Privy Council Appeal No. 102 *of* 1930.
Bengal Appeal No. 80 *of* 1929.

The Tata Iron and Steel Company, Limited - - - - *Appellants*

v.

The Raneegunge Coal Association, Limited - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 31ST JULY, 1931.

Present at the Hearing:

LORD BLANESBURGH.
LORD WARRINGTON OF CLYFFE.
LORD ATKIN.
LORD THANKERTON.
SIR GEORGE LOWNDES.

[*Delivered by* LORD BLANESBURGH.]

This is an appeal from the judgment and decree of the High Court of Judicature at Fort William in Bengal dated the 10th February, 1930, affirming, on appeal, a judgment and decree of the 2nd July, 1929, of Buckland J., exercising the original jurisdiction of the same Court. The appeal is concerned with the true effect of an agreement dated the 16th January, 1919, and made between the respondents—who will be referred to as "the Coal Company"—of the one part, and the appellants—"the Tata Company"—of the other part, and the main question still at issue is whether the Tata Company can under that agreement be required in any month to accept delivery of coal in excess of 25,000 tons. Both Courts in India have answered this question in the affirmative. The Tata Company appeals.

The case is one in which a court of construction might well have been helped by fuller information than is disclosed in the

agreement itself as to the circumstances under which the parties contracted, as to their relative positions towards each other, as to the requirements of the Tata Company in relation to supplies of coal, and the extent proved or conjectured of the three seams of coal belonging to the Coal Company, the output of which over 25 years is made the subject matter of the agreement. But information on these matters has not been supplied by either party. Both have been content to rely in support of their respective views of the agreement upon its provisions alone, with this further information added, that the supplies of coal for the Tata Company thereby contracted for must always have fallen far short of any anticipated amount of coal required by that Company for the purposes of its works and business.

The Coal Company is recited in the agreement as being the proprietor working a colliery in Mauzas Kustore and Alkusa in the District of Manbhum, known as the Kustore and Alkusa Collieries, and as having agreed to sell to the Tata Company the output of coal from seams Nos. 12, 13 and 15 in these collieries for the period at the price and upon and subject to the terms and conditions thereinafter mentioned and appearing. The immediately relevant operative provisions which follow may thus be summarised.

The agreement, by clause 1, is to commence and come into operation as on and from the 1st of April, 1921, or such earlier first day of April as the Tata Company may by 12 months' previous notice in writing declare. Subject to a proviso to which reference will later be made, the agreement is thereafter to remain and continue in force for 25 years.

By clause 2—a clause important as an aid to construction—the agreement is made subject to all such other contracts and engagements for the sale and delivery of coal as shall have been entered into by the Coal Company before and shall be subsisting "at the commencement of the agreement" with the proviso that upon notice being given as provided by clause 1—

> "No further contracts or engagements for the sale and delivery of coal from the said seams, Nos. 12, 13 and 15, shall be entered into by the [Coal Company] for a period longer than 12 months from the date of such notice."

By clause 3 the Coal Company in each month during the continuance of the agreement is to sell and the Tata Company is to buy—

> "All such output of coal . . . or run of mine as shall be raised by [the Coal Company] from seams Nos. 12, 13 and 15 . . . during such month."

The coal is to be loaded by the Coal Company at its own expense into wagons at the colliery siding and is to be despatched at the risk and charge of the Tata Company.

Clause 4 makes provision for fixing of prices once a year, the price never to be less than Rs. 3. 12 annas per ton.

By clause 5, unless prevented by, amongst many other visitations, the "exhaustion or deterioration of the said seams or any of them," the Coal Company is to—

> "Despatch each month the whole output of coal or run of mine from the said seams 12, 13 and 15 as and when the same shall be raised to [the Tata Company] at their iron and steel works at Sakchi in the District of Singhbhum,"

with a right given to the Tata Company, by previous instruction, to require any portion of the output to be despatched to any other party or place. The Coal Company is also by this clause required to furnish to the Tata Company every week particulars of raisings "available for despatch under the agreement." This last will be found to be an illuminating phrase.

By clause 7 each month's output of coal and run of mine from the seams is to be deemed to be the subject matter of a distinct and separate contract, with a proviso that if in any month the Coal Company is prevented by any of the causes mentioned in clause 5 from despatching (here follows another illuminating phrase) "the entire output of that month (less the quantity covered by and deliverable under the contracts and engagements referred to in clause 2 hereof)," the result is to be that "in every such case the aggregate quantity of stocks remaining undespatched at the end of such month shall subject as hereinafter provided be carried forward and added to and be treated as the output of the next succeeding month." All of this is followed by a proviso that if the stocks remaining undispatched at the end of a month shall amount to or exceed 10,000 tons, the Tata Company is to pay the full value of such stock and the Coal Company's piling and stacking charges.

By clause 8 the Coal Company is to indent on the railway for a sufficient number of wagons and is to assign to the Tata Company such a number of wagons each month as shall bear to the total number of wagons received at the collieries during such month "the same proportion as the output of coal and run of mine from the said seams . . . during that month (less the quantity covered by and deliverable under the contracts and engagements referred to in clause 2 hereof) shall bear to the entire output and run of mine from all seams for the time being worked in the said collieries." The repetition in this clause of the phrase from clause 7, already noted, will not be missed.

Clause 9, which is the critical clause, is as follows :—

> "The output of coal and run of mine from the said seams, Nos. 12, 13 and 15 is estimated approximately at 15,000 to 25,000 tons a month, and the [Coal Company] shall unless prevented by any one or more of the causes mentioned in clause 5 hereof maintain such output at such estimated quantity provided that if such an output (unless prevented as aforesaid) is not maintained, the [Tata Company] shall be at liberty to purchase in the market any deficiency under the minimum quantity of fifteen thousand tons per month on account and at the risk of the [Coal Company], who shall make good any loss sustained by the [Tata Company]."

Clause 11 is a definition clause of importance in construction. It provides that "the expression 'output,' wherever it occurs in these presents," is to be deemed to mean the quantity of coal and run of mines left available for despatch after deducting and making allowance for "the quantity consumed or required for" the working of engines and machinery . . . "and/or for any other purpose or requirement whatsoever of the collieries."

The proviso to clause 1 and clause 12 may be conveniently grouped. The proviso declares that if before the expiration of the contract term of 25 years either of the Companies goes into liquidation otherwise than for the purposes of reconstruction or if the Coal Company relinquishes and abandons its collieries, then and in each such case the agreement shall cease and determine forthwith, provided that the Coal Company shall not relinquish and abandon its collieries without the consent and approval of the Tata Company, not, however, to be withheld if workable coal in the collieries or any of them shall have been exhausted or if the Coal Company is finding it impossible or difficult to work its collieries or any of them at a profit.

Clause 12 precludes the Coal Company from selling or transferring its collieries without making it a condition that such sale or transfer is subject to the agreement and all liabilities thereunder, so that on completion the agreement shall be binding on the purchasers or transferees as if it had been originally entered into by them.

It is convenient in the first instance to consider the effect of this agreement apart from clause 9. And a survey of its provisions appears to their Lordships to disclose a consistent purpose to secure to the Tata Company at every turn as large a continuous delivery of coal as the capacity of the seams and labour and physical conditions will permit. By clause 3, the influence of clause 2 still being fresh and therefore unexpressed, "all the output of coal and run of mine" is the comprehensive subject of the sale. Unless stopped by the visitations in clause 5 detailed it is "the whole output of coal and run of mine as and when the same shall be raised" that by the clause is carried to the Tata Company or as that Company may direct. The provision under clause 7 for the storage and stacking of gotten coal by the Coal Company when during some month it has not been possible to despatch it suggests neither a limitation upon its amount nor any reduction in the deliveries to be made during the succeeding month by reason of the forwarding during the same month of the undespatched outputs of the past. Assignments of railway wagons indented under clause 8 are to be proportionate to the actual deliverable output. No hint anywhere of limitation. Again, the care taken by the proviso to clause 1 and by clause 12 itself to preserve to the Tata Company the enjoyment of its covenanted privileges under possibly changed conditions is observable. Nor will there be missed the power reserved to

that Company, by timely notice, to prevent, as from its date, any of the coal otherwise reserved to the Tata Company being made available during any part of the contract term for any other person—a power which, it may here be recalled, the Tata Company actually exercised by serving, under clause 1 of the agreement, as early as the 29th of January, 1919, a notice bringing the agreement into force on the 1st April, 1920, although the notice for every other purpose than that of stopping further encroachment upon the contract reserves under clause 2 would have been equally effective if served as late as the 31st of March. Again, with reference to the suggestion that a limited monthly supply might well be provided for in order to leave a sufficiency of coal in the seams for the service of the contract over a term so long as 25 years, it has first to be observed that no evidence as to the extent of the seams proved or conjectured has been adduced, while twice (clauses 1 and 5) the exhaustion of these seams is included amongst the events excusing the Coal Company from further performance. And when it has been noted finally that the Tata Company is not by the agreement required to use the contract coal for its own purposes, but is at liberty to dispose of it and direct its destination wheresoever and to whomsoever it pleases, as freely indeed as any surplus coal produced by itself, while the Coal Company all the time is precluded from disposing of what may be called the three seams contract coal to anyone other than the Tata Company, it can excite no surprise that the agreement, although directed to secure for the Tata Company the largest available output, is in no way framed so as to hinder the Coal Company from properly working its three seams at a profit to itself. On the contrary, its proved inability so to do will by clause 1 release the Coal Company from further performance of the agreement.

But it is said that all these provisions, pointing so invariably in a contrary direction, are really in no way inconsistent with a construction being placed upon clause 9 which must effectively preclude the Coal Company from either itself taking from the three seams in any month a contract output exceeding 25,000 tons or from requiring the Tata Company to accept under the agreement any monthly delivery in excess of that quantity. Indeed, learned Counsel for the Tata Company found in clause 9 an agreement between the two Companies under which, unless excused by clause 5, the minimum deliveries must never in any month fall below 15,000 tons, while the maximum must never exceed 25,000 tons.

Now there is much to be said on more general lines as to the true effect and purpose of clause 9. But this much, their Lordships think, is clear, namely, that the construction contended for can have no justification unless by the clause the " outputs " of 15,000 tons and 25,000 tons therein mentioned represent outputs which, according to the working of the agreement, are in the

language of clause 5, "available for despatch under the agreement."

If they are not so available, there can be no question of either the one figure being a minimum or the other being a maximum in any contractual relation to the Tata Company. And the argument upon the clause for the Tata Company was really based upon the assumption that the output of 25,000 tons mentioned in clause 9 was in fact an output of deliverable coal. But in their Lordships' view there is no real warrant for this assumption.

Conceivably the monthly "output" of coal of which an estimate is made by the clause may be one of three outputs. It may be that defined by clause 11, "the defined output"—that is to say, the gross monthly output, less a reserve, quite unrestricted in amount, for what may be called the operative or domestic purposes of the collieries. Or, again, it may be what may be described as the "contract output"—that is to say, in terms of the phrase twice adopted in the agreement to describe that output (clauses 7 and 8); it may be the defined output "less the quantity covered by and deliverable under the contracts and engagements referred to in clause 2 hereof." Or, finally, it may be the gross output of the seams with none of the deductions prescribed or allowed to bring that output down either to the defined output or to the contract output.

Now, if this agreement were a statute, in view of the rigid terms of the definition in clause 11, it might not be permissible for any court of construction to place upon the word "output" in clause 9 any other than its defined meaning. But greater liberty of interpretation is permissible in the case of an agreement like this, whose drafting precision is imperfect, and, exercising that liberty, their Lordships very strongly incline to the view, as being most completely in accord with the reality of any possible estimate that the output actually referred to in the clause is the gross output and no other.

What, however, to their Lordships seems clear is that, on construction, while the output may be the defined output, or it may be the gross output, it cannot be held to be the contract output. And this for two reasons. The first, that the word in section 9 is quite unqualified, and is in terms within the express provisions of the definition clause. Of itself this might in an agreement like the present be inconclusive, but the force of the observation is immeasurably strengthened by the fact that when the contract output is being referred to in each of the two immediately preceding clauses, it is described in the identical terms already referred to, which are free of all ambiguity. Moreover, the omission of these or similar words from clause 9, significant enough in itself, must, their Lordships think, be regarded as deliberate, when their second reason against treating the output of that clause as the contract output is regarded.

That reason is that at the date of the agreement any estimate of the "contract output" was frankly impossible. That output during the continuance of the agreement depended upon two factors, both ascertainable only in the future, the one governed by the action of the Tata Company, the other by the action of the Coal Company, and both unknown. It depended, first, upon the actual date, early or late, of the Tata Company's notice under clause 1; it depended next upon the magnitude and duration of the contracts and engagements which might be made by the Coal Company for the supply to other persons of coal from the seams, contracts which might be concluded prior to the receipt of the notice, a period which, if the notice were not given at all, as might have been the case, would extend until the 1st of April, 1921.

If, then, it be true, as their Lordships think it is, that the average output stated in clause 9 has no reference whatever to the service of the contract, that clause can give no countenance to the suggestion that it provides for a maximum or any supply to the Tata Company in any month of 25,000 tons. It is indeed not impossible, on the true construction of clause 9, that quite consistently with the discharge by the Coal Company of every obligation to maintain output imposed by the clause, there might still, in any month, clause 5 being out of the picture, be no deliverable coal at all for the Tata Company, beyond the 15,000 tons secured to it solely by the provision that, saving clause 5, the "quantity" which the Coal Company must in every month make good is 15,000 tons. And this view of clause 9 brings it into complete harmony with the rest of the agreement. The estimate of gross output, between 15,000 tons and 25,000 tons in each month becomes an output which may be looked for and which, for whom it may concern, the Coal Company is to maintain; but the purpose of the clause, corresponding in that respect with so many other clauses of the agreement, is really to secure for the Tata Company, saving clause 5, a minimum delivery, or the equivalent of a minimum delivery of 15,000 tons, in each month. There is no maximum at all.

The learned Chief Justice in his judgment reached the same conclusion, even on the assumption that the output estimated in clause 9 was the contract output. That view was strongly supported before the Board by learned Counsel for the Coal Company. Their Lordships are in sympathy with it. They would hesitate long before they attributed to the clause with no expressed operative provision going beyond the securing of a minimum monthly supply an effect not required by the wording of the clause itself and entirely discordant with the tendency of the other provisions of the agreement as they read them.

But they do not pursue this topic further. They are content to rest their decision upon the view of clause 9 first expressed in this judgment.

The Tata Company, contending that it was entitled to refuse all deliveries in any month beyond 25,000 tons, refused to accept in April, 1928, any excess. The learned trial Judge, who rejected this contention, granted to the Coal Company amongst other relief, "an enquiry what was the quantity of coal which the plaintiff Company could and would have raised and delivered to the defendant Company in excess of 25,000 tons per month during the period commencing from the first day of April to the tenth day of September, 1928, inclusive, and to what sum, if any, the plaintiff Company is entitled by way of damages in respect of such quantity of coal in consequence of the defendant Company's refusal to accept the same."

And this inquiry was maintained by the Appellate Court. Upon the footing that the view taken of the agreement in the Courts below was well founded, this enquiry was the only part of the learned Judge's formal judgment retained by the Appellate Court to which exception was taken before the Board by the Tata Company, and with reference to that enquiry it was finally conceded by learned Counsel that unless he could successfully distinguish the present case from *Cort* v. *Ambergate, &c., Railway Company*, 17 Q.B. 127, his objection to the enquiry must fail. Upon this their Lordships need only say that, in their opinion, no valid distinction between the two cases can be drawn.

It follows therefore that the order appealed from should stand, and their Lordships will humbly advise His Majesty that this appeal therefrom be dismissed, and with costs.

In the Privy Council.

THE TATA IRON AND STEEL COMPANY, LIMITED,

v.

THE RANEEGUNGE COAL ASSOCIATION, LIMITED.

DELIVERED BY LORD BLANESBURGH.

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