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September 25.

JAWAHAR LAL BURMAN

v.

UNION OF INDIA

(B. P. SINHA, C. J., P. B. GAJENDRAGADKAR and RAGHUBAR DAYAL, JJ.)

Arbitration—Denial of validity of contract containing arbitration agreement—Petition for declaration that there is valid contract and to afffirm existence of arbitration agreement—Maintainability—Scope and effect—Jurisdiction—Arbitration Act, 1940 (10 of 1940) ss. 28, 31, 32, 33.

The appellant and the respondent nominated their arbitrator who heard the matter at length and the proceedings had reached a stage when an award might have been pronounced. It was then that the appellant chose to obstruct the further progress of the proceedings by raising the plea that there was no concluded contract. The appellant refused to apply under s. 33 and so a stalemate issued because the arbitrators were not entitled to proceed further with the arbitration proceedings.

The respondent moved the court under s. 28 along with s. 33, for a decision of the question about the existence and validity of the arbitration agreement, and also prayed that extension of time be granted to the arbitrators for making the award.

The appellant pleaded in defence that there was no concluded contract, and there was no jurisdiction in the court to grant extension under s. 28 of the Act.

The High Court confirmed the finding of the trial court that there was a concluded contract which contained a valid arbitration agreement. As for jurisdiction it held that since the petition had been filed as composit application under ss. 28 and 33, it was open to the court under s. 28 to enter upon the question of the existence or validity of the contract and so there was no substance in the point of jurisdiction raised by the appellant.

It is against this decision that the appellant came up by special leave.

Section 33 of the Arbitration Act, 1940, consists of two parts—the first part deals with a challenge to the existence or validity of an arbitration agreement or an award and it provides that only persons who challenge the existence of the arbitration agreement that can apply under the first part of the section. The second part of the section refers to the application made to have the effect of either the arbitration agreement or the award determined, and under this part

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an application can be made to have the effect or purport of the agreement determined but not its existence. That means that an application to have the effect of the agreement can be made provided the existence of the agreement is not disputed. The question is—whether a person affirming an arbitration agreement can apply under the latter part of s. 33 about the existence of the agreement or its validity.

Held, that a party affirming the existence of an arbitration agreement cannot apply under s. 33 for obtaining a decision that the agreement in question exists. An application to have the effect of the arbitration agreement determined can however, legitimately cover the dispute as to the existence of the said arbitration agreement.

Section 32 of the Act creates a bar against the institution of suits with regard to an arbitration agreement or award on any ground whatsoever. Thus if a party affirms the existence of an arbitration agreement or its validity it is not open to the party to file a suit for the purpose of obtaining a declaration about the existence of the said agreement or its validity. The bar to the suit thus created by s. 32. inevitably raises the question as to what remedy is open to a party to adopt in order to obtain a appropriate declaration about the existence or validity of an arbitration agreement.

Held, that having regard to the scheme of ss. 31, 32, 33 of the Act in matters which fall within the bar created by s. 32, if a suit cannot be filed it is necessarily intended that an application can be made under the court's powers provided for by s. 31 and impliedly recognised by s. 32 of the Act.

Held, further that in holding that s. 32 impliedly recognises the inherent jurisdiction of the court to entertain an application made by parties affirming the existence of an arbitration agreement the provisions of s. 32 is brought in line with the provisions of ss. 33 and 20 of the Act. Indeed s. 33 is a corollary of s. 32 and in a sense deals with the most usual type of cases arising in arbitration proceedings.

A question arises whether an application can be made under such inherent jurisdiction for declaration that the contract which includes the arbitration agreement includes cases where the arbitration agreement is made a part of the contract itself.

Held, that where the challenge to the contract made in defence to the claim, is a challenge common to both the contract and the arbitration agreement, the petition in substance is a petition for a declaration as to the existence of a valid arbitration agreement and a suit to obtain such a declaration is clearly barred by s. 32. The fact that an incidental declaration is claimed about the existence and validity of the main contract does not affect the essential

chararcter of the application. It is an application for obtaining a declaration about the existence and validity of an arbitration agreement.

Held, also that the powers to enlarge time for making the award which is the subject matter of s. 28 does not include a power to entertain a petition for declaration that there was a concluded contract between the parties containing a valid arbitration agreement.

Hayman v. *Darwins. Ltd.*, (1942) A. C. 356, referred to.

Messrs. M. Gulamali Abdulhussain & Co. v. *Messrs. Vishwambharlal Ruiya*, I.L.R. (1950) Bom. 333, approved.

Bajranglal Laduram v. *Agarwal Brothers*, A I.R. 1950 Cal. 267 and *State of Bombay* v. *Adamjee Hajee Dawood & Co.* Ltd. I.L.R. (1952) 2 Cal. 39, disapproved.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 328 of 1961.

Appeal by special leave from the judgment and order dated February 2, 1961, of the Punjab High Court (Circuit Bench), at Delhi in Civil Revision Application No. 135-D of 1957.

Din Dayal Sharma and *N. N. Keswani,* for the appellant.

C. K. Daphtary, Solicitor-General of India, V. D. Mahajan and *T.M. Sen,* for the respondent.

1961. September 25. The Judgment of the Court was delivered by

GAJENDRAGADKAR, J.—The principal point which this appeal by special leave raises for our decision relates to the construction of ss. 32 and 33 of the Arbitration Act, 1940 (10 of 1940) (hereafter called the Act). That question arises in this way. The respondent, Union of India, filed a petition in the Court of the First Class Sub-Judge at Delhi against the appellant M/s. J. Burman & Co., through its proprietor Jawahar Lal Burman under ss. 33 and 28 of the Act. The respondent alleged that a concluded contract had been entered into between the parties on August 31, 1949 for supply of 170-1/2 Cwt. of cocoanut oil by the appellant to the respondent. The respondent had advertised in the Indian Trade Journal for the said supply and the appellant had submitted its tender No. SM-I/104524.

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This tender was accepted by the respondent which concluded a contract between the parties. The respondent's case was that the said contract was governed by general conditions of contract Form W.S.B. 133. These conditions included an arbitration agreement. Disputes arose between the parties regarding the said contract, and so in pursuance of the arbitration agreement they were referred to the two arbitrators appointed by the parties. After the arbitration proceedings had gone on for a considerable time before the arbitrators the appellant objected to their jurisdiction to deal with the disputes on the ground that there was no concluded contract between the parties. This plea made it necessary for the respondent to move the Court for a decision of the question about the existence and validity of the arbitration agreement. It was on these allegations that the respondent in its petition claimed that it may be held that there was a concluded contract between the parties containing a valid arbitration agreement. The petition having been made under s. 28 along with s. 33 the respondent prayed that suitable extension of time be granted to the arbitrators for making the award. The appellant pleaded in defence that no concluded contract had been made between the parties and that there was no jurisdiction in the Court to grant extension under s. 28. The other allegations made by the respondent in its petition were also traversed.

On these pleadings the learned trial judge framed appropriate issues. He found that a concluded contract had been proved between the parties as alleged by the respondent, that there was a valid arbitration agreement in the said contract and that the Court had jurisdiction to try the petition. Incidentally it may be pointed out at this stage that no specific point had been raised in the pleadings of the appellant that the Court had no jurisdiction to entertain the petition under s. 33 or s. 32 of the Act. In fact the trial judge has observed that it was not shown to him how the

application was incompetent. Consistently with the findings recorded by him the learned trial judge declared that there was a concluded contract between the parties under which the matter was duly referred to arbitration through an arbitration agreement clause in the contract. As a result of the declaration he held that there was a valid reference to arbitration between the parties. Consequently he granted a month's time to the arbitrators to make their award.

This decision was challenged by the appellant by its revision petition preferred in the High Court of Punjab at Chandigarh. The High Court has confirmed the finding of the trial court that there was a concluded contract which contained an arbitration agreement. The question of jurisdiction under s. 33 of the Act was argued before the High Court and its attention was drawn to the conflict of judicial decisions on the point. The High Court, however, held that since the petition has been filed as a composite application under ss. 28 and 33 it was open to the Court under s. 28 to enter upon the question of the existence or validity of the contract and so there was no substance in the point of jurisdiction raised by the appellant. In the result the appellant's revision application was dismissed. It is against this decision that the appellant has come to this Court by special leave; and on his behalf Mr. Din Dayal has raised the same two points for our decision. He contends that the High Court was in error in holding that the trial court had jurisdiction to entertain the respondent's petition, and he argues that even if the point of jurisdiction raised by him fails it should be held that there was no concluded contract between the parties and so there was no scope or room for making any reference to arbitration. The first of these two contentions has been seriously pressed before us.

Before dealing with the question of jurisdiction it is necessary to recall the material facts which

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have led to the present dispute. The appellant and the respondent nominated their arbitrators. The arbitrators heard the matter at length and the proceedings had reached a stage when an award might have been pronounced. It was then that the appellant chose to obstruct the further progress of the proceedings by raising the plea that there was no concluded contract. Even then he refused to apply under s. 33 and so a stalemate issued because the arbitrators were not entitled to proceed further with the arbitration proceedings in view of the point raised by the appellant. It is necessary to bear in mind this background of the dispute in considering the point of jurisdiction.

The question of jurisdiction raised by the appellant has to be answered in the light of the construction which can be reasonably placed on the material provisions of ss. 32 and 33 of the Act. It may be conceded at the outset that the question thus raised presents some difficulty. Sections 32 and 33 read thus:

> "32. Notwithstanding any law for the time being in force, no suit shall lie on any ground whatsoever for a decision upon the existence, effect or validity of an arbitration agreement or award, nor shall any arbitration agreement or award be set aside, amended, modified or in any way affected otherwise than as provided in this Act.
>
> 33. Any party to an arbitration agreement or any person claiming under him desiring to challenge the existence or validity of an arbitration agreement or an award or to have the effect of either determined shall apply to the Court and the Court shall decide the question on affidavits:
>
> Provided that where the Court deems it just and expedient, it may set down the application for hearing on other evidence

also, and it may pass such orders for discovery and particulars as it may do in a suit."

In appreciating the effect of these two provisions it would be relevant to remember that the object of the Legislature in enacting the two sections quite clearly was to prevent the abuse of the process of the Court. Before the present Act was passed experience showed that unscrupulous and dishonest parties to the arbitration agreements frequently chose to deny the existence of the said agreements even after the arbitration proceedings had concluded and ended in awards and that tended to make all arbitration proceedings futile. More often than not these pleas ultimately failed but it meant considerable delay and waste of time and substantial expense. That is why ss. 32 and 33 have been enacted with the object of bringing the relevant disputes for decision before the specified Courts in the form of petitions. It is significant that under s.31(2) of the Act all questions regarding the validity, effect or existence of an award or an arbitration agreement between the parties to the agreement or persons claiming under them shall be decided by the Court in which the award under the agreement has been, or may be, filed, and by no other Court. Indeed, s.2(c) defines a Court as meaning a Civil Court having jurisdiction to decide the questions forming the subject-matter of the reference if the same had been the subject-matter of a suit, but does not, except for the purpose of arbitration proceedings under s. 21, include a Small Cause Court. Therefore, stated broadly, it would be correct to assume that the main object of introducing the new provisions of ss. 31, 32 and 33 was to entrust the decision of the relevant disputes to the specified Court and to require the parties to bring the said disputes for the decision of the said Court in the form of petitions. Remedy by a regular suit is intended to be excluded.

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Section 32 creates a bar against the institution of suits, and it provides that if the existence effect or validity of an arbitration agreement or award is in dispute on any ground whatsoever no suit shall lie for the adjudication of the said dispute. It also provides that no suit shall lie to set aside, amend or modify or in any way affect an arbitration agreement or an award. It would be noticed that the clause "on any ground whatsoever" is very wide and it denotes, *inter alia*, that if the existence or validity of an arbitration agreement is questioned on any ground whatever it cannot be the subject-matter of a suit; the said dispute shall be tried as provided in this Act. Thus there can be no doubt, that if a party affirms the existence of an arbitration agreement or its validity it is not open to the party to file a suit for the purpose of obtaining a declaration about the existence of the said agreement or its validity. Such a suit in terms is barred by s. 32. This position is not disputed. The bar to the suit thus created by s. 32 inevitably raises the question as to what remedy it is open to a party to adopt in order to obtain an appropriate declaration about the existence or validity of an arbitration agreement; and it is on the decision of this question that the parties are at issue before us.

Before answering this question we may conveniently consider the scope of s. 33 and its effect. Section 33 consists of two parts. The first deals with a challenge to the existence or validity of an arbitration agreement or an award, and it provides that the persons there in specified can apply to the Court to have a decision on its challenge to the existence or validity of an arbitration agreement or an award. In other words, there is no doubt that it is only persons who challenge the existence of the arbitration agreement that can apply under the first part of s. 33. This position is also not disputed. The second part of the section refers to applications made to have the effect of either the arbitration agreement or the award determined. The question

which we have to consider is whether a person affirming an arbitration agreement can apply under the latter part of s. 33. Even assuming that the requirement that an application can be made under the first part of s. 33 only by persons desiring to challenge the arbitration agreement does not apply to its latter part, it is difficult to hold that an application to have the effect of the arbitration agreement determined can legitimately cover the dispute as to the existence of the said arbitration agreement. It is clear that the first part of s. 33 refers to the existence or validity in terms and ss. 31 and 32 also refer separately to the existence effect or validity. Therefore, the effect of an arbitration agreement is treated as distinct from the existence of the agreement, and where it was intended to refer to the existence as well as the effect of such an agreement both the words "existence and effect" have been specifically used. Thus, under the latter part of s. 33 an application can be made to have the effect or purport of the agreement determined but not its existence. That means that an application to have the effect of the agreement can be made provided the existence of the agreement is not in dispute. Besides, if a person affirming the existence of an agreement is held entitled to apply to the Court under the latter part of s.33 for getting a declaration about the said existing agreement then the first part of s. 33 would be wholly superfluous. Therefore, it seems to us that a party affirming the existence of an arbitration agreement cannot apply under s. 33 for obtaining a decision that the agreement in question exists. In fairness we ought to add that the learned Solicitor-General, who appeared for the respondent, did not dispute this position.

If the party affirming the existence of an arbitration agreement cannot apply under s.33 what is the remedy open to him? This question takes us back to s. 32. If s. 32 has created a bar against the institution of a suit for obtaining

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a declaration about the existence of an arbitration agreement, unless it is held that the creation of the said absolute bar itself involves the right to make an application under the Act it would lead to the anomalous result that a party is given no remedy to enforce the right; and it is an ordinary rule of construction that such an unreasonable and unconscionable result should as far as possible be avoided because the Legislature could not have intended such a result. In our opinion, having regard to the scheme of ss. 31, 32 and 33 it would not be unreasonable to hold that in matters which fall within the bar created by s.32 if a suit cannot be filed it is necessarily intended that an application can be made and such an application can be made under the Court's powers provided for by s.31 and impliedly recognised by s. 32. On this construction s. 33 cannot be treated as exhaustive of all cases where applications can be made. The Legislature has provided for the said cases under s. 33 because it was thought that they represented the usual type of cases which arise under the arbitration agreements. A contrary view would lead either to a stalemate or would in substance compel the party affirming the existence of an agreement to forego the procedure prescribed by the said agreement and sue on the contract itself. We are satisfied that a fair construction of ss. 31, 32 and 33 does not lead to such an anomalous position. Mr. Din Dayal contends that there is really a lacuna in the Act inasmuch as having created a bar by s. 32 the Legislature has failed to provide a remedy by way of an application. On reading ss. 31, 32 and 33 together we do not think the Court is driven to the conclusion that there is a lacuna in the Act.

In this connection it is material to remember that even in dealing with applications under the first part of s. 33 the Court may accept the opponent's plea and hold that the arbitration agreement exists if the challenge to the said existence set out in the petition is rejected. In other words, in many

cases applications made under the first part of s. 33 may end in the finding that the arbitration agreement exists. Similarly, in applications made under s.20 of the Act, if a dispute arose as to the existence of the arbitration agreement the Court may find in favour of the existence and make an order of reference as contemplated by s. 24. Thus, it is clear that in the applications expressly provided for by these two sections a party affirming the existence of the agreement would be entitled to prove the said existence, and if he succeeds he would obtain a decision to that effect. Therefore, in holding that s. 32 impliedly recognises the inherent jurisdiction of the Court to entertain applications made by the parties affirming the existence of arbitration agreements we are bringing the provisions of s.32 in line with the provisions of ss. 33 and 20. Indeed, s. 33 is a corollary of s. 32 and in a sense deals by way of illustration with the most usual type of cases arising in arbitration proceedings. Section 28 of the Act has no material bearing on the decision of this point. The power to enlarge time for making the award which is the subject-matter of the provisions of s. 28 cannot be held to include a power to entertain petitions like the present. Indeed, the learned Solicitor-General has not attempted to justify the conclusion of the High Court that s.28 confers such a power.

Even if it is held that there is inherent jurisdiction in the Court to entertain an application in support of the existence of an arbitration agreement the question still remains whether an application can be made under such inherent jurisdiction for a declaration that the contract which includes the arbitration agreement as defined by s. 2(a) includes cases where the arbitration agreement is made a part of the contract itself. The argument is that though an application may be made under the inherent jurisdiction of the Court to obtain a declaration about the existence or validity of an arbitration agreement, no such application can be

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made to obtain a declaration about the existence or validity of the main contract itself. In dealing with this argument it would be necessary to have regard to the substance rather than the form of the matter. In the present case the respondent claims that there is a concluded contract between the parties and that the said contract contained a valid arbitration agreement. Looking at the substance of the matter the prayer was first in regard to the existence and the validity of the main contract leading up to the second and principal prayer that there was a valid arbitration agreement. Quite clearly the decision of this question cannot depend merely on the words used in the petition. Where the challenge to the contract made by the appellant in defence to the claim of the respondent is a challenge common to both the contract and the arbitration agreement, the petition, like the one made by the respondent, must in substance be held to be a petition for a declaration as to the existence of a valid arbitration agreement; and a suit to obtain such a declaration is clearly barred by s. 32. Therefore, in our opinion, the fact that an incidental declaration is claimed about the existence and validity of the main contract does not affect the essential charater of the application. It is an application for obtaining a declaraction about the existence and validity of an arbitration agreement.

It is true that an arbitration agreement included in the contract itself is in one sense an integral part of the contract and in another sense it may be distinct from it. As observed by Lord Macmillan in *Hayman* v. *Darwins, Ltd.*[1]), "the arbitration clause is quite distinct from the other clauses. The other clauses set out the obligations which the parties undertake towards each other *hinc inde*; but the arbitration clause does not impose on one of the parties an obligation in favour of the other. It embodies the agreement on both the parties that, if any dispute arises with regard to

(1) [1942] A.C. 356, S. C. [1942] 1 All. E.R. 337 at p. 347.

the obligations which the one party has undertaken to the other, such dispute shall be settled by a tribunal of their own constitution. Moreover, there is this very material difference that whereas in any ordinary contract the obligations of the parties to each other cannot in general be specifically enforced and breach of them results only in damages, the arbitration clause can be specifically enforced by the machinery of the Arbitration Acts". It is, therefore, theoretically possible that a contract may come to an end and the arbitration agreement may not. It is also theoretically possible that the arbitration agreement may be void and yet the contract may be valid; and in that sense there is a distinction between the arbitration agreement and the contract of which it forms a part; but, as we have already pointed out, in the present case, the challenge to the contract itself involves a challenge to the arbitration agreement; if there is a concluded contract the arbitration agreement is valid. If there is not a concluded contract the arbitration agreement is invalid. In such a case a prayer for a declaration of the existence of the contract and its validity inevitably leads to the consequential prayer about the existence and validity of the arbitration agreement. If that is so, a suit cannot lie for a declaration that the arbitration agreement is valid because the prayers that the respondent has made in the present case fall directly within the clause "on any ground whatsoever". Indeed, we apprehend that in a very large majority of cases where the arbitration agreement is a part of the main contract itself, challenge to the existence or validity of one would mean a challenge to the existence or validity of the other. We would accordingly hold, though for different reasons, that the High Court was right in coming to the conclusion that the petition made by the respondent was competent under s. 32 of the Act and has been properly entertained by the trial Court.

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This question has been the subject-matter of some judicial decisions to which reference may now be made. In *Messrs. M. Gulamali Abdulhussain & Co.* v. *Messrs. Vishwambharlal Ruiya*(1) a petition had been filed for a declaration that the respondents had entered into the contract with the petitioners for purchase of 500 bars of silver on or about January 30, 1948 according to the rules and regulations of the Marwari Chamber of Commerce, Ltd., and that the respondents were bound to have all disputes in connection with the same contract decided by the arbitrators as provided by the said rules and regulations. The competence of this petition and the jurisdiction of the Court to entertain it were disputed. Both the learned trial judge and the Court of Appeal rejected the respondents' contention and held that there was an inherent jurisdiction in the Court to entertain petitions in respect of matters covered by the bar raised by s. 32.

On the other hand, in *Bajranglal Laduram* v. *Agarwal Brothers*(2) as well as in *State of Bombay* v. *Adamjee Hajee Dawood & Co., Ltd.* (3), a contrary view has been accepted. In the latter case, a suit had been filed on the Original Side of the Calcutta High Court claiming a declaration that a certain contract was not made between the parties and was not binding on the plaintiff. A further claim was also made that it should be declared that the defendant was not entitled to make any claim in respect of the said contract and that the contract be adjudged void and delivered up as cancelled. The learned trial judge construed the plaint as one for declaration that the arbitration agreement contained in the contract was invalid and on that view he held that under ss. 32 and 33 of the Act the suit was not maintainable. On appeal it was held that the suit was not one for challenging the validity of the arbitration agreement merely; it

(1) I. L. R. [1950] Bom. 333. (2) A. I. R. 1950 Cal. 267.
(3) I. L. R. [1952] 2 Cal. 49.

covered other reliefs and so bar of ss. 32 and 33 could not be pleaded. We are inclined to think that the decision of the Bombay High Court is substantially correct.

That takes us to the next question as to whether there was a concluded contract between the parties or not. We have already noticed that in response to the advertisement published by the respondent in the Indian Trade Journal the appellant submitted its tender. It is common-ground that the tender thus submitted was subject to the conditions of contract governing the Department of Supply Contracts which were set out in the Government Publication Form W. S. B. 133. Clauses 4(a) and (b) of these conditions are relevant. They deal with the security deposit. Clause 4(a) provides that on acceptance of the tender the contractor shall at the option of the Secretary, Department of Supply and within the period specified by him, deposit with him a security deposit therein specified. Clause 4(b) provides that "if the contractor is called upon by the purchaser to deposit security and the contractor fails to provide the security within the period, such failure will constitute a breach of the contractor and the Secretary, Department of Supply, shall be entitled to make other arrangements at the risk and acceptance of the contractor". It is thus obvious that the tender offered by the appellant submitted to these terms and that on these terms security deposit is a condition subsequent and not a condition precedent. Clause 4(b) makes it clear that the failure to make the deposit would be a breach of the contract itself. This position is not disputed; but Mr. Din Dayal contends that this position has been substantially varied by the Form in which the appellant's tender was accepted by the respondent. His argument is that the material words used in the acceptance letter changed the pre-existing position and made the security deposit a condition precedent to the acceptance itself. If this contention is right it would necessarily mean

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that there was no concluded contract. Thus the decision of this point depends upon the construction of the letter of acceptance issued by the respondent to the appellant after receiving its tender.

In this letter written on August 31, 1949 the respondent stated as follows :

"Dear Sirs,

Ref :—Your tender No. and date Nil.

Your offer is hereby accepted for a quantity of 1704 Cwts. and 2 qrs. (One thousand seven hundred and four hundred weights and two quarters only) of Oil Cocoanut conforming to specification No. IM. 1370 (d) at Rs. 89/6/- (Rupees eightynine and annas six only) per Cwt. packed in non-returnable sound, strong 45 gallon drums, delivery ex-godown at Calcutta by 30-9-49 or earlier if possible subject to your depositing 10% as security.

The security money which comes to Rs. 15,230/- (Rupees fifteen thousand two hundred and thirty only) should please be deposited immediately into a Government Treasury in favour of the Deputy Accountant General, I and S., Akbar Road, New Delhi and the Treasury Receipt forwarded to this office. This security money will be refunded to you after the completion of the contract.

The contract is concluded by this acceptance and formal acceptance of Tender will follow immediately on receipt of Treasury Receipt.

Kindly acknowledge receipt.

Yours etc. etc."

The whole argument is founded on the use of the clause "subject to your depositing 10% as security." *Prima facie* this clause may justify the argument that it is intended to make the security deposit a condition precedent; but in construing the true

effect of this clause we must look at the whole of the letter bearing in mind the fact that it has been written not by a lawyer or in consultation with a lawyer but by a Government officer in the ordinary course of the discharge of his duties. The first sentence in the first paragraph clearly shows that the offer was accepted for the quantity therein specified. The second paragraph calls upon the appellant to see that the specified amount is deposited immediately into the Government Treasury. This paragraph is more consistent with clause 4(a) of the general conditions. It reads as if having accepted the tender the appellant is reminded that it has to deposit the amount under the relevant condition, and the letter ends with the categorical statement that the contract is concluded by this acceptance. Mr. Din Dayal is right when he contends that s. 7 of the Contract Act requires that the acceptance of the offer must be absolute and unqualified, it cannot be conditional; but reading the letter as a whole we do not think that the Courts below have erred in coming to the conclusion that this letter amounts to an absolute and unqualified acceptance of the tender or offer made by the appellant. While dealing with this question it may be pertinent to recall that the general conditions of the contract prescribed by Form W.S.B. 133 are made a part of the tender, and the contract itself was intended to be executed expeditiously. The tender shows that the appellant represented that the earliest date by which delivery could be effected would be within twenty days from the date of the receipt of the order and it also said that full quantity of cocoanut oil required was held by it. Therefore, to begin with the tender treated the security deposit as a subsequent condition, the contract was for the immediate supply of goods and the acceptance purports to be in accordance with the relevant government rules and uses the expression that the contract was concluded by the said acceptance. Therefore, in our opinion, reading the letter as a whole it would not be possible to

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accept the appellant's argument that the letter was intended to make a substantial variation in the contract by making the deposit of security a condition precedent instead of a condition subsequent.

In the result the appeal fails and is dismissed with costs.

Appeal dismissed.