TIMBLO IRMAOS LTD., MARGO

v.

JORGE ANIBAL MATOS SEQUEIRA & ANR.

December 16, 1976

[A. N. RAY, C.J., M. H. BEG AND JASWANT SINGH, JJ.]

Construction of a power of attorney—Principles of ejusdem generis—Object—Purpose—Nature—Frame—Provisions and language used—Dictionary meaning—Surrounding circumstances, whether power includes—Incidental to the ascertained objects.

Evidence Act 1872—*Sec.* 92 *proviso* 2—*Existence of separate oral agreement on which written agreement is silent.*

The appellant company sued Mr. & Mrs. Sequeira for recovery of certain amounts under two contracts of supply of iron ore. The first contract was signed by Ramesh holder of a power of attorney of Sequeiras and the second contract was signed by Ramesh's father as the agent of Ramesh. Under the two contracts Sequeiras were supposed to supply and load iron ore and were liable to pay demurrage in case of delay in loading the ship and were entitled to receive certain despatch money if the loading was made earlier. Sequeiras filed their counter claims. The Court did not arrive at a definite conclusion about the quantity of ore supplied and left that to be determined in execution proceedings. The court found that the first contract was binding between the appellant and Sequeiras as it had been ratified by Sequerias and acted upon by the appellant. The court, however, held that the second contract was not binding on Sequeiras as Ramesh had a limited authority and, therefore, he could not constitute his father his attorney for the purposes of executing the second agreement. The trial Court also found that the appellant had committed breaches of the contract but left the quantum of damages to be determined in execution proceedings. The decree of the trial Court was substantially confirmed in appeal by the Additional Judicial Commissioner.

HELD : 1. The Judicial Commissioner erred in concentrating on only one dictionary meaning of the word "exploitation" used in the power of attorney executed by Sequeiras in favour of Ramesh. The court, while interpreting a power of attorney, has to construe the document as a whole in the light of its purpose and surrounding circumstances and the transactions meant to be governed by it. Practice and custom have also some bearing on the nature and effect of the power of attorney. The purpose of the powers conferred on the power of attorney have to be ascertained having regard to the need which gave rise to the execution of the document, the practice of the parties and the manner in which parties themselvs understood the purpose of the document. The powers which are absolutely necessary and incidental to the execution of the ascertained purposes of the general powers given must be necessarily implied. Applying the above rules of interpretation the court came to the conclusion that Ramesh had power to appoint an agent to execute the contract in question and therefore the second contract was also binding on Sequeiras [454A-B, 456A-H]

Brvant, Powls, and Bryant, Limited v. *La Banque De Peuple etc.* (1893) A.C. 170 @ 177 and 179 and *Jonmenjoy Coondoo* v. *George Alder Watson,* 10 I.L.R. Cal. 901 @ 912 approved.

O.A.P.R.M.A.R. Adaikappa Chettiar v. *Thomas Cook & Son (Bankers) Ltd.* AIR 1933 PC 78, distinguished.

2. The implied powers cannot go beyond the scope of the general object tances do not derrogate from the width of the general power initially conferred. of the power of attorney but must necessarily be subordinated to it Specific ins- To such a case *ejusdem generis* cannot be applied. The mode of construing a document and the rules to be applied to extract its meaning correctly depends upon not only the nature and object but also upon the frame, provisions, and language of the documents. In cases of uncertainty the rule embodied in proviso 2 to section 92 of the Evidence Act which is applicable to contracts can be invoked.

A The ultimate decision of such a matter turns upon the practice and particular facts of each case. [458D-P]

3. The findings arrived at by the Appellate Court that Sequeiras were prevented from performing their part of the contract, owing to the failure of the appellant to provide either sufficient lighting or enough winches to enable due performance of the contract, is unexceptionable. The Judicial Commissioner rightly concluded that the company had not discharged its own part of the contract so that it could not claim demurrage or damages. [458-G-H]

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The court partly allowed the appeal and remanded the matter back to the trial court for determining the liabilities of the parties in the light of the judgment. [459E-F]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1868 of 1968.

Appeal from the Judgment and Decree dated the 21st February 1968 C of the Judicial Commissioner's Court at Goa, Daman and Diu in Appeal No. 3370 of 1964.

S. *V. Gupte, Naunit Lal* and (Miss) *Lalita Kohli* for the Appellant.

V. C. Mahajan and *R. N. Sachthey* for Respondents.

The Judgment of the Court was delivered by

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BEG, J.—The Plaintiff-appellant Timblo Irmaos Ltd., (hereinafter referred to as 'the Company') had sued Jorge Anibal Matos Sequeira and his wife (hereinafter referred to as Sequeiras') for recovery of Rs. 2,82,141/- claimed under a contract of 23rd January, 1954, and a sum of Rs. 1,14,700/-, claimed under another contract of 4th February, 1954. The Sequeiras counter-claimed Rs. 3 lakhs as price of E 8000 tons of iron ore supplied to the Company; and pleaded that a sum of Rs. 1,13,000/-, advanced by the Company to the Sequeiras was to be adjusted after final determination of the amount due as price of goods sold and supplied.

The Sequeiras are holders of a mining concession. They, it was alleged, had entered into the two contracts, one of 23rd January, 1954, F through their attorney, Ramesh Jethalal Thakker (hereinafter referred to as Thakker Junior), for supplying 8000 tons of iron ore, altered in some respects, by a later agreement, and the other of 4th February, 1954, alleged to be binding on the Sequeiras although entered into through Jethalal C. Thakker (hereinafter referred to as 'Thakker Senior'), the father of R. J. Thakker. The most important clause in the contract of 23rd January, 1954, was that iron ore should be G loaded in a ship 'Mary K' at Marmagoa, and that the loading must be done at the rate of 500 tons per "weather working day" of 24 hours. Under the contract, the rate of demurrage for not loading the ship in time was to be paid at the rate of US $ 800.00 per day an pro rata for each fraction of a day. The buyer company was to pay what was called "despatch money" at half the rate of demurrage for time saved in loading. The payment was to be in the Portuguese H Indian rupees at the exchange rate of Rs. 4.76 per US $. The buyers had also to make an initial payment of Rs. 55,000/- as soon as delivery by loading began. The buyers were also to establish a Letter of Credit, before 27th January, 1954, in favour of

the sellers, the Sequeiras, for the full value of the iron ore after deducting Rs. 55,000/- paid initially, and Rs. 1/4 per gross ton awaiting final settlement by presentation within ten days, at the bank named in the agreement, by presentation of the certificate of weight issued by the Master of the vessel. Certificates of the quality and specifications and of final weighment were to be sent by the buyers after the vessel's arrival at the port of discharge. A

The second agreement of 4th February, 1954, relates to loading of 6000 to 9000 tons of iron ore of given quality and specifications in the ship 'Mary K' at the minimum rate of 500 tons per day commencing delivery within 24 hours of the buyer notifying the requirements to the seller. It also contained other stipulations similar to those of the first one. The important point to note about this agreement is that it is signed by Jethalal C. Thakker as the attorney of his son Ramesh Jethalal Thakker. B C

It appears that the clause relating to initial payment was changed so that the sellers, Sequeiras, were paid Rs. 1,13,000/- between 25th January, 1954, and 22nd July, 1954. It also appears that there was delay in delivery for which the plaintiff claimed demurrage. There were also complaints about alleged departure by the seller from the specifications agreed upon. The Sequeiras, the sellers, had it seems, also applied for an interim injunction so that the ship's loading capacity may be checked. Under orders of the Court, an inspection of the ship was made and a report was sumbitted by an expert on 15th March, 1954, after the determination of its loading capacity so that the ship could finally sail only on 16th March, 1954. D

The Margao Comarca Court, where the claim and the counter claims were filed, held that the seller's attorney, Thakker Junior, who had received Rs. 1,13,000/-, which had to be deducted from the price of the iron ore supplied, was not duly authorised by the power of attorney executed by the Sequeiras to sell. The Court did not find enough material to reach a definite conclusion about the quantity of ore supplied and left that to be determined in execution proceedings. It, however, held the first contract to be binding between the parties as it had been ratified by the seller and acted upon by the buyer. But, the second contract was held to be not binding upon the Sequeiras as Thakker (Junior) was found to have been given only a limited authority so that he could not constitute his father his attorney for the purpose of executing the second agreement. The Trial Court accepted the basis of the counter-claim of the Sequeiras and found that the company had committed breaches of contract but left the quantum of damages to be determined in execution proceedings. E F G

The decree of the Trial Court was substantially affirmed in appeal. Nevertheless, the Additional Judicial Commissioner Goa, Daman & Diu, had modified the decree, the appellant company has come up to this Court in appeal as of right. Two questions arise for determination before us. The first is whether the second contract of 5th February, 1954, was duly covered by the authority conferred by the Sequeiras upon their attorney, Ramesh Jethalal Thakker, or not. The second H

A relates to the amount of demurrage, if any, payable by the Sequeiras, the defendants-respondents, to the plaintiff-appellant.

On the first question, the Judicial Commissioner concentrated on the dictionary meaning of the word "exploitation" used in the power of attorney executed by the Sequeiras in favour of Thackker Junior. The learned Judicial Commissioner took the meaning of the word from B Chambers' 20th Century Dictionary which gave : "the act of successfully applying industry to any job, as the working of mines, etc; the act of using for selfish purposes". The learned Judicial Commissioner also referred to the inability of learned Counsel for the company to cite a wider meaning from the Oxford Dictionary which the learned Counsel had carried with him to the Court. The Judicial Commissioner then ruled :

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> "Hence, I see no escape from the conclusion that on the basis of the power of attorney given by Sequeira to Ramesh the latter could not have entered into any agreement for sale of ore extracted from the mine belonging to Sequeira on his behalf. Consequently, Sequeira is not bound by the agreement dated 4th of February, 1954".

D As already mentioned by us, the first contract of 23rd January, 1954, was held to be binding despite this finding because the parties had acted upon it and dealt with each other on the basis that such a contract existed. We think that this background can be taken into account as indicating what the parties themselves understood about the manner in which the words used in the power of attorney dated 17th January, 1953, executed by Sequeiras in favour of Thackker Junior E was related to the actual facts or dealings between or by the parties. Moreover, the power of attorney had to be read as a whole in the light of the purpose for which it was meant. As it is not lengthy, we reproduce its operative part. It reads :

> "Jorge Anibal de Matos Sequeira, married, major of age, businessman, landlord, residing in Pangim, whose identity F was warranted by witnesses, said in the presence of the same witnesses that by the present letter of attorney he appoints and constitutes his attorney Mr. Ramesh Jethalal, Bachelor, major of age, businessman, from Bombay, residing at present in Bicholim and conters on him the power to represent him, to make applications, allegations, and to defend his right in any public offices or Banks, to draw up and sign G applications, papers, documents and correspondence; specially those tending to acquire petrol, gunpowder, train, transport vehicles, machines, furniture (alfaias) and other instruments used in mining industry, apply for and obtain licences for importation and exporation, to give import and export orders, even temporary, sign applications, suits and only other things necessary, attach and withdraw documents, make H declaration, even under oath and in general any powers necessary for the exploitation of the mine named Pale Dongor situate at Pale for the concession of which the said Siqueira applied and which he is going to obtain to impugn, object,

protect and prefer appeals upto the higher Courts, notify and accept notifications and summons in terms of Sec. 35 and 37 of the C.P.C., to use all judicial powers without any limitation, to subrogate these powers to some one else. This was said and contracted. The witnesses were Bablo Panduronga Catcar ad Xec Adam Xecoli, both married landlords, major of age from Bicholim who sign below". A B

Apparently, practice and custom have some bearing on these transactions in Goa. It is this reason that, although the power of Attorney was executed by Mr. Sequeira, yet, his wife was impleaded, according to the practice in Goa, and no objection was raised either on the ground that she was wrongly impleaded or that the power of attorney was vitiated on the ground that it was executed only by her husband. In any case, the subsequent agreement of 23rd January, 1954, which was held to have been acted upon, and the similar agreement of 5th February, 1954, of which also the defendants were bound to have and did have full knowledge, were never repudiated by Sequeiras, before the filing of the suit before us. Indeed, the agreement of 5th February, 1954, appears to be a sequal to the first agreement of 23rd January, 1954. We do not think that the two could be really separated in the way in which the Judicial Commissioner thought that they could be by holding that the one was acted upon whereas the other was not. In any case, the second was the result of and a part of the same series of dealings between the parties. C D

We do not however propose to rest our findings on the ground that the parties are bound by the second agreement due to some kind of estoppel. We think that the terms of the power of attorney also justify the meaning which the parties themselves appear to have given to this power of attorney that is to say, a power to conduct business on behalf of the Sequeiras in such a way as to include sales on behalf of Sequeiras. E

We think that perhaps the most important factor in interpreting a power of attorney is the purpose for which it is executed. It is evident that the purpose for which it is executed must appear primarily from the terms of the power of attorney itself, and, it is only if there is an unresolved problem left by the language of the document, that we need consider the manner in which the words used could be related to the facts and circumstances of the case or the nature or course of dealings. We think that the rule of construction embodied in proviso 6 to Section 92 of the Evidence Act, which enables the Court to examine the facts and surrounding circumstances to which the language of the document may be related, is applicable here, because we think that the words of the document, taken by themselves, are not so clear in their meanings as the learned Judicial Commissioner thought they were. F G

As we have already mentioned, the learned Judicial Commissioner chose to concentrate on the single word "exploitation" torn out of its context. The word "exploitation" taken by itself, could have been used to describe and confer only such general powers as may be H

A needed for the working or exploitation of the mine. But, the earlier parts of the document show that the main purpose of the document was to give power to Thakker Junior to represent Mr. Sequeira not only in litigation and financial affairs but "to draw up and sign" various "documents and correspondence". It is true that the power to sell is not specifically mentioned in the document. The nature of the documents and the correspondence which Thakker Junior could sign B on behalf of Mr. Sequeira is also not clarified. Instances of particular kinds of business to be transacted by the agent in the course of "exploitation" of the mine are given, such as "acquisition of petrol, gun powder, train, transport vehicles, machines, furnitures and other instruments used in mining industry". It is difficult to see how any documents even for these special purposes could be signed without a power to buy and sell on behalf of the Sequeiras. Furthermore, the power C expressly includes giving of "import and export orders". Now, the conduct of a business so as to give necessary orders for purposes of exporting and importing must, we think, by a necessary implication, include the power to sell what is excavated from the mine to be exploited. Otherwise, how could iron ore be exported? It is a well known rule of construction that powers necessary and incidental to the effective exercise of the powers conferred will be implied.

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The learned Judicial Commissioner had, in our opinion, overlooked several well known rules of interpretation: firstly, that, a word used in a document has to be interpreted as a part of or in the context of the whole; secondly, that, the purpose of the powers conferred by the power of attorney have to be ascertained having regard to the need which gave rise to the execution of the document, the practice of the E parties, and the manner in which the parties themselves understood the purpose of the document; and thirdly, that, powers which are absolutely necessary and incidental to the execution of the ascertained objects of the general powers given must be necessarily implied.

Applying the rules of interpretation of the document indicated above, it seems to us that the true meaning of the document will be F seen to be that which the parties themselves understood it to be, that is to say, one which included the power to sell iron ore. Once we reach this conclusion it is not difficult to see that Thakker Senior was duly authorised to execute and sign on behalf of Thakker Junior because this is covered by the express words of the power of attorney: "to subrogate these powers to someone else". The mode of construction which we have indicated seems to us to be borne out by the G very authorities cited on behalf of the defendants-respondents to which we will now advert.

Learned Counsel for the respondents seemed to place much reliance on *Bryant, Powis, and Bryant, Limited* v. *La Bangue De Peuple etc.*,(1) where it was observed (at p. 177) :

> "Nor was it disputed that powers of attorney are to be H construed strictly—that is to say, that where an act purporting to be done under a power of attorney is challenged as being in excess of the authority conferred by the power, it

(1) (1893) A.C. 170 at 177 & 179.

is necessary to shew that, on a fair construction of the whole instrument, the authority in question is to be found within the four corners of the instrument either in express terms or *by necessary implication*".

It was also held there (at p. 179) :

> "To put it shortly, the power of attorney authorized Davies to enter into contracts or engagements for three specified purposes : (1) the purchase or sale of goods; (2) the chartering of vessels; and, (3) the employment of agents and servants; and, as *incidental thereto, or consequential thereon,* to do certain specified acts and other acts of the same kind as those specified. If the instrument be read fairly, it does not, in their Lordships' opinion, authorize the attorney to borrow money on behalf of the company, or to bind the company by a contract of loan. It appears to their Lordships that the words quoted in the judgment of the Court of Queen's Bench are to be read in connection with the introductory words of the sentence to which they belong, 'for all or any of the purposes aforesaid'. So read, the words in question do not confer upon the agent powers at large, but only *such powers as may be necessary in addition to those previously specified, to carry into effect the declared purposes of the power of attorney*".

We think that the passage quoted above correctly lay down the law which is applicable in this country as well and which we are applying here. The method of construing a power of attorney indicated above fully supports our view that the document we have to construe confers a power to sell iron ore on behalf of the Sequeiras.

We were then referred to *Jonmenjoy Coondoo* v. *George Alder Watson,*(1) where it was held that a power of attorney which expressly confererd the power upon the agent to "negotiate, make sale, dispose off, assign and transfer or cause to be assigned and transferred at his discretion" Govt. notes, deposited with him for safe custody, did not include the power to lend or pledge. In this case, the ratio-decidendi seemed to be that lending or pledging would defeat the purpose of the power of attorney which expressly conferred the power to sell. Obviously, if what was to be sold was loaned or pledged, it could not be easily sold. As we have noticed above, the powers deemed to be conferred by necessary implication must serve the purpose of the document and not frustrate it. The Privy Council observed (at p. 912) :

> "The appellant's Counsel relied mainly upon the word negotiate, and also upon 'disposed of'. In order to see what was intended by these words, they must be looked at in connection *with the context, as well as with the general object of the power.* This appears to their Lordships to have been to sell or purchase for Watson Government promissory notes and other securities, not to borrow or lend money upon

(1) 10 I.L.R. Cal. 901, 912.

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> them. If the word 'negotiate' had stood alone, its meaning might have been doubtful, though, when applied to a bill of exchange or ordinary promissory note, it would probably be generally understood to mean to sell or discount, and not to pledge it. Here it does not stand alone, and, looking at the words with which it is coupled, their Lordships are of opinion
B that it cannot have the effect which the appellant gives to it, and, for the same reason, 'dispose of' cannot have that effect".

We think that this case also bears out the mode of construction adopted by us.

We were then referred to *O.A.P.R.M.A.R. Adaikappa Chettiar*
C v. *Thomas Cook & Son (Bankers) Ltd.*,(1) where the well known principle of *ejusdem generis* was applied to hold that general words following words conferring specifically enumerated powers "cannot be construed so as to enlarge the restricted power there mentioned". In this case, the purpose of the general power was subordinated to the specific powers given which determined the object of the power of attorney. There is no deviation in this case from the general rules
D of construction set out above by us. We have indicated above that implied powers cannot go beyond the scope of the general object of the power but must necessarily be subordinated to it. In fact, in a case like the one before us, where a general power of representation in various business transactions is mentioned first and then specific instances of it are given, the converse rule, which is often specifically stated in statutory provisions (the rules of construction of statutes and
E documents being largely common), applies. That rule is that specific instances do not derrogate from the width of the general power initially conferred. To such a case the *ejusdem generis* rule cannot be applied. The mode of construing a document and the rules to be applied to extract its meaning correctly depend upon not only upon the nature and object but also upon the frame, provisions, and language of the document. In cases of uncertainty, the rule embodied in
F proviso 2 to Section 92 of the Evidence Act, which is applicable to contracts, can be invoked. Thus, the ultimate decision, on such a matter, turns upon the particular and peculiar facts of each case.

Coming now to the second question, we find that the findings of fact recorded by the Judicial Commissioner are unexceptionable. Firstly, it was found that, although, under the contract, the defendants-respon-
G dents could load iron ore at any time during 24 hours, which included the night, yet, the defendants were prevented from doing so owing to the failure of the plaintiff to provide either sufficient lighting or enough winches to enable due performance of the contract. Secondly, it was admitted that the appellant never opened a Letter of Credit with the named bank by 27 January, 1954, as promised by it. Thirdly, the delay in loading was held to be due to the fault of the company. The
H Judicial Commissioner rightly concluded that the company had not discharged its own part of the contract so that it could not claim

(1) A.I.R. 1933 PC 78.

demurrage or damages. Indeed, it was found that the company did not have to pay any demurrage at all to the shippers for delayed departure. A

Learned Counsel for the appellant relied strongly on the following terms in the contract of 23rd January, 1954 :

> "Demurrage (if any) in loading payable by Seller at the rate of US $ 800.00 per running day fraction of day pro rata. Buyers to pay despatch money at half the demurrage rate for all time saved in loading. Payment either way in Portuguese Indian rupee currency at the rate of exchange of Rs. 476/- for US $ 100.00." B

The contention was that this created an absolute liability to pay for delay in loading irrespective of whether the company had to pay the shippers any demurrage. It was urged that the liability was upon the seller irrespective of whether such payment had to be made to the shipping company or not. We think that the demurrage could not be claimed when the delay in loading was due to the default of the respondents themselves. It is apparent that the basis upon which the agreement to pay demurrage rested was that the appellant will afford proper facilities for loading. When the appellant itself had committed breaches of its obligations, it is difficult to see how the respondents could be made responsible for the delay in loading. We think that the Judicial Commissioner had rightly disallowed this part of the claim. C D

In the result, we partly allow this appeal, set aside the finding of the Judicial Commissioner as regards the binding nature of the contract dated 5th February, 1954. We hold that this document embodied the terms of an agreement which was legally binding on both sides before us. The case will now go back to the Trial Court for determination of the liabilities of the parties to each other for alleged breaches of contract except to the extent to which the findings negative the claim to demurrage and the admitted payment of Rs. 1,13,000/- by the appellant to the defendants which will have to be taken into account. The parties will bear their own costs. E F

P.H.P. *Appeal allowed in part.*