

Pragdas Mathuradas - - - - - Appellant

vs.

Jeewanlal (1929) Limited - - - - - 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 8TH JUNE, 1948

*Present at the Hearing :*

LORD THANKERTON  
LORD MORTON OF HENRYTON  
SIR MADHAVAN NAIR

[*Delivered by* LORD MORTON OF HENRYTON]

This is an appeal from a judgment and decree of the High Court of Judicature at Fort William in Bengal in its civil appellate jurisdiction, dated the 27th March, 1945, reversing a judgment and decree of the same Court in its ordinary original civil jurisdiction, dated the 14th January, 1943. The appeal arises out of an action by the respondent company against the appellant firm claiming damages for breach of a contract for the supply of tin.

It is necessary to set out the proceedings in the Courts in India in some detail, as the findings of fact by the learned trial Judge, and the attitude adopted by the appellant firm in regard to these findings of fact, are of great importance. The learned trial Judge (Mc Nair J.) stated the events leading up to the action as follows:—

“ The plaintiff company sue the defendant firm for damages for breach of contract for the supply of tin. On December 8, 1941 there was a telephone conversation between N. T. Shaha of the plaintiff company and Ranchoredas of the defendant firm in which the plaintiff company made known their requirements and the defendant firm contracted to supply them.

Later the same day the plaintiff company wrote to the defendant firm:—  
' Dear Sirs,

Tin.

We confirm having purchased from you to-day tin in blocks, Penang quality, for forward delivery as follows:—

35 tons at Rs. 215/8/- per cwt. net.

5 tons at Rs. 218/- per cwt. net.

Our delivery instructions will follow.'

The parties are both merchants of standing. They had had previous dealings in various commodities, and from March until September 1941 they had had business transactions in tin totalling some 28 tons.

It appears that the plaintiff Company had contracts with the Government for the supply of tinned articles to the Supply Department, and there is every reason to believe that the plaintiff company were purchasing tin on this occasion for use in their factories in execution of their contracts with the Government.

On 7th December 1941 the Japanese attacked Pearl Harbour and early on the 8th December it was known in Calcutta that a state of war existed between Japan, Great Britain and the United States of America.

That morning Mr. H. K. Shaha, Managing Director of the plaintiff company instructed Mr. N. T. Shaha, Assistant Secretary of the company, who is in charge of the plaintiff's business in Calcutta to buy 25 tons of tin and Mr. N. T. Shaha telephoned to Mr. Ranchoredas, a partner in the defendant firm. Ranchoredas stated that the market rate was Rs.216/- a cwt. He stated further that he would refer to his elder brother, Goberdhone Das, who might be able to give a slightly lower quotation. N. T. Shaha referred to H. K. Shaha and the deal with regard to 25 tons was put through with Ranchoredas at Rs.216/- subject to any better price which might be given by Goberdhone. Goberdhone reduced the price to Rs.215/8/- and that is the price mentioned in the confirmatory letter.

The plaintiff company soon after booked another 10 tons at the same price and about a couple of hours later they decided to buy a further 5 tons which they got at Rs.218/- as the market had been rising throughout the day. It is in evidence that the opening rate on the 8th December was Rs.205/- or Rs. 206/- and the closing rate was about Rs.227/-.

These facts are undisputed. The plaintiff company however allege that during the preliminary conversation they informed the defendant firm that they were purchasing in order to fulfil Government contracts, that they wanted to cover themselves absolutely against their requirements of tin, and that they insisted that tin should be delivered to them under all circumstances. They state further that Mr. Ranchoredas agreed to those conditions and said that he would deliver goods from ample stocks always at his firm's disposal. These statements and alleged conditions are denied by the defendant firm.

The market, as I have said, was on the 8th December a rising market, and it continued to rise during the following days when the Japanese armies invaded the Malaya Peninsula. Penang was occupied by the Japanese at some date shortly before the 19th December and the defendant firm were unable to obtain the shipments of Penang tin for which they had contracted with their principals in Penang.

The defendant firm's case is that they had contracted for the purchase of 100 tons in all from three suppliers in Penang. There was no difficulty on the 8th December with regard to shipment. Ships were sailing regularly from Penang and cargo space was available.

It is clear from the evidence that neither the plaintiff company nor the defendant firm had any apprehension on the 8th December as to the due arrival of shipments from Penang for at any rate another month."

Their Lordships will hereafter refer to the appellant firm as "the sellers" and to the respondent company as "the buyers."

Correspondence followed between the parties, but it is only necessary to quote the sellers' letter of 22nd December 1941, which was as follows:—

" 43, Strand Road,  
Calcutta, 22nd December 1941.

Messrs. Jeewanlal (1929) Ltd.,  
101, Clive Street,  
Calcutta.

Re: 40 Tons of Tin Ingots

Dear Sirs,

We are in due receipt of your letter dated 22nd instant and in reply have to inform you that the basis of the above business is forward

and owing to the unforeseen trouble in Penang the shipment is not possible. As such we have no other alternative but to cancel the contract.

Yours faithfully,  
Sd., Pragdas Mathuradas."

On 20th February, 1942 the buyers filed their plaint alleging wrongful repudiation of the contract by the sellers and acceptance of such repudiation by the buyers. A sum of Rs.91,350 was claimed as damages, but it is now common ground between the parties that if the buyers are entitled to damages, the correct sum is Rs. 50,100. By their written statement the sellers pleaded "It was expressly agreed or alternatively there was implied (*sic*) that delivery would only be made as and when goods arrived from Penang against orders placed by the defendant firm there." In paragraph 3 certain other implied conditions were alleged.

McNair J. heard oral evidence and summed up his views on that evidence as follows:—

"From the surrounding circumstances to which I have referred it appears to me beyond doubt that the plaintiffs' recollection is at fault, and that they did not inform Ranchoredas prior to the contract that they would require delivery under all circumstances, nor did Ranchoredas give the alleged guarantee that he would deliver from stock. On the other hand it is equally difficult to accept the defendants' story that they stressed the fact that delivery could only be given on arrival of the tin from Penang.

We are then left with the letter of the 8th of December from which to discover what were the intentions of the parties when using the words 'forward delivery'."

Their Lordships read this passage as a finding by the learned trial Judge that he could not accept the oral evidence of either party as to the express terms of the contract made on 8th December 1941, and that the only reliable record of these terms was the letter of that date already quoted. McNair J. then went on to construe the letter in the light of the surrounding circumstances, and held that "The contract became impossible of performance owing to the non-arrival of tin from Penang." He therefore dismissed the suit with costs.

The buyers appealed. In the course of his judgment the Chief Justice (Sir Harold Derbyshire) quoted certain paragraphs of the sellers' written statement and continued:—

"In the appeal before this Court Mr. B. C. Ghose for the defendants abandoned the implied terms (a), (b), (c), (d) and (e) of paragraph 3 and contended that the condition to be implied in the contract is that Penang tin already ordered by the seller should arrive in Calcutta and said that if this condition could not be implied the defence failed. Mr. Ghose also accepted the findings of fact of McNair J."

Their Lordships think it is plain that the last sentence involves an acceptance by counsel of the position that the only reliable record of the contract was the letter of 8th December 1941. In consequence of this acceptance, the Chief Justice (with whose judgment Lodge J. agreed) did not examine the oral evidence in detail. He felt unable to imply the condition put forward by the sellers, or to accept the view of McNair J. that the contract became impossible of performance, and stated his conclusions as follows:—

"In my opinion this was a contract for the purchase and sale of 40 tons of Penang tin as set out in the plaintiffs' letter of December 8th, 1941, and its fulfilment was not contingent upon the arrival of the tin from Penang; further the contract was broken by the defendants on December 22, 1941 as on which date damages should be computed.

In my opinion this appeal should be allowed with costs here and below."

In opening the appeal before this Board, counsel for the sellers referred to a number of passages in the oral evidence given before McNair J. and sought to rely on these passages, and in particular upon an answer given by Mr. H. K. Shaha in cross-examination, as establishing that it was a term of the contract made orally on 8th December 1941 that the sellers should only be bound to deliver the tin when it arrived from Penang. Their Lordships do not think it right to entertain this argument, in view of the attitude (already stated) which was adopted by counsel for the sellers at the hearing of the appeal in India. The findings of fact by the trial Judge having been accepted by counsel on the appeal in India, their Lordships think that the present appeal must proceed upon the footing that no express terms of the contract have been proved other than those set out in the buyers' letter of 8th December 1941. It is, however, open to the sellers to contend that the term now under discussion is contained in the letter of 8th December 1941, on its true construction, or must be implied, and that it became impossible for the sellers to fulfil the contract.

Turning to the terms of the letter of 8th December 1941, their Lordships are quite unable to construe the words "for forward delivery" as having any meaning other than their ordinary meaning "for delivery in the future." There is no context to alter or enlarge the meaning of these words, and the subsequent sentence "Our delivery instructions will follow" are entirely consistent with the words bearing their ordinary meaning.

Further, their Lordships see no good reason for implying the condition that Penang tin already ordered by the sellers should arrive in Calcutta. As Scrutton L.J. said in *Comptoir Commercial Anversois v. Power Son & Co.* [1920] 1 K.B. 868 at p. 899:—"The Court . . . ought not to imply a term merely because it would be a reasonable term to include if the parties had thought about the matter, or because one party, if he had thought about the matter, would not have made the contract unless the term was included; it must be such a necessary term that both parties must have intended that it should be a term of the contract, and have only not expressed it because its necessity was so obvious that it was taken for granted."

Their Lordships cannot find that the term in question was such a necessary term that both parties must have intended it to be a term of the contract. So far as the buyers were concerned, there is no reliable evidence that they either knew or cared whether the tin which they required would be supplied from a consignment already ordered by the sellers from Penang. They may have thought that the sellers already had 40 tons of Penang tin in stock or would buy it in India. In fact the sellers had only a small quantity in stock, but there is no accepted evidence that the buyers were informed of this fact, or of the fact that the sellers had ordered 105 tons of tin from Penang. The figure 105, and not the figure 100, appears to be correct, from the documents. Moreover, it is quite clear, from undisputed evidence, that on and after 8th December, the sellers might have supplemented their stocks by buying tin in Calcutta. There is thus no ground for concluding that the buyers must have intended the term in question to be a term of the contract. On the contrary it seems unlikely that the buyers, who had Government orders to carry out, would have agreed that the sellers should only be bound to deliver the tin if and when a consignment already ordered by them should arrive in Calcutta. As to the sellers, it is extremely likely that they intended to supply the 40 tons in question from the 105 tons which they had ordered from Penang; but even in their case it is by no means clear that they must have intended this to be a term of the contract. The findings of the learned trial Judge show that on 8th December the sellers had no apprehension as to deliveries from Penang, and they may have been willing to contract for forward delivery without specifying the precise source of supply.

As the term in question is not proved to form part of the express contract, and cannot be implied, the only remaining question is whether it became impossible for the sellers to fulfil the contract when the Japanese occupied Penang. Their Lordships are willing to assume that impossibility of performance would be a complete defence in the present case, and that it is still open to the sellers to rely on this defence, notwithstanding the admissions of Mr. Ghose. Even so, the burden of proving impossibility rested on the sellers and clearly that burden was never discharged. It will be sufficient to quote the following passage from the evidence of Mr. Ranchoredas:—

Q.—Could you get ready Penang tin in December in Calcutta any large quantity?

A.—It is not impossible, but it could be secured by taking one ton from one dealer, another ton from another, in that way. But usually it could not be secured. This quantity of goods could not be secured at a particular price or at a little higher or lower price than a particular fixed price.

Q.—You said about a particular price. What do you mean?

A.—The abnormal price was very high.

Q.—You know it has been stated that you, during December, supplied goods of Penang quality in Calcutta. Is that correct?

A.—Yes. After that as our source at Penang was no more available to us, we purchased little quantities here in the market and supplied to customers.

Q.—Were those contracts with customers ready or forward?

A.—Contracts for ready goods.

It may also be noted that shortly after 22nd December the buyers were able to buy 6 tons of tin in India at an average price of Rs.304 per cwt. In fact, the sellers took up the attitude that they were not bound to make any effort to deliver the 40 tons, after the Japanese had occupied Penang. Mr. Ranchoredas said in evidence "There was no question of buying against the contract. The contract was for forward delivery and as the goods did not arrive we are not bound to give them."

The result is that in their Lordships' view the learned Chief Justice and his colleague arrived at the right conclusion, and their Lordships will humbly advise His Majesty that this appeal should be dismissed. The appellants must pay the respondents' costs of this appeal.

In the Privy Council

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PRAGDAS MATHURADAS

v.

JEEWANLAL (1929) LIMITED

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DELIVERED BY LORD MORTON OF HENRYTON

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