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[630] ORIGINAL CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Bayley.

GOCULDAS MADHAVJI (*Plaintiff*) *v.* NARSU YENKUJI (*Defendant.*)*
[6th and 13th September, 1889.]

Agreement for permission to quarry—License necessary—Non-renewal of license—Construction of agreement—Conditional or unconditional promise to pay.

By an agreement (in renewal of similar agreements for the two previous years) dated the 3rd September, 1888, the defendant agreed to pay the plaintiff 'rent' for a piece of hilly ground at the rate of Rs. 329 *per* month for one year, during which time the defendant was to be allowed to blast stones and carry on the work of quarrying to the extent of seven crow-bars, such quarrying to be done at such places as the plaintiff had pointed out, or should choose to point out from time to time. The rent to be paid was arrived at on a calculation of Rs. 47 *per* crow-bar, and was to be payable whether defendant employed the seven crow-bars or less. The defendant by the sixth clause of the agreement further undertook, as follows:—"As regards the police arrangement and other expenses at the time of blasting stones, and obtaining an order or license &c. and as to any other kind of expenses, risk and responsibility, all these are upon me. I will duly pay you at the rate of Rs. 329 per month clear until the fixed time." The defendant was a stone contractor, and had been employed in this work of quarrying all his life, and for the previous two years on this very spot, and was well aware that blasting could not be carried on without a license from the authorities, which was revocable at any time, and required renewal annually. At the time of the agreement the defendant was in possession of license, which expired on the 31st December, 1888. After that date the authorities refused to renew the license, on the ground that the quarry where operations were being carried on was surrounded by houses on all sides, and the defendant thereupon refused to continue the payment of the monthly rent of Rs. 329. The plaintiff accordingly brought this suit in the Small Cause Court for three months' rent at the above rate.

Held, looking at the nature of the contract, that it must be taken to have been the intention of the parties to it that the monthly sum of Rs. 329 should only be payable so long as quarrying was permitted by the authorities, and that there was no unconditional contract to pay Rs. 329 in all events in cl. 6 of the agreement or elsewhere.

Taylor v. *Caldwell* (1) followed; *Marquis of Bute* v. *Thompson* (2) and *Ridgway* v. *Sneyd* (3) commented on and distinguished.

REFERENCE from the Court of Small Causes, Bombay.

[631] The facts sufficiently appear from the following case stated for the opinion of the High Court by W. E. Hart, Chief Judge of the Court of Small Causes at Bombay:—

"1. The plaintiff is the owner of a stone quarry in a piece of hilly ground situated at Gunpowder Road, Mazagaon, and the defendant is a stone contractor who contracts with the owners of such places for the purchase of stone to be quarried and removed by his own labour.

"2. On the 3rd September, 1888, the defendant executed a Gujarati agreement, translation whereof is as follows:—

"'To Thakar Goculdas Madhavji by Vanjan Narsu Yenku. To wit—I have taken on rent from you your ground for carrying on a stone quarry in your hilly ground behind the temple of Mankeshvar, in Mazagaon. I have made with you the terms of the agreement in respect thereof; the following are the particulars thereof:—

* Small Cause Court Suit, No. 10254 of 1889.

(1) 3 B. & S. 826; 32 L.J.Q.B. 164. (2) 13 M. & W. 487. (3) Kay, 627.

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" '(1). In this hilly ground I am to carry on (or work) 7, namely seven, crow-bars for blasting stones. The rent in respect thereof is fixed at the rate of Rs. 329 *per* month in respect of seven crow-bars, at the rate of Rs. 47 for one crow-bar. The rent is duly to accrue from the 6th day of September in the year 1888. I will duly continue to pay you the same one month in advance from the date of the current month.

" '(2). In this ground of the hill I am to blast stones and carry on the work of the seven crow-bars only in as much space as you have pointed out to me and in as much space and at such places as you may hereafter from time to time cause to be pointed out in the ground of this hill. Until the fixed time of this writing I am duly to take the stones which may turn up therein. With the exception of blasting stones with seven crow-bars I have no right to take out or blast loose stones with extra crow-bars, nor have I any right to take them, and I am not to take them, away.

" '(3). The time for carrying on the work of those seven crow-bars is fixed at twelve months from the 6th day of September, 1888; until that time I may carry on (or work) seven crow-bars; or I may carry on (or work) less crow-bars; nevertheless I will duly pay you at the rate of Rs. 329 *per* month, in respect of the seven crow-bars up to the fixed time. I am not to raise any dispute therein.

" '(4). As to the stones which may turn up by blasting with these seven crow-bars, or the stone metal which I may break these stones into, I am duly to remove and take away this broken stone metal or stones from your compound. I will not keep a depot in your compound. If I shall keep any you may write to me a letter with three days' time; within that time I will duly take away the goods so kept or the goods which may be lying there. If I do not take away the same I will duly pay you at the rate of Rs. 15 *per* day in respect of rent after that time.

[632] " '(5). As to the earth which may turn up by my carrying on the work of the seven crow-bars, I will duly cause that earth to be thrown at my expense at such places as you may cause to be pointed out to me in your ground of the hill. I have no right of any kind whatsoever to that earth.

" '(6). I am to carry on the work of the seven crow-bars in respect of blasting stones; as regards the police arrangement and other expenses at the time of blasting stones, and obtaining an order or license, &c., and as to any other kind of expenses, risk, and responsibility, all these are upon me. I will duly pay you at the rate of Rs. 329 *per* month clear until the fixed time.

" '(7). I will not blast stones below the level of this ground, nor am I to take out stones therefrom. I will duly do my work above the level of this ground.

" '(8). I am to carry on the work of the seven crow-bars written above. If I or my men were to employ an eighth crow-bar at any time, I will duly pay you at the rate of Rs. 20 *per* day in respect of rent on account thereof.

" ' (9). In the event of my not acting in conformity with the agreement mentioned in this writing, or delaying payment of rent, or acting contrary to the terms of the writing, you may forthwith stop my quarry of the seven crow-bars, and you have a right to or over all my stones or broken stone metal, and other goods belonging to me which may be there; and I will duly pay you the rent up to the fixed time mentioned in this

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writing. Besides this whatever loss and expenses you may incur in respect hereof all those are duly upon me.

"'(10). Opposite to this ground of the seven crow-bars there are pits (or holes) made on my behalf in two or three plots of ground; water is to be taken out or drawn from those pits, and on throwing earth in those very pits I will duly make the level thereof even with that of the *sarkari*, or public road; the expenses which may be incurred in respect thereof are all upon me. I am duly to do the same in two months from the date mentioned in this writing; and, if I do not do it, you may get it done on my account by any person whatsoever; whatever expenses may be incurred in respect thereof I am duly to make good, and pay you the same without dispute.

"'(11). In this ground of the hill and chawls your other tenants are living and may hereafter come to live. I will not cause any inconvenience of any kind or loss to them. If I do, I am duly to be answerable in respect thereof.

"'In this manner I have given this in writing of my own will and accord and in sound mind and understanding; the same is duly agreed to, by, and binding on me and on my heirs and executors.'

"At this time the defendant was the holder of a license from the Deputy Commissioner of Police allowing him to carry on blasting operations in the plaintiff's quarry till the 31st December, 1888; as these went on, they gradually receded further from the road and approached nearer to the houses in the neighbourhood.

[633] "3. On applying for a fresh license for the year 1889 to the Commissioner of Police the defendant was informed, on 22nd February, 1889, that the Municipal Commissioner objected to the renewal of the license for the current year, as the quarry, where the operations were to be carried on, was surrounded by houses on all sides.

"4. The defendant then applied for a license to the Municipal Commissioner, who, after reference to the Executive Engineer on 29th April, 1889, finally replied that it was not safe to allow the blasting operations any longer at the place referred to.

"5. In the meantime the defendant had informed the plaintiff, by letter of the 5th February, 1889, of the refusal of the Commissioner of Police to grant a license for blasting in the plaintiff's quarry during the current year, as the ground was unfit for such purposes, and had given notice that he had, in consequence, ceased to work there, and considered the agreement void for its unexpired portion, and declined to make any further payment under it.

"6. To this the plaintiff replied, on the 6th February, that he was not concerned with the grant of license to the defendant, who was bound, by the distinct terms of his agreement, to pay Rs. 329 *per* month for a year from 6th September, 1888, whether he carried on blasting operations or not.

"7. This suit has now been brought by the plaintiff, on the agreement, to recover Rs. 987, being the three sums of Rs. 329, payable in advance on 6th February, 6th March, and 6th April. It is admitted that all sums previously due have been paid, and that these have not; and that during the period which these payments should have covered, *viz.*, from 6th February to 6th May, the defendant has done no work in the plaintiff's quarry. It is also admitted that it would be illegal for

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the defendant to blast without a license, to be obtained from the Commissioner of Police before the coming into force of the City of Bombay Municipal Act, 1888, and after that date from the Municipal Commissioner. Nor is it contended in the present case that the license was wrongly refused by either, or on any ground other than that of danger to the surroundig houses and their inmates.

[634] "8. I found the defendant was in no default in applying for the license, or informing the plaintiff of his failure to obtain one; and that there was no obligation on the plaintiff to obtain one: but that, without the fault of either party, the operation of blasting stone in the plaintiff's quarry—which was legal at the time they entered into their agreement—had become illegal before the date at which the first payment sued for would have been payable under that agreement.

"9. The only question argued at the trial was whether this exonerated the defendant from his obligation, under the agreement, to pay Rs. 329 *per* month for a year from the 6th September, 1888. I held that it did; because I found the only consideration for the defendant's payment was the plaintiff's permission to go on his land for the purpose of blasting with seven crow-bars and removing the stone so blasted, which purpuse having become unlawful, the plaintiff could not now lawfully perform his part of the contract, and, therefore, the defendant's agreement was avoided by reason of illegality of its consideration: see Pollock on the Principles of Contract (2nd edn.), pp. 282 and 340. I, therefore, dismissed the suit with costs, Rs. 85.

"10. This sum the plaintiff has now deposited in the Court, together with the sum of Rs. 50 to cover the costs of a reference to the High Court which he desires to be made on the questions: 1st, whether the agreement of 3rd September, 1883, has become void; 2nd, whether the defendant is not, in any event, liable, under the terms of the 6th clause of that agreement, to pay to the plaintiff the sum sued for.

"To these the defendant desires to add—

"3rd. Whether, in the events that have happened, the defendant is not discharged from all liability under the said agreement.

"11. I, therefore, respectfully crave the opinion of their Lordships on these questions; and, in case they should desire any further information not contained in the above statement, I hereto annex a copy of my judgment delivered on the 7th August, 1889."

[635] The only material additional fact found in the judgment alluded to was the fact that the defendant had all his life been a stone contractor and had worked the same quarry for the two previous years under similar agreements with the plaintiff, and was well aware of the nature and revocability of a license to blast stone.

Inverarity and *Anderson*, for the plaintiff.

Starling, for the defendant.

Inverarity:—The sole questions are, what is the contract, and what was in the parties' minds when they made it? We say there is an unconditional agreement to pay rent, with, furthermore, an express provision providing for the non-cessation of rent in the very event that has happened, *viz.*, the non-renewal of the license—an event which was clearly in the contemplation of both parties when the contract was entered into. Where is the illegality in this contract? It is on that ground that Mr. Hart has decided against us. There is no obligation on the defendant's part to

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blast, nor any covenant on our part that he shall blast. We contract to give him our permission to go on the ground in order to take stone, and he contracts to pay rent, so much a month: it has not become impossible or illegal for either of us to continue to perform those promises respectively. Consequently the consideration has neither failed, nor the contract become illegal or impossible: see *Paradine* v. *Jane* (1); Mr. Pollock's comment on that case; Pollock on Contracts (4th edn.), p. 363.

[SARGENT, C.J.—That is so. Section 56 of the Contract Act has nothing to do with this case. It is purely a case of construction of the contract. What did the parties intend? That is the question.]

Just so, and to find their intention you must see what was in their minds when they came to contract. The only two questions (apart from the scope of the express provisions of cl. 6 of the agreement) are (I) was the event which happened foreseen, or, which is the same thing (see *Barkar* v. *Hodgson* (2), ought it to have **[636]** been foreseen; and (II) if so, then is the contract conditional or unconditional?—*Baily* v. *De Crespigny* (3).

[BAYLEY, J., cited *Taylor* v. *Caldwell* (4).]

That case went on the finding that the accidental destruction by fire of the Music Hall was a thing which the parties had not in their minds when they entered into their contract. But here the event which intervened was clearly in the contemplation of the parties; the contract itself shows that; for it expressly provides for it. But without that express provision it would still be the same: for the defendant has been at this work all his life, and for some years at this very spot, and it is admitted that he knew that a license might be revoked, or not renewed, at the will of the authorities at any time. If, knowing this, he makes merely an unconditional contract, that alone is sufficient; he must fulfil it. If I rent a grouse moor expressly to shoot game on, and am, for some reason, refused a game license, can I claim that the bargain is off? In this case defendant cannot get stone for want of a third person's permission: but, suppose it had been because it turned out there was no stone there worth getting, would he not still have to pay the rent he unconditionally contracted to pay? It is clear, both in law and equity, that he would: see *Marquis of Bute* v. *Thompson* (5), *Ridgway* v. *Sneyd* (6) and *Phillips* v. *Jones* (7). If plaintiff cannot be held to have warranted that there was stone fit to work, how can it be said, (even apart from art. 6 of the agreement), that he warranted the continuance of the license? If a lessee of a coal mine must be held (as Vice-Chancellor Wood (8) says he must be held) to know and, therefore, contemplate that a vein of coal may be interrupted by a fault and cease to be workable, much more should the defendant here be held to know and contemplate that his working might be interrupted by the cessation of the license. Supposing this were a sale, and not a lease, could the defendant for a moment avoid the purchase? I submit the defendant is liable, and the questions referred should be decided in the plaintiff's favour.

[637] *Starling, contra*:—The cases cited are of leases, and are not in point, for this is not a lease. The mere use of the word "rent" does not

(1) Aleyn, 26. (2) 3 M. & S. 267. (3) L. R. 4 Q. B. 180.
(4) 3 B. & S. 826; 32 L. J.Q. B. 164. (5) 13 M. & W. 487.
(6) Kay. 627. (7) 9 Sim. 519. (8) Kay. 635.

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make it a lease. The plaintiff might point out this spot to-day, and that to-morrow, for the defendant to work in; consequently it cannot be said any particular piece of ground has been let. The real consideration intended here was the right and the ability to blast stone. That has failed, for it has become illegal to blast. The plaintiff was to point out a place where the defendant could blast: that he can no longer do. It was never contemplated by the contracting parties that the license might cease; and art. 6 of the agreement does not deal with any such contingency. "Expenses, risk and responsibility" refer to the expenses, risks, &c., incidental to the operation of blasting: not to the getting or failing to get the license. The parties contemplated the continuance of the license. Of course, if they had thought about it, they might have foreseen its possible discontinuance; but so also in *Taylor* v. *Caldwell* (1) might fire, as a possibility, have been contemplated. That case is an authority in my favour: see also *Appleby* v, *Myers* (2).

[SARGENT, C. J.—It all turns upon what the Courts say, in each particular case, was or was not in the contemplation of the parties. In mining cases no doubt the Courts have very strictly applied the maxim of "*caveat emptor*." But in other cases they have applied different considerations: *e.g.*, in *Clifford* v. *Watts* (3) where the Court distinguish that case from *Marquis of Bute* v. *Thompson* (4).]

That is an authority in my favour; so also is *Marquis of Anglesea* v. *Church Wardens of Rugely* (5).

Inverarity in reply.—*Clifford* v. *Watts* (3) is in no way inconsistent with *Ridgway* v. *Sneyd* (6, and the other cases previously cited. In that case action was brought on the covenant to get coal, not on the covenant to pay rent. The Vice-Chancellor in *Ridgway* v. *Sneyd* (6) distinctly pointed out that on the former covenant the defendant would be excused. **[638]** Of course if the Court finds, as a fact, that the continuance of the license was an implied term of this agreement, I have nothing more to say. That is, in other words, that by the contract it was intended that 'no license, no rent.' But this is a formal written contract and in such a contract no such term can be implied "unless the Court comes to a clear conclusion that both parties must have intended that term to be implied" *per* Lord Esher in *Emanuel* v. *La Compagnie Fremiere De Vichy* (7). And the Court must not come to that conclusion simply because that contingency has not been provided for—*Rhodes* v. *Forwood* (8). The only presumption that arises in the latter case is that the parties' minds did not touch this point at all: but that is not enough for the defendant's case. In this case, if that term had been intended to be in the contract, not having been overlooked, it must have been expressed; not being expressed (of course, I argue that the exact contrary is expressed) it can only be because it was not intended to be a term of the contract. No doubt both parties expected the license to continue; but that is not enough to make its continuance an implied term—*Hale* v. *Rawson* (9). As for this contract not being a lease, that is no doubt the case; it is not strictly a lease, as no definite possession is given; but that makes no difference whatever in the rights and liabilities of the parties.

Cur. adv. vult.

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(1) 3 B. & S. 826; 32 L. J. Q. B. 164. (2) L. R. 2 C. P. 651.
(3) L. R. 5 C.P. 577. (4) 13 M. & W. 487. (5) 6 Q.B. 107.
(6) Kay 627. (7) W.N. 27th July 1889, 150. (8) L. R. 1 Ap. Ca. 265.
(9) 4 C.B. N. S. 85.

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JUDGMENT.

The judgment of the Court was delivered by

SARGENT, C. J.—This reference from the Small Cause Court arises out of a claim for Rs. 981 alleged to be due to plaintiff upon an agreement entered into with him by the defendant on the 3rd September, 1888. By this agreement the defendant agreed to pay the plaintiff rent for a piece of hilly ground at the rate of Rs. 329 *per* month for one year, during which time the defendant was to be allowed to blast stones and carry on the work to the extent of seven crow-bars. At the time of the agreement the defendant had a license from the Commissioner of Police, which expired on the 31st December, 1888. On his applying for a fresh license he was informed that the Municipal [639] Commissioner objected to the license being granted, as the quarry, where the operations were being carried on, was surrounded by houses on all sides. By the agreement the plaintiff had the power of pointing out where the defendant was to quarry ; but it is admitted that there is no other part of the hill which could be used by the defendant for the purpose, except the part to which the Municipal Commissioner objects. The Judge of the Small Cause Court held that the agreement was rendered void by the quarrying being forbidden by the legal authorities. But it is to be remarked that the contract includes no agreement to quarry. The plaintiff performed his part of the contract when he pointed out the land for the defendant's use. The defendant's only obligation was to pay Rs. 329 *per* month to the plaintiff, and this the defendant could have done, from a legal point of view, whether the quarrying was forbidden or not, as was pointed out by Blackburn, J., in *River Wear Commissioners* v. *Adamson* (1) when discussing the effect of the decision in *Paradine* v. *Jane* (2). The question for determination, in our opinion, is whether, by reason of the quarrying having been stopped, the defendant is relieved from his liability to pay the monthly sum of Rs. 329, as provided by the agreement. We may remark, in the first instance, that this was not a contract of "letting." The plaintiff was to remain in possession, and point out certain places on the hill where the defendant might quarry, with power to change these from time to time. It was, as in *Taylor* v. *Caldwell* (3), a contract merely to give the defendant the use of such places as he might point out. Now, the general rule is, as stated by Blackburn, J., in *Taylor* v. *Caldwell* (3), that "where there is a positive contract to do a thing, not in itself unlawful, the contractor must perform it or pay damages for not doing it, although in consequence of unforeseen accidents the performance of his contract has become unexpectedly burdensome or even impossible." Such being the general rule, there is, however, a class of cases in which, notwithstanding the general rule, the defendant has been excused from performing his contract by an occurrence which [640] neither party can reasonably be supposed to have contemplated, or, as it was said in *Baily* v. *DeCrespigny* (4), which " was not within the contract."

In *Taylor* v. *Caldwell*(3), where the defendant had contracted to give the plaintiff the use of the Music Hall on certain days and the Music Hall was accidentally burnt down before the time arrived for the plaintiff to have the use of it, the Court held the defendant to be discharged from his obligation, on the ground that there was an implied condition in the

(1) L.R. 2 App. Cas. 770. (2) Aleyn. 26.
(3) 3 B. & S. 826 ; 32 L. J. Q. B. 164 (166). (4) L. R. 4 Q. B. 180.

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contract that the Hall should continue in existence. So in *Clifford* v. *Watts* (1) the Court held the defendant excused from his obligation to extract not less than 1,000 tons of potter's clay, annually paying a royalty of 2*s.* 6*d. per* ton, on the ground that the parties contracted on the assumption that there were 1,000 tons of potter's clay on the land. Again in *Baily* v. *DeCrespigny* (2), where in a covenant in a demise that the defendant should or would not permit to be built any messuage on a paddock fronting the demised premises, and the paddock was taken up by the London and Brighton Railway Company who erected a railway station on it, the defendant was discharged from his covenant, because its words were not used with reference to the possibility of the particular contingency which afterwards happened. These cases show, as stated in Pollock on Contracts, p. 351 (4th edn.), that thet endency of the decisions is "to treat the subjects as one to be governed by rules of construction rather than by rules of law."

Passing to the contract in question it is to be remarked that by cl. 1 the rent of Rs. 329 *per* month is arrived at by calculating Rs. 47 in respect of each of the seven crow-bars which the defendant was authorized to work with. This shows that the obligation to pay Rs. 329 *per* month was based on the assumption that the defendant would be able to work the crow-bars, although the amount of stone which the defendant would be able to extract by such work would be necessarily more or less uncertain, more especially having regard to the clause which enabled the plaintiff to point out the particular places where the defendant was to work. **[641]** No doubt, both parties must be taken to have been aware that the authorities had the power of stopping the quarrying if it was dangerous to the public; but quarrying had been going in the plaintiff's hill up to that time, and it is only reasonable to suppose that the parties entered into the contract on the assumption that quarrying would continue to be permitted by the authorities.

It is not alleged that the veto which the authorities have put on the quarrying was owing to the defendant's careless or improper mode of blasting; the only reason assgined by the Commissioner of Police is that the blasting was dangerous to the neighbouring houses and their inmates. Nor is it alleged by the plaintiff that he can point out any other spot for blasting to which the authorities would not equally object; and, therefore, this "crow-bar work," upon which the rent was based, thus became impossible, without either party being to blame for it. We think that, looking at the nature of this contract, it would defeat the intention of the parties were we to regard the defendant's obligation to pay the monthly Rs. 329 as in substance unconditional on quarrying being allowed, and that the contract must be taken to have been entered into on the assumption that the authorities would permit quarrying, just as in *Clifford* v. *Watts* (1) the contract was held to have been based on the assumption that there were 1,000 tons of clay to be extracted. The cases of *Marquis of Bute* v. *Thompson* (3) and *Ridgway* v. *Sneyd* (4), relied on for the plaintiff, were cases of mining leases, and are distinguishable from the present case. The former is discussed in *Clifford* v. *Watts* (1), where it is pointed out that a minimum rent was agreed to be paid, which showed that rent was to be paid in any case. In *Ridgway* v. *Sneyd* (4) the decision refusing

(1) L.R. 5 C.P. 577 (588). (2) L.R. 4 Q.B. 180. (3) 13 M. & W. 487.
(4) Kay, 627.

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to relieve the plaintiff from his liablity was mainly based on the same consideration.

It was said, indeed, that art. 6 of the agreement threw the risk of obtaining leave to quarry on the defendant; but, we think, that, on the reasonable construction of the language of that clause, all that was intended was to throw on the defendant the expenses [642] to be incurred in carrying out the police arrangement and obtaining the license, and to prevent his having any cause of complaint on that account against the plaintiff; but that is quite a different thing from making the obligation to pay the rents absolute, whether the quarrying was stopped altogether or not. It was said indeed, that it was only the blasting which was forbidden, and that the defendant might have quarried by other means; but there is no finding in the case that any other means were practically feasible, or that blasting by means of some description of explosive is not, practically speaking, an essential part of quarrying stone on the plaintiff's hill.

We must, therefore, answer the first question in the negative; the second question in the negative; and the third in the affirmative.

Costs to be costs in the cause.

Attorneys for the plaintiff.—Messrs. *Pestonji and Rustom.*

Attorneys for the defendant.—Messrs. *Payne, Gilbert and Sayani.*

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ORIGINAL CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Bayley.

S. A. RALLI AND OTHERS (*Plaintiffs*) *v.* PARMANAND JEWRAJ (*Defendant*).* [13th September, 1889.]

Practice—Civil Procedure Code, s. 622—Material irregularity—Small Cause Court—Motion for new trial.

The defendant contracted to sell to the plaintiffs a quantity of rape-seed, April—May delivery. On the 23rd of April the defendant endorsed over to the plaintiffs a delivery order for the seed given him by Messrs. L. M. & Co., which plaintiffs presented to Messrs. L. M. & Co. on the 26th April and on three or four subsequent occasions. Messrs. L. M. & Co. refused to deliver, on the ground that they had till the 31st May for delivery. On the 15th May, Messrs. L. M. & Co. failed, and then, but not before, plaintiffs informed the defendant that they had not had delivery from Messrs. L. M. & Co., and demanded it of him. The defendant failing to deliver, the plaintiffs sued for damages as of the 31st May. The learned Judge of the Small Cause Court, on this statement of facts, and before evidence was gone into, ruled that the damages were assessable as of the 25th April, on which day it was admitted the market rate was as high or higher than the contract rates. The plaintiffs on this ruling, without going into their case further accepted judgment for [643] nominal damages, and took out a rule for a new trial, on the ground that the Judge was in error in assigning the 25th April, and not the 31st May, as the date which ruled the question of damages. On the argument of the rule the Full Court decided against the plaintiffs, not on this point, which they did not decide one way or the other, but on another point altogether, *viz.*, that plaintiffs ought to have given defendant notice of Messrs. L. M. & Co.'s refusal to give delivery on the 25th April, and not having done so, could not call on the defendant to deliver.

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* Small Cause Court Suit, No. 13896 of 1889.