time. The appellant to have his costs. It will be open to the respondents, if so advised, to raise a point of limitation as to the earlier Darkhasts.

1918.

SHIDAYA VIRBHADRAYA v. SATAPPA BHARMAPPA.

SHAH, J.:—I agree.

Decree reversed.

J. G. R.

PRIVY COUNCIL.*

BHAGWANDAS PARASRAM (PLAINTIFF) *v.* BURJORJI RUTTONJI BOMANJI (DEFENDANT).

P. C.* 1917. *October* 26, 29; *November* 26.

[On appeal from the High Court of Judicature at Bombay.]

Wagering contracts—Common intention to wager essential—Speculation not equivalent to wagering—Pakki Adat—*Contract Act (IX of 1872), section 30—Bombay Act III of 1865, sections 1 and 2.*

Speculation does not necessarily involve a contract by way of wager, and to constitute such a contract a common intention to wager is essential.

Even if one party to a contract were a speculator who never intended to give delivery, and that fact was known to the other party, yet in the absence of any bargain or understanding, express or implied, that the goods were not to be delivered, that would not convert a contract, otherwise innocent, into a wager; nor would the mere fact, that as to the greater part of the goods there was no delivery but an adjustment of claims, vitiate the transaction.

Pakki Adat dealings are well established as a legitimate mode of conducting commercial business in the Bombay market.

Held (reversing the decision of the Appellate High Court) that the contracts in suit were not wagering contracts.

APPEAL 51 of 1916 from a judgment and decree (28th March 1913) of the High Court at Bombay in its appellate jurisdiction, which reversed a judgment and decree

* *Present.*—Lord Buckmaster, Sir John Edge, Sir Walter Phillimore, Bart., and Sir Lawrence Jenkins.

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(24th October 1912) of the same Court in the exercise of its original civil jurisdiction.

The only point for determination on this appeal was whether the transactions in question in the suit from which the appeal arose were agreements by way of gaming and wagering within the meaning of Bombay Act III of 1865.

The facts which led to the litigation will be found in the report of the case in the Appellate Court at page 204 of I. L. R. 38 Bom.

The trial Judge (BEAMAN J.) held that the defence that the contracts were of a wagering nature failed and made a decree in favour of the plaintiffs.

On appeal by the defendant the Appellate Court (SIR BASIL SCOTT C. J. and CHANDAVARKAR J.) reversed the decision of the first Court and dismissed the suit.

On this appeal which was heard *ex parte*,

Sir W. Garth for the appellant contended that the contracts between the appellant firm and the respondents were not, as held by the High Court (Appellate), wagering contracts within the meaning of the Act. The former law in force in India as to wagering contracts has been held by the Board to have been superseded by section 30 of the Contract Act (IX of 1872), and that is, therefore, now the law as to wagers and in Bombay is supplemented by Bombay Act III of 1865, sections 1 and 2. The appellant, as "*Pakka Adatia*," could accept the contracts himself, or he would, as he did in the present instance, pass it on to others. He guaranteed the price whichever he did and was paid his commission. In the case of *Bhagwandas* v. *Kanji*[a] which has been treated by both Courts in India as an

(a) (1905) 30 Bom. 205.

authority for the custom of a *Pakka Adátia's* dealing, it is said "the contract of a *Pakka Adátia* is one whereby he undertakes or guarantees in effect to find goods for cash, or cash for goods or to pay the differences". The appellant, therefore, could not have gained or lost by the rise or fall of the market in linseed at due date, and was not interested in the result of the contracts. The Appellate Court was not justified in holding that the appellant was gambling with reference to the sub-contracts which he entered into. He was entitled to commission and reimbursement of his expenses, but ran no risks. For a contract to be a wagering contract it was essential that each party to it should stand to win or lose according to the result of the event as to which a risk is taken. Reference was made to *Sassoon v. Tokersey*[1]. The points relied on by the Appellate Court as to the evidence that 300 tons of linseed was bought "for Court purposes", and that in all the sub-contracts delivery to a specified Marwari firm was barred, were not established. The defendant-respondent had not discharged the onus which lay on him to prove them. They were not raised in the pleadings, and should not have been taken into consideration. There was no evidence to support the finding of the Appellate Court that the sub-contracts were for differences only. The decision of the trial Judge that the contracts were not wagering contracts was right and should be restored.

1917, November 26th:—The judgment of their Lordships was delivered by

SIR LAWRENCE JENKINS:—This appeal arises out of a suit for the recovery of money. Many defences have been pleaded, but only one need now be noticed; it is that the transactions on which the claim rests were

[1] (1904) 28 Bom. 616 at pp. 624, 625.

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agreements by way of wager. At the trial several issues were framed, and the third was in these terms :—

"Whether the transactions mentioned in the plaint are not wagering transactions and whether the plaintiffs were not aware of the defendant's intention to deal in differences only?"

The trial Judge, sitting on the original side of the High Court at Bombay, found all the issues in the plaintiffs' favour, and passed a decree for the amount claimed.

On appeal the appellate Bench of the High Court agreed with the findings of the trial Judge on all the issues but the third. On that it held in favour of the defendant, and dismissed the suit.

It is from that decree that this appeal has been preferred by the plaintiffs, and the only question is whether the plea that the transactions were by way of wager has been established.

At the date of these transactions the plaintiffs were a firm carrying on a large mercantile business at Bombay, and, as a branch of it, they were in the habit of acting as *Pukka Adatias*. The defendant, on the other hand, was a young man without any regular business, who, with the aid of winnings in a lottery, engaged in speculative transactions on the Bombay market.

In June and July 1910, he instructed the plaintiffs to sell for him three several lots of linseed amounting in all to 4,000 tons for September delivery.

On the strength of this order the plaintiffs sold linseed to this amount by separate contracts to thirty-nine buyers. Though the transactions took the form of sales by the defendant to the plaintiffs, followed by re-sales by the plaintiffs to thirty-nine buyers, the plaintiffs acted throughout as *Pukka Adatias*, and, to secure them against loss, sums amounting in the

aggregate to 61,000 rupees, were deposited with them by the defendant as margin money.

The market went against the defendant, and at the end of August the plaintiffs asked him either to give delivery of the linseed, or to authorise them to purchase linseed on his behalf. The defendant, however, did neither the one nor the other, and so the plaintiffs, acting within their rights, discharged their obligation to the thirty-nine buyers by delivering 300 tons, and by making cross contracts, and paying differences as to the balance of the linseed. The result was, that after giving the defendant credit for the 61,000 rupees deposited as margin money, and a sum of Rs. 5,804-2-3 due to him on another account, there was due to the plaintiffs Rs. 90,763-14-6, unless the plea of wagering is an answer to their claim. To determine whether this plea is applicable, it is necessary to consider the real nature of the relations between the parties to the transactions. The case has proceeded in both the Courts on the footing that the plaintiffs were employed by the defendant, and acted as *Pakka Adatias*, and the description in *Bhagwandas* v. *Kanji*[1] of the customary incidents of such an employment was applicable to the circumstances of this case, though it is to be noted that the defendant was not an up-country constituent.

The plaintiffs, therefore, acted in conformity with the terms of their employment when they made the contracts with the thirty-nine buyers.

And as they made these contracts in exercise of the authority conferred upon them and became liable for their performance, they also became entitled to be indemnified by their employer, the defendant, against the consequences of the acts done by them unless those

[1] (1905) 30 Bom. 205.

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acts were unlawful. There is no suggestion that the acts of a *Pakka Adatia* as such are unlawful; on the contrary, *Pakki Adat* dealings are well established as a legitimate mode of conducting commercial business in the Bombay market.

No doubt the contract of a *Pakka Adatia*, as that of anyone else, may be by way of wager; but can it be said that the employment of the plaintiffs by the defendant was of this description?

It has not been shown that there was any bargain or understanding between the parties, either express or implied, that linseed was not to be delivered, nor was it a term of the employment that the plaintiffs should protect the defendant from liability to make delivery.

It may well be, as suggested in the evidence of Hargopal, that the defendant was a speculator, who never intended to give delivery, and even that the plaintiffs did not expect him to deliver; but that would not convert a contract, otherwise innocent, into a wager. Speculation does not necessarily involve a contract by way of wager, and to constitute such a contract a common intention to wager is essential.

No such intention has been proved.

Under the sales to the thirty-nine buyers it was the right of each buyer to call for delivery, but as the plaintiffs had carried through the transaction as *Pakka Adatias* of the defendant the rise or fall of the market was a matter of no concern to them, except so far as it might enhance the risk of recovering complete indemnity from their employer. Their right was to their commission and to an indemnity against loss as incidents of their employment.

The mere fact that as to the greater part of the linseed there was no delivery, but an adjustment of claims, cannot alone vitiate the transactions.

The learned Judges in appeal were evidently impressed by the statement ascribed to the plaintiffs' munim that the delivery of 300 tons was made for the purpose of Court proceedings and by the clause in the contracts forbidding delivery to Messrs. Narandas Rajaram and Co. Their Lordships, however, attribute no importance to either of these matters. Even if the munim's statement be regarded as proved—a point on which their Lordships are, in the circumstances, far from satisfied—it would mean no more than that the plaintiffs fancied an actual delivery would tend to allay such doubts as the Court might otherwise have as to the reality of the transactions. But this was in no sense inconsistent with this reality. At the same time the clauses forbidding delivery to Messrs. Narandas Rajaram clearly cannot be regarded as throwing any doubt on the transactions. No such suggestion seems to have been made at the trial in the Court of first instance, and it does not appear to their Lordships to be reasonably susceptible of the significance ascribed to it.

Their Lordships, therefore, hold there was no ground for setting aside the decree of the Court of first instance, and they will, therefore, humbly advise His Majesty to restore it and to reverse the decree of the High Court on appeal, ordering instead of it that the appeal to it be dismissed with costs. As the defendant Burjorji has died during the pendency of the appeal, and the present respondent has been appointed at the instance of the appellants to represent him for the purpose of this appeal alone, there will be no order as to the costs of this appeal.

Solicitors for the appellant: Messrs. *Ashurt, Morris, Crisp & Co.*

Appeal allowed.

J. V. W.