

(1959) 02 CAL CK 0011
In the Calcutta High Court
Case No : A.F.O.D. No's. 45 and 100 of 1955

Aryan Mining and Trading Corporation Ltd.	APPELLANT
Vs	
B.N. Elias and Co. Ltd. and Another	RESPONDENT

Date of Decision : 18-02-1959

Acts Referred:

Contract Act, 1872 — Section 55, 62, 63, 73

Citation : AIR 1959 Cal 472

Hon'ble Judges : K.C. Das Gupta, C.J;R.S. Bachawat, J

Bench : Division Bench

Judgement

R.S. Bachawat, J.—Appeals Nos. 45 of 1955 and 100 of 1955 from original decrees have been heard together.

2. Appeal No. 45 of 1955 is against a decree passed by Bose J., in suit No. 3434 of 1952 instituted by B. N. Ellas and Co. Ltd., against Aryan Mining and Trading Corporation Limited. Appeal No. 100 of 1955 is against a decree passed by Bose J., in suit No. 3433 of 1952 instituted by the Agarpara Co. Ltd., against Aryan Mining and Trading Corporation Limited. B.N. Elias and Co. Ltd., is the Managing Agent of the Agarpara Co. Ltd.

3. Both the suits were heard together by Bose J, He delivered his main judgment an suit No. 3434 of 1952 and a subsidiary judgment in the other suit. Both the appeals have been heard together; This judgment is intended to cover both appeals.

4. The subject-matter of suit No. 3434 of 1952 is a contract dated 26-12-1950, whereby Aryan Mining and Trading Corporation Limited agreed to sell to B. N. Elias and Co. Ltd., 4000 tons of manganese ore with 46/48 per cent., manganese contents at Rs. 82 per ton F. O. R. Barabil, delivery--500 tons monthly beginning from February, 1951 to be completed by December, 1951 latest. Under this contract the buyer deposited with the seller a sum of Rs. 1,20,000/- as advance. After giving credit for certain sums due to the seller for price of goods sold and

delivered. B.N. Elias and Co. Ltd. claimed a sum of Rs. 56,919-4-9 by way of refund of the advance. At the trial it was conceded that the seller was entitled to a credit for a further sum of Rs. 13,624-4-9 on account of price of goods sold and delivered. Bose J., has given a decree for refund of the balance sum of Rs. 43,294-15-9 on account of advance and a further sum of Rs. 244-12-9 for under loading and analysis charges. The correctness of this part of the decree is not challenged. It appears that under this contract 2,302 tons and 10 Cwt. of goods remained undelivered. There is now no dispute that all deliveries made by Aryan Mining and Trading Corporation Limited are to be appropriated towards the contract dated 26-12-1950 which is the subject-matter of this suit and that 2,302 tons and 10 cwt. of goods remained undelivered under this contract. The buyer alleges that the seller committed breach of the contract by not delivering the balance goods and it claims damages on the footing that the due date of delivery was extended up to 31-3-1952. Bose J., has accepted the buyer's contention that the due date was extended as alleged by the buyer and has awarded damages on that footing. The correctness of his findings on this point is challenged.

5. The subject-matter of suit No. 3433 of 1952 is a contract dated 8-2-1951, whereby Aryan Mining and Trading Corporation Limited agreed to sell to Agarpara Co. Ltd., 2000 tons of manganese ore at Rs. 90/- per ton F. O. R. Barabil-delivery 500 tons monthly beginning from October 1951 to be completed by December, 1951. Under this contract the buyer deposited a sum of Rs. 1,00,000/- with the seller as advance. Bose J., has decreed refund of the advance with interest at 6 per cent., per annum. The correctness of this part of the decree is not challenged. It is now common case that no part of the goods deliverable under this contract was delivered by the defendant. The buyer claims damages on the footing that the due date of delivery was extended up to 29-2-1952. Bose J., has accepted the buyer's contention and has awarded damages on that footing. The correctness of his decree on this point is challenged.

6. On a proper construction of both the contracts Bose J., held that the contracts were entire and indivisible contracts and not instalment delivery contracts as contemplated by Section 38 of the Indian Sale of Goods Act. The correctness of this ruling is not challenged before us.

7. In both suits the seller contended that time was not of the essence of the contract and that the seller had not committed any breach of the contract. Bose J., has negatived this contention. It is now conceded before us that the time was of the essence of both the contracts and that the seller had committed breaches of both contracts.

8. In both the appeals the seller urges that the due date of delivery under the two contracts was not extended and that the damages ought to have been assessed on the basis of the market rates prevailing on 31-12-1951. The quantum of damages awarded by Bose J., is also challenged. The sole question in Appeal No. 45 of 1955 is whether the due date of delivery of the contract dated

26-12-1950, was extended up to 31-3-1952, and if so to what damages is the plaintiff entitled. The sole question in Appeal No. 100 of 1955 is whether the due date of delivery under the contract dated 8-2-1951 was extended up to 29-2-1952; and if so, to what damages is the plaintiff entitled.

9. Bose J., came to the conclusion that the due dates had been extended. In one part of his judgment he expresses his opinion thus:

"It may be that Mr, Yagnik had not in so many words agreed to the extension granted up to 29th February and 31st March 1952, at any time, but I have no doubt that by his act and conduct, he had given the plaintiff companies, the impression that he accepted the extension."

In another part of the judgment he observes:

"As I have held already that the acts and conduct of the defendant company show that they had accepted and agreed to the extension, this argument of Mr. Mukherji is of no assistance to the defendant."

Mr. I.P. Mukherji had argued that Bose J., has given his verdict in a somewhat uncertain language. We have for ourselves anxiously scanned through the entire evidence on the record and we have for ourselves come to the conclusion that the due dates of delivery were extended as alleged by the buyers in the two suits. (After discussing the evidence, the judgment proceeded:)

10-32. On a perusal of the entire evidence on the record, I am satisfied that the due date of delivery under the contract dated 26-12-1950 was extended up to 31-3-1952 and that the due date of delivery under the Agarpara Co. Ltd., contract dated 8-2-1951, was extended up to 29-2-1952.

33. Before us Mr. Mukherjee argued that at best the defendant could be said to have agreed to the extension on 30-1-1952 after the defendant had committed breaches of contract, He argued that by the agreement as to extension the parties in substance entered into new agreement and that such new agreement is not permissible in law u/s 62 of the Indian Contract Act. In support of his contention he relied mainly upon the decision in Manohur Koyal v. Thakur Das Naskar ILR 15 Cal 319, where a Bench of this Court observed:

"Section. 62 is but a legislative expression of the common law; and its provisions do not apply after there has been a breach of the original contract."

34. On behalf of the plaintiff reliance is placed upon Sections 55 and 63 of the Indian Contract Act and it is argued that on the failure of the defendant to supply the goods on the due dates of delivery, the contracts became voidable, but the buyers elected not to avoid the contract and agreed to grant an extension of the dates of delivery and as such extension was consented to by the seller the buyers are entitled to damages on the basis of the market rates prevailing on the extended dates.

35. In my opinion, the buyers' contention must prevail.

36. In AIR 1922 178 (Privy Council) , their Lordships of the Judicial Committee had occasion to deal with a contract for the supply of railway sleepers by 31-5-1913. It was found that time was of the essence of the contract; that the appellant was in default in not making complete delivery in time, that is at 31-5-1913; that the appellant applied for and was granted an extension of time until 30-11-1913, for delivery of the balance goods and that delivery of the balance goods was not made by the respondents on November 30, and they were consequently in default. The judgment of the Judicial Committee was delivered by Lord Dunedin who, after referring to Section 55, para 1 of the Indian Contract Act said:

"The respondents here did not elect to avoid the contract; they held it as subsisting, and agreed to prorogue the time of performance This they were entitled to do. See Section 63 of the Indian Contract Act, which explicitly says so."

After referring to the third paragraph of Section 55 Lord Dunedin observed that that paragraph" clearly means that the promisee cannot claim damages for non-performance at the original agreed time, not that he cannot claim damages for non-performance at the extended time"

He then went on to observe:

"Now apart from the terms of the Indian Contract Act, the law is as laid down in Tyers v. Rose-dale and Ferryhill Iron Co. (1873) 8 Ex. 305. Baron Martin in that case said : "The second question is one of law, and is a most important one--it arises over and over again every day in the ordinary transactions of mankind." It is this: There is a contract for the sale of goods to be delivered, say, in January or upon a day of January. On the day before the delivery is to take place the vendor meets the vendee and says : "It is not convenient for me to deliver the goods, upon the day named, and I will be obliged if you will agree that the goods shall be delivered at a later period", and the vendee assents; or the vendee goes to the vendor and says : "It is not convenient for me to receive the goods in January or upon the day named and will you agree that the delivery shall be postponed?" and the vendee assents; the later is the present case, and the contention on the part of the defendants is that this puts an end to the contract, and that the defendants are not bound to deliver upon the later day. In my opinion, the contention is not well founded. It is impossible to distinguish the case of the application coming from the vendors and one coming from the vendee."

That opinion was affirmed in the Exchequer Chamber. The effect of Section 55 of the Indian Contract Act above quoted is, where the party having the option elects not to avoid, to put agreement after the original date on the same footing as an agreement, as put by Baron Martin, just before the original date..... Where, as here, a specific time is stated, then that substituted date must hold. If there were a simple waiver of the right to extension of the original time, then a

reasonable time would be the proper time for delivery. It follows that there being no delivery on November 30, the appellant was in breach, and damages are calculable in the ordinary way."

37. I read this judgment as a clear ruling that in view of Sections 55 and 63 of the Indian Contract Act, on the expiry of the stipulated time for delivery the buyer may elect not to avoid the contract and may extend the time for performance and where such extension is agreed to by both the seller and the buyer the agreement is binding on both of them and the seller is bound to deliver on the extended date. It does not matter that this agreement takes place after the original date of delivery has expired and when the seller has already committed breach of the contract. If the goods are not delivered, the buyer is entitled to damages for non-performance at the extended time and such damages must be calculated in the ordinary way.

38. The binding nature of the agreement as to the extension of the time for performance is established by the general law of contract and by Sections 55 and 63 of the Indian Contract Act. To establish its validity it is not necessary to have recourse to the provisions of Section 62 of the Indian Contract Act. The respondents do not justify the agreement as to extension by reference to Section 62 and the point that that section does not apply after a breach of the original contract has no relevance. Section 62 does not prohibit such an agreement. There is nothing in that section which renders it unlawful or void.

39. u/s 63 of the Indian Contract Act the buyer may extend the time of performance. If such extension is not agreed to by the seller, the buyer is not entitled to claim damages for non-performance on the extended date for the seller is not then bound to deliver on the extended date and the seller cannot take advantage of his own unilateral act for the purpose of obtaining enhanced damages. Where, however, the extension is agreed to by both parties the seller is bound to deliver by the extended date and the buyer is entitled to damages for non-performance on that date.

40. The next question is as to the assessment of damages.

41. Before us it has been common case that the damages in respect of the B.N. Elias and Co. Ltd., contract should be assessed on the basis of the market rates prevailing on the 31st March, 1952 and that damages in respect of the other contract should be assessed on the basis of the market rate prevailing on the 29th February, 1952.

42. I will firstly deal with the evidence as to the market rate prevailing on the 31st March, 1952. The learned trial Judge has assessed the market rate at Rs. 114 per ton. There is satisfactory material on the record to show that the market rate on the 31st March, 1952 should be assessed at least at that rate. From the bill dated the 29th May, 1952 (Ex. J) it appears that Hind Shippers Limited supplied to M. A. Tulloch and Co. Ltd. 200 tons of manganese ore with 45 per cent, manganese content at Rs. 138/-per ton. The bill is proved by Tulsi Charan

Basu. He says that the goods were supplied in respect of the contract which was orally entered into in March 1952. He further stated that there was correspondence to confirm the oral contract. He said that the price was Rs. 138 f. o. r. K.P. Docks deducting Rs. 18 on account of railway freight the price would be Rs. 120/- f. o. r. Barbil. I accept the evidence of Tulsi Charan Basu. There is also a bill dated the 31st July, 1952 (Ex. H) in respect of supplies by A. C, Feegrade to R. Mc. Dill and Co. Ltd. The supplies were from the 1st March to the 31st March, 1952. The original contract provided for delivery at Rs. 60/- per ton, but the arrangement was that supplies would be made at the prevailing market rates. The relevant document has been proved by Amiya Kumar Ganguly. The transaction has been proved by Feegrade. The learned Judge has accepted their evidence. I see no reason to doubt their testimony. The bill shows that the prevailing market price in March, 1952 of manganese ore with 45 per cent, manganese content was Rs. 115/-. The evidence of Feegrade is that the price was F. O. R. Barajamda. Next is the contract dated the 19th April, 1952. (Ex, K) The contract shows that manganese ore with 46 per cent. manganese content was sold at Rs. 130/- per ton F.O.R. loading station Barajamda B. N. Railway. The contract was for the supply of 200 to 300 tons. The transaction is proved by one Luxmi Prosad Sao. There is some evidence on the record to show that in March, 1952 the market was a rising market and also that the price was somewhat stationary between the 31st March, 1952 and the 30th April, 1952. On the materials on the record it is impossible to say that the rate of Rs. 114/- per ton is too high a rate. I am satisfied that the market rate of manganese content 46/48 per cent. ought not to be assessed at less than 114 rupees per ton. There is no cross-appeal by the buyer B.N. Elias and Co. Ltd. It is, therefore, not necessary for us to decide whether the market rate ought to have been assessed at a higher figure. I should add that the evidence on the record shows that within each grade of manganese ore there is ordinarily a difference of Rs. 5/- per ton for difference of each unit. The witnesses have spoken of three grades with manganese contents of 38/42 per cent., 43/45 per cent, and 46/48 per cent. The witnesses also say that there is a difference of more than Rs. 5/- per ton in respect of goods of different grades.

42a. I am, therefore, satisfied that the decree of the learned trial Judge with regard to damages under this contract cannot possibly be assailed by the appellant.

43. Regarding the market rate prevailing on the 29th February, 1952, the evidence is somewhat scanty. There is some evidence of a contract on the 31st January, 1952, said to have been entered into between Bird and Co. Calcutta and Bird and Co. London. The Sales Register has been proved by John Henry O'Neill and Sudhir Kumar Bose. It is said that on conversion of the contract rate given by this contract one could arrive at the rate prevailing on the 31st January, 1952 and that the price prevailing on the 29th March, 1952, must be higher than the rate prevailing on the 31st January, 1952. The original contract has not been produced. The contract is mentioned in the Sale Register and is spoken to by Mr.

O'Neill at answer to question 29. The mode of conversion is given by him in answer to question 12. For various reasons I am unable to rely upon this contract. It is common case that on the 22nd April, 1952 the market price was much higher than that prevailing on the 31st January, 1952. I find, however, that another contract between the same two companies entered into on the 22nd April, 1952 speaks of sale of manganese ore with manganese content of 46.4 per cent, at ₹. 14/10/-. The two contracts dated the 31st January, 1952 and the 22nd April, 1952 do not appear to reflect the prevailing market rates. If ₹. 14/15/- was the rate for manganese ore with 46.8 per cent. manganese content on the 31st January 1952, ₹. 14/10/- could not possibly be the price of manganese ore with manganese content 46.4 per cent. on the 22nd April, 1952. Although legally the two companies are different, there can be no doubt (that they are associated companies. I am unable to persuade myself that the rates mentioned in the two contracts reflect the prevailing market rates. Besides, I am not satisfied about the accuracy of the mode of conversion spoken to by Mr. O'Neill. Although the mode of conversion spoken to by Mr. O'Neill was not challenged by Mr. Mukherjee on cross-examination, on a very careful consideration of the matter I am totally unable to accept his evidence as to the mode of conversion given in his answer to question 12. There seems to be apparent arithmetical errors in the mode of conversion. Besides, the basis of conversion on the 22nd April, 1952 is not necessarily the correct basis of conversion on the 30th January, 1952.

44. In the trial court the plaintiff tendered certain issues of the Indian Trade Journal of the Government of India and also certain publications of the Bengal Chamber of Commerce to show the prices of the manganese ores prevailing during the relevant period. Mr. Niren De on behalf of the respondent expressly conceded that he could not possibly rely upon these journals and publications to prove the market rate. I think this concession is plainly right. These journals and publications incorporate certain quotations given by mercantile firms. The individual firms and companies from whose statements these compilations had been made had not been called to give evidence to prove the market rates incorporated in the journals and publications.

45. The bill of A. C. Feegrade, dated the 31st July, 1952, showing the cost of manganese ore supply from the 1st March, 1952 to the 31st March, 1952 does not assist the plaintiff in proving the market rate on the 29th February, 1952. The bill is a lump bill for the monthly supply from 1st March, 1952 to the 31st of March, 1952. It is not possible to come to a definite conclusion that the prices mentioned therein represent the market rates prevailing even on the 1st March, 1952. Besides it is common case that damages are to be assessed on the basis of the market rate prevailing on the 29-2-1952.

46. Some reliance is placed by the appellant on the answers of Sri Yagnik to questions Nos. 282 to 293 and specially his answer to question No. 289. Sri Yagnik certainly says that in January the price of manganese ore with 46 p.c.

manganese content was Rs. 90/- and that of manganese ore with 47 p.c. manganese content was Rs. 5/- more. He also said that the price in March of 1952 of manganese ore with manganese content 46 p.c. and 47 p.c. were Rs. 100/- and Rs. 105/- respectively. It is said that in answer to question No. 289 the witness was speaking of the market rate of manganese ore in February and that he said that the market rate in February, 1952 was for 46 p.c. Rs. 100/- and for 47 p.c. Rs. 105/-. The question and the answer do not explicitly say so, Bose, J. has not read this answer as an answer with regard to the market price prevailing in February, 1952. At the appellate stage, it is not possible for us to read the answer to question No. 289 as an admission of Sri Yagnik with regard to the market rate in February, 1952.

47. In answer to questions 445-460 Sri Yagnik speaks of a contract dated 1-2-1952 with J.D. Poorter Rotterdam for 2000 tons of manganese ore ? 14-15s. f.o.b. including duty. The contract has not been made an exhibit. The place where the goods were to be delivered f.o.b. does not appear from the oral evidence. We have also no reliable basis for conversion of this rate into a rate f.o.r. Barabil.

48. The only other evidence is the evidence of A. C. Feegrade taken in conjunction with the bill Ex. H. which shows that manganese ore was supplied from 1st January, 1952 to 29th February, 1952, The Bill shows that the rate charged for manganese ore with manganese content 48.8 p.c. was Rs. 105/- and for manganese ore with manganese content 46.4 p.c. was Rs. 95/-. The contract dated the 8th February, 1951 provides for the supply of manganese ore with 47/48 p.c. manganese content. On a plain reading of the contract it appears that the defendant seller could properly perform the contract by supplying manganese ore with 47 p.c. manganese content. Under the contract the seller could supply manganese ore with contents varying between 47 and 48 p.c. For non-supply of the manganese ore, the seller can be charged only with market price of manganese ore with manganese content 47 p.c. Fee-grade's bill gives rates for manganese ore with contents 48.8 and 46.4 p.c. While there is evidence to show that for each unit within the same grade roughly there is a difference of Rs. 5/-, there is no clear evidence on the record to show that the price of manganese ore with content 48.8 p.c. is the same as the price of manganese ore with manganese content 48 p.c. or that the price of the manganese ore with 46.4 p.c. manganese content is the same as the price of manganese ore with 46 p.c. manganese content. If a deduction of Rs. 9/- is made for 1.8 ore content, from the rate for manganese ore 48.8 manganese content then the price of manganese ore with 47 p.c. content would be Rs. 96/-. On the other hand, if an addition of Rs. 3/- is made for an addition of 6 p.c. manganese ore, the price of manganese ore with 47 p.c. content on the basis of the price of manganese ore with 46.4 content would be Rs. 98/-. The evidence of Sri Yagnik is that the market price in February 1952 was higher than the market price in January, 1952. He has said that the market price of manganese ore with manganese content 47 p.c. in January 1952 was Rs. 95/-. We have to make a somewhat

rough estimate of the market rate of manganese ore with manganese content 47 p.c. on the 29th February, 1952. Giving our anxious and best consideration to the matter, we assess and find the market rate of manganese ore with manganese content 47 p.c. on the 29th February, 1952 to be Rs. 97/-. In this respect we are unable to agree with the assessment of damages by Bose J. He had found the market rate at the end of February or the beginning of March, 1952 to be Rs. 105/- per ton F.O.R. Loading Station. We are unable to come to the conclusion that on the materials on the record the plaintiff has proved that the market rate of manganese ore with 47 p.c. content on the relevant date was Rs. 105/- per ton F.O.R. Loading Station.

49. The result is that appeal No. 100 of 1955 must be allowed to the extent that the damages must be reduced. We find that in respect of the Agarpara contract the plaintiff in suit No. 3433 of 1952 is entitled to damages on 2000 tons at the rate of Rs. 7/- per ton, being the difference between the market rate and the contract rate of Rs. 90/- per ton. The result is that we find that on account of damages the plaintiff in this suit is entitled to Rs. 14,000/-. Consequently, the decree passed in the suit must be reduced to the extent of Rs. 16,000/-.

50. In appeal No. 100 of 1955 Agarpara Company filed a cross-objection. In view of our finding that cross-objection must be dismissed.

51. I propose to pass separately the following orders in the two appeals.

52. In Appeal No. 45 of 1955 I propose to pass the following order:-- The appeal be dismissed with costs. Certified for two counsel.

53. In Appeal No. 100 of 1955, I propose to pass the following order :--The appeal is allowed to this extent that a decree for Rs. 114000/- be substituted in lieu of the decree for Rs. 1,30,000/-passed by the learned trial Judge. The decree of the learned trial Judge will stand modified to that extent. The rest of the decree including the decree for interest and costs is hereby affirmed. The cross-objection is dismissed.

54. Each party will bear his own costs of this appeal and of the cross-objection.

Das Gupta, C.J.

55. On a consideration of the evidence important portions of which have been mentioned in detail by my Lord in his judgment, I have come to the conclusion in agreement with him that in both the contracts, time was of the essence of the contract, that after the, 31st of December, 1951, which was the due date of performance, the buyer did not elect to avoid the contract, but on the application of the seller for an extension granted an extension, that at the conference of the 30th of January, 1952, the extension was for the one contract, to the 31st of March, 1952 and for the other, to the 29th of February, 1952 as agreed to by both sides. In my opinion, we are bound by the authority of the decision of the Privy Council in the case of AIR 1922 178 (Privy Council) to hold that the appellant being in breach, damages have to be calculated in the ordinary way on

the basis of the substituted date, namely the 31st March, 1952 and the 29th February, 1952.

56. As regards the market rate of manganese ore with 46 p.c. manganese content on the 31st March, 1952, it is clear on the evidence as discussed by my Lord that Rs. 120/- per ton would be a fair rate. The learned Judge has given a decree on the basis of Rs. 114/- per ton. That cannot be considered too high a rate and that appeal must therefore be dismissed.

57. As regards the market rate of manganese ore with manganese content 47 p.c. on the 29th February, 1952, which has to be decided for assessing the damage in the other suit, the evidence is extremely unsatisfactory. On the one hand, we have the admission of Sri Yagnik that the rate for such ore in January was Rs. 95/- per ton and that in February it was more. How much more he does not say. There was one question and answer on which some reliance was sought to be placed. That would seem to show that the rate was Rs. 105/-per ton. But month is not mentioned and I agree with my Lord that it is not permissible for us to put in the words "February, 1952" when the record does not show the month and the Judge who heard the evidence has not proceeded on the basis that that statement referred to February.

58. We are, therefore, left practically with the evidence of Feegrade as regards the rates at which he sold manganese ore of 48,8 p.c. content and 46.4 manganese content. There is hardly any index available to us from which we can calculate correctly the rate of 47 p.c. manganese ore therefrom. The best approach to accuracy which is possible on the state of the evidence is I think Rs. 97/- per ton for manganese ore with 47 p.c. manganese content on the 29th February, 1952.

59. Accordingly, I agree in the order proposed by my Lord.