
(1913) 12 BOM CK 0006
In the Bombay High Court

Chhogmal Balkissondas, A Firm

APPELLANT

Vs

Jainarayan Kanaiyalal

RESPONDENT

Date of Decision : 18-12-1913

Acts Referred:

Contract Act, 1872 — Section 30

Citation : (1915) ILR (Bom) 1

Hon'ble Judges : Batchelor, J; Basil Scott, J

Bench : Division Bench

Judgement

Basil Scott, Kt., C.J.—This is an appeal from, a decree of Mr. Justice Macleod dismissing a suit brought by the plaintiffs, who carry on business as Shroffs, pakka adatis and commission agents in Bombay, to recover Rs. 48,045-15-0 as a balance of account payable by the defendant on transactions in which the plaintiffs acted as the defendant's pakka adatis. The balance appearing against the defendant is attributable to losses on forward contracts for the sale or purchase of silver, Bengal cotton, Broach cotton and linseed, All these losses occurred on contracts under which in fact no delivery was given or taken and all the contracts were entered into with the plaintiffs by Mangalchand, the Munim of the defendant's Cawnpore branch. The defendant disputes the authority of Mangalchand to enter into forward contracts on his behalf and upon this contention arises the first point in the appeal.

2. Mangalchand was the sole Munim of the defendant at Cawnpore from 1897 to 1911, his remuneration, being a share of six annas in the profits of the Cawnpore business.

3. There is no doubt that it is common for Marwari firms in the mofussil and their Marwari adatis in Bombay to enter into forward contracts for the purchase or sale of silver, cotton, and seeds. The evidence of Jwaladas shows that the defendant's Cawnpore books record forward transactions of this description in 1958 (1900-01), 1959 (1901-02), 1962 (1905-06) and 1964 (1907-08). The books for 1961 and 1963 were not forthcoming at the time of Jwaladas

investigation and they have not been produced, in this Court. The evidence establishes that the defendant visited Cawnpore from time to time but never himself examined the books. Business relations between the plaintiffs and the defendant's Cawnpore branch, went on from 1901 to 1911 and it is not disputed, that an adjustment arrived at in 1908, when Rs. 81 was found due to the defendant, embraced accounts of forward transactions entered into by Mangalchand in the name of the defendant. It is, however, the fact that between 1908 and 1910 the transactions between the plaintiffs and the defendant's Cawnpore firm related solely to hundies and that of the forward transactions entered into in 1910 and 1911 no trace is to be found in the defendant's Cawnpore books. It is probable that Mangalchand did not wish, the defendant to know of the forward contracts he was entering into during that period with the plaintiffs but it is not contended that the latter received any intimation that Mangalchand's apparent authority to enter into forward contracts had ever been revoked. On the 1st of April 1911 the defendant writes to the plaintiffs: "After having copied our account up to this day please write up information about any goods which may have been bought and sold through you." This information was supplied at once but it is not till after the 22nd of April when the plaintiffs' solicitors wrote that at least Rs. 40,000 would, be required as margin on the forward transactions that the defendant by his pleader's letter of the 5th May informed the plaintiffs' solicitors that Mangalchand had no authority to enter into forward transactions.

4. The learned Judge was therefore right In holding the transactions in suit were within the apparent authority of Mangalchand and we agree with him in thinking that if the transactions had resulted, in a profit to the defendant the defence that Mangalchand had exceeded his authority would not have been put forward.

5. The defendant has, however, a second line of defence based on Section 30 of the Contract Act on which he has succeeded in the lower Court. He pleads that all the orders given, to the plaintiffs by Mangalchand to enter into forward transactions were in respect of wagering and gambling transactions and were entered into by the plaintiffs on that understanding. He also denies that the plaintiffs acted, as pakka adatias. The denial on the one side and the assertion on the other of the plaintiffs' employment as pakka adatias were probably made with a view to support the respective cases of wager and no wager but for the reasons given by this Court in *Burjorji Ruttonji v. Bhagwandas Parashram* (1913) 38 Bom. 204 we are of opinion that the existence of the pakki adat relationship does not of itself negative the existence of an understanding between the adatia and his constituent that no delivery should be given or taken under forward contracts and that only differences should be recovered.

6. The plaintiff's accounts show that the defendant was charged the usual pakki adat commission of six annas and four annas for brokerage. The plaintiffs' journal entries which have been put in namely Exhibits 25 and 32, relating to the 1,000 tons of linseed and the 200 tons of rapeseed. for the April-May Vaida of

1911, show that the plaintiffs regarded the transactions as being on the defendant's gharu or private account while the Soda Vahi entry (Exhibit 19) shows that of 300 bales of Broach cotton sold on the defendant's account for the Vaida of March 1911 two hundred were taken by the plaintiffs on their own private account. The plaintiffs' Gumasta Ramkisson deposes that the 800 bales of Broach cotton for the March Vaida on which the defendant is debited with a loss of Rs. 13,225 was part of 2,600 bales bought and sold, by the plaintiffs for the March Vaida of which a considerable proportion was taken on plaintiffs' gharu or private account.

7. This is all consistent with the plaintiffs' contention that they were pakka adatias of the defendant transacting business upon the terms of the Bombay custom described, in *Bhagwandas v. Kanji* (1905) 30 Bom. 205 but it follows that qua the defendant they were principals and not disinterested middlemen bringing two principals together. The question then which we have to decide is what on the evidence was the common intention of the parties with, regard to the settlement or completion of the transactions referred to in the account annexed to the plaint.

8. The evidence of Mangalchand as to the manner in which these transactions were carried out is as follows:

Such transactions were made in this way. The rates were out some twelve months prior to the due date: then the Bombay and Calcutta people used to inform their customers about the rates of different commodities: whoever found the rate to become cheap in future would sell and whoever considered the rate to become high in future would purchase. If at any time after this Soda before the due date the purchaser found the transaction profitable he would resell by a telegram, otherwise on the due date the losses and profits used to be settled according to the rates. No delivery used to be given or taken on the due dates by the seller or purchaser respectively. As long as I dealt in such transactions I neither gave nor took any delivery of anything sold or purchased. There takes place no delivery at Bombay and so I never contemplated to take or give delivery of goods. Chhogmal Balkrishna's shop is at Bombay. I made Satta transactions with the said firm and once or twice I sent ready goods also for sale. I made the same kind of Satta transactions with Chhogmal Balkrishna as I have mentioned above to have made with Madon and other adatias of Bombay. In this case too no deliveries were contemplated or made.

9. The evidence of Ramkisson, the plaintiffs' Gumasta, strongly supports the defendant's contention that under the forward contracts in question no deliveries were contemplated. That the contracts in respect of 60 chests of silver were purely by way of wager was admitted by plaintiffs' counsel before Ramkisson's cross-examination had begun. These contracts were made upon an order from defendant by wire on the 23rd July 1910 to sell 60 silver and on the 7th October 1910 to buy 50 silver. The contracts for all the other commodities were effected by wire in the same way. The wire of the 7th October 1910 relating both to silver

and to Bengal cotton, may be quoted, as an example. "Sell 50 silver Aso and 22 January; reply." The telegrams include orders for sale and purchase of 800 bales of Broach cotton, a commodity not produced in the Cawnpore District. Besides these 6,000 more bales of this cotton were bought or sold, by the plaintiffs for the Vaida of March 1911 but no delivery was given, or taken.

10. Coming now to commodities produced in the district in which Cawnpore is situate, the defendant gave telegraphic instructions to the plaintiffs to sell 200 bales of Bengal cotton on the 7th October 1910 for the January Vaida, and on the 24th of January 1911 to sell the same amount for that Vaida. The plaintiffs in fact received no Bengal cotton from any constituents in 1966-67 or 1967-68 but they contracted for the sale or purchase of 2,700 bales upon which differences were paid or received.

11. Taking next linseed, another commodity produced in the Cawnpore District, the defendant gave instructions for the sale and purchase of 300 tons for the September Vaida. The transaction was settled by striking differences. The plaintiffs' linseed, transactions for that Vaida were for 425 tons all of which were settled by payment of differences.

12. For the May Vaida the defendant instructed the plaintiffs by telegram to buy 1,000 tons of linseed in all and to sell 200 but none was delivered, or received. For that Vaida the plaintiffs' linseed, transactions amounted to 3,850 tons but there were no deliveries except 25 tons to a Bombay Marwari named Sadashiv Gambirchand some time after the defendant's repudiation of liability.

13. The mode in which the plaintiffs executed the defendant's orders was that employed in executing the orders of all other Marwari constituents on forward contracts. They took, for themselves on gharu or personal account such, orders as they wished to reserve and passed on the others to other Bombay Marwaris through brokers (the modus operandi is well illustrated by the learned Judge in his detailed, account of the defendant's linseed contracts for the September Vaida). These Bombay Marwaris are a small body who, as the evidence of the invariable payment of differences suggests, almost certainly contract with a thorough understanding that no deliveries shall be called for or given. They only number 20 out of the plaintiffs' 300 constituents. The subsidiary contracts or Kabalas are only accepted by the plaintiffs from Marwaris. There is no evidence that any of the Marwaris with whom the plaintiffs deal require produce for export. The plaintiffs Gumasta admits (1) that in 1966-67 or 1967-68 the plaintiffs did not deliver any Broach cotton for cash; (2) that during those years no constituents sent them Bengal cotton; and (3) that at the May vaida of 1911 although, it might have been profitable to buy ready linseed to fulfil forward contracts this was not done in any case.

14. The first two of these admissions do not apparently apply to the business of sale on commission of tangible produce; for the plaintiffs' Gumasta says:

I can tell you from the books how much cotton, linseed and rapeseed was

delivered for the last three years. The quantities delivered will appear in the weighment book. We receive ready goods for sale on commission from our constituents" cotton, linseed and rapeseed. We receive linseed by the bag of two and one-fourth Bengal maunds. We get from 4,000 to 5,000 bags a year. Last year we got 10,000 bales of cotton for sale on commission. We also received rapeseed for sale on commission. The figures will appear in the weighment books.

15. This business of sale of ready goods is a commission agency business the records of which are kept in a book which has no relation to the Vaida or forward business in which the defendant's losses were incurred.

16. Much reliance has, however, been placed upon certain letters which passed between the plaintiffs and Mangalchand from which the Court is asked to infer that Mangalchand intended and the plaintiff's expected the linseed contracts for the Vaida of May 1911 to be fulfilled by the delivery of linseed. And if this inference were accepted the conclusion would be suggested that the evidence as a whole does not negative the possibility of deliveries under the other forward contracts initiated by Mangalchand, even for other commodities such as Bengal and Broach "cotton. In discussing the passages in the correspondence which are relied on it is important to bear in mind that the time for fulfilment of forward linseed contracts for the May Vaida in Bombay is from the 15th to the 31st of May.

17. On the 3rd of January 1911.(Exhibit 65) the plaintiffs wrote:

Orders for many Sodas (transactions) in silver are received from you by other people. No (orders are received) by me. What is the reason thereof? It does not become yon to act in this way.

Mangalchand replied by Exhibit N :

You write to say that we do not send to your firm orders (for) business and that we send the name to some other firm. It is all right. We have not sent orders (for business) to anybody. Further, please write and let us know how you came to know that and to whom we have sent orders (for business). (As to) whatever work has been sent in these days the same has all been sent to your firm and not to any other place (i.e., firm). Ready goods have been more or less sent. The same have been sent to Tilokchand Mamraj. Goods used to be sent (to him) even formerly. Now-a-days we do not venture to buy or sell any kind of goods. When we think proper we shall send orders (for business) to you. Please write and let us know when pakka information about linseed will be received. Please write about the tendency of silver market. Here rain has fallen all over the four directions. Owing to the fall of rain the crops will be still better. Please note this. The 5th of Pos Sud in (the Samvat year) 1967 (5th January 1911).

18. This letter can hardly refer to forward contracts of produce for the defendant had in December given the plaintiffs orders for the forward purchase of 500 bales of Broach cotton and for the forward sale of 400 tons of linseed and 200 tons of

rapeseed (see Exhibit F). Mangalchand says that "now-a-days they do not venture to buy or sell any kind of goods," which might intimate to the plaintiffs, if intimation were needed, that deliveries need not be expected under the forward contracts. The ready goods sent to Tilokchand Mamraj were 100 tons of poppy seed sent for sale on commission. They were sold to an export firm, on railway receipts as soon as it was known the goods were on the way. The request for pakka information about linseed was not apparently made for the purpose of the forward contracts for on 7th of January before a reply was received a telegraphic order to sell 200 tons of linseed at 123 was sent to the plaintiffs (see Exhibit F).

19. On the 8th January Mangalchand wrote, Exhibit O, in which, after referring to the forward sale on the previous day of 200 tons of linseed, he says:

We think that all the commodities will fall (in price) after five (or) seven days. The crops in this district are very abundant. On arrival of the goods appertaining to the crops the market will go down considerably. Further, everything is under the control of Thakorji Shall we send ready goods to you? If you can exert yourself" in selling the same, please write (to us). The 8th of Posh Sud of Samvat 1907.

20. On the 9th Mangalchand writes (Exhibit P):

You have written to say that you have sold cotton and linseed. We have brought the same to account as written by you and have already sent a chithi (i.e., letter). The same must have reached (you). By what time will the pakka report about linseed and that of Indian and American (cotton) come? Please write positively (about the same). With regard to the produce of linseed in India it is conjectured that it will be four times more than that of the last year. Further, it is in the hands of Thakorji. Ready goods will begin to arrive within one month when Bazar will go down positively. The Bazar will surely not be so (brisk).

21. On the 20th January the plaintiffs complain (Exhibit 67):

Further you send orders on Bhai Bhikanichand Balkissondas for many Sodas (transactions) in silver.

22. To which Mangalchand replies on the 22nd (Exhibit Q):

Yon write that our orders for silver business are received at Bhikamchand Balkisson"s. How do you write this way? We have never had any occasion even for correspondence with them, nor are they our commission agents. Further, nobody has in these days orders for silver business from us. If there be any business we shall send the orders to you.

23. On the 21st January (Exhibit S) the plaintiffs sent an account of transactions for the year 1966 showing Rs. 1,194 due to the defendant.

24. On the 28th January (Exhibit 68) they wrote:

Moneys have not been received from you. Do you be good enough therefore to

send the same.

25. To this demand Mangalchand takes exception in Exhibit T on the 8th February as no moneys were due by him on the account and if money is wanted to meet losses on the Bengal cotton contracts particulars should be sent. He then proceeds as follows:

We shall remit the moneys in respect of the loss twenty days before the month in which the due date is to fall. Do you please rest assured. We shall of course send linseed to you. At Jamnapur the produce of linseed is, very large. Our man will go to attend to the purchases. Ready linseed will be sent. Please rest satisfied. Further, we have written to the linseed merchants. Those people will send all the goods. Further, please be writing about the tendency;(of the market) as to silver. Please send a letter containing full particulars. Please write about business, if any. We shall send to you ready linseed entirely. Further, our instructions for the purchase of lai (i.e., a kind of seed) have been sent to all places. The lai received at present is of inferior quality. Dry goods will be received in ten days" time, when purchases will be commenced, and lai will be sent to your place. Please note that Please send a letter containing full particulars.

26. The promise to remit moneys is very vague. It can hardly refer to the loss on the Bengal cotton contracts the Vaida for which had expired. It was apparently intended as a comforting assurance that the defendant would fulfil his engagements. The references to ready linseed have been much relied on by the plaintiffs" counsel as showing an intention to deliver everything that was due on the linseed contracts. At this time, however, the buyer could not be forced to take delivery under a contract for the May Vaida, nor at any date before the 15th of May. The references to all the linseed may be reasonably explained as meaning that all that might be brought in by merchants would be consigned to the plaintiffs "ready", i.e. for sale on commission.

27. On the 9th February the plaintiffs wrote (Exhibit B in appeal) that the linseed market was entirely upwards (teji) and people expected it to go to Rs. 15.

28. On the 10th February Mangalchand writes (Exhibit V):

We shall sent all the linseed ready; on the arrival of linseed the market will go down considerably.

29. He seems here to propose to send all the ready linseed available in order to depress the market which was going against him for the Vaida contracts.

30. To the same effect is Mangalohand"s letter (Exhibit W) of the 13th February:

We think that immediately after consignment of the goods appertaining to the crops there will be a considerable fall. We shall purchase as much as we possibly can. There is still fifteen to twenty days time for consignment of goods.

31. On the 16th February Mangalchand writes (Exhibit X) acknowledging receipt of the account sent by the plaintiffs (showing a loss of over Rs. 7,000) in respect

of the January Vaida and promising to bring the items to account. He then says he will begin purchasing linseed in twenty days.

32. On the 20th February (Exhibit Y) he writes:

Purchases of ready goods have commenced. We shall send, you the railway receipts in respect of linseed and lai in the course of ten-fifteen days. Please consider the same to be as good as received.

33. On the 25th February (Exhibit Z) he writes:

The linseed market will again go down. When the Jamnapur linseed arrives (the market) will go down at once. Thakorji (God) willing it will arrive within fifteen days.

34. On the 9th of March (Exhibit AI) he writes:

Further, we are going to send a man to you with whom we shall also send the railway receipt in respect of the ready goods. Please exert yourself in transacting the business. Please be writing the rates of ready lai and linseed. The man will reach (you) in five to seven days. Please transact the business of the ready goods with profit. We shall send the same in large quantities. Please rest assured.

35. The reply of the 12th March (Exhibit 70) shows that the plaintiffs understood this to mean that Mangalchahd was sending a man with ready linseed which the plaintiffs were to sell profitably: not to deliver or to hold against forward contracts already made.

36. The plaintiffs' next letter, Exhibit 71 of the 19th of March, was in reply to a telegram from Mangalchand of the 16th instructing them to buy 300 bales of Broach cotton. This would close his Broach cotton transactions the Vaida for which began on the 15th. These Broach transactions had gone against him and showed a loss of Rs. 13,000 which made him a debtor to the plaintiffs in Rs. 12,000. The plaintiffs then show anxiety that the settling contract should be acknowledged.

37. They write:

Having entered into a Soda (transaction) as mentioned above, I wrote intelligence (with regard to the same) by wire. Do you be good enough to write acknowledging receipt (of the telegram). Do you be good enough to write and send intelligence about your having made a note of the Soda (transaction). Further, the market for linseed is steady (powga). The tendency is up (teji). You wrote that you would send ready goods, but the same have not been sent. Therefore (to) be good enough to write information (samachar) about squaring up the Soda.

38. It is upon the last sentence in the above extract that the plaintiffs have placed their chief reliance in this appeal. Assuming it is said that the promises to send all the ready linseed, or all the linseed ready, mean that the linseed would

be sent to be delivered against the outstanding forward contracts of sale the result of not sending the ready linseed is that the linseed contract must be settled in another manner. "To" (therefore), they say, introduces the consequence of the failure to send ready linseed.

39. It appears to us for the reasons already indicated in our comments on the correspondence that the first step in this argument breaks down. The promise was, to "bear" the market with large consignments of ready linseed for sale on commission, not, to fulfil the outstanding contracts by premature deliveries. Mangalchand's failure to perform this promise may, when taken in connection with the present loss on Broach cotton, have caused the plaintiffs to press Mangalchand to settle the forward contracts still outstanding. We are, however, by no means satisfied that this is the true purport of the last sentence. It is, we think, more probably a Marwari iteration of what has gone before concerning the closing Broach contract. An instance of the custom of iteration and re-iteration will be found in another much discussed letter Exhibit T which closes by asking for the third time for a letter containing particulars although the request has no connection with that part of the letter which immediately precedes it.

40. Speaking generally the correspondence of Mangalchand only indicates a desire to keep the plaintiffs in good humour by promises which he had no intention of performing, while Exhibit 71 will not support the edifice of inference which the appellant's counsel would have us build upon it.

41. We are of opinion for the above reasons that the learned Judge was right in his conclusions. We are unable, however, to agree that the defendant who successfully pleaded a lawful defence was not entitled to his costs. We affirm the decree in so far as it dismisses the plaintiffs' suit; but vary it by ordering that the plaintiffs do pay the defendant's costs. The plaintiffs must also pay the defendant's costs of the appeal.