ORIGINAL CIVIL.

Before Sir L. H. Jenkins, Chief Justice, and Mr. Justice Russell.

THE BENGAL COAL COMPANY, LIMITED (ORIGINAL DEFENDANTS), APPELLANTS, *v.* HOMEE WADIA AND CO. (ORIGINAL PLAINTIFFS), RESPONDENTS.*

1899. *October* 12.

Offer—Contract—Continuing offer—Successive contracts—Reasonable notice.

The plaintiffs were the agents of two mills in Bombay. The defendants were a coal company carrying on business in Bombay by their agents, the Bombay Company, Limited.

The defendants on the 19th of August, 1897, signed a memorandum in the form of a letter addressed to the plaintiffs, of which the first two clauses were as follows:—

"The undersigned have this day made a contract with Messrs. Homee Wadia and Co. for a period of twelve months, *viz.*, from 1st September, 1897, to 31st August, 1898.

"Sellers to supply them with Bengal Coal Co.'s Deshurghur from time to time as required by purchasers; reasonable notice to be given of such requirements. The total quantity indented for during the year shall not exceed, without seller's consent, the maximum average of 350 tons per month."

Up to the 16th July, 1898, the plaintiffs had indented for 1,752 tons, of which 1,552 tons had been delivered. On that date they indented for 500 tons more. On the 18th July, the plaintiffs further indented for an additional 1,500 tons. The defendants replied offering to deliver 500 tons in August, but declining to deliver 1,500 tons. The plaintiffs on the 22nd July gave notice to the defendants that they would require delivery of the balance, *viz.*, 2,648 tons (that is, 4,300 *minus* 1,552 tons already delivered), on or before the 31st August, 1898.

The defendants subsequently delivered 200 and 500 tons, leaving 1,948 tons undelivered. The plaintiffs claimed Rs. 6,600-13-5 as damages for non-delivery.

Held, that the memorandum of the 19th of August, 1897, was not a contract, but simply a continuing offer, and that each successive order given by the plaintiffs was an acceptance of the offer as to the quantity ordered. The offer of the defendants and each successive order of the plaintiffs constituted a series of contracts. The failure alleged was one to comply with orders given after the defendants' offer was cancelled and withdrawn.

Held, further, that the plaintiffs were not entitled to obtain more than 350 tons in any one month without the defendants' consent.

Held, further, that the notice given by the plaintiffs on the 22nd July, 1898, to supply 2,648 tons was not a reasonable notice within the meaning of the memorandum of the 19th August, 1897.

* Suit No. 520 of 1898. Appeal No. 1029.

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BENGAL COAL CO. v. HOMEE WADIA AND CO.

APPEAL from Candy, J.

Suit to recover damages for non-delivery of coal.

The plaintiffs were the agents of two mills in Bombay, *viz.*, the Dhun Mill and the Diamond Mill, the latter of which at the date of the contract hereinafter stated had not yet begun to work. The defendants were a coal company carrying on business in Bombay by their agents, the Bombay Company, Limited.

On the 19th August, 1897, the following agreement to supply the plaintiffs with coal for a year was made by the defendants :—

"*Bombay*, 19*th August*, 1897.

"HIRJIBHAI F. R. WADIA,
"Broker.

"The undersigned have this day made a contract with Messrs. Homee Wadia and Co. for a period of 12 months (twelve), *viz.*, from 1*st September*, 1897, *to* 31*st August*, 1898.

"Sellers to supply them with Bengal Coal Co.'s Deshurghur from time to time *as required by purchasers;* reasonable notice to be given of such requirements. The total quantity indented for during the year shall not exceed, without sellers' consent, the maximum average of 350 tons per month.

"Price Rs. 13 (thirteen) per ton, usual office terms of ½ per cent. Cash on delivery from alongside steamer in harbour.

"If sellers fail to give them delivery, purchasers to buy Deshurghur either from alongside or from the bandar at market rate, or if it be not obtainable they to buy any other description of Bengal coal and recover the difference in price, if any, from the sellers. Should buyers fail to take delivery of the required quantity after indenting for same as aforesaid, sellers to sell on their account.

"For the Bombay Company, Limited,
"(Sd.) H. R. DUNK,
"For Managing Director,
"Agents to the Bengal Coal Co., Ld."

Under this contract the plaintiffs indented for and the defendants delivered 200 tons in September, 1897, and 100 tons in each of the months from October, 1897, to February, 1898, inclusive, 150 tons in March, 1898, 200 tons in April, 1898, 300 tons in June, 1898, and 200 tons in July, being a total of 1,552 tons.

This amount of coal having been actually delivered, a further indent for 200 tons was made by the plaintiffs *prior* to the 16th

July, 1898, and on that day they indented for a further quantity of 500 tons by the following letter :—

"DEAR SIRS,—With reference to the contract dated 19th August, 1897, for the supply of 4,200 tons Deshurghur coal, we have up to date indented for 1,752 tons, out of which we have taken delivery of 1,552 tons. We have already handed you an indent for another 200 tons. You have, therefore, still 2,448 tons to deliver. We learn from your reply of 8th July to our memo. of the previous day that you expect the next boat at the end of the month, so please hand us a delivery order for 500 tons (beyond the 200 indented for) from this boat.

"Probably next week we might again indent for another similar or larger quantity for delivery at the end of this month. . . .

"Yours faithfully,

"(Sd.) HOMEE WADIA & Co."

Two days later, *viz.*, 18th July, 1898, the plaintiffs indented for a further supply of 1,500 tons by the following letter :—

"DEAR SIRS,—As intimated in ours of 16th instant we have now to indent for another 1,500 tons (one thousand five hundred tons) of Deshurghur coal besides the 500 tons therein asked for, and will thank you to hand us a separate delivery order for this quantity (1,500 tons) or only one delivery order for all 2,000 (two thousand) tons as might suit you. We suppose we need not repeat that these 2,000 tons don't include the 200 (two hundred) tons previously indented for or that we want these two thousand tons from the next boat which your reply of 8th July said is expected at the end of the current month.

"Yours faithfully,

"(Sd.) HOMEE WADIA & Co."

This letter Candy, J., was of opinion had been written after an interview between the plaintiff and Mr. Dunk which took place on the 18th July. At that interview Mr. Dunk told the plaintiff he would not deliver any more coal beyond the 200 tons already ordered. The defendants wrote the following letter to the plaintiffs on the 19th July :—

"*Bombay*, 19*th July* 1898.

"Messrs. HOMEE WADIA & Co.,
Bombay.

"DEAR SIRS,—In reply to your two letters of 16th instant, received yesterday, we do not read the contract of 19th August, 1897, as you appear to do.

"Your request for 500 tons beyond the 200 tons we cannot comply with, as your notice is too short. Your request for delivery order for 1,500 tons contained in your letter of yesterday—received this morning—is of course quite out of the question.

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"As to the 500 tons, we are, however, prepared, as a concession, to let you have them by a later steamer arriving in August, if you will let us know this month that this will suit you; this concession is without prejudice to our Mr. Dunk's intimation to you of yesterday that we cannot supply more than the 200 tons indented for in the early part of this month.

"It was represented to us that you were the agents of two mills and that your contracts were made to meet the requirements of those mills, and we entered into them on that understanding.

"We beg to inform you that your business does not suit us, and we, therefore, withdraw from the arrangement for 1899 contained in the writing of 14th instant."

The plaintiffs contended that, under the contract, the defendants were bound to deliver within the year 4,200 tons of coal, (*i.e.*, 350 tons per month), and on the 22nd July, 1898, they gave notice to the defendants that they would require delivery of the balance, *viz.*, 2,648 tons (*i.e.*, 4,200—1,552) on or before the 31st August, 1898, as in the following letter :—

"In order to avoid misunderstanding we shall be glad to know whether we rightly understand that you are prepared to deliver (1) 200 tons out of the S. S. 'Samoa,' and (2) 500 tons out of the next boat, and will not deliver the remaining 1,500 tons indented for, nor recognise our client's claim, either in respect of the late delivery of 500 tons nor non-delivery of 1,500 tons.

"Our clients maintain that the notice given by them is quite ample and that you are bound to deliver the balance of coal under the contract before the 31st August next.

"Without prejudice to the notices previously given, we are instructed to give you notice that our clients require you to deliver them the whole of the remaining quantity of coal, *viz.*, 2,648 tons, on or before the 31st August next in such lots as may suit you. Our clients will accept the 200 tons per S. S. 'Samoa' in part delivery of the above quantity.

"We are, therefore, instructed to inquire whether you are ready and willing to give delivery of the remaining 2,448 tons on or before the 31st August or not."

The defendants subsequently delivered the 200 and 500 tons, which left a balance undelivered of 1,948 tons. They refused to deliver any more coal. The plaintiffs, therefore, filed this suit claiming Rs. 6,600-13-5 as damages.

The defendants contended (*inter alia*) that the writing of the 19th August, 1897, was not a contract on their part to supply coal, but was, at most, an offer to supply coals on the orders of the

plaintiffs; that their offer might be withdrawn by them at any time, unless such order had already been given by the plaintiffs. Their contention is stated in the following prayers of their written statement:—

"3. The defendants submit that upon the true construction of the said document it contains no contract on their part to supply any coals, but is, at most, an offer to supply coals, which offer it was open to the defendants at any time to withdraw as to any coals unless the same had then been ordered by the plaintiff. The defendants say that on the 18th of July, 1898, the plaintiff, who had previously ordered two lots of coal of 200 and 500 tons respectively of which he had not then obtained delivery, was informed by the defendants' agents that the defendants would not supply more than the said 200 tons of coal then already ordered. The defendants submit that they were justified in giving the plaintiff such notice, and were thereby absolved from the necessity of complying with any further requirements of the plaintiff. The defendants deny that they had by the 18th July, 1898, received any notice from the plaintiff that he would require the 1,500 tons of coal in the 3rd paragraph of the plaint mentioned.

"4. Defendants also say that they did not receive from the plaintiff reasonable notice requiring them to supply the 500 and 1,500 tons of coal in the plaint mentioned, or the balance of coal in the plaint referred to, having regard to the shortness of the interval between the dates on which such coal was ordered and the 31st of August, 1898, when the year provided for by the said document terminated. The defendants submit that by reason of such want of reasonable notice they were under no obligation to supply any of the said coal.

"5. As to the said 500 tons of coal, the defendants say that as a concession to the plaintiff, and without admitting any liability in respect thereof, they delivered the said coal to the plaintiff and the same was accepted by him."

The lower Court passed a decree for the plaintiffs.

The defendants appealed.

Scott and *Jardine* for the appellants.

Macpherson and *Anderson* for the respondents.

The following authorities were cited:—*Great N. R. Co.* v. *Witham* [1]; Leake on Contract, p. 30, and *Offord* v. *Davies* [2].

JENKINS, C. J.:—This suit is brought by Mr. Homee N. A. Wadia, who carries on business in Bombay under the name of Homee Wadia and Co., against the Bengal Coal Company, Limited, who, as their name indicates, carry on business in Bengal.

(1) (1873) L. R. 9 C. P., 16. (2) (1862) 12 C. B., 41.

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The suit is one to recover damages for breach of an alleged contract dated the 19th August, 1897.

This document is in writing, and is as follows:—(His Lordship read the document and continued:—)

Mr. Justice Candy considered that this document constituted a binding contract between the parties, and he held that under it the Bengal Coal Company was bound to deliver to the plaintiffs within the year a total quantity of coal not exceeding 4,200 tons; and he was further of opinion that reasonable notice to deliver the coal within the meaning of the memorandum of the 19th August had been given by the plaintiffs. On those findings he assessed the damages and passed a decree in favour of the plaintiffs.

From that decree the present appeal is preferred, and it has been contended before us that the learned Judge was wrong in holding that there was a contract at all, and that even if he was right in holding that there was a contract he was wrong in holding that reasonable notice to deliver had been given. I think the appellants are right in both these contentions.

I am of opinion that the memorandum of the 19th August, 1897, is not a contract, but simply a continuing offer made by the defendants to the plaintiffs, and that each successive order given by the plaintiffs under it while it remained in force was an acceptance of the offer as to the quantity ordered, and that thus the offer of the defendants and each successive order of the plaintiffs together constituted a series of contracts.

It is an invariable principle of the law of contracts that an offer by one person made to another imposes no obligation on the former until it is accepted by the latter according to the terms in which the offer is made. That is a principle very clearly laid down in *Offord* v. *Davies*[1] and *Great N. R. Co.* v. *Witham*[2], and I think having regard to that principle and to those authorities, it is clear that the memorandum of the 19th August, 1897, was (until orders under it were given) nothing more than a continuing offer, which the defendants might revoke. They could not, of

(1) (1862) 12 C. B., 41 (2) (1873) L. R. 9 C. P., 16.

course, revoke it as to orders actually given, but except as to them, they had full power of revocation.

If that is so, then the plaintiffs' case must fail. For the failure to perform alleged in this case, and for which the plaintiffs claim damages, was a failure to comply with orders which were given after the defendants' offer was cancelled and withdrawn. That was done on the 18th July at the interview of that date, and the plaintiffs' order for the balance of the 4,200 tons was given afterwards. When that order was given, there was no offer in existence upon which it could operate as an acceptance.

On this ground, therefore, in my opinion the plaintiffs' claim must be rejected, but there is another point upon which, I think, the lower Court has erred in construing the writing of the 19th August. The second clause of that document is as follows:—"Sellers to supply them with Bengal Coal Company's Deshurghur from time to time as required by purchasers; reasonable notice to be given of such requirements. The total quantity indented for during the year shall not exceed without seller's consent the maximum average of 350 tons per month."

I think the word "average" there must be read as meaning "quantity." It was probably written by mistake in the hurry of business. The two words "maximum" and "average" are inconsistent, and one or the other must go out or be modified. The expression "maximum quantity" probably more correctly expresses the intention of the writer. That appears to have been the limit which the defendants offer imposed on the amount of coal to be ordered by the plaintiffs in each month. I cannot agree with the learned Judge of the Court below that the plaintiff was entitled under this writing to order at any time the whole quantity of 4,200 tons. That was the total amount to be supplied within the year if ordered by the plaintiffs. It was the outside limit, but the coal was to be supplied by the defendants in monthly instalments, and the plaintiffs were not entitled to obtain more than 350 tons in any month without the defendants' consent.

Further, I do not think that the notice given by the plaintiffs on the 22nd day of July, 1898, to supply 2,648 tons was a reason-

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able notice within the meaning of the memorandum of the 19th August. Perhaps it might have been physically possible for the defendants to carry out such an order, but it would clearly have required an effort which the plaintiffs had no right to demand. I do not think that a notice involving such an effort from business men with innumerable other matters to attend to can be held to be such a reasonable notice as was intended by both parties when this document was given. It has been argued that because 4,200 tons were liable to be indented for in the course of a year, the defendants were bound to have set apart a sufficient quantity of coal to answer the orders if given. But it is clear that it was just to prevent the necessity of having to do this, that the parties inserted in the memorandum a clause requiring that reasonable notice should be given.

For these reasons I think that this appeal should be allowed with costs here and in the Court below.

RUSSELL, J.:—I concur.

Attorneys for plaintiffs:—Messrs. *Bicknell, Merwanji and Motilal.*

Attorneys for defendants:—Messrs. *Crawford, Brown and Co.*

APPELLATE CIVIL.

Before Sir L. H. Jenkins, Chief Justice, and Mr. Justice Candy.

1899. *June* 19.

DHONDO RAMCHANDRA AND OTHERS (ORIGINAL DEFENDANTS), APPELLANTS, *v.* VASUDEO SAKHARAM SOMAN AND OTHERS (ORIGINAL PLAINTIFFS), RESPONDENTS.*

Limitation—Khoti—Adverse possession—Limitation Act (XV of 1877), Sec. 18, and Art. 144, Sch. II—Survey Settlement Act (Bombay Act I of 1865.)

A mixed khoti village, consisting of khoti and dhárá lands, belonged to two co-sharers, Parashram and Dhondo. Each of them passed kabuláyats to Government in alternate years till 1862-63, when Parashram on account of his advanced age allowed Dhondo to pass the kabuláyat every year. In the year 1867 the survey settlement having been introduced under Bombay Act I of 1865, Dhondo refused to pass the annual kabuláyat. Government thereupon put the village under attachment, which was, however, removed in the year 1878 on his passing the

* Second Appeal, No. 544 of 1898.