*Before Mr. Justice Mitter and Mr. Justice Prinsep.*

SHOSHI MOHUN PAL CHOWDHRY AND OTHERS (PLAINTIFFS) v. NOBO KRISHTO PODDAR AND OTHERS (DEFENDANTS).* 1878 *Sept.* 16.

*Sale of Goods—Transfer of Ownership—Ordinary Diligence—Contract Act (Act IX of 1872), ss. 18, 19, 78, 86, 117, 118.*

*A* contracted with *B* to sell him 975 maunds of rice, the whole contents of a certain golah at Kallygunge (near which place *B* resided) at a certain rate. *B* paid to *A* certain earnest-money, and agreed to remove the whole of the rice, after weighing, on or before a certain date. *B* transferred his contract to *C*, who, through his servant, took delivery from *A* of 130 maunds, paying to *A* Rs. 1,000; but subsequently refused to take delivery of the residue, as he alleged it to be of inferior quality to that contracted for. The golah was accidentally burnt, and the residue of the rice destroyed. In a suit by *A* to recover from *B* the balance of the purchase-money (after deducting the payments made) under the contract,—*held*, that the sale was complete, and the ownership, with the risk of loss in the rice sold, passed to *B* under ss. 78 and 86 of the Contract Act, because the contract was for "ascertained goods" for which *B* had paid earnest-money and taken part delivery; and that it was not open to *B* to rescind the sale on alleging and proving a breach of warranty on the part of *A*, unless he could bring the case within the provisions of s. 19; but that he was precluded from so doing, because he might have discovered the inferiority of the quality of the rice by using "ordinary diligence."

THE plaintiffs, rice merchants of Nulchitty, having a shop at Kallygunge, on the 6th Bhadro 1282 (27th June 1875) sold the whole contents of their golah No. 4 of their shop at Kallygunge, containing 975 maunds of "*Panah Padi Balam*" rice, at a certain rate to the defendants. The defendants on that date paid to the plaintiffs Rs. 357 as earnest-money, and agreed to remove the whole rice after weighing on or before the 27th of Bhadro. Subsequently to this contract the defendants transferred their rights to one Pitamber Shaha. On the 1st Assin (16th September) a servant of Petamber's weighed out of the golah in question 130

* Special Appeal, No. 2137 of 1877, against the decree of H. C. Sutherland, Esq., Officiating Judge of Zilla Backergunge, dated the 15th of August 1877, reversing the decree of Baboo Promoth Nath Mookerjee, Subordinate Judge of that District, dated the 8th of March 1877.

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maunds, and took delivery of that amount. Before taking delivery of this quantity, Pitamber's servant paid Rs. 1,000 to the plaintiffs. But he subsequently refused to take delivery of the residue as the quality of the rice was, as he thought, inferior to that contracted for. On the 22nd Aughran following, the golah was accidentally burnt down. The plaintiffs, after disposing of the damaged rice, deducting the price realized by that sale, as well as the payments made, brought this suit to recover the balance of the purchase-money according to the terms of the contract. The defendants contended—(1) that the property in the rice did not pass by the contract, therefore the risk was with the vendors; (2) that the contract was made by sample, and that the quality of the rice in golah No. 4 was inferior to that of the sample.

The Subordinate Judge held that the ownership in the rice and the risk passed to the defendants; that the sale was by sample; but that upon the evidence it was very doubtful whether there was really any breach of the warranty as regarded the sample. But that, assuming there was a breach, the defendants were not entitled under the law to rescind the sale. That they could only claim abatement of price, but not having claimed it in the suit, it could not be allowed. He accordingly decreed the claim in a modified form.

The District Judge, on appeal, held, that there was a breach of the warranty in respect of the quality of the rice contracted to be sold. Agreeing with the first Court that the sale was by sample, he added: "admitting, however, for the sake of argument that the rice was not sold by sample, there was still an implied warranty, that the rice sold should be of a particular kind, *viz.*, *Chaitro Panchi Padi.* Now the price shows, that the contract, as understood between the parties, was for rice of a good quality." On this point he came to the conclusion that the rice in golah No. 4 was not of the description, good "*Chaitro Panchi Padi;*" and upon this ground, as well as on the ground that after the defendants had given notice to the plaintiffs of their determination not to abide by the contract, there was ample opportunity for the plaintiffs to have sold the rice at a good price, he dismissed the suit.

The plaintiffs appealed to the High Court.

Mr. *H. Bell* (with him Baboo *Bhoobun Mohun Doss*) for the appellants.—We contend that the risk of the rice had passed to the defendants, the sale passed the rice; and at any event, from the time that they took part-delivery, the risk was theirs. The defendants say the rice was of an inferior quality, and that was a breach of warranty; but if the goods had passed, there could be no such thing as a breach of warranty. Section 78 of the Contract Act clearly lays down under what circumstances the property in ascertained goods pass to the purchaser, and the rice in golah No. 4 was an ascertained amount. The seller had nothing more to do which was essential to the contract; he had weighed the rice for his own satisfaction; it only remained for the purchaser to weigh. The case of *Swanwick* v. *Sothern* (1) is exactly in point, if the word "rice" be substituted for the word "oats." It was there objected that the goods ought to have been weighed; but it was held that where the quantity of goods are known, the weighing can only be for the satisfaction of the buyer, and therefore in our case if any one was to weigh it was the defendants. Illustration (*a*) of s. 81 was taken from the English case of *Kershaw* v. *Ogden* (2), which shows that the property passed on part-delivery. The defendants rely on s. 81 of the Contract Act, which is the case of *Simmons* v. *Swift* (3). The agreement there was to weigh; in our contract we had already weighed, and that distinguishes our case from it. I say we fall under illustration (*b*) of s. 81. Even assuming we fall under illustration (*a*) of s. 81, and had to weigh, their refusal to take more than 130 maunds would dispense with the condition precedent of weighing, and where there is delay in taking delivery, and the goods are destroyed during that delay, the rule is, that the loss falls on those who cause the delay. As to the warranty, assuming the rice to have been sold by sample, it would give the defendant no right after receiving 130 maunds to refuse to accept the rest. Section 117 (170) of the Contract Act — *Heyworth* v. *Hutchinson* (4) —

(1) 9 A. and E., 895.
(2) 34 L. J., Ex., 159.
(3) 8 D. and R., 693.
(4) L. R., 2 Q. B., 447.

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decides, that where the contract is for the sale of specific goods, a guarantee is not a condition but only a warranty, and that a defendant could not reject the goods because of their inferiority, and further, contracts cannot be rescinded for breach of warranty when the goods are unascertained.

Baboo *Gooroodas Bannerjee* for the respondents. — The ownership did not pass to the purchaser in this case, because the identity of the goods sold had not been ascertained; the plaint only shows that there was a certain sale of certain goods at a certain rate; the evidence does not show it was the sale of all the rice in the golah; it must be specified at the time of sale what is being sold. The plaint states that the sale in question was 192 maunds of rice of a certain quality, they ought to have weighed it—ss. 81 and 82 of the Contract Act. Under s. 81, the contention of the other side is untenable; they assume there was nothing to be done after the contract was entered into; but they ought to have weighed; nothing was said in the contract as to who was to weigh. The lower Court have found that the sale was by sample, and if the sale did not come up to the sample, there would not be a right to rescind (s. 117, Contract Act); but we are, at all events, entitled to get compensation from the seller for the loss caused by the breach of warranty.

The judgment of the Court was delivered by

MITTER, J.—In this special appeal it has been urged that, upon the facts found, the ownership of the property, and consequently the risk passed to the defendants; that consequently, even if there was any breach of the warranty, the defendants could not rescind the sale under the contract law; that the defendants are, therefore, liable. An objection has also been taken to the finding of the lower Appellate Court, that it is not clear. It has been said that the District Judge having held that the sale was by sample, should have determined, whether the quality of the rice in golah No. 4 was equal to that of the sample; instead of determining that question, he

holds that the defendants bought only "*Chaitro Panchi Padi*" of good quality, and the rice was not of that description.

As regards this last contention, I do not think there is any force in it. What the District Judge holds is, that although the sale was by sample, yet having regard to the contract price, and the prices of rice ruling in the market at the time of the contract as established by the evidence, it may be inferred that there was an implied warranty as to the quality of the article sold being of the nature mentioned above. There is no error of law in this part of the judgment of the lower Appellate Court (see illustration [*b*] of s. 113). We must, therefore dispose of the case taking this as a correct finding.

But I am of opinion that notwithstanding this finding in favor of the defendants, the District Judge is not right in dismissing the suit entirely.

I am of opinion that, under s. 78 of the Contract Act, the ownership in the rice passed to the purchasers, because the contract for the sale was "of ascertained goods," the latter having paid the earnest-money and taken delivery of a portion of it. It has been pressed upon us that, under s. 81, the sale did not become complete, because the rice remained to be weighed. This contention is not valid, because, so far as the vendors were concerned, nothing remained to be done on their part to the rice sold "for the purpose of ascertaining the amount of the price." The rice was to be weighed for the satisfaction of the purchasers (see the illustration [*b*] of this section).

The ownership in the rice sold, therefore, passed to the purchasers, consequently, under s. 86, risk of loss also passed to them.

It is true that, under s. 107, the plaintiffs might have sold the rice at the risk of the defendants after the latter had refused to fulfil the contract. But I am of opinion that the omission to take that course does not affect their right to recover the balance of the purchase-money.

Then the question is whether the finding regarding the breach of the warranty as to the quality of the rice sold is any answer to the suit. I am of opinion that it is not, except for the abatement of the contract price.

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Upon this point our attention was called by the counsel of the parties in the course of the argument to ss. 117 and 118. But it seems to me that these sections, except the last para. of s. 118, have no application to the facts of this case. Section 117 refers to sale of a specific article; and s. 118 to "the sale of goods which, at the time of the contract, were not ascertained, or not in existence."

In this case the sale having been completed, and the ownership with the risk in the rice sold having passed to the purchasers, the latter could rescind the sale only if the breach of the warranty would bring the case within the provisions of s. 19 of the Contract Act. The defendants' case possibly may be brought within the purview of that section on the ground that the "agreement" was caused by misrepresentation on the part of the plaintiffs as defined in cl. 3 of s. 18. But I think the defendants are precluded from resting their defence upon section 19 by reason of its first exception. Because the defendants reside near Kallygunge, and might have discovered "the truth with ordinary diligence."

For these reasons, I am of opinion that, upon the finding of fact, to which the District Judge has come, he is not right in dismissing the suit entirely. The defendants are at the utmost entitled to claim abatement of the contract price upon that finding. The last para. of s. 118 supports this view, the law as laid down in Addison on Contracts, p. 196 (sixth edition) is also to the same effect.

The Subordinate Judge notices this point, but declines to go into the question of abatement, because it is not claimed in the written statement. But the facts upon which this point arises are stated in the written statement. The District Judge has gone not at all into this matter. I am of opinion that the defendants are entitled to have this question decided in this case.

For the foregoing reasons the decision of the lower Appellate Court must be reversed, and the case remanded to that Court for the determination of the question of abatement in the contract price. As the defendants have established the right to such abatement, I think the District Judge should give them an opportunity of establishing the actual amount of abatement by

fresh evidence, if the evidence already on the record be found to be insufficient for the determination of this question. But of course if defendants are allowed to adduce fresh evidence, leave must be given to the plaintiffs to produce counter-evidence upon the point. Costs to abide the result.

*Case remanded.*

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*Before Mr. Justice Jackson and Mr. Justice McDonell.*

SREENARAIN BAGCHEE (DEFENDANT) *v.* SMITH AND OTHERS (PLAINTIFFS).*

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*Subordinate Tenure—Setting aside Sale of superior Tenure, effect of.*

The holder of a chahar-patni, or other subordinate tenure, whose tenure had been brought to an end by the sale for arrears of rent of a superior tenure on which his own was dependent, is, upon such sale being set aside, remitted to his previous position, and is entitled to recover possession of the land comprised in his chahar-patni from the purchaser or any assignee of the purchaser at such sale, and he can do so notwithstanding that he himself took a dar-patni, including the land he had held as chahar-patnidar, from the purchaser at such sale, and that this dar-patni was afterwards sold in execution of a decree against himself, and purchased at such last-mentioned sale by the person whom he seeks to evict on the strength of his original title.

THE plaintiffs in this case, Patrick Smith and others, had been chahar-patnidars of certain lands in Turruff Ramgourpore, which formed the subject-matter of this suit. The patni on which their tenure was dependent, there being intervening se-patni and dar-patni tenures, had been sold by the Collector for arrears of rent, and purchased by one Tarachand Biswas. The plaintiffs then, to avoid eviction, took, from Tarachand Biswas, a new dar-patni of the entire turruff within which their chahar-patni had been comprised. Thereupon the Land Mortgage Bank, having a decree against the plaintiffs, took out execution and sold the entire turruff, and the defendant Sreenarain Bagchee became the purchaser at such sale. Afterwards the sale by the Collector of the patni, which had carried with it all of the chahar-patni as well as the intermediate tenures, was set aside, and all these

Appeal from Original Decree, No. 329 of 1877, against the decree of the Officiating Subordinate Judge of Nuddea, dated the 3rd August 1877.