

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Mirtunjoy Chuckerbutty v. John Cochrane, Assignee, &c., from the late Court of Sudder Dewanny Adawlut of Calcutta ; delivered 20th July, 1865.

Present :

LORD JUSTICE KNIGHT BRUCE.

LORD JUSTICE TURNER.

SIR EDWARD VAUGHAN WILLIAMS.

SIR LAWRENCE PEEL.

SIR JAMES W. COLVILLE.

THE Appellant in this case is the owner of silk filatures, and a dealer of silk in Junghypore, a district of Bengal. The Respondent is the official assignee of an insolvent firm that formerly carried on business in Calcutta, under the style of Hickey, Bailey, and Co.

That firm from the year 1840 up to the end of 1847 acted as the factors and agents of the Appellant ; selling some of the goods consigned to them by him in Calcutta, and shipping others to London for sale there ; and the following seems to have been the course of dealing between them :—The Appellant was in the habit of drawing on Hickey, Bailey, and Co., against the goods consigned to them, and they accepted and paid his drafts, charging him in account with the amount of them. If they sold the goods in Calcutta, they rendered the account sales to him, and credited him with the proceeds. Against the goods shipped to London they drew bills in sterling money upon the consignees ; but credited the Appellant in account with the proceeds of those bills in rupees at the rate of exchange at which they were sold in Calcutta ; and on receiving the account sales from London, they either gave

him further credit for the profit, or debited him with the loss on each shipment, according to the final result of the transaction. The account current so kept was balanced on the 30th of April in each year, and from time to time rendered to the Appellant. From 1840 up to a period which, as found by the Courts below, we may take to have been some time in 1845, the consignments to London were shipped by Hickey, Bailey, and Co., to the consignees "for sale on account and risk of Mirtunjoy Chuckerbutty." Examples of the invoices are given at p. 118, and elsewhere in the Appendix. About 1845 some change took place in the constitution of the firm of Hickey, Bailey, and Co., and either contemporaneously with, or shortly after, that event the shipments on account of the Appellant were made in a different form; most of the invoices stating the goods to be shipped by Hickey, Bailey, and Co., and consigned to the London house for sale "on account of the concerned;" and one or two stating them to be consigned for sale on account of Hickey, Bailey, and Co. Examples of the first of these two classes of invoice are at pp. 73, 77, 100, and elsewhere in the Appendix; an example of the latter class is at p. 74 of the Appendix. All these later invoices however continued to specify the mark or brand by which the Appellant's silks were known in the market. It is upon the variation in the form of the consignments made in and subsequently to 1845 from that of the consignments made before that year, that the principal question on this Appeal is raised.

The disputes between the Appellant and Hickey, Bailey, and Co., began in 1847, the year so disastrous to commerce in India. The letters of the 27th of November, 1845, and the 21st of February, 1846 (at page 59 of the Appendix), show that from a date as early as the latter part of 1845 the silk market, both in Calcutta and in London, was in a state of great depression. On the 13th of April, 1846, Messrs. Hickey, Bailey, and Co., wrote to the Appellant (Appendix, p. 60): "Our market continues worse every day. After having failed in attempting to sell your silk, we have, according to your request and instructions, shipped the whole on your account to London, the particulars of which will be forwarded to you in due course." And

accordingly their letter of the 23rd December, 1846 (Appendix, p. 63), contains this passage: "We also inclose invoices of 64 bales silk, and 900 pieces of your good corahs shipped on your account to London; the sums drawn against these shipments, as per memorandum at foot, viz., rupees 54,816 12 6 have been carried to your credit under due dates."

It is not difficult from this memorandum, and by means of the quantities of silk, and the dates and amounts of the bills there specified, to identify the shipments so advised with the shipments of 7 bales per "Oriental," and 8 bales per "Tartar," to Magniac, Jardine, and Co., the shipment of 13 bales per "Kelso," to S. Phillips and Co., the shipment of 18 bales per "Essex," to H. J. Johnston and Co., the shipment of 18 bales per "Cressy," to Cockerell and Co., and the shipment of 4 cases of corahs, also per "Cressy," to Thurburn and Co., which are respectively mentioned in the accounts. The losses on these shipments are amongst those his liability to which the Appellant disputes; and many, if not all, of them must have entered into the accounts which were the subject of the correspondence that will be next mentioned.

In August 1847 Messrs. Hickey, Bailey, and Co. wrote to the Appellant their letter of the 5th of that month, which is at page 60 of the Appendix. The most important passage in it is the first paragraph, which is in these words: "We beg to wait upon you with the following: a statement of your account current exhibiting on the 30th of April last a balance in our favour of Company's rupees 12,171 3 7, and a continuation of the same in open account to date showing a balance against you of about rupees 31,882 6 5. Four account sales from Messrs. Magniac, Jardine, and Co., Samuel Phillips and Co., and Cockerell and Co., of London, comprising 69 bales of your silk, and three account sales comprising 51 bales of theirs." This letter also expresses an unwillingness in the then state of the markets to receive any further consignments "at drawn against;" and presses the Appellant to place the house in funds either by remittances or goods.

The Appellant's answer to this communication was dated the 12th of August, 1847, and is at page 102 of the Appendix. After professing himself con-

founded by the letter of the 5th, he says: "The cost of the goods I consigned to you was 5,000 or 8,000 rupees more than I drew on you, and I believed you owed me that sum at least, but in your letter you make me your debtor more than 31,000 rupees. I am ashamed to hear this. Your old house several years has sent silk and corahs to England on my account, and the London houses have ever sent account sales, &c., for every transaction in my name, and I have these accounts in my hand. Your new house, I don't know how, has taken a new manner of business, and all the account sales sent to me now are copies signed in Calcutta; this does not satisfy me at all, and therefore I want the London account sales as formerly. There are many particulars I want to know in these sales, because I see in your copies several sales on account of the concerned. Until I have the particulars I will not examine the account current, and I request you will send them to me as quick as possible."

In reply, Hickey, Bailey, and Co., on the 28th of August sent the letter which is at p. 61 of the Appendix. In this they forwarded, though under a kind of protest, the original accounts demanded; complained of the tone of the Appellant's letter to them; and again pressed for payment of the balance due to them.

There is no evidence of any further correspondence between the parties until October 1847. On the 11th of that month, Hickey, Bailey, and Co., wrote a letter to the Appellant, which is not in evidence. From the references to it in the subsequent correspondence, we may infer that it contained an account corresponding more or less closely with that mentioned in the record as No. 1.

In answer to it the Appellant wrote the letter of the 25th October, which is at p. 103 of the Appendix, and in which he for the first time put forward distinctly the case on which he now relies. He says, "I am very anxious to settle my two years' accounts with you. I hereby send you the copy of the abstract of your letter dated 11th October, 1847 (this is the letter of that date set out at p. 98 of the Appendix), for your inspection. In your opinion my goods created a good name in the London markets, so relying on your statement I desired you to ship a quantity of my silk, but you

in contravention to your practice shipped them in your own name instead of mine, and therefore owing to my name being suppressed I hold you responsible for the loss. It is very easy to settle accounts. I will only debit you with the invoice cost of the goods shipped by you to London; likewise, I will debit you with amount of the account sales sent by you with interest. You may also, according to former practice, debit in my name the amount I received from you with interest, and also costs."

The reply of Hickey, Bailey, and Co. to this is dated the 30th of October, and is at p. 62. After explaining the letter of the 11th of October, 1847, they say, "Regarding the shipments, we must beg to observe that the invoices of your property have been uniformly worded according to the practice followed in Calcutta, 'on account of the concerned,' under your well-known filature mark, and not in our name as you pretend, which, however, would make no difference in the result of the operations. You were fully made aware of those shipments by our letter of the 23rd of December, 1846, &c., and therefore cannot at this late hour, because the result has been a loss, pretend to have no personal interest, and decline all responsibility in shipments made on your account, and to which you have till now made no objections, you having on the contrary, in many of your letters, directed us to ship your goods on your own account, and not to sell them in Calcutta, evidently because you expected a more profitable realization of them by so doing. We therefore beg to hand you again a statement of your account closed 30th April last, showing a balance in our favour of Company's rupees 22,312 9 6, and a continuation of the same in open account, showing a balance against you up to date of Company's rupees 48,547 1 0. *This account, you will see, has been corrected, owing to a mistake in crediting you with a draft for rupees 10,000 against a shipment which had nothing to do with your account.*" The right to make this correction is also a material question on this Appeal.

The Appellant replied to this letter by that of the 18th of November, which is at p. 104 of the Appendix. The following are the material passages in it: "I am informed of the particulars from the contents of your letter dated the 30th of October,

which reached me at a time when I was busily engaged in preparing your accounts, and consequently could not reply to it. I am now sending you the account for your inspection, bearing a balance of rupees 1,390 12 1 in my favour, which please let me have. The points treated by you in your letter may be true in your opinion, but in my opinion they are improper, for my goods were unjustly shipped to England. Notwithstanding this I have forwarded bills to you, and debited you with the cost price of them. I have credited you with the amount you paid to me, and entries have been made regarding your commission and discount according to the former practice."

Messrs. Hickey, Bailey, and Co. stopped payment early in January, and were formally adjudged insolvents on the 17th of February, 1848. In their schedule the claim against the Appellant was entered as "disputed." The Respondent afterwards became the official assignee of this insolvent estate, and some correspondence appears to have passed between him and the Appellant touching the disputed claim on the latter, in June and July 1849. The Appellant's letters are at pp. 103 and 104 of the Appendix. He continued to insist on his view of his rights, and, instead of admitting anything to be due from him to the estate of Hickey, Bailey, and Co., to contend that the sum of rupees 1,390 12 1 was due to him on the balance of the account as made out by him.

In July 1857, after a delay not very satisfactorily accounted for, on the ground of the poverty of the estate and the complexity of the accounts, the Respondent, under the authority of the Insolvent Court, commenced an action in the Zillah Court of Moorhadabad against the Appellant for the recovery of 100,000 rupees, the balance alleged to be due on this disputed account. The plaint showed that the balance claimed to be due at the date of the insolvency, with the subsequent interest, amounted to rupees 110,938 and a fraction; but relinquished all in excess of the rupees 100,000, in pursuance of a rule which obtained in the Courts of the East India Company, and forbade a Plaintiff to recover more than double the amount of his principal debt.

The Judgment of the Zillah Court, which is

dated the 2nd of February, 1859, and is at p. 19 of the Appendix, decreed the whole amount claimed to the Respondent, with interest at the rate of 12 per centum per annum, from date of suit to date of payment.

On appeal, the Sudder Court confirmed this Judgment on all points except the calculation of interest. It held that the sum claimed as principal money and the balance due to the insolvent firm in February 1848, being rupees 54,784 9, should be corrected by the deduction of the difference between 12 and 10 per cent. interest on the account between the 30th of April, 1846, and the 30th of April, 1847; it refused to allow the Respondent any interest on the sum so ascertained during the period in which he had delayed to bring his suit, but gave him interest on it from the date of the commencement of the suit to the date of payment, at the rate of 12 per centum per annum. This Judgment is at p. 133 of the Appendix, and bears date the 24th of February, 1862.

From these Decrees the present Appeal is brought; and the substantial questions to be determined upon it (some minor points that were raised on the pleadings having been given up in the Courts below or here), seem to be reduced to the following, viz. :—

1. Whether the Appellant is properly chargeable with the balance of the account between him and the late firm of Hickey, Bailey, and Co., taken on the principle on which this account has been taken, or whether he is now entitled to have that account taken on the principle asserted in his letters of the 25th of October and 18th of November, 1847, viz., that of treating all the later shipments to England as made by Hickey, Bailey, and Co. at their own risk, and of debiting them with the prime cost, or other assumed value of the goods in Calcutta at the dates of the shipments.

2. Whether, assuming the shipments to have been made at the risk of the Appellant, it is proper under the circumstances to charge him with the amounts of the redrafts from London.

3. Whether he is entitled to any, and what relief in respect of the item of rupees 10,000 withdrawn by Hickey, Bailey, and Co., from the amount

as mentioned in their letter of the 30th October, 1847?

4. Whether the interest on the balance due by him has been correctly calculated?

The first question involves the inquiry whether Hickey, Bailey, and Co., when they made the consignments of the Appellant's goods in the form in which they are shown to have made them subsequently to the year 1845, were guilty of any breach of the duty which either the general law, particular custom, or special contract between them and their principal, imposed upon them as factors. In the Court below evidence was given to show what are the general powers of factors in Calcutta who are employed to ship goods for sale in England on account of their principal. Their Lordships apprehend that this evidence was adduced not so much for the purpose of establishing that any peculiar custom of trade obtained in the port of Calcutta, as for that of showing what was the general law; the country courts of India not being very conversant with questions of mercantile law, and not recognizing the law of England as the *lex fori*. But, however that may be, their Lordships are of opinion that the evidence altogether fails to show that any particular usage or custom qualifying the mercantile law of England, as between principal and factor, prevails at Calcutta. It is, therefore, by the general mercantile law that the powers and duties of Hickey, Bailey, and Co., in making their consignments of the Appellant's goods, must be determined.

Again, their Lordships see no ground for dissenting from the exposition of the law which is contained in the careful Judgment of the Sudder Court at p. 136 of the record. They are of opinion that Hickey, Bailey, and Co., as factors, having an interest by reason of their advances in the Appellant's goods, were justified in shipping those goods for sale either "on account of those concerned," or "on account of themselves," unless their general authority was controlled by instructions from their principal, or by contract. Of positive instructions or of express contract there is no proof. The existence of either, if to be inferred at all, is only to be inferred from the evidence of the course of dealing before 1845.

Again, their Lordships are of opinion that even if there were nothing to set against the course of dealing so proved, the inference from it that the general discretion of the factors in respect of all future consignments had been controlled, would hardly be safe or legitimate. But, in truth, the prior course of dealing is not the only fact from which their Lordships have to draw their conclusion on the point now under consideration. The letter of the 23rd December, 1846, proves that invoices of the consignments of that year were then sent to the Appellant. All those invoices are not produced; but it is impossible to escape the conclusion that they must have shown in what form the consignments were made; since the losses on the shipments to which they relate are unquestionably some of those which the Appellant, on the ground of the improper form of the consignment, is now seeking to throw on the estate of Hickey, Bailey, and Co., and he does not pretend that the invoices sent to him were not counterparts of the invoices sent to England. Nevertheless, on the receipt of that letter he made no complaint respecting the form of the consignments.

Again, when these transactions were known to have resulted in heavy losses, and he wrote this letter of the 12th of August, 1847, his chief complaint was that in the absence of the original account sales, he had not the proper evidence of what had been done with his goods in England; and it was not until October 1847 that his present case was distinctly made. The correspondence thus tends strongly to negative the existence of instructions, contract, or understanding inconsistent with the acts of Hickey, Bailey, and Co. Their Lordships therefore think that the alleged breach of duty on the part of the factors has not been established, and that as between them and the Appellant he was chargeable with the losses on all the shipments to England. The foundation of his case having thus failed, it is unnecessary to inquire whether, if it had been established, he would have been entitled to the particular relief which he claims. Their Lordships, however, observe that in many important particulars this case, if the agent's breach of instructions had been proved, would have been distinguishable from

that of *Bertram v. Godfrey* in "Knapp's Reports." There it was proved that the agents who in breach of their instructions had neglected to sell at 85, might have sold at that price; and consequently, the facts both gave the measure of the damages sustained, and afforded the means of compelling the agents to put their principal in the position in which he would have stood had they observed his instructions. Here it is quite uncertain what (if any) proportion of the loss is attributable to the form of the consignment. Nor is it easy to see upon what principle Hickey, Bailey, and Co., could be charged with the cost or invoice price of the goods; since it follows from the letter of the 13th of April, 1846, both that the Appellant had authorized the shipment of them for sale in England; and that they must have been sold at a heavy loss, if sold at that time, in Calcutta.

The next question is, whether the Appellant has been properly charged in account with the redrafts. It is stated in the Judgment of the Sudder Court (p. 137), that no question had been raised regarding the good faith of these entries. They must, therefore, be taken to represent correctly the difference between the net proceeds of the Appellant's goods, and the amounts of the bills drawn against them by Hickey, Bailey, and Co. Had Hickey, Bailey, and Co., remained solvent and paid the re-drafts, the propriety of these charges against the Appellant could not have been questioned. For he had already received credit in account for the sums for which Hickey, Bailey, and Co.'s bills on London had been sold; and, therefore, to charge him with the redrafts was only tantamount to writing back the excess of credit which he had received in anticipation of the realization of the proceeds of his goods. The question raised, however, is whether Hickey, Bailey, and Co. having failed, and having presumably paid, at most, a dividend on these re-drafts, they are entitled to charge the whole amount of them against the Appellant. The answer to this question depends on the further question, whether upon or after the insolvency of Hickey, Bailey, and Co., the consignees in England had any right of resort to the Appellant for the recovery of the difference between the sums realised by the sale of

the goods, and the amount of their acceptances against them; or the unpaid portion of such deficiency. If they had no such remedy, the Appellant, as the account stands, has received credit for all to which he is entitled, viz., the net proceeds of his goods; whereas, if he were to retain credit for the amounts for which the bills on London were sold without submitting to be debited with the redrafts, he would charge the estate of Hickey, Bailey, and Co. with more than the net proceeds of the goods. On the other hand, if he remained liable to the consignees for the losses on the goods or for any part of such losses, his objection to a mode of stating the amount, which would have the effect of making him pay, or leaving him answerable for such losses, twice over, would be well founded.

It appears to their Lordships that in these transactions there was not that privity of contract between the Appellants and the consignees in England, which would render him liable for the sums represented by the redrafts in question.

This is not the ordinary case of a contract made by an agent for an undisclosed principal, on which the contractee on discovering the principal may at his election sue either principal or agent.

The contract on which the liability, in respect of which the redrafts were drawn, arose, was not a simple consignment of goods for sale by an agent on account of an undisclosed principal; it was a contract of pledge by factors having an interest in the goods pledged. Hickey, Bailey, and Co. being entrusted with the possession of the goods, and having advanced upon them, drew the bills on London in their own names; they and not the principal were liable as drawers on those bills; and they probably sold the bills with the shipping documents in the market. Had the bills not been accepted by the consignees, the holders, though pledgees, by means of the bills of lading, of the goods, could have had no remedy for any deficiency against the Appellant. The acceptance of the bills by the consignees, and the delivery of the shipping documents to them, made *them* the pledgees, but did not alter the character of the transaction, which was one whereby Hickey, Bailey, and Co. had pledged the goods for the payment of bills on which

they, and not the Appellant, were liable as drawers for an amount exceeding the value of the goods. The redrafts are for that excess. There seems on such a transaction to be no privity of contract between the consignees and the undisclosed principal. How can such a privity be imported into it by the fact that, according to the course of dealing between Hickey, Bailey, and Co. and the Appellant, the latter received credit on account for the sums for which the bills on London were sold, subject to the final adjustment of the accounts of the different consignments?

Their Lordships are therefore of opinion that the Appellant has been properly charged with the redrafts.

We have next to consider the disputed item of rupees 10,000. In the account No. 1 (at p. 32 of the Appendix) the Appellant is credited with this sum under date the 13th of April, 1846, as the proceeds of a draft of Hickey, Bailey and Co., on Gouger and Stewart, of London, against sixteen bales of raw silk, shipped for Appellant's account per "Orient"; and under date March 18th he is on the other side of the same account charged with rupees 541 12 6, as commission and shipping charges on the same consignment. It has already been stated that by their letter of the 30th of October, 1847, Hickey, Bailey, and Co. advised the Appellant that this shipment had been erroneously treated as made on his account; that he had in fact nothing to do with it; and that they had, accordingly, corrected the account by striking out the credit of 10,000 rupees.

It seems that, in the first instance, they omitted to strike out as they ought, on this view of the case, to have done, the charge of rupees 541 12 6; but this omission was afterwards set right by the Respondent (Appendix, p. 3). In the plaint and subsequent proceedings this shipment and the credit attached to it are stated generally and loosely to have been those "of another merchant;" and the only case thus made by the Appellant on this point, was to the effect that no sufficient reasons had been assigned for withdrawing from the account a sum with which he had been once credited; and that the Respondent's looseness

of statement concerning the transactions was an argument for holding that the deduction of the sum in question had been made fraudulently. On the trial in the Zillah Court, Mr. Morinet, the former book-keeper of Hickey, Bailey, and Co. was examined as to this item. His evidence (see Appendix, p. 67) was to this effect, "The silk did belong to the Defendant originally, but was shipped by Hickey, Bailey, and Co. on their own account, they having purchased it, and rendered the account sales to the Defendant." No question was put to him by way of cross-examination on this statement, although he was cross-examined by the Appellant's agents as to another part of his evidence. The contest in both the Courts below apparently continued to be confined, as before, to the propriety and *bona fides* of the alteration in the accounts. Their Lordships see no grounds for disturbing the conclusion of both the Courts below upon this point. They accept Mr. Morinet's statements as the true account of the transaction. He was not cross-examined upon it; there seems to have been no suggestion in the Courts below that the Appellant had not received credit for the proceeds of these bales of silk as sold in Calcutta. There is an item in the accounts which are in the record which seems to represent those proceeds; and the fact would probably appear even more clearly if we had the Bengalee account made out by the Appellant on the principle asserted by him which was before the Courts below. It is difficult to conceive that he would allow the account to be finally taken against him without seeing that in one way or other every bale of silk which was consigned by him to Hickey, Bailey, and Co. was accounted for.

The evidence of Mr. Morinet, however, suggests another question, which, although it has not been dealt with in the Courts below, their Lordships have been unwilling to exclude from their consideration. That question is, whether the transaction as described by Mr. Morinet is not one which the Appellant may impeach as a fraudulent purchase by an agent on his own account of his principal's goods. In an ordinary case it might fairly be objected that this point was not taken upon the pleadings. The answer to that in the present case is, of course, that the Respondent, by speaking of the transaction as

one of another merchant, has misled the Defendant, and thrown considerable suspicion on the *bona fides* of his own case. On the other hand, it is to be observed that Mr. Morinet, if cross-examined, might have cleared up the transaction, and have shown that the purchase by Hickey, Bailey, and Co. was known to and sanctioned by the Appellant. Again, it was open to the Appellant, if he were interested in so doing, to raise the point now under consideration in the Indian Courts, where he was represented by an eminent English barrister, to whom the equity on which it is based must be familiar. That he failed to insist on this equity, is a strong argument that it was not for his interest to do so. He could only have set aside this purchase by Hickey, Bailey, and Co. on the terms of writing back the sum for which he had received credit as the proceeds of the sale to them, and by taking to the shipment to England, with its loss or profit as the case might be. And there seems to be no reason why this particular shipment of sixteen bales should have escaped the common fate which on the evidence we must take to have befallen the other consignments of silk which were shipped from Calcutta about that time, and have realized a profit, instead of resulting in heavy loss. It may be added that the point is not distinctly taken in the Appellant's case. On the whole, their Lordships see no sufficient ground for re-opening this account in respect of the item of rupees 10,000.

The only remaining question is that of the interest to be allowed. The Sudder Court, in the exercise of the discretion given to it by Act 32 of 1839, has given interest from the date of the commencement of the suit, at the rate of 12 per centum per annum. There was evidence that the account current between Hickey, Bailey, and Co. and the Appellant bore interest at the rate of 10 per centum per annum only; and on that ground the Sudder Court reduced the interest allowed by the Zillah Judge before the commencement of the suit. Their Lordships are of opinion that the same consideration should have determined the rate of interest to be allowed from the date of suit, and that the amount of this should also be calculated at 10 per centum per annum.

The order, therefore, which their Lordships propose humbly to recommend to Her Majesty as proper to be made on this Appeal is, that the interest allowed from the date of suit to the date of payment be reduced by the difference between 12 per centum and 10 per centum per annum, and that in other respects the Decree of the Sudder Court be affirmed. But having regard to this alteration in the amount decreed, and to the other circumstances of the case, they will also recommend that each party do bear his own costs of this Appeal.

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other workers in the field.