[IN THE COLONIAL COURT OF ADMIRALTY OF CEYLON.]

1940 *Present*: **Soertsz J.**

In re PART CARGO *ex* M.V. "MARO Y".

In the Matter of an Application by E. G. Adamally & Co.

Contract—Sale by tender of cargo seized as prize—Notification calling for tender—Conditions of contract—Remedy of remission of price.

The Marshal of the Prize Court called for tenders for the sale of a cargo of rice, one parcel of which was described as "4,986 bags white rice marked S. F. B. David (I. & II.)". The petitioners offered Rs. 44,874 for it as a separate parcel and they made an alternative offer of Rs. 626,683 for the whole cargo, which was accepted.

In making the alternative offer they valued this particular lot at Rs. 59,810. They complain that this lot of rice was not whole rice as they were led to believe by the description but broken rice for which they would not have offered more than Rs. 24,905.07. They claim a refund of the difference between the two sums, viz., Rs. 24,904.93.

Clause 11 of the notification calling for tenders was as follows:—

> **The purchaser shall be deemed to have satisfied himself as to the condition of the rice and the quantities thereof, and the Marshal does not warrant the quality, the quantity or condition of the said rice. The purchaser shall not be entitled to any remission of the purchase price on any ground whatsoever.**

***Held*, that the above clause took away from the purchaser absolutely the remedy of remission of price claimed by him.**

THIS was an application by the petitioners for the refund of a sum of Rs. 24,905.07 in respect of the purchase amount of Rs. 626,683 paid by them for a cargo of rice *ex* m.v. "Maro Y", sold as prize by the Marshal of the Court. The facts are stated in the headnote.

N. E. Weerasooriya, K.C. (with him *N. M. de Silva*), for petitioners.—The Marshal advertised *inter alia* 4,986 bags of white rice marked S. F. B. David (I. & II.). White rice is in the trade same as whole rice. This was a

sale by description. What was sold was in fact broken rice. This is not what the Marshal advertised to sell. As goods did not correspond to description petitioner is entitled to relief.

Petitioner bought broken rice at one price, whole rice at another. Price chargeable for this lot is that paid for broken rice.

Clause 11 of conditions of sale, namely, that no claim can be made for a remission of price on any ground whatsoever must be read together with earlier part of that clause which refers only to questions of quality, quantity or condition and has no application to this case where there was definitely a vital misdescription.

E. F. N. Gratiaen, for intervenients.—Clause 11 is not capable of a restricted meaning. It is conclusive. *See Larsen v. Sylvester.*[1] Petitioners had right of inspection. In any event they made a profit and are therefore entitled to no relief.

J. W. R. Ilangakoon, K.C., A.-G. (with him *M. F. S. Pulle, C.C.*), for the Crown.—If both the petitioners and the Marshal believed that the rice in question was whole rice then the parties were not *ad idem* and no contractual rights accrued to either party. *Anson 149, 154, Bell v. Lever Bros.*[2]

Assuming that the sale was by description within the meaning of section 14 of the Sale of Goods Ordinance, it cannot be alleged that there was either any misdescription or misrepresentation. The rice was described as white rice and the rice in the 4,896 bags corresponded to the description. Because two of the lots on board the vessel were decribed as broken rice it did not imply any representation by the Marshal that the rice in question was whole rice.

The sale was not, in fact, a sale by description because the terms of clause 11 of the conditions of sale required the buyer to satisfy himself with regard to the quality, quantity and condition of the rice. *Varby v. Whiff*[3]. The buyer cannot be heard to say that he had no opportunity of seeing the goods because an examination of the sketch of the ship showing the storage of the rice would have revealed that the rice was broken rice. See also *Thornet & Fahi v. Burs & Sons*[4].

If the petitioners contend that the description amounted to a misrepresentation then it was innocent misrepresentation which did not give the purchaser any right to damages in view of the fact that he had taken delivery of the rice and disposed of it. *Peek v. Derry*[5], *Hulbert Symons & Co. v. Buckelton*[6].

The correct interpretation of clause 11 of the conditions of sale is that the parties contracted on the basis that there might be errors in the quality, quantity or condition of the goods, and that any such errors should not be the basis of any claim to be made by one party against the other.

N. E. Weerasooria, K.C., in reply.—*Wallis Son & Wells v. Pratt & Haynes*[7] is on all fours with the present case. This view still holds good. Crown is estopped from repudiating mistake.

[1] *77 L. J. 1908 K. B. 993.*
[2] *(1932) A. C. 161.*
[3] *(1900) 1 K. B. 513.*
[4] *(1919) 1 K. B. 486.*
[5] *(1899) 14 A. C. 337.*
[6] *(1913) A. C. 30.*
[7] *(1911) A. C. 394.*

October 14, 1940. SOERTSZ J.—

This is an application by the petitioners for a refund to them, of the sum of Rs. 24,905.07 out of the sum of Rs. 626,683 paid by them for a cargo of rice sold as prize by the Marshal of this Court in pursuance of orders given to him on July 26, and August 22, 1940. The cargo had been seized on board the m.v. "Maro Y".

The petitioners allege that in the notification published by the Marshal calling for tenders, there was a description of the cargo offered for sale, and that one parcel thereof was described as "4,986 bags white rice marked S. F. B. David (I. & II.)". They say that influenced by this description, they offered Rs. 44,874 for it as a single and separate parcel, fixing their offer at Rs. 9 a bag, and that they made the alternative offer of Rs. 626,683 for the whole cargo because that was the figure that resulted from an addition of eleven per centum to the aggregate of the amounts offered by them when they made their tender for the cargo lot by lot. In making that alternative offer they say they valued this particular lot at Rs. 59,810. They complain that, in fact, this lot of rice was not *whole* rice as they were led to believe, but *broken* rice for which they would have offered no more than Rs. 24,905.07. They claim a refund of the difference between these sums, which appears to be Rs. 24,904.93 and not Rs. 24,905.07 as claimed by the petitioners. The difference, however, is negligible.

The petitioners' case is that, according to the usage of the market, when the word "broken" is not used to qualify the word "rice", "whole rice" is always meant and understood. "White rice", they say, means white *whole rice*, and is never understood to mean white broken rice.

Stated shortly, that is the petitioners' case. But for the view I take of clause 11 in the notification calling for tenders, the petitioners' application raises many questions of great difficulty. But the interpretation I put on that clause absolves me from the necessity of considering most of those questions. For instance, I do not think I need pause to examine the bearing on the petitioners' claim of the fact that although the description at the foot of the notification calling for tenders shows this lot as "bags white rice" as distinguished from other items shown as "bags broken rice", the tender form itself, on which the petitioners made their offer describes all the lots as "bags rice" without any discrimination between "rice" and "broken rice". Nor do I think it necessary to consider the legal effect of the fact that the petitioners' offer that was accepted by the Marshal was *the alternative offer for the whole cargo*, or the legal effect of the fact that in the tender form on which the petitioners made that offer they indicated to the Marshal that they were making their total offer on a certain computation of rates per bag of whole and broken rice. Again, I do not think I need consider the question whether the petitioners are entitled in this case, to ask for a remission of price, inasmuch as they admit that they made a profit on the whole transaction, as well as on the sale of this particular lot. I will therefore confine myself to a consideration of the bearing of clause 11 on the main contention put forward by the petitioners' Counsel, namely, that where goods are sold by description,

it is a *condition* of the sale that the vendors shall deliver to the purchaser goods of that description and no other. He relied on the opinion given by the House of Lords in the case of *Wallis Son & Wells v. Pratt & Haynes*[1] that where the defendant in that case sold seed to the appellants as "Common English Sainfoin" on the condition that the sellers give no warranty expressed or implied as to growth, description or any other matter, and delivered "Giant Sainfoin", a different and inferior seed which the appellants accepted believing it to be "Common English Sainfoin" and resold it as such, there was a breach of a *condition* of the contract which entitled the buyer to treat the breach of condition as a breach of warranty and to sue for damages. It was stated in that case that but for the fact that the buyers had accepted and dealt with the goods, they were entitled to repudiate the contract on the ground that there had been a breach of a condition upon which their obligation under the contract rested.

Assuming that the evidence given by the first petitioner before me, establishes that "broken rice" is, in the usage and language of the trade, different from and inferior to "rice", and applying the principle in the case just referred to, it would appear that there was a breach of a condition. Such a breach entitles the party affected by it to resort to certain remedies which the law places at his option. He may in the appropriate cases, ask for a rescission of the contract and/or damages, or he may waive the condition and ask for damages, or he may ask for a reduction of the purchase price.

In this instance, the petitioners had sold the goods in question and so put it beyond their powers to ask for a rescission of the sale in respect of this lot although by his letter dated September 12, 1940, the Marshal suggested to them that that was the course they should adopt. I should wish to say here that I must not be understood as indicating any opinion on the question whether the petitioner, are or are entitled to a rescission of the sale in respect of a particular lot of the cargo where they had made their offer for and purchased the whole cargo. All I mean to say is that the remedy of rescission if it was available in law and whatever its proper form in a case like this, was not in the power of the petitioners because they had accepted these goods and disposed of them to third parties. The petitioners do not make their claim on the footing of an action for damages. Many difficulties stand in the way of their doing that, but it is not necessary to enter upon an examination of those difficulties. It is sufficient to say that their Counsel stated repeatedly that this was not a claim for damages. Indeed, I do not see how the petitioners could have asked for damages, because the misrepresentation complained of was, they concede, an innocent misrepresentation. The petitioners, therefore, ask for a refund of a part of the purchase price. In other words they ask for a remission of the price paid by them.

It is at this stage that clause 11 of the notification A arises for examination. It is in these terms:—"The purchaser shall be deemed to have satisfied himself as to the condition of the rice and the quantities thereof, and the Marshal does not warrant the quality, quantity or condition of the said rice. The purchaser shall not be entitled to any remission of the

[1] *(1911) A. C. 394.*

purchase price *on any ground whatsoever*". For the purpose of interpreting this clause, I will assume that the difference between "rice" and "broken rice" is an essential, and not a qualitative difference, and that, consequently, it is not open to the vendors to plead the stipulation that he did not warrant the quality of the rice. In other words, I will treat the failure to give "whole" rice as a breach of a condition of the contract. I have already pointed out that the petitioners have not treated this breach of condition as a breach of warranty and have not framed their claim as one for damages on that basis. Their claim is pure and simple, a claim for remission of the price, and that claim is, in my opinion, defeated by the last sentence in clause 11 by which they bound themselves not to claim remission of the purchase price *upon any ground whatsoever*. Counsel for the petitioners contended that that part of clause 11 only debar the petitioner from asking for a remission of price on the ground of defect or inadequacy in quality, quantity or condition of the rice, and has no reference to a breach of a condition of the contract such as, they say, occured when things of one kind were contracted for purchase and sale and things of another kind were delivered. I am clearly of opinion that such a restriction cannot be read into that part of clause 11. The words "*upon any ground whatsoever*" are very wide. Indeed, there do not appear to be conceivable limits to the word "ground" with the amplification given to it by the addition of the words "any" and "whatsoever". Mathematically expressed, the effect of the words "any" and whatsoever" is to raise the value of the word "ground" to the highest power. Authority supports that view. In the case of *Larsen v. Lyloester & Co.*[1], the House of Lords considered the meaning of the phrase "hindrances of what kind soever" in the context "the parties hereto mutually exempt each other from all liability arising from frosts, floods, strikes, lockouts of workmen, disputes between master and men and any other unavoidable accidents or hindrances of any kind whatsoever beyond their control preventing or delaying the working, loading or shipping of the said cargo". A delay occurred inconsequence of a block of many steamers waiting for their turns for a berth. The shipowners of the particular ship claimed demurrage and when the charterers set up a claim for exemption by virtue of the clause cited above, the contention for the shipowners was that "hindrances of what kind soever" must be construed in accordance with the *ejusdem generis* rule. The House of Lords rejected that contention. Lord Loreburn said:—
"The Counsel for the appellant argued that the hindrance was not within the words of the Charter, and he invoked the doctrine of *ejusdem generis*. The language used is "any other unavoidable accidents or hindrances of any kind whatsoever beyond their control". Those words follow certain particular specified hindrances which it is impossible to put into one and the same *genus*. It is sufficient for us to say that in *Jersey v. Neath Poor Law Union*[2], Lord Justice Fry referred to the words of a similar kind and indicated what I think is perfectly true, namely, that you have to regard the intention of the parties as expressed in their language and that words such as these "hindrance of what kind soever" are often

[1] *(1908) 77 L. J. K. B. 993.* [2] *58 L. J. Q. B. 573.*

intended to mean, as I am sure they are in this case intended to mean, exactly what they say. It is impossible to lay down any general rules for the application of the doctrine of *ejusdem generis* but I agree with Lord Justice Fry that there may be a great danger in loosely applying it. It may result, as he says, "in giving not the true effect to the contracts of parties, but a narrower effect than they were intended to have".

I have quoted this part of Lord Louburn's opinion at length because I think it is peculiarly apposite not only to the literal meaning of the words I am considering here, namely, "any ground whatsoever", but also to the matter of giving true effect to the contract of parties as that contract emerges on an examination of the circumstances in which it came into existence.

Those circumstances are that the Marshal has been given directions to sell this cargo of rice as prize. The rice was lying in the *hold* of the ship in several hatches or compartments stacked layer upon layer. All the information the Marshal had in regard to this rice was such as the ship's papers gave him. This fact must have been clear to the petitioners when the first petitioner went on board the vessel, as he admits he did, to inspect the cargo. He states in paragraph 4 of his affidavit of September 23, 1940, "the cargo was lying in the hold of the ship in several hatches or compartments, and the lot in question was at the bottom of the hatch No. 5 with several other lots placed above it rendering it impossible for the purchaser to draw samples or inspect the said lot of rice until such time as the lots of rice above this lot in the hatch had been unloaded". In this state of things it must have been apparent to the petitioners that the Marshal was describing the cargo to the best of his knowledge and *belief* in the notification he published, and they would, therefore, understand the Marshal acting with circumspection and with all the precaution he took in notifying the terms of the offer.

In cluse 15 he announced that inspection of the cargo could be arranged for and he took care to say in so many words that "the purchaser shall be deemed to have satisfied himself as to the condition of the rice and the quantities thereof, and the Marshal does not warrant the quality, quantity or condition of the said rice", and this declaration ought to have put the petitioners on inquiry. If actual inspection was impossible or impracticable, they had the opportunity of examining all the relevant papers relating to the cargo. Such an inspection would have disclosed the fact that at least in one document namely the Stowage Plan this lot of rice is described as "broken rice". If the petitioners had inspected *all* the relevant papers the situation that confronted them would have been that this very lot of rice was described as "white rice" in the notification calling for tenders, as "rice" in the tender form and as "broken rice" in the Stowage Plan. It is note worthy that in the tender form, even those lots which contained rice correctly described as "broken rice" in the notification, are described only as lots of "rice" without any qualification. If the petitioners had sought all the information that they could have obtained, these facts would have been before them and with those facts to guide them, they could have made such a tender as they thought fit. The fact that they did not choose to adopt that course does not entitle them to

wring their hands now because if things had turned out according to their sanguine expectations their profits would have been considerably greater than the substantial profit they actually made. To my mind, it is a conclusive *defence to* the petitioners' claim that they agreed to the stipulation made by the Marshal that " the purchaser shall not be entitled to any remission of the purchase price on *any ground whatsoever*".

The legal implication, as I understand it, of this stipulation is that although it leaves open to the purchasers the remedies of rescission and damages for breach of a condition of the contract if they are able to frame actions to obtain such relief, it takes away from them completely and absolutely the remedy of remission of price. They may not ask for remission of price on any ground whatsoever.

In regard to what was said about the hardship to the petitioners, even if I were satisfied that they were not shedding crocodile tears, I can see no harshness whatever in such a stipulation as was made by the Marshal in clause 11 of the notification. One must bear in mind that this transaction, properly conceived, has war for its background, and the opportunity for leisurely negotiation with which one is familiar in time of peace, if it exists at all, exists in mearge measure. Although the transaction takes place far from the battlefield, there is inherent in it every atom of the urgency of the *emptio ab hasta* of ancient times, and the seller would naturally take the precaution of throwing the risk of any mistake or matter of doubt on the buyer.

In my opinion the application fails and must be refused.

In regard to costs, I think the proper order to make is that the petitioners shall pay the costs of the Attorney-General. The costs of the parties noticed will abide the result of their pending claims. As many of them as succeed in making good their claims shall have their costs of this inquiry paid to them by the petitioners.

Application refused.