

1863.
July 13.

Special Appeal No. 277 of 1861.

RA'MA'BHA'I GIRDIRBHAI' *Appellant.*
ALLI' AKBA'R KA'JRA'NI *Respondent.*

Policy of Insurance—Jettison—Evidence of Loss—Protest of Nákodá.

In an action on a policy of insurance to recover the value of a portion of the goods insured lost by jettison, the protest of the Nákodá, and Custom House vouchers, showing that on the return of the ship to her port of sailing (being driven back by stress of weather), the goods alleged to have been lost were not on board her, are not sufficient as even *prima facie* proof of the loss.

THIS was an action to recover principal, Rs. 1,760, and interest, on foot of a policy of insurance effected at Súrat on goods from Bombay to Bussora in the Baglá *Sulámáni*, Nákodá Mansúr. The vessel cleared for the Persian Gulf, but sailed in the first instance for Bushire. The plaintiff shipped 150 tubs of sugar-candy for Bussora. In consequence of the vessel having encountered a very heavy gale, 132 tubs of sugar-candy were obliged to be thrown overboard, and the vessel put back to Bombay. The defendant traversed the fact of the shipment and the loss, and further contended that the goods were not shipped for Bussora, and that, as a portion only of the goods had been lost, the plaintiff could not recover, as a general average statement had not been made.

The Munsif of Súrat, who tried the case, found on all the material points for the plaintiff, and gave judgment in the full amount claimed.

On appeal, the Acting Judge, A. K. Forbes, confirmed the Munsif's decree. In the course of his judgment he stated—

“The plaintiff insured one hundred and fifty tubs (pairs) China sugar-candy, of the value of Rs. 3,000, from Bombay to Bussora, on board the Baglá *Sulámáni*, Nákodá Mansúr, on the 1st of May 1858, by a policy underwritten by the defendant; and by another policy, underwritten by the firm of Jagmohandás Fakírbháí on the 5th of May 1858, he insured the fifty other tubs from Bombay to the Persian Gulf. On the 29th of June following, the Nákodá, Mansúr, made a protest at the office of Mr. Charles Frewen Kelly, a notary public at Bombay, in which he stated that the *Sulámáni* set sail from the port of Bombay on the 7th of May preceding, bound to Bushire; that she proceeded on her voyage with favorable weather until the 15th of May, when she encountered

a very heavy gale; that on the 16th and 17th the weather continued very heavy, so that on the last-mentioned day the crew were compelled to throw half the cargo overboard, including 132 tubs (pairs) of the sugar-candy shipped by A'gá Allí Akbár for Bussora, and 106 for Bushire; that on the same day they bore up for Bombay, and reached that port on the 23rd; that the Customs officers landed the remainder of the goods; and that the goods which were not damaged were subsequently sent to Bushire in another English-built vessel, and the damaged goods were handed over to the respective owners.

“The insurance then was for Bussora, but the port-clearance was for the Persian Gulf, and the *Sulámáni* set sail in the first instance for Bushire. Mr. M. B. Vikáji, Assistant Commissioner of Customs, however, proves that Bushire, Bussora, and other ports go under the general name of the Persian Gulf in the Bombay Custom House.

“The policy itself provides it shall be lawful for the said ship *Sulámáni* in this voyage to proceed, and sail to, and touch and stay at, any ports or places whatsoever within the limits of the said voyage without prejudice to the insurance; and Mr. Fernandes, manager of the Bombay Native Insurance Office, proves that Bushire is an intermediate port between Bombay and Bussora, and that if goods insured for Bussora were shipped for Bushire, the insurers would be liable for any portion of them thrown overboard during the voyage; I, therefore, hold that the insurance was not rendered void by the fact that the goods were shipped on board a vessel which was to call at Bushire, although the policy specified Bussora as the port at which they were to be landed.

“The first instrument of evidence in regard to the fact of the loss is the protest made by the Nákodá, Mansúr. It was urged, on behalf of the defendant, that this is not receivable in evidence unless proved. There is no express enactment that protests authenticated by notaries public shall be received without further proof, as there is in the case of powers of attorney under some circumstances. But in an action on a foreign bill a protest purporting to be attested by a notary public will prove the dishonour of the bill without proof of the notary's attestation, and as a document of a public nature made by an authorised and accredited agent appointed for the purpose, I think this protest must be received *prima facie*, unless disproved. The next question is whether it is sufficient

1863.
 RA'MA'BHA'I
 GIRDHARBHAI
 v.
 ALLI'AKBA'R
 KA'JEA'NI.

1863.
 RA'MADHAI
 GIRDHARDHAI
 v.
 ALLI'AKBAR
 KAJRA'NI.

evidence that the goods were thrown overboard ; and, as I find Mr. Fernandes distinctly stating the practice of insurance to be that, if the assertion of the owners of goods that they have been thrown overboard is supported by a protest duly made by the commander, then the amount of insurance is paid to the owners to the extent of the property lost, I think that it is so. But the protest does not stand alone ; it is supported by the transshipment paper proved by Mr. M. B. Vikáji, which shows that 288 out of the 300 tubs of China sugar belonging to A'gá Allí Akbár were not on board the *Sulámáni* when she returned to Bombay, and by the certificate of transshipment under the signature of Mr. D'Souza, proved by Mr. M. B. Vikáji, to the same effect. This evidence is not, however, of the same force as the protest in which the commander of the vessel makes oath to what occurred in his presence at the time the goods were thrown overboard. It is contended for the defendant that the Custom House documents do not tally with each other, and are worthless : for example, that the Import General Manifest mentions the whole 300 tubs as re-imported, instead of 238, as stated in the transshipment list ; but Mr. M. B. Vikáji has noted that the transshipment list gives the details of, and explains, the Import Manifest, and I have no doubt that the other apparent discrepancies, such as they are, could have been easily explained by the Custom House officers if they had been questioned upon the subject in the course of the original trial. I, for these reasons, consider it proved that 238 tubs of sugar-candy, shipped by A'gá Allí Akbár, on the *Sulámáni*, were thrown overboard.

“In regard to the necessity for a general average statement, it is sufficient to remark that, whatever may be the English law on the subject, there is neither law nor practice binding the Mofussil Court, from which it can be decided that a general average statement should be made. Even the Supreme Court of Bombay, it appears, admits the authority of the Native practice, which is that the insured is paid the whole amount.”

From this judgment the defendant below appealed. The appeal was heard before SAUSSE, C. J., and NEWTON and TUCKER, JJ.

Westropp, Shántarám Náráyan, and *Kivámuddin Miyánji* appeared for the appellant.

White, Dhirajlál Mathurádás, and *Dáclábhái Frámji* for the respondent.

For the appellant it was contended that there was no sufficient proof of the loss of the goods, and that the protest

of the Nákodá and the Custom House vouchers, had been improperly received in evidence.

1863.
 KA MA'BHA'I
 GIRDHARBA'I
 v.
 ALLI, AKBA'B
 KA'JRA'NI.

SAUSSE, C.J., in delivering judgment, said—It might be very convenient for traders engaged in the petty commerce carried on by means of Native *baglás*, that there should be some relaxation in the strictness of proof required of essential matters in actions upon policies of insurance; but when the aid of Courts of Justice is invoked, the rules of evidence by which they are governed must be complied with, even though in doing so some difficulties, delay, and expense disproportionate to the amount sought to be recovered, may be occasioned. It is only the parties to such contracts who can relax the strictness of proof required, and that by an agreement, either expressed in terms, or implied by a local and reasonable usage at the port where the policy was effected.

Neither description of agreement appears to have existed in the present case, and we think we ought to reverse the decree of the Court below, and remand the cause for re-trial upon the merits. The protest of the Nákodá and the transhipment paper, mentioned in the judgment of the Court below, were improperly received in evidence as *primá facie* proof of the loss of the goods; and we are further of opinion that the document dated 10th March 1858, in its present form, and not being proved to be a certified copy of an entry or entries in the public books of the Custom House of Bombay, is not corroborative evidence of the fact of the goods having been thrown overboard.

We are also of opinion that the question of adjustment of average loss, or payment by the underwriters for the portion of the cargo thrown overboard, may be decided according to whatever may be proved to be the usage of the port of Súrat in respect of such claims upon similar policies.

The judgment will, therefore, be reversed, and the case remanded. Costs to abide the event.

Decree reversed.