

was a suit against co-sharers, art. 131 was applied, and we think rightly, in determining whether the claim to share in the *hak* was barred; but in the present case there would be no cause of action until Narayan and his successors in title, Sakharam and Dhondu, had been recognized by the Collector and paid the arrears of *hak*; and as Gangadhar was quite independent of them, this was not until 1876, *i.e.*, less than twelve years before the institution of this suit.

We must, therefore, reverse the decree of the Court below and restore that of the Subordinate Judge, with costs on defendants throughout.

Decree reversed.

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Before Mr. Justice Parsons.

THE OCEANIC STEAM NAVIGATION COMPANY, LIMITED
(Plaintiffs) v. SOONDERDAS DHURUMSEY AND OTHERS
(Defendants).* [20th and 21st March, 1890.]

Charter-party—Shipping—Misdescription of tonnage of ship—Misrepresentation—Contract Act IX of 1872, ss. 10, 13, 14, 18, 19.

The defendants in Bombay chartered a ship from the plaintiffs which was described in the charter-party as of the measurement of about 2,700--2,800 tons nett register. The ship had never been in Bombay and was wholly unknown to the defendants. Evidence was given that in the negotiations for the charter-party the plaintiffs stated to the defendants that the ship was certainly not more than 2,800 tonnage register. She, however, turned out to be of the registered [242] tonnage of 3,045 tons, and the defendants refused to accept her in fulfilment of the charter-party.

Held, that the defendants were entitled to treat the contract as void by reason of the erroneous statement of the plaintiffs with regard to the size of the ship. (Indian Contract Act IX of 1872, ss. 10, 13, 14, 18, 19).

[Affirmed, 15 B. 389.]

SUIT for damages for breach of charter-party.

On 15th March, 1889, the plaintiffs and defendants entered into a charter-party in Bombay whereby the S. S. "Runic," described therein as of the measurement of about 2,700—2,800 tons nett register, was chartered by the defendants for a voyage from Bombay *via* the Suez Canal to certain European ports.

At the date of the charter-party the "Runic" was not and had never been in Bombay. She arrived there on the 28th April, 1889, and proved to be a steamer of the nett registered tonnage of 3,045 tons. Notice of her arrival was duly given by the plaintiffs to the defendants, who at once repudiated the contract, on the ground that the S. S. "Runic" was of larger tonnage than described in the charter-party. The plaintiffs thereupon filed the suit. The following paragraphs of the plaint are material:—

"2. In the said charter-party the said S. S. 'Runic' was described as of the measurement of about 2,700—2,800 tons nett register." The plaintiffs say that the fulfilment of such description was not a condition

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of the charter-party, but on the contrary it was well known to the defendants and their brokers that the measurement of the 'Runic' was not known in Bombay, and all that was known was that she was like the S. S. 'Idar,' (another steamer well known in Bombay), but larger, and no warranty of the actual carrying capacity of the S. S. 'Runic' could be or was given.

"3. As a matter of fact, the 'Runic' is of the nett registered tonnage of 3,045 tons; but her carrying capacity, having regard to her draught, which prevents her passing through the Suez Canal loaded beyond a certain depth, is, for the purpose of this charter-party, not more than if her actual nett registered tonnage had been about 2,700—2,800 tons. The defendants' brokers before the said charter-party was entered into, were informed that the S. S. 'Runic' was like the 'Idar' but larger."

The defendants alleged that the practice in Bombay was to charter steamers by their tonnage, and that it was not until all the details of the arrangement were completed that the name of the steamer was disclosed. The following paragraphs of the written statement set forth the defendants' case:—

[243] "4. The defendants say negotiations were carried on between Messrs. Edward Bates and Company and the defendants' brokers, Messrs. Gray and Company, for the charter-party by the defendants of a steamer for May loading of from 2,600—2,700 tons, which was all that the defendants wanted. On the 15th March, 1889, terms were verbally arranged * * *. The defendants were then informed that the steamer which would be offered was a sister ship and of the same tonnage as the steam-ship 'Idar', which was well known in Bombay.

"5. On the next day the said Messrs. Edward Bates and Company sent to the defendants a printed charter-party. The defendants at first refused to sign the same, because the tonnage was mentioned as 2,700—2,800 tons, which was more than they had contracted for. Ultimately the defendant Soonderdas Dhurumsey was induced to sign the same, as the excess was only 100 tons, but it was clearly understood that the tonnage would not exceed 2,800 tons. The defendants say that they would never have accepted the said charter-party had they known that it would or could be contended that thereunder they were bound to accept a steamer of more than 2,800 tons.

"6. The defendants say the steam-ship 'Runic' had at that time never been in Bombay harbour, and that none of the persons concerned, other than Messrs. Edward Bates and Company, knowingly misled the defendants as to the tonnage capacity of the said steam-ship 'Runic', in order to induce them to enter into the said charter-party.

"7. The defendants submit that the representations made by the said Messrs. Edward Bates and Company on behalf of the plaintiffs as to the tonnage of the said steam-ship, the subject of the charter-party, amounted to a warranty that she was of a tonnage not exceeding 2,800 tons.

"8. The defendants deny that their said brokers were informed that the steam-ship 'Runic' was larger than the steam-ship 'Idar,' or that the defendants and their brokers knew that the measurement of the steam-ship 'Runic' was not known to the plaintiffs' agents, as alleged.

"9. The defendants admit that they refused to accept the steam-ship 'Runic' in fulfilment of the said charter-party, and submit that, having regard to the fact that she was of 3,045 registered tonnage, they were justified in so doing."

At the hearing the following were the material issues raised:—

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(1) Whether the description of the measurement of the S. S. "Runic," as between 2,700—2,800 tons, was not a condition of the charter-party?

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(2) Whether the agreement between the plaintiffs and defendants was not for a steamer of a certain measurement, the name being afterwards disclosed?

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[244] (3) Whether the defendants were not induced to enter into the said contract by the plaintiffs' misrepresentation to them of the measurements of the said steamer?

B. Nicholson, the plaintiffs' manager, who negotiated the charter-party with C. Gray, freight broker, gave evidence. He said:—

" * * * I saw Gray again on the 14th March. I told him we had instructions to close; that I did not know the tonnage of the steamer, and that her name was not very intelligible. I said she was rather larger than the 'Idar'; that the 'Idar' had carried about 7,200 tons Bombay cargo; that this steamer would probably carry about 7,500 tons. He then left and saw his principal, and came back and said his principal must have something down as to what the size of the ship would be. I then told him I had no particulars, but to the best of my calculation I should say she must be 2,600 to 2,700 tons. Subsequently a charter-party was signed, in which 2,700 to 2,800 tons was mentioned. I mentioned to Gray that I had made a mistake in my calculation of 2,600 to 2,700 tons, and so had inserted 2,700 to 2,800 tons. There was no concealment of the figures 2,700 to 2,800 tons. There was one other interview between Gray and myself before the charter-party was signed. He objected to certain words, but they had nothing to do with the tonnage. When I told him that my former calculation was wrong, and that 2,700—2,800 was nearer the mark, I told him also that the 'Runic' was bringing only 5,400 tons of coal. * * *. He made no objection. * * *. The understanding was that she was a big ship. * * *. I was present when the charter-party was signed. We signed it at our office, and then sent it to Gray for the other party to sign. We kept one copy and they the other * * *. The ship arrived on 29th April. Between the 15th March and 29th April, freights had gone down. * * *. When the defendants repudiated, I looked about for another charterer, and ultimately let the ship on the 16th May at 18/9."

C. Gray, the freight broker, who was called as a witness for the defendants, gave the following evidence:—

"I am a freight broker, partner with Karsandas Lakhmidas * * *. I remember the 14th March. I saw Nicholson in the morning, and he asked me what rates I could get for a steamer in the morning of May loading. I enquired, and in the evening I saw Nicholson again * * *. He described the ship as about the size of the 'Idar.' The 'Idar' was well known to me * * *. Having thus got the size of the ship and her dates from Nicholson, I went and saw Soonderdas (the defendant), taking with me the memorandum which Nicholson gave me. I told Soonderdas what Nicholson had told me of the size of the vessel, and got permission from him to treat, and I went back to Nicholson * * *. The rest of the memorandum was then written out and initialled, to show the matter was closed * * *. During the 14th the name of the 'Runic' was not mentioned * * *. No description was given of the steamer other than that she was about the

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size of the 'Idar' and 2,600—2,700 registered tonnage. The following morning I heard the name of the 'Runic' for the first time. Nicholson [245] gave it to me. During that day the charter-party was made out. Nicholson spoke to me in the morning, and said he wished to make the tonnage 2,700 to 2,800, instead of as he had given it before. He said he was not certain of the size of the ship, and wished another 100 tons to be put to make himself safe. Karsandas Lakhmidas was with me. I did not myself agree to this, but went and consulted Soonderdas and Liladhar (his partner). Karsandas and Soonderdas had a talk together, and I was told that Soonderdas had agreed to accept the larger measurement. We went back and told this to Nicholson, and the charter-party was then made out and executed. I knew nothing then of the 'Runic' or its size. I know now her size is 3,045 tons. We had never fixed a ship so large as this. Large steamers are more difficult to fix than small ones. Had the ship been offered as one of 3,045 tons, we probably should not have obtained such favourable terms. The rule in Bombay is that a ship is chartered on its tonnage, and the name is given when the negotiations are closed, and then the name is inserted in the charter-party * * *. I am sure I could not have got the terms I did for a ship the size of the 'Runic.' I do not think that Soonderdas would have taken the contract for a ship of the size of the 'Runic'."

Liladhar Haridas, one of the defendants, gave evidence. He said :—

"I remember the day Gray and Karsandas came to me, and said there was a steamer of May loading and asked me if I would charter it. I asked what was its size. They said the size of the 'Idar.' I told him to bring me the terms * * *. I told them to make all sure about the tonnage being 2,600—2,700 tons and to fix the bargain * * *. I knew the 'Idar' and had seen her in Bombay. They wrote the memorandum and brought it back with some thing written on it, and said they had closed the bargain. They said they had got the tonnage written down, as I had requested, and had got the memo. initialled. The name of the ship had not been mentioned on that day. All we were told was that she was of the size of the 'Idar' and 2,600 and 2,700 tons register. The next day Karsandas came and said that Nicholson gave the name of the ship as the 'Runic' and wanted to have 100 tons added to the tonnage. Soonderdas and I said we were unwilling to take a ship 100 tons larger than the one we had agreed to take. Karsandas said that Nicholson had assured him that the tonnage was 100 tons more, and that he wanted the alteration made only for his safety. At last we agreed. Karsandas said he was positive the tonnage would not be more. The charter-party was executed the same day. Had we known that the ship was of 3,045 tons we would never have signed. We took joint objection to the increase of 100 tons. Had we known the ship was more than 2,800 tons, we would not have executed the charter-party. I know now that the 'Runic' is over 3,000 tons. I found this out a few days only before she arrived. When she arrived and was offered to us, we refused, and thought she was not the one we chartered. We have chartered many steamers—some 700 or 800 steamers—in the last ten years."

Macpherson and Lang, for plaintiffs.—We contend that the size of the ship is not material, and that the defendants are not [246] entitled to repudiate their contract. The question of materiality depends on whether the object of the contract would be frustrated by the ship being of a different size from that which the defendants understood. Here

the object could be carried out, for the "Runic" could carry all the cargo that the defendants had to put on board. Measurement is only inserted in a charter-party as description: see *Maude and Pollock on Shipping*, p. 298; *Scrutton on Charter-parties*, p. 52. Variation in tonnage is not material, unless very great—*Winch v. Barbour* (1); *Windle v. Barker* (2); *Gibbs v. Grey* (3). There was no warranty; and no misrepresentation, unless it was false and fraudulent, would entitle the defendants to repudiate. Of course if the representation as to tonnage was a condition precedent or a warranty or guarantee, the plaintiffs must fail. But it was not so. *Nicholson* was not in a position to give a guarantee. He spoke uncertainly about the size of the ship—*Maude and Pollock*, p. 308.

Jardine (with *Latham*, Advocate-General), for defendants.—The defendants were not obliged to accept the steamer "Runic" as the steamer for which they contracted. What they contracted for was a ship of a certain tonnage. The name of the "Runic" was not mentioned until the contract was made. That is the practice in Bombay. Here a ship is not negotiated for by name, but by size. The size mentioned to the defendants was 2,600 or 2,700 tons. That was the representation on which they were induced to contract with the plaintiffs—s. 18 of the Contract Act IX of 1872. We contend that this is not a mere matter of description. No doubt misdescription unless very great is not material, but here the size of the ship is matter of contract—*Morris v. Levison* (4).

JUDGMENT.

PARSONS, J.—The point at issue lies within a very narrow compass. Though described as one of great nicety it is not one the decision of which presents much difficulty. Speaking generally it is whether the defendants were, in law, entitled to treat the contract as void, on account of the erroneous statement of the plaintiffs as to the size of the vessel.

[247] That such an erroneous statement was made, is clearly proved in evidence. There is no doubt whatever in my mind that the plaintiffs represented to the defendants that the ship to be chartered was not larger than, but about the same size as, the "Idar," and that her tonnage register was from 2,600 to 2,700 and certainly would not exceed 2,800 tons. No mention was made of her carrying capacity. There can also be no doubt that this statement was of a very material kind, and that it caused the defendants to take the ship on the terms contained in the charter-party, which otherwise they would not have done.

It is, however, argued by the learned counsel for plaintiffs that this erroneous statement was not a guarantee, or a condition precedent which would entitle the defendants to repudiate the whole contract, but was a stipulation or representation under which the defendants were bound to fulfil their part of the contract, though they might claim damages, and he has cited several English cases and text books in support of his argument. I have looked through these authorities, and I must say that the cases appear very conflicting, and the law on the subject far from clear.

In *Maude and Pollock's Law of Merchant Shipping*, p. 309, it is said that the more recent cases conclusively establish the proposition that the

(1) 6 Ell. & Bl. 675.

(3) 2 H. & N. 221.

(2) 25 L.J. Q.B. (N.S.) 349.

(4) L.R. 1 C.P.D. 155.

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question whether the stipulation is in the nature of a condition precedent depends chiefly upon whether it forms part of the substance of the contract, and whether it is of such a nature that the breach of it will frustrate the object of the contract. This, however, only raises the difficulty (and does not solve it) of deciding what is of the substance of the contract, and what is a frustration of the object of the contract. If the description of a ship as an A 1 brig is an undertaking that the ship was so classed at Lloyds, as was held in *Routh v. Macmillan* (1); I fail to see why the description of her as of the measurement of 180 or 200 tons or thereabouts should not also be an undertaking, and yet that was held not to be so in *Windle v. Barker* (2). A similar line of argument might justify a ruling that the statement of a ship as a steam-ship was only a matter of description. The object of the contract could be carried out: the [248] voyage might, it is true, be somewhat longer, but damages might be asked for this loss of time. It appears to me that if a misdescription of the quality or character of the vessel is a condition precedent, it is difficult to see why a misdescription of the size is not also. The latter may be as, or even more, important than the former. It is in evidence here that rates for large vessels are less than for small ones. If, then, a statement of a lower quality ship—which would, I presume, mean lower rates—will avoid a contract, why not a statement of larger size, which would have precisely the same effect. However, I need not pursue the argument further.

We have to decide this case, not on English case law, but on statute law or the law as contained in the Indian Contract Act IX of 1872. I find it there laid down in s. 10 that "all agreements are contracts if they are made by the free consent of parties competent to contract." In s. 13, that "two or more persons are said to consent when they agree upon the same thing in the same sense." In s. 14 "consent is said to be free when it is not caused by (4) misrepresentation while it is laid down in s. 18"; that "misrepresentation means and includes (1) the positive assertion in a manner not warranted by the information of the person making it of that which is not true, though he believes it to be true; and (3) causing, however innocently, a party to an agreement to make a mistake as to the substance of the thing which is the subject of the agreement;" and in s. 19 that "when consent to an agreement is caused by misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused."

Applying this law to the present case, I find distinctly that there was misrepresentation of both the kinds I have above mentioned; there was the positive assertion by the plaintiffs that the ship (thereafter known as the "Runic") was about the same size as the "Idar," and certainly not more than 2,800 tonnage register—an assertion which is not warranted, by any information the plaintiffs had at the time, and which was not true; and there was also the causing the defendants to make a mistake as to the size of the vessel, which was in this case the quality the parties [249] had principally in view. I find, moreover, that the consent of the defendants to this charter-party was caused by this misrepresentation. Defendant No. 2 positively swears that he would never have entered into the charter-party had he not been assured that the vessel was not more than 2,800 tons register, and the freight broker Gray also says that he is sure that he could not have got the terms of this charter-party for a vessel

(1) 33 L.J. Exch. 38.

(2) 25 L.J. Q.B. (N.S.) 349.

the size of the "Runic" and that the terms of this agreement were only consented to for a steamer of the size of the "Idar" and no larger. This really is conclusive of the case. To offer the "Runic" to the defendants, as the plaintiffs did, when she arrived, and tell them they could treat her as being smaller than she really was, was really to add insult to injury: rather should they have been frank, have dropped concealment when they discovered, as they did soon after the execution of the charter-party, that they had made a misrepresentation as to the size of the vessel, have gone to the defendants, explained their mistake, and obtained, if possible, a new and valid contract in the place of this voidable one.

I find the first four issues in the affirmative. The fifth issue I find in the negative. The suit is dismissed with costs.

Attorneys for the plaintiffs:—Messrs. *Little, Smith, Frere and Nicholson*.

Attorneys for the defendants:—Messrs. *Hore, Conroy and Brown*.

13 B. 249 (F B.).

APPELLATE CIVIL—FULL BENCH.

Before Sir Charles Sargent, Kt., Chief Justice, Mr. Justice Bayley, Mr. Justice Scott, and Mr. Justice Jardine.

WAMAN RAGHUPATI BOVA AND OTHERS (*Original Defendants*),
Appellants v. KRISHNAJI KASHIRAJ BOVA (Original Plaintiff),
*Respondent.** [10th October, 1889.]

Hindu Law—Adoption of an only son—Invalidity of such adoption—Practice.

The adoption of an only son is, by the general Hindu law, invalid.

[*Overr.*, 24 B. 367 (382); *N.F.*, 14 A. 67 (F.B.)=12 A.W.N. 161; 21 A. 460=22 M. 398 (P.C.)=3 C.W.N. 427=23 I.A. 113=9 M.L.J. 67; *F.*, 19 B. 628; *R.*, 17 A. 294 (297); 1 Bom. L.R. 144 (151); 16 Bom. L.R. 263 (278)=23 Ind. Cas. 912.]

[250] THE plaintiff claimed, as the adopted son of one Kashiraj, to be entitled to an eight-anna share in the *sansthan* of Shri Venkatesh and to have a right to perform the *pūja*, &c., &c. He prayed that the defendants might be ordered to deliver over to him the possession of the *sansthan*, or, in default, to pay him Rs. 400.

The defendants denied his claim, alleging that he was the only son of his father, and that his adoption by Kashiraj was, therefore, invalid.

The Court of first instance found that the plaintiff was an only son, that his adoption was, therefore, invalid, and dismissed his suit.

On appeal by the plaintiff, the District Judge upheld the plaintiff's adoption, applying the doctrine of *factum valet*. He, therefore, reversed the lower Court's decision, and remanded the case for re-trial.

The defendants preferred a second appeal to the High Court.

The appeal came on before the Division Bench consisting of Mr. Justice Jardine and Mr. Justice Candy, who made a reference to a Full Bench.

The reference was as follows:—

"JARDINE, J.—The learned District Judge found that the adoption of an only son was not invalid at Hindu law, merely on the ground that

* Reference in Appeal No. 31 of 1888.

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