

ORIGINAL CIVIL.

Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Batty.

CHANDULAL SUKLAL AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS,
v. SIDHRUTHRAI SOOJANRAI (ORIGINAL DEFENDANT), RESPONDENT.*

1905.
January 20.

Principal and agent—Sale and purchase by the agent on his own account—Wagering contracts—Usage of trade—Commission agents—Pakka adat system—Tender of evidence as to delivery at other vaidas—Relevency of such evidence.

The defendant, a resident of the North-West Provinces, from time to time sent orders to the plaintiffs in Bombay to sell and purchase cotton on his account. The plaintiff carried out the defendant's orders as they were received. Up to the due date they had purchased on behalf of the defendant 400 bales more than they had sold. It appeared that by reason of other contracts entered into with the merchants from whom they had purchased on behalf of the defendant the plaintiffs had 'cancelled' all these purchases, before the due date. The defendant neither sent money to pay for the cotton nor did he direct the plaintiffs to sell on his behalf. The plaintiffs sued the defendant describing themselves as commission agents for their commission and for the loss on 400 bales sold on defendant's account. The plaintiffs were unable to show that they had paid any damages on account of the defendant, for failure to take delivery, to any of the merchants from whom they had purchased on defendant's account. The suit was dismissed in the lower Court on the ground that the contracts were wagering contracts. In appeal the plaintiffs contended that they were entitled as between themselves and the defendant to treat themselves as the principals, on the ground that the business was conducted on the *pakki adat* system, under which no privity was established between the defendant and the merchants to whom or from whom cotton was sold or bought on his account.

Held that if the plaintiffs were, as their plaint stated, commission agents, and they were employed by the defendant as his commission agents, and as such, under instructions and on account of the defendant, entered into these purchases, they had no cause of action.

Held, further, that the usage termed the *pakki adat* system involved a material departure from the ordinary relations between a principal and his agent of which there was no suggestion in the pleadings or issues, nor was there any evidence to prove it. The plaintiffs must therefore be held to the case they had made.

During the course of the hearing in the lower Court it appeared that at the *vaida* for which the contracts in question had been made the plaintiffs had neither given or taken delivery of any cotton. They tendered evidence to show that at other *vaidas* they had given or taken delivery of cotton and other

* Suit No. 275 of 1898 ; Appeal No. 1182.

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goods. The learned Judge rejected the evidence as irrelevant to the issue whether the contracts were wagering contracts.

Held, on appeal, that the evidence tendered was relevant and should have been admitted.

THIS was an appeal from the decision of Starling, J.

The plaintiffs described themselves in the plaint as commission agents carrying on business in Bombay, the defendant carrying on business at Deoband in the North-West Provinces. They alleged that the defendant employed them as commission agents, and that they as such commission agents under instructions and on account of the defendant entered into various sales and purchases of Bengal cotton all deliverable between the 15th and 25th January, 1897. The third and fourth paragraphs of the plaint were as follows:—

(3) At the due date of the several contracts there remained outstanding 400 bales to be taken delivery of on account of the defendant, and the plaintiffs had already intimated to the defendant that unless he remitted to them money to enable them to take delivery of the said 400 bales, the same would be sold by them on his account at the market rate.

(4) The defendant having failed to send to the plaintiffs the amount of purchase money, the plaintiffs sold the said 400 bales of cotton on defendant's account at the market rate and the same resulted in a loss of Rs. 6,702-13-0, including brokerage and commission.

By his written statement the defendant admitted that he employed the plaintiffs as his commission agents, but either denied or put the plaintiffs to strict proof of the other allegations contained in the plaint, and finally pleaded that if the plaintiffs had in fact entered into any contracts for sale and purchase on his behalf they were wagering contracts. In the course of the trial before Starling, J., the plaintiffs' moonim admitted that not a single bale of cotton had been received or delivered at the *vaida* in question, that is between January 15th and 25th, 1897. At a subsequent stage of the hearing evidence was tendered to show that on other *vaidas* cotton was taken and delivered by the plaintiffs. This evidence was rejected by the learned Judge as being irrelevant.

On the 7th of October, 1901, Starling, J., delivered an oral judgment dismissing the plaintiffs' suit on the ground that the contracts sued on were wagering contracts. He recorded no

finding on any of the other issues, which are set out below in the judgment of the learned Chief Justice. The plaintiffs appealed; the Court of appeal consisting of Sir L. Jenkins, C. J., and Chandavarkar, J., were of opinion that the rejected evidence should have been admitted, and the case was remanded for the taking of the evidence tendered and rejected, and for findings to be recorded on the remaining issues. Starling, J., after hearing the further evidence adduced by the plaintiff, adhered to his finding on the seventh issue, *i. e.*, that the contracts were wagering contracts, and recorded findings in favour of the defendant on all the other issues. The plaintiffs appealed.

Inverarity and *D. D. Davar*, for the appellants:—The business was done on the *pakki adat* system. The plaintiffs had no concern with the intention of the defendant; they had simply to earn their commission. We rely on the decision of Chandavarkar, J., in *Kanji Devji v. Bhagwandas Narotandas*⁽¹⁾. We purchased or sold as ordered by the plaintiffs to definite individuals, but we contend we were not bound to keep those contracts open. We were at liberty to settle them before due date. There never was any privity of contract between the up-country constituent and the merchant in Bombay to whom we bought or sold.

(1) Suit No. 545 of 1904. Judgment was delivered on December 2nd, 1904. The passage relied upon by the appellants was the following:

“The following are the incidents of the *pakki adat* system:—

(1) A *pakka adatia* can allocate any up-country constituent's order to himself, without the knowledge, consent, or permission of the constituent. This may be called the right of allocation in the first instance.

(2) A *pakka adatia* receives an order to buy or sell, accordingly he enters into a contract with a Bombay merchant. Subsequently but before the due date the *pakka adatia* enters into a cross contract with the same merchant on his own (the *pakka adatia's*) account and either squares the original contract or keeps the two contracts open till due date. He is entitled to do that and yet keep the order of the first constituent open till the due date so as to hold the said constituent bound on that date to deliver or take delivery, as the case may be.

(3) In the case put above (No. 2), instead of entering into the cross contract on his own account, the *pakka adatia* can enter into it on behalf of another constituent. The same result follows.”

An appeal from this decision is now pending (Ed.).

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As between the plaintiffs and the defendant we were the principals: so far as the defendant is concerned we were the buyer and seller, though not so in fact. This was not a wager with the plaintiffs. We cannot gain or lose by the market going up or down. The up-country constituent makes the profit or incurs the loss—we only pay or receive on his behalf, and earn our commission. The defendant knew how we conducted the business. The evidence shows these were not wagering contracts.

Robertson and Setalvad, for respondent:—These were wagering contracts. The correspondence shows no delivery ever intended on either side. No bales at all delivered or received at this *vaida*, or on account of an up-country constituent at any other *vaida*. *In re Gieve* ⁽¹⁾, *Universal Stock Exchange v. Strachan* ⁽²⁾, Bombay Act III of 1865, *Perosha Cursetji v. Manekji Dossabhoj* ⁽³⁾, *Deshi Talakshi v. Shah Ujamsi Velsi* ⁽⁴⁾ relied on. Having regard to the plaint and the claim for commission the appellants cannot ask to be treated as principals. The *pakki adat* system now set up by the appellants was not suggested in the Court below: nor was it shown to be known to the defendant. By the manner in which the appellants dealt with the contracts their duty became adverse to their interests. This disentitles them to relief, at any rate unless they can show positively the knowledge and acquiescence of the respondent. *Rothschild v. Brookman* ⁽⁵⁾, *Bostock v. Jardine* ⁽⁶⁾, *Robinson v. Mollett* ⁽⁷⁾, *Tetley v. Shand* ⁽⁸⁾. In any case as all the contracts purporting to be entered into by the appellants on behalf of the respondent were settled or cancelled before due date the appellants cannot show that they have paid any sum to any third party on behalf of the respondent. An agent is only entitled to an indemnity: Contract Act, section 222, Bowstead Digest of the Law of Agency, pp. 67, 68 and 172.

Inverarity in reply: It was assumed that what was done was done in accordance with the *pakki adat* system: therefore there was no failure of duty on appellants' part in not providing a third party to whom respondent could look for performance. The

(1) (1899) 1 Q. B. 794.

(2) (1896) A. C. 166.

(3) (1898) 22 Bom. 899.

(4) (1899) 24 Bom. 227.

(5) (1831) 5 Bl. N. S. 165.

(6) (1865) 3 H. and C. 700.

(7) (1874-75) L. R. 7 H. L. 302.

(8) (1871) 25 L. T. N. S. 658.

evidence taken on remand shows that large quantities of goods of various kinds were given and taken delivery of, and that cotton was delivered and received on other *voidas*.

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JENKINS, C. J.:—The plaintiffs sue to recover Rs. 7,309-10-3 with interest as the balance due to them in respect of transactions between them and the defendant.

In the plaint the case they make is that they were commission agents carrying on business in Bombay: that the defendant in 1896 employed them as his commission agents in Bombay and that they as such commission agents under instructions and on account of the defendant entered into various sales and purchases of Bengal cotton all deliverable between the 15th and 25th January, 1897: that at the due date of the several contracts there remained outstanding 400 bales to be taken delivery of on account of the defendant: that the defendant having failed, though warned, to send the plaintiffs money to enable them to take delivery of the 400 bales, they sold the same on the defendant's account, whereby a loss resulted of Rs. 6,702-13-0 including brokerage and commission; and that the amount then due was Rs. 7,309-10-3.

The defendant by his written statement denied the alleged sales and purchases, and further pleaded that if the plaintiffs entered into any contracts for sale or purchase on his behalf they were wagering contracts.

The case came on for hearing before Starling, J., when the following issues were raised:—

1. Whether the plaintiffs entered into the contracts in the plaint mentioned on behalf of the defendant.
2. Whether the said contracts, if any, were not settled by the plaintiffs before the due date and without informing the defendant.
3. Whether at the due dates of the several contracts there remained to be taken delivery of on account of defendant 400 bales as alleged in paragraph 4 of the plaint.
4. Whether the plaintiffs in fact sold 400 bales on account of the defendant as alleged in paragraph 4 of the plaint.
5. Whether the plaintiffs were entitled to sell the same.
6. Whether the plaintiffs have paid the sum of Rs. 6,702-13-0 or any part thereof on behalf of the defendant.
7. Whether the said contracts were not wagering contracts.
8. General issue.

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In the first instance the learned Judge, holding on the 7th issue in the affirmative, dismissed the suit with costs without any finding on the other issues. An appeal from this decree was preferred with the result that this Court, being of opinion that evidence had been improperly excluded, remanded the case for this evidence to be taken, and directed findings to be recorded on all the issues.

The case again came before Starling, J., who found on the 7th issue in the affirmative: he also found on the 1st and 2nd issues in the affirmative and the 3rd, 4th and 5th in the negative. It is under these circumstances that the case again comes before us. The dealings between the plaintiffs and the defendant comprised of one sale and several purchases of Bengal cotton in August and October 1896 for the *voida* of January 1897. The sale was of 100 bales on the 21st of August at Rs. 173, and the purchases were of 300 bales on the 24th of August partly at Rs. 174-8-0 and partly at Rs. 174, and of 200 bales on the 26th of October partly at Rs. 173 and partly at Rs. 172-12-0. The sale is not made the subject-matter of this suit for it has been treated as "cancelled" by one of the purchases which is also excluded, and the contest relates to the remaining three purchases. Which of the purchases is thus excluded is not clear, but this is of no importance, for the course of dealing in each case has been substantially the same.

The first order to buy was on the 24th August 1896, and was communicated by a telegram from the defendant to the plaintiffs in these terms: "Received telegram buy cotton January 300 bales 174."

Thereupon the plaintiffs on the same date bought 100 bales from Sivdayal Rudmul at 174-8-0, 100 from Tulsiram Musadilal at 174, and another 100 from Tulsiram Musadilal at 174.

In the plaintiffs' Soda Vahi it is entered that "the same were purchased on account of Sivdatrai Saravgi of Deoband" that is on account of the defendant. The same day the plaintiffs telegraphed to the defendant "Bought cotton January 300 bales 174/4."

On the 25th of August the defendant wrote to the plaintiffs:—

The deity Shri Ramji always assists!

Peace! Prosperity. To the worthy of all good comparisons, the most illustrious Bhai Chandulal Rameserdas at that good place, Bombay. From Deoband, written by Sidhrathrai, whose Ram Ram salutations do you be pleased to read.

Further, do you be pleased to read, piece of intelligence (as follows) :—

Your letter arrived. I have noted the intelligence which you wrote. You write (saying) that you have made contracts on my behalf agreeably to the following particulars. I have noted the same.

100 Bales of cotton for January (delivery) sold at (Rs.) 173.

300 Bales of cotton for January (delivery) purchased at (Rs.) 174-4-0.

You wrote (thus). I have brought the same to account agreeably to what you wrote. Rest assured of that.

Further, do you be pleased to write as to what you think of cotton for January (delivery).

Do you be good enough to write a reply about it.

(This) letter is written on the lunar date the 2nd of Bhadarwa vad of S. (Samvat) 1953 (25th August 1896).

From Exhibit No. 2, the plaintiffs' account with Shivdayal, we find the purchase from Shivdayal entered, and the account shows that this contract was "cancelled" before the January *vaida*. Exhibit No. 3, the plaintiffs' account with Tulsiram Musadilal, shows a similar treatment of the two purchases from him.

On the defendant's October order purchases were made from Soairam Ganpatram and Govindasji Luchmondas and these too were "cancelled" before the due dates.

To speak of these contracts of sale or purchase as being "cancelled" is perhaps not accurate; but what is meant, is well understood: it is that a contract of the one class is followed by a contract of the other, having the effect of cancelling or reducing liability on the first: thus if the plaintiffs on a constituent's instruction buy 100 bales of cotton at 174, and later, on his instructions sell a similar number of bales at the same price, then as between the constituent and the plaintiffs his liability on the first contract is treated as balanced and adjusted.

In their answers to interrogatories the plaintiffs thus describe their view of the position:

"Shivdayal Rudhmal and Tulsiram Musadilal did not offer delivery of the goods agreed to be purchased by us from them on behalf of the defendant and it was not necessary for them to be ready and willing so to do."

So in his evidence Nanakram Rambhagat, the plaintiffs' moonim, says:

"On the due date there was one contract for 100 bales for Shivdayal to deliver to us, but I think he must have given a delivery order for that. *All the*

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other transactions had been squared up except this...I turn to the account of Tulsiram Musadilal— There are several items on each side of this account. By the due date both sides had been squared except payment of differences by us...I have Soniram Ganpatram's account. In it there is only one sale and one purchase of 100 bales and there was nothing outstanding on the due date. I have the account of Govindas Luchmondas at page 5. That was squared up before the due date.....On the due dates Shivdayal had 100 bales to deliver for which he gave me delivery order but no one of the other merchants from whom we purchased were bound to receive or deliver any bales."*

Thus on the purchases made in consequence of the defendant's instructions from Shivdayal Rudmull, Tulsiram Musadilal, Soniram Ganpatram, and Govindasji Luchmondas no delivery was made, there was not even an offer of delivery, and in the plaintiffs' view it was not necessary for them to be ready and willing to offer delivery.

All these purchases were treated as "squared" by the due dates, and it is not proved that in respect of any one of them any loss was suffered by the plaintiffs.

*The account of Tulsiram Musadilal (Exhibit No. 3 in the case) in the plaintiff's books illustrates the evidence of this witness. The first item on the credit side is the purchase by the appellants of 200 bales part of the order for the purchase of 300 bales referred to in a previous portion of the judgment.

The account with Tulsiram Musadilal in respect of cotton of the month of January (delivery).

<i>Cr.</i>	<i>Dr.</i>
200 Bales of cotton purchased. Rate 174. Journal (page) 4. The 1st of Bhadwa Bud (24th August 1896). Numbers 92-93.	100 Bales of cotton sold. Rate 153. Journal (page) 24. The 7th of Magsar sud (11th December 1896).
100 Bales of cotton purchased. Rate 168½. Journal (page) 5. The 7th of Bhadwa Bud (30th August 1896). Number 37.	100 Bales of cotton sold. Rate 147½. Journal (page) 27. The 10th of Pos Bad (29th December 1896). Number 1.
100 Bales of cotton purchased. Rate 171. Journal (page) 17. The 7th of Katik Bud (26th October 1896). Number 15.	100 Bales of cotton sold. Rate 150. Journal (page) 27. The 11th of Pos Bad (30th December 1896). Number 88.
	100 Bales of cotton sold. Rate 142½. Journal (page) 23. The 2nd of Pos Sud (5th January 1897). Number ...

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(Ed.)

If, therefore, the plaintiffs were, as their plaint states, commission agents, and they were employed by the defendant as his commission agents, and as such commission agents under instructions and on account of the defendant entered into these purchases, it is obvious that no cause of action is shown. But they seek to escape from this consequence by contending that they were not commission agents in the ordinary sense of that term, but that they conducted their business on the *pakki adat* system.

For the terms of that system we have been referred to the judgment of Chandavarkar, J., in *Kanji Devji v. Bhagwandas Narotamdas*⁽¹⁾.

Relying on this it is argued that the plaintiffs were really the principals with whom the defendant dealt, and that the contracts with Shivdayal and the other sellers, though made in consequence of the defendant's instruction, were not in truth made on his account so as to establish privity between him and those several sellers.

But the usage proved before Chandavarkar, J., involves a material departure from the ordinary relations between a principal and his agent, and the learned Judge's view in its favour is based on evidence adduced before him for the purposes of that case.

In this case there is no suggestion of this usage in the pleadings or the issues nor is there evidence which proves it.

And obviously the finding in *Kanji Devji v. Bhagwandas Narotamdas*⁽¹⁾ cannot be claimed as establishing a usage of which we ought in this suit to take judicial notice.

The plaintiffs must, in my opinion, be held to the case they have made, and I am confirmed in this view by the tenor of the correspondence between them and the defendant.

The result, therefore, is that we confirm the decree with costs.

Decree confirmed.

Attorneys for the plaintiffs: *Messrs. Tyabji, Dayabhai & Co.*

Attorneys for the defendant: *Messrs. Malvi, Hiralal & Mody.*

(1) (1904) 7 Bom. L. R. 57.

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