

*Privy Council Appeal No. 32 of 1924.*

*Patna Appeals Nos. 17 and 19 of 1922.*

Homeshwar Singh and Others - - - - - *Appellants*

*v.*

Jugal Kishore Marwari and Another - - - - - *Respondents*

Jugal Kishore Marwari and Another - - - - - *Appellants*

*v.*

Homeshwar Singh and Others - - - - - *Respondents*

*(Consolidated Appeals.)*

FROM

THE HIGH COURT OF JUDICATURE AT PATNA.

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE  
PRIVY COUNCIL, DELIVERED THE 29TH JUNE, 1925.

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*Present at the Hearing:*

LORD PHILLIMORE.

LORD CARSON.

SIR JOHN EDGE.

*[Delivered by LORD PHILLIMORE.]*

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This case turns upon the construction of a contract made between a landowner in the district of Bhagulpur, the deceased father of the appellants in the main appeal, and two persons interested in the purchase of timber whom it will be convenient to call the contractors.

By this contract, made on the 23rd May, 1915, the landowner sold to the contractors the right of cutting 5 lakhs of sleepers to be cut from Sakhua trees in the landowner's jungle. The sleepers were to be in defined quantities of six different dimensions—the longest 12 feet in length and the shortest 3 feet—with varying differences in breadth and thickness, and valued at separate prices.

The whole were to be cut before June, 1919, so that there was a period of four years for performing the contract. But it was in contemplation, as the contract shows, that 15,000 sleepers

would be cut each month during the nine dry months of the year and 135,000 at least a year, the contractors also undertaking to do their best to cut some sleepers during the three wet months.

The contractors made a deposit of Rs. 6,000 which was about the equivalent of the average cost of 30,000 sleepers or two months' production.

The nine dry months began in the month of Kartik which runs from the 23rd October to the 21st November. Before this month the contractors had cut 187 sleepers, but in the first month instead of cutting 15,000, they only cut 1,055. In the second month they cut 3,432, and the whole number they cut before they were finally stopped was less than 9,000.

The contractors put forward for an excuse for their delay that the landowner had promised to provide a sawing machine, but both Courts decided that this excuse was not established.

On the 22nd December the second month had elapsed, and on the 23rd the landowner gave notice to determine the contract and stop further cutting.

On the same day the lawyer for the contractors wrote that they were willing to pay the price of 30,000 sleepers, and they followed it up by a letter of the 31st which purported to be a reply to the landowners' notice of the 23rd.

This attempt of the contractors to put forward their letter of the 24th as containing an offer made before the letter of cancellation reached them, failed in the view which both Courts took of the evidence, and it stands that upon the failure to produce 15,000 sleepers in the course of the first month, the landowner determined the contract; and the sole question is whether in doing so, he was within his rights.

The contractors insisting that the contract had been improperly determined, brought this action on the 30th April, 1916, claiming Rs. 617,876 as damages.

The Subordinate Judge dismissed the action, but intimated that if the action had lain, the damages in his view would have been Rs. 600,000.

The High Court at Patna reversed this judgment and declared that there had been a breach of contract, but considered the damages claimed excessive and awarded Rs. 200,000 only. Both parties have appealed from this decision.

The matter turns upon three paragraphs in the contract, Nos. 3, 5 and 6: and the translation of them is as follows:—

“ 3. We, the second party, shall during the term each year from the month of Kartik up to the end of Asarh, get 15,000 sleepers of every measurement prepared every month, and shall, after they are counted according to the contract, pay to the first party the price thereof according to the rates mentioned above, without any objection to this neither we the second party, nor our representatives shall raise any objection. If we do so, the first party shall be competent to cancel this deed and stop the cutting of the trees in the lands specified below without waiting for the expiry of the term of this agreement. Be it noted that during the term (of the lease) every year from the month of Sravan to the end of Aswin, we, the second party, shall

try our best to cause as many sleepers of different measurements prepared as possible and after getting them counted according to the contract pay the price thereof in accordance with the rates mentioned above, to the first party on taking receipt therefor. The second party shall, on no account without sufficient reason willingly stop the preparation of sleepers during these three months. Let it be known that we, the second party, will have to prepare 1,35,000 (one lakh and thirty-five thousand) sleepers of different measurements every year during the nine months from Kartik to Asarh, in accordance with the terms specified above. If, through negligence on the part of us, the second party, we fail to prepare so many sleepers no plea regarding deficiency in the number of sleepers, put forward by us, shall be entertained and we, the second party, shall be held liable to pay on demand, the price of the entire number of one lakh and thirty-five thousand sleepers to the first party.

“ 5. The sleepers, which we the second party, shall get ready shall be counted every week on behalf of the first party and seals and numbers shall be put on them on behalf of the first party. If this work cannot be managed to be done every week, it should be done every month. But the second party shall, on no account, be entitled to take away the sleepers after they have been counted sealed and numbered, unless they have paid the price thereof. The second party shall obtain receipt for whatever money they pay for the sleepers from the manager of the first party. No plea of payment without receipt shall be entertained. If, through negligence the sleepers may not be counted, sealed and numbered on behalf of the first party the second party shall be at liberty to serve a formal notice on the first party giving two weeks' time, and it shall be incumbent on the first party to get the sleepers counted, sealed and numbered within the period of the notice issued by the second party shall have to wait till then, but such delay shall not exceed more than two weeks after the expiry of the period fixed under the notice. If this be not done the second party shall then have the power to enter the measurement and number of sleepers in their own papers and take away the same and if, the first party, shall be entitled to get the price of the sleepers according to the entries made in the papers of the second party.

“ 6. Without paying in full the price of the sleepers that will be got ready every month and obtaining receipt therefor, the second party will not be entitled to cut trees or prepare sleepers in the succeeding month. In that case, on the expiry of the said succeeding month, I, the first party, shall be competent to bring the trees mentioned in the schedule given below in my direct possession and to stop the cutting of the trees, without waiting for the expiry of the term of this agreement, and if in such circumstances, I, the first party, be put to any loss through some act on the part of the second party, the second party shall be liable to pay compensation for the loss to me, the first party, and the sum of Rs. 6,000 in deposit will be forfeited.”

The early part of Clause 3 would appear at first blush to contain a definite contract by the contractors to cut 15,000 sleepers during each month of the nine obligatory months. Indeed, the contractors in their plaint use the words “ the stipulated number of 15,000 sleepers,” and again “ the stipulated minimum number of sleepers.” But it is suggested on behalf of the contractors either that the latter part of the clause shows that there was no such obligation, and that these figures are to be considered as directory only or hortatory only and not compelling

or that a breach of this particular covenant would not go to the root of the contract.

It is not quite clear upon which ground the High Court relied in deciding for the contractors. Perhaps the learned Judges relied upon both. The view which they seem to have taken is that the latter part of the clause supersedes the earlier, inasmuch as it substitutes a duty to prepare nine times 15,000 by the end of the year (or at least to pay for them if not prepared) for the duty in the earlier part of the clause to provide 15,000 per month.

The clause is not well drawn, but in their Lordships' view the right way to read it is that the two provisions are cumulative and not mutually exclusive. If for some reason which the landowner is willing to accept, a month passes without the stipulated tale of sleepers having been cut, he has, though he waives his right for that month, not lost the right to insist that by the end of the nine months the deficiency should be made up.

If then there is a positive obligation on the contractors to cut, to tender for counting, and when counted to pay for 15,000 sleepers a month, what is the landowner's remedy for a breach of this obligation? To sue for the price of 15,000 sleepers, though they have not been cut? That remedy is reserved for cases where there has been a failure in the nine months total.

Their Lordships have been invited by counsel for the respondents to put a reasonable construction on the contract, and it would be unreasonable if there were no remedy for the failure to make periodic payments. It would be reasonable if the landowner could treat such a breach as going to the root of the contract, and this seems to be provided for by Clauses 3 and 6 combined.

Reliance was placed by counsel for the respondents upon the use of the word "objection." It was said that this word conveyed the idea that the contractors must positively refuse to discharge their duty before the landowner's right to cancel arose. But it had to be admitted that if the contractors refused to pay for cut and counted sleepers, at any rate after a demand for payment, that would be an "objection," which would entitle the landowner to cancel.

Under Clause 3, therefore, there is a right to cancel for non-payment for the monthly tale of sleepers; but the time within which payment is to be made is not specified. This is provided for by Clause 6, which follows upon the provisions as to counting contained in Clause 5. Each payment is to be made in the "succeeding month." So strict is this provision that the contractors have no permission to cut in the succeeding month till the sleepers of the preceding month have been counted (an operation which need not take long) and paid for.

If in that succeeding month the sleepers of the preceding month have not been paid for, the right to cancel arises.

All this cannot be denied. But it is said that the contractors can avoid all their obligations and keep the contract alive for four years by merely cutting a nominal amount of sleepers every month, tendering them for counting and paying for them when counted.

As to this the Subordinate Judge well observes :--

"The document cannot be construed as meaning that the plaintiffs might prepare 1 lac and odd in the course of the year and pay for the same at the end of it. If this construction were valid, then the words in Clause 6 that the plaintiffs would not be entitled to cut trees and prepare sleepers in a succeeding month without paying for the sleepers of the previous month become meaningless."

Some observations were made by the Judges in the High Court upon the failure of the landowner to respond to the various applications which were made to him to have a count of the sleepers already prepared ; but, as each of these applications admitted that the proper number of sleepers had not been prepared, there was no obligation on the landowner to have a count. The duty of the contractors was to tender the full tale of sleepers due from them, and no count could be required till they were ready with this.

No doubt the landowner must count before he requires payment ; but the first duty lies with the contractors to supply sleepers for counting.

Counsel for the respondents contended that the landowner was really claiming to treat the failure to cut as the cause of cancellation. To this the landowner's answer would be that it was immaterial to him whether the sleepers were cut or not, as long as the sleepers were paid for, but that it does not lie in the mouth of the contractors to say that they have not cut the sleepers, inasmuch as they were bound to have cut them.

The sleepers " that will be got ready every month " are the covenanted 15,000. Unless they are tendered for counting and paid for when counted the landowner can use his remedies under Clause 6 ; and this is what he did.

Counsel for the respondents boldly said that if the contractors failed to cut, the landowner had no remedy under Clause 6. This was the necessary result of his argument, but their Lordships cannot accept it.

Upon the whole their Lordships would humbly recommend His Majesty that this appeal should be allowed, and the cross appeal dismissed, and that the judgment of the Subordinate Judge should be restored with costs here and below. The costs of a petition presented on behalf of the respondents should be costs in the appeal.

In the Privy Council.

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