

reference to the charge under section 151 of the Indian Penal Code. As regards the charge under section 188 of the Indian Penal Code, which is said to relate to the disobedience, by the accused, of the order of the Police Commissioner forbidding them to go out in procession, there is no doubt a great deal in Mr. Inverarity's argument upon section 77 of the Police Act XIII of 1856, but we think it is unnecessary, under the circumstances, to consider whether this portion of the conviction was sustainable, or to decide whether the Police Commissioner was justified, under the said provision, in prohibiting the intended procession. An appeal is expressly prohibited by law, and in our view of the conviction under section 151 of the Indian Penal Code we do not think our interference is required in order to promote the ends of justice. The application, therefore, stands rejected.

Attorneys for the applicants.—Messrs. *Jefferson, Bhaishankar and Dinsha.*

Attorney for the prosecution.—Mr. *H. Cleveland*, Government Solicitor.

1882

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 EMPRESS  
 v.  
 TUCKER.

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 ORIGINAL CIVIL.
 

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*Before Mr. Justice Latham.*

HASONBHOY VISRAM AND OTHERS *v.* H. CLAPHAM, OWNER; J. HENDERSON, MASTER OF STEAM-SHIP *HUTTON*, AND MESSRS. FINLAY, MUIR & Co.\*

1882  
 August 18, 21,  
 22, 24, 25,  
 & September 5.

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*Charter-party—Principal and agent—Charter-party signed by agents for master and owner—Parties to suit—Liability of master—Liability of agents—Master of ship, the agent of charterer to sign bill of lading—Right of master to recover from charterer sums paid by master as damages for short delivery of cargo—Appropriation of payments—Contract Act (IX of 1872), Secs. 69, 60, 69, 230, 235.*

By a charter-party, dated 20th September, 1880, F., M. & Co., as agents for master and owner, let the steam-ship *Hutton* to E., for a term of not less than three and not more than four months, for the sum of Rs. 15,000 per month payable in advance. By subsequent agreement the term was extended to 30th March, 1881, and the charterer was to pay at the rate of Rs. 18,000 a month for the extended time. On 27th February, 1881, the ship being about to proceed on her last voyage to Calcutta and thence to Bombay, E., finding himself unable to pay more than Rs. 6,000 out of the sum of Rs. 18,000, which was then due as hire for the month ending 9th March, 1881, requested the plaintiff to pay F., M. & Co. on his behalf

1882

HASONDHOY  
VISRAMv.  
H. CLAPHAM.

the remaining Rs. 12,000. The plaintiffs did so in consideration of an agreement, whereby E. assigned to them all the freight payable to E. and all benefits under the said charter-party in respect of the then intended voyage of the *Hutton*. It was also agreed between the plaintiffs and E. that the said ship should be consigned to the plaintiffs at Calcutta and also to them at Bombay, and that the plaintiffs should receive all the freight, passage money, &c., to be recovered for the said voyage, the plaintiffs charging two per cent. commission on the gross value of the freight shipped in Calcutta and two per cent. on the amount of freight collected by them in Bombay, and interest on the said sum of Rs. 12,000 at the rate of nine per cent. per annum. Due notice of this agreement was given to F., M. and Co. On 11th March, E., being unable to pay the Rs. 6,000, requested the plaintiffs to pay that sum to F., M. & Co. on his behalf, which the plaintiffs did, E. agreeing that the said payment should be on the same terms as those on which the Rs. 12,000 had been paid. The ship, having proceeded to Calcutta, returned with cargo to Bombay, where she arrived on 2nd April, 1881. F., M. & Co., as agents for master and owner, refused to allow the plaintiffs to collect the freight payable in Bombay, and collected it themselves.

The plaintiffs brought this suit, in the first instance, against the owner and the master of the *Hutton* (first and second defendants), praying for an account of the monies received by the defendants or their agents in respect of the freight and for payment of the balance found due after deducting the sums properly payable to the defendants for hire of the ship and for Rs. 400 damages sustained by the plaintiffs by reason of the wrongful acts of the defendants, whereby the plaintiffs had been deprived of the two per cent. commission. The plaintiffs alleged that the balance due to them would be about Rs. 9,500. The first defendant did not appear. The second defendant (the master) contended that he was not liable; that F., M. & Co. had been especially appointed as agents of the owner; that they were not his (the master's) agents, and that they had no authority to sign the charter-party for him. He admitted that the sum of Rs. 12,000 had been paid to F., M. & Co. by the plaintiffs as agents for the owner; but as to the Rs. 6,000 he denied that it had been paid to F., M. & Co. on his account or on account of the owner. He further alleged that there was a large sum due by E. in respect of hire of the ship and other proper claims against him under the charter-party, and that the defendants were, therefore, justified in refusing the demands of the plaintiffs as assignees of E. until the whole of their claims against E. were liquidated. He alleged that F., M. & Co. had received the freight of the ship, amounting to Rs. 20,426, and he claimed a lien on this sum in respect of the sum of Rs. 19,282 due for hire and other charges on the said ship, and Rs. 605 for money paid for short delivery of goods. The plaintiffs subsequently made F., M. & Co. defendants to the suit. In their written statement, F., M. & Co. stated that they had signed the charter-party as agents only and not as principals, and they contended that the plaintiffs could not proceed simultaneously against the first defendant and the second defendant, but must elect to proceed separately against either, and, further, that the plaintiffs could not proceed simultaneously against themselves (F., M. & Co.) and the second defendant, but should elect to proceed separately against either. They admitted the receipt of the Rs. 12,000, as agents for the first defendant, and not as agents of the second defendant. As to the

Rs. 6,000, they alleged that it had been paid to them, not on account of the *Hutton*, but in respect of claims which they had against E. in connection with the *Clan Gordon*, another ship which had been chartered by E. They admitted the receipt of the freight of the *Hutton*, amounting to Rs. 20,426, but claimed a lien on this sum in respect of hire and other proper charges due under the charter-party.

*Held* that the second defendant (the master) was not liable on the charter-party. He had given no authority to F., M. & Co. to sign it as his agents; and his conduct in acting under the charter-party, being referable to his character of, and duty as, master, did not amount to ratification. But, inasmuch as he claimed to deduct from the freight received in Bombay sums which were paid either by him or to F., M. & Co. for him, he was so far a proper party to the suit.

*Held*, also, that, under section 230 of the Indian Contract Act (IX of 1872), F., M. & Co. were not liable as principals on the charter-party, as they appeared on the face of the charter-party to have signed merely as agents. But they were liable, under section 235 of the Contract Act, for having untruly represented themselves to be the authorized agents of the master to enter on his behalf into the contract therein contained. Their liability was limited to the amount which could have been recovered from the master if he had really been their principal. No difference was made in their liability by the fact that the owner was also liable.

As to the Rs. 6,000, *held*, on the evidence, that the plaintiffs at the time of the payment had specifically appropriated this sum to the hire then due for the *Hutton*.

*Held*, further, that the charter-party was one of the class known as "*locatio navis et operarum magistri*"; that under such a charter-party the master would, as between owner and charterer, sign bills of lading as agent of the charterer; that as between the owner and the charterer the latter was liable to defray the damages for non-performance of the contracts contained in the bills of lading including damages for short delivery of cargo, and that, such being the liability of E. as charterer, the plaintiffs as his assignees were bound by all the equities affecting him, so that the defendants might set off as against the plaintiffs whatever the owner of the *Hutton* might have set off against E. if he had been the plaintiff.

The second defendant (the master) alleged that he had paid in Bombay certain sums of money to consignees as damages for short delivery of cargo, and he claimed credit for such payments as against the plaintiffs.

*Held* that he had no power to bind E. by making such payments on his behalf in Bombay, where both E. and the plaintiffs were resident, without the consent either of E. or of the plaintiffs. In order to establish these charges against E. and his assignees (the plaintiffs,) it was necessary for the defendants to prove either that they were, in fact, due, in which case the master would be justified in paying them under section 69 of the Contract Act, or that their correctness had been admitted by E. or his agents. The defendants having failed to produce the required proof, the claim of the second defendant was disallowed.

**SUIT** on a charter-party. The action was brought by the plaintiff as assignee of the charter-party originally against the

1882

HASONBHOY  
VISRAM  
v.  
H. CLAPHAM.

1882

HASONBHOY  
VISRAM  
v.  
H. CLAPHAM.

first and second defendants, the owner and master of the steam-ship *Hutton*. The following allegations were made in the plaint :—  
By a charter-party dated 20th September, 1880, Messrs. Finlay, Muir & Co., as agents for the master and owners of the steam-ship *Hutton*, let the said ship to one Essa Ahmed on hire for a term of not less than three and not more than four months, the said Essa Ahmed agreeing to pay Rs. 15,000 *per* calendar month for the use and hire of the said ship, such payments to be made in cash fortnightly in advance to owner's agents in Bombay, the owner to have a lien upon all cargoes and all sub-freights for freight or charter money due under the charter, and charterer to have a lien on the ship for all moneys paid in advance and not earned.

The hire of the said steam-ship under the said charter-party commenced on the 20th October, 1880.

On the 1st December, 1880, it was agreed that the hire of the said ship was extended until between the 10th and 20th March, 1881, and that the said Essa Ahmed should pay at the rate of Rs. 18,000 a month for such extended time, but that in all other respects the terms of the said charter-party should stand good.

On the 25th February, 1881, the time was further extended up to the 30th March, 1881.

On the 27th February, 1881, the said ship was in the harbour of Bombay, and was about to proceed on her last voyage, under the said charter-party and agreements, from Bombay to Calcutta in ballast and thence to Bombay with cargo. There was then a sum of Rs. 18,000 payable to the defendants for the hire of the said ship for the month ending the 9th March, 1881. The said Essa Ahmed having represented to the plaintiffs that he was about to pay to the said Messrs. Finlay, Muir & Co. the sum of Rs. 6,000, part of the said sum of Rs. 18,000, requested the plaintiffs to pay on his behalf to Messrs. Finlay, Muir & Co. the balance of the said sum of Rs. 18,000, *viz.*, Rs. 12,000, which plaintiffs consented to do. By an agreement dated 27th February, 1881, made between the said Essa Ahmed and the plaintiffs, the said Essa Ahmed, in consideration of the said sum of Rs. 12,000 paid by plaintiffs to the said Messrs. Finlay, Muir & Co., assigned to the

plaintiffs all the freight payable to the said Essa Ahmed, &c., and all the benefit, &c., to be derived by the said Essa Ahmed under the said charter-party, *i.e.*, by and during the said intended voyage. It was also agreed that the said steam-ship should be consigned for the said voyage to the plaintiffs at Calcutta, and also to them at Bombay, and that the plaintiffs should receive all the freight, passage money, &c., to be recovered and received for the said voyage, the plaintiffs charging two per cent. commission on the gross value of the freight shipped in Calcutta and two per cent. on the amount of freight collected by them in Bombay, and interest on the said sum of Rs. 12,000 at the rate of nine per cent. *per annum*.

Notice of the said agreement was given to Messrs. Finlay, Muir & Co., as such agents, as agreed by the said Essa Ahmed and the plaintiffs.

On the 27th February, 1881, the plaintiffs paid to Messrs. Finlay, Muir & Co. the said sum of Rs. 12,000.

On the 11th March, 1881, Essá Ahmed, being unable to pay the said sum of Rs. 6,000, requested the plaintiffs to pay the same to Finlay, Muir & Co. on his behalf, and he agreed that the said payment should be on the same terms as those on which the sum of Rs. 12,000 had been paid. The plaintiffs accordingly paid to Messrs. Finlay, Muir & Co. the said sum of Rs. 6,000 as the balance of the Rs. 18,000.

The said steam-ship proceeded to Calcutta, and there loaded a cargo for Bombay. The plaintiffs were ready and willing to pay to Messrs. Finlay, Muir & Co. the balance payable in respect of the hire of the said ship, and were desirous, upon the arrival of the said ship in Bombay, to collect the said freight according to the terms of the agreement of the 27th February, 1881. Messrs. Finlay, Muir & Co., however, refused to inform the plaintiffs how much was payable in respect of the said hire or to recognize the plaintiffs as assignees.

The plaintiffs on the 31st March, 1881, tendered to Messrs. Finlay, Muir & Co. the sum of Rs. 12,000, which the plaintiffs believed to be the balance payable in respect of the hire of the said ship up to 31st March, 1881, and were always ready and

1882

HASONBHOY  
VISRAM  
v.  
H. CLAPHAM.

1882

HASONBHOY  
VISRAM

v.

H. CLAPHAM.

willing to pay what was properly payable in respect of such hire, but the said Messrs. Finlay, Muir & Co., refused to accept the said sum.

The said ship arrived in Bombay on the 2nd April, 1881, and was fully discharged of her cargo by 6th April, 1881. Messrs. Finlay, Muir & Co., as agents of the defendants, refused to allow the plaintiffs to collect the said freight payable in Bombay, and collected the same themselves. Messrs. Finlay, Muir & Co. also neglected to render to the plaintiffs any account of the freight so collected by them.

The plaintiffs stated that they were willing that the defendants should deduct out of the freight the amount properly payable in respect of the hire of the said ship, which the plaintiffs believed amounted to Rs. 10,800, and they stated that after making the aforesaid deductions there would be a balance of about Rs. 9,500 payable by the defendants to the plaintiffs.

The plaintiffs also claimed Rs. 400 as damages for the wrongful acts of the defendants, whereby the plaintiffs had been deprived of the two per cent. commission.

The plaintiffs prayed for an account of the monies collected and received by the defendants or their agents in respect of the freight, passage money and earnings and for payment of the balance found due after deducting the sums properly payable to the defendants for hire of the said ship and for payment of Rs. 400 damages.

The first defendant (the owner) put in no written statement, and did not appear.

The second defendant (the master) filed his written statement in which he alleged that Messrs. Finlay, Muir & Co. were specially appointed by the owner of the said steam-ship as his agents in all matters in reference to the chartering of the said ship; that Essa Ahmed had due notice of such appointment, and that he (the second defendant) had no power or authority to enter into a charter-party with the said Essa Ahmed or any other person; and, further, that at the time the said charter-party was entered into he was at sea.

The other material allegations of the second defendant are set forth in the following paragraphs of his written statement:—

1882

“6. This defendant admits that the sum of Rupees twelve thousand was paid to Messrs. Finlay, Muir & Co. as in the plaint alleged.

HASONBHOY  
VISRAM  
P.  
H. CLAPHAM.

“This defendant is informed and believes that on the 11th day of March, 1881, Messrs. Finlay, Muir & Co. received from the said Essa Ahmed a sum of Rs. 6,000, but denies that the same was paid or received on account of the defendants in this suit or either of them. This defendant says that the said sum was received by Messrs. Finlay, Muir & Co. in pursuance of an agreement dated the first day of March, 1881, and made between the said Messrs. Finlay, Muir & Co. and the said Essa Ahmed, and that no portion of the said sum of Rs. 6,000 was paid or credited to either of the defendants in this suit by the said Messrs. Finlay, Muir & Co.

“This defendant admits that the plaintiffs tendered a sum of Rs. 7,200 as the balance due to the first defendant from the said Essa Ahmed for the hire of the said steamer up to the 31st March, 1881, as appears from the correspondence annexed to the plaint. This defendant says, however, that under the terms of the charter-party there was at the date of such tender a very much larger sum due by the said charterer, Essa Ahmed, for hire of the said steamer and other proper claims, and that the defendants were justified, under the terms of the charter-party and the circumstances of the case, in refusing the demands of the plaintiffs as assignees of the said Essa Ahmed till such time as the whole of their said claims against Essa Ahmed were ascertained and liquidated. This defendant says that at the date of the plaintiff's said tender and demands the said steamer had not been re-delivered by the said charterer to the owners according to the terms of the charter-party, nor had she even arrived in Bombay, and it would have been impossible under those circumstances to ascertain what amount would be ultimately due from the said charterer to the defendants in respect of the said hire and other proper charges in pursuance of the said charter-party; and, moreover, that if the said demands of the plaintiffs had been acceded to, the defendants would have lost the benefit of their

1882

HASONBHOY

VISRAM

v.

H. CLAPHAM.

lien on the cargo and freights secured to them by the terms of the said charter-party.

"This defendant says that Messrs. Finlay, Muir & Co., as agents for the first defendant, have received on account of the said charterer, Essa Ahmed, the sum of Rs. 20,426 for freight payable in respect of the last voyage of the said steam-ship *Hutton* under the charter-party from Calcutta to Bombay, but this defendant says that there is due from the said Essa Ahmed under the terms of the said charter-party the sum of Rs. 19,282-1-11 for hire of the said steamer and other charges in connection therewith, and the sum of Rs. 605 for monies paid by the owner on his account in respect of short delivery of goods by the said charterers to divers consignees."

"2. This defendant says that the defendants have a lien on the said sum of Rs. 20,426 for the said sums of Rs. 19,282-1-11 and Rs. 605."

"10. This defendant says further that other claims have been made against the defendants in respect of short delivery of cargo and for dock charges for which the said Essa Ahmed is liable.

"This defendant says that, disregarding the claims referred to in the last paragraph, there is due by the first defendant to the said Essa Ahmed or his assignees the sum of Rs. 589-14-1, as appears from the said account, but that if the claims in the last paragraph referred to are held good or recovered from the defendants, there will be a balance due on the said account from the said Essa Ahmed.

"This defendant says that the said Messrs. Finlay, Muir & Co. have always been willing to furnish accounts to the said Essa Ahmed or the plaintiffs, but that it has been hitherto and still is impossible to furnish a complete account, owing to the fact that some of the claims against the said ship for which the said charterer, Essa Ahmed, is liable to the first defendant remain unsettled."

The second defendant (the master) was arrested before judgment by the plaintiffs, whereupon he paid into Court a sum of Rs. 10,000 to answer any decree that might be made against him.

In July, 1881, Messrs. Finlay, Muir & Co. were made defendants to the suit. The following paragraphs of their written statement set forth the material portions of their defence:—

1882

HASONBHOY.  
VISRAM.  
v.  
H. CLAPHAM.

“ 4. These defendants say that they signed the charter-party, in the plaint referred to, as agents only and not as principals.

“ 5. These defendants were specially appointed by the first defendant, the owner of the said steam-ship *Hutton*, as his agents in all matters in reference to the chartering of the said steam-ship, of which *Essa Ahmed* in the plaint mentioned had due notice.”

“ 7. These defendants submit that the plaintiffs cannot proceed simultaneously against the first defendant and the second defendant, but must elect to proceed separately either against the first defendant or against the second defendant.

“ 8. These defendants also submit that plaintiffs cannot proceed simultaneously against themselves and the second defendant, but must elect to proceed separately either against these defendants or against the second defendant.”

“ 12. These defendants admit that the sum of Rs. 12,000 was paid to them as in the eighth paragraph of the plaint alleged, and they received the same as agents for the first defendant only according to the terms of the charter-party and not as agents for the second defendant.

“ 13. These defendants admit that on the 11th day of March, 1881, they received from the said *Essa Ahmed* a sum of Rs. 6,000, but deny that the same was paid or received on account of the first or second defendant in this suit, or either of them. The said sum was received by these defendants in pursuance of an agreement dated the 1st of March, 1881, and made between these defendants and the said *Essa Ahmed*, and no portion of the said sum of Rs. 6,000 was paid or credited to either the first or the second defendant in this suit.

“ 14. The said *Essa Ahmed* was on the first day of March, 1881, indebted to the owners of the steam-ship *Clan Gordon* (in the said agreement of the first day of March, 1881, mentioned) in a sum exceeding Rs. 6,000, and these defendants say that they received the said sum of Rs. 6,000 in the last paragraph mentioned as agents for the owners of the steam-ship *Clan Gordon*,

1882

HASONBHOY

VISRAM

v.

H. CLAPHAM.

and have applied the same in part discharge of the debt due to them as aforesaid by the said Essa Ahmed.

“ 15. These defendants admit that the plaintiffs tendered a sum of Rs. 7,200 as the balance due to the first defendant from the said Essa Ahmed for the hire of the said steamer up to the 31st day of March, 1881, as appears from the correspondence annexed to the plaint, but say that such tender was made on condition that the said sum should be accepted in full of the hire of the steamer up to the date thereof.

“ 16. These defendants say, however, that under the terms of the charter-party there was at the date of such tender a very much larger sum due by the said charterer, Essa Ahmed, for hire of the said steamer and other proper claims, and that these defendants were justified, under the terms of the charter-party and the circumstances of the case, in refusing the demands of the plaintiffs as assignees of the said Essa Ahmed until such time as the whole of their said claims against Essa Ahmed were ascertained and liquidated.

“ 17. These defendants say that at the date of the plaintiffs said tender and demands the said steamer had not been re-delivered by the said charterer to the owners according to the terms of the charter-party, nor had she even arrived in Bombay, and it would have been impossible under those circumstances to ascertain what amount would be ultimately due from the said charterer to the first defendant in respect of the said hire and other proper charges in pursuance of the said charter-party, and, moreover, that if the said demands of the plaintiffs had been acceded to, the first defendant would have lost the benefit of his lien on the cargo and freight secured to him by the terms of his said charter-party.

“ 18. These defendants as agents for the first defendant have received on account of the said charterer, Essa Ahmed, the sum of Rs. 20,426 for freight payable in respect of the last voyage of the said steam-ship *Hutton* under the charter-party from Calcutta to Bombay and also a further sum of Rs. 94, the proceeds of sale of rice sweepings; but that there is due from the said Essa Ahmed, under the terms of the said charter-party, the

sum of Rs. 20,554-1-0 for hire of the said steamer and other charges in connection therewith and for monies paid on his account by or on behalf of the first defendant in respect of short delivery of goods by the said charterer to divers consignees."

1882

HASONBHOY  
VISRAM  
v.  
H. CLAPHAM.

"2. These defendants say that the first defendant has a lien on the said sum of Rs. 20,426 for the said sum of Rs. 20,554-1."

"19. These defendants say further that other claims have been made against the defendants in respect of coals supplied for the use of the said steamer, and for which the said Essa Ahmed is liable, and against which he is bound to indemnify the first and second defendants.

"20. These defendants say that, disregarding the claims referred to in the last paragraph, there is due by the said Essa Ahmed to the first defendant the sum of Rs. 33-4-6, as appears from the said account."

At the hearing the following issues were raised on behalf of the second defendant (the first defendant not appearing) :—

1. Whether the plaintiffs were entitled as against the second defendant to maintain this suit.

2. Whether Messrs. Finlay, Muir & Co. had authority to sign the charter-party in the plaint mentioned for the second defendant.

3. Whether the said charter-party was binding on the second defendant.

Counsel for Messrs. Finlay, Muir & Co. raised the following issues :—

4. Whether the plaintiffs were entitled to maintain this suit against these defendants.

5. Whether the hire of the steam-ship *Hutton* commenced on the 19th or 20th October, 1880.

6. Whether the sum of Rs. 6,000 in the plaint mentioned was paid or received on account of the first or second defendant or either of them.

7. Whether the defendants, Messrs. Finlay, Muir & Co., were, under the terms of the charter-party and circumstances of the

1882

HASONBHOY  
VISRAM  
v.  
H. CLAPHAM.

case, justified in refusing the tender of Rs. 7,200 in the fourth paragraph mentioned.

8. Whether the plaintiffs were entitled to Rs. 400 claimed as damages, or any part thereof.

Counsel for the plaintiffs raised the following issues :—

9. Whether any and which of the items on the debit side of the account annexed to the written statement ought to be disallowed.

10. General issue.

Hon. *B. Lang* (Acting Advocate General) and *Inverarity* for the plaintiffs.

*Farran* and *Kirkpatrick* for defendant No. 2.

*Starling* and *Fox* for defendants No. 3.

The following authorities were referred to on behalf of the plaintiffs :—*Child v. Stenning* (1); Story on Agency, sec. 294; Pollock on Contracts (2nd ed.), 225; *Simon v. Patchet* (2); Contract Act IX of 1872, sec. 59.

Counsel for the defendants cited the following authorities :—Story on Agency, sec. 160; Contract Act (IX of 1872), secs. 230-233; Civil Procedure Code (Act X of 1877), sec. 28; *Gunn v. Roberts* (3); *Mackinnon, Mackenzie & Co. v. Lang, Moir & Co.* (4); *Soopromanian Setty v. Heilgers* (5); *Gadd v. Houghton* (6); *Southwell v. Bowditch* (7); *Schuster v. McKellar* (8).

LATHAM, J.—In this suit the plaintiffs are the firm of Visram Ebrahim & Co.; the first defendant is the owner and the second defendant the master of the steam-ship *Hutton*; and the remaining defendants are the members of the firm of Messrs. Finlay, Muir & Co., by which name it will be convenient to designate them collectively. The suit springs out of a charter-party of the *Hutton*, dated September 20, 1880, and signed by Finlay, Muir & Co. as agents for master and owners, whereby the *Hutton* was chartered to one Essa Ahmed for a term of not less than three or more than four months at Rs. 15,000 per month, pay-

(1) 5 Ch. Div., 695.

(2) 7 El. & Bl., 568.

(3) L. R. 9 C. P., 331.

(4) I. L. R., 5 Bom., 58.

(5) I. L. R., 5 Calc. N., 71.

(6) 1 Ex. Div., 357.

(7) 1 C. P. D., 100, 374.

(8) 7 El. & B., 84.

able fortnightly in advance, commencing at a future date which turned out to be either the 19th or 20th of October, 1880. By a memorandum dated the 1st December, 1880, the time was extended to between the 10th and 20th of March, 1881; and on the 25th February, 1881, by another memorandum it was further extended to the 30th of March, 1881; and by an endorsement on the charter-party dated October, 1880, the hire was made payable monthly in advance instead of fortnightly.

Under this charter-party matters appear to have gone on smoothly until the fifth month of its duration, when Essa Ahmed, who was engaged in sundry other transactions with Finlay, Muir & Co., and who has since filed his schedule in the Insolvent Court, ran short of money, and failed to pay the Rs. 18,000 hire for that month when due. On February 27, 1881, the plaintiffs paid Finlay, Muir & Co. Rs. 12,000 on account of this hire, and obtained a receipt for the same. On the same day, Essa by writing of that date assigned to the plaintiffs the freight to be earned by the *Hutton* as a security for this advance, of which assignment he gave notice to Finlay, Muir & Co. by his letter of February 28. It had been intended that Essa should himself have paid the balance of Rs. 6,000 to Finlay, Muir & Co.; and on March 1 he, by his letter to that firm, bound himself to pay them, in connection with the amount due to them for freight or hire of the *Hutton* and another steamer called the *Clan Gordon* and other small items not specified, Rs. 6,000 on or before March 7, and Rs. 3,000 before the completion of the loading of the *Hutton* in Calcutta, from which port she was to return to Bombay with cargo. However, Essa did not keep his promise, and was consequently pressed by Finlay, Muir & Co.

On March 11, Essa, in company with the plaintiff Fazulbhoj Visram, came to Finlay, Muir & Co.'s office, and Fazulbhoj there by cheque of his firm paid a sum of Rs. 6,000, which Essa by his letter of that day secured in the same manner as the Rs. 12,000. Whether this sum of Rs. 6,000 was or was not appropriated at the time of payment to the hire due for the *Hutton* is the main question in this suit. A dispute on the subject between Finlay, Muir & Co. and the plaintiffs commenced on the day of payment. On

1882

HASONBHOY  
VISRAM  
v.  
H. CLAPHAM.

1882

HASONBHOY  
VISRAM  
v.  
H. CLAPHAM.

March 31, Messrs. Payne and Gilbert, as plaintiffs' solicitors, tendered Finlay, Muir & Co. the sum of Rs. 7,200 for the hire of the *Hutton* up to that day, and required the steamer to be consigned to the plaintiffs. On the same day Finlay, Muir & Co. refused the tender as insufficient, and refused to allow the plaintiffs to take over the cargo and collect the freight unless the sum of Rs. 24,000 were deposited with them ; and they ultimately returned the Rs. 7,200, as Messrs. Payne and Gilbert had requested them to do unless they would give a receipt in full. The *Hutton* arrived in Bombay on April 2 ; and her cargo was discharged and the freight collected by Finlay, Muir & Co., who placed her in the dock : the unloading was finished on April 6. Finlay, Muir & Co. afterwards rendered an account of their receipts and disbursements in connection with the *Hutton* (exhibit No. 2 to their written statement), showing a balance of Rs. 33-4-6 due by them ; they claiming to deduct from the freight Rs. 6,000 as the unpaid balance of hire for the fifth month of the charter-party, and also sundry items specified in the debit side of that account, some of which are admitted, others disputed by the plaintiffs.

The points in dispute in the suit may be summarized as follows :—

1. Can the suit be maintained against any and which of the defendants ?

2. From what date did the hire under the charter-party begin to run ?

3. Was the Rs. 6,000 paid on March 11, 1881, appropriated to the hire of the *Hutton* ?

4. Are the plaintiffs entitled to recover Rs. 400 as damages sustained by them through Finlay, Muir & Co.'s having refused to allow them to discharge the steamer and collect the freight ?

5. Are the defendants entitled to credit for any, and which, of the items on the debit side of the account rendered by them, other than the said sum of Rs. 6,000 ?

1. With regard to the first defendant, the owner of the *Hutton*, it is not questioned that Finlay, Muir & Co. had authority to sign the charter-party on his behalf, and he is, therefore, properly

made a party to this suit. The second defendant, the master, appears on the evidence to have given no authority to Finlay, Muir & Co. to sign the charter-party as his agents; and I do not consider that his conduct in acting under the charter-party, which is referable to his character of and duty as master, amounts to a ratification of that signature. The second defendant is, therefore, not liable on the charter-party. Still he comes here to assert his own interests in claiming to deduct from the freight received in Bombay sundry sums which were paid either by him or by Finlay, Muir & Co. for him; and so far he is a proper party to the suit.

The position of the defendants, Finlay, Muir & Co., is more complicated. I do not think that they are liable as principals on the charter-party under section 230 of the Contract Act by reason of their signature as "agents for master and owners"; as they appear on the face of the charter-party to sign merely as agents, and the case is governed by, and indeed having regard to the language of the instrument is even stronger than the cases of *Soopromanian Setty v. Heilgers* (1) and *Mackinnon, Mackenzie & Co. v. Lang, Moir & Co.* (2) These cases agree with the English decisions of *Fleet v. Murton* (3), *Wagstaff v. Anderson* (4), and *Hutchinson v. Tatham* (5), a charter-party case not unlike the present. Mr. Pollock at page 121 of his book on Contracts (3rd ed.) suggests a possible difference between the English and Indian law as to the liability of agents for an undisclosed principal: but I cannot consider the weight of his opinion as counterbalancing that of the two Indian decisions above quoted, with which on the point now under discussion I entirely agree; nor does he seem to have considered the effect of the words "shall be presumed to exist" or what evidence is sufficient to displace the presumption. But, although Finlay, Muir & Co. are not liable as principals on the charter-party, they are liable under section 235 of the Contract Act for having untruly represented themselves to be the authorized agents of the master to enter on his behalf into

1882

HASONBHOY  
VISRAM  
v.  
H. CLAPHAM.

(1) I. L. R., 5 Calc., 71, *per* Wilson, J.,  
at pp. 78 and 79.

(2) I. L. R., 5 Bom., 584, *per* West, J.,  
at pp. 588-9.

(3) 7 L. R., Q. B., 126.

(4) 5 C. P. D. 171 *per* Bramwell,  
L. J., 175.

(5) 8 L. R. C. P., 482, *per*  
Bovill, C.J., 484.

1882

HASONBHOY  
VISRAM  
v.

H. CLAPHAM.

the contract therein contained. This section is in accordance with the English law as established by *Collien v. Wright* (1) and the other cases cited at Smith's *Leading Cases* (7th ed.), Vol. 2, pp. 381, 382. I cannot think that any difference is made in their liability by the fact that the owner is also liable. The measure of damages in such a case is laid down in *Simons v. Patchett* (2). No doubt, according to that case, Finlay, Muir & Co. are not liable for a greater amount than could have been recovered from the master if he had really been their principal. But in the present case the master has paid into Court the sum of Rs. 10,000 covering the outside amount of damages which plaintiffs seek to recover, and I see no reason for in any degree limiting Finlay, Muir & Co.'s liability to make good these damages. Nor can I think that there is any ground for drawing a distinction between Finlay, Muir & Co.'s liability on the charter-party as it originally stood and as extended by the agreements of the 1st December, 1880, and the 25th February, 1881. I may add that, in my opinion, it would not have been difficult to frame the plaint so as to have made Finlay, Muir & Co. liable as principals at least for the Rs. 6,000, in respect of which sum they are in fact asserting a claim independently of the other defendants. But the plaint is not framed on this basis, and I must deal with the plaintiffs' case as they have themselves shaped it.

2. As to the date on which the hire under the charter-party began to run, I think that there can be no doubt but that it was October 19, 1880. The charterer accepted the vessel and began to load it on that day, and probably on the previous evening. The ship was not clear of inward cargo until the 19th, and under the charter-party he might have waited until after twenty-four hours' notice of her being so clear. But as he accepted the vessel and began to load her, I think that he must pay as from the commencement of such use.

3. The question of the appropriation of the Rs. 6,000 is the most important point in the case. Plaintiffs say that they specifically appropriated this sum at the time of payment to the hire then due for the *Hutton*. Defendants say that no such specific

(1) 7 E. &amp; B., 301,

(2) 7 E. &amp; B., 568

appropriation was made, and that in default thereof they appropriated the sum to the hire due for the *Clan Gordon*. Either claim is warranted if the allegations made in support of it are established; that of the plaintiffs under section 59 and that of the defendants under section 60 of the Contract Act, which sections follow the English law. At the time of payment it was clearly the plaintiffs' interest to appropriate the Rs. 6,000 to the hire of the *Hutton*, as they were not concerned in *Essa's* after transactions with *Finlay, Muir & Co.*, and were interested in freeing the *Hutton* from liability. It was equally the defendants' interest to appropriate the sum to the hire of the *Clan Gordon* which was unsecured, whereas that of the *Hutton* would be covered by the freight on her incoming cargo. The plaintiffs rely on exhibit M, a letter dated March 11 from *Essa* to *Finlay, Muir & Co.*; and that letter, if received by *Finlay, Muir & Co.* before the payment of the Rs. 6,000, is a clear appropriation of the money to the hire of the *Hutton*. The defendants' witnesses until a late stage of the case denied all knowledge of it prior to its discovery among the papers in their solicitors' office. But on the production of *Finlay, Muir & Co.'s* answer to exhibit M dated March 11, Mr. Wilson, of *Finlay, Muir & Co.*, admitted that his firm must have received exhibit M on that day. He stated that he was still unable to remember the receipt of the letter or to give the time on March 11 when it was received, but that he was sure that he could not have received it before the Rs. 6,000 were paid. It is in any case strange that *Finlay, Muir & Co.* should in their reply have taken no notice of the concluding paragraph of exhibit M; but, in my opinion, such absence of notice would be most strange if M were received after the dispute as to the appropriation of the Rs. 6,000 had arisen, which was within half an hour of the payment. Looking at the probabilities of the case, the strong motive which the plaintiffs had to get the letter delivered to *Finlay, Muir & Co.* before they paid the Rs. 6,000, and the direct evidence of *Essa* that it was so delivered (though he is not a witness on whose uncorroborated testimony I place much reliance); and considering that on the other side defendants can only allege absence of recollection of the receipt of the letter, I

1882

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HASONBHAY  
VISRAM  
v.  
H. CLAPHAM.

1882

HASONBHAY  
VISRAM  
2.  
H. CLAPHAM.

must come to the conclusion that letter M was delivered to Finlay, Muir & Co. before the Rs. 6,000 were paid, and constituted a valid appropriation of the money when paid. It is fair to say that I believe Mr. Wilson spoke the truth when he stated that he had no recollection of the receipt of M, and that he gave his evidence candidly; still defendants cannot well complain if the plaintiffs have doubted their straightforwardness on this point, having regard to their extraordinary carelessness as to a document of such vital importance in the case.

I should add that I do not think that the plaintiffs' case as to the appropriation of the Rs. 6,000 rests on the letter M alone. I am disposed to accept the plaintiff Fazulbhoy's account of the interview at Finlay, Muir and Co.'s to the extent, at least, of his having stated that the Rs. 6,000 were paid for the hire of the *Hutton*. Essa is clearly not speaking the truth as to that interview when he deposes to Jamsetji's having written the receipt (exhibit N), which proved to be in the handwriting of Framji the cashier. But Fazulbhoy had strong motives to lead him to make this statement explicitly; he declared his intention to make such an appropriation within half an hour of the payment, no circumstance having occurred in the interval to account for any change of mind by him in this behalf; and I much prefer his evidence to that of Jamsetji and Devidas. Again, I think that having regard to Mr. Wilson's evidence that "it probably occurred to him that plaintiffs were under the impression that they were paying for the *Hutton*"; to the fact that plaintiffs had paid Rs. 12,000 expressly for the *Hutton* before; to Finlay, Muir & Co.'s knowledge that the freight of the *Hutton* had been assigned to the plaintiffs; and to the reference to the *Hutton* in Finlay, Muir's letter of March 10; the case is within section 59 of the Contract Act as one in which the circumstances implied that the Rs. 6,000 were to be appropriated to the overdue hire of the *Hutton*. And, lastly, even if the appropriation by Finlay, Muir & Co. to "account of outstanding freight" contained in their receipt could be maintained, I think that the result would be the same. The balance of the *Hutton's* hire for the fifth month was an item in that account prior to the sum due for the hire of the *Clan Gordon*,

and under section 61 of the Contract Act the Rs. 6,000 would have to be applied to such prior item. It is clear law that a creditor cannot without the payer's assent alter an appropriation which he has once communicated to the payer: 2 Tudor's Mercantile Law, page 22, and the cases there collected, and especially *Bodenham v. Purchas* (1); *Fraser v. Birch* (2); and *Bank of Scotland v. Christie* (3).

4. As to the damages of Rs. 400 claimed by plaintiffs as the amount of commission lost to them by Finlay, Muir & Co.'s refusal to allow them to collect the freight of the *Hutton* in Bombay, I cannot but disapprove of Finlay, Muir & Co.'s reluctance to state plainly the amount which they claimed as due for the *Hutton*, and the preposterous charge of Rs. 24,000 which they ultimately made. Their conduct was such that I doubt if the insufficiency of the tender of Rs. 7,200 would have prevented my giving the plaintiffs these damages if I were convinced that they had sustained them. But I am not so convinced. Plaintiffs have charged Essa Ahmed with this commission in their account with him, where it is stated at Rs. 408-4-6; and there is no evidence that Essa has disputed the correctness of this charge. Very possibly he could do not do so, having regard to the terms of the assignment and to his own default in payment of the amount thereby agreed to be paid by him to Finlay, Muir & Co. Of course, I cannot in this suit decide the rights of the plaintiffs as against Essa Ahmed; it is sufficient to say that they themselves treat the amount as due from him, and are not proved to have suffered these damages.

5. Before deciding as to whether the defendants are entitled to credit for any and which of the items on the debit side of the account annexed to Finlay, Muir & Co.'s written statement, the credit side of which account is admitted by the plaintiffs, it is necessary to examine the plaintiffs' position under their assignment from Essa Ahmed. The charter-party is, in my opinion, one of the class known as "*locatio navis et operarum magistris*" (4) and under such a charter-party the master would, as between the owner and

1882

HASONBHOY  
VISRAM

H. CLAPHAM.

(1) 2 B. &amp; Ald., 39, 45.

(3) 8 C. &amp; F., 214, 228, per Lord

(2) 2 Knapp, 380, 389.

Cottenham.

(4) Maclachlan on Shipping (2nd ed.), 322.

1882

HASONBHAY  
VISRAM  
v.  
H. CLAPHAM.

the charterer, sign bills of lading as agent of the charterer: *Schuster v. McKellar* (1). This is made still clearer in the present case by the words of the charter-party "Bills of lading are to be signed at any rate of freight the charterer or his agents may require..... The charterer hereby indemnifies the owner from all consequences or liabilities that may arise from the captain's doing so." I do not mean to say that by a charter-party in this form the owner's possession of the ship is divested so as to oust his lien, or that he is not liable to persons who have consigned goods by the steamer in ignorance of the charter-party—*Sandeman v. Scurr* (2)—or even to the charterer in respect of the unskilful navigation of the ship, *Omoa Coal and Iron Company v. Huntley* (3). But I think that, as between the owner and the charterer, the charterer is liable to defray not merely the expenses specified in clause three of the charter-party, but also the damages for non-performance of the contract contained in the bills of lading, including damages for short delivery of cargo. I am much disposed to believe that Essa Ahmed did expressly agree to be liable for such damages for short delivery before the first voyage under the charter-party; but it is unnecessary to decide this, as I think that he was so liable independently of any express agreement. Then Essa's liability being as above stated, I think that the plaintiffs, as assignees from Essa of the freight, chose in action, are bound by all the equities affecting Essa himself, so that the defendants may set off as against the plaintiffs whatever the owner of the *Hutton* might have set off against Essa if he had been the plaintiff: Pollock on Contracts (3rd ed.), 229, 230; *Mangles v. Dixon* (4). The plaintiffs are of course entitled to proof that the items are due as from Essa to the defendants.

The first item of Rs. 6,000 has been already disposed of, and must be disallowed. Taking the other items *seriatim*, I think that the defendants must be allowed credit for.

Rs. 11,400, freight from March 19 to April 6, 1881.

(1) 7 E. & B., 704, 723, *per* Lord Campbell. (3) 2 C. P. D., 464.

(2) 2 L. R. Q. B., 86, 90, *per* Cockburn, (4) 3 H. L. Ca. 702, 731, *per* Lord Cottenham.

Rs. 660 for 40 tons of coal.—I see no reason to disbelieve the engineer's evidence as to this item, and the alterations on his log-book so far as decipherable seem to be to the plaintiffs' benefit.

1882

HASONBHOY  
VISRAM  
v.

H. CLAPHAM.

„ 32 6 5 for victualling bill.  
 „ 25 0 0 for extra preventive work.  
 „ 651 1 6 for stevedore.  
 „ 305 6 0 for dubash.  
 „ 10 0 0 for hire of chronometer. These three last items have not been seriously objected to.  
 „ 49 12 9 for advertisements.

„ 126 3 6 for dock dues. I think that the master was justified in taking the steamer into dock, her papers not having arrived from Calcutta, and no special directions as to the place of discharge having been given by Essa or the plaintiffs. But I can only make out four days spent in discharge cargo, viz., from April 3 to April 6 inclusive.

There remain the amounts paid in respect of short delivery of cargo. I have already said that Essa was liable to pay for any such short delivery. But I cannot admit that the master had power to bind Essa by making such payments on his behalf in Bombay, where both Essa and the plaintiffs were resident without the consent of either Essa or the plaintiffs. I do not find that the text books treat the master as having such authority—Kay on Shipmasters and Seamen, Vol. I, p. 446; and the principles, laid down in *Gunn v. Roberts* (1) seem to me against his possessing it. I think that, in order to establish these charges against Essa and his assignees the plaintiff, the defendants must prove either that they were in fact due, in which case the master would be justified in paying them under section 69 of the Contract Act, or that their correctness has been admitted by Essa or his agents.

Now the defendants have failed to produce any proof that these sums were really due, and have only produced the authority of Essa's agents at Jeddah and Aden respectively for two items—those of Rs. 60 for 10 bags of dhal and Rs. 160 for 2 bales of tobacco.

1882

HASONBHAY  
VISRAM  
v.  
H. CLAPHAM.

These two items I allow; and also that of Rs. 112 paid to C. J. Khumbatta & Co. in respect of the expenses of the transshipment of cargo in Bombay incurred contrary to the terms of the bill of lading, as such expenses were occasioned by the delay of the Calcutta agents of Essa and the plaintiffs in forwarding the *Hutton's* papers. The remaining items I am compelled in the absence of legal proof to disallow, though not without regret, as I have little doubt but that they were really due.

I find upon the issues as follows :—

1. The plaintiffs are entitled to maintain the suit against the second defendant in respect of those items in the account annexed to the written statement of Finlay, Muir & Co. which are alleged to have been paid by him or on his behalf.

2 and 3. Finlay, Muir & Co. had not such authority, and the charter-party is not binding on the second defendant as a party thereto.

4. The plaintiffs are entitled to maintain the suit against defendants 3, 4 and 6. The name of defendant 5 has been struck out by consent.

5. The hire of the steam-ship *Hutton* commenced on October 19, 1880, and the Rs. 18,000 in the fourth paragraph of the plaint mentioned were due for the month ending March 18, 1881.

6. The Rs. 6,000 in the tenth paragraph of the plaint mentioned was received on account of the first defendant.

7. The defendants, Finlay, Muir & Co., were so justified.

8. The plaintiffs are not entitled to the sum of Rs. 400 in the 17th paragraph of the plaint claimed, or any part thereof.

9. Those items only on the debit side of the account No. 2 annexed to the written statement of defendants, Finlay, Muir & Co. which have been above mentioned in that behalf, ought to be disallowed as against the plaintiffs.

10. The plaintiffs are entitled to the relief hereinafter granted.

And I pass judgment for the plaintiffs for the sum of Rs. 6,928-14-1 and costs, and interest at the rate of per cent. on the amount of judgment as against the defendants other than the second defendant.

The second defendant to bear his own costs.

1882

*Judgment for plaintiffs.*

HASONBHOY  
VISRAM  
v.  
H. CLAPHAM.

Attorneys for the plaintiffs.—Messrs. *Payne and Gilbert.*

Attorneys for the defendants.—Messrs. *Prescot and Winter.*

### APPELLATE CIVIL.

*Before Sir M. R. Westropp, Kt., Chief Justice, and Mr. Justice Melvill.*

GOVINDA AND ANOTHER (ORIGINAL PLAINTIFFS), APPELLANTS, v. JESHA  
PREMAJI AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.\*

1878  
*February 11.*

*Mortgage—Sale—Burden of proof.*

Where one party to a transaction alleges it to be a mortgage and the other alleges it to be a sale, the question for consideration is whether or not there continued to be a debt from the former to the latter.

The plaintiffs sued for possession of certain lands, alleging that they had been mortgaged to the defendant by their father under two documents. The defendant produced them and relied upon them as deeds of sale, which conveyed to him absolutely the lands mentioned in them. The form of the instruments was not conclusive, but it appeared *aliunde* by the conduct of the defendant himself that the deeds were intended as mere securities for money, and that he had treated them as such. Certain entries in the defendant's accounts also treated the respective considerations named in the deeds as continuing debts due to the defendant from the plaintiffs' father. The Subordinate Judge awarded the plaintiffs' claim, but his decree was reversed, in appeal, by the Assistant Judge, who held that the transaction was a sale and not a mortgage. On appeal to the High Court,

*Held* that, under the circumstances mentioned above, a Court of Equity would regard the instruments as mere securities for money.

*Held* further that the entries, when put in evidence, were sufficient to shift the burden of proof from the plaintiffs to the defendant, and that it was incumbent on the latter to give either oral or documentary evidence which in some way neutralized or explained away their effect, or showed that they related to other transactions than those mentioned in the two documents.

The High Court, accordingly, reversed the decree of the Assistant Judge, and restored that of the Subordinate Judge, with costs throughout.

THIS was a second appeal from the decision of H. Batty, Acting Assistant Judge at Thana, reversing the decree of the Second Class Subordinate Judge of Pen.

\* Second Appeal, No. 309 of 1877.