

stated that "the pure quality is the commercial mustard oil," and the seventh witness for the defence, an owner of two mills, "says that mustard oil is the pure quality." This seems to us to be beyond all doubt the truth. As the Magistrate says,— "Mustard oil, ghee, milk, etc., have a certain signification, and when a person demands that article, he has a right to be supplied with that article and nothing else." If, when a purchaser asked for mustard oil, he were to be given adulterated mustard oil, and this were held to be no offence under the Municipal Act, then the adulteration would increase in quantity. Any adulterant might be used and the quantity would be increased, so that soon in mustard oil so-called, the mustard oil would be conspicuous, if not for its entire absence, yet for its presence in only a very small degree.

The third plea raised for the defence is that the purchaser is not prejudiced by the adulteration. But in our opinion he must be prejudiced. Mustard oil is used for cooking purposes and for external application. If it is adulterated, it becomes less suitable for these purposes. The more it is adulterated, the less it possesses the qualities for which it is purchased. Then the use of the adulterants is clearly for the purpose of increasing the bulk of the oil and the profit of the manufacturer. This must be to the prejudice of the purchaser, particularly when, as in this case, he is charged the same price as he would have had to pay for pure mustard oil.

[649] The case of *Baishtab Charan Das v. Upendra Nath Mitra* (1) has been cited. In that case there was no evidence produced to rebut the evidence adduced by the defence to the effect that what is commercially known as mustard oil is the adulterated oil. In this case such evidence has been produced and has been relied on by the lower Court with manifest propriety.

For these reasons we discharge the Rule.

Rule discharged.

30 C. 649 (=7 C. W. N. 562.)

ORIGINAL CIVIL.

HARIDAS KHANDELWAL v. KALUMULL.* [1st May, 1903].

Contract—Breach of Contract—Resale, right of—Contract Act (IX of 1872) s. 107—Inferiority in quality—Right to reject—Proprietary right, exercise of—Damages.

Unless there is something in the contract to the contrary, a buyer cannot be compelled to take goods with an allowance for inferiority in quality. But if the right to reject the goods as being of an inferior quality is not exercised by the defendant when the goods are tendered, but a right of a proprietary character in respect of the goods is exercised by directing delivery to be made to third parties, then the defendant accepts the goods; and if they remain in the possession of the plaintiff, then he has a lien upon them, and he is entitled, under s. 107 of the Contract Act, to resell the goods and recover as damages the difference between the contract price and the price at the resale.

ORIGINAL SUIT.

The plaintiff instituted this suit in the Court of Small Causes, Calcutta, for the recovery of Rs. 2,021 as damages and costs by reason of the defendant's failure to take delivery of 50 chests of [650] shellac,

* Small Cause Court Transfer Suit No. 16 of 1902.

(1) (1898) 3 C. W. N. 66.

1903
MAY 1.

ORIGINAL
CIVIL.

30 C. 649=7
C. W. N. 562.

T, N. mark (in a diamond), of the average standard quality, under a contract, dated the 14th November 1901. The price was Rs. 75 per bazar maund, and delivery was to be given from the godowns of the plaintiff's broker in January and February 1902. One of the terms of the contract was that "should the shellac be inferior in quality, it is to be taken with an allowance to be settled by the undersigned," and it was further provided that "all disputes on the contract to be settled by the undersigned, whose decision shall be final and binding on both parties." The contract was signed by "A. M. John, broker." On the application of the defendant, the suit was transferred to this Court.

The defence put forward was that the defendant rightly rejected the goods on the ground that the goods were not of the quality and condition contracted for. The goods were tendered by the plaintiffs through their broker to the defendant's *gomasta* in Calcutta, who took no steps for inspecting the goods or testing their quality, but by an endorsement on a delivery order directed the plaintiff's broker to deliver the goods in question to K. G. Banerjee & Co., who caused a sample of the goods to be drawn, and requested the plaintiff's broker to make an allowance of Re. 1-8 per bazar maund, but the broker, through A. C. John, an assistant, offered an allowance of 8 annas per maund. Thereafter K. G. Banerjee & Co., by a similar endorsement, directed the broker to deliver the goods to the firm of Becker, Ross & Co., who caused a sample to be drawn of the shellac, and, alleging that the goods were not of the contract quality, rejected them. Then, for the first time by a letter dated the 21st March 1902, the defendant rejected the goods and called upon the plaintiff to make a fresh tender within 24 hours. The goods were all this time lying in the godowns of the plaintiff's broker.

The plaintiff, however, claimed the right of reselling the goods and, after due notice by letter, re-sold them on the 1st of April 1902, at Rs. 57 per maund.

Mr. A. Chaudhuri for the plaintiff. Under the terms of the contract, the defendant was bound to take delivery of the goods and he could claim an allowance for any inferiority in quality, which allowance was to be settled by the broker. He did not do [651] so: he exercised the right of proprietorship over the goods by ordering delivery to be given to K. G. Banerjee & Co. who, in their turn, endorsed over the delivery order to Becker, Ross & Co., neither of whom are entitled to claim any allowance from the plaintiff. At the instance of K. G. Banerjee & Co. the plaintiff's broker did settle the allowance at 8 annas per maund, and even then the defendant refused to accept.

Mr. Sinha (Mr. H. D. Bose with him) for the defendant. The goods not being of the average standard quality, the defendant was not bound to accept them: ss. 113, 117, and 118 of the Contract Act. No case has been made in the plaint that the defendant exercised any right of proprietorship over the goods. If it be conceded that the defendant was, under the terms of the contract, bound to accept the goods with an allowance for inferiority, such allowance was to have been settled by the broker, A. M. John, whose name appears in the contract and not by his assistant. An arbitrator cannot delegate his authority: see Russell on Arbitration, 8th Edition, p. 148.

SALE, J. This was a suit which was instituted in the Small Cause Court, and subsequently transferred to this Court for recovery of damages by reason of the defendant failing to take delivery of 50 chests of shellac.

The defence set up in the affidavit of the defendant, which, under the order of this Court, must be regarded as the written statement in the suit, was that the defendant rightly rejected the goods on the ground that in quality and condition they were not of the character which the plaintiff had contracted to deliver to the defendant.

The goods, which were the subject-matter of the suit, were described in the contract as 50 chests of shellac, T. N. mark (in a diamond), of the average standard quality. The price was Rs. 75 per bazar maund, and delivery was to be given from the godowns of the plaintiff's broker in January and February 1902, the terms being cash on delivery. The date of the contract is the 14th November 1901.

The goods were tendered by the plaintiff through his broker to the defendant on the 18th February. It appears that [652] the defendant, who was carrying on business in Calcutta through his gomasta, Giridhari Lall Chobay, took no steps for the purpose of inspecting the goods, or testing the quality of them, but on or about the 25th February, by an endorsement on a delivery order, directed the plaintiff's broker to deliver the goods in question to the firm of K. G. Banerjee & Co. It appears that the defendant was under a contract to deliver shellac to the firm of K. G. Banerjee & Co., and accordingly the defendant, under the terms of his contract with K. G. Banerjee & Co., tendered the goods in suit to that firm in performance of his contract with them. On the 10th or 11th March 1902, Messrs. K. G. Banerjee & Co. caused a sample of the goods to be drawn and requested the plaintiff's broker to make an allowance of Re. 1-8 per bazar maund; the goods were at the time in the godowns of the broker. The broker offered only an allowance of 8 annas, and in the result K. G. Banerjee & Co., by a similar endorsement, directed the broker to make over delivery of the goods to the firm of Becker, Ross & Co. K. G. Banerjee & Co. were under a contract at the time to deliver shellac, T. N. Mark, to Messrs. Becker, Ross & Co. Similarly, Becker, Ross & Co. caused a sample to be drawn of the shellac, and, alleging that the goods were not up to contract quality, rejected them. The defendant thereupon, for the first time, on the 21st March rejected the goods and called upon the plaintiff to make a fresh tender within 24 hours. The plaintiff, however, claimed the right of reselling the goods in question as against the defendant, and after due notice by letter the goods were resold on the 1st April at the price of Rs. 57 per bazar maund, and the plaintiff now claims to recover from the defendant as damages the difference between the contract price of the goods and the price of the goods obtained on the resale.

Now it may be conceded that if the goods tendered under the contract in suit to the defendant were not of the contract quality, the defendant had the option to reject the goods subject of course to the special provisions of the contract; and unless there was something in the contract to the contrary I take it the buyer could not be compelled to take the goods with an allowance for inferiority in quality. In the present contract, however, there is a provision that the buyer in case of inferiority is to take the [653] goods subject to an allowance to be fixed by the broker. There is a further provision that all disputes in respect of the contract are to be finally determined by the brokers. Having regard to these provisions in the contract, the question might undoubtedly have arisen whether the defendant was not bound to take the goods if they were not of the contract quality with an allowance to be fixed by the broker. The question

1903
MAY 1.

ORIGINAL
CIVIL.

30 C. 649=7
C. W. N. 562.

1903
MAY 1.

ORIGINAL
CIVIL.

30 C. 649=7
C. W. N. 562.

in the present case, however, is not dependent, I think, upon any suggestion as to inferiority in quality of the goods tendered under the contract. It appears to me upon the facts admitted in the affidavit of Giridhari Lall Chobay, which is the defendant's written statement in the suit, that the right, if any, to reject the goods as being of an inferior quality was not exercised by the defendant when the goods were tendered. On the contrary, the defendant by directing delivery of the goods to be given to K. G. Banerjee & Co. exercised a right of a proprietary character in respect of the goods. Moreover, the action of K. G. Banerjee & Co. in directing delivery of the same goods to Becker, Ross & Co. under their contract with that firm exercised a proprietary right of a still more unequivocal character, because in this case delivery was directed after a sample of the goods had been drawn and the quality thus tested. It appears to me then that these acts are evidence of an acceptance of the goods, and inasmuch as the goods remained in the possession of the plaintiff through his brokers, the plaintiff had a lien on the goods for the purchase-money which entitled them to resell the goods under section 107 of the Contract Act. It has been proved that the right to resell was exercised by the plaintiff after due notice given to the defendant, and I think that the plaintiff was justified in exercising that right.

Under these circumstances it is not necessary that I should make a final and formal adjudication as to the quality of the goods, though, I think, under all the circumstances that the truth as regards the quality of the goods is to be found in the evidence of Mr. A. C. John, who was called on the part of the plaintiff, who says that the inferiority was such as might be compensated by an allowance of 8 annas per bazar maund. I think the [654] evidence on the other side as regards the excessive inferiority of the goods, especially the evidence of Hem Chunder Bose, is very much exaggerated. However, the question in the case does not depend on the question of inferiority. The plaintiff being entitled to exercise the right of resale, he is entitled to recover from the defendant as damages the difference between the contract price of the goods and the price obtained upon the resale.

There will therefore be a decree for the amount so calculated as damages. Costs on scale No. 2 and interest on decree at six per cent.

Judgment for the plaintiff.

Attorneys for the plaintiff : *Manuel and Agarwalla.*

Attorney for the defendant : *C. C. Bose.*

30 C. 655.

[655] APPELLATE CIVIL.

SHABIUDDIN v. DEOMOORAT KOER.* [6th and 11th May, 1903.]

Cross-objection—Civil Procedure Code (Act XIV of 1882) s. 561—Cross-objection against co-respondents—Limitation Act (XV of 1877) s. 5.

X brought a suit against A, B, C, D, E and others to recover a sum of money and to enforce a security bond given by E. The suit was decreed against E alone. On appeal by E, X preferred a cross-objection under s. 561 of the Civil Procedure Code against A, B, C and D, without giving them notice :—

Held, that there was nothing in the suit which could be taken as an exception to the general rule that the right of a respondent to urge cross-objections

* Appeal from Original Decree No. 7 of 1901, and Cross-objection against the decree of Abdul Bari, Subordinate Judge of Patna, dated Sept. 11, 1900.