

(1916) 02 CAL CK 0003
In the Calcutta High Court

Lakurka Coal Company, Ltd.

APPELLANT

Vs

Jumnadass Bhagwandass

RESPONDENT

Date of Decision : 11-02-1916

Acts Referred:

Citation : 33 Ind. Cas. 838

Hon'ble Judges : Lancelot Sanderson, C.J.; John Woodroffe, J.; Asutosh Mookerjee, J

Bench : Full Bench

Judgement

Lancelot Sanderson, C.J.—This is an appeal by the Colliery Company from a judgment of Chaudhuri J., delivered on 14th April 1915 by which he gave judgment for the plaintiff for Rs. 29,224-3-3 with interest. The claim was based on a contract whereby the plaintiff agreed to purchase from the Colliery Company 6,000 tons of Rubble at Rs. 1-6 and 4,000 tons of Dust at Rs. 1-4 per ton to be delivered from November 1911 to April 1912. It is agreed that the contract quantity has not been delivered and the defendants' contention was that the non-delivery was due to the failure of the supplies of Railway wagons for the conveyance of the coal, for which the defendants allege they were not responsible.

2. It appeared that the only method of removing the coal from the colliery was by Railway wagons from the colliery siding, that the colliery had no wagons of their own available for the delivery of coal to their customers but it was the practice for the Colliery Company, in accordance with instructions from their customers, to indent upon the Railway Company for the wagons. Such indents were made for all their buyers according to despatching instructions and not separately for each buyer. The plaintiffs, in addition to other business carried on by them, were dealers in coal and had been in that trade for some seven or eight years at the date of the contract.

3. On the 6th September 1911, the plaintiffs wrote to H.V. Low & Co., who are the Managing Agents in Calcutta for the Colliery Company, asking them to quote

the actual selling rate for B.B. Rubble, from the Lakurka Company and stating that if the rate proved agreeable, they intended accepting the entire stock of B.B. Rubble from the Lakurka Colliery. Apparently a rate was quoted, for on the 12th September 1911 the plaintiffs again wrote a letter to Low & Co., see letter (page 11):

We are prepared to accept your rate for Lakurka B.B. Rubble at Rs. 1-6 per ton as referred to in your letter of 11th September 1911, and beg to state that if you feel agreed to enter into a contract as to supplying us all the B.B. Rubble that is lying in your stock and will be raised till March 1912 and that no other men will be given supply of B.B. Rubble from your Lakurka Colliery except ourselves and that regular supplies will be arranged against our indents for wagons, we are quite prepared to deposit amount to your satisfaction either at yours or at your office as you please. We beg to add that we shall commence taking delivery from October and with slow progress till December but the last three months from January to March 1912, ours will be plenty of orders to hand and those you are to please arrange to give prompt effect to.

Also please let us know as to what will be the probable quantity including the B.B. Rubble lying in stock and that will be raised till March 1912. Please oblige us by your kindly quoting the actual rate for Dust from your Lakurka Colliery by return. A favourable reply will highly oblige. "P.S. The deposit money must be the one as current in all other offices.

4. No answer was sent to this and accordingly the plaintiffs wrote again on the 16th September 1911 (page 12):

We beg to invite your kind attention to our letter No. 412 of 12th September 1911 and shall feel glad to have an early reply thereto.

5. Then an interview took place on 15th October 1911 at the Colliery at which Mr. Castles, the Colliery Manager, Mr. Pattinson, a partner in Low & Co., Mr. Moore and two of the partners in the plaintiffs' firm were present, and an agreement was evidently arrived at between the parties for on the same day a letter was sent from the Lakurka Colliery signed Low & Co. to the following effect:

With reference to our conversation you may take delivery of 6,000 tons of Rubble at Rs. 1-6 (Rupee one and annas six) and 4,000 tons of Dust at Rs. 1-4-0 (Rupee one and annas four) per ton from November to April, cash with order and subject to a deposit of Rs. 1,000 (Rupees one thousand) Government paper as security of due fulfillment of this contract.

6. On the 9th October the plaintiffs replied (page 13):

With reference to your letter No. 948 of 15th October 1911 in connection with the purchase of B.B. Rubble and Dust from Lakurka and that of 15th instant regarding the purchase of B.B. Rubble from your Auckland Colliery, we beg to state that we agree to accept the quantities as offered by you in your above and that the money towards the security deposit shall be sent you after the Kali Puja

Festival that takes place on the 21st next, as our Head Office at Ranigunge is also closed for the said period.

7. This was directed to Low & Co. at Calcutta. Low & Co., writing from Calcutta, replied on the 20th (page 14):

With reference to your letter dated 19th instant, we have no knowledge of a letter No. 948 dated 15th October 1911, nor of a letter regarding the sale of Auckland B. 13. Rubble.

We must see these letters and ascertain what quantities and rates were offered you before going further into the matter.

8. Obviously they had not been advised of the contract made at the Colliery and evidenced by the letters of the 15th and 19th October 1911. Consequently the plaintiffs wrote on 26th (page, 14):

With reference to your favour dated 20th instant, we beg to send you herewith copies of your letters Nos. 948 of 15th October 1911 regarding sale of 6,000 tons of B.B. Rubble and 4,000 tons of Dust from Lakurka Colliery at Rs. 1-5 and Rs. 1-4 per ton respectively and that dated 15th instant regarding disposal of 4,000 tons of B.B. Rubble from your Auckland Colliery at Re. 1 per ton for ready references. To make it more plain we beg to remind you that the former letter was written out at 10 in the morning in the Lakurka Colliery Office while the latter at the Lakurka Colliery Manager's Bungalow at 4 p. M. in the evening. Further we beg to add that you did offer us above-mentioned rates and we agreed to accept them.

Herewith we beg to send you a hundi valued Rs. 1,000 (Rupees one thousand only) on production of which at our Calcutta Office Lalchand Nopechand, 180 Harrison Road, the total value will be paid in, in exchange, which please keep with you in deposit as security towards the proposed contract on the disposal of the B.B. Rubble and Dust. Please be good enough to acknowledge a formal receipt for the hundi, or the money you get in exchange with it at an early date and issue necessary instructions to your respective Collieries to effect prompt deliveries of stuff against our requisitions. Thanking you in anticipation.

9. Low & Co. replied on the 27th (page 15):

We are in receipt of your letter No. 883 dated 26th instant enclosing copies of our letters No. 948 and No. nil dated 15th instant regarding the sale of 6,000 tons of Lakurka B.B. Rubble Coal, 4,000 tons of Lakurka Dust Coal and 4,000 tons of Auckland B.B. Rubble Coal to you at Rs. 1-6, Rs. 1-4 and Re. 1 per ton respectively, which are in order.

On your hundi amounting to Rs. 1,000 security for the due fulfillment of the Contract being cashed our formal receipt will be handed to your Calcutta friends and we will hold ourselves in readiness to deal with your despatching instructions.

10. In my judgment, even if it had not been already made at the interview, the

contract was concluded on the 19th by the letter which the plaintiffs sent accepting the terms offered by the defendants in their letter of the 15th, and this is the contract which the Court has to construe in this case.

11. It is alleged by the defendants that after the contract had been made and during the latter part of the month of November, a shortage of Railway wagons began to be felt, partly owing to the Durbar and partly owing to trade conditions, and that Railway Companies did not supply sufficient wagons to the Colliery to enable the Company to meet the requisitions of the Company's customers and that consequently the deliveries of the quantities asked for by the plaintiffs could not be delivered. Assuming that there was such a shortage of wagons and that it was the cause of the non-delivery the first question to be considered is whether the defendants can be held liable for such shortage of wagons. The learned Judge has held that it was part of the contract that the defendants should provide the wagons necessary for the delivery of the coal to the plaintiffs, and consequently that the defendants are liable for the failure to deliver. The contract as contained in the letters above mentioned has no reference to the supply of wagons, and it is not suggested that the arrangement made at the interview of the 15th October 1911 carried the matter any further.

12. If, therefore, there was an undertaking by the defendants to provide the wagons, it must be an implied undertaking.

13. The principle, on which a stipulation or undertaking is to be implied in a written contract, was laid down by Bowen, L.J., in *The Moorcock* 14 P.D. 64 : 58 L.J.P. 73 : 60 L.T. 654 : 37 W.B. 439 : 6 Ap. M.C. 373 where he says: "An implied warranty, or, as it is called, a covenant-in-law, as distinguished from an express contract or express warranty, really is in all cases founded on the presumed intention of the parties", and upon reason. The implication which the law draws from what must obviously have been the intention of the parties, the law draws with the object of giving efficacy to the transaction and preventing such a failure of consideration as cannot have been within the contemplation of either side; and I believe if one were to take all the cases, and they are many, of implied warranties or covenants-in-law, it will be found that in all of them the law is raising an implication from the presumed intention of the parties with the object of giving to the transaction such efficacy as both parties must have intended that at all events it should have. In business transactions such as this, what the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended at all events by both parties who are businessmen; not to impose on one side all the perils of the transaction, or to emancipate One side from all the chances of failure, but to make each party promise in law as much, at all events, as it must have been in the contemplation of both parties that he should be responsible for in respect of those perils or chances." And this principle was followed down by Lord Esher in *Hamlyn v. Wood* (1891) 2 Q.B. 488 : CO L.J.Q.B. 734 : 65 L.T. 286 : 40 W.B. 24 and the passage to which I am about to refer is at page 491, where he says: "A large number of

cases have been cited, in some of Which the Court implied a stipulation, and in others refused to do so. In my opinion, it is useless to cite such cases, so far as they merely show that in the particular case an implication was or was not made. The only use of citing such cases is where they lay down the rule as to such implications, upon which the Court will act in dealing with the particular case before it. I have for long time understood that rule to be that the Court has no right to imply in a written contract any such stipulation, unless, on considering the terms of the contract in a reasonable and business manner, an implication necessarily arises that the parties must have intended that the suggested stipulation should exist. It is not enough to say that it would be a reasonable thing to make such an implication. It must be a necessary implication in the sense that I have mentioned." Then he refers to the passage of Lord Justice Bowen which I have already quoted.

14. The question, therefore, is, can the Court in considering this contract in a reasonable and business manner come to the conclusion that an implication necessarily arises that it was the intention of the parties that the defendants should undertake the absolute obligation to provide the wagons and be responsible for any failure of supply, even though they had taken all reasonable steps to procure them and the Railway Companies had failed to supply them?

15. It is admitted by the defendants that an undertaking to indent for the wagons and to load the coal into the wagons when supplied by the Railway Companies, must be implied. It was the regular practice and course of business for the customers to send their requisitions to the Colliery and for the Colliery Company to indent for wagons in accordance therewith. It was indeed stated that as a matter of practice and course of business the Railway Companies only received indents from the Colliery Companies. Further, the rate mentioned in the contract included charges for moving the Rubble and Dust from the Colliery to the siding and loading it into the wagons. Therefore, it must necessarily be implied that there was a duty on the defendants to indent for wagons in accordance with the plaintiffs' requisitions and load them when supplied.

16. But I am unable to say that the further obligation mentioned above, viz., that the defendants would procure the wagons and would be responsible for any failure to supply, must necessarily be implied. In the first place, the form of the contract is "you may take delivery of 6,000 tons", etc., which would point to a taking of delivery in the ordinary way, viz., by delivering the coal into wagons at the Colliery siding. So far as it goes, it would indicate a limitation of the defendants' liability to loading the coal into wagons when supplied. In the second place, the Indian Mining Association form of contract, which I understand was the ordinary form of brokers' contract in the coal trade, was put in evidence and this shows that such contracts are made subject to supply of wagons for which the sellers "shall indent on the Railway Company upon receipt of buyer's despatching instructions."

17. There was no evidence or suggestion that the rate mentioned in the contract

was more than the market rate and it seems to me strange that the defendants should without extra remuneration have taken upon themselves an obligation, not usually undertaken in such contracts, viz., an absolute liability to provide the wagons, over the supply of which they had no control except by way of indenting upon the Railway Companies.

18. To make such an implication would, in my judgment, be in the words of Bowen, L.J., "to impose on one side all the perils of the transaction," or "to emancipate one side from all the chances of failure," and I cannot come to the conclusion that such a promise must have been in the contemplation of the parties.

19. This view of the case is borne out by the subsequent correspondence, which was voluminous. It is clear that the plaintiffs were complaining of the non-delivery of the coal requisitioned by them, but an examination of the correspondence shows that they did not assert the absolute obligation of the defendants now relied upon until the attorney's letter of 8th May 1912, but that when writing themselves what they were insisting upon was that they were not receiving a proper proportion of the wagons which were in fact supplied by the Railway Companies.

20. On the other hand, when the complaint as to non-delivery was first made, viz., by the plaintiffs' letter of 22nd November 1911, the defendants replied on the 23rd alleging the shortage of wagons as an excuse. If there had been the absolute obligation on the defendants now contended for, one might have expected the plaintiffs to have stated at once that the shortage was no excuse for non-delivery and that; they should hold the defendants to their contract. On the contrary, by their letter of the 29th November 1911, they seem to accept the position that the defendants were excused from delivering as regards one Railway where there was a shortage, but alleged that on another Railway, viz., the B.N. Railway, there was not the same excuse.

21. On the 30th November the defendants wrote:

Dear Sirs,

We are in receipt of your letter dated 29th instant and regret the delay in executing your orders, but all buyers of coal are experiencing the same trouble and we are doing our best at the Collieries to despatch what wagons are given us proportionately to our buyers.

We have written to the Colliery Managers both at Lakurka and Auckland, asking them to give special attention to your orders.

22. To this proposition of proportional distribution there was no reply, and the plaintiffs did not rely upon the absolute right to have the wagons procured by the defendants for the delivery of their coal.

23. Again on the 15th and 16th January 1912 (page 28) the defendants wrote:

Dear Sirs,

In reply to your letter dated 12th instant we regret the delay in dealing with your orders, which is, as you know, due to small supplies of wagons. Mr. Burt is giving special attention to your orders and will reserve as many wagons for your requirements as he reasonably can.

16th January 1912.

Dear Sirs,

We are in receipt of your letter of the 15th instant and have written strongly to the Colliery Manager regarding your requirements and trust you will have no further cause to complain of short supplies.

24. There was a reply to that letter on the 18th January by the plaintiffs (page 29), who write:

18th January 1912.

Dear Sirs,

We are glad to note the contents of your favour dated 16th instant and, trust that henceforth we may have our order to a certain extent complied with by Lakurka Colliery Manager but we would at the same time suggest of your kindly transferring same 4,000 or 5,000 tons B.B. Rubble or Dust from Lakurka Colliery to your Gurudpore Colliery where we learn slack coal is lying in abundance, or from any other Collieries where you may feel convenient. In the event of your complying with the request, we are confident that we may have supplies of fair proportion of wagons. Awaiting a reply by return.

25. Then again on the 30th January the defendants wrote (page 32):

Dear Sirs,

In reply to your letter dated 29th instant we have to say that you are receiving a proportionate number of the few wagons supplied to Colliery. Colliery Manager has been instructed to give your orders as much attention as possible. We have already replied to your letter dated 23rd instant. All cash and orders must be submitted to this office whence the orders will be passed on to Colliery for execution. Colliery has no authority to deal with orders.

26. Then on the 13th of February they wrote (page 40):

Dear Sirs,

With reference to your No. 1881 dated 12th instant we beg to say that wagon supplies are now worse than ever they have been before. Akra and South Gobindpur have been unable to supply any Rubble or Dust to you, as practically no wagons for public orders have been supplied to them. Auckland is in a similar position. We are doing all we can under the circumstances and are doing our best

to carry out your contract as far as circumstances permit, and your almost daily letters asking(sic) supplies of wagons, which it ought to (sic) to you we are unable to obtain, are quite unnecessary.

27. Then on the 21st of March they wrote (page 46):

Dear Sirs,

We are in receipt of your letter No. 2297 dated 20th March 1912 and are asking our Colliery Manager to increase deliveries to you.

With regard to your claim we do not admit liability. The shortness of wagons has interfered not only with the supply of coal but with the whole work at the Colliery. You have been at the Colliery frequently of late and must have seen for yourself that there is no room to stock and no room to conduct screwing operations. We are giving you a share of our wagons so far as the deplorable conditions at the Colliery will allow, and we must, therefore, ask you to give us time to complete the contract.

28. Then on the 3rd of April they wrote (page 48):

Dear Sirs,

We are in receipt of your letter dated 2nd instant and in reply have to say that you are receiving a fair proportion of the wagons not required for Government orders. There are other buyers with running contracts with Colliery as well as yourself and you cannot expect to receive supplies to the complete exclusion of other customers.

29. There was no reply to this. The plaintiffs wrote on the 23rd April 1912 (page 50):

Dear Sirs,

We beg to state that we are now quite tired of and disgusted with writing to you about increasing supplies, but without any effect whatever. This month we have received supplies both from Auckland and Lakurka Collieries which are equally poor. This sort of supplies as has been continued for months together will not complete the contracted quantity. We shall, however, in reference to your letter dated 21st ultimo, be glad to extend the period up to 15th May 1912, should you feel glad to arrange to complete our contract during the said period. But as we anticipate that you will still fail to act up to your promise as you have already done, we shall have to adopt measures for the same.

30. To which the letter of the defendants on the 1st of May was an answer in these terms (page. 51)--:

Dear Sirs,

6,000 tons Lakurka B.B. Rubble.

4,000 tons Dust.

4,000 tons Auckland B.B. Rubble.

With reference to your above contracts we are prepared to continue delivery until their completion under the following conditions.

We will deliver during the remainder of this season such quantities of Dust and B.B. Rubble as there are wagons available for. Any quantities remaining not despatched to be carried forward for delivery next season subject to wagon supplies.

Kindly let us know if you agree to the above otherwise the contract is finished.

31. I have not referred to all the letters which were read many times in the course of the argument. To my mind the correspondence is inconsistent with the absolute obligation now contended for by the plaintiffs, viz., that the defendants were under a liability to procure the necessary wagons, though it is quite consistent with the case that the plaintiffs were entitled to a certain proportion of the wagons supplied by the Railway Companies, and shows that they were complaining that they were not receiving a proper proportion.

32. In my judgment, therefore, there was no absolute obligation upon the defendants to procure the wagons necessary for the delivery of the coal and dust to the plaintiffs, but that in this respect the defendants' liability "was limited to indenting for the wagons and loading the coal when they were supplied by the Railway Company.

33. The question, then, arises whether there was such shortage of wagons as justified the defendants in delivering to the plaintiffs about 1,372 tons of B.B. Rubble and about 770 tons of Dust Coal during the specified time instead of 6,000 tons and 4,000 respectively.

34. I do not think there is any question that if the defendants had allocated all the wagons, which they received from the Railway Companies, to the plaintiffs, there would have been more than sufficient wagons for delivery of the whole contract quantity, but on the other hand it is equally clear that if the Company's indents for the whole of their customers are taken into consideration, such indents were not fully complied with, and only a small proportion of wagons indented for was in fact sent, and the defendants contend that inasmuch as the known practice was for the Colliery to indent for all its customers and not for any particular customer, the only obligation upon the defendants on the happening of the shortage was to distribute the wagons actually received among the buyers for whom the defendants had indented, and that in making such distribution not only must the orders of all the buyers be considered, but also the maintenance of the working of the Colliery; that there was no obligation to distribute the wagons on any standard of fairness unless such standard means taking into consideration not only the number of wagons ordered by the various buyers and the number supplied, but also the necessities of the Colliery and the course of business as

regards the preferment of certain classes of orders.

35. It was farther contended that the above-mentioned obligation did not arise out of the original contract of purchase and sale, but upon a contingency not contemplated by the parties and out of a contract of agency implied from the course of business and from their indenting for wagons.

36. I think, therefore, the case stands thus: There was an obligation on the defendants to indent for wagons in accordance with the plaintiffs' requirements; though the plaintiffs gave up making, regular and specific requisitions for wagons in accordance with the request of the defendants, they clearly intimated that they wanted sufficient consignments to complete the delivery within the contract time; the defendants did indent for sufficient wagons to complete the delivery, they did in fact get sufficient wagons, but such wagons were supplied in respect of indents sent by the defendants on behalf of other customers as well as the plaintiffs.

37. Under these circumstances, the plaintiffs allege that they are entitled to judgment. On the (sic) hand, the defendants say that by reason (sic) implied agreement arising out of the c(sic) of business the defendants were only bound to give the plaintiffs a proportion of the wagons actually received, and that they gave them such proportion.

38. This view of the case has not really been considered in the Court of first instance, for inasmuch as the learned Judge held that the defendants were under the absolute liability to provide the wagons, the last mentioned questions did not arise.

39. It is true that the learned Judge had held that the defendants had "successfully shown that there was not any inequitable distribution of the wagons received" but this was, in view of his previous decision, "obiter dictum" and his finding on this point has been challenged by the learned Counsel for the plaintiffs.

40. I think, therefore, this appeal should be allowed and the case remitted to the original side for the above-mentioned matters to be tried. I am not certain whether any amendment of the pleadings will be necessary; but in my judgment, if any amendment is necessary leave should be given to allow the parties to raise the issues which arise in view of the construction which I have placed upon the contract.

41. I have purposely abstained from expressing any opinion as to the merits of any of the matters which will have to be investigated before the learned Judge of the Original Side, so as to avoid any chance of prejudice to the one side or the other; but I wish to make it clear, as far as my own judgment is concerned, that the only matter I have decided is the construction of the contract, and that all other matters, as for instance, the allegation that the real cause of the delay was not shortage of wagons but shortage of Coal and Dust, are open to the plaintiffs, and that if the question of proportional distribution becomes material, the

plaintiffs should not be precluded by the above-mentioned finding of the learned Judge in that respect, and that this matter also must be regarded as fully open to the plaintiffs. I think the appeal should be allowed with costs, and the costs of the first trial should be left to the discretion of the Judge who tries the case.

Woodroffe, J.

42. This appeal raises several questions of difficulty owing to the absence of a formal contract and the paucity of evidence regarding its making, the happening of a contingency for which no express provision was made, which provision must be made out from the course of business. It raises also a number of questions which it is not possible to here deal with as they have not been the subject of pleading, sufficiently specific issues and evidence and which have not been dealt with in the judgment, which proceeds upon the single point of the construction of the contract. The suit is one for damages for breach of contract. It is for the plaintiff to establish both "the contract and its breach. Negotiations opened with an enquiry made in a letter of 6th September 1911. A reply was given by the Colliery Agents on the 11th September 1911, which is not produce, and replied to by the letter of the plaintiffs of 12th September 1911 and 16th September 1911. Then on the 15th October, according to the evidence of the plaintiff Purusuttamdas, a contract was entered into at the Colliery with Mr. Pattinson, a member of the firm of Messrs. Low & Co., the Colliery Agents. His evidence is that it was arranged that 6,000 tons of Rubble and 4,000 tons of Dust from the Lakurka Colliery would be supplied at Rs. 1-6 and Rs. 1-4 between November 1911 and April 1912. I quote the words of the witness. This oral conversation is said to have been confirmed by a letter written at the Colliery, dated 15th October 1911, which, states "You may take delivery of 6,000 tons, etc." This letter was accepted by another of 19th October 1911 written to the Calcutta firm, who replied on the 20th October 1911 that they had no knowledge of the matter. On the 26th October 1911 it was explained to the latter that the contract was entered into at the Colliery, to which Messrs. Low & Co., replied accepting the position and declaring that they held themselves in readiness to deal with despatching instructions. If the contract is to be found only in the oral evidence above referred to, and the letters dated 15th October 1911 and 19th October 1911, then according to the contract it would appear that delivery was to be at the defendants' Colliery from which it was to be removed apparently by the plaintiff, since nothing is said about the despatch of coal by the Colliery. Such removal depended on the question whether railway wagons were available for the purpose. Nothing is said as to who was to get the wagons necessary or upon whom the loss would fall in the event of the Railway Company being unable to supply wagons. It is, however, common ground that the contract included terms to be gathered from the course of business. It is admitted that according to such course of business the Company was under an obligation to indent for the wagons and if the wagons asked for were fully supplied, to assign them to the purchasers on whose behalf the indent was made, and then to load the wagons without further charge. The defence is that though not bound so to do by the

express terms of the contract, yet by the course of business the Colliery on behalf of the buyers indented for wagons and did not get the sufficient quantity, with the result that the coal was not delivered. Two questions arise on this, viz., was there in fact a shortage of wagons, and if so, was the defendant Company liable therefor? That is, did such shortage to the extent it existed exonerate them? The case for the plaintiff on the second point has been (and this has been accepted by the learned Judge) that the Colliery Company absolutely undertook to get the wagons and made themselves liable for the risk that wagons might not be available. In this view of the case it was not necessary for him to decide any other of the matters argued before us in appeal. I am unable to accept this view of the case for the following reasons. The express contract is silent on the point and no usage or course of business is established which fines such a liability on the defendant. The argument in effect is an inference of such liability from other facts. The learned Judge finds that it was a well-understood term of the contract, though not expressed. There is no oral evidence that it was so agreed and the contract as set out in the plaint is as stated in the letters there cited. The learned Judge, however, relies on the correspondence. The question of the absolute liability of the defendant Company to supply wagons was not there dealt with, but there is an admission there that the defendant Company was obliged to give the plaintiff a fair share of the wagons actually supplied and an apparent admission that the plaintiff had not had such a share. Reliance has been placed on the fact that the defendant Company did not say that they had no liability whatever in respect of the wagons.. But this question of the absolute liability of the defendant Company to supply the wagons does not seem to have been present to the mind of the writers, and did not come up Until they were written to by the attorney for the plaintiff. For, on the other hand, it may be asked why did not the plaintiffs in their earlier letters write and say that they were not concerned with the defendant Company's difficulties about the wagons, for the latter were under an absolute obligation to supply wagons and were liable, whether the Railway Company were able to supply the wagons or not. Nor does it seem likely that without extra remuneration the Company would undertake to supply wagons. It is said that they made enquiries of the Railway and were satisfied that there was no risk, the shortage being temporary only. A letter of the 17th October 1911 is relied upon on this point as also the defendants' oral evidence. It would appear from the letter of the 20th October 1911 that the writer of the former letter was unaware of this contract. The fact, however, that the supply of wagons may be taken into account in making contracts, does not establish an understanding by the Company that they are liable for the wagon supply. Such enquiries are necessary for the carrying on of the business. Thus the Company could not fairly at one and the same time assert its non-liability for wagon supply and allow others to contract with it, without knowing whether such supply was sufficient to enable such others to get the benefit of such contracts. Further, we have it that at the time of this contract there was in existence a form of mining contract which was subject to the supply of wagons. It is Said that the fact that it was not adopted in this case indicates an intention to contract without

reference to any condition as to the existence of railway wagons. But this circumstance is explained by the fact that the contract was orally entered into at the Colliery. Had it been entered into in Calcutta it is probable that the general mining contract would have been adopted. It is argued that because it is established that according to practice the Colliery alone can indent for wagons, this shows that the obligation for supply is on the latter. This does not follow. What does follow in such case is that there is an obligation on the Colliery to indent. This, however, is admitted. But because the Colliery is under the circumstances bound to indent, it does not follow, in the absence of an express provision or proved course of business to that effect, that the Colliery is to be held liable if on indenting it is unable to get wagons. The statement in the judgment that Mr. Burt fixed these contracts on the understanding that he was to get the wagons, is obviously ambiguous.

43. My conclusion then on this part of the case is that assuming (without deciding) that there was in fact a deficiency in the wagon supply, the defendant Company is not liable on their contract in respect of such assumed deficiency. Thus if we had to deal only with a contract for delivery of 10,000 tons of coal by the defendant to the plaintiff and there were no other contracts entered into by the defendant Company and wagons were supplied by the Railway Company sufficient to carry 5,000 tons only, the defendant Company would not, in my view of the case, be responsible for damages for non-delivery of these 5,000 tons because a third party, the Railway Company, had not supplied the wagons necessary for the purpose. In short, the contract was subject to wagon supply. The Company have no wagons of their own.

44. But this finding does not dispose of the suit, which is for damages for breach of contract and which the defendant Company contests on the ground that they could not carry it out in its totality on account of deficiency in the number of wagons supplied by the Railway. Its only effect is to negative the plaintiffs' contention that deficiency in wagon supply was no defence.

45. The question still remains for determination whether there was in fact a deficiency in supply of wagons which exonerates the defendant Company from paying damages for goods admittedly not delivered, and if so, to what extent. It is admitted that between the 1st November and 30th April 1912, the number of wagons supplied to the Company was 2,300. The plaintiffs say it was more. It is not contested that about 600 wagons only were necessary for the carriage of the plaintiffs' coal. The plaintiffs on this contend that there was no shortage of wagons as alleged. If they are right in this, they are entitled to succeed notwithstanding that the first point here dealt with, viz., the construction of the contract is decided against them. It being admitted that according to the course of business the Company undertook and was bound to indent for and did indent for wagons and got wagons in excess of the requirements of the plaintiff, it is upon the defendant Company to show what they allege that there was nevertheless a shortage of wagons which exonerated them from the carrying out

of their contract with the plaintiff further than they have done. It is true that Chaudhuri, J., has held that there was a shortage and that the plaintiff received a fair proportion of the wagons available. But having regard to his finding as to the construction of the contract this decision was not necessary, and doubtless for this cause was given without any statement of reasons and without consideration of points which have been argued before us in appeal, but do not seem to have been present to the mind of the learned Judge Nor are the facts upon this issue as to the shortage of wagons sufficient for a decision, nor are such findings as are to be found in the judgment sufficient. What the standard of equitable distribution is, the learned Judge does not state. The case must, therefore, be remanded to the learned Judge for the determination of the issue whether there was in fact a shortage in the wagon supply. If there was not, the plaintiff succeeds, if there was such a shortage it must be determined what the shortage was, and the extent to which it exonerated the defendant Company from carrying out its contract. The first question to be considered on this issue is whether in ascertaining such shortage, it is open to the Company to consider other contracts of other purchasers which have to be fulfilled, and if so, what contracts may be so taken into account. According to the respondents they are not concerned at all with the fact that the Company entered into other contracts This the appellants deny, saving that as the indents for wagons were on behalf of all purchasers they had to be distributed amongst the latter. The question further remains to be determined what contracts (if any) must be so considered, and in what way: and in particular whether contracts made subsequently to that of the plaintiff should not be excluded. For it may be argued that in entering into such subsequent contracts the defendant Company to that extent precluded themselves from carrying out their contracts with the plaintiffs. Whether this be a good contention has to be decided. Further, on this point it must be considered whether the defendant Company are entitled to give preferential treatment to loco coal, steam coal and slack. For they claim to be entitled to load the wagons first with steam coal and slack and to give to the plaintiff a share only of the wagons left over. Lastly, after considering these and any other points which may arise on this issue, it will be necessary to determine whether the plaintiffs were entitled to a fair proportion of the wagons supplied, and if so, what was the fair proportion of wagons to which the plaintiffs were so entitled, and whether they did, in effect, get them, and if not, to what damages they are entitled in respect of coal which was not, but which should have been, delivered had the plaintiffs received the fair proportion of wagons to which they were entitled.

46. There is, in my opinion, no force in the contention that the defendant Company are not liable because they in fact supplied the wagons for which they received despatching orders. For it is shown that the plaintiffs were told it was no use giving further orders and that delivery would be given as and when wagons were available. There is, however, a further issue which has still to be tried, viz., whether the contract quantity of B.B. Rubble was ready for delivery, and if not whether and to what extent the shortage of Railway wagons exonerates the

defendant Company.

47. It being decided by us that the defendant Company is not liable for shortage of wagon supply, the suit must be remanded to the learned Judge to enquire and determine (1) whether there was in fact a shortage of wagons, and, if so, to what extent such shortage existed and operated to exonerate the defendant Company. (2) Whether the contract quantity of B.B. Rubble was ready for delivery.

48. In determining these issues it will be necessary to determine the respective contentions of the parties above noted, as also on the second issue the question whether the shortage of wagon supply, if any, affects the question of the prima facie liability of the defendant Company in respect of non-readiness to deliver if this is established. That Rubble was not ready for delivery seems hardly to have been disputed, but the bearing of this fact on the case and its relation to the question of wagon supply has not been considered.

49. As the hearing of the appeal has to a large extent been concerned with the question of the construction of the contract on which the respondent fails, the appellant is entitled to the costs of the appeal. The case must be remanded for determination of the other issues which arise in the suit. The costs of the suit will be dealt with by the learned Judge after the determination of the remaining issues on remand.

Mookerjee, J.

50. This is an appeal by the defendant Company against the plaintiff firm in a suit for damages for breach of contract. The case for the respondents was that the appellants agreed to supply 6,000 tons of B.B. Rubble Coal and 4,000 tons of Dust Coal during the months of November 1911 to April 1912; that the Company actually supplied only 1,372 tons 13 cwt. of the former kind and 771 tons 5 cwt. of the latter kind; and that the plaintiffs are consequently entitled to recover Rs. 33,727-4-9 as damages for breach of contract. The defendant Company, in their written statement, submitted that though at the request of the plaintiffs' firm, wagons were indented for from the Railway Company, the latter could not supply a sufficient number of wagons, and, consequently, the coal could not be delivered in terms of the agreement. The written statement, in fact, suggested that it was the duty of the plaintiff firm to take delivery of the Rubble and Dust at the Colliery and to remove the same from there, and that owing to insufficient supply of wagons and not to any default of the Company, the plaintiff firm failed to take delivery of the rest of the Rubble and Dust Coal. On these pleadings, the question obviously arose, whose duty it was to get the wagons. Mr. Justice Chaudhuri has come to the conclusion that the Colliery Company had undertaken to provide wagons, and that the failure of the Company to supply the contract quantity was a breach of the contract; in this view, the plaintiff firm have been awarded a decree for Rs. 29,224-3-3. The defendant Company have appealed to this Court and the cases of the respective litigants have been elaborately

presented from every conceivable point of view, by Mr. Das for the appellants and Mr. Mitter for the respondents. The fundamental question for determination, as it has emerged out of this discussion, is, was there any, and, if any, what, agreement between the parties as to the supply of wagons in which the coal was to be loaded for transmission.

51. The contract between the parties is embodied in two letters dated the 15th and 19th October 1911. The first of these letters had been preceded by oral negotiations which, admittedly, do not affect the question now in controversy. The letter itself is addressed to the plaintiff firm and states you may take delivery of the stated quantity of coal, at certain rates per ton from November to April. The second letter, which is addressed by the plaintiff firm to the Calcutta agents of the defendant Company, contains the acceptance of the terms offered in the earlier letter. It is thus plain that these letters are entirely silent as to the wagon supply; they do not explicitly state whose duty it was to get the wagons; this is subject to the observation that the language used in the first letter, if literally interpreted, may apparently support the theory that, as the purchasers were to take delivery, they were to provide the wagons in which the coal was to be loaded. In a case of this description, one of two hypotheses is possible, either that this particular point had entirely escaped the attention of the parties, or that the contract, though contained in several writings, is imperfectly expressed, and was made subject to a usage or custom of the trade or to the course of business usual in the class of transactions to which the contract relates. The voluminous evidence on the record shows that, in the case before us, the contract in truth is partly expressed in writing, partly implied or understood and unwritten. The test to be applied to discover the entire contract in these circumstances is that formulated by Sir John Coleridge, in *Juggomohun Ghose v. Manickchund* 7 M.I.A. 263 : 4 W.B. 8 (P.C.) : 1 Suth. P.C.J. 357 : 1 Sar. P.C.J. 681 : 19 E.R. 308 namely, is the usage so well known and acquiesced in, that it may be reasonably presumed to have been an ingredient tacitly imported by the parties into their contract. To the same effect is the language used by Willes, J., in *Plaice v. Allcock* 4 F. & F. 1074 "it must be shown as a matter of law, first, that it was a certain usage; and secondly, that it was a reasonable usage, not inconsistent with law, and as a matter of evidence that it was so universally acquiesced in that everybody in the trade knew it; or could have ascertained it if he had taken the pains to enquire." Lord Alverstone, C.J., in *Devonald v. Rosser* (906) 2 K.B. 728 : 75 L.J.K.B. 688 : 95 L.T. 232 : 22 T.L.R. 682 refers with approval to the similar words used by Lord Denman, C.J., in *R. v. Stoke-upon-Trent* 5 Q.B. 303 : 13 L.J.M.C. 41 : 8 Jur 34 : 114 E.R. 1263 "it is so universal that no workman could be supposed to have entered into the service without looking to it as part of the contract." As was said by Bowen, L.J., in *The Moorcock* 14 P.D. 64 : 58 L.J.P. 73 : 60 L.T. 654 : 37 W.B. 439 : 6 Ap. M.C. 373 and by Lord Esher M.R. in *Hamlyn v. Wood* (1891) 2 Q.B. 488 : CO L.J.Q.B. 734 : 65 L.T. 286 : 40 W.B. 24 the Court has a right to imply a stipulation in a written contract, only if, on considering the terms of the contract in a reasonable and

business manner, an implication necessarily arises that the parties must have intended that the suggested stipulation should exist. The same view was in substance adopted by Ayyar. J. in *Volkart Brothers v. Vettuvolu Nadan* 11 M. 459 when he said that the usage deemed incorporated by implication into a contract must be shown to be certain and reasonable and so universally acquiesced in that everybody in the particular trade knows it or might know it, if he took the pains to enquire. Reference may also be made in this connection to *Prodyote Kumar Tagore v. Rakhal Chandra Sarkar* 5 Ind. Cas. 243 : 37 C. 322 : 11 C.L.J. 209 : 14 C.W.N. 487 (where reliance is placed upon the observations of Baron Parke in *Hutton v. Warren* 1 M. & W. 466 : 2 Gale 71 : 1 Tyr. & G 646 : 5 L.J. Ex. 234 : 150 E. R 517 : 46 R.R. 368 and *Gibson v. Small* 4 H.L. Cas. 353 : 1 C.L.R. 363 17 Jur. 1131 : 10 E.R. 489 : 94 R.R. 138 and to the notes to *Wigglesworth v. Dallison* 1 Sm. L.C. 613 : 99 E.R. 132 : 1 Douglas 201. The truth is that the law recognises the fact that men assume that the words of the contract will be understood in their trade meanings, and that the terms of their agreements will be governed by the well-recognised usages of the callings to which they relate, and it necessarily looks to these usages to ascertain the real thought of the contract. It finds that merchants do not write all the terms of their contracts, but rely upon the knowledge and good faith of one another as to matters so well-known that special reference to them would be burdensome and unnecessary, and that they accordingly agree upon many of the terms of their contracts by mere silence; what these terms are, must be shown by parol evidence. See *Browne v. Byrne* 3 El. & Bl. 703 : 2 C.L.R. 1599 : 23 L.T.Q.B. 313 : 18 Jur. 700 : 2 W.R. 471 : 118 E.R. 1304 : 97 R.R. 715; *Humfrey v. Dale* 7 El. & Bl. 266 : 119 E.R. 1246 : 26 L.J.Q.B. 137 : 3 Jur. (N.S.) 213 : 110 R.R. 587. We must, consequently, determine, upon the evidence, what term was by implication, included in the contract between the parties to this litigation; in this connection it is important to observe that the parties are now agreed that there was an implied term as to the supply of wagons.

52. In the Court below, as already indicated, the defendant Company alleged that the plaintiff firm were under an obligation to take delivery of the Rubble and Dust at the Colliery and to remove the same from there; in other words, it was the duty of the plaintiff firm to secure a sufficient number of wagons, though the defendant Company, at the request of the plaintiff firm, endeavoured, from time to time, to procure the wagons. The plaintiff firm on the other hand maintained that the defendant Company were under an absolute obligation to provide the necessary wagons and that the alleged shortage of wagons afforded no valid defence to the claim. In my opinion, neither of these extreme positions is tenable. It is not disputed that the only method of removal of the coal was by means of Railway wagons from the Colliery siding. Neither the Colliery nor the purchasers had wagons, and, *prima facie*, it does not look probable that either party should have undertaken an absolute obligation to provide the wagons; there is, further, the important circumstance that even if either party had undertaken to supply the wagons, the Railway Company could not be forced to

accept them for carriage of coal. Consequently, if either party had undertaken to provide the wagons, one would have expected to find evidence of negotiations with the Railway authorities for the acceptance of the wagons so supplied; apparently no such negotiation took place; on the other hand, the defendant Company enquired of the Railway authorities whether wagons would be available. This serves to indicate that the parties looked forward to the Railway Company as the source of supply of the requisite wagons. This is fully borne out by such evidence, as we have on the record, of the usual course of business in transactions of this character. The evidence shows that the Railway Companies do not, as a rule, entertain applications from individual buyers for the supply of wagons for the carriage of coal, and that the indents for wagons are sent by the Colliery Companies. The evidence further shows that, such indents are sent by the Colliery Companies, not specifically for individual buyers, but in accordance with despatching instructions received from various customers. In the case before us, the defendant Company did, from time to time, indent for wagons, but never received the full supply, as the Railway Companies were unable to respond to the demand made on their resources by the Imperial Durbar and the trade conditions consequent thereon. The defendant Company maintain that when they indented for wagons, they did what they had undertaken to do in conformity with the usual course of business, and that there was no absolute obligation on their part actually to supply wagons. This contention has been negatived by Mr. Justice Chaudhuri; after careful consideration of the evidence, I regret I am unable to accept as sound his conclusion that the Colliery Company undertook an absolute obligation to supply the wagons into which the coal was to be loaded. The view I take is confirmed by various circumstances. The price agreed upon was the ordinary market rate, and no extra allowance was made by the Company, as would undoubtedly have been made if the risk had been undertaken by them. It is also clear from the Mining Association Form that ordinarily the supply of coal from a colliery is made contingent upon the Railway authorities supplying wagons indented for by colliery upon receipt of despatching instructions from buyers. There would have been no controversy between the parties if the standard form of agreement had been used in this case; that they did not use it, does not imply that they intended to depart from the usual terms; if such had been their intention, one would have expected an express statement to that effect. On the other hand, the fact that the agreement was made at the Colliery, far away from Calcutta, furnishes an obvious reason why the form was not used. We have also the very significant circumstance that in the course of the protected correspondence between the parties themselves, no suggestion was ever made by the buyers that the sellers were under an absolute obligation to supply the wagons. Thus, to take the group of three letters dated 22nd, 23rd and 29th November 1911, We find that the buyers complain of insufficient supply of coal, the sellers attribute the fact to heavy shortage of wagons, and the buyers in reply do not repudiate the excuse offered as irrelevant. In fact, the correspondence shows that the buyers throughout accepted the position that, if there was in reality a shortage of wagons, the Colliery Company was under an

obligation only to allocate a fair share or proportionate share of available wagons for their use; and the grievance they made was that they were not given such proportionate share. It was not till the matter had been placed by the buyers in the hands of their Solicitors that, on the 8th May 1912, the position was taken up that shortness of wagon supply was no excuse. Clearly in a matter of this description, the conduct of the parties themselves affords valuable evidence of what they really intended by the agreement they had made. I hold, accordingly, that the view which commended itself to Mr. Justice Chaudhuri cannot be supported, and that the Colliery Company did not impliedly undertake an absolute obligation to supply the wagons. The implied term of the agreement, on the other hand, was that the Colliery Company would load the contract quantity of coal into wagons if the requisite number was supplied by the Railway authorities on indents made by them, and that, in the event of short supply of wagons, the Colliery Company would allocate for the use of the plaintiffs a fair or proportionate share of the wagons available. The position, then, is that the fundamental ground which forms the basis of the decision of Mr. Justice Chaudhuri, fails; the result follows that the appeal must be allowed and the case remitted for retrial.

53. I do not think it desirable to enumerate exhaustively the points which may require investigation at the re-trial; but, some aspects of the case, which were sought to be developed in more or, less detail in the course of the argument addressed to us, though possibly imperfectly appreciated in the Trial Court, may be here indicated. One of the points for enquiry will obviously be, whether there was, as a matter of fact, a shortage of wagons and, if so, its extent; the question, thus stated, has a deceptive appearance of simplicity, though it is really of a complex character. The buyers allege that while about 600 wagons would have been sufficient for the purposes of their contract, the Colliery Company had at their disposal 2,300 wagons. This, *prima facie*, throws upon the Company the burden of proof that they were not under an obligation to use, for the benefit of the plaintiffs, all the wagons available, and that they were entitled to take into account the claims of other customers, and not only to give equal treatment to some, but preferential treatment to others. This aspect of the matter plainly requires careful scrutiny. The buyers also assert that apart from the question of short delivery of wagons, the Colliery Company had not ready the necessary stock of coal, and that, as a matter of fact, they had no room either to conduct screwing operations or to stock the coal. If this question is answered in favour of the Company, and if they also prove that there was a shortage of wagons due to circumstances beyond their control, the question will arise, whether the Company did, in fact, allocate for the use of the plaintiffs a fair or proportionate supply of the available wagons; the proof of the affirmative of the allegation that they did so, clearly rests upon them. These and other questions, which it is neither possible nor desirable to specify precisely and exhaustively at this stage, will form the subject of investigation on the re-trial. I am also of opinion that liberty should be reserved to the parties to amend the pleadings and to re-adjust

the issues.

54. On these grounds, I agree that the appeal must succeed and the case be remitted for retrial. The appellants are entitled to their costs here; the costs of the first trial will be in the discretion of the Trial Judge.