

*Judgement of the Lords of the Judicial Committee  
of the Privy Council on the Appeal of  
Gan Kim Swee and others v. Ralli and others  
from the High Court of Judicature at Fort  
William in Bengal; delivered Tuesday April  
6th, 1886.*

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Present :

LORD BLACKBURN.

LORD HALSBURY.

LORD HOBHOUSE.

SIR RICHARD COUCH.

THEIR Lordships will not trouble you to reply, Mr. Cohen.

This is an appeal from the High Court at Fort William in Bengal, where Judgement 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.

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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 catch 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, catch was generally examined. The correspondence between the Respondents and their New York agency at pages 184, *k.*, *l.*, and *m.* 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. At page 184 *k.*, 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 at page 184 *l.*, in a letter dated June 22, 1880, they say, " As you " are aware, we were all along receiving our " catch 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 at the bottom of the page 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 had improved, and we hope that on " arrival you will find an improvement in our " shipments." Then at page 184 *m.*, line 9:— " We are sorry of not having been aware of the " objectionable form of your contracts for catch,

“ which do not admit of any allowances in case  
 “ of inferiority of quality, as otherwise we would  
 “ have certainly been much more particular in  
 “ restricting our business to the very best marks.  
 “ Being ignorant of this, and seeing our com-  
 “ petitors (who had far better experience than  
 “ ourselves in this article) buy the  $\diamond$  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 at the bottom of the page  
 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 through-  
 out 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 catch 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 catch 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 is 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 are unable to follow the learned Judges in their conclusion as to the inferior quality of the catch. The Judgement apparently depends upon the proposition that the catch in its original manufacture contained an inordinate quantity of sandy or earthy matter; and that the condition of the catch was incapable of being discovered in Calcutta upon the examination on account of the semi-liquid state of the catch. Their Lordships are unable to discover any evidence to justify that finding. If indeed the evidence had established that the liquid state of the catch 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 Judgement 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.