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all cases before the issues are settled, and any defendant not so applying *shall be deemed to have acquiesced* in the institution of the suit.

No application was made under section 20. Therefore, the Barsi defendants must be deemed to have acquiesced in the institution of the suit, and the suit cannot now be said to have been improperly instituted against them in the Sirsi Court.

We therefore reverse the order of the District Judge and send back the case to be determined on the merits.

Costs of this appeal will be costs in the suit.

G. B. R. *Order reversed.*

ORIGINAL CIVIL.

Before Mr. Justice Batchelor.

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April 3.

MOTILAL PARTABCHAND, CARRYING ON BUSINESS IN THE NAME OF KHUSALCHAND PARTABCHAND (PLAINTIFF), *v.* GOVINDRAM JEYCHAND, CARRYING ON BUSINESS IN THE NAME OF RAMBUX JEYCHAND (DEFENDANT).*

Wagering contracts—Agreement to pay differences—Surrounding circumstances—Form of contract not of moment—Contract Act (IX of 1872), section 30—Bombay Act III of 1865.

The law which is contained in section 30 of the Contract Act (IX of 1872) and in Bombay Act III of 1865, is that the Court must not only consider the terms in which the parties have chosen to embody their agreement, but must look to the whole nature of the transaction or institution, whatever it may be, and must probe among all the surrounding circumstances, including the conduct of the parties, with a view to ascertain what in truth was the real intention or understanding between the parties to the bargain. The actual form of the contract is of little moment, for gamblers cannot be allowed to force the jurisdiction of the Courts by the expedient of inserting provisions which might in certain events become operative to compel the passing of property though neither party anticipated such a contingency.

The Court should be astute to discover what in fact was the common intention of both parties, and should do all that is possible to see through the ostensible and apparent transaction into the underlying reality of the bargain.

* O. C. J. Suit No. 721 of 1903.

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SUIT to recover a sum of money from the defendant.

The plaintiff sued to recover Rs. 5,092-8-0 from the defendant, alleging that the defendant had, during the year 1901 A. D., entered into contract with the plaintiff for the purchase and sale of large quantities of linseed; that the defendant failed to carry out his contracts for delivery of 3,250 cwts. of linseed which became deliverable in September 1901, and that by reason of the defendant's breach of contract the plaintiff sustained damages amounting to Rs. 5,092-8-0.

The defendant, in his written statement, contended *inter alia*, that he did not enter into any contracts with the plaintiff, and that the alleged contracts if made at all were not real contracts but were made in respect of agreements of wager on the price of linseed and that it was not the intention of either the plaintiff or defendant that any linseed should be delivered under the said agreement but it was their common intention that differences only between the contract price and the price fixed by the punch on the due date should be paid and received.

Davar, with *Raikes* (acting Advocate General), for the plaintiff.

Robertson, with *Inverarity*, for the defendant.

BATCHELOR, J.—The plaintiff and the defendant are Marwari traders in a large way of business, and in this suit the plaintiff claims Rs. 5,092-8-0 as damages for breach of contracts for the sale and delivery of linseed. The contracts in question are seven in number, Exs. A to G, ranging in date from 11th March to 7th May 1901, and purport to be forward contracts for the delivery of linseed between the 14th and 28th September 1901, that is, the Bhadarva *vaida* of the *Samvat* year 1957. The plaint sets out that, under these contracts, deducting a sale made by the plaintiff under the contract Ex. H, 3,250 cwts. of linseed became deliverable by defendant to plaintiff in Bhadarva 1957; that owing to defendant's failure to fulfil the contracts, plaintiff had suffered the damage above stated; and that though repeated demands for payment had been made the defendant failed to make any compensation to the plaintiff. In his written statement the defendant denied that he had entered into the alleged contracts with the plaintiff, and contended that if the said contracts were made by him, they

were mere wagering agreements unenforceable in law. It was pleaded, further, that the plaintiff had not called on the defendant to give delivery on the due date, and had never tendered the price of the linseed. Finally it was denied that the plaintiff had suffered the damage complained of or any damage, and the market rates of linseed adopted in the plaint were challenged by the defendant.

The following are the issues on which the parties went to trial:—

1. Whether the defendant agreed to buy and sell from and to the plaintiff linseed as alleged in para. 3 of the plaint?

2. Whether, if so, the plaintiff ever demanded delivery of the said linseed?

3. Whether the plaintiff was ready and willing to perform his part of the contract?

4. Whether the plaintiff has suffered the damage alleged or any part thereof?

5. Whether the said contracts, if entered into at all, were not wagering contracts?

On the first issue—whether the defendant agreed to sell to the plaintiff the 3,250 cwts. of linseed—I am of opinion that the plaintiff has clearly established his case. The evidence shows, and I understand that the fact is not disputed, that at the time these contracts purport to have been made, the defendant's *munim* at Bombay was one Jagannath Mantri, and that in June 1901 he absconded from Bombay taking with him the books and papers of the firm. A warrant was obtained for his arrest, and, being subsequently induced to surrender, he was taken down to Hyderabad (Deccan), the defendant's principal seat of business, and was there tried and convicted. Now the contracts Exs. A to G are made on the usual printed form with manuscript additions, and purport to be signed by Jagannath Mantri for the defendant's firm. The witness, Subhanchand Sijanmal, who was then the plaintiff's munim but is no longer in plaintiff's employment, identifies the signature of Jagannath. It is true that he never actually saw Jagannath signing his name, but he was familiar with the signature and I cannot doubt that the identification is satisfactory. And the witness proves further, that, in accordance with the practice of his firm, the signatures were duly verified when the contracts were accepted. Of the seven contracts, Exs. A, B and E were

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made by plaintiff on behalf of his constituent Hiralal Ratanchand, Ex. C was made on behalf of Sangidas Bikhanchand, and Exs. D, F and G were entered into on the plaintiff's own behalf. In the plaintiff's *soda-vahi* (register of contracts) we have the corresponding entries Exs. I to O. I have no doubt that the books are correctly kept, and these entries corroborate Subhanchand's evidence as to the authenticity of the contracts. Further support to this part of the plaintiff's case is furnished by Exs. 4 and 5, the *khatas* of Hiralal and Sangidas, who are credited with the differences due to them. Then there is the evidence of the broker, Gopal Jenarayan, who upon this point is unshaken in cross-examination, who is fortified by the book entry Ex. Z, and who deposes that the contract Ex. C was made through him by the defendant and was signed by Jagannath in his presence. It is not suggested that the contract Ex. C can reasonably be put upon any different footing from the other contracts sued upon. Again we have the three contracts, A 7, which are admitted by defendant's witness Surajmal Nihalchand to be signed by Jagannath, and if these signatures be compared with the signatures on the contracts in suit, they will be found to agree.

Against all this evidence nothing tangible is even alleged by the defendant, who has not chosen to come to Bombay to defend this suit. In the opening paragraph of the written statement there is indeed a vague denial that these contracts were made, but, if the written statement be read as a whole, it would seem that this denial is a *pro forma* allegation and that the real defence was intended to be grounded on other considerations. And this view is strengthened by the course adopted in argument: Mr. Robertson, for the defendant, contending that the contracts, though made by Jagannath, would not be binding on the defendant. Of course it is perfectly competent to the defendant to rely upon alternative defences, but it is noticeable that an attitude of mere negation is the only position that the defendant can assume upon the question of the authenticity of Jagannath's signatures upon these contracts. In other words it is not alleged that any one could have forged Jagannath's signature; on the contrary, whatever misfeasance is imputed, is imputed to Jagannath himself, and the real argument is that,

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assuming the signatures to be genuine, the contracts are not enforceable against the defendant. I find as a fact that the contracts in suit were signed by Jagannath. As to the contention that no obligation was imposed on the defendant by Jagannath's execution of these contracts, it is unfortunate in the first place that no hint of this defence is to be found in the written statement. Then it is to be observed that Jagannath was admittedly the defendant's *munim* for the Bombay business, and I need not seek to attach to the word *munim* any further significance than is conveyed by Mr. Robertson's own paraphrase of "managing agent." Whatever be the particular form of words chosen for a transaction, the fact is indisputable that for the purposes of the defendant's trade in Bombay Jagannath *was* the defendant. He was the defendant's agent and representative, whom the defendant held out as empowered to transact all business on his behalf. And, in spite of attempted denials on the plaintiff's behalf, the defendant's own *munim*, Chunilal Salegram, the deeds Exs. A5 and A6 produced by him, and the defendant's witness Surajmal Nihalchand prove incontestably that linseed was one of the ordinary articles of commerce in which the defendant's firm was dealing. As I have said, the defendant does not appear personally to resist this claim, and there is literally no evidence to suggest that these contracts, whatever may be their true character, were made by Jagannath either in excess of his authority or in violation of his master's orders. Mr. Davar, for the plaintiff, has commented upon the fact that certain books and letters of defendant's firm which should be produceable have not been produced, and though I think the importance of this circumstance may be easily exaggerated, it is not a matter which can be wholly overlooked. On the evidence it is, in my opinion, manifest that in entering into these contracts Jagannath was doing just that class of acts which he was ostensibly placed by defendant in Bombay for the purpose of doing. Nor is there any evidence to show that Jagannath was acting for his own benefit, as opposed to the benefit of his master. These facts being so, I can entertain no doubt that these contracts of Jagannath bind his principal, the defendant. Authority for this opinion is, I think, supplied by *Montaignac* v.

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Shilla (1) and *Ruben* v. *Great Fingall Consolidated* (2). In this latter case Collins, M. R., cites and explains the passage, which he calls the *locus classicus* on the subject, from the judgment of Willes J. in *Barwick* v. *English Joint Stock Bank* (3). There the principle is thus stated:—"The master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved.....It may be said that the master has not authorised the act. It is true, he has not authorised the particular act, but he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which the agent has conducted himself in doing the business which it was the act of his master to place him in." Now it seems to me quite clear upon the facts of this case that the acts of Jagannath fall within this principle and are binding upon the defendant.

The second and third issues have not been separately argued at any length. They are really involved in the fifth issue which is the point upon which the whole case turns and which I shall discuss in a moment. Exhibits T and U, extracts from the plaintiff's Register, are adduced to prove that on the 25th and 27th September letters of demand were sent to the defendant, and for the purposes of this issue I will hold that these letters were really despatched. But it is certain that they did not reach the defendant, and in any case the capital question remains whether they demanded delivery or merely the payment of differences. I may say briefly that if the plaintiff succeeded on the issue as to wagering, I think he should succeed also on this issue, but not otherwise.

Similar remarks are applicable to the third issue. If the contracts were genuine commercial transactions, then I should hold that the plaintiff was ready and willing to perform his part. For his own affirmation to this effect need not be distrusted, and his cash book shows that on the due date he was in possession of ample funds wherewith to meet these contracts.

(1) (1890) 15 App. Cas. 357. (2) [1904] 2 K. B. 712 (C. A.).
(3) (1867) L. R. 2 Ex. 259.

Postponing for a moment the fourth issue as to the damages claimable, I am now brought to the crucial question in the case, that is, whether the contracts in suit were *bona fide* dealings for the sale and delivery of goods, or were merely wagering agreements on differences, in other words bets upon the rise and fall of the market. This is a question of fact, and the only legal principle that I can call in aid is that admittedly the burden of proof lies on the defendant. In other respects this case, like every other case of facts, must depend on its own evidence, and a study of the reported decisions can afford little help except as indicating the classes of facts upon which the Courts have based their judgments. The law upon the subject which is contained in section 30 of the Contract Act and in Act III of 1865 is, I take it, this, that you must not only consider the terms in which the parties have chosen to embody their agreement: you must look to the whole nature of the transaction or institution, whatever it may be: and you must probe among all the surrounding circumstances, including the conduct of the parties, with a view to ascertain what in truth was the real intention or understanding between the parties to the bargain. The actual form of the contract is of little moment, for gamblers cannot be allowed to force the jurisdiction of the Courts by the expedient of inserting provisions which might in certain events become operative to compel the passing of property though neither party anticipated such a contingency: see *Universal Stock Exchange* v. *Strachan* [1] per Lord Herschell, the decision of the Privy Council in *Kong Yee Lone & Co.* v. *Lowjee Nanjee* [2], and *Doshi Talakshi* v. *Shah Ujamsi Velsi* [3]. Mr. Davar, for whose able and interesting address I desire in passing to express my acknowledgments, has insisted upon the indisputable distinction which exists between mere speculation and wagering, and has laid particular stress upon Farran J.'s judgment in *J. H. Tod* v. *Lakhmidas Purshotamdas* [4], which was approved by the appeal Court in *Doshi Talakshi's* case [3]. But I am not aware that, except perhaps in one passage, Farran, J., has laid down the law

(1) [1896] A. C. 166 at p. 173. (2) (1901) 29 Cal. 461; 3 Bom. L. R. 476.
(3) (1899) 24 Bom. 227; 1 Bom. L. R. 786. (4) (1892) 16 Bom. 441.

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more favourably to the plaintiff than appears from the decisions to which I have already made reference. The particular passage in question is where the learned Judge says that the contracts are not wagering contracts "unless it be the intention of both contracting parties, at the time of entering into the contracts, under no circumstances to call for, or give delivery from or to each other." It may perhaps be doubted whether the phrase "under no circumstances," which does not appear to have been prominently brought before the Court of Appeal in *Doshi Talakshi's* case[1], is not rather an overstatement of the requirements of the law; and upon this point I would refer to the decision in *In re Gieve*[2]. That was a case where the contract in terms gave the buyer an option to demand delivery upon the payment of a small excess commission. It was argued that, even if the contracts were for the payment of differences only, the power in either party to turn them into real contracts by insisting upon delivery prevented them from being wagering contracts, but the Court of Appeal disallowed the contention: in the simple and decisive language of Lindley, M. R., such a contract does not escape the taint of wagering: "it is a gaming transaction plus something else": it was a bargain for differences plus an option to purchase. And the other Lords Justices were not less emphatic, Rigby L. J. observing:—"The very condition that it is to be optional for the purchaser to take up the stock shows that he is not bound to do so. He may do so if he chooses, by paying an extra sum, but not otherwise. This, therefore, is a contract for the payment of differences, and for nothing else. No doubt these conditions are put in to make it appear that they are intended to protect the selling broker, but I am glad to say they are not sufficient to blind this Court to the real nature of the transaction, which was that there was no intention whatever to deliver or accept stock."[3] I must not be understood as affirming that Farran J.'s view is irreconcileable with these pronouncements; it is enough to say that I follow the law as it is stated by the Lords Justices. I may add that the authorities which I have cited appear to me to require that the Courts shall be astute to discover what in fact was the common

(1) (1899) 24 Bom. 227: 1 Bom. L. R. 786. (2) [1899] 1 Q. B. 794 (C. A.).
(3) [1899] 1 Q. B. 794 at p. 800.

intention of both parties, and shall do all that is possible to see through the ostensible and apparent transaction into the underlying reality of the bargain. With regard to *Sassoon* v *Tokersey*[1], where the defence of wagering was not allowed, I may observe that in that case the plaintiffs were mere brokers, and could not be assumed to know the intentions of the contracting principals; moreover it was held as a fact that 90 per cent. of the business was *bona fide* and that delivery to a very considerable extent took place. So in *Forget* v. *Ostigny*[2], there was an actual purchase of the commodity, namely shares, and the defendant actually received dividends. As to *Ajudhia Prasad* v. *Lalman*[3] that apparently merely follows the judgment of Farran, J., in *J.H. Tod* v. *Lakhmidas*[4], and it would seem that neither *Kong Yee Lone and Co.* v. *Lowjee*[5] nor *In re Gieve*[6] was brought to the consideration of the Court. The case of *Eshoor Doss* v. *Venkatasubba Rau*[7] supports the view which I have taken, and, so far as a decision on one set of facts can influence a decision on another set of facts, makes against the acceptance of the present plaintiff's story. For the judgment of Parker, J., proceeds mainly upon the footing that the question discussed between the parties was the payment of differences, not the passing of the Government paper, and that, though the plaintiff had been long engaged in these transactions, he had only given delivery on one single occasion.

Now before going to the facts of this case I may interpolate here such notice as seems necessary of Mr. Robertson's contention that in any event the defendant is not answerable upon the suit of the plaintiff since plaintiff was a mere agent acting on behalf of up-country constituents whose claims have been settled. This remark, however, applies only to a part of the contracts in suit, and even as to them I confess my inability to discover its legal significance. In so far as the plaintiff was an agent, he was acting on behalf of undisclosed principals, of whom nothing was known until the witnesses in this case were examined. Here the

(1) (1904) 28 Bom. 616: 6 Bom. L. R. 521.
(2) [1895] A. C. 318.
(3) (1902) 25 All. 38.
(4) (1892) 16 Bom. 441.
(5) (1901) 29 Cal. 461: 3 Bom. L. R. 476.
(6) [1899] 1 Q. B. 794.
(7) (1894) 17 Mad. 480 and (1895) 18 Mad. 306.

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plaintiff is suing as a principal and under section 230 sub-section (2) of the Contract Act it appears to me that his suit is competent. With these observations I pass to consider the facts in the case in the light of the principles and authorities which I have set out above. In the words of Lord Hobhouse in *Kong Yee Lone's* case[1], I have to see whether the circumstances are such as to warrant the legal inference that the parties never intended any actual transfer of goods at all, but only to pay or receive money according as the market price of the goods should vary from the contract price at the due date. Now whatever else may be said, it must, I think, be admitted that in this case the question is not at first sight easy of solution, and it seems to me desirable to record that the conclusion at which I have arrived has been reached only after anxious consideration. On the evidence, taken as a whole, it cannot be seriously doubted that whatever be the character of these particular contracts, contracts of similar form were commonly made in the Marvari bazar in Samvat 1957 with no intention of giving or taking delivery of linseed, but with the sole object of gambling on differences. On the other hand, it must be confessed that this case does not present certain significant *indicia*, which in other cases have induced the Courts to concede the defence of wagering. In *Kong Yee Lone's* case[1], for instance, the transactions in question were extravagantly out of proportion to the genuine commercial resources of the parties, and in *Doshi Talakshi's* case[2] the contracts were made at Dholera in Broach cotton, a commodity which never found its way either by production or delivery to Dholera. But here it cannot be pretended that the purchase of 3,000 odd cwt. of linseed was beyond the range of the defendant's capabilities or that the requisite quantity of the commodity could not easily have been obtained in Bombay. At the same time, these of course are not the only evidences of wagering, and I have to scrutinise all the circumstances of this case in accordance with the principles above enunciated. In the first place I would call attention to Ex. S, which is a statement prepared from the plaintiff's books showing his transactions in linseed for the years 1957 to 1959. I do

(1) (1901) 29 Cal. 461 : 3 Bom. L. R. 476.

(2) (1899) 24 Bom. 227 : 1 Bom. L. R. 786.

not attribute much weight to the dealings in 1959, for by that time the plaintiff may have reconsidered his position and may have determined to put himself on the right side of the law. Unfortunately the accounts for years prior to 1957 are not forthcoming, but as this result appears to be mainly due to the defendant's neglect to call for them in time, the absence of these books is not a matter which it would be fair to press against the plaintiff. Taking, then, the years 1957 and 1958, we find that during that period the plaintiff purchased for himself and for various customers nearly 3½ lakhs cwts. of linseed, a quantity of which I shall not exaggerate the value in estimating it at Rs. 30 lakhs. In respect of these enormous purchases the only linseed actually delivered was the comparative trifle of 1,219¼ cwts. plus 1,000 cwts. in 1958. And this delivery was in itself exceptional, inasmuch as in 1957 it was made, not to Marvari purchasers upon a native *vaida* transaction, but to the European firm of Volkart Brothers for the April-May delivery. Having regard to Ex. A1 I am not prepared to disallow Mr. Davar's contention that this delivery was given in respect of a forward contract, but it must none the less be observed that the original contract has not been produced by the plaintiff. It appears, further, that the commission paid on this contract was at a different rate from the commission charged on contracts with Marvaris, and I do not think that this isolated and exceptional act of small delivery throws very much light upon the character of the plaintiff's general transactions. And in the same way the small delivery in 1958 appears also to have been made entirely to European firms. It may indeed be said that to a large extent the other contracts were discharged by cross-contracts entered into on the *pakki adat* system of commission agency; but still there remain the facts that business of this sort would be highly speculative and that there was a very large balance of deliverable linseed—*viz.*, 43,500 cwts.—which in fact was never delivered. It is not inconsistent with the defence that there may have been a small amount of genuine business done in the Marvari bazar, for that circumstance, when weighed against the enormous contracts not completed by delivery, would raise but a slight presumption in the plaintiff's favour. It is admitted that the only linseed which plaintiff

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actually had in hand during 1957 was a small quantity of 500 cwts., which bears an almost infinitesimal proportion to the amounts under contract. Ex. S shows that for the three *vaidas* in 1957 the balances deliverable by or to the plantiff were 4,750 cwts. in Magser, 13,000 in Vaishak, and 5,750 in Bhadarva; and the plaintiff himself deposes that the sums due in respect of all these balances were settled by the payment of differences.

Next it is to be observed that the plaintiff has no godown or warehouse in which to store linseed. He says that he was in the habit of storing his goods with his three *mukadams*, but none of the *mukadams* is called to corroborate him, and the fact that he was and is without a storehouse possesses some significance in the light of all the other evidence.

The contracts in suit purport to be made "according to office terms," a somewhat obscure expression which is not explained by the evidence on the record. One witness indeed, Surajmal Nihalchand, interprets the words as meaning that if delivery is insisted on, it must be given; but he admits that he speaks only from hearsay, and I am not disposed to attach much importance to his view. But whether he be right or wrong, the plaintiff himself acknowledges that he for his part is entirely ignorant of the meaning of the phrase, and this ignorance has furnished Mr. Robertson with at least one argument which impresses me as sound. I think I need not do more than notice the over-ingenious theory that since this phrase is not defined, it is impossible to say that the contract has been broken; that is too refined a suggestion to bear much weight; but there is great force in the inference that the plaintiff's ignorance militates against the reality of the contracts. For in each case the contract bears on its face this limitation that it is made "according to office terms" a limitation which is also found in the hundreds of other similar contracts entered into by the plaintiff. But it is difficult to suppose, if these were genuine mercantile transactions, that the plaintiff would not have informed himself of the meaning of a limitation upon which might depend lakhs of rupees. On the other hand the difficulty at once disappears if we adopt the hypothesis that both parties were gambling, and that the actual form of the contract was a mere cloak to disguise their intentions.

Next I will consider the conduct of the parties, a very important guide in cases of this sort where one has to collect a common intention from *indicia* which must necessarily be somewhat imperfect or inconclusive. If these contracts were commercial transactions, delivery had to be made to the plaintiff by the 28th September 1901. Jagannath, the defendant's *munim*, had absconded in June, and I am quite clear that this absconding was perfectly well-known through the length and breadth of the Marvari Bazar. But the plaintiff stands by and makes no sign till, if we accept his own version, the 25th September. On that day and on the 29th September he says that he sent letters of reminder to the defendant's Bombay office, and he refers to the extracts from his Register. (Exhibits T and U). But the letters are not produced, though, the defendant's Bombay office being closed, they were returned to the plaintiff. This non-production seems to me an important matter, for if the letters were really written and were now produced, they might conceivably affect the case unfavourably to the plaintiff. Moreover, if we accept the Registers, they show that the letters to the defendant were some among a great many letters written to other clients of the plaintiff's firm upon similar contracts, contracts which were clearly discharged by the payment of differences. It is difficult to resist the suspicion that the letters themselves were mere calls to pay differences, and not demands for delivery. Then upon the evidence recorded I am satisfied that the plaintiff neither personally nor by deputy made any call upon the defendant's *munims* when they were in Bombay for the purpose of settling the defendant's affairs after the disappearance of Jagannath. Passing from these occurrences, the next sign of activity which plaintiff professes to have displayed is that, after the expiry of the due date, he instructed his Hyderabad *munim*, Lakhmichand, to dun the defendant for the debt. But no letter to or from Lakhmichand is produced, and Lakhmichand himself is not called as a witness. Thus the first authentic demand made by the plaintiff is that conveyed by his attorneys' letter, Exhibit V, dated 19th November 1903, that is, over two years subsequent to the accrual of the obligation. That letter demands the payment of Rs. 5,092-8-0 "due

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by you (the defendant's firm) to them at foot of your account with them in respect of linseed transactions." The letter does not suggest that any prior demand had ever been made. And it is important to notice how the sum claimed was arrived at. It is calculated not upon the difference between the agreed price and the market rate on the date of delivery, but on the difference between the agreed price and the rate fixed by the Marwari *panch* for the settlement of forward contracts. It is clearly proved that this rate is an arbitrary rate fixed by the Marwari dealers from 10 to 30 days after the expiry of the due date. In this particular case it is further established that the Marwari rate was appreciably lower than the market rate prevailing on the 28th September and Mr. Davar expressly takes the position that the Marwari rates are fixed low with the object of softening the losses of those who are on the wrong side of the market; so that it would have been to plaintiff's interest to adopt the market rate as the basis of his calculations. That he did not do so, and that he took the *panch* rate as the measure of his damages, seems to me to afford a plain indication that the parties never intended to pass property in actual goods. It may be said that this position is weakened by the fact that, in corresponding contracts in cotton, rates are also fixed by the Cotton Dealer's Association; but I do not think that there is any real analogy between the two cases inasmuch as the Cotton Association admittedly fixes its rates in the sole endeavour to arrive as near as may be at the actual market rates. Here, however, the rate arbitrarily fixed by the Marwari panch was only Rs. 9-11-9 per cwt., while the evidence proves, despite the plaintiff's disclaimer, that the real price was never under Rs. 10 about the dates in question. It must be acknowledged that the defendant's conduct has not been wholly satisfactory, and a great deal of Mr. Davar's criticism is not easy to answer. At the same time I am clearly of opinion that in this respect the case against the defendant looks a great deal worse than it really is. I will concede that it is probable that up to the last moment the defendant was uncertain whether he should resist this claim or not. But that, I think, is the worst that can be said, and that does not appear to me to be of very great

significance. It is upon the record that these debts are reckoned as debts of honour in the Marwari Bazar, and I have no doubt that a Marwari merchant may find reasons for submitting to such demands quite apart from the question whether they are enforceable in law. Up to the last the defendant has omitted to appear at this trial, and his absence has rightly exposed him to rather severe comment at the hands of the learned counsel for the plaintiff. But it must be remembered that the defendant himself has no direct personal knowledge of the matters in dispute, and it does not appear that he would be in a position to give material evidence upon any points other than those which I have already decided in the plaintiff's favour. I think there has been some negligence and carelessness on his part, but I do not think that he can properly be charged with bad faith or with concealment of facts. Both his *munims* were put into the witness box, and both answered candidly and readily all the questions asked of them. Nor do I doubt the honesty or good faith of the instructions given to Mr. Robertson upon which the learned counsel professed himself eager to obtain any adjournment which might seem desirable to the Court for the purpose of securing further documentary evidence. In other respects the most damaging act of the defendant's was connected with his application to postpone the trial of the suit, for in this application a certificate was tendered from the Surgeon to H. H. the Nizám's Body-guard to the effect that the *munim* Chunilal was suffering from acute dysentery. On my refusing to grant an adjournment for more than a couple of days Chunilal came up from Hyderabad and has attended Court throughout the trial, being apparently in the best of health. Now in my opinion tortuous conduct of this kind deserves severe reprobation, but I should run the risk of doing injustice if I allowed such a consideration to influence me beyond a fair degree. Nothing is to be gained by shutting one's eyes to the fact, which I conceive is not likely to be disputed by any one of competent experience, that among the classes with whom I am dealing a dishonest pretence of this kind would be regarded merely as a piece of sharp practice not specially discreditable to the person employing it.

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The depositions of the witnesses may be considered shortly as, in my opinion, their general effect is too clear to call for any elaborate discussion. The most favourable construction which the plaintiff could ask me to put upon this evidence is that, under the contracts, if delivery had been insisted on, it would have had to be given. In my judgment, however, this proposition is not established; and even if it were established, then *In re Gieve*[1] indicates that it would not assist the plaintiff if the fact is—as I find the fact to be—that the giving or taking of delivery was never within the contemplation of either of the parties. The plaintiff himself admits that in the overwhelming majority of similar contracts made by him in 1957 and 1958 settlement was made, not by delivery, but by the payment of differences or by counter-contracts. He suggests, and his learned counsel adopts the suggestion, that this was a mere accident happening through particular and (I suppose) exceptional circumstances; but the evidence satisfies me, on the contrary, that this was the normal, regular and intended course of the transactions. The only witness whom plaintiff has elected to call by way of corroborating him is the broker Gopal Jenarayan, and he was summoned to prove only the genuineness of the contract (Ex. C.). In cross-examination, however, by Mr. Robertson, he so far favours the plaintiff's case as to say that if the seller has goods in his possession, he is bound to give delivery. But it would seem that he is speaking hypothetically or conjecturally, for he cannot distinctly specify any case of delivery, and accounts for his inability naturally enough by observing that, as he is merely a broker, it is no business of his to watch deliveries. I would notice also his first answer in cross-examination :—"The panch rate was for outstanding contracts, *i.e.*, those not already settled: that is the usual custom for outstanding contracts."

On the other hand, the evidence called by the defendant to discharge the burden of proving that these were gaming transactions appears to me entitled to respect and belief. Vasantpal Javerchand, the *munim* of the important firm of Gadmal Gumanmal, is in an exceptionally good position to know what

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

such contracts really mean, and his interest is clearly to represent them as honest mercantile transactions. But he says in the most emphatic language that delivery never was either made or expected. He corroborates the defendant's *munims* that after Jagannath's absconding no one came on behalf of plaintiff to make any claim before the defendant's representatives. It is true that he contradicts the *munims* as to whether Jagannath left any books behind in the shop; but upon this point I feel sure that the *munims* are right, and that Vasantpal, who has no special reason to remember the precise time when the books were recovered, is committing an error of recollection. As to the nature of the contracts, Vasantpal is directly supported by Ram Karan Magniram and Rajbax Ramlal, both *munims* of Marvari firms to whom neither ignorance nor partiality can be attributed. This evidence leaves no room for reasonable doubt as to what is the real character of transactions such as these in suit: whether for that reason or another its admissibility is challenged by Mr. Davar on the ground that the witnesses speak only to *res inter alios actæ*. I have overruled the objection principally because I am of opinion that in this class of suits it would be almost idle to expect to get at the truth unless the Court takes the widest possible outlook consistent with the provisions of the Indian Evidence Act; otherwise the result would be that the statute could be violated with impunity by the simple and habitual device of cloaking wagers in the guise of contracts. In admitting this evidence as to the real character of precisely similar agreements made under the same conditions of time and place and circumstance I do not think that I am unduly straining the provisions of the Evidence Act, *e.g.*, section 7, and I may call in aid a passage from the judgment of Jenkins, C.J., in *Doshi Talakshi's* case[1]; there the learned Chief Justice, in speaking of the "surrounding circumstances" of the agreements in that case says that these circumstances "and the position of the parties and *the history of dealings of this class* are legitimate, though not exclusive, matters for our investigation into the true intention of the parties." The words which I have italicised fortify my opinion that Mr. Davar's objection ought not to prevail.

(1) (1899) 24 Bom. 227 at p. 231.

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The remaining witnesses scarcely demand separate notice. Bachulal Navalchand is not a witness in whom I can place confidence, and I therefore omit his deposition from consideration. Surajmal Nihalchand also is not an impressive witness, and I suspect that the main object which he kept before his mind in the witness box was the expediency of saying nothing which could ever damage his legal position in regard to his own contracts. The *munims*, Chunilal and Raoji (or Nayakji), are of course interested parties, but it is due to them to say that, excluding the former's pretence of illness already referred to, I can discover no reason why they should be distrusted. Throughout a long and somewhat severe cross-examination their answers were always given readily and candidly, and though it may be that they know more of their master's linseed contracts than they profess, yet I think they are entitled to the description of substantially truthful witnesses.

Upon the whole, then, after the best consideration that I can give to all the evidence, I hold it to be distinctly proved that in the contracts in suit neither party ever intended to give or receive delivery, but both parties intended to settle by the payment and receipt of differences. In other words, the contracts were mere wagering transactions, and this suit must fail. With regard to costs, I am sitting as a judge to administer the law and I cannot enter into nice questions concerning the comparative moral culpability of the parties. I see no reason why the usual rule should not be followed. The defendant has succeeded on the first issue. The defendant will bear one-fifth of plaintiff's costs, and plaintiff will pay four-fifth of the defendant's costs and all his own costs.

It remains only to add that, if I had found in plaintiff's favour on the fifth issue, I should have awarded him the damages claimed since these are less than the sum which would be recoverable on the difference between the agreed price and the market rate prevailing on the due date.

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R. R.