(1920) 07 BOM CK 0038

Bombay High Court

Case No: None

Manilal Raghunath and Others		APPELLANT
	Vs	
Radhakisson Ramjiwan, A Firm		RESPONDENT

Date of Decision: July 23, 1920

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 41 Rule 24

Citation: AIR 1921 Bom 238 : (1921) ILR (Bom) 386

Hon'ble Judges: Norman Macleod, J; Fawcett, J

Bench: Division Bench

Judgement

Norman Macleod, Kt., C.J.
The plaintiffs filed this suit to recover from the defendants the losses they had incurred on certain forward contracts for cotton entered into by them on their behalf as their pakka brokers.

2. The defendants raised the defence of wagering and the issue raised at the trial was whether the transactions in the suit were by way of wagering.

3. The trial Judge decided that issue in favour of the plaintiffs and directed an account to be taken of what was due to the plaintiffs. The defendants appealed and when the appeal came on for hearing before Scott C.J. and Heaton J. the defendants asked to be allowed to call further evidence.

4. The ground for the application was that the learned Judge in the trial Court was wrong in allowing the plaintiffs to change their case in the course of reply and to allege that they were in the position of mere brokers when the case had been conducted throughout on the case made by the plaintiffs that they were pakka brokers. The Court said:

The suit is in form a suit by agents against their principals for money due upon an agency account. The defence is in that the contracts, which form the basis of the

account, were entered into between the plaintiffs and the defendants, there was no intention on the part of either side--whoever the contracting parties were--to fulfil the contracts in specie.

5. The Court considered that Beaman J. had decided the case on the footing that the plaintiffs acted as middlemen and that it was quite possible that the defendants'' contention that plaintiffs'' position was exactly similar to that of a pakka adatia was correct, and that the defendants should have an opportunity of showing that those who contracted with the plaintiffs for the same Vaidas and for amounts of produce corresponding with those for which the defendants entered into contracts had no intention of carrying out their bargains and that this was known to the plaintiffs. Farther evidence was therefore recorded. With all due respect it does not appear that the defendants entered into any contracts, if as employers they gave orders to the plaintiffs as their agents. However that may be, the question whether the plaintiffs were middlemen or occupied the position of pakka adatias need not be discussed as it has been admitted that for all material purposes the plaintiffs acted in the same way as pakka adatias. It may be noted that at the time when this suit had been filed Burjorji Ruttonfi v. Bhagwandas Parashram (1913) 38 Bom. 204, a case of a very similar nature, had been decided by the Appeal Court against the plaintiffs who were pakka adatias and it may be surmised that to avoid that decision the present plaintiffs had called themselves pakka brokers. The plaintiffs'' first witness admitted that pakka brokers were the same as pakka adatias and were liable in exactly the same way. The decision of the Appeal Court in Burjorji Ruttonji v. Bhagwandas Parashram (1913) 38 Bom. 204 has since been reversed by the Privy Council 22 CWN 625 (Privy Council) , on the ground that the defence of wagering had failed.

6. Now, the chief difficulty in dealing with this appeal appears to me to arise from the fact that the proper issues were not raised, and that was due to the fact that although contests between pakka adatias and their constituents in these Courts have been very frequent, it does not seem to have been sufficiently realised that if the contract between the two is a contract of employment, such a contract can never by its very nature come within the definition of a wagering contract and the pakka adatia must win unless the constituent can bring the contract within the provisions of Bombay Act III of 1865. That test was present to the mind of the learned trial Judge and was also referred to during the argument in 22 CWN 625 (Privy Council) , but unfortunately it does not appear that the respondents there were represented.

7. Their Lordships'' judgment in that case requires a careful analysis, as, with the greatest respect, some of the remarks are sufficiently uncertain to cause a difference of opinion as to their meaning. In a similar case, recently tried, before me on the Original Side, counsel for the opposing parties read, certain portions of that judgment in diametrically opposite ways.

8. But before entering on that, it will be as well to carefully set out from the evidence before us the exact nature of the business transacted between the parties and deduce the rights and liabilities arising therefrom in the light of the judgment in Bhagwandas v. Kanji (1905) 30 Bom. 205.

9. The defendants are traders residing in the Berars and though some years ago they used to send cotton to Bombay they took to speculating and lost most of their resources. The plaintiffs are what may be called outside brokers, and not recognized shroffs whose contracts are accepted in the market in which this peculiar business is done.

10. The business between the plaintiffs and defendants was carried on by correspondence, the plaintiffs advising the defendants with regard to the state of the market, the defendants giving the plaintiffs orders to buy or sell. The commodity dealt in was mostly Broach but also Bengal and Akola cotton. Now, leaving all question of wagering aside for the present, when the defendants ordered the plaintiffs to buy, say 100 bales Broach cotton for the March Vaida, and the plaintiffs booked the order, that meant that the plaintiffs undertook to produce the cotton on the Vaida day and defendants undertook to pay for it. The plaintiffs might cover their own liability by entering into a forward contract with a seller, or they might prefer to take the risk themselves. Whatever course they pursued the defendants had nothing to do with any parties with whom the plaintiffs contracted The plaintiffs only were liable to them. If that were the only transaction, when the Vaida day arrived, the defendants could either call upon the plaintiffs to deliver the cotton or settle at the room rate. If, however, before the Vaida day the defendants gave the ''plaintiffs an order to sell 100 bales then the business would be squared, the defendants would be debited with the cost of the purchase and credited with the proceeds of the sale. In the account of the suit dealings in Broach cotton at p. 202 it will be seen that the plaintiffs covered their own liability by entering into contracts with other parties, with the exception of 100 bales which were sold at the room rate at the Vaida. Not a single contract in the usual form was signed. The whole business from start to finish was transacted by book entry, the defendants being debited with the cost of purchases and credited with the price of sales. The plaintiffs would make nothing except their brokerage and the profit on the 100 bales settled at the room rate at the Vaida.

11. Stopping there, if there was nothing more in the case, there would be no answer to the plaintiffs'' claim. They were employed to buy and sell cotton and if they incurred losses in the course of their following their employers'' instructions they were entitled to be indemnified. And if it be once realised that they guaranteed to find the cotton ordered by the defendants or to pay cash, for the cotton sold, while the defendants had no concern whatever with the methods by which they arranged to fulfil their guarantee, then it would seem that in the absence of any evidence of witnesses, or of inferences which can be drawn from surrounding circumstances

with regard to any understanding arrived at between the plaintiffs and defendants, it is absolutely irrelevant to enter into the question how the plaintiffs arranged to fulfil their guarantee. It will be necessary now to consider the incidents of the employment of the plaintiffs as pakka adatias as laid down in Bhagwandas v. Kanji (1905) 30 Bom. 205 and approved of in 22 CWN 625 (Privy Council) . In Bhagwandas v. Kanji (1905) 30 Bom. 205 the up-country constituent had in December 1903 ordered the pakka adatia to sell 400 bales Broach cotton for the March Vaida. The adatia on receiving the order sold by four separate contracts 400 bales to three different persons. On the 26th January the adatia bought back from two of these persons 200 bales and the remaining 200 bales were bought back on the 24th March. On the 9th February 1904 the constituent had wired to the adatia to buy 400 bales Broach cotton for the March Vaida. The adatia said he had written on the 10th February that he could not carry out the order. The constituent denied having received the letter. The constituent was debited with the loss on the 400 bales on the ground that he had Tailed to give delivery. He contended that there was a wrong debit, that the adatia having squared the contracts with the third parties without substituting others could not hold liable on the due date the constituent for whom the first contract had been entered into. On these facts and on these contentions it was held by the Appeal Court: (1) that no contractual privity was established between the up-country constituent and the Bombay merchant. (By Bombay merchant I presume it was intended to refer to the third party with whom the ladatia contracted.)
(2) That the up-country constituent had no indefeasible right to the contract (if any) made by the pakka adatia on receipt of the order, but the pakka adatia might enter into cross-contracts with the Bombay merchant either on his own account or on account of another constituent, and thereby for practical purposes cancel the same.

(3) That the pakka adatia was under no obligation to substitute a fresh contract to meet the order of his first constituent.

12. It also seems to have been held that the adatia is no obliged to carry out an order of his constituent provided he informs the constituent at once of his inability to carry out the order.

13. What then was the relationship between the constituent and the adatia?

14. Jenkins, C.J., said:

I think the contract between the parties was one of employment for reward, and the incidents proved appear to me to converge to the conclusion that the contract of a pakka adatia in circumstances like the present is one whereby he undertakes, or--to use the word in its non-technical sense as business men on occasion do use it...--guarantees that delivery should, on due date, be given or taken at the price at which the order was accepted, or differences paid : in effect ho undertakes or guarantees to find goods for cash or cash for goods or to pay the difference. I do

not say that there is no relation of principal and agent between the parties at any stage; there may be up to a point, and that this is legally possible is shown by Mellish, L.J. in Ex parte White 1870 L.R. 6 Ch. 397, where ho speaks of ''a person who is an agent up to a certain point.'' So here there may have been that relationship in its common meaning for the purpose of ascertaining the price at which the order was to be completed, and to this point of the transaction all the obligations of that relation perhaps apply. But when that stage is passed, I think the relation is not that of principal and agent, but of the nature I have indicated (1905) 30 Bom. 205.

15. Now I shall apply that definition of the relationship of the parties to the facts. When the constituent gives an order to buy, the adatia is his agent to ascertain the market price. Having done that, if he accepts the order he is employed for reward and undertakes to produce the goods at the due date in return for his constituents'' cash. But is not an agent a person who is employed by his principal to do certain things for reward? If A asks B to buy on his behalf certain goods for forward delivery for a commission and B informs A that he has bought the goods, it depends on the terms of the contract of employment whether B undertakes to deliver the goods, whether his seller defaults or not, or whether B is no longer responsible after he has brought the buyer and seller into contact. Here it is held that by the terms of the contract the adatia is responsible, but more than that his constituent has nothing whatever to do with the seller. He has no interest in the contract and the adatia can deal with it as he pleases. If the adatia sells back the goods to the seller at a profit his employer is not entitled to that profit nor of course would he be liable for any loss. But it does seem very strange that when the constituent employs the adatia for reward to do a certain thing, he has no title to what has been done under his orders. Would it not be much more in consonance with the facts to say that when the constituent asks the adatia to buy or sell, it is a contract between those two, that the adatia will deliver the goods to the constituent for his cash, or pay cash for the constituent''s goods, in other words, a plain contract of sale or purchase? Once it is established that there is no privity between the constituent and the third parties, that the adatia can make contracts with such parties or not as he pleases, that if he makes contracts he can cancel them just as it suits him, it all comes to this, the constituent gives an order to buy, say, 100 bales Broach cotton for the March Vaida at the market rate. The adatia says: "I have bought at 300 which I guarantee to be the market price." He is then liable to deliver the cotton at 300 on the Vaida day. It is open to him to cover his liability by buying from a third party at 300 in which case he earns only his commission, or he may take the risk himself. In any event even if he does cover himself, he can deal with the covering contracts as he pleases and sell back the cotton if it suits him. There is then an absolutely "distinct dividing line between the dealings as between the adatia and his constituent on the one hand, and his covering dealings, if any, on the other. Can it matter whether the adatia if he covers does so by means of pakka contracts or wagering contracts? None whatever as far as I can see.

16. Now will be seen the confusion which has arisen owing to the single issue in the case being: "Were the transactions in the suit by way of wager?" I leave out of consideration the issue as to damages. The transactions in the suit clearly are the transactions between the plaintiffs and defendants which gave rise to the claim in the suit. The transactions between the plaintiffs and defendants, and the plaintiffs'' covering transactions could not possibly form the subject-matter of one issue. But if the adatia is only in the first place an agent and then a person employed for reward the contract of agency or employment cannot possibly come within the definition of a wagering contract nor could a contract of agency or employment he referred to as ''transactions''. Somewhat similar questions have arisen in England in suits between brokers and their clients. Lord Halsbury says (Vol.. XV, p. 283):

But since in transactions in stocks and shares the rue nature of the--bargain is sometimes involved in some obscurity, the relations in which the parties stand...must he ascertained. It one who is desirous of ''speculating'' (and I take it that the word ''speculating'' is used as the equivalent of ''gambling'' in differences) employs a broker on the Stock Exchange to buy or sell for him, their relation is that of principal and agent. The broker charges a commission for his services, and a rise or fall in the price of the stocks purchased or sold does not affect him. If such be the true relation between the parties, there Is nothing at stake between them, and there is no wager: Thacker v. Hardy (1878) 4 Q.B.D. 685. And although the broker be employed to make wagers and does so, while this will not make the transaction between him and his client a wager, yet the broker will not be able to recover from his client losses he may have paid, or commission for his services : 55 & 56 Vic. c. 9, Section 1. As long, therefore, as the relation between the parties is really only that of broker and client, the contract between them cannot be a wager, even although the broker may know that the client does not expect to be called upon to settle the transaction except by the payment of differences.

17. The only difference then between the relationship of a pakka adatia and his constituent on the one hand, and that of a broker personally liable on the contracts he enters into on orders received and his client on the other, is that in the latter case the broker enters into the contract as agent for the client, he himself also being personally liable to the person with whom he contracts, while the adatia does not make the contracts with third parties as agent, but as principal, the constituent having no right to be brought into contact with the third parties.

18. The leading case on wagering contracts between principals is The Universal Stock Exchange v. Strachan [1896] A.C. 166 The appellants bought from and sold to the respondent various stocks and shares at the "tape prices" of the day. Bought and sold notes were made out by the appellants in each transaction stating that they acted "as principal or jobber" and subject to the terms printed on the back. Term 2 stated, inter alia, that every purchase or sale contracted by the Company was a bona fide transaction for delivery on a specified settling day and the contracts

entered into by the Company were not contracts of gaming or wagering. The transactions were for very large amounts and in no instance were stocks and shares ever delivered.

19. The respondent brought the action to recover securities handed to the appellants for the performance of his contract, alleging that the contracts were gambling transactions for differences. Cave J. in summing up said:

Notwithstanding those ostensible terms of business, was there a secret understanding that the stock should never be called for or delivered, and that differences only should be dealt with? If there was that secret understanding, then the plaintiff is entitled to recover his securities.

20. The jury found that the whole of the transaction were gambling transactions. The case was taken to the House of Lords. Lord Halsbury L.C., after saying that he was unable to understand after the directions to the jury what possible misdirection could have been suggested, proceeded:

The case resolves itself into au entirely different question, the only question of law I need refer to--namely, whether or not there was any evidence to go to the jury.... When I look at the terms themselves the whole scheme appears to me to be intended with great ingenuity to pretend that there is to be a real transaction, and yet there is to be a payment in respect of the relations between the parties which is only reconcilable in my mind with its being an unreal transaction.... I am satisfied, as far as I am concerned, that the jury were right, and that there was ample evidence to go to them which would justify them in the conclusion at which they arrived.

21. Lord Herschell said:

It has been said that wherever a contract is entered into between two parties containing an obligation under any circumstances to cause property to pass from one to another, whatever else there may be in the contract, and although neither of the parties contemplated that that provision should ever become operative, yet, if it ever may become operative, the contract cannot be by way of gaming or wagering. The proposition amounts to this, that parties who intended to gamble with one another, but wanted to have the security against one another of being able in a Court of Justice to recover their bets, could compel a Court of Justice to adjudicate and secure to them their bets by a judgment, if only they inserted in their contract a provision which might in certain events become operative to compel the goods to be delivered and received, although neither of them anticipated such a contingency; the purpose of inserting the provision creating an obligation being only to cloak the fact that it was a gambling transaction, and enable them to sue one another for gambling debts.

22. In In re Gieve [1899] 1 Q.B. 794 the contracts in question gave the seller or buyer an option to demand delivery on acceptance of the stocks or shares the

subject-matter of the contracts, the price being increased by one-eighth if the stock was taken up or decreased by one-eighth if stock was delivered. It was held by the Appeal Court that the transactions were gaming transactions although one of the parties had the option to turn them, into real transactions of sale and purchase. Vaughan Williams L.J. in delivering judgment said:

The whole form of the transaction is just what one would have expected if the parties were minded to gamble in differences but wore anxious to put the contract into such a form as to cloak or conceal the fact that they were gambling. Then, when one adds to that the history of the transactions from I beginning to end, the conduct of the parties leads almost necessarily to the inference that they only intended gambling transactions.

23. Thacker v. Hardy [1899] 1 Q.B. 794 was a case between a broker and his client. The plaintiff, a broker, entered into contracts on behalf of the defendant upon which he became personally liable and he sued the defendant for indemnity against the liability incurred by him and for commission, Lindley J., who tried the case, came to the conclusion: (1) that the defendant was a speculator, and the plaintiff knew him to be so; (2) that the defendant employed the plaintiff to speculate for him on the Stock Exchange; (3) that the defendant knew the plaintiff would have to enter into contracts to buy or sell to carry out his instructions; (4) that there was no other way in which the plaintiff could speculate for the defendant; (5) that the plaintiff did buy and sell accordingly; (6) that the defendant never expected, nor intended, to accept actual delivery of what the plaintiff might buy for him, nor actually deliver what plaintiff might sell for him, and that the plaintiff knew that; (7) that the defendant knew the risk he was running but hoped plaintiff would so be able to arrange matters that lie should only have to receive or pay differences; (8) that unless the plaintiff could so arrange matters, the defendant could not pay for what was bought or deliver what was sold and plaintiff knew that. But it was held that whenever one person employed another to do a lawful act which exposed him to liability, there was an obligation to indemnify, and what the plaintiff was employed to do was to buy and. sell on the Stock Exchange, and everything he did was perfectly legal in spite of the facts found that the defendant was gambling in differences and the plaintiff knew he was gambling. This decision was affirmed on appeal. It is submitted that if a similar case were to come before the Courts again the provisions of 55 & 56 Vic. c. 9 would be applicable and the result on the findings in Thacker v. Hardy (1878) 4 Q.B.D. 685 might be different. Section 1 of Bombay Act III of 1865 enacts:

All contracts, whether by speaking, writing, or otherwise knowingly made to further or assist the entering into, effecting, or carrying out agreements by way of gaming or wagering, and all contracts by way of security or guarantee for the performance of such agreements or contracts, shall be null and void.

24. The proper issues in this case therefore were: (1) If the contract between the parties was one of employment for reward was it knowingly made to further or assist the entering into of agreements by way of gaming or wagering? (2) If the contract between the parties was as between principal and principal was it by way of wagering or gaming?

25. In order to win on the first issue the defendants must prove that there was an understanding between them and plaintiffs: (1) that they were not only speculating but gambling, (2) that, if they ordered the'' plaintiffs to buy cotton, they would never call upon them to deliver it, and if they ordered them, to sell, they would never themselves deliver it, (3) that, if the plaintiffs incurred losses in carrying out their orders, they could indemnify them, and (4) that even if the plaintiffs did not contract with third parties in pursuance of their orders, differences would be received and paid exactly as if they had. Incidentally it might be arranged that plaintiffs should only enter into wagering contracts with third parties, and that would be sufficient to vitiate the contract of employment, though it might not be possible to prove that those third parties with whom the plaintiffs contracted were also wagering. On the second issue the defendants would have to prove there was a common intention only to pay differences. It is quite hopeless to expect to get any direct evidence from the plaintiffs'' side on the last point in a case of this kind. No witness of theirs will ever admit that there are such things as wagering contracts. They may plead ''guilty to a knowledge that there are such things as satta transactions which are merely speculative and are or can be so mixed up with genuine transactions that they gain inevitable validity from such transactions. On the oral evidence the learned trial Judge remarked:
I thought that the limit of audacious and silly perjury had boon reached by the defendants'' first witness, but I am bound to say that the plaintiffs surpassed him.

26. But in conclusion he said:

I do not propose to touch upon the evidence in detail, partly because of its intrinsically bad quality and partly because all the facts material to be known are virtually admitted. I am satisfied that the defendant has not been able to prove either that he himself never at any time meant to give or take delivery of the goods covered by these contracts or that plaintiffs were aware of such intention, if they had had it, much less that the parties, who sold, held similar intentions and that the plaintiffs were aware of that also. I must, therefore, hold that these contracts were not wagering contracts.

27. Those remarks were based on the decision that the plaintiffs were middlemen and that the actual contracting parties were the defendants on the one hand and the parties with whom the plaintiffs entered into contracts at the defendants'' instructions on the other. But as the plaintiffs are now admitted to have occupied the same position as pakka adatias, we must consider the evidence which was

before Beaman, J. and the evidence since recorded from an entirely different point of view. There is no need why we should be deceived by the pious protests of the plaintiffs, if from a survey of the surrounding circumstances we must come to the inevitable conclusion that the plaintiffs were the centre of a series of gambling transactions, and that there must have been an understanding well-known to all concerned on all the four points which I have set out above. First, the defendants were traders in the Berars. Can it possibly be suggested that the plaintiffs ever imagined that the defendants wanted Broach cotton sent to them or that they would have Broach cotton to deliver? It may be that in the language used by Jenkins C.J. in Bhagwandas v. Kanji (1905) 30 Bom. 205 the plaintiffs undertook to find goods for* cash or cash for goods, but that, with all due respect, is a purely idealistic description of what a pakka adatia may do, and even then is somewhat difficult to understand if analysed. The position of a buying and selling agent is well understood in business circles. An agent may guarantee to buy the goods ordered by the employer, and to deliver them if the money for them is paid; he can also guarantee to sell what his employer sends him and account for the sale proceeds, in other words, that is commission agency business, and stands on quite a different footing to what appears from the evidence in this case to be the business of a pakka adatia. It may be that if a constituent orders an adatia to buy cotton the adatia undertakes to find cotton if the constituent will pay, but the converse is ambiguous. Does it mean that if the constituent orders the adatia to sell the constituent must find the goods and the adatia will in the ordinary coarse pay over the proceeds to the constituent? But that is a thing which never happens. Or does it mean that the adatia will find the goods to deliver to the person with whom he contracts in return for that person''s cash? It would be safer to say that the adatia guarantees to carry out his constituent''s orders and the constituent guarantees to indemnify the adatia for all expenses incurred in carrying out those orders. Again, it may be as well to clear away the confusion that has arisen by discussing whether the contract is one between principal and principal or between principal and agent. The parties to a contract are always principals but if the contract is one of agency, the contract which the agent enters into in pursuance of the agency may be made by him with a third party: (1) either as agent in which case he is not liable, or (2) as principal without disclosing the fact that he is an agent, in which case the third party has nothing to do with the party employing the agent until he is disclosed, or (3) the agent may be personally liable to the third party as well as the person employing the agent. It follows from the decision in Bhagwandas v. Kanji (1905) 30 Bom. 205 that the contracts made by the adatia belong to none of these classes as the constituent is never brought into contact with the parties with whom the adatia contracts, nor can they ever make the constituent liable if the adatia in his contracts with them defaults. Therefore by a different road the same conclusion is arrived at, that the transactions between the adatia and third parties have no connection whatever with the transactions between the adatia and his constituent. To go back to the surrounding circumstances. Secondly, there is the correspondence between the

parties from which it is clear the plaintiffs knew the defendants were gambling and not speculating. Thirdly, there are the records of the transactions, a mere series of debits and credits by book-entry without a single contract being signed. Though even if there were contracts drawn up and signed exactly in the way that contracts evidencing genuine mercantile transactions are drawn up and signed the Court need not be led away by such pretences. We have now the evidence of Ishwarlal Purshottamdas who examined the books of the plaintiffs. The results for transactions on Broach, Akola and Bengal cotton are tabulated on pp. 212, 214, 219 and 224 respectively.

28. His Lordship, after detailing the several transactions between the parties, proceeded as follows:

The plaintiffs had similar accounts with all the persons mentioned from whom the plaintiffs bought, and sold, and the tabulated statements show how they squared the transactions entered into with them. In the defendants'' ledger account the numbers of bales bought and sold are entered with the prices, the losses and gains being debited and credited.

29. The ledger accounts of the other firms are kept in an exactly similar way. The transactions on each side being numbered so that corresponding sales and purchases can be graced. Representatives of three of these firms were called, others had stopped business or left Bombay and could not be found.

30. Karsondas Manmohandas, partner in Ramgopal & Co., said that in all his transactions with the plaintiffs in 1914 he had neither given nor taken delivery. He might have done so before 1914 (p. 29). Amongst the Indian brokers there could not be a written contract; all contracts were made orally by Indian brokers (p. 32). He had dealings with five of the persons with whom plaintiffs dealt and had never given or taken delivery (p. 33).

31. Hanumanbux Udheram, Munim of Nanakrain Raghunath, said in their dealings with plaintiffs no delivery was taken or given of cotton for the Broach March Vaida. In respect of 200 bales Akola sold for the January 14th. Vaida plaintiffs gave a shroff''s contract. As between brokers there never was a written contract. Tadaorai Shi vial, Munim of Shivnarayan Nemani, said that in the year 1914 the plaintiffs neither gave nor took delivery in their dealings with his masters.

32. All these firms acted as brokers who never signed contracts. If they could manage to got a shroff contract their liability ceased. No doubt they often acted as intermediaries in genuine transactions,'' but there is no evidence that where they made oral contracts with constituents, the transactions were anything more than book entries of rates.

33. Now in cases of this nature the only question of law is whether there is evidence to go to a jury, and if that question can be answered in. the affirmative, the next

question is whether the Court, performing the function of a jury, can reasonably come to the conclusion on that evidence, either that the parties have entered into contracts by way of wagering, or have entered into contracts knowingly to further or assist the entering into or carrying out agreements by way of wagering. In my opinion undoubtedly in this case there is evidence to go to a jury. If the correspondence between the plaintiffs and defendants can be considered as amounting to contracts of sale and purchase, I should ask a jury to say whether, on the evidence before them they thought there was a secret understanding that cotton should never be called for or delivered and that differences only should be dealt with. If on the other hand the plaintiffs were employed for reward I should ask the jury to say whether they thought the defendants were only dealing in differences and plaintiffs knew that, and whether there was a secret understanding that whatever the plaintiffs might do on the defendants'' instructions the transactions as between themselves were to be settled by paying differences.

34. Is there then anything in the judgment in 22 CWN 625 (Privy Council) which would compel me to say that that would be a misdirection?

35. In that case the defendant instructed the plaintiffs who were pukka adatias to sell for him three several lots of linseed amounting to 4,000 tons September delivery.

36. On the strength of that order the plaintiffs sold linseed by separate contracts to thirty-nine buyers. The transactions took the form of sales by the defendant to plaintiffs, followed by re-sales by the plaintiffs but the plaintiffs acted as pakka adatias and the defendant, deposited Rs. 61,000 to secure them against loss. As the market fell the plaintiffs called on the defendant, at the end of August, either to give delivery or to authorise them to purchase on his behalf. The defendant did neither, so plaintiffs gave delivery of 300 tons and cancelled the contracts for the remainder by cross-contracts.

37. Their Lordships held that the plaintiffs were employed as pakka adatias and acted in conformity with their employment when they made the contracts with the thirty-nine buyers. So they became entitled to be indemnified by the defendant against the consequences of the acts done by them unless they were unlawful.

38. Then their Lordships say 22 CWN 625 (Privy Council) :

No doubt the contract of a pahha adatia, as that of any one 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.

39. Now with the greatest respect I confess to having some difficulty in following that passage, taken in conjunction with the incidents of the employment of the plaintiffs as pakka adatias as set out in Bhagwandas v. Kanji (1905) 30 Bom. 205. It was the plaintiffs who had undertaken to deliver to their thirty-nine buyers, there was no privity of contract between the defendant and those buyers, and though it seems that the defendant in form contracted to sell to the plaintiffs that was merely one way of noting down what the defendant had employed the plaintiffs to do. Nor do I understand how the employment of plaintiffs by defendant could be by way of wager, unless that expression can be extended to the employment of an agent to make a bet. But such a contract of employment cannot, it is submitted, come within the definition of a wagering contract. It seems as if their Lordships considered that there was only one set of transactions, for again the issue was whether the transactions on which the claim rested were agreements by way of wager; but whether the defendants were sellers to the thirty-nine buyers, the plaintiffs also being liable to the buyers, or whether the plaintiffs only were to be considered as the sellers is by no means clear. The question whether the contract of employment of a pakka adatia could be vitiated under Bombay Act III of 1865 was nowhere discussed. However that may be, the facts of this case bear no resemblance to the facts in 22 CWN 625 (Privy Council) .

40. The plaintiffs there had entered into written contracts with thirty-nine buyers, and there was no evidence that as between the plaintiffs and those buyers there was a common intention to wager. Nor were their Lordships satisfied that as between the plaintiffs and the defendant there was an understanding that everything was to be settled by payment of differences.

41. Here all the evidence points to an understanding not only between the plaintiffs and defendants but also between the plaintiffs and the persons with whom they, dealt that all transactions should be closed either before or at the Vaida by payment of differences. The evidence also shows that the defendants in effect employed the plaintiffs to make bets on the rise and fall of the cotton market, that the plaintiffs knew that and encouraged the defendants to give them orders for making bets and that the plaintiffs made bets in consequence of those orders with third parties who also knew that they were betting with the plaintiffs. Apart from that, if A employs B to make a bet" and B for his own convenience enters into a contract with a third party which can be enforced, that does not in any way get rid of the fact that A was betting, that B knew that he was betting and agreed to assist him in attaining his object. I cannot conceive any jury, even if they happened to be gifted with only an ordinary amount of common sense, coming to any other conclusion than that all the transactions recorded in the case were wagering, pure and simple, and it really makes no difference whether the defendants were buying cotton from and selling cotton to the plaintiffs direct, or employed them to buy and sell on their behalf. There never was the slightest intention to deliver a single bale and all the transactions were to be adjusted by paying and receiving differences. There was one

argument addressed to us which requires consideration, namely, that the greater part of the plaintiffs'' claim relates to differences resulting from cross-contracts; and, therefore, cannot be based on wagering contracts. Now if A orders B to buy 100 bales cotton at the market rate for a future Vaida and the Court is of opinion that when the contract is entered into there is a secret understanding that only differences are to be paid and received, that is to say, that if the market rate at the Vaida is higher B pays A the difference, and if the market rate is lower A pays B the difference, it does not seem to matter much if the parties before the Vaida agree to fix their losses or gains rather than wait until the Vaida. It depends entirely on whether the original contract is held to be a wager or not. Apart from that, according to the decision in Bhagwandas v. Kanjni (1905) 30 Bom. 205 the adatia is under no obligation to make a cross-contract.

42. In my opinion the appeal must be allowed and the suit dismissed with costs throughout.

Fawcett, J.

43. I concur generally in the arguments and conclusions in the judgment just delivered.

44. The form of the issue as to wagering was no doubt due to the plea in paras. 2 and 4 of the defendants'' written statement that the transactions in question were all wagering transactions: bat the applicability of the provisions of Bombay Act III of 1865 to the case was discussed in the judgment of the lower Court, and the appeal has been argued on the same footing, so that there can be no valid objection to this Court re-settling the issues under Order XLI, Rule 24, Civil Procedure Code, in the manner stated in the learned Chief Justice''s judgment.

45. On the facts found in that judgment, with which I concur, both issues should clearly be answered in the affirmative.

46. The correspondence, in which the plaintiffs frequently refer to satta dealings and the need of hedging as the market turns against the defendant firm, and the actual course of dealings between the parties, leave no reasonable doubt, in my opinion, that there was an. understanding between the parties that there was to be no actual delivery and that all the transactions were to be adjusted by paying and receiving differences. In the face of this evidence, mere statements that the transactions were ''genuine'' can be given no weight.

47. In the judgment of the Court below (at p. 132 of the first Appeal Paper Book) it is said that this evidence showing that to plaintiffs'' knowledge defendants never meant real business," has no bearing whatever upon the other half of the contract, that is to say, the intentions of those who were selling against the defendants'' buying orders". This is no doubt correct if the plaintiffs were mere middlemen, as the lower Court treated them: but it is now common ground that they were on the

same footing as pakka adatias, who as regards his up-country constituent is a principal and not a disinterested middleman bringing two principals together, and consequently this view falls to the ground. I do not agree with the learned Advocate-General that the fact of the plaintiffs making themselves liable in the Bombay market is conclusive against the plea of wager or farthering wagering transactions. Nor do I read the judgment in 22 CWN 625 (Privy Council) as laying down any such proposition. In the paragraph at p. 378 beginning "Under the sales to the thirty-nine buyers," the matter is dealt with as an indication that the adatias had no common intention to wager: but the question still remains whether the contracts in respect of which the plaintiffs sue were not knowingly made to farther or assist the entering into agreements by defendants, by way of gaming or wagering, within the meaning of Bombay Act III of 1865. And even as regards a common intention to wager, it seems to be a question purely of probabilities. No doubt it is the case [as stated in Halsbury''s Laws of England, Vol. XV, p. 281, footnote (s)] that--"As between broker and client, where the broker has by the custom of the Stock Exchange to become personally liable to the jobber...the probabilities against his making a wagering contract with his client are strong." But in this case I think such a probability is distinctly outweighed by the evidence showing that the plaintiffs carried on a business to enable persons like the defendants to gamble in differences. The plaintiffs ran the risk of defendants not indemnifying them for losses incurred on their behalf and setting up a plea of wager, but that is a risk which plainly they were prepared, to take and which does not, in my opinion, conclude the question of intention. The evidence that has been taken in regard to the plaintiffs'' transactions in the Bombay market goes against them, as shown by the learned Chief Justice; and the fact that the witnesses called regarding the transactions say they are genuine is in the circumstances immaterial. It seems practically impossible in these cases to get a witness to admit that he is a party to a gaming transaction, unless of course it is in his interest to do so.

48. I agree, therefore, in allowing the appeal and dismissing the plaintiffs'' suit with costs throughout.