APPELLATE CIVIL.

Before Sir Murray Coutts Trotter, Kt., Chief Justice, and Mr. Justice Krishnan.

B. PARTHASARATHY CHETTY & Co. (DEFENDANTS), APPELLANTS,

1925, January 21.

v.

T. M. GAJAPATHY NAIDU & Co. (PLAINTIFFS), RESPONDENTS.*

Contract for sale of goods—Description of goods as of 3 labels and designs—Rejection by buyer on the ground that invoice did not specify the description of goods as agreed—Rejection on that ground unjustifiable—Goods proved to be of one design and label—Re-sale by vendor under terms of contract—Suit by vendor for damages for loss on resale under the contract—Suit, not for difference between market price and contract price—Delay in resale, effect of—Plea of defendant that goods were not of the kind agreed, if permissible—Rule in Braithwaite's case, scope and applicability of.

The plaintiffs agreed to purchase from foreign merchants in Europe and sell to defendants 30 cases of fireworks, in 3 lots of 10 cases each, each lot, under one label, in all 3 designs; the contract provided that the defendants should accept and pay bills drawn on them for the amount of the invoices, and that on failure to accept and pay for the bills on maturity, the plaintiffs were authorized to sell the goods on defendant's account. The invoices did not contain the specification of goods as comprised of 3 labels of 10 cases each. The defendants refused to accept the goods *on that ground.* It was proved that the goods were all in one label and of the same design. The plaintiffs sold the goods ten months later and sued the defendants for the difference between the contract price and actual sale price. The latter pleaded non-liability.

Held, that, before the plaintiffs could substantiate a claim for damages on resale of goods under the contract, they must show that the goods which they purported to sell were the goods which the defendant would have been obliged to accept under the contract but failed to do so;

* Original Side Appeal No. 1 of 1923.

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that the plea that the goods were not those agreed to be sold could be taken by the defendants, even though their ground of rejection based on the contents of the invoices was unjustifiable;

and that the rule in *Braithwaite's case* [1905] 2 K.B., 543, was not applicable to this case, as the suit here was not for difference between the market price and the contract price, but was for a wider remedy under the terms of the contract;

Held further, that the delay of the plaintiffs in selling the goods was unreasonable and disentitled them to any damages.

Scope of the rule in *Braithwaite's case* [1905] 2 K.B., 543, explained.

APPEAL from the Judgment of Sir WALTER SALIS SCHWABE, Chief Justice, in the exercise of the Ordinary Original Civil Jurisdiction of the High Court on C.S. No. 162 of 1921.

The material facts appear from the judgment.

Nugent Grant for appellant.—This is a contract for sale of goods. This is an F.O.B. contract. It is open to the seller to get payment by a bill of exchange or in cash from the buyer. The learned CHIEF JUSTICE held that because the defendant refused to accept the bill, he could not prove that the goods sent were not in accord with the indent. This is a case of sale of fireworks by the plaintiff to the defendant. The defendant was not given a reasonable opportunity for inspection. There was a delay of ten months by the plaintiff before he sold the goods. If he had sold them earlier, as he ought to have done, there would be no loss. Defendant is not liable in damages, as the plaintiff ought to have sold without delay. The rule in *Braithwaite's case*(1) is not applicable to this case. The authority of *Braithwaite's case*(1), is much shaken in the House of Lords: See *British and Beningtons, Ltd.* v. *N. W. Cachar Tea Co. & others*(2). The CHIEF JUSTICE finds that five-eighths of the fireworks were not according to the indent.

(1) [1905] 2 K.B., 543.

(2) [1923] A.C., 48.

Assuming breach by defendant, plaintiff could not get damages unless he sold goods contracted for by defendant.

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V. C. Gopalaratnam for respondent.—This is a C.I.F. contract, though it is expressed to be F.O.B. Defendant is to be liable for cost, insurance and freight. In a C.I.F. contract, buyer cannot ask for inspection. Further, plaintiff is only a commission agent and has no control over the goods. Defendant must pay the bill, take the goods, and if he finds g ods not of the kind contracted for, he must sue for damages. Even if he accepted the bill, he could not have inspection in a C.I.F. contract before payment. The rule in *Braithwaite's case*(1) is applicable to this case. It has been followed in several cases in this Court.

JUDGMENT.

COUTTS TROTTER, C.J.

COUTTS TROTTER, C.J.—If I had not the misfortune to differ from my learned predecessor who tried this case, I should myself have thought this matter to be a reasonably clear one. The plaintiffs are persons who were buying goods from foreign merchants in Europe on the demands of persons in the position of the defendants, and in this case the defendants commissioned the plaintiffs to get them some fireworks from Europe on certain conditions. The contract is a confused document, but the clauses that we are primarily concerned with apparently are reasonably clear. The contract provided for the drawing of bills against invoices and I will take it for purposes of argument that this was in effect a C.I.F. contract. The invoices come to hand with the documents and drafts attached. The terms of payment are these:

"We authorize you to draw upon us for the total amount of invoice at the sight mentioned below at current rate of

(1) [1905] 2 K.B., 543.

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exchange and such bill or bills we hereby bind ourselves to accept on presentation and pay at maturity."

That is the material clause. Then lower down comes this:

"Should we fail to accept or to pay at maturity such bill or bills or to pay cash as before agreed, we hereby authorize you to dispose of the documents or goods either by private sale or by public auction on our account."

The contract was on the 6th May 1920 and the goods came through in about the following October and the specification of the goods provided for by the contract was "30 cases of wonder candles, offer No. 383, each label 10 cases, in all three designs." Then there was a further order for five lots of two cases of different classes of goods and we are only concerned with one of these because the others were not shipped. The contract provides that the plaintiffs are to be at liberty to execute the order in something less than its entirety. The invoices specify the two cases of goods as "wonder candles coloured as per my offer No. 383, 9 cm, burning" and the 30 cases as "wonder candles (electric sparkles) white as per my offer No. 383, 9 cm, burning." The defendants were obviously bound on receipt of the shipping documents, if they were in order, to accept the drafts that were forwarded through the Mercantile Bank. They refused to do so and they justified their refusal on the ground that the invoice was silent as to the provision that the 30 cases should have been divided into three lots of 10 cases each, containing a different design and that that ought to have appeared on the face of the invoice. This case has been discussed on the footing that that was not a reasonable rejection and that there was nothing in the invoice to warrant them in refusing to accept the drafts. Therefore the position was that, on the date when they refused to accept these drafts in October, they were in breach and

the defendants have been sued for the consequences of that breach. The goods were taken over by the plaintiffs and in August 1921 they were sold and sold at a very great drop in value. In the first place, it is very evident that the plaintiffs could not possibly go on indefinitely holding goods of this kind, goods of a perishable nature and goods which are only in vogue at certain seasons in the year, and apparently the season in India is not very different from the season in England, the months of November and December. But there was a much more fundamental flaw in the plaintiffs' goods than that. It was proved on the evidence that satisfied the learned CHIEF JUSTICE, to be a fact that, when the goods were examined, instead of being divided into three lots each with a different label specified in the contract, all the 30 cases were the same. The finding of fact is challenged by the plaintiffs-respondents. But we have gone through the evidence very carefully—Mr. Gopalaratnam has taken us through it, and our opinion is that the only witness who is clear or specific about the matter and who seemed to know what he was talking about is D.W. 6, Govindasami Chetty, who is quite explicit and the more he was cross-examined about it the more clearly did he adhere to the story that he gave that he had *seen* all these goods and that they were all marked with the same labels. It is suggested that the state of the law about the sale of goods is this, that, if there is a breach of contract which is unwarranted and cannot be supported, the buyer who rejects the goods cannot be heard to say thereafter that in truth and in fact the goods were in such a state as would have justified him in rejecting them on the actual ground of their quality, even though he took and falsely took some other ground of rejection.

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That may or may not be the scope of *Braithwaite's case*(1) and I notice Lord SUMNER in the House of Lords, while confining *Braithwaite's case*(1) strictly to that case, seemed very doubtful as to whether even that was not too wide a proposition to put forward. But I notice that in *Braithwaite's case*(1) when it came to the measurement of damages it is clear that the inferior quality of the timber in that case, though it was not allowed for the defence to say that it entitled them to reject and that therefore there could be no damages, was clearly taken into account, and having ascertained the difference between the market and contract price, allowance was made for the deficiency of the quality of the timber tendered. What is the position in this case? In this case, the plaintiffs claim not damages based on the market price in which case the principle of *Braithwaite's case*(1) might intervene to prevent Mr. Grant saying

"Oh, you cannot get any damages here because your goods were not only not as warranted but there was a complete breach of the condition of description and you were in fact selling other goods."

Let it be assumed that *Braithwaite's case*(1) would carry Mr. Gopalaratnam so far that Mr. Grant could not set up that defence. But here there is no claim for the difference between the market price and the contract price. The claim here is in the terms of the contract. 'We sold the goods and we could debit you with the loss that we suffered, the difference between the actual sale price and the contract price.' What is the clause? The clause is this, and I am quoting only the material words:

"Should we fail to accept the bills we hereby authorize you to dispose of the goods on our account and risk without notice and we bind ourselves to make good any loss or deficiency that may arise from such sale."

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(1) [1905] 2 K.B., 513.

What does that mean? It means that if the defendants default in accepting the bills, the plaintiffs have the power to resell *the goods*. What is meant by *the goods*? Obviously the goods that corresponded to the description in the contract. Supposing that instead of being filled with fireworks the cases were filled with shavings, is it possible for a moment to say that the plaintiffs can go into the market and sell the shavings and then come down on the defendants for the price of the fireworks? We should clearly be exceeding the scope of the doctrine in *Braithwaite's case*(1), if we should give effect to so absurd a contention. The plaintiffs have elected to open their mouth for a wider remedy and they have got to prove that the goods that they sold were goods which they delivered or were prepared to deliver in conformity with the contract. Had they sued for the difference between the market and contract price, I think it would be quite possible to state:

> "Yes. You must get that and you need not prove that the goods really corresponded to what was contracted for. But of course you will have to make allowance for any loss of value caused by the breach of condition, although it is not available as a weapon for the rejection of the goods *in toto*."

It is only fair to observe that the learned CHIEF JUSTICE did apparently find as a fact that the goods tendered were just as good as the goods contracted for. In that case it might be that if they had sued for the difference between the market price and the contract price and proved it they would have got some damages. However I do not think they would have got very much because the only evidence that was called in went all to show that if the goods had been resold on the date of breach or shortly afterwards, far from having depreciated in value, they had appreciated. However that was not

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done and we cannot allow the plaintiffs to start a wholly new case on a different basis at this stage. We must therefore hold that the plaintiffs have failed to prove their case, that, in any event, they were not justified in unreasonably delaying before they resold the goods, and that further in law, before they could substantiate a claim of this nature and on this ground, they must show that the goods which they purported to resell and had resold were goods which the defendants would have been obliged to take under the terms of the contract but failed to do so. The appeal must be allowed with costs here and below.

With regard to the two cases, they stand on exactly the same footing as the others because there never was any opportunity given to see whether the goods on the market would have involved any loss at all and the evidence is just the same as with regard to the other cases. The plaintiffs cannot leave their case in a state of nebulous conjecture. On this part of the case also, the plaintiffs fail.

Mr. Grant does not press the counter-claim. The counter-claim will stand dismissed with costs in the appeal.

KRISHNAN, J.

KRISHNAN, J.—I agree and have nothing to add.

K.R.