

I agree with the construction put upon cl. 12 by Mr. Justice Shephard in the case of *Seshagiri Rau v. Rama Rau* (1), viz., that the words "in all other cases" in cl. 12 of the Charter exclude suits for immoveable property, and therefore that this is a suit for immoveable property, and the question as to whether the defendant dwelt at the time the suit was brought, or whether any cause of action arose, within the jurisdiction, in respect of which personal relief might have been given, becomes irrelevant. In my view, it appears from the plaint that the declaration of the plaintiff's right of possession of immoveable property is asked for: the suit is a suit for land, and it does not become less a suit for land or immoveable property within the words of the Charter because there is also asked, as ancillary to the declaration asked by the plaintiff, that the Will under which he claims should be construed, and that the estate should be administered by the Court, and that an account should be rendered by the executrix.

[323] I express therefore no opinion on the question as to the residence of the principal defendant.

Upon the question raised under s. 42 of the Specific Relief Act, because of the view I take, it is unnecessary to say anything.

The result therefore will be that this suit will be dismissed with cost.

Attorney for the plaintiff: *Preonath Bose*.

Attorneys for the defendants: *K. S. Mookerjee and U. L. Bose*.

Suit dismissed.

29 C. 323.

APPEAL FROM ORIGINAL CIVIL.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, Mr. Justice Banerjee and Mr. Justice Hill.

BOISOGOMOFF v. NAHAPIET JUTE COMPANY.*

[4th March, 1902.]

Damages—Proof of inferiority of quality—Examination of samples from portions of bulk—Method of ascertaining damages—Method established and recognized in the trade.

In a suit for damages by a purchaser of goods on the ground of their being below the guaranteed standard of quality, if it is clear from the evidence that such is not necessary for the plaintiff to prove the alleged inferiority in quality by an examination of the entire bulk: an examination of a fair number of samples taken from different portions of the bulk is sufficient for the purpose.

In a case of this class, if the method of ascertaining damages appears to be established and recognized in the trade, the plaintiff need not show how he has dealt with the goods delivered to him, and whether he has suffered any and what loss by reason of the goods not being up to the warranted standard.

THE plaintiff J. Boisogomoff appealed.

This action was brought to recover damages for alleged breach of warranty. The plaintiff, a jute merchant in Calcutta, purchased from the defendant company in September and October 1900 three lots of jute containing in the aggregate 7,000 bales. [324] According to the contracts the jute was to be of the standard quality of the mark known as T. S. N. 2. This mark is guaranteed to

* Appeal from Original Civil No. 27 of 1901 in Suit No. 4 of 1901.

(1) (1896) I. L. R. 19 Mad. 448.

1902
MARCH 4.
—
APPEAL
FROM
ORIGINAL
CIVIL.
—
29 C. 323.

contain 40 per cent. of Hessian warp. In the early part of November the jute in respect of which the dispute arose was delivered in Calcutta on the flats *Gorai* and *Khargosh*, and consisted of 6,000 bales. Upon examination of the jute the plaintiff complained to the defendant company that it was not equal to the standard quality of the mark. The defendant company thereupon sent a Mr. Emin to examine the jute, but the plaintiff's press-house manager would not allow the *coolies* and assorters to open the bales. Some correspondence then took place, and in the course of it the defendant company expressed their willingness that a survey should be made of the jute, and proposed that the arbitration should be held by the Bengal Chamber of Commerce. To this proposal the plaintiff sent a reply, stating, among other things, that in the terms of the contract no mention was made of the Bengal Chamber of Commerce, and they would therefore hold a private survey. On the 27th November 1900 the defendant company wrote in answer to this communication as follows :—

"We have received your letter of date. As the contracts in question do not provide for any form of survey, we consider we made you a very fair offer when we proposed to refer the question as to whether the jute is equal to the standard of the mark to the arbitration of the Bengal Chamber of Commerce."

"As you have declined our offer, we now withdraw it, and we refuse to consent to any private survey of the jute in question, as we are satisfied that your complaints are entirely groundless. You offer no reason for refusing to refer the matter to the Chamber of Commerce, and we can only infer that you have none, and that the real reason for your complaint is that the market has dropped since the contracts were entered into."

To this reply was sent on the next day by the plaintiff as follows :—

"Your statement that you infer that we have no ground for complaint, and that the real reason is that the market has declined is insulting and, untrue and perfectly uncalled for."

"In our letter of the 23rd, we stated our ground for complaint that the quality was not to the standard of the mark. Our reason for objecting to refer it to the arbitration of the Bengal Chamber of Commerce is that their surveys are mostly, if not all on contracts with mill guarantees of percentage of Hessian warp and weft, and that many of the surveyors on their list do not know the standard of your marks. We, therefore, consider it desirable that surveyors should be appointed who know the standard of the mark. Your declining to examine or survey any jute [325] landed by us is, we hold, unreasonable, as until the jute is landed how could we possibly examine it? The question, however, of how, when and where a survey should take place is one for the surveyors, and not for the parties to the survey to decide. As you positively now refuse to agree to a survey of any kind, we give you notice that we have asked Mr. Crichton of Sinclair, Murray & Co. and Mr. Duncan of the Budge-Budge Mills to examine the jute and grant survey reports of both the parcels under dispute, and should they state that, as we contend, the jute is inferior and state that we are entitled to an allowance, and should you fail to pay same on demand, we will without further notice instruct our solicitor to recover the amount by aid of the Court. As soon as the surveyors appoint the time at which they will examine the jute, we will inform you that you may, should you wish, have a representative present at the survey."

Mr. Duncan, a buyer of jute for the Budge-Budge Mills and Mr. Crichton, a member of the firm of Messrs. Sinclair, Murray & Co., Jute-brokers, were selected by the plaintiff to examine and report on the jute, and Mr. Wallace, the Manager of the Howrah Jute Mills, and Mr. Brown, who is a partner in the firm of Messrs. Landale and Morgan, Jute-brokers, were invited by the defendant company to examine the jute on its behalf. These four gentlemen went on board the flat *Khargosh* when 12 bales were taken from the bulk and opened. The entire bulk of these bales was not examined, but only a portion.

1902
MARCH 4.
—
APPEAL
FROM
ORIGINAL
CIVIL
—
29 C. 323.

Mr. Duncan was of opinion that there would be about 25 per cent. of Hessian warp in the bales which were opened, but to make himself more sure he made up his mind to have a mill selection, and sent 10 bales of the jute to the Budge-Budge Mills for examination. The mill selection was made at the mills under the supervision of one Mr. Pullin, the jute godown Superintendent, and according to his evidence the quantity of Hessian warp in the 10 bales did not amount to 25 per cent. A report was thereupon made by Messrs. Crichton and Duncan, in which they estimated the loss sustained by the plaintiff at the sum of Rs. 7,875, being an allowance of two annas per maund for every 5 per cent. deficiency in Hessian warp. There was evidence that surveyors customarily make this allowance.

After stating the facts of the case as above, His Lordship Mr. Justice Stanley, who originally tried the action, went on to observe in his judgment as follows :—

“Neither the plaintiff nor any one in his employment has been examined, and not a tittle of evidence has been given on the part of the plaintiff to prove [326] what was the quality of the bulk of the consignments, that is, the 5,978 bales which form the balance of the 6,000 bales. I am told that I should judge of the bulk by the sample on the principle, I presume, *ex uno disce omnes*.

“Assuming that the evidence satisfied me that the bales which were examined were inferior to the standard quality of the mark, should I be justified in arriving at the conclusion that the remaining bales were all likewise inferior: when the plaintiff who, so far as appears, has had the opportunity of examining, if he has not actually examined, the remaining bales, has adduced no evidence to prove the quality of them? I know of no case in which, under similar circumstances, a Court has condemned the bulk of a large consignment of goods as of inferior quality on proof of the inferiority of a sample. In the case of breach of warranty of quality, *prima facie* the measure of damages is the difference between the value of the goods at the time of delivery to the buyer and the value they would have had, if they had answered the warranty. This is the principle upon which damages would be measured in the present case, if there was a breach of the warranty.

“What data have been furnished to me by the plaintiff for estimating the value of the bales (5,978 in number) which were not examined by the surveyors? None whatever. I am asked to accept the testimony of the surveyors in regard to the bales which were examined, as satisfactory evidence of the quality of the jute which was not examined, and to say that I am satisfied that the jute in the unopened bales corresponded in quality with the jute in the bales which are opened. This seems to me to be a somewhat arbitrary mode of estimating damages. No doubt there may be cases in which the Court would be justified in drawing an inference as to the quality of the bulk from the quality of a sample, as, for example, in a case in which the plaintiff had no opportunity of examining and testing the bulk. Here, however, such is not shown to be the case. The plaintiff does a large export trade. If the jute in question was exported, then for the purpose of export it was necessary for him, according to the evidence, to rebale the jute, opening all the bales and re-assorting the jute. If this had been done, there would not have been much difficulty, I would say, in ascertaining approximately at least the amount of Hessian warp in the consignment. As Sir Allan Arthur in his evidence said, there would be no difficulty in such case in saying what percentage of Hessians there was in each assortment of the consignments and the plaintiff could have arrived at some estimate of his loss, if he had suffered any.

“If the jute was not exported, but was used by the plaintiff in manufacture, he would, one would expect, be in a position to adduce some evidence to satisfy the Court as to its quality. If it was sold, then the plaintiff should, I would think, have been able to tell the Court the classification under which it was sold and what percentage of Hessian warp was guaranteed. If the plaintiff had sold the jute and only guaranteed that it contained 25 per cent. of Hessian warp. I am disposed to think that I should have heard of this. As matters stand, not a shred of evidence in regard to the unopened bales has been adduced by the plaintiff. The only evidence which I have bearing upon the quality of the jute in these bales, independently of the evidence which was given in regard to the examined bales, is that of

1902
MARCH 4.
—
APPEAL
FROM
ORIGINAL
CIVIL.
—
29 C. 323.

Mr. Nahapiet, the Manager at Naraingunge of the Jute Department of the defendant company. He has been in the jute trade for fifteen years, and he [327] superintends the assortment of and the pressing and baling of the Company's jute. Before the bales, he said, are pressed he makes an examination of the jute from *khata* to *khata* (batch of coolies engaged in sorting), and on passing the qualities as correct the jute is taken to the press-house and baled. Until the jute has been examined and passed by him, the jute is not pressed. In answer to a question in cross-examination Mr. Nahapiet admitted that it was possible, but very unlikely, that he would make a mistake and pass a bale which did not contain the guaranteed percentage of the Hessian warp. If the consignments by the flats *Khar-gosh* and *Gorai* had been tested properly, he says that the bales would have given between 47 to 55 per cent. Hessian. The assortment, he says, was carefully done to keep up the reputation of the mark. This is very striking evidence. No doubt the plaintiff's Counsel are justified in pointing out that Mr. Nahapiet is interested in this litigation: he is the person who is responsible for any faulty assortment of jute; and, if there was faulty assortment in this case, he would be responsible for the loss. I have no reason, however, to think that this consideration has unduly weighed with Mr. Nahapiet in giving his evidence. He appeared to me to give his testimony without regard to any personal consideration of this kind and to be speaking what he believed to be the truth. It may be that he has somewhat overstated the percentage of Hessian warp in the bales, but I am quite satisfied that he did not wilfully overstate it. If his evidence is trustworthy, it is impossible to believe that the plaintiff has any real grievance. I believe that Mr. Nahapiet's evidence is reliable, and taking it in conjunction with the evidence of Mr. Wallace, I have arrived at the conclusion that, as regards the bulk of the consignment, the jute was not inferior to the standard quality of the mark.'

His Lordship then discussed the evidence with regard to the bales which were examined, and came to the conclusion that the plaintiff had failed to satisfy him that the jute was inferior to the standard quality of the mark, and gave judgment against the plaintiff.

Mr. *Dunne* and Mr. *Sinha* on behalf of the appellant.

The Advocate-General (Mr. J. T. *Woodroffe*) and Mr. *Garth* on behalf of the respondent company.

MACLEAN, C. J.—This is a suit to recover damages for an alleged breach of warranty as to the quality of 6,000 kutchra bales of jute purchased by the plaintiff from the defendants. There is no dispute as to the contracts which are set out in the plaint: the only dispute is as to the quality of the goods. The jute was to be of the standard quality of a certain mark $\frac{T.S.N.}{N.2}$ and this, admittedly, means that each bale was to contain 40 per cent. of what is known as Hessian warp. The sole question is whether the bales delivered did contain that percentage of Hessian warp, [328] and this is a question of fact. The jute was delivered by the defendants, and immediately after delivery the plaintiff complained that the jute was not up to the standard quality of the mark, and asked the defendants to send down a representative to inspect it. Some correspondence then ensued: the plaintiff suggesting a survey and the defendants proposing an arbitration by the Bengal Chamber of Commerce: the plaintiff declined the latter offer, as he was entitled to do, and I regret that the defendant's agents should have thought it necessary to make the imputation they did against the plaintiff in the letter of the 27th November 1900. The price paid for the whole of the jute, including 1,000 bales, as to which there is no dispute, was about 1,50,000 rupees. The plaintiff then appointed two surveyors to examine the jute, and the defendants sent down two gentlemen to "watch" the proceedings on their behalf. I will deal in a moment with what took place on this survey and subsequently.

Before examining the evidence, I desire to deal with two points, which are prominently dealt with in the judgment of Mr. Justice Stanley.

If by his observation the learned Judge intended to convey that, before recovering damages in a case of this class, the plaintiff was bound to examine each of the 6,000 bales of jute, and, as the result of such examination, was bound to show that in each bale the jute fell short of the requisite standard, I most respectfully differ from him. If such were the usage, it would, I fear, impose a serious clog upon commercial transactions. But it is clear from the evidence that this is not so. Mr. Duncan, one of the plaintiff's witnesses, says—"I examined 12 bales out of the bulk, which was in the flats there. It is usual to examine certain lots only in making a survey. To take a part of the bulk, to examine a part and make a report on that part, we are supposed to take 10 or 12 bales, a sufficient quantity to form a judgment as to what the bulk is;" and further on he says—"In order to find the average of a whole consignment, it is not usual to examine the whole consignment. To arrive at an average for the consignment, we take a portion for selection. The average of the consignment is taken to be that of the portion selected. We took the quantity which we considered would give us a representative quantity of the bulk," and Mr. Wallace, the [329] defendants' witness, on being asked "Do you consider that a test of 12 bales is sufficient for a cargo of 10,000?" says—"Picked out here and there in the bulk. I should think it was. Selected as these were, I should think it was so."

The other point is that the plaintiff ought to have shown how he had dealt with the jute which was delivered, and whether he had suffered any and what loss by reason of the jute not being up to the warranted standard. There would have been much force in this contention had it not been that, according to the evidence, the measure of damages, or perhaps, I should say, the method of ascertaining the damages in a case of this class appears to be established and recognized in the trade. It would appear that the buyer is entitled in respect of the inferiority alleged in this case to an allowance of six annas per maund, the rule being to allow two annas per maund for a deficiency of 5 per cent. of Hessian warp. Both Mr. Duncan and Mr. Crichton say so, and Sir Allan Arthur, who is experienced in these matters and who was called for the defendants, appears to be of the same opinion. Mr. Crichton speaks of it as a custom in the trade. Moreover, we have heard no argument from the respondent's Counsel that, if the plaintiff is entitled to damages, the damages as regards the quality of the jute have been assessed upon a wrong basis.

Mr. Justice Stanley dismissed the suit, holding that the plaintiff had failed to satisfy him that the jute was not up to the warranted standard, hence the present appeal, and it now becomes necessary to consider the evidence on this point, which is the real issue in the case.

Mr. Crichton and Mr. Duncan surveyed 12 bales out of the consignment on board one of the flats, and the survey lasted quite an hour. I agree with the Court below that, as the evidence of these gentlemen is that of experts, we must regard it with every care, though apparently from the evidence of Nahapiet Seth Nahapiet, one of the defendants' witnesses: "It is not the least difficult to distinguish between the two classes of jute, that is between Hessian and Sacking warps." And I also agree with Mr. Justice STANLEY that no real importance detracting from the value of Mr. Crichton's evidence ought to be attached to [330] the circumstance that his firm was desirous of taking over the

1902
MARCH 4.
—
APPEAL
FROM
ORIGINAL
CIVIL.
—
29 C. 323.

1902
MARCH 4.
—
APPEAL
FROM
ORIGINAL
CIVIL.
—
29 C. 323.

plaintiff's agency. Now, Mr. Crichton's evidence is precise, that the bales which he examined were not up to the standard quality, and that they contained only 20 or 25 per cent. of Hessian warp. He tells us how the bales were opened, what he and Mr. Duncan did, and how the jute was examined, and he points out the difference between Hessian warp, Sacking warp, and cuttings. Nor do I think that in material points he has been shaken by cross-examination.

It was urged for the respondent that the survey was defective, because only a portion of the jute out of the bales which were opened was examined, and that the surveyors could not have arrived at a just conclusion as to the percentage of Hessian in each bale without examining the whole; but Mr. Crichton says, they can always judge of a bale by opening half the hanks, and that they can do so accurately; and this view is confirmed by Mr. Wallace, one of the defendants' witnesses, who says: "From one-third to about half of each bale was opened. Probably more in one or two. I could form an opinion as to whether that jute was up to standard quality or not;" so that it would appear to be common ground between the witnesses on each side that enough of each bale was opened to enable the surveyors to form an opinion as to whether the jute was up to standard quality or not.

Mr. Duncan, who also surveyed these 12 bales, says that they examined the quality carefully, and that he did not consider that it was up to the standard quality of the mark; but in order to make sure of his opinion, he determined to have a mill selection taken. His opinion on the survey was that the jute in the bales which were examined was substantially below the standard quality of the mark by some 15 per cent.

With the view to this mill selection, which is, apparently, a much more searching examination than that effected by a survey, ten bales were selected from the bulk of the consignment, five from one flat and five from another, and these were sent to the Budge-Budge Jute Mills with a note to Mr. Batchelor, who was the Manager. Mr. Duncan is an Assistant in the firm of Andrew Yule & Co., who were the Managing Agents of the Budge Budge Jute Mills.

[331] It has been contended for the respondents that it has not been clearly established that the ten bales, which were subjected to the mill selection, formed part of the consignment to the plaintiff; but I think that, upon the evidence, it is clearly made out that the ten bales did form part of that consignment, and the learned Judge's observations on this part of the case proceed upon that footing. Mr. Pullin, who is employed in the Budge-Budge Mills and who tells us how mill selections of jute are effected, and who examined jute in this case on the 4th December and superintended the selections, tells us the result of the selection—a result which shows that the bales examined were very far below the standard quality of the mark. No valid reason is shown for impeaching Mr. Pullin's evidence on this point, nor do I think that the fact that the selection was made at the Budge-Budge Mills is sufficient ground for saying that the selection was not a fair or an honest one. It is true that no representative of the defendant company was present at the selection, but this may be attributed to the circumstance that they had previously declined to be parties to the survey.

As against this evidence we have that of Mr. Wallace, who is a gentleman of experience in the jute trade, and who, it will be remembered, was sent down with Mr. Brown not to survey, but to watch the

survey to be made by Messrs. Crichton and Duncan. He says decidedly that there was 40 per cent. of Hessian warp in the bales which were opened, and this would bring the bales up to the standard quality of the mark.

I gather from his evidence that he did not by any means make so careful an examination as Messrs. Crichton and Duncan. He does not appear to have handled the jute, but to have stood about and looked on whilst Messrs. Crichton and Duncan were examining it. He, in fact, says it is not necessary to handle it, though the witness, Nahapiet Seth Nahapiet, said: "Of course, we always handle it to see that it is all right—" a statement from which he subsequently resiled.

We have it, then, that, out of the bulk, 22 bales were examined—12 by way of survey and 10 by way of mill selection, with a result showing, as deposed to by Messrs. Crichton and [332] Duncan, that the jute was far below the standard quality of the mark, the deficiency in the Hessian warp being at least 15 per cent. As against this we have only the evidence of Mr. Wallace whose examination of the 12 bales on the flat was of the somewhat superficial nature I have described. He says the jute was up to the standard quality. No doubt, there is the evidence of Nahapiet Seth, the Manager of the Mill Jute Department of the defendant company. He tells us how the business of the Company is carried on at Naraingunge. The Company appear to have sent out about 35,000 bales with the mark T. S. N. 2 in the season of 1900, and he says, speaking generally, that bales of this mark had more than 40 per cent. of Hessian when they were taken out of the godown and put into the flat. It appears from his evidence that they received complaints from the Budge-Budge Company about certain jute they had sold to that Company, and that the jute complained of was exactly the same class of jute as that sold to the plaintiff, and that they had made an allowance in respect of that complaint. I do not think that this gentleman's evidence as to the quality of the jute generally can prevail as against the evidence given as to the quality of the jute in the specific consignment to the plaintiff, or can or ought, to prevail as against the direct evidence in this case as to the result of the examination of the 22 bales, and especially as regards the ten bales which were subjected to the mill selection. I have no desire to make any imputation upon the Company in this matter: I have no doubt that every care was taken in this case by them to see that the jute at their depôt at Naraingunge was up to the standard quality, but it is not always easy to avoid a mistake being made, and I think that in the case of this particular consignment the plaintiff has made out that the jute was not up to the standard mark.

It is said in the judgment appealed against that from the manner in which the plaintiff must have dealt with the goods, he must be in possession of evidence as to the quality of the entire bulk other than that furnished by the survey of the mill selection, and, as he has kept back such evidence, his suit should fail. I do not think that that is so. There is nothing to show that the plaintiff must have dealt with the goods in the manner suggested, [333] and there is no reason for thinking that he has kept back any evidence as to their quality.

In my opinion, then, the judgment of the Court below must be reversed; and as no question has been raised before us as to the amount of damages for the breach of warranty as to the quality of the jute, there

1902
MARCH 4.
—
APPEAL
FROM
ORIGINAL
CIVIL.
—
29 C. 323.

1902
MARCH 4.
—
APPEAL
FROM
ORIGINAL
CIVIL.
—
29 C. 323.

must be a judgment for the plaintiff for the amount claimed except the claim for the survey fees, and he must have his costs in both Courts.

BANERJEE, J. I am of the same opinion. I only wish to add a few words with reference to one of the questions raised in the case, namely, whether in a suit for damages by a purchaser of goods, on the ground of the goods being below the guaranteed standard of quality, it is necessary for the plaintiff to prove the alleged inferiority in quality by an examination of the entire bulk, or whether an examination of a fair number of samples taken from different portions of the bulk is sufficient for the purpose.

The learned Judge in the Court below has held that it is necessary to examine the entire bulk, and that it is only in exceptional cases, such as those "in which the plaintiff had no opportunity of examining and testing the bulk," that the Court would be justified in drawing an inference as to the quality of the bulk from the quality of the sample. With all respect for the opinion of the learned Judge, I must say, I am unable to assent to it. It demands an amount of evidence, which it will be highly inconvenient, if not wholly impracticable, to adduce in cases of large transactions like the present. Nor is such evidence considered necessary in the ordinary affairs of life.

No doubt the plaintiff in a case like this must prove that the goods are of inferior quality as alleged. But the question is, 'when may a Court hold that the fact of such inferiority in quality is proved? S. 3 of the Evidence Act, which in this respect only lays down a rule of common sense, says: "A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists." Now, if after examining a fair number of samples taken from different portions of the bulk, it is found that the [334] samples are all of inferior quality, the probability that the bulk is of the same quality is so great that every prudent man would act upon the supposition that it is of such quality, and, if that is so, the Court ought to hold that the fact that the goods are of inferior quality is proved in such a case.

HILL, J. I agree with the learned Chief Justice, and, I think, speaking for myself, that, if regard be had to the manner in which the case of the defendant company was put in the written statement, the plaintiff might well have supposed that the issue which it was intended to raise for trial was, whether upon the results of the survey, and judging from it alone, the jute supplied was of the quality contracted for. So far as my experience goes, it would be unusual and contrary to the practice of the trade to require a more exhaustive test than that which was applied in the present case, and there is nothing in the written statement that I can perceive to suggest to the plaintiff that, an adequate survey having been made, he would be called upon to adduce evidence bearing directly upon the quality of the consignment as a whole. That the plaintiff's survey was sufficient according to the understanding of mercantile men, for the purpose of determining the quality of the bulk, is apparent from the evidence on both sides.

Appeal allowed.

Attorneys for the appellant : *Leslie and Hinds.*

Attorneys for the respondents : *Morgan & Co.*