

(1927) 12 PRI CK 0006

In the Privy Council

Case No : Privy Council Appeal No. 69 of 1926

R. Arunachala Nayudu

APPELLANT

Vs

S.R. Balakrishna and Co.

RESPONDENT

Date of Decision : 08-12-1927

Acts Referred:

Citation : (1927) AIR(PC) 266

Hon'ble Judges : Lancelot Sanderson, John Wallis, Sinha, Atkinson, Viscount Sumner, JJ.

Advocate : Douglas Grant and Dold, Hy. S.L. Polak, T.C.K. Kurup, L.De Gruyther, B. Dube, for the Appearing Parties.

Judgement

Sir Lancelot Sanderson, J.

These are consolidated appeals by Arunachala Naidu against the judgment of the High Court of Judicature at Madras dated 23rd April 1924, and two decrees of the same date made in pursuance of the above-mentioned judgment.

On 5th August 1918, the respondents, Messrs. S. R. Balakrishna and Co., brought a suit (eventually numbered 27 of 1919) against Arunachala Naidu in the Court of the learned Subordinate Judge of South Malabar at Calicut, praying (amongst other things) for a decree for delivery of possession of the properties therein referred to.

On 23rd October 1918, Arunachala Naidu brought a suit (eventually numbered 28 of 1919) against Messrs. S. R. Balakrishna and Co. in the same Court praying, amongst other things, for a decree directing the defendants to execute a registered deed of sale of the said properties to the plaintiff.

The learned Subordinate Judge tried the two suits and delivered one judgment. He dismissed Messrs. Balakrishna and Co.'s suit (No. 27 of 1919) with costs, and in suit No. 28 of 1919 he directed the defendants, Messrs. Balakrishna and Co., to execute a deed of conveyance to the plaintiff, Arunachala Naidu, of the property in suit; the learned Judge made other incidental orders, to which it is not

necessary to refer in detail.

Messrs. Balakrishna and Co. appealed against both decrees to the High Court of Judicature at Madras. The High Court heard the two appeals together and delivered one judgment by which the appeals were allowed and the decrees of the learned Subordinate Judge were reversed.

A decree was made by the High Court in suit No. 27 of 1919 directing the defendant Arunachala Naidu, to deliver possession to the plaintiffs of the properties referred to in the schedule annexed to the plaint and ordering the defendant to pay the plaintiffs' costs.

In suit No. 28 of 1919 the decree of the High Court, after reversing the decree of the learned Subordinate Judge, ordered the defendants, Messrs. Balakrishna and Co., to pay to the plaintiff the sum of Rs. 4,359-3-6. In other respects the plaintiff's suit was dismissed and each party was directed to bear his or their own costs in both Courts.

From these two decrees of the High Court Arunachala Naidu has appealed. In this judgment he will be referred to as the appellant and Messrs. Balakrishna and Co. as the respondents.

It appears that the appellant was a timber merchant, that he had agreed to purchase the above-mentioned properties, which were forest tracts in Wynaad, from a Mr. Hoskins for Rs. 9000, that he had paid a deposit of Rs. 1,000, but that he was unable to pay the whole of the purchase money.

Subsequently it was arranged that the respondents, who were carrying on a timber trade in Calicut, should pay the balance of the purchase money, take a conveyance of the properties in their name, and lease the property to the appellant on the condition that the appellant should deliver timber to the respondents within specified times, and if it was found at any time within the fixed period that the cost of timber supplied came to Rs. 9,000 after making certain deductions, the respondents would assign the properties to the appellant at his expense. The agreement was dated 27th November 1915, and the terms are as follows. - (After reciting the terms of the contract in detail the judgment proceeded.) The main question argued on this appeal was whether the appellant had supplied the timber in accordance with the agreement to the value of Rs. 9,000; there were further questions, viz., whether the timber, if supplied, was delivered within the time specified in the agreement, whether time was of the essence of the contract, and whether the time was extended by agreement between the parties.

There was a subsidiary question whether the amount due to the appellant in respect of certain scantlings could be taken into consideration in calculating the amount and value of the timber delivered by the appellant under the agreement.

Their Lordships may dispose of this last-mentioned question at once.

Clause 13 of the agreement provided that defective timber felled on the hills was to be sawn into scantlings and delivered to the respondents, who were to sell the scantlings on behalf of the Appellant and credit him with the proceeds of the sales after deducting 5 per cent. commission.

It is clear from the terms of the clause that the above-mentioned delivery was not contemplated by the parties as a delivery of timber, which was to be taken into consideration when ascertaining whether timber to the value of Rs. 9,000 had been delivered to the respondents.

The learned Subordinate Judge in his judgment included the sum of Rs. 3,119-14-4 in respect of the scantlings on the one side of the account, and on the other side charges amounting to about Rs. 2,651 in respect of scantlings. Their Lordships are of opinion that the conclusion of the High Court was right in respect of this matter, and that the items relating to scantlings must be excluded from calculation.

On the main question the learned Subordinate Judge held that on account of the supply of logs the appellant was entitled to be credited with the sum of Rs. 15,074-10-10, subject to certain deductions. The High Court, however, was of opinion that the total value of timber supplied by the appellant to the Respondents was Rs. 10,839-15-0, subject to certain deductions which reduced the amount, for which the appellant was entitled to credit, considerably below the sum of Rs. 9,000.

The arguments presented to their Lordships in respect of this main question related to two matters; firstly, the number of logs alleged to have been delivered by the appellant to the respondents, and secondly, the measurement of the logs. On the first point the learned Subordinate Judge held that it had been proved that the total number of logs delivered was 341; the High Court came to the conclusion that 316 only had been delivered.

Thus there was a difference of 25 logs.

The disputed 25 logs fell under two heads; (1) 7 red cedar logs and (2) 18 logs generally. (1) The High Court held that the evidence of the cartmen relating to the delivery of the seven red cedar logs was worthless, and that it was extremely unsafe to rely upon a receipt which the appellant's witnesses alleged had been given by the respondents' servant, which was Ex. 62 (c).

The learned Subordinate Judge, who tried the suit and who had the opportunity of seeing the witnesses and hearing them give their evidence, said as follows : There is no reason to think that Ex. 62 (c) was not signed by the Moopan and that the witnesses examined by defendants (now the appellant) are giving false evidence. I believe the evidence adduced by the defendant and find that seven red cedar logs mentioned in invoice 143 were received by the plaintiffs (now the respondents).

Their Lordships having considered the evidence, both oral and documentary, on

this question, are of opinion that no sufficient reason has been shown for interfering with the finding of fact of the learned Subordinate Judge, who was in a much better position to gauge the truth and value of the oral evidence than the learned Judges of the High Court.

In their Lordships' opinion, therefore, the appellant must be credited with the value of the seven red cedar logs, which appears from the evidence to have been Rs. 464.

(2) With reference to the balance of the 25 logs, the High Court held as follows :

As regards the balance of 18 logs, a finding must be arrived at with reference to the general probabilities.

Venkatasubba Rao, J., who delivered the main judgment of the High Court, stated that a close scrutiny of the entries in the respondents' books had been made, and that the appellant had not been able to show from the respondents' books that more than 316 logs had been received by them.

The learned Judge added that the confusion had resulted from the hopeless way in which the respondents dealt with the logs in their account books, and that he fully endorsed the view expressed by the Commissioner, who had been deputed to examine and report upon the accounts, that the respondents' books were extremely misleading and that no uniform practice was observed in regard to the making of entries in respect of the logs.

In view of this criticism it is obvious that the failure to find the 18 logs in the entries in the respondents' books by itself cannot be any sufficient answer to the appellant's case that the 18 logs had been delivered; yet the learned Judges of the High Court seem to have based their conclusion in respect of this matter mainly on the fact that they could not trace the 18 logs in the respondent's books.

The Commissioner, whose examination of the books, documents and evidence seems to have been very exhaustive and careful, made a report which set out the materials available for deciding the question whether the 18 logs and the 7 red cedar logs were delivered by the appellant to the respondents. The Commissioner did not come to any definite conclusion on the above-mentioned question, but having considered the evidence and the Commissioner's report, their Lordships are of opinion that there was sufficient evidence to justify the learned Subordinate Judge's finding of fact that the 18 logs had been delivered by the appellant to the respondents and that the total number of logs so delivered was 341 and not 316 as alleged by the respondents.

The learned counsel, who appeared for the appellant, was not able to assist their Lordships upon the question of the value of the 18 logs, and although it is clear that the appellant is entitled to credit for a considerable sum in respect thereof, their Lordships are not able to ascertain the exact value of the said 18 logs.

Their Lordships, however, do not consider it necessary to direct a further inquiry merely in respect of this one matter, having regard to the conclusion at which they have arrived on the question of measurement.

Their Lordships are of opinion that the second point viz.; the measurement of the logs, is of great importance in this case.

The Commissioner reported that the parties were at considerable variance regarding the measurement and quality of the logs which had been supplied. He drew attention to the fact that the Respondents did not take measurements until some time after delivery, that the timber passing rough books were in some cases most misleading and unreliable, that the respondents' selling measurements were a little more than the purchasing measurements, that a slight difference in the girth would be considerable when the contents were calculated, that two measurements for almost all the logs appeared in the respondents' books, and that the appellant was given credit for the lesser measurements only.

The explanation given by the Respondents to the Commissioner was that the greater measurements denoted the measurements of the logs as they were without deducting for sapwood, and the lesser measurements denoted the quantity after making an allowance for such conditions. At the trial and in the High Court the respondents endeavoured to justify their measurements by alleging a custom regarding them; viz., firstly, that fractions short of 1/20th should be deducted out of length; secondly, further deduction should be made of 1/20th in length and 1/20th in girth; and thirdly, should the log be defective such deductions as the common measurer allows should be made.

The learned Judges of the High Court held that the evidence given on behalf of the respondents for the purpose of proving the custom could not be accepted, and the learned Judge who delivered the main judgment, concluded his remarks upon this part of the case with this significant passage:

My finding therefore on the question of measurements is against the defendant (now the appellant). I would, however, add that but for the conduct and acquiescence on the part of the defendant I should not be disposed to find this issue in favour of the plaintiffs (now the Respondents) because the evidence shows that they are prepared to deviate from the straight course in order to make some profit and also because on their own showing their selling measurements do not correspond with their buying measurements.

It is clear, therefore, that the learned Judge would not have disagreed with the finding of the learned Subordinate Judge on this point but for the fact that he thought that the appellant had by his conduct and acquiescence agreed to the respondents figures as regards measurements.

Their Lordships are of opinion that the respondents have not shown any sufficient reason (apart from the question of acquiescence which will be dealt with

presently) for disturbing the finding of the learned Subordinate Judge in respect of the measurements.

The learned Judges of the High Court held that the appellant had by his conduct precluded himself from questioning the correctness of the measurements as recorded by the respondents; they relied chiefly on the correspondence, and upon the fact that the appellant did not attend at the respondents' place of business for the purpose of checking the measurements taken by the respondents though he was invited by them so to do.

The appellant was not obliged to attend at the respondents' place of business to check their measurements; it might have been wise for him to attend, but if he chose to rely upon the measurements taken by himself or by his own servants, in the event of a dispute, he was entitled so to do.

Their Lordships do not think it necessary to refer to the correspondence in detail. It was alleged that some of the letters purporting to have been sent by the appellant to the respondents had been fabricated by him for the purposes of this case - in particular the letter No. 197, dated 5th October 1916, marked Ex. 21 (B.) was referred to.

The first general account, sent by the respondents to the appellant, was dated 2nd October 1916, and the defendant alleged that the above-mentioned document was a copy of his reply thereto. Having regard to the admitted letters, their Lordships do not think it necessary to express any opinion on the question of the alleged fabrication; they must, however, point out that their attention has not been drawn to any part of the cross-examination of the appellant in which the allegation of fabrication was specifically put to him, as it should have been, if it was intended to rely upon it subsequently. It is to be noted that Venkatasubba Rao, J., stated that he did not believe that the appellant had acknowledged the above-mentioned account (Ex. 56) to be correct.

The second general account, sent by the respondents to the appellant, was dated 19th August 1917, and on 1st September 1917, the appellant wrote to the Respondents complaining that the schedule of accounts was not signed, and that the numbers put on the timbers by him had not been entered in the schedule, and that it was not possible for him to ascertain exactly the measurements; he asked the respondents for a further signed account. This at all events cannot be taken as an acceptance of the Respondents' measurements.

The respondents received that letter, and replied that the appellant's numbers might have been washed out, and it would be difficult to send such numbers; and they suggested that the appellant should be present when the timber was measured.

Having considered the correspondence and the evidence, their Lordships are of opinion that it is not possible to hold that up to 1st September 1917, there was any such acquiescence by the appellant in the respondents' measurements

as de barred him from disputing them at the trial. On 23rd Feb. 1918, the appellant through his vakil, called upon the Respondents to execute a conveyance, and alleged a delivery of 1,087 candies of timber, which allegation was no doubt based on his own measurements.

On the 4th March 1918, the respondent replied, disputing the appellant's figures and alleging a breach of the contract by the appellant.

With much respect to the learned Judges of the High Court, their Lordships are of opinion that it has not been proved that the appellant by his "conduct and acquiescence," agreed to the measurements taken by the respondents.

The result in their opinion is that the learned Subordinate Judge's finding on this point must be upheld, and that the appellant is entitled to credit in respect of logs supplied to the respondents under the agreement for the sum of Rs. 15,074-10-10 which is the cost of 341 logs after deducting the 10 per cent. discount and 1 per cent. brokerage specified in the agreement.

From this amount there is to be deducted the sum of Rs. 4,361-15-9. This is made up as follows: Rs. 4,184-15-0 and Rs. 120 on account of cart hire, and Rs. 57-0-9 for unloading charges. The result is that the appellant is entitled in respect of logs delivered to the Respondents under the agreement to be credited with the sum of Rs. 10,712-11-1.

Their Lordships therefore are of opinion that, subject to the question whether the deliveries were in time, the cost of the timber supplied by the appellant to the respondents was more than the sum mentioned in the agreement of the 27th November 1915, viz., Rs. 9,000 and that the appellant was entitled to have the property, mentioned in the schedule thereto, assigned to him in accordance with Cl. 10 of the agreement.

The High Court found that time was of the essence of the contract, but that there was no doubt that the respondents extended the time for the performance of the contract in regard to the supply of the 1,000 candies of timber; the learned Judge who delivered the main judgment stated that the "contrary was not seriously suggested."

Their Lordships have no hesitation in agreeing with this finding, and they are also of opinion that the whole of the above-mentioned 341 logs of timber delivered by the appellant to the respondents were supplied during the subsistence of the contract.

That being so, the condition referred to in Cl. 10 of the agreement was performed by the appellant, and he is entitled to have the assignment of the property therein mentioned.

The learned Subordinate Judge dealt with accounts relating to other matters, such as promissory notes, scantlings, etc. Their Lordships were not asked to deal with the accounts relating to these matters, and they adopt the conclusions of

the learned Subordinate Judge in respect thereof.

Their Lordships therefore, are of opinion that the appeals should be allowed, that the judgment and decrees of the High Court should be set aside, that the decree of the learned Subordinate Judge in suit No. 27 of 1919 should be restored that the decree of the learned Subordinate Judge in suit No. 28 of 1919 should be varied by directing that the defendants should execute a conveyance to the plaintiff at the plaintiff's cost in respect of the suit property within three months from the date of the Order in Council to be made on this appeal, and that in default the deed of conveyance shall be executed by the Court of the learned Subordinate Judge; that the other directions contained in the said decree should stand, and that the respondents should pay to the appellant his costs both in the High Court and in this appeal, and they will humbly advise his Majesty accordingly.