PRIVY COUNCIL.

SETH SAMUR MULL AND ANOTHER (PLAINTIFFS) *v.* CHOGA LALL (DEFENDANT). P. C.* 1879 *July* 18.

[On Appeal from the Court of the Judicial Commissioner of Ajmere.]

Trade Custom of Beawar—Payments made by 'Arathdars.'

By a custom of Beawar, a merchant coming there from another district is allowed to trade, only in the name and on the credit of some local *arath*, or banking firm, which guarantees his dealings, and to which, on the conclusion of transactions, a '*panri*,' or memorandum thereof, is sent by the stranger merchant.

C, coming to Beawar, made several purchases in accordance with the above custom, using the firm of *S* and *M* as his *arath*. On leaving Beawar, he sent *S* and *M* a *panri*, in which all his purchases, except the last and largest, under which he had taken no delivery and had made no payment, were entered.

On application by the vendors in the last transaction to *S* and *M* as guarantors of *C* to make good the purchase-money, they at first refused on the ground that the transaction was not entered in the *panri* sent them, but afterwards they consented to pay the vendors the amount of the loss occasioned by *C's* failure to pay and take delivery.

In a suit by *S* and *M* against *C* to recover the amount so paid—

Held, that if the plaintiffs were cognizant of, and allowed their name to be used in, the last transaction, as was shown to have been the case in previous transactions, they were, according to the custom, liable to the vendors, and consequently entitled to recover over from the defendant what they had paid: and that, even if there was no actual authority given at the time of the transaction, still, as the defendant had used the name of the plaintiffs as his guarantors, and had held them out as liable to pay on his behalf for the goods he purchased, they were thereby authorized, if they thought fit, to make the subsequent payment which they did on behalf of the defendant, or (in other words), to ratify the use which the defendant had made of their name, and were not deprived of their right to do so by their having for a time repudiated liability.

THIS was an appeal from a decision of the Judicial Commissioner of Ajmere, dated the 3rd April 1876, which reversed a decision of the Commissioner and restored a previous decision of the Deputy Commissioner of Ajmere.

* *Present:* — SIR M. E. SMITH, SIR R. P. COLLIER, and SIR H. S. KEATING.

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Mr. *Cowie*, Q. C., and Mr. *C. W. Arathoon* appeared for the appellants, who were the plaintiffs in the first Court.

Mr. *Leith*, Q. C., appeared for the respondent.

The questions raised for decision on the appeal are shortly stated in their Lordships' judgment, which was delivered by

SIR R. P. COLLIER. — Although this case has undergone several lengthened investigations, it appears to their Lordships that the facts material to its decision lie in a small compass. The plaintiffs are bankers carrying on business at Ajmere, and also at a place called Beawar, which is also at times called by another name, Nyanuggur. The defendant is a merchant at Nusserabad, and the transaction out of which this appeal arises, is a purchase of a quantity of cotton at Beawar. It appears that at Beawar there is a custom which seems to their Lordships to be fairly stated in the case of the respondent. That case says: "There is an admitted custom prevailing at Nyanuggur, according to which a merchant coming from any other district, is only allowed to trade in the name and upon the credit of a Nyanuggur firm. The actual dealings are effected by the stranger himself, or by his broker; but in each transaction the name of a Nyanuggur merchant is given, and his name is entered as the principal in the transaction. Credit is given to him, and the final settlement of the transaction is effected with him. He is known as the *arath* or agent. At the conclusion of such transaction a memorandum of it is sent to the *arath* by the person who makes use of his credit. This memorandum is known by the term *panri.*" It appears that, towards the end of August 1870, about the 24th or 25th, the defendant came to Beawar for the purpose of extensively dealing in cotton. He remained there ten days, and during nine days he effected a number of purchases according to this custom, which he may be assumed to have been fully acquainted with, and used the plaintiffs as his '*araths*,' in the sense in which that term has been used in the description of the custom given in the respondent's case. These transactions, extending over nine days, amounted to as much as 6,025 maunds of cotton; and with reference to all of these purchases, the defendant being

on the spot, vouched the plaintiffs, who were also on the spot, and they must be taken to have perfectly well known that he represented them as his '*araths*' according to the custom.

There is no dispute with respect to these previous transactions, which form a continuous series of dealings, but the dispute arises with respect to the last transaction in which the defendant was engaged. On the night of the tenth day of his sojourn at Beawar, the defendant entered into another transaction of a similar character, but larger in amount, whereby he purchased, of various persons in the market, as much as 14,000 maunds of cotton, employing the same brokers as before, and referring again to the plaintiffs as his *araths* or guarantors. It further appears that the plaintiffs, or at all events their agents, were at the time in the bazar, and one of the Commissioners who made investigations into this subject observes, that from the evidence recorded he is inclined to believe that they were cognizant of the proceedings, or took part in them. The defendant suddenly left Beawar on the next morning; he sent a '*panri*,' which has been described as a memorandum of the transaction,—it does not exactly appear when, but probably very soon after,—to the plaintiffs, in which he acknowledged his liability as far as the 6,025 maunds were concerned, but in which he took no notice of this last transaction. Thereupon the sellers applied to the plaintiffs, as guarantors, to make good the purchase-money, and the plaintiffs undoubtedly at that time said that as they had not had a *panri*, they could not hold themselves responsible. It appears that a dispute arose, and subsequently the matter was referred to a punchait, and this punchait determined that the plaintiffs ought to pay to the vendors of the cotton the sum of one rupee per maund, amounting to Rs. 14,000, being the loss sustained by the vendors in consequence of the fall of the price of cotton, and for that sum they bring this action against the defendant.

The case has come before three Commissioners, the Deputy Commissioner, the Commissioner, and the Judicial Commissioner. The first Commissioner found in favor of the defendant, the second in favor of the plaintiffs, the third in favor of the defendant; and from the last judgment the appeal is preferred.

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It appears to their Lordships, that the result of the evidence, and of the findings which have been come to by the Assistant Commissioners who were deputed to investigate the case, is, that the defendant, in the contract for the purchase of the 14,000 maunds, used the name of the plaintiffs, and that the vendors sold to him on the credit of that name; and further, that the defendant had the authority of the plaintiffs to use their name. The plaintiffs' name had been used with their full concurrence in a number of transactions during nine successive days; they were present, or some of their agents, when this further transaction of the same kind was entered into, and it appears to their Lordships a fair inference, that they were cognizant of, and allowed their name to be so used in, the last transaction, as they had in the others. If so, they were undoubtedly liable, according to the custom, to the vendors, and they would be entitled to recover over what they paid against the defendant.

But it further appears to their Lordships, that if there was no actual authority at the time, still, that the defendant having used the name of the plaintiffs as his guarantors, and treated them and held them out as liable to pay on his behalf the price of this cotton, thereby authorised them, if they thought fit, subsequently to make that payment on his behalf. They may not unnaturally have at first hesitated to undertake the responsibility, and endeavoured to avail themselves of the absence of a *panri*; still, when they subsequently made the payment, not indeed of the whole amount, but such as had been arrived at upon a reference to a kind of arbitration, they were entitled to treat the use of their name by the defendant as an authority to make that payment on his behalf, and the defendant cannot dispute their right to do so. In other words, they had a right to ratify the use which he had made of their name, and they have not deprived themselves of that right by their previous conduct in, for a time, repudiating their liability.

Under these circumstances, their Lordships are of opinion, that the judgment of the Judicial Commissioner was erroneous, and they will humbly advise Her Majesty that that judgment

be reversed, and that the judgment of the Commissioner of Ajmere be affirmed, with costs of this appeal.

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Agent for the appellants: Mr. *T. L. Wilson.*

Agents for the respondent: Messrs. *Burton, Yeates,* and *Hart.*

APPELLATE CIVIL.

Before Mr. Justice Mitter and Mr. Justice Tottenham.

THE COLLECTOR OF MONGHYR, ON BEHALF OF RUDER PROKASH MISSER (PLAINTIFF) *v.* HURDAI NARAIN SHAHAI AND ANOTHER (DEFENDANTS).*

1879 *July* 14.

Res Judicata—Mitakshara Law—Alienation, Voluntary and Involuntary, by Members of a Family governed by the Mitakshara Law.

A, a Hindu governed by the Mitakshara law, after the attachment of a property, part of his ancestral estate, to which he and his minor son *B* were jointly entitled as members of a joint Hindu family, conveyed by a deed of gift the whole of his interest in the ancestral property, including the property under attachment, to *B*. Five days after the execution of the deed of gift, the property was sold in execution of the decree of the attaching creditor *C*, and was purchased by *C* at such sale. Ten days after the sale, *A* instituted proceedings under s. 256 of Act VIII of 1859 to set it aside on the ground of irregularity. These proceedings were afterwards continued in the name of *A*, but virtually on behalf of the minor *B*, under the control and direction of the Collector, who had taken charge of his estate, and appointed a manager under Act XL of 1858.

These proceedings terminated in 1874 by the application to set aside the sale being dismissed, and the sale was, therefore, confirmed, and *C* took possession of the property.

In 1877, a suit was instituted on behalf of *B* by the manager appointed by the Collector against *C* and *A* to recover possession of the property, on the ground—(1), that when it was sold, it was not the property of *A*, the judgment-debtor; and (2), that the property of a joint Hindu family could not be sold or alienated by, or taken in execution of, a decree against a single member of that family.

Held (1), that the fact, that the plaintiff, through his guardian, had actively intervened in the proceedings under s. 256 of Act VIII of 1859, was no bar to

* Appeal from Original Decree, No. 310 of 1877, against the decree of J. W. Lowis, Esq., District Judge of Bhaugulpore, dated 25th July 1877.