*Privy Council Appeal No.* 126 *of* 1919.
*Allahabad Appeal No.* 31 *of* 1917.

**Sheikh Muhammad Habid Ullah** - - - - - *Appellant*

*v.*

**The Firm of Bird and Company** - - - - - *Respondents*

FROM

## THE HIGH COURT OF JUDICATURE AT ALLAHABAD.

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 14TH FEBRUARY, 1921.

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*Present at the Hearing :*
LORD DUNEDIN.
LORD PHILLIMORE.
MR. AMEER ALI.

[*Delivered by* LORD DUNEDIN.]

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The present appeal arises out of a contract made between the appellant and the respondents by which the appellant was to supply 4,000 sleepers of a special pattern at any station on the Bengal-Nagpur Railway by the 31st May, 1913. As a condition of the contract, the appellant had to deposit and did deposit Rs. 5,000 with the respondents as security for liquidated damages at a certain rate per foot for all sleepers not delivered on the said 31st May. The sleepers had to pass inspection. Only 1,746 sleepers were delivered and passed inspection. The time for delivery was extended, but no more deliveries were made and the parties in December, 1913, broke off negotiations. The appellant then raised action asking for (1) the return of the deposit ; and (2) damages in respect of his profit on the balance of sleepers not supplied. The respondents counter-claimed for damages in respect of sleepers not delivered.

The Subordinate Judge held that time was of the essence of the contract as originally made, but that the respondents had by delaying inspection not given the appellant proper opportunity of supplying the whole of the sleepers by the 31st May ; that thereafter both parties were willing and anxious that the contract should go on, time being, he held, under these circumstances no

longer of the essence. He further held that when in the month of December the respondents alleged non-performance, and maintained that they would claim the penalty, that was equivalent to putting an end to the contract on their part, and he gave judgment for a return of the deposit and for damage calculated on the profit which would have accrued in respect of the unsupplied balance. On appeal, this judgment was reversed. The High Court, agreeing with the Subordinate Judge that time was of the essence of the contract as originally made, held that the fault in non-delivery by that date lay with the appellant, who never had 4,000 sleepers ready for delivery by that time, and could not excuse himself because at one particular station of the railway there was no room to lay out 4,000 sleepers at one time. They held that the respondents had excused non-delivery at the 31st May, and had in response to application to that effect by the appellant's agent, allowed the time of delivery to be prorogued until the 30th November; that non-delivery having been then made the appellant was in breach; that, although the liquidated damages condition could no longer apply, the respondents were entitled to damages for the non-delivered portion on the calculation of the profit which they would have made comparing the price under the principal contract with the Railway Company with the price they had to pay under the contract with the appellant. They accordingly dismissed the appellant's claim for damages, and gave him a decree for the deposit under deduction of the damages due to the respondents as above calculated.

The view of the evidence which commended itself to the High Court is set out with great minuteness in the judgment of the High Court, and as their Lordships agree with the learned Judges, they do not think it necessary to repeat what is there said. The crucial facts are as follows:—(1) Time was of the essence of the original contract; (2) the appellant was in default in not making complete delivery in time, *i.e.*, at 31st May, 1913; (3) the appellant applied for and was granted by the respondents an extension of time until the 30th November, 1913, for delivery of the balance over the 1,746 sleepers which had been delivered; and (4) delivery of the balance was not made by the respondents on the 30th November, and they were consequently in default. Their Lordships, however, think it necessary to give their opinion as to the law which applies to the above facts. The first point is settled by the Indian Contract Act, which enacts, Section 55, paragraph 1:—

> "When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time would be of the essence of the contract."

The respondents here did not elect to void the contract; they held it as subsisting, and agreed to prorogue the time of

performance. This they were entitled to do, see Section 63 of the Indian Contract Act, which explicitly says so :—

> " 63. Every promisee may dispense with or remit, wholly or in part, the performance of the promise made to him, or may extend the time for such performance, or may accept instead of it any satisfaction which he thinks fit."

The learned Subordinate Judge in their Lordships' opinion misread the third paragraph of Section 55 ; that paragraph is as follows :—

> " If, in case of a contract voidable on account of the promisor's failure to perform his promise at the time agreed, the promisee accepts performance of such promise at any time other than that agreed, the promisee cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed, unless, at the time of such acceptance, he gives notice to the promisor of his intention to do so."

This clearly means that the promisee cannot claim damages for non-performance at the original agreed time, not that he cannot claim damages for non-performance at the extended time, yet the learned Judge says :—

> " Subsequent extension of time could not legally bind the plaintiff to complete it within the time so generously extended by defendant and intimated to plaintiff months after."

Now apart from the terms of the Indian Contract Act, the law is as laid down in *Tyers* v. *Rosedale & Ferryhill Iron Co.*, L.R. 8 Exchequer 305 and 10 Exchequer 195. Baron Martin in that case said :—

> " The second question is one of law, and is a most important one—it arises over and over again every day in the ordinary transactions of mankind. It is this : There is a contract for the sale of goods to be delivered, say, in January or upon a day of January. On the day before the delivery is to take place the vendor meets the vendee and says : ' It is not convenient for me to deliver the goods up on the day named, and I will be obliged if you will agree that the goods shall be delivered at a later period.' and the vendee assents ; or the vendee goes to the vendor and says, ' It is not convenient for me to receive the goods in January or upon the day named and will you agree that the delivery shall be postponed ? ' and the vendor assents ; the latter is the present case, and the contention on the part of the defendants is that this puts an end to the contract, and that the defendants are not bound to deliver upon the later day. In my opinion, the contention is not well founded . . . It is impossible to distinguish the case of the application coming from the vendors and one coming from the vendee."

This opinion was affirmed in the Exchequer Chamber. The effect of the 55th section of the Indian Contract Act above quoted is, where the party having the option elects not to avoid, to put agreement after the original date on the same footing as an agreement as put by Baron Martin just before the original date. In England the matter is often complicated by the necessity of considering the 17th section of the Statute of Frauds and the 4th section of the Sales of Goods Act, but in the Indian Contract Act there is no section analogous to this. It is not necessary, therefore,

to enquire whether the case of *Plevins* v. *Downing*, L.R.1, C.P.D. 220, is or is not reconcilable with the case of *Tyers* v. *Rosedale & Ferryhill Iron Co.* Difficulties which confronted the Court in *Plevins* v. *Downing* do not arise here, so that the law may safely be stated as in *Tyers* v. *Rosedale & Ferryhill Iron Co.* Where, as here, a specific time is stated, then that substituted date must hold. If there were a simple waiver of the right to extension of the original time, then a reasonable time would be the proper time for delivery. It follows that there being no delivery on the 30th November, the appellant was in breach, and damages are calculable in the ordinary way.

The appellant, however, before the Board argued that the damages could not be recovered, because as a matter of fact the respondents supplied the sleepers from other wood which they had and made a profit on that supply greater than the profit which they would have made by the contract wood. The answer to this argument is to be found in the well-known case of *Rodocanachi* v. *Milburn*, L.R. 18, Q.B.D. 67, which was applied by the House of Lords in the recent case of *Williams* v. *Agius*, 1914, A.C. 510.

> " It is well settled that in an action for non-delivery or non-acceptance of goods under a contract of sale the law does not take into account in estimating the damages anything that is accidental as between the plaintiff and the defendant, as, for instance, an intermediate contract entered into with a third party for the purchase or sale of the goods."

In the present case had the appellant supplied the timber the respondents would have made their profit and would have still had the other timber to sell, upon which they were entitled to make such profit as they could.

Their Lordships will humbly advise His Majesty to dismiss the appeal with costs.

**In the Privy Council.**

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SHEIKH MUHAMMAD HABID ULLAH

*v.*

THE FIRM OF BIRD AND COMPANY.

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DELIVERED BY LORD DUNEDIN.

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