

ORIGINAL CIVIL.

Before Mr. Justice Pigot.

NARAIN CHUNDER DHUR (PLAINTIFF) v. COHEN (DEFENDANT.) 1884

Market rate—Ascertainment of market rate in suit on an agreement of indemnity—Evidence. February 21.

Where the Court has had the advantage of having in evidence before it a record of the market rate of any particular day made up by a broker of intelligence and experience, such a record should be received as evidence of the particular state of the market on that day.

THIS was a suit upon an agreement which was entered into by Cohen to indemnify the plaintiff against any loss which might be sustained under a contract entered into between Narain Chunder Dhur and the Camberhatty Co., Limited. The facts were that Cohen, who was a broker, had informed the plaintiff that he knew of a contract for the purchase of six lacs of gunny bags, which contract he advised the plaintiff to take over; he (Cohen) being willing to give the plaintiff an indemnity against loss on the contract. The contract was taken over by the plaintiff, and the indemnity given by Cohen.

The contract resulted in a loss, and the indemnity was put in force against Cohen. His defence was that even assuming the agreement to be an agreement of indemnity, the plaintiff was not entitled to ask for damages, inasmuch as he, Cohen, had, a month after the contract had been taken over by the plaintiff when the market rate had gone up, informed him that he, Cohen, had a purchaser who would take the contract off the plaintiff's hands.

Mr. *Gasper* and Mr. *Sale* for the plaintiff.

Mr. *Hill*, Mr. *Bonnerjee* and Mr. *Handley* for the defendant.

During the hearing it was sought to prove the market rate of gunny bags on certain particular days, and for that purpose Mr. *Delius*, a member of the firm of *Poppé, Delius & Co.*, brokers, was called and examined by Mr. *Gasper*; the witness giving the following evidence: "My firm makes out weekly quotation of rates of gunny bags. I have a return here for the 27th March 1882.

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It was drafted by me or my partner, it is very difficult to say by which of us, written by my baboo, and signed by myself. The returns of the 3rd, 10th, 17th, 24th April, were all signed by me. They must have been made by me, because my partner was at home at the time. The return for the 20th March 1882 is signed by me, it must have been so, as my partner was at home. These returns are made out according to the tone of the market during the week, particularly on the closing day, and likewise the rates. It is difficult to explain how the market rate is ascertained. The contracts which we enter into constitute one of the elements from which these returns are made up. Many transactions are often made which we do not take notice of. We ascertain the market rate from the better class of buyers. We disregard speculators' contract, and purchases by bad buyers, as they can't buy except at higher rates than European buyers or first class buyers. For instance, I know the rate at which my buyers will buy to-day, though the mills may be asking more than those rates; still I know that I can get the bags at the rates my buyers will buy at. I strike the market rate from what the producers are asking and my buyers are willing to pay. Our quotations vary from 4 annas to 8 annas according to the state of the market within that basis. The quotations are made on the day previous to the date they bear."

Mr. *Gasper* submitted the witness could refer to the quotation.

Mr. *Hill* objected.

PRICOR, J.—The question is what was the rate prevailing in the market at the time the memorandum was prepared for what I may call sound business. The returns prepared by this gentleman are, as Mr. *Delius* states, records made by him at the time of what he knew, or believed he knew, to be the fact with regard to the market rate of such transactions. The facts which were then present to his mind were—(1) What within his knowledge buyers were willing to offer, and what within his knowledge the producers or sellers were asking. Along with that there was the further fact, the transactions which were actually entered into, and upon these classes of facts, all of which are facts, he compiled this record. Now, the market rate of any day is nothing more than a compilation of the result of various facts connected with the trade of that day.

and what I desire to do in ascertaining the particular state of the market on any day, is not to cast on the Court the duty of gathering rates from contracts and from them to strike for itself the market rate, but I desire to hold that when the Court has the advantage of having in evidence before it, a record of the rates made by a gentleman of intelligence and experience on that day, it should have that advantage, the advantage of having the rates made out in that way, in preference to computing the rate for itself. I therefore admit the quotations.

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Attorney for plaintiff: Messrs. *Barrow & Orr*.

Attorney for defendant: Mr. *C. F. Pittar*.

APPELLATE CIVIL.

Before Mr. Justice McDonell and Mr. Justice Field.

JANOKY BULLUBH SEN (ONE OF THE DEFENDANTS) v. JOHIRUDDIN.
 MAHOMED ABU ALI SOHER CHOWDHRY (PLAINTIFF.)*

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 February 26.

Lien—Sale in execution of Decree—Section 295 (Act XIV of 1882), provisions—Lis pendens—Judicial lien.

Where two mortgagees, in execution of their several decrees, attached the same property, of which a moiety without further specification was respectively mortgaged to each of them, and subsequent to the attachments the property was sold in execution of one of the decrees, *Hold*, that notwithstanding the whole interests of the mortgagor was intended to be sold, the purchaser took one of the moieties subject to the lien of the unsatisfied mortgagee, and that omission or neglect on the part of the Court executing the decree to give specific direction as provided by clause (b) of s. 295 of the Civil Procedure Code did not prejudice the rights of the unsatisfied mortgagee or discharge his encumbrance.

ONE Nusiruddin borrowed two sums of money from the plaintiff and the defendant No. 2 under two separate mortgage bonds executed in their favour on the same date. Both the bonds after enumerating the several zemindaries in the possession of the mortgagor continued in these terms: "A moiety of all the above mentioned zemindaries bearing the above mentioned

* Appeal from Original Decree No. 91 of 1881, against the decree of Baboo Bhugwan Chunder Chuokerbutty, Rai Bahadur, Subordinate Judge of Rungpore, dated the 5th of January 1881.