PRIVY COUNCIL.

GAN KIM SWEE AND OTHERS (DEFENDANTS) *v.* RALLI BROTHERS (PLAINTIFFS.)

P. C.*
1886
March 31.
April 1, 2,
and 6.

[On appeal from the High Court at Calcutta.]

Contract, Breach of—Alleged breach of warranty by vendor on a sale and delivery of goods—Burden of proof after acceptance, following upon an examination by purchaser.

Under five contracts for the sale of good Burma cutch, to be delivered to a Calcutta firm, in Calcutta, by the vendors, who knew that it was bought for the export market, delivery and acceptance followed upon a searching examination of the cutch by the purchasers.

The latter having sent advices of this purchase to a New York firm, with which they were in partnership, parcels of cutch were sold to different buyers in America, to whom, under such "forward" contracts, the cutch was shipped in separate shipments by the Calcutta firm.

On the arrival of the cutch, objection was taken to its quality by the American buyers, who refused to take delivery. The Calcutta firm, thereupon, sued the vendors under the five contracts above mentioned.

The burden of proof being upon the plaintiffs, who had accepted the cutch after full examination in Calcutta, to prove the breach of contract by the vendors by cogent evidence sufficient to rebut the presumption of due performance that arose from such acceptance, *held* that this presumption was not rebutted in the absence of evidence as to the treatment of the cutch on its re-shipment by the plaintiffs, on the voyage from India to America, and at the port of arrival.

APPEAL from a decree (13th September 1883) of a Divisional Bench of the High Court.

The decree from which this appeal was preferred awarded Rs. 1,13,066, with interest at 6 per cent. and costs, to the respondents, Messrs. Ralli Brothers, of Calcutta, as damages sustained by them in consequence of a breach of warranty of the quality of 9,043 bags of cutch, sold and delivered to them by the appellants, who were Chinese merchants, trading in Calcutta under the style of Eng, Hong & Co. The latter, having a branch firm in Rangoon, traded in cutch, the produce of Burma forests, which, after being sorted, packed in bags, and

* *Present:* LORD BLACKBURN, LORD HALSBURY, LORD HOBHOUSE, and SIR R. COUCH.

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marked with a trade mark in Rangoon by the firm, was shipped to Calcutta.

By five contracts, dated respectively 24th September, 1st, 3rd and 30th December 1879, and 3rd February 1880, Eng, Hong & Co. contracted to deliver to Ralli Brothers, bags of cutch marked 

, to amounts varying from 500 bags to 4,000 bags, "guaranteed to be of the standard quality of the mark" (1), at prices varying from Rs. 9-8 per bazar maund in the first contract to Rs. 12-8 in the last; delivery to be given and taken from the sellers' godowns in Calcutta, within periods, fixed in the contracts, varying from 23rd September 1879 to 6th February 1880.

Ralli Brothers, in Calcutta, having advised their New York firm, the latter, as agents, made contracts for sale of the cutch to other firms in America, of which the Calcutta firm received advice. Delivery of the cutch after examination having been taken in Calcutta, under the above contracts, by the Calcutta firm, they re-shipped and despatched it to America in several shipments, according to the number of "forward" contracts, there being in this case eight.

On arrival every shipment was rejected, with a slight exception. Of 1,500 bags, which had been accepted in Calcutta under the contract of 24th September 1879, only 950 bags were accepted by the American firms. The remaining 550 bags of that batch, together with all the cutch delivered as above stated, and despatched in other shipments to America, were rejected by the American buyers.

The suit out of which this appeal arose was thereupon brought by the Calcutta firm of Ralli Brothers.

The plaint alleged that the marks mentioned in the five contracts for delivery in Calcutta were well known as indicating a prime quality; but the cutch delivered was bad in quality, mixed with other substances, and in the case of some bags fraudulently packed.

The defendants, amongst other things, denied that there was a standard of prime quality in cutch, or that any fixed standard

(1) Initials of a Rangoon firm, Eck Guan,

of quality was meant by the marks; the quality of cutch varying from year to year, and even from month to month of the cutch season. They also denied that the cutch, delivered by them, and accepted after examination by the plaintiffs, was of other quality than that contracted for, or that any had been fraudulently packed.

The construction of the five contracts, and the effect of the examination and acceptance in Calcutta, as well as questions as to the quality of the cutch at the time of the delivery in Calcutta, and as to the alleged false packing, were put in issue.

Part of the evidence consisted of the examination of witnesses taken under commissions issued to Rangoon, New York, and London.

The suit, having been partly heard in the original jurisdiction by one Judge, was then, by consent of parties, and under an order of the Chief Justice, heard and determined by a Bench of two Judges (Norris and Wilkinson, JJ.) The Court held that the marks referred to in the five contracts were used for the purpose of indicating that the cutch was of the average quality packed by the Rangoon firm denoted by the marks, and meant that the cutch was to be good and of a uniform quality. They found, however, that the cutch delivered was not so.

Finding that the defendants knew at the time that the cutch had been bought by the plaintiffs for export, they held that the proper measure of damages was the difference between the price which would have been paid in New York for the cutch, had it been good, and the price that it, being bad, actually realized. The claim in respect of false packing was rejected.

Mr. *A. Cohen, Q.C.*, Mr. *A. Charles, Q.C.*, and Mr. *J. H. A. Branson* appeared for the appellants.

Mr. *T. H. Cowie, Q.C.*, and Mr. *R. V. Doyne* for the respondents.

For the appellants, the argument principally urged was that the High Court, in deciding that the cutch delivered was not of such good quality as had been contracted for, had acted upon evidence insufficient in effect to rebut the inference, or presumption, that necessarily arose from the acceptance of the cutch

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in Calcutta after a searching examination. All the evidence pointed to such an examination having taken place. The result was that all the evidence taken under the New York and London commissions was only so far relevant as it might be taken to bear on the question of the long previous condition of the cutch *i.e.*, at the time of delivery in Calcutta; and that evidence affected the real question between the parties remotely only and not directly. Considering the length of time, and the effects of exposure, from which the cutch might well have suffered either in the re-shipment after delivery in Calcutta, or on the voyage, or in New York on arrival, it followed that evidence of its condition, when ultimately rejected by the buyers in America, was no criterion of what it might have been at the time of its delivery in Calcutta. The judgment of the High Court had been given without sufficient regard to where the burden of proof lay, and was incorrect.

Mr. *T. H. Cowie, Q.C.*, and Mr. *R. V. Doyne* argued for the respondents that they, who were not precluded by the acceptance in Calcutta from proving inferiority in the quality of cutch actually existing at the time of delivery, had established by the general body of the evidence that the cutch could not have been in a good state when delivered. Thus a breach of contract had been made out. The respondents had sustained damage to an amount at least equal to that awarded by the decree, the appellants having been aware that the market in Calcutta for cutch was an export market, and that the contracts in question were entered into by the respondents with a view to re-shipping the cutch to a foreign port.

Counsel for the appellants were not called upon to reply.

Their Lordships' judgment was delivered by

LORD HALSBURY.—This is an appeal from the High Court at Fort William in Bengal, where judgment was given for the respondents, the plaintiffs below, with damages for the breach of warranties contained in five several contracts for the sale of cutch to the respondents.

The course of the evidence in this case renders it unnecessary to draw any distinction between the first and the four later contracts. It is not denied that in all five contracts the obligation

was to deliver good cutch, and the real dispute in this case is whether good cutch was delivered. Had the evidence raised any distinction between cutch of a peculiar manufacture or quality, as indicated by a recognised mark, it might have been necessary to consider more minutely the effect of the warranties contained in the four later contracts; but the contest between the parties has been conducted on much broader grounds. The 11,000 bags, the subject of the five contracts, were delivered in Calcutta between the 5th of April 1879 and the 26th April 1880.

In the course of the deliveries extending over this period an examination to determine whether it should be accepted as according to contract or not took place. Some was rejected, other cutch substituted, and extra allowance made for weight. This was done in the presence of one or other of the brokers and of the person selected by the purchasers, who made the examination and conducted the examination in the manner in which, at that time, cutch was generally examined. The correspondence between the respondents and their New York agency discloses the fact that upon some telegrams and letters which are not before us, the respondents explained to their agency why they had accepted some which, in their judgment, might not exactly have come up to the contract quality. They say: "We had to reject several lots, receiving only what would pass as prime. We had to complain also in some instances about heavy tare, and we only received such lots with full allowance of weight." Then in a letter dated June 22, 1880, they say: "As you are aware, we were all along receiving our cutch on advancing markets, and although we were very careful in receiving, in many instances we were compelled to accept deliveries which we would have rejected if our market was quiet, and we were not pressed by freight engagements." Then they say: "We may here add, that owing to the strong demonstrations and the rejections made by our competitors and ourselves, the quality and the packing of the supplies since February has improved, and we hope that on arrival you will find an improvement in our shipments." Then again: "We are sorry at not having been aware of the objectionable form of your contracts for cutch, which do not admit of any allowances in case of inferiority of quality, as otherwise we would have certainly

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been much more particular in restricting our business to the very best marks. Being ignorant of this, and seeing our competitors (who had far better experience than ourselves in this article) buy the ◇EG◇ mark, we thought that by being careful in the delivery, and receiving full allowances for any inferiority in the quality or extra tare, we could protect ourselves and take our share in this business. On several occasions we have rejected lots for inferiority of quality or false packing (when we were not pressed for shipment), and the same lots have been accepted and shipped by our competitors, and this was an argument of our seller for our being very particular in our deliveries." Then they say again, in a letter dated the 30th July: "After the great disappointments we have had (which, however, have been partly caused by the fact that we were never aware of the clause in your contracts allowing the buyer to reject out-and-out any inferior quality) we shall of course be more careful in our deliveries and ship only really good quality."

It is to be observed that that correspondence, which obviously arises from some telegram not before us, had taken place between the parties before the end of April 1880, and indeed the selected specimen on which so much turns, and which will have hereafter to be dealt with, was taken before the end of April 1880, and throughout the course of delivery in New York, occupying from the 13th April until the 21st October, no complaint whatever is made of either quality or packing until the letter of the 4th November. Mr. Cowie very fairly admitted that, although that letter of the 4th November refers to some communication by these persons, it refers to some verbal communication on or about that time, and the letter itself, when looked at, does not refer to inferiority of quality at all, but refers, apparently, to the question of false packing.

It probably is not necessary, upon this state of facts, and seeing what the course of delivery has been, to put any construction on the Indian Contract Act, since treating it as a matter simply of fact and inference, it is impossible not to see that the evidence of the searching examination at Calcutta, and the period which is allowed to elapse from the time, and during the course of delivery,

extending over the period referred to, renders it at all events incumbent, by very cogent evidence on the part of the respondents, to rebut the inference which justly would be drawn from the acceptance in Calcutta, after such searching examination, that the goods delivered were according to contract.

Their Lordships are of opinion that the Judges of the High Court were right in rejecting the claim in respect of false packing. If the evidence of the condition of the cutch as received in New York was accurate, it is absolutely impossible to suppose that it could have escaped the examination at Calcutta. To take the one specimen which has been more than once referred to of a fraudulently packed bag—there is no other phrase that will adequately describe it—in which there were two or three inches of cutch outside and the interior filled with dirt and rubbish, and which has been referred to once or twice as a piece of evidence that it is impossible to reconcile with a really honest examination at Calcutta, it is worthy of remark that, although a considerable quantity—and, as Mr. Doyne has pointed out in his argument, a very considerable number—of bags were rejected at Calcutta, it was not suggested in any part of the evidence that anything of that sort was discovered during the examination. It would almost have followed, as a matter of course, that if any such fraudulent trick as that had been discovered, the examination would have been much more stringent even than it was. But the respondents took delivery after examination, and if they had sought to show that the article as delivered in New York was the same in quality and condition as to packing as when it was received and accepted by them, they should have given some evidence (for the burden was clearly on them) of its treatment in Calcutta after delivery to them, its loading on board, the conditions of the voyage, and, further, have shown that no changes of heat, moisture, or pressure by superincumbent weight, could have affected the article during the voyage until its delivery in New York. It is obvious that the respondents have offered no evidence on any one of these questions, and it appears to their Lordships they have entirely failed to satisfy the burden which was upon them. But while their Lordships entirely agree with the Judges of the High Court in rejecting the claim as to false packing, they

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are unable to follow the learned Judges in their conclusion as to the inferior quality of the cutch. The judgment apparently depends upon the proposition that the cutch in its original manufacture contained an inordinate quantity of sandy or earthy matter; and that the condition of the cutch was incapable of being discovered in Calcutta upon the examination on account of the semi-liquid state of the cutch. Their Lordships are unable to discover any evidence to justify that finding. If indeed the evidence had established that the liquid state of the cutch at Calcutta had prevented examination, and upon its arrival at New York it disclosed that, as originally manufactured, it was defective, a different question might have arisen; but in truth there is hardly any evidence in support of this branch of the proposition. Their Lordships fail to discover any evidence that the examination at Calcutta was prevented or even affected by the liquid condition of the cutch; and there is absolutely no evidence of the cutch being so manufactured that it contained an undue quantity of earthy or sandy matter. The learned Judges appear to have acted upon their own view of what was described by the sample marked "T 3," and they have regarded this sample, the size of which does not distinctly appear, but which appears to have been taken at the latter end of April 1880, as having sufficiently informed their minds of what was the quality of the 11,000 bags of cutch. Their Lordships are wholly unable to acquiesce in the inference drawn, and therefore will humbly advise Her Majesty that the judgment of the High Court should be reversed, and the suit be decreed to be dismissed with costs, and the respondents will pay the costs of this appeal.

Appeal allowed, with costs.

Solicitors for the appellants: Messrs. *Watkins & Lattey.*

Solicitors for the respondents: Messrs. *Sanderson & Holland*

C. B.