Privy Council Appeal No. 9 of 1931.
Patna Appeal No. 45 of 1929.

Erroll Mackay - - - - - - - *Appellant*

v.

Maharaja Dhiraj Kameshwar Singh and another - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT PATNA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 16TH JUNE, 1932.

Present at the Hearing:
LORD WRIGHT.
SIR LANCELOT SANDERSON.
SIR DINSHAH MULLA.

[*Delivered by* LORD WRIGHT.]

The questions in this appeal are whether the first respondent, who was substituted for his father as defendant on the latter's death, is responsible in damages and if so, in what sum to the appellant, who was plaintiff in the action. The claim was on a contract dated the 9th November, 1919, for the sale of 200 maunds of new crop Java indigo seed at Rs. 22 a maund excluding bags, f.o.r. Purnea railway station, delivery to be made in April, 1920, the plaintiff paying (as in fact he did) on the date of the contract Rs. 1000 as earnest money. The first question is whether that contract was made, as it purported to be made, by one Hervey (who was on the plaint joined as a defendant in the suit, but was dismissed from it on 12th March, 1924) as agent for the defendant, who will be hereafter referred to under the description of respondent, which term will be applied equally both to the original and the substituted defendant. Hervey was at the date of the contract manager of the respondent's factory at Kajah; it was denied that he had actual or implied authority to make the contract. Their Lordships are of opinion that this contention is

not now open to the respondent, since it involves a question of fact which has now been concluded by the concurrent findings of two Courts: that Hervey had authority has been held first by the Subordinate Judge of Purnea and then by the Judges of the High Court of Patna. There was ample evidence before the Courts that Hervey had made in the past for the respondent similar contracts, which had been duly carried out, and also that it was in the ordinary course of an employment such as his to make such contracts for his employer. No question of law was involved. Indeed, the argument on behalf of the respondent on this aspect of the case seems to have been that the actual contract, made as it was before the extent of the then next succeeding indigo crop on the Kaja estate could be foreseen (because the crop is not harvested until between February and April), was speculative and improvident from the standpoint of his employer's interest rather than that it was unauthorised as against outside dealers. Their Lordships are of opinion that the contract must now be held to be a valid contract binding the respondent.

The respondent failed to make any deliveries either by the end of April, 1920, or at all. The question then is, what are the damages, that is, at what date are they to be estimated and on what basis. Hervey had left the respondent's service in December, 1919, and was succeeded by C. J. Berrill. The appellant wrote on the 3rd May, 1920, to Berrill pressing for delivery, and again on the 10th May, 1920, to the "Manager Kajah concern". On the 2nd June, 1920, he received a reply requesting him to send a copy of the contract he had stated had been entered into, but by letters of the 1st June and 11th June, 1920, he was informed that the contract was unauthorised and invalid and was offered a refund of the deposit of Rs. 1000; and the same repudiation was reiterated on the 1st July, 1920. The Subordinate Judge at Purnea found that the contract was finally repudiated on the 1st June, 1920, and accordingly treating that as the date of breach assessed the damages on the basis of a market price then ruling of Rs. 60 per maund. On appeal, the Judges of the High Court at Patna held that the date of the breach was the 30th April, 1920, by which date the contract, according to its terms, ought to have been completed by full delivery. Their Lordships are of opinion that this was the correct date of breach: there is no evidence that the contract time was varied or extended: all that happened was that the appellant wrote pressing for delivery after that date, but the respondent never acknowledged any obligation to deliver, or did anything but repudiate the contract. Their Lordships accordingly pronounce against the appellant's claim that the proper date was either the 1st July, 1920, or the 11th June, 1920, or the 1st June, 1920. On the basis of the date of 30th April, 1920, it is now necessary to consider how the damages are to be estimated. If there was an available market for the goods at the date of breach the damages must be based on the difference between that market price and the contract price: a contract

of resale becomes immaterial, because if there was a market, the law presumes that the buyer can minimise his damages by procuring substituted goods in the market, so that he is thus in the same position, apart from the difference in price, as if the seller had not made default. Hence the difference of price, if the market price exceeds the contract price, is the sole damage in general recoverable. The Subordinate Judge had proceeded on the basis of there being an available market, but at the wrong date. The Judges of the High Court on appeal held there was no market price which could be relevant to consider unless there was a market at Purnea, and the Judges accordingly remanded the case to the Subordinate Judge to find what was the market price for Java indigo seed at Purnea or its neighbouring districts on the 30th April, 1920. The Subordinate Judge had evidence before him that dealings in the Purnea district in Java indigo seed were controlled by the market at Cawnpore, but as Cawnpore was 300 or 400 miles away from Purnea, he, following the direction from the High Court, rejected evidence which was tendered by the appellant relative to the market at Cawnpore, and refused to allow proof of the prevailing rate at Cawnpore, the appellant having given evidence that there was no recognised market for the seed at Purnea. He found, however, that the market price at Purnea was Rs. 15 per maund, on evidence led for the respondent of two transactions between the respondent as landlord and certain growers as his tenants. The Judges of the High Court on appeal, held that these were special transactions depending on the relationship of the parties and afforded no criterion of a market price. They held that there was no market for the goods at Purnea, and that being so, that the measure of the appellant's damages was the difference between the price under the contract sued on, and that under a sub-contract of sale made between the appellant and a merchant at Cawnpore called Varma, dated the 14th November, 1919, on terms similar except as to price to those in the contract sued on, treating that as evidence, in the absence of a market price of the true value of the goods. Their Lordships are of opinion that if it were right to exclude consideration of market prices ruling at Cawnpore, and to hold that there was no relevant market price, still the measure of damage adopted by the Judges of the High Court would not be correct, because what is material is the value of spot goods at the date of the breach, whereas the prices in the two contracts were those ruling in the previous November for future goods deliverable in April, 1920. But in their Lordships' opinion the learned Judges were wrong in excluding evidence of the market prices for indigo seed ruling at Cawnpore. It is clear on the evidence that Cawnpore was the central market for indigo seed, to which growers at Purnea would resort, if need were, to sell and purchasers would resort, if need were, to buy. The merchants dealing in that commodity carry on business there : the Judges of the High Court treat the place of

delivery (f.o.r. Purnea) as fixing the locality of the relevant market (if any) as at or near Purnea. In their Lordships' opinion, this is a fallacy : the place of delivery may in this case have relevance to the extent of involving some adjustment of price, but as it seems clear that transactions of sale or purchase f.o.r. Purnea are dealt with at Cawnpore, the damages, in their Lordships' opinion, must be based on the facts of this case on the market price ruling at Cawnpore on the 30th April, 1920, and on that alone. Both Courts have rejected the appellant's further or alternative claim based on an award of damages made against him at the suit of Varma on the contract of the 14th November, 1919.

The difficulty in now fixing this relevant market price arises because the Subordinate Judge, under the direction of the Judges of the High Court, excluded evidence tendered by the appellant to establish what that price was. It was contended on behalf of the respondent that in the event of their Lordships finding as they now do, the case must again be remanded to the Subordinate Judge for a finding of fact. Their Lordships are not prepared to adopt that course. The amount involved in the suit is small and the case has already twice been considered by the Subordinate Judge and twice by the High Court at Patna. It is true that some further evidence might have been available for this Board, if the Courts had not excluded that evidence : but the respondent cannot complain of that result because the exclusion of the evidence was at the instance of his Counsel. Their Lordships feel that there should be an end of this litigation and that they should arrive at an estimate on the materials before them, which if not the best possible are at least sufficient to enable a finding of the relevant market price, and their Lordships accordingly fix it at Rs. 40 per maund, as against the appellant's claim on the relevant basis of Rs. 50 per maund. Their Lordships are of opinion, therefore, that the appellant is entitled to damages on the basis of Rs. 18 per maund on 200 maunds, and is also entitled to the return of the earnest money Rs. 1000 with interest thereon from the 9th November, 1919, to the date of the Order in Council made on the appeal, at 12 per cent. per annum. The appeal in their Lordships' opinion should thus be allowed and the appellant have his costs of the proceedings in the Courts below, and of this appeal. Their Lordships will humbly advise His Majesty accordingly.

In the Privy Council.

ERROLL MACKAY

v.

MAHARAJA DHIRAJ KAMESHWAR SINGH
AND ANOTHER.

DELIVERED BY LORD WRIGHT.

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