

(1956) 07 CAL CK 0021

Calcutta High Court

Case No: Suit No. 3615 of 1953

Bhagwandas Sitaram

APPELLANT

Vs

Albion Jute Mills Co.
Ltd.

RESPONDENT

Date of Decision: July 26, 1956

Acts Referred:

- Evidence Act, 1872 - Section 115
- Sales of Goods Act, 1930 - Section 19

Citation: AIR 1957 Cal 143

Hon'ble Judges: Bose, J

Bench: Single Bench

Advocate: B. Das and S.C. Sen, for the Appellant; R.C. Deb and R. Dutt, for the Respondent

Judgement

Bose, J.

This is a suit by the plaintiff for specific delivery of 50 bales of hessian cloth and in the alternative, for value of the said goods and in the further alternative, for recovery of a sum of Rs. 33,825/- as damages for conversion of the goods.

2. The case of the plaintiff is that by contract in writing, bearing No. 3362 dated October 8, 1952, which was entered into in the standard Form "A" of the Indian Jute Mills Association contract, the defendant No. 1, Albion Jute Mills Co., Ltd. sold to one Bhagwandas Goel & Sons 150 bales or three lakh yards of hessian cloth, under the said contract the goods were deliverable in November 1952. On November 21, 1952, the defendant Bhagwandas Goel & Sons issued shipping instructions to the defendant No. 1 for placing the said goods alongside the vessels s. "Salatiga" on their own account, and pursuant to such shipping Instructions the defendant No. 1 placed the said 150 bales of hessian cloth alongside the said steamer within November 1952. On December 2, 1952, Bhagwandas Goel & Sons sold 50. bales of hessian cloth out of the said 150 bales to Messrs. Khusoram Benarasilal, the defendant No. 3 under a contract of the same date. Thereafter

on that very day Khusiram Banarasilal in its turn sold the said 50 bales of hessian cloth to the plaintiff firm under a contract dated December 2, 1952, bearing No. 23811. On the same day the plaintiff issued shipping instruction in their account to Khusiram Banarsilal for placing the goods alongside the said vessel s.s. "Salatiga". Khusiram Banarasilal passed the said shipping instruction in due course of trade to their sellers Bhagwandas Goel & Sons, and Bhagwandas Geol & Sons, in their turn issued shipping instructions to the defendant No. 1 on December 3, 1952. It is alleged in the plaint that the defendant 1 assented to the sale of the said goods by the said Khusiram Banarasilal to the plaintiffs & transferred the said goods to the account of the plaintiffs; but as the said vessel "Salatiga" shut out the said goods, the defendant No, 1 issued two pucca-delivery orders, being P.D.O.'s Nos. 1068 and 1069 dated December 3, 1952, for 25 bales each in favour of Bhagwandas Goel & Sons. The said pucca delivery orders were issued by the defendant No. 1 against payment in full by the said Bhagwandas. Goel & Sons and all the parties concerned, that. is, the plaintiff and the said Khusiram Banarasilal also paid for the said pucca delivery orders to their respective sellers. Upon such payment the-said two delivery orders were endorsed and delivered by the defendants to the plaintiff who became the last holder of the said delivery orders.

3. On December 18, 1952, the plaintiff company issued a fresh shipping instruction for amending the marks on the goods and for placing the relative goods alongside the vessel s.s. "Wonosari". The said shipping instruction also passed in the same chain and reached the defendant No. 1 on December 20, 1952. Thereupon pursuant to such shipping instruction the defendant No. 1 placed the goods covered by the two delivery orders and with the marks amended as directed, alongside the said vessel and thus unconditionally appropriated the said goods to the plaintiff's contract with their assent, it is further alleged that the goods were afloat alongside the vessel since about December 2, 1952. It is further the plaintiff's case that according to the custom and usage of the market in manufactured jute goods in Calcutta, pucca delivery orders for jute goods are issued by the Jute Mills only on payment and are passed from hand to hand by endorsement and are sold and dealt with in the market as absolutely representing the goods to which they relate and further that such delivery orders are recognised in the Jute market as documents of title to goods thereby covered and under such delivery orders the transferee acquires a title to the goods to which they relate. It is alleged that by reason of the premises the plaintiffs were at all material times and are still the owners of the said 50 bales of hessian cloth and are entitled to have the same delivered to them or to their orders, but on or about January 6, 1953, the defendant No. 1 with full knowledge that the goods were being exported on the plaintiff's account wrongfully refused to register the said two pucca delivery orders in the plaintiff's name and to deliver the said goods according to the order of the plaintiffs and falsely claimed a lien on the said goods and/or the pucca delivery orders for an alleged claim against the defendant No. 2, Bhagwandas Goel & Sons. The plaintiff disputes the defendant No. 1's claim of the said Hen and alleges that by reason of the wrongful breach of contract and/or by reason of the conduct of the defendant No. 1 in depriving the plaintiff of its property and in wrongfully converting

and/or detaining the said goods, the plaintiff has Buffered damage which it assesses at Rs. 33,825/-. It is alleged that the defendant has not paid the said sum or any portion thereof in spite of demands.

4. The defendant the Albion Jute Mills Co., Ltd. filed its written statement on January 2, 1954. It is stated in the written statement that a sum of about Rs. ten lacs was due and payable by Bhagwandas Goel & Sons. It is further stated that the goods in suit were brought alongside s.s. "Salatiga" on the representation and promise of Bhagwandas Goel that the price in respect thereof would be cleared before the actual shipment but as the said price was not paid the defendant claims unpaid vendor's lien in respect of the said goods. It is denied in the written statement that the defendant assented to the sale of the goods in favour of the plaintiffs or that it transferred the goods to the account of the plaintiffs or that the delivery orders were issued as against payment in full as alleged or at all. The factum and validity of the alleged custom and usage pleaded is denied and disputed, and it is also denied that the delivery orders are recognised as documents of title or that the plaintiffs ever became the owners of the goods in suit. It is alleged that there was no privity between the plaintiffs and the defendant Albion Jute Mills Co, Ltd. The goods were not ascertained and the property in the goods did not pass at any time to the plaintiffs or to Bhagwandas Goel & Sons or to the plaintiffs' immediate seller. It is further denied that the defendant has converted or detained the goods as alleged or that the plaintiffs have suffered any damage as alleged. The defendant further repudiates its liability for the alleged claim of the plaintiffs.

5. On December 14, 1955 the defendant verbally applied for amendment of paragraph 20 of the written statement and by an order of this court passed on the same day this court allowed the written statement to be amended in the following manner:

The suit is bad for non-Joinder of parties, Bhagwandas Goel & Sons, Khusiram Benarasilal and Rallies India Ltd."

6. On January 24, 1956 the plaintiffs applied for amendment of the plaint and an order was made allowing the plaintiffs to amend the plaint by adding paragraph numbered 20 by which Bhagwandas Goel & Sons Khusiram Benarasilal and Rallies India Ltd. were added as parties to the suit and they were made defendants Nos. 2, 3 and 4 respectively but no relief was claimed against any of the added defendants.

7. At the hearing the defendant No. 1 has given up its case of lien as set up in the written statement The following issues were raised at the hearing.

1. Are there any contracts as alleged in para 3 of the plaint?

2. Is there any practice or custom or usage as alleged in paragraphs 5, 8 and 12 of the plaint? If so, is the same valid and/or binding upon the plaintiff?

3. Has the property in the 60 bales of hessian cloth mentioned in the plaint, passed to the plaintiff?

Was or is the plaintiff the owner of the said goods?

4. Has the plaintiff any right or title to the said goods?

Is the defendant No. 1 estopped from denying the plaintiff's right or title, if any?

5. Is there any contract between the plaintiff and the defendant No. 1 as alleged in paragraph 13 of the plaint?

If so, has the defendant No. 1 committed any breach thereof as alleged in paragraph 10 of the plaint?

6. Has the defendant No. 1 converted and/or detained the said goods.

7. Are the documents Nos. 1068 and 1069 mentioned in the plaint, documents of title to goods?

Is the plaintiff a transferee and/or holder of the said documents?

Is the plaintiff entitled to have the goods delivered to itself or its order under the said documents as alleged in the plaint?

8. What is the value of the 50 bales of hessian cloth mentioned in the plaint?

9. Is the plaintiff entitled to any of the reliefs claimed in the plaint?

8. The parties have adduced oral and documentary evidence.

9. One Sitaram Agarwalla, a partner of the plaintiff firm has deposed and has stated that a contract in the standard form A of the Indian Jute Mills Association was entered into on December 2, 1952 between Khusiram Benarasilal and the plaintiff firm for sale of 50 bales of hessian cloth. The plaintiff firm purchased 50 bales from Khusiram on the terms "Guaranteed alongside" and on December 17, 1952 the plaintiff firm paid to Khusiram Benarasilal Rs. 33,825/- being the value of the goods by a cheque. The counterfoil of the cheque is tendered and marked as Ex. A I (Q, 8-13). The bill of Khusiram is dated December 10, 1952 and is tendered and marked as Ex. B. The plaintiff firm gave shipping instructions regarding the goods by a letter dated December 18, 1952 which is marked as Ex. C (Q. 22-23). The witness has proved the letter dated February 20, 1953 (DD6) written by Messrs. P.D. Himatsingh & Co., solicitors of the plaintiff firm to the Albion Jute Mills Co. Ltd. (Ex.. D) and also a letter dated March 16, 1953 (DD 8) from M/s P.D. Himatsingka & Co. to defendant No. 1 (Ex. E). The witness has also proved a letter dated June 1, 1953 written by Mr. K.K. Kshetry to Mr. C.C. Bose (Ex. P) and two other letters dated January 6, 1953 and January 12, 1953 have also been proved by this witness and

they have been marked as Exs. I & J. The witness has stated with reference to the letter of June 9, 1953 written by the Java Bengal Line that marks of the Rallies India Ltd. were put on the goods in suit at the instance of the plaintiff firm as the Rallies were buying goods at that time in large quantities (Q 43) but he has also stated that the plaintiff firm had no transaction with Rallies India Ltd. in connection with the goods in suit (Q. 45). This witness has also proved two delivery orders (Ex. K) and has stated that the plaintiff firm is at present holders of these delivery orders and they are in possession of the said documents (Q 50 and 52). In course of cross-examination the witness has admitted that chain contracts are entered into in the matter of purchase of jute goods (Q. 58) and the last buver is the shipper (Q. 59) and the shipping instructions are also carried forward in a chain (Q. 67), The witness has stated that the plaintiff firm maintains a regular set of books, Sowdah books and Bill Books but no record of shipping instruction is kept (Q. 75 to 78). The witness admits that goods were brought alongside the vessel "On amount of Rallies India Ltd. but denies that the Rallies were shippers in respect of the goods in suit (Q. 85-87). The witness was confronted with the letter dated January 6, 1953 and his answer is that the first sentence in that letter does not record the correct facts (Q. 91). The witness has, however, admitted that the plaintiff could not send shipping instructions direct to the defendant No. 1 because they would not recognise the plaintiff (Q. 93 & 94). The witness has admitted that the goods were originally brought alongside the vessel in November 1952 before the due date, on the instruction of Bhagwandas Goel & Sons. (Q. 111) and the goods remained at "i oat after they were so brought (Q. 114). Out of the 150 bales of hessian cloth purchased by Bhagwandas Goel & Sons from the defendant No. 1. 50 bales were not shipped and in respect of these goods two delivery orders were issued by the defendant No. 1 (Q. 117). The attention of the witness was drawn to the absence of the words "Or order or assigns" in the two delivery orders and also to the marginal note that delivery was to be given to registered holders only. The witnpss has stated that Bhagwandas Goel & Sons, were the registered holders (Q. 119 to 121). This witness was subsequently recalled for proving the Sowdah book which has been disclosed during the hearing of the suit. He has stated with reference to the Sowdah book that there was no transaction between the plaintiff firm and the Rallis India Ltd. in 1952. It may be noted that in this Sowdah book (Ex. HH) most of the pages appear to be blank but there are entries here and there scattered over some pages in this book.

10. One Niranjana Dutt the manager of Bhagwandas Goel & Sons has also deposed. He has produced a contract dated October 8, 1952 entered into between Bhagwandas Goel & Sons and the defendant No, 1. This is marked as Ex. L. This witness has also produced certain bills of defendant No. 1 relating to the goods covered by the contract Ex. L. The bills are marked as Ex. M. The bills Ex. M relate to the goods in suit and these bills show that payment in respect of the goods had been made by a cheque dated December 17, 1952 and the other 100 bales covered by the contract (Ex. L) were paid for, on December 10, 1952 and December 12, 1952 (Q. 53). The witness has admitted that out of 150 bales, 75 bales were shipped on account of India Fibre Produce Shipping Co. Ltd. and another 25 bales were shipped for Ram Sahaimull More Ltd. (Q. 68-72); the other 50

bales were not shipped but were sold locally (Q. 88-92).

11. One Kamakshya Charan Lahiri, an assistant in the Java Bengal Line has produced a shipping register of the Java Bengal Line. This register is maintained for recording cargo that have been shipped or brought alongside a particular vessel; and for every ship, a separate register is kept (Q. 5). The witness have also proved that the letter of 9th June is signed by the Offlcer-in-charge of Export and he has also produced a letter of the plaintiff firm of the same date. These are marked as Exs. O and P. The entry in the shipping register relating to the goods in suit is at p. 64 (Q. 25). The witness has proved two other letters (Exs. Q and R). The evidence of this witness is that 50 bales were not shipped because the party could not produce the shipping documents from the Customs. His evidence is that the goods were not shut out as alleged (Q. 33). Two other letters dated July 20, 1955 and July 21, 1955 are also proved by the witness and they are marked as Exs. S and T. in the course of cross-examination, the witness admits that Rallies India Ltd. booked space in s.s. "Wonosari" in December 1952 (Q. 51) and he has also stated that such space was booked for about 400 bales of goods.

12. One Benarasilal Charia, a partner of Khusiram Benarasilal has produced a contract copy book of the firm and has referred to the copies of the contract No. 2381 dated December 2, 1952 relating to the 50 bales in suit (DD-Y). The firm of Khusiram Benarasilal. according to the witness, paid Rs. 33,825/- to Bhagwandas Goel & Sons. The receipted bill is marked as Ex. EE/1 and the counterfoil of the cheque marked as Ex. FF/1 (Q. 21-22). Payment was made on December 17, 1952 (Q. 36 to 39) and delivery orders were received on that day from Bhagwandas Goel & Sons and were made over to the plaintiff firm on the same day. This is the oral evidence that has been adduced on behalf of the plaintiff firm.

13. The defendant No. 1 has not, however, adduced any oral evidence. The defendants Nos". 2, 3 and 4 have not entered appearance in the suit and were not represented during the hearing of this case.

14. The relevant documentary evidence may now be considered. The first document in point of time is the contract dated Octobar 8, 1952 bearing No. 3362 between Bhagwandas Goel & Sons and the defendant No. 1 for sale of 150 bales of hession cloth--free alongside the export vessel in the Port of Calcutta--due date November 1952. This contract was put through by the brokers Minamull Salyanarain & Co. and there are endorsements of payments appearing on the face of that contract, which show that the goods were paid for in instalments, on December 10, 1952, December 12, 1952 and December 17, 1952. The next documents are shipping instructions issued by Bhagwandas Goel & Sons on November 21, 1952 to Albion Jute Mills for placing only 50 bales of hessian cloth out of 150 bales alongside s.s. "Salatiga" for shipment to Los Angelos. The shipping documents according to the instructions were to be on board in favour of India Fibre Produce Shipping Co. Ltd. On the reverse of the documents the bale numbers are given (DD 2 and DD3). Thereafter on December 2, 1952 a contract for sale

of 50 bales out of 150 bales was entered into between Khusiram Benarasilal and Bhagwandas Goel & Sons. This contract bears No. 2381. On the said December 2, 1952 Khusiram Benarasilal sold 50 bales to the plaintiff Bhagwandas Sitaram. This contract bears No. 23811 dated December 2, 1952. Delivery was to be free alongside the export vessel in the Port of Calcutta and guaranteed alongside on December 5, 1952. This contract contains inter alia the following clauses: --

Clause 3-- Payment to be made in cash in exchange for Delivery Orders on sellers, or for Railway receipts or for Dock receipts or for Mate's receipts (which Dock's or Mate's receipts are to be handed by a Dock's or the ship's Officers to the seller's representative.

Clause 4-- The buyers hereby acknowledge that so long as such Railway receipts or Dock's or Mate's receipts (whether in seller's or buyer's name) are in the possession of the sellers, the lien of the sellers, as unpaid vendors subsists both of such Railway receipts or Dock's receipts or Mate's receipts and the goods they represent, until payment is made in full.

15. It appears that on the same date (2-12-52) the plaintiff issued shipping instructions to Khusiram Benarasilal for placing goods alongside s.s. "Salatiga,". This appears from the evidence of Benarasilal Charia (Q. 29). This instruction was passed to Bhagwandas Goel & Sons who in their turn on the 3rd December 1952 issued shipping instruction to the defendant Albion Jute Mills for allowing the man of Bhagwandas Goel & Sons to change the original marks of India Fibre and Produce shipping Co. Ltd. (I.P.S.C.) to (B.D.S.R) the plaintiff's marks. Bhagwandas Goel & Sons also directed that the relative shipping documents Would be on board in favour of the plaintiff Bhagwandas Sitaram (D.D, 4). On that very day (3-12-52) the defendant No. 1 issued a Boat Note In favour of the Commanding Officer of s.s. "Salaliga" bound for San Francisco, giving the Boat No. ss P.S. 206 and instructing the officer to receive the 50 bales (of which numbers are given in the Boat Note) bearing the plaintiff's marks on account of the plaintiff Bhagwandas Sitaram (Ex. AA). The Boat Note does not refer to any particular contract of sale, but it is clear that by this document the defendant No. 1 assented to and recognised the transaction of sub-sale in favour of the plaintiff.

16. The port Shipping Register (p. 46) shows that the goods were actually placed alongside vessel on the 5th December 1952 with the plaintiffs mark impressed on them (Ex. B3/1). The two bills made out by the defendant Mill in the name of Bhagwandas Goel & Sons" also indicate that the bills were made on a/c Bhagwandas Sitaram (Ex. m). This, in my view, is also evidence of assent to the sub-sale in favour of the plaintiff. The plaintiff and Khusiram Benarasilal agreed by their contract that delivery was to be free alongside the vessel in the Port of Calcutta guaranteed alongside 5-12-52. As I have pointed out already, the Boat Note and the entry in the Port Shipping register show that the defendant No. 1 gave effect to this agreement by carrying out the instructions which were passed in chain ultimately to the Mills. Thus the evidence makes it clear that there was

appropriation of the goods to the contract and property in the goods passed as soon as the goods were placed alongside the vessel.

17. It was observed by the Judicial Committee In the case of AIR 1938 152 (Privy Council) :

"In the present case the sale being free along Side the property prima facie passes when the goods are appropriated by delivery alongside in implement of the contract."

It was further held by the Privy Council that Clause 3 of the contract in that case which was in practically similar terms as Clause 3 of the contract in suit, did not prevent the property passing. It is therefore clear, that when the shipping instructions passed from the plaintiff to Khusiram Benarasilal and from Khusiram Benarasilal to Bhagwandas Goel & Sons, and from the latter to the Albion Jute Mills Co.. Ltd. and pursuant to such instructions the goods were actually placed alongside vessel on plaintiff's account, all the parties had accented and recognised the position that the plaintiff had the title and right to call for the goods to be placed alongside the vessel and at its disposal. (38) Then it appears that as the goods were not shipped in s. s. "Salatiga" the plaintiff on 18th December 1952 issued fresh shipping instructions to Khusiram Benarasilal and directed that the marks should be changed from (B, D. S. R.) to "Ralli" and the goods should be placed alongsid" s. s. "Wonosari" on account of Messrs. Rallig (India) Ltd. (Ex. C). It also appears from the letter of Java Bengal Line dated 9th June 1953 (P. D. 24) that the goods were accordingly placed alongside "Wonosari" on 28th December. 1952 with mark of "Rallis" impressed upon the goods.

19. The Port shipping register (Exs. CC/1 and Ex. IA -- page 64 of the Register) shows that space was hooked on account of Rallis (India) Ltd. in respect of the goods in suit in s. s. "Wonosari". This is again evidence of the fact that thp title of the plaintiff to deal with the goods was recognised by the defendants 1. 2 and 3 in as much as they had carried out whatever instructions had been given by the plaintiff in respect of the said 50 bales of hessian cloth,

20. In the meantime, on the 3rd December 1952, the defendant No. 1 had issued two delivery orders in respect of the goods in suit which are marked as Ex. K. The relevant portion of one of the deliverv orders may be set out hereunder.

"No. 1068 Calcutta 3rd December 1952 To

The Mill Manager,

Lothian Jute Mills.

Deliver to Messrs. Bhagwandas Goel & Sons the following 25 bales -- 50.000 yards hessian cloth. 36" -- 7 1/2 oz. 40 : 9 x 9 plain: 2000 yards per bale folded.

Under the terms and conditions of Messrs. Minamull Satyanaraian & Co's contract No 984/3362. For Albion Jute Mills Co. Ltd. (Lothian Jute Mills) Illegible. Director"

This delivery order also contains a marginal note printed in red. to the following effect -- "Delivery to registered holder only".

21. These two delivery orders were endorsed by Bhagwandas Goel & Sons to Khusiram Benarasilal and by the latter to the plaintiff, such endorsements appear on the reverse of the delivery orders. It also appears that on 17th December 1952. a sum of Rs. 33.825/- was paid by the plaintiff to Khusiram Benarasilal and an identical amount was paid by Khusiram Benarasilal to Bhagwandas Goel & Sons, and the said Bhagwandas Goel and Sons also paid a similar amount to the defendant No. 1. So it appears that the defendant No. 1 had received the full value in respect of the goods; still the defendant No. 1 claimed a lien by letter dated the 12th January 1953 (P. D. 12 -- Ex. G. But as I have pointed out already, this claim for lien has been given up at the hearing.

22. On the 20th February 1953 the plaintiffs solicitor wrote to the defendant No. 1 (D. D. 6) stating that the delivery orders were documents of title, and they pass from hand to hand by endorsement or delivery. The solicitors on behalf of their client claimed delivery of the goods and they also disputed the lien, on the ground, that the goods had been fully paid for. It appears that no reply was given to this letter by the defendant No. 1. A reminder was sent on 5th March 1953 (D. D. 7) and on 16th March 1953 delivery orders were sent to the defendant No. 1 for registering the name of the plaintiff as holder (D. D. 8). On 24th March 1953 a further reminder was sent for registering the name of the plaintiff and for return of the delivery orders (D. D. 9). On 30th March 1953 the defendant No. 1's solicitor referred to the letter of the 12th January 1953 and pointed out that as the defendant No. 1 had a Ten for their dues against the registered holders Bhagwandas Goel & Sons, they were unable to deliver the goods to the plaintiffs or to register the delivery orders in the name of the plaintiff until such lien was satisfied (D. D. 10). It may be noted that it was not disputed in this letter that the delivery orders were not documents of title nor was it disputed that the plaintiff had no title to the goods, The defendant No. 1 withheld delivery and refused registration solely on the ground of their alleged lien, which claim, as I have stated already, has been given up at the hearing. Some more correspondence passed and ultimately on 29th May 1953 the defendant No. 1's solicitors returned the delivery orders with an endorsement in red ink that the defendant No. 1 had a lien on the goods.

23. It appears to me that by reason of the acts and conduct aforesaid, the defendant No. 1 is estopped or precluded from denying that the plaintiff has title to the goods or is the owner thereof, and consequently by withholding delivery or refusing to deliver the goods in suit, the defendant No. 1 has been guilty of wrongful detention and conversion of the goods. The goods have been paid in full and the claim for lien has been given up and in the circumstances the defendant No. 1 had no right to retain possession of the goods and deprive the true owner of the benefit and use of the said goods. It was obligatory on the

defendant No. 1 to make over possession of the goods on demand by the plaintiff. It is to be noted that none of the other defendants who have been subsequently added as parties to the suit have claimed any right or interest in the goods. That there can be a good title by estoppel is clear from Benjamin on Sale, Sixth Edition, pp. 13-14. in the case of *Simm v. Anglo American Telegraph Company* 1879-5 Q. B. D. 183 (B) the following passage occurs:

"There may be also a good title by estoppel to things which do not require any instrument to transfer them, as for instance, goods: if an action is proceeded upon the ground that the property in goods has passed to the vendor of the plaintiff and if that question depends upon whether a particular parcel of goods has been set apart and appropriated to the contract between the vendor of The plaintiff and the defendant, an admission by the defendant. the owner of the goods, that there had been a setting apart of the goods, will be effectual as against him to pass the plaintiff who has paid for the goods, the defendant is estoppel from denying that the goods have been set apart, and the plaintiff is entitled to rely upon the admission of the defendant, which if true, would have given the plaintiff a good title to the goods."

See also *Woodley v. Coventry* 1863-32 LJ Ex 185 (C) and also *Anglo India Jute Mills Co. v. Omadamull* ILR 38 Cal 127 a (D), last paragraph.

24. Mr. Rule C. Deb has argued that it is *Bailies (India) Ltd.* who had title to the goods and not the plaintiff, and therefore the plaintiff cannot maintain the present suit.

25. Now the letter dated 18th December 1952 (Ex. C), the letter of the plaintiff dated 6th January 1953 (P. D. 8), the Port Shipping register entry (Ex. CC/1 and Ex. I/A) at p. 64 of the register, and the letter of the Java Bengal Line dated 9th June 1953 (P. D. 24) and the letter of the Java Pacific Line dated 21st July 1955 (Ex. V) no doubt suggest that *Rallis (India) Ltd.* had perhaps some; right or interest in respect of the goods, but the evidence of *Sitaram Agarwalla* is that the goods were impressed with *Rallis* mark in anticipation that *Rallis* would purchase the goods as, according to the witness *Rallis (India) Ltd.* were in fact purchasing large quantities Of jute goods in the market at the time. The witness *Sitaram* was asked in cross-examination during the hearing on the 9th May 1956, whether the plaintiff firm maintained a sowda book and his answer was in the affirmative (Q. 76 of *Sitaram*). On the very next day (10th May 1956) Mr. K.K. Kshetry the solicitor lor the plaintiff, by a letter disclosed the sowda book for the year 1952 and offered inspection thereof. This letter is marked as Ex. G G. It has been suggested by Mr. Deb, the learned counsel for defendant No. i that this sowda book is not genuine, but I do not find any warrant for such suggestion. It is improbable that the sowda book could have been manufactured in course of a single night and disclosed on the day after the day on which it was enquired from *Sitaram*. whether his firm maintained any sowda book. The sowda book shows that during the whole year 1652 there was no transaction between *Rallis (India) Ltd.* and the plaintiff, in respect of any goods, not to speak of the goods in suit. This supports the explanation given by the witness *Sitaram* as to *Ralli*'s mark being

put on the goods. If the defendant No. 1 was really serious about proving before the Court that there was any sale or transaction in favour of Rallis (India) Ltd. relating to the goods in suit, they could have subpoenaed Rallis (India) Ltd. to produce the documents or to give evidence in respect of that matter; but no such attempt was made on behalf of the defendant No. 1.

26. I, therefore, hold that it has not been established that Rallis (India) Ltd. has been called, but as I have stressed already, the defendant No. 1 has not in fact adduced any oral evidence in this case.

27. Mr. Deb has also argued that the delivery orders (Ex. K) are not negotiable instruments and therefore, they could not be negotiated by mere endorsement or delivery. The learned Counsel points to the fact that the goods under the delivery orders, were deliverable to Bhagwandas Goel & Sons only and that there are no words like "Or order or assigns" after the name of Bhagwandas Goel & Sons, to indicate that the parties contemplated negotiation of the documents. It is also pointed out that the delivery is to be given to registered holders only and the learned counsel has, therefore, submitted that all these indicate that the negotiation of the delivery orders was intended to be restricted. The learned Counsel has placed reliance on Chitty on Contracts, 21st Edition, p. 614. The passage relied upon is as follows:

"A document of title must, it seems, purport on the face of it to be negotiable and words stating that delivery is to be to the "Order or assigns" of the consignee or of the shipper seem to be essential to, the transferability."

The learned author was here dealing with the question whether a bill of lading is a document of title and about the negotiability of such a document of title.

28. The attention of the Court has also been drawn to the case of *Henderson & Co. v. Comptoir D'Escompte De Paris*, 1873-5 P. C. 253 at p. 259 (bot) to 260 (E). The observation of Sir Robert Collier is as follows:

"It appears that a bill of lading was made out, which is in the usual form, with this difference that the words "Or Order or assigns" are omitted. It has been argued that notwithstanding the omission of these words, this bill of lading was a negotiable instrument, and there is some authority in "nisi prius" for that proposition; but undoubtedly the general view of the mercantile world has been for some time that in order to make bills negotiable, some such words as "Or order or assigns" ought to be in them.

For the purposes of this case, in the view their Lordships take it may be assumed that this bill of lading was not a negotiable instrument:"

29. It thus appears that although the Judicial Committee did not specifically decide the point in this case, it made observations which indicate that they were inclined to take the view that the absence of the words "Or order or assigns" would make the document a

non-negotiable one The learned Counsel Mr. Deb also drew my attention to Section 2, Clause 4 of the Sale of Goods Act and to Section 137 of the Transfer of Property Act. He has submitted that in order that a delivery order may be a document of title which may be passed from hand to hand, a custom or usage has to be established as contemplated by the said two sections to which I have made reference. The learned Counsel has also relied on the decision of the Privy Council reported in Ramdas Vithaldas v. S. Amerchand & Co. 43 Ind App 164 : (AIR 1916 PC 7) (F), in support of his proposition. The learned Counsel has also put in evidence two specimen delivery orders of Champdani Jute Co. Ltd. and Victoria Jute Co., Ltd. to show that the words "Or orders are usually found in delivery orders, and reference is also made by the learned counsel to the case of ILR 33 Cal 127 (D), to show that the words "Or order" were there in the delivery order which was the subject matter of that suit. Mr. Deb has submitted that it is essential to have such words in the delivery order where negotiation of such documents is contemplated. It appears to me that this argument of Mr. Deb is not without force but in the present case not only has the delivery order been endorsed in favour of the plaintiff firm (though it may be perhaps under a misconception) but it has been recognised repeatedly by the acts and conduct of the defendant No. 1 to which I have already made reference that the plaintiff firm had title to the goods and it was entitled to deal with the goods in such manner as it liked and it appears to me that the plaintiff had by reason thereof altered its position by paying the full price in respect of the goods covered by the delivery orders and under the contract of sale which was entered into between the plaintiff firm and the defendant Khusiram Benarasilal. The plaintiff firm, therefore, has title by estoppel to these goods and in my view therefore the plaintiff firm has a cause of [action independently of the delivery orders. It is also to be noted that in the present case the plaintiff firm had paid Rs. 33,825/- on December 17, 1952 on account of the value of the goods and they have been kept out of the use of the goods and of their money all this time. In the circumstances I propose to award interim interest at 4% on the amount claimed in the suit.

30. This disposes of all the points which have been raised by learned Counsel for the respective parties. The issues, therefore, have to be answered as follows:

Issue No. 1: In the affirmative.

Issue No. 2: This has not been proved. In ILR 33 Cal 127 (D), the form of the delivery order was different (the words Or/Order were there); and it is not clear what the form of the delivery order was in the case of [Duni Chand Rataria Vs. Bhuwalka Brothers Ltd.](#) .

issue No. 3: In the affirmative.

Issue No. 4: In the affirmative.

Issue No. 5: No contract between the plaintiff firm and defendant No. 1.

Issue No. 6: In the affirmative.

Issue No. 7: Not established.

Issue No. 8: Market rates have been tendered in evidence by consent of parties. The value is Rs. 33, 825/-.

Issue No. 9: There will be a decree in favour of the plaintiff" firm against defendant No. 1 for Rs. 33,825/- with interim interest at 4% and interest, on decree at 6%. The defendant No. 1 will pay to the plaintiff firm its general costs of the suit and costs of two days" hearing before me as of a defendant suit. Certified for two Counsel. The Receiver will stand discharged without filing any account, the defendant No. 1 will also pay to the plaintiff the costs of the application for the appointment of the said Receiver which resulted in the order dated February 25, 1954.