Privy Council Appeal No. 4 of 1927.

Sir Bissessar Dass Daga and others - - - - - *Appellants*

v.

Emmanuel Vas and others - - - - - - *Respondents*

FROM

THE COURT OF THE JUDICIAL COMMISSIONER, CENTRAL PROVINCES.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 24TH NOVEMBER, 1927.

Present at the Hearing:

VISCOUNT SUMNER.
LORD SINHA.
SIR JOHN WALLIS.
SIR LANCELOT SANDERSON.

[*Delivered by* VISCOUNT SUMNER.]

On the 5th November, 1923, two applications came on for hearing before the Additional District Judge of Nagpur in execution proceedings taken in suit No. 4 of 1921. The first in date was that of the present respondents, defendants and judgment debtors in the suit, for leave to deposit Rs. 28,649.2.9 to be paid over to the decree-holders, and for an order declaring the decree to have been thus fully satisfied. The other was that of the decree-holders for execution of their decree by seizure and delivery to them of certain manganese ore, alleged to be lying at several mines and railway sidings, and by the appointment of a receiver and other relief. The respondents, having got wind of the appellants' intention to apply to the Court, lodged their application first, but nothing turns on this. The learned Judge, holding that under the decree the judgment debtors were entitled to take the course proposed, granted their application and held that the decree-holders were not entitled to the relief prayed but must take in satisfaction the amount deposited by the judgment debtors, and his determination was affirmed on appeal by the Court of the Judicial Commissioner of the Central Provinces. The case now

comes to their Lordships' Board on the construction of the decree in question and particularly of Clause 10, which is as follows :—

> "10. That in the event of the defendants failing to deliver the full quantity of 4,000 tons of ore of the stipulated grade in any particular year or violating any of the conditions of this compromise, the defendants shall pay to plaintiffs damages at the rate of Re. 1 (rupee one) per ton on the whole of the quantity which may then have remained undelivered out of the total quantity of 31,234 tons and the same shall be recovered by execution of this decree."

On the 1st March, 1916, the respondents, a syndicate possessed of and working manganese mines and dealing in the ore produced there, had contracted with K. Ettlinger & Co., of London, for the purchase of 38,000 tons of their manganese ore by instalments over an extended period. The contract contained provisions to secure to the buyers the exclusive supply of the sellers' ore till the contract quantity had been worked out. At the end of the year the benefit of this contract was assigned to the present appellants by the Official Liquidator under the war legislation applicable, and deliveries of ore under it and payments for purposes connected with it were made for some time. In 1921 the buyers commenced the suit, No. 4 of 1921, above mentioned, alleging deliveries of ore by the defendants to third parties in breach of the contract to the extent of over 1,000 tons and claiming a mandatory injunction and other relief. The defendants in their written statement alleged that the contract was all along wholly void as constituting a trading with the enemy ; that the assignment of it was invalid ; that their deliveries of ore to third parties were justifiable on various grounds ; and that the appellants on their side were guilty of numerous breaches of contract.

The suit proceeded as far as the formulation of the issues, but they were never tried. The parties arrived at an agreement of compromise, and the terms, with one variation, which their Lordships agree with the Judicial Commissioner's Court in thinking immaterial for present purposes, were embodied in the compromise decree of the 28th February, 1922, out of which the execution proceedings now in question arose. It is entitled in the suit ; it recites that " this suit coming on this day for final disposal . . . it is hereby ordered and decreed in terms of the compromise arrived at between the parties and sanctioned by the Court," and it then sets out the agreed clauses. The second of these restrains the defendants from selling ore from the mines mentioned in the agreement of the 1st March, 1916, or alienating the mines themselves (except as provided in Clause 8), till they have delivered the whole remaining balance of 31,234 tons. The third provides for deliveries at the rate of 4,000 tons per year for seven successive years ending in February, 1929, with a balance delivery of 3,234 tons in the next and final year. Then follow provisions for the quality of the ore to be delivered and for determination of that quality by analysis ; for tender of each lot in writing, with particulars of the mine of origin and the place of delivery, each lot not being less than 500 tons, with liberty to the defendants in case they raise more than 4,000 tons in one year to sell the surplus to third parties, giving

notice of the same with full particulars to the plaintiffs. Clause 9 fixes the price payable by the plaintiffs at Rs. 8 per ton. Then follows Clause 10 quoted above. The general tenor of this agreed decree shows that, like the original agreement on which it is founded, the parties had in contemplation the execution and completion of this contract by actual deliveries in annual instalments, the performance being secured by the present grant of an injunction preventing the defendants from finding any alternative market for their ore.

Seventeen months later the decree-holders filed their application for execution, alleging that the first 4,000 tons had been short-delivered by about 1,240 tons, and that only 60 tons more had been delivered in the first half of the second year. In the judgment debtors' statement in reply to the application the substantial correctness of these figures is admitted with the additional allegation that their best efforts had not enabled them to deliver any more. It also mentions, what was no doubt a material factor in the dispute, that " price of the manganese has at present gone very high," and in their judgment of the 24th March, 1924, the Judicial Commissioner's Court mention that the price was then, as they were informed, about Rs. 25. It may accordingly be taken that the business object of the compromise was to get the supply of ore at Rs. 8 continued for years to come, and the business object of the breach was to put an early stop to so ruinous a loss by bringing the contract to an end. The question is whether Clause 10 permitted this to be done.

The appellants point out that this clause provides for liquidated damages and that without it the decree would only be capable of execution by enforcing the injunction. In order to ascertain the sum, for which execution should go, it would be necessary to bring a suit or suits to have the damages ascertained. Clause 10 is therefore a clause in the decree-holder's favour in the first instance. Though by saving time and costs it may really benefit the debtor as well in the long run, it is not framed as a clause mainly intended for the debtor's convenience. In a sense it is an option to the buyer, for, if he does not choose to seek an order for delivery of specific ore, he is able to ask for execution as of a judgment for a calculable sum of money, but in no sense can it be construed as an option to the seller, when it no longer suits him to go on with the contract, to buy back at an advance of only R. 1 per ton the whole of the undelivered portion of the contract. Why restrain the judgment debtors from delivering their ore to third parties, if in effect they can do so at will on merely paying the agreed forfeit? This virtually makes Clause 2 inoperative. It would be a strange result of a compromise, aiming at the continuance of deliveries, to authorise the seller to repudiate his obligations and, taking advantage of his own wrong, to end the matter at his own selected moment by a prearranged payment, which might not be an adequate compensation at all.

The argument for the respondents and the reasoning, on which

both Courts below proceeded, is the same. All the clauses of the decree are indeed to be read together, but Clause 10 controls Clause 2. Payment of sums calculated in accordance with Clause 10, if the seller chooses to make it, will be a sufficient compliance with the whole decree and, in spite of non-delivery of by far the greater part of the deliverable quantity, no further relief will be available to the decree-holders. The clause contains no words limiting the case provided for to failures arising from causes beyond the sellers' control, but it does say that the provision as regards the damages " shall " operate on the defendants' violating any of the conditions of the compromise and it must be enforced as it stands. Among the principal conditions are the sellers' obligation not to deliver to third parties, an act from which they consented to be restrained, but, if they delivered to others in violation of this restriction as the Court plainly understood that they had done, it was also in violation of the conditions of the contract, and would only result in bringing into play the penalty named in Clause 10. The learned Judges recognised that this construction rendered nugatory the stipulated restraint upon selling elsewhere, and enabled the defendants to escape the consequences of a wilful breach of contract, consisting in the withholding from the decree-holders of ore actually in their possession and capable of being delivered to the plaintiffs, by simply paying R. 1 per ton as liquidated damages. Why the decree should begin by forbidding delivery to third parties except in a named case under Clause 8, and then end by giving permission to do so to any extent in case a different event happened under Clause 10, is not explained or explicable.

It must be borne in mind that there are two distinct breaches, for which the decree provides. There is delivery of ore to third parties, except as authorised by Clause 8, for which an appropriate relief is an injunction, and there is failure to deliver the agreed quantities to the decree-holders, for which damages, liquidated or not, will be the proper remedy. Their Lordships do not think that they are constrained to a construction of Clause 10, which will enable the judgment debtors to render nugatory all their obligations under the prior part of the contract, whenever it suits their pockets to do so. Clause 10 provides that they shall pay at the specified rate, if they fail to perform the contract in any respect, but it does not say that such payment is to be a full and exclusive satisfaction of all obligations under the contract. The payment into Court does not make the decree a satisfied decree. It provides a mode of enforcing such payment—" the same shall be recovered by execution of this decree "—but it does not say that the other terms shall not be enforced by execution of the decree, namely, by applying to the Court to enforce the injunction. The sellers have to show some cause in argument why they should not obey the injunction to which they have consented. They cannot do so merely by pointing to a clause, which provides an alternative remedy, under which they " shall " pay so much by way of liquidated damages, if a money payment is sought at all. Reading the contract as a

whole and taking all its terms together is a very different thing from reading it so that its final clause defeats the whole object of the agreement. Such a meaning even the debtors never could have intended unless they deliberately proposed to lay a trap for the decree-holders. As the clause stands it provides a remedy for the decree-holders without stipulating for the debtors any corresponding discharge of the injunction. It does not even cover all the possible events, in which the contract might be broken, for, if before the time had arrived for any performance at all, the judgment debtors had announced that they would never perform it in any respect, this would have been an anticipatory breach, for which unliquidated damages would be recoverable if the decree-holders chose so to treat it, but, not being a breach of any of the conditions, that is the expressed conditions, it would be outside of Clause 10. On the other hand, an unintentional failure to satisfy all the requirements of Clause 5 would be as much a violation of a condition as a deliberate diversion of the ore to other buyers and failure to deliver the full or any quantity to the decree-holders, and, on the respondents' contention, would equally imperatively require payment of the expressed forfeit, Clause 2 notwithstanding. The chapter of accidents equally with the deliberate pursuit of gain might thus bring the whole scheme to an end at the outset before any ore had been delivered, or again, by a combination of luck and care the sellers might keep the contract going till it became profitable to them to break it, and then bring it to an end whenever they pleased. This is not giving to a business contract a construction that will give it the efficacy which the parties must have intended at the outset. The compromise agreement is one for the non-performance of which mere payment of this sum of money would not be an adequate relief and, in spite of Clause 10, the contract is otherwise proper to be specifically enforced. Accordingly their Lordships think that this appeal succeeds.

In the view which they took of the construction the Courts below rightly refrained from expressing any opinion as to the relief, which might be proper, if the contrary construction were adopted or as to the extent to which a remedy under Clause 10 would be available to the decree-holders concurrently with other appropriate remedies in the circumstances. These and similar questions remain to be determined by the Court, which will dispose of the decree-holders' application. The proper course will be to declare, that Clause 10 of the compromise decree of 28th February, 1922, does not, on a true construction, afford to the judgment debtors any answer to the petition for execution of it, presented by the decree-holders ; to allow the appeal of the decree-holders with costs here and below ; to set aside the decisions of both Courts in favour of the judgment debtors, and to remit the application of the decree-holders to the Court of the District Judge of Nagpur to be dealt with, in accordance with the above declaration and otherwise as may be right, and their Lordships will humbly advise His Majesty accordingly.

In the Privy Council.

SIR BISSESSAR DASS DAGA AND OTHERS.

v.

EMMANUEL VAS AND OTHERS.

DELIVERED BY VISCOUNT SUMNER.

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