

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Peacock and others v. Byjnauth and others, and Graham and Company v. Byjnauth and others, from the High Court of Judicature at Fort William in Bengal; delivered 24th January 1891.

Present :

LORD HOBHOUSE.

LORD MACNAGHTEN.

SIR RICHARD COUCH.

MR. SHAND (LORD SHAND).

[*Delivered by Lord Hobhouse.*]

These suits form part of a group of seven suits instituted for the purpose of deciding questions arising out of the failure of Caralambus Tambaci, who carried on business under the firm of Paul Tambaci and Son. The suits were disposed of by the High Court of Calcutta simultaneously upon evidence and arguments common to the whole. The decrees have not been challenged in appeal except so far as they are adverse to the interests of Messrs. Peacock, Mollison, & Co., who are in effect the Appellants in both the suits now the subject of these appeals.

The facts of the case have been so fully, accurately, and luminously stated in the judgment of the High Court, and, as stated there, have been so entirely relied on by the Counsel, and so repeatedly referred to during several days

of argument, that their Lordships do not find it necessary to make any fresh preliminary statement, but will refer to the material facts as and when they are required to explain the conclusions arrived at.

The principal question in the High Court, and the only one which their Lordships propose to deal with in these appeals, is the question whether Byjnauth, or, as he is usually called, "the Banian," was entitled to the lien which he claimed against merchandise in the godowns of Tambaci, and against other merchandise which at the time of Tambaci's suspension of payment was on board ship, consigned by Peacock to Tambaci, and which Peacock claimed the right to stop *in transitu*. The effect of the High Court decrees is to deny the Banian's claim of lien over goods marked with certain devices of which the P. mark may be taken as an example, but to affirm this right over goods marked P. T. and C. The learned Judges were of opinion that he had stipulated for a lien over the whole, but that as to all except the P. T. and C. goods he knew that they were consigned by Peacock under express agreements that the proceeds should be remitted to meet bills drawn against them; and therefore that Tambaci could not properly pledge those goods as security for the balance of a general current account.

The High Court rightly states that there is no rule of law giving a lien to a Banian, neither is there any custom to that effect. If he claims one, he must prove it either by showing some express agreement, written or verbal, that he shall have a lien, or some course of dealing from which it must be implied. The Banian relies on both these methods of proof, but he does not allege that there was any written agreement.

The express agreement relied on being only verbal, it is important to see how the Banian states it. His complaint was the first

step in the litigation, and in it he states, in general terms, that up to the year 1882 he made advances to Tambaci on the security of a lien on the goods in his godowns. With respect to the year 1882, he states with more particularity, that he refused to make further advances without further security than the goods in the godowns afforded, and that he was assured by Vassilopulo (who was then managing the affairs of Tambaci in Calcutta) that more goods were coming out, and that in effect he made his advances thenceforward on the security of all the goods shipped from England, whether they had arrived or not (Record, pp. 2, 3).

In his examination on interrogatories the Banian was asked whether he did not become Tambaci's Banian under the agreement of the 11th July 1873, and whether that agreement had been rescinded and altered. His answer is to the effect that he was employed under that agreement, and that it was never expressly rescinded, but was modified in some respects. The most important modification was that, whereas the agreement provides that the Banian shall deposit with Tambaci Rs. 25,000 in Government securities or cash by way of security against his defaults, it was "shortly after the execution" agreed, at the request of Caralambus Tambaci, that the Banian should, instead of the deposit, advance him Rs. 25,000 in cash, with interest at 12 per cent., and on the security of the goods in the godowns (Record, p. 81).

He then goes on to state that "very soon after the execution" of the agreement, Caralambus Tambaci proposed to him that he should advance funds to the firm from time to time upon the security of a lien and charge upon all goods for the time being in the godowns of the firm, and that advances were made on that footing (Record, pp. 81, 82).

In the beginning of the year 1875—the Banian says—he found that Tambaci was enlarging his business, and required more advances, and he asked for a fresh written agreement giving him security, but Caralambus Tambaci put him off by saying that the word of a gentleman was sufficient, and that he need not be afraid, “as all the goods in the godowns “ would remain in my possession as a pledge.” At the same time, he says, it was agreed, amongst other things, that his advances should carry interest at the rate of 12 per cent. per annum. As regards the transactions of the year 1882 he affirms the allegations made in his plaint (Record, pp. 82, 83).

The plaint was filed in September 1882; the Banian was examined on interrogatories in June 1883; and in August 1883 Caralambus Tambaci was orally examined in England, and cross-examined at great length by the Banian’s Counsel. He denied that there was ever any agreement that the Banian should have a lien on any goods for his advances. At the trial of the cause in May 1884 the Banian was orally examined. He had then the advantage of knowing Tambaci’s oral deposition, whereas Tambaci knew only what the Banian had said upon interrogatory, and, being in England, could not be recalled to speak to any new matter.

In point of fact some very important new matter is introduced by the Banian at the trial. His account now is as follows. “One day” (which may be taken as being the 9th of June 1873, though it may be a day or two earlier, but the exact day is not material) he was introduced to Tambaci at the office of Mr. Sassoon, and Tambaci asked him to be his Banian in the same way in which he was acting for Sassoon. They arranged to go more fully into the matter at Tambaci’s house, and Tambaci

went away. Sassoon said nothing on that occasion (Record, p. 904). "One day," probably the next day, or (say) the 10th June, the Banian went to Tambaci's house. "I asked him, 'How 'do you wish the business to be done?' He "said he would give me a commission of $1\frac{1}{2}$ per "cent., and interest at 12 per cent. per annum, "and I will take advances from you on my "goods.' He further said this, he was carrying "on business on a very limited scale, and only "required small advances, but hereafter he in- "tended to extend his business, and then he "would require larger advances. Then I said "to the Sahib, 'State to me the nature of the "'business more particularly.'" Then it was arranged that the Banian should have the key of the godowns; that his men should be in charge of the godowns; that the chitties for goods delivered should be made out in his name, "in "respect of the advances which I shall have "made on these goods;" that the godown sirkar was to be his man, and the durwan, and the cash babu. The two parties then visited the godowns together, and the Banian agreed to put a man in charge (Record, pp. 904, 905). The next day (say the 11th June) they met again at Sassoon's office, and "had all the "conversation about the terms over again; "commission, chitty, interest, advances, mode "of delivery, and everything over again" (Record, p. 905). This took place in Sassoon's presence, and he joined in the discussion, and said that those were the terms on which the Banian was doing business with him (Record, p. 905). On the 12th June he paid the Rs. 25,000 to the Agra Bank to redeem goods in pledge; and it was probably on the 11th that he began his business as Banian (Record, p. 906).

Sassoon speaks to the two meetings at his
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office, and he confirms the Banian as to the nature of the agreement; but he says that the terms of it were all settled at the first meeting through his intervention, both because Tambaci wished to engage on the same terms on which Sassoon did business with the Banian, and because he acted as interpreter when necessary. At the second meeting he says only that he learned they had agreed with each other, and commenced the business (Record, pp. 996, 997).

When weighing the conflicting lines of evidence the High Court addresses itself to the question of antecedent probability. The learned Judges think it improbable that a man like the Banian would give such large credit without security to a firm situated as Tambaci's was in 1873 (Record, p. 1201). But it must be borne in mind that the business was very greatly enlarged after the Banian's employment, and wholly by means of his advances; that besides his commission he got interest at 12 per cent., an amount of $4\frac{1}{2}$ above the average bank rate upon pledges; and that this charge of interest so completely absorbed the assets of the business that in January 1882 Vassilopulo calculates that the firm is insolvent by exactly the amount it has paid for interest during 1880 and 1881 (Record, p. 736). It may be true that a man supplying money as the Banian did, would, though he looked to profit on sales, expect a higher interest than the bank which made specific advances on specific goods, but hardly so much higher. Their Lordships do not see the *à priori* improbability of the opposite theory, that the Banian was glad to carry on a great trade with the credit and connection of Tambaci, of which the whole proceeds, except so much as was necessary for the actual living of the Tambacis, would come into his pocket in the shape of

interest or commission. The great inflation of the business, which proved after a time, when markets were adverse, to be ruinous, could not have been effected without his aid, given long after he knew that Tambaci had no capital of his own. That he should also be a secured creditor seems a somewhat exaggerated amount of advantage to stipulate for.

But there are other considerations affecting the *à priori* probability of a transaction. On Tambaci's part it was, as the Banian states it, a dishonest one. In England he was buying goods on express agreements that the money got for them in Calcutta should be appropriated to meet bills drawn for their price, while he was making such arrangements in Calcutta that at the moment of their arrival there they would be subject to a prior lien for the whole amount due on account current with the Banian. Indeed, the Banian claims by virtue of the fresh agreement in 1875 to have a claim against the goods while yet in transit. It can hardly be thought *à priori* probable that Tambaci would make such an agreement.

No doubt many things that Tambaci knew were concealed from the Banian. But the Banian alleges one entire agreement, extending to the whole of the goods consigned to Tambaci in Calcutta, and operating continuously (with the extension in 1875) to the close of the transactions. Now it is proved beyond doubt, and the High Court have found, that as to portions of the goods (*e.g.*, those marked $\frac{PM}{c}$) the Banian had notice of the interest of the consignors. Yet he went on, maintaining that his agreement gave him a prior lien on those goods. Moreover, he was warned in 1875 by a friend that "commission goods" stood in a different position from others, and was advised to make inquiries on the subject (Record, p. 920). He says he had a conversation a few days after with the Sahib

(Tambaci), but it does not appear that he ever made, or if he made that he ever pursued, any serious inquiry on the subject. He held on his course just the same. The agreement then which he alleges is an agreement for a general lien on all goods coming to Calcutta on Tambaci's account, whatever might be the terms on which the vendors had shipped them. It is not *à priori* probable that any experienced man of business, such as the Banian was even as early as 1873, should rely on such an agreement as that. It seems to their Lordships that the agreement, as stated by the Banian, was, on his own side, a hazardous one, and on Tambaci's side dishonourable, both considerations being against its antecedent probability.

The direct oral evidence to support the original agreement alleged by the Banian is confined to the Banian himself and Sassoon. The High Court attach great importance to Sassoon's evidence (Record, p. 1200). Nobody has impeached Sassoon's veracity. But the weight of his evidence to support the Banian depends also upon its accuracy, upon its accordancy with the Banian's own account, and partly upon the opportunity given for meeting it. The conferences at Sassoon's office and at Tambaci's house in June 1873 are the corner stone of the Banian's case as presented by his oral evidence. It is most important that there should be no doubt as to their tenor. There is no doubt that in some way, and it may have been by conversation in Sassoon's office, arrangements were made that the Banian should take charge of merchandise, should incur expenses in employing a staff, should effect sales on commission, should receive the money, and should bring it into account, receiving discount at the rate of 12 per cent. on it if paid before it was due, and paying interest at 12 per cent. if retained after it was due. When a discussion is carried on between three

persons, sometimes in English, sometimes in Hindustani, and with one of them acting occasionally as interpreter between the other two (which is Sassoon's account of the first conference), it must be very easy indeed to confuse between a conversation and an agreement, and between such an arrangement as Tambaci alleges and as is embodied in the agreement of the 11th July, and an arrangement to advance money against the security of the goods. Sassoon tells us that "somebody said, if money "is to be advanced it must be against the "security of the goods" (Record, p. 297). The somebody, he thinks, was the Banian, and Tambaci agreed. This was evidently, according to Sassoon's recollection, the first introduction of this important matter between the parties, and he himself took an active part in making the bargain. But the Banian's memory is materially different. Nothing, according to him, was done at the first meeting except the introduction of himself to Tambaci, and Sassoon said nothing. All the details were settled the next day in the absence of Sassoon at Tambaci's house. They were "made pukka" at the second meeting in Sassoon's office in Hindustani (Record, p. 905), though Sassoon says only that he then learned that the parties had agreed and commenced business (Record, p. 997). Now when such differences are found between the parties in their recollections of those occurrences which are the most striking in their nature and the most likely to endure in the memory, they must materially impair the value of statements as to other parts of the conferences which are less likely to endure in the memory; viz., the exact expressions used, whether in Hindustani or in English, concerning the Banian's advances and his position with respect to the merchandise he was to keep and to sell. It may be that

something was said about advances, but it would be dangerous to hold an agreement proved upon such evidence, even if there were nothing but Tambaci's previous denial to bring it into doubt.

Then as to the possibility of meeting this evidence, which in effect was sprung upon the Banian's opponents at the trial. Tambaci, the only other person present on these occasions, could not be recalled, which as the High Court says was unfortunate; and the Appellants are entitled on that ground at least to have the evidence very critically examined. But the objection goes somewhat deeper. Why were not these extremely important conferences mentioned earlier? The first person who introduced the name of Sassoon is Tambaci himself. When under cross-examination he stated that Sassoon introduced him to the Banian (Record, pp. 281, 285). That would have been the time to press him as to his recollection of the conferences in June 1873. But though several questions were put to him about Sassoon's introduction, nothing was asked about the conferences. On the contrary, it is suggested that it was not Sassoon at all, but Demetriadi, who introduced the Banian. His legal advisers then could not have been instructed as to these important conferences which gave birth and shape to the agreement now relied on. Their Lordships find it very hard to believe that, if the Banian had really relied on the making of the agreement he now alleges, he would not have put it forward at the earliest moment, whereas he failed to do so when invited by the interrogatories to say under what agreement he carried on business, and failed again, when in Tambaci's examination it would have been proper to lay a ground for its introduction. It is not till the trial that he brings forward the conferences which are the origin of his agreement and its strongest direct evidence.

As regards the evidence of the Banian, the High Court, while thinking him capable of adding a fringe of fictitious evidence to his case, and in fact disbelieving him in some instances, were favourably impressed by his demeanour, and think him not untruthful in the main; and they express belief in his main statement, though not till after satisfying themselves that a number of incidents in the course of the business tell in its favour. Their Lordships accept the view taken of the Banian's character, but they cannot help taking his evidence as labouring under two great difficulties.

One has been already mentioned in commenting on Sassoon's evidence. The other is that, at least down to the year 1880, there is no written document produced which is so much as alleged to confirm him. On the 11th July 1873, just a month after the conferences at which the terms of his employment were settled, the written agreement was executed, and it is wholly silent about advances or security, except a security to be given by him to Tambaci. It is a most extraordinary thing that the Banian, who thought it necessary that the terms which he had settled with Tambaci should be repeated all over again, and "made pukka" in Hindostanee before Sassoon (such is his version of the affair), should not think it necessary to see that they were embodied in the formal written agreement. His mode of meeting this difficulty is even more extraordinary. He says (Record, p. 919), that the written agreement was never read over to him, and that he did not, even up to the time of his examination, know what it contained. "I was under the belief when I signed it that it contained the terms arranged for the pledge of goods advanced on." Their Lordships find it impossible to believe this statement. He did not put it forward when exa-

mined on interrogatories. It was not suggested in Tambaci's cross-examination. The agreement was prepared, and its execution witnessed, by a solicitor of the highest standing, to whose office the Banian is said by Tambaci to have gone several times about this matter (Record, p. 281). That solicitor would hardly have permitted a party ignorant of English to execute the agreement without satisfying himself that he understood it. And the Banian's then partner in this one business, Mohendro Nath, who knew English well, and who appears to have been taken into the business on account of that knowledge, and who is stated to have accompanied the Banian on several occasions to the solicitor's office while the draft was in preparation, and who executed the agreement, is not called to say anything about it.

Their Lordships hold that the oral evidence wholly fails to establish the agreement for lien on which the Banian relies in the year 1873. As for the asserted modification or new agreement in 1875, there seems to be no evidence of it but that of the Banian himself, given at the trial, and quite contrary to the story told in his answers to interrogatories; unless the statement of his gomashtha, Nowrung, can be considered a corroboration. The High Court have justly disbelieved it (Record, p. 1198). But the learned Judges consider that there was an agreement for a lien in 1873 on the goods in the godowns, and that it was extended to goods in transit at some subsequent date (Record, p. 1202), relying on inferences drawn from a variety of circumstances which their Lordships will proceed to consider.

The first is, that the Banian had the keys of the godown in which the goods were stored, and appointed men to take charge of them. That is no more than was necessary for the per-

formance of his duty to take and keep the goods and to make sales and to deliver to the buyers. His predecessor in the post, Nolit Mohun, who made no advances, had the same kind of custody. When the Banian tries to make out that his custody was of a more exclusive character, and that the durwans were all appointed by him and not by Tambaci, the evidence is against him. The High Court disbelieve him, and treat this story as one of the instances in which he adds a fringe of fiction to his real case (Record, pp, 1177, 1198, 1200). It is observable that when the Bank of Bengal took goods in pledge they were careful to have the exclusive possession of them, changing the locks and appointing their own durwans. Having regard to this difference, and to the fact that the Banian thought it desirable to strengthen his case by evidence which was proved to be untrue, their Lordships think that this incident of the course of business bears against the Banian's contention.

The next point is, that the bazar chitties were made out to the Banian, whereas in Nolit Mohun's time they were made out to Tambaci. That change seems a very immaterial circumstance, if in itself the new practice was more convenient. It certainly seems more convenient that the Banian, who, after a contract of sale had been made, was debited in Tambaci's books with the price, and was held responsible for it, and who transacted with the buyers from first to last, should also (even independently of the fact that the firm was usually in debt to him) be the person to whom the buyers should give their notes for payment. Their Lordships think that this incident bears neither one way nor the other on the point in controversy.

The next point is, that policies of insurance of the merchandise against fire were

regularly effected by the Banian in the name of Tambaci, and then endorsed by him and handed to the Banian. The practice is denied by Tambaci, but is proved to have existed during the whole period of Vassilopulo's management, and must be taken to have been in existence when he assumed the management in April 1878. The High Court consider that the policies were endorsed by way of completing the Banian's security (Record, pp. 1177, 1201). Their Lordships agree that this incident makes more for the Banian's theory than for the opposite one, but it does not make very strongly. It is the common case that, at all events in the later years of the business, the firm was always heavily indebted to the Banian, and that he looked for payment to the sales of goods. If then sales should be prevented by fire, it would be, as between Tambaci and the Banian, right that the latter should have the substitute for the price, and convenient that he should have in his hands every facility for getting it. It may be observed that no fire ever occurred, so that no occasion has arisen for dispute as to the property in the policies or in the money secured by them.

An important feature in the course of business is the treatment of the bills of lading. At the trial the Banian asserted that they were endorsed to him directly upon their arrival in Calcutta; and his gomashtha Nowrung backed his assertion. If that had been the case, it would have given support to the Banian's contention that he was intended to hold a security upon the coming merchandise. If there was an agreement to that effect, it certainly would be of importance to him that he should have the title assigned to him and should possess the documents of title at the earliest possible moment; but the Banian's assertion on this point appears to be part of the fringe of fiction. The facts are the other way, and

are so found by the High Court (Record, p. 1178). The object of endorsing over the bills of lading was that the endorsee might obtain delivery of the goods from the ship, and they were never endorsed till the arrival of the ship, which was generally a week or ten days, and sometimes longer, after the arrival of the bills. In his plaint, which was framed at the very beginning of the controversy and before the importance of these details had been observed, the Banian states what happened in the case of one ship, the "Knight of St. Patrick." "On the arrival of the said vessel, the said Vassilopulo endorsed and delivered to the Plaintiffs the bills of lading and the said goods in order to enable the Plaintiffs to obtain delivery of the same, and to hold the same subject to their lien, &c." (Record, p. 3). This is a plain account of the practice of the firm both with Logothetis when he acted as carrier from the ship to the godown, and afterwards with the Banian when he became carrier; only with the addition of the then controverted matter of lien. The opinion of the High Court is that the practice as to the bills of lading, standing by itself, proves nothing either way. To their Lordships it appears to bear against the Banian's theory, if standing alone.

But it does not stand quite alone. For a considerable period, dating back at least to the year 1877, particulars of shipments of merchandise, which were sent out from Manchester as early as possible, were communicated by Tambaci to the Banian. There is the inevitable dispute about the meaning of such a practice. One side says it was because the Banian was to advance against those shipments, and on the security of the goods shipped; the other side, that it was to facilitate dealings between the Banian and the customers at the earliest possible

time. Their Lordships are not now dealing with the events which happened at the end of 1881 and during 1882, about which there are some peculiar features, but with the practice which prevailed for some years previously. If the Banian's theory of the communication of particulars were the true one, it is almost impossible to conceive that he would not (as he now alleges he did) get the most important document of all transferred to him as soon as it arrived in Calcutta. But he did not. And the two parts of this practice throw a reflex light on each other. The retention of the bills by Tambaci goes to show that the communication of the particulars was for the mercantile object which he alleges. And the communication of the particulars lends more significance to the fact that the documents of title were retained till the moment when it became necessary to transfer them for the purpose of obtaining delivery of the goods.

It will be seen that, in their Lordships' opinion, the incidents of business hitherto enumerated tell much more against the Banian's case than in its favour. But it has been strongly urged at the Bar that during the latter period of his employment the Banian did, with the knowledge of Vassilopulo, make advances in contemplation of specific quantities of merchandise either arrived in Calcutta or notified to arrive; and that it must be taken to have been the contract between the parties, at least at that time, that the goods so taken into consideration were to be held in pledge for advances made immediately afterwards. It is not indeed asserted that in any instance there was a specific sum of money advanced on the security of a specified quantity of goods. The lien claimed at this period is still a lien for the general balance of account. But the fact that the Banian calculated the amount of goods belonging to Tambaci is

said to show that he must have advanced on the security of them.

A number of letters have been put in evidence to sustain this contention. Some were written by Tambaci to the Banian, and these contain nothing to the purpose. Others passed between Vassilopulo and Tambaci during the latter part of 1881 and in 1882, and in them Vassilopulo enlarges on the fears and irritation of the Banian, and on the necessity of so encouraging him by sales of stock or reduction of debt on the Indian side, and by purchases of new stock on the English side, that he may continue to supply the funds necessary for the existence of the firm. The contention on the Banian's part is that, though he was no party to this correspondence, it faithfully reflects the interviews between himself and Vassilopulo, that Vassilopulo's expressions are inconsistent with the idea that the Banian was not advancing on the security of the merchandise, that Tambaci approved what Vassilopulo was saying and doing, and that it was not open to him afterwards to say that there was no agreement for such security.

The earliest document relied on, the document before referred to as the only one produced to confirm the Banian's case, is of earlier date than this correspondence. It is a list of goods in the godowns, dated the 2nd June 1880, made out by Vassilopulo, and with some calculations written on it by the Banian. He sets down the value of the goods, the amount of his advances and his receipts from sales for some time past, and concludes that he may advance more. That is all. The High Court thinks it some corroboration of the Banian's case. But that depends upon the view taken of the then subsisting relations of the parties. It appears that Vassilopulo had asked the Banian for money at a time when no goods had arrived for two or

three months (Record, p. 913). It is the common case that the Banian got his profits by means of the constant influx of goods from England and their sale in Calcutta. It must have been essential to him at all times after the large advances began that he should be well acquainted with the magnitude of the business. And if he had reason to think that its life blood was being dried up by the stoppage of supplies from England, it was natural for him to calculate the amount available for sale in Calcutta before making further advances. The ordinary course of the business would shortly bring the whole of the price into the Banian's hands. There is nothing to show that at this time he was looking beyond the ordinary course of business. The incident now under consideration is consistent with the theory he now sets up, but it is equally consistent with the contrary theory.

The Banian does not assert that there was any alteration in the terms of his employment, either at this time or later on. His account of what passed in 1882 is as follows :—

“ In 1882, I had the arrangement also with Mr. Vassilopulo. In this way there was an arrangement before it was made more pucca in 1882, as regards the goods in transit. The arrangement was the same, only, before 1882, I used to advance as much money as he wanted; subsequent to 1882 I advanced only to the extent of the goods I received. The arrangement as to the goods in transit was made in 1875. There was no alteration or addition to it in 1882.”

Strictly construed, this statement would mean that before 1882 money was advanced by the Banian just as asked for, and without any reference to amounts of goods, which would be destructive of his case. Such cannot be his meaning; it is impossible to think that there ever was a time when he had not regard to the volume of the business; and he probably means only that during 1882 he made advances with a more careful eye to the quantities of goods available for sale. But that increase of caution

would not give him a lien. The course of the business continued as before.

It is to be noticed that Vassilopulo himself believed that the Banian had a lien on all the goods purchased. His views are succinctly stated in his letter of the 7th November 1888, where he combats Caralambus Tambaci's assertion that the Banian had no such lien.

"You deny that the goods are pledged to the Banian, and as I hear will send an affidavit to that effect. But have I said or do I say anything to the contrary? On the contrary, I maintain that there is no agreement of the sort. What I do not deny though, and what I never shall nor can I deny, is that the Banian always held the keys of the godowns, and this circumstance, and the manner in which the Banian made the advances since January 1882, entitle the Banian to a lien. And then, just notice how many other circumstances have turned up in favour of the Banian. Nobody can take from him those goods on which he paid the drafts or which he released from the Bank of Bengal."

The same views are insisted on in his evidence. He and the Banian are at one in stating that there was no new agreement made in his time. He is indeed drawing a conclusion of law, on which his opinion is of no value. He infers a lien from the practice from which it is not to be inferred. And he does not distinguish between the various classes of goods to which it may apply, viz., the goods which were specifically pledged to the Bank and redeemed, and the goods the drafts against which had been paid, and the goods whose proceeds ought by Tambaci's express agreement to be appropriated to pay the shippers the price still due to them.

The correspondence between Vassilopulo and Tambaci must be read with these conflicting views of the two parties clearly kept before the mind, and with the recollection that the conflict had not until late in 1882 been brought into relief, and that the question is whether Tambaci must have understood Vassilopulo's expressions as meaning that, beyond his interest in obtaining

merchandise and selling it, the Banian held a legal security upon it. In two or three passages Vassilopulo speaks of "cover" to the Banian by purchases and by goods. But he also speaks of "covering" him by sales (Record, p. 761), which was Tambaci's view of the legitimate way of reimbursing him. He says in one passage that the Banian and the Bank, in case of insolvency, would "take all our stock;" but in the next sentence he says that the creditors in England would "take" the property there, though there was no pledge of that. (Record, p. 732.)

Again, he writes of a discussion with the Banian, in which he sets forth the great profit which the latter is making, about a lac a year by interest, besides other profit; and he sets their debt to him against the "value of the goods in your hands." And the conversation proceeds thus:—

"After I had pointed out to him the increase of our business on the one hand, and the profits he makes without any danger on the other, I said to him point blank,—Baboo, you must allow us more accommodation in proportion to the business we are doing, and which is increasing daily. At least 10 lacs, if you have confidence in our business, our character and honesty, and in the management of the business. If you have no confidence, or if you are not prepared to supply us with the requisite accommodation, tell me plainly, because I consider it my duty to place everything before Mr. Tambaci, so that he may do what is necessary in connection with the increase of our business. If we are able to do a large business, let us do it, if not, we must curtail it; in any case though, I, as manager here, must know, so as to arrange my transactions accordingly."—Record, p. 687.

After which he says the Banian assented to give further help when his other engagements permitted him to do so (Record, pp. 606, 607). That conversation has been very much pressed at the Bar as being impossible to reconcile with the conclusion that the Banian had no legal security against the goods. To their Lordships it appears to be consistent with the Banian's

contention, but to lead more naturally to the inference that the parties to it were not thinking at all of lien or any other legal question, but of the Banian's interest in keeping up and extending a business from which he was deriving great profit, without incurring the risk of a partner, and with practical security, as Vassilopulo contended, so long as his advances and the volume of the business answered to one another. As for the mere expression "goods in your hands," *i. e.*, the Banian's hands, Vassilopulo frequently speaks of the same goods, or of goods in the same position, as goods in "our" hands, "our" stock, and so forth.

Their Lordships think that too much stress has been laid on those letters passing between Vassilopulo and his principal, but as they have been so much discussed on both sides, their Lordships have examined them, with the result of finding that there are no expressions in them which Tambaci, or indeed any other person knowing the relations of the parties, might not naturally read without suspecting that the Banian was setting up a claim to legal security upon the goods, and that no conversation with him is related which is not referable to his commercial advantages and practical security in the increase of the business.

We have evidence of the usual course of business being followed down to July 1882, in the case of the ship "Myra," which has been relied on at the Bar as showing that the security of the merchandise was a condition of the Banian's advances. The particulars of shipments by the "Myra" arrived on the 6th July, and Vassilopulo immediately transmitted a copy to the Banian's gomashta, with a written request endorsed upon it that he wanted Rs. 18,000, and that sum was paid to him. It was the only occasion on which a request for money was made

in that way (Record, pp. 901 and 597). Now if the advance was made on the security of the goods, we should expect that the Banian would be very careful to perfect his legal title by getting the bills of lading at the earliest possible moment. But though he asserts that he did procure them on their arrival, he could not prove a single instance in which he had done so. That is strong to show that even in the case where a special request for money was made on showing a special shipment, the consideration for the advance was, not a pledge of the goods, but the profit to be made by their sale, and the reimbursement of general debt by their price when sold, according to the ordinary course of the business.

The upshot of all this examination is that there never were any such agreements for security as the Banian alleges in 1873 and 1875, and that the transactions of 1881 and 1882, though they show more caution on the Banian's part in regulating his advances according to the volume of business, yet left the prior arrangements untouched, and that they remained untouched until Tambaci's insolvency.

This view renders it unnecessary to examine the question of notice, or whether, in the language of the Contract Act, the circumstances raised a presumption that the pawnor was acting improperly. It is also unnecessary to consider whether Messrs. Peacock had a right to stop *in transitu*, because the Banian, having no lien, had no interest entitling him to dispute their claim to effect a stoppage.

As to the goods sold and brought into account between Tambaci and the Banian, their Lordships agree with the High Court for the reasons given by the learned Judges. It has been argued at the Bar that the sales effected in September 1882, which undoubtedly were large

and rapid, were a wrongful act as between Tambaci and the Banian, who, it is said, falsely represented Tambaci's wishes to Vassilopulo, and thereby induced him to effect the sales. Without stopping to consider whether, if such a case were proved, it would give such a right to recover the money as Messrs. Peacock claim, their Lordships hold that the evidence does not disclose such a case. They are much more disposed to think that during his visits to Cawnpore Tambaci was behaving deceitfully towards the Banian, and leading him to suppose that large sales would be effected, and his debt reduced thereby. Nobody attributes misconduct to Vassilopulo. There is no suggestion that the sales were effected at unfair prices. The sales, though negotiated by the Banian and strongly pressed for by him, were the acts of Vassilopulo as manager of the firm, and were in accordance with the purpose for which the goods were consigned. As their proceeds have been duly brought into account between the firm and the Banian, the principals of the firm cannot disturb that account, except on the ground of bad faith.

It remains to consider how their Lordships' views affect the decrees made below in the two suits.

In *Byjnauth v. Graham* (Record, p. 1219), it was declared that the Banian (the substantial Plaintiff) is entitled to one bale out of eight, and to 55 others marked P. T. and C. ; and Messrs. Peacock (the substantial Defendants) are entitled to 24 bales with the P. mark. The Banian is ordered to pay Messrs. Peacock the sum of Rs. 6,608. 14, being the net proceeds of sale of the 24 bales, and their costs of a commission to examine Vassilopulo in Calcutta. Messrs. Peacock are ordered to pay to the Banian his costs of suit, and one fifth of the costs of the commissions to examine witnesses in

England. It appears that the one bale was admitted to belong to the Banian. Vassilopulo's examination was asked for by the Banian and turned out to be useless. It is not clear why Messrs. Peacock are ordered to pay the whole costs of a suit in which they succeeded to a substantial extent; but it is probably because in the other suit, where the victory and defeat were also divided, the Banian is ordered to pay costs. It is stated at the Bar that the method of dealing with costs has proved injurious to Messrs. Peacock.

The Banian has now failed in this suit entirely, except as to the one bale to which his title is not disputed. Their Lordships have to make the decree such as in their judgment the High Court should have made it at the trial. The proper course will be, first, to affirm the decree so far as regards the one bale awarded to the Banian, and the net sale proceeds of the 24 bales awarded to Messrs. Peacock, and so far as it directs payment of Rs. 6,608. 14 with interest to Messrs. Peacock, and so far as it directs payment of the costs of the commission to examine Vassilopulo with interest, and provides for the scale of taxation; secondly, to discharge the rest of the decree; thirdly, in lieu thereof, to declare that the Banian had not at the institution of the suit any right or interest in the 55 bales and the sale proceeds thereof awarded him; to dismiss the suit so far as regards those bales; to direct him to pay to Messrs. Peacock their price, if sold, with interest at 6 per cent. from the time of sale, or otherwise their value, with interest at 6 per cent. from the institution of the suit, and also to pay them the costs of suit and one fifth of the costs of the English commissions. Messrs. Peacock must also be repaid the costs paid by them in pursuance of the decree.

In *Peacock v. Byjnauth* (Record, p. 1407) Messrs. Peacock were ordered to pay the Banian's costs occasioned by their having instituted two suits instead of one. The suit was dismissed so far as it concerned the goods sold and accounted for. It was declared that the Banian was entitled to the bales marked P. T. and C. It was declared that Messrs. Peacock were entitled to 104 bales marked $P_{C.T.}$ (which is clearly a mistake for $P_{C.M.}$), and to 52 bales marked $P_{C.T.}$, and the Banian was ordered to pay them Rs. 33,619.18.9, being the sale price of so many of those bales as had not been delivered to them. And the Banian was ordered to pay to Messrs. Peacock their costs of suit, except as aforesaid, and one fifth of the English commissions.

The proper course will be, first, to affirm the decree so far as it directs Messrs. Peacock to pay the costs occasioned by bringing two suits, and provides for the scale of taxation, and so far as it relates to goods sold and accounted for, and so far as it relates to the bales marked $P_{C.M.}$ and $P_{C.T.}$; secondly, to discharge the rest of the decree; and, thirdly, in lieu thereof, to declare that out of the bales marked P. T. and C. and mentioned in the plaint Messrs. Peacock are entitled to be paid the amount of the bills drawn by them against such bales, with interest thereon at 6 per cent. from the institution of the suit; to direct accounts, if necessary, for the purpose of ascertaining the amounts due to Messrs. Peacock, and the amount of the value or price of the bales, with interest thereon from the date of suit or of sale, as the case may be; to direct the Banian to pay the amount found due on the bills out of the amount of value or price, so far as the same will extend; and to declare that each party ought to bear his own costs of suit, and to be charged with one half of one fifth of the cost of the English commissions. The Banian must also be

repaid the costs paid by him in pursuance of the decree.

As in these appeals each party has succeeded and each failed on a substantial issue, their Lordships award no costs, except that, under the circumstance of the extreme bulkiness of the Record, they direct the Respondents to pay the Appellants one moiety of the costs of it.
