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[333] ORIGINAL CIVIL.

Before Sir Charles Sargent, Justice.

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JADOWJI GOPAL AND OTHERS (*Plaintiffs*) v. JETHA SHAMJI AND  
C. A. TURNER, OFFICIAL ASSIGNEE AND ASSIGNEE OF THE ESTATE  
AND EFFECTS OF LILADHAR GOVINDJI, AN INSOLVENT (*Defendants*).\*  
[1st, 2nd, 4th, 5th & 9th September, 1879.]

*Jokhmi hundi*—Custom—Equitable assignment of goods as security.

If the drawee of a *Jokhmi hundi* refuses to accept it, but nevertheless as consignee takes possession of the goods against which it is drawn and which are referred to in it, the only remedy of the holder is against the drawer of the *hundi*, or the person from whom the holder bought it.

The plaintiffs at N purchased, on 22nd December 1878, from L, for Rs. 4,000, a *jokhmi hundi* drawn in favour of plaintiffs by L upon his firm in Bombay. The *hundi* contained a statement that it was "drawn against" twenty-nine bales of wool shipped at Tuna, and it was made payable eight days after the safe arrival of the ship at Bombay. The plaintiffs obtained from L, at the same time, a letter addressed by him to his firm at Bombay, which contained the following passage:—

"Upon you a *jokhmi hundi* is drawn, the particulars whereof are as follows:—

"(Rs. 4,000). The value having been received from Jadowji Gopalji, *hundis*, for Rs. 4,000 drawn against 29 bags of sheep's wool shipped on board the 'Hariprasad,' owner Dayal Morarji, from the sea-port town of Tuna.....On the safe arrival of the vessel do you be good enough to land the goods and deliver the same to Jadowji Gopalji; and as to the *jokhmi hundis* drawn before, if in respect thereof any money has to be paid to Jadowji Gopalji, do you be good enough to pay the same."

The above letter was duly presented by the plaintiffs to L's Bombay firm on the 27th December 1878. Evidence was given that, at the time the plaintiffs obtained the *hundi* and the letter, the goods referred to had been already shipped. On the 1st January 1879, the firm of L was adjudicated insolvent by the High Court at Bombay. On the 5th January 1879, the ship arrived at Bombay with the goods in question on board, and on the 7th January the shipowners delivered them to the Official Assignee. The plaintiffs sued the Official Assignee (as assignee of the estate and effects of L) and the shipowners to recover possession of the wool, or the amount of the *hundi*, and contended that by the custom of Bombay the holder of a *jokhmi hundi* had a charge upon the goods mentioned therein, and that, in the event of the drawee failing to pay the amount of the *hundi*, the holder was entitled to obtain possession of the goods and realize by their sale the amount due to him upon the *hundi*.

Plaintiff, also, contended that the above letter of the 22nd December 1878 operated as a valid equitable assignment of the wool to him.

[334] *Held*, that the plaintiff, as holder of a *jokhmi hundi*, had no charge upon the wool in question, and could not, upon this ground, recover from the defendants the possession of the wool or the amount due upon the *hundi*; but

*Held*, also, on the authority of *Burn v. Carvalho* (1), that the letter of the 22nd December 1878 operated as an equitable assignment of the wool to the plaintiffs, on the safe arrival of the vessel, as a security for the payment of the *hundi*, and that the plaintiffs were, therefore, entitled to obtain possession of the wool.

In this suit the real questions in dispute were between the plaintiff and the second defendant as the assignee of the estate of the insolvent Liladhar Govindji. The second defendant, as such assignee, contended that certain bales of wool belonged to the insolvent's estate. The plaintiff, as the holder of a *jokhmi hundi* which he had purchased from Liladhar

\* Suit No. 36 of 1879.

(1) 4 M. & Cr. 702.

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Govindji prior to his insolvency, claimed to have, under the circumstances of the case, a charge or lien, to the extent of Rs. 4,000, upon the said bales of wool which were specifically mentioned in the *hundi*. He based this claim upon an alleged custom to that effect. He also claimed the wool in question under a certain letter written by Liladhar Govindji prior to his insolvency, which, the plaintiff contended, operated as a valid equitable assignment of the wool to him.

The second defendant, as the assignee of Liladhar Govindji, denied the plaintiff's claim, and further contended that the goods in question were in the order and disposition of Liladhar Govindji at the date of his insolvency.

The following are the facts of the case:—

The plaintiffs carried on business at Navanagar and Bombay under the name of Jadowji Gopalji. On the 22nd December 1878 the plaintiffs' firm at Navanagar purchased from one Liladhar Govindji, a *jokhmi hundi* for Rs. 4,000 drawn in favour of the plaintiffs by his firm at Navanagar upon his firm in Bombay. The *hundi* contained a statement that it was "drawn against" twenty-nine bales of wool shipped at Tuna in the ship "Gunga Hariprasad" belonging to the first defendant's firm of Daya Morarji, and it was made payable eight days after the safe arrival of the ship in Bombay.

The *hundi* was in the following words:

"There is welfare! To the feet of the worshipful Bhai of five- [335] fold dignity, Liladhar Govindji, at the sea-port town of Bombay a great and good place. From Navanagar, written by Bhai Liladhar Govindji, whose prostrations do you be good enough to read. To wit: (we) have received here from (Thakar) Jadowji Gopalji Rs. 4,000, in words forty hundred, in full, which are received. In respect thereof this *jokhmi* (i.e., conditional) *hundi* (is drawn against goods) on board the 'Gunga Hariprasad,' nakhwa Bhoja, owner Th Dayalji Morarji, (being) 29 (twenty-nine) bags of sheep's wool shipped from the sea-port town of Tuna, against which (this) *jokhmi* (i. e., conditional) *hundi* (is drawn) after the said vessel shall have arrived in a safe, sound and secure manner. After the time of 4 four (i.e., 8) days (there-after) do you be good enough to pay (the money) to (one) named Sha(1), looking to (his) means, station and place. The token is that we shall write (about it) in the letter (of advice). The 14th of *Magsar Vud* of S. (Samvat) 1935 (22nd December 1878). The handwriting of Damodar, the son of the living Inderji, whose prostrations do you be good enough to read."

(On the back.)

"Do you be good enough to pay the double of the half of Rs. 2,000, twenty hundred, in all Rs. 4,000, forty hundred; do you be good enough to pay according to the usage of *jokhmi* (i.e., conditional) *hundi*."

Rs. 4,000.

Together with the above *hundi* the plaintiff also obtained from Liladhar Govindji at Navanagar a letter of the same date, viz., 22nd December 1878, addressed by him to his firm at Bombay, which, according to the evidence, was duly presented by the plaintiffs to the Bombay

(1) i. e., a respectable person being a holder thereof.

firm on the 27th December. The material parts of this letter were as follows:—

“Upon you a *jokhmi hundi* is drawn, the particulars whereof are as follows:—

“(Rs. 4,000.) The value having been received from Jadowji Gopalji, *hundis* for Rs. 4,000 drawn against 29 bags of sheep's wool shipped on board the ‘Hariprasad,’ owner Dayal Morarji, [336] from the sea-port town of Tuna.....On the safe arrival of the vessel do you be good enough to land the goods, and deliver the same to Jadowji Gopalji; and as to the *jokhmi hundi* drawn before, if in respect thereof any money has to be paid to Jadowji Gopalji, do you be good enough to pay the same.”

The *satmi* (ship's manifest), dated the 28th December 1878, was put in evidence to show that the goods were already shipped on that day. Evidence was given that the *satmi* was dated after all the goods had been put on board.

On the 29th December 1878 another letter was sent from Liladhar Govindji's firm at Navanagar to his firm at Bombay, which contained the following passage:—“If you have paid money in respect of the *jokhmi hundi* drawn before, that is right. Otherwise, do you be good enough to make over the goods to the owner.”

On the 1st January 1879 the firm of Liladhar Govindji was adjudicated insolvent by the High Court at Bombay.

On the 3rd January 1879, Liladhar Govindji at Navanagar wrote to the first defendant's firm of Dayal Morarji in Bombay a letter requesting them to deliver the wool in question to the plaintiff Jadowji Gopalji, and informing them that a *hundi* for Rs. 4,000 had been drawn against it.

On the 5th January 1879 the ship “Gunga Hariprasad” arrived safely at Bombay with the twenty-nine bales of wool on board.

On the 7th January 1879 the first defendant's firm of Dayal Morarji, the owners of the ship, wrote to the plaintiffs' solicitors, informing them that, at the request of the Official Assignee, the defendants had deemed it advisable to deliver up the wool to him upon his indemnifying them from the consequences of such delivery.

The plaintiff alleged that, upon the safe arrival of the ship “Gunga Hariprasad” at Bombay with the wool on board, he became entitled, according to the law and custom of *jokhmi hundis*, either to be paid the amount of the *jokhmi hundi* by the drawee, or to obtain possession of the wool against which the said *hundi* had been drawn, and which was referred to in the *hundi*, and to [337] apply the proceeds of such wool towards the payment of the amount due upon the *hundi*. The plaintiff accordingly prayed that the defendants should be ordered to deliver the said wool to the plaintiff, or to pay the amount of the said *jokhmi hundi* with interest.

In his written statement the Official Assignee denied that the plaintiffs had any charge or lien upon the wool in question for the amount claimed, and he contended that the wool was the property of Liladhar Jadowji, or in his order or disposition, at the date of his insolvency, and as assets of his estate vested in the Official Assignee.

At the hearing the following issues were raised:

1. Whether the plaintiffs are entitled to a lien or charge on the wool, in the plaint mentioned, in respect of the amount claimed or any part thereof.

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2. Whether the bales of wool, in the plaint mentioned, were not in the order and disposition of the insolvent Liladhar Govindji within the meaning of the Indian Insolvent Act.

3. Whether the charge created by the *hundi* was not void as a fraud against the general body of the creditors of Liladhar Govindji.

*Latham and B. Tyabji*, for the plaintiffs.—By the custom relating to *jokhmi hundis*, the holders of those instruments have a specific lien or charge upon the particular goods, if any are specifically mentioned in the *hundi*, or upon goods generally in the ship, if the goods are not so mentioned in the *hundi*. If the ship is lost, the *hundi* is not payable. In the event of the insolvency of the drawer of the *jokhmi hundi*, the holder looks, not to the drawer to be paid by him, but to the goods to have his claim satisfied out of the proceeds of their sale.

Secondly, the letter of the 22nd December 1878 operated as a valid equitable assignment: *Burn v. Carvalho*(1). The plaintiffs could not give notice of the charge to the master of the "Hariprasad," inasmuch as the vessel had sailed at the time they got [338] the *hundi*, and thereby rendered it impossible for them to give such notice.

*Macpherson and Rusell*, for the Official Assignee.—As to the alleged custom, nothing has been shown to prevent the drawee of the *hundi* or the consignee of the goods from selling or otherwise dealing with them during the interval of time between the arrival of the ship and the due date of the *hundi*. If such a custom existed, it is obvious, upon the face of the *hundi* itself, that the goods would be lying idle somewhere for eight days.

Secondly, as to the letter of 22nd December 1878, it is impossible to contend that that did not constitute a valid equitable assignment; but the circumstances relating to it are suspicious, and suggestive of fraud.

Thirdly, the goods were in the order and disposition of the insolvent Liladhar Govindji with the consent of the true owner, and, therefore, came within the "order and disposition" clause, s. 23, of the Indian Insolvent Act, 11 and 12 Vic., c. 21; Lee on Bankruptcy, p. 151; Tudor's Mercantile Law, p. 492. The plaintiffs have not done everything they should have done; they should have got their names inserted in the *satmi* (or ship's manifest) as consignees: *Belcher v. Bellamy*(2). The *satmi* is signed by the *nacoda*, who keeps the original and sends a copy to the shipowner. The plaintiffs should have given notice of their claim to the shipowner, whereas no notice was given to him till after the insolvency of Liladhar Govindji. See *Dearle v. Hall*(3), *In re Freshfields Trusts*(4), *Ex parte Stewart* (5), and *Knowles v. Harsfoll*(6) [*Per Curiam*].—Here the owner could do nothing; it is the captain who has possession of, and control over, the goods.] But the evidence goes to show that it is the shipowner who has to deliver the goods. All the witnesses refer to the shipowner, because there are no bills of lading in the case of the native craft such as the "Hariprasad." In the cases of *Burn v. Carvalho*(1) and *Acraman v. Bates* (7) everything was done that could be done.

[339] *B. Tyabji*, in reply, referred to *Brewin v. Short* (8), *Smith v. Topping* (9).

(1) 4 M. &amp; Cr. 690.

(2) 2 Exch. 303.

(3) 3 Russ. 1.

(4) 11 Ch. D. 200=39 L.J. Ch. 98.

(5) 34 L.J. Bkey. 6.

(6) 5 B. and A. 134.

(7) 2 Ell. and Ell. 1456. (8) 5 Ell. and Bl. 227.

(9) 5 B. and Ad. 674.

## JUDGMENT.

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SARGENT, J.—This suit arises out of the insolvency of the late firm of Liladhar Govindji, who, up to the 29th of December last, carried on a large business as wool merchants in Bombay and Navanagar. The plaintiffs, who carry on business as shroffs at Bombay and Navanagar under the name of Jadowji Gopalji, are the holders of a "*jokhmi*" *hundi* for 4,000 rupees, purchased by them, on 22nd December last, from the firm of Liladhar Govindji at Navanagar, drawn upon the same firm at Bombay and they claim, as against the general creditors of the estate of Liladhar Govindji, to be entitled to a charge in respect of the amount of the said *hundi* on twenty-nine bales of wool shipped by the above firm of Liladhar Govindji on a native vessel, "Hariprasad" at the port of Tuna, in the Bay of Cutch, and consigned to that firm at Bombay. They rest their claim on two grounds; 1st, on the established custom as to the rights of holders of "*jokhmi*" *hundis*; 2nd, on an assignment of the twenty-nine bales as a security for the payment of the *hundi* in question.

It appears that this description of *hundi* has been in general use for a very long period in the trade carried on between Bombay and the ports in the Gulf of Cutch, and also to have been recently introduced into the trade between this port and Kurrachee. In form a *jokhmi hundi* does not materially differ from that of the ordinary *hundi*, except in one particular clause, which constitutes its characteristic difference. That clause is stated by Mr. O'Leary, late First Judge of the Small Cause Court, in a judgment (which both parties have consented to my reading) delivered by him (in suit No. 53 of 1874) after receiving a considerable amount of evidence (1), to be in the following words:—"To wit: here have been kept and returned from Sha, Rs. \_\_\_\_\_ in full, so the *hundi* is *jokhmi* on board the vessel— \_\_\_\_\_, nakhwa— \_\_\_\_\_, owner— \_\_\_\_\_. After the fixed time of 4 (four) days after the vessel shall have arrived safely from the sea-port town of \_\_\_\_\_ at the sea-port town of \_\_\_\_\_ do you pay to [340] Sha— \_\_\_\_\_." He further mentions that the word *jokhmi* is variously interpreted as "against goods" or "against risk," and that the latter appears to be the most strictly accurate. I may mention that the interpreter of this Court says that its literal meaning is "conditional." If this be so, the *hundi* will appear to be termed *jokhmi*, because it is "conditional" on the safe arrival of the vessel. In this *hundi* in question the clause has been thus translated: "In respect thereof this *jokhmi* (i.e., conditional) *hundi* (is drawn against goods) on board the "Gunga Hariprasad," nakhwa Bhoja, owner Sha Dayalji Morarji, (being) 29 bags of sheep's wool shipped from the sea-port town of Tuna against which this *jokhmi hundi* is drawn. After the vessel shall have arrived in a safe, sound and secure manner after the time of 4 (four) days do you be good enough to pay the money to Sha \_\_\_\_\_ looking to his means, station and place."

The evidence in this case shows that the goods are sometimes specified, as in the *hundi* in question, and sometimes not, as in the form of the *hundi* given by Mr. O'Leary. One of the witnesses, however, says that it has been the practice to do so since Samvat 1924; but the witnesses are unanimous in stating that a *jokhmi hundi* is always drawn on or against goods shipped on the vessel mentioned in the *hundi*; and, lastly, that the price paid for a *jokhmi hundi* depends on the rate of exchange, the vessel in which the goods are shipped, the season, and the nature of the

(1) See this judgment, *infra*, Note (a) 4 B. 344.

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goods. A *jokhmi hundi* would thus appear to have been designed with a double purpose, *viz.*, to put the drawer of the *hundi* in funds, and, at the same time, to effect an insurance upon the goods themselves, by reversing the position of the insurer and insured from that which obtains in ordinary policies, the insurer being the buyer of the *hundi* who pays the insurance money down, and is entitled to recover it with a premium (together making the amount of the *hundi*) in case the vessel arrives safely. Such being the peculiar nature of a *jokhmi hundi*, important questions may well be expected to arise as to the rights and liabilities, of the drawer, the holder of the *hundi*, or *hundiwallah*, and the consignee of the goods. In the case before Mr. O'Leary the question for determination was, whether the *hundi*- [341] *wallah* was entitled to recover from the drawee of a *hundi* who had not accepted the *hundi*, but who had taken possession of the goods, and the conclusion he arrived at, is thus stated by him in a very carefully considered judgment—"It appears to me there is not the slightest difference of opinion, among any of the witnesses, as to the legal remedy of the *hundiwallah* in the case where the *malwallah* (a consignee of the goods) refuses to accept the *hundi*. Some of them endeavour to put it differently; but they all, in my opinion, admit that if the *malwallah* will not accept the *hundi*, and will not give up possession of the goods, the *hundiwallah's* only real remedy is to sue the drawer of the *hundi* or the person from whom he immediately bought it. All the witnesses point to this, that the *hundi* is taken on the credit of the drawer, and to the same effect is the resolution of the merchants in 1870 (1). After laying down the law as I have stated, and stating the obligation there is on the *malwallah* not to take possession of the goods without honouring the *hundi*, to go on to say (para. 9). But, if that person, after examining and taking charge of the goods, will be so strong as not to pay money for the *hundi*, or if that person becomes insolvent and the *hundi* returns (or, as it is in the translation in this suit, if he be unable to pay, and the *hundi* is returned), the writer of the *hundi* or the seller, whichever may be substantial (or, as it is in the translation in this suit, 'be able to pay') shall pay the money thereof, the interest and charges for non-acceptance of the *hundi* without raising any objection." The witnesses before me were probably of the same class as those before Mr. O'Leary, *viz.*, *munims* and members of firms in Bombay engaged in the business of buying and selling *jokhmi hundis*, and their evidence leaves no doubt on my mind that the *jokhmi hundi* is, as Mr. O'Leary says, taken on the credit of the drawer. It is true that it was sufficient, for the purposes of the action before that learned Judge, to decide that no personal liability was incurred by the drawee by the mere circumstance of his taking the goods; but it is plain that the questions, whether the drawee who has taken the goods is liable for the *hundi*, and whether the *jokhmi hundi*-holder has a charge upon the goods in the hands [342] of the drawee, are almost the same as far as they depend upon custom. However, the 9th article of the rules which I have just referred to (1), can only be explained, as it appears to me, by assuming that the consignee of the goods, however reprehensible his conduct may be, is in his strict right in taking possession of the goods, and that the *jokhmi hundi*-holder cannot follow them in his hands. Article 8, doubtless, would show the existence of a practice by which, when the consignee refuses to take charge of the goods (apparently

(1) See *infra* Note (b) 4 B. 347.

because he does not wish to pay the *hundi* that has been drawn against them) and the drawer has no agent at the port of destination to honor the *hundi*, the *hundiwallah* is empowered to sell the goods on account of the drawer. But such a practice has no application to the circumstances of the present case. The consignee did not refuse to take charge of the goods; on the contrary, the Official Assignee, in whom all the rights of the firm of Liladhar Govindji at Bombay, as consignees of the goods, vested, took possession of the goods, or which is the same thing, obtained possession of them, as it was his legal duty to do.

With this view of the custom it becomes necessary to consider the second ground of the plaintiff's claim to the goods, *viz.*, that they were actually assigned to them as a security for the payment of the *hundi*; and they rely on Ex. F, which purports to be a letter bearing date 22nd December 1878, the same date as that of the *hundi* in question, addressed by Liladhar Govindji at Navanagar to his firm at Bombay, informing the latter that two *jokhmi hundis* for 7,100 and 4,000 had been drawn against 48 bags and 29 bags, respectively, of sheep's wool shipped in the vessels "Mahadeoprasad" and "Hariprasad," and directing them, on the safe arrival of the vessels, to deliver the 77 bags to the plaintiff Jadowji Gopalji; and as to the *hundi* that, if anything had to be paid, to duly pay the same to the plaintiff. This latter direction is not very clear, but would appear to mean that they should pay any deficiency there might be after the goods had been applied towards satisfaction of the *hundis*. This letter, the plaintiffs say, was given them at their request, and forwarded by them to their firm at Bombay, by whom, they say, it was shown on [343] 4th *Posh Sud* (27th December) to Inderji, the son of Liladhar Govindji, who was at the time managing the firm's business in Bombay. Now, I cannot doubt that the letter to the plaintiffs (supposing it to have been given at Navanagar, under the circumstances mentioned by Ludha Sunderji, to be by them forwarded to the firm at Bombay) operated as an equitable assignment of the goods to the plaintiffs, on the safe arrival of the vessel, as a security for the payment of the *hundi*. *Burn v. Carvalho* (1) is a distinct authority that a direction to an agent to pay a debt out of a particular fund, is equivalent to an equitable assignment of so much of such fund. In that case, Lord Cottenham held that two letters, one of which was an application by the plaintiff to a bankrupt previously to bankruptcy to write to his agent at Bahia, directing him to deliver over to the plaintiff's agent goods of the bankrupt that he had in his hand, of an equivalent value of certain bills for which the bankrupt was liable, but which had been paid by the plaintiff, and the other, an answer from the bankrupt, amounted to an equitable assignment, and was binding on the assignees of the bankrupt. Here the case is somewhat different in form, for the order is to deliver the entire fund to be applied by the creditor himself in satisfaction of his claim. But in both cases the principle is the same, *viz.*, that the transaction gives the creditor the right to be paid out of the particular fund, which, however, in this case was contingent on the safe arrival of the "Hariprasad." Upon the whole of the transactions, then, the goods must be taken to have been consigned to the firm at Bombay subject to the above right, and would, in case of bankruptcy, be in the hands of the Official Assignee similarly affected; the universal rule being, as stated by Lord Westbury in *Ex parte Stewart* (2) that the

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assignees in bankruptcy take the property of the bankrupt subject to the equities that affected it in his hands. [His Lordship discussed the evidence as to the alleged fraud, and decided in favour of the plaintiffs.]

*Judgment for the plaintiffs.*

Attorneys for the plaintiffs.—Messrs. *Shapurji and Thakurdas.*

Attorneys for the defendants.—Messrs. *Craigie, Lynch and Owen.*

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[344] NOTE (a).—The following is the judgment of the late John O'Leary, Esq., (formerly First Judge of the Court of Small Causes at Bombay) which is above referred to in the judgment of Sir Charles Sargent:—

*Sivji Lalji v. Ratansi Mulji* (Small Cause Court Suit, No. 53 of 1874).

IN this case the plaintiff, as holder of two *jokhmi hundis* payable to bearer, seeks to recover the amount from the drawee of the *hundis* without acceptance.

It might appear, at first sight, as if this action was manifestly untenable as contravening an established rule, that the holder of a bill of exchange has, as such, no cause of action against the person on whom the bill is drawn, unless and until he has accepted the bill of exchange.

It is sufficient, however, to say that it appears to be clearly held in the case of *Raisey Amerchand*, plaintiff and appellant, v. *Jusraj Vizpal*, defendant and respondent, originally decided by Mr. Justice Bayley on 25th July 1871 and on appeal by Sir C. Sargent and Melvill, JJ., on July 19th, 1872, that a suit of this kind is not governed by the same rules as are applicable to an action on an English bill of exchange.

In giving judgment, in July 1871, Mr. Justice Bayley is stated to have said: "This is a suit in respect of a contract, hitherto unknown in this Court, called a *jokhmi hundi*." This case has not been reported, and I am not aware of any other case on the subject having come before the Courts.

In that case his Lordship said: "A *jokhmi hundi* is in the nature of a policy of insurance, with this difference, that the money is paid beforehand, to be recovered if the ship is not lost."

This mode of doing business, which might perhaps, at first sight, considerably startle an English underwriter, is and has been for a long period (as appears from the evidence) the common course of dealing in the trade between Bombay and Cutch and Halar. The merchants resident in Bombay, engaged in this trade, appear to number about forty or fifty, and among them the house of Pragji Lakhmidas seems to be recognized as the *panch-bouse* or mahajan.

A considerable amount of evidence has been laid before me in the present case with respect to the peculiar usages of this trade in reference to *jokhmi hundis*. I have also read the notes of evidence taken in the High Court case referred to, and I have also carefully read a pamphlet published in Bombay in 1871, purporting to contain certain rules (1) relating to the trade in *jokhmi hundis*, and signed by the majority of the Cutch and Halar merchants resident in Bombay, and drawn up by them on the 15th August 1870.

The course of procedure in this form of marine insurance seems, in its simplest form, to be this. A merchant ships goods from a port of Cutch to his agent or vendee in Bombay. At the port of shipment (or it may be elsewhere) he draws a *hundi* on the consignee of the goods in Bombay. The amount of this *hundi*, it is admitted, ought never in legitimate trade to exceed the value of the goods so shipped. The form of the *hundi* does not materially differ from that in ordinary use. The characteristic clause in a *jokhmi hundi* seems to be as follows:—"To wit: here have been kept and retained from Sha, Rs. \_\_\_\_\_ in full; so the *hundi* is *jokhmi* on [345] board the vessel \_\_\_\_\_, nakhwa \_\_\_\_\_ owner \_\_\_\_\_, After the fixed time of 4 (four) days after the vessel shall have arrived safely from the sea-port town of \_\_\_\_\_ at the sea-port town of \_\_\_\_\_ do you pay to Sha \_\_\_\_\_."

The word *jokhmi* is variously interpreted as "against goods" or "against risk." The latter appears to be the most strictly accurate. The time of payment also seems to be interpreted to mean twenty days; that is, 4 × 4 + 4, or 16 + 4. Having drawn the *hundi* in this form, the consignor negotiates it in the ordinary way, and the purchaser of the *hundi* either forwards it direct to his agent in Bombay, or proceeds to negotiate it again in the market, like an ordinary *hundi*.

(1) See Note (b), *infra*, 4 B. 347.

The rate at which the drawer of such a *hundi* is able to negotiate it, is, of course, not the rate of the day regulating the course of exchange between the two ports; it ought, apparently, to be that rate *plus* the premium of insurance which would ordinarily be paid on the goods on voyage in question.

Under these circumstances we have to consider the rights and liabilities of the three parties concerned, namely, the drawer of the *hundi*, the holder (*hundiwallah*), and the consignee (*malwallah*).

Goods have been shipped, an insurance has been effected, and the only instrument representing the "policy of insurance" is in the hands of the underwriter, for the simple reason that he has already paid all that he can be called on to pay in the event of a total loss of the ship and cargo.

As to the *rights* of these parties, all the evidence which I have been able to see, places them in almost the identical positions (as to the *hundiwallah* and *malwallah*) of the underwriter and the assured in an ordinary English policy of insurance, with, of course, this great difference, that when we come to enforce these rights, the position of the parties is reversed: it is the underwriter (or his representative) who has to recover whatever may be due to him; the assured has already been paid in full.

In the simple case of total loss there is no further trouble: the *hundiwallah* has no remedy; the *malwallah*, of course, will not accept or pay; and, though the holder of *hundi* for value the *hundiwallah* has no recourse to the drawer, because the *hundi* is *jokhmi*, i. e., subject to the risk of the vessel being lost.

In the event of the safe arrival of the ship and cargo, again, the rights of the *hundiwallah* are plain. He should present the *hundi* to the *malwallah* on the arrival of the ship and before delivery has been taken of the goods. If the *malwallah* wishes to take delivery, he should accept and pay the *hundi*. If he determines not to take delivery of the goods, he may do so; in that case he should hand over possession of them to the *hundiwallah*, who has then no further claim upon him.

In the intermediate case of partial loss of the goods, or damage, the rights of the parties seem to be very much those enjoyed under English marine insurance law. The *hundiwallah* is entitled to be paid in full in the case of partial loss or damage, unless it amounts to a general average loss. In that event a general average statement should be made by the firm of Pragji Lakhmidas and the *hundiwallah* should accept payment of these *hundis*, with such a rebate as their several proportions of the general average loss may amount to.

[346] In the latter case, at least, one of the witnesses before me seemed to think that after obtaining part payment as above from the *malwallah*, the *hundiwallah* has a right to call on the drawer for the balance. This, however, would appear to be opposed to common sense and to the spirit of the entire body of evidence on the subject.

So far as to the rights of the parties. When we come to consider the enforcing of these rights, or the remedies of the *hundiwallah*, we find the great difficulties of the case arise.

The case now before me is one of them. The *hundiwallah* alleges that the goods having arrived safe, and the *malwallah* having taken delivery of them, the latter is bound to pay the amount of this *hundi*. The *malwallah*, on the contrary, alleges that there was a jettison of portion of the goods, and that the *hundiwallah* is only entitled to a payment of portion of the amount specified in the *hundi*. This amount was, at one stage of this case, offered and declined by the plaintiff. The defendant now puts the plaintiff at arm's length, and contends that, whether by English law or by the customary law of the parties, the plaintiff cannot, in a suit in Court, compel him to pay anything.

On the evidence in this case, I think, there is quite sufficient to show that there was a loss of goods in the ship which was a legal cause of general average, and that the *hundiwallahs* including the plaintiff, were only entitled to receive a proportionate amount on this *hundi*, probably that stated by the witnesses to have been accepted by the other *hundi* holders, namely, 23½ per cent., and 22 crores less than the full amount of the *hundi*.

That being my opinion on the facts it would appear to be unnecessary, and, therefore, somewhat rash, to lay down any proposition of law in respect of this somewhat obscure branch of native mercantile customs. However, in the first place, there may be some doubt about the facts, and some of the other Judges of this Court may take a different view of them; and, in the next place a great deal of time and trouble has been devoted, and some expense gone to by the parties in endeavouring to inform me on that law or custom in this case. Therefore, I think it only due to them to put the case in a form in which, if I should turn out to be wrong on the facts I may possibly be set right as to the law.

It appears to me there is not the slightest difference of opinion among any of the witnesses as to the legal remedy of the *hundiwallah* in the case where the *malwallah*

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refuses to accept the *hundi*. Some of them endeavour to put it differently; but they all, in my opinion, admit that, if the *malwallah* will not accept the *hundi*, and will not give up possession of the goods, the *hundiwallah's* only real remedy is to sue the drawer of the *hundi* or the person from whom the *hundiwallah* immediately purchased it. All the witnesses point to this, that the *hundi* is taken on the credit of the drawer, and to the same effect is the resolution of the merchants in 1870. After laying down the law as I have stated, and stating the obligation there is on the *malwallah* not to take possession of the goods without honouring the *hundi* they go on to say (para. 9): "But if that person, after examining and taking charge of the goods, will be so strong as not to pay money for the *hundi*, or, if that person becomes insolvent and the *hundi* returns, the writer of the *hundi* or the seller, whichever may be substantial, shall pay [347] the money thereof, the interest and the charges for non-acceptance of the *hundi*, without raising any objection."

So Javerchand Bhavanji, one of the witnesses in this case, the munim of the firm of Bhavanji Madhabji, puts it in the same way; he says: "The *hundi*-holder is bound, in the first instance, to apply to the consignee; if the consignee refuses to accept, the *hundi*-holder may take possession, of the goods. If he does not get possession, he may send it back to the drawer." Again, "if the consignee refuses to accept the *hundi* or deliver the goods, the *hundi*-holder may sue the consignee. I know of no instance in which this has been done; as far as I know in such cases, the *hundi* goes back; I know of instances of this."

Again, Dewji Punja, a witness strongly predisposed to favour the plaintiff, says: "I held a *hundi* on this ship against twenty bales of wool; it was drawn against Panachand Ravji, who has failed. I have not got possession of the goods, because there were other *hundi*-holders, and the goods can only be taken possession by all the *hundi*-holders together. The custom is that it is only in case of insolvency of the drawee that the *hundi*-holders are entitled to the goods."

For these reasons it appears to me the plaintiff cannot recover in this action.

NOTE (b).—The following are the rules relating to *jokhmi hundis* referred to in the above judgment. These rules were drawn up and signed by the principal native merchants on the 15th August 1870:—

Translation of portions of a Gujrati pamphlet, containing certain rules and other particulars is regard to *jokhmi* and *non-jokhmi hundis* drawn from Bombay on places in Cutch and Halar, as settled by the principal dealers in such *hundis* and signed by them, dated 15th August 1870, printed at Bombay in 1871 at *Daftar Ashkar Press*.

(First portion, *i.e.*, the heading at page 1, as follows:—

As to the rules settled in regard to *jokhmi hundis* drawn from here on different places in Cutch and Halar, and as to the limits exactly settled in regard to time in respect of *non-jokhmi* and *jokhmi hundis* relating to the said countries as agreed to by the principal dealers in *hundis* relating to such countries, they are laid down below in consecutive articles. The under signed agree and consent to act in accordance therewith.

(The Second portion, *i.e.*, 2nd article at page 2, as follows:—)

2. *Second Article*.—Having shipped goods on board vessels of different places in Cutch and Halar, (and) having drawn *jokhmi hundis* in respect thereof. If the drawers should have gone from Bombay (1) to other places, and if such vessels should safely return here as stated in the first article, and if the goods in such vessel be brought ashore for any reasons as stated in the first article, and if there be none to pay the moneys on behalf of the drawers of the *hundis*; then, upon the shipped goods being brought ashore, the purchasers of the *hundis* are to take charge of the goods, and to give notice to the owners of the goods or the sellers of the *hundis*. If no reply [348] thereto be returned within one month, or within that one month's time if the drawers and sellers of the *hundis* shall not give an assurance in respect of the moneys of the purchasers of the *hundis*, then the purchasers of the *hundis* are at liberty to sell the goods on their own account. If there be any deficiency, then the purchaser of the *hundi* may recover the same from either the drawers or the sellers of the *hundi* (*i.e.*, from) whichever (of them) may be able to pay. As to that, neither the drawers nor the sellers are to take any objection.

(The third portion, *i.e.*, 8th and 9th articles at pages 5 and 6, as follows:—)

8. *Eighth Article*.—As to the parties on whom any *jokhmi hundis* may have been drawn, and (to whom) the drawers of the *hundis* may have consigned goods in respect thereof, upon the safe arrival of the vessel they are to take charge of goods and to pay the amount of the *hundis* at the due time. But if they shall not take charge of the goods, and if the agents of the drawers of the *hundis* shall take charge of

(1) Meaning probably should they be absent from Bombay.

the goods and pay the amounts of the *hundis*, the same are to be recovered from them. If this be not done, then with regard to as many *hundis* as shall be presented, those of the presenters thereof whose *hundis* may be of large amounts are to be consulted and the *hundi* people (holders) shall meet together and sell the goods on account of the drawers of the *hundis*. And as to the net amount which may be realized, all the *hundi* people are to take (divide) the same according to the average. And, if there be any deficiency therein, they are to recover the same from the drawers of the *hundis* with interest at the rate of  $\frac{3}{4}$  per cent. (per mensem); and if there be a surplus, the same is to be deposited with the *mahajans* (1) on account of the drawers.

9. *Ninth Article*.—After the safe arrival (2) of the vessel in which the goods have been shipped from here, the owner of the goods is to take charge of the goods thereof, and to pay the moneys of the *jokhmi hundis* which may have been drawn in respect thereof; but if that party (i.e., owner) after having taken charge of the goods should wilfully decline to pay the moneys of the *hundis*, or if he be unable to pay, and the *hundis* be returned, the moneys thereof shall be paid to the purchasers of the *hundis*, by the drawers or sellers of the *hundis* (i.e.,) whichever may be able to pay with the interest and the charges appertaining to the dishonoring (thereof) and the expense without any objections whatever being raised by the latter.

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[349] ORIGINAL CIVIL.

Before Mr. Justice West.

RUSTOMJI EDULJI CROOS, Plaintiff v. CURSETJI SORABJI CROOS AND OTHERS. Defendants.\* [29th March and 1st April, 1880.]

*Evidence—Admissibility of unstamped document for collateral purpose—Stamp Act (XVIII of 1869), sec. 18, ch. I. Art. 14; and sch. II, art. 36.*

The plaintiff as administrator of D sued to recover from the defendants the sum of Rs. 3,000, alleging that in February 1878 the said sum had been entrusted to defendants Nos. 1 and 2 for investment on D's account, and had been advanced by them as a loan to defendant No. 3. The defendants alleged that the money was originally the property, not of D, but of the plaintiff himself; that he had made it over as a gift to his daughter P, by whom it had been lent to defendant No. 3, and that defendant No. 3 had duly repaid it to P. In the defendant's written statement it was alleged that the gift to P had been made in the month of February 1878, and evidence to this effect was given at the trial. At the trial, however, the defendants also alleged that in July 1878 the plaintiff had executed an instrument of gift of the Rs. 3,000 to P, and they produced a document, dated 3rd July 1878, purporting to be signed by the plaintiff, whereby he made over Rs. 3,000 to P, of which Rs. 1,000 was to be held by P in trust for D during D's life, and to be paid back to plaintiff on D's death, and the remaining Rs. 2,000 were to be the property of P absolutely. When tendered in evidence the document was objected to as being unstamped, and, therefore, inadmissible.

*Held*, that the document, though unstamped, was admissible in evidence, on the ground that the purpose for which it was tendered, was collateral to the object of the document, and that its admission did not involve giving effect to it as operative between the parties to it.

THIS was an action by the plaintiff as administrator of his mother Dossibai, the original plaintiff in the suit, to recover from the defendants the sum of Rs. 3,000 which it was alleged had been entrusted to the first and second defendants for investment on Dossibai's account, and advanced by them as a loan to the third defendant.

The first and second defendants were the parents of the plaintiff's wife Dhunbai, who with her daughter Putlibai resided with them.

\* Suit No. 83 of 1879.

(1) i.e., meaning representing the people in general.

(2) i.e., at the place of destination.