

ORIGINAL CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Chandavarkar.

1913.

March 18.

BURJORJI RUTTONJI BOMANJI (APPELLANT AND DEFENDANT) *v.* BHAGWANDAS PARASHRAM, A FIRM (RESPONDENTS AND PLAINTIFFS).^o

Pakki adat transactions, incidents of—Wagering, defence of.

From about the end of June 1908 the defendant, a young man, without much experience of business, entered into *pakki adat* transactions for the sale of linseed with the plaintiffs who were a firm of Marwari shroffs and merchants in a large way of business dealing as merchants and commission agents, largely in cotton and to a small extent in linseed. There was one transaction in cotton between the parties and the defendant entered into transactions in linseed to the extent of 4,000 tons in all with the plaintiffs, which transactions the plaintiffs passed on to various purchasers, 39 in all, between which purchasers and the defendant there was no privity whatever. In the contract made by the plaintiffs with each of the said purchasers there was a term that delivery should not be given to the firm of Narrondas Rajaram & Co., a Marwari firm, who were in the habit of insisting on delivery and of refusing to settle contracts by the payment or receipt of differences.

The plaintiffs subsequently attempted to secure evidence to show that the transactions between themselves and the defendant were genuine transactions and not wagers. They endeavoured to induce the defendant to sign a draft letter prepared by the plaintiffs' attorneys in which instructions were given for the purchase of a small part of the 4,000 tons of linseed for the sale of which the defendant had entered into transactions with the plaintiffs and ultimately induced the defendant to sign a draft letter acknowledging the correctness of the statements made in a letter of the plaintiffs' attorneys to the defendant setting out the plaintiffs' version of the transactions between the parties. The plaintiffs further purchased and delivered 300 tons of linseed in part fulfilment of their contracts with the 39 purchasers and as to the balance of 3,700 tons the contracts with these purchasers were settled by the payment of differences. It appeared, however, that the purchase of 300 tons had been effected by the plaintiffs with the view to influence the result of litigation.

Held, that in view of the fact that the *pakka adatia* was not a disinterested broker but a party to the contract whose intention to gamble or otherwise might well be known at the inception of the contract, and that there was no

^o Appeal No. 74 of 1912 : Suit No. 272 of 1911.

privity between the defendant and the 39 buyers from the plaintiffs, the existence of such purchasers was only relevant as affording an indication of the plaintiffs' intention at the time of the contracts with the defendant, but in view of the condition that delivery should not be given to Narrondas Rajaram & Co., it appeared that it was not intended that delivery should be given to the 39 purchasers by the plaintiffs and accordingly the said 39 contracts were not a sufficient indication of an intention on the part of the plaintiffs to call for delivery from the defendant.

Held, further, that on an examination of the business of the contracting parties and of the surrounding circumstances of the case it appeared that the common intention of the parties was that the plaintiffs and the defendant should deal in differences and settle that way and that accordingly the suit must fail.

Bhagandas v. Kanji⁽¹⁾, discussed.

THE plaintiffs in this suit were a firm of Marwari merchants and shroffs doing business in Bombay in a large way and dealing largely in cotton and to a small extent in linseed. The defendant was a Parsi of about 29 or 30 years of age who had won a large sum of money in a sweepstake and thereafter entered into speculative transactions in American futures and fine Broach. In June 1910 it appears that the defendant was persuaded by one Hargopal, the munim of the plaintiffs, to enter into forward transactions in cotton, linseed, etc., through the plaintiffs as his *pakka adatias* and accordingly the defendant deposited with the plaintiffs the sum of Rs. 61,000 by two instalments as margin against the transactions intended to be undertaken between the parties. The defendant then entered into one transaction for the sale of cotton through the plaintiffs which resulted in a small profit to the defendant with which he was credited by the plaintiffs and also entered into transactions for the sale of 4,000 tons in all of linseed which resulted in a considerable loss in excess of the margin money deposited by the defendant.

⁽¹⁾ (1905) 30 Bom. 205.

1913.

BURJORJI
RUTTONJI
v.
BHAGWAN-
DAS
PARASHRAM.

1913.

BURJORJI
RUTTONJI
v.
BHAGWAN-
DAS
PARASHRAM.

After the above transactions had been entered into the plaintiffs requested the defendant to sign a draft letter to the plaintiffs prepared by their solicitors to the following effect:—

“With reference to the 4,000 tons of linseed sold by you as my *pakka adatia* for September 1910 delivery I have to request you to purchase on my account from the bazar 250 tons of ready linseed for the present and deliver the same against the contracts made by you on my behalf. The value of the 250 tons so to be purchased on my account should be debited to my account and I will pay interest on the same at 7 annas per cent. per month all other usual charges will be allowed.”

The defendant refused to sign this draft but on receiving a letter from the plaintiffs' solicitors to the following effect:—

“We are instructed by our clients Messrs. Bhagwandas Parashram to state that they as your *pakka adatias* under your instructions and orders received from you on or about the respective dates mentioned below sold 4,000 tons of linseed as under at the rates mentioned below :

1,000 tons on Ashad Vad 9 at Rs. 11-5-0 per cwt.

800 tons on Ashad Vad 15, viz. :—

500 tons at Rs. 11-10-0.

100 tons at Rs. 11-10-9.

100 tons at Rs. 11-10-6 and

100 tons at Rs. 11-10-7½ and

2,200 tons on Ashad Sud 5 at Rs. 11-14-7½ per cwt. deliverable in September 1910. That the time to deliver the said 4,000 tons of linseed begins from tomorrow and according to the practice of the Bombay Market the option to deliver the goods lies with the sellers. We are therefore instructed by our said clients to call upon and to require you to supply to our clients the quantity of linseed agreed to be sold by you to enable our clients to carry out your aforesaid sales or to give our clients the necessary instructions to purchase as much quantity of ready linseed from the Bombay Market and then to deliver the same against the sales effected by them on your behalf.

We are also instructed to state that our clients undertake not to buy ready linseed or settle business without your mutual consultation or without your written consent in that behalf.

Our clients also inform us that they have on the 1st of July last received from you Rs. 61,000 as a deposit against the transactions and it has been agreed that interest at 7 annas per cent. per mensem is to run on the account between you and them,”

The defendant signed a reply also drafted by the plaintiffs' solicitors to the following effect:—

"I beg to acknowledge receipt of your letter of date and in reply I confirm what is written therein, subject to correction in the event of there being any mistake.

I shall give your clients instructions in the matter for purchase of ready goods or buying by forward contract."

Thereafter the plaintiffs frequently called on the defendant to deposit more margin money on account of his transactions with the plaintiffs but the defendant without definitely refusing avoided depositing any further margin money.

The plaintiffs in the meantime had passed on their transactions with the defendant by entering into sub-contracts with 39 purchasers for the whole of the 4,000 tons of linseed involved and in part fulfilment of these sub-contracts purchased and delivered 300 tons of linseed, as to the balance of 3,700 tons these sub-contracts being settled by payment of differences. The defendant however was able to prove an admission by the plaintiffs that the 300 tons actually purchased by them had been so purchased for the purpose of proving the genuineness of the transactions between the parties in the event of litigation.

The plaintiffs sued the defendant for the amount of the loss occasioned by the said transactions giving credit to the defendant for the amount of the margin deposited by him and for the amount of the profit on the successful transaction in cotton. The defendant in his written statement stated *inter alia* that the common understanding between the parties with respect to the abovementioned transactions was that no delivery should be given or taken but that differences only should be dealt in.

The suit came on for hearing before Mr. Justice Beaman who decided in favour of the plaintiffs. After

1913.

BURJORJI
RUTTONJI
v.
BHAGWAN-
DAS
PARASHRAM.

1913.

BURJORJI
RUTTONJI
v.
BHAGWAN-
DAS
PARASHRAM.

reviewing the evidence and after dealing particularly with the purchase of 300 tons of linseed by the plaintiffs for the purpose of proving the genuineness of the transactions involved in the suit the learned Judge said:—

Certainly had this been a transaction between the defendant and the plaintiff-firm themselves I should, in view of that little additional touch and the virtual certainty that the plaintiffs knew exactly what the defendant had in view, have been disposed to hold that they knew that the defendant was merely gambling, and, therefore, neither they nor he at any time had the intention of either giving or taking delivery. But considering, as I have already said, that they immediately passed all these contracts on to numerous other purchasers, I do not think there is any room left for any such conclusion.

The defendant appealed.

Strangman, with *Davar*, for the defendant-appellant:—The plaintiffs are Marwari shroffs, dealing principally in cotton and wheat; the defendant is a young man of no experience who made his money in a lottery.

(Referring to the sub-contracts) every single one of these transactions was settled by cross-contracts except one which was given for the purposes of the Court.

Refers to *In re Gieve*⁽¹⁾.

Jinnah, with *Jayaker*, for the plaintiff-respondents:—The defendant has had business experience in South Africa. His object is to make out that he is a gambler but he is not to be believed.

Refers to the headnote in *Forget v. Ostigny*⁽²⁾.

The plaintiff-firm do business on a large scale, they take and give delivery. They were employed as *pakka adatias* by the defendant. On the receipt of his orders

⁽¹⁾ [1899] 1 Q. B. 794,

⁽²⁾ [1895] A. C. 318

they put the orders on the market and sold. The burden of proof is on the defendant to show that the understanding was only to pay differences.

Refers to section 30 of the Contract Act (IX of 1872).

There must be an agreement to wager; what agreement is there here which is a wager?

Refers to *Bhagwandas v. Kanji*⁽¹⁾; *Perosha Cursetji v. Manekji Dossabhoy*⁽²⁾; *Sassoon v. Tokersey*⁽³⁾.

Strangman replies.

C. A. V.

SCOTT, C. J.:—This suit was brought by the plaintiffs, a firm of Marwari merchants, who act *inter alia* as *pakka adatias* to recover from the defendant Rs. 90,763-14-6 and interest as the amount due by the defendant to the plaintiffs as his *pakka adatias* in respect of certain contracts in cotton and linseed.

The defence was that the transactions were wagering transactions and that, therefore, the sum claimed could not be recovered: the defendant also counter-claimed repayment of two sums of Rs. 50,600 and Rs. 10,400, deposited by him as he alleged at fixed deposit but as the plaintiffs alleged as margin-money or security in respect of the contracts above mentioned.

The only contract in cotton was dated the 30th June 1910. It was for the purchase by the defendant from the plaintiffs of 2,000 bales of Broach Cotton for March 1911. The market went in the defendant's favour and the contract was closed for Rs. 5,804-2-3 without any delivery taking place. The defendant has received credit in the account sued on for this sum. The linseed contracts are as follows:—

⁽¹⁾ (1905) 30 Bom. 205 at pp. 216, 217.

⁽²⁾ (1898) 22 Bom. 899.

⁽³⁾ (1904) 28 Bom. 616.

1913.

BURJORJI
RUTTONJI

v.

BHAGWAN-
DAS
PARASHRAM.

1913.

BURJORJI
RUTTONJI
v.
BHAGWAN-
DAS
PARASHRAM.

One dated the 1st of July 1910 for the sale by the defendant to the plaintiffs of one thousand tons of linseed at Rs. 11-5-0 per cwt. Another of the 6th of July 1910 for the sale by the defendant to the plaintiffs of 800 tons at rates varying from Rs. 11-10 to Rs. 11-10-9 per cwt. The plaintiffs further allege that the defendant orally agreed to sell them a further 2,200 tons of linseed on the 10th of July 1910.

Applying the recognised rule in all cases where the defence of wagering contract is set up, the business of the contracting parties and the surrounding circumstances of the case must be examined.

The plaintiffs are Marwari shroffs and merchants in a large way of business who deal largely in cotton as merchants and commission agents but only to a small extent in linseed. They receive from constituents for sale in Bombay on an average not more than 150 tons of linseed in the year. The defendant is a Parsi, 29 or 30 years of age, who has never had any regular business. In September 1909 he won a St. Ledger Sweep of about a lac-and-a-quarter and thereafter entered into cotton speculation in American futures and fine Broach through the agency of Messrs. Bruel & Co. after depositing margin-money with them. The transactions proved unprofitable but after paying his losses he received back from Bruel & Co. the balance of his margin-money in two sums, Rs. 45,000 and Rs. 10,161. This was at the end of June 1910. At that time it is proved that the defendant and Hargopal, the plaintiffs' then Munim, used constantly to meet in the evening at Chowpatty and the defendant says Hargopal suggested he should deal in linseed in differences and settle in that way. Business eventually commenced between the parties on the 30th of June with the cotton contract above mentioned. On the 1st July the defendant signed a letter stating he had given Rs. 50,600 on the previous day and

Rs. 10,400 on that day to be retained at interest as security against business in cotton and linseed. On the 30th of August 1908 the parties went together to Messrs. Tyabji Dayabbai & Co., the plaintiffs' solicitors, where the managing clerk drafted a letter for the signature of the defendant. It ran as follows :—

1913.

BURJORJI
RUTTONJI
v.
BHAGWAN-
DAS
PARASHRAM.

With reference to the 4,000 tons of linseed sold by you as my *pakka adatias* for September 1910 delivery I have to request you to purchase on my account from the bazar 250 tons of ready linseed for the present and deliver the same against the contracts made by you on my behalf. The value of the 250 tons so to be purchased on my account should be debited to my account and I will pay interest on the same at 7 annas per cent. per month all other usual charges will be allowed.

The defendant however declined to sign it. It seems strange that a simple request to the agent to carry out a small part of a pending contract should necessitate the intervention of solicitors. There can, we think, be no doubt that the letter was intended to create evidence from which might be inferred the genuineness of the contract which would fall to be performed or settled in the following month. On the following day the solicitors were again requisitioned and produced another draft in the following terms :—

We are instructed by our clients Messrs. Bhagwandas Parashram to state that they as your *pakka adatias* under your instructions and orders received from you on or about the respective dates mentioned below sold 4,000 tons of linseed as under at the rates mentioned below : 1,000 tons on Ashad Vud 9 (1st July 1910) at Rs. 11-5-0 per cwt.

800 tons on Ashad Vud 15 (6th July 1910), viz. 500 tons at Rs. 11-10-0, 100 tons at Rs. 11-10-9, 100 tons at Rs. 11-10-6 and 100 tons at Rs. 11-10-7½ and 2,200 tons on Ashad Sud 5 (11th July 1910) at Rs. 11-14-7½ per cwt. deliverable in September 1910. That the time to deliver the said 4,000 tons of linseed begins from tomorrow and according to the practice of the Bombay Market the option to deliver the goods lies with sellers. We are therefore instructed by our said clients to call upon and require you to supply to our clients the quantity of linseed agreed to be sold by you to enable our clients to carry out your aforesaid sales or to give our clients the necessary instruc-

1913.

BURJORJI
RUTTONJI
v.
BHAGWAN-
DAS
PARASHRAM.

tions to purchase as much quantity of ready linseed from the Bombay Market and then to deliver the same against the sales effected by them on your behalf.

We are also instructed to state that our clients undertake not to buy ready linseed or settle business without your mutual consultation or without your written consent in that behalf.

Our clients also inform us that they have on the 1st of July last received from you Rs. 61,000 as a deposit against the transactions and it has been agreed that interest at 7 annas per cent. per mensem is to run on the account between you and them.

A reply was also drafted for the defendant by the solicitors which the defendant did sign. It ran thus :

Bombay, 31st August 1910.

Messrs. TYABJI DAYABHAI & Co.,

Attorneys for

Messrs. BHAGWANDAS PARASHRAM.

DEAR SIRS,

I beg to acknowledge receipt of your letter of date and in reply I confirm what is written therein subject to correction in the event of there being any mistake.

I shall give your clients instructions in the matter for purchase of ready goods.

Yours faithfully

The plaintiffs thus got an acknowledgment of a sale as *pakka adatias* of 4,000 tons of linseed on account of the defendant. It is to be noted, however, that when the plaintiffs deal with Bombay constituents they usually employ a broker. See for example the evidence of the partner in Narrondas Rajaram & Co. and the agency by which the thirty-nine contracts for sale of linseed in this case were effected. It does not seem clear that the incidents of the *pakki adat* relationship should be assumed to apply to the contracts of plaintiffs and defendant of which the evidence affords no trace of an agreement between the parties. The case however has been tried on the footing that the plaintiffs were *pakka*

adattas of the defendant and we will deal with it on that footing. A correspondence was then commenced:—

Bombay, 9th September 1910.

BURJORJI RUTTONJI BOMANJI DUBASH, Esqr.

1913.
BURJORJI
RUTTONJI
v.
BHAGWAN-
DAS
PARASHRAM.

SIR,

Our clients Messrs. Bhagwandas Parashram have placed in our hands copy of a letter, dated the 31st ultimo, addressed by their former solicitors to you regarding 4,000 tons of linseed which you had instructed to sell as per particulars given in the said letter and requiring you to place our clients in a position to give delivery of the said linseed of the quantity agreed to be sold by you and your reply thereto of the same date intimating that you would give instructions to our clients for the purpose of ready goods or buying by forward contract. As our clients have not received any instructions nor any margin-money from you, we are now instructed to call upon you to furnish margin-money amounting to Rs. 80,000 which with the sum of Rs. 61,000 already deposited by you as margin-money makes the sum of Rs. 1,41,000 which is the approximate difference between the market rate of today and the price at which you have contracted to sell the goods and to give you notice that unless within four days from the receipt hereof by you our clients receive the said margin-money or sufficient quantity of goods or you make arrangement satisfactory to our clients to meet the contracts on due date our clients reserve their right to make arrangements for closing the transaction by purchase of ready goods or by forward contracts as they may think proper holding you liable for all costs, charges and expenses incidental thereto.

Yours truly,

(Sd.) BICKNELL MERWANJI and ROMER.

Bombay, 12th September 1910.

MESSRS. BICKNELL MERWANJI and ROMER,
Solicitors, Bombay.

DEAR SIRS,

Re Bhagwandas Parashram and myself.

Your letter of 9th September came to my hands on Saturday evening at 7 at Chowpatty. I am afraid your clients have not laid all true facts before you otherwise you would not have written the letter under reply. Hence I do not think it advisable to reply.

Yours faithfully,

(Sd.) BURJOR R. BOMANJI.

1913.

Bombay, 14th September 1910.

BURJORJI
RUTTONJI
v.
BHAGWAN-
DAS
PARASHRAM.

BURJOR R. BOMANJI, Esqr.

SIR,

Bhagwandas Parashram v. Yourself.

We have communicated the contents of your letter of the 12th instant to our clients.

Our clients state they have placed all true facts before us and have also placed the correspondence that has passed between you and them as well as their former attorney's letter to you of the 1st ultimo and your reply thereto of the same idem. If you however maintain that our clients have not placed all true facts before us will you please state what the true facts are as alleged by you ?

Our clients state that our letter of the 9th instant had been addressed to you in respect of the linseed transactions only but we find from the letters addressed by you to them that you have entered into transactions of purchase of cotton for March next delivery and that at the time these transactions were entered into you had agreed to deposit with them margin-money and had agreed to deposit further margin-money if the accounts deposited by you from time to time proved insufficient to cover the differences. That as to cotton transactions you authorised them to enter into transaction for sale of cotton for March delivery against the cotton purchased and that by reason of the counter contracts cotton transactions resulted in profits payable to you in March next but at your request our clients have after deducting discount, brokerage and commission thereout credited to your account the balance of Rs. 5,804-2-3 and sent you an acknowledgment through broker Mankanji and retained the amount with themselves with your consent as further margin on account of linseed transactions.

That when the market for linseed went up beyond the limits of the deposit our clients asked for further deposit and you from time to time promised to pay the same but you did not do so except as to the aforesaid sum of Rs. 5,804-2-3 which you caused to be credited as aforesaid and our clients state that since you received our letter of the 9th instant you had an interview with our clients when you informed them that you would not deposit any margin nor give any definite reply till due date of delivery and since our letter under reply our clients state that the market has gone up still further with the result that to cover them a further margin of one lakh has to be deposited by you with them under the arrangement and that they cannot wait further.

We are therefore instructed to give you this notice that unless within 24 hours from the receipt hereof by you, you deposit a further sum of rupees one

lakh, or comply with the requisitions contained in our said letter of the 9th instant our clients reserve their right to proceed in manner intimated by our said letter.

Yours truly,
(Sd.) BICKNELL MERWANJI and ROMER.

Bombay, 28th September 1910.

Messrs. BICKNELL MERWANJI and ROMER,
Solicitors, Bombay.

DEAR SIR,

Re Bhagwandas Parashram.

In reply to your letter of the 14th instant I beg to state that I am sorry that I could not reply to your letter earlier than now.

Will you let me know to what letter you refer in para. No. 2 of your letter?

After knowing that I shall be in a position to give a detailed reply to your letter.

Yours truly,
(Sd.) BURJORJI R. BOMANJI.

Bombay, 29th September 1910.

BURJORJI R. DUBASH, Esqr.

SIR,

Referring to previous correspondence addressed by us to you on behalf of our clients Messrs. Bhagwandas Parashram, we are instructed by our clients to remind you that the last day for giving delivery of linseed under the contract entered into by our clients as your *pakki adat* agents on your behalf is the 30th instant, but that you have not yet made an arrangement for giving delivery of the said goods. Our clients have purchased 300 tons for ready delivery on your account and risk and provision has to be made for 3,700 tons more.

We are therefore instructed by our clients to call upon you to provide for 3,700 tons of linseed to be given delivery of by the 30th instant within due time and to give notice that in default of your compliance with the aforesaid requisition our clients will, as your *pakki adat* agents, take such steps towards the fulfilment of the contract as they may think proper according to the market rate of that day.

Yours truly,
(Sd.) BICKNELL MERWANJI and ROMER.

1913.
BURJORJI
RUTTONJI
v.
BHAGWAN-
DAS
PARASHRAM.

1913.

*Bombay, 1st October 1910.*BURJORJI
RUTTONJIv.
BHAGWAN-
DAS
PARASHRAM.

BURJOR R. BOMANJI, Esqr.

DEAR SIR,

In continuation of our previous correspondence we are instructed by our clients Messrs. Bhagwandas Parashram to inform you that the contracts for 4,000 tons deliverable on your behalf yesterday were dealt with by our clients as follows :—

By purchase of 300 tons at Rs. 13-15-0 as intimated in our letter of the 29th ultimo and 350 tons at Rs. 13-8-0, 2,575 tons at Rs. 13-9-3, 700 tons at Rs. 13-9-0 and 75 tons at Rs. 13-8-10½ per cwt.

The account of the amount payable by you will be made up and forwarded to you in due course.

Yours truly,

(Sd.) BICKNELL MERWANJI and ROMER.

On the 30th of September an interview took place at defendant's house between Hargopal and a member of the plaintiffs' firm and the defendant and a friend in the presence of a concealed shorthand writer. From the report of the conversation on that occasion which has been proved it appears that the plaintiffs admitted that the purchase of 300 tons ready (which defendant denied he had authorised) was done for the purpose of the Court's proceedings.

Turning now to the surrounding circumstances proved on behalf of the plaintiffs we find that on the occasion of each contract for sale of linseed by the defendant they employed brokers to make small contracts (thirty-nine in all) with various Marwari firms for the sale of linseed aggregating that sold by the defendant. In each case the contract was in the same form, of which one of the conditions was 'not to be delivered to Messrs. N. R. & Co.' N. R. & Co. means Narrondas Rajaram & Co. It is explained by one of the partners in this firm that they always insist on delivery of produce contracted for, being large exporters—and that is why the Marwaris boycott them in contracts of the class under consideration.

The plaintiffs produce entries in their books to show that they have paid to the various Marwaris with whom the contracts for the sale of linseed by which they covered themselves were made, the differences due on 3,700 tons, but the 300 tons was the only linseed actually delivered. Of these two main facts appearing in the plaintiffs' evidence the clause in the contracts relating to Narrondas Rajaram & Co. is in favour of the defendant's contention. The learned Judge says that the contracts both selling and buying are made in the first instance as between the *pakka adatia* and his client and that therefore the plaintiffs in form were the purchasers from the defendant of the whole 4,000 tons and in form it was the plaintiffs who sold to the thirty-nine buyers under the covering contracts that amount of linseed. According to the decision in *Bhagwandas v. Kanji*⁽¹⁾, which has been taken in both Courts as correctly stating the customary incidents of the business of a *pakka adatia*, the contracts of the plaintiffs with both sellers and buyers must be regarded as being not only in form but also in substance independent contracts, for the *pakka adatia* may at any time decide to set off one set of contracts, not against those which may have been their occasion and cause, but against some other contracts altogether. The selling client can never claim as of right the benefit of any covering contracts entered into on the same day as his sales but is always bound to be content with the personal guarantee of the *adatia*. If then he can never claim advantage from any simultaneous contracts involving to another constituent of the *adatia* the reverse of his own operations how can it in fairness be said that if he seeks to establish an intention to gamble, the existence of corresponding buyers on the other side of the *adatia* must always leave uncertain the issue as to the real common intention of

1913.

BURJORJI
RUTTONJI
v.
BHAGWAN-
DAS
PARASHRAM.

(1) (1905) 30 Bom. 205.

1913.

BURJORJI

RUTTONJI

v.

BHAGWAN-

DAS

PARASHRAM.

the parties to his contract? There are in fact no parties to the selling contract but the client and his *adatia* who is the buyer. The *adatia* is not the disinterested broker. He is a party to the contract whose intention may well be known at the time of its inception. The learned Judge says that had this been a transaction between the defendant and the plaintiffs' firm themselves, he should in view of the evidence of the purchase of 300 tons of ready linseed bought 'for the Court's proceedings' and the virtual certainty that the plaintiffs knew exactly what the defendant had in view, have been disposed to hold that neither plaintiffs nor defendant at any time had the intention of either giving or taking delivery; but considering they immediately passed all the contracts on to numerous other purchasers there was no room left for such a conclusion. But if, as we think it must be assumed, there was no privity between the defendant and the thirty-nine buyers their existence is only relevant if it affords an indication of the intention of the plaintiffs at the time of the defendant's contracts. But the condition in the thirty-nine contracts barring delivery to Narrondas Rajaram & Co. is we think indication of an intention that delivery should not be called for. If this is the correct inference the payments to the thirty-nine buyers, assuming them to have been seriously made, must be attributed to that form of sporting honour which leads Marwaris to pay up their gambling differences so long as they have money to do so. We are of opinion that the sub-contracts considering their conditions are not sufficient indication of an intention on the part of the plaintiffs to call for delivery from the defendant while all the other circumstances which have been alluded to point to the conclusion that the common understanding was as deposed to by the defendant that he and the plaintiffs should deal in differences and settle in that way.

We reverse the decree of the lower Court dismiss the suit and the counter-claim with costs.

Attorneys for the appellant: *Messrs. Mulla and Mulla.*

Attorneys for the respondents: *Messrs. Tyabji Dahyabhai & Co.*

Decree reversed.

H. S. C.

APPELLATE CIVIL.

Before Mr. Justice Heaton and Mr. Justice Shah.

CHATRU VALAD ABAJI PATIL (ORIGINAL DEFENDANT No. 2), APPELLANT, v.
KONDAJI VITHAL PATIL (ORIGINAL PLAINTIFF), RESPONDENT.*

Civil Procedure Code (Act XIV of 1882), section 257A—Decree—Satisfaction—Decree not carrying interest—Mortgage passed in satisfaction of decretal debt made payable in instalments—Interest payable on failure to pay instalments—Covenant for interest can be severed from the covenant as to repayment of principal—Agreement not void so far as concerned principal.

The plaintiff obtained a decree against the defendant for Rs. 800 without interest, but with costs which amounted to Rs. 89-12-0. In satisfaction of the decretal debt and in consideration of a cash advance of Rs. 10-4-0, the defendant passed a mortgage-deed for Rs. 900 in favour of the plaintiff. The amount of Rs. 900 was repayable in nine annual instalments of Rs. 100 each. On failure to pay any one instalment interest was to be charged at the rate of 1½ per cent. per mensem; and the whole amount became payable on failure to pay any two instalments. None of the instalments having been paid, the plaintiff sued to recover Rs. 900 principal and Rs. 900 as interest. The lower Courts held that the mortgage-deed contravened the provisions of section 257A of the Civil Procedure Code (Act XIV of 1882) but they passed a decree for Rs. 900 in plaintiff's favour, as the covenant to pay interest was quite distinct and severable from the covenant to pay principal. The defendant having appealed:—

Held, confirming the decree, that the primary and main agreement was to pay a sum of money which was not in excess of the decretal amount, and that it was only on failure to fulfill that agreement that interest was to be charged,

* Second Appeal No. 833 of 1912.

1913.

BURJORJI
RUTTONJI

v.

BEAGWAN-
DAS
PARASHRAM.

1913.

September 9.