

(1929) 11 MAD CK 0042
In the Madras High Court

(Appana) Venkatasubba Rao and Another	APPELLANT
Vs	
Ripley and Co. and Others	RESPONDENT

Date of Decision : 15-11-1929

Acts Referred:

Citation : AIR 1930 Mad 624

Judgement

1. This appeal arises out of a suit filed by plaintiffs against the defendants claiming Rs. 6,215 as damages for non-performance of a contract to deliver jute. The contract sued upon is marked as Ex. A and is dated 3rd September 1925. Under that contract the defendants promised to deliver 224 candies of jute at Rs. 90 per candy of 506ths delivery to be completed before 30th September 1925, A portion of the goods was delivered before 30th September 1925 and after that date some further quantity was delivered. According to the plaintiffs, defendant 1 delivered from 17th September 1925 to 31st October 1925, 111 can dies. In para. 5 of the plaint the plaintiffs state:

Defendant 1 has been demanded by letter dated 25th November 1925 to deliver the balance of jute on or before 30th November 1925 but defendant 1 has not complied with the same and has committed default in fulfilling the terms of the contract.

2. Then the plaintiffs claim as damages in respect of the undelivered goods the difference between the market price on 30th November 1925 and the contract price, the market price being Rs. 145 per candy. The plaintiffs filed an additional statement dated 21st February 1927 stating that although the delivery was fixed for 30th September 1925 time was extended to 30th November 1925 at the request of defendant 1. They then state that defendant 1 met one C. Sanjiva Rao Naidu and asked him to extend the time. Finally they state:

In the month of November in Bimilipatam defendant 1 met Mr. Manfield in the street and was asked by him when he would complete his contract. Defendant 1 replied that he need not trouble. Mr. Manfield said he did trouble because very little jute left and that if the contract was not completed within the next few days

a registered notice would be sent. The plaintiffs waited till 25th November 1925 and issued a notice demanding delivery on or before 30th November 1925.

3. In the written statement defendant 1 admits that he did not deliver more than 111 candies. He does not deny the fact that deliveries were continued to be made after 30th September, the date fixed in the contract for performance. His case is that there was no contract to extend the time and that damages should be assessed as on 30th September 1925. The Subordinate Judge assessed damages on 31st October 1925 on the ground that there was extension of time till that date, the defendant making deliveries and the plaintiffs accepting them till then, and passed a decree for Rs. 3,955. Against this decree the defendants appeal.

4. It is clear from the facts that deliveries were being taken after 30th September 1925, that the dubash of the plaintiffs was pressing the defendants for delivery and that defendant 1 was making promises to deliver. The dubash has been examined as P.W. 2. He says:

Deliveries were made by defendant 1 till 30th October 1925 though the date fixed was 30th September 1925. I used to demand delivery from defendant 1. According to my request he delivered till the end of October 1925. I wrote letters Ex. B and B-1 to plaintiff.

5. Then in cross-examination this is what he says:

The price of jute rose by the end of September 1925. I have only the power to recommend for extension of time. I cannot extend the time without referring the matter to plaintiffs. The plaintiffs never wrote to me that they granted extension of time, The head clerk of plaintiffs gave instructions for preparing the plaint. When extension is granted letters were taken from those who asked for extension, Defendant 1 deals very largely with plaintiffs for the last ten years. Although the time for delivery was fixed in the contract subsequent deliveries are taken at the option of plaintiffs. The deliveries were made in my presence.

6. Although defendant 1 in examination-in-chief states that he never asked P.W. 2 Sanjiva Rao Naidu to extend the time, nor Mr. Manfield he also states:

The person with whom I entered into contract used to receive the goods even after the expiry of the time for performance.

7. Then in cross-examination he says:

I delivered goods even after the time fixed for performance. The practice is to receive goods even after the time fixed for performance had expired. They will ask us for deliveries. We will deliver the goods after the time. Sanjiva Rao Naidu did not meet me before 8th November 1925. They will be usually asking my clerk to make deliveries.

8. Exs. B and B-I are letters written by P.W. 2 to the plaintiff. Ex. B is dated 8th November 1925. Referring to defendant 1 this is what he says in that letter:

I met and asked this man for our jute deliveries. He also told me that he had sent his clerk to up countries and it would be brought to Bimli on Wednesday. He will deliver his contracts at Bimli only.

9. On 19th November 1925 he wrote Ex. B-I in which he says as follows:

We have been daily insisting on him for deliveries. They told me that their men once went to up countries and returned. I again made them go to up countries today. I told him plainly that I got orders first to issue registered notices and buy jute against their contracts at the market rate.

10. All that defendant 1 says in cross-examination is that he did not meet P. W. 2 before 8th November 1925. He does not state that he never met him afterwards; nor does he deny what Sanjiva Rao Naidu states in Exe. B and B-I although they were filed in Court during P.W. 2's examination. The matter does not stop here because we find that sixteen days afterwards on 25th November 1925, the plaintiffs state in their plaint and it is not contradicted, that registered notice was sent to defendant 1 calling on him to deliver the balance of jute on or before 30th November 1925. They say that he did not comply with their request. Taking these facts together it seems to be clear that there was an extension of time granted, that goods were being delivered at the request of the plaintiffs by the defendant and that he was specifically told that he must complete the contract before 30th November 1925 and in default proceeding would be taken against him. The Subordinate Judge was right in these circumstances in finding that there was an implied contract to deliver the goods and time was extended. He, however, seems to have fallen into an error in thinking that the plaintiffs did not in their plaint start their case with an implied extension of time; for reading para. 5 of the plaint and the additional statement it is clear that the plaintiffs distinctly told defendant 1 that if the goods were not delivered they would take steps and further a definite date was fixed. Reference was made to *Toya Menka Kaiesha Ltd., v. Chabildas Nathubai* AIR 1922 Bom. 203 and *The Phoenix Mills Ltd. v. Madhavdas Rupchand* [1916] 24 Bom. L.R. 142. But we think that the facts here are distinguishable. This is not a case where the defendants at their own option went on delivering goods after breach and the plaintiffs accepted them. Here the defendants were making deliveries and the plaintiffs distinctly told them that they will not wait after a specific date. We do not think that it can be laid down in a case like the present where delivery was going on as in this case that it is open to the defendant to fall back upon 30th September as the date for assessing damages. There is no cross-appeal as regards the date for damages to be fixed as 30th September 1925 instead of 31st October, and although that would be the proper date to be fixed for damages there is no hardship on defendant 1 because the damages assessed are less than what they would otherwise have been. In these circumstances we think that the decree of the lower Court is right. The appeal is dismissed with costs.