Privy Council Appeal No. 69 of 1926.

R. Arunachala Nayudu - - - - - - *Appellant*

v.

S. R. Balakrishna and Company - - - - - *Respondents*

Same - - - - - - - - - *Appellant*

v.

Same - - - - - - - - - *Respondents*

(*Consolidated Appeals.*)

FROM

THE HIGH COURT OF JUDICATURE AT MADRAS.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 8TH DECEMBER, 1927.

Present at the Hearing:

VISCOUNT SUMNER.
LORD ATKINSON.
LORD SINHA.
SIR JOHN WALLIS.
SIR LANCELOT SANDERSON.

[*Delivered by* SIR LANCELOT SANDERSON.]

These are consolidated appeals by Arunachala Naidu against the judgment of the High Court of Judicature at Madras dated the 23rd April, 1924, and two decrees of the same date made in pursuance of the above-mentioned judgment.

On the 5th August, 1918, the respondents, Messrs. S. R. Balakrishna & Co., brought a suit (eventually numbered 27 of 1919) against Arunachala Naidu in the Court of the learned Subordinate Judge of South Malabar at Calicut, praying (amongst other things) for a decree for delivery of possession of the properties therein referred to.

On the 23rd October, 1918, Arunachala Naidu brought a suit (eventually numbered 28 of 1919) against Messrs. S. R. Balakrishna & Co. in the same Court praying, amongst other things, for a decree directing the defendants to execute a registered deed of sale of the said properties to the plaintiff.

The learned Subordinate Judge tried the two suits and delivered one judgment. He dismissed Messrs. Balakrishna & Co.'s suit (No. 27 of 1919) with costs, and in suit No. 28 of 1919 he directed the defendants, Messrs. Balakrishna & Co., to execute a deed of conveyance to the plaintiff, Arunachala Naidu, of the property in suit ; the learned Judge made other incidental orders, to which it is not necessary to refer in detail.

Messrs. Balakrishna & Co. appealed against both decrees to the High Court of Judicature at Madras. The High Court heard the two appeals together and delivered one judgment by which the appeals were allowed and the decrees of the learned Subordinate Judge were reversed.

A decree was made by the High Court in suit No. 27 of 1919 directing the defendant, Arunachala Naidu, to deliver possession to the plaintiffs of the properties referred to in the schedule annexed to the plaint and ordering the defendant to pay the plaintiffs' costs.

In suit No. 28 of 1919 the decree of the High Court, after reversing the decree of the learned Subordinate Judge, ordered the defendants, Messrs. Balakrishna & Co., to pay to the plaintiff the sum of Rs. 4,359-3-6. In other respects the plaintiff's suit was dismissed and each party was directed to bear his or their own costs in both Courts.

From these two decrees of the High Court Arunachala Naidu has appealed. In this judgment he will be referred to as the appellant and Messrs. Balakrishna & Co. as the respondents.

It appears that the appellant was a timber merchant, that he had agreed to purchase the above-mentioned properties, which were forest tracts in Wynaad, from a Mr. Hoskins for Rs. 9,000, that he had paid a deposit of Rs. 1,000, but that he was unable to pay the whole of the purchase money.

Subsequently it was arranged that the respondents, who were carrying on a timber trade in Calicut, should pay the balance of the purchase money, take a conveyance of the properties in their name, and lease the property to the appellant on the condition that the appellant should deliver timber to the respondents within specified times, and if it was found at any time within the fixed period that the cost of timber supplied came to Rs. 9,000 after making certain deductions, the respondents would assign the properties to the appellant at his expense. The agreement was dated the 27th November, 1915, and the terms are as follows :—

" Between :—

(1) S. R. Balakrishna and Company, carrying on timber business at Kallayi of Kasbaamsam, desam of Calicut taluk, and

(2) Arunachalam Naidu, Contractor of Vayitri Bazaar of Kunnathitamvake desam of Vayitri amsam of Wynaad taluk.

"1. The properties, the boundaries and measurement of which are described in the subjoined schedule, are held in possession by No. 1 on the strength of the assignment under a deed, dated 20th November, 1915, registered as No. 5324 of K.S.R. Office by which No. 1, got assigned all the rights belonging to Mr. J. W. Hockins, over the same.

"2. No. 2 obtained possession of the said properties, this day from No. 1 as per the stipulations noted below :—

"3. It is resolved, for No. 2, to enter the said properties to conduct felling operation without paying kuttikkanom and to convey timber noted below within the 30th May, 1917, near Mooryattpalem, the place of business of No. 1, and to satisfy him :—

Timber of above 7 koles in length and over 12 virals in girth without any defects or curves or hollow	500 candies of vayanavu.
Timber of above 7 koles in length and over 12 virals in girth without any defects or curves or hollow	200 candies of white cedar.
Timber of above 7 koles in length and over 12 virals in girth without any defects or curves or hollow	100 candies of aynee.
Timber of above 5 koles in length and over 12 virals in girth without any defects or curves or hollow	100 candies of vengai.
Timber of above 5 koles in length and over 12 virals in girth without any defect or curves or hollow	100 candies of jack.

"4. (*a*) No. 1 alone has the right and authority to accept or reject the timber that arrives, after examination and No. 2 has no right whatever to question it.

"(*b*) No. 1 should give receipt when timber is brought to the said place and if default is made without payment of cart hire, any loss resulting therefrom, he will have to pay to No. 2.

"5. No. 2 has undertaken to deliver at the said place and according to the said stipulations, within 30th August, 1916, 100 candies of white cedar, 250 candies of vayanavu, 50 candies of aynee and 50 candies of jack and other round timber one of the aforesaid quantity and the balance within 30th May, 1917.

"6. Excepting for white cedar the price of which is Rs. 24, the price of the other timber is settled at the rate of Rs. 15 per candy.

"7. No. 2 has also agreed to deduct a discount of 10 per cent. and brokerage of 1 per cent. out of the total value.

"8. No. 2 has agreed to No. 1's debiting in No. 2's account, the cart hire paid by No. 1 at the rate of Rs. 4-8-0 per candy of timber which has been accepted, from time to time, on its arrival. No. 2 has no right to demand the cart hire for rejected timber.

"9. No. 2 has no right or authority to demand, personally, any sum other-than the said cart hire, out of the cost of timber.

"10. No. 1 has resolved to give No. 2 the assignment of the schedule mentioned properties, with all the rights belonging to him, under a deed, executed at the expense of No. 2, whenever the cost of timber comes to Rs. 9,000, after deducting the said discount, brokerage and cart hire after the measurement of timber was taken.

" 11. On finding a balance of Rs. 9,000 as aforesaid and on giving the assignment as per the said stipulation, it is resolved that No. 2 should deliver the balance of timber out of 1,000 candies, on measurement, as per the said stipulations, satisfying No. 1 and the balance amount, after deducting 10 per cent. discount and 1 per cent. brokerage and Rs. 4–8–0 cart hire, to be paid in cash to No. 2 from time to time, and receipt to be taken from him.

" 12. The timber that is felled on the said properties can only be given to No. 1 according to the said stipulations. No. 2 has no right or authority to sell them to any other individual. In case it is seen that he does so, No. 1 has full right and authority to enter the said properties after cancelling this karar on service of notice.

" 13. It is mutually resolved that the defective timber out of timber felled on hills, is to be sawn and converted into scantlings and delivered at the business place No. 1 who is to sell them on getting permission from No. 2 and the balance amount after deducting 5 per cent. commission to be credited into the accounts of No. 2. It is also resolved to sell the timber rejected by No. 1 as per the said stipulations and the balance amount after deducting 5 per cent. commission to be credited into No. 2's account.

" 14. If No. 2 makes a default in the matter of delivering timber and satisfying No. 1 this karar gets void forthwith without anybody's interference, and No. 1 has authority to enter the properties mentioned below without any litigation and No. 2 has no right or authority to prevent him from entering. Besides No. 1 has right and authority to collect loss at the rate of Rs. 2 per candy of timber not delivered.

" 15. In case it is found impossible to deliver timber worth Rs. 9,000 and get the assignment of properties, the cart hire of Rs. 4–8–0 per candy for the timber delivered from time to time, besides Rs. 3–8–0 per candy for cart hire, and Rs. 4 per candy for all other expenses. Such as felling charges, elephant rent, etc., after deducting the said discounts must be paid by No. 1 to No. 2 and No. 1 has authority to deduct the loss for timber undelivered at the aforesaid rate from the sum obtained after such calculation and No. 2 can only demand payment, if there is any balance.

" 16. No. 1 is responsible for any loss or obstruction of No. 2 due to No. 1's unlawful act.

" By agreeing to these, both the parties have signed this karar in the presence of witnesses.

" *Dated 27th November*, 1915.

" Written in the hand of N. N. Rama Ayyar.

" *Witnesses :—*

1. P. N. Rama Ayyar.
2. Swami.

" (Signed)
" 1. S. R. Balakrishna & Co.
V. V. Shanmukha Mudaliyar.
" 2. Arunachalam Naidu."

The main question argued on this appeal was whether the appellant had supplied the timber in accordance with the agreement to the value of Rs. 9,000 ; there were further questions, viz., whether the timber, if supplied, was delivered within the times specified in the agreement, whether time was of the essence of the contract, and whether the time was extended by agreement between the parties.

There was a subsidiary question whether the amount due to the appellant in respect of certain scantlings could be taken into

consideration in calculating the amount and value of the timber delivered by the appellant under the agreement.

Their Lordships may dispose of this last-mentioned question at once.

Clause 13 of the agreement provided that defective timber felled on the hills was to be sawn into scantlings and delivered to the respondents, who were to sell the scantlings on behalf of the appellant and credit him with the proceeds of the sales after deducting 5 per cent. commission.

It is clear from the terms of the clause that the above-mentioned delivery was not contemplated by the parties as a delivery of timber, which was to be taken into consideration when ascertaining whether timber to the value of Rs. 9,000 had been delivered to the respondents.

The learned Subordinate Judge in his judgment included the sum of Rs. 3,119-14-4 in respect of the scantlings on the one side of the account, and on the other side charges amounting to about Rs. 2,651 in respect of scantlings. Their Lordships are of opinion that the conclusion of the High Court was right in respect of this matter, and that the items relating to scantlings must be excluded from calculation.

On the main question the learned Subordinate Judge held that on account of the supply of logs the appellant was entitled to be credited with the sum of Rs. 15,074-10-10, subject to certain deductions. The High Court, however, was of opinion that the total value of timber supplied by the appellant to the respondents was Rs. 10,839-15-0, subject to certain deductions which reduced the amount, for which the appellant was entitled to credit, considerably below the sum of Rs. 9,000.

The arguments presented to their Lordships in respect of this main question related to two matters: firstly, the number of logs alleged to have been delivered by the appellant to the respondents, and secondly, the measurement of the logs.

On the first point the learned Subordinate Judge held that it had been proved that the total number of logs delivered was 341; the High Court came to the conclusion that 316 only had been delivered.

Thus there was a difference of 25 logs.

The disputed 25 logs fell under two heads: (1) 7 red cedar logs and (2) 18 logs generally. (1) The High Court held that the evidence of the cartmen relating to the delivery of the 7 red cedar logs was worthless, and that it was extremely unsafe to rely upon a receipt which the appellant's witnesses alleged had been given by the respondents' servant, which was exhibit LXII (*c*).

The learned Subordinate Judge, who tried the suit and who had the opportunity of seeing the witnesses and hearing them give their evidence, said as follows:—

> "There is no reason to think that exhibit LXII (*c*) was not signed by the Moopan and that the witnesses examined by the defendant (now the appellant) are giving false evidence. I believe the evidence adduced by the defendant

and find that seven red cedar logs mentioned in invoice No. 143 were received by the plaintiffs (now the respondents)."

Their Lordships having considered the evidence, both oral and documentary, on this question, are of opinion that no sufficient reason has been shown for interfering with the finding of fact of the learned Subordinate Judge, who was in a much better position to gauge the truth and value of the oral evidence than the learned Judges of the High Court.

In their Lordships' opinion, therefore, the appellant must be credited with the value of the 7 red cedar logs, which appears from the evidence to have been Rs. 464.

(2) With reference to the balance of the 25 logs, the High Court held as follows: "As regards the balance of 18 logs, a finding must be arrived at with reference to the general probabilities."

Venkatasubba Rao, J., who delivered the main judgment of the High Court, stated that a close scrutiny of the entries in the respondents, books had been made, and that the appellant had not been able to show from the respondents' books that more than 316 logs had been received by them.

The learned Judge added that the confusion had resulted from the hopeless way in which the respondents dealt with the logs in their account books, and that he fully endorsed the view expressed by the Commissioner, who had been deputed to examine and report upon the accounts, that the respondents' books were extremely misleading and that no uniform practice was observed in regard to the making of entries in respect of the logs.

In view of this criticism it is obvious that the failure to find the 18 logs in the entries in the respondents' books by itself cannot be any sufficient answer to the appellant's case that the 18 logs had been delivered; yet the learned Judges of the High Court seem to have based their conclusion in respect of this matter mainly on the fact that they could not trace the 18 logs in the respondents' books.

The Commissioner, whose examination of the books, documents and evidence seems to have been very exhaustive and careful, made a report which set out the materials available for deciding the question whether the 18 logs and the 7 red cedar logs were delivered by the appellant to the respondents. The Commissioner did not come to any definite conclusion on the above-mentioned question, but having considered the evidence and the Commissioner's report, their Lordships are of opinion that there was sufficient evidence to justify the learned Subordinate Judge's finding of fact that the 18 logs had been delivered by the appellant to the respondents and that the total number of logs so delivered was 341 and not 316 as alleged by the respondents.

The learned counsel, who appeared for the appellant, was not able to assist their Lordships upon the question of the value of the 18 logs, and although it is clear that the appellant is entitled to credit for a considerable sum in respect thereof, their Lordships are not able to ascertain the exact value of the said 18 logs.

Their Lordships, however, do not consider it necessary to direct a further inquiry merely in respect of this one matter, having regard to the conclusion at which they have arrived on the question of measurement.

Their Lordships are of opinion that the second point, viz.: the measurement of the logs—is of great importance in this case.

The Commissioner reported that the parties were at considerable variance regarding the measurement and quality of the logs which had been supplied. He drew attention to the fact that the respondents did not take measurements until some time after delivery, that the timber passing rough books were in some cases most misleading and unreliable, that the respondents' selling measurements were a little more than the purchasing measurements, that a slight difference in the girth would be considerable when the contents were calculated, that two measurements for almost all the logs appeared in the respondents' books, and that the appellant was given credit for the lesser measurements only.

The explanation given by the respondents to the Commissioner was that the greater measurements denoted the measurements of the logs as they were without deducting for sapwood, and the lesser measurements denoted the quantity after making an allowance for such conditions. At the trial and in the High Court the respondents endeavoured to justify their measurements by alleging a custom regarding them: viz., firstly, that fractions short of $\frac{1}{4}$ kole should be deducted out of length; secondly, a further deduction should be made of $\frac{1}{4}$ kole in length and $\frac{1}{4}$ viral in girth; and thirdly, should the log be defective such deductions as the common measurer allows should be made.

The learned Judges of the High Court held that the evidence given on behalf of the respondents for the purpose of proving the custom could not be accepted, and the learned Judge who delivered the main judgment, concluded his remarks upon this part of the case with this significant passage:—

> "My finding therefore on the question of measurements is against the defendant (now the appellant). I would, however, add that but for the conduct and acquiescence on the part of the defendant I should not be disposed to find this issue in favour of the plaintiffs (now the respondents) because the evidence shows that they are prepared to deviate from the straight course in order to make some profit and also because on their own showing their selling measurements do not correspond with their buying measurements."

It is clear therefore that the learned Judge would not have disagreed with the finding of the learned Subordinate Judge on this point but for the fact that he thought that the appellant had by his conduct and acquiescence agreed to the respondents' figures as regards measurements.

Their Lordships are of opinion that the respondents have not shown any sufficient reason (apart from the question of acquiescence which will be dealt with presently) for disturbing the finding of the learned Subordinate Judge in respect of the measurements.

The learned Judges of the High Court held that the appellant had by his conduct precluded himself from questioning the correctness of the measurements as recorded by the respondents; they relied chiefly on the correspondence, and upon the fact that the appellant did not attend at the respondents' place of business for the purpose of checking the measurements taken by the respondents though he was invited by them so to do.

The appellant was not obliged to attend at the respondents' place of business to check their measurements; it might have been wise for him to attend, but if he chose to rely upon the measurements taken by himself or by his own servants, in the event of a dispute, he was entitled so to do.

Their Lordships do not think it necessary to refer to the correspondence in detail. It was alleged that some of the letters purporting to have been sent by the appellant to the respondents had been fabricated by him for the purposes of this case—in particular the letter numbered 197, dated the 5th October, 1916, marked Ex. 21 (B.) was referred to.

The first general account, sent by the respondents to the appellant, was dated the 2nd October, 1916, and the defendant alleged that the above-mentioned document was a copy of his reply thereto. Having regard to the admitted letters, their Lordships do not think it necessary to express any opinion on the question of the alleged fabrication; they must, however, point out that their attention has not been drawn to any part of the cross-examination of the appellant in which the allegation of fabrication was specifically put to him, as it should have been, if it was intended to rely upon it subsequently.

It is to be noted that Venkatasubba Rao, J., stated that he did not believe that the appellant had acknowledged the above-mentioned account (Ex. 56) to be correct.

The second general account, sent by the respondents to the appellant, was dated the 19th August, 1917, and on the 1st September, 1917, the appellant wrote to the respondents complaining that the schedule of accounts was not signed, and that the numbers put on the timbers by him had not been entered in the schedule, and that it was not possible for him to ascertain exactly the measurements; he asked the respondents for a further signed account. This at all events cannot be taken as an acceptance of the respondents' measurements.

The respondents received that letter, and replied that the appellant's numbers might have been washed out, and it would be difficult to send such numbers; and they suggested that the appellant should be present when the timber was measured.

Having considered the correspondence and the evidence, their Lordships are of opinion that it is not possible to hold that up to the 1st September, 1917, there was any such acquiescence by the appellant in the respondents' measurements as debarred him from disputing them at the trial.

On the 23rd February, 1918, the appellant, through his vakil, called upon the respondents to execute a conveyance, and alleged

a delivery of 1,087 candies of timber, which allegation was no doubt based on his own measurements.

On the 4th March, 1918, the respondents replied, disputing the appellant's figures and alleging a breach of the contract by the appellant.

With much respect to the learned Judges of the High Court, their Lordships are of opinion that it has not been proved that the appellant by his "conduct and acquiescence," agreed to the measurements taken by the respondents.

The result in their opinion is that the learned Subordinate Judge's finding on this point must be upheld, and that the appellant is entitled to credit in respect of logs supplied to the respondents under the agreement for the sum of Rs. 15,074–10–10, which is the cost of 341 logs after deducting the 10 per cent. discount and 1 per cent. brokerage specified in the agreement.

From this amount there is to be deducted the sum of Rs. 4,361–15–9. This is made up as follows: Rs. 4,184–15–0 and Rs. 120 on account of cart hire, and Rs. 57–0–9 for unloading charges. The result is that the appellant is entitled in respect of logs delivered to the respondents under the agreement to be credited with the sum of Rs. 10,712–11–1.

Their Lordships therefore are of opinion that, subject to the question whether the deliveries were in time, the cost of the timber supplied by the appellant to the respondents was more than the sum mentioned in the agreement of the 27th November, 1915, viz., Rs. 9,000, and that the appellant was entitled to have the property, mentioned in the schedule thereto, assigned to him in accordance with clause 10 of the agreement.

The High Court found that time was of the essence of the contract, but that there was no doubt that the respondents extended the time for the performance of the contract in regard to the supply of the 1,000 candies of timber: the learned Judge who delivered the main judgment stated that the "contrary was not seriously suggested."

Their Lordships have no hesitation in agreeing with this finding, and they are also of opinion that the whole of the above-mentioned 341 logs of timber delivered by the appellant to the respondents were supplied during the subsistence of the contract.

That being so, the condition referred to in clause 10 of the agreement was performed by the appellant, and he is entitled to have the assignment of the property therein mentioned.

The learned Subordinate Judge dealt with accounts relating to other matters, such as promissory notes, scantlings, etc. Their Lordships were not asked to deal with the accounts relating to these matters, and they adopt the conclusions of the learned Subordinate Judge in respect thereof,

Their Lordships therefore are of opinion that the appeals should be allowed, that the judgment and decrees of the High Court should be set aside, that the decree of the learned Subordinate Judge in suit No. 27 of 1919 should be restored, that

the decree of the learned Subordinate Judge in suit No. 28 of 1919 should be varied by directing that the defendants should execute a conveyance to the plaintiff at the plaintiff's cost in respect of the suit property within three months from the date of the Order in Council to be made on this appeal, and that in default the deed of conveyance shall be executed by the Court of the learned Subordinate Judge; that the other directions contained in the said decree should stand, and that the respondents should pay to the appellant his costs both in the High Court and in this appeal, and they will humbly advise His Majesty accordingly.

In the Privy Council.

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DELIVERED BY SIR LANCELOT SANDERSON.

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