APPELLATE CIVIL.

Before Falshaw and Kapur, JJ.

DELHI CLOTH AND GENERAL MILLS CO., LTD., DELHI,—*Appellant.*

versus

SHRI K. L. KAPOOR,—*Respondent.*

Regular First Appeal No. 222 of 1950

1954

Nov., 24th

Indian Contract Act (Act IX of 1872)—Section 56—Implied terms—When to be invoked into a contract.

Held, that implied terms can in certain cases be invoked into a contract by the Court. This judicial power to remedy an omission arises not under the pressure of external circumstances, but in order to repair an intrinsic failure of expression or to remedy an omission due to inadvertence or clumsiness of draftsmanship.

Held, that an implied term can only be invoked into a contract:—

(i) to give business efficacy to the transaction as must have been intended by the parties;

(ii) if an obligation is not clearly intended and as such it must fail to take effect unless some obvious oversight is remedied; or

(iii) it is something so obvious that it goes without saying.

Regular First Appeal from the decree of the Court of Shri Y. L. Taneja, Sub-Judge, 1st Class, Delhi, dated the 31st August, 1950, decreeing the plaintiff's suit for Rs. 46,712 and proportionate costs.

N. C. CHATTERJI, for Appellant.

C. K. DAPHTRY, Solicitor-General, for Respondent.

JUDGMENT

Falshaw, J. FALSHAW, J. This is an appeal by the Delhi Cloth and General Mills Company Limited, Delhi, against a decree passed in favour of K. L. Kapur, respondent for Rs. 46,712.

The facts of the case are to a great extent not in dispute, though some of their implications are, and are as follows. About December, 1945, the plaintiff, K. L. Kapur, who possesses a diploma in engineering from the Maclagan Engineering College at Lahore and claims to be an expert in the branch of industrial technology described as "Time and Motion Study"

Delhi Cloth and General Mills Co., Ltd. Delhi v. Shri K. L. Kapoor

Falshaw, J.

approached the Company with a view to placing his skill at its disposal for the purpose of effecting economies in the running of its factories. He was successful in persuading the management to give his methods a trial and the only terms of the contract subsequently entered into between the parties are embodied in the letters, P. 2, P. 3 and P. 4. The first of these dated the 29th of January, 1946, is addressed by the Managing Directors of the Company to the plaintiff and reads— (page 87)

> "Reference your letter No. D. M. 1, dated the 28th December, 1945, please note that the terms on which we are prepared to engage you for study of Time and Motion in our Mills are as follows :—
>
> We will pay you 10 per cent of the savings effected annually for the first year only. 2½ per cent of this amount will be payable after three months of the completion of your work to our satisfaction, 2½ per cent after six months and the balance after one year. The payment will not be for suggestions only, but for actual economies effected by your personal effort. The decision of the General Manager, Spinning Superintendent and our Costing Officer will be final for purposes of deciding as to how much economies have been effected and to what an extent. Although the economies effected will be recurring, but the payment will only be on the basis of first one year's savings.

Exhibit P. 3 on the same page is from the plaintiff to the Managing Directors, dated the 31st of January, 1946, as follows :—

Delhi Cloth and General Mills Co., Ltd. Delhi
v.
Shri K. L. Kapoor

Falshaw, J.

"I am in receipt of your letter No. 12853, dated the 29th January, 1946. In this connection I beg to point out that the work was started in the Mills about a month back on the understanding that I will receive 20 per cent of the savings effected annually for the first year only. 20 per cent is already a low figure and it is not possible for me to do the job on anything lesser than this. 5 per cent of this amount was to be payable after three months of the completion of work in a department, 5 per-cent after six months and the balance after one year.

I agree that the savings will be recurring but payment to me on the first year's savings.

I also agree that the General Manager, Spinning Superintendent and Costing Officer in consultation with me will decide as to how much economies have been effected and to what an extent. Their decision in this respect will be final. It is, however, suggested that certain basis be formed against which improvements will be compared e.g.. average 24 hours production for the months of November and December or any other two months of the year 1945.

Time and Motion Study work is mostly educative and as the operators form better habits, the production begins to improve and the costs decrease. Rest of the work consists of improving the effectiveness of supervision and introducing better control. My work, therefore, will be most practical and personal. Suggestions will be made

to the management where changes in organisation, machinery and plant lay-outs will be required.

Perfect loyalty and honesty in work is assured". The last letter P, 4, page 88) is from the Company to the plaintiff, dated the 5th February, 1946, and reads—

"Reference your letter No. DM 3, dated the 31st January, 1946, we are agreeable to the figure of 20 per cent mentioned by you on the terms etc. already decided."

Thereafter Kapur began studying conditions in the Spinning Department of the Company, which in itself apparently comprises two separate factories, and on the 21st of February, 1946, he submitted what is described as his first report P. 5|1 (page 122). This is apparently a statistical analysis in which he recommended the regrouping of workers of five instead of six groups, which he considered would save one headdoffer and one doffer for each shift, and he suggested that the men thus saved should be assigned to him as his staff. It does not seem that either any of his suggestions contained in this report were accepted or acted upon at that time or afterwards.

He continued working in the Spinning Department and on the 21st of March, 1946, submitted his second report Exhibit P. 6|1 (page 135) which purports to be a comparative analysis of the work done in the two spinning factories, and on the strength of the figures relating to Mill 2, he suggested the reduction of the strength of the workers in Mill 1 from 150 to 126. This suggestion also appears to have been ignored in practice.

He then proceeded to investigate and make some suggestions regarding what are described as "*lapeta*" bobbins and thereafter submitted what is apparently

Delhi Cloth and General Mills Co., Ltd. Delhi
v.
Shri K. L. Kapoor

Falshaw, J.

more or less a final report on the spinning department, Exhibit P. 11 (page 125), dated the 24th of July 1946. In this he suggested changes in the system of incentive payments as between doffers and piecers and estimated that the quicker work produced by the incentive would result in a 4 per cent increase in production which would result in a net saving of Rs. 52,500 in the course of a year. He also estimated that his scheme regarding Lapeta bobbins would save annually Rs. 99,600 and that a further sum of Rs. 37,000 would be saved by reducing the number of doffers. He thus estimated that net annual gain to the Company from these reforms would amount to Rs. 1,89,100.

Thereafter during August he was permitted to carry out certain tests, the first lasting only one shift and the second a whole week, the results of which he summed up in his letter P. 14, dated the 25th August, 1946 (page 98) claiming that during these tests a considerable increase in production had occurred. He suggested that this could be maintained by adopting one of three courses—

(1) constant policing of the department,

(2) development of feelings of competition, and

(3) incentive.

After that he was instructed by the note P. 16, dated the 1st September to stop work in the spinning and start work in the engineering department. By D. 8, dated the 2nd of September (page 149) Kapur repeated his suggestions regarding the spinning department but placed emphasis on incentive as the best means of attaining the company's requirements. On the 12th of September he wrote the letter D. 9 (page 150) in which he protested for the first time against

the proposed transfer of his activities from the spinning to the engineering department and said that he had not yet completed his work in the spinning department. He also suggested that in any case it would be preferable for him to turn from the spinning to the weaving department rather than the engineering department.

It would seem that towards the end of September, Kapur had begun to feel that his efforts were not being properly appreciated by the management of the company and he sent the letter P. 17, dated the 25th of September, 1946 (page 93) in which he pointed out the alleged highly successful effects of his experiments and estimated that as the result of his efforts the company stood to gain a sum of Rs. 3,89,000 in one year, that is Rs. 1,89,000 referred in his letter of the 24th of July, plus Rs. 2,00,000 as increased profits. He therefore demanded in accordance with the terms of agreement with the company the payment of first 5 per cent amounting to Rs. 19,450 which he claimed would be due on the 24th of October. This demand caused the attitude of the company to stiffen and its reply P. 19, dated the 27th of September, 1946 (page 94), simply informed Kapur that he had been working with the company for quite a while and they did not consider any useful work had been done and they therefore did not wish to retain his services.

Thereafter apparently Kapur ceased to work in the mills and his next step was to file a criminal complaint on the 15th of April, 1947, against two of the Directors of the company, Mr. Bharat Ram and Mr. Charat Ram, Tirloki Nath, Spinning Superintendent and Mr. Mukerji, Deputy-General Manager and Jai Kishan Das Gupta, Costing Officer, under section 420, Indian Penal Code, in the Court of a Magistrate at Delhi. In this complaint he alleged that the accused

Delhi Cloth and General Mills Co., Ltd. Delhi v. Shri K. L. Kapoor

Falshaw, J.

had all along intended to deceive him and that they had actually adopted his ideas and were deriving profits therefrom.

The learned Magistrate who dealt with this complaint adopted the unusual, but in the circumstances sensible, course of inviting the co-operation of the accused in his inquiry under section 202, Criminal Procedure Code. The result was that on the 9th of June, 1947, he dismissed the complaint under section 203, Criminal Procedure Code, on the finding that the dispute was one of a civil nature, and that he had found from the evidence shown to him by the accused and his own inspection of the books of the company that there was nothing to show that any scheme suggested by Kapur had been put into operation or that there was any increase in profits which could be attributed to any such scheme. Defeated in these tactics, which I can only regard as deplorable, Kapur next served a notice of demand on the company, dated the 27th October, 1947, through a lawyer and then instituted the present suit in *forma pauperis* in February, 1948. In this he repeated his allegation that as a result of his efforts the company was making, or was likely, to make a profit of Rs. 3,89,000 in a year and he claimed Rs. 77,000 representing 20 per cent of the above amount less Rs. 800 which the company had paid him during his period of service.

The defence of the company may be summed up as being that in fact no suggestion made by the plaintiff was of any practicable value, his suggestions had not been acted upon, and no increase in profits or production had resulted to the company from his efforts. It was also pleaded that under the terms of the contract between the parties the decisions of the General Manager, Spinning Superintendent and Costing Officer of the company were final as to the usefulness or effect of any of the plaintiff's suggestions. To this

part of the case the plaintiff replied that the defendants were bound to implement and put the plaintiff's scheme into practice, and since the defendants, by wrongfully terminating the plaintiff's services, put it beyond the plaintiff's power to effect actual economies by his personal efforts, the defendants were estopped from raising the plea that the suit was premature. He repeated that the defendants were bound to implement the plaintiff's scheme.

On these pleadings the Court framed the following issues :—

(1) What were the terms of the contract between the plaintiff and the defendant ?

(2) Whether the suit is not maintainable for the reasons given in para No. 1 of the preliminary objection to the written statement.

(3) Whether the General Manager, Spinning Superintendent and Costing Officer of the defendants were competent to decide whether the plaintiff's scheme was practicable and; or useful ? If so, whether the defendants are estopped from ra'sing the plea that any such scheme is binding on the plaintiff ?

(4) Whether the present suit is premature ?

(5) Whether the defendants are estopped from raising the p'ea that the suit is premature ?

(6) Whether the defendants committed any breach of contract, and if so to what damages, if any, is the plaintiff entitled ?

Delhi Cloth and General Mills Co., Ltd. Delhi
v.
Shri K. L. Kapoor

Falshaw, J.

(7) Whether the plaintiff was ready or willing or capable of performing his part of the contract ?

(8) Whether the plaintiff is entitled to any damage for breach of contract, compensation for the loss of profits and costs of the plaintiff's labour, scientific skill and otherwise ? If so to what extent ?

Apart from the documents exchanged between the parties very little evidence was produced, the plaintiff merely examining himself as a witness while the defendants examined only Tirloki Nath, who was the Spinning Superintendent during the period in question but had since become the General Manager, and Jai Kishan Das, the Costing Officer. Tirloki Nath also filed the report R. W. 1/1 which contains his detailed criticisms of the various reports and suggestions of the plaintiff, and which really amounts to a written summary of the technical arguments on behalf of the defendant company.

The findings of the lower Court may be summarised as being that the company had not in fact, adopted any of the suggestions made by the plaintiff, but that it was an implied term of the contract between the parties that the company was bound to implement and try out any schemes suggested by the plaintiff unless they were of the positive view that the scheme of the plaintiff was so manifestly dangerous that its putting into practice would far outweigh the likely advantages. Having come to this conclusion the learned Subordinate Judge then embarked on the obviously dangerous course, for a layman whose experience of the textile industry was confined to the evidence produced in this case together with an inspection of the defendants' mills during the course of

the suit which lasted for about three hours, of endeavouring to estimate whether the plaintiff's suggestions would, if they had been put into practice, have resulted in the savings and increased profits claimed by him, and on this point he came to the conclusion that generally speaking the plaintiff's suggestions were practicable and profitable and the defendant's criticisms unjustified. Practically speaking the only exception he made was in the case of the plaintiff's claim for an alleged annual saving of Rs. 1,63,920 in respect of waste yarn of which the plaintiff's share under the contract would have been Rs. 32,784. He therefore found that allowing for the Rs. 800 received by the plaintiff he was entitled to a sum of Rs. 46,712 and decreed the suit accordingly.

Mr. Chatterjee for the appellant company has strongly attacked the view of the lower Court that it was an implied contract between the parties that any suggestions made by the plaintiff was bound to be given a trial by the company unless it was manifestly dangerous. He has pointed out the inconsistencies of the plaintiff's pleas in this respect. In the plaint it was clearly claimed that in fact the defendant company had picked the plaintiff's brains and had put into practice the valuable suggestions made by him, from which the resultant savings in costs and increase in profits were actually materialising and being realized by the company, and it was only after the company had denied that in fact any of the schemes had been put into practice, and had pleaded that the terms of the contract made the General Manager, the Spinning Superintendent and the Costing Officer of the company the final judges as to the utility of the schemes presented by the plaintiff, that the latter raised the plea that there was a term of the contract, implied or otherwise, that his schemes were bound to be given a trial and put into practice, and that the failure of

Delhi Cloth and General Mills Co., Ltd. Delhi
v.
Shri K. L. Kapoor

Falshaw, J.

the company to do this amounted to a breach of the contract.

It certainly cannot be said that there was any express term in the contract between the parties which is contained in the letters set out above that any suggestion made by the plaintiff was bound to be given a trial. The essence of the contract was clearly that no payment was to be made for mere suggestions and that payment of the plaintiff's percentage was only to be made on the basis of results achieved, of which the three officers of the company mentioned above were to be the final judges. Mr. Daphtry for the plaintiff has tried to argue that the words of the contract set out in the defendants' first letter clearly meant in themselves that the plaintiff's suggestions were bound to be tried out in practice by the company, but in my opinion the words are not capable of this interpretation, and if in fact there had to be any implied term added to the contract between the parties I should have thought that it would rather be that the company was not bound to try out any suggestion of the plaintiff which *ab initio* did not appear likely to lead to any valuable results or appeared to be impracticable. It is certainly easier to read such an implication into the actual term that the General Manager, Spinning Superintendent and Costing Officer should be the final judges of the value of any of the plaintiff's suggestions, than a term to the effect that they were bound to implement any suggestion of the plaintiff however foolish and impracticable it appeared *prima facie* to be.

However, the difficulties of reading implied terms into contracts are set out clearly in the passage beginning at the foot of page 127 in the third Edition

of the Law of Contract by Cheshire and Fifeet as follows:—

"The terms so far discussed have been imported into the contract from local or commercial usage, sometimes with legislative sanction, or have been directly imposed upon the parties by statute. There are yet others which may be implied, not under the pressure of external circumstances, but in order to repair an intrinsic failure of expression. The document which the parties have prepared may leave no doubt as to the general ambit of their obligations; but they may have omitted, through inadvertence or clumsy draftsmanship, to cover an incidental contingency, and this omission, unless remedied, may frustrate their design. In such a case the judge may himself supply a further term, which will implement their presumed intention and, in a hallowed phrase, give 'business efficacy' to the contract. In doing this he purports at least to do merely what the parties would have done themselves had they thought of the matter. The existence of this judicial power was asserted and justified in the case of *The Moorcock* (1) —

"The defendants were wharfingers who had agreed, in consideration of charges for landing and stowing the cargo, to allow the plaintiff, a shipowner, to discharge his vessel at their jetty. The jetty extended into the Thames, and, as both parties realized, the vessel must ground at low water.

(1) (1889) 14 P.D. 64

Delhi Cloth and General Mills Co., Ltd. Delhi
v.
Shri K. L. Kapoor

Falshaw, J.

While she was unloading, the tide ebbed and she settled on a ridge of hard ground beneath the mud. The plaintiff sued for the resultant damage'.

The defendants had not guaranteed the safety of the anchorage, nor was the bed of the river adjoining the jetty vested in them, but in the Thames Conservators. But the Court of Appeal implied an undertaking by the defendants that the river bottom was, so far as reasonable care could provide, in such a condition, as not to endanger the vessel. Bowen, L.J., explained the nature of the implication—

> "I believe if one were to take all the cases and there are many, of implied warranties or covenants in law, it will be found that in all of them the law is raising an implication from the presumed intention of the parties, with the object of giving to the transaction such efficacy as both parties must have intended that at all events it should have. In business transactions such as this, what the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended at all events by both parties who are businessmen. The question is what inference is to be drawn where the parties are dealing with each other on the assumption that the negotiations are to have some fruit, and where they say nothing about the burden of this unseen peril, leaving the law to raise such inferences as are reasonable from the very nature of the transaction.'

In the sixty years which have since elapsed, the principle of this case has been frequently invoked. It finds its analogy in another principle that each party implicitly agrees to do all that is necessary for the proper and effectual performance of the contract. In one case, for instance .—

> 'The plaintiff agreed with a mining company to remove certain waste rock within two years, provided that it did not exceed 50,000 tons. The company agreed to supply a crusher. The crusher supplied, however, was capable of crushing only three tons an hour, and, as nothing was ever done by the company to improve it, the work came to a stop.'

In an action for damages brought by the plaintiff, the Privy Council held that the contract, though it was silent on the matter, was subject to an implied term that each party would do all that was necessary to be done by him for the performance of the work. The defendants were liable inasmuch as they had failed to provide a crusher equal for the work.

The convenience of the doctrine is manifest, and it has often received the doubtful compliment of citation by counsel as a last desperate expedient in a difficult case. The Courts, however, have recognised the danger of undue elasticity, and have circumscribed its limits. Based upon the presumed intention of the parties, it may not contradict or vary the express terms of the agreement. Nor can it be used simply to render the contract rather more attractive in the eyes of reasonable men. It is for the parties, not for the judges, to determine the nature of their liabilities. The doctrine can be invoked only if an obligation, clearly intended as such, must fail to take effect unless some obvious oversight is remedied; and, even

Delhi Cloth and General Mills Co., Ltd. Delhi
v.
Shri K. L. Kapoor

Falshaw, J.

so, the judges will supply the minimum necessary to save the contract from shipwreck. The test to be applied by the Court in deciding whether to make the implication has been stated by several judges in much the same language—

> 'A term can only be implied' said Scrutton, L.J., 'if it is necessary in the business sense to give efficacy to the contract, i.e., if it is such a term that it can confidently be said that if at the time the contract was being negotiated some one had said to the parties what will happen in such a case, they would both have replied—of course so and so will happen; we did not trouble to say it is too clear. (*Reigate* v. *Union Manufacturing Co.* (1).

> 'Prima facie that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying; so that, if while the parties were making their bargain an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common, 'Oh, of course'. (*Shirlaw* v. *Southern Foundries, Ltd.* (2).

It is one thing, however, to state a test and another to apply it with confidence, and it is not without significance that in the very case in which this simple formula was given the Court of Appeal was divided as to the obvious character of the implication."

(1) (1918) 2 K.B. 592
(2) (1939) 2 K.B. 206

Applying the views expressed above to the facts of the present case, it seems to me absurd to suggest that if at the time when the agreement was being reached between the parties anyone had raised the question whether the company was bound to put into practice any suggestion made by the plaintiff, however fantastic and impracticable it appeared to be, both parties would at once have said that of course that was a necessary condition of the contract. Indeed if such a suggestion had been raised the most probable reaction of the company would have been to insist that the General Manager, Spinning Superintendent and Costing Officer should not only be the final judges of what practical advantages actually resulted from the plaintiff's suggestions, but would also have been made the judges of whether any suggestion was sufficiently practicable and potentially useful to be given a trial at all. In any case an agreement of both parties to the term sought to be implied by the plaintiff seems out of the question. Even the learned Subordinate Judge was not prepared to go the whole hog on what he considered to be the implied term of the contract that any suggestion should be implemented, since he has imported the reservation that the defendants could limit the sphere of the activities of the plaintiff and ask the plaintiff to go slow if he was going rapidly, and that they would not be bound to put into practice any scheme which was manifestly dangerous. I cannot imagine wherefrom the learned Subordinate Judge derived this notion of an implied term of this nature and in my opinion he was completely wrong in importing any such term into the contract between the parties, and this removes basis on which his decree in the plaintiff's favour is founded.

Delhi Cloth and General Mills Co., Ltd. Delhi
v.
Shri K. L. Kapoor

Falshaw, J.

Indeed, in arguing the plaintiff's case Mr. Daphtry boldly reverted to the original position taken by the plaintiff both in his criminal complaint and his plaint in the present suit that not only were the suggestions made by the plaintiff potentially profitable to the company but also that the company had profited, and was still profiting by putting them into practice. One fact alone, however, appears to me to negative this contention. This is the figures contained in the table D. 2 (page 159), which contains a statement of efficiency in Mill No. 1 for the years 1945, 1946 and 1947 regarding different counts, namely 10s ordinary warp 16s. B. R. Warp, 10s Ordinary weft and 16s B. R. weft extracted from the company's registers. The table contains the figures for each month of the three years in question together with the average for the whole year. The average efficiency for the whole 12 months of 1945 is 89 per cent, in 1946 90.6 per cent and in 1947 89.1 per cent. For 16s B. R. warp the figures are 89.7 per cent, 92 per cent and 90.6 per cent. For 10s ordinary weft the figures are 85.2 per cent, 85.8 per cent and 86.1 per cent. For 16s B. R. weft the figures are 87.4 per cent, 89.9 per cent and 87.3 per cent. The increase in efficiency in 1947, as against 1945 is thus .1 per cent for 10s ordinary warp, .7 for 16s B. R. warp and .9 per cent for 10s ordinary weft, while in the case of 16s B. R. weft there is decrease of .1 per cent. Such fractional changes in the efficiency of machines over these years are clearly explicable in any one of a hundred ways and they cannot possibly be attributed to the application of any ideas derived from the plaintiff. In fact it would be surprising if the figures were identical and did not show such fractional difference.

Although the basis of the decree in the plaintiff's favour disappears with the finding that the lower

Court wrongly imported an implied term into the contract between the parties and it is therefore not strictly necessary for the decision of this appeal that the potential efficacy of the plaintiff's suggestions should be discussed, I think it would not be out of place for me to deal at least shortly with this aspect of the case and I must say that after considering the reports submitted by the plaintiff and the detailed criticisms of them contained in the document prepared by the Spinning Superintendent as well as the evidence of the parties I remain wholly unconvinced that the suggestions put forward by the plaintiff would have resulted in any thing like the economies or increased profits claimed by him. His work was confined to the spinning department where apparently the chief classes of workmen are called 'doffers' and 'piecers'. The work of the doffers is apparently to fit in the appropriate machines the bobbins of various sizes relating to different counts for the spun thread to be wound on them, and to remove the filled bobbins from the machines for transfer to the weaving department or for disposal by sale in the form of yarn. The work of the piecers is apparently to supervise the machines during the actual winding process. There is no doubt that a perennial source of waste and trouble in the weaving process are the so-called '*lapeta*' bobbins which are bobbins on which the thread is broken or otherwise defectively wound through the slovenliness or other shortcomings on the part of the piecers. There can be no doubt that any textile company would welcome and pay any sum for the services of anyone who could devise a scheme for eliminating '*lapeta*' bobbins, but it is quite clear that in the present case the efforts and suggestions of the plaintiff for dealing with this problem can only be described as futile. In fact his suggestions in practice boiled down to the suggestion in his letter on the

Delhi Cloth and General Mills Co., Ltd. Delhi
v.
Shri K. L. Kapoor

Falshaw, J.

24th of July 1946, that some sort of deterrents should be applied to piecers for defective work. Obviously, however, any kind of deduction of wages would lead to labour trouble and possibly be prohibited altogether by an industrial tribunal, and, apparently realising this, the plaintiff was reduced to putting forward what I regard as the fantastic suggestion that psychological punishment should be imposed on piecers, who should be given so-called lapeta cards on which some mark of disgrace should be stamped for every lapse on their part. I have no doubt whatever that better brains than those of the plaintiff, and persons brought up in the textile industry have endeavoured to find some solution to this problem without yet having been successful.

There is no doubt that in the one shift test which the plaintiff carried out in August he was able to show increased efficiency of the machines under his charge by persuading the doffers to carry out their tasks a few seconds faster than they were accustomed to and by being specially provided with a supply of clean bobbins, and even for the one week test carried out under the supervision of the plaintiff, during which he is said only to actually have been present in person to supervise the machine being tested on two days, some small increase in efficiency was shown, but the underlying difficulty all along was obviously to keep up the workers to these standards. The suggestion which was finally chiefly relied on by the plaintiff was some change in the scheme of incentive payments but this can hardly be called a new idea on his part, since system of incentive payments was already in force, and I for one have been unable to see the advantages of the scheme suggested by him to increase the incentives for doffers and reduce those of piecers. He also suggested that some sort of a competitive spirit should be fostered between different groups of workers and between different shifts.

No indication is given in his reports as to how this competitive spirit should be built and fostered, but it must be presumed that plaintiff had in mind something like giving the different groups or shifts names like the house in a public school appointing leaders or captains, and presenting some sort of a trophy for the group or shift showing the greatest efficiency over a particular period. I am reduced to putting forward a suggestion of this kind, which I myself regard as fantastic, because I cannot think of anything else which the plaintiff could have had in mind.

I do not think that the plaintiff's usefulness to the defendant company can be better summed up than in his own letter of the 25th August, 1946, in which he was reporting the result of the week's test carried out by him. Towards the end he said—

> "For this we must know what has caused increase in production. Whereas supply of clear empties is an important factor, the main cause of increase in production is better efforts on the part of doffers and head doffers. From better efforts is not meant more extensive physical exertions but better mental attitude and more skilful use of their physical energy.
>
> To stabilise this increase in production, three courses are open to the management :
>
> (1) Constant policing of the department.
> (2) Development of feelings of competition
> (3) Incentive.
>
> Management can make a choice out of these."

This seems to me to indicate quite clearly that the plaintiff understood that although he could induce the doffers and head doffers to perform their tasks

Delhi Cloth and General Mills Co., Ltd. Delhi v. Shri K. L. Kapoor

Falshaw J.

more quickly while under his supervision, and so get through a slightly larger amount of work, the real difficulty was going to be to keep them up to this standard in the future and I can only assume that when he offered the management the choice of three courses for ensuring the continuance or the speeding up of the work, he placed them in what he considered to be their respective order of merits. In other words the plaintiff knew that constant policing was the only effective method which could keep the workers up to the mark. We have the evidence of the Spinning Superintendent Tir'oki Nath to the effect that the speeding up of the performance of their task which the plaintiff was trying to bring about was already causing resentment among the workers, and I for one find this statement easy to believe in the light of ordinary human nature. After all, the fundamental principle of business and commerce is getting as much as possible for as little as possible, and since organisation of labour is increasing, this applies to labour as well as capital.

Only competition maintains a labour. It is quite clear that the responsible officers of the company realised that the introduction of the methods suggested by the plaintiff would only lead to labour trouble, which might be very serious indeed if speeding-up method increased efficiency to the extent that a retrenchment of workers followed in consequence.

I have not discussed in detail the masses of figures produced in his various reports by the plaintiff, and discussed at length and accepted by the learned Subordinate Judge, because I feel that neither of us is sufficiently acquainted with the working of the textile industry to be competent to set ourselves up as experts, and in dealing with the practicability and potential results of the plaintiff's scheme I have considered only the broadest aspects. However, as I

have indicated above I remain, so far as I have been able to understand the technical points in dispute, completely unconvinced of the plaintiff's ability to effect any appreciable standard in the efficiency of the defendant's mills, and in my opinion, even if the lower Court was right in attempting to estimate the potential savings and profits which would have resulted from the adoption of the plaintiff's suggestions, the plaintiff has failed to establish his claims. However, as I have said above in my opinion the lower Court went completely wrong in basing the plaintiff's claim on an implied term in the contract. The result is that I would accept the appeal and dismiss the plaintiff's suit with costs throughout.

KAPUR, J. I agree, but because of the importance of the matter I would like to give my reasons in regard to the question of implied contract. The terms of the contract can be culled from certain letters which have been placed on the file—Exhibits P. 2, P. 3 and P. 4. The first among these is dated the 29th January, 1946, and is by the Managing Director of the defendant-company to the plaintiff. The following portion of the letter at page 87 is important. It says—

> "* * *The payment will not be for suggestions only, but for actual economies effected by your personal effort. The decision of the General Manager, Spinning Superintendent and our Costing Officer will be final for purposes of deciding as to how much economies have been effected and to what an extent."

The letter, Exhibit P. 3, is by Kapur to the Managing Director of the Company, and on the same page, and the relevant portion is at page 88 which runs as under—

> "I also agree that the General Manager, Spinning Superintendent and Costing Officer in consultation with me will decide as to

Delhi Cloth and General Mills Co., Ltd. Delhi v. Shri K. L. Kapoor

Kapur, J.

how much economies have been effected and to what an extent. Their decision in this respect will be final."

The letter of the Managing Director, Exhibit P. 4, dated the 5th February, 1946, only shows that the Company agreed to 20 per cent instead of the 10 per cent which they had suggested.

This correspondence, in my opinion, negatives the implied term which was relied upon by the Court below. The existence of judicial power to remedy an omission arises "not under the pressure of external circumstances, but in order to repair an intrinsic failure of expression" and whenever there is an omission due to inadvertance or clumsiness of draftsmanship, the Courts, it has been held, may remedy this omission. This judicial power was asserted and justified in *The Moorcock's case* (1), where Bowen, L. J., stated the law at page 68 to be—

"* * * * * * *

> In business transactions such as this, what the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended at all events by both parties who are businessmen* * * * The question is what inference is to be drawn where the parties are dealing with each other on the assumption that the negotiations are to have some fruit, and where they say nothing about the burden of this unseen peril, leaving the law to raise such inference as are reasonable from the very nature of the transaction."

(1) (1889) 14 P.D. 64

In *Mackay* v. *Dick* (1), judicial power was exercised by Lord Blackburn in an action for damages which was brought by the plaintiff on a contract which was silent on the matter in dispute but was held subject to an implied term that each party would do all that is necessary to be done by him for the performance of the work and the defendants were held liable inasmuch as they had failed to provide a crusher adequate to remove waste rock within two years provided it did not exceed 50,000 tons and the defendants supplied a crusher which was capable of crushing only 3 tons per hour, and as nothing was ever done by the defendants to improve it, the work came to a stop.

In *Hamlyn and Co.* v. *Wood and Co.* (2), the limits of the doctrine of *The Moorcock* were stated to be that such an implication of the term in a contract can be made only where it is necessary in order to give a transaction such efficacy as both parties must have intended it to have and to prevent such failure of consideration as cannot have been within the contemplation of either party and the question whether in any particular case such an implication ought or ought not to be made must depend on the particular facts of the case. In that case the defendants who were brewers entered into an agreement by which they agreed to sell to the plaintiffs all grains made by the defendants at the average rate charged each year by certain specified firms from July 10, 1885 to September, 1895. In 1890 the defendants sold their business and ceased to supply grains to the plaintiffs and it was held that a term could not be implied in the contract to the effect that the defendants would not by any voluntary act of their own prevent themselves from continuing the sale of grains. Such an implication

(1) (1881) 6 A.C. 251, 263
(2) (1891) 2 Q.B. 488

Delhi Cloth and General Mills Co., Ltd. Delhi
v.
Shri K. L. Kapoor
Kapur, J.

was described by Lord Esher M. R. as "tremendously strong and one which is beyond all bounds" and was not within the contemplation of the parties.

The test by Lord Justice Scrutton in *Reigate* v. *Union Manufacturing Co.* (1), was expressed in much the same language. The learned Lord Justice said—

> "A term can only be implied if it is necessary in the business sense to give efficacy to the contract; that is, if it is such a term that it can confidently be said that if at the time the contract was being negotiated some one had said to the parties, 'What will happen in such a case', they would both have replied, 'Of course, so and so will happen; we did not trouble to say that; it is too clear.' Unless the Court comes to some such conclusion as that, it ought not to imply a term which the parties themselves have not expressed."

In a later case *Shirlaw* v. *Southern Foundries* (2), Mackinnon, L.J., laid down the test in the following terms—

> "If I may quote from an essay which I wrote some years ago, I then said: "*Prima facie* that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying; so that, if, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common 'Oh, of course!'".

(1) (1918) 1 K.B. 592, 605
(2) (1939) 2 K.B. 206

Referring to the judgment of Bowen L.J. in *The Moorcock* (1), the learned Lord Justice said—

> "* *; but I fancy that he would have been rather surprised if he could have foreseen that these general remarks of his would come to be a favourite citation of a supposed principle of law, and I even think that he might sympathize with the occasional impatience of his successors when *The Moorcock* (1), is often flushed for them in that guise."

*Cheshire in his Law of Contract at page 129 referring to the doctrine of Moorcock has stated—

> "The convenience of the doctrine is manifest, and it has often received the doubtful compliment of citation by counsel as a last desperate expedient in a difficult case."

The Court of Appeal implied such a term in *Hivac Ltd.* v. *Par Royal Scientific .Instruments, Ltd.* (2), in a case where unknown to the plaintiffs five of their workmen were working in their spare time for the respondent. When they discovered this fact the plaintiffs asked for and obtained an injunction to restrain the workmen, and a reciprocal obligation has been placed on the employer in *Gregory* v. *Ford* (3), by Byrne J. where a term was implied "that the servant shall not be required to do an unlawful act," such as driving an uninsured vehicle. He was, therefore, held entitled to recover from the employer the damages and costs which he had to pay to the third party.

(1) (1889) 14 P.D. 64
(2) (1946) 1 A.E.R. 350
(3) (1951) 1 A.E.R. 121

Delhi Cloth and General Mills Co., Ltd. Delhi *v.* Shri K. L. Kapoor

Kapur, J.

As pointed out by Cheshire in the Law of Contract despite these applications of the doctrine it is not unfair to say that the prevailing judicial note is one of caution. The Court of Appeal refused to imply into the contract a term which imposed on the employer a duty to exercise reasonable care in safeguarding the property of an actor employed by him whose overcoat together with certain other articles were stolen from his dressing room during a rehearsal, see *Deyong* v. *Shenburn* (1).

In *K. C. Sethia* v. *Partabmull Rameshwar* (2), the Court of Appeal again refused to apply the term of shipment being "subject to quota" in order to give the contract "business efficacy". In that case the plaintiffs bought from the defendants certain quantities of jute. Both parties knew that no jute could be exported except by licence of the Government of India and the Government in 1947, adopted a quota system requiring a shipper to choose a "basic year". Subsequently the defendants were allowed to ship less than a third of the contracted quantity of jute and the plaintiffs sued for the breach of contract. Jenkins L.J. said at page 59—

> "I do not think that the Court will read a term into a contract unless, considering the matter from the point of view of business efficacy, it is clear beyond a peradventure that both parties intended a given term to operate, although they did not include it in so many words."

The Court of Appeal held in that case that the Court would read an implied term into a contract only where it was clear that both parties intended that term to operate.

(1) (1946) 1 A.E.R. 226
(2) (1950) 1 A.E.R. 51

In a Calcutta case which went to the Privy Council *Pragdas Mathuradas* v. *Jeewanlal* (1), where the defendant-firm contracted to supply the plaintiff-company Penang quality tin and it was known in Calcutta that war with Japan had broken out and the plaintiff-company sued for damages for the breach of contract on the defendant-firm refusing to supply the goods owing to unforeseen circumstances, the Privy Council held that the contract did not imply the condition that the Penang tin already ordered by the sellers should arrive in Calcutta, and the words "for forward delivery" were given their ordinary meaning "for delivery in the future". Lord Morton of Henryton delivering the judgment of their Lordships referred with approval the observations of Scrutton, L.J., in *Comtoir Commercial Anverpois* v. *Power Son & Co.* (2), and said—

> "The Court * * * * *
>
> ought not to imply a term merely because it would be a reasonable term to include if the parties had thought about the matter, or because one party, if he had thought about the matter, would not have made the contract unless the term was included; it must be such a necessary term that both parties must have intended that it should be a term of the contract, and have only not expressed it because its necessity was so obvious that it was taken for granted"

All these cases show that—

(1) the doctrine can only be invoked to give business efficacy to the transaction as must have been intended;

(1) A.I.R. 1948 P.C. 217
(2) (1920) 1 K.B. 868, 899

Delhi Cloth and General Mills Co., Ltd. Delhi
v.
Shri K. L. Kapoor

Kapur, J.

(2) if an obligation is not clearly intended and as such it must fail to take effect unless some obvious oversight is remedied; or

(3) it is something so obvious that it goes without saying.

The Courts in England have limited the doctrine of *The Moorcock* (1), and although the doctrine has been applied to certain cases in recent times the prevailing judicial note is one of caution.

In two cases the Supreme Court have discussed the question of implied term in a contract. Fazl Ali, J., in *Ganga Saran* v. *Ram Charan-Ram Gopal* (2), observed at page 42—

> "It seems necessary for us to emphasize that so far as the courts in this country are concerned, they must look primarily to the law as embodied in sections 32 and 56 of the Indian Contract Act, 1872".

The matter was again discussed in the judgment of Mukerjea, J., in *Satyabrata Ghose* v. *Mugneeram Bangur & Co., and another* (3). In this last judgment the question which was raised and decided was as to the extent to which the English doctrine of implied term dealing with cases of frustration is applicable. It was held that to the extent that the Indian Contract Act deals with a particular subject, it is exhaustive upon the same and it is not permissible to import the principles of English law *dehors* the statutory provisions.

(1) (1889) 14 P.D. 64
(2) 1952 S.C.R. 36
(3) 1954 S.C.R. 310

Delhi Cloth and General Mills Co., Ltd. Delhi
v.
Shri K. L. Kapoor

Kapur, J.

The present case is not one of frustration but a term was sought to be implied in order to give business efficacy to the agreement. But the principle laid down by the Supreme Court is applicable and I have already discussed that it was not necessary in the present case to imply any term in order to give effect to the contract and to remedy some obvious oversight.

In the present case by making the officers of the Company the final judges of whether there has been any economy effected or not, the contract negatives any justification for invoking the doctrine of implied term, and even if the contract was absolutely silent such a term should not be read into the contract because the result of that would be that howsoever absurd and harmful the suggestions made by the plaintiff were to be the defendants were bound to give effect to them which obviously would not justify the implying of any such term.

I have nothing more to add to what has been said by my learned brother and I agree with the findings given by him and the reasons given there for dismissing the appeal.