

A

HOTESHWARLAL trading as SUBRAIL & SONS

v.

S.E. TATHEM (FIJI) LTD.

B

[SUPREME COURT, 1973 (Tuivaga J.), 15th June]

Appellate Jurisdiction

Contract—sale of goods—f.o.b. contract—goods of unmerchantable quality on arrival at destination—whether risk falls on buyer or seller.

C

Sale of goods—f.o.b. contract—goods of unmerchantable quality on arrival at destination whether risk falls on buyer or seller.

Onions were sent from Australia to Labasa via Suva and arrived 21 days after despatch. They were wholly rotten on arrival.

D

In a f.o.b. contract relating to perishable goods there is an implied condition that the goods shall be of merchantable quality and the seller also undertakes that the goods shall be in such a state that they can endure the normal journey and be in merchantable condition upon arrival at the destination.

Cases referred to:

Mash and Murrel Ltd. v. Joseph I. Emanuel Ltd. [1961] 1 W.L.R. 862; [1961] 1 All E.R. 485.

Broome v. Pardess Co-operative Society [1939] 3 All E.R. 978.

E

Appeal from a decision of the Magistrate's Court in favour of the respondent.

H. M. Patel for the appellant.

A. Katonivualiku for the respondent.

TUIVAGA J. [15th June 1973.]—

F

This is an appeal from the decision of the Magistrate's Court sitting at Suva whereby the respondent was given judgment against the appellant for \$291.48 for goods sold and delivered and expenses connected therewith.

Five grounds of appeal were formulated and argued before this Court. Except for Ground 4 I can with utmost respect find little or no merit in any of the other grounds. Ground 4 is in the following terms:—

G

“ In the alternative, the learned trial magistrate erred in fact in not holding that the terms of the contract was for the supply of onions in good order and substance at Labasa and the onions did not arrive in such condition.”

H

The essential facts giving rise to this appeal may be shortly stated:—

In or about November 1970 the respondent and the appellant entered into an f.o.b. contract whereby the respondent undertook to sell and the appellant undertook to buy two tons of Australian best quality onions. Pursuant to this contract 100 bags of “ A ” grade medium Queensland brown onions were put on board the ship “ Taiyuan ” in Brisbane and consigned to the appellant in Labasa. The shipment of onions at Brisbane was arranged by S.E. Tatham & Co. Pty. Ltd. of Melbourne, Australia, on behalf of the respondent. On the 16th December, 1970 the ship “ Taiyuan ” left Brisbane and arrived in Suva Wharf on the 22nd December, 1970.

The onions were off-loaded and kept in Shed No. 4 at the Suva Wharf until the 31st December, 1970 when they were re-shipped to Labasa. On the 6th January, 1971 the shipment of onions arrived at Labasa Wharf. On the same day the appellant examined the onions and found them to be rotten. For that reason the appellant refused to accept the onions or pay for them. On the 7th January 1971 the health authorities at Labasa condemned the onions as unfit for human consumption.

The Court is clearly concerned here not with the risk of accidental loss of goods which normally passes upon delivery over the ship's rail but with the risk of deterioration of the goods in transit. In an f.o.b. contract (as in a c.i.f. contract) relating to perishable goods and containing an implied condition that the goods shall be of merchantable quality, the seller undertakes, by further implication, that the goods shall be in such a state that they can endure the normal journey and be in a merchantable condition upon arrival at destination and a reasonable time thereafter, allowing for their normal disposal: see *Mash and Murrell Ltd. v. Joseph I. Emanuel Ltd.* [1961] 1 W.L.R. 862. However, the position is otherwise where the transit or disposal of the goods is unduly delayed: see *Broome v. Pardess Co-operative Society* [1939] 3 All E.R. 978 at 985. Diplock, J. stated this rule in the case of *Mash and Murrell Ltd.* (supra.) thus:—

“ It is the extraordinary deterioration of the goods due to abnormal conditions experienced during transit for which the buyer takes the risk. A necessary and inevitable deterioration during transit which will render them unmerchantable on arrival is normally one for which the seller is liable.”

In the present case the onions were consigned to the appellant in Labasa which was the place of destination under the contract. Applying the principle stated above it is clear that a condition must be implied in the contract that the onions would be merchantable not only at the point of shipment but also during transit until arrival at the place of destination and a reasonable time thereafter allowing for their normal disposal. The learned Magistrate treated the question of merchantability of the onions as one to be determined at the time of shipment and of course he dealt with the case on that footing. In view of the authorities referred to above such approach is clearly erroneous.

The parties were undoubtedly aware that the onions would be landed in Suva and then re-shipped to Labasa on the next available boat. Several days' delay was experienced in Suva before the onions could be shipped to Labasa. However, there is no suggestion that there was anything unusual in such a delay. The respondent in accepting the appellant's order for a consignment of onions must have known that there would be a risk of some delay in re-shipment of onions to Labasa. The respondent has been in the particular business for several years and has previously had occasion to do business with the appellant on a similar basis. In any event the delay of several days is of little consequence in view of the uncontradicted evidence that onions would keep for 3 to 4 months. The onions were wholly rotten upon arrival at Labasa and this was only 21 days after they were shipped from Brisbane. The only inference to be drawn from the decaying state of the onions is that they were not of such quality and fitness as to endure the transit from Brisbane. Indeed the deterioration of the onions appeared to have taken place even before the consignment of onions reached Suva. This seems clear from the evidence of Shiu Narayan (D.W.2), the wharf delivery clerk. He made the point that on 24.12.70 when he saw the 100 bags of onions at the Suva Wharf they were bad. Later in his evidence he described the same onions as very bad. His evidence in this regard was not discredited in cross-examination. In the whole of the circumstances of this case I am satisfied that the respondent was in breach of its under-

