(1945) 03 CAL CK 0007

Calcutta High Court

Case No: Appeal from Original Decree No. 16 of 1945

Jeewanlal (1929) Ltd. APPELLANT

Vs

Pragdas Mathuradas RESPONDENT

Date of Decision: March 27, 1945

Final Decision: Allowed

Judgement

Derbyshire, C.J.
The Plaintiff Company appeals from a judgment of McNair, J., dismissing its claim for Rs. 91,350 for damages for breach of contract to sell and deliver forty tons of tin. The Plaintiffs carry on business in Calcutta and Bengal as metal workers. Their original business was the manufacture of articles made from aluminium, but for sometime previous to 1941, they had also manufactured articles made from steel coated with tin to supply the Government of India. The Defendants are a firm carrying on business in Calcutta as metal merchants dealing in tin (amongst other metals) which they import; according to the evidence of Ranchoredas Benani, one of their partners, they do business on a very large scale.

2. According to the documents put in evidence by the Defendants at the trial, the Plaintiffs, by orders in writing, bought bundles of Brass sheets or circles from the Defendants as follows :

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3. No dispute has arisen under the above contracts.

4. On December 7th, 1941, the Japanese declared war on the British Empire and the United States of America, and this fact was known to both parties in Calcutta early in the morning of December 8th, 1941. The Plaintiffs that morning considered their requirements of tin to cover themselves for the contracts for tinned goods they had in hand and Mr. Tulsidas Saha, the Assistant Secretary of the Plaintiffs, teleploned Mr. Ranchoredas Benani and ordered 25 tons of tin at Rs. 215-8-0 per cwt. and a little later

another 10 tons at the same price. About 1ï¿½ hours later in the day, Tulsidas ordered from Ranchoredas another 5 tons of tin, but the price had then risen to Rs. 218 per cwt. The same day the Plaintiffs sent a bought note to the Defendants as follows:

Calcutta, 8th December, 1941.

Messrs. Pragdas Mathuradas.

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

35 tone @ Rs. 215-8-0 per cwt.

5 tons @ Rs. 28-0-0 per cwt.

Our delivery instructions will follow.

Yours faithfully,

Jeewanlal (1929) Ltd.

5. That document was received by the Defendants and produced by them; it bears on its face the following writing: "File by order 9th December, 1944." Presumably the Defendants wrote that note on it. The Defendants did not reply to that note and did not send any sold note or other document relating to the contract in reply. On or about probably a day or two before--December 19th, the Japanese Forces occupied Penang which is a port in the Indian Ocean on the western side of the Malay Peninsula.

6. It is agreed by both the Plaintiffs and Defendants that Penang quality tin means tin exported from Penang and that such tin is of better quality than Singapore tin, although it would appear from the contract of September 25th, 1941, that the difference is not very great.

7. On December 19th, Tulsidas for the Plaintiffs had a telephone conversation with Ranchoredas and asked the latter when it would be convenient for him to deliver the tin. Ranchoredas, according to him, said he would deliver it as soon as he got it. That according to Tulsidas "aroused his suspicions" and he wrote the Defendants a letter of that date which was as follows:

With reference to our purchases of 40 tons of Penang tin we shall be obliged to know when you would deliver this material so that we can arrange for the payment in time. The material is required, for use in the supply of Government orders on our books awaiting delivery in the next few months to commence from the month current.

8. The Defendants on December 20th replied:

We beg to acknowledge the receipt of your letter dated December 19 and in reply have to inform you that the material in question does not seem to arrive here due to trouble in Penang.

We note that the material is required for use in the supply of Government orders and would like you to please inform the Supply Department of your inability to secure the materials due to unforeseen circumstances beyond everybody''s control. However, we assure you to deliver you immediately we receive consignment from Penang, if any comes at all, though we doubt if it will be possible.

9. The Plaintiffs by letter dated December 22nd, replied:

. . . . We regret we cannot accept your contentions and have no alternative but to repeat our request for an early delivery of the material by whatever means and oblige.

10. The same day, December 22nd, the Defendants by letter replied:

. . We have to inform you that the basis of the above lousiness is forward and owing to unforeseen trouble in Penang the shipment is not possible. As such we have no other alternative but to cancel the contract.

11. On December 23rd, the Plaintiffs wrote back stating that when the orders were placed, "there was a specific understanding that it had no connection with future arrivals," .... that the Plaintiffs "would not have done the business if there was the remotest suggestion that delivery was dependent upon tin being receivable from Penang." The Plaintiffs ask for delivery in 10 ton lots at once; failing that they will buy against the contract.

12. On December 30th, 1941, the Plaintiffs wrote to the Defendants that they had had no reply to their letter of December 23rd and had bought 6 tons of tin at an average price of about Rs. 76 per quarter in about Rs. 304 per cwt. and claimed the difference Rs. 10,109-0-6.

13. On January 2nd, 1942, the Defendants wrote back denying that the contract was entered into on the specific understanding that delivery of the tin was to be made "under all circumstances" and alleging that the contract was made "on forward basis on the definite understanding that the goods would be delivered to you as and when we would receive shipment of the goods" and that the phrase "forward delivery" in the contract was used "for the specific purpose of pointing out that the goods would be supplied as and when we could get shipment of the goods from Penang." The cancellation of the contract was affirmed and liability to pay the differences claimed was denied.

14. On January 3rd, 1942, the Plaintiffs wrote back maintaining their contentions and stated that on that day (January 3rd, 1942) Tin Penang quality was quoted at Rs. 307 per cwt. in Calcutta. To that letter the Defendants replied on January 5th denying their liability

under the "said cancelled contract," but not denying the quotation at Rs. 307 per cwt. The Defendants'' letter contains this paragraph:

The purchase of the goods was made by you on December 8, 1941 when the Pacific trouble arose on forward delivery basis on the distinct understanding that the goods would be delivered to you as and when we receive the same from Malay. We had entered into contracts for purchase of goods deliverable from Malay, As no delivery of the goods was received by us owing to the Pacific situation and as there was no chance of our receiving such delivery we were justified in cancelling the contract and intimated the same to you in our letter of the 22nd ultimo.

15. On January 12th, the Plaintiffs wrote back slating that the contract was entered into by the Defendants after the Pacific troubles had arisen and the situation on the date of the contract was known to everybody, that the Plaintiffs had accepted the Defendants'' repudiation of the contract and already bought against it and claimed damages and "unless you are willing to amicably adjust the quantum of such damages within 48 hours, we shall have no other alternative but to file a suit"

16. On January 13th, the Defendants wrote back:

. . As no delivery of the goods was received by us owing to the Pacific situation, we were justified in cancelling the contract and we intimated the same to you in our letter of the 22nd ultimo. . . We understand that some tin ingots have been landed in the jetty in Calcutta by ship. We have not received any intimation from our shippers. We are making enquiries if any portion of the goods which we had sold to you and to our other customers on forward delivery basis has arrived here. If we find that any portion of the goods that has been sold to you and to our other customers on forward delivery basis has arrived, then without prejudice to our contention that we were justified in cancelling the contract with you, we shall be glad to give delivery to yourselves and to our other customers in proportion to our forward sales. We shall write to you again on this matter on getting definite information.

17. On February 6th, the Plaintiff''s solicitor wrote claiming as damages Rs. 91,350 on the basis of the market price at the date of breach of Rs. 330 per cwt.

18. On February 7th, the Defendants'' solicitor wrote back denying breach of contract and further:

Our clients intimated to your clients in their letter of January 13 last that some tin ingots had been landed in the jetty at Calcutta by a ship. Our clients have been making diligent enquiries about the said goods. They have not yet received any intimation from their shippers. The steamer agents have not also received any manifest regarding the goods. Until the manifest is received by the steamer agents, it may not be possible for the steamer agents to sort out the goods or deliver the same to any of the dealers in Calcutta. If the goods that have arrived hear our clients'' usual marks, our clients will try to clear those goods on Bank''s guarantee if possible. If and when our clients are able to clear any portion of the goods which our clients have sold to your clients and to their other customers on forward delivery basis, they will ask your clients and other customers to fake delivery in proportion of the forward sales effected by our clients without prejudice to our clients'' contention that the contract with your clients has been cancelled.

19. On February 12th, the Defendants'' solicitor again wrote affirming the cancellation and its correctness. They also stated that the Defendants received notification on February 9th, that 2042 slabs of refined tin of various marks have been brought to Calcutta by S.S. Hongkong from Penang via Rangoon, that they are enquiring into it and expect to give delivery of some portion of it to their customers, including the Plaintiffs "without prejudice to our clients'' contention that the contract with your clients had already been cancelled."

20. On February 20th/21st. 1942, the Defendants'' solicitor wrote:

We are instructed to inform your clients, which we hereby do through you that it appears to our clients that out of 2042 slabs (about 100 tons) refined tin of various marks that have been brought to Calcutta by s.s. Hongkong from Penang, about 15 tons bear our clients'' usual marks and as such our clients may be allotted about 15 tons. Our clients have paid to their bankers sufficient money to cover the price and freight of the said 15 tons in order to enable their bankers to give guarantee. If and when our clients are allotted any portion of the said goods, our clients will allot the same proportionately to your clients and to their other customers without prejudice to our clients'' contention that they were justified in cancelling the contract with your clients.

Our clients have been informed by Messrs. Mackinnon Mackenzie & Co. (the ship''s agents) that the Government has stopped delivery of the entire quantity of goods to any of the importers as the Government may require the same. In this case your clients and our clients'' other customers will have to obtain Government permit for delivery of the portion to be allotted.

21. On February 22nd, 1942, the Plaintiffs began this suit. On February 24th, the Plaintiffs'' solicitor wrote in reply to the Defendants'' solicitors'' letter of February 20th/21st:

Our clients have no concern with the slabs of tin which your client might receive out of shipment which is alleged to have arrived per s.s. Hongkong.

22. The plaint sets out the purchase of December 8th, 1941, and refers to the letter of that date and alleges that the tin was required by the Plaintiffs for use in their factories principally for the supply of Government orders as the Defendants were (it is alleged) informed at the time and that the Defendants agreed to give delivery according to the requisitions of the Plaintiffs.

23. The written statement states that the Defendants will refer to the said letter for the terms and effect thereof and further that "it was expressly agreed or alternatively it was implied that delivery could only be made as and when goods arrived from Penang against orders placed by the Defendants" firm there."

24. Paragraph 3 of the written statement pleads:

Before entering into the said contract, the Plaintiff company were aware that the [Defendants used to import tin from Penang and that tin could be supplied only if and when such tin arrived in Calcutta. The contract between the parties was expressly made for forward delivery and was subject to conditions which were to be implied from the nature thereof, namely:

(a) that tin would be mined at Penang and be available for purchase and shipment from Penang.

(b) that freight would be available in usual course from Penang and goods should be shipped from Penang to Calcutta.

(c) that only on arrival of tin from Penang the Plaintiffs would be entitled to delivery.

(d) that delivery would be made within a reasonable time after the making of such contract upon arrival of tin in Calcutta.

(e) that the Defendants have placed and would place orders and give instructions to despatch tin against orders or contracts made by them for its supply at Penang.

25. Paragraph 5 of the written statement pleads that the Defendants placed orders for tin at Penang but could not obtain tin against contracts made by them at Penang and all mining of tin and sale and purchase and shipment of tin from Penang became impossible.

26. Paragraph 6 pleads:

In the premises the basis upon which the contract was entered into WEB swept away as also the contract. The contract became impossible of performance and void. The Defendant was discharged from its obligation to perform the contract by reason of the facts stated hereinbefore.

27. 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.

28. The first question is--what was the contract between the parties? Having regard to the fact that the Plaintiffs sent the bought note of December 8th, that the Defendants did not

reply to it adding to its terms or disagreeing with them or modifying them, and that they ordered it to be filed, I think that letter embodied the terms of the contract.

29. Before McNair, J., both sides gave evidence as to what they said to each other relative to the contract before the note was sent, the Plaintiffs alleging that they asked for and were promised delivery under all circumstances and the Defendants alleging that they informed the Plaintiffs that delivery could only be given on arrival of the tin from Penang.

30. The learned Judge refused to believe this evidence from both sides and said:

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

31. The learned Judge went on to say:

It appears to be much more probable that the words ''forward delivery'' have the sarnie implication as the words ''forward delivery basis'' which were used in the Metal & Alloys Co. Ltd.''s contract.

32. This was another contract entered into by the Defendants on December 8th, 1941, with the Metal & Alloys Co., Ltd., the bought note for which reads as follows:

To Messrs. Pragdas Mathuradas

December 6, 1941.

We place on record that you nave to-day agreed to sell to us the following tin, Penang Quality on forward delivery basis on arrival from Penang.

40 tons at Rs. 208-8-0 per ewt.

Indian Metals & Alloys Co. Ltd.

33. But in that contract it is specifically stated "on forward delivery basis on arrival from Penang."

34. One would think that if the Defendants wished to make delivery of tin or the performance of the contract contingent upon the arrival of tin from Penang, they would have written back to the Plaintiffs and said so when they got their letter of December 8th. In view of the Indian Metal & Alloys Co.''s letter that matter must on December 8th or 9th have been present to the Defendants'' minds. But the Defendants did not so write. It will be convenient here to summarise the Defendants'' position now disclosed at the trial, with regard to Penang tin supplies on December 8th.

35. [After considering the position of supply his Lordship proceeded.]

36. It would appear that there was a reasonable chance of the whole or a considerable part of this tin, 105 tons, being shipped on or about December 8th or 9th. Under normal conditions the transit of tin from Penang to Calcutta takes about 10 days.

(c) Before and after the declaration of war by Japan and until the Government of India stepped in to control tin (in February, 4942) Penang tin was available in India.

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37. The Defendants have contended that this contract was made impossible of performance and/or frustrated because with the fall of Penang it became impossible for the Defendants to obtain Penang tin to fulfil their contract with the Plaintiffs.

38. The burden of proving that contention is upon the Defendants. Against the contention are the following facts:

[After considering the relevant facts his Lordship proceeded.]

39. In my opinion the Defendants have not proved that the contract was rendered impossible of performance and/or frustrated by the non-arrival of tin from Penang after its fall.

40. The other defence taken by the Defendants is that a condition is to be implied into the contract "that Penang tin already ordered by the sellers should arrive in Calcutta."

41. The burden of proving that such a condition is to be implied lies on the Defendants. It was not suggested that such a condition was to be implied from the previous dealings between the parties. It would appear from the recorded terms of the previous contracts that the Plaintiffs bought tin or brass sheets from the Defendants for present or future delivery without reference to the Defendants'' means of procuring the goods to be supplied.

42. The Defendants have contended that the words in the Plaintiffs'' letter of December 8th for forward delivery implied the suggested term "that Penang tin already ordered by the sellers should arrive in Calcutta."

43. It has not been pleaded that the words "forward delivery" have a special technical or trade meaning and no evidence as to such meaning has been given. There is only the evidence given by the Plaintiffs and Defendants as to what they respectively say the words mean, and the Judge has not accepted their evidence.

44. In my view "forward" has the ordinary meaning where time is referred to and that according to the Concise Oxford Dictionary means "future." "Forward delivery" in my opinion means delivery in the future subject, of course, to a reasonable limit of time. Does that delivery in the future in the circumstances of this case imply that it is to be dependent

upon future arrivals of tin ordered by the Defendants from Penang? If it does, a new term is being implied into the contract. In Comptoir Commercial Anversuis v. Power, Son & Co. [1920] 1 K.B. 868 at p. 899, Scrutton, L.J., said:

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 it to be a term of the contract and have only not expressed it because its necessity was so Obvious that it was taken for granted.

45. In the present case McNair, J., in his judgment said:

On December 8 when this contract was made, Japan had entered the war, but there was no anticipation of Japanese activities in Malaya. That is admitted by the parties. So far as they could anticipate events, there was a certainty that tin ordered by the Defendant firm would arrive within a very short time. The market was however rising, and it may well be that the main object of the Plaintiff company in entering into a contract for such a large quantity of tin was to fix the price in view of their requirements of tin for fulfilment of Government contracts. There was no reason to anticipate an actual shortage of tin; shipping was more or less normal, but there was reason to anticipate rise in prices due to the entry of Japan into the war.

46. I agree with these words. The quantity of tin bought was a large one, but, on the other hand, the Defendants were in a large way of business. The Defendants might know how they intended to provide the tin sold, but it is not shown that they told the Plaintiffs. The Judge has refused to accept the Defendants" evidence that it was "on arrival from Penang." The Defendants might have supplied it partly from stock, partly from shipments ordered or already on the way, from purchases they could make in the market in Calcutta or elsewhere in India. In a somewhat similar case of the Blackburn Bobbin Company, Ltd. v. T.W. Allen & Sons, Ltd. [1918] 2 K.B. 467 al p. 469, Pickford, L.J., said:

Why should a purchaser of goods, not specific goods, be deemed to concern himself with the way in which the seller is going to fulfil his contract by providing the goods he has agreed to sell?

47. It appears to me that that question applies with effect here.

48. In the words of Scrutton, L.J., quoted above,

was it such a necessary term that both parties must have intended it to be a term of the contract and have only not expressed it because its necessity was so obvious that it was taken for granted?

49. I am unable to come to the conclusion that it was a necessary term since the tin might be provided otherwise than by arrival from Penang. Again the Defendants, with the Indian Metal and Alloys Company''s contract before them with that term in it, did not think it necessary to write back to the Plaintiffs on December 9th and put in the tin "on arrival from Penang."

50. I am not satisfied that the term was necessary to give business efficacy to the contract or that either party must have intended it.

51. 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 22nd, 1941, as on which date damages should be computed.

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

53. Without prejudice to the rights of the parties to appeal, they have agreed on the damages, calculated as on December 22nd, 1941, to be Rs. 5,000. There will be judgment in favour of the Plaintiff for that amount. Certified for two Counsel.

Lodge, J.

I agree.