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was the managing member along with defendant No. 3. The plaintiffs' allegation of a previous partition has been found to be false. The Subordinate Judge has also found that the debt was valid, that is, that it was contracted for the necessities of the family. The sale certificate relied on by the purchaser (defendant No. 1) shows that what was sold was the entire property and not merely a share. We think, therefore, the conclusion arrived at by the Subordinate Judge is right, and this appeal should be dismissed with costs.

Appeal dismissed.

M. N. R.

ORIGINAL CIVIL.

Before Mr. Justice Stanley.

BOISOGOMOFF

v.

NAHAPIET JUTE COMPANY.*

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Warranty, breach of—Sample—Jute—Examination—Proof of inferiority of quality—Opportunity of examining the bulk—Mode of examining sample.

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 the sample, *e.g.*, in a case in which the plaintiff had no opportunity of examining and testing the bulk, but the Court would not condemn the bulk as of inferior quality on proof of the inferiority of a sample, if the plaintiff had the opportunity of examining the bulk, but adduces no evidence to prove its quality.

In examining a certain number of bales of goods taken as a sample the entire quantity in each bale and not merely a portion should be examined. It is not proper to examine a portion merely of each such bale and to assume that the residue would be of similar quality to the portion examined, and this is particularly so when the examination of the sample is by a trade custom to be the test of the quality of the bulk.

THIS suit was instituted for the recovery of damages for alleged breach of warranty in respect of certain bales of jute sold and

* Original Civil Suit No. 4 of 1901.

(1) This case is published *in extenso* at the request of Stanley, J. See Appeal from Original Civil, p. 328.

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delivered by the defendant company to the plaintiff. The facts of the case appear fully from the judgment.

Mr. Sinha and *Mr. Knight* for the plaintiff.

Mr. Garth and *Mr. J. G. Woodroffe* for the defendant company.

STANLEY J. This is an action to recover damages for alleged breach of warranty. The pleadings are very simple and the evidence has been meagre. The plaintiff, who is a jute merchant in Calcutta, purchased from the defendant company in the end of September and beginning of October 1900 three lots of jute, containing in the aggregate 7,000 bales. According to the contracts the jute was to be of the standard quality of the mark known as T. S. N. Twos only. This mark is guaranteed to contain 40 per cent. of hessian warp. In the early part of November the jute in respect of which the dispute has arisen was delivered in Calcutta in 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. The plaintiff explains the cause of this refusal to an old-standing ill-feeling between Mr. Emin and his press-house manager, and says that he himself afterwards met Mr. Emin and invited him to accompany him to the press-house, but he declined to do so.

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 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's agents, Messrs. Kiemander and 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."

A reply was sent on the following day, in which the plaintiff says:—"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."

Mr. Duncan, a buyer of jute for the Budge-Budge Mills, and Mr. Crichton, a member of the firm of Messrs. Sinclair, Murray and Company, 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 of these bales were not examined, but only a portion. Mr. Crichton says that they examined a number of hanks from each bale. Mr. Wallace says that from one-third to half of each bale was opened out. 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. Mr. Crichton was more readily satisfied

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that the jute was inferior to the standard, and he expressed his opinion that the percentage of the hessian warp was between 20 and 25. The views of Messrs. Duncan and Crichton were not communicated at the time to Messrs. Wallace and Brown, nor did the latter gentlemen state their views to Messrs. Duncan and Crichton. On the following day Mr. Duncan attended on the flats and sent ten bales of the jute to the Budge-Budge Mills for examination. No intimation of this was given to the defendant company. It seems to me that it would have been only fair to the defendant company to have apprised the company that a mill selection was about to be made, and to have given the company an opportunity of being represented at the selection. Nothing of the kind was done, nor was any opportunity offered to the defendant company of having a similar mill selection made. The mill selection was made at the Budge-Budge Mills under the supervision of a Mr. Pullen, the jute godown superintendent, and according to his evidence the amount of hessian warp in the 10 bales did not amount to 25 per cent. Messrs. Crichton and Duncan thereupon made a report, 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 five per cent. deficiency in hessian warp. It is said that surveyors customarily make this allowance.

This is shortly the case of the plaintiff. 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 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, 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, *primâ 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 were 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 the 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

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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 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 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 consignment of the flats *Khargosh* 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 any 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.

I now come to the bales which were examined. There is a remarkable variance in the views which were expressed by the experts on both sides as to the quantity of the hessian warp found in the opened bales. Messrs. Crichton and Duncan on the one hand say that the hessian warp did not amount to 25 per cent., while Mr. Wallace alleges that it was well above the guaranteed 40 per cent. Mr. Brown, who agreed with Mr. Wallace, having gone to Europe, has not been examined, and therefore no importance can be attached to the report so far as he is concerned. Mr. Wallace says that the bales varied, and that one bale was below the average, but that this bale would have yielded 30 per cent. of hessian warp. The others were all, he said, "fair average." Taking the 12 bales examined all round, the average was over 40 per cent. of hessians. Mr. Crichton appears to have had no difficulty in arriving at the opinion which he formed. He appeared to me to be an acute and ready man, not perhaps deficient in self-confidence. He did not, as Mr. Duncan, require to have a mill selection made. Mr. Duncan, on the contrary, had clearly, I think, some misgivings, for he expressed a desire to have a mill selection made. Mr. Crichton says that Mr. Duncan wished to see the jute "in his own light," that is, I presume, in the light which pervades the Budge-Budge Mills jute department. What the peculiarity of this light is we have not been told. I should have thought that a jute expert could test jute in any ordinary light.

It appears to me that there was an initial error committed by both Mr. Crichton and Mr. Duncan in the test which they made when they found that the hanks of jute which they examined were, as they thought, inferior to the quality of the mark. It was surely their duty to examine all the jute in the opened bales. *Non constat*, but that the part in each bale which was left unexamined contained sufficient hessian warp to make up for any deficiency of this warp in the portion which they examined. They had no right to assume that the residue of the jute in the opened bales was of similar quality to the portions which they examined, particularly when their examination was to be a

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test not merely of the opened bales, but of the entire consignment. It seems to me clear, as Mr. Wallace has pointed out, that these gentlemen, when they found portions of a bale inferior, ought to have examined the entire of the bale. They, or at least Mr. Crichton, appear to have been too ready to arrive at a conclusion. Mr. Duncan, no doubt, was more cautious, seeing that he determined to have a mill selection made. To make himself more sure, as he says, but, according to Mr. Crichton, in order to see the jute "in his own light," he made up his mind to have a mill selection taken. Mr. Duncan is a buyer of jute for the Budge-Budge Mills, and has been four years in Calcutta. Before he came to Calcutta he was for 25 years engaged in the jute business in Dundee, but he had no experience, he says, in surveying jute in Dundee. Whatever may be the views and ideas of Mr. Duncan as regards the requisites necessary to bring jute within the classification of hessian warp, it is not unnatural to suppose that these views and ideas will be shared by the employees in the jute department of the Budge-Budge Mills, and, therefore, I am not disposed to attach so much importance to the mill selection, which was so made, as I otherwise should. If bales of jute had been sent for selection to another mill than the mill with which Mr. Duncan is connected, the test would have been, in my opinion, more satisfactory. I am disposed to think from the evidence that Mr. Duncan is perhaps a little hypercritical and exacting in the matter of jute classification, and that he looks for a colour in hessian warp which is not according to the true test requisite for its classification as hessian. He admits that hessian is difficult to define. He defines it as being good coloured, strong and with straight fibre, not broken fibre. The colour, he says, should be white and gloss indicated strength. Mr. Crichton said that the hessian was light in colour and strong, and that sacking warp is inferior in colour, but strong. Colour seems to be an important criterion of superiority, but where and what the dividing colour between hessian warp and sacking warp is we have not been told. Mr. Nahapiet said that hessian warp must be long, glossy, and golden coloured with strong fibres. Mr. Wallace said that the jute which he examined was light in colour and

not, as alleged by Mr. Crichton, grey in colour. Mr. Crichton said that the jute was deficient in strength and colour, that it was grey and heavy rooted. Mr. Wallace struck me as being a person who had experience in, and sound knowledge of, jute. I was favourably impressed by his evidence and the manner in which he gave it. In a matter of this kind there is room for exaggeration, and I cannot but think that, if there were defects in the jute in question, these defects have been exaggerated by the witnesses for the plaintiff. I do not say wilfully exaggerated, but there exists in the case of expert witnesses a tendency to support the view which is favourable to the party who employs them, so that it is difficult to get from them an independent opinion. A high authority once said: "Skilled witnesses come with such a bias on their minds to support the cause in which they are embarked that hardly any weight should be given to their evidence." I do not say that in the present case I have acted on the principle so stated. I may observe also that I do not attach any importance to the suggestions made by the defendant's Counsel that Mr. Crichton's firm would be willing and are desirous to take over the plaintiff's agency, and therefore that Mr. Crichton is not an important witness.

I decide this case solely upon the evidence which has been laid before me as to the quality of the jute. The plaintiff has failed to satisfy me that the jute was inferior to the standard quality of the mark, the burden of proving which lay upon him.

Judgment therefore must be given against the plaintiff, and the action be dismissed with costs.

S. C. B.

Attorneys for the plaintiff: *Leslie and Hinds.*

Attorneys for the defendant company: *Morgan & Co.*

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April 2, 7, 15.

Before Mr. Justice Ameer Ali.

BROJENDRA NATH MULLICK.

v.

LUCKHIMONI DASSEE.*

Attorney and client—Remuneration—Suit—Promissory Note—Agreement by Attorney to take a gross sum in lieu of costs—Client—in Attorney's day book.

* Original suit No. 881 of 1900.