any loss on account of non-supply of the goods by the plaintiff, it could not adjust the loss itself. It became its duty to institute a suit for recovery of the amount or to claim

(2) A.I.R. 1974 S.C. 1265.

(3) A.I.R. 1975 Delhi 27.

a set-off. It could not take the powers of the Court in its own hands and retain the payments which it was liable to pay to the plaintiff.

(8) The third question that arises for determination is as to whether this Court can assess the damages without any evidence of market value on the record. I have already mentioned above that the breach took place in the second week of May, 1970, fourth week of October, 1970, and first week of February, 1971. There is no evidence on the record to show as to what were the prevailing prices in those periods. D.W. 2, Ram Muni in his statement dated May 31, 1974, deposed that quotations were invited for making the risk purchases. These quotations were to be opened on October 26, 1970. They had not been opened till that date. The above statement establishes that tenders for supply of the goods were invited in or about October but these were not opened. The goods were purchased at approved rates of Governments of Punjab and Haryana without making any enquiries from the market regarding prevailing prices on the dates when breach of agreements took place. The plaintiff was liable to compensate the defendant regarding the loss for purchasing the goods on the dates when the breach took place. In case it had purchased the goods subsequently, plaintiff's liability would be limited to that extent, which the defendant would have suffered, if it had purchased goods on the date of breach. I am fortified in the above view by the observation of the Supreme Court in *P.S.N.S. Ambalavana Chettiar and Co. Ltd. and another* v. *Express Newspapers Ltd., Bombay* (4). It was held in that case that the seller is entitled to claim as damages the difference between the contract price and the market price on the date of breach. Where no time is fixed under the contract of sale for acceptance of the goods, the measure of damages is *prima facie* the difference between the contract price and the market price on the date of the refusal by the buyer to accept the goods. In the aforesaid case the breach was committed by the buyer. The same principle shall also apply if the breach was committed by the seller.

(9) From the above observations, it is clearly established that in order to determine the damages, the difference between the contract price and the market price on the date when the breach takes place, has to be determined. It can be done if the market price on the date of breach of the agreement is determinable. In case there is no evidence regarding the market price on the date of breach of

(4) A.I.R. 1968 S.C. 741.

agreement, no damages can be worked out. This view gets support from a Division Bench judgment of Patna High Court in *M/s Matanhella Brothers and others* v. *M/s Shri Mahabir Industries Pvt. Ltd.*'(5), wherein Untwalia J., as he then was, while speaking for the Court, observed thus :—

> "I am definitely of the opinion that the breach of the contract occurred and the defendants were responsible for that breach in April, 1961, to be more accurate, near about the middle of April, 1961. The claim of the plaintiff for damages based upon the difference between the contract price and the market price prevailing in June, 1961 was unsustainable. There being no claim or evidence in regard to the prevailing market rate in or about the middle of April, 1961, the suit, as framed, must fail. In this connection reference may be made to the following decisions in *Erroll Mackay* v. *Kameshwar Singh* (6), *Dominion of India* v. *Bhikhraj Jaipuria* (7), *Bhikhraj Jaipuria* v. *Union of India* (8) and *Murlidhar Chiranjilal* v. *Harischandra Dwarkadas* (9).
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> "Reliance was placed on behalf of the plaintiff-respondent upon the decision of this Court in *Firm Rampratap Mahadeo Prasad* v. *Sesanse Sugar Works Ltd.* (10) and a decision of the Supreme Court in *P.S.N.S., Ambalavana Chettiar & Co. Ltd.* v. *Express Newspapers Ltd., Bombay* (11). In my opinion, none of these two cases helps the contention of the plaintiff-respondent. In the Patna case, the question was that if during the time when the goods ought to have been delivered and when they were not delivered, the buyer had re-purchased the goods in the market whether that re-purchase rate could be taken as the market rate for ascertaining the quantum of damages under section 73 of the Contract Act. Their Lordships held, it could be so. If I may say so with respect, there is no scope for doubting the

(5) A.I.R. 1970 Patna 91.
(6) A.I.R. 1932 P.C. 196.
(7) A.I.R. 1957 Pat. 586.
(8) A.I.R. 1962 S.C. 113.
(9) A.I.R. 1962 S.C. 366.
(10) A.I.R. 1964 Pat. 250.
(11) A.I.R. 1968 S.C. 741.

proposition of law which was laid down in that case. The point to be noticed with reference to that case also is that the market rate, which, on the facts of that case, was taken to be the re-purchase rate, was the rate which was prevalent when the goods ought to have been delivered, but were not delivered; that is to say, on the date of the breach of the contract on the part of the seller."

The contract price for supplying goods to the Government during certain period, cannot be accepted as the market price throughout that period. The market price is to be established by positive evidence. If there is no evidence of the market price, then the party which claims damages, shall not be granted the same.

(10) Mr. Anand Swaroop, learned counsel for the respondent, has argued that if there is no evidence regarding the market value of the goods on the date of breach, the price paid for the goods by the purchaser shall be treated as the market price. In support of his contention, he has referred to *Firm Rampratap Mahadeo Prasad* v. *Sasansa Sugar Works Ltd.* 10(*ibid*). I am unable to accept the contention of the learned counsel. The goods in the present case were not purchased on or about the dates when the breach took place, but were purchased much later and on different dates. The facts in the *Firm Rampratap Mahadeo Prasad's* case (supra), are different. A reference to the aforesaid case was also made in *M/s. Matanhella Brothers'* case (supra). The learned Bench distinguished that case. A reference has been made to that effect in the part of the judgment quoted above. It is not necessary to refer to the facts of that case again. It is sufficient to hold that Mr. Anand Swaroop cannot derive any benefit from the observations in that case.

(11) Now I shall deal with R.F.A. No. 299 of 1975. It is contended by Mr. Majithia, learned counsel for the appellant in this appeal that the weight of the paper which was required to roll the cotton, was to be included in the weight of the cotton for calculating its price. He submits that the learned trial Cour has wrongly held that the weight of the paper has to be excluded.

(12) I have given a thoughtful consideration to the argument of Mr. Majithia, but regret my inability to accept it. The defendant placed order for the supply of cotton wool by telegram dated March

27, 1970, Exhibit P. 4. Simultaneously, the order was confirmed by a letter of even date, Exhibit P. 5. In the letter it is specifically mentioned that the weight of the roll was to be 400 grams net. In compliance with the order, the cotton was supplied by the plaintiff to the defendant. After the receipt of 1000 rolls by the defendant, it raised an objection that the full quantity of cotton had not been supplied. The plaintiff thereafter, on May 26, 1970, supplied about 850 rolls of 400 grams each, free of cost. In case the agreement between the parties was that paper used in the rolls was to be included in the weight of the cotton, the plaintiff should not have agreed to supply additional rolls. From the conduct of the plaintiff, it is further established that it agreed to supply rolls of 400 grams of cotton wool net. I, therefore, reject this contention of the learned counsel.

(13) No other point was raised.

(14) For the reasons recorded above, both the appeals fail and the same are dismissed with no order as to costs.

N.K.S.

Before R. S. Narula, C. J.

CHANDU LAL,—*Petitioner.*

versus

KALIA AND GORIA,—*Respondents.*

Civil Revision No. 849 of 1973.

January 6, 1976.

Punjab Tenancy Act (XVI of 1887)—Sections 45, 50, 50-A and 77(3) (f) and (g)—Pepsu Tenancy and Agricultural Lands Act (XIII of 1955)—Sections 39 and 47—Tenant ordered to be ejected under section 45(5)—Civil suit by such tenant contesting his liabiliy to ejectment—Jurisdiction of Civil Court—Whether barred.

Held that section 50-A of the Punjab Tenancy Act, 1887 has confined the bar to the jurisdiction of a Civil Court only in respect of the suit of a tenant whose ejectment has been ordered under sub-section (6) of section 46 of the Act and not of a tenant who has been directed to be ejected either under sub-section (5) of section 45 or under any other provision of law. Exclusion of the jurisdiction of a Civil Court has not to be readily inferred and all provisions containing such a bar have to be strictly construed. The bar to a suit in