

In Re: Andrew, Yule and Co.

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Court : Kolkata

Decided On : Aug-27-1931

Reported in : AIR1932Cal879,140Ind.Cas.877

Appellant : In Re: Andrew, Yule and Co.

Judgement :

Ameer Ali, J.

1. This is a special case stated for the opinion of the Court by the arbitrators appointed by the Bengal Chamber of Commerce.
2. The dispute relates to 3,00,000 yards of Hessian, contained in 150 bales, sold by the Fort Gloster Jute ., by a contract, dated 6th November 1929. The goods were sold F.A.S. They were resold by the buyers to sub-buyers in America, who purported to reject a portion of the goods, namely, 100 bales out of the 150 bales. The trouble arose owing to the goods, or a considerable portion of them, having gone through a particular batching process which gave them an unusual smell. This smell rendered them unfit for one of the principal purposes for which goods of this class are used, i.e., the packing of provisions.
3. The facts have been stated in a special case, which has been drawn with skill and care. As is 'inevitable however certain points of fact are left uncovered by the arbitrators, by which I mean that it has been left to the Court not only to lay down the law, but also to draw certain inferences of fact. I refer to paras 15 and 16 of the

special case, which relate to the question of description,' secondly, to paras 12 and 13, which relate to the question of special purpose,' and thirdly, to paras 3, 4, 5 and a portion of para 11, which relate to the 'place for inspection.' I will deal with these matters again in the order in which they arise.

4. Although the actual questions, on which I am asked to give an opinion, are more in number, the main questions involved are four only. These main questions are as follows:

5. First, a question of procedure or jurisdiction, namely, whether Andrew Yule Ltd., the buyers, are entitled in the circumstances of the case, to refer this dispute to the arbitration of the Board of Bengal Chamber of Commerce; secondly, the question of description, whereby I mean whether the goods failed to conform to the description in the contract so as to give the buyers a right of rejection; thirdly, whether in this contract there was an implied condition of fitness for a particular purpose, i.e., the purpose of packing foodstuffs; Lastly, the question as to whether if the buyers had originally a right to reject either because the goods failed to conform to description or because there was an implied condition of fitness, they have lost that right in the circumstances of this case.

6. It was asked, by reason of the fact that other arbitrations will follow the result of this arbitration, to give a considered judgment, and I am glad I did so because one of the questions, or rather one aspect of that question, the right of part rejection, having regard to certain recent authorities in England, which were not brought to my notice at the time of argument, is one of real difficulty. I am not surprised that arbitrators and the public are in doubt as to the law on this point. I will now deal with the main questions as I have formulated them. First of all as regards the right to arbitration, I will deal with this very shortly. In the first instance, the sub-buyers rejected in America. That was on 13th February 1930. This fact was communicated by the buyers to the sellers. It is possible for buyers, in communicating their sub-buyers' rejection to the sellers, so to identify themselves with the action of the sub-buyers as to make it a repudiation by themselves but from the facts stated I do not find that this was the case or that the buyers beyond communicating the fact of the sub-buyer's rejection, purported to reject on their

own behalf. The arbitration apparently purported to be instituted by, the buyers on behalf of the sub-buyer and as I read the special case there was no actual expression of rejection by the buyers until 4th November 1930 (see para 10 of the statement of facts, special case).

7. The form however in which the arbitration was originally instituted is to my mind comparatively unimportant. There is now a dispute between buyers and sellers and the former have the right to have it arbitrated. The arbitration however is purely between buyers and sellers it cannot be regarded as a proceeding to which the sub-buyers are in any sense parties.

8. It follows that nothing done by the sub-buyers is relevant except so far as it can be imputed to or regarded as an act of the buyers. For instance, the rejection of the buyers in America of 13th February 1930, is not in itself a rejection by the buyers. On the other hand the part retention by the sub-buyers must (as will be seen hereafter) be regarded as a part retention by the buyers.

9. Buyers must realize that, in the case of sales between principals the mere communication of their sub-buyers' views, is of itself of no legal value, and [that the omission to express their own refusal of the goods may lead to the loss [of the right to reject. I therefore answer question 1 as follows: The buyers are entitled to have the dispute in question arbitrated. The arbitration is one solely between sellers and buyers. The second question is the question of description. Were the goods other than the goods described in the contract by reason of their peculiar smell? Now, that is partly a question of fact and partly a question of law. In so far as it is a question of fact I must point out first that the quotation from the contract, in para. (2) of the special case is not quite accurate and the form of the contract must be looked at. In the contract the goods are described as follows:

Fort Gloster, Standard Mills Make, quality, weight and size as per margin.

10. Now, in the margin, there is a printed form, and against 'quality' are written in the words 'Hessian cloth.' From this fact and from the wording of para. 15 of the special case, it appears to me that in the trade 'quality' is confined to the nature of the cloth or fabric, and I propose to deal with the matter on this basis. There

remains however the description 'Mills Standard Make.' As to this, I have the findings of the arbitrators in paras. 15 and 16 of the special case. These paragraphs are carefully drafted but as already indicated, they leave it to the Court to decide whether the difference in smell which they found to exist rendered the goods other than 'Standard Mills Make.' That, as 1 way, is very largely a question of fact. Now, the inferences which I draw on this point are as follows: Smell is undoubtedly a quality which can form part of the description of the goods. Obviously, if there was a contract for odourless paraffin oil goods carrying smell would not conform to the description. So, if the standard make of paraffin oil of certain manufacturer X is odourless and there is a sale of X's standard make paraffin oil, paraffin oil manufactured by X but carrying smell would disconform.

11. Smell is of importance or otherwise according to the nature of the goods. In the case of the sale of foodstuffs it is obviously of prime importance; it is of some importance in

Here it appears to me it is plain on the face of this contract that the packing of these particular goods was part of the description of the goods. In these circumstances it is irrelevant to inquire whether it was considered in the trade a matter of importance, or whether it affected the market value of the goods.

12. In order that it may be of assistance to the arbitrators, I propose, first of all, to refer them to the sections of the English and Indian Acts. Under the old Contract Act, curious as it may be, there is no section equivalent to Section 13, English Sale of Goods Act, which lays down that it is a condition to be implied in each contract that the goods shall conform to the description. Sections 117 and 118 do not do so. They merely state the result, namely, that in the case of specified articles on breach of the condition, there is not a right to reject, but only to damages, and that, in the case of unascertained goods, both remedies are available. It appears to me that Section 113 was intended to combine two sections of the English Act. Unfortunately, it adopted a wording which corresponds with neither:

Section 113, Where goods are sold, as being of a certain denomination, there is an implied warranty that they are such goods, as are commercially known by that

denomination.

13. This section appears to combine the elements of Section 13 and Section 14 (2), English Sale of Goods Act. But however this may be, in my opinion the law under the Indian Contract Act is the same as the English law, and the Indian Contract Act has now been amended by introducing the English sections, namely, Section 13 of the English Act, in Section 15 of the Indian Sale of Goods Act, and Section 14 (2), of the English Sale of Goods Act in Section 16 (2) of the Indian Sale of Goods Act. With regard to case law, there does not appear to be any decided case as to smell, but analogous cases are quoted in Benjamin on Sale, p. 647, of which *Bostock & Co. v. Nicholson & Sons* [1904] 1 K.B. 725 may be referred to. The contract there was for B. O. V. goods. It was found on the facts stated or on the evidence that B. O. V. goods, according to the course of a particular manufacture, were goods free from arsenic. At one stage, the manufacturers introduced a new process, which involved the use of arsenic. Goods were supplied manufactured by the new process and bearing traces of arsenic. It was held that the goods supplied were not B. O. V. goods. That is analogous.

14. I find therefore that these goods 'disconformed substantially' [McCardie in *Wimble Sons & Co. v. Lillico & Sons* [1922] 38 T.L.B. 296] from the description in the contract. I therefore answer question (1) in the affirmative and question (2) in the negative. The next question is as to implied condition of fitness. I will deal with this shortly, as I think that, on this point, the facts found by the arbitrators point to a clear conclusion. The sections of the Act, dealing with this matter, are Section 114 of the Contract Act; Section 14 (1) of the: English Sale of Goods Act; and Section 16 (1) of the Indian Sale of Goods Act. The facts on this point are found in paras. 12 and 13 of the special case. In my opinion, although the Indian section of the Contract Act differs slightly in wording from the English section, the law is the same and the rules may be formulated as follows; (i) If the buyers expressly communicate to the sellers the purpose for which the goods are wanted (and the, other conditions are present), then there is an implied condition of fitness. (ii) Apart from express Communication, that knowledge may be imputed to the sellers by reason of the circumstances of the case. (iii) Where the goods may be utilized for

a variety of purposes known to the supplier, then unless he is notified of the particular purpose for which these goods are wanted, there is no condition of fitness that they shall be fit for that particular purpose. For that there is authority in *Priest v. Last* [1903] 2 K. B. 148 relying upon' older authorities, in particular a passage in *Drummond v. Van Ingen* [1887] 12 A.C. 284 and *Jones v. Padgett* [1890] 24 Q. B. D. 650.

15. As I read paras. 12 and 13 of the special case, the circumstances of this case render Rule (iii) above applicable, and there was no communication by the buyer of the particular purpose out of the several purposes for which the goods in question are used. In this connexion, Mr. Pugh has argued two subsidiary points. First, that under Section 115, Contract Act, there is no implied warranty of fitness by reason of the fact that the goods were of a 'well-known kind.' This section however in my opinion, corresponds with Section 14 (1) of the English Act and it relates only to the sale of a specific article of a patented or other well-known kind; see *Gillespie Bros. & Co. v. Cheney Egggar & Co.* [1896] 2 Q. B. 59. Secondly, he also argued that the defect in this case was a 'latent defect' within the meaning of Section 116. A latent defect however referred to in that section, does not mean a defect which cannot be discovered except on detailed investigation by the buyer; it means a defect which could not be known to either party. The section therefore is not applicable to the facts of the present case. I hold therefore there was no condition for fitness in this case, that is to say, fitness for being used for the purpose of packing foodstuffs. I answer question 3 in the negative. Question 4 does not arise. The last question, viz., the question of the loss of the right to reject, presents real difficulty.

16. Speaking generally, there are three classes of circumstances which may cause a loss of the right of rejection by the buyers. All these are present in this case; First of all, acts of ownership such as sub-sale, shipment, sending forward, etc. Second, delay in giving notice of rejection. Third, part retention of goods. In this case the buyers resold, received the goods F. A. S. and, without inspecting, sent forward the goods to America. They did not give notice of rejection until 4th November 1930. They, or their sub-buyers, retained 50 bales. Again, for the assistance of the arbitrators and the public, I propose to give a table of the

sections of the Acts which have a bearing on the question of a loss of the right to reject:

Subject. Indian Contract English Sale of Indian Sale of

Act. Goods Act. Goods Act.

1. Acceptance, .. Section 118 Section 35 .. Section 42.

(3rd clause),

2. Part-retention.. .. Section 11(1)(c) Section 13.

3. Examination.. Section 38(3) Section 34(1).. Section 41.

4. 'Mixed' Goods Section 119 .. Section 30(3).. Section 37(3).

17. I now deal with the facts of this case. 'First of all, the fact of sub-sale, shipment and conveyance, to the sub-buyers. This fact is dealt with in paras. 3 to 5 of the special case. In para. 5, the words 'accepted the goods' are used as also in question 3, but I propose to read, in the place of accepted,' the word 'received,' ho as to leave open the question of whether the goods were 'accepted' in the legal sense. Now obviously, the facts mentioned are acts of ownership within the meaning of Clause (3), Section 118. Therefore apart from other considerations, the goods were 'accepted.' The other considerations are as follows; these acts of ownership will not amount to acceptance, unless the buyers have had a reasonable opportunity for inspection, i. e., if the acts of ownership were exercised before the time and place for inspection had been [reached: see the English Section 34 (1), not so clear in Section 38, Indian Contract Act. Moreover even if the goods were inspected, or the time and place for inspection had been passed, if the goods had some concealed defect which could not have been discovered on inspection, then again the particular act of ownership will not be deemed to be acceptance. The question therefore in this case is; (a) whether for any reason the time and place for inspection was not F. A. S. Calcutta, but on arrival in America? (b) Whether there was any secret defect in the goods not discoverable on ordinary inspection With regard to (a), the normal place for inspection is the place of

delivery. Here *F. A. S. Calcutta. Perkins v. Bell* [1893] 1 Q. B. 193. The place and time may however in certain circumstances, be postponed; *Saunt v. Belcher & Gibbons* [1920] 90 L. J. K. B. 541. I will read two passages from the judgment of Bailhache, J.:

It is argued that, because the defendants knew that the breeze was to go to France, the place for examination and acceptance must be extended from Deptford, the place where the defendants were to deliver the goods, to France, In support of this contention the case of *Vanden Hurk v. Martens* him was cited as showing that where goods are sold by a seller, who has to deliver them at a destination which, to his knowledge, is not their final destination, but only a place from which there is to be a further transit, the place of inspection and acceptance is removed from the place at which the seller has to make his delivery to the place which is the ultimate destination of the goods. But that proposition is not universally true. It depends upon whether the place at which the seller has to deliver the goods, although it is not the ultimate destination of the goods, is a place, where, having regard to the nature of the goods and the way in which they are packed, inspection can reasonably be had.

18. Then again:

In my opinion, in order to postpone the place for inspection it is essential that the two elements already mentioned should be present. First, the original vendor must know that the goods are going to another destination, and secondly, the place at which the original vendor is to deliver the goods must either be unsuitable in itself or the nature or packing of the goods must make inspection at that place unreasonable.

19. As regards the facts of this case, clearly the sellers knew that the goods were going forward to a further destination, but was the second condition fulfilled, namely, were the barges alongside the vessel an unsuitable place for inspection either by reason of the place itself or the nature of the goods, or the manner of packing That again is really a question of fact. As I read the paragraphs of the special case (paras. 3, 4, 5 and part of 11) there is no finding that inspection of these goods F.A.S. in the barges was unreasonable either as to time or place. It

appears to me therefore that, by shipping the goods on board and sending them forward without making such inspection, these goods were accepted. As regards (b) in the same way it does not appear to me that the arbitrators found that there was any secret defect such as existed in *Heilbutt v. Hickson* [1872] 7 C. P. 438 although the wording of para. (11) may be liable to a different construction. Next as regards delay in giving notice of rejection. I will deal with this very shortly. As already indicated, on the facts found, I am unable to regard the rejection of 13th April 1930, by the sub-buyers as a rejection by the buyers. If this view is correct and there was no notice of rejection by the buyers until 4th November 1930, then I think there has been an acceptance of the goods on the ground of mere delay. The last point is the point of part rejection or part retention of the goods. That is the most difficult point in the case. In a divisible contract, that is to say, a contract by instalments or a contract which according to its terms is treated as an instalment contract, it is quite clear that the buyer can reject the quantity under any instalment; see *Rotax Horn* [1910] 2 K.B. 937.

20. The trouble arises in the case of indivisible contracts, and in this case the contract is indivisible. I might say that the difficulty can be got over from a practical point of view by stating in the contract that any particular quantity may be regarded as a separate contract; but in this case it is An indivisible contract. Now, on principle, I should have thought that the answer was obvious, that you could not accept part and reject part. I give a very simple example. I should have thought that you could not go to a caterer and ask for a plain cake, and on getting a seed cake say; 'Well, I can eat half the seed cake and then reject the other half.' It might be that if you cannot see that it is a seed cake from the outside, or from the smell of it, that you may cut it to see what it is. That is your right to examine. I think you must reject the whole cake and you must give notice of such rejection before it gets stale; that is the reasonable time specified in the section. You may say; 'But, that is the case of a whole cake. What about the case of a dozen biscuits ?' Obviously, if the biscuits were in a tin or box, the same principle would apply. Does it make any difference if you go and ask for 12 plain biscuits and they give you 12 aniseed biscuits I should have thought that you could not say 'well, I can eat 6 aniseed biscuits and I will return the others.' As a matter of practical business, of course in the great majority of cases the caterer would be satisfied if you returned

the six which you did not want. He would credit you with the price of six returned or supply another six of the kind ordered. But as a matter of law, you must offer to return the whole lot. That I should have thought was the rule apart from statute. It should be noted that the Contract Act contained no section equivalent to Section 11 (1) (c), Sale of Goods Act. A recent English decision however--also a case stated by arbitrators--has held directly to the contrary, and I therefore propose to deal with the question in detail. I refer to *Barker v. Agius* [1927] 33 Com. Cas 120.

21. Salter, J., as far as he himself was concerned, took the view which I have expressed. In that case, it was a cargo of bricquets, and as a matter of fact the bricquets on deck were according to description; the bricquets in the hold were not; according to description. The buyer took the bricquets on deck, some 25 tons; they rejected the bricquets in the hold, several hundred tons. The arbitrators did not know whether this would deprive the buyers of a right to reject. They stated a special case for the Court, much as the arbitrators have done in this case.

22. Salter, J., was himself very strongly of the opinion that the buyers having accepted the 25 tons could not reject the balance,, but he felt that by reason of certain authorities he was not entitled to follow his own opinion and he finally held that the buyer was entitled to reject part under Section 30 (3), Sale of Goods Act. The three cases he relied upon were as follows: *Moore & Co. v. Handaeur* [1921] 2 K.B.519 *Cunningham v. Munro* [1922] 28 Com. Cas. 42 and *Hardy v. Hillerns & Fowler* [1923] 2 K. B. 490. I purpose to differ from the ruling of Salter, J., in this case and on these grounds. I do not propose to rely upon the difference of wording in Section 119, Contract Act [our section which deals with ' mixed goods '], and the English section [S. 30 (3), Sale of Goods Act], firstly, because I do not believe any difference was intended; secondly, because we now have under the Indian Sale of Goods Act the same section, Section 37 (3). There is, in this case, a difference of fact, namely, in *Barker v. Agius* [1927] 33 Com.Cas 120 the bad goods and the good goods were separated into different portions, the good above deck, the bad below deck. In this case there is no such separation. This is a distinction and I rely upon it by reason of the opinion expressed by Greer, J., quoted below. But mainly I propose to differ from the ruling on principle and because, having carefully looked at the authorities relied upon by Salter, J., I do not think they justify the

abandonment of his real opinion. In *Moore v. Landauer* [1921] 2 K.B.519 what was being dealt with was another proposition altogether. It was argued there that because a portion of the goods were according to contract therefore the buyer must accept that portion. The Court said 'No.' There was much discussion about Section 30 of the English Act (which relates to 'mixed goods') but the decision would surely have been the same if Section 30 had never been mentioned, i. e., under Section 13 of the English Act and upon general principles, namely, that a buyer can reject goods which are not of the description ordered.

23. The second case relied upon, *Cunningham v. Munro* [1922] 28 Com. Cas. 42 was again a case stated by arbitrators, and in that case the buyers had accepted a small portion and , rejected the larger portion. It is true that was held not to deprive them of a right to reject, but the matter was not argued, and there is no ruling on the point of law. The last case, *Hardy v. Hillerns & Fowler* [1923] 2 K. B. 490 in my opinion, so far as the Court of appeal is concerned does not support the proposition at all. On the other hand in the Court below, at the end of his judgment, Greer, J., says this:

Counsel raised another point. He said that the buyers were entitled to reject that part of the goods which had not been sent on to the subpurchasers but had been warehoused in Hull and therefore that they were entitled to damages in respect of the failure of the goods sent on to comply with the contract, and to reject the balance of the goods altogether. With regard to that point it seems to me that it is not open to me to consider it, because I have not been asked by the arbitrators to do so. I shall only answer the question which is raised not expressly but inferentially, by the case, namely, whether the rejection of the whole quantity was or was not a valid rejection. If my view is desired on the point, I may say that, in my judgment, there could not be an acceptance of part and a rejection of the balance; that can be done when a portion of the goods is obviously in accordance with the contract and another part is not, but where the same objection applies to the whole quantity and a portion has been accepted notwithstanding the objection. there cannot be a rejection of a part.

24. I differ from the above view to the effect that there can be part rejection where the good goods can be or are in fact separated from the bad goods. I think even then the buyer loses his right to reject if he accepts part under an indivisible contract. In my opinion, the view expressed by Greer, J., is not supported by the judgment of the Court of Appeal: see passages at pp. 495, 496 and 499. I prefer to follow the statement of the law by Farwell, J., in *Jackson v. Rotax Motor & Cycle Co.* [1910] 2 K.B. 937 and, so far as my opinion is concerned, I commend this to the attention of the arbitrators in preference to the later cases.

Then the next question is, what is the meaning of the contract? If it be an entire contract, then, inasmuch as in this case in May 1909, deliveries were taken and paid for and the goods delivered passed out of the purchasers' hands by-being sold to retail dealers, there is no possibility of rejection of the articles ultimately delivered, because the purchasers have under Section 35, Sale of Goods Act, 1893, accepted and dealt with the earlier consignments. But that very consideration makes it impossible to my mind to regard this as an entire contract.

25. It is my belief that neither Section 30 (3), Sale of Goods Act, nor Section 119, Contract Act, were intended to provide a right to reject part of the goods under an indivisible contract of sale. I therefore answer question (3) as follows: I find that the goods were not only received but were accepted in Calcutta. I hold that they could not be rejected in America and I hold that the only claim of the buyers is in damages. On the 4th question I hold that the goods could not be rejected and that the buyers' only claim lies in damages.