

(1962) 12 PAT CK 0001

In the Patna High Court

Case No : Letters Patent Appeal No. 100 of 1958

Firm Rampratap Mahadeo Prasad and Others

APPELLANT

Vs

Sasansa Sugar Works Ltd.

RESPONDENT

Date of Decision : 03-12-1962

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 2
Contract Act, 1872 — Section 56, 73

Citation : AIR 1964 Patna 250

Hon'ble Judges : Ramratna Singh, J;Kanhaiya Singh, J

Bench : Division Bench

Advocate : Balabhadra Prasad and Hari Lal Agarwal, for the Appellant; A.B.N. Sinha and Ramananda Sinha, for the Respondent

Final Decision : Dismissed

Judgement

Ramratna Singh, J.—This appeal under the Letters Patent is by the defendants first party against the decision of a learned Single Judge of this Court, who confirmed the judgment and decree of the Subordinate Judge, Second Court, Chapra in a suit for damages for breach of a contract. Appellants 2 and 3, who have got a firm in the name and style of Rampratap Mahadeo Prasad (defendant-appellant No. 1), were Selling agents during the relevant period of gunny bags manufactured by Messrs. Katihar Jute Mills Ltd., Katihar (defendant second party). On the 30th November, 1950, there was a contract between the defendant-appellants 1 to 3 and the plaintiff respondent for the supply of 40,000 gunny bags. F.O.R. Katihar, at the rate of Rs. 210/- per hundred bags through their manager, defendant-appellant No. 4. Due to the failure on the part of the appellants to execute this contract, there was some difference between the parties; but ultimately a fresh agreement (Ext. 1) was arrived at on the 9th August, 1951, the relevant term whereof read thus :

"5. That we shall supply to you the balance quantity of 14500A Twill gunny bags of the old Katihar Jute Mills 44" x 26 1/2" x 2.5/8 lbs. being the unsupplied

"balance of the contract dated 30-11-50 in two equal instalment during the months of November and December 1951 positively at the contracted rate of Rs. 210/- (two hundred and ten) per hundred bags F. O. R. Katihar."

The appellants did not, however, supply any gunny bag in pursuance of this agreement, in spite of repeated demands, on the ground that the Mills were closed during the relevant period. There is no dispute between the parties so far.

2. Then the case of the plaintiff-respondent is that they had to purchase gunny bags of the same quality at the rate of Rs. 263 per hundred bags from Messrs. Katruka and company of Dinapore. Hence, the plaintiff claimed as damages Rs. 7,685/-, being the difference between the rate at which they had purchased the bags and the rate at which the appellants had agreed to supply the same under the aforesaid agreement dated the 9th August, 1951. The defence of the appellants was that they could not supply the gunny bags on account of the stoppage of work in the Katihar Jute Mills, and, therefore, the doctrine of frustration applied. The amount of damages claimed was disputed; and it was asserted that the plaintiff had failed to prove the necessary ingredients for measure of the damages.

3. The learned Subordinate Judge accepted the case of the plaintiff that they had purchased gunny bags at the rate of Rs. 263/- per hundred bags and held that they were entitled to the amount of damages claimed. The plea regarding the doctrine of frustration was rejected by him. Before the learned Single Judge, the only plea pressed was that the plaintiff was entitled to only a nominal damage, inasmuch as they had failed to prove the prevailing market rate; but it was rejected by the learned Single Judge, who upheld the decision of the trial Court.

4. In the present appeal, learned Advocate for the appellants pressed two points. The first point was that, though the doctrine of frustration, as laid down in Section 56 of the Indian Contract Act, did not apply to the case, the contract in question, which is a mercantile contract has to be so construed that the supply of gunny bags was to be made subject to the condition of availability of the same. It was submitted that the contract in question did not contain an absolute warranty to deliver the goods, inasmuch as the gunny bags manufactured by the said Katihar Jute Mills only had to be supplied and it had been established that the Mills were not working during the relevant period. There is, however, no substance in this contention. The alleged condition precedent is not entered in the written agreement in question. Further, the evidence on record shows that the stoppage of the Katihar Jute Mills was not an unforeseen circumstance at the time the contract in question was entered into. Defendant No. 3 Mahadeo Prasad (D. W. 1) has admitted that the Mills were closed from the 16th June, 1951 due to labour strike, though the contract in question came into existence on the 9th August, 1951. Thus, the appellants undertook to supply 14,500 gunny bags to the plaintiff respondent in two equal instalments during the months of November and December, 1951 with the full knowledge of the fact that the Mills were closed due to labour strike; and, therefore, the supply of gunny bags could not

be dependent upon the working of the Mills.

5. Learned Advocate for the appellants relied on a decision of the Calcutta High Court in *Bis-hendas Agarwalla v. Nirmala Tea Co. Ltd.* ILR 1950 Cal 458 in support of his contention. But the facts of that case were absolutely different. By a contract in writing, the defendant company, who were owners of the Nirmala Tea Estate in Assam, agreed to sell to the plaintiff, a merchant of Calcutta. "500 maunds of green tea picked and sorted of the Nirmala Tea Estate of the latter part of the season 1945-46 at 13 annas per pound. Delivery Ex-factory". During the relevant season, the defendant company could manufacture only 277 maunds of green tea from the estate, which they delivered to the plaintiff, and it was not possible to manufacture the balance, as the crop was not available. The learned Single Judge in that case dismissed the claim of the plaintiff for damages on the ground that it was a contract to supply such a quantity as might be produced from the second lot of the crop of 1945-46 grown on the particular tea estate, and that it was not a contract to sell and buy 500 maunds of a particular quality irrespective of its manufacture or growth on a particular plot of land, but the contract was for sale of the specific crop to be grown on a specific land. In that case, the learned Judge referred to a decision of the Privy Council in the case of *Hurnandrai Fulchand v. Pragdas Budhsen* 50 I A 9: AIR 1923 PC 54, which goes against the contention of the learned Advocate for the appellants in the present case. By a written contract, dated the 26th November, 1917, the respondent of that case, sold to the appellant 864 bales of dhotis as specified to be manufactured by named mills, with whom the sellers had contracted for a larger number of bales. The contract provided that the goods "are to be taken delivery of as and when the same may be received from the mills, delivery to be caused to be given in full by December 31, 1918"". The sellers delivered only part of the goods owing to the mills failing to manufacture or deliver to them the balance. It was held by Lord Sumner that the words "as and when" could not be construed as "if and when" and that the buyers were entitled to recover damages from the sellers. His Lordship further observed that the stipulation as to delivery did not limit the goods to be delivered to those supplied by the mills in 1918, nor did they make delivery by the mills condition precedent, and the sellers were not relieved of their obligation by frustration of the contract, or by any implied condition. If the contract was for a fixed quantity, then the sellers must find in the contract some matter of excuse or discharge or they must pay damages. The learned Single Judge in that case also referred to a decision of this Court in *Noor Mohamad and Others Vs. Sonu Mistri and Others*, , wherein it was observed that, where a party has not qualified his obligation under a contract, he is liable to make compensation in damages for non-performance although the performance has been rendered impracticable by some unforeseen cause beyond his control. The learned Judge, with reference to this observation, said that no one would disagree with the same. The relevant term of the contract in the present case is more favourable to the plaintiff-respondent than the term in the Privy council case, referred to above, and the observations of Lord Sumner apply with greater

force to this case. The Calcutta decision does not, therefore, apply to this case; and the contention of the learned Advocate must fail.

6. The only other point pressed was that the plaintiff were entitled to a nominal damage only, inasmuch as the prevailing market rate has not been proved. It was conceded at the bar that the provisions of Section 73 of the Indian Contract Act would apply for determination of the amount of damages to which the plaintiff may be entitled. In other words, the plaintiff could be entitled to such damages as naturally arose in the usual course of things or which the parties knew, when they made the contract, to be likely to result from the breach of the contract. Further, in estimating the damage, the means which existed for remedying the inconvenience caused to the plaintiff by non-performance of the contract must be taken into account. Where there is an available market for the goods in question, the measure of damages is prima facie to be ascertained by the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered. The market value is taken, because it is presumed to be the true value of the goods to the purchaser. The last possible moment within a specified period fixed for delivery is the time to be taken, since the seller is entitled to tender delivery till that moment. Where delivery is to be by instalments so that there is a number of successive times, fixed for delivery, each time is taken as to each instalment. For instance, if the goods were to be delivered by instalments at the end of three months, September, October and November, the measure of damages is the sum of the difference between the contract rate and the market rate of the several instalments on the respective final days for performance (See *Brown v. Muller*, (1872) 7 Ex 319). Again, where the defendant agreed with the plaintiff to purchase from him gunny bags, of which delivery was to be given at certain stated times, and the defendant failed to take delivery, the market rate to be taken is of the different dates of failure by the defendant to take delivery. *Cohen v. Gossim Nana* ILR 1 Cal 264. These principles are well settled and they were not disputed at the bar.

7. Applying these principles, we have to see what damages, if any the plaintiff respondent in the present case are entitled to get. The appellants wrote to the respondent on the 4th November 1951 Ext. A (10), in reply to the latter's letter dated the 31st October 1951, Ext. A(g), that, as the Katihar Jute Mills Ltd. were till then closed due to some unavoidable reasons and there was no stock of A twill bags there, the delivery of the respondent's goods would be made as soon as the Mills resumed working and A twill bags were manufactured. Consequently, the respondent wrote to Messrs. Katruka and Company on the 6th November, 1951, Ext. 1(k), requesting them to despatch 15,000 A twill 44" x 26 1/2" gunny bags more in addition to a contract dated the 30th July, 1951 the respondent had with that company on the same rate (that is, Rs. 263/- per hundred bags) so as to reach the respondent that month, that is, November, 1951, and the next month, that is, December 1951, in equal instalments. The first instalment of 7,500 bags was supplied by Messrs. Katruka and Company under the bill (Ext.

3(a)), dated the 29th November, 1951 and the remaining 7,500 bags were despatched on the 31st December, 1951, as appears from the bill of the date (Ext. 3(b)). The plaintiff respondent have produced oral as well as documentary-evidence to prove that they paid Messrs. Katruka and Company for these 15,000 bags at the rate of Rs. 263/- per hundred bags. Learned Advocate for the appellants submitted that, as the appellants had to supply the bags to the respondent at Katihar, the market rate prevailing at Katihar in the district of Purnea could be the only relevant market rate, and the respondent have not adduced any evidence regarding the same. But, admittedly, the appellants were one-of the selling agents of the Katihar Jute Mills and there is evidence on the record to show that Messrs. Katruka and Company of Dinapore were also selling agents of the Mills. Bashirddin Ahmad (P. W. 1), an employee of the respondent has said that the bags supplied by the company were manufactured by the Katihar Jute Mills; and this statement was not challenged in cross-examination. That Messrs. Katruka and company had also to supply the goods F. O. R. Katihar is evident from the letter dated the nth December 1951 (Ext. 1(p)) written by them to the plaintiff respondent, inasmuch as they were to despatch the gunny bags to the respondent from Katihar. In this letter, Messrs. Katruka and company said

"we are trying our best to get your bags we have stationed a special representative at the factory in order to see that the despatches are made by the first available opportunity. We are really sorry that your bags could not be released in time but due to booking difficulty arising out of the scarcity of wagons and some labour trouble in the factory the execution of your order has been delayed".

Hence, the price of Rs. 263 /.- per hundred bags was also fixed for delivery at Katihar.

8. Even assuming for the sake of arguments that Rs. 263/- per hundred bags was the market rate of Dinapore, there could not be any appreciable difference between that market rate and the market rate at Katihar, because the Court can take judicial notice of the fact that Sasamusa, where the respondent have their sugar works, is comparatively nearer to Dinapore than to Katihar. Then, the learned Advocate for the appellants submitted that only the price charged by Messrs. Katruka and company could not be the market rate of Dinapore or of Katihar; but, in the absence of any evidence to show that some other market rate prevailed at those places in November and December, 1951, there is no reason to doubt that Messrs. Katuruka and Company were charging the market rate prevailing then. It will be recalled that the appellants failed to supply the goods on the ground that the Mills had no stock of bags, even though the "contract had been entered into on the 9th August, 1951; but Messrs. Katruka and company supplied the additional 15,000 bags to the plaintiff respondent from the godown of the Mills at the rate agreed upon in July, 1951 without taking any undue advantage of the respondent's difficulty on the failure of the

appellants to execute the contract in question. Though the appellants denied in paragraph 14 of the written statement that the rate was Rs. 263/- per hundred bags during November and December, 1951, or that the plaintiff purchased bags in those months at that rate, they did not adduce any reliable evidence in support of this denial or to show that there was any other market rate prevailing at the time. Of course, they examined Baluram Goel (D. W. 2) of Gorakhpur, who produced two bills showing sale of a twill bags of the same size at the rate of Rs. 202/- per hundred bags in November, 1951 and at the rate of Rs. 204/- per hundred bags in December, 1951 from Nathmul Jain of Kanpur; but he admitted that the bags which he purchased through these bills were manufactured by a Jute Mill of Kanpur in Uttar Pradesh, which is far away from Katihar in the State of Bihar. Hence, his evidence is of no help. It is also obvious that the failure of the appellants to supply sunny bags of the same quality from Kanpur Mill or any other Mills shows that the quality of the gunny bags prepared by the Katihar Jute Mills was superior and, therefore, the price thereof was higher. The respondent has also produced several letters from Arora and Sehgal Ltd. of Calcutta containing quotations which show that the market rate of such gunny bags was much more than Rs. 263/- per hundred bags in November and December, 1951. In the circumstances, it must be held that Rs. 2637.- Per hundred bags was the market price in November and December, 1951 of A twill gunny bags manufactured by the Katihar Jute Mills and the plaintiff-respondent paid the price of 15,000 bags at this rate to Messrs, Katruka and Company.

9. Learned Advocate for the appellants also submitted that the plaintiff did not aver in the plaint the market rate prevailing at the time. It is true that there is no specific allegation regarding the market rate; but pleadings in this country have to be construed liberally, and the allegation in the plaint that, on the expression by the appellants of their inability to supply the bags to the respondent, the latter was compelled to purchase similar bags at the rate of Rs. 263/- per hundred bags indicates, by implication, that that was the market rate prevailing in November and December, 1951.

10. Learned Advocate referred to certain decisions in support of his argument that, in the absence of a clear evidence about the market rate prevailing at Katihar, the plaintiff were entitled to only nominal damages; but none of the decisions really supports him. In the case of AIR 1932 196 (Privy Council) , a contract of November 9, 1919, provided for the sale of 200 maunds of indigo seed at Rs. 22/- per maund F.O.R., Purnea railway station, delivery to be made in April, 1920. The seller having failed to deliver, the buyer sued for damages. The High Court held that, as there was no market for indigo seed at or near Purnea, the damages should be based upon the difference between the price at which the buyer on November 14, 1919 had resold for delivery in April and the contract price. The evidence showed that Cawnpore, 300 or 400 miles from Purnea, was the central market for indigo seed to which growers at Purnea and purchasers resorted. It was held that the damages should be based upon the market price at Cawnpur on April 30, 1920; even if the High Court had been right in holding that

there was no relevant market price what was material was the value of such goods at the rate of the breach, not the price ruling in November, 1919, for goods deliverable in April 1920. In *Sally Wertheim v. Chicoutimi Pulp Co.* (1911) AC 301, according to the contract in question, delivery of the goods had to be made at a place known as Chicoutimi. On the seller's making delivering the goods, the buyer purchased similar goods at Manchester at a price higher than the contract price, and the difference between the contract price and the market price at Manchester was allowed. It will be noticed that the market price prevailing at a different place, namely, Manchester, was taken into consideration in determining the damages. In *Ismail Salt and Sons v. Wilson and Co.* ILR 41 Mad 709: (AIR 1919 Mad 1053), it was observed that, where there are no materials put forward by the plaintiff to indicate what it would have cost him to obtain similar goods in the cheapest manner, it may be that only nominal damages would have to be allowed. But at the same time it was observed that, where there are some materials, the Court should as a jury try to arrive at the cost at which the plaintiff could have got other similar goods for the contracted rate of delivery and give him the difference, if any, between, that and the contracted price. This observation, read as a whole, does not support the contention of the learned Advocate for the appellants because, as shown already, there are some materials in the present case on the basis of which the damage suffered by the plaintiff can be determined. There is another important observation in this case. It reads thus

"It is not the nearest market that always governs but the place where, having regard to all the facts of a particular case, the plaintiff would without any material inconvenience to himself procure the goods in the manner that would throw the least amount of hardship on the other party".

This observation supports the conduct of the plaintiff-respondent in the present case, inasmuch as the plaintiff procured the gunny bags from Messrs, Katruka and Company without any material inconvenience to themselves and without throwing the risk of any hardship on the appellants.

11. In *Seth Bikhraj Jaipuria Vs. Union of India (UOI)*, , of course, their Lordships of the Supreme Court upheld the decision of the High Court that the appellant failed to prove that he was entitled to compensation for breach of contract because there was no evidence regarding the ruling market rate on the relevant date. But in this case the only evidence adduced on behalf of the appellant was the controlled price list of similar goods determined for the district of Shaha-bad under a statutory notification; the appellants had obviously the option of delivering the goods at any railway station F.O.R. in the province of Bihar, and there was no evidence on record whether similar notifications had been issued by the authorities in other districts of Bihar. Further, their Lordships observed that, if the goods were supplied in the district of Shahabad, the appellant could evidently not seek to recover price of the goods supplied and accepted on and after the relevant date at rates exceeding those fixed by the notification; for, by the issue

of the control order, on the contract, must be deemed to be superimposed the condition that foodgrains shall be sold only at rates specified therein. None of these decisions, therefore, helps the appellants; rather some of them support the method adopted by me for determining the market rate. Hence, this contention of the learned Advocate also fails.

12. In the result, the appeal fails and is dismissed with costs.

Kanhaiya Singh, J.

13. I agree.