

ORIGINAL CIVIL.

Before Mr. Justice Farran.

HAJI ABDUL RAHMAN ALLA'RAKIIIA, (PLAINTIFF), v. HASAN-
BHOY VISRAM AND OTHERS, (DEFENDANTS).*

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March 15, 17

*Shipping—Charter-party—Optional clause—Choice of ports to load cargo—
Construction—Election—Election once made, final.*

The plaintiff chartered the defendants' ship to proceed from Bombay to Jedda and thence carry a cargo of pilgrims to Calcutta. The charter-party contained the following clause :—

“ Owners to have the option of requiring the charterer to ship salt at Ras Rawaya or at Aden to fill up the lower holds of the steamer, at a lump sum of Rs. 12,000 payable before delivery at the port of discharge. Rs. 2,000 to be deposited by the charterer on account of the above freight, out of which Rs. 1,500 to be paid here (Bombay) 48 hours before sailing, and Rs. 500 before departure of the steamer from Jedda.”

Before the ship left Bombay the plaintiff was called upon to pay and paid the Rs. 1,500 advance freight. On the ship's arrival at Jedda the plaintiff was required by the defendants' agent to name the port where he intended to load the salt, and pay the Rs. 500 named in the charter-party. The plaintiff, in reply, named Aden, and paid the Rs. 500, which the defendants' agent acknowledged as received “for filling up salt to go to Aden.” This was on the 22nd July. The captain, however, believing that the plaintiff would not find salt at Aden for Calcutta, refused to sail to Aden to load the salt, unless the expense of going there and returning to Jedda for the pilgrims was guaranteed by the plaintiff, which the plaintiff refused to do. Subsequently, on the 30th July, the captain, on the instructions of the defendants, informed the plaintiff that the choice of the port to load salt was with the defendants, and that they named Ras Rawaya as the port where the plaintiff was required to load his salt, and refused to go to Aden. The plaintiff refused to go to Ras Rawaya. There was, to the defendants' knowledge, no salt at Ras Rawaya. There was plenty of salt at Aden, though none offering for Calcutta, owing to the prices ruling at the latter port. The captain refusing to load the pilgrims unless the balance of the Rs. 12,000 salt freight was paid in advance, the plaintiff paid it, and brought this suit to recover the whole of the said sum.

Held, that the plaintiff was entitled to succeed (i) because by the true construction of the contract the choice of the port must be taken to be with the plaintiff, who had to do all that was necessary to provide the salt: the option given by the contract to the owners being as to whether they should require salt to be loaded or not: and (ii) because, if the election of the port was with the defendants, they, through their agent at Jedda, conclusively determined their election in favour of

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Aden at latest on the 22nd July when they accepted the Rs. 500 "for filling up salt to go to Aden."

THIS was a suit, on a charter-party entered into by the plaintiff with the defendants, to recover a sum of Rs. 12,000, alleged to have been wrongfully demanded by the defendants from the plaintiff, and paid by the plaintiff to the defendants under protest.

The defendants were the owners of the steam-ship *Sultan*. By a charter-party of the 11th June, 1890, made by the plaintiff with the defendants, in Bombay, the plaintiff chartered the *Sultan* to carry a full cargo of pilgrims from Jedda to Calcutta, the steamer not to sail from Jedda before 10th August, 1890.

An endorsement on the charter-party provided as follows:—

"Owners to have the option of requiring the charterer to ship salt at Ras Rawaya, or at Aden, to fill up the lower holds of the steamer, at a lump sum of Rs. 12,000 only, payable before delivery at port of discharge. Fifteen lay days to load and discharge, to commence after 24 hours of arrival at such port. Demurrage same as on the other side. Rs. 2,000 to be deposited by the charterer on account of the above freight, out of which Rs. 1,500 to be paid here 48 hours before sailing, and Rs. 500 before departure of the steamer from Jedda."

Ras Rawaya is a port some few hours' sail only from Jedda. Aden, for such a ship as the *Sultan*, is some three days' sail from Jedda.

On the 18th June the plaintiff in Bombay was called upon to pay, and paid the Rs. 1,500 advance of the salt charter freight. On the 21st June the *Sultan* sailed from Bombay to Jedda with the plaintiff on board as a passenger. She touched at Aden, where, the defendants alleged, it was ascertained, and brought to the notice of the plaintiff, that, though there was no want of salt, there was no salt offering for Calcutta, the prices there ruling being such as to prevent owners of salt shipping for that port.

On the 17th July the *Sultan* arrived at Jedda. On the 19th July, Háji Abdula Arab, the agent of the defendants at Jedda, sent the following notice to the plaintiff:—

"Jedda, 19th July, 1890,

"Dear Sir,—I beg to inform you that the S. S. *Sultan* is arrived here and is now discharging her cargo; she will finish her discharging on or aboutt the 21st instant. I, therefore, give you, hereby, notice of 48 hours to destine the port

where you intend to load the salt for Calcutta, and keep ready your every requisition relating to the same; also you are to pay Rs. 500, 24 hours before departure of the said vessel, according to her charter-party.

“(Signed) HAJI ABDULA ARAB,
“Agent of the S. S. *Sultan*.”

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The plaintiff replied that he should like to know more certainly the exact date when the ship would have completed discharging her cargo; to which Hájí Abdula replied on the 20th July as follows:—

“*Jedda, 20th July, 1890.*”

“Dear Sir,—I now give you a certain date that the above-mentioned S. S. *Sultan* will proceed to your destined port on 22nd instant. Therefore I give you, hereby, notice to destine the port in 24 hours from this date and pay Rs. 500, according to the charter-party relating to the salt for the port of Calcutta.

“(Signed) HAJI ABDULA ARAB,
“Agent for the S. S. *Sultan*.”

On the 22nd July the plaintiff sent to Hájí Abdula Rs. 500 with this letter:—

“*Jedda, July 22nd, 1890.*”

“Dear Sir,—As soon as your vessel is ready for sea, kindly proceed to Aden, there to load a cargo of salt in your lower holds, in terms of charter-party dated Bombay, 11th June, 1890.

“In accordance with the said charter-party I beg to send you herewith Rs. 500.

“(Signed) HAJI ABDUL RAHMAN ALLÁ'RAKHIA,
“Charterer.”

A receipt for the money was given to the plaintiff, which ran as follows:—

“*22nd July, 1890.*”

“To SETH HAJI ABDUL RAHMAN ALLÁ'RAKHIA, written by Hájí Abdula Hájí Arab.

“To wit, from you rupees five hundred in respect of charter-party steamer *Sultan* for filling up salt to go to Aden in advance on account as above received. This receipt has been given to you for it.”

On the same day the captain telegraphed to the defendants in Bombay as follows:—

“Received order proceed Aden. No salt there for Calcutta. Wire instructions.”

On the 23rd July the plaintiff wrote the following letter:—

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"TO THE COMMANDER OR AGENT, S. S. *Sultan*.

"Dear Sir,—Referring to my notice of yesterday, I shall be glad to know at what hour you propose going to Aden, so as I can give you the necessary letter to my agents there as to the salt you are to load.

"(Signed) HĀJĪ ABDUL RAHMAN ALLĀRAKHĪA,
Charterer."

The captain, however, refused to sail for Aden without a guarantee that salt would be got on arrival, or if not, that the plaintiff would, at any rate, pay the Rs. 12,000, the agreed freight. The plaintiff refused to give any such guarantee, and lodged a protest before the British Consul at Jedda against the captain for not proceeding to Aden to load salt. The captain replied with a counter protest, in which he gave his reasons for refusing to sail, as follows:—

July 25th, 1890.

" . . . I asked the charterer to give me a guarantee that I would get salt upon arrival. I did this, because my Aden agent wired to my agent here that no salt was to be had at Aden for Calcutta. I also asked the charterer for a guarantee for the estimated amount of freight of Rs. 12,000 in case there was no salt for the steamer upon her arrival at Aden. To both of these requests he offered no satisfactory answer.

"I hereby protest against the conduct of the said charterer, on the ground that, knowing there was no salt at Aden, he wished to compel me to burn coals and lose much time to no purpose in going to and returning from Aden for nothing; thus putting the owners of the steamer to much unnecessary expense, besides causing the steamer to lose her pilgrim charter, which would probably be to his advantage; and I consider it simply a ruse on his part to effect this by requiring me to go to Aden. . . ."

The defendants, who had, in the meanwhile, been kept informed by the captain, or their agent HĀjĪ Abdula, of all that was being done at Jedda, telegraphed on the 29th July to the captain as follows:—

"Our option, load salt Ras Rawaya. Notify charterer our readiness load there; otherwise take pilgrims only under protest for salt freight."

The captain accordingly telegraphed to the plaintiff, (who was then at Mecca), as follows:—

"Owners, who have the option, according to the charter-party, of loading salt either at Ras Rawaya or Aden, have elected to load at Ras Rawaya. I, therefore, give you notice that I am ready to start for Ras Rawaya at once. Please wire your agents there."

It was proved that there was no salt at all at Ras Rawaya, and that the defendants when sending their telegram of the 29th were aware of that fact.

On the 2nd August the captain sent the following notice to the plaintiff:—

“*Jedda, August 2nd, 1890.*”

“Sir,—This is to give you notice that having failed to carry out the terms of the salt charter-party, the owners wishing the steamer *Sultan* to load at Ras Rawaya, notice to this effect having been duly given to you and asking for your agent's name there to which you made no reply, I hold you responsible for the Rs. 12,000, estimated amount of freight, and this sum must be paid to the owners' agents here 48 hours before the pilgrims embark.

“(Signed) WILLIAM JOHNSON,
“Master, Steamer *Sultan*.”

The plaintiff thereupon lodged a formal protest before the British Consul, and paid Rs. 10,000, the balance of the Rs. 12,000 claimed. The pilgrims were then allowed to be loaded, and the ship sailed for Calcutta.

The plaintiff now sued to recover this money.

The following issues (amongst others) were raised for the defendants:—

(2) Whether the defendants had not the option to name the port at which salt was to be loaded?

(3) Whether the plaintiff had any salt to ship at either of the two ports?

(4) Whether the master of the *Sultan* was not justified in giving the notice of the 30th July?

(5) Whether the defendants elected Aden as the port at which salt was to be loaded, as contended by the plaintiff?

(6) Whether on the 30th July, 1890, it was too late for the defendants to elect to go to Ras Rawaya to ship salt?

The other issues raised are not material for the purposes of this report.

Jardine and *Anderson* for the plaintiff:—We say, in the first place, that the choice of the port was, by the contract, left with us. Every practical consideration points to that as necessarily the intention of the parties, and the Court would only come

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to another conclusion if absolutely compelled to do so. The contract may be read either way. There are two options in the clause: (1) whether salt is to be loaded or not; (2) at what port it is to be loaded. The first very properly belongs to the shipowner; his decision would depend upon the other engagements of his ship. But the second as properly belongs to the charterer, who has to make his arrangements for the salt so soon as he knows that salt is to be loaded. Moreover, this is how all parties understood the clause till the defendants found it to their interest to put another construction on it. And, legally, the presumption is the same way, on the well-known principle that, "in case an election be given of two several things, always he which is the first agent, and which ought to do the first act, shall have the election"⁽¹⁾; see also cases cited in Leake on Contracts (1878), p. 676.

Secondly, if the choice of the port was with the defendants, they, under the circumstances of the case, must be taken to have chosen Aden. The acceptance, at any rate, of Rs. 500, on the 22nd July, "to go to Aden for filling up salt," was a conclusive election of that port. An election, once made, is binding and irrevocable. Once made, it is the same as if there had been no election—*Brown v. Royal Insurance Company* ⁽²⁾; *Gath v. Lees* ⁽³⁾; Leake on Contracts (1878), 679; Addison on Contracts (8th Ed.), 1188. The defendants refused to go to Aden, and, therefore, cannot claim the salt freight. Whether the plaintiff would or would not have succeeded in getting salt there, is immaterial. But, as a matter of fact, it is clear that salt was to be had at Aden; it was only a question of price; while at Ras Rawayā admittedly there was no salt.

Latham (Advocate-General) and *Badrudin Tyabji* for defendants, *contra*:—The clause in the charter-party is clear, and gives the option to the owners. As a matter of fact, there were not two options, but only one. The plaintiff was bound to load salt; Rs. 1,500 advance freight had actually been paid by him under the salt charter before the ship left Bombay. Therefore the only subject of choice was between the two ports. If it is an onerous

(1) Co. Lit. (19th Ed.), 145a.

(2) 1 El. & E., 583; 28 L. J. Q. B., 275.

(3) 3 H. & C., 558.

contract, the plaintiff has only himself to blame; he should not have entered into it. The opposite construction makes it almost equally onerous to the defendants, for it is a very much more expensive trip to Aden and back from Jedda, than to Ras Rawaya and back.

[FARRAN, J. :—It appears from the evidence that, at the time the charter-party was entered into, the defendants thought that the ship could load salt after she had taken her pilgrims on board, and in course of her voyage from Jedda to Calcutta.]

That is so, no doubt, but that turned out to be a mistake.

Then we say what occurred at Jedda prior to the 30th July did not amount to a deliberate and conclusive choice, on our part, of Aden. The plaintiff was in no way prejudiced by our not declaring Ras Rawaya earlier than the 30th July, and so cannot complain of our doing so, if the choice was by the contract with us.

FARRAN, J. :—The points arising for decision in this case are somewhat nice, but as my mind is made up as to what my decision should be, I will not reserve my judgment.

The charter-party here provides that “the owners are to have the option of requiring the charterer to ship salt at Ras Rawaya or at Aden, to fill up the lower holds of the steamer, at a lump sum of Rs. 12,000 only, payable before delivery at port of discharge * * * Rs. 2,000 to be deposited by the charterer on account of the above freight, out of which Rs. 1,500 to be paid here (*i. e.* Bombay) 48 hours before sailing, and Rs. 500 before departure of the steamer from Jedda.”

The Rs. 1,500 were demanded and paid in Bombay on the 18th June, and the ship sailed on the 21st June for Jedda under the charter-party. She touched at Aden on her way, and there it was ascertained that there would be some difficulty in getting salt for Calcutta. On the 17th July she reached Jedda, and was, by previous arrangement made by the owners, put into the hands of Hájí Abdula Arab, who must be treated, I think, in all respects as the agent of the owners, to act for them either alone, or in conjunction with the master of the vessel, in the usual way. On the 19th July the agent gives the charterer notice that the vessel

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will have finished discharging on the 21st instant, and calls on him "to destine the port where you intend to load the salt," and to pay the Rs. 500 according to the charter-party. This notice is repeated; and on the 22nd July the charterer writes requesting that the ship may be sent to Aden for the salt, sending with the letter the Rs. 500 payable under the charter-party. The Rs. 500 is accepted: the receipt for it recites that it is received in respect of the charter-party "for filling up salt to go to Aden." Soon afterwards the captain, believing that no salt will be found at Aden for Calcutta, and that he will, in going to and returning from there, be engaged in a fool's errand, refuses to go to Aden unless the balance of the freight, Rs. 10,000, is paid down in advance. Formal protests are entered by either side before the British Consul at Jeddah. On the 29th July, the owners telegraph from Bombay that the option is with them, and name Ras Rawaya as the port they elect to go to; and on the next day the charterer is so informed, and required to load salt at Ras Rawaya. This the charterer refuses to do; and the captain insisting on payment of the Rs. 10,000, balance of the salt freight, as a condition precedent to allowing the pilgrims to be loaded on board, the charterer pays this sum under protest, and now brings this suit to recover that sum, as well as the Rs. 2,000 previously paid on the same account.

On this state of facts, the first question that arises is, with whom—the shipowner, or the charterer—is the option to select the port at which salt is to be loaded? This depends on the wording of the clause in the charter-party, read by the light of all the surrounding circumstances. The clause runs: "the owners to have the option of requiring the charterer to ship salt at Ras Rawaya or at Aden." Rs. 1,500 of the freight for the salt charter was to be paid here in Bombay 48 hours before sailing for Jeddah.

Now it is important to bear in mind that, at the time this charter-party was entered into, the owners were under the impression that salt could be loaded at Aden after the pilgrims had been taken on board,—that is, in the course of the voyage from Jeddah to Calcutta. Thinking that, it was practically a matter of indifference to them whether the ship loaded at Aden or at Ras

Rawaya—the latter port being but a few hours' sail from Jeddah. To the charterer, however, who had to provide the salt cargo, it was of course of immense importance to have the choice of the port at which he should load; so much so, indeed, that it is difficult to believe that he would willingly, and intentionally, enter into so onerous a charter as the defendants' contention would make this out to be.

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Now I think that in the clause we have two sets of alternatives contained: (1) whether salt shall be shipped or not; and (2) whether it shall be shipped at Ras Rawaya or at Aden. It was urged by the Advocate General that there was only one alternative—the second—because the Rs. 1,500 advance freight having been demanded and paid before the ship left Bombay, the charterer was bound to ship salt. But that, I think, is an erroneous argument. That fact does not show that there was not the first of the two options. On the contrary, by demanding and accepting the advance freight of Rs. 1,500 in Bombay, the defendants concluded that option—which was undoubtedly with them—in a particular way.

If that is so, the clause becomes reasonable and intelligible if we suppose the first option to be with the owners, and the second with the charterer. As I have said, it was the charterer who had to find the salt; and it is only reasonable to suppose that the choice of the port would be with him: and it is not unworthy of remark that this is how the captain, himself a man of some experience in this trade, admits that he understood it. The legal presumption is the same way: see Leake on Contracts (1878), p. 676. If there is any ambiguity in the clause, it should be read against the interests of the person drawing it up; but this is a principle, which, in such a case as this, I should not be inclined to press very far.

In any case, however, I think the plaintiff must succeed on the ground that, if I am wrong in the above, and the choice of the port was, by the charter-party, with the defendants, the latter must be taken, under the circumstances of this case, to have elected to send the plaintiff to Aden; and, having so elected, could not afterwards change their minds and require the plaintiff to go

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to Ras Rawayá. An election once definitely made is final, apart from all collateral considerations—*Brown v. Royal Insurance Company*⁽¹⁾; *Gath v. Lees*⁽²⁾.

I have already found that Abdula Arab was defendants' agent at Jeddá, and represented them in the various communications that passed between him and the plaintiff at that port. If the choice was with the defendants they could, of course, if they sô chose, leave it to the plaintiff to elect, and this, I think, they clearly did. If not before, at any rate on the 22nd July, when Rs. 500 were paid by the plaintiff, and accepted by Abdula, "for filling up salt to go to Aden," the port of Aden was, I think, definitely and conclusively determined upon as the port at which the charterer was to load his salt. After that it was not open to the shipowners to go back on the matter, and say "the choice was with us, and we have not yet exercised it; we name Ras Rawayá."

I find, therefore, on the fifth issue raised, that the defendants did elect to go to Aden, and that afterwards, on the 30th July, they absolutely refused to go there. Consequently, I find that the plaintiff was relieved from his responsibilities under the salt charter, since it is admitted that he could not have loaded salt at Aden with the pilgrims on board. Moreover, the defendants were then insisting that he should load it at Ras Rawayá, and not at Aden. There will be a decree for the plaintiff for the sums he was called upon to pay under the salt charter, with interest at 6 per cent. from the dates on which the various instalments of that sum were paid, with the costs of the suit.

Attorneys for the plaintiff:—Messrs. *Crawford, Burder, Buckland and Bayley*.

Attorneys for defendants:—Messrs. *Conroy and Brown*.

(1) 28 L. J. Q. B., 275.

(2) 3 H. & C., 558.