# Sorabji Hormusha Joshi And Co. vs V.M. Ismail And Anr. on 18 November, 1959

## Equivalent citations: AIR1960MAD520, AIR 1960 MADRAS 520

JUDGMENT

Ramaswami, J.

(1) This appeal is directed against the decree and judgment of our learned brother Basheer Ahmed Sayeed, in C. C. C. A. No. 9 of 1953, reversing the decree and judgment of the learned City Civil Judge, Madras, in O. S. No. 126 of 1949.

(2) The defendants Sorabji Hormusha Joshi and Co., (referred to in this judgment as Joshi and Co.) are carrying on business in Bombay, from 1946. They import dried sheep skins from East Africa. The plaintiffs, Ismail and Ibrahim, are brothers doing business in hides and skins in Vaniyambadi in North Arcot District. The second plaintiff Ibrahim stays and does business in Bombay. The plaintiffs had two transactions with the defendants and of which we are concerned only with the transaction of October 1947. In October 1947 the second plaintiff met the defendants and learnt from them that a consignment of dried sheep skins from East Africa had arrived in Madras and was lying in the Madras harbour.

The second plaintiff looked into the import invoices with the defendants showing their stock at Madras of East African raw dried sheep skins, in three lots, two of 6 bales each and one of 5 bales, bearing particular numbers and in all 17 bales lying in the Madras harbour. It was agreed that on payment of the price by the plaintiff in Bombay, the plaintiffs should get delivery orders and clear the goods in the Madras harbour through M/s. Maswood and Co., Madras. The lots purchased are described as sheep skins, shade dried, U. K. quality, comprising of Choice I and Choice II.

This transaction was completed on 18-11-1947 and delivery orders to Madras Maswood and Co., for these 17 bales were handed over to the second plaintiff as against cash payment of Rs. 3900 plus 3600 plus 2750 totalling Rs. 10,250. The second plaintiff says that he went to the Madras harbour to take delivery of the goods through M/s. Maswood and Co., and found that some of the bales appeared on the face of them to have been water-damaged. One Mr. Marfatia is said to have been sent for according to the second plaintiff and he is said to have assured the latter that he would represent the matter to the defendant firm and do the needful for making a settlement. In the meantime Mr. Marfatia is said to have desired to be informed of the extent of damage and the quantity which would have to be rejected and taken back. Then the second plaintiff had engaged Ms/. Maswood and Co., to despatch the bales by train to Vaniyambadi on 25-11-1947 from the S. R. V. S. godown, where they had been taken on 22-11-1947. The goods reached Vaniyambadi within a

week thereafter.

At Vaniyambadi the goods were unloaded and taken to the Katheeb Tanning Factory, owned by P.W. 6, the local Municipal Chairman. This was in the beginning of December 1947. Subsequently on an unspecified date three bales, of which one was of Choice No. I and the other two were of Choice No. II, were said to have been opened. The first two bales were not water-damaged but some of the skins were worm-eaten and had quality skins. In the water-damaged bale, some skins had only become bad on account of water-damage but there were no worms in any of the bales, vide the evidence of the first plaintiff as P.W. 3 (p. 49 of the printed papers).

But the first letter to the first plaintiff Ex. A-6 does not refer to the opening of these three bales but merely mentions 'Only after receipt of the report of this person (Marfatia), Joshi will come for some settlement as written yesterday'. The next letter Ex. A-8 dated 23-12-1947 beyond stating that the purchasers had some complaints to make to this Joshi, does not specify what the matters was even as regards the three bales opened or anything about the other 14 bales. In fact Joshi's lieutenant one Khan seems to have told the first plaintiff to send a complaint and that if that was done they would look into the matter. The second plaintiff as a matter of fact sent a telegram on 24-12-1947 'Joshi says--given complaints in writing--he will consider--otherwise colour goods--report result'. In fact for the first time on 12-1-1948 a letter is written by a lawyer of Madras to the defendant firm (Ex. B-4).

In that letter reference is made to the three bales which had been opened. The lawyer informs the defendants that it was found to the first plaintiff's surprise that in addition to the damaged condition caused by water, the skins to a considerable extent were worm-eaten and were for all practical purposes as good as worthless. The lawyer's notice requests the defendants to send an agent to be present at the opening of the other 14 bales at Vaniyambadi and arrive at an amicable settlement.

Then after some correspondence on 11-2-1948 the Solicitors of the defendants in Bombay intimated the non-liability of the defendants and saying that the purchase was made by the plaintiffs in their own risk and that the matter became entirely closed on the delivery orders being ordered to M/s. Maswood and Co., and that Marfatia was not the representative of the defendant company but only their salesman: vide Ex. B-8. Then steps had been taken by the plaintiffs to notify the defendant company that they were going to have a survey made at Vaniyambadi.

The defendant firm without prejudice to their contentions were prepared to send their representative to Vaniyambadi to watch the survey. Subsequently a survey had been made on 20-3-48 by one Obaidulla Sahib of M/s. Kothawal Mohamad Obaidulla Sahib and Sons, Tanners, Vaniyambadi, who seems to have been singularly unfitted for doing this survey. It is enough to extract the following admissions in his evidence as P.W. 4:

> "I have not imported or dealt with African skins. I do not know anything about the price or the market of African skins at any time..... This is the first time that I surveyed..... I do not know the condition or nature of the skins in the eleven bales..... I cannot say whether the skins of the eleven unopened bales were of the

> 'U. K. quality' or of any other quality..... I have no experience of African skins nor do I know anything about their classification. I conducted the survey with my experience in dealing with Indian skins..... There was no damage to the other eleven bales."

This surveyor's report dated 14-4-48 and got prepared by a third party was to the effect that the three bales opened by him were not of merchantable quality. In regard to the three bales opened already by the plaintiffs the skins of one bale had been tanned and they were found according to them as not being high grade skins but torn and with dents. The plaintiffs therefore are stated to have sold on 22-7-1948 the skins purchased by them in public auction which fetched Rs. 6,050/-. It is in these circumstances that the plaintiffs filed the suit out of which this appeal arises for recovery by way of damages of Rs 5,404-9-3.

(3) The defendants raised various contentions which are reflected in the following issues:

> 1. Did the defendants commit breach of the condition and warranty regarding the quality of the goods supplied and if so, are the plaintiffs entitled to damages for the same?
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> 2. Whether the plaintiffs are estopped from questioning the quality of the goods supplied for the reasons stated in paragraph 5 of the written statement?
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> 3. To any and what damages are the plaintiffs entitled?
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> 4. Is the first plaintiff a necessary party to the suit and entitled to the reliefs?
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> 5. To any and what other relief or reliefs are the plaintiffs entitled?

(4) Before the learned City Civil Judge the plaintiffs 1 and 2 examined themselves as P. Ws. 3 and 1 respectively. They also examined the Manager of M/s. Maswood and Co., as P.W. 2, the surveyor as P.W. 4, a so-called leather expert as P.W. 5 and the owner of the Katheeb Tanning Factory as P.W. 6. The witnesses on the side of the defendants, consisting of the defendant and two other leather experts in Bombay who had dealt with East African skins, were examined on commission in Bombay.

The learned trial Judge came to the conclusion that the plaintiffs had not made out their case for damages against the defendant company and therefore dismissed the plaintiffs' suit. On appeal our learned brother came to an opposite conclusion and decreed the plaintiff's claim covering all the 17 bales. Hence, this Letters Patent Appeal by the defeated defendant company.

(5) On a review of the entire circumstances of the case, we have come to the same conclusion as the learned trial Judge and I shall deal with the claim of the plaintiffs from the point of view that the plaintiffs would be entitled to no damages on the ground that it has not been shown that the goods bought by description were not of merchantable quality as described in the sold-notes; and secondly

on the facts of this case. The buyer by description had the opportunity to inspect goods and reject them and did not avail himself of the opportunity and reject them within reasonable time and therefore the seller was absolved from responsibility in regard to defects which such examination might have revealed with the result that this claim for damages will not lie.

(6) The law covering both these points is the same in England, U. S. A. and India.

(7) Before the passing of the Indian Contract Act, 1872, the rules of English law, including those in the Statute of Frauds were applied within the limits of the Presidency Towns. The 'sales' chapter of the Indian Contract Act represented generally the English law on the subject as it then stood, except in one or tow important particulars e. g., market-overt. The Indian Contract Act only laid down simple and elementary rules. It was not exhaustive and on various occasions the Courts had to import analogies from the decisions of the English Courts.

In 1926-27 an exhaustive examination of the case law bearing on certain portions of the Indian Contract Act was made and in 1928 a draft bill was prepared under the aegis of the late D. F. Mulla who was then the Law Member of the Government of India and the present Sale of Goods Act (Act III of 1930) was enacted. It is practically based upon the English Sale of Goods Act, 1893, which had stood the test of time and had been adopted in most of the Colonies and Overseas Dominions and most of the American States re-enacted there as the Uniform Sales Act (America).

(8) The sale of Goods Act has been the subject-matter of extensive literature too numerous to be noted here. I have derived assistance in regard to the subject-matter of controversy from the standard treatises viz., Schmithhoff's Sale of Goods (1951) in regard to English law, Williston's Law Governing Sales of Goods for American Law and for our Act III of 1930, Rameshwar Dial's. The Indian Sale of Goods Act (1953), Pollock and Mulla's Indian Sale of Goods and Partnership Act (1950) and G. N. Sinha's Sale of Goods Act (India and Pakistan), 1957 Edn.

(9) The Civil Law holds that warranty enters into and forms an integral part of the contract of sale itself. According to common law the obligation is derived from the general doctrine which holds vendor responsible for every species of deception. Hoe v. Sanbron, 21 N. Y. 552(559). An implied warranty, instead of being a part of the contract to which it attaches itself, is the law's contribution to the welfare of the parties beyond the terms of the contract itself.

It is a legal fiction invented to prevent the seller from loading a fraud on to a contract, which by its terms will not be able to combat the fraud: S. F. Bowser Co. Inc. v. Neccormack, (1930) 230 N. Y. App. Division Rep. 303.

> "An implied warranty is not one of the contractual elements of an agreement. It is not one of the essential elements to be stated in the contract nor does its application or effective existence rest or depend upon the affirmative intention of the parties. It is a child of the law. Because of the acts of the parties, it is imposed by the law. It arises independently and outside of the contract. The law annexes it to the contract. It writes it, by implication, into contract which the parties have made. Its origin and use

> are to promote high standards in business and to discourage sharp dealings. It rests upon the principle that honesty is the best policy and it contemplates business transactions in which both parties may profit. The doctrine of implied warranty should be extended rather than restricted": Bekkevold v. Potts, 1927-173 Minn. 87 (SC), Chhedilal Harinivas v. Brit-over Ltd., 52 Cal WN 45.
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> (10) In early, times when the economic conditions were as primitive as society itself, most transactions of sale took place in an open market where the buyer and seller came face to face, the buyer inspected the goods, selected them, paid the price and took the article away. The seller was not responsible for anything; that was the rule of caveat emptor in its barest and simplest form. As conditions of society and commerce became more complex as time passed, the Judges found the rule unsuitable because of its resulting in hardship and injustice. To prevent these results they found or invented exceptions to the general rule to meet particular cases.

The history of the true at common law in England is in fact a process of the evolution of these exceptions. Starting with the rule which implied no condition and warranty on the seller's part on any part of the transaction they, the judges to meet the changed circumstances, modified the law and developed a series of conditions and warranties implied by law in a contract. In 1893 the law as to sale of goods was codified in England.

(11) An authoritative exposition of the common law before the English Sales of Goods Act was given by Mellor, K., in Jones v. Just, (1868) 3 QB 197.

(12) Section 15 of the Act III of 1930 covers sale by description as in the case here where the description of the goods is the basis of the contract and it is essential to their identity as the subject matter of the contract, the case is one of sale of goods by description. In other words, the buyer must have contracted for them as described so that the falsity of the description made the goods substantially different things from those that were described so as to constitute a failure of consideration. Section 16 enacts that where goods are bought by description as in this case there is an implied condition that the goods shall be of merchantable quality.

(13) What is meant by the word 'merchantable?

(14) The Act does not give any definition, yet, the word has by long use become a term of art in commercial law. merchantable quality means that the goods comply with the description in the contract so that to a purchaser buying goods of that description the goods would be good tender: Summer Permain and Co., Ltd. v. Webb and Co., Ltd., (1922) 1 KB 55. Goods are of merchantable quality if they are of such a quality and in such condition that a reasonable man, acting reasonably, would, after a full examination, accept them under the circumstances of the case in performance of the offer to buy them, whether he buys for his own use or to sell again: Per Farwell, L. J., in Bristol Tramway Co. v. Fiat Motors Ltd., (1910) 2 KB 831 at p. 841.

It is relative term, the test being, are the goods merchantable under the particular description in the contract? Aga Mirza Nasarali Khoyee and Co. v. Gordon Woodroffe and Co. (Mad), Ltd., AIR 1937 Mad 40: 1936 Mad WN 970: 44 Mad LW 676: 1937-2 Mal LJ 131; Malli and Co. v. V. A. R. Firm, AIR 1923 Mad 252: 16 Mad LW 145: 43 Mad LJ 208: 1922 Mad WN 468. In re Baldeo Prasad, (S) : Hasanbhoy Jetha v. New India Corporation Ltd., (S) (Sale of skins stipulated to be fair average quality). The condition is not that the goods shall be merchantable, but that they shall be of merchantable quality and it is more restricted than it would have been, if it had required that the goods should be merchantable.

(15) Goods cease to be merchantable because of defects rendering them unfit for the purpose for which they are usually sold or merchantability is fulfilled when the goods do not differ from the normal quality of the described goods including under the term quality the state or condition as required by the contract. The goods should be immediately saleable under the description by which they are known in the market: Grant v. Australian Knitting Mills, (1936) AC 85 at p. 100; (1922) 1 KB 55; Bajrangi Parshad v. Provincial Govt. C. P. and Berar, AIR 1951 Nag 301. The seller is bound by an implied condition that the goods are free from such defects.

The proviso to S. 16 of the Act, however, divides all such defects into two kinds, often called patent and latent defects. Patent defects are those which can be found on examination by a person of ordinary prudence with the exercise of due care and attention. Latent defects are those which cannot be discovered on such examination. There is an implied condition on the seller's part that the goods are free from latent defects: Mc. Kenzie and Co. (1919) Ltd. v. Nagendranath, ILR (1946) 1 Cal 225: 50 Cal WN 213. This condition exists in regard to patent defects as well, if there has been no examination of the goods by the buyer.

If there has been one, the seller's responsibility for them ceases and passes to the buyer. Whether a defect is latent or patent will depend on the nature of the goods and the nature of the defects and the extent of examination needed for its discovery. It is a question of fact in each case. For a case where a latent defect rendered the goods unmerchantable even though there was a thorough examination by the buyer's experts, see AIR 1937 Mad 40.

(16) At common law an opportunity to the buyer to inspect goods, whether availed of or not, was sufficient to absolve the seller from responsibility in regard to defects which such examination might have revealed. Under the Act an actual examination is necessary. (S. 41). But if the buyer's examination of the goods is superficial, the implied condition as regards defects which such examination, if more careful and thorough, would have revealed, is destroyed: Thornett and Fehr. v. Beers and Sons, (1919) 1 KB 486.

There the defendants, who were desirous of purchasing a quality of vegetable ghee from plaintiffs who dealt in that commodity, went, by arrangement with plaintiffs, to the warehouse where the ghee, which was in barrels, was stored, for the purpose of inspecting it. Every facility was offered to defendants for inspection; but, being pressed for time, they did not have any of the barrels opened, and merely looked at the outside of the barrels. Defendants purchased the ghee, and after it was delivered they alleged that it was not of merchantable quality. It was held that the defendants had

examined the goods and consequently there was no implied condition that the ghee was to be of merchantable quality.

(17) A mere receipt of goods does not amount to acceptance and before the buyer can be called upon to accept the goods, he can claim a reasonable opportunity of examining the goods. That opportunity is to be given by the seller on request by the buyer. Whether the opportunity offered by the seller for the examination of the goods was reasonable would, like any other question of fact, depend on the circumstances of each case. It would also depend on the terms of the contract.

(18) The seller's duty is to afford the buyer a reasonable opportunity; it is up to the buyer to avail of that opportunity and if he fails to avail of it or if he avails of it in an incomplete or perfunctory manner the seller cannot be held liable: (1919) 1 KB 486; Bragg v. Villa Nova, (1923) 40 TLR 154. Peer Mohammad Rowther v. Dalooram Jayanarayan, AIR 1919 Mad 728; Muthukrishna Reddiar and Sons v. Madhavji Devichand and Co. Ltd., . The opportunity is to be afforded only on request from the buyer. Where no such request is made it may be presumed that the buyer has dispensed with this requirement, i. e, has chosen to waive. Waiver may be implied from other acts or conduct of the buyer as well; National Traders v. Hindustan Soap Works, .

The inspection and rejection must be without practicable delay. The trial Court has rightly relied on Mithan Lal v. Suraj Parshad, AIR 1932 Lah 52 and Province of Madras v. Galia Kotwalla and Co., Ltd., 1945-2 Mad LJ 418: (AIR 1946 Mad 69, for the proposition that avoidable and inordinate delay would disentitle the plaintiffs from maintaining any action for damages.

(19) Prima facie the place and the time of examination are the time and place of delivery: Perkins v. Bell, (1893) 1 QB 193; Nagar Dass v. Vel Mohammed, AIR 1930 Bom 249; In re Andrew Yule and Co., AIR 1932 Cal 879. The general rule may, however, be replaced by the circumstances of the particular contract: Saunt v. Belcher and Gibbons Ltd., (1920) 26 Com Cas 115. The right of inspection in a c. i. f., contract does not exist at the place or time of delivery. The buyer is bound to make payment against the tender of goods; his right of examining the goods and to reject them if they are not in conformity with the contract, however, remains even after payment and is exercised on actual delivery of goods: Polenghi Bros. v. Dried Milk Co., (1905) 92 LT 64; Ram Dayal Ram Narain v. Bhairo Bux, AIR 1924 Pat 240; Mahadev Ganga Prasad v. Gourishankar, .

The place of delivery is the proper place of inspection: Hilebutt v. Hickson, (1872) 7 C. P. 438. But the circumstances of the case may show that some other place is the appropriate place. Where the goods to the knowledge of the seller are purchased by the buyer to deliver for further destination and the nature of goods and the way in which they are packed make it unreasonable to inspect immediately on delivery, the right to reject will be extended to the later date: Van Den Hurk v. Martons and Co. Ltd., (1920) 1 KB 850; Hardy and Co. v. Hillerns and Fowler, (1923) 2 KB 490.

(20) Section 41 of the Act gives the buyer a right to inspection and unless he has had an opportunity of exercising that right, he is not deemed to have accepted the goods. In other words, he has the right to reject them. Where the contract is for specific goods, the property in which has passed to the buyer, the right of rejection is lost: S. 13(2). The right to reject is also lost where the buyer has

accepted the goods and that acceptance may take place before or after the examination of the goods. The right of examination is, therefore, closely connected with the acceptance of the goods and the passing of property.

The parties may intend whether a right of examination is to be treated as a condition precedent qualifying the buyer's obligation either to take title or to pay the price or a condition subsequent authorising the return of the goods and the recovery of the price, if title to the goods has passed, or the price has been paid: see 3 Williston and Sales, S. 471.

(21) If it is a condition precedent, the goods must be merchantable on arrival at destination in order to conform to the contract and the risk of deterioration and the loss would be wholly upon the seller. Where it is treated as a condition subsequent, the risk of deterioration would rest upon the buyer. His right of examination would be there, but it would be only for the purpose of determining whether at the time the title passed, that is to say, at the time the sale was made or at the time the delivery was made to the carrier, the goods conformed to the contract and were merchantable.

(22) Closely associated with this question is the distinction between assent to delivery to be operative as a transfer of property and acceptance of goods after examination under S. 41. There may assent so as to pass the property constantly with the examination goods later on and rejection, if necessary.

> "The defendant insists that the goods are not appropriated to a contract with the assent of the buyer until the buyer has so manifested his approval of their quality as to preclude him thereafter from giving notice of rescission. In that view, the passage of title may be indefinitely postponed and reasonable time within which a buyer is privileged to return goods found to be defective will vary with many circumstances, as, for instance, the nature of the defects, whether patent or concealed. We think assent to appropriation is something more immediate and certain. It does not signify an acceptance so definitive and deliberate as to bar rescission for defect". 3 Williston on Sales, S. 482.
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> (22A) It signifies the buyer's willingness to take as his own the goods appropriated by the seller, subject to rescission and return if defects are afterwards discovered. The cases are many in which goods are shipped by carriers who receive them for the buyers. An order for such shipment is an assent that the goods be appropriated by the seller, and title passes when they are delivered to the carrier 'in a deliverable state': Ramdas v. Firm Laxmichand Kashiram, AIR 1955 NUC (Raj) 133.

This does not mean that the buyer is helpless if the goods when they reach their destination are found to be defective. His assent to the appropriation of goods in a deliverable state is not assent to the appropriation of any goods, though of a kind or a quality at variance with the contract. On the other hand, his assent will stand, and may be retracted, if the variance is pretended. There is no distinction in this respect between delivery to the buyer through a carrier or other intermediary and delivery to the buyer personally. The question in each case is whether delivery is made in such

circumstances as to indicate assent to the appropriation by the seller.

(23) Delivery to be operative as a transfer of the property must be assented to by the buyer: 3 Williston on Sales, S. 472. The seller may not force the goods upon buyer unwilling to receive them. The buyer, when delivery is tendered, may refuse to assent to it at all (taking of course the risk of liability for damages), or may assent subject to the condition that he be allowed to see the goods before delivery or appropriation shall be deemed to be complete.

(24) There is difference in other words, between inspection following delivery, and inspection to determine whether delivery shall be permitted. Until that determination is made, the transaction is in fieri. Delivery remains inchoate while the buyer refuses to treat it as perfected. Even taking the goods in, may be so qualified by notice or agreement that possession will not operate as an expression of assent.

The buyer is entitled examine the goods to decide whether he will become owner, and until the examination is completed or waived he is under no obligation to accept the goods: 3 Williston on Sales, S. 472. The examination is waived, however, in so far as it is a condition precedent to the transfer of the property, when there is an assent to delivery without reservation or condition accompanying the receipt and qualifying or postponing or neutralizing its effect: Henry Glass and Co. v. Misroch, New York Court of Appeals, (1925) 239 N. Y. Rep 475.

(25-26) Bearing these principles in mind, if we examine the facts of this case, we find that the plaintiffs have not shown that the goods supplied to them by the defendants were not of merchantable quality as described in the sold-notes. (His Lordship reviewed the evidence and proceeded):

> (27) To sum up, what the plaintiffs purchased were not selections but rejections of East African sheep skins of low value in comparison to the highly priced selections viz., of slaughtered animals of first class quality without holes etc. After purchasing them they went for C-3 price A-1 skins under the pretext that the phrase 'U. K. Quality' meant superfine skins of flawless quality. The goods supplied were of merchantable quality as they were capable of being used for purposes for which they appear to have been bought viz., resale or tanning for making leather purses, watch straps etc. (28) Turning to inspection, the relevant dates have been given above and the evidence clearly makes out that notwithstanding the opportunity which the first plaintiff had to inspect or examine the goods before taking delivery, he did not do so and the circumstances of the case show that the plaintiffs accepted the goods and have started making these objections only when the prices had started to fall and wanted to go back on their contract. (His Lordship went through the evidence, and proceeded):
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> (29) On this evidence it is quite clear that the first plaintiff who had an opportunity to inspect the goods did not avail himself of the same and was content to take delivery and having done so it does not lie in his mouth now to say that unmerchantable

> goods were fraudulently palmed off on him. On the other hand, the evidence, in this case clearly shows that probably the condition in which the surveyor noted the skins in the three bales was due to the bales not being opened and the damp not being removed by shade drying and the goods not being properly stored. Therefore, we are not in a position to say that even in the case of these bales when deterioration had set in.
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> (30) Therefore, looked at from any point of view, the plaintiffs have failed under both the heads and their suit was rightly dismissed by the learned trial Judge. We set aside the decree and judgment of Basheer Ahmad Sayeed, J., and restore the decree and judgment of the trial Judge. This Letters Patent Appeal is allowed with costs.

Anantanarayanan, J.

(31) I agree that, upon the merits of the evidence and the findings of fact in this case, we are constrained to differ, with great respect, from the conclusions of the learned Judge (Basheer Ahmed Sayeed, J.), who has reversed the judgment and decree of the learned City Civil Judge, and held that the suit of the plaintiffs ought to have been decreed to damages. Much of the contest before the learned Appellate Judge appears to have centered itself around the issue whether these sales of sheep skins were really sales of specific goods by description. The learned Appellate Judge has found that these were sales of 'specific goods' by description. The definition of 'specific goods' embodied in S. 2(14), namely, "goods identified and agreed upon at the time a contract of sale is made"

> would appear to apply to facts like the present, where a party ordering the goods did not order them as goods of a certain description or quality, but placed the order by rounding off in red ink individual items in the indent Ex. A-5. However, we shall certainly assume, for the purposes of this case, that the goods were also goods by description, since in Ex. A-1 itself they are described as sheep skins, shade-dried and of superior U. K. Quality, The actual invoices Exs. B-1, B-2, and B-3, contain a similar description of these lots, further specifying them as first choice and second choice.
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> (32) Now, what are the consequences of such a sale of specific goods by description, in the sense of rights accruing therefrom to the buyer of the goods? As the learned Judge (Basheer Ahmed Sayeed, J.)) stated there is certainly a presumption or implied condition under S. 15 of the Sale of Goods Act, that the goods should correspond with the description. Again, under S. 16(2) of the Sale of Goods Act:
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> "Where the goods are bought by description from a seller who deals in goods of that description..... there is an implied condition that the goods shall be of merchantable quality,"

But there is a proviso to the section that:

"if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed." Be it noted that the buyer is not bound to reject the goods, and that his mere acceptance of the goods, or the fact of the sale itself, does not extinguish his rights. Under S. 13(1) of the Act, the buyer may waive the condition to be fulfilled, or elect to treat the breach of the condition as a breach of warranty, and not as a ground for repudiating the contract.

(33) Therefore there is, or there would appear to be, tow conditions or implied terms upon which such a condition in respect of sale of specific goods by description can be held to have been fulfilled as between parties. The first is that the goods must correspond to the description. The second is that, impliedly, they must be of merchantable quality. The rights of the buyer are not extinguished by the mere fact of acceptance, or the mere fact of passage of title in the goods to him. This has been made very clear by two decisions of this Court, where the applicable principles of law are stated and expounded.

(34) In Sha Thilokchand Poosaji v. Crystal and Co., , the learned Chief Justice and Rajagopala Ayyangar, J. had occasion for expounding the law upon this aspect. As the learned Chief Justice observes, the right of a buyer for damages for breach of warranty proceeds upon the basis of acceptance of the goods delivered, and not a rejection thereof. In other words, the right of rejection of goods, and the right to sue for damages for breach of warranty, are alternative remedies. They are not cumulative. A buyer can (where goods not answering to the description contracted for are delivered) waive the condition and accept the goods, and sue for damages for breach of warranty, and this is the effect of S. 13(1) of the Sale of Goods Act.

The basis on which a buyer would be entitled to such damages, would be the difference between what the goods were worth when they arrived, and what the sale of the goods would have realised, had they been in the state contracted for. In this context, reference has to be made to the English case in (1868) 3 QB 197.

(35) The same aspect of law was again discussed in by the learned Chief Justice and Ramachandra Iyer, J. The learned Judges refer to Sections 15 and 16(2), and observe that the effect of the two conditions is to give a right or an occasion to the buyer to reject the goods, in case what was tendered did not answer the description, or was not of a merchantable quality. But where the goods were accepted, the buyer would be precluded from rejecting the goods, and would only be entitled to a remedy by way of damages. But the passing of property in the goods is not the test of applicability.

(36) But what are the facts of the present matter? As regards the term as to description, the buyer may certainly claim damages, if he is able to prove that the sheep-skins in the present case were (1) not shade-dried as affirmed, (2) not of 'U. K. Quality' as affirmed and (3) not U. K. quality first choice or second choice, as affirmed. My learned brother has already dealt with the facts of evidence upon this aspect, and it is not necessary that I should reiterate them. It is sufficient to state that the plaintiffs totally failed to establish that there was a particular ascertainable quality which could be

called 'U. K. quality' or U. K. quality first choice and second choice, to which the goods did not correspond.

On the contrary, it is not even clear whether the designation 'U. K. quality' can only apply to what are known as 'selections' or might equally apply to what are known as 'rejections', in the Hides and Skins business. The truth appears to be that 'U. K. quality' is a very broad term, applying to shade-dried skins of all descriptions which, in the trade, were considered fit for export to the United Kingdom. 'Selections' and 'rejections' are again not clearly defined, with reference to objective tests, and it is not at all clear, for instance, that 'U. K. quality' skins might not have holes in certain places, hairs falling, etc. On the contrary, the evidence seems to show that considerable latitude was allowed in the trade for such skins imported from Africa, particularly the disinterested and weighty evidence of P.W. 6, a very respectable merchant who is the Chairman of the Vaniyambadi Municipal Council. He is clear that no one with experience in the trade would confidently expect that such skins would have no blemishes or defects, or purchase them on speculation. Again, there is some evidence that, at the price, which the plaintiffs paid, perfect skins could not at all have been expected, by any one with knowledge of the business.

Obviously, the plaintiffs were grossly disappointed. Otherwise, they would not have come forward with an action for damages. But the disappointments of a buyer with rosy expectations, is not the test. Clear and objective tests must be applied, and it must be established that the goods failed to fulfil the term as to description of quality. That is certainly not the case here.

(37) With regard to merchantable quality, which is also an implied condition, the facts are even more heavily against the plaintiffs. For the proviso to S. 16(2) would certainly apply, in the sense that the buyers certainly had an opportunity to inspect the goods, and did make some kind of superficial inspection, as the evidence shows. If the buyers were not satisfied, they should have immediately proceeded to make a thorough inspection, and to intimate the defects to the sellers. At the least, the goods should have been inspected by the buyers immediately after transport to Vaniyambadi, and the defects revealed by such inspection should have been intimated to the sellers.

The attempt to prove that Mr. Marfatia, who was then acting on behalf of the sellers, was intimated at the warehouse itself of the defects in these skins, totally failed, and the plaintiffs failed to examine Mr. Marfatia as a witness. The actual inspection by a representative of the Chamber of Commerce comes months later, and the earlier inspection of 3 bales by one of the plaintiffs in upon some unascertained date. It is totally impossible for us to determine whether, with reference to the conditions of storage by plaintiffs at Vaniyambadi, the goods did not suffer deterioration by damp, worms, failure to take out and ventilate or dry the skins, etc. For all that the evidence shows, the entire deterioration in this case might be due to storage under imperfect conditions by the plaintiffs for an unjustifiably long period.

(38) In this connection, learned counsel for plaintiffs urges that the right to sue for damages upon implied breaches of conditions as to description and merchantability does not cease, by mere acceptance or sale, or even the failure to inspect the goods at the time of acceptance. In this he is certainly right, as the authorities have shown. As observed in , even the proviso to S. 16(2) applies

only where the goods were actually examined by a buyer.

But where the goods were not thoroughly inspected at the time of sale, the proviso does not apply, and the purchaser would be entitled to the benefits of the warranty. The difficulty here is not in applying the law. The difficulty, if we may so tersely express it, is in ascertaining the facts. It is here that a decision such as Empire Engineering Co., Cawnpore v. Municipal Board, Bareilly, AIR 1929 All 801, is of value and interest. A buyer need not examine the goods when he buys them. But if he wants to inspect them, he must do so within a reasonable time.

If he does not do so, he loses his right of rejection, though he could sue upon the breach of warranty. But the difficulty here would be, as in the present case, that I the inspection were made months later, and revealed certain defects, it may be totally impossible to determine whether those defects existed at the time when the goods were taken over, or had subsequently developed owing to imperfect storage and allied causes. Reference might also be made to 1945-2 Mad LJ 418: (AIR 1946 Mad 69), for the broad proposition that goods must not be rejected if opportunities for inspection within a reasonable period had not been availed of.

(39) In order to apply the test laid down in , or , (cited earlier) the buyer must show that the goods at purchase differed from what they ought to have been in the state contracted for. It is this which has totally failed in the present case. There is no evidence to establish that the goods were not shade-dried, of 'U. K. quality', first and second choice, as described. In fact, the evidence is quite insufficient to show that these descriptions implied certain qualities or objective tests, which could not be applied to the sheep-skins in the present case.

There were, undoubtedly, defects, such as holes, worm-eaten condition, hairs falling off etc. Had they been ascertained, immediately, or at least within a reasonable period, it could be urged that these defects infringed the implied term as to merchantable quality. But we are quite unable to hold that those defects necessarily existed at the time of delivery of the goods. Since the inspection was unjustifiably prolonged, and the goods, in the meantime, were stored in some godown under conditions of which we cannot be certain, these defects might well have developed in the supervening period.

(40) There are only two English decisions which might at all be construed as supporting the contentions of learned counsel for respondents, at least by implication, and they might be immediately examined. In the first decision, Beck and Co. v. K. Szymanowski and Co., 1924 AC 43, a defect was discovered 18 months after delivery, and the buyers were held entitled to judgment.

But it is noteworthy that the defect related to actual quantity, namely, that the length of cotton per reel was less than 200 yards, the average shortage being about 6 per cent. This is not a variation which could possibly have supervened in the interval, and that explains the judgment. In the other case Poulton v. Lattimore, (1829) 9 B and C 259, Littledale, J., observed:

> "I am of opinion, that where goods are warranted the vendee is entitled, although he does not return them to the vendor, or give notice of their defective quality, to bring

an action for breach of the warranty."

This dictum is relied upon, but obviously, the dictum must be understood together with the implications of such a situation. It is for the buyer to establish that the defective qualities existed throughout, and at the time of delivery. Unless he establishes this, the dictum cannot apply.

(41) Under those circumstances, we must certainly hold that the appellants are entitled to succeed, since the plaintiffs respondents failed to prove that there was a breach of condition as to the description of these goods, assuming that this was a sale of specific goods by description, or that there was a breach of warranty as to merchantable quality. I hence agree that the appeal must be allowed, and the suit dismissed with costs throughout.

(43) Appeal allowed.