Madhya Pradesh Mines Ltd. (Now Madhya Pradesh Industries Ltd.)

Vs

Rai Bahadur Shriram Durga Prasad Ltd.

Civil Appeals Nos. 1161 And 1162 Of 1966

(C. A. Vaidialingam, A. N. Ray JJ)

05.05.1971

JUDGMENT

HEGDE, J. -

1. These two appeals by special leave arise out of cross-suits in respect of the contract for purchase of manganese ore entered into between the appellants and the respondents on May 7, 1953, under the agreement marked as Exh. P-81. The appellants are the sellers and the respondents are the buyers. There has been a breach of that contract. The parties are at issue as to who was responsible for the breach. Both the trial court as well as the High Court have come to the conclusion that the sellers were responsible for the breach of the contract. The buyers' suit was for the refund of the money advanced by them with interest. In the sellers' suit they claimed a sum of Rs. 1,13,439/2/- after adjusting the advance of Rs. 4,41,000/- as damages against the buyers' for wrongfully refusing to take delivery of the ore supplied under the contract. The sellers' suit has been dismissed and the buyers' suit has been substantially decreed.

2. On May 7, 1953, the buyers entered into a contract to buy 7,500/- tons of high grade of manganese ore and the sellers agreed to sell the same. The ore was to be delivered at one or the other of the four points mentioned in the contract. The price agreed to be paid was Rs. 140/- per ton of 2,240 lbs. F.O. R. Sitasaongi and Duttapohar sidings and Ramtek and Goberwahi stations on the basis of 48% Mettalic Manganese; Rejections below 46% Mn., Maximum 9% Fe., Maximum 9% Sio2 and Maximum 0.10% P., and if any ore offered does not fulfil those conditions the buyers were entitled to refuse to take delivery of the same. Clauses 4 and 5 of the contract are important for our present purpose. They read as follows :

> "4. That the sellers undertake to delivery 7,500 tons during the period January, 1954 to June, 1954, in approximately equal monthly quantities of 1,250 tons. However, it would be the sellers' option to complete the deliveries earlier than the period mentioned hereinabove. On delivery of any parcel at any of the above named railway sidings and/or Railway Stations against the above deliveries, the buyers will pay to the sellers the full value based on the analysis ascertained and final settlement will be based on the railway weighbridge weights ascertained at Goberwahi and Itwari Stations.

5. That the sampling will be done jointly in the presence of the representatives of the sellers and the buyers and the samples in tins under the signatures and seals of both the parties will be sent both to M/s. Hughes and Davies, Bombay and M/s. J. S. Williams, Takli Road, Nagpur and the mean of their results will be final and binding on both the sellers and buyers. The cost of sampling and

analysis as referred to hereinabove will be borne equally by the sellers and the buyers. However, in case there be any dispute in regard to sampling, the same shall be done by Messrs. Hughes and Davies of Bombay which shall be binding on both the sellers and buyers."

3. As per the terms of the contract the buyers paid a sum of Rs. 4,41,000/- as advance, at 42% of the basic price for the purchase of 7,500 tons of manganese ore. It was agreed between the parties that each time the sellers supplied ore to the buyers, 42% of the price of the ore supplied should be adjusted towards the advance and the buyers are required to pay the balance only. The remaining terms of the contract are not relevant for our present purpose.

4. In January, 1954, the sellers supplied 1,207 tons of ore. The parties jointly took samples from out of the ore supplied. Thereafter the samples were analysed by M/s. Hughes and Davies and M/s. J. S. Williams. The quality of that ore did not come up to the specifications. Hence the buyers rejected the same. In February, 1954, the sellers again supplied 1,295 tons of ore. On this occasion also samples were taken jointly by the sellers and the buyers and those samples were analysed by M/s. Hughes and Davies and M/s. J. S. Williams. Out of the quantity supplied only 85 tons of ore were found to be in accordance with the specifications. The buyers rejected the entire quantity of 1,295 tons supplied. After the aforementioned rejections in January and February, the sellers began to complain about the manner in which the samples were taken. They expressed a doubt that there was some manipulation in drawing samples. In March, the sellers supplied 1,540 tons of ore. On that occasion they asked M/s. Hughes and Davies to draw the sample. This fact was informed by the sellers to the buyers. The buyers did not object to the same and the buyer's representative was present at the time the samples were drawn. Samples so drawn were analysed by M/s. Hughes and Davies as well as by M/s. J. S. Williams. The samples were found to be in accordance with the specifications. But yet the buyers rejected the same on two grounds viz., that the quantity offered for sale was in excess of the quantity required to be supplied during that month and secondly that the sellers had improperly denied to the buyers the opportunity of drawing samples jointly. In April the sellers offered to supply 1,555 tons of ore. In this month also samples were drawn by M/s. Hughes and Davies but those samples were analysed by M/s. Hughes and Davies and M/s. J. S. Williams. Out of the said supply only 970 tons were found to be in accordance with the specifications. But the buyers rejected the entire lot. In May and June the sellers supplied 4,556 and 3,439 tons of ore respectively. On both those occasions the samples were drawn by M/s. Hughes and Davies. At the time the samples were drawn buyers' representative was not present. The analysis of those samples was also made by M/s. Hughes and Davies. M/s. J. S. Williams refused to analyse the samples drawn in May and June on the ground that the sellers in their correspondence had insinuated that the analysis made by M/s. J. S. Williams was not reliable.

5. So far as the rejection of the supplies made in January and February, the sellers have no complaint. Now coming to the rejection of the supplies made in May and June, there can be hardly any doubt that the sellers did not comply with the terms of clause (5) of the agreement. Analysis both by M/s. Hughes and Davies and M/s. J. S. Williams was an essential part of the contract. In fact at the time of the arguments, we were told that M/s. Hughes and Davies were the nominees of the sellers and M/s. J. S. Williams were the nominees of the buyers. The condition that the samples of the ore to be supplied should be analysed both by M/s. Hughes and Davies and by M/s. J. S. Williams is one of the essential conditions of the contract. It was not open to the sellers to ignore that term. It is true that the contract does not provide for the contingency of either M/s. Hughes and Davies or M/s. J. S. Williams refusing or being unable to analyse the samples taken. We are unable to agree with the contention of Mr. M. C. Chagla, learned Counsel for the sellers that clause (5) of the contract is not an essential part of the contract. It is clear from the terms of the contract that the

parties considered the quality of the ore to be supplied as one of the essential conditions of the contract. When M/s. J. S. Williams refused to analyse the samples, the sellers did not even call upon the buyers to nominate someone else in the place of M/s. J. S. Williams. On the other hand the sellers intimated to the buyers that they were willing to send the samples for analysis to a particular company at Calcutta and if the buyers did not accept that offer, the analysis made by M/s. Hughes and Davies would become final. The buyers rejected that ultimatum. Under the circumstances we are of the opinion that the offers made in May and June, were not in accordance with the terms of the contract.

6. According to the buyers the true import of clause (5) of the contract is that in respect of each supply the parties must first make effort to jointly draw the samples. It is only if there is any dispute between them as regards the drawing of samples in respect of any supply, the parties can call upon M/s. Hughes and Davies to draw the samples. In respect of the supplies made in March and April, the sellers did not afford any opportunity to the buyers to draw the samples jointly. That being so, the samples drawn in respect of those supplies were not drawn in accordance with the contract. But according to the sellers even as far back as January, 1954, they began to entertain a doubt that when samples were drawn jointly, the representative of the buyers indulged in certain manipulations and therefore it decided once and for all that in future samples should be drawn only by M/s. Hughes and Davies. It is contented on behalf of the sellers that after they came to the conclusion that the buyer's representative indulged in manipulations at the time of drawing samples jointly, there was no purpose in going through the farce of attempting to draw samples jointly before calling upon M/s. Hughes and Davies to draw samples. The High Court has accepted the construction contented for on behalf of the buyers. We have not thought it necessary to examine as to which of these contentions is the correct one because in our opinion in view of the fact that the supplies made by the sellers in January, February, May and June were not in accordance with the terms of the contract, the sellers were responsible for the breach of the contract.

7. The contention of the sellers that each supply should be considered as a separate contract is untenable. The contract between the parties is one and indivisible. It is a contract to sell and purchase 7,500 tons of ore of specified quality. It is true that the sellers were permitted to supply the agreed quantity in instalments but that did not convert each supply into a separate contract.

8. Even if we come to the conclusion that the supplies made in March and April were in accordance with the terms of the contract those supplies would amount to only 2,510 tons of ore. The buyers had contracted to purchase 7,500 tons. A supply of 2,510 tons of ore cannot be considered as complying with the contract. Hence we agree with the trial court as well as with the High Court that it is the sellers who committed the breach of the contract.

9. From the material on record, it is clear that the buyers were waiting for an opportunity to breach the contract. After the contract was entered into, there was a steep fall in the price of manganese ore. It came down from 121 per ton in January, 1954, to Rs. 88/8/- in May of that year. There was slight rise in June but that was very insignificant, Evidently because of that reason, the buyers were looking out for an opportunity to get out of the contract but unfortunately the sellers gave them that opportunity. The rejection by the buyers of the ore supplied in March and April, appears to be quite unreasonable. We are satisfied that in this case the conduct of the buyers was not above board.

10. The contract does not provide for payment of any interest on the advance made. Hence the question whether interest should be given on that amount is within the discretion of the court. Similarly the question of interest on that advance during the pendency of the suit is within the

discretion of the court. We think under the circumstances of the case, it will be just and proper to disallow the buyers any interest on the advance made till the date of the decree of the trial court. For the same reason we think that in this Court the parties should be asked to bear their own costs.

11. In the result Civil Appeal No. 1161 of 1966, (appeal arising out of the suit filed by the sellers) is dismissed without costs and Civil Appeal No. 1162 of 1966 (appeal arising out of the suit filed by the buyers) is allowed to the extent mentioned earlier. In other respects it is dismissed, no costs.

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