ORIGINAL CIVIL.

Before Mr. Justice Davar.

1911. *July* 25.

KANJI DWARKADAS *v.* HARIDAS PURSHOTTAM.*

Insurance—Marine insurance—Insurable interest of agent in goods of principal—Effect of a Mahajan's "Majur"*—Local custom when enforced—Duties and rights of insurer and policy-holder in case of total loss.*

The plaintiffs, as commission agents, shipped certain goods on behalf of constituents on board the ship "*Ali Madut*" in the year 1899. The plaintiffs were instructed by their principals to insure these goods and accordingly by a policy dated February 7th, 1899, the plaintiffs insured the goods with the defendants, subject, as stated in the policy, to the custom of the port of Cutch Mandvi.

The ship "*Ali Madut*" was wrecked off the coast of German East Africa and the wreck and the remains of the cargo were sold by the local authorities and the proceeds handed over to the owner of the vessel.

The plaintiffs sued the defendants to recover Rs. 3,500 as the value of the goods.

The defendants, besides certain other objections to the plaint, objected that the plaintiffs as agents had no insurable interest in the goods; that by the custom of the port of Cutch Mandvi the claim of the plaintiffs could not be established without the production of a Mahajan's "*Majur*", and that the defendants were in any event entitled to credit for the sale proceeds of the wreck and cargo.

Held, that an agent who has authority from his principals, express, implied or ratified, can effect insurances on the goods of his principals; that the custom of the port of Cutch Mandvi must be construed in a reasonable manner and that under it a Mahajan's "*Majur*" could not be required in the case of total loss; that the policy-holder's duty was only to give intimation of total loss, at the earliest possible opportunity to the insurer, and that it was for the insurer to protect his interest and to recover whatever was left as the net balance of the sale proceeds of the cargo.

Ransordas Bhogilal v. *Kesrising Mohanlal*(1), referred to.

THE plaintiffs, as commission agents for certain Borah merchants, shipped certain goods on board the *ganjo* or native ship "*Ali Madut*" and, at the instruction of their principals, insured the goods with the defendants for the sum of Rs. 3,500. The policy stated that the insurance was subject to the local custom prevailing at the sea-port town of Cutch Mandvi. The ship was wrecked off the coast of East Africa and the wreck and the remains of the cargo were sold by the local authorities and the sale proceeds paid to the owner of the vessel.

* O. C. S. Suit No. 9 of 1902.

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The plaintiffs sued to recover the sum of Rs. 3,500.

Bahadurji and *Kanga* for the plaintiffs.

Talyarkhan and *Mirza* for the defendants.

DAVAR, J. :—In the beginning of the year 1899 a country craft or *dhow* called "*Ali Madut*" came to Bombay from Cutch and was chartered to sail to the sea-port town of Noshi Be in the Island of Madagascar. The plaintiffs, acting as commission agents for four Borah merchants, put on board the said *dhow*, or *ganjo* as it is sometimes called, certain goods belonging to the said merchants. One of those merchants was Alibhai Jiwanji, the owner of the "*Ali Madut*", who had insured his goods at Cutch through the plaintiffs' firm at that place. The other three desired the plaintiffs to insure their goods in Bombay and a policy of insurance was effected with the firm of Haridas Purshottam and Company. A *kutcha* policy was effected on the 2nd of February 1899 on which date the ship appears to have sailed from Bombay, and the formal policy was subsequently executed on the 7th of February 1899 and is Exhibit F in the case. The goods belonging to the three merchants, for whom the plaintiffs' firm was acting as commission agents, were insured for Rs. 3,500. It appears that the "*Ali Madut*" met with bad weather and was carried out of its course, and, after having battled with the sea for some days, was eventually wrecked in the vicinity of a sea-port town on the Eastern coast of Africa named Minkin Dari. When the ship struck on the rock, the Nakva and the crew abandoned it with all its cargo and, in a small boat belonging to the vessel, managed to land at Minkin Dari. That sea-port town belongs to the German Government and the authorities in that town, on being informed of the wreck, employed divers and saved a portion of the cargo which with the broken vessel was sold at Minkin Dari, and after deducting all necessary charges and expenses the balance of the sale proceeds were paid over by the German authorities to the agent of the owner of the vessel. The plaintiffs say that, on being informed of the loss of the vessel and cargo, they gave notice to the defendants' firm and demanded payment of the insurance moneys, and, the firm of Haridas Purshottam having

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failed to pay the insurance moneys, they filed this suit to recover the same on the 10th of January 1902. The firm of Haridas Purshottam and Company originally consisted of three brothers, Haridas Purshottam, Jetha Purshottam and Ramdas Purshottam, who are all now dead and the defendants are their representatives.

This claim of the plaintiffs is resisted by the defendants on various technical grounds, and I will deal with each one of them as they were formulated by the learned counsel who appeared for the defendants.

The first contention on behalf of the defendants was that the constitution of the suit was bad, and that it was filed in the name of an individual who was dead at the time the suit was filed. In the plaint, as it was originally filed, the plaintiffs are described as "Kanji Dwarkadas carrying on business at Mint Road in Bombay." No doubt, the individual of the name of Kanji Dwarkadas was dead some years before the suit was filed and even before this insurance was effected. He founded the firm which was carried on in his name, and his sons who were associated with him in the business during his lifetime continued to carry on the same firm in the same name after his death, and up to the present moment the three surviving sons and the sons of the fourth son who died soon after his father are carrying on the same business in the same name. It was obvious to my mind that the intention of the framer of the plaint was to file the suit in the name of the plaintiffs' firm. This suit was filed on the 10th of January 1902. In the beginning of that year new Rules of the Bombay High Court came into operation and one of them, Rule 361, permitted a partnership to file a suit in the name of the firm. Being satisfied that that was the intention of the plaintiffs, I made an order on the 14th of July while the suit was at hearing, permitting the plaintiffs to add the words "a firm" after the words "Kanji Dwarkadas." At a later stage of the hearing on the 17th of July, the plaintiffs called Mr. Sorabji Edulji, a managing clerk in the office of the plaintiffs' solicitors, who produced a draft of the plaint in the handwriting of his late

father Edulji Sorabji Davar. That draft, Exhibit J, proves conclusively that the managing clerk, when he drafted the plaint, put in the names of the three surviving sons of Kanji Dwarkadas and the names of his three grandsons, the sons of his deceased son Liladhar, as the plaintiffs. Mr. Payne, to whom the plaint was submitted for settling, struck off all the names in the plaint, retaining only the words "Kanji Dwarkadas" in the draft, and added the words "carrying on business at Mint Road in Bombay." After the evidence of Sorabji and the production of the draft plaint, I think it is not open to the defendants to contend that the suit was filed in the name of an individual who was dead. The suit was filed in the name of the firm as authorised by the Rule that had then recently come into force, and the suit as constituted, even without the addition of the words "a firm," is, in my opinion, properly constituted and is maintainable by the plaintiffs.

The second point urged by Mr. Talyarkhan on behalf of the defendants was that the plaint, not being signed by one of the plaintiffs, was bad and therefore the suit must fail. It is true that the plaint is not signed by any of the plaintiffs but is signed and verified by their *munim* Purshotamdas Ramdas. Section 51 of the old Code, which then applied to this suit, required that the plaint should be signed by the plaintiff but the same section provided that if the plaintiff is by reason of absence or other good cause unable to sign the plaint, it may be signed by any person duly authorised by him on his behalf. No doubt the plaintiffs, or some of them at least, were in Bombay when the plaint was declared and presented for admission. The learned counsel for the defendants in cross-examination elicited the fact from the plaintiffs' *munim* that he held a power-of-attorney which authorised him to sign plaints and file suits on behalf of the plaintiffs. He had not the power-of-attorney with him on that day. He was asked to produce it on the following day. That power was produced, and when it was suggested that Mr. Talyarkhan, having given notice to produce it, if he inspected it, might be called upon to put the power in, he refused to touch it. It was stated by the

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learned counsel for the plaintiffs that there was very serious illness in the family of the plaintiffs which prevented them from attending to their business and that in consequence thereof the *munim* signed the plaint. No question was asked by Mr. Talyarkhan to the *munim* why the plaintiffs had not signed the plaint, and the learned counsel for the plaintiffs not realising the point of cross-examination did not ask the *munim* for the reason which was given as soon as the point was clearly stated to the Court. At the hearing I refused to entertain this objection on the part of the defendants seriously. The plaint was presented to the Court and a copy furnished to the defendants' attorneys ten years ago. It was admitted that the copy showed that the plaint had been verified by the *munim* and not by any of the plaintiffs. They never took this objection in any form whatever till at the hearing, and I refused to entertain the same, as I had no reason whatever to disbelieve the statement made to me that it was owing to serious illness in the family that none of the plaintiffs had come to the Fort and signed this plaint. I am by no means sure that if this was a defect which required serious consideration that it would not have been cured by getting one of the plaintiffs, two of whom were present in Court throughout the hearing, to sign the plaint.

The next objection taken on behalf of the defendants was that the plaintiffs had no insurable interest in the goods, that the policy taken by them was, therefore, null and void, and that they were not entitled to recover under the policy. On the evidence before me I hold as proved that the plaintiffs were acting as commission agents for the three merchants for whom they purchased goods. They, as such agents, put the same on board the "*Ali Madut*", and consigned them to the said merchants' firm at Noshi Be. I also hold it as proved that the plaintiffs were specifically instructed and authorised to insure these goods in Bombay. And I hold it as proved that in taking out this policy of insurance the plaintiffs were acting under instructions from the owners of the goods and were authorised by them to insure the said goods. They paid for

the goods which they purchased in the market, they had a running account with those merchants and they debited the price of those goods to those merchants in their respective accounts.

The learned counsel for the defendants in support of his contention cited several passages from the Encyclopædia of the Laws of England on the subject of insurable interest. The passage which was not cited and which, I think, correctly summarizes the authorities on the subject is at page 587 of Vol. VIII of the Encyclopædia. It is there stated: "Besides the foregoing different kinds of 'assured' who can enter into a policy, policies can also be effected by agents for the assured. In order to do so, agents must have an authority from their principals—express, implied or ratified."

The Law on this head is summarized to the same effect at page 52 of Porter's Law of Insurance (2nd Edition): "A common carrier, pawn-broker, factor, broker, and wharfinger have an insurable interest in the goods entrusted to them; but if they insure the goods to their full value and receive it, they will, after satisfying their own claims, be trustees of the balance for the real owners." See *Sidaways* v. *Todd*[1].

The next point urged by the learned counsel for the defendants was that no claim of the plaintiffs could be established without the production of the Mahajan's "*Majur*". The policy recites that it is according to the local custom prevailing at the sea-port town of Cutch Mandvi. In the correspondence that passed between the solicitors of the respective parties previous to the suit, the defendants' solicitors admit that the insurance was according to the custom of Cutch Mandvi, but they say their clients are unable to produce the Mahajan's "*Majur*", as the ship was lost at a port called Minkin Dari, before it reached its destination and therefore the Mahajans could make no "*Majur*" in respect of it.

On this head a great deal of fog seemed to have enveloped the minds of all parties concerned. The custom which

(1) (1818) 2 Stark. 400.

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Mr. Talyarkhan attempted to set up was that in all policies under the usage and custom of Cutch Mandvi, no claim whatever could at any time be successfully made, unless a Mahajan's "*Majur*" was produced. The custom that was sought to be established had many grave infirmities and appeared to be both vague and unreasonable. I repeatedly asked the learned counsel as to what he meant by Mahajan and the only answer was: "a body of leading Bhatia merchants," subsequently enlarged into "Indian merchants." Supposing a ship was ship-wrecked at one of the Arabian or African coast towns, where there is no Mahajan and no Indian merchants, what would happen? To that, there was no answer.

Since the hearing was closed, and while I was looking into the authorities on the questions arising in this suit, I came across a case in *Ransordas Bhogilal* v. *Kesrising Mohanlal*[1]. If my attention had been called to this case at the hearing probably much discussion would have been saved. That was a case in which the question of a Mahajan's "*Majur*" or certificate arose and it was contended that according to the custom and usage of Mangrole the production of the certificate alone was sufficient to entitle the policy-holder to recover his average loss. The Court held against such contention and the judgment of the Court consisting of Sir Mathew Sausse, C. J., and Arnould, J., throws considerable light on what a Mahajan is in connection with insurance policies. They say: "The Mahajans appear to be self-constituted body of the principal native merchants at each of the small ports on the Indian and Arabian coasts of the Indian Sea, who assume cognizance of sea-losses to the extent of fixing the amount of average loss incurred and payable by native underwriters".

The plaintiffs' witness Tricumdas Ranchoddas who has considerable experience in the usages and customs governing insurance by native merchants in Cutch, said that in all large and important sea-port towns, those who carry on business as insurers nominate a small number of respectable and

(1) (1863) 1 Bom. H. C. R. 229.

prominent Indian merchants at those ports and they are called Mahajans.

It seems to me that it would be most unreasonable to hold that in every case under a policy such as the one in this suit, no claim could be established without the production of a Mahajan's "*Majur*". A custom to be enforceable at law must, amongst other things, be reasonable and the Court in the case, I have referred to, of *Ransordas Bhogilal* v. *Kesrising Mohanlal*[1] held that the usage sought to be established in that case, namely, that the Mahajan's *Majur* should be taken as conclusive evidence against the underwriter without production of manifests and account sales, was not a reasonable custom and, if the custom was not reasonable, it was not binding. There must be on the African and Arabian coasts numerous little sea-port towns where there may be no Indian merchants and how is a policy-holder to produce a Mahajan's "*Majur*" from places where the Mahajan never existed. Besides all this, it seems to me that there is great force in what was contended on behalf of the plaintiffs. They say a Mahajan's "*Majur*" is only necessary when the ship reaches its port of destination and when there is only a partial loss of cargo; but that in cases where there is actual or constructive total loss before the ship reaches its destination, there is no question of the production of a Mahajan's "*Majur*". That is the evidence given by witnesses who have great experience in this particular line of business and whose evidence is wholly trustworthy. There can be no doubt that this was a case of total loss. The ship struck on a rock and was so broken up and damaged that the Nakva and the crew abandoned the wreck with all its cargo. And the extent of damage to the ship may be gathered from the fact that the remnant of the ship was sold for Rs. 50. The circumstances surrounding the wreck of the vessel, the abandonment of the same by its officer and crew and the subsequent sale of the goods are such circumstances as have led the Courts to hold that it is a case of total loss and where in the opinion of competent authorities on the report

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of the wreck it is found to be necessary to sell the cargo, it has been held that the public sale *per se* vested the proceeds of the sale in the underwriters. See *Saunders* v. *Baring*[1]. In that case Lord Blackburn held that the mere fact that a cargo of coals had been so damaged by the perils of the seas as to render an immediate sale necessary, and that they were so sold, is sufficient to constitute a total loss. In the same case it was further held that "where the money is in the hands of a third party, the assured is entitled to be paid the total loss . . . The underwriters must pay the total loss, and they will then be entitled to take all such steps to get all the proceeds from the hands of third parties, as the plaintiffs themselves could have taken."

In this case the principal partner in Haridas Purshottam's firm, Mr. Haridas, was alive when the news of the loss of the "*Ali Madut*" and its cargo reached Bombay. The evidence of the plaintiffs' *munim* and the plaintiffs' broker establish to my satisfaction that intimation was sent to him at the very earliest opportunity. It was clearly his duty to take steps to secure his interest and to recover whatever was left as the net balance of the sale proceeds of the cargo. He did nothing and took up an attitude of hostility, with the result that the net balance of the sale proceeds has been paid by the German authorities to the owner of the ship.

In law a policy-holder has nothing further to do in case of total loss but to give intimation of that loss at the earliest possible opportunity to the insurer and then claim moneys payable under his policy. This the plaintiffs have done. The absence of the Mahajan's "*Majur*" is pleaded merely for the purposes of defeating the plaintiffs' claim. The plaintiffs have before them a document of far greater reliability than a Mahajan's "*Majur*". Exhibits C and D are documents properly authenticated by the German authorities giving all the information and more than the Mahajan's "*Majur*" would have done. The evidence taken on commission and taken *de bene esse*, the evidence recorded by me and the documents Exhibits C and D,

(1) (1876) 34 L. T. 419.

prove conclusively that the "*Ali Madut*" with all its cargo was carried by stress of weather away from its course and wrecked in the vicinity of Minkin Dari, that the vessel broke up, the whole of the cargo went under water and only a portion of it was subsequently saved, that the officers of the German Government at Minkin Dari sold the wreck and the cargo that was saved, and, after paying all proper expenses, handed over the net balance of Rs. 3,370 to the agent of the owner of the "*Ali Madut*". The whole cargo on board the ship was worth about Rs. 20,000 and the approximate contribution which the defendants would be entitled to claim is somewhere about 580 odd rupees. And this claim the underwriters had and may still have against the third party who held the moneys, and the plaintiffs as policy-holders had nothing whatever to do with what took place after the wreck.

It seems to me that Haridas realized that there would be many difficulties in the way of the plaintiffs' proving their case in Bombay. and he merely set up the absence of the Mahajan's "*Majur*" as a pretext for the purpose of escaping payment. I hold that the custom attempted to be set up by the defendants is not proved, that it is vague, indefinite and unreasonable as enunciated on their behalf, and as such not binding on the plaintiffs even if it had been proved as alleged.

At one time it was contended that the "*Ali Madut*" was not in a seaworthy condition when she left Bombay. There was absolutely no justification whatever for this contention and the learned counsel for the defendants abandoned it at the hearing after having put the plaintiffs to the trouble of proving the falsity of this contention.

It was further contended on behalf of the defendants that they were entitled to a proportionate credit out of the net balance realized by the sale of the cargo. I have dealt with this point. Rs. 580 odd would undoubtedly have been the proportionate share of Haridas Purshottam and Company in the net sale proceeds on the assumption that the owner of the ship was not entitled to claim priority of payment for his freight which amounted to between Rs. 2,700 and Rs. 2,800

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and the expenses of bringing the crew down from Minkin Dari to Bombay. That claim as I have said above the insurers may have against the owner to whom the balance has been paid.

Mr. Talyarkhan further contended at the hearing that no notice of this loss was given to the insurers till more than two years after the loss. This contention is, I think, untenable. In the very first letter addressed to Haridas Purshottam and Company by the plaintiffs' solicitors, it is stated that due notice of such loss was given to them. In the reply it is not denied that notice was given to them, but it is denied that "any proper notice" had been given. I believe the broker when he says that he went and informed Haridas of this loss as soon as he was instructed to do so by the plaintiffs' *munim*. And by proper notice I take it that Haridas meant no written notice was given to him before the 24th of June 1901.

The last contention was that the plaintiffs could not establish their claim without producing a protest from Minkin Dari. I do not quite understand this contention and it was not seriously pressed. The facts in this case are proved by evidence that to my mind is satisfactory. We have in this case the testimony of the Nakva of the "*Ali Madut*" recorded *de bene esse* and Exhibits C and D. I do not, therefore, see what more is required to be done by the plaintiffs to establish their claim. The actual value of the goods insured belonging to the three constituents of the plaintiffs is proved to be Rs. 3,170-12-6. To that must be added Rs. 31 being the plaintiffs' commission, making altogether the sum of Rs. 3,201-12-6. In taking out the policy the plaintiffs included freight which came to Rs. 274-4-0 and insured the goods for the round sum of Rs. 3,500.

Plaintiffs seek to recover the policy moneys with interest at 9 per cent. per annum from the first day of October 1899. This is a suit filed in the very beginning of 1902. No doubt, there were many difficulties in the way of the plaintiffs in proof of their case. These difficulties were entirely created by the obstructive attitude taken up by Haridas. The plaintiffs had to get witnesses to Bombay and have them examined

de bene esse. They had to get some of their witnesses examined on commission, but the *de bene esse* examination and the commission evidence was all taken and finished by the end of 1903 and yet I find that this case was transferred to the Stayed List on the 29th of January 1903 and remained in the Stayed List till the 17th of April 1909, more than six years. At one time I felt inclined to give expression to my disapprobation of this scandalous delay in bringing the suit to a hearing by depriving the plaintiffs of their interest on the sum that may be found due to them for a period longer than a year or eighteen months which ought to be the utmost limit within which a suit should be brought to a hearing and terminated ordinarily. But having regard to the attitude adopted by the original defendants, having regard to the fact that they acquiesced in the delay and took no steps whatever to bring the suit to a hearing, I feel that if I deprive the plaintiffs of any portion of their interest or cost, I would be punishing one party when both are guilty of what I cannot help stigmatising as scandalous conduct in sleeping over this case for ten years. Neither the plaintiffs nor their principals have had to pay freight on the goods that were lost to them and any possible claim by the owner is now wholly barred. I, therefore, hold that under the policy the actual loss sustained by the owners of the goods and by the plaintiffs, including the plaintiffs' commission, is Rs. 3,201-12-6. For this amount there will be a decree for the plaintiffs. I will allow interest on this sum but in my opinion a fair mercantile rate of interest to allow would be at the rate of 6 per cent. and not 9 per cent.

I find the issues 1, 2, 3, 4, 5, 6, 8 and 9 in the affirmative.

On the 7th issue I find that the loss sustained amounts to Rs. 3,201-12-6. I pass a decree for that amount with interest thereon at 6 per cent. per annum from the 1st of October 1899 up to date. Costs and interest on judgment at 6 per cent. till payment. Costs to include all costs reserved.

The decree will be against the defendants in their representative capacity in which they are sued, and will be limited to the extent of the assets of the original partners in Haridas

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Purshottam and Company which may have come to their hands.

Attorneys for the plaintiffs: *Messrs. Payne & Co.*

Attorneys for the defendants: *Messrs. Little & Co.*

Suit decreed.

H. S. C.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Batchelor.

1912.

January 8.

DAGDU VALAD ANANDRAM AND OTHERS (ORIGINAL DEFENDANTS NOS.2—4), APPELLANTS, *v.* MIRASAHEB VALAD TANHAJI AND OTHERS (ORIGINAL PLAINTIFFS), RESPONDENTS.*

Dekkhan Agriculturists' Relief Act (XVII of 1879), section 2†—Agriculturist—Definition—Son of agriculturist is not an agriculturist.

The minor son of an agriculturist who is depending for his support on his father is not an agriculturist within the meaning of section 2 of the Dekkhan Agriculturists' Relief Act (XVII of 1879). Dependence for livelihood upon another who is an agriculturist is not the same thing as earning livelihood for oneself by agriculture. To earn livelihood by agriculture is to obtain means of livelihood by it.

SECOND appeal from the decision of C. C. Boyd, District Judge of Ahmednagar, confirming the decree passed by D. G. Medhekar, Subordinate Judge of Shevgaon.

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* Second Appeal No. 912 of 1910.

† Dekkhan Agriculturists' Relief Act (XVII of 1879), section 2, runs as follows :—

2. . . . . .

1st.—"Agriculturist" shall be taken to mean a person who by himself or by his servants or by his tenants earns his livelihood wholly or principally by agriculture carried on within the limits of a district or part of a district to which this Act may, for the time being extend, or who ordinarily engages personally in agricultural labour within those limits.

* * * * * * *

2nd.—In Chapters II, III, IV and VI, and in section 69, the term "agriculturist," when used with reference to any suit or proceeding, shall include a person who, when any part of the liability which forms the subject of that suit or proceeding was incurred, was an agriculturist within the meaning of that word as then defined by law.