Poly Resources Pte Ltd v Brani Readymixed Pte Ltd
[2000] SGHC 289

Case Number : Suit 1645/1998

Decision Date : 10 March 2000

Tribunal/Court : High Court

Coram : Lim Teong Qwee JC

Counsel Name(s) : S Appadurai and Lim Hsiao Kang (Haridass Ho & Partners) for the plaintiff; George Lim and Jinny Tan (Wee Tay & Lim) for defendant

Parties : Poly Resources Pte Ltd — Brani Readymixed Pte Ltd

10 March 2000

Lim Teong Qwee JC

1. This action arises out of an agreement or two agreements as the plaintiff ("Poly Resources") alleges for the supply of granite aggregate to the defendant ("Brani"). Poly Resources claims the unpaid balance of price and other charges and Brani counterclaims damages for failure to deliver. At the close of submissions I intimated to the parties that there would be judgment for Brani on its counterclaim and I would see counsel in Chambers as to damages and other reliefs. On 2 November 1999 I gave judgment for Poly Resources on its claim and for Brani for damages on its counterclaim. I ordered a set-off and interest on the balance at 6% per annum from 16 October 1998 when the original counterclaim was filed. Both parties have given notice of appeal as to the counterclaim and these are my grounds.

2. Poly Resources carries on the business of supplying granite aggregate. It does not operate its own granite quarry but obtains its supplies from a quarry in Pulau Karimun which is a nearby island in Indonesia. The quarry is operated by its associated company. The aggregate is carried to Singapore by barge. According to its operations manager Lim Huang Jiang Jimmy Poly Resources has "10 pairs of barges at its resource" and each barge makes 12 voyages a month from Pulau Karimun to Singapore and back. Each barge can carry between 1,600 metric tons and 1,800 metric tons.

3. Brani carries on as its name suggests the business of supplying ready-mix (or "ready-mixed") concrete for which granite aggregate is one of the basic raw materials. Its customers are those engaged in the construction industry. It obtains its supplies from Poly Resources and other suppliers in the market. Brani maintains a stockpile of granite aggregate. I should think this is a necessary measure to ensure ready supplies and to meet standards for ready-mix concrete.

4. On 16 August 1995 Poly Resources wrote to Brani:

> "We are pleased to offer you on the supply of graded 20mm aggregate ex-jetty to your landing site and delivered to your site at PSA Terminal (Pasir Panjang). Our offer price is as follows –
>
> | Ex-Jetty Price | Delivered Price | Duration | Quantity |
> |---|---|---|---|

$15.00/mt	$17.50/mt	1/9/1995 – 31/8/1997	7000mt per month for 24 months

Note:

….

The supplier reserves the right to suspend all supply for non-payment within the said credit term [of 30 days] or any of the delivery conditions is not comply.

….

Period of Supply: Whichever comes first, duration or quantity.

…."

This is followed by five paras of terms and conditions which clearly show that the granite aggregate was to come by barge from Pulau Karimun and delivered ex-jetty (at $15 per metric ton) and not at site (at $17.50 per metric ton). This is not disputed. The jetty was at Pasir Panjang. The offer was accepted a week later.

5. Poly Resources says in its statement of claim that it is an implied term that Brani would place orders each month up to a quantity of 7,000 metric tons and/or nominate up to a quantity of 7,000 metric tons for Poly Resources to supply. In its defence Brani admits an implied term to place orders but denies that the quantity ordered was to be up to 7,000 metric tons per month or that orders were to be placed each month.

6. Poly Resources alleges that in breach of contract Brani "failed and/or neglected and/or refused to order or nominate or take delivery of the full quantity of 7,000 metric tonnes of granite aggregate per month". The particulars filed show that for the 12-month period of September 1995 to August 1996 Poly Resources delivered a total of 40,453.42 metric tons (which gives an average of about 3,371 metric tons per month) and that the largest quantity delivered in any month was about 5,500 metric tons. A claim for damages was withdrawn at the commencement of the trial but it is alleged that "by reason of [Brani's] repeated breaches … [Poly Resources] suspended the supply of granite aggregate from September 1996".

7. Poly Resources goes on to say in its statement of claim that "upon suspension of the First Contract" (meaning the contract formed by the written offer of 16 August 1995 and its acceptance) it continued to supply granite aggregate from September 1996 to August 1997 on the same terms and conditions except a reduction in quantity from 7,000 metric tons per month to 3,200 metric tons per month. It refers to this as the second contract. It claims $100,847.25 for the unpaid balance of price of granite aggregate sold and delivered on the second contract. It also claims interest and certain charges for the increase in the Indonesian export tax. Brani does not dispute the unpaid balance and interest but denies the second contract as alleged. It also denies the charges in respect of the export tax.

8. Brani admits the delivery of the quantity of granite aggregate for the 12-month period down to August 1996 but denies any breach of contract. It alleges that "in October 1995 and from March 1996, [Poly Resources] failed and/or refused to supply [Brani] with the quantities ordered". It is not

disputed that Poly Resources delivered 4,205.61 metric tons in October 1995, 1,819.74 metric tons in March 1996 and a total of 57,108.88 metric tons in the 17 months between April 1996 and August 1997.

9. Brani says that Poly Resources was in breach of contract in failing to deliver the contract quantities and it bought in from the market at higher prices and suffered a loss. It counterclaims damages for such loss. The particulars filed provides as an alternative a measure of damages based on prices published by Construction Industry Development Board ("CIDB").

Quantity

10. Paragraphs 2 and 5 of the terms and conditions provide:

> "2. Quantity
>
> The quantity of materials loaded on barge shall be determined by means of draft displacement chart readings on each barge, the accuracy of which has been duly certified by the relevant authority and shall not be subjected to any disputes.
>
> 5. Acceptance of Product
>
> Our product shall be delivered to your landing jetty by our barges. The Buyer shall authorise a representative to receive the products delivered. An authorised representative shall sign on our Barge Record Form and affix the Buyer's company stamp to confirm receipt the materials. Delivery is deemed to have completed and the quantity of materials accepted by the Buyer once the Barge Record Form of each barge load is duly signed and stamped."

11. Under the contract Poly Resources would deliver the granite aggregate by barge. The quantity was determined by readings of the draft and reference to the displacement chart. Upon the Barge Record Form for each barge load being signed delivery was deemed completed. I think the parties contracted for delivery by barge loads. It would not be practical to deliver part of the cargo of any one barge and it would not be consistent with para 5 or para 2. It would also not be practical to ship a quantity substantially less than a full cargo.

12. Each barge load is 1,600 metric tons to 1,800 metric tons. Four barge loads would be 6,400 metric tons to 7,200 metric tons. Five barge loads would mean at least 8,000 metric tons. To bring the total down to 7,000 metric tons for five barge loads would require an average of 1,400 metric tons for each barge load which is substantially less than the capacity of each barge. Looking at the letter of 16 August 1995 as a whole and in particular the terms and conditions I have referred to and having regard to the capacity of the barges used I think the intention of the parties was that the plaintiff would deliver about 7,000 metric tons in four barge loads of not less than 1,600 metric tons and not more than 1,800 metric tons each per month and that it would do so every month for 24 months beginning September 1995. If any instalment was not delivered eg by exercise of the right "to suspend all supply" and the month when such instalment ought to have been delivered had passed no further delivery would be made for that month. Upon four barge loads having been delivered in any month no further delivery would be made in that month.

Implied terms

13. Poly Resources alleges that it was an implied term "that there could be variations in the monthly supply of up to 20% of the monthly requirement" and that the granite aggregate was to be

supplied via four barges. 7,000 metric tons less 20% would be only 5,600 metric tons and its own evidence was that a barge load was 1,600 metric tons to 1,800 metric tons so that four barge loads would give a total of 6,400 metric tons to 7,200 metric tons. I have heard no submissions from counsel on this point and it is I think sufficient to say that it is not necessary to imply such a term to give the agreement between the parties such efficacy as they must have intended that it should have. It was a contract for about 7,000 metric tons in four barge loads of 1,600 metric tons to 1,800 metric tons each per month.

14. It was the duty of Poly Resources as seller to deliver the granite aggregate and that of Brani as buyer to accept and pay for it in accordance with the terms of the contract. See s 27 of the applicable (English) Sale of Goods Act 1979. Under the terms of the contract Poly Resources was obliged to deliver to Brani at its landing jetty. It was obliged to do so every month but no time was fixed. It must do so within a reasonable time. See s 29(3). It must be within the month to count as a delivery for that month.

15. I come now to the implied term as regards placing orders. It was as I have pointed out the duty of Poly Resources to deliver. The quantity to be delivered, the place for delivery and the mode of delivery were all agreed upon. So was the period for delivery but not the date or the time of day.

16. The granite aggregate had to be carried by barge from Pulau Karimun to the jetty at Pasir Panjang. There is no direct evidence of the sailing time but each barge could achieve 12 voyages a month. The agreement between the parties allowed eight hours for discharge beyond which demurrage was payable. Loading at Pulau Karimun would have to be allowed for. I should think that the sailing time in fully laden condition would probably be less than 12 hours. It was a short voyage but there would be uncertainties in a maritime adventure.

17. The jetty at Pasir Panjang was referred to in the agreement as Brani's jetty. In para 3 of the terms and conditions there is a reference to "berth-in at the Buyer's landing site" for discharge. See also para 5 where it is referred to as "your landing jetty" meaning that of Brani. I think it follows that it was the duty of Poly Resources to give reasonable notice of its readiness to berth for delivery and that of Brani to ensure that its jetty was ready for the barge to berth.

18. The agreement is silent as to whether Brani must place an order each month. It is an agreement for the supply of a fixed quantity ie about 7,000 metric tons in four barge loads of 1,600 metric tons to 1,800 metric tons each month for 24 months. I do not see that it could serve any purpose to require Brani to place any order in any month. It could not order more and it could not order less. The agreement between the parties works perfectly well without having to imply the term alleged in the statement of claim.

19. Mr Appadurai conceded that the quantity to be delivered was certain and that it was Poly Resources' duty to deliver but he submitted that Brani had to nominate as there were occasions when the barge could not use the jetty because of other users. If nomination meant merely appointing the quantity to be delivered (as the implied term pleaded clearly suggests) I do not see how this could assist Poly Resources. If it meant appointing the days of the month for delivery then it might provide some assistance (and I put it no higher than that) but that is not the implied term pleaded. But again on the days appointed the jetty might also be used; by others.

20. Brani in its defence admits an implied term to place orders but denies the quantity to be ordered or that orders had to be placed every month. Mr Appadurai submitted that it was therefore not open to this court to (as he put it) reject either term. I am unable to agree. The partial admission in the defence was and could not have been understood as anything but a denial of the term alleged

in the statement of claim and an allegation of a different implied term which Poly Resources in its reply denied. In my judgment there was no implied term as to placing orders in terms as alleged in the statement of claim or as alleged in the defence. It is not necessary to imply either of these terms to give the agreement such efficacy as the parties must have intended it should have. The agreement could work perfectly well without any such term.

Second contract

21. No particulars of the second contract alleged in the statement of claim are given other than that the quantity was reduced to 3,200 metric tons per month for the 12 months from September 1996 to August 1997. Mr Appadurai said that the first contract was made on 23 August 1995 (when the offer in Poly Resources' letter of 16 August 1995 was accepted) and that it was discharged on 23 September 1996 and on the same day the second contract was made. I think he was referring to the correspondence (which I shall refer to shortly) but he then said that the second contract was made on 1 September 1996 when granite aggregate was first supplied under the new terms.

22. On 2 September 1996 Poly Resources wrote to Brani:

> "… over the period of the previous twelve months, you have taken delivery of the above 38,652.28 mt which is an average of only 3,221.02 mt per month. This quantity is much less than the amount of 7,000 mt which you have contracted to purchase.
>
> …
>
> Henceforth for the remaining duration of twelve months of the contract, the contractual amount shall be reduced to 3,200 mt per month.
>
> Please confirm immediately in reply that the contract is hereby varied and that you will take delivery of 3,200 mt for the next twelve months. Any further shortfall in quantity shall entail liquidated damages at the end of the twelve months from date hereof. We would inform that should you fail to confirm in reply by 9 September 1996 that the contract is varied to 3,200 mt for the remaining twelve months and that you will take delivery of 3,200 mt per month or pay liquidated damages for any further shortfall, then the contract shall be deem to be terminated due to your breach."

This letter was written by its general manager Mr Lem Fee Mon Norman. There was no reply but on 3 September 1996 Brani wrote to Poly Resources for the attention of Mr Lem and another member of its staff to complain that in the last two months it had failed to make any delivery as requested and gave notice that it had bought in from the market.

23. On 11 September 1996 Mr Lem again wrote on behalf of Poly Resources:

> "We regret to note that we have not heard from you regarding our proposal to you to reduce the amount of granite from 7,000 mt to 3,200 mt, since you have taken much less than the 7,000 mt that you have contracted to purchase in the first year. Instead, you have sent us faxes alleging that we have failed to deliver as per your request during the past 2 months.
>
> …
>
> Kindly confirm in writing by 12 noon on the 14th September, 1996 that the contract is hereby varied and that you will take delivery of 3,200 mt for the next 12 months. Any further shortfall in

quantity shall entail liquidated damages at the end of the 12 months from the date hereof. Please be informed that should you fail to confirm that the contract is varied to 3,200 mt per month for the remaining 12 months or pay liquidated damages for any further shortfall, the contract shall be deemed to be terminated."

Poly Resources was threatening to terminate the contract unless the quantity was reduced or liquidated damages were paid for further shortfalls.

24. On 12 September 1996 Brani wrote:

"We will for the remainder of the contract period, order an average quantity of 7,000 mt of grade 20mm aggregate from you each month."

There can be no doubt that the proposal by Poly Resources to reduce the quantity was not accepted.

25. Mr Lem testified at the trial. Under cross-examination he was referred to Brani's letter of 12 September 1996. He agreed that Brani had not agreed to the variation proposed. He knew that. Any reasonable person in his position would have understood Brani's letter to be saying that.

26. On 23 September 1996 Mr Lem again wrote on behalf of Poly Resources:

"We refer to the above matter and to our letters dated 2nd September, 1996 and 11th September, 1996. We regret that we have not heard from you"

This was untrue. Brani had written on 12 September 1996. Brani had also written on 13, 17 and 21 September 1996 each time referring to the supply of 7,000 metric tons per month.

27. Poly Resources' letter of 23 September 1996 went on to say:

"We state, once again, that we have the specific right to suspend delivery and terminate this contract due to your breach. However, we are prepared to waive our claim for liquidated damages for the shortfall during the 1st 12 months if you take delivery of 3,200 mt each month from the date of this letter.

In view of this, we would like to inform you that we shall be supplying 3,200 mt each month to you as of this date."

This was the letter that Mr Appadurai probably had in mind when he said that the first contract was discharged on 23 September 1996 and the second was made.

28. On 26 September 1996 Brani wrote:

"We had made it clear in our reply and we still maintain our position that we shall be drawing the average quantity of 7,000 mt of 20 mm graded aggregate per month from you commencing September 1996. If you fail to supply us this quantity, we shall purchase the short supply quantity elsewhere and charge you the difference in the cost of purchase."

There was no further communication from Poly Resources as to the reduction in the quantity to 3,200 metric tons per month.

29. On 16 October 1996 Brani wrote:

> "… for the remainder of our contract, please supply us with one barge of aggregate at our jetty comprising 1600 - 1800 m/ton according to the attached schedule for the month of October '96 (which was fax to you on 9th October 1996) and every Thursday commencing November '96 till the end of the contract on 31 August 1997."

The schedule referred to was for delivery on 14, 19, 24 and 29 October 1996.

30. In September 1996 Poly Resources delivered a total of 3,425.34 metric tons but there is no evidence as to whether any part of this was delivered before or after 12 September or 23 September 1996. There were deliveries each month until August 1997 which was the last month of the contract evidenced by Poly Resources' letter of 16 August 1995.

31. It is clear that there was no second contract as alleged in the statement of claim and that the contract evidenced by Poly Resources' letter of 16 August 1995 was not discharged or varied as to the quantity to be delivered as alleged and I find accordingly. The contract between the parties was for the supply of about 7,000 metric tons in four barge loads of 1,600 metric tons to 1,800 metric tons each per month. This contract was and continued in full force and effect until August 1997.

Quantity delivered

32. Mr Jimmy Lim the operations manager of Poly Resources dealt with Mr Roy Hee the project manager of Brani. Mr Jimmy Lim said in his affidavit:

> "[Brani's] Mr Roy Hee or his staff would contact me or my staff and orally place the order for the supply of granite. (It was only upon the Plaintiffs threatening to terminate the Contract that the Defendants started placing their orders <u>in writing</u>.)"

He also said:

> "Time and again, I would contact Mr Roy Hee and ask him if the Defendants would improve upon their orders. He repeatedly assured me that they would increase their orders the next month."

It is not disputed that there have been shortfalls in delivery evey month throughout the 24 months of the contract. Mr Hee has since died and Brani has had to rely largely on the correspondence and other documents.

33. On 14 February 1996 Brani wrote:

> "The Main Contractor has informed us the concrete quantity will be increased for the forthcoming months, we would therefore require your supply of 7,000 tons per month commencing March 1996."

Brani was supplying ready-mix concrete to the main contractor for a construction project for Port of Singapore Authority. It had a contract to purchase granite aggregate and I think by this letter it confirmed that it would take 7,000 metric tons per month commencing March 1996.

34 On Mr Jimmy Lim's evidence it was Mr Hee who "repeatedly assured" him that Brani would increase their orders the next month. It was not necessary for an order to be placed but the evidence was consistent with either Brani not being ready to accept delivery or waiving delivery by Poly Resources. In either case Poly Resources would not be in breach of its duty to deliver. I find that

Brani has not proved that Poly Resources had wrongfully neglected or refused to deliver the shortfalls in the months down to and including February 1996.

35. For March 1996 and the months to come Brani stated that it required 7,000 metric tons. Poly Resources did not deliver the quantity required. Mr Jimmy Lim said that Brani's letter of 14 February 1996 was not an order because it did not give specific dates for barges to arrive at its jetty. He went on to say that he asked Mr Hee:

> " 'Which date you want me to send to you?' He [Mr Hee] said 'Okay.' I did not accept as answer. I asked him for answer. No answer came back. I did nothing. I just kept quiet."

If "okay" was all Mr Hee said it could not mean that he would not accept delivery or that Poly Resources would not need to deliver. Brani had written on 14 February 1996 to require the supply of 7,000 metric tons.

36. It was not Brani's duty to place any order. It was not an express term of the contract that any date had to be given for Poly Resources' barges to arrive at Brani's jetty for delivery. It is not alleged in the pleadings that it was an implied term. In any case it was Poly Resources' duty to deliver the granite aggregate. I find that Brani had not declined to accept delivery of the quantity for March 1996 referred to in its letter of 14 February 1996 and had not waived such delivery. Poly Resources only delivered one barge load of 1,819.74 metric tons and in my judgment it was in breach of its duty to deliver 7,000 metric tons in March 1996.

37. On 16 April 1996 Brani wrote "We will require 1 barge 20mm aggregate every week." It is not disputed that between April 1996 and August 1997 Poly Resources did not deliver four barge loads in any month. Only two barge loads were delivered each month except May and July 1996 when only one was delivered and in June 1996 when three for a total quantity of 5,264.88 metric tons were delivered. It delivered a total quantity of 57,108.88 metric tons in that period.

38. The contract was as I have held for Poly Resources to deliver about 7,000 metric tons in four barge loads of not less than 1,600 metric tons and not more than 1,800 metric tons each every month. It could have delivered four barge loads of 1,600 metric tons each. It did not. In my judgment it was in breach of its duty to deliver a total of not less than 6,400 metric tons per month in each of the 17 months from April 1996 to August 1997.

39. I intimated to counsel that Poly Resources had wrongfully neglected or refused to deliver the shortfall amounting to 5,180.26 metric tons for March 1996 and 6,400 metric tons per month for the 17 months from April 1996 to August 1997 less 57,108.88 metric tons delivered in that period. I also intimated to counsel that the measure of damages was to be ascertained by the difference between the contract price and the market price at the respective times. See s 51 of the applicable (English) Sale of' Goods Act 1979.

40. I saw counsel in Chambers on the assessment of damages. Mr George Lim submitted that the prices actually paid by Brani ought to be preferred to the prices published by the CIDB. While the prices paid would be evidence of the market price the difficulty in Brani's way is that it had a stockpile of granite aggregate and from time to during the contract period it drew upon the stockpile and it also bought from the market at varying prices. Its purchases during the relevant period exceeded the shortfall so that it was even buying ahead of any breach by Poly Resources. There was an available market and it was not disputed that the prices published by CIDB were where appropriate market prices at the respective dates. I saw no reason to prefer prices paid by Brani in ascertaining the measure of damages.

41. Counsel agreed the amount on the basis I had indicated and I entered judgment accordingly.

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