[PRIVY COUNCIL]

1955

Present : **Lord Morton of Henryton, Lord Radcliffe, Lord Keith of Avonholm, Lord Somervell of Harrow and Mr. L. M. D. de Silva**

ABDUL HAMID *et al.*, Appellants, *and* ODHAVJI ANANDJI & CO., LTD., Respondents

PRIVY COUNCIL APPEAL NO. 40 OF 1954

S. C. 240—D. C. Colombo, 21,162

Sale of goods—Wrongful refusal to accept the goods—Measure of damages—Special damage—Sale of Goods Ordinance, s. 49.

Where, in a contract of sale of goods, the buyer wrongfully refuses to take delivery of the goods and there is no available market for the rejected goods at the time of the refusal to accept, then the goods may be sold as soon as buyers can be found. In such a case the amounts realised later, if reasonable steps are taken, are the best measure of their value at the date of the breach of contract ; the prima facie measure of damages that can be claimed under section 49 of the Sale of Goods Ordinance is the difference between the contract price and the value at the date of the breach.

APPEAL from a judgment of the Supreme Court delivered on March 9, 1953, by Gratiaen J. (Gunasekara J. agreeing).

Joseph Dean, for the defendants appellants.

J. F. Donaldson, for the plaintiffs respondents.

Cur. adv. vult.

May 16, 1955. [*Delivered by* LORD SOMERVELL OF HARROW]—

This is an appeal by buyers who wrongly rejected goods under a contract of sale. It is submitted on their behalf that the damages awarded are excessive and should be reduced or a new trial ordered.

Under a contract dated 24th December, 1946, the appellants, merchants in Colombo, agreed to buy from the respondents, merchants in Mombasa, 60 tons of cowpeas as per sample approved at £51 per ton c.i.f. Colombo shipment per s.s. " June Crest ". The " June Crest " was then loading and arrived at Colombo on or about 14th January, 1947. The documents with a bill of exchange for the contract price attached were forwarded to the National Bank and presented to the appellants. The appellants refused to accept the bill which was noted for non-payment on 29th January. On that day and again on the 4th February, the respondents cabled to the appellants that unless the draft was paid within forty-eight or twenty-four hours respectively, the respondents would sell. There was no reply. On 5th March the respondents' proctor wrote to the appellants.

2——J. N. B 46658—1,592 (8/55)

Dear Sir,

I have been consulted by Messrs. Odhavji Anandji & Co., Ltd., of Mombasa, to take steps against you for the breach of contract entered into with them on 24th December, 1946, by your representative Mr. M. Y. Aboobucker, for the purchase by you of 60 tons of cowpeas at £51 per ton c.i.f. Colombo.

The goods were duly shipped by s.s. "June Crest" which sailed from Mombasa on or about 28th December, 1946, with goods.

You have failed to accept the goods and honour the relative Bill of Exchange for £3,134 3*s*. 1*d*.

As you have failed to take delivery of, and pay for, the goods in spite of my clients' requests, my clients will now dispose of the goods on your account and at your risk, according to their earlier intimations to you, and file action against you for the recovery of any deficit.

As the quantity of goods is very large the sale of the whole quantity in bulk at an auction sale may not be as advantageous as a sale by private treaty, and so my clients intend to have the goods sold by private treaty unless you prefer a sale by public auction, in which event you must inform me forthwith.

Before doing so, I am giving you a final opportunity of fulfilling your obligations under the contract.

If I don't hear from you within 24 hours agreeing to meet the draft and take the goods, my clients will proceed to dispose of the goods as stated above.

The disposal of the goods will be done by my clients without prejudice to their legal rights under this contract and purely with a view to reducing their ultimate claim against you as far as possible.

Yours faithfully,
(Sgd.) S. A. S. HAMID.

The appellants replied on the 17th March.

Dear Sir,

With reference to your letter of the 5th instant addressed to Mr. Abdul Latiff Abdul Hamid, I am instructed to state that the goods referred to are not the goods contracted for by my client's representative and that the same were found to have been attacked by weevils and been subject to some treatment before they were shipped and which has adversely affected the quality of the goods. My client regrets that he cannot accept the goods in view of the damaged condition in which they have been received and as the goods cannot be marketed in Colombo or elsewhere.

My client also denies liability for any loss that your clients may suffer in respect of the said goods.

Yours faithfully,

In the meantime the goods had been cleared by E. B. Creasy & Co., Ltd., who acted for the National Bank. On 3rd April, 530 bags were delivered to M. Popatlal & Co. for sale and the remaining bags on 12th July.

The bags were sold under 13 contracts, one for three bags in April and the rest in July, August and September.

The plaint was filed on 16th May, 1949, the respondents claiming damages for wrongful refusal to take delivery of the documents or goods. Special damage was alleged as follows :—

> The plaintiff with due notice to the defendants sold the said goods at their risk by private treaty at the then available market rate for Rs. 5,609·12. In this connection the plaintiff incurred expenses amounting to Rs. 1,000.
>
> By the said refusal, neglect or breach of contract aforesaid, the defendants have caused plaintiff loss or damage in the sum of Rs. 37,525, to wit :—Rs. 36,325 being difference between the said Rs. 41,934·12 and Rs. 5,609·12 and the said sum of Rs. 1,000 which said sum of Rs. 37,325 or any part thereof the defendants have failed and neglected to pay though thereto often demanded.

The sum of Rs. 41,934·12 is the equivalent of the contract price.

The defence was that the goods shipped did not correspond to the sample and were not merchantable. The defences failed and the learned Judge awarded the damages as claimed. The appellants appealed taking the point now taken before the Board namely that the damages were excessive. The appeal failed.

The provisions as to damages for wrongful refusal to accept goods are contained in section 49 of the Ceylon Sale of Goods Ordinance and are the same as those in section 51 of the Sale of Goods Act, 1893 :—

> 49.—(1) Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for non-acceptance.
>
> (2) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract.
>
> (3) Where there is an available market for the goods in question the measure of damages is prima facie to be ascertained by the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted, or, if no time was fixed for acceptance, then at the time of the refusal to accept.

Sub-section 3 is of course a prima facie application of the principle laid down in sub-section 2. If there is no market price within sub-section 3 then the prima facie measure is the difference between the contract price and the value at the date of the breach. If the rejected goods could be sold at the time or times referred to in sub-section 3 then it may well be academic to consider whether there was a market price within sub-section 3. The realisable price whether " market " or not will give the figure to be subtracted from the contract price. There are cases, of which it is said by the respondents this is one, in which the goods in

question could not (reasonably) be sold at the date of the breach. In such cases the amounts realised, later, if reasonable steps are taken, will be the best measure of their value at the relevant date.

At the trial the appellants maintained that the sample referred to in the contract was one of white cowpeas.

The respondents disputed this and the learned trial Judge accepted the respondents' evidence that the contract was for brown or red cowpeas, a somewhat inferior commodity.

It was submitted for the appellants first that there was an available market for the 60 tons of brown cowpeas on or about the 4th February and a market price within sub-section 3. Alternatively it was submitted that the sellers acting reasonably could have realised the goods earlier at better prices. The learned Judge awarded the damages as claimed without discussing these points. One explanation may be that they were not sufficiently taken. The appellants called some evidence and asked some questions as to prices in February and March. The appellants were of course defending on merits and may not have emphasised arguments which would only become relevant if they lost the case. Their Lordships however agree with the Supreme Court in holding that the points should be regarded as open on appeal.

In their Lordships' view on the evidence it would be impossible to hold that there was an available market within sub-section 3 for 60 tons of brown cowpeas at the time of the appellants' refusal to accept. The alternative submission requires a consideration in a little detail of such evidence as there is. It is common ground that these cowpeas are liable to be attacked by weevils after two or three months and of course deteriorate. There was therefore every motive for the bank and those acting for the sellers to see that the goods were sold as soon as buyers could be found.

Once the goods were in the hands of Popatlal the evidence is clear. Their representative said that he sold at the highest possible price. The delay from April to July was due to the fact that there were no buyers earlier. The same witness said that in December and January large quantities of this and other grains had arrived. The demand therefore fell off. If no buyers for these brown cowpeas could be found in April, May and June, it seems probable on his evidence that there would have been no buyers in March and February. Owing to congestion, landing was slow and there was some confusion in the warehouses.

The defendants called some evidence as to sales in March. These were sales of comparatively small quantities to retailers. Most of the evidence dealt with white cowpeas and therefore does not assist. The evidence if accepted is not strong and one of the defendants' witnesses said there was no good price between January and March. The Supreme Court referred to the fact that the appellants had admittedly taken delivery from the "June Crest" of 25 tons of cowpeas of the same description. If their case was that the respondents could have obtained higher prices why did they not prove how much they had realised for this smaller quantity?

The fact that there are no clear findings or evidence as to the course of events in February and March is due to the failure of the defendants to make clear or emphasise the case they now seek to make. They were

invited to formulate issues but failed to do so on any of the points now raised. There would seem to have been no clear cross-examination on the question why no bags were handed over to the selling agents before the beginning of April. The onus is of course on a plaintiff to prove recoverable special damage. The respondents here called a representative of their firm, of the bank, of the bank's clearing agents and of the selling agents. They were clearly making the case that they had acted reasonably, had got the best prices and that therefore the net proceeds represented the value of the goods. Taking the evidence as a whole their Lordships agree with the Supreme Court in holding that the claim was made out.

Their Lordships will humbly advise Her Majesty that the appeal be dismissed. The appellants must pay the costs of the appeal.

Appeal dismissed.