

Keshavlal Brothers and Company - - - - - *Appellants*

v.

Diwanchand and Company - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT BOMBAY.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 27TH FEBRUARY, 1923.

Present at the Hearing :

LORD DUNEDIN.

LORD ATKINSON.

LORD WRENBURY.

[*Delivered by* LORD ATKINSON.]

This is an appeal from a decree of the High Court of Bombay in its appellate jurisdiction dated the 23rd February, 1920, reversing a decree of a single Judge of the said Court in its original jurisdiction dated the 26th June, 1919.

The suit out of which the appeal arises was instituted by the appellants, as plaintiffs, against the respondents claiming over Rs. 40,000 damages for breach of a contract for the sale of steam coal. The suit was decided by the Trial Judge in the plaintiffs' favour. He assessed the damages at Rs. 17,508-6-5, but that decree was set aside by a Division Bench of the High Court (Macleod C.J., and Heaton J.), which allowed the appeal and dismissed the suit on the ground that in the special circumstances which existed no damage had been suffered by the plaintiffs.

The main question for determination by this Board is whether in these circumstances the appellants are entitled to the sum of Rs. 17,508-6-5 awarded to them by the Trial Judge or are, as decided by the Court of Appeal, not entitled to recover any damages. On the 11th October,

1917, the appellant Company and the respondent Company entered into an agreement in writing in the following terms :—

“ Keshavlal Brothers & Co.,

“ Bombay,

“ 11th October, 1917.

“ The undersigned have this day sold to Messrs. Keshavlal Brothers & Co. quantity of coal amounting to Rs. ——— 1,200 tons or thereabouts.

“ Description.—Bengal steam coal, good second class.

“ Delivery.—To be despatched to Cotton Depot, coal to be weighed and delivered at Cotton Depot, monthly 200 tons from November, 1917, to April, 1918, in equal instalments.

“ Rate.—Rs. 17.15, say Rs. seventeen and annas fifteen, per ton net.

“ Delivery.—At Cotton Depot.

“ Terms.—Payment on delivery in Bombay.

“ Indent in any class to be furnished by the buyers, and the sellers agree and undertake to deliver the coal guaranteed in instalments as above from stock.

“ (Signed) RAMAVTAR MAINI,

“ Per Pro DIWANCHAND & Co.”

The Cotton Depot mentioned in this agreement is admittedly a place in Bombay where cotton and other goods are deposited for sale. The respondent Company had admittedly a depot there for coal. It is to be observed that the coal contracted to be sold is not identified. It is to be taken from the vendors' stock.

It is necessary to describe at some length the system for the supply of coal established at this date by the Indian Government. Owing to the shortage of coal due to the war, Committees had been appointed for several districts in India, including Bombay, to regulate the supply of coal, and the means by which it could be obtained. Officials styled Coal Controllers were, by the Government of India, appointed to superintend, direct, and control the action of these Committees. On the 30th January, 1917, the Coal Controller, having jurisdiction in the matter, issued a notice to the effect that the Committee appointed by Government to regulate coal supplies had directed that wagons would only be supplied after the 5th February then next succeeding, on indents signed by the actual consumer and countersigned by the Authority appointed by the Committee to certify these indents, and further that the indents should be prepared on the prescribed forms, copies of which were obtainable from the coal managers named. These indents were graded for priority into five classes, A, B, C, D, E, not according to the nature of the coal to be supplied, but rather according to the urgency of the need of the different consumers to obtain coal.

The respondent Company had agreed with the Garraria Colliery at Jharia, Bengal, to buy from them the coal necessary, presumably, to implement the above-mentioned contract of the 11th October. The whole output from this colliery was placed at the disposal of the Government in December, 1917. The indent was thereupon transferred to the Nandkurki Colliery.

Shortly after, the produce of this latter colliery was restricted, and the indent was transferred to the Fatehpur Colliery.

The appellants wrote to the respondents the following letter or order ; it bears date :—

“ Bombay,
“ 8th November, 1917.

No. 5951/73.

“ Messrs. Divachand and Company.

“ DEAR SIRs,

“ *Re* our Contract for 1,200 tons of steam coal dated 11.10.17.

“ With reference to our above Contract we beg to send you herein enclosed a special indent, No. 719, dated 7.11.17, in favour of the Proprietors, The Dhanjibhoy Ice Factory, Mazagaon, Bombay. The special indent has been certified by the Deputy Controller, “ Coal supplies,” Bombay, recommending the special supply of 10 (ten wagons) monthly up to 120 wagons for despatch to Byculla (Bombay) on their account.

“ We are forwarding the third part of the indent to the Coal Manager, Calcutta, requesting him to sanction special supply of wagons to Dullabhji Howjee’s Garraria Colliery and instruct the District Superintendent, Dhanbad, to allot wagons against indents from the Colliery. Kindly forward this second part to the colliery concerned instructing them to indent for the wagons regularly and despatch coal without the least delay. We enclose herewith a copy of the Coal Manager’s letter.

“ Trusting you to do the needful, and hoping to hear soon from you *re* despatches.

“ Signed) GIRJASHANKER I. PATHEK,
“ FOR KESHAVLAL BROTHERS AND CO.

“ Enc. Sp. Indent and Copy.”

On the same day the appellant company addressed to the Coal Manager at Calcutta the following letter :—

“ 8th November, 1917.

“ To the Coal Manager,
“ East Indian Railway, Calcutta.

“ DEAR SIR,

“ We beg respectfully to send you herein enclosed a third part of the special indent No. 719, dated 7th November, 1917, in favour of the Proprietor, the Dhanjibhoy Ice Factory, Mazagaon, Bombay. The special indent has been certified by the Deputy Controller, “ Coal Supplies,” Bombay, recommending the special supply of ten wagons monthly up to 120 wagons for despatch to Byculla (Bombay) on their account.

“ We have to request your goodself to sanction supply of wagons as certified and instruct the District Superintendent Dhanbad to meet indents from Dulabji Howjee’s Garraria Colliery to enable them to expedite despatches.

“ Thanking you in anticipation, and hoping to hear soon favourably.

Yours faithfully,

Enc. Sp. Indent.

The indent referred to in this letter was in the following form :—

“ Keshavlal Brothers and Company,
“ East Indian Railway,
“ Special Indent for Coal.

Indent No. 719.

“ Dated 7th November, 1917.

(1) Full name and address of Consumer : The Proprietors, The Dhanjibhoy Ice Factory, Mazagaon, Bombay.

- “ (2) Description of Industry : Ice Factory.
- “ (3) Weekly Consumption : 40 tons (forty).
- “ (4) Stocks held on date, tons : 55 tons.
- “ (5) Party from whom purchased : Messrs. Bhukhandas Motilal and Company, c/o Dewanchand and Co.
- “ (6) Name of Colliery : Garraria Colliery.
- “ (7) Name of Managing Agents of the Colliery : Dhulabhji Howji.
- “ (8) Name of siding : coal will be loaded at Garraria E. I. Railway.
- “ (9) Description of Coal : Steam Coal.
- “ (10) Total quantity purchased, tons : 120 wagons.
- “ (11) Terms of delivery : 10 wagons monthly.
- “ (12) Name of railway station at which coal will be unloaded Byculla (Bombay).”

The nature and minuteness of the information inquired after in this specimen indent shows how anxious the officers of the Government of India were that the coal to be carried in the wagons they permitted to be used should be applied to satisfy the needs of consumers, and not be trafficked in by middlemen. But the contract which by the use of the requested wagons it was sought to obtain coal to implement, was not the contract entered into between the appellants and the respondents on the 11th October, 1917, nor yet a contract entered into between the appellant company and the Dhanjibhoy Ice Factory. It is apparently a contract entered into between the ice factory and a company named the Bhukhandas Motilal Company.

It may well be that the words “ c/o Divanchand and Company,” found in the indent after the name of this Company, so represented as the vendors, was designed to indicate that the purchase was made by the respondents on behalf of the consumers, the ice factory. In a letter written by the respondent Company to the appellant Company on the 9th November, 1917, the writers state that they have not bought the coal from the persons mentioned in the indent, but from the Colliery, and express a fear that the colliery proprietors “ may refuse to supply coal to these people.” The appellants replied on the same day, calming the fears of the respondents in reference to this piece of deception, and begging of them to instruct the colliery people to despatch coal under this special indent in favour of the proprietors of the Dhanjibhoy Ice Factory, Bombay. Thus by the arrangement of these two middlemen the indent is falsified, the regulations of the Government evaded and possibly its officers deceived.

On the 26th November, 1917, the appellants wrote to the respondents requiring delivery of 200 tons of steam coal under their contract of the 11th October, 1917. On the next day the respondents' reply that they are receiving coals from the Deputy Controller, and would be pleased to deliver the appellants 50 tons of it next day, the 28th November, 1917. The appellants wrote refusing to take delivery of this comparative small quantity of coal and demanding delivery at the earliest date of the full quantity in arrear. On the 10th December, 1917, the appellants wrote to the respondents demanding the delivery next day of 100 tons of

coal. To this letter the respondents replied next day that they are expecting to receive soon a good lot of coal and asking the appellants to wait a little. On the 18th January, 1918, the appellants wrote to the respondents, referring to their contract of the 11th October, 1917, stating that the writers had only received from them 217 tons 19 cwt., that the instalments for December, 1917, and January, 1918, were due, and that the writers were ready to accept delivery of these instalments and asking for immediate delivery of them. On the 7th March, 1918, the appellants again wrote to the respondents demanding delivery of the instalments due. On the 7th March the respondents wrote making an excuse for non-delivery. To the last letter the appellants on the same day reply, that it is impossible for them to wait longer for the coal due to them, that as they desire to keep up the connection they will wait till Monday, the 11th March, and that if the respondents then fail to deliver to them the coal they are entitled to receive, they will be reluctantly compelled to purchase same in the local market at the risk of the respondents and on their account, and further, that they will claim the market difference. On the 13th March, the appellants wrote to the respondents informing them that being much in want of coal, they had purchased 150 tons at the market price of Rs. 71 per ton. Two days later they sent to the respondents a bill for Rs. 7,959-6, being Rs. 53-1 per ton difference between the contract price and the price they paid on the 150 tons so purchased. On the 18th March, 1918, the appellants wrote to the respondents setting forth precisely how as regards the fulfilment of the contract of the 11th October, 1917, matters stood. They point out that of the 800 tons (200 tons per month for four months) contracted to be delivered, they have only received 335 tons 6 cwt. up to the 28th February, 1918, that the balance in arrear on the contract therefore amounted on that date to 464 tons 14 cwt., that the instalment of 200 tons for March was already overdue, that they were compelled to buy 150 tons at the market rate on the account of the respondents, and that they therefore claim the difference between the contract price and the market price on the 150 tons so purchased. It will be observed that the respondents never suggest that there is not an open market for the sale and purchase of steam coal in Bombay. Nor up to this do they suggest that the appellants were joint adventurers in this enterprise of selling and delivering or procuring to be sold and delivered to the Ice Factory 1,200 tons of Bombay steam coal, not yet that the appellants had sub-contracted with the Ice Factory to deliver 1,200 tons of steam coal to it. On the contrary, the respondents treat the appellants as purchasers from them of this 1,200 tons of steam coal under the contract of the 11th October, 1917, to whom they were bound to deliver the coal purchased. But on the 22nd March, 1918, the respondents wrote a letter in which, after stating that they were surprised at the appellants making a demand for a difference of Rs. 53-1 on 150 tons, putting forward for the first

time the contention that the appellants were bound to deliver the coals deliverable under the contract of the 11th October, 1917, to the Ice Factory. They state :—

“ You know that the Dhanjibhoy Ice Factory is the consumer of the coal, and the contracted coal is to be supplied to them and to no one else. Before we send a reply to you in respect of the damages claimed by you, please let us know at once whether you delivered these coals to the Dhanjibhoy Ice Factory, or not, and if so, what quantity.”

And then after a long explanation as to the causes which prevented the receipt and delivery of the coals they expected, say :—

“ We fail to understand the reason of your buying coals from the market for the Dhanjibhoy Ice Factory unless they were refused on their application to the Deputy Controller to supply them from Government reserve stock.

“ For the present we hasten to inform you that we are not at all liable to pay any damages to you, and we repudiate any liability in the matter, and you were not at all justified under the contract and under the circumstances which now prevail to buy coals from market and if you have done so it is at your own risk and responsibility.

“ We request you to answer all the queries mentioned above, and also to send us the amount of Rs. 3,940-1-3 due to us which is now very long standing.”

To this letter the appellants reply, stating that the respondents know well that they are bound to give the appellants the delivery guaranteed from stock, and that in spite of their repeated requests, as they have failed to carry out their contract, the appellants are obliged to claim the damages mentioned in their previous letter. They add : “ We are convinced that by putting forth such queries your intention is to avoid delivery of the instalment for the month of March, 1918, which we regret we are unable to allow you for a moment.”

The appellants have sued to recover damages for the respondents' breach of the contract of the 11th October, 1917, consisting in the non-delivery of the goods contracted to be delivered. They naturally claimed to recover the difference between the price which they contracted to pay for these goods and the market price at which they could have sold them. Had the goods been delivered and no questions of a sub-contract had arisen, they would have cost the appellants the contract price, and had they been delivered they could have sold them at the market price, which would be presumably their value. The appellants by the non-delivery have lost the money which they might have secured namely, the difference between these two prices. They have been damnified to that extent. In the 7th paragraph of the statement of defence filed by the respondents it is alleged that on the 8th November, 1917, the appellants informed the respondents that they, the appellants, had agreed (it is not said with whom) to sell the coal received under this contract to the Dhanjibhoy Ice Factory, Bombay. The whole correspondence which took place between the parties is utterly inconsistent with this assertion, and the parol evidence does not, in any way, sustain it.

It appears to their Lordships that this case does not at all resemble those cases in which, for instance, A contracts with B to sell and deliver to B certain commodities, and then contracts with C to buy from him similar commodities in order to implement his contract with B, informing C at the time he buys, of the special purpose to which he intends to devote those commodities. In such a case if C does not deliver the commodities to A, questions may arise as to whether the damages to which he, C, would become liable for his breach of contract were not to be augmented by the extra loss A sustains by reason of the non-fulfilment of his contract with B. The authorities in England seem to go the length of holding that notice to C of the special purpose for which A requires the goods is not enough ; that to make C liable for the additional damage he must have, expressly or implied, contracted to run the additional risk, *Horne v. Midland Railway Co.*, L.R. 8, C.P. 131, 138, 140, 141. Sir George Lowndes contended, however, that under the 73rd section of the Indian Contract Act, 1872, notice would be enough to make a vendor liable though he did not contract to run the risk, to which Blackburn J. refers in the case just cited. It does not appear to their Lordships to be necessary to decide this question, as in their view there is no evidence, oral or written, to establish that the appellants had sub-contracted with any person or body to deliver to the Ice Factory the whole, or any portion, of the coal they had purchased from the respondents, when they should receive it or at any time thereafter. The parties agreed that the coal in fact delivered by the respondents to the appellants only amounted to 315 tons 16 cwt. Five issues were settled for the respondents. Two of them alone would seem to be of importance. No issue was raised as to whether the appellants ever contracted to deliver over to the Ice Factory Company the coals they might receive from the respondents. The two important issues were whether the contract sued upon did not become impossible of performance, and whether the appellants were entitled to any damages, and if so how much. Upon those two issues the respondents appear to have concentrated all their efforts. The Trial Judge, rightly in their Lordships' opinion, held in favour of the Appellants on those issues. Ramavtar Maini, one of the partners of the respondents' firm, admitted that coal was available and could be purchased in the local market, and it was admitted that at no time was an absolute embargo placed on the supply of coal from the Garraria Colliery. The Trial Judge awarded to the appellants Rs. 17,508-6-5 as damages. The Court of Appeal set forth their ground of decision in the following passages of their judgment. Macleod C. J. said: "The defendants knew that the plaintiffs could only deliver coal to the party who signed the indent. The plaintiffs [the appellants] must have known that they could not deal with that coal in the open market. The only profit they could make out of the contract was the difference between the contract price and the price the indenter [The Ice Factory Company] would pay them."

It must be taken, therefore, when the contract was made that both the parties knew that the only profit the plaintiffs could make would be the difference between their contract and the contract they might make with either the indenter or an intended party, and would at the most provide the measure of damages."

Heaton J. expresses a practically identical opinion. He says :—

"The purpose of the contract was to procure coal for one particular customer, and, therefore, under the contract, the coal, if procured, had to go to that particular consumer, or as to part, might be used to replenish coal in stock from which that consumer had been supplied."

Their Lordships are unable to accept these views. As between the appellants and the respondents there was no contract to supply to the former the identical coal obtained from the collieries. On the contrary, it was expressly provided that the coal purchased from the respondents was to be supplied from the respondents' stock. Again, as already pointed out, no contract was entered into between the appellants and the respondents or between the appellants and the Ice Factory that the appellants should deliver over to the Ice Factory the coal that should be delivered to them under the contract of the 11th October, 1917. The indent was, no doubt, manipulated in the way that has been already pointed out in order to get the use of the wagons. The appellants' name does not appear on the indent. The respondents' does appear. No evidence was given as to the particular relations between the respondents and the Ice Factory. Their Lordships are therefore of opinion that whatever those relations may have been, and whatever obligations rest upon the respondents, the appellants would not have been bound, had the agreement of the 11th October been performed, to sell or deliver to the Ice Factory the coals which should be delivered to the appellants out of the respondents' stock. They do not think that the Ice Factory was the appellants' only customer. Their view is that had the coals purchased been delivered to the appellants in pursuance of their contract, the latter would have been entitled to sell them in the open market at the market price, and that being so, the damages were rightly assessed at the difference between the contract price and that market price. Their Lordships are therefore of opinion that the judgment appealed from was wrong and should be reversed and the judgment and decree of Mr. Justice Kajiji be restored, and they will humbly advise His Majesty accordingly. The respondents must pay the costs of the appellants here and in the Courts below.



In the Privy Council.

KESHAVLAL BROTHERS AND COMPANY

vs.

DIWANCHAND AND COMPANY.

DELIVERED BY LORD ATKINSON.

Printed by

Harrison & Sons, Ltd., St. Martin's Lane, W.C. 2.

1923.