APPEAL FROM ORIGINAL CIVIL.

Before Jenkins C.J., and Woodroffe J.

D. N. GHOSE & BROS. 1915

v. *Jan.* 28.

POPAT NARAIN BROS.*

Practice—Reference—Assessment of damages.

A reference should be directed by the Court to assess damages only when the enquiry would involve questions of detail which it would be wasting the time of the Court to investigate.

Wallis v. *Sayers* (1) referred to.

APPEAL by the defendants, D. N. Ghose & Brothers, from the judgment of CHITTY J. on exceptions to the report of the Assistant Referee.

On the 28th May 1912 the plaintiffs, Popat Narain Brothers, instituted a suit against the defendants D. N. Ghose & Bros. being suit No. 537 of 1912 for the recovery of Rs. 7,776-9-6 as damages for non-delivery of coal which the plaintiffs bought from the defendants under five several contracts, namely (i) Contract No. 90 dated the 7th October 1911 by which the defendants sold to the plaintiffs 900 tons of Lodna rubble at Re. 1-12 per ton, (ii) Contract No. 91 dated 7th October 1911 by which the defendants sold to the plaintiffs 1,500 tons of Hemtodih rubble at Re. 1-8 per ton, (iii) Contract No. 122 dated 30th November 1911 by which the defendants sold to the plaintiffs 200 tons of Gajalidund B. B. rubble at Re. 1-12 per ton, (iv) Contract No. 124 dated the 1st December 1911 by which the defendants sold to the plaintiffs 100 tons of Ghusick B. B. rubble at Rs. 2-4 per ton, and (v) Contract made on the 16th February 1912 by which the defendants sold to the

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plaintiffs 2,000 tons of Dhurmobund steam coal and 2,000 tons of Tituria steam coal at Rs. 3-14 per ton. It was alleged by the plaintiffs that the following quantities remained undelivered under the several contracts, namely under contract No. 90, 616 tons 11 cwt., under contract No. 91, 737 tons 12 cwt., under Contract No. 124, 84 tons 3 cwt., and the whole quantity under Contract No. 122 and the contract of the 16th February 1912.

A decree was made with the consent of the parties on the 28th November 1912, on the following terms. "The defendant firm undertakes to deliver the balance of coal remaining undelivered under the first four contracts except the portion relating to Hemtodih coal in respect of which the defendant firm undertakes to make up the Hemtodih contract by delivering Tituria coal. As to the contract of the 16th February that is to be satisfied by delivering to the plaintiff firm 1,000 tons each of Dharmabad and Tituria coal. . . . . The terms of the payment of the price of the coal under the first four contracts will be in accordance with the terms on the contracts. The payment of the price of the 2,000 tons under the contract dated the 17th February is to be on the same terms. The plaintiff firm to send despatching instructions at once and to be entitled to a *pro rata* share of the wagons sent. All deliveries must be completed by the 28th February 1913. . . . . The total amount of all the contracts so far as may be, is to be delivered by equal monthly instalments, that is $\frac{1}{3}$ in December next, $\frac{1}{3}$ in January next and $\frac{1}{3}$ in February next. Liberty to the defendant firm to give increased deliveries in any particular month. Each party to bear own costs of this suit."

The present suit was instituted by Popat Narain Bros. on the 13th February 1913.

The plaintiffs alleged that in pursuance of the consent decree, they gave despatching instructions to the defendants for the total quantity of rubble and coal which the defendants had undertaken to deliver—that during December and January the defendants delivered only the following quantities of steam coal and rubble namely 216 tons 14 cwt. of Dharmabund and 390 tons 11 cwt. of Tituria steam coal, and 106 tons of Lodna rubble. On the 28th January 1913 the defendants wrongfully repudiated their obligation to deliver any further goods under the said decree, the reason being the rise in the market price for coal and rubble, and that by reason of such repudiation, and the non-delivery of the balance of the steam coal and rubble, the plaintiffs had suffered loss and damage amounting to Rs. 8,914-11 calculated on the basis of the market rates prevailing on the 28th January 1913. The plaintiffs alleged they were always ready and willing to take delivery of and pay for the goods as provided in the decree and that they gave proper instructions and made payments in terms of the decree.

Allowing credit for a particular bill for Rs. 158-3-9 the plaintiffs claimed from the defendants the sum of Rs. 8,755-7-3.

In their written statement the defendants denied that they wrongfully repudiated any obligation, or committed any breach of contract and relied on the defence that there was a shortage of wagons. They alleged that previous to the decree they had delivered under contract No. 90, 303 tons 4 cwt., and since the decree 217 tons 4 cwt. of Dharmabund steam coal, 390 tons 11 cwt. of Tituria steam coal and 124 tons 4 cwt. of Lodna rubble. They denied that the plaintiffs had suffered any loss or damage and submitted that in any event they could not be made

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liable for the entire amount of coal remaining undelivered on the basis of the difference between contract rates and the rate prevailing on the 28th January 1913. The defendants lastly denied that the plaintiffs were ready and willing to take delivery of the coal in terms of the decree.

The suit came on for hearing before FLETCHER J., and, on the 23rd April 1913, the following decree was made:—

"It is ordered and decreed that the further hearing of this suit be adjourned and that it be referred to the Assistant Referee of this Court to enquire and report what was the amount of damages suffered by the plaintiff firm by reason of the repudiation on the 28th January 1913 by the defendant firm of the contract embodied in the consent decree of this Court made in suit No. 537 of 1912, and dated the 28th November 1912, such damages to be ascertained on the basis of the market rates on the 28th January 1913. . . . ."

The plaintiffs filed their statement of facts on the 18th July 1913, and the defendants their counter statement of facts on the 6th August 1913. After several adjournments the reference was entered upon on the 26th February 1914, and the report of the Assistant Referee was made on the 9th March 1914. Exceptions to the report were filed by the plaintiffs on the 23rd June 1914. The exceptions were heard by CHITTY J., and on the 7th July 1914 his Lordship pronounced the following judgment:—

"This matter comes before me on exception to the Assistant Referee's report. The plaintiffs are the excepting party but their Counsel has now given up all the exceptions, except one, that is, their objection to the Assistant Referee's finding in respect of a contract for Lodna rubble. In their Statement of Facts the defendants put the rate for Lodna rubble at Rs. 3-4 per ton. The plaintiffs called some evidence to show that it was much higher over Rs. 5 per ton. The Assistant Referee for good reasons found that that evidence was of no value, and did not prove any market rate. The defendants then called two witnesses, one Behari Lall Ganguly, from Messrs. Turner Morrison and Company and one Umesh Chunder Gupta from Messrs. Dibar and Roy. These witnesses proved sales to the defendants

and to Dibar and Roy by Messrs. Turner Morrison and Company at the Lodna Colliery in January 1913 at Re. 1-7 or 1-8 per ton. We may take it that the general rate of those sales was Re. 1-8. The plaintiff objects and I think, rightly objects that this is no evidence of a market rate for Lodna rubble, which could be taken into account for assessing the damages sustained by the plaintiffs. It is clear from Behari Lall's evidence that Messrs. Turner Morrison and Company gave preference in their sales of Lodna rubble to the defendants and Dibar and Roy. That being so, the rates at which those two firms could purchase at the pit's mouths from Turner Morrison and Company do not represent the rate at which the plaintiffs could procure similar coal in the open market. It is plain from Behari Lall's evidence that these two firms had the exclusive right of purchasing this coal from Messrs. Turner Morrison and Company. It was only, if there was any surplus left over, that it would be sold to outsiders. It is incorrect, therefore, to say that the price at which Lodna rubble was sold to the defendants and Messrs. Dibar and Roy represented the market price of that coal on that date. The defendants in their Statement of Facts admitted that the rate at which the plaintiffs could buy was Rs. 3-4, but their Counsel argued before the Assistant Referee that this was a mistake on their part, and he accordingly adduced the evidence above referred to to show that the market rate was lower. I have already said that the rate of Re. 1-8 at which sales were made to the defendants and Dibar and Roy does not represent the market rate in the sense of being the price obtainable in the open market. As to the defendants being bound by this admission, they may not be absolutely bound, but it is very cogent evidence against them. It appears to me all the more cogent because, when they made it, the defendants must have been well aware of the sales at Re. 1-8 to themselves and Dibar and Roy. They cannot escape from the fact. The plaintiffs are now willing to accept the rate of Rs. 3-4 admitted by the defendants. I order accordingly that this exception be allowed and the damages be assessed at the rate of Rs. 3-4 on the 492 tons 7 cwt. As the other exceptions have not been pressed I direct that each party do bear their own costs."

From this judgment the defendants appealed.

Mr. A. N. Chaudhuri and *Mr. B. K. Ghosh*, for the appellants.

Mr. B. L. Mitter and *Mr. Bhattacharjee*, for the respondents.

[For the purposes of this report the arguments of counsel are unnecessary.]

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JENKINS C.J. This is an appeal which arises out of a suit between a vendor and a purchaser of coal, and one which should have been disposed of at the trial both on the question of liability and on the question of damages. However, a reference was directed.

More than once this Bench has protested against a reference being directed in cases of this nature. I wish again to repeat the protest, and I do this in the language of the Court of Appeal in England, when Lord Justice Bowen expressed his desire to protest against the melancholy spectacle which the case before him presented. He said . . . . . "Cases ought only to be referred to other persons to assess the damages where the inquiry involved questions of detail which it would be wasting the time of the Court to investigate." The opinion so expressed by Lord Justice Bowen was shared by Lord Justice Cotton and Lord Justice Fry, the latter of whom said that "he had more than once expressed his fears lest the practice of directing enquiries should lead to two trials when one was sufficient. Sending an action to a referee might be necessary in some cases, but as a general rule his Lordship objected to the splitting up of the trial into two enquiries—*first*, as to the right, and, *secondly*, as to the amount of damages. This case might have been entirely disposed of by the Judge": *Wallis* v. *Sayers* (1). We share the opinion to which expression is given in *Wallis* v. *Sayers* (1), and this case amply illustrates the undesirability of a needless reference. I have described the nature of the suit. It was commenced a long time back there was a decree establishing the right in 1913, and we are now in 1915 dealing with an appeal on exceptions to the Referee's report as to the *quantum* of damages. I trust that cases of this kind will not be referred to

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the Referee. It is not merely that this is an error of procedure, but where the question is one between a seller and a purchaser and the point in dispute may be *readiness and willingness to sell*, it is obviously of prime importance to know how the market has gone with reference to the contract price. In this case the matter went before the Referee. It did not take a very direct course, and I am not clear that the real points were properly appreciated, but the result has been that the plaintiff has failed to prove the amount of damages in respect of this particular coal, Lodna rubble, unless he can rely on an allegation in the defendant's Statement of Fact. But that allegation was made provisionally. The plaintiff never insisted upon it before the Referee as being a correct statement of the market rate, and it is obvious from the course which the case took before the Referee, that both parties gave the go-by to that statement and endeavoured to establish by evidence before him what the market rate was. The plaintiff has failed to prove that the market rate exceeded Rs. 1-12 annas. Therefore, I think Mr. Justice Chitty ought not to have interfered with the conclusion of the Referee.

This appeal is allowed, and the order of Mr. Justice Chitty is set aside with costs of this appeal and the exceptions before Mr. Justice Chitty.

WOODROFFE J. I agree.

Appeal allowed.

Attorneys for the appellants: *B. N. Basu & Co.*

Attorney for the respondents: *Rajani Mohan Chatterjee.*

J. C.