

Burn and Company, Limited - - - - - *Appellants*

v.

His Highness Thakur Sahib Sree Lukhdinji of Morvi State - - - *Respondent*

FROM

THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL DELIVERED THE 18TH JUNE, 1925.

Present at the Hearing :

LORD SUMNER.

SIR JOHN EDGE.

MR. AMEER ALI.

[*Delivered by* SIR JOHN EDGE.]

The suit in which this appeal has arisen was brought on the original civil jurisdiction side of the High Court at Calcutta on the 27th August, 1918, by His Highness the then Thakur Sahib of Morvi against Burn and Company, Limited, to recover damages for the alleged conversion of 42 railway wagons, and for an alleged breach of contract to make and deliver the same wagons. The property in the wagons had never vested in His Highness of Morvi, who had never been, constructively or otherwise, in possession of them. The claim for conversion has been dropped. The original plaintiff died and his son, who succeeded him as the Thakur Sahib of Morvi, was on the 19th July, 1922, brought on the record as the plaintiff. The original plaintiff was, and his successor, the present plaintiff, is, the proprietor of the Morvi State Railway.

The contract was made between His Highness the then Thakur Sahib of Morvi through the manager of the Morvi State Railway, his agent, and Burn and Company, Limited, of Howrah and Calcutta, in British India. The contract was for the manu-

facture of 50 railway wagons by the defendant company at the Company's works at Howrah and their delivery to the Morvi State Railway upon certain terms which will be later more fully mentioned. The contract was made by correspondence between the manager of the Morvi State Railway, who lived at Morvi, and the defendant company at Calcutta. The suit has throughout been treated as a suit upon a contract to which the Indian Contract Act, 1872 (Act IX of 1872), applies.

The correspondence began on the 29th October, 1914, by a letter to the defendant company from the manager of the Morvi State Railway, asking the company to quote rates for 25 covered wagons and 25 open wagons as per specifications and drawings which he enclosed. The specifications showed that the wagons were to be metre gauge railway wagons. Between the 29th October, 1914, and the 23rd January, 1915, several letters passed between His Highness's agent and the defendant company, the result of which was the contract in suit. By the contract which was agreed upon the defendant company agreed to manufacture and to deliver to the Morvi State Railway, upon terms as to payment which will be mentioned, 25 covered and 25 open goods wagons, 50 railway wagons in all, at the price of Rs. 1,825 for each covered wagon and at the price of Rs. 1,875 for each open wagon, the wagons to be in accordance with certain specifications and drawings, and the 50 wagons to be delivered in six months from the date of the receipt by the defendant company of an order for the wagons. The terms of payment were that His Highness of Morvi should pay to the defendant company one-third of the contract price on the order for the wagons being given, and one-third of the contract price when the underframes of the wagons should be wheeled, and the remaining one-third when the wagons should be delivered. One-third of the total contract price amounted to Rs. 30,833. The contract contained no provision that the contract time for the delivery of the wagons should be extended in case the defendant company should be delayed in completing the wagons owing to the war or any other cause beyond the company's control.

On the 23rd January, 1915, His Highness of Morvi, through his agent, sent to the defendant company his final order for the 50 wagons and said "we have no more drawings to send than we have already sent. From the specifications and drawings sent, you will kindly prepare working drawings in detail and send them for our approval."

After the receipt by the defendant company of the order of the 23rd January, 1915, for the wagons, the defendant company was much delayed in performing the contract by the difficulties, owing to the war, of obtaining some of the necessary parts of the wagons and the wagons were not ready for delivery at the time specified by the contract. His Highness of Morvi did not at any time exercise such right, if any, as he may have had under

the Indian Contract Act, 1872, of determining the contract because the defendants had failed to deliver the wagons in accordance with it.

The agreement that the second instalment of the contract price should be paid by His Highness to the defendant company when the underframes of the wagons should be wheeled, of course meant that the second instalment should be promptly paid when the defendants had given His Highness of Morvi, through his agent, notice that the company had fixed the wheels to the underframes of the 50 wagons. On the 25th October, 1916, the defendants sent by post to the manager of the Morvi State Railway an account, dated the 24th October, 1916, for Rs. 30,833, for the second instalment, being one-third of the contract price due when the "underframes are wheeled," and stated in the letter in which the account was enclosed, that it was submitted by them "for favour of payment at your convenience." That letter and the account which was enclosed in it were notice to His Highness's agent when in the course of the post they were received at Morvi, that the defendant company had fixed the wheels to the underframes of the 50 wagons. It was found by Mr. Justice Rankin, who tried the suit, and it has not been disputed, that at the date of that account, the 24th October, 1916, the underframes had been wheeled. On the 19th November, 1916, the manager of the Morvi State Railway acknowledged the receipt of the company's letter of the 25th October, 1916, and enquired "when the wagons will be completed and despatched," but did not send any payment of the second instalment.

The position which His Highness, through his agent, then took up and maintained for months is illustrated by the following extract from the manager's letter of the 19th November, 1916 :—

"It is now more than a year and a half and yet, as we understand from your letter you have come as far as the wheeling of underframes, and at the rate you have gone on, there is no knowing when you will finish the work. When we placed the order, you certainly knew the condition of the market, because the war had then been on some months already. Till June even you talked of delay of a few weeks, but it is now several months which may perhaps run into years. In addition to loss of interest on the money locked up with you and trouble and inconvenience we had to pay hire to other Railways and even on payment of hire we could not get timely and sufficient supply and suffered in traffic. In consulting your convenience it was only fair and reasonable that you should have consulted ours. From your opening correspondence, we expected, beside solid and substantial work, that timely execution of this order might lead to future orders.

"We fear the payment of 2nd instalment will remain locked up as the 1st and shall therefore be glad to know definitely when the wagons will be completed and despatched."

In reply to that letter of the 19th November, 1916, the defendant company wrote to the manager of the Morvi State Railway on the 23rd November, 1916, as follows :—

"Your favour No. 4906 of 1916 dated 19-11-16. We regret very much that you should write to us in this way as we can assure you we have done

all possible to expedite and complete your work, the delay is entirely due to conditions brought about by the war.

“ You ask when delivery will be made and we regret we cannot at present inform you, for instance the springs for your buffers although all ready in England cannot be despatched because the Munitions Board have so far not granted the necessary permit for them to be shipped. To help us will you kindly address the Railway Board stating that these springs are urgently wanted (*i.e.*, 200 buffing springs) and should be supplied, send their reply to us and we can then enable our London Office to obtain shipping sanction.

“ Your contract has been considered in every possible way and we trust that this trouble regarding one item alone, the buffing springs, will give you an example of the unprecedented and extraordinary conditions that have been in existence for the last 18 months and which grow more onerous and difficult every day.”

The springs for the buffers referred to in that letter of the 23rd November, 1916, were apparently Ibbetson springs, which are patent springs and are made only in England. Their Lordships think it only fair to the parties to this suit that some of the difficulties of the situation should be illustrated by the passages which they have quoted.

On the 14th December, 1916, the 4th January, 1917, and the 25th January, 1917, the defendant company wrote to the manager of the Morvi State Railway asking for payment of the second instalment and received no reply. On the 14th February, 1917, the defendant company telegraphed to the manager of the Morvi State Railway: “ Kindly wire when may expect settlement bill rupees 30,833 account wagons.” That was the account for the second instalment. In reply the company received from the manager by telegraph the following reply on the 19th February, 1917: “ No. 87. Your telegram of 14th, matter is referred to proprietor of this railway.” The proprietor was His Highness of Morvi. The reference to His Highness of Morvi did not result in the payment of the second instalment. In their Lordships’ opinion His Highness of Morvi had then decided not to perform his contract to pay the second instalment until some future time, and the defendant company was then entitled under the Indian Contract Act, 1872, to rescind the contract, but the company did not rescind the contract.

By the 20th February, 1917, the defendant company had completed eight of the contract wagons and on that date forwarded them to the Morvi State Railway, and thereby treated the contract as subsisting. On the 27th February, 1917, the defendant company wrote to the manager of the Morvi State Railway enclosing an account, dated the 26th February, 1917, for Rs. 5,000 in respect of the eight wagons, and in their letter said “ . . . we have wired you to-day as follows: kindly wire why bill Rs. 30,833 account wagons not paid . . . we shall be obliged if you will arrange to remit the amount as well as the amount of the enclosed bill No. 8456 W. for Rs. 5,000 with as little delay as possible. . . .” His Highness of Morvi was not bound to accept in part performance of the contract eight wagons, but

he did receive them. To the telegram of the 27th February, 1917, the manager of the Morvi State Railway replied by telegram on the 28th February as follows: "No. 88. Your wire. Refer to this office wire 87 dated 18. Matter referred proprietor." The defendant company received no other reply to their telegram of the 27th February or to their letter of that date.

On the 5th March, 1917, the defendant company wrote to the manager of the Morvi State Railway with reference to their account for the second instalment and his telegrams of the 19th and 28th February, and said that the company had "decided not to despatch any more wagons till your proprietor has paid the bill before mentioned and also that for Rs. 5,000 sent you with our letter of the 27th ultimo." On the 11th April, 1917, the defendant company wrote to the manager of the Morvi State Railway as follows:—

"Dear Sir,

"*Re Wagons.*

"As we have neither received a cheque for the money due to us nor any reply to our letter dated the 5th March we find it necessary to address you again upon this matter and we desire to point out to you that by not paying our bills when they became due for payment you have broken the contract and we shall therefore take whatever action appears to us to be necessary for our own interests if we do not receive a satisfactory reply to this letter before the date specified below.

"The wagons could be delivered as soon as we could obtain trucks from the Railway to carry them, but we regret we cannot now permit another of your wagons to leave our works until you pay us in full for the whole order.

"Your action has put us to very considerable expense and very great inconvenience and at the present time your wagons are occupying much valuable space in our works. . . ."

The date specified in that letter was the 20th April, 1917. The letter of the 11th April, 1917, was, their Lordships consider, a notice to His Highness of Morvi that the remaining 42 wagons were completed ready for delivery to him on payment of the balance of the contract price which would then be due. On the 21st April, 1917, the manager of the Morvi State Railway telegraphed to the defendant company as follows: "Your letter though dated eleventh reached here yesterday. Matter referred to proprietor who now in Bombay." No other reply to the defendant company's letter of the 11th April having been received, the defendant company wrote to the manager of the Morvi State Railway on the 7th May, 1917, as follows:—

"*Re WAGONS.*

"We desire to call your special attention to our letter dated the 11th ultimo and to inform you that it is now imperative that we receive a satisfactory reply to this letter at once otherwise we shall have no option but to settle the matter without further reference to you. Kindly favour us with a reply by return."

To which the defendant company received the following reply, dated the 19th May, 1917:—

"*Re WAGONS.*

"With reference to your special reminder No. OM231/H., dated the 7th instant, I have to inform you that His Highness the Thakore, proprietor
(B 40—3400—16)T

of this Railway, is not here at present but he has gone to Matheran, a hilly station for the hot weather, and so I have forwarded your letter to him and I will let you know on hearing from him."

No other reply to the defendant company's letter of the 7th May having been received, the solicitors of the defendant company, on the 4th July, 1917, wrote to the manager of the Morvi State Railway as follows :—

" Sir,

" Supply of Wagons from Messrs. Burn and Co., Ltd.

" Our clients, Messrs. Burn and Co., Ltd., have instructed us to address you with reference to the contract for the purchase by your Railway of 50 goods wagons from them. The terms of the contract were : Payment as to 1/3rd with the order, 1/3rd when the underframe was wheeled and the balance on delivery. The first instalment was duly paid but the second instalment has not yet been paid, in spite of repeated demands, and in spite of the fact that our clients have actually delivered 8 wagons. In the existing circumstances of the trade, it is obvious that our clients cannot keep the undelivered balance of the wagons locked up indefinitely and, as you have failed to carry out your part of the contract the only course now open to them is to dispose of the wagons elsewhere as best they can but before doing so they are prepared to give you the opportunity of purchasing these wagons outright by paying the total amount of the original contract price outstanding and we are accordingly instructed to give you notice, as we hereby do, that unless the full amount of the original contract price is paid to our clients or to us as their agents within 10 days from the date hereof the undelivered wagons will be disposed of by our clients as they may think fit.

" Yours faithfully,

" Orr, Dignam and Co."

On the 18th July, 1917, the defendant company's solicitors wrote to the manager of the Morvi State Railway as follows :—

" Sir,

" As neither our clients nor ourselves have received any reply to our letter to you of the 4th instant our clients have now taken steps to dispose of the undelivered wagons elsewhere and have made up an account the balance due to the Railway after deducting the costs of the wagons delivered from the deposit made to be Rs. 15,833. We enclose you herewith copy of this account together with our cheque for Rs. 15,833 and shall be obliged if you will let us have a formal receipt for this amount by return.

" Yours faithfully,

" Orr, Dignam and Co."

After the 18th July, 1917, the defendant company sold the 42 wagons to the Mysore State Railway. On the 22nd September, 1917, Messrs. Sanderson and Co., the solicitors of His Highness of Morvi, wrote to the defendant company's solicitors saying that they were instructed to ask for the delivery of the 42 wagons still undelivered, enclosing a cheque for Rs. 30,833, the amount of the second instalment and stating that their clients would pay the third instalment, immediately on the receipt and erection of the wagons in accordance with the terms of the contract. It may be assumed that the cheque was returned. The rest of the correspondence is not material.

As has been mentioned, the suit was tried by Mr. Justice Rankin. It was contended on behalf of the defendant company that the payments of the instalments of the contract price at the times specified for them were of the essence of the contract. In support of that contention it was urged that the terms as to the payment of the first and second instalments showed that time was of the essence of the contract; that the performance by the company of the contract involved the expenditure of very considerable sums of money and the occupation of the company's workshops by a large number of bulky articles; that metre gauge railways did not form a market where such wagons could be easily disposed of; that the wagons had to be made in accordance with special specifications; and that plaintiff was a person who could not be sued as of right. Mr. Justice Rankin observed in his judgment that the case depended entirely upon the correspondence, the correct appreciation of the general circumstances of the case, and of the rules of law to be applied, and he said:—

“On the whole and with some difficulty, I have come to the conclusion, looking at the circumstances and the letters, that in this case time was not of the essence of the contract.”

The letters to which the learned Judge referred were letters of the 28th December, 1914, the 10th January, 1915, the 16th January, 1915, and the 23rd January, 1915, which, in their Lordships' opinion, do not support the conclusion at which he arrived.

Mr. Justice Rankin, having observed that the defendant company had, on the 18th July, 1917, sent to the plaintiff's solicitors the letter of that date enclosing a cheque for the balance due, on the footing that the contract was cancelled, held that the defendant company had broken the contract, and gave His Highness of Morvi, the present plaintiff, a decree for damages, which, in their Lordships' opinion, were not excessive. The balance for which the cheque was sent was the balance due of the first instalment, which had been paid, after deducting the price of the 8 wagons.

From that decree the defendant company appealed under the Letters Patent. The appeal was heard by Sir Lancelot Sanderson, C.J., and Mr. Justice Richardson. The Chief Justice in his judgment said:—

“But for the conduct of the defendants, I should have thought that with regard to the payment of the second instalment time was of the essence of the contract. The defendants were under contract to build 50 wagons. In my judgment they were not bound to proceed with the work, after the wheels were attached to the underframes, until the plaintiff paid the second instalment. They surely could not be expected to keep the wagons, partly built, standing in their works, for an indefinite time, or for so long as the plaintiff chose to keep them waiting for the second instalment. Having regard to the terms of the contract and the nature of the work to be done by the defendants, in my opinion, *prima facie*, time would be of the essence of the contract.

“The defendants, however, for some reason known to themselves, did not treat it as of the essence of the contract.

“They actually delivered 8 wagons in February, 1917, although the second instalment, which had been demanded in October, 1917 (1916), had not been paid, and although as far as could be seen in February, 1917, there was no immediate prospect of the second instalment being paid.”

The Chief Justice and Mr. Justice Richardson agreeing that the defendant company broke the contract on the 18th July, 1917, the appeal was by their decree dismissed. From that decree this appeal has been brought.

Their Lordships, having regard to the times when the three instalments of the contract price were according to the contract to become payable, and to the fact that the manufacture of the 50 wagons would involve considerable expenditure by the defendant company in providing materials for their construction, and in the payment of men who would necessarily be employed in constructing them, and to the fact that it might be difficult to enforce in a British Court or in a Court of the State of Morvi payment by His Highness of Morvi of the contract price, are of opinion that it must have been the intention of the parties when the contract was made that time should be of the essence of the contract as to the times when the three instalments of the contract price should be paid. When His Highness of Morvi had, after he had notice that the underframes of the wagons had been wheeled, made default in payment of the second instalment of the contract, which was, in effect, a refusal by him to perform the contract in its entirety, the defendant company was entitled to treat the contract as void and to rescind it, but the defendant company did not rescind it; on the contrary, the defendant company, by delivering 8 of the wagons in February, 1917, to the Morvi State Railway, treated the contract as a subsisting contract. The defendant company was not on that delivery of the 8 wagons entitled to insist on a then payment for them. The contract price was not payable until the 50 wagons had been delivered.

In the view of the facts of this case which their Lordships take, and of the law which they consider is to be applied to those facts, they find that the defendant company finally broke the contract in July, 1917. The 18th of that month may be taken as the date when defendant company finally broke the contract.

Their Lordships are of opinion that this appeal should be dismissed with costs, and they will humbly advise His Majesty accordingly.

In the Privy Council.

BURN AND COMPANY, LIMITED,

vs.

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DELIVERED BY SIR JOHN EDGE.

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