

1901.

IN RE
MATHUR
LALBHAI.

We must look to the law and custom of British India to determine the question. That law does not make *Babashai* coin a legal tender, and therefore the title to it cannot pass by mere delivery. As to custom, there is no suggestion or proof of it in this proceeding. If there is any custom, it may be set up, if the parties choose, in a civil proceeding. But on the present application we do not think we can interfere with the discretion exercised by the Sessions Judge under section 517 of the Criminal Procedure Code. We reject the application.

Application rejected.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, Chief Justice, and Mr. Justice Chandavarkar.

1901.

June 14.

NATIONAL BANK OF INDIA, LIMITED, PLAINTIFF, *v.* SALEH
MAHAMED BALAXA, DEFENDANT.*

Letter of credit—Bill of exchange—Meaning of the word “honoured” in reference to a bill of exchange—Right of acceptor of bill to shipping documents.

It is in accordance with ordinary mercantile usage for a party presenting a bill for acceptance to deliver to the acceptor at the time of acceptance the shipping documents relating to the goods in respect of which the bill is drawn.

The primary purpose of a letter of credit is to secure an obligation to accept the bills or drafts drawn under it. An acceptance of itself imposes an obligation to pay.

Where a letter of credit stipulates for security, the purpose is to obtain that security at acceptance, for it is then that the acceptor's liability on the draft arises.

A letter of credit addressed by the firm of S. R. & Co. to the defendant stated that his drafts to the extent of £4,000 would be “duly honoured by us against delivery of shipping documents and invoices.” A bill was drawn by the defendant upon the firm against this credit and was sold and handed over by him to the Bank, together with shipping documents relating to a consignment of goods made by him in respect of which the bill was drawn. The Bank presented the bill to S. R. & Co., by whom it was duly accepted, and the Bank thereupon handed over the shipping documents to S. R. & Co. When the bill

* Civil Reference No. 2 of 1901.

became due, the acceptors (S. R. & Co.) did not pay, and the Bank then sued the defendant (the drawer). The defendant contended that in the letter of credit the word "honoured" meant "paid," and that the Bank should not have handed over the shipping documents to S. R. & Co. until the bill was paid.

Held, that it was in accordance with ordinary mercantile usage to hand over the shipping documents to the acceptor at the time of acceptance, and that there was nothing in the letter of credit to prevent the Bank from acting in accordance with that usage. The word "honoured" in the letter of credit meant "honoured by acceptance."

In re Agra and Masterman's Bank⁽¹⁾ referred to.

REFERENCE by Major H. M. Abud, Political Agent at Aden, under section 8 of Act II of 1864.

Messrs. Schmorl Rischmann & Co. of London gave the defendant, Saleh Mahomed Balaxa, a letter of credit against which he was to draw bills at ninety days' sight. The letter was as follows:

21, Old Broad Street, London, E.C., 18th May 1900.

TO SHEIKH SALEH BIN MAHOMED BALAXA, Aden.

Dear Sir,—We beg to inform you that Messrs. T. Schmorl and Co. of this place have opened with us a credit in your favour of £4,000, say four thousand pounds sterling, to be used in your drafts on us at ninety days' sight against your shipments of hides and skins &c. from Aden to London and to New York, U. S. or Atlantic ports, which drafts will be duly honoured by us to the debit of the said friends against delivery of shipping documents and invoices to be countersigned by Mr. C. A. Brenchley, Messrs. T. Schmorl and Co.'s representative in Aden.

Insurance will be covered by Messrs. Schmorl and timely notice to be given.

We are &c. &c.,

(Signed) SCHMORL RISCHMANN & Co.

It appeared that the defendant had on three occasions drawn against this credit and sold his bills to the National Bank at Aden.

On the 10th September, 1900, he consigned certain bales of skins to London by the steam ship "Egypt" and he drew against the above credit on Messrs. Schmorl Rischmann and Co. a bill for £633-7-0, which he sold to the said Bank at Aden. The bill was handed to the Bank, together with the invoice and bill of lading of the said consignment.

(1) (1867) L. R. 2 Ch. 891.

1901.

NATIONAL
BANK OF
INDIA
v.
SALEH
MAHAMED.

1901.

NATIONAL
BANK OF
INDIA
v.
SALEH
MAHAMED.

The bill was afterwards duly presented by the Bank to Messrs. Schmorl Rischmann and Co. and was accepted by them, they at the same time receiving from the Bank the invoice and bill of lading for the said consignment.

When the bill became due it was not paid by Messrs. Schmorl Rischmann and Co., but was returned by them to the Bank with the endorsement "Refer to drawer".

The bill was then sent back to the Bank at Aden. The Bank there applied to the defendant (the drawer) for payment, but without success. The Bank then brought this suit against him in the Court of the Resident at Aden.

The defendant contended that he was not liable, because the Bank had parted with the shipping documents before being paid the amount of the bill, and by so doing had acted in violation of the letter of credit under which the bill was drawn. He alleged that he had handed these documents to the Bank as security, and that they ought not to have parted with them before payment, and that having parted with the security without receiving payment, the loss should fall on them and not on him.

The Resident at Aden referred the case to the High Court under section 8 of Act II of 1864. In his reference he said :

Both parties admit that the draft was drawn under the terms of the letter of credit of the 18th May, 1900, on which, however, they place a different construction, and it is therefore the issue to be tried. Neither party have produced any evidence as to the customary manner in which the former transactions under the same letter of credit have been dealt with. The Manager of the Bank merely states that in the former transactions the documents were handed over on the mere acceptance of the drafts by Messrs. Schmorl Rischmann and Co. of London. The defendant disclaims all knowledge of how the former drafts were dealt with, but he avers that the terms of the letter of credit only permit of the delivery of the documents after payment of the drafts.

The pith of the matter is contained in the following words of the letter of credit, viz. "which draft will be duly honoured by us to the debit of the said friends against delivery of shipping documents and invoices to be countersigned by Mr. C. A. Brenchley, Messrs. T. Schmorl and Co.'s representative in Aden." The question would seem to me to hinge on the interpretation of the word "honoured." Can a bill be said to be effectually honoured when it is accepted, and subsequently on presentation for payment it is referred to drawer, *i.e.* dishonoured? There is nothing, I think, in the letter of credit to show whether the honouring of the draft and delivery of documents was to be on acceptance of the draft or on its being honoured by payment at due date. The defendant

alleges that the meaning of the letter of credit is that the documents were to be handed over on payment of the draft and not before, and he further avers that he handed over the documents to the Bank as security, as without them the bank would not have bought his draft. The plain argument of which is, that the Bank had security for the draft and that if they parted with that security without receiving the value, the loss would not fall on him but on them.

From section 99 of Act XXVI of 1881 it would appear that a draft can be dishonoured in two ways, that is to say, either by non-acceptance or non-payment. In this case the draft was honoured by acceptance, but dishonoured by non-payment. On the acceptance of the draft, the Bank apparently handed over to the drawee and acceptor the shipping documents. No evidence of the intention of the parties, except the contradictory allegations of the parties, has been produced, and I am therefore of opinion that the plaintiff should be non-suited with costs for failure to prove his claim, and because I can hardly believe that the term "honour" in the letter of credit does not mean the final act of payment, as, if it did not, drawer would have parted with his goods and his money too, which hardly seems to be equitable, while the plaintiff who held the shipping documents actually parted with them without taking sufficient care that the draft would be met at maturity by the drawee and acceptor. Had the Bank bought the draft without consideration, there would be no doubt but that the drawer is liable, but as consideration and security they obtained the shipping documents, and if these documents were not security I can conceive of no useful purpose being served by their taking them at all.

Scott (Acting Advocate General) with *Little and Company* for plaintiff:—We have not lost our right against the defendant because we handed over the shipping documents to the acceptors when they accepted the bill. They were entitled then to get those documents—*Gilbert v. Guignon*⁽¹⁾; *Ranken v. Alfaro*⁽²⁾; *Shepherd v. Harrison*.⁽³⁾ The words in the letter of credit do not require the Bank to adopt any other practice. The word "honoured" in the letter of credit does not mean "paid". It means "accepted," and the Bank was justified in handing over the documents when the bill was "honoured" by being accepted—Negotiable Instruments Act (XXVI of 1881), section 91.

Jardine (with *Craigie, Lynch and Owen*) for defendant:—The liability of the defendant depends on the construction of the letter of credit. We contend that the word "honoured" in that

(1) (1872) L. R. 8 Ch. 16 at p. 20.

(2) (1876-77) 5 Ch. D. 736.

(3) (1871) L. R. 5 H. L. 116.

1901.

NATIONAL
BANK OF
INDIA
v.
SALEH
MAHAMED.

1901.

NATIONAL
BANK OF
INDIA

v.

SALEH
MAHAMED.

letter means "paid," and that the Bank was not justified in handing over the shipping documents until the bill was honoured by payment.

JENKINS, C.J. :—This is a reference to the High Court under the Aden Courts Act (Act II of 1864) and though the provisions of section 8 have not been strictly observed, we think the point for our opinion is sufficiently indicated to enable us to dispose of the case without returning it for amendment.

The plaintiff Bank, as the payee, has sued the defendant as the drawer of a bill not paid by the acceptor at maturity. The defendant contends that he is exonerated, because the Bank parted with certain shipping documents given to it with the bill, and by so doing acted in contravention of the terms of a letter of credit, under which the bill was drawn.

Now, apart from the letter of credit, it is clear that the plaintiff was acting in accordance with ordinary mercantile usage in delivering the shipping documents to the acceptor of the bill on acceptance, so that we have to see whether there is anything in the letter of credit that forbids the Banks so acting, and imposes on such conduct the penalty of the loss of all remedies against the drawer. It appeared to the learned Judge that this was the legal result of the following words in the letter of credit, viz. "which draft will be duly honoured by us to the debit of the said friends against delivery of shipping documents and invoices." "Honoured," he thought, must mean *paid*, and therefore he held the letter of credit forbade the delivery of shipping documents before payment. The *ratio decidendi* is thus expressed by the learned Judge: "I can hardly believe that the term 'honour' in the letter of credit does not mean the final act of payment, as, if it did not, the drawer would have parted with his goods and his money too, which hardly seems to be equitable, while the plaintiff who held the shipping documents actually parted with them without taking sufficient care that the draft would be met at maturity by the drawee and acceptor."

We do not agree with this view. In the first place the primary purpose of a letter of credit is to secure an obligation to accept the bill or draft; for when there is an acceptance, *that* itself

imposes an obligation to pay without any stipulation to that effect in the letter of credit. If in the letter now under consideration "honoured" means "paid" only, then there is no express stipulation for acceptance. Again, in a letter of credit stipulating for security the purpose is to obtain that security at acceptance; for it is then that the acceptor's liability on the draft arises, and, if he does not then obtain his security, he may find, when the time for payment comes, that it is non-existent.

For these reasons we think the word in this letter of credit refers to honour by acceptance. We should have come to this conclusion apart from authority, but we find the same view taken by Lord Cairns of a letter of credit in much the same terms—*In re Agra and Masterman's Bank*.⁽¹⁾ The words of the letter of credit there were, "You are hereby authorised to draw upon this bank at six months' sight to the extent of £15,000 sterling and such drafts I undertake duly to honour on presentation." Of this letter Lord Cairns says: "It is a general invitation issued by the Agra and Masterman's Bank through Dickson Tatham and Co. to all persons to whom the letter may be shown to take bills drawn by Dickson Tatham and Co. on the Agra and Masterman's Bank with reference to the letter and to alter their position by paying for such bills, with an assurance that if they or any of them will do so, the Agra and Masterman's Bank will accept such bills on presentation." The only difference between that letter and the present is, that the promise is to honour *on presentation*; but the words *on presentation* can make no difference, as a bill or draft may be presented either for acceptance or for payment.

For these reasons we are of opinion that the letter of credit affords no defence to the suit, and we would so answer the reference. The case will now go back to the Court at Aden to be dealt with in accordance with the Act, and the costs of the reference will be costs in the suit.

Order accordingly.

1901.

NATIONAL
BANK OF
INDIA
S
SALEH
MAHAMED.

(1) (1867) L. R. 2 Ch. 391.