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sons, and that the plaintiff's suit was rightly dismissed.

I would therefore dismiss the appeal with costs.

BHIDE J.—I agree.

N. F. E.

Appeal dismissed.

APPELLATE CIVIL.

Before Broadway and Abdul Qadir JJ.

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June 15.

G. D. GEAR AND COMPANY (DEFENDANTS) Appellants

versus

THE FRENCH CIGARETTE PAPER CO., LTD. (PLAINTIFFS) Respondents.

Civil Appeal No. 2548 of 1927.

Sale of Goods—Suit by sellers—buyers' failure to take delivery—Measure of damages—non-marketable goods made to order—price of the goods.

Held, that in a suit for damages by the sellers against the buyers for failure to take delivery of goods ordered by the latter and specially made for them, distinction must be drawn between goods which are marketable and those which are not —such as those which could not be of use to anybody but the defendant-buyers. In the latter case the price of the goods is the measure of damages.

Vic Mill, Limited, In re (1), followed.

Second appeal from the decree of Mr. J. K. M. Tapp, Additional District Judge, Lahore, dated the 25th May 1927, reversing that of Sheikh *Mohammad Akbar, Subordinate Judge, 2nd Class, Lahore, dated the 16th December 1925, and ordering the defendant to pay to the plaintiff Company the sum of* **Rs. 1,787.**

MOOL CHAND, for Appellants.

CARDEN-NOAD, for Respondents.

(1) (1913) L. R. 1 Ch. D. 183, 187.

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ABDUL QADIR J.—This second appeal has arisen out of a suit between two cigarette companies. The defendant Company, known as Messrs. G. D. Gears and Company of Lahore, placed an order with the French Cigarette Paper Company, Limited, incorporated in England, for supplying them with 500,000 cigarette papers, bearing the name of G. D. Gears and Company, with 18 carat gold tips. The latter Company accepted the order and despatched the said goods to Messrs. G. D. Gears and Company and sent the invoice, dated 22nd August 1920, relating to the goods so supplied. Messrs. G. D. Gears and Company were asked to take delivery, on payment of £178 14*s* along with £7 15*s* 3*d* on account of interest. After some correspondence between the parties the Lahore firm refused or neglected to take delivery, and the French Cigarette Paper Company, Limited, sued the defendant Company for recovery of Rs. 3,300 with interest on account of the price of goods supplied and work done. The defendant firm admitted that they had placed the order, but pleaded that the plaintiffs had not sent them any invoice nor any sample of the cigarette papers manufactured by them, which would have enabled them to judge whether the order had been properly executed. The defendants further stated that when they received intimation from the Bank of a draft for £178 14*s*, they claimed that it should be paid at the rate of 2*s* to a rupee and that this proposal of theirs was agreed to by the plaintiffs in a letter dated the 19th October, 1921. They added that they had objected to interest being charged on the draft and that the plaintiffs had agreed to instruct the Bank to demand payment of £178 14*s* only, instead of £186 9*s* 3*d*, which was the amount including interest.

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An *ex-parte* decree was at first passed against the defendants on the 5th April 1924, and an application to have the decree set aside was rejected on the 8th of July. But an appeal by the defendants against the last order succeeded and the case was remanded for retrial. The trial Court found against the plaintiffs on the main issues and dismissed the suit, but the parties were left to bear their own costs. However, on appeal to the District Judge, Lahore, the plaintiffs succeeded and the learned Additional Judge gave them a decree for £178 14*s* at 2*s* to the rupee, that is Rs. 1,787 in all, and ordered the parties to bear their own costs throughout. The plaintiffs were directed to make over the consignment to the defendants on the said sum being paid. It is against this decree that this second appeal has been preferred and we have heard *Rai Sahib* Mr. Mool Chand for the appellants and Mr. Carden-Noad for the respondents.

The main contention of the appellants now is that the goods were not according to the indent. The learned Additional Judge has discussed this matter fully. He rightly points out, with regard to the differences mentioned in his Court, that the defendant company were not affected by them. The actual number of cigarette papers received was 480,000 instead of 500,000, but as the price demanded was for 480,000 only, the purchasers did not suffer in any way by this shortage in the number of papers supplied. It was found that the gold tips were of 22 carat gold instead of 18 carat gold. This means that the quality of the gold tips was superior to that bargained for and no grievance in that behalf could legitimately be made. The third point of difference between the cigarette papers manufactured and the papers ordered was that

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the imprint on them in blue letters was not in script but in ordinary letters. This is a difference, no doubt, but obviously not one which would justify the defendant-appellants in refusing to take the goods altogether. We have looked at the gold tip printed cigarette papers, which seem to be quite neat and attractive. It appears to me that this excuse is only a pretext for refusing to take the goods, which are in all other respects according to order, and for not paying the price for which the defendants are responsible. It is pointed out by the Lower Appellate Court that the letters written by the defendant firm to the plaintiffs, marked Exhibits P. 4 and P. 5, show that no objection as to non-receipt of sample was ever raised by the defendants when they wrote to the plaintiffs expressing their readiness to take delivery of the consignment and paying £178 14*s* at 2*s* for the rupee. The objection to the cigarette papers on the ground of the writing on them not being in script seems to be an afterthought. I think the lower appellate Court has rightly held that there was practically a waiver on the part of the defendants of any objection that they could possibly have on the score of any difference between the goods as ordered and those actually supplied.

Mr. Mool Chand has argued, in conclusion, that the suit practically amounts to one for damages for breach of contract, and it is a well-known principle of law that if a person claims damages for breach of contract he must try to minimize the loss as much as possible. He says that the respondents had, in a letter marked Exhibit P. 6, offered to sell the consignment and to hold the defendant-appellants responsible for the loss, but they have not done so, and are now urging that

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the papers could not be sold in the market. I think there is no substance in this contention in the present case. The nature of the goods ordered was such that they could not be of use to anybody but the defendants. Papers marked with the name of the defendant firm are of no possible use to any other firm and could not have been sold in the market. Moreover, the possibility is, as pointed out by Mr. Carden-Noad, in his reply to the appellants, that if his clients had tried to sell these goods in the market, they might have run the risk of a suit for damages by the defendants, who had eventually offered to purchase the whole lot for Rs. 1,000 and could have objected to the sale. Similarly persons purchasing from the plaintiffs would have exposed themselves to the risk of infringing the rights of the defendant firm. He refers to an English case, by way of analogy, *i.e. Vic Mill, Limited* (1), where, in the case of goods specially made to order, distinction is drawn between goods which are marketable and which are not marketable, and it is laid down that in the latter case the price of the goods is the measure of damages. I think the principle laid down in the decision above referred to is applicable to the present case and the price of the goods should be regarded as the correct measure of damages in this case.

In my opinion, therefore, the decision of the Lower Appellate Court is quite correct and I would uphold it and dismiss this appeal with costs.

BROADWAY J.

BROADWAY J.—I concur.

N. F. E.

Appeal dismissed.

(1) (1913) L. R. 1 Ch. D. 183, 187.