
(1871) 07 CAL CK 0009

Calcutta High Court

Case No: None

Harjiban Das and
Another

APPELLANT

Vs

Bhagwan Das

RESPONDENT

Date of Decision: July 25, 1871

Final Decision: Allowed

Judgement

Norman, Officiating C.J.

1. The first question upon this appeal is whether the High Court has jurisdiction to entertain the suit. The ground on which the jurisdiction was chiefly rested when the case was before Mr. Justice Phear, was that the cause of action arose in Calcutta, and this is the point dealt with at length in his judgment, which on that point has not been assailed by the appellant. But it has been contended before us that the defendant, at the time of the commencement of the suit, "did carry on business or personally work for gain" within the local limits of the ordinary original civil jurisdiction of the High Court, and therefore that by clause 12 of the Charter of 1865, the High Court was empowered to try and determine the suit. The facts on this point are as follows:--The defendant Bhagwan Das says he resides at Allumgunge in Patna, and has a head office, or kothi, at Marugunge, which is also at Patna. For many years past he has been in the habit of sending down country produce to Calcutta--five thousand, seven thousand, or ten thousand rupees" worth at a time. The defendant used formerly to send his goods to the arhat of Ishanchandra Sen in Patturiaghatta; but latterly to that of Narsing Chandra Biswas. The defendant says he used to come to Calcutta sometimes twice, and sometimes three, four, or five times in the year. He says he used to put up, that is, lodge and transact his business at the golah of the arhatdar. He used to sell the goods, receive the money, and make all payments, as well of bills drawn against the goods, as otherwise, himself. For this purpose on each visit he would remain one, three, four, or five months at a time as circumstances might require. The defendant paid to the arhatdars a commission of 12 annas per cent on the price of the goods sold, and a small allowance called chutki he paid as rent. The

summons was served on the defendant in Calcutta three days after the institution of the suit. The gomasta of Harjiban Das proves that five days before the summons was served, he saw the defendant at Narsing Chandra Biswas's arhat in Patturiaghatta. The defendant was engaged talking to brokers, and negotiating the sale of country produce. It is thus proved that the defendant habitually resorted to Calcutta for the purpose of carrying on trading operations on a considerable scale, remaining there for the purpose of such business for months at a time, and that it was during one of his visits to Calcutta for such purpose that the suit was instituted.

2. Unless some artificial construction is to be put on the expression "carry on business" in the Charter, I think that it must be pronounced that the defendant at the time of the commencement of the suit did "carry on business" or "work for gain" within the local jurisdiction of the High Court.

3. Mr. Marindin for the respondent cited, amongst other cases, *Shiels v. The Great Northern Railway Company* 30 L.J., Q.B., 331. For the decision in that case, which turns on the construction of the term "shall dwell or carry on his business" in the 9 & 10 Vict., c. 95, s. 60, it is enough to say that the Court held that a Railway Company cannot be said to carry on "its business" in a particular district, merely because it has a station where tickets are issued and contracts in relation to the carriage of goods are made. The issuing of such tickets and the like is not the business of a Railway Company, being a very small part of, or one of, the transactions connected with that business. Mr. Justice Hill, whose judgment was read and relied on, says, I do not mean to say that a private trader or firm may not carry on business within the meaning of the statute in more than one place." In *Mitchell v. Hender* 23 L.J., Q.B., 273, the defendant was a surgeon residing within the jurisdiction of the County Court of Liskeard. The cause of action was work done by the plaintiff for the defendant at a mine within the jurisdiction of the Launceston County Court. In order to deprive the plaintiff of his costs, and to show that the Superior Courts had not a concurrent jurisdiction under the 9 & 10 Vict., c. 95, s. 128, the defendant showed that he was in daily attendance upon his patients as surgeon, apothecary, and accoucheur within the Launceston district." Coleridge, J., "held that this was enough to show that he carried on his business there. He says:--"If the defendant was moving about doing the work of his business, and the effecting of it within the Launceston jurisdiction, he comes, I think, within the words of the Act." In *The Keynsham Blue Lias Lime Company v. Baker* 2 H. & C., 729, it was held that a registered joint stock company for the manufacture and sale of goods carried on business at the place of manufacture and sale, not at the registered office of the Company where the directors used to meet and transact their business. These cases show clearly, first, that it is not material that the place of the defendant's permanent residence is Patna; and, secondly, that a party may carry on business or work for gain, within the meaning of such a clause as that with which we have to deal, in more places than one. I may add that for myself I have never seen reason to doubt the correctness of the decision in *Greesh Chunder Bonnerjee v. Collins* 2 Hyde, 79, which is a stronger case than that now before us.

4. We have therefore to consider whether the plaintiffs are entitled to a decree upon the merits. The facts are as follows:--

The firms of Sheikh Syad Ali and Bhagwan Das had had for a long time dealings with each other. Bhagwan Das used to draw hundis at Patna on his firm at Calcutta and sell them to Sheikh Syad Ali at Patna. Sometimes Sheikh Syad Ali only paid down a portion of the consideration. The hundi in suit was drawn at the kothi of Sheikh Syad Ali in Patna by Bhagwan Das on his own firm of Bhagwan Das at Calcutta. It was stipulated that the value should be paid by the firm of Sheikh Syad Ali within three days. The plaintiffs, who carry on business in Calcutta, were in the habit of purchasing hundis from the Calcutta firm of Sheikh Syad Ali. On the 2nd day of the dark side of the moon in Aswin, Sambat 1924, or in other words the 15th day of September 1867, Makund Lal Chobay, a broker, the agent of Syad Ali, brought the hundi now in suit to the plaintiffs, who purchased it, paying (deducting the discount) Rs. 2,468 or thereabouts. The hundi purports to be drawn by the defendant's firm Bhagwan Das of Patna on Bhagwan Das of Calcutta, for Rs. 2,500 deposited by Sheikh Syad Ali, on the 15th day of the light side of the moon in Bhadro 1924 (September 13th 1867), payable forty-one days after date. The hundi purports to be accepted by Bhagwan Das in favor of Sheikh Syad Ali Sahib.

5. The defendant admits that the bill was drawn by himself, but denies that he accepted it. And though from the mode in which the defendant has put forward that denial there seems good reason to doubt whether the acceptance is not really his, we must treat it as not proved that the acceptance is in the handwriting of the defendant or of any of his gomastas.

6. The plaintiffs say, that at the time they discounted the hundi, they did not know that Sheikh Syad Ali had not paid the full consideration for it. They took it in the usual course of business. Sheikh Syad Ali failed to pay to the defendant the consideration for the acceptance as stipulated by him on the 3rd day after the bill had been drawn. Gopilal Dalai, the broker who had been employed both by Syad Ali and Bhagwan Das in the negotiations for drawing the bill on behalf of Bhagwan Das, pressed Manahar Lal, the gomasta of Sheikh Syad Ali at Patna, for payment of the consideration, and thereupon Manahar Lal wrote a letter to Sheikh Syad Ali's firm in Calcutta, and handed it to Bhagwan Das. The letter was as follows (reads letter of September 16th 1867):--Before the hundi fell due, Syad Ali's business failed. The plaintiff Harjiban Das went to the defendant in Calcutta, and told him that Syad Ali had failed, and that the defendant must pay the bill. The plaintiff says the defendant took the hundi in hand, and said, I have not accepted it." The plaintiff says, "I gave him an answer to that, and asked whose handwriting is this? (meaning by whom was it drawn). He said, it is drawn by me. I said the hundi is written in your own hand, and is signed by you; and now his business has failed, you say you have not written it. It won't do. He said I have not accepted it, nor will I pay it. Do what you like." The defendant's account of this interview is: I came to Calcutta twenty-five days after I drew the hundi. After coming to Calcutta I saw the plaintiff Harjiban Das. He came to me first. "When he came he said to me, is this hundi accepted

by you? I said, it is not, nor have I received the money. He said, but it is drawn by you. I said, it is true it is written by me, but I received no consideration. All I got was a letter written by Syad Ali to his own gomasta. I got no money for it." The bill was again presented to the defendant when it became due. He says : The attorney's man who accompanied Harjiban or Pitam Das said, are you going to pay the amount of this? I said I have not received any money for this, nor have I given any acceptance to it. I will not pay the amount of this. You may go and take it from Syad Ali." On this occasion there seems to have been no reference to the letter written by Syad Ali to his own firm in Calcutta. There seems to be no reliable evidence that the defendant or any one on his behalf informed the plaintiffs of the true state of the defendant's position with respect to the hundi. Pitam Das went up to Patna before the bill became due to see if he could get payment. Gapi Lal Dalai, in answer to a question," were you ever questioned by the plaintiffs or any and what person on their behalf as to the said hundi; if yes, who were present, and what was said? answered," yes. I was questioned by Pitam Das on behalf of the plaintiffs as to the said hundi in Isri Prasad's house and before him. Lekraj Sao, father of Bhagwan, was also present there. I informed Pitam Das of all the circumstances in connection with the hundi which I have stated in full in my answer to the 3rd question. Isri Prasad said that he would send for Mohan Lal and settle the matter," But Gapi Lal is contradicted both by Isri Prasad and Pitam Das, and I cannot accept his statement, because I think it is clear that the defendant, at the time of this interview, was endeavouring to escape all liability on the bill by contending that he had not accepted it, or that he had received no consideration. If the defendant really told Harjiban that all that he got was a letter written by Syad Ali to his own gomasta, he told Harjiban what was false, he suppressed the fact that he got Syad Ali promise to pay in three days. But I believe that he made no statement, that he had got a letter written by Syad Ali to Harjiban Das. To have done so would have been to have told Harjiban Das, "you will have no difficulty with that bill. It is all right. I am liable just as any other person who has accepted a bill for the accommodation of the payee is liable." Unable to get payment from Syad Ali, Pitam Das, by the assistance of his friends at Patna, eventually arranged to take from Sheikh Syad Ali two bills of Rs. 2.500 each, which the firm of Harjiban Das held, the sum of 2,200 rupees down, and the rest by certain instalments. The agreement was as follows : (reads agreement of November 3rd 1867).

7. The point which has been argued before us with great ingenuity by Mr. Marindin and Mr. Evans for the defendant is, that the effect of the letter written by Manohar Lal, the gomasta of Sheikh Syad Ali of Patna, to Sheikh Syad Ali of Calcutta, was to alter the character of the defendant's obligation and to make him liable as a surety only for Sheikh Syad Ali upon the bill in suit; that the plaintiffs, at the time of making of the agreement of the 7th of the light side of the moon in Kartick (November 3rd), had notice that the defendant was merely a surety for Sheikh Syad Ali; that the agreement which gave time to Sheikh Syad Ali, the principal, operated as a discharge to the defendant, the surety, although at the time of the discount of the hundi by the plaintiffs that relation did not exist between Sheikh Syad Ali and the defendant.

8. I think, however, that there is no satisfactory or reliable evidence that at the time when by entering into the agreement of the 7th day of the light side of the moon in Kartick (November 3rd), the plaintiffs gave time to Sheikh Syad Ali, the plaintiffs knew or had notice that the defendant stood in the position of a surety, even if he was a surety only.

9. I desire to say that I have heard nothing in the course of the argument which convinces me that, if an obligation is entered into by two persons, A. and B., with a third, C, by which the two obligors are both liable to the third, C, as principals, A. and B. can by any subsequent arrangements amongst themselves, without the privity or assent of C, relieve themselves or either of themselves of the obligations which are incident to the character of principal, and by mere notice of such arrangement compel C. to forego his right to treat them both as principals. Lord Lyndhurst, in *Oakeley v. Pasheller* 4 Cl. & Fin., 207; see 232; S.C., 10 Bligh., N.S., 548; see 586, asks the question--"Can you cite any authority to the effect that two principal debtors could by arrangement between themselves convert one into a surety only for the other principal debtor?" Mr. Pemberton and Mr. Jacob, in reply to that question put during the argument in the House of Lords, do not attempt to say that anything of the sort could be done. But they argue that in point of fact, Sir Charles Oakeley, the creditor, by adopting an arrangement by which the new debtor became liable to him, accepted Reid and Kynaston as the principal debtors, leaving and looking to Sherard's executors as sureties for the new obligation. I think it clear that an obligor cannot, without the consent of the obligee, alter the position of the obligee, or take away his rights as they existed at the time when the obligation had its inception. In the case of *Oakeley v. Pasheller*, Sec 10 Bligh, N.S., 578 if the judgment of Sir John Leach be examined carefully, it becomes clear that he also noticed the point that Sir Charles Oakeley, the obligee, had adopted the new firm as principal debtors, and thereby consented to accept the liability of Sherard's executors as that of sureties, and I may add that this is the view which is taken of the case in *Lindley on Partnership*, Volume 1, page 452. In the present case Bhagwan Das sold his bill on credit. As drawer and acceptor, or drawee of a bill on his own firm sold for value, he was liable on that bill as principal. On the failure of the vendee of the bill, Syad Ali, to pay the consideration, he for his own purposes, or for some consideration of which we know nothing, chose to forego his right to proceed at once against Sheikh Syad Ali. Instead of enforcing the remedy then immediately open to him, he chose to take from Syad Ali an engagement to provide for the bill at maturity. He did this without communicating with Harjiban Das, who in the meantime had taken the bill in the ordinary course of business for value. The effect of the new arrangement was to alter the whole character of the bill and of the liabilities of the parties to it. I think that this could not be done without the assent of Harjiban Das, the holder of the bill; I think that as between himself and Harjiban Das, Bhagwan Das was the principal debtor on the hundi when the hundi was discounted by the plaintiffs, and that as between the defendant and Harjiban Das the plaintiff, the plaintiff has a right to hold him to his original obligation as principal debtor to this hour. The mere fact that the plaintiffs on discovering that there was something wrong about the bill were willing to proceed, and did proceed against Syad Ali in the first instance, in no way alters his position.

10. But even if it be admitted that notice can have the effect of creating an equitable duty on the part of the obligor to use his rights in such a way as not to prejudice the interests of a surety, I think that it must be admitted that such a notice of the existence of rights wholly unknown to the obligee must be an honest, fair, and full disclosure of the relations of the obligors as between themselves, so as to enable the obligee to know and effectually exercise his own rights. The principle on which insurers are bound to disclose not only all the facts which they believe to be of importance, but all the facts that might influence the party about to insure, seems to me to apply to cases like the present. I think no equitable right can be based on a notice which conceals or suppresses facts, which it is or may be essential to the interest of the obligor that he should know. Such, it is clear, would be the effect of the notice which the defendant says that he gave. Had the defendant told the plaintiffs that he had originally sold the bill on credit, and had on failing to get payment accepted the letter of 3rd Aswin (September 16th), the plaintiffs would probably have called on the defendant for immediate payment according to his contract with Syad Ali when they drew the bill. Of the cases cited there is not one which, when carefully examined, will be found to govern the case before us.

11. I think that the defence wholly fails, and the plaintiffs are entitled to a decree for the amount claimed.

Macpherson, J.

12. The plaintiffs suit was dismissed on the ground that the Court had no jurisdiction to entertain it, because the cause of action did not arise in Calcutta, and because the defendant did not, at the time of the commencement of the suit, carry on business" in Calcutta, within the meaning of section 12 of the Letters Patent of 1865.

13. It is urged in appeal that, whether the cause of action did or did not arise in Calcutta, the defendant was certainly carrying on business there when the suit was commenced.

14. I am of opinion that the appellants are right in this contention, and that therefore the Court below was wrong in holding that the defendant was not subject to the jurisdiction in this suit.

15. Taking the defendant's own statement, his place of permanent residence is at Allumgunge in Patna, and he has a kothi or place of business in Marugunge, also in Patna. His principal business consists in buying country produce at Patna and sending it down to Calcutta for sale, himself following every consignment, himself selling it in Calcutta, and himself receiving the proceeds. He comes to Calcutta, he says, three, four, or five times, and sometimes only twice in the course of a year, remaining in Calcutta three, four, or five months at a time. He puts up at the golah of the arhatdar in whose godowns his goods are stored, and on whose premises he lives : he conducts all sales and realizes the proceeds himself, employing no agent in the matter; then returns with the proceeds to Patna, where he remains for a month or two preparing and despatching fresh

consignments, and starting again for Calcutta so as to meet them on arrival there. This goes on throughout the year, and has been going on for five or six years. He has been in the habit of drawing bills at Patna on himself at Calcutta, and of paying them there. He has kept books in Calcutta of his transactions there. While absent from Patna, his father looked after his business there, the only other business spoken of being a dealing in hundis drawn by himself at Patna on himself at Calcutta. The hundis have usually been paid by him out of the moneys realized here by the sale of his goods.

16. It appears to me that this is clearly such a carrying on of business in Calcutta as makes the defendant subject to the jurisdiction in this suit.

17. For the defendant, the case of *Shiels v. The Great Northern Railway Company* 30 L.J., Q.B., 331 was much relied on. But that case seems to me to have really but little bearing upon the facts with which we have to deal at present. A railway company, which in a certain sense carries on business at every station in Great Britain, where it makes contracts for the conveyance of, and receives, passengers or goods to be conveyed, is in a position wholly different from that of a trader who exercises his calling partly in one and partly in another of two districts. There no doubt would be manifest inconvenience, and some injustice, as Mr. Justice Hill says, in *Shiels v. The Great Northern Railway Company* 30 L.J., Q.B., 331, if the words carry on business were taken in their most extended import, for then a railway company against whom a cause of action within the jurisdiction of the County Court Act arose, might be sued in any County Court in the kingdom, at the option of the plaintiff, provided the company had a station within the district of such County Court, without any regard to the place where the cause of action arose, or to the fact that the officers or the servants of the company at such last-mentioned station knew nothing of, and had nothing to say to, the affairs or business of the company, other than obeying the instructions of the directors, and acting in conformity with the regulations of the company at the particular station where they were employed." Not one, however, of the inconveniences contemplated in this passage of Mr. Justice Hill's judgment are to be found in the present case, if it be held that this Court has jurisdiction. For the defendant is sued on a hundi drawn by himself and payable in Calcutta by himself; he having, moreover, been in Calcutta when it fell due, and himself knowing everything connected with the transaction. So far, therefore, as the argument ab inconvenienti may have had anything to do with the conclusions arrived at by Mr. Justice Hill, that argument is wholly out of place in this case. Mr. Justice Hill continues:--Many illustrations might be put to show that the words carry on his business" must receive some limitation, even in the case of private individuals. A builder, whose place of business is in one County Court district, takes a contract for the erection of extensive buildings in another district, the completion of which will require a considerable time, and for the purpose of such buildings, he erects workshops thereat. In one sense, the builder carries on his business in the last-mentioned district, but he does not do so within the meaning of the enactment, see *Gorslett v. Harris* 29 L.T., 75." Then he gives the case of "a dealer, whose place of business is in London, and who sells exclusively therein, but

employs travellers to visit different parts of the country" making contracts for him; and he says it is clear that London is the only place in which he carries on his business. He adds, however,--"I do not mean to say that a private trader or firm may not carry on business, within the meaning of the statute, in more than one place. The illustrations which I have used are merely for the purpose of showing that the words "carry on his business" are not to be taken in their most extended sense." Fully adopting this declaration, I do not doubt that the decision in *Shiels v. The Great Northern Railway Company* 30 L.J., Q.B., 331 is perfectly right. Moreover, I am not inclined to cavil at the illustration as to the London dealer who has travellers acting for him in the country. As to the builder whose place of business is in one county while he is erecting buildings in another, Mr. Justice Hill's illustration will be perfectly sound in a certain state of facts, but not so in a certain other state of facts. If the builder's position in its general features resembled that of the railway company in *Shiels v. The Great Northern Railway Company* 30 L.J., Q.B., 331, it would certainly be correct. But in this case of the builder, as in every case arising on the construction of these words carrying on business," all depends on the particular facts proved in each particular case. No fixed or certain rule applicable to all cases can be laid down: that this was Mr. Justice Hill's opinion is apparent; and he expressly says that a private trader may carry on business in more than one place. The judgment in this case of *Shiels v. The Great Northern Railway Company* 30 L.J., Q.B., 331 was approved of and affirmed by the full Court of Queen's Bench in *Brown v. London and North-Western Railway Company* 32 L.J., Q.B., 318. But in this latter case also it was evidently the opinion of the Court that the carrying on business need not necessarily be confined to one place. Crompton, J., says: "I agree with Hill, J., that "business" must mean the general business carried on at the principal station. I am inclined to think that there may be cases in which the business of a railway company may be held to be carried on at two places. For instance, suppose a terminus at two places like Liverpool and Manchester, and the meetings of the directors held as much at one place as the other, I do not see why the business may not be said to be carried on at both." Blackburn, J., says: The question turns entirely on the construction of the 60th section, 9 & 10 Vict., c. 95. That was enacted with a view of regulating where defendants in general should be sued; and it would appear that the Legislature thought that in small cases, managed generally by the parties themselves, the most convenient place would be that in which the defendant either dwelt or carried on his business; contemplating such cases as a man having a place of business in "Westminster and living in some suburban villa. But business can only be said to be carried on where it is managed. No doubt there may be cases where a man carries on more businesses than one, and in different places. But such cases are quite exceptional; and the place of business in general must be the place where the general superintendence and management take place." In *The Keynsham Blue Lias Lime Co. v. Baker 2 H. & C.*, 729, the business of railway companies is treated as in some degree *sui generis*. In this case the company's business was to manufacture and sell their goods. The directors met in London, but the sales were made at the place where they got the material and prepared it for sale, and that was held to be the true place of business. In *Framji Kavasji Marker v. Hormasji Kavasji Marker* 1 Bom. H.C. Rep., 220,

the Court (Sausse, C.J., and Arnould, J.) say: To determine whether a defendant is carrying on business, it must first be ascertained what his particular trade, calling, or occupation is, and then we can examine whether the facts proved amount to a carrying on of that particular trade, calling, or occupation within the jurisdiction." The learned Judges then went into the facts, and found that the defendant was a retail dealer in European goods, having shops and carrying on the business of selling those goods at various up-country stations, and having an establishment in Bombay, where goods were purchased, or received from Europe, and forwarded to the various shops up country. No sales were ever made in Bombay by the defendant or his servants there. The Court say: The branch or agency established within the jurisdiction appears to have been limited to purposes other than those of sale or profit. Under these circumstances, we think that the defendant as a retail dealer, gaining his livelihood by the profit upon sales of his goods, did not "carry on business" in Bombay so as to render him in that respect liable to the jurisdiction. In the present case "sale" is made the test of carrying on the business of a retail dealer, and the place of sale is treated as the place of carrying on that business." If we apply a similar test to the case now before us, can it be doubted that the defendant was carrying on business in Calcutta? He in fact made his livelihood by the profits upon the sales of his merchandise in Calcutta. He expressly says he took no goods up country with him for sale there. The only other means of livelihood was the dealing in hundis drawn at Patna on himself in Calcutta; and this was also in itself a species of carrying on business in Calcutta, inasmuch as the hundi business was intimately connected with, and in truth a part of, the other business of selling his merchandise in Calcutta.

Unquestionably the more important portion of the defendant's business was transacted in Calcutta. The defendant says his head office was in Patna. But what sort of a head office does he really show to have existed? He proves merely that when absent from Patna his father looked after his business for him. There is no evidence that the father ever transacted any business for him, unless it may be that he occasionally drew hundis in the defendant's name upon the defendant at Calcutta, to be taken up by the defendant there with the money realized from the sale of his goods. I cannot say that I have any doubt whatever that, under the circumstances, the defendant was carrying on business in Calcutta, and is therefore subject to the jurisdiction. Our own decision, in the case of *Greesh Chunder Bonnerjee v. Collins* 2 Hyde, 791, is strongly in favor of this view of the question; and there is nothing whatever against it in the case of 3 M.H.C.R. 146, or in *Subharaya Muddali v. Government* 1 Mad. H.C. Rep., 286. Some question has been raised as to whether it is proved that the defendant was carrying on his business in Calcutta at the time the suit was commenced, even if he was so at the time the summons was served upon him. On the evidence, I have no hesitation in finding, as a fact, that he was carrying on his business in Calcutta at the time of the commencement of this suit.

18. Finding that the Court has jurisdiction, I proceed to consider how the case stands on the merits.

19. The plaintiffs seek to recover the amount of a hundi for Rs. 2,500, dated the 15th of the light side of the moon in Bhadra 1924 (the 13th September 1867), drawn by the defendant at Patna on the defendant in Calcutta, payable forty-one days after date to Syad Ali or order. The defence is that the hundi was an accommodation bill given by the defendant to Syad Ali for his accommodation and without consideration, and that the plaintiffs, after the hundi had become due, and after the plaintiffs had notice that the defendant was, as regards this hundi, only surety for Syad Ali who was the principal debtor, gave time to the principal Syad Ali in such a manner as released the defendant his surety.

20. It is quite clear that this hundi (which being drawn by the defendant upon himself may be treated as a promissory note, whether the acceptance appearing upon it is a forgery or not,--a question as to which I do not stop to inquire)--was not an accommodation bill in its inception at the time it was taken by the plaintiffs. This is in fact admitted by Mr. Marindin; and whether admitted or not it appears on the face of the defendant's written statement, in which he says (para. 4) that he drew the hundi on himself at Calcutta at the request of Syad Ali, who had promised to pay him the consideration in a day or two; and (para. 5) that Syad Ali having failed to pay the amount, informed the defendant that the amount of the hundi would be paid at Calcutta by his gomasta, and gave the defendant a letter to that effect to his (Syad Ali's) gomasta in Calcutta. In his deposition the defendant says,--"I received nothing whatever from Syad Ali. I had had dealings with him of this sort. I had drawn hundis of which he paid me down a portion. On this occasion he paid no portion. I had no goods or funds of his." In cross-examination he says,--"I draw bills on myself at Calcutta and pay them. I had many hill transactions with Syad Ali, very many; I drew the bills at Patna and gave him bills to the extent of 50,000 or 60,000 rupees, during the three years his transactions went on with me. I drew bills also for others.* * * With the proceeds of my goods I take up the hundis. I do not buy piece goods here. I buy nothing. I do not take any hundis here. I meet hundis if they come from there; and if any money is left in my hands I take it with me. * * * * When away at Patna, I draw bills at Patna on myself in Calcutta. If I am not here, I accept them when I come down." Gapi Lal Dalai, a witness examined for the defence (under commission), says that he was the broker employed by both parties at the time the hundis were drawn by the defendant; and that the statement made by the defendant in the 4th para of his written statement is true,--namely, that the defendant gave the hundi to Manahar Lal, the gomasta of Syad Ali, upon his undertaking to pay the consideration thereof in three or four days. Then he says : I did, on behalf of the defendant, go to Manahar Lal, and demand money for the hundi I demanded it when the time within which Manahar Lal had promised payment had expired,--that is to say, three or four days after the delivery of the hundi."

21. In its inception, therefore, it was a hundi given by the defendant to Syad Ali for valuable consideration; the consideration being the promise to pay the defendant at Patna within three or four days. The plaintiffs became holders of the hundi for value, on the night of the day after that on which it bears date, that is to say, before" the expiry of

the time within which Syad, Ali had promised the defendant to pay him the value.

22. The case for the defendant is that when Syad Ali made default at the end of the three or four days, the defendant pressed him, and thereupon Syad Ali (by his gomasta Manahar Lal) gave him a letter to his (Syad Ali's) Calcutta firm directing the latter to pay the hundi on due date, as he had not paid for it at Patna. On the evidence, it is doubtful whether this letter ever was received by the Calcutta firm of Syad Ali. Manahar Lal, the Patna gomasta of Syad Ali, says he wrote such a letter and sent it by post to Beharilal, the Calcutta gomasta of Syad Ali: and that he gave a letter to the like effect to Bhagwan Das. This is corroborated by Gapi Lal Dalai, and also by the defendant himself, who says the letter produced and dated the 3rd of the dark side of the moon in Aswin 1924 (16th September 1867) is the letter which he personally got from Manahar Lal. But Beharilal, the Calcutta gomasta of Syad Ali, was examined as a witness for "the defendant, and denies ever having received any such letter by post or otherwise; while the defendant himself does not say that he ever presented his letter to the Calcutta firm or made any demand whatever against Syad Ali upon it at any time.

23. Soon after this letter was given by Manahar Lal, Syad Ali being in difficulties stopped payment. The plaintiffs evidently had some communication with the defendant about that time, as to whether the hundi would be paid when due. The defendant says that on this occasion he said he would not pay it because the acceptance on it was not his, and because he had received no consideration for the hundi from Syad Ali. The plaintiffs deny that anything was said about want of consideration. However that may be, when the hundi fell due it was presented for payment to the defendant and he absolutely refused to pay it, denying that he had accepted it--whereupon it was protested.

24. Up to this point in the case, there is no doubt as to the defendant's liability. As the drawee for valuable consideration of a hundi on himself (or as it may be put, as the maker of a promissory note) in favor of Syad Ali, for which the plaintiffs paid full value, the defendant was undoubtedly liable to pay the plaintiffs the amount of the hundi when due, whatever may have been his relations with Syad Ali at the time the hundi reached maturity.

25. But it is contended that, owing to subsequent events, the defendant is no longer liable. It is said that, by reason of the agreement to pay in Calcutta, entered into by Manahar Lal, the position of the parties was changed, so that, as between themselves, Syad AH was the principal debtor on this hundi, and the defendant merely his surety; that, before the hundi fell due, the plaintiffs became aware that the defendant was only surety for Syad Ali; that after it was presented for payment to the defendant, and repudiated and dishonored by him, the plaintiffs entered into an agreement to give time to Syad Ali, and that this agreement operated as a release to the defendant. I do not, however, think that the letter given by Manahar Lal, or the agreement which led to that letter being written, had the effect of altering the position of the parties, so as to make Syad AH the principal in this matter, and the defendant his surety only. The defendant and Syad Ali were both of

them traders, carrying on business at Patna and Calcutta. The defendant had considerable transactions in hundis in connection with his trade of selling in Calcutta merchandize brought down by him from Patna. As he himself says, the practice was that the hundis should be drawn by his Patna firm (i.e., himself at Patna) upon his Calcutta firm (i.e., himself at Calcutta), and that the hundis thus drawn should be paid by him, when in Calcutta, out of the proceeds of the goods sold by him there. Living as he did mainly by bringing down country produce from Patna for sale here, it was manifestly for his benefit and convenience to draw and sell his hundis in Patna, so as to be placed in funds there wherewith to pay for purchases made. This being the nature of his business, the defendant, in the ordinary course of it, sold this hundi to Syad Ali, with whom he had had many such transactions, and who promised to pay the price of the hundi in two or three days. He did not pay as he promised; and being pressed for the money, he came to terms with the defendant, and agreed that, instead of paying then at Patna, he would pay on a later date at Calcutta. Thereupon the letter now produced and relied on by the defendant was given by Syad Ali. I cannot see that this latter agreement alters the position of the parties, except that the payment of the price of the hundi was postponed, and the place of payment changed from Patna to Calcutta. After the letter was given, there was, just as much as ever, a contract binding Syad Ali to pay the defendant the price of the hundi; the date and place of payment alone were altered. This is no case of principal and surety at all, though it is a case in which the defendant, when called upon to pay the amount of the hundi, might well have the feeling that practically he had received no consideration for it, as Syad Ali had failed to fulfil his promise. But every creditor who has parted with his goods or money, and does not get paid for them by his debtor, ordinarily has a precisely similar feeling. But even if the relation between Syad Ali and the defendant was converted into one of principal and surety, the defendant is not, in my opinion, released even if the plaintiffs did give time to Syad Ali. Mr. Marindin argues that, if the relation of principal and surety exists, time given to the principal will exonerate the surety, if the creditor, when giving time, has notice that the one is principal, and the other is surety only, even although he had no notice of the fact when the original contract was entered into. And he argues further that it does not matter when the relation of principal and surety comes into existence, provided it does so prior to the giving of time, and the creditor when giving time is aware that it exists. However startling these propositions may seem at first sight, they appear to be borne out by the decisions, and the dicta of the Judges, in the case of *Pooley v. Harradine* 7 E. & B., 431; *Taylor v. Burgess* 29 L.J., Exch., 7; *Greenough v. M'Clelland* 30 L. J, Q.B., 15; and *Bailey v. Edwards* (4). But the present case, taking it as one of principal and surety, goes in its facts far beyond any of these cases. In every one of them, the surety had been surety from and at the time of the original contract. Here the alleged surety was admittedly a principal when the bill was drawn by him, and when it was taken for value by the plaintiffs. It is true that, in *Bailey v. Edwards* 11 Jur. N.S., 134, Mr. Justice Blackburn says that it was decided in *Oakeley v. Pasheller* 10 Bligh, N.S., 548; S.C., 4 Cl. & Fin., 207 that the surety will be discharged, if the creditor, having notice that he is surety, gives time to the principal, even although the relationship of principal and surety did not come into existence until a date subsequent to

that of the original contract. But the decision of Sir J. Leach, M.R., in *Oakeley v. Pasheller* 10 Bligh, N.S., 548; S.C., 4 Cl. & Fin., 207, is stated too broadly when thus expressed. For a careful perusal of the report satisfies me that in that case the surety was held discharged, because the creditor had, with notice of the arrangement come to by the parties between themselves after they had become liable to the creditor as joint debtors, by his conduct recognized and assented to the new arrangement. The marginal note given to this case is not limited as it should be, and is not warranted by the facts. The latest case I have found bearing on the subject is *Ewin v. Lancaster* 6 B. & S., 571. There also the surety had been only a surety from the commencement. *Bailey v. Edwards* 11 Jur. N.S., 134 is no doubt mentioned with approval: but it is referred to by Cockburn, C.J., merely as a case in which it was held that the giving time to a prior indorser of a bill of exchange discharged an accommodation acceptor. "There is no decided case that I know of which actually governs the case now before us, except so far as *Oakeley v. Pasheller* 10 Bligh, N.S., 548; S.C., 4 Cl. & Fin., 207, and the dictum of Blackburn, J., founded upon that case, may be said to govern it. I am clear that *Oakeley v. Pasheller* 10 Bligh, N.S., 548; S.C., 4 Cl. & Fin., 207 does not go so far as it is said to have gone; and that being so, I am not prepared to act upon the rule which is supposed to be deducible, but has never in any contested case been decided to be deducible, from it. There is another point in which this case differs from all of the reported cases. It is this that, when the hundi fell due, and when the defendant was undoubtedly liable upon it as principal, it was duly presented to him for payment, and he then not only did not pay it, but wholly repudiated all liability on the hundi, on the ground that he had never accepted it. It is possible that this refusal to pay, and repudiation of liability, might have an important bearing on the question of the equities which the defendant sets up as against the plaintiffs. On this, however, it is unnecessary for me to enter at length, or express any opinion.

¹ See *Toolsee Doss Dutt v. Gomes*, Gasper's S.C.C. Rep., 135