IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

G. W. P. Gunawardena of
No. 48, Negombo Road,
Mirigama, carrying on business
under the name and style of
Thilakamali Rice Mill

PLAINTIFF-APPELLANT

C.A 906/1993 (F)
D.C. Homagama Case No. 54/M

Vs.

Ceylon Steel Corporation Oruwala,
Aturugiriya – substituted by
Ceylon Heavy Industries &
Construction Co. Ltd., Oruwala,
Aturugiriya.

SUBSTITUTED-DEFENDANT-RESPONDENTS

BEFORE: Anil Gooneratne J.

COUNSEL; Manohara de Silva P.C with G.W.C. Bandara
For the Plaintiff-Appellant

Harsha Soza P.C., with S. Samaranayake
For the Substituted Defendant-Respondent

ARGUED ON: 26.09.2011

DECIDED ON: 02.12.2011

GOONERATNE J.

This was an action filed in the District Court of Homagama on a breach of contract claiming damages in a sum of Rs. 554,140/-. Defendant-Respondent states that this action relates to a sale of goods transaction, and Plaintiff filed action to recover Rs. 554,140/- as damages. It is the position of the Plaintiff-Appellant at the trial that he relied on the representations made in documents marked P2 & P7, and purchased a machine called or described as "single pass rice husk-fired par boiler dryer machine". This machine was manufactured by the Defendant Respondent (Steel Corporation) and purchased by Plaintiff Appellant for a sum of Rs. 195,000/-. By P2 Defendant, represented in or about 1980 the following as contained therein.

(a) price 195,000/-
(b) Machine parboils paddy instantly – dries it simultaneously in a continuous flow process at the rate of 1 ton of paddy per hour
(c) Power of machine 3 motors of PH 50 H2 – 2 HP
(d) Finished product would be odorless lighter in colour with a pleasant taste in cooked rice
(e) Guaranteed for 1 year – free services and repairs for 6 months

Documents P7 gives more details as a machine which at the same process boil the paddy and dry it (එක වර වී තම්බන වේලන යන්ත්‍රය) P7 includes an introduction, refer to new technology, special features, rice etc.

In brief the Plaintiff's case is that after the machine was installed in the Plaintiff's premises, the machine failed to function and it had to be repaired on numerous occasions by the Defendant and even after repair the machine malfunctioned and could not function continuously.

Further even if the machine functions it failed to par boil the paddy as represented by the Defendant as in P2 & P7. Plaintiff called upon Defendant to take back the machine and pay the price paid together with damages and Defendant failed to do so.

Parties proceeded to trial on 12 issues and 2 admissions. (paragraphs 1, 2, 4 & 5 of plaint admitted and signature in document V1 admitted)

The attention of this court was drawn to several items of evidence led at the trial. It is important for this court to consider the evidence placed before the original court to ascertain the case of each party since the factual position must be clearly established of each party. Plaintiff Appellant refer to the evidence of one Abeywickrema an Engineer by profession

attached to the Paddy Marketing Board who produced report P1. The summary of the report include the following as emphasized by Plaintiff-Appellant.

(a) quality of rice is reduced as ash and smoke escapes through the cylinder and get mixed with paddy
(b) Temperature cannot be controlled. Paddy gets charred
(c) Ash particles and smoke emanates the area. Difficult to operate machine.
(d) Power failure or breakdown of machine results in paddy left in cylinder gets charred.
(e) Paddy coming out of the dryer is hot and high in moisture. It had to be dried further. No provision to dry it further.

The Plaintiff emphasis on the evidence of the above witness to demonstrate that the machine sold does not confirm to the description in document P2 & P7. Perusal of the cross-examination of this witness I find that the Defendants have not been able to change the position of the witness in any material aspect. Emphasis is on (b) above from this witness.

The witness of Plaintiff was one Ariyaratne of the Warakapola Multipurpose Corporative Society. Witnesses evidence was brief and refer to letter P3. Rice produced by this machine which he purchased for sale at the Corporative Society had the following faults. Upon inquiry i.e over boils and become sticky, grey in colour, rice mixed with ash and after wasting residue remains. Stored rice got spoilt.

There is reference to the evidence of Bank witnesses to demonstrate that Plaintiff obtained a loan from the Bank for the purpose of the project (Rs. 175,000/-. The evidence of Plaintiff had been summarized in the written submissions of the Appellant though at the trial Plaintiff had given lengthy evidence to prove the several lapses of the machine inclusive of material described above by the several witnesses called on his behalf. Plaintiff according to evidence purchased the machine relying on the representations made by P2 & P7. After placing an order the inventor Mr. H.I. Fernando inspected the premises of Plaintiff where the machine was installed and it was done according to the instructions of Mr. H.I. Fernando. Plaintiff testify on the payments made, his investing money etc. the project and transporting machine etc. He also refer in his evidence to all most all the faults mentioned above

Plaintiff marked numerous letters he had sent to the Defendant Corporation. Attention of Court is drawn to his letter dated 15.12.1981 marked P12 which is addressed to the Chairman of the Defendant Corporation in which he describes the poor quality of the rice produced by this machine. He also produced letter dated 22.12.1981 marked P14, letter dated 20.01.1982 marked P16. Attention of Court is also drawn to letter marked P17 dated 08.02.1982 where Mr. H. I. Fernando the inventor had

informed the Plaintiff the modifications that they propose to do to the machine inter alia to "eliminate fungus attack and over boiling". This letter is an tacit admission of the faults of this machine. Attention of court is also drawn to letter marked P24 which is a tacit admission of the fact that when the normal quantity of water is used for cooking the rice is overcooked. This is a letter by which the inventor is pleading with the Plaintiffs Bank to grant concessions to the borrower (the plaintiff) until improvements are done to the machine. This letter also shows that the machine is not up to required standard.

The Appellant also comment on the evidence of the Defendant's witness who was the inventor of the machine. (Pg 128 of proceedings of 13.5.1986). That evidence disclose

(a) less water to be used when cooking rice
(b) explosion which occurred in the chamber of the machine.
(c) During wet season growth of fungus; suggest solution to prevent - Fix an additional motor to dry.
(d) Admits faults in letter P16. Admits P17.

The important question that arises in this case, though a large volume of evidence was led in the original court, is the question of documents P2 and P7 represent to the buyer important express terms which would be

contractually binding or whether the statements contained in P2 & p7 are of a commendatory nature and not legally binding or that it does not fall outside the pale of puffery. Wilmot vs. Sutherland 1914 C.P.D 873. Such terms if it is so, induced the Plaintiff to enter into a contract and purchase the machine? It is the Plaintiff's position that P2 & P7 represents terms of contract which would make the Defendant-Respondent liable. In the written submissions of Plaintiff-Appellant it is submitted that the learned District Judge erred in his judgment for the following reasons.

(a) Judgment based solely on the evidence of witness Fernando the inventor and failed to consider document P1 and the evidence of Abeywickrema the Engineer.

(b) Judge's observation that Plaintiff failed to engage experienced persons to operate the machine. Plaintiff stress it is not a pre-condition in the contract.

The Appellant has discussed the law applicable with several authorities and also refer to several provisions of the Sale of Goods Ordinance. (Though no issue was suggested in the original court) I will consider the legal position having dealt with the case of Defendant-Respondent.

The position of the Defendant-Respondent, gathered from the pleadings and submissions of learned President's Counsel is that Plaintiff had expressed satisfaction with the performance of the machine, that the guarantee period having lapsed and as such Plaintiff has no right to make a

claim. It is also stated that Plaintiff failed to properly operate the machine. Learned President's Counsel for Respondent stressed that Plaintiff came to court not on the basis of violation of implied conditions set out in the Sale of Goods Ordinance, and state it is for the first time in appeal that such a position had been urged. He also states that there is a statutory bar in setting out a different position (Explanation 2 of Section 150 of the Civil Procedure Code). It was also contended that reference made in the advertisement in P2 & P7 are not express terms but tradesman's puffery which are not legally binding. There is reference to an invitation to treat and an offer by citing 'Law of Contracts' by C.G Weeramantry pg. 110 Vol. I Therefore the statements in P2 are not capable of being accepted.

The learned President's Counsel, I believe connecting issue Nos. 5 & 6 has taken up the following position in the written submissions.

Plaintiff-appellant is praying for a return of the purchase price, and damages. In paragraph 7 of the plaint the plaintiff-appellant has pleaded that he has called upon the defendant-respondent to take back the said machine.

Plaintiff-appellant is seeking to treat the contract as repudiated and reject the goods. The plaintiff-appellant's claim for a return of the purchase price is on the basis that he is entitled to reject the said machine. The plaintiff-appellant's position is fallacious and wrong.

Prof P.S. Atiyah in his book "The Sale of Goods" (fifth edition) states as follows at page 287 in dealing with the topic of "Loss of the right to reject"

> "Even though the seller may be guilty of a breach of condition and the buyer may prima facie be entitled to repudiate the contract and reject the goods, he may in certain circumstances lose this right, and be compelled to treat the breach of condition as though it were a mere breach of warranty. He may, in other words, have to accept the goods, and be content with a claim for damages."

At page 288 Atiyah also deals with the circumstance in which the buyer would lose the right to reject the goods. Those circumstances are principally where the buyer has accepted the goods, or where the contract is for specific goods, and the property in the said goods has passed to the buyer – vide section 12(3) of the Sale fo Goods Ordinance.

There is reference in the written submissions of Respondent to Section 12(3) & Section 35 of the Sale of Goods Ordinance. Another point dealt in the written submissions of Respondent is the letter marked V1 of 21.9.1981 written by Plaintiff. The following extract in V1 is reproduced "I certify that the performance of the machine is now up to the specification given by the corporation". Was V1 written after Plaintiff had ample opportunity to examine the machine? Can it be said Plaintiff rejected the machine within a reasonable time. By V2 (15.12.1981) Plaintiff attempted to return the machine well over 1 year after purchase. Guarantee period lapsed. Vide Section 35 & 12(3) of the Sale of Goods Ordinance.

The following are also noted:

The plaintiff-appellant is not entitled to the sum of Rs. 339,140/- claimed in the plaint. That sum is claimed under different heads, namely, cost of

erecting the building, cost of installation of electrical equipment and interest on loans from banks and other parties.

Don Maxwell Abeyratne, and official of the Commercial Bank, Wellawatte testified that the plaintiff-appellant obtained a loan of Rs. 175,000/- to purchase a motor car, and that the interest due on the said sum as at the date he gave evidence is a sum of Rs. 55,465.84. This sum is not claimable from the defendant-respondent because it falls outside the heads under which he has claimed the said sum of Rs. 339,140/- as damages. The plaintiff-appellant has taken the loan to buy a car.

The documents marked P5 and P6 were produced to show that a loan of Rs. 250,000/- has been taken from the Bank of Ceylon, Gampaha Branch to establish the Rice Mill, and that interest is due on this loan. No evidence has been placed before Court to prove that the money obtained on the said loan was applied towards establishing the said rice mill. The plaintiff also said the money he got upon retirement, namely, a sum of Rs. 42,542.65 from the provident fund, a sum of Rs. 47,626.80 by way of commuted pension and a sum of Rs. 14,000/- from the Welfare Society (vide page 114) were invested in the said rice mill. There is no proof that the moneys allegedly obtained for

purposes of setting up the said Rice Mill were in fact utilized for the said purpose.

Respondent also comment on the evidence of Salmansingho the contractor who built the foundation of the rice mill. Respondent refer to P25 an estimate giving details of expenditure as a self serving document. Estimate prepared after about 4 years from the date of construction. Respondent severely criticize that the amount shown as Rs. 339,140/- part on the erecting the building, electrical equipment etc. due by way of damages cannot be claimed. A point stressed by the Respondent is that the Plaintiff did not have or employed trained operators and it was essential to have the machine operated by trained personnel. The Defendants witnesses have testified that the machine could be controlled or heat generated could be controlled. It is also stressed that documents marked V1, V9 & V10 negate fundamental breach. Defects were repaired during the guarantee period. Respondent's position was that the machine was not properly handled.

At the outset I note that this is a reconstructed record. One of the important matters to be decided in this case is whether the material contained in P2 & P7 contain express terms which a party could rely and a

breach of any one or more of them would result in a breach of contract? Or whether P2 & P7 is an advertisement which merely contains material for an invitation to treat not capable of giving rise to a cause of action which entitled Plaintiff to considered as a binding contract? On the other hand has it been conveyed to a prospective buyer that the machine need to be properly handled with expertise? Failure to do so would not result in a claim for damages? Oral and documentary evidence indicate that during the guarantee period the Defendant party attempted to rectify the defects. What would be the conclusive effect of document V1? Or did the Defendant take mean advantage in getting the Plaintiff to issue such letter by direct or indirect means of compulsion.

I would firstly consider the matters contained in document P2 & P7. It is necessary to read the entirety of same. P2 reflect in large print as Paddy Par Boiler/Drier. At the outset of this judgment I have referred to the contents of P2 & P7. Some relevant terms are included in P2 but all of them are not express conditions. The term which state machine parboils paddy instantly dries it simultaneously in a continuous flow process at the rate of 1 ton of paddy per hour cannot be taken lightly. It is an express term and that would induce, prospective buyers to enter into a contract. Guarantee period

is another express term. It is arguable whether reference to the finished product would be odorless lighter in colour with pleasant taste is an express term. Document P7 gives more details and expands on P2. As stated above it is my view that the contents of P2 & P7 refer to certain express terms and items and breach of it would give rise to a claim, against the Defendant Corporation since it is not mere representation.

A mere representation would not amount to an express term. It cannot give rise to claim damages. These statements contained in P2 & P7 are not preliminary investigations or negotiations. The party making the statement had special knowledge or skill as compared with the other party. De la Salle Vs. Guildford 1901(2) KB 215.

Tradesmen's Puff – Law of Contracts – Vol. II pg. 564 Chapter 19 para 588 – C.G Weeramantry.

> **"Tradesmen's Puff."** The importance of distinguishing between terms of a contract and mere representations is brought out clearly in relation to statements which are made by way of puffery. In order that an assertion regarding the quality of goods should be regarded as a term of the contract, it is clear that it must fall outside the pale of puffery. Expressions used by vendors in extolling the virtues of their goods do not form a part of the contract, for exaggeration of merits and suppression of defects are to be expected and guarded against by every reasonable purchaser.

I would consider the gist of Plaintiff's evidence and itemise same as follows:

(a) Machine sold in parts and it was given to plaintiff on 3.11.1980. Fitted by Engineers and labourers of the Defendant Corporation.

(b) Machine operated on 23.2.1981 for the first time

(c) Prior to purchase perused the notices pertaining to machine but machine did not function properly according to the notices issued by Defendant Corporation.

(d) Complained by letters P10 (20.6.1981) – Defendant Corporation by P11 (30.7.1981) proposed to send a team to repair the machine

(e) Complained by P12 (19.12.1981). A long letter suggesting a refund.

(f) Letter P13 by Defendant Corporation about improving the machine and requesting for a report from Plaintiff on the present condition of the machine.

(g) P14 complaint by Plaintiff (depending on the advertisement it falls far short of the advertised claim). Complain of quality of rice. Letter of inventor of machine (P15) suggestion to rectify faults by H.I. Fernando of Defendant Corporation P16 complain of Plaintiff.

(h) P17/P18 letter by H.I. Fernando of Defendant Corporation Plaintiff complaint to Minister (P19). P21 letter of demand receipt of (P20) of purchase.

(i) Reasons for signing letter V1 contained in P23 of 15.2.1982. Did not agree with all contents in V1. The letter V1 typed and brought to Plaintiff for signature by Defendant Corporation in cross-examination of Plaintiff.

(j) Machine operated as from 23.2.1981. Reject the records maintained by Defendant Corporation that operation date was 30/1/1981.

(k) Plaintiff had an operator to work the machine details of operator and how he was selected. Reject suggestion of Defendant being critical of operator. (at a certain point in the proceeding (folio 91 – 94) illegible)

(l) Folio 94 – Plaintiff's position V1. Plaintiff states his signature was obtained by employees of Defendant Corporation what is recorded is that ... යන්ත්‍රය වැඩ කරන්න තමන් අරගෙන මාස 7 කට පස්සේ ඒ සහතිකය දුන්නා. මම දුන්නා නොවේ.

මගෙන් අත්සන ගත්තා. ඒ අය ටයිප් කර ගෙන ආවා. මම අත්සන් කරන්න බැහැ කිව්වා.

At folio 101.... සහතිකය අත්සන් කරන විට මෝල ක්‍රියා කිරීම ගැන සැහීමකට පත් වී සිටියේ නැහැ. අත්සන් නොකලහොත් මෙක අලුත්වැඩියා කරන්නේ නැහැ කිවා. ඒකට මිසක් අලුත්වැඩියා කරන්න වෙනත් තැනක් නැහැ. එම නිසා මම අත්සන් කලා.

The learned District Judge has in his judgment expressed the view in so many words that an experienced person was not engaged to handle the machine and such mishandling resulted in malfunctioning of the machine. Original court seems to suggest a contributing factor and pass the blame to the Plaintiff. I am unable to agree with the trial Judge's views on this aspect. When I consider the oral and documentary evidence in this case and concentrating more particularly on documents P2 & P7 there is no express term or a pre-condition to engage qualified experienced persons. Series of letters exchanged between parties indicate an inherent defect in the machine. Nor can it be denied that the Defendant-Corporation from time to time employed several of their staff to repair the machine. Not once but several times. If experienced persons only could handle operations in this machine that fact should have been conveyed to the Plaintiff either in P2 or P7 and or in any other contemporaneous document. It appears to me that the Defendant at a certain point realized their fault and attempted to blame the

Plaintiff in the manner suggested by the learned District Judge in his judgment. In the commercial world in anticipation of litigation a party may be advised to shift the blame. I reject the views of the learned District Judge on this aspect. Trial and error attitude should not harm an innocent party, who negotiated on the footing of facts conveyed by document P2 & P7.

Delay in submitting P1 report cannot be held against the Plaintiff. On P1 alone this case cannot be decided. The learned District Judge does not seem to reject documents P10 to P19. As itemized in this judgment regarding Plaintiff's evidence from (d) to (h) is sufficient to conclude defects in the machine, which had been repaired by the Defendant Corporation from time to time.

Another point referred to in the judgment is on document V1. Trial Judge states that the Plaintiff failed to protest about V1. to a high officer or a person in authority. One has to realize the predicament Plaintiff faced. On one hand he was keen to get the project moving. He was on the other hand had no option but to complain of defects. His explanation as to the reason he placed his signature on a prepared document V1, by the Defendant, is an acceptable explanation in the circumstances of this case. I am unable to accept the trial Judge's views on same. To draw an adverse

conclusion on V1 would be unreasonable in the circumstances of this case since the machine had been subject to breakage and repair on many occasions. V1 is not a document to be accepted conclusively. In business circles this type of method is very often employed to shut out an innocent buyer. It is to be noted that subsequent to V1 also Plaintiff complained about defects.

In the judgment based on evidence trial Judge observes that the Defendant Corporation had decided not to engage in the manufacturing of this type of machine at a certain stage. One could arrive at a conclusion that necessary inferences could be drawn as it may have been unprofitable for the Defendant Corporation to embark on future sales. The case in hand demonstrate the several continuous lapses in the machine which had to be constantly repaired. Board of Directors decided to stop it's manufacture. Board will decide what is best for the organization. I have reproduced the following from the judgment.

ප්‍ර: ඇයි මේ යන්ත්‍රය නිපදවීම නතර කලේ ?

උ: බෝඩ් එක තීරණය ගත්තා මගෙන් අහල නොවෙයි නතර කලේ. ඊංජිනේරුවන්ගෙන් අහල නොවෙයි. Trial Judge express his views at this point (not supported with reasons or material) as ... මෙයින් පෙනි යන්නේ වානේ

සංස්ථාවේ අධ්‍යක්ෂ මණ්ඩලය ඔවුන්ගේ මනාපය අනුව යන්ත්‍රයේ නිපදවීම කිසිදු හේතුවක් ඉදිරිපත් නොකර නිෂ්පාදනය නවත්නා ඇත.

The other point is on controlling the heat generated. Witnesses of the Defendant-Respondent attempt to demonstrate that there are methods to control heat. All these methods should have been contemplated and conveyed to the Plaintiff at least at the negotiation stage. As observed earlier trial and error methods employed by the Defendant Corporation has inconvenienced the buyer (Plaintiff) and caused him monetary losses. The Plaintiff-Appellant relying on the important conditions referred to in P2 & P7 invested a large sum of money at that time expecting a return by purchasing the machine. It was not certainly in a good working condition, which resulted in malfunctioning of the machine many times. Plaint was filed on a breach of contract. Plaintiff for good reasons did not specifically plead the provisions of the Sale of Goods Ordinance. This court observes that there is a clear breach of conditions contemplated in documents P2 & P7. Plaintiff-Appellant need to be compensated.

Whether one pleads the provisions of the Sale of Good Ordinance or not, the transaction presented to court is no doubt a sale of goods transaction. I need not rely solely on the Sale of Goods Ordinance, to

express the view that whatever items/goods sold should be of a merchantable quality.

Merchantable quality means "that the goods in the form in which they were tendered were of no use for any purpose for which goods which complied with the description under which these goods were sold would normally be used, and hence were not saleable under that description" (per Lord Reid in B.S. Brown & Sons Ltd. V. Craiks Ltd. (1970) 1 W.L.R. 752, 755). Consequently, goods are not of merchantable quality if, in the state in which they are tendered. (1) they have defects unfitting them for their ordinary use, or (2) their condition is such that no reasonable buyer, with knowledge of their true condition, would accept them in performance of the contract. The fact that the defect can be easily cured, e.g. by washing an irritant out of woolen underwear or by making some trifling repair, is immaterial. Merchantable quality does not mean that there will be purchasers ready to buy the goods, or that the goods will comply with the law of a foreign country, so as to be saleable there. (Summer, Permain & Co. v. Webb & Co. (1922)1 K.B. 55).

The other aspect is the guarantee period. In the commercial world seller attracts buyers by giving a guarantee period, for the items sold. Whether such period was available or not, cannot excuse a seller who has sold defective goods. Complaints made by the Plaintiff-Appellant seems to be a continuous process and he encountered difficulty at various stages of his project. What the Plaintiff-Appellant purchased was not as the seller contracted in P2 & P7. As such one cannot take cover by referring to a guarantee period, when damage and defects are apparent. When a buyer such

as the Plaintiff purchased a par boiler dryer milling machine, I take that every representation made with regard to the texture and quality of the machine, or product produced by the machine is something the Plaintiff would take seriously. It has influenced the Plaintiff to purchase the machine. It would go to the root of the fundamental obligation of the contract. Plaintiff purchased this par boiler dryer machine, by necessary implication, it should par boil and dry to the required expected standard. If not it would be a violation of the fundamental obligation of the contracts. It is so in the case in hand.

Weeramantry on Law of Contracts – Vol. II Pg. 583

> We have already drawn attention to the importance of a term or condition of a contract as compared with a mere representation. Furthermore, there is said to be a component of the contract of yet greater importance than a term or condition, for there is at the heart of every contract, a core of basic or fundamental obligation, lacking or failing which the contract loses altogether its original character and identity, and fails in its primary object. To this core of obligation, more basic in its nature than a term or condition, is given the name fundamental obligation ..... A fundamental obligation has been defined as 'something which underlies the whole contract so that if it is not complied with the performance becomes something totally different from that which the contract contemplates'. If for example, a contract is entered into with a local authority for the supply of electricity to a cinema hall, it would run counter to the main object and intent of the contract if the local authority should be entitled, even deliberately and wrongfully to interrupt the supply of electricity without cause. Again if graphite 'not warranted free from defects' is sold but is found to contain an admixture of

rock stone which damages the buyers machine, such a difference of substance would not constitute a mere defect, but would render the substance delivered quite different form that contracted for".

I am convinced that Plaintiff should be entitled in law for a refund of the purchase price of Rs. 1, 95,000/- (The amount reflected in P22). However I am not in a position to allow the expenses calculated by Plaintiff on document P25. It is not a contemporaneous document. It has been prepared after a lapse of time, which leave room for exaggeration. Plaintiff should have maintained proper accounts from the out set to show the expenditure. The loans obtained from Banks and retiral benefits received by Plaintiff cannot be added, as I cannot find strong reliable evidence to prove that money was applied towards establishing the rice mill and the project.

In all the above circumstances I set aside the judgment of the learned District Judge, and allow this appeal and enter judgment for Plaintiff-Appellant in a sum of Rs. 1,95,000/- with legal interest from date of plaint till payment in full. In the circumstances no order is made as to costs.

Appeal allowed subject to above directions.

JUDGE OF THE COURT OF APPEAL