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to hold the musical entertainments must be reversed, but it stands as to the right of way. As each party has succeeded partially in this appeal, there will be no costs.

BRETT J. I agree.

Decree modified.

S. M.

APPEAL FROM ORIGINAL CIVIL.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, Mr. Justice Brett and Mr. Justice Fletcher.

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March 10

COOVERJEE BHOJA*

v.

RAJENDRA NATH MUKERJEE.

Damages, measure of—Contract for forward monthly Deliveries—Construction of Contract—Breach before the time for complete Performance—Market Rate, where no Market in India, how to be determined.

The defendant contracted to sell to the plaintiffs 5,000 tons of manganese ore of a certain quality to be delivered into waggons at Kamptee, B.-N. Ry., "500 tons in October, 1,000 tons in November, 1,500 tons in December 1906, or larger quantities each month if practicable, the whole 5,000 tons to be completed not later than 15th February 1907." In October 1906 the defendant tendered in part fulfilment of the contract certain Domree ore which the plaintiffs refused to accept, on the ground of inferiority in quality. Thereupon the defendant on the 5th November 1906 wrote cancelling the contract, and on the 17th January 1907 finally repudiated all liability under the contract. On the 5th March 1907, the plaintiffs instituted an action for damages for non-delivery. It was established in evidence that ordinarily there was no market rate for manganese ore in India, but that there was a free market in England, and that the plaintiffs intended to ship the ore to England :—

Held, that the contract constituted a set of distinct contracts, and the proper measure of damages was the sum of the differences between the contract and market price of the several quantities at the several periods for delivery, even though the defendant repudiated the contract at a period previous to the final date specified in the contract.

Josling v. *Irvine* (1), *Brown* v. *Muller* (2), *Roper* v. *Johnson* (3), followed.

Inasmuch as there was no market rate for the commodity in Calcutta at the date of the breaches, the damages for those breaches was the value to

* Appeal from Original Civil, No. 5 of 1908.

(1) (1861) 6 H. & N. 512. (2) (1872) L. R. 7 Ex. 319.

(3) (1873) L. R. 8 C. P. 167.

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the plaintiffs of the portions that ought to have been delivered on those dates at the prices procurable in England less the cost of getting them there.

Borries v. *Hutchinson* (1) followed.

APPEAL by the defendant, Cooverjee Bhoja, from the judgment of Harington J.

By a contract dated the 22nd August 1906, Messrs. Martin & Co., of which firm the respondent, Rajendra Nath Mukerjee, was a member, purchased through Messrs. Buskin & Co., brokers, from Cooverjee Bhoja 5,000 tons of manganese ore at Rs. 14 per ton to be delivered into waggons at Kamptee or other neighbouring station, Bengal-Nagpur Railway, 500 tons in October, 1,000 tons in November, 1,500 tons in December, or larger quantities each month if practicable, the whole 5,000 tons to be completed not later than the 15th February 1907. It was agreed that the quality of the ore should be similar to that shown in two analyses already taken, copies whereof were attached to the bought note. The percentages of some of the component parts in these analyses were, in the one, manganese 59·66, phosphoric acid ·1, silic matter 6·94, and in the other, manganese 57·05, phosphoric acid ·14 and silic matter 5·97. It appears no such copies of the analyses were attached to the sold note; the vendor, however, had the original analyses in his possession, and had given copies to the brokers.

It was further provided that the buyers or their representatives were to sample and analyse each parcel at the place of delivery, and such quantity only as might be approved by the buyers was to be despatched; and should the ore be found on analysis to contain less than 50 per cent. of manganese, the seller agreed to give an allowance of 6 annas per unit for the inferiority, payment to be made in Calcutta on delivery of railway receipts. It was alleged by Messrs. Martin & Co. that they insisted on the introduction into the contract of the provisions as to the quality of the ore, as to the approval of the buyers and the grant of allowance, in order to ensure the supply of ore suitable to meet a contract containing like provisions as to quality, to be made in England by the Indian Manganese

(1) (1865) 18 C. B. N. S. 445.

Company, whose agents they were, and that Cooverjee Bhoja was aware that the ore covered by the contract with him was to be supplied to meet such a contract.

It appears that during the first three weeks of October certain correspondence passed between Messrs. Martin & Co. and Cooverjee Bhoja, in the course of which the former made frequent and repeated complaints to the latter as to the non-delivery of any of the ore under the contract. On the 25th October, Mr. Hance, who had been deputed by the purchasers to sample and analyse the ore and had proceeded to Kamptee for the purpose, wrote to the vendor that he could not accept any of the Domree ore then at Kamptee. On the 29th October the vendor replied, observing "I have nothing but Domree ore to offer you, and as you have given me distinctly to understand that you cannot accept any of my ores from this mine in completion of the above contract, please note that if you do not forthwith take delivery of the Domree ore that is now lying at Kamptee station and which I tender under the above contract, I will consider the contract cancelled." This letter was replied to on the 1st November by Messrs. Morgan & Co., solicitors of the purchasers, stating that the ore tendered was of an inferior quality and not of the analysis contemplated by the contract, and threatening proceedings. On the 5th November, Cooverjee Bhoja replied, stating "the ore which I offered to your clients is of the quality contemplated for delivery under the above contract. As your clients have refused to accept this ore and have not taken delivery of the same in terms of contract, I have instructed my seller not to despatch any more ore to the Kamptee station on my account, and I must, therefore, give your clients notice through you that I hereby cancel the contract with them."

This action was accordingly instituted on the 5th March 1907 by the purchasers against the vendor for the sum of Rs. 35,000 as damages for non-delivery of the manganese ore, on the basis of the difference between the contract rate and the market rate on the 17th January 1907, when, it was alleged by the plaintiffs, the defendant finally repudiated his liability to deliver under the contract.

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The pleas raised in defence were: *first*, that there was no concluded contract between the parties, by reason of the fact that copies of the analyses were not attached to the sold note; *secondly*, that the tender of the Domree ore was a good tender within the meaning of the contract and that the plaintiffs wrongfully refused to accept the said ore; *thirdly*, that the plaintiffs were not entitled to recover differences as on the 17th January 1907.

It was established in evidence that the Domree ore which was tendered by the defendant showed on analysis a percentage of 39·68 of manganese, and that Domree ore was unmarketable in India. It was admitted that there was a free market for manganese ore in England, and that the plaintiffs intended to ship the ore to England.

On the 20th December 1907, Harington J. gave judgment for the plaintiffs, allowing them the sum of Rs. 25,000 as damages, being the difference between the contract price and the nearest market price.

From this judgment the defendant appealed.

Mr. Garth and *Mr. Pugh*, for the appellant.

Mr. Dunne, *Mr. J. E. Bagram* and *Mr. J. Chatterjee*, for the respondent.

Cur. adv. vult.

MACLEAN C.J. This is a suit by the buyers to recover damages against the seller for breach of contract for non-delivery of certain manganese ore. The contract was entered into through a firm of brokers, Messrs. Buskin & Co., and is in the following terms :—

"Calcutta :

"Messrs. Martin & Co. *22nd August 1906.*

Dear Sirs,

We have this day bought by your order and on your account from Messrs. Cooverjee Bhoja, 19, Pollock Street,

The following manganese ore 5,000 tons at Rs. 14 per ton in waggons.

The ore to be delivered at Kamptee or other neighbouring station, B.-N. Railway, 500 tons in October, 1,000 tons in November, 1,500 tons in December 1906, or larger quantities each month if practicable, the whole 5,000 tons to be completed not later than the 15th February 1907.

Quality of ore to be similar to that shown by the analyses already taken, copies of which are hereto attached.

Buyers or other representatives to sample and analyse each parcel at place of delivery and such quantity only as may be approved by buyers to be despatched. Should the ore be found on analysis to contain less than (50 per cent.) fifty per cent. of manganese, the seller agrees to give an allowance of six (6) annas per unit for the inferiority."

To the bought note sent to the plaintiffs, Messrs. Martin & Co., were attached two copies of certain analyses which had been made on behalf of the defendant of the ores from his mines. No such copies were attached to the sold note as the defendant had the original analyses in his possession.

The suit came on for hearing before Harington J. who gave judgment in favour of the plaintiffs for Rs. 25,000 and costs. Against this judgment the defendant has appealed. Upon the appeal coming for hearing before us, three questions have been argued on behalf of the appellant:—

(i) Whether there was any concluded contract bewteen the parties by reason of the fact that no copies of the analyses were attached to the sold note ?

(ii) Whether, if there was a valid contract, the tender of certain ore, known as Domree ore, was a good tender within the meaning of the contract ?

(iii) As to the principle on which the learned Judge has assessed the damages.

On the first point it is necessary to say very little. It appears from the evidence that the originals of the analyses were in the possession of the defendant, and that he had given copies thereof to Buskin. The defendant knew very well what the analyses referred to in the contract were, and he never took this objection until after the suit was instituted.

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We, therefore, think there is nothing in the first point raised by the defendant, the appellant before us.

Turning next then to the second point as to whether the tender of the Domree ore was a good tender within the meaning of the contract, we have in the first place to determine what is the meaning of the contract.

The learned Judge has held that under the contract the seller bound himself to deliver ore containing between 57·05 and 59·66 units of manganese, and that the buyers were not bound to accept ore not containing these proportions of manganese, although they had the option to accept ore containing less than 50 units of manganese. With this construction of the contract we are unable to agree, and it has been admitted at the Bar that under the contract the buyers were bound to accept ore containing 50 units of manganese and even less subject to the allowance specified in the contract, provided that the ore was merchantable within the meaning of the contract and provided in both cases that the ore in other respects complied with the terms of the analyses.

It seems to us reasonably clear that the analyses were attached to the contract for the purpose of guaranteeing that the ore to be delivered should not contain larger quantities of phosphoric and silic matter than those shown in the analyses.

Coming then to the evidence relating to the tender of the Domree ore, it is not necessary for us to go through the early correspondence between the parties. It is sufficient to say that the plaintiffs had made frequent and repeated complaints to the defendant as to the non-delivery of any of the ore under the contract. On the 25th October Mr. Hance, an agent of the plaintiffs, wrote to the defendant that he could not accept any of the Domree ore then at Kamptee.

To this the defendant replies on the 29th October as follows :—" I have nothing but Domree ore to offer you, and as you have given me distinctly to understand that you cannot accept any of my ores from this mine in completion of the above contract, please note that if you do not forthwith

take delivery of the Domree ore that is now lying at Kamptee station, which I tender under the above contract, I will consider the contract cancelled." This letter was replied to by Messrs. Morgan & Co., solicitors for the plaintiffs, stating that the ore tendered was of an inferior quality to that contemplated by the contract and threatening proceedings. The defendant replied to Messrs. Morgan & Co.'s letter on the 5th November, stating that "the ore I offered to your clients is of the quality contemplated for delivery under the above contract. As your clients have refused to accept this ore and have not taken delivery of the same in terms of the contract, I have instructed by seller not to despatch any more ore to the Kamptee station on my account, and I must, therefore, give your clients notice through you that I hereby cancel the contract with them."

The evidence shows that this Domree ore which was tendered by the defendant showed on analysis a percentage of 39·68 of manganese. The learned counsel for the appellant has challenged this fact, but we see no reason to differ from the learned Judge in finding that the ore tendered contained only a percentage 39·68 of manganese. The evidence further shows that Domree ore is unmarketable in India—also that there is a grade of ore known as first class ore which contains 50 per cent. and upwards of manganese. Taking these facts into consideration, it is impossible for us to differ from the finding of the learned Judge that the Domree ore was not a good tender of ore within the meaning of the contract.

Lastly as to the question of damages. The learned Judge has proceeded on the basis that having regard to the fact that the defendant repudiated the contract, the measure of damages was the difference between the contract rate and the market rate on the 15th February, and further that as there was no market rate in February the *quantum* of damages must be assessed by reference to the market rate in March, which was the next period on which there was a market rate. We are unable to agree with the learned Judge either as to the

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measure of damages or as to the mode of estimating the amount thereof.

Under the contract if the defendant had delivered to the plaintiff 500 tons of ore before the 31st October, 1,000 tons before the 30th November, 1,500 tons before the 31st December, and the remaining 2,000 tons before the 15th February 1907, the plaintiffs would have had no cause of action against the defendant.

The contract was in fact a set of distinct contracts, and as each period arrived if no delivery has taken place, the damages will be the difference between the contract price and the market price on that day of the quantity which ought then to have been supplied: and even if the defendant absolutely repudiates his contract at any period previous to the final date specified in the contract, yet in considering the question of damages they will be estimated with reference to the times at which the contract ought to have been performed: *Josling* v. *Irvine* (1), *Brown* v. *Muller* (2), *Roper* v. *Johnson* (3).

We, therefore, think that the learned Judge in treating the breach as a single breach on the 15th February 1907 was wrong. Nor are we able to agree with the learned Judge that as there was no market value for manganese ore on the 15th February 1907, the plaintiffs are entitled to damages assessed on the footing of the next nearest market rate.

Whether there be a market rate or not the principle on which the damages are to be assessed is exactly the same, *viz.*, the value of the goods at the date of the breach or breaches. But if there is no market rate, the mode of estimating this value is different but comes back to the elementary principle—what were the goods worth at the time?

Now, it is admitted that there is a free market for manganese ore in England and that the plaintiffs intended to ship the ore to England. In assessing the damages, therefore, on this contract for such of the breaches at the date of which there was no market rate in Calcutta, we think that the principle adopted

(1) (1861) 6 H. & N. 512. (2) (1872) L. R. 7 Ex. 319.
(3) (1873) L. R. 8 C. P. 167.

in the case of *Borries* v. *Hutchinson* (1) is the one that ought to be proceeded upon, namely, that the damages for those breaches is the value to the plaintiffs of the portions that ought to have been delivered on those dates at the prices he would have got for them in England less the cost of getting them there.

We accordingly vary the decree of the learned Judge in so far as he directed that the defendant should pay to the plaintiffs the sum of Rs. 25,000, and in lieu thereof we direct an enquiry before the Official Referee as to damages on the footing of the foregoing remarks.

We think there ought to be no costs of this appeal. The order for costs in the Court of first instance will stand.

The costs of the inquiry before the Referee will be dealt with after the reference.

BRETT AND FLETCHER JJ. concurred.

Decree varied.

Attorneys for appellant: *Pugh & Co.*

Attorneys for respondents: *Morgan & Co.*

J. C.

(1) (1865) 18 C. B. N. S. 445.