16,1955

G.H.C.2

In the Privy Council.

No. 40 of 1954.

ON APPEAL FROM THE SUPREME COURT OF CEYLON

BETWEEN

ABDUL HAMID and ABDUL LATIFF both carrying on business in partnership under the name style and firm of ABDUL LATIFF ABDUL HAMID at 123 Bankshall Street in Colombo ... ... (*Defendants*) APPELLANTS

AND

ODHAVJI ANANDJI & CO. LTD. ... (*Plaintiffs*) RESPONDENTS.

CASE FOR THE RESPONDENTS

RECORD

1.—This is an appeal from the Judgment of the Supreme Court of Ceylon dated 17th March, 1953, affirming a Judgment of the District Court of Colombo dated 6th February, 1951, in favour of the present Respondents (Plaintiffs in the action) for Rs. 36,669.53 with interest and costs. As the sum involved was more than 5,000 rupees, the Appellants were entitled as of right to appeal to Her Majesty in Council subject to the fulfillment of certain conditions as to security for costs. The conditions having been fulfilled, final leave to appeal to the Queen in Council was granted by order of the Supreme Court dated 3rd June, 1953. p. 80 p. 70 p. 85

10 2.—It is proposed in this paragraph to summarise the matter, dealing with the facts in greater detail in succeeding paragraphs. The Appellants had agreed to buy from the Respondents 60 tons of cow-peas c.i.f. Colombo. The Respondents shipped the goods and tendered the documents. The Appellants rejected the documents on the grounds that " the goods had " been sent contrary to instructions " ; the Respondents sold the goods and sued the Appellants for damages claiming the difference between the contract price and the nett proceeds obtained on realisation of the goods. The Appellants did not in their defence rely on the grounds originally assigned (lack of authority) but on allegations that the goods were defective

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and not in accord with the contract. The trial Judge rejected these defences and gave Judgment for the Respondents for the sum claimed. The Appellants appealed but on the hearing before the Supreme Court abandoned all defences as to liability but contended that the Respondents had acted unreasonably in that it was suggested they could have sold the goods earlier and at better prices than they did. The Supreme Court rejected this contention and affirmed the Judgment of the District Court. It is assumed therefore that the only issue before the Judicial Committee will be that of damages. The question of whether the Respondents acted reasonably must be one of fact and there would appear to be concurrent findings of fact in the Respondents' favour.

3.—The Respondents carry on business as merchants in Mombasa, East Africa. The Appellants are brothers and carry on business as merchants in partnership in Colombo. The contract in question in this
Ex. P2, p. 89 action was in writing dated 24th December, 1946, and made in Mombasa. It was signed on behalf of the Appellants by Mr. M. Y. Aboobucker (referred to by the Trial Judge and herein as Yakoob) who was a brother of the two Appellants and who had gone to East Africa to buy grains for them. The terms of the contract were :

Sellers :	Odhavji Anandji & Co. Ltd., Mombasa.
Buyers :	Messrs. Abdul Latiff Abdul Hamid, Colombo.
Quantity :	Sixty (60) tons.
Quality :	Cow-peas as per sample approved.
Price :	£51 (Pounds fifty-one) c.i.f. Colombo.
Packing :	In sound single bags.
Tare :	Usual.
Shipment :	S.S. " June Crest " loading at present.
Marks :	ALAH/Colombo.
Payment :	By an irrevocable Letter of Credit.

4.—The Respondents shipped the goods by the vessel named in the
Ex. P5A, p. 99 contract—the " June Crest." The bill of lading is dated 28th December, 1946. In addition to these 60 tons the Respondents also shipped by the "June Crest" a further 25 tons of cow peas bought by the Appellants under another contract. The Appellants did not reject these 25 tons. By
Ex. P8, p. 123 a cable dated 31st December, 1946, the Appellants informed the Respondents that they had opened a credit for the 25 tons but did not require the balance, e.g. the 60 tons. The goods had in fact already been shipped and in any event the contract was a firm one.

5.—The " June Crest " arrived in Colombo on 13th January, 1947,
p. 39 and discharge was completed on 27th January, 1947. The Appellants had not opened a Letter of Credit as required by the contract. The Respondents therefore had the shipping documents and a bill of exchange for the price presented to the Appellants by a notary on 29th January, 1947.
Ex. P10, p. 122 The Appellants refused to accept them and the grounds noted by the

notary were "Drawee declined to pay and stated the goods have been "sent contrary to instructions." On 29th January and again on 4th February, 1947, the Respondents cabled to the Appellants requiring them to pay for the goods and threatening to resell at the Appellants' risk if they did not. The Appellants did not reply.

Ex. P13, p. 135
Ex. P11, p. 136

6.—The Respondents then instructed their bankers to clear the goods through the Customs and this was done about the 13th February, 1947. On 5th March, 1947, a proctor in Colombo acting for the Respondents wrote to the Appellants stating that unless the Appellants paid for the goods within 24 hours, the Respondents would proceed to dispose of them by private treaty. The Appellants did not reply until 17th March, 1947, when their proctor replied that the goods were not in accordance with the contract as they had been attacked by weevil and had been subject to some treatment before shipment and "cannot be marketed in Colombo or elsewhere."

Ex. P15, p. 127
Ex. P12, p. 137
Ex. D16, p. 141

7.—The sale of the goods was entrusted by the Respondents' bankers to M. Popatlal & Co., General Merchants of Colombo, to sell on commission. They sold three bags at the beginning of April, 1947, but were unable to dispose of the balance till July, August and September, 1947, when the remaining 643 bags were sold to various buyers. The gross proceeds of sale were Rs. 12,550.99, the expenses Rs. 7,441.90, leaving nett proceeds of Rs. 5,109.09. The contract price for the goods was Rs. 41,934.12, so that the deficiency was Rs. 36,825.03.

Ex. P18, p. 143

8.—On 16th May, 1949, the Respondents commenced proceedings in the District Court of Colombo against the Appellants. In their plaint the Respondents pleaded the contract, shipment of the goods and tender of the documents, breach of the contract by the Appellants' failure to accept the goods or documents and claimed damages which they particularised as the loss on resale. The Appellants did not raise in their Answer the ground originally assigned for non-acceptance (that they had not ordered the goods). They expressly admitted the contract. They raised three defences :—

pp. 10, 11
pp. 15, 16

(A) That in breach of an express term the goods were not up to sample.

(B) That in breach of an implied term the goods were not of merchantable quality.

(C) That in breach of an implied term the goods were not fit for human consumption.

These defences were abandoned in the course of the hearing in the Supreme Court, but as some of the facts are relevant parts of the general history it is proposed to deal with them briefly.

9.—The only witness called by the Appellants who had seen the sample was Yakoob, and he had not seen the bulk delivered and could not therefore

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give direct evidence as to its condition. The issue as to sample was whether the bulk corresponded with sample in colour. There are two kinds of cow peas—white and dark (sometimes called brown, sometimes called red). The contract in this case described the goods as cow peas without any prefix,
p. 61 and the second Defendant admitted in evidence that in the trade the word cow peas without prefix denoted brown cow peas. The Appellants contended, however, the sample was a sample of white peas, so that the contract was for white peas. It was common ground the peas were not white: according to the Appellants they were a mixture, but mostly brown. According to the Respondents the peas were brown. Therefore, 10
pp. 43, 44 the issue was as to the colour of the sample. Yakoob's evidence was that he saw some white peas in the Respondents' premises in Mombasa, and that was the contract sample, but that he was not given any part of it so he could not produce it. He denied going to the warehouse where the
p. 25, l. 23 goods were. The evidence given by Mr. Manek for the Respondents was quite the reverse: he said he and Yakoob went to the warehouse and samples were drawn from the 60 tons offered, and that Yakoob approved the sample, and kept part of it: the peas shipped were in accord with the sample: they were not white peas: the Respondents only dealt in red cow peas. There was therefore a direct conflict of evidence, and the 20
p. 66 Judge had to decide which witness to believe. The Judge accepted the evidence of Mr. Manek, and rejected that of Mr. Yakoob. He gives his reasons in his Judgment.

10.—The defence that the goods were not of merchantable quality rested on the allegation that they were infested with weevils. Mr. Marker
pp. 51, 52 (a witness called by the Appellants) said that at the beginning of February, 1947, he and the second Defendant went to some warehouse with a Mr. Glacebrook, a surveyor of the Chamber of Commerce, with a view to surveying the 60 tons of cow peas (646 bags). The cargo covered by this bill of lading was, however, at this time so mixed with the other cargo 30
p. 57, l. 20 from the "June Crest," that they could only find 70 or 80 bags. These 70 or 80 bags were affected by weevils. The second Defendant said the goods surveyed by Mr. Glacebrook were "rotten." Mr. Glacebrook the
p. 65 surveyor was not called. The Judge did not regard the evidence of either the second Defendant or Mr. Marker as reliable, and was not altogether satisfied that the bags said by Mr. Marker to be attacked by weevil were necessarily those shipped under this contract. He also pointed out, that it did not follow the other bags were in the same condition. The Judge did not, however, rest his decision solely on these points.

p. 55, l. 7 Mr. Bagsobhoy, a witness called by the Appellants, had stated that 40
cow peas were liable to attack by weevil in about three months, and Mr.
p. 50, l. 18 Marker gave the period as being two to three months, and had admitted
p. 52, l. 42 in cross examination, that if bags of sound peas were near bags affected by weevils, the sound bags would be affected by weevils from the affected bags.
p. 24 Mr. Manek's evidence was that cow peas were normally harvested in
Ex. P20, p. 128 November in East Africa, and the manifest showed that the "June Crest"

had carried large quantities of cow peas and other grains which might have been affected by weevils prior to shipment. The evidence of Mr. Marker and other witnesses showed that on the discharge the cargo from the "June Crest" had been mixed and stored in close proximity. In these circumstances the Judge held that even if (as he thought not unlikely) p. 69 the attack by weevil had begun by early in February, that was no evidence that the goods shipped under this contract were affected by weevil or unmerchantable at the time of shipment in December.

11.—As to the allegation that the goods were not fit for human p. 64 consumption, the Judge held (as is the fact) that there was no evidence the Respondents were ever told the peas were required for that purpose, and he declined to imply into the contract any term to that effect. In any event, the matter relied on as being a breach of this term was the presence of weevil, and as already stated the Judge was not satisfied that the goods were affected by weevil on shipment.

12.—During the course of the hearing, the Appellants sought leave to pp. 40 and 41 raise additional defences by alleging that the contract was conditional on a subsequent confirmation by Defendants or that Yakoob had no authority to contract otherwise than subject to confirmation by the Defendants. As the case had then been proceeding for two years on the basis of a defence which admitted the contract, the Judge refused to allow these defences to be raised.

13.—The Judge dealt with the issue of damages briefly. It is the practice in Ceylon for the Judge to settle issues with Counsel at the beginning of the trial. Two issues had been proposed by Counsel for the Respondents to deal with the question of damages, and had been agreed to by Counsel for the Appellants and accepted by the Judge. In his Judgment, the Judge dealt with the question of damages by giving his answers to the issues so settled. These issues were :

Issue 7 (A) Did Plaintiffs realise a sum of Rs. 5,609.09 by the sale of the said goods ?

(B) Did Plaintiffs incur expenses amounting to Rs. 1,000 in connection with the said transaction and sale ?

Issue 8 Is the Plaintiff entitled to claim from the Defendant a sum of Rs. 41,934.12 and the said sum of Rs. 1,000 less the said sum of Rs. 5,609.09 ?

It should be explained, that in their plaint the Respondents had alleged that the proceeds of sale were Rs. 5,609.12, and that there were additional expenses of Rs. 1,000. The evidence showed that the gross proceeds of sale were Rs. 12,550.99, and the expenses Rs. 7,441.90 leaving nett proceeds of Rs. 5,109.09. The expenses of Rs. 7,441.90 included an item of Rs. 125.50, being the income tax paid by the brokers on their

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commission. The Rs. 41,934.12 referred to in Issue 8 was the price payable for the goods under the original contract.

p. 70

14.—The Judge answered these issues as follows :—

" Issue 7 : Yes. On the statement appearing on p. 18, " the goods realised a sum of Rs. 12,550.99 : the expenses incurred " by the Plaintiffs in regard to the sale of the goods was Rs. 7,441.90 " leaving a balance of Rs. 5,109.09.

" Issue 8 : The Plaintiff is entitled to Rs. 41,934.12, less the " sum of Rs. 5,109.09, that would be Rs. 36,825.03 : to this " I think, must be deducted a sum of Rs. 125.50, which appears " in the statement of accounts (p. 18) as payment on account of " income tax : Poptlal & Co. are not entitled to income tax, so " that the amount due to the Plaintiff Company would be " Rs. 36,699.53. . . . In the result the Plaintiff will have " Judgment in a sum of Rs. 36,699.53. . . ."

The damages awarded by the Judge were therefore the actual amount of the Respondents' loss save for the one item of expenses, which he disallowed. Judgment was accordingly entered for the Respondents for this sum with interest and costs.

p. 71

15.—The Appellants appealed to the Supreme Court, and the grounds of appeal as set out in paragraph 6 of the Notice of Appeal (dated 6th February, 1951) were that

" (A) the said order ' (e.g.) the Judgment) ' is contrary to law, and " the weight of evidence adduced at the trial ;

" (B) the writing dated 24th December, 1946, which was an agreement " to sell, was subject to confirmation by the Appellants by their " opening an irrevocable letter of credit ;

" (C) the Respondent had, contrary to the arrangement between the " parties and their course of dealing, shipped the said goods, and " had not even informed the Appellants about such shipment ;

" (D) even if there was a valid contract, the goods shipped were not " according to sample, and were unfit for human consumption ;

" (E) the Respondent had not acted reasonably in disposing of the " goods which were perishable, and has failed to minimise the " loss that might result by the alleged breach of contract ;

" (F) all the relevant and necessary documents were not tendered, " and there was no proper and legal tender of documents."

The defences raised by grounds (B) (C) and (F) were not raised in the Defence, nor was there any allegation in the Defence that the Respondents had acted unreasonably as alleged in ground (E). It is to be observed the Appellants no longer relied upon the defence that the goods shipped were not merchantable.

16.—It appears from the Judgment of the Supreme Court that the Appellants sought on the Appeal to set up still further fresh defences, but that as these involved issues of mixed law and fact not raised in the Court below the Supreme Court refused to entertain them, and as there is no record of what they were, it is not possible to deal with them in this case. p. 76, l. 23
It also appears from the Judgment that the Appellants abandoned the pleas that the goods were not fit for human consumption, and not in accordance with sample. They also abandoned the allegations of lack of authority, and that the contract was subject to confirmation (both of which the Judge had refused to entertain as not having been pleaded). There is no reference in the Judgment to ground of appeal (F) (that the proper documents had not been tendered). It is assumed, therefore, that it was either abandoned or was one of those the Court refused to entertain. The point was not pleaded or raised in the Court below, and there are no grounds for suggesting the proper documents were not tendered. At all events the Judgment of the Supreme Court proceeded on the basis that the only issue for them to determine was that raised in ground (E) as to damages. p. 77, l. 28

17.—Section 49 of the Ceylon Sale of Goods Ordinance is the same as Section 50 of the Sale of Goods Act 1893 and reads :

" 49. (1) Damages for non-acceptance—where the buyer wrongfully " neglects or refuses to accept and pay for the goods the seller " may maintain an action against him for damages for non- " acceptance.

" (2) The measure of damages is the estimated loss directly and " naturally resulting in the ordinary course of events from the " buyers' breach of contract.

" (3) Where there is an available market for the goods in question, " the measure of damages is *prima facie* to be ascertained by the " difference between the contract price, and the market or " current price at the time or times when the goods ought to " have been accepted, or if no time was fixed for acceptance " then at the time of the refusal to accept."

The law of Ceylon as to the mitigation of damage appears to be the same as the law of England, since the Judgment of the Supreme Court refers to *British Westinghouse* v. *Underground Railways of London*, 1912, A.C. 673, and *Payzu* v. *Saunders*, 1919, 2 K.B. 581, as establishing that a Plaintiff must act reasonably, and that what is reasonable is a question of fact to be decided on the facts of the case.

18.—There was no free market in cow peas in Ceylon in the sense that there is a market in say, tin or rubber in London. The case made by the Appellants was that when the Appellants did not answer the Respondents' telegram of 4th February, 1947, the Respondents should have realised the Appellants were not going to take delivery, and have taken steps as from 6th February, 1947, to sell the goods, and that the steps they took were not reasonable.

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p. 79, l. 10
p. 35

19.—The Supreme Court pointed out that the manager of Popatlal & Co. had said in evidence that the sales were made at the best prices obtainable, and that it had been impossible to sell earlier as there were no buyers. The Supreme Court considered it implicit in the Judgment of the trial Judge that he had accepted this evidence.

20.—The Supreme Court dealt, however, with the question of damages at some length. They considered that the market value of the goods at the beginning of February was not capable of precise ascertainment. " The " market for cow peas of even the best quality had seriously declined : " cow peas of the contract quality were still less in demand, and, from the " commercial point of view, there was virtually no ready market for a " quantity of 60 tons at all. In fact, the Defendants' Proctor " (that is the Proctor for the present Appellants) " had been instructed to state on " 17th March, 1947, that the goods cannot be marketed in Colombo or " elsewhere." The Supreme Court considered that the steps the Respondents took were reasonable, and they dismissed the Appeal.

p. 79, l. 27
p. 79, l. 38

21.—The Respondents submit that the question as to the amount of the damages is in this case a question of fact, and that as there are concurrent findings as to the proper amount by the two Courts below, the matter is not one which the Judicial Committee should be called upon to consider, but that in any event the evidence shows the Respondents did act reasonably.

22.—It is submitted there is no particular significance in the date of 6th February, 1947, suggested by the Appellants, and that they could scarcely be heard to complain if the Respondents had waited till they got a reply to their Proctor's letter of 5th March, 1947, and the Appellants' Proctor did not reply to this till 17th March, 1947. In fact, however, the evidence shows that the Respondents did take appropriate steps at each stage. As the Respondents were in Mombasa, they entrusted the protection of their interests in Colombo to their bankers, which was, it is submitted, a usual and proper course.

Ex. P12, p. 137
Ex. D16, p. 141

23.—The evidence as to the sequence of events after the arrival of the ship is as follows :—

p. 39, l. 11

(A) T. Nagarath, an employee of the ship's agents, said that the discharge of the " June Crest " was completed on 27th January, 1947.

p. 33, l. 17

(B) G. G. Peiris, an employee of Creasy & Co. Ltd., said that his company were instructed by the National Bank (the Respondents' bankers) to clear the goods through the customs on 30th January, 1947. He produced the customs entry (P15 dated 13th February, 1947) and said the duty was paid the next day. He could not say the exact dates the goods were obtained from the customs.

There was no cross examination to suggest that there was any delay by Creasy & Co. either in entering the goods or in getting delivery.

(C) K. R. Subramaniam (a customs official) explained the system of clearance. After discharge from the ship the goods would have to go to a customs warehouse and wait there till they had been weighed and the duty assessed. The cargo from the "June Crest" was sent to three or four different warehouses. W. J. Pullenayagam, the customs official in charge of this cargo, said the Customs warehouses were congested at this time owing to a number of ships coming in at the same time with cargo similar to the "June Crest." p. 29, l. 23 p. 38, ll. 5, 10

(D) On 4th February, 1947, the Respondents had cabled to the Appellants threatening to sell unless the Appellants took up the documents. The Appellants did not reply. On 5th March, 1947, the Respondents' Proctor wrote to the Appellants that in view of the large quantity the Respondents thought it would be better to sell by private treaty rather than try to sell by public auction, and inviting the Appellants to reply in twenty-four hours if they had any objection to this course. They did not reply till 17th March, 1947: their Proctor did not by that reply suggest sale by auction: he wrote that the goods could not, owing to their condition, be sold at all in Colombo or elsewhere. Ex. P11, p. 136 Ex. P12, p. 137 Ex. D16, p. 141

(E) The sale of the goods was entrusted to Popatlal & Co. to sell on commission. There was no evidence as to the date on which they received instructions to sell. They sold three bags on 3rd April: the balance of the bags were sold in July and August, 1947, except for the final lot sold on 1st September, 1947. Their manager, Mr. R. M. Suppiah, said the reason the goods were not sold earlier was that there were no buyers at an earlier date. Ex. P18, p. 143 p. 35, l. 13

24.—The sales made by Popatlal & Co. were at 24, 25 or 26 Rupees per unit of 200 pounds (which is the usual unit) as appears from Exhibit P18. The statement that the prices were 24, 25 and 26 Rupees per *cwt.* which appears on p. 35 of the Record, is clearly an error for 24, 25 or 26 per 200 pounds. Mr. Suppiah stated these were the best prices obtainable for these goods. p. 143 p. 35, l. 13

25.—The evidence given on behalf of the Appellants as to the prices obtainable for cow peas was confusing and was as follows:—

(A) Mr. Marker (a commission agent who shared offices with the Defendants) said the price of cow peas in February, 1947, was Rs. 43 per 200 pounds; in March, it was Rs. 50 per 200 pounds. This was for white cow peas. Red cow peas would be 5 to 10 Rupees per 200 pounds less. It did not, however, appear he had sold anything but white peas. In cross examination he said p. 50, l. 15

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p. 52, l. 6 that Mombasa cow peas were worth 5 or 10 Rupees per 200 pounds less than Aden cow peas. He did not say if the prices he had given in chief were for Aden or Mombasa peas. Then he said that for Mombasa peas it made no difference whether the peas were white or red, which conflicted with what he had said in chief. Then he said he did not know if the peas he had handled were Mombasa or Aden peas, which was surprising if there was a substantial difference in price. He said he bought cow peas from Appellants in April at Rs. 42. He did not specify the type.

p. 52, l. 20 In May, the price of red cow peas was 32 Rupees—he did not specify whether for Aden or Mombasa peas. In June, he bought at Rs. 42 (colour and origin unspecified). He dealt in quantities of 3 to 5 bags.

(B) Mr. Kareem Bagsobhoy, a merchant called by the Appellants,

p. 55, l. 1 said in chief that the price in November of cow peas was £48 per ton, then he said, " About April and May, you cannot give a fixed " price for this period because there was no good quality stuff. " There was no good price between January and March, 1947."

p. 56, l. 15 In cross examination, he said that in January one or two ships with peas came from Aden and three from Africa. The price of good quality peas did not fall, but the price of inferior quality fell.

p. 59, l. 6 (C) The second Defendant produced documents which, he said, showed he had been selling cow peas in March, 1947, at Rs. 45 to 48 per

p. 59, l. 22 200 pounds. He said the only cow peas he had at the time were two consignments ex the " June Crest " (the 25 tons he bought from the Respondents under the other contract, and a quantity bought from another supplier). It is, however, clear that the sales to which the second Defendant was referring could not be out of the 25 tons bought from the Respondents. Mr. Manek had said, and the Judge accepted, that the Respondents' peas

pp. 139 and 140 were red. The sale notes to which the second Defendant referred were all for white peas with two exceptions, where the colour was not specified. He agreed white peas fetched a higher price than the darker kind. He agreed that in January, 1947, three ships with peas came from Africa, and one or two ships with peas may also have come from Aden. He said the market fell for poor quality goods and he said the quality of the goods on the " June

p. 57, l. 36 Crest " was " rotten." This Defendant said he sold the 25 tons of red Mombasa cow peas he accepted from the Respondents ex the " June Crest " on the open market. Mr. Manek had said

p. 79, l. 45 the 25 tons were the same quality as the 60 tons, and the Supreme Court commented on the Defendants' failure to give a satisfactory account of the prices they obtained for the 25 tons.

26.—Even if the Appellants' evidence is accepted as showing that some cow peas were being sold in February, March and April at over 40 Rupees

per 200 pounds, that does not in the least show that red or brown Mombasa peas of the quality of the sale sample and in the condition in which these peas were when cleared from the customs could ever have been sold for more than the 24 or 25 Rupees per 200 pounds which Popatlal & Co. obtained. They could not be sold till they had been cleared through the customs; they were not cleared till about mid-February, and no one suggested they could have been cleared earlier. By that time it is likely they were already affected by the weevil. At all events, the second Defendant swore that the bags he had seen in the customs warehouse were so affected.

10 27.—The Respondents humbly submit the Appellants' Appeal should be dismissed and that the Judgments of the District Court of Colombo and the Supreme Court of Ceylon should be affirmed for the following among other

REASONS

(A) BECAUSE it was not proved that the goods were, at the time of shipment, unmerchantable, and they were in fact then merchantable.

(B) BECAUSE it was not a term of the contract that the goods should be fit for human consumption, and because at the
20 time of shipment they were fit therefor and/or because there was no evidence that they were unfit therefor.

(C) BECAUSE it was not proved that the goods shipped were not in accordance with the contract sample, and they were in fact in accord therewith.

(D) BECAUSE the Appellants did not by their Notice of Appeal complain of the findings of the trial Judge that the goods were at the time of shipment of merchantable quality and that the contrary had not been proved, and did not argue this point in the Supreme Court.

30 (E) BECAUSE the Appellants in argument before the Supreme Court abandoned the defences that the goods were not in accordance with sample and that they were entitled to reject because the goods were unfit for human consumption.

(F) BECAUSE the only defences as to liability pleaded were as to lack of merchantable quality, failure to correspond with sample and unfitness for human consumption, and because the trial Judge and Supreme Court were right in refusing to entertain any other defences not pleaded, and because the Supreme Court were right in refusing to go into issues not raised at the trial, and because there was no substance in the
40 suggestions that the contract was made without authority

or subject to confirmation or that the proper documents were not tendered.

(G) BECAUSE the Appellants had no defence on the issue of liability.

(H) BECAUSE there was no available market in which the goods in question could be sold in February, March, 1947, and because they could not be sold earlier or otherwise than they were sold.

(I) BECAUSE there was not at any time any ascertainable market price for these goods, and the only way of ascertaining their value is to take the prices obtained.

(J) BECAUSE the Respondents' loss by reason of the Appellants' breach of contract was Rupees 36,669.53.

(K) BECAUSE the Respondents acted reasonably in the steps they took to sell the goods, and because there is no evidence of any failure to mitigate damage, or that any better prices could have been obtained than were obtained.

(L) BECAUSE the questions as to the amount of damage and as to whether the Respondents acted reasonably are questions of fact on which there are concurrent findings in favour of the Respondents.

(M) BECAUSE the Appellants did not by their pleading make any allegation that the Respondents had acted unreasonably, nor did they ask the trial Judge to frame or answer an issue relating thereto.

(N) BECAUSE the Judgments of the trial Judge and of the Supreme Court of Ceylon are correct for the reasons therein stated.

T. G. ROCHE.

In the Privy Council.

No. 40 of 1954.

ON APPEAL FROM THE SUPREME COURT OF CEYLON.

BETWEEN

ABDUL HAMID and ABDUL LATIFF both carrying on business in partnership under the name style and firm of ABDUL LATIFF ABDUL HAMID at 123 Bankshall Street in Colombo (*Defendants*) APPELLANTS

AND

ODHAVJI ANANDJI & CO. LTD. (*Plaintiffs*) RESPONDENTS.

CASE FOR THE RESPONDENTS

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(A65282)