

[ORIGINAL CIVIL.]

Before Sir M. R. Westropp, *Knt.*, Chief Justice, and Sir Charles Sargent, *Knt.*,
Justice.

1878,
March 15.

HAJEE ESMAIL HAJEE SIDICK AND ANOTHER } APPELLANTS
(ORIGINAL PLAINTIFFS) }

v.

SHAMJI POONJA'NI (ORIGINAL DEFENDANT) ... RESPONDENT.*

Marine insurance—Policy, construction of.

In a policy of insurance, effected in Bombay upon goods shipped from Calcutta to Jeddah, two clauses were inserted in writing, the rest of the policy being in the ordinary English printed form. The first written clause was in English as follows:—"Warranted free of particular average, unless stranded, sunk, or burnt." The second was written on the margin of the policy in the Gujaráthi language, and was to the following effect:—"Insurance upon the goods to be without damage. The loss arising from damage is to be on the head of the owner of the goods."

Held—The underwriters of such a policy are liable to the insurer for a particular average loss where the vessel, in which the insured goods are shipped, is stranded, sunk or burnt.

This was an action against the defendant as underwriter for the sum of Rs. 1,920 of a policy of insurance upon 680 bags of rice shipped by the plaintiffs from Calcutta to Jeddah. The ship *Hylbree*, in which the goods, together with other cargo, were conveyed, was wrecked on the 8th February 1876 upon a rock five or six miles off the port of Jeddah. Part of the cargo on board was saved, and duly delivered to the consignees, uninjured. The remainder, some portion of which was still under water on the wreck, was sold, more or less damaged, and the proceeds divided rateably among the persons interested. The sum allotted to the plaintiffs in respect of the 680 bags of rice was Rs. 308. For this sum the plaintiffs gave credit to the defendant, and sued to recover the balance of the amount for which the defendant had insured, viz., Rs. 1,612.

The policy, which was dated the 5th January 1876, was in the ordinary English printed form. Two clauses had been inserted in writing. The first of these was written in the body of the policy, and was in the English language as follows:—"Warranted free of particular average, unless stranded, sunk or burnt." The second was written on the margin of the policy, and was in Gujaráthi to the following effect:—"Insurance upon the goods

* Suit No. 568 of 1876.

to be without damage. The loss arising from damage is to be on the head of the owner of the goods." A memorandum of agreement, or *kacheha* policy, had been previously executed by the plaintiffs and defendant in which it was provided that "this insurance is agreed to be according to the rules of an English policy without damage."

The defendant contended that the plaintiffs had suffered merely a partial loss, and that the effect of the Gujaráthi clause was to exempt insurers from all liability except for total loss.

The action was tried by Mr. Justice Atkinson, who passed a decree for the defendant.

The plaintiffs appealed.

Kirkpatrick and *Inverarity* for the appellants.

B. Tyabji and *Lang* for the respondents.

WESTROPP, C.J. :—We are of opinion that no total loss of the plaintiffs' goods has been shown; but that to recover in this action it is sufficient, inasmuch as the ship was lost by being stranded upon a rock, to establish a particular average loss. Whether we look to the oral evidence as to the commercial meaning attached in Bombay to the Gujaráthi words importing "without damage," or to the true construction of the policy itself without the aid of such evidence, we must hold the defendant (respondent) to be responsible for a particular average loss. Except the testimony of the respondent himself, (who was strongly biassed by his interest,) and that of his one witness who—Mr. Justice Atkinson, it was admitted, said—was wholly undeserving of credit, the evidence was all in one direction, viz., that the ship having been stranded, the underwriters were, under such a policy as that sued upon here, liable for the damage, *i.e.*, the particular average loss incurred. The plaintiffs' witnesses, of whom four were insurance brokers, two were underwriters, and two were merchants, were unanimous on that point.

Independently, however, of their evidence, and looking at the documentary evidence alone in this case, we should have come to the same conclusion. In the Gujaráthi preliminary (*kacheha*) policy (exhibit No. I) it was stated that "this insurance is agreed to be according to the rules of an English policy without damage." What those rules are in Bombay, sufficiently appear in the seven-

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teen policies put in on behalf of the plaintiffs, and the two policies, marked No. 2, put in on behalf of the defendant. All of those policies contain in the body or in the memorandum the usual English clause—"free from particular average, unless stranded, sunk or burnt;" and in the margin the Gujaráthi clause to the effect that "this policy is without damage." The eight policies, marked No. 1, and put in on behalf of defendant, contain neither of these clauses. Hence it would seem that, according to the custom of Bombay, amongst native merchants and native underwriters, when either of these clauses appear in a policy, the other does so also. They are (so far as we can form an opinion from the documentary evidence before us) apparently invariably found together. The English clause occurs first in point of order. It is, however, unnecessary to resort to the rule as to deeds or contracts, that where clauses are inconsistent with each other, the first in order must prevail. There is no such irreconcilability here. Effect will be given to the Gujaráthi provision, that the policy sued upon is "without damage," by construing it to mean that the underwriters shall not be liable for damage, unless the ship be stranded, sunk or burnt, and this construction gives full effect to the English provision, also contained in the policy, that the underwriters are to be free from liability for particular average, unless the ship be stranded, sunk or burnt. Were we to give unlimited scope to the Gujaráthi stipulation, that the policy is to be "without damage," we should reject altogether from the English clause the excepting words "unless stranded, sunk, or burnt." These specific words control, but do not nullify, the principal words "without damage" in the Gujaráthi stipulation, and it is our duty so to construe the policy as to give effect, so far as is practicable, to all the provisions in the policy without wholly rejecting any of them. We decline to countenance for a single moment the argument that the underwriters, who have been subscribing such policies for many years, do not understand the meaning of the English clause.

Decree reversed.

Attorneys for the appellants :—*Messrs. Jefferson and Payne.*

Attorneys for the defendant :—*Messrs. Tyabji and Sayani.*