P. C.*
1904
Feb. 25.
March 23.

DURGA PROSAD SUREKA
v.
BHAJAN LALL LOHEA.

[On appeal from the High Court at Fort William in Bengal.]

Contract—Bought and sold notes—Misrepresentation—Fraud, effect of—Right of plaintiff to fall back on original contract—Evidence Act (I of 1872) ss. 91, 92, (1)—Damages for breach of contract.

The plaintiff made a contract by telegram with the defendants for the purchase of a full cargo of kerosine oil, which the defendants had themselves contracted to buy from a firm of merchants in Calcutta.

That firm declined to have their contract with the defendants transferred into the plaintiff's name and it was therefore arranged between the plaintiff and the defendants that bought and sold notes should be exchanged.

In carrying out this arrangement the defendants misrepresented the amount of the cargo, and the words "100,000 cases" were inserted in the bought and sold notes when the cargo really consisted of 125,000 cases of oil.

Both the Courts below found that this misrepresentation was fraudulently made.

The High Court in its Original Jurisdiction held that the bought and sold notes were invalidated by the fraud and gave the plaintiff a decree for damages on his contract as proved by the oral evidence.

The High Court in appeal treated the case as founded on the bought and sold notes, and held that no other evidence of the contract could be given, and dismissed the suit.

Held, that the bought and sold notes having been falsified, the plaintiff was entitled to disregard them and fall back on his original contract.

Appeal from a judgment and decree (29th March 1901) of the High Court at Calcutta, by which a judgment and decree (25th July 1900) of the same Court in its ordinary Original Civil Jurisdiction was reversed and the suit of the appellant dismissed.

* *Present:*—Lord Davey, Lord Robertson and Sir Arthur Wilson.

The plaintiff and the assignees of his estate and effects under his insolvency appealed to His Majesty in Council.

The facts, out of which the suit arose, were as follows:—

The plaintiff carried on a large business as a dealer in kerosine oil in the name of Bissendyal Durga Prosad. The defendant Bhajun Lall Lohea was a broker, and the other defendants Ghanesham Dass, Fool Chand, Gujanand, and Bansidhar carried on business as dealers in oil in the name of Bhujrung Roy Joynarain. On 23rd September the defendants purchased from Graham & Co., merchants in Calcutta, Russian kerosine oil which in their contract was described as "one full cargo of Russian kerosine oil containing say about (125,000) one lakh twenty-five thousand cases (15%) fifteen per cent. more or less. 'Rising Sun Brand, shipment October-November 1899." Towards the end of October the plaintiff instructed Posner, a broker in Calcutta, to enter into negotiations for the purchase from the defendants of the cargo of oil, which was the subject of the contract above mentioned. In pursuance of these instructions Posner on 27th October 1899 sent the following telegram to Bhajan Lall Lohea, who was then absent from Calcutta "at what rate will you sell your cargo from Graham's October-November: make us firm offer." To this Bhajan Lall replied "Received telegram: in what penny want to buy Graham cargo." On 28th October 1899 Posner sent a telegram "Have buyer at 49½ pence: reply to-morrow": and on 29th October Bhajan Lall replied. Can sell. Sell 50 pence till tomorrow evening." Posner then on 30th October again telegraphed "Received telegram. Have sold to Durga Prosad at 50 pence."

On 6th November 1899 the plaintiff, and the defendant Ghanesham Dass called at the office of Messrs. Graham & Co. to get their permission to have their contract of 23rd September 1899 with the defendants transferred into the name of the plaintiff. Graham & Co., however, declined to sanction the transfer, and thereupon the plaintiff and the defendant Ghanesham Dass went to Posner's office and it was arranged that in order to carry out the agreement made between the plaintiff and the defendant Bhajan Lall Lohea bought and sold notes should be exchanged;

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and this was done on the same day. The bought note was as follows:—

"Calcutta, 1st November 1899.

"To Babu Bissendoyal Durga Prosad.

"We have this day purchased by your order and on your account from Babu Bujrung Roy Joy Narain (100,000) one lac cases of 15 per cent. (fifteen per cent. more or less, Russian kerosine oil, "Rising Sun" brand, October-November shipment, at the rate of 50*d.* (fifty pence) sterling per case. All other conditions as per seller's contract with Messrs. Graham & Co.'s contract, dated 23rd September 1899.

POSNER & Co."

The sold note was in the same terms and was addressed to Bhujrung Roy Joynarain. At the time the notes were made out the defendant Ghanesham Dass assured the plaintiff and Posner that the cargo, which the defendants had purchased from Graham & Co., consisted of "one lakh (100,000) of cases 15 per cent. more or less," and acting on that assurance Mr. Posner made out the bought and sold notes for that amount. Though made out on 6th November the notes were dated the 1st November as Mr. Posner thought the contract between the parties had been concluded on that day.

After the arrival of the cargo of oil in Calcutta disputes arose between the parties as to the quantity of oil the plaintiff was to get from the defendants: the plaintiff alleging that he was entitled to the entire cargo, and the defendant contending that he was only entitled to get 100,000 cases 15 per cent. more or less: and on 15th January 1900 the plaintiff filed the suit out of which this appeal arose. In his plaint he stated "that the plaintiff is advised and submits that his said contract with the defendants in fact comprises the sale to him by them of the full cargo sold to the defendants as aforesaid, and that by virtue thereof he is entitled to every case contained in the said cargo at the rate of 50 pence per case." He also stated "that with respect to the said bought and sold notes the plaintiff states that the words and figures (100,000) one lakh were therein caused to be inserted by misrepresentation and fraud on the part of the defendants, and that such words and figures are a mistake in fact, and he submits that the said bought and sold notes, in so far as they purport to show that only 100,000 cases 15 per cent. more or less out of the

said cargo, and not the whole of the said cargo, were purchased by him under his said contract, do not contain the terms of the real contract between him and the defendants, and are not binding upon him, and he further submits that, if necessary, he is entitled to have the said bought and sold notes rectified and altered in order to make them express the term of his said contract." The plaint prayed (*inter alia*) (*a*) that it may be declared that under the said contract entered into between him and the defendants dated 1st November 1899, the plaintiff is entitled at the rate of 50 pence per case to the whole of the said cargo sold to the defendants as aforesaid: (*b*) that the defendants be decreed to make over possession to the plaintiff of the whole of the said cargo on his paying them for the same at the rate of 50 pence per case, which he has always been, and is now, ready and willing and hereby offers to do; (*c*) that, if necessary, the said bought and sold notes be rectified and varied by the substitution of the words and figures "one full cargo containing say about (125,000) one lakh and twenty-five thousand " in the place of the words and figures "(100,000) one lakh" now appearing therein: and (*d*) that the plaintiff may have such further or other relief as the nature of the case shall require.

The defendant Bhajan Lall Lohea in his written statement admitted the telegrams sent him about the cargo of oil, but alleged that "he was informed by the other defendants and he believes that the plaintiff entered into a contract for the purchase of one lakh of cases and not the full cargo."

The other defendants filed a separate written statement in which they denied that there had been any fraud or misrepresentation; that the true contract was that contained in the bought and sold notes; that if both the parties were under a mistake of fact there was no binding contract between them; and that the plaintiff was not entitled to any of the reliefs claimed.

The full cargo consisted in fact of 134,850 cases of which the defendants gave the plaintiff delivery of 109,000 cases, and the question was whether the plaintiff was under the circumstances, entitled, or not, to the remaining 25,850 cases.

The High Court in its ordinary Original Civil Jurisdiction (SALE J.) was of opinion, that the account of the transaction given

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by the plaintiff and Posner was correct, and that the plaintiff had been induced to consent to the bought and sold notes being made out as they were by the false representation of Ghanesham. He held that oral evidence of the fraud was admissible and that the plaintiff was entitled to invalidate the contract as contained in the bought and sold notes, though he was not entitled to a rectification of them. He was of opinion that the presumption that the notes were intended to express the real agreement between the parties had been satisfactorily rebutted, and that the plaintiff was entitled to fall back on his agreement with Bhajan Lall Lohea as contained in the telegrams, and for breach of that agreement he gave the plaintiff damages for the non-delivery of the remainder of the cargo over and above the 109,000 cases delivered.

The material portions of his judgment were as follows:—

"The plaintiff contends that notwithstanding the terms of the bought and sold notes he is entitled to the full benefit of the agreement, which admittedly had been come to between himself and Bhajan Lall Lohea for the purchase of the entire cargo. It appears to me that to entitle him to the relief which he seeks the plaintiff is bound to show, in the first place, some ground of fraud or misrepresentation which would entitle him to invalidate the document which in this case consists of the bought and sold notes purporting to contain the agreement between himself and the defendants; and assuming that he succeeds in invalidating that document, he must next show that some other agreement exists independent of the terms contained in the bought and sold notes which would entitle him to the relief claimed.

"It was contended at the hearing, that, on the facts stated in the plaint, and assuming them all to be correct, that the plaintiff was not entitled to any relief, and it was further contended that it was not open to the plaintiff to give any evidence as regards any contract other than that contained in the bought and sold notes

"I was not prepared to assent to that contention at the time, and on consideration I think that I was correct in so holding. Both the plaintiff and the defendants have gone into evidence as to the circumstances under which the bought and sold notes came into existence, and the first question I have to determine is, whether the plaintiff has shown any ground for invalidating the documents in question."

After discussing and considering the evidence at some length the judgment continued:—

"It seems to me therefore that for these reasons the plaintiff has succeeded in showing that he was induced to consent to the bought and sole notes being so drawn up as to represent the contract as being for one lakh of cases by the deliberate and false representation of Ganesham to the effect that this was the

number of cases mentioned in the defendants' contract with Graham & Co. I think the plaintiff has succeeded in showing that it was his intention that the bought and sold notes should refer to the entire number of cases mentioned in the defendants' contract with Graham & Co., and therefore he cannot be held bound by the terms of the bought and sold notes which restrict his rights to the one lakh of cases therein mentioned. And I think that the plaintiff is no more bound in this suit by the terms of the bought and sold notes, than he would have been in a suit instituted against him by the defendants on the agreement contained in the bought and sold notes, if in such suit he was able to show that he had been induced to consent to that agreement by the false representation of the defendants that the number of cases mentioned represented the entire cargo of oil bought by the defendants from Graham & Co. In my opinion the misrepresentation which led the plaintiff to consent to the agreement for sale of the oil being expressed in the terms of the bought and sold notes, amounts to fraud within the meaning of proviso 1, section 92, Evidence Act; and it is a fraud which entitles the plaintiff to invalidate the documents (that is, the bought and sold notes), which purport to contain the terms of the agreement between him and the defendants.

"That being so, the next question is as to whether apart from the terms of the bought and sold notes, there exists any agreement of which the plaintiff can take advantage to obtain the relief he seeks.

"It has been contended for the plaintiff that, if the Court comes to the conclusion that the bought and sold notes do not correctly represent the intention of the parties, the plaintiff is entitled to have them rectified, and, for this purpose sections 31 and 32 of the Specific Relief Act have been relied on. On the facts found by me, I feel some hesitation as to whether section 31 can be said to apply. The language of that section seems to me to refer to a case in which the contract sought to be rectified was intended to represent the mutual intentions of the parties.

"The section provides that where the parties intended to express their common intention in a contract in writing, and that contract, by reason of fraud or other like circumstance fails to represent that common intention, then it is open to either party to seek to have that contract rectified; but the peculiarity of the present case is this, that though by the original agreement between the plaintiff and Bhajan Lall Lohea, there was a clear intention to buy and sell the entire cargo of oil, yet when the defendants, as represented by Ghanesham, and the plaintiff came together for the object of having a document drawn up to give effect to that agreement, there was at that time no longer a common intention between the plaintiff and the defendant Ghanesham.

"The plaintiff's intention was that the contract should refer to the entire cargo. Ghanesham's intention was that it should not, because his object was so to word the agreement in the bought and sold notes that it should affect only a part of the cargo.

"If therefore the bought and sold notes were to be rectified so as to represent the original intention of the plaintiff and the defendants, it would not represent the intentions of both parties at the time the bought and sold notes were drawn up; and under those circumstances, though it is not necessary to express a final

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opinion on the point, I think it doubtful, whether sections 31 and 32 apply to a case such as the present. The plaintiff, however, in my opinion, notwithstanding the terms of the bought and sold notes, is entitled to rely on the agreement made with Bhajan Lall Lohea, and to obtain relief on that footing; and I have arrived at this conclusion after careful consideration of the case of *Cowie* v. *Remfry*(1). I think the principle laid down by that case is this, that when parties, who are merchants, enter into a contract which is evidenced by bought and sold notes, the presumption is that they intend to be bound by the contract as expressed in the bought and sold notes and by that only. This, however, is a presumption which may be rebutted by clear evidence, and this view was taken by Pigot, J, in the case of *Jadu Rai* v. *Bhubotaran Nundy*(2)."

At page 195 of the report there is this remark by that learned Judge :—

"It may perhaps be a question, looking at the case of *Cowie* v. *Remfry*, which governs this Court, whether in Calcutta bought and sold notes do not by custom presumably constitute the contract, unless this be disproved, once the authority of the broker is established.

"I think, therefore, the presumption, though one not lightly to be set aside, is still one which may be displaced by satisfactory evidence. In this case the evidence is very clear. The parties did not at the outset intend their contract to be expressed in bought and sold notes. In fact for days previous to the execution of the notes a definite arrangement had been come to between the plaintiff and the defendants as represented by Bhajan Lall Lohea, that the entire interest in the contract with Graham and Co. should be transferred to the plaintiff, and by entering into the bought and sold notes it was not the intention of the plaintiff or the defendants to abrogate or set aside that original agreement. The object of the parties was to give effect to it. It was only by reason of the fraud of Ghanesham that the bought and sold notes did not express fully and correctly the arrangement already made. I think therefore that the evidence in this case shows that the presumption that the bought and sold notes were intended to express the real obligation between the parties, has been satisfactorily rebutted.

"I think therefore for these reasons that the plaintiff has succeeded in establishing his right, under the agreement made with the defendants on the 30th of October 1899, to the entire quantity of cases mentioned in the contract of the 23rd of September between the defendant and Graham and Company.

"It is admitted that subsequent to suit 109,000 cases have been delivered by the defendants to the plaintiff. I think the plaintiff is entitled to damages for non-delivery of the remainder. The form of the prayer in the plaint is rather that of a prayer for specific performance of a contract; but inasmuch as the contract is in respect of moveables, I think it is open to me to award damages; and the damages to which the plaintiff is entitled is the difference between the market price and the contract price of the undelivered goods at the date, at which they ought to have been delivered."

(1) (1816) 3 Moore's I. A. 448; 5 Moore's P.C. 232.
(2) (1889) I. L. R. 17 Calc. 173.

From this decision the defendants appealed, and the appeal was heard by a Division Bench of the High Court (MACLEAN C.J. and PRINSEP & HILL JJ.)

The Appellate Court agreed with the Court below that the number of cases mentioned in the bought and sold notes was inserted by the fraudulent misrepresentation of Ghanesham as to the quantity of the whole cargo. But they were of opinion that the suit was based on the bought and sold notes and for their rectification, and held that no rectification could be allowed as that relief had been refused by the Court below and there was no appeal by the plaintiff from that portion of the decree. The Appellate Court held that the suit was not based on any other contract and that, where the terms of a contract had been reduced to writing, no other evidence, except the writing, could be given of the terms of the contract. They observed

"Upon the evidence, we are satisfied, whilst giving all due weight to the arguments which have been adduced on behalf of the appellants, and which have been carefully weighed by the learned Judge in the Court below, and referred to in his judgment, that, in the first instance, the defendants agreed to sell, and the plaintiff agreed to purchase, the whole cargo, that an attempt was made to obtain a transfer of the defendants' contract with Graham and Company for the whole cargo, that the attempt failed, and that it was in consequence of such failure that the bought and sold notes which reduced the terms of the contract to the form of a document, were made out, and that the number of cases mentioned in those bought and sold notes, was inserted by the fraudulent misrepresentation of Ghanesham as to the quantity of the whole cargo: in other words, we believe the plaintiff's story, and do not believe the defendants.

"The question then arises, what is the relief to which the plaintiff, under these circumstances, is entitled; and in this connection, it is important to ascertain what he asks for by his pleadings. By paragraph (*a*) of his prayer, he asks for a declaration based upon the footing that the contract was that represented by the bought and sold notes, whilst, at the same time, he asks for a rectification of these very notes by the substitution referred to in paragraph (*c*).

"Paragraph (*a*) of his prayer is not strictly accurate; for the bought and sold notes are not dated the 1st November 1899, but the 6th of that month.

"It is urged by the appellants, that, on his pleadings, the plaintiff has elected to come to Court on the footing of the bought and sold notes, representing the terms of the contract, that he is suing on that as the contract and the only contract between the parties, and that, inasmuch as the contract refers only to a lakh of cases, he is entitled under that contract to nothing more than the quantity there stated to have been bought and sold.

"We should feel reluctant to give effect to this contention, if it could be avoided; for, as has been stated, it appears to be clear upon the evidence, that

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there was, at the outset, an agreement between the parties for the sale of a lakh and twenty-five thousand cases. But as matters now stand, the plaintiff is, unfortunately, in this difficulty. His suit is founded on a contract evidenced by the bought and sold notes, and he prayed that these might, if necessary, be rectified, so as to bring them into conformity with the true contract between the parties.

"This relief was, however, refused him by the Court below. He has neither appealed against the decree in this respect, nor did he before, or even at the time of the hearing of the appeal, seek to avail himself of the provisions of section 561 of the Code of Civil Procedure, under which he might have objected to the decree as having failed to give him this relief. Had he taken either of these courses, it would, we think, have been open to us under the provisions of ss. 31 and 34 of the Specific Relief Act to rectify the contract and to enforce it in its rectified form. But he chose to support the decree on the grounds stated by the learned Judge for his decision, and we think consequently that he is now no longer in a position to ask for the rectification of the contract. It is true that some time after the appeal had been heard and judgment had been reserved, he applied to us for permission to file objections to the decree under s. 561 with a view to procuring the rectification of the contract; but, after hearing Counsel on both sides, we were of opinion that his application came too late and we accordingly refused it.

"If then the bought and sold notes cannot now be rectified, what is the position of the plaintiff? Rectification having been refused, he is suing on the contract evidenced by the bought and sold-notes as they stand, and he has admittedly got all he contracted to purchase under those notes as they stand. He is not suing for rescission of the contract, or for damages on the footing of the fraud, but he is suing on the contract as evidenced by the bought and sold notes and for rectification, if necessary. As we have pointed out, rectification was refused by the Court below, and there has been no appeal or objection by the plaintiff from this part of the decision.

"The learned Judge in the Court below has taken the view that these documents being tainted with fraud might under proviso (1) to s. 92 of the Evidence Act, be invalidated, and then he holds that as soon as they were out of the way, the plaintiff might resort to the original agreement, as the parties had no intention that it should be abrogated when the bought and sold notes were drawn up. But apart from any question which might arise as to the application of the principle followed in *Cowie* v. *Remfry*(1) it seems to us that it is difficult to reconcile this view with the provisions of s. 91 of the Evidence Act. That section so far as it is material provides that when the terms of a contract have been reduced to the form of a document no evidence shall be given in proof of the terms of such contract, except the document itself. What was effected by the plaintiff and Ghanesham Dass, when they went to Posner's office after their infructious visit to the office of Graham & Co. was the reduction of their contract to the form of a document; and it seems clear that (putting out

(1) (1846) 3 Moore's I. A. 448: 5 Moore's P. C. 232.

of view the error as to the number of cases) both parties intended the bought and sold notes, which were then drawn up, to be the final and binding expression of the terms agreed upon. If this be so, we do not think that it was open to the plaintiff to prove the contract by any other evidence than that afforded by the bought and sold notes. Section 91 is not itself made subject to any exception which would let in evidence *dehors* the document, where there has been fraud, nor do we think that proviso (1) to s. 92 was intended to modify the effect of s. 91 in the manner which the view of the learned Judge would seem to imply. That proviso speaking generally, and so far as contracts are concerned, appears to relate to cases of rescission and rectification.

"The plaintiff has not sued upon the original agreement, for he has sued upon the contract as evidenced by the bought and sold notes: he says that was the contract: that is his case; and the only evidence he can give of the terms of that contract is the document itself.

"We think, therefore, that, inasmuch as, under the circumstances, it is not now competent to us to rectify the bought and sold notes, and since the plaintiff is precluded from proving his contract by any evidence other than the document itself, the appeal must be allowed, and the suit dismissed. But, under all the circumstances, we think that each party should bear his own costs, both of the appeal and of the original suit."

H. H. Asquith K. C., *R. B. Haldane K. C.*, *A. Phillips* and *W. C. Bonnerjee* for the appellants contended that the decision of the High Court was erroneous. The appellant's case was not based on the bought and sold notes, but on the contract made through Posner with the defendant Bhajan Lall Lohea. This was the view taken by the Court of first instance, which finding that the appellant had shown that the bought and sold notes did not contain the real contract, had granted relief by substituting the true contract for that falsely shown in the bought and sold notes. Having found that there was fraud on the part of Ghanesham Dass in the making of the bought and sold notes the High Court, having all the facts before them and having found them in the appellant's favour, should have granted him the relief he was entitled to on those facts, and not have dismissed his suit on the technical grounds of decision stated in their judgment. The defendant was entitled to avoid the bought and sold notes and rely upon his original contract. Reference was made to the Evidence Act (I of 1872) s. 92 prov. (1); Contract Act (IX of 1872) s. 19; and *Cowie* v. *Remfry* (1). No rectification of the bought and sold notes was necessary. The fact that the appellant did not appeal

(1) (1846) 3 Moore's I. A. 448; 5 Moore's P.C. 232.

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against that portion of the decree of the first Court, which did not give him such rectification, nor file objections under s. 561 of the Civil Procedure Code (Act XIV of 1882) on the respondent's appeal to the High Court, should not have been held to preclude him from obtaining relief on his plaint.

Cohen K. C., *Lawson Walton K. C.* and *De Gruyther* for the respondents contended that in the circumstances of the case it appeared the parties had been under a mistake of fact, and that there was no binding contract between them. Even if the appellant was entitled to fall back on the transaction effected by the telegrams sent by Posner on his behalf to Bhajan Lall Lohea there was no complete contract, as they did not show what the amount of the cargo was, nor the other terms of Graham & Co.'s contract with the respondents.

Counsel for the appellant was not called upon to reply.

The judgment of their Lordships was delivered by

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LORD ROBERTSON. The facts in this case, as found by both Courts, are simple and very cogent.

In October 1899 (the matter being brought to a final conclusion on 30th October 1899), the appellant Sureka bought from the respondents the whole of a certain cargo of Russian kerosene oil, which the respondents had themselves bought from merchants named Graham & Co. at 50 pence per case. Seeing that the market was rising, and repenting them of their bargain, the respondents, by fraud, inserted in the bought and sold notes the figures 100,000 cases, as descriptive of the quantity of oil sold, whereas the truth was that the cargo amounted to 125,000. This opportunity of fraud came the respondents' way, because the original sellers (Messrs. Graham & Co.) did not fall in with, or at least were said by the respondents not to fall in with, the arrangement first proposed, viz., that the original sale by them should be simply transferred to the appellant Sureka as buyer. Accordingly, the bought and sold notes were signed, the appellant Sureka only discovering afterwards that instead of recording the contract they falsely stated it.

In this state of the facts, the right of the purchaser was indisputable, viz, to have the whole cargo, or damages. The

trick practised on him in the bought and sold notes had no legal effect on his original right. Nor did that right depend either for constitution or for evidence on the bought and sold notes. In India a contract of sale of goods can be proved by parol; and, the bought and sold notes having in this instance been falsified, the aggrieved purchaser was entitled to disregard them and prove his contract by other and antecedent material. This he has done conclusively, by the evidence of the broker and by the telegrams.

The appellant Sureka came into Court on 15th January 1900 with a plaint, in which he prayed, *inter alia* :—

(*a*) That it be declared that under the said contract entered into by and between him and the defendants, dated the said 1st day of November 1899, the plaintiff is entitled, at the rate of 50 pence per case, to the whole of the said cargo sold to the defendants as aforesaid.

(*b*) That the defendants be decreed to make over possession to the plaintiff of the whole of the said cargo, on his paying them for the same at the rate of 50 pence per case, which payment the plaintiff had always been and is now ready and willing and hereby offers to make.

(*c*) That, if necessary, the said bought and sold notes be rectified and varied by the substitution of words and figures "one full cargo containing say about (125,000) one lakh and twenty-five thousand," in place of the words and figures "(100,000) one lakh," now appearing therein.

* * * * *

(*h*) That the plaintiff may have such further or other relief as the nature of the case shall require.

Upon this prayer, now that there has been all this litigation about it, it may be remarked that the plaintiff treats the falsified bought and sold notes with more ceremony than they deserve; that his first prayer ought to have made no reference to the date of those documents as the date of the contract, and that the second prayer was unnecessary. But their Lordships see no room for question that the prayers quoted afforded adequate means for rendering justice.

On 25th July 1900, Mr. Justice Sale gave Sureka a decree declaring that by virtue of the agreement between the appellant

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Sureka and the respondents on the 30th October 1899, Sureka was entitled to the entire quantity of cases of kerosene oil mentioned in the contract between the respondents and Messrs. Graham & Co. and gave the appellant (Sureka) damages.

On the case coming by appeal before the High Court a view of the case was taken, which their Lordships consider much too narrow. The High Court treated the action as founded on the bought and sold notes; and, holding the appellant to his reference to them by date (1st November 1899), in prayer (*a*), and to his application, in prayer (*c*), that those should be rectified, they pointed out that he had been refused this relief and had not appealed against the refusal, or objected to the decree under s. 561 of the Code of Civil Procedure. Accordingly the High Court expressed their rather surprising conclusion as follows: "We think therefore that, inasmuch as under the circumstances it is not now competent to us to rectify the bought and sold notes, and since the plaintiff is precluded from proving his contract by any evidence other than the document itself, the appeal must be allowed and the suit dismissed."

The learned Counsel for the respondents did not support this ground of judgment. The High Court was completely possessed of the case of the appellant Sureka; his case rested not on the falsified bought and sold notes, which he was there to repudiate, but on the perfectly competent evidence which, while disproving the bought and sold notes, proved the contract, which they falsely purported to record. For this case no rectification was needed, and it was not touched by the 92nd section of the Evidence Act. Nor did the misconception which led to the mention of the 1st November 1899 create any substantial obstacle in the way of justice being done or necessitate so unsatisfactory a conclusion as that which has led to this appeal.

In default of any defence of the judgment of the High Court, the learned Counsel for the respondents suggested one topic, which may be disposed of in a sentence. The telegrams, it was said, do not set out a complete contract, and, in particular, do not import the conditions of Graham & Co.'s contract. This argument, if it had any effect, is irreconcileable with the concurrent findings of both Courts. But the answer is that, if the

telegrams do not prove what is said to be wanting, the broker's evidence does.

Their Lordships will humbly advise His Majesty that the appeal ought to be allowed and the decree of the High Court reversed with costs, and the decree of Mr. Justice Sale restored. The respondents will pay the costs of the appeal.

Appeal allowed.

Solicitors for the appellants: *Morgan, Price*, and *Newburn*.

Solicitor for the respondents: *W. W. Box*.

J. V. W.