Privy Council Appeal No. 15 *of* 1916.

The Karachi Port Trust - - - - *Appellants,*

v.

J. Mackenzie Davidson and Another - - *Respondents.*

FROM

THE COURT OF THE JUDICIAL COMMISSIONER OF SIND, AT KARACHI.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 11TH MARCH, 1918.

Present at the Hearing:

EARL LOREBURN.
LORD DUNEDIN.
LORD SUMNER.
LORD PARMOOR.

Delivered by LORD DUNEDIN.

The plaintiffs in this suit are the contractors who contracted to supply labour for reclamation work undertaken by the defendants, the Karachi Port Trust, at the north pool of Karachi.

By the contract entered into between the plaintiffs and the defendants the plaintiffs were to supply the labour for filling and emptying the waggons used in transporting sand from places on the shore and laying it down on the foreshore to be reclaimed. Work was done by the plaintiffs and payments were made therefor by the defendants.

The claim as originally launched consisted of one large item of 72,514 rupees and of various small items. The trial Judge disallowed item 1 *in toto*, and in respect of the other items allowed 650 rupees, 150 of which had been admitted, and found the defendants entitled to the costs of the action. The Appeal Court recalled the judgment of the trial Judge and allowed 17,640 rupees for the first item, and 1,900 rupees in respect of the other items, and made a new order as to costs.

Before their Lordships' Board the parties agreed to settle all items except the first by allowing judgment for the plaintiffs for 1,350 rupees, the question of costs to be unaffected by this arrangement.

The sole question, therefore, that has been argued before this Board has been the question of liability for the first item. That item was in respect of 89,000 brass (a brass = 100 cubic feet) of sand, alleged to have been handled and not paid for.

The clauses of the contract which are material to the determination of the question involved are as follows:—

"1. The work required to be done by the contractor is to find the necessary labour for filling and emptying the waggons.

"2. The contractor will be paid by measurement of the area reclaimed and before commencing work he must satisfy himself as to the correctness of the depths shown on the sections of the ground and agree to abide by same and the following stipulations."

* * * * * *

"11. The Port Trust are at present engaged in putting rubble protection to enclose the area to be reclaimed and this will be in progress probably when the work is commenced and the contractor is not to make any claim for alleged or actual loss of material being washed away during the progress of the work and when quoting his rate for the labour in filling and emptying it must include all and every such contingency as loss in bulk through washing or spreading by the sea, sinking and settlement, or leaking or blowing out of the waggons during their transit from the sandhills to the site of reclamation.

"12. There are approximately about 250,000 brass to be reclaimed but the contractor will be paid strictly in accordance with the work when actually done on the sections of the ground at the completion of the work and no allowance whatever as stated in paragraph 11 will be entertained for sinking, washing away, &c."

The area reclaimed was measured, after the operations of the plaintiffs were finished, by the engineers of the defendants. The plaintiffs, though invited to send their engineer to check the measurements, did not do so. In the result the defendants brought out the sum which was due in accordance with these measurements and paid the plaintiffs accordingly. As to the accuracy of these measurements there are concurrent findings of fact by the trial Judge and the Court of Appeal. The trial Judge says:—

"The defendants' calculations have been explained in full detail by the Port Engineer, Mr. Coad, and appear to have been liberal and reasonably accurate. The calculations have been entirely re-done in light of such incorrectnesses as have been pointed out, and the result has been to show not a deficit but a considerable overpayment. It remains only to observe that plaintiffs declined defendants' offer to be present at and check the final measurements on the ground, and that it is impracticable to check them now on the ground owing to the subsequent completion of the reclamation. There would therefore appear to be no reason to suppose that there were any material miscalculations of the work done on the reclamation."

The Appeal Court judgment says:—

"Nor do we think the plaintiffs have shown that the final measurement sectional drawings are wrong, or that the depths in them are incorrect."

The plaintiffs being thus debarred from challenging the defendants' measurements as to the amount of sand actually deposited on the ground, seek to make their case in the following way. By a calculation of the number of waggons filled and the average contents of each waggon, they say that they prove that so much sand was actually put on the ground. The difference between the amount so brought out and the amount as disclosed by the engineers' measurements is sand which has in some way disappeared. This sand, they say, has been washed away. Turning to the contract, they argue that the contract, when read with the plans and specifications, show an implied covenant on the part of the defendants to afford a protection of rubble work to keep the deposited sand from being washed away, and, averring that the defendants failed to afford such protection, they claim the value of their work on the sand deposited but rendered unavailable as damages for breach of contract on the part of the defendants.

Both the trial Judge and the Judges of the Court of Appeal were of opinion that the plans added an implied term to the contract, but they differed as to what that term was. The trial Judge held that it was to supply the protection actually shown on the plans and sections, that being a low rubble construction shown in section and designated on the plan "temporary rubble toe to protect filling during reclamation." He held that, judged by that standard, the defendants had, as a matter of fact, constructed all that they had covenanted to do. The result was that the plaintiffs had proved no breach and consequently no damage.

The Judges of the Court of Appeal held that the implied covenant was to supply an "adequate" protection, and they considered that inadequacy was proved by the mere fact of the discrepancy between what they considered the proved waggon-loads deposited, and the proved amount measured, there being in their view no means of accounting for that difference except by the supposition that the missing amount had been washed away, and the fact of its being washed away being *per se* proof of the inadequacy of the protection.

It was argued on behalf of the defendants that as the contract itself is silent on the point, an implied obligation to afford "protection" by means of rubble work could not be drawn from the plans and sections, and that Section 11 of the contract above quoted was destructive of any such idea. Their Lordships do not find it necessary to express an opinion whether that argument is sound or not. They are clearly of opinion that it is quite impossible to spell out of the plans and sections an obligation to do more than what is there shown. Indeed the learned counsel for the plaintiffs admitted that he could not support the view of the Court of Appeal, which would extract from the contract which is silent on the point, and from the plans and specifications which contain no words of obligation, but only show certain proposed constructions, a

covenant on the part of the defendants to afford an "adequate" protection. This concession, though candidly made, could not, in the opinion of their Lordships, have been with any prospect of success withheld.

This dislodges the judgment of the Court of Appeal, which is also based on what seems to their Lordships a fallacy. Taking the measurements of the contents of the waggons on the one hand, and the measurements of the stuff on the ground on the other as equally accurate, and finding that the sum of the latter is less than the sum of the former, the learned Judges draw the inference that the difference must be accounted for by washing away. This, however, is a *non sequitur*. Not only may part of the sand have been blown away in transit, but the discrepancy might be caused by subsidence (the measurements having been effected from the data furnished by sectional drawings), and further the sectional drawings themselves might be erroneous, an error which by Clause 2 of the contract the plaintiffs were content to abide by. Indeed the method employed by the learned Judges entirely ignores the stipulation of the contract that measurement of the area was to be the basis for arriving at the sum to be paid.

The case, therefore, is reduced to this, that assuming without deciding that the contract has an implied condition, their Lordships must hold that that condition was only to execute the protection as shown on the plans; and here there is a direct finding by the trial Judge who saw the witnesses that the defendants had done what they contracted to do, a finding which is undisturbed by any finding or even remark of the Court of Appeal. In such a case their Lordships think it impossible to disturb the finding of the trial Judge. The result is that the plaintiffs fail on the first item of the claim. The judgment appealed against must be recalled, and in accordance with the arrangement recited judgment entered for 1,350 rupees. As the defendants have been completely successful on the only substantial question in the case they must have their costs in the Courts below and before this Board.

Their Lordships will humbly advise His Majesty in accordance with this opinion.

In the Privy Council.

THE KARACHI PORT TRUST

v.

J. MACKENZIE DAVIDSON AND ANOTHER.

DELIVERED BY LORD DUNEDIN.

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