

*Judgment of the Lords of the Judicial Committee
of the Privy Council on the Appeal of Rams-
wamy Setty and another v. Koosoo and another,
from the High Court of Judicature at Fort
William, in Bengal; delivered May 27th, 1881.*

Present:

SIR BARNES PEACOCK.

SIR MONTAGUE E. SMITH.

SIR ROBERT P. COLLIER.

SIR RICHARD COUCH.

SIR ARTHUR HOBHOUSE.

Their Lordships are of opinion in this case that the judgment of the High Court on appeal should be reversed, and that the judgment of the First Court should be affirmed.

It appears that in the year 1875 Koosoo and Ko Pho, or one of them, purchased, in Burmah, a number of rubies. They, not having the means of paying for them, borrowed a sum of Rs. 62,044 from Arnasalem Setty, for which they gave a promissory note, both Ko Pho and Koosoo being liable upon that note. Arnasalem Setty endorsed the note to the Plaintiffs in the action. It was expected that the proceeds of a sale of the rubies in Calcutta would be sufficient to take up the note; but that hope was not realised; and therefore an arrangement was come to for sending the rubies, or some of them, to England for sale, through Messrs. Hamilton & Company, who were jewellers in Calcutta. In consequence, the bond of the 29th June 1875 was entered into, by which Ko Pho, as well as Koosoo, bound himself to pay to the Plaintiffs the sum of Rs. 65,368 upon

Q 6678. 125.—7/81. Wt. . E. & S. A

certain conditions; the Rs. 65,368 being the amount of principal and interest due upon the note. The bond contained the following recital:

“Whereas the said Koosoo is desirous of sending to England a number of Ava rubies, through the firm of Hamilton & Company, of Calcutta, for sale, and has borrowed from the said Cheena Tanna Anna Pallaneappa Setty the sum of Rs. 62,044, which, with interest thereon at the rate of one rupee and eight annas per centum per mensem, amounting to the sum of Rs. 3,324 and 6 annas, being added to the sum of Rs. 62,044, makes a total sum of Rs. 65,368 and 6 annas, which the said parties intend shall be repaid to the said Cheena Tanna Anna Pallaneappa Setty from the proceeds of the said rubies, after deducting all the charges of Messrs. Hamilton & Company and their agents in England for commission and insurance on the same; and it has been agreed that the said Koosoo and Ko Pho shall be liable to pay any deficiency of the said loan in case the proceeds payable by the said firm of Hamilton & Company shall not be sufficient to pay the amount of this bond.”

It appears that, out of the rubies purchased in Burmah, it was considered that only 108 were rubies for which there would be a good sale in England, the remainder being smaller, and the expense of sending them to England being more than the profit to be derived from a sale of them; and it was therefore arranged by Ko Pho and Koosoo, and by the Plaintiffs, that only the 108 should be sent to England. The learned Judges of the High Court on Appeal thought that Ko Pho only consented that the smaller rubies should not be sent at that time. The recital of the bond, however, does not refer to the whole of the rubies; it does not say that

Koosoo is desirous of sending to England all the rubies, but "merely that he was desirous of sending to England a number of Ava rubies." That number it was settled and arranged by all the parties should be 108, and they were actually sent. The condition of the bond is this:—"If the price of the rubies to be realised by the said Cheena Tanna Anna Pallaneappa Setty from the said firm of Hamilton & Company shall not amount to a sufficient sum to pay the sum of Rs. 65,368 and 6 annas, and interest from this day, at the rate of 1 rupee and 8 annas per centum per mensem, till the date upon which the said Cheena Tanna Anna Pallaneappa Setty shall receive from the said firm of Hamilton & Company the clear proceeds of the said rubies, then the above bond and obligation shall remain a security for the difference between the said sum of Rs. 65,368 and 6 annas, and interest at 1 rupee and 8 annas per centum per mensem, and the amount to be received by the said Cheena Tanna Anna Pallaneappa Setty from Messrs. Hamilton & Company; and on payment by the said Koosoo and Ko Pho of the said difference, then this obligation shall be void, or otherwise to remain in full force and virtue." The rubies having been sent to England, Koosoo and Ko Pho both agreed that a reserved price should be put upon them. But when they arrived in England the market for the sale of rubies had gone down, and there was no sale for them at the reserved price. If Koosoo and the Plaintiffs had without the consent of Ko Pho arranged that the rubies should not be sold in England, but should be sent back and sold in Calcutta, and had put it out of the power of Hamilton & Company to sell them in England, the Defendant, Ko Pho, might have had a defence to the action;

but he consented to the rubies being brought back and sold in Calcutta. The learned Judges of the High Court say:—" Much
 " reliance was placed by the Plaintiffs upon a
 " passage in Arnasalem's evidence, in which he
 " states that the Defendant Ko Pho told him
 " to write to his agent to send for the rubies
 " from England, as the market had fallen there,
 " and that they should be sold in Calcutta. On
 " the same occasion Ko Pho said that he would
 " himself write to Koosoo to have the rubies sold
 " in Calcutta; but this conversation took place
 " four months before the actual sale of the rubies,
 " and there is no evidence that either Arnasalem
 " or Ko Pho wrote to Calcutta upon the subject,
 " or that Ko Pho did really in this way authorise
 " the sale which took place." Whether the
 conversation took place four months before the
 actual sale or not is immaterial. The letter at
 page 87 of the record was signed for Ko Pho by
 the pen of Koosoo, and there is no sufficient
 evidence to show that Ko Pho authorised Koosoo
 to sign it for him. But, without referring to that
 letter, their Lordships are of opinion that there is
 quite sufficient evidence to show that Ko Pho
 consented that only 108 rubies should be sent
 to England for sale, and that he afterwards
 consented to their being brought back and
 sold in Calcutta. They were sold in Cal-
 cutta, and it thereby became impossible to
 realise anything from the sale of them in
 England. Ko Pho was therefore liable to pay
 to the Plaintiffs the amount secured by the
 bond after deducting the amount which
 Mr. Justice White, by his decree, has ordered to
 be deducted therefrom; viz., the sum which was
 realised by the sale in Calcutta.

Under these circumstances their Lordships
 will humbly advise Her Majesty to reverse the

decree of the High Court on appeal, and to affirm the decision of the High Court in its original jurisdiction, and to order that the Defendants do pay the costs in the High Court in appeal. Their Lordships order that the Respondents do pay the costs of this Appeal.

