APPELLATE CIVIL

Before Bishan Narain and Chopra, JJ.

THE DOMINION OF INDIA, NEW DELHI,—*Defendant-Appellant*

v.

M/S. RAM RAKHA MALL AND SONS,—*Plaintiff-Respondent*

Regular First Appeal No. 23 of 1951.

1956

Dec. 18th

Evidence Act (I of 1872)—Section 92—Contract with Government on standard forms, effect of—Written contract—Modification by oral assurance, if permissible—Security deposit, forfeiture—Oral promises made to supply wagons—Wagons not supplied—Contracted goods purchased but could not be supplied for want of wagons—Security deposit if could be forfeited.

Held, that it may be that the written contract cannot be modified by oral agreement, but it is open to a party by its conduct or by oral assurances to induce the other party into believing that the contract need not be performed in accordance with the written terms of the contract and in such a case it is obvious that it would be most unjust to permit such a party to turn round later on and to rely on the written terms of the contract. Even if the principle of estoppel is not applicable to such a case, the principle applicable to it may be described as principle of "quasi-estoppel" as a principle of equity. After all the rules of evidence are meant to advance justice and not to hamper or defeat it. It is well-known that in commercial circles parties often rely on oral assurances and act in accordance with them even when the written contract is in different terms. When persons are dealing with Government departments which have got standard forms, such a state of affairs often happens because it is always not easy to change the terms of standard forms to bring them in conformity with the conditions prevailing at the time that the particular contract is entered into and there is nothing in section 92 of the Evidence Act preventing the applicability of this principle.

Held, that in equity the Government cannot be allowed to go back on the oral promise made by the authority

concerned to supply the wagons and therefore the security deposited by the contractors for due performance of the contract cannot be forfeited on the ground that the plaintiff-firm did not perform its part of the contract.

Thomas Hughes v. *Metropolitan Railway Company* (1) and *Combe* v. *Combe* (2), relied upon.

First appeal from the decree of the Court of Shri Mohinder Singh, Sub-Judge, 1st Class, Ferozepore, dated the 22nd day of November, 1950, granting the plaintiff a decree for Rs. 5,070 with proportionate costs.

S. M. SIKRI, Advocate-General and D. N. AWASTHY, for Appellant

C. L. AGGARWAL, RAJ KUMAR and ROOP CHAND, for Respondents.

JUDGMENT

Bishan Narain, J.

BISHAN NARAIN, J.—Firm Ram Rakha Mal and Sons had deposited Rs. 5,070, as security with the Government for performance of the contract entered into between the parties. On a suit having been filed by the firm for refund of this amount and for damages amounting to Rs. 430, the trial Court dismissed the suit relating to damages but decreed the refund of the deposit. The Government is dissatisfied with this decree and has appealed to this Court.

The facts leading to this appeal are not seriously in dispute. Firm Ram Rakha Mal and Sons is a firm of contractors. Sometime in the third week of June, 1944, the Assistant Director of Military Farms, Northern Circle (Lahore Cantonment) called for tenders for supply of forty lakhs pounds of white bhusa to be supplied to the Military Farms stack-yard at Ferozepore Cantonment during August, September, and October,

(1) (1876-7) 2 App. Cas. 439
(2) (1951) 1 All. E.R. 767

1944. The plaintiff firm made a tender with an earnest money of Rs. 1,000. It appears that the tenders were opened on 1st July, 1944, at 2-30 p.m. and the plaintiffs' tender to supply the required bhusa at Rs. 2-8-6 per 100 lbs. was accepted. According to the tender, out of the entire quantity 20 per cent was to be supplied during August, 1944, 40 per cent during September and the remaining 40 per cent during October, 1944. The plaintiff-firm appears to have been informed of the acceptance of this tender on 2nd July, 1944, as in reply the firm wrote on 5th July, 1944, to say that the tender was subject to supply of wagons being guaranteed as local supply was small. It was further stated in this letter that if such a guarantee could not be given then the earnest money might be refunded. This request was made with reference to clause 5 of "special instructions" (Exhibit D. 8) which clause forms part of the terms of the agreement between the parties. This clause as far as it is relevant to this case reads as follows:—

> "5. Railway wagons cannot be guaranteed, but every effort will be made to arrange wagons for the contractor; provided he fulfils the following conditions:—
>
> (a) Obtains as much bhusa as possible from local resources for which wagons are unnecessary.
>
> (b) Submits a wagon programme to this office not later than the 13th of each month, showing the wagons required for the following month.
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The Dominion of India, New Delhi
v.
M/s. Ram Rakha Mall and Sons

Bishan Narain, J.

(f) Non-receipt of wagons will not be accepted as a plea or excuse for not delivering the bhusa at the agreed rate of delivery (see clause (a) above).

This contract had to be sanctioned by the Director of Military Farms at Simla, but in anticipation of this sanction the Lahore authorities directed the firm to commence deliveries under the tender (*vide* memorandum Exhibit P. 6, dated 29th July, 1944). The firm was officially informed of the acceptance of this tender by memorandum dated 6th August, 1944, and in accordance with the terms of the contract the firm deposited a security of Rs. 5,070 for due performance of the contract. In the meanwhile the contractors, on 12th July, 1944, sent their requirements of wagons. Permits for wagons were sent to the firm, but the station of destination was given as "Multan Cantonment" instead of "Ferozepore Cantonment". This mistake made in the permits for wagons for the month of August was never corrected inspite of repeated reminders and the firm was not supplied any wagon during this month. The contractors asked for extension of time for performance of contract by letter dated 21st August, 1944, and also requested for wagons as the bhusa in question was lying at various railway stations and was exposed to rains for want of wagons. During September, only 20 wagons were supplied which were fully utilized by the contractors. On 27th and 28th September, 1944, the contractors informed the authorities that the entire quantity had been purchased by them and that as it was impossible for a private individual to get wagons the authorities might extend time and in the meanwhile supply the required wagons. The Government sent permits

for wagons for October, but this time the permits contained another clerical mistake. The permits showed that the goods had to be sent to "the Manager, Military Farm, Bowali Farm siding Harbanspura" instead of "Manager, Military Farm, Ferozepore Cantonment". This mistake again was never corrected and no wagon was supplied to the contractors during October. All this time the Military authorities never wrote directly to the firm and frantic appeals of the firm remained unattended to. It was only on 21st October, 1944, that the firm received a letter from Lahore requesting it to increase the supply of bhusa during October, 1944 and to send supplies every day by carts from local zamindars in spite of wagon difficulties. It appears that the Government made other arrangements with effect from 1st November, 1944. The contractors asked for refund of security by letter dated 2nd December, 1944, but by order dated 4th July, 1945, this security was forfeited by the Government. Admittedly the contractor firm supplied in all 21.17 per cent of the entire quantity and this supply was made partly locally and partly by transport in wagons made available by the Military authorities.

In this appeal the Government's case is that under the written agreement the plaintiff-firm was bound to supply the entire contract quantity irrespective of the fact whether the promised assistance to supply wagons succeeded or failed. The Government relies on clause 5(f) of the "special instructions" which has been reproduced in an earlier part of this judgment. It was conceded that the Government did not succeed in supplying wagons ,but it was argued that this fact did not absolve the plaintiff-firm from the contractual obligation to supply the goods. It was

The Dominion of India, New Delhi
v.
M/s. Ram Rakha Mall and Sons

Bishan Narain, J.

also contended by the learned Advocate-General that the firm cannot set up any oral agreement to the effect that the Government was responsible for the supply of the wagons as such plea contravenes section 92 of the Indian Evidence Act. According to him, this plea amounts to contradiction or, in any case, variation of the terms of written agreement. I may state here that it was conceded by the learned Advocate-General in the beginning of his arguments that the Government was not entitled to forfeit the security deposited by the plaintiffs under the terms of the contract, but argued that it was within its right to do so under the general law inasmuch as the contractors failed to perform their part of the contract.

There is no doubt, as observed by Mr. Justice M. Monir (now Chief Justice, Supreme Court of Pakistan) in his well-known treatise on Law of Evidence that there has been considerable confusion and conflict of opinion on the question whether oral evidence of the intention or of the acts and conduct of the parties is admissible to show that an instrument was intended by the parties to be different from what it purports to be, or to show that there was a contemporaneous oral agreement between the parties varying the terms of the instrument. Their Lordships of the Privy Council in *Balkishan* v. *Legge* (1), laid down that such evidence was not admissible. The judicial opinion in India is, however, not agreed as to the precise meaning and scope of this decision of their Lordships of the Privy Council. Subsequent decisions of the Privy Council have also not clarified the legal position and have merely resulted in more conflicting decisions in this country. It is hoped that

(1) I.L.R. 22 All. 149

this vexed question relating to precise scope of section 92 on contemporaneous or subsequent agreement evidenced by oral assurances or by conduct of the parties will soon be decided authoritatively by their Lordships of the Supreme Court.

In the present case, however, this position does not directly arise. The terms of the agreement in the present case are given in various forms which are standard forms. Ram Rakha Mal has stated in the witness-box that the Assistant Director, Military Farms (Lahore), had orally agreed to supply wagons and there is no reason to disbelieve him in this respect as the plaintiffs' lettter and the subsequent conduct of the parties are in consonance with it. The programme of the wagon requirements was supplied by the plaintiff-firm in accordance with the agreement. The Government procured the required permits and forwarded them to the contractors. The wagons, however, did not become available to the contractors because of clerical mistakes in these permits. The wagons supplied during September, 1944 were fully utilized by the plaintiff-firm. The Government promised to rectify the clerical mistakes in the August, and October permits but failed to do so. Thus the plaintiff-firm throughout the period remained under the impression that the wagons will become available to the firm for this contract at any time. Relying on this expectation the plaintiff-firm purchased the required goods at different places and transported them to the various railway stations. It is true that these goods could have been transported, at whatever cost, by other means of transport, but till the last the plaintiff-firm was left under the impression that the wagons would soon be available to them. In these circumstances the question

The Dominion of India, New Delhi
v.
M/s. Ram Rakha Mal and Sons

Bishan Narain, J.

arises whether the Government was within its rights to forfeit the security on the ground that the plaintiff-firm did not perform its part of the contract. As I have already said, it is clear, from the correspondence that throughout this period the plaintiffs were acting under the belief that wagons would soon become available. It can be said that in view of this belief the contractors were prevented from arranging alternative means of transport. It was only a week before the expiry of three months that the Government wrote to say that the supply may be made from local zamindars and even then it was not said that the contractors had been in default in not making full supplies in spite of their failure to supply the wagons. There is ample proof on the record and it is not controverted before me that the plaintiffs had purchased the entire quantity that was to be supplied. It appears to me that in such circumstances it must be held that the contractors did all that they could to perform their part of the contract and it cannot be said that they had failed to perform their contract and, therefore, their security was liable to forfeiture.

In the circumstances narrated above it appears to me clear that in equity the Government cannot be allowed to go back on the oral promise made by the authority concerned to supply the wagons and, therefore, the security deposited by the contractors for due performance of the contract cannot be forfeited on the ground that the plaintiff-firm did not perform its part of the contract. It may be that the written contract cannot be modified by the oral agreement, but it is open to a party by its conduct or by oral assurances to induce the other party into believing that the contract need not be performed in accordance with the written terms of the contract and in such a case it is obvious that it

would be most unjust to permit such a party to turn round later on and to rely on the written terms of the contract. Even if the principle of estoppel is not applicable to such a case, the principle applicable to it may be described as the principle of "quasi-estoppel" as a principle of equity. After all the rules of evidence are meant to advance justice and not to hamper or defeat it. It is well-known that in commercial circles parties often rely on oral assurances and act in accordance with them even when the written contract is in different terms. When persons are dealing with Government departments which have got standard forms, such a state of affairs often happens because it is always not easy to change the terms of standard forms to bring them in conformity with the conditions prevailing at the time that the particular contract is entered into. There is nothing to my mind in section 92 of the Indian Evidence Act which prevents the applicability of this principle to a case like the present one.

This principle has been the subject-matter of various decisions. Professor Corbin in his treatise on contracts has observed at page 106 of the Second Volume that a person who has orally prevented the other from performing in accordance with the written contract should not be permitted to charge that other with a wrongful breach. At page 115 of the same volume the learned author has reproduced the following passage from an Amercian judgment:—

> "He who prevents a thing from being done may not avail himself of the non-performance, which he has himself occasioned, for the law says to him, in effect 'this is your own act, and, therefore, you are not damnified.' The

The Dominion of India, New Delhi
v.
M/s. Ram Rakha Mall and Sons

Bishan Narain, J.

principle is fundamental and unquestioned. Sometimes the resulting disability has been characterized as an estoppel, sometimes, as a waiver. We need not go into the question of the accuracy of the description. The truth is that we are facing a principle more nearly ultimate than either waiver or estoppel, one with roots in the yet larger principle that no one shall be permitted to found any claim upon his own inequity or take advantage of his own wrong".

In England this principle was first laid down in *Thomas Hughes* v. *Metropolitan Railway Company* (1). Lord Cairns at page 448 observed—

> "It is the first principle upon which all Courts of Equity proceed, that if parties who have entered into definite and distinct terms involving certain legal results—certain penalties or legal forfeiture—afterwards by their own act or with their own consent * * which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, * * * *, the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which have thus taken place between the parties."

Recently Lord Denning, L.J., laid down the principle in the following words in *Combe* v. *Combe* (2).

(1) (1876-7) 2 App. Cas. 439
(2) (1951) 1 All. E.R. 767

"The principle, as I understand it, is that where one party has, by his words or conduct, made to the other promise or assurance which was intended to affect the legal relations, between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualifications which he himself has so introduced, even though it is not supported in point of law by any consideration, but only by his word."

The Dominion of India, New Delhi
v.
M/s. Ram Rakha Mall and Sons

Bishan Narain, J.

Applying these principles I have no doubt in my mind that the contractors cannot be held responsible for the failure of supplying the contract goods at Ferozepore in accordance with the terms of the contract, as the non-performance was caused by the guarantee given by the Military authorities that the wagons will be supplied to the contractors for transport of the contract goods from various railway stations to Ferozepore. In view of this finding it must be held that the Government was not entitled to forfeit the security deposited by the contractors for due performance of the contract.

For all these reasons I see no force in this appeal and I would dismiss it with costs.

Chopra, J.—I agree.

Chopra J.