Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of The Bombay Burmah Trading Corporation, Limited, v. Aga Mahomed Khaleel Shirazee, from the High Court of Judicature at Madras; delivered the 11th July 1911.

PRESENT AT THE HEARING:

LORD MACNAGHTEN.
LORD ATKINSON.
LORD ROBSON.
MR. AMEER ALI.

[DELIVERED BY LORD ATKINSON.]

This is an Appeal from a Judgment and Decree of the High Court of Judicature at Madras dated the 21st December 1908, made in the exercise of its Appellate Jurisdiction, whereby the Judgment and Decree of the Chief Justice of the same Court made in the exercise of its Ordinary Jurisdiction were reversed, and judgment entered for the Respondent the Plaintiff in the suit, for the sum of Rs. 11,913. 4. 6. damages for the breach of contract for the sale and delivery to the Plaintiff of 1,500 teakwood railway sleepers.

The facts of the case are not complicated, and as far as it is necessary to set them out are as follows:—

A person named M. Chinnappa Iyer, of 209, Thambu Chetty Street, Madras, in the month of May 1905, entered into a contract with the Madras Railway Company for the sale to them of 1,500

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teakwood sleepers of the dimensions 12′ by 12″ by 7″, deliverable in two instalments of 750 each.

The Company had advertised for tenders for 3,000 teak sleepers on a specification which set forth that the sleepers should be of the dimensions above mentioned, and should be of the following description :—

"Each teak sleeper to be delivered at the Terminal " Buildings yard at Rayapuram must be straight, sound, " and well seasoned, sawn uniformly square and to correct " dimensions throughout its length, and be free from holes, " shakes, cracks, sap, and other imperfections. The sleepers " so delivered at Rayapuram will be inspected by an " engineer deputed by the Chief Engineer, whose decision " as to those to be accepted or rejected will be final. The " sleepers which may be condemned as not complying with " this specification will not be paid for, and they must be " removed from our yard at your own cost within seven " days of your receiving notice to do so."

The price to be paid was apparently Rs. 210 per ton.

The Appellants are large timber merchants, part of whose business it is to manufacture and supply teak sleepers. Their duly accredited agents at Madras are Messrs. Arbuthnot & Co., one of the members of which firm is Mr. F. S. Arbuthnot. Iyer, before tendering to the Railway Company for this contract, entered into negotiations with F. S. Arbuthnot in reference to the terms upon which they would supply him with sleepers to enable him to carry out any contract which he might make with the Railway Company for the supply of any portion of the sleepers required. This cannot be disputed. It is practically admitted; and, from the following letter, signed by F. S. Arbuthnot and addressed to the Appellants' manager at Rangoon, coupled with the evidence which he gave at the trial hereafter referred to, it would rather look as if he regarded the Appellants as the real contractors, and Iyer and a firm of King & Co.

merely as intermediaries. The letter is Exhibit D., and runs as follows :—

" Madras,
" 22nd May 1905.

" Dear Sir,

* * * * *

" *Sleepers.*—With reference to your telegram of 20th " April for 3,000 sleepers 12 ft. by 12 ins. by 7 ins. at " Rs. 170 landed Madras, we have just heard unofficially " that we have secured the business—1,500 through King " and 1,500 through another dealer. This sale will be " advised definitely next week when we receive written " confirmation from the buyers."

Ultimately Iyer entered into a contract with the Appellants through Arbuthnot & Co. for the sale to him of 1,500 sleepers 12′ by 12″ by 7″ at the rate of Rs. 170 per ton (Rs. 40 per ton less than the price to be paid by the Railway Company), landed at Madras, to be shipped from Moulmein or Rangoon at Appellants' option. The contract is contained in the letters which passed between the parties. It never was embodied in a formal instrument. Much controversy arose as to whether Iyer had, during his negotiations with Arbuthnot & Co., ever given to F. S. Arbuthnot, who appears to have been the member of the firm in charge of this transaction, a copy of the specification of the Company on which he had tendered, thus making it the basis of his contract with them. The Chief Justice, the Trial Judge, was of opinion that the Respondent had failed to establish that Iyer had done this. The Court of Appeal thought the contrary. A copy of the specification in the form of a letter (marked Exhibit A), signed by the Chief Engineer of the Company, and addressed to Messrs. Arbuthnot & Co., was, on search, subsequently found amongst the papers of Mr. F. S. Arbuthnot. This gentleman stated on his examination (page 118, Record) that he knew nothing about this letter till after the suit was instituted. He admits it bears his signature, as well as those of Mr. Young

and M. Arbuthnot (members of the firm), and also of a Mr. Peebles. All letters, he states, came to him in the ordinary course of business, and this letter after having been initialed was sent down to be placed among the records of the office. He adds :—"My firm did not tender. King & Co. did "not tender. They procured the 1,500 through " my firm. I knew they (the sleepers) were re- " quired for the Madras Railway. I think it is " probable I was told they were for the purpose of " the contract for 3,000 with the Madras Railway. " I expect I added 1,500 and 1,500 together." Lower down on the same page, he states that their firm considered they had the control of the Madras Railway contract, that they had power to select the person who was to have the order, that Chinnappa Iyer unlike King & Co. (who would not take sleepers from Moulmein) had not been doing business with them regularly, and that they had only selected him because they had been asked by one Dubash of the Import Department to give him a chance. Their Lordships think it unnecessary to decide this point as to the alleged delivery of the copy specification to F. S. Arbuthnot by Iyer for these reasons :—First, because they concur in the opinion expressed by the Court of Appeal at page 156, line 29, of the Record that " the evidence shows that Exhibit A. " (the copy specification) merely contains an " enumeration of the qualities of a good sleeper " usually insisted on by railway authorities," and secondly because the Appellants, having through their agents been fully informed of the purpose for which Iyer purchased these sleepers from them, must be taken to have impliedly warranted that they were reasonably fit for that purpose, and thirdly because they think that a sleeper whose qualities are inferior to those " of " a good sleeper, as usually insisted upon by " railway authorities," cannot well be con-

sidered to be a sleeper of the dimensions specified reasonably fit for use by the Madras Railway Company. The point therefore becomes, in their Lordships' view, irrelevant. One of the letters forming the written contract with Iyer, namely that dated the 23rd May 1905, written by Arbuthnot and addressed to Iyer contains the following paragraph :—

" The passing of our Moulmein or Rangoon " friends, the Bombay-Burma Trading Corpo- " ration, Limited, is as usual final as regards " both measurement and quality, which please " take note."

In their Lordships' view the defence of the Appellants to the claim made against them will ultimately be found to rest upon this paragraph, the rights it confers, and the manner in which those rights have been exercised. The first question is as to its true construction. What does it mean ? It cannot mean that the Appellants were entitled to deliver under the contract any kind of sleeper they chose. It must have contemplated that there was some standard with which these sleepers should be compared. That standard must at the lowest have been the standard set up expressly or impliedly, by the contract between the parties ; that was the specification, or at the least the requirement that the sleepers were reasonably fit, as sleepers of the dimensions described, for use by the Madras Railway Company. So that the right conferred upon the Appellants amounted merely to the right to determine by and through the skilled and experienced persons whom they should necessarily employ for the purpose, acting honestly and impartially according to the best of their judgment whether the goods supplied were in conformity with the requirements of the contract under which they were so supplied.

So much as to the contract entered into between the Appellants and Chinnappa Iyer. Some short time after that event, and before any sleepers had been delivered, Iyer, finding himself unable to pay the deposit stipulated for in his contract, with the consent of the Appellants, and of the Railway Company, transferred to the Respondent the benefit of his contracts with both Companies and procured the latter to be accepted in both in his stead.

A formal agreement was drawn up between the Respondent and the Railway Company, and was duly executed by both. It is dated the 19th of June 1905, and the description of the sleepers to be supplied contained in it differs from that contained in Exhibit A in this, that the words "from teakwood" are inserted in the agreement after the word "sawn." In other respects the descriptions were identical.

There was much controversy on the point as to whether, whatever the precise contract between the Appellant and Iyer may have been, new terms were not, on the occasion of this transfer, added to it, and the stipulation made then, if not before, that the sleepers supplied should conform to the specification of the Railway Company.

The question turns upon the two letters following, dated respectively the 16th and 21st June 1905, and three paragraphs from a letter of Arbuthnot & Co., dated the 23rd of the same month, coupled with the evidence of F. S. Arbuthnot on the point at page 119, line 12 of the Record. The letters are as follows :—

"Madras, 16th June 1905.

"Mr. Aga Mahomed Khaleel Shirazi,
"36-37, Ungappa Naick Street,
"Madras.

"Dear Sir,

"We are in receipt of your letter of to-day's date "enclosing original letter from M. Chinnappa Iyer from

" which we note that he has transferred to you, his
" contract with Madras Railway for 1,500 sleepers
" 12′ × 12″ × 7″, for which he has contracted with us
" at Rs. 170 per ton, landed Madras. To this we agree,
" on condition that you send us by return your cheque for
" the deposit due, Rs. 8,925, all other terms and conditions
" as mentioned in our various letters to M. Chinnappa Iyer.
" You ask us to allow interest on the deposit, but this is
" only granted to our two very large contractors, and on
" account of the troubles which M. Chinnappa Iyer has
" given us over this contract we are not disposed to make an
" exception in his favour. As, however, the contract is now
" transferred to you, as a special case we agree to allow you
" interest on the deposit at the rate of 5% per annum. *But*
" *on the condition only* that each shipment of sleepers arriving
" for you is paid for in full immediately on arrival.

" Yours faithfully,
" *Per pro.* Arbuthnot & Co.,
" (Signed) F. S. Arbuthnot.
" Agents, B. B. T. C. (Ltd.)

" 36–37, Ungappa Naick Street.
" Madras, 21st June 1905.

" To
" Messrs. Arbuthnot & Co.,
" Agents, B. B. T. C., Limited,
" Madras.

" Dear Sirs,

" In your letter of the 16th instant you said that the
" terms and conditions are as mentioned in your letters
" with Mr. M. Chinnappa Iyer. On my enquiry he said
" that the conditions are this (*i.e.*) the teak sleepers of 750,
" 12′ × 12″ × 7″ should be delivered in the month of
" October and the remainder of 750 in March next. The
" same should be taken delivery within a month, if it
" exceeds a month, an interest of 9% should be charged.
" The teak sleepers must be delivered as per Railway
" specification which was sent to you by Mr. M. Chinnappa
" Iyer, an interest of 5% must be allowed on deposit money.
" On these conditions I herein enclose you a cheque on
" Chartered Bank of India, Australia, and China for
" Rs. 8,925 (eight thousand nine hundred and twenty-five).
" An early reply with the receipt is solicited.

" I am, Sirs,
" Yours faithfully,
" (Signed) Mahomed Khaleel Shirazi.

" Madras, 23rd June 1905.

" Mr. Aga Mahomed Khaleel Shirazi,
" 36-37, Ungappa Naick Street,
" Madras.

" Dear Sir,

" We are in receipt of your letter of 21st instant " enclosing a cheque on the Chartered Bank of India, " Australia, and China for Rs. 8,925, which has been placed " to the credit of your account as a deposit against the order " of M. Chinnappa Iyer (now transferred to you) for 1,500 " sleepers 12′ × 12″ × 7″ at Rs. 170 per ton landed Madras.

" As regards the terms of delivery M. Chinnappa Iyer is " under a misapprehension. We have never undertaken to " deliver 750 sleepers in September and 750 in March next, " nor could we under any circumstance bind ourselves to " deliver the sleepers precisely in the months specified by " you. We have however informed our friends of the " delivery which would suit you best.

" As regards other terms, the passing of our friends the " Bombay-Burmah Trading Corporation, Limited, either at " Rangoon or Moulmein (whichever port shipment may be " made from) is as usual final as regards both measurement " and quality. No exception is ever made to this rule . . ."

Mr. Arbuthnot's evidence is in substance to the effect that he considered the third paragraph of this letter of the 23rd of June a contradiction of the statement contained in the letter to which it was a reply as to the obligation to deliver sleepers according to the railway specification, but not as a contradiction of Iyer's allegation that the specification had been sent to him. The evidence of this gentleman on this point cannot be regarded as satisfactory; but having regard to the view which their Lordships have taken as to the true nature of the implied warranty to be imported into the written contract, the point so much discussed is, they think, as already stated, irrelevant. There is not and cannot be any pretence for the suggestion that the sleepers supplied were in fact either in conformity with the specification, or were reasonably fit to be used as sleepers of the specified dimensions by the Madras Railway Company.

Of the 748 sleepers delivered by the Appellants on the 8th of September no less than 593 were rejected by that Company, and of the 600 delivered on the 9th of December 1905 no less than 513 were rejected, and as to the balance of the 1,500 the contract was rescinded by mutual consent.

The real defence, therefore, of the Appellants is rested upon the alleged fact that the sleepers delivered were passed by the two expert persons they employed for the purpose in the impartial and honest exercise of their judgment.

On examining the evidence of these witnesses, James McGeorge and William Pyne, however, it clearly appears that they did not correctly appreciate the position in which they had been placed, or the true nature of the task they were appointed to perform. They were in truth constituted judges or arbitrators to decide upon a matter in which the interests of the two contracting parties were in conflict. They were the employés of one of these parties. That would render their task all the more delicate and difficult, and would make it all the more incumbent upon them to take care to avoid even the appearance of injustice to the Respondent. Well, in the first place Mr. McGeorge had scarcely had skill and experience sufficient for the work he was put to do. And in addition neither he nor his colleague was ever supplied with the materials necessary to enable him to do it. He never saw the Specification "A." He said he did not think he ever saw a "Railway Contract for Sleepers." Pyne, the other witness, who was both skilled and experienced, was left in the same state of ignorance as to the contract. He never saw the specification, nor does he appear to have ever been informed what were the terms of the Respondent's contract with the Appellants. At

the bottom of page 130 he says, "Masters "informed me as to dimensions and time for "delivery. We had logs in stock. I had simply "to go round and make suitable logs." At foot of page 131 he is reported as having said "I "applied the same process of examining them "as I did to them in ordinary course of busi-"ness." And in reply to questions put to him by the Chief Justice he further deposed, "When "I approached inspection I did so from point of "view of passing goods in the ordinary routine "of business as fit to be sent out." The Chief Justice finds that these men acted honestly according to the best of their skill and judgment. That may be so, but that is not the point. The point is that they never approached the question they had to determine, namely, the conformity of the goods supplied with the contract under which they were supplied. They never applied their minds to this. They merely determined that the sleepers were fit to be sent out as the manufacture of their employers. There was not, therefore, any "passing" of the sleepers within the meaning of the contract, and the contention of the Appellants on this Appeal that there was such a "passing" in their Lordships' view entirely fails.

They accordingly think that the decision appealed from was right and that this Appeal should be dismissed, and they will humbly advise His Majesty accordingly.

The Appellants must pay the costs of the Appeal.

In the Privy Council.

THE BOMBAY-BURMAH TRADING CORPORATION, LIMITED,

v.

AGA MAHOMED KHALEEL SHIRAZEE.

DELIVERED BY LORD ATKINSON.

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