

1871
 KHUGOWLEE
 SING .
 v.
 HOSSAIN BUX
 KHAN.

They are of opinion that he was right in holding that the plaintiffs had failed to establish the validity of the ikrarnama, which was the foundation of their case, and in dismissing their suit. Their Lordships will accordingly advise Her Majesty to allow this appeal, to reverse the decree of the High Court, and to direct that in lieu thereof a decree be made dismissing the appeal against the decree of the Zilla Judge with costs. If the appellants have paid any costs under the order reversed, those costs must be refunded, and they must also have their costs of this appeal.

Appeal allowed.

Agent for appellants: Mr. *Wilson*.

[APPELLATE CIVIL.]

Before Mr. Justice Bayley and Mr. Justice Paul.

INDUR CHANDRA DUGAR (ONE OF THE DEFENDANTS) v. LACHMI
 BIBI (PLAINTIFF).*

Hundi—Duplicate—Acceptance—Custom.

The plaintiff obtained a hundi from a banker, B., at Baluchar, for a certain amount drawn upon the firm of the latter at Calcutta. Afterwards on her representing to B. that she had lost the hundi, B. granted the plaintiff a duplicate, in the body of which it was stated that if the original had been accepted before presentation of the duplicate, the latter was to become null and void. The duplicate was presented to the agent of B. at Calcutta, and payment was refused on the ground that the original had been presented and accepted and paid in due time. *Held*, that the plaintiff had no cause of action against B. for non-payment of the duplicate hundi, nor for money had and received on account of the original consideration having failed.

Custom cannot affect the express terms of a written contract.

THE plaintiff on the sixth day of the dark side of the moon in Jaishtha 1926 Sambat, 31st May 1869, obtained a hundi for Rs. 1,000 from the firm of Indur Chandra Dugar at Baluchar,

* Special Appeal, No. 2554 of 1870, from a decree of the Officiating Judge of Moorshedabad, dated the 23rd September 1870, affirming a decree of the Subordinate Judge of that district, dated the 31st May 1870.

drawn upon his firm at Calcutta. She alleged that this hundi was lost, and that she thereupon gave notice of the fact to the firm at Baluchar, and obtained a duplicate; that when the duplicate was presented for payment to the firm in Calcutta, payment was refused, with an endorsement on it, stating that the original hundi, presented by Haranand Roy Dowlat Ram, had been accepted and paid; that thereupon she gave notice of the dishonor of the duplicate hundi by the Calcutta firm to the drawer of the hundi at Baluchar, and demanded payment from him. On his refusing to pay, she brought this suit to recover the amount of the hundi paid by her from him, making the person who had presented the original hundi to the firm of the drawer at Calcutta a defendant along with him.

The defendant No. 1. Indur Chandra Dugar, admitted having drawn the hundi, and having granted the duplicate, as alleged by the plaintiff, but he contended that he was not liable to pay the amount of the original hundi to the plaintiff, as he had issued the duplicate on the express understanding that it was not to be paid if the first had been accepted before the presentation of the second, and that this condition was inserted in the body of the duplicate hundi, and that his firm at Calcutta had accepted and paid the original hundi, before the presentation of the duplicate, in good faith and in due course of business, to one Haranand Roy Dowlat Ram, a respectable man. The defendant No. 2 Dowlat Ram urged that the plaintiff had disclosed against him no cause of action; that he was not liable for the money, and that he had, in good faith and in course of business, obtained the original hundi from one Debi Dutt Ponkesmal.

The Subordinate Judge held that the plaintiff had proved a custom among bankers that, whenever a duplicate hundi is issued, the firm or individual, who has to accept and pay it, must call for a triplicate from the drawer before honoring the hundi. On this point the Subordinate Judge remarked:—"In short, from the tenor of the evidence of these witnesses above named, it seems incumbent on the gomasta in charge of the defendant's firm at Calcutta, to call for a triplicate from the drawer, his employer's firm at Baluchar, and to make payment after hearing therefrom, but it does not appear that the gomasta

1871
INDUR CHAN-
DRA DUGAR
v.
LACHMI BIBI.

1871
 INDUR CHAN
 DRA DUGAR
 v.
 LACHMI BIBI.

“had acted in compliance with this custom, so that the defendant
 “No. 1, the drawer, is bound to pay the amount of the dupli-
 “cate hundi to the plaintiff.”

With regard to the words in the body of the duplicate hundi, which declared that it should be null and void after the acceptance of the first, the Subordinate Judge held that, as this condition was contrary to banking usage, the defendant could reap no advantage from it. The Subordinate Judge gave the plaintiff a decree for the amount to be recovered from defendant No. 1, the drawer of the hundi, remarking that the defendant No. 1 could recover the amount from defendant No. 2, by a separate suit against him. Defendant No. 1 appealed to the Judge, who affirmed the decision of the Court below. He observed:—“The
 “evidence as to the custom which exists with reference to transac-
 “tions of the kind referred to in this suit is, I think, sufficient to
 “support the judgment of the lower Court as to the liability of
 “the appellant.

“It is urged by the appellant that, inasmuch as the duplicate
 “granted to the plaintiff contained a condition that it should be
 “payable only if the first draft had not been accepted, the
 “duplicate can have no legal validity. But the evidence as to
 “custom sufficiently shows that a person who asks for and
 “obtains a duplicate draft is entitled to have payment of the
 “original draft refused, until a triplicate be obtained, and the
 “defendant cannot, I think, be allowed to deprive the plaintiff
 “of this benefit by the insertion of a condition which would
 “have that effect if the defendant’s argument be admitted. The
 “duplicate appears to me to be one which must be decided
 “according to custom, and I therefore dismiss this appeal.”

Against this decision of the Judge, the defendant Indur Chandra preferred a special appeal to the High Court.

Baboo Hem Chandra Banerjee (with him Baboo Chandra Madhab Ghose), for the appellant, in the first place urged, that both the Courts below had assumed the loss of the original hundi, without deciding it as a question of fact upon evidence, and that in the lower Appellate Court, the defendant had brought to the notice of the Court the evidence which would have estab-

lished the sale of the original hundi by the first holder of it. He next contended that the issue of the duplicate was not unconditional, but contained an express stipulation that it should be null and void if the first had already been accepted and paid ; that as it was not even alleged, much less proved, that the acceptance of the first was made in collusion with the party presenting it, in order to defraud the plaintiff, and that as on the other hand, the defendant had alleged and proved that the acceptance was made in due course of business, *bonâ fide*, and with ordinary precaution, as the party presenting it was admitted to be a respectable and wealthy man, the plaintiff could have no equitable ground for asking the Court to give him a decree for the amount recoverable against the defendant. As to the alleged custom, he urged that the evidence was contradictory, and only went to establish that, in case of a doubt, a triplicate should be called for. The evidence, however, of all the witnesses proved a custom that, before the agent of the drawer received any notice of the issue of the duplicate, or of the loss of the original hundi, he would be fully justified, according to the usage of bankers, in honoring the original, though presented by a transferee, upon being satisfied that the party presenting it was a respectable and known person. In this case the agent at Calcutta had taken precisely that course. The hundi was a negotiable instrument, and therefore passed by mere transfer. Further he contended that the plaintiff, if there were such a custom at all as the lower Courts found, must have been aware of it at the time he asked for and obtained a duplicate, and it must be presumed that, when he took it with that express condition, he waived the application of any alleged custom.

Baboo *Kali Mohan Das*, for the respondent, urged that the plaintiff had lost her money by the acceptance in Calcutta which was made carelessly and contrary to the custom of bankers. Had the agent adopted the ordinary precaution of calling for a triplicate, this loss would not have occurred to the plaintiff. The plaintiff had proved the invariable custom of calling for a triplicate whenever a duplicate was issued ; in this case, that custom had been deviated from and the plaintiff was therefore entitled

1871

INDUR CHAN-
DRA DUGAR
v.
LACHMI BIBI.

1871 to sue and recover from the defendant the amount of the hundi.
 INDUE CHAN- As to the condition in the duplicate hundi, he contended that
 DRA DUGAR the acceptance of the original referred to in it was not an
 v. the acceptance of the original referred to in it was not an
 LACHMI BIBI. acceptance in favor of any body and every body, but an accept-
 ance in favor of the plaintiff, or of some one else *bona fide*
 presenting in her behalf. It was never intended that the con-
 dition should override the custom, but that it should be con-
 strued by the light of the custom.

Baboo *Hem Chandra Banerjee* was not called upon to reply.

PAUL, J.—In this case the facts are very few and very simple. It appears that the plaintiff, on the 6th day of the dark side of the moon in Jaishta 1926 Sambat (31st May 1869) obtained a hundi for Rs. 1,000 from the defendant's firm at Baluchar, drawn upon his firm at Calcutta.

The plaintiff alleged that that hundi was lost, and on representation of that fact to the defendant, he granted the plaintiff a second hundi drawn by his said firm at Baluchar upon his said firm at Calcutta; and in the body of this duplicate it was stated that, if the original be found accepted, the duplicate shall become null and void. It appears on the evidence that, when the duplicate hundi was presented to the defendant's firm at Calcutta, the original had already been accepted, and the result was that the Calcutta firm declined to accept the duplicate stating at the top of it that they had already accepted the original hundi presented by one Haranand Roy Dowlat Ram, the defendant No. 2 in this case. In doing this they allege that they followed the terms of the duplicate hundi. Thus, the plaintiff brings this action in one of two ways, either for the non-acceptance of the duplicate hundi, or to recover money had and received on the ground that the original consideration failed.

It is quite clear that the non-acceptance of the second hundi was in accordance with the strict terms of that hundi, and this circumstance of refusal cannot give the plaintiff any cause of action.

As to the plaintiff seeking to recover the amount of the

original hundi, on the ground that the consideration failed, it appears to me that the plaintiff must lose her suit also. I think the consideration had not failed, for it is admitted by the plaintiff herself that the original hundi had been accepted by the defendant's firm at Calcutta before the duplicate was presented, and that, on due date of the original hundi, the amount thereof was paid by the acceptors. Under these circumstances it cannot be said that the consideration failed.

But an element of confusion has been imported into the case by the evidence of some witnesses as to custom. That alleged custom cannot possibly override the plain terms of the contract, as is evident from the clear language of the second hundi; but besides that, the evidence in this case seems only to go to the extent of showing that, in the event of both the original and the duplicate being presented for payment by persons of equal respectability, some further proceedings should be taken by the production of a triplicate, and the payment stopped until the dispute is settled. That custom therefore does not affect the present case before us. If the custom however, does not amount to that, but amounts to what the plaintiff contends for, *viz.*, that notwithstanding the payment of the original hundi, the duplicate must also be paid for on presentation, all that I can say is that such custom is irrational, absurd, and contrary to the principles of equity and good sense, and cannot be sustained as a custom in a Court of Justice. If the plaintiff had only been guided by the ordinary principles of honesty and justice she would have refrained from bringing the suit in this case. The suit in fact seems to be a sort of oppression attempted to be committed on the defendant, for nothing but a pure act of grace and courtesy could render it obligatory on the defendant to grant the duplicate hundi to the plaintiff, on the bare allegation of the loss of the original. The defendant was not bound to grant her the duplicate until she fully guaranteed him against any future demand. The result is that the honesty of the motive by which the defendant was actuated has been very ill recompensed by the proceedings which the plaintiff has taken against him in the present suit. I think that the suit against defendant No. 1, must fail for all these reasons, and that the suit

1871

INDUR CHAN-
DRA DUGAR
v.
LACHMI BIBI-

1871
 INDUR CHAN.
 DRA DUGAR
 v.
 LACHMI BIBI.

against defendant No. 2 must equally fail, for there is no evidence that the original hundi was really lost, and had not passed into the hand of this defendant *bond fide* by sale and purchase.

The result is that this appeal must be allowed, and the plaintiff's suit dismissed with all costs.

BAYLEY, J.—I think it is not necessary in this case to go into the question of custom, for the duplicate hundi and the endorsement upon it show the one distinct condition that no acceptance of the duplicate should be made if the original were once accepted, and the other that the original hundi had been accepted. The payment of the duplicate therefore by the very terms of that document is not due on the duplicate. The first hundi once accepted was an acceptance of all liability to the total amount of the bill, *viz.*, Rs. 1,000, and this suit by the plaintiff is only an attempt to make the defendant twice liable for one and the same amount. The duplicate was given by the defendant, on the mere representation of the loss of the original, as an act of grace.

I agree in reversing the judgment of the lower Courts with costs.

Appeal allowed.

[ORIGINAL CIVIL.]

Before Mr. Justice Phear,

1871
 June 26.

P. F. HUGHES *v.* THE SECRETARY OF STATE FOR INDIA
 IN COUNCIL.

*Contract of Service.—Suit against Government for Wrongful Dismissal—
 Public Servants.*

A suit for wrongful dismissal by one of its servants will lie against the Government.

In a suit by a subordinate officer in the P. W. D. for wrongful dismissal, against the Government, in which it was admitted that there was no time of service fixed and in which the plaintiff put in a memorandum of agreement between himself and the Government, stipulating that he should give six months' notice of his intention to leave the service of the Government,—