1982 June 2

[A. LOIZOU, SAVVIDES AND STYLIANIDES, JJ.]

NICODEMOS CHARALAMBOUS,
Appellant-Plaintiff,

v.

LOUKIA KAZANOU AND ANOTHER,
Respondents-Defendants.

(*Civil Appeal No.* 6145).

Administration of Justice—Adjournments and delays in the hearing of cases undesirable.

Findings of fact made by trial Court—Based on credibility of witnesses—Nothing established entitling Court of Appeal to interfere with such findings inspite of the adjournments and delay in the hearing of the case.

Contract—Architect and employer—Architect preparing plans for a building on instructions of employer—Express condition that work should be capable of being executed for a fixed amount or thereabout—Condition not complied with by architect—Employer entitled to repudiate the contract and no longer employ architect who was not entitled to any remuneration.

Contract—Architect and employer—Claim by architect for remuneration for plans prepared on instructions of employer—Contract repudiated by employer because plans not complying with conditions as to cost of building—Architect not entitled to remuneration on a quantum meruit basis because section 70 of the Contract Law, Cap. 149 applies where an act is done by one person at the express request of another.

In November, 1971 respondent 1 instructed the appellant to prepare architectural plans for the construction of a house on a building site of hers. In an action by the appellant for £1980 agreed remuneration for the preparation of the plans in question the trial Court, having accepted the version of the respondent that the cost of the building should be in the region

of C£8,000, found that there was an express condition that the work should be capable of being executed for a fixed amount or thereabout which condition was not complied with by the appellant; that, also, an opportunity was given to the appellant to remedy the situation by changing the plans and inviting new tenders and again the limitation regarding the cost was not satisfied. On these findings the trial Court held that respondent was entitled to repudiate the contract and dismissed the action.

The action was filed on 2.2.1974 and it was originally fixed for hearing on 9.12.1975. After three adjournments the evidence of the appellant-plaintiff was heard on the 10.2.1976. There followed ten adjournments, which were granted on the application of either of the parties or of both, the hearing of the case commenced on 13.3.1979 and was adjourned to 15.3.1979 when it was concluded. Judgment was reserved and was delivered on 28.5.1980.

Upon appeal by the plaintiff it was mainly contended:

(a) That given that the hearing of the evidence of the plaintiff took place in February, 1976 and that of the defendants in March 1979 and the judgment was delivered in May, 1980, the appreciation of the credibility of the witnesses of the two sides and the evaluation of their evidence is incompatible with the safe administration of justice.

(b) That the trial Judge wrongly found that there was a condition or prerequisite that the cost of building should be of a certain height.

(c) That the trial Court wrongly has not found that the agreed remuneration of the plaintiff was on a quantum meruit basis.

Held, (1) that the issue of the adjournments is an issue that has to be examined in the context of the whole evidence that was adduced by both sides and not in the abstract; that this Court has come to the conclusion that, in spite of the adjournments and the delay in the hearing of the case for which everyone involved in the case had his share of responsibility, nothing has been established to entitle it to interfere with the findings of fact made by the trial Judge and based on the credibility of

the witnesses as they are duly born out by the totality of the circumstances of the case; and that, therefore, contention (a) should fail.

(2) That the finding of the trial Judge that there was a condition or prerequisite that the cost of the building should be of a certain height was clearly born out by a number of circumstances including the financial position of the respondent; (pp. 336–7 post); that where an architect is instructed to prepare plans for a building to cost approximately a certain sum and this condition is not complied with by the architect the employer is entitled to repudiate the contract and refuse to pay the architect; that since the trial Judge found that there was an express condition that the work should be capable of being executed for a fixed amount or thereabout, which condition was not complied with by the appellant; that, since, also, an opportunity was given to the appellant to remedy the situation by changing the plans and inviting new tenders and again the limitation regarding the cost was not satisfied respondent 1 was entitled to repudiate the contract and no longer employ the appellant as her architect; that in the circumstances and as all possibilities of affecting modifications to get down to the limitation imposed by the respondent had failed, it was correct to conclude that the appellant was not entitled to any remuneration; accordingly contention (b) should fail.

(3) That a question of quantum meruit does not arise in this case because section 70* of the Contract Law, Cap. 149 does not apply where an act is done by one person at the express request of another; that the claim of the appellant as pleaded, and there was no alternative claim for quantum meruit, was based on an express agreement; that taking it, as urged by counsel, that no lump sum as remuneration had been agreed in advance but it would have been assessed in the basis of percentages, again no question of quantum meruit arises, as the appellant in such a case would be entitled to reasonable remuneration, not under section 70 of the Contract Law, but because

* Section 70 provides as follows:

"70. Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered".

the request or agreement for the rendering of services by the appellant would have implied a promise to pay such reasonable remuneration; that moreover on the findings of fact made by the trial Judge which were to the effect that the agreement relied upon by the appellant contained a vital term which was found to have been breached by him, the appellant could not have a claim for remuneration for what he did not do in accordance with the terms of the agreement between the parties and from which the respondents received no benefit; that the respondents have not refused to perform nor had rendered themselves incapable to performing their part of the contract and therefore put it in the power of the appellant either to sue for a breach of it or to rescind same and sue on a quantum meruit for work actually done; accordingly the appeal should be dismissed.

Appeal dismissed.

Observations regarding the undesirability of adjourning cases and hearing them piecemeal (pp. 332–5 post).

Cases referred to:

Georghallides v. *Theodoulou*, 1962 C.L.R. 115 at p. 125;

Tsiarta and Another v. *Yiapana*, 1962 C.L.R. 198 at p. 208;

Antoniou v. *Elmaz* (1966) 1 C.L.R. 210 at p. 213;

HjiNicolaou v. *Gavriel and Another* (1965) 1 C.L.R. 421;

Athanassiou v. *Attorney-General of the Republic* (1969) 1 C.L.R. 439;

Edwards v. *Edwards* [1968] 1 W.L.R. 149 at p. 150;

Kafieros and Another v. *Theocharous and Others* (1978) 1 C.L.R. 619 at p. 645;

Efstathios Kyriacou and Sons Ltd. v. *Mouzourides* (1963) 2 C.L.R. 1;

Charalambous v. *Charalambous* (1971) 1 C.L.R. 284;

International Bonded Stores Ltd. v. *Minerva Insurance Co. Ltd.* (1979) 1 C.L.R. 557;

Kranidiotis v. *The ship "AMOR"* (1980) 1 C.L.R. 297;

Dick v. *Piller* [1943] 1 All E.R. 627;

Ottley v. *Morris* (*Inspector of Taxes*) [1979] 1 All E.R. 65;

Kier (*Cyprus*) *Ltd.* v. *Trenco Constructions Ltd.* (1981) 1 C.L.R. p. 30;

Esefeco Ltd. v. *Olympos Tours Ltd.*, (1981) 1 C.L.R. 236;
Columbus Cc. v. *Clowes* [1903] 1 K.B. 244 at p. 247.
Nelson v. *Spooner* (1861) 2 F & F 613 at p. 618;

Appeal.

Appeal by plaintiff against the judgment of the District Court of Nicosia (Papadopoulos, S.D.J.) dated the 28th May, 1980 (Action No. 1007/74) whereby his claim for agreed remuneration for the preparation of architectural plans for the construction of a house was dismissed.

H. Solomonides for *L. Papaphilippou*, for the appellant.
K. Michaelides, for the respondent.

A. LOIZOU J. gave the following judgment of the Court. This is an appeal against the judgment of a Judge of the District Court of Nicosia by which the claim of the appellant/plaintiff, a qualified architect, for agreed remuneration for the preparation of architectural plans for the construction of a house was dismissed with no order as to costs.

The first ground of law argued in this appeal is that "given that the hearing of the evidence of the plaintiff took place in February 1976, and that of the defendants in March 1979, and the judgment was delivered in May, 1980, the appreciation of the credibility of the witnesses of the two sides and the evaluation of their evidence is incompatible with the safe administration of justice". This ground was, as fairly conceded by counsel for the appellant, the strongest of the grounds of appeal, inasmuch as the remaining grounds turn on the findings of fact made by the trial Judge on the basis of the credibility of witnesses.

In support thereof, we have been referred in the course of the hearing, and it will be useful to refer also in this judgment to the history of the events. The action was filed on the 2nd February, 1974, on a specially endorsed writ, and after the close of the pleadings an application to fix the case for hearing was filed on the 8th June, 1974. On the 18th October, 1974, Mr. Papaphilippou on behalf of the appellant applied that the case be adjourned sine die as his client was abroad and there was no room for settlement, as he put it. There being no objection on behalf of counsel for the respondents, the application was granted. On the application of counsel for the respondents

the case was fixed for mention and directions on the 25th September, 1975, when in the presence of both counsel, the case was adjourned for hearing on the 9th December, 1975, when on the application of both counsel it was once more adjourned for hearing to the 25th February, 1976. On the 3rd February, 1976, counsel for the appellant applied that the evidence of the plaintiff be taken as preparatory to the hearing of the action. This was fixed on the 7th February, and the evidence of plaintiff was heard as part of the plaintiff's case and not as preparatory to the trial on the 10th February, 1976. Then it was adjourned for continuation to the 6th May, 1976, that is almost three months later. On the 5th May, however, an application in writing was made by counsel for the respondents—and counsel for the appellant recorded his non objection to it—that the case be adjourned to the 15th October, 1976, for continuation of hearing with no reasons given.

On the 15th October 1976, at 11.30 a.m., the following minute is recorded, with both counsel appearing: "Court: In view of the misplacement of the file which was found only a few hours ago (the case is) adjourned to continue on 25.1.1977 for continuation 26.1.1977".

On the 4th December, 1976, counsel for the respondents applied that the case which was fixed for hearing on the 25th and 26th January, 1977, be adjourned as he would be engaged on that date before the Supreme Court. Counsel for the appellant recorded his non objection to the adjournment and on the 25th January, 1977, the Court granted the application and adjourned the case for hearing to the 17th May, 1977, to be changed later to the 21st May when in the presence of counsel and with no reasons given, the case was adjourned by the Court for hearing to the 26th October, 1977, on which date both sides applied for an adjournment as Mr. K. Michaelides was abroad and Mr. Papaphilippou engaged in Civil Appeal 5622. The case then was fixed for hearing on 22.3.1978 on which date, on the application made on behalf of counsel for the respondents and with no objection and no costs claimed on behalf of counsel for the appellant, the case was adjourned to the 4th July, 1978, for hearing, on which date the record of the Court is as follows: "Court: B.U. on 15.9.1978 for a date of hearing to be given". On the 15th September the Court fixed the case for hearing "to

continue on the 9th December, 1978", on which date the record reads: "Court: Hearing to continue on 13.3.1979" on which date eventually the hearing of the case was continued and then adjourned after the hearing of one witness to the 15th March, 1979, when the hearing was concluded and judgment reserved, which in fact was delivered on the 28th May, 1980.

Counsel for the appellant referred us to a number of authorities where the question of adjournments and hearing of cases piecemeal was examined by this Court and by English Courts. We find it useful to quote from some of them as there are pertinent observations made therein to which we would like to draw the attention of all concerned with the good, which we firmly believe is interwoven with the administration of justice.

In the case of *Georghallides* v. *Theodoulou*, 1962 C.L.R. 115, at p. 125, Josephides, J., had this to say:

> "Finally, we would like to observe that, as it is the constitutional right of every person to have his case heard within a reasonable time, it is highly desirable that judgments reserved by Courts should, generally, be delivered without any delay. Moreover, in cases where legislation or other facts are likely to prejudice the rights of the parties it is the duty of the Judge to see that there is no undue delay in the hearing of the case and delivery of the judgment".

Observations regarding the undesirability of adjourning cases and hearing them piecemeal are also to be found in the case of *Christodoulos St. Tsiarta & Another* v. *Kodros Kyriacou Yiapana & Another*, 1962 C.L.R. 198, at p. 208, where Josephides, J., on behalf of the then High Court said the following:

> "A further word needs to be said with respect to adjournments. They produce justifiable dissatisfaction by litigants and their witnesses, and statistical records of this Court confirm the opinion there are far too many. If an action can proceed the first time it comes on for trial so much the better. When adjournments are necessary there should not be more than one or two. After that there should be no more adjournments except in unusual circumstances as to which the Judge has to decide. Having made these comments it must be added these will be very unusual

circumstances in which there may be many adjournments, but they should be few in number".

In *Antoniou* v. *Elmaz* (1966) 1 C.L.R., 210, at p. 213, Vassiliades, J., once more reiterated the anxiety of the Court regarding the proper prosecution of trials which includes the litigant's right to a hearing of his case within a reasonable time by the appropriate Court as declared in Article 30 of our Constitution. For that purpose he referred with approval to what the then President of this Court, Mr. Justice Zekia said in the case of *HjiNicolaou* v. *Gavriel & Another* (1965) 1 C.L.R. p. 421, at p. 431:

"Finally we desire to express once more our disapproval for the delays in the hearing of cases. In a recent judgment (*Nicola* v. *Christofi and Another* (1965) 1 C.L.R. 324 at p. 338) we had occasion to reiterate our previous observations deprecating the piecemeal hearing of cases and the delays in the delivery of reserved judgments. We also expressed the view that adjournments should, as far as possible, be avoided except in unusual circumstances, and that once a trial was begun, it should proceed continuously day in and day out, where possible, until its conclusion, (see also *Tsiartas and Another* v. *Yiapana*, 1962 C.L.R. p. 198 at p. 207)".

He then went on and added at p. 214 the observations of the Court he was presiding by saying "a mere look at the record is sufficient to show how this trial proceeded, and how the piecemeal hearing must have affected the findings of the trial Court resting on evidence taken in such manner".

In *Athanassiou* v. *The Attorney-General of the Republic* (1969) 1 C.L.R., p. 439, what was said by Sir Jocelyn Simon P., in the case of *Edwards* v. *Edwards* [1968] 1 W.L.R. 149 at p. 150, was cited with approval at p. 455 of the report:

"..... It is desirable that disputes within society should be brought to an end as soon as reasonably practical and should not be allowed to drag festeringly on for an indefinite period. That last principle finds expression in a maxim which English Law took over from the Roman Law: it is in the public interest that there should be some end

> to litigation ..... As long ago as Magna Carta, King John was made to promise not only that justice should not be denied but also that it should not be delayed; and there have been times in our history when various Courts have come under severe criticism for their procedural delays".

With regard to the undesirability of hearing of cases piecemeal pertinent observations were made by Malachtos, J., when delivering the judgment of the Court in *Kafieros and Another* v. *Theocharous and Others* (1978) 1 C.L.R. 619 at p. 645.

The question of adjournments by Courts and the legal principles governing the exercise of the discretionary power for such purpose and the grounds upon which the Supreme Court will interfere on appeal with the exercise of the judicial discretion of a trial Judge in granting or refusing an adjournment was examined also in the case of *Efstathios Kyriacou and Sons Ltd.* v. *Mouzourides* (1963) 2 C.L.R. 1, where reference is also made to *Charalambous* v. *Charalambous* (1971) 1 C.L.R. 284; *International Bonded Stores Ltd.* v. *Minerva Insurance Co. Ltd.* (1979) 1 C.L.R. 557; *Kranidiotis* v. *The Ship "AMOR"* (1980) 1 C.L.R. 297, and a number of English authorities including *Dick* v. *Piller* [1943] 1 All E.R. 627; *Ottley* v. *Morris* (*Inspector of Taxes*) [1979] 1 All E.R. 65.

Also reference may be made to the case of *Kier* (*Cyprus*) *Ltd.* v. *Trenco Constructions Ltd.* (1981) 1 C.L.R., p. 30, where the position is once more reviewed and the Court had this to say at p. 39:

> "..... As such it has to be examined on the particular facts of each case and not in abstracto; whether an adjournment will be granted or not must always be considered in the light of the right to a hearing within a reasonable time as provided by Article 30, para. 2, of our Constitution and Article 6, para. 1, of The European Convention on Human Rights of 1950, ratified by The European Convention on Human Rights (Ratification) Law 1962 (Law No. 39 of 1962)".

This passage is also cited in *Esefeco Ltd.* v. *Olympos Tours Ltd.* (1981) 1 C.L.R., p. 236.

Moreover, according to a statement of the Earl of Reading, C.J. (1920) W.N. 34, the hearing of a case will not be postponed or taken out of due order merely to suit the convenience of counsel. He was dealing with an application for the postponement of the hearing and he said that such applications caused great difficulty in arranging the lists and he did not intend in future to grant any applications for the postponement of cases for the convenience of counsel except in very special circumstances, and he added that the practice of arranging dates to suit counsel had led to great embarrassment to the Court.

In all fairness to the learned trial Judge and counsel appearing in this case, it has to be made clear that the situation highlighted in this judgment regarding adjournments and piecemeal hearings is not one to be found only in this case. It is a matter of frequent occurrence in all jurisdictions, almost one of a general practice which has to be faced in its entirety and by all concerned with uniform, determined and concerted action.

We have dealt at some length with the question of adjournments, of piecemeal hearings and delays in the trial and conclusion of cases and we have reviewed the cases containing judicial pronouncements on these most important aspects that go to the root of the good administration of justice. No doubt the essence of it is condensed in the old saying that has been repeated so many times that justice delayed is justice denied. We only hope that what has been said in all the aforesaid cases should not be forgotten or ignored but should be followed earnestly for the benefit of all litigants, that come to Courts seeking their aid for the protection of their legitimate rights.

Having said this we turn now to the case in hand that has given rise to this point. It was argued that once the learned trial Judge decided the case on the credibility of witnesses due to the long lapse of time between 1976, when he heard the plaintiff, and 1979-1980 when he heard the rest of the evidence and delivered his judgment, he was not in a position to have a correct recollection of the demeanour of the witnesses under examination and that he preferred the evidence of the witnesses for the defendants/respondents, because it was more fresh in his mind and ignored completely the evidence of the appellant/plaintiff as he could not possibly have remembered his demeanour in the witness box.

We do not subscribe to this argument. This is an issue that has to be and in fact we did, examine in the context of the whole evidence that was adduced by both sides and not in the abstract, and we have come to the conclusion that, in spite of the adjournments and the delay in the hearing of the case for which everyone involved in the case had his share of responsibility, nothing has been established to entitle us to interfere with the findings of fact made by the trial Judge and based on the credibility of the witnesses as they are duly born out by the totality of the circumstances of the case. This ground, therefore, fails and together with it fail the two other grounds, the one challenging in particular the finding of the trial Judge that there was a condition or prerequisite that the cost of the building should be of a certain height, and the other one that the trial Judge ignored the fact that respondent 1 approved the plans prepared by the appellant, by her signing and submitting herself an application to the appropriate Authority for a building permit.

The former of the two findings was clearly born out by a number of circumstances, including the financial position of the respondent and her prospects to finance it with a loan and the changes in the plans that were effected because of their cost, though not successful in reducing the cost of the building to the agreed level. With regard to the latter ground it has to be noted that the application for a building permit was signed in blank by respondent 1 before she knew about the cost of the construction of the building to be built on the basis of the plans to be prepared by the appellant and that her application was submitted to the respondent Authority by the appellant after himself completing it.

The version of respondent 1 was that the building should cost in the region of C£8,000.—because she had only C£6,000.—in cash and she had secured a loan of C£2,000.—from the Bank. It should be a simple house with three bed-rooms and the only special request was that it should have many cupboards.

The version of the appellant was that the respondent had asked him to make the plans of a unique conception and execution, original with no one like it in Cyprus. It should be of a luxurious construction with concealed lighting and provision for horizontal and vertical extension.

The learned trial Judge accepted the version of respondent 1 which he found to be consistent with her financial position and clearly supported by the testimony of two witnesses, Mr. and Mrs. Lambertides, who had no reason to lie to the Court. He found that her version regarding her instructions to the appellant for the preparation of the plan was correct.

As we have already said we have found no reason to interfere with these findings of fact.

He then dealt with the legal aspect of the case and referred to the legal position as summed up in *Halsbury's Laws of England*, 4th Edition, Vol. 4, para. 1352, and in *Hudson's Building and Engineering Contracts*, by Wallace, 9th Ed., p. 105, under the heading "Duty and Liabilities". The first extract from Halsbury's at para. 1352 reads as follows:-

> "If the architect or engineer is authorised to obtain tenders, he is entitled to payment of any expenses reasonably or necessarily incurred in connection therewith.
>
> If the architect is instructed to prepare plans for a building or for works to cost approximately a certain sum, and all the tenders sent in are considerably in excess of the sum mentioned, it seems to be a question of fact whether the employer is entitled to repudiate the employment and refuse to pay the architect, on the ground that there was a condition that the works should be capable of being constructed for the sum, or approximately the sum, mentioned and that the buildings as designed could not be carried out for that sum or anything near it".

The aforesaid passage comes from the case of *Nelson* v. *Spooner* (1861) 2 F & F 613, at 618, where Cockburn C.J. left the following questions to the Jury:

> "(1) whether it was an express condition that the works should be capable of being executed for the estimated sum; if not, then
>
> (2) whether there was an implied condition that the work should be capable of being done for a sum reasonably near to the estimated sum; if so, then

(3) was the estimate reasonably sufficient; and

(4) as to a claim for work and labour on the plans, etc., whether the labour was bestowed or not under the special contract".

The other passage referred to from *Hudson's Building and Engineering Contracts*, which in the 10th Edition is at page 144, is as follows:

"*Excess of cost over estimates*

In the earliest stages of the employment of his architect or engineer, the employer will in practice usually indicate or impose limitations on the cost of the proposed project. Even if no mention of this is made, it is suggested that an architect must design works capable of being carried out at a reasonable cost having regard to their scope and function. There will, therefore, in most cases be an express or implied condition of the employment that the project should be capable of being completed within a stipulated or reasonable cost, and an architect or engineer will be liable in negligence if, in fact, the excess of cost is sufficient to show want of care or skill on his part. Thus, in *Money-penny* v. *Harland* (1826) Best C.J. said: 'A man should not estimate a work at a price at which he would not contract for it; for if he does, he deceives his employer.... If a surveyor delivers an estimate greatly below the sum at which a work can be done, and thereby induces a private person to undertake what he would not otherwise do, then I think he is not entitled to recover'.

Illustrations

(1) .....

(2) F. was instructed to prepare designs for a building not to exceed in cost £4,000. He prepared plans, and tenders were invited; the lowest tender was £6,000. Held, that F. was not entitled to recover his remuneration for the work done: *Flannagan* v. *Mate* (1876) 2 Vict. L.R. (Law) 157.

(3) An architect estimated that a school building he had designed would cost $110,000. He knew the estimate was for the purpose of preparing a by-law to raise the

necessary funds. The lowest tender was for $157,800. He then eliminated forty per cent. of the cubic content of the school, and said the remainder could be carried out within the limit. The lowest tender was $132,900. Held, by the Court of Appeal of British Columbia, that he had been negligent, and was properly dismissed and liable to pay damages: *Savage* v. *Board of School Trustees* (1951) 3 D.L.R. (2d) 39 (Canada)".

It is further pointed out in *Hudson's* (supra), p. 145, that where an architect has obtained tenders which are substantially in excess of the express or implied limitation—in our case we had an express limitation—he should normally be given an opportunity of obtaining further tenders without expense to the employer unless it is obvious that no tender is likely to satisfy the limitation or the breach is so serious as to justify the client in treating the contract as repudiated. In support of this proposition reference is made to what Wright, J., said, by analogy, in *Columbus Co.* v. *Clowes* [1903] 1 K.B. 244, at p. p. 247:

"It seems to me that the most the plaintiffs can get is the reasonable cost of making the plans good. But then comes the difficulty. The defendant himself would have made the plans good without any charge. Indeed he would have been bound to do so. If, however, the plaintiffs had called in another architect, he would in all probability have insisted on commencing the plans de novo, and would have refused to make any use of the defendant's plants. But would that have been a reasonable course to pursue? I do not think it would".

This passage is to be found relevant when an error in the design is discovered at an early stage in which case the building owner should normally, as part of the duty to mitigate damage, give the architect or engineer an opportunity to correct it. In our case, the appellant was given an opportunity to satisfy the limitation with the assistance of a special Quantity Surveyor so that the cost of the building would be at the level at which the respondent 1 was in a position to spend and had asked for. In fact, changes were effected, new tenders were invited but again the lowest tender was C£16,000.—and the respondent gave up the idea of proceeding with the building.

It appears that in the present case the learned trial Judge found that there was an express condition that the work should be capable of being executed for a fixed amount or thereabout, which condition was not complied with by the appellant. Also an opportunity was given to the appellant to remedy the situation by changing the plans and inviting new tenders and again the limitation regarding the cost was not satisfied. Therefore, respondent 1 was entitled to repudiate the contract and no longer employ the appellant as her architect. In the circumstances and as all possibilities of affecting modifications to get down to the limitation imposed by the respondent have failed, it was correct to conclude that the appellant was not entitled to any remuneration.

The question of quantum meruit does not arise in this case as the prerequisites of section 70 of our Contract Law which covers the cases where a person lawfully does anything for another or delivers anything to him not intending to do so gratuitously and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of or to restore the things so done or delivered, are not satisfied.

The argument advanced that the appellant was entitled to be remunerated on the basis of a quantum meruit since on the evidence adduced it was established that he would be paid on the basis of percentage and not by a lump sum, does not stand. As pointed out in Mulla, Indian Contract and Specific Relief Acts, 9th Ed., p. 499:

> "It is superfluous to add that the section does not apply where an act is done by one person at the express request of another. It (s. 70) will not apply where the goods are supplied pursuant to a request. A contrary view was taken in a Bombay case which it is submitted is erroneous (*B. N. Elias & Co.* v. *State of West Bengal* (1959) A. Cal. 247; *Union of India* v. *Ram Nagina Singh*, 89 Cal. L. J. 342 *reld. on*; contra *Ramakrishna* v. *Rangoobai* (1959) A.B. 519). An alternative claim under sections 65 and 70 becomes nugatory as soon as the court finds a valid arbitration clause in a contract covering the subject-matter of dispute (*Shalimar Paints* v. *Omprokash* (1967) A. Cal. 372; *Rungta Sons (P) Ltd.* v. *Jugometal Trg. Republike*, 63

C.W.N. 527; (1959) A. Cal. 423; *Anderson Wright Ltd.* v. *Moran & Co.* (1955) A.S.C. 53; (1955) 1 S.C.R. 862 refd. to). In *Moselle Solomon* v. *Martin & Co.* (62 Cal. 6; 2, 621) (Lord Williams J.), Lord Williams J. held that the terms of section 70 are very wide and it is applicable even when the plaintiff can sue upon the contract express or implied. Jack J. held the contrary, i.e. it is not applicable where there is an express contract, which it is submitted is the correct view. Thus if a client engages a pleader to act for him in a case, and if no fee is fixed, the pleader is entitled to reasonable remuneration not under this section, but because the request implies a promise to pay such remuneration (*Sibkisor Ghose* v. *Manik Chandra* (1915) 21 Cal. L. J. 618; 29 I.C. 453. The decision in *Nathman* v. *Sanitation Panchayat Committee*, 1935 A.N. 242; 160 I.C. 301, cannot be correct. See *Ratanlal Hiralal* v. *Chandradutt*, 1951 A.N. 431)".

In our case the claim of the appellant as pleaded and there was no alternative claim for quantum meruit, was based on an express agreement. Taking it, as urged by counsel, that no lump sum as remuneration had been agreed in advance but it would have been assessed on the basis of percentages, again no question of quantum meruit arises, as the appellant in such a case would be entitled to reasonable remuneration, not under section 70 of our Contract Law, but because the request or agreement for the rendering of services by the appellant would have implied a promise to pay such reasonable remuneration.

Moreover on the findings of fact made by the trial Judge which were to the effect that the agreement relied upon by the appellant contained a vital term which was found to have been breached by him, the appellant could not have a claim for remuneration for what he did not do in accordance with the terms of the agreement between the parties and from which the respondents received no benefit. The respondents had not refused to perform nor had rendered themselves incapable of performing their part of the contract and therefore put it in the power of the appellant either to sue for a breach of it or to rescind same and sue on a quantum meruit for the work actually done.

For all the above reasons we have come to the conclusion

that this appeal should fail and is dismissed accordingly, with no order as to costs in view of the adjournment applied for by the respondents.

Appeal dismissed. No order as to costs.