CASES

DECIDED IN THE

APPELLATE CIVIL JURISDICTION

OF THE

HIGH COURT OF BOMBAY.

Special Appeal No. 69 of 1866.

DWA'RKA'DA'S LALUBHAI' .....*Appellant.*
A'DA'M A'LI SULTA'N A'LI .....*Respondent.*

Marine Insurance—Constructive total loss—Remand.

In a suit on a policy of insurance, as for a total loss, where goods were shipped for the voyage from Súrat to Karáchí, and the vessel, having sprung a leak, was forced to put into Dwárká, at which place the goods (with the exception of some iron thrown overboard during the voyage) were landed and placed in a warehouse, from which a portion (some castor oil and jágarí) was carried off by robbers; and the larger residue of the cargo—consisting principally of cotton seeds, which were dried and cleaned—was sold; and the proceeds, after deducting freight expenses, remained in the hands of the Mahájans of Beyt, to be paid to whomsoever might be entitled to them:—

Held: 1*st*.—That the loss by robbers, although not expressly mentioned in the policy, was one of the perils insured against.

2*nd*.—That the judge below, being erroneously of opinion that, when the goods were once landed damaged, there was nothing to do but to sell everything for the benefit of the underwriters, and having consequently recorded no finding on the material question, whether the whole or any part of the cargo was practically capable of being sent in a marketable state to the port of destination;—the suit must be remanded in order that the judge may determine, whether there was a constructive total loss, which entitled the plaintiffs to abandon, and, if not, that he may award such a proportion of the value of the iron and of the jágarí and oil which were actually lost, and of the amount of the deterioration in the cotton seeds and other articles, as the sum insured by the defendant bore to the whole sum insured, taking into account, also, in that case what proportion the sum insured bore to the actual value of the goods.

The High Court is not at liberty in a special appeal to draw any inference of fact from the evidence in the case.

1866.
August 22.
S. A. No. 69 of 1866.

THIS was a special appeal from the decision of C. H. Cameron, District Judge of Súrat, in Appeal Suit No. 156 of 1865, reversing the decree of the Munsif of Súrat, in Original Suit No. 580 of 1865.

The case was argued before COUCH, C. J., and NEWTON, J.

Howard and *Dhírajlál Mathurádás* for the appellant.

Reid and *Shántárám Náráyan* for the respondent.

The facts sufficiently appear in the judgment.

Cur. adv. vult.

September 27. COUCH, C. J.—This was a suit on a policy of insurance on goods shipped on board a native vessel called *Hariprasád*, for the voyage from Súrat to Karáchí. The plaintiffs, the special respondents, claimed Rs. 897 with interest, as for a total loss.

The defendant, by his answer, admitted the policy; but insisted that the goods insured had been safely landed at Dwárká, and, therefore, he was not liable.

The Munsif rejected the claim, on the ground that the plaintiffs had not shown that the whole, or any specific portion, of the goods were lost, so as to charge the insurers.

On appeal, the District Judge reversed this decree, and awarded to the plaintiffs the full amount claimed with interest.

The facts of the case appear to have been that the vessel, after leaving Súrat with the goods on board, met with bad weather, and, having sprung a leak, was forced to put into Dwárká harbour. The goods insured consisted principally of cotton seeds of the value, as stated in the manifest, of Rs. 1,318-12. There were also jágarí, valued at Rs. 180; castor oil, valued at Rs. 130; iron, valued at Rs. 335; and some other articles of small value. The iron was thrown overboard during the voyage; and on the arrival of the vessel at Dwárká the remaining goods were landed, and placed in a godown, which was shortly afterwards plundered by the Wághírs, and the jágarí and oil were carried off by them. The cotton seeds, after being dried and cleaned,

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were sold with the other articles of small value; and the proceeds, after deducting the freight and expenses, remained in the hands of the Mahájans at Beyt, to be paid to whomsoever might be entitled to them.

The District Judge has based his judgment upon his opinion, that the agreement was, that if the goods did not arrive safely at Karáchí, the insurer would be answerable for the loss, that the goods had not reached Karáchí safely, and, therefore, the defendant was liable; but it is to be remarked that he does not show an accurate appreciation of the evidence, when he says that most of the goods were thrown overboard. He appears to have thought that the whole loss, including the plundering by the Wághírs, was occasioned by perils of the seas.

Now, there was no actual total loss of the goods insured, as a large portion of them was landed at Dwárká, and, supposing the robbery by the Wághírs to be a loss occasioned by perils of the seas, still the cotton seeds, which formed the more valuable portion of the cargo, remained. We think the robbery by the Wághírs was a loss, not strictly by perils of the seas, but by one of the perils insured against. The rule *causa proxima non remota spectatur* is not opposed to this. Although not expressly mentioned in the policy, a loss by robbers must be considered as amongst the perils insured against. It became necessary to land the goods at Dwárká, and (if they were not then in such a state that there was a constructive total loss) to keep them there, until they could be forwarded in the same vessel after it had been repaired, or in another vessel, to the port of destination; and we think they must be considered during that period to be protected by the policy as if they were still on board the vessel, and a loss of them by robbery is within the perils insured against. This view is supported by the judgment of Lord *Mansfield* in *Pelly* v. *Royal Exchange Assurance Company* (*a*).

In order to arrive at a right conclusion in this case, it was necessary for the Judge in the court below to consider,

(*a*) 1 Burr. 342.

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whether on the arrival of the vessel at Dwárká when that part only of the cargo which consisted of iron had been actually lost, or after the robbery by the Wághírs when another portion was actually lost, there was a constructive total loss of the goods insured, which entitled the plaintiffs to abandon.

The principle upon which he should have proceeded is stated in the following passage in Sir *Joseph Arnould's* work on Marine Insurance, Sec. 399—"Where the original ship is disabled in the course of the voyage, and no other can be procured at the port of the casualty or any neighbouring port, the master has a right, where the cargo is of a perishable nature and sea-damaged, to sell it at such port for the benefit of all concerned, and the assured on goods in like case may abandon, and recover as for a total loss. Where, however, the original ship can be repaired with any prospect of sending on the cargo, or what remains of it, in a marketable state to its port of destination, or where another ship can be procured, either at the same or a contiguous port, without any very extraordinary delay or sacrifice, the master is, at all events, empowered, if not bound, to send it on; and he certainly has no right in such cases to sell, nor can the assured on goods abandon and recover as for a total loss." And Chief Justice *Jervis*, in delivering the judgment of the Court of Common Pleas in England in *Rosetto* v. *Gurney* (*b*) says :—"As a general rule, where the whole or any part of a cargo is practically capable of being sent in a marketable state to its port of destination, the master cannot sell, nor can the assured recover as for a total loss. Whether the cargo can practically be forwarded to its port of destination, involves a consideration of all the circumstances of each particular case; and this word 'practically,' as explained by my brother *Maule* in *Moss* v. *Smith* (*c*), comprehends the condition upon which the difference between a total and partial loss depends. 'In matters of business,' says that learned Judge, 'a thing is commonly treated as impossible when it is impracticable, and as impracticable, when it cannot be done

(*b*) 11 C. B. 186. (*c*) 9 C. B. 103.

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without laying out more money than the thing is worth.' Thus, if goods are reduced to such a state by sea-damage as to be worth nothing if sent on, the master may sell them, and the owner may recover as for a constructive total loss: *Parry* v. *Aberdien* (*d*). So if, from sea-damage, the goods cease to retain their original character, for instance, from the progress of putrefaction, the master is justified in selling, and the assured may recover a total loss: *Roux* v. *Salvador* (*e*). On the other hand, if the damage is repairable, the loss is total or partial, according to circumstances. If the damage cannot be repaired without laying out more money than the thing is worth, the reparation is impracticable, and, therefore, as between the underwriters and the assured, impossible. If it can, the cargo is then practically capable of being sent in a marketable state to its port of destination, the master cannot sell it, and the assured cannot recover as for a constructive total loss. And the same rule applies if a part only of the cargo can be saved."

If the facts found by the District Judge had been sufficient to enable us to apply this principle to the case, we might ourselves have disposed of the suit, and have either confirmed the decree of the lower court, or modified it by awarding to the plaintiff what he would be entitled to as for a partial loss; but the Judge has acted upon the erroneous opinion, expressed in his judgment, that when the goods were once landed damaged, there was nothing to do but to sell everything for the benefit of the underwriters, and has not recorded any finding upon this material part of the case.

This court is not at liberty, on a special appeal, to draw any inferences of fact from the evidence in the case; and we must, therefore, remand the suit for re-trial, in order that the court below may determine, whether there was a constructive total loss, according to the rule which we have pointed out; and the court will receive any additional evidence which may be necessary for the determination of this question. If it should find that there was a constructive

(*d*) 9 B. & C. 416. (*e*) 4 Sc. 34.

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total loss, the plaintiff will be entitled to recover the amount claimed with interest; but if not, then such a proportion of the value of the iron and jágarí and oil which were actually lost, and of the amount of the deterioration suffered by the cotton seeds and other articles, as the sum insured by the defendant bears to the whole sum insured, should be awarded to the plaintiff with interest thereon. And, in estimating the value of the goods lost, and the amount of the deterioration which the underwriters are to be charged with, the court must consider what proportion the sum insured bore to the actual value of the goods; and, if it was less than the actual value, should allow for the loss and deterioration in the same proportion. And the costs of this appeal will abide the final decision.

Decree reversed and suit remanded.

Special Appeal No. 540 *of* 1865.

NAROTTAM JAGJI'VAN..... *Appellant.*
NARSANDA'S HA'RIKISANDA'S..... *Respondent.*

Hindú Law—Testamentary Power—Separate Property.

The title of a remote kinsman, though heir of a Hindú testator, who died without leaving issue, or any near relative surviving him, and with whom that remote kinsman had not been united in food, worship, or estate, cannot prevail against the title of a devisee of the property of that testator, whether such property was, by the testator, self-acquired, or held in severalty, either by virtue of a partition, or of the non-existence, or, if any ever did exist, the extinction of coparceners.

1866. October 13. S. A. No. 540 of 1865.

THIS was a special appeal from the decision of C. H. Cameron, District Judge of Súrat, in Appeal Suit No. 65 of 1865, reversing the decree of the Munsif of Surat, in Original Suit No. 1304 of 1864.

The case was argued before WESTROPP and GIBBS, J J., by *Nánábháí Haridás* on behalf of the appellant.

There was no appearance on behalf of the respondent.

Cur. adv. vult.