IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

Korea-Ceylon Footwear Manufacturing
Company Limited of
No. 36, D.R. Wijewardena Mawatha,
Colombo 10.
Plaintiff

SC APPEAL NO: SC/CHC/19/2002
CHC NO: HC (CIVIL) 174/1996 (I)

Vs.

Coats Tootal Lanka (Private) Limited of
P.O. Box 250,
No. 33, Steples Street,
Colombo 02.
Defendant

AND NOW BETWEEN

Coats Tootal Lanka (Private) Limited of
P.O. Box 250,
No. 33, Steples Street,
Colombo 02.
presently called and known as,
Coats Thread Lanka (Private) Limited of
Floor 3-6, No. 163, Union Place,
Colombo 02.
Defendant-Appellant

Vs.

Korea-Ceylon Footwear Manufacturing Company Limited of
No. 36, D.R. Wijewardena Mawatha,
Colombo 10.
presently under winding up by court in the District Court of Colombo Case No. 67/CO and represented by:
1. N.S.C de Silva
2. L.C. Piyasena
3. L.L.S Wickramasighe
4. C.R. Weragala
All of
No. 32, Park Road, Colombo 05.
The liquidators appointed by the District Court in Case No. 67/CO.

Plaintiff-Respondent

Before: P. Padman Surasena, J.
Mahinda Samayawardhena, J.
Arjuna Obeyesekere, J.

Counsel: Sanjeeva Jayawardena, P.C., with Lakmini Warusevitane for the Defendant-Appellant.

Avindra Rodrigo, P.C., with Akiel Deen for the Plaintiff-Respondent.

Argued on : 22.03.2022

Written submissions:

by the Plaintiff-Respondent on 28.04.2022.

by the Defendant-Appellant on 04.05.2022.

Decided on: 16.12.2022

Mahinda Samayawardhena, J.

The plaintiff company filed this action against the defendant company in the Commercial High Court seeking recovery of a sum of Rs. 20,383,451.56 with interest on the basis that the thread supplied by the defendant on 20.05.1994 and 04.06.1994 (*vide* paragraph 5(a) of the plaint) were not in good order and condition. According to paragraph 5(c) of the plaint, the plaintiff had paid a sum of Rs. 62,087.85 to the defendant for this purchase. The defendant filed answer seeking dismissal of the plaintiff's action and made a claim in reconvention in a sum of Rs. 2.5 million for loss of reputation. After trial, the learned Judge of the Commercial High Court entered judgment for the plaintiff. Hence this appeal by the defendant.

The plaintiff is a manufacturer of shoes. The case for the plaintiff is that it incurred damages as a result of a foreign buyer rejecting a consignment of shoes manufactured by the plaintiff due to the soles of the shoes becoming discoloured by the dispersing of the dye in the thread supplied by the defendant.

The invoices relevant to the thread supplied by the defendant on 20.05.1994 (V3) and 04.06.1994 (V4) and the written conditions of sale (V5) were marked through the evidence of the main witness for the plaintiff, Mr. Amunugama, the General Manager (Operations) of the plaintiff company (*vide* page 72 of the brief). On the same page he clearly admits in evidence that when the plaintiff makes a purchase, the

purchased item is specified in an invoice, and that invoice denotes the conditions of sale.

> *Q. When you make a purchase what you purchase is specified on an invoice and that invoice denotes the conditions of sale?*
> *A. Yes.*
> *(4th condition read)*
> *.....*
> *(The invoice dated the 4th of June 1994 is marked V3; invoice dated 20th May 1994 is marked V4 and conditions of sale as V5.)*

In my view, V3, V4 and V5 constitute the agreement of sale of the disputed lot of thread.

On the front page of V3 and V4 it is printed "TERMS AND CONDITIONS OF SALE ON REVERSE" and the "CONDITIONS OF SALE" on the reverse of V3 and V4 is marked V5.

The 4th condition reads as follows:

> *Because of the disproportionate value of sewing thread in relation to the value of other items used in the manufacture of wearing apparel, the purchaser must satisfy himself that any thread ordered is suitable in every respect for the end use intended. All express or implied warranties or conditions statutory or otherwise as to quality or fitness for any purpose are hereby expressly excluded.*

The 9th condition reads as follows:

> *Where due to operation of law, consequential, special or incidental damages cannot be excluded, they are expressly limited in amount to the purchase price of the merchandise purchased.*

In view of my final decision, the 9th condition has no relevance.

The plaintiff accepted the thread relevant to this case subject to the 4th condition. The learned High Court Judge accepts this in the judgment but states "*In my view the defendant could not rely on the exemption clause in V5 because in P7 the defendant has created an impression in the mind of the plaintiff that the thread supplied by the defendant is resistant to chemical attack*." The learned Judge further explains "*In the circumstances the express condition in P7 that the polyester thread is resistant to chemical attack overrides the exemption clause found in condition 4 of the document marked V5*."

P7 stipulates the following condition.

> *Astra is a spun polyester thread specifically designed for very high speed sewing. It has many properties superior to other sewing threads. It is stronger, size for size, than threads currently on the market. Interchangeable with other threads with little machine adjustment. Under 1% shrinkage. Resistant to perspiration and chemical attack. Suited to tropical conditions. Very low hot air shrinkage.*

The learned High Court Judge says the above is an express condition. On the face of P7, it is so; but the question is whether it is an express condition of the contract entered into between the plaintiff and the defendant. It is not the position of the learned High Court Judge that it is an implied condition of the contract; nor was such a clear position taken by the plaintiff at the argument. If the said condition is to be treated as an implied condition of the contract as opposed to an express condition, different principles of law (statutory and case law) are applicable and I find no such discussion in the post-argument written submissions either.

An exemption clause is a term in a contract which excludes or limits or purports to exclude or limit, a liability which would otherwise arise. Traditionally, Courts are loath to give a liberal interpretation to such clauses and instead give a literal interpretation. Court should be mindful of sweeping exclusion clauses imposed on weaker parties when assessing the extent of contractual obligations. An ambiguous term in an exemption clause can be restrictively interpreted against the person seeking to rely on it by application of the contra proferentem rule. But if the exemption clause is clearly worded and the contract is a commercial contract as opposed to a consumer contract, Court is prepared to deviate from this traditional view. In *Photo Production Ltd v. Securicor Transport Ltd* [1980] AC 826, Lord Diplock stated at 851:

> *in commercial contracts negotiated between businessmen capable of looking after their own interests and of deciding how risks…can be most economically borne…it is wrong to place a strained construction upon words in an exclusion clause which are clear and fairly susceptible of one meaning.*

It is not possible for an exemption clause and an express condition term to co-exist in a contract; one has to supersede the other. J.C. Smith in *The Law of Contract* (London: Sweet and Maxwell 1989) at page 148 states "*A man cannot in one and same contract expressly include a term (whether condition or warranty) and also exclude it.*"

What is P7 (which is said to contain an "express condition" relevant to the contract) and how did it find its way into the case record?

There is no dispute that the plaintiff uses a chemical known as *toluene* in the shoe manufacturing process (*toluene* is a component in the paste used by the plaintiff to affix the sole of the shoe to the upper part) and the dispersing of the dye from the thread occurred because of the use of

toluene since the dye is soluble in *toluene*. *Vide* the evidence of the plaintiff's own expert witness, the Director of the Rubber Research Institute. In my view, the finding of the expert witness does not favour the plaintiff although the plaintiff thinks otherwise.

When witness Amunugama was cross-examined on whether the plaintiff company informed the defendant company of their requirement for the thread, his answer was "*On the catalogue they say that the thread is suitable for this process and I have seen that.*" Then when he was asked whether he produces that catalogue, P7 was produced (page 65). If P7 is an express condition of the contract between the plaintiff and the defendant, is that how it should have found its way into the case record? What happens if that question was not asked by counsel for the defendant? In my view, if P7 was an express condition of the contract, that document ought to have been listed and produced in the examination of chief. It is in this backdrop that we need to assess whether P7 is an express condition.

It is the position of the defendant that the defendant manufactures thread for the apparel (clothes) industry and not for the shoe manufacturing industry, and the P7 catalogue should be understood in that context. By looking at the language in P7, I cannot reject that argument. The use of the word "shrinkage" in two places of that document supports the defendant's position. It refers to clothes shrinking in the laundry.

Witness Amunugama admits that the defendant manufactures this thread for clothing or apparel purposes (page 62) and that the defendant in P7 does not state that this thread can be used for the manufacture of shoes (page 65). However he says they had purchased thread from the defendant from at least 1990 and the defendant knew of the purpose of the purchase.

As I stated at the outset, the questionable purchase took place on 20.05.1994 and 04.06.1994; but this witness admits there was a similar complaint (the dispersing of dye from the thread to the sole of the shoe) in 1992. The written complaint made in that regard dated 08.10.1992 marked V1 reads:

> *We regret to advise that the black thread supplied by you were used in some shoes exported to Italy, but, unfortunately these threads have been bleeding over a period of time and they have been coming through the rubber foxing, outsole, etc. Therefore, the customer has rejected the entire consignment and they are claiming refund of the value of US$ 31,411.20. We attach herewith a copy of the fax received from our Agents in Italy in this regard. Further these shoes were shown by our Supplies Manager to your Mr. Amarasekera, Marketing Director and Mr. B. Perera your Sales Manager. If you require further samples we could dispatch same to you.*
>
> *We would appreciate if you kindly let us know the manner in which you would wish to resolve this claim. Your earliest reply would be appreciated.*

Condition No. 4 of the contract (V3/V4) clearly states "*the purchaser must satisfy himself that any thread ordered is suitable in every respect for the end use intended.*" This in my view is a fair and reasonable condition. The reason as stated by the defendant to the plaintiff in V2 is "*We have no control over the processes, or changes of processes, which our customers may employ in the manufacture of their products and cannot therefore take any responsibility for them.*" I agree with this explanation. V2 was sent long before the institution of the action. This is not a position the defendant took up for the first time at the argument – *vide* also paragraph 8(b) and (e) of the answer.

It is the position of the defendant that the plaintiff accepted this explanation and their business relationship continued. Witness Amunugama accepts that no action was instituted on the written complaint V1 to recover damages etc. It is significant to note that the witness admits that after this complaint on 08.10.1992 the plaintiff company continued to purchase thread from the Defendant (page 69) and, what is more, even after the incident relevant to the instant action in 1994, they continued to do so (page 72). This amounts to acquiescence or waiver on the part of the plaintiff; the plaintiff waived his right to complain against the violation of the contract, if at all there was such a condition. In the case of *Hartley v. Hymans* [1920] 3 KB 475 the buyer expressed his frustration through letters regarding the late delivery of the product and requested better deliveries. The seller continued to make the deliveries after the agreed completion date. The buyer later cancelled the order and refused to take up further deliveries. Court held that the buyer had waived his right to claim that the period for delivery had ended on the date agreed by continuing to write letters.

In view of the above, the contention of the plaintiff that there was no way the plaintiff could have known that the dye used by the defendant would disperse and cause the discoloration of the shoes is unsustainable. The plaintiff knew of the problem beforehand. The written complaint made by the plaintiff to the defendant regarding the instant issue dated 30.12.1994 marked P18 is identical to the complaint in V2 made in 1992.

The evidence of the defendant's witness, who was the Director (Manufacturing) in the defendant company, was that the defendant was under no obligation to supply thread to the plaintiff for the manufacture of shoes and "*it was for the defendant company to consider whether the thread was suitable for their purpose and this was meant for the apparel industry*." (page 162) His position is that "*According to the apparel*

standard it [the dye] does not migrate." (page 174) This is because in domestic washing, laundering, dry-cleaning etc. chemicals like *toluene* are not used. This was further explained in the re-examination:

Q: You also state that this thread that is sold by your company is manufactured for what purpose?

A: Cloth stitching.

Q: Your attention was drawn to the document P7, produced by the plaintiff on the last date?

A: Yes.

Q: Which states 'resistant to perspiration and chemical attack'?

A: Yes.

Q: By that term what are the chemicals contemplated?

A: Chemicals contact with the clothes used in domestic ... Industrial washing and dry-cleaning.

Q: What does it mean industrial washing?

A: Laundering.

Q: Soap and other matters containing chemicals?

A: Yes.

Q: It is resistant to that chemical that are referred to in P7?

A: Yes.

Q: You also draw the attention of Court to the document P5 which contains conditions of sale referred to by the defendant-company, sale of this thread?

A: Yes.

Q: You draw the attention of Court to condition No.4, that the purchaser must satisfy that the thread is suitable in every respect for the end use intended?

A: Yes.

Q: You find that on the evidence, that though this thread is meant for cloth stitching purposes that there are various buyers who buy the thread for other purposes?

A: Yes.

Q: Now for manufacture of shoes?

A: Yes.

Q: According to condition No.4, the purchaser must satisfy that the thread is suitable for what is said, for his use?

A: Yes.

Although this witness stated that the thread is used for cloth stitching, it was suggested to the witness that the thread is sold for shoe manufacturing also to companies such as Bata, DSI, DI and ASIA. This was admitted by the witness; but the important point is there are no complaints from other shoe manufacturers of the dye dispersing from the thread and damaging the shoes (page 209). This also goes to show that the problem (dye dispersing) does not lie in the thread supplied *per se*, but the way the manufacturing process of the end product takes place, over which the defendant says it has no control, and rightly so.

The learned High Court Judge has relied upon two decisions to arrive at his decision, i.e. that P7 overrides V3. One is *Andrews Brothers (Bournemouth) Ltd v. Singer & Co Ltd* [1934] 1 KB 17 and the other is *Curtis v. Chemical Cleaning and Dyeing Co* [1951] 1 KB 805.

In *Andrews Brothers (Bournemouth) Ltd v. Singer & Co Ltd*, a contract "*for the sale of new Singer cars*" contained a clause (5) by which "*all conditions, warranties and liabilities implied by statute, common law, or otherwise are excluded*". The sellers delivered, and the buyers accepted, a car which was not a new car. In an action for damages for breach of contract in that the car delivered was not a new car, the sellers contended that the condition that the car should correspond with the description "*a*

new Singer car," which would otherwise be implied by section 13 of the Sale of Goods Act, 1893, was excluded by clause 5 and the buyer's claim was, therefore, barred. It was held that "*the buyers were entitled to damages because the contract was a contract for the sale of "new Singer cars"; the term "new Singer cars" was an express, and not an implied, term of the contract and, therefore, it was not excluded by clause 5*." The facts of *Andrews'* case are different from the one before me. If I may repeat, in that case the contract was "*for the sale of new Singer cars*" and therefore it was an express term of the contract itself, and clause 5 which was an exclusion clause was held to apply only to new vehicles, and therefore *did not apply* to exclude the condition implied by section 13 of the Sale of Goods Act, 1893. There is no such express term in the contract (V3-V5) the parties have agreed to in the instant case, nor does the learned High Court Judge say that the condition – that the thread sold is resistant to chemicals – is an implied term of the contract.

In *Curtis v. Chemical Cleaning and Dyeing Co*, the plaintiff took a white satin dress to the defendants' shop to be cleaned. She was given a paper headed "Receipt" and was asked by a shop assistant to sign it. The plaintiff inquired why her signature was required and the assistant replied, in effect, that the defendants would not accept liability for certain specific risks, including the risk of damage by or to the beads and sequins with which the dress was trimmed. In fact the "receipt" contained a condition that the cleaners accepted no liability for any damage however arising. When the dress was returned to the plaintiff it was found to be stained, and she was awarded damages by the County Court Judge who held that the defendants had been guilty of negligence and were not protected by their exemption clause by reason of misrepresentation as to its character. The Court held that the defendants could not rely on the exemption clause because their assistant, by an innocent misrepresentation, had created a false impression in the mind of the

plaintiff as to the extent of the exemption and thereby induced her to sign the receipt. Here again the facts are different. In the instant case there is no false misrepresentation. When the plaintiff complained about the same issue in 1992 (*vide* V2), according to the defendant, the defendant explained its position and the plaintiff accepted it; for otherwise they would not have continued with the business relationship. According to the evidence of witness Amunugama, the plaintiff has handled the situation by purchasing light colour thread instead of dark colour thread (page 72). In *Curtis v. Chemical Cleaning and Dyeing Co,* the contract was between a customer and the company whereas here the contract is between two companies, which take calculated business decisions. And, unlike in *Curtis*, here the decisions were not required to be taken instantly.

The learned High Court Judge is not correct when he states "*the defendant could not rely on the exemption clause in V5 because in P7 the defendant has created an impression in the mind of the plaintiff that the thread supplied by the defendant is resistant to chemical attack*" and "*the express condition in P7 that the polyester thread is resistant to chemical attack overrides the exemption clause found in condition 4 of the document marked V5.*" In the facts and circumstances of this case, I take the view that P7 is not part of the agreement; there is no correlation between P7 and V5. Therefore, the question whether one clause overrides the other does not arise and the exemption clause stands.

In view of this finding, there is no necessity for me look into the question of the damages awarded by the learned High Court Judge to the plaintiff. It does not arise.

I set aside the judgment of the Commercial High Court and allow the appeal of the defendant. The plaintiff's action shall stand dismissed. I make no order as to costs.

Judge of the Supreme Court

P. Padman Surasena, J.
I agree.

Judge of the Supreme Court

Arjuna Obeyesekere, J.
I agree.

Judge of the Supreme Court