
(1925) 04 MAD CK 0080
In the Madras High Court

(Diwan Bahadur) Govindoss Chathurbhujadoss and Co.

APPELLANT

Vs

Sukdevadoss Ramprasad

RESPONDENT

Date of Decision : 29-04-1925

Acts Referred:

Citation : AIR 1926 Mad 326 : (1926) 23 LW 105

Hon'ble Judges : Kumaraswami Sastri, J; Krishnan, J

Bench : Full Bench

Judgement

Kumaraswami Sastri, J.—The appeal arises out of suit filed by the respondents against the appellants for the recovery of Rs. 65,255-2-3 claimed in respect of 135 bales of Japan twist alleged to have been sold and delivered by the plaintiffs to the defendants.

2. The case for the plaintiffs is that the bales of twist mentioned in the schedule and amounting to 135 in number were sold and delivered to the defendants on the dates and at the prices mentioned in the schedule, that Rs. 9,115-5-0 was paid for 15 bales and that the balance of Rs. 65,255-2-3 claimed is due.

3. The case for the defendants is that there was no sale and delivery as alleged in the plaint and that the contracts were merely wagering contracts and as such are unenforceable. They state that they, the plaintiffs, and certain other merchants formed a group and it was agreed between them that the transactions had among them should be on the footing that no deliveries should be required but havala chits passed on, that patta patties or delivery orders should be issued to the respective purchasers, that after the delivery orders were sent round and the same ultimately reached the hands of the original vendors, patta patties should be settled and that accounts should be taken on the footing of differences in prices. They state that the goods covered by the delivery orders were ultimately purchased by various persons from whom the plaintiffs purchased the identical goods covered by the delivery orders and that in no case were the goods actually delivered nor was it ever intended that actual delivery of goods should take place, but that it was distinctly agreed between the parties that only

the differences in prices should be adopted after the exchange of patta patties.

4. The learned trial Judge decreed the plaintiffs' claim on the ground that there was no proof that the contracts were wagering contracts. He states in his judgment that it was not contended that the actual goods contracted for were delivered and that it was admitted that documents purporting to be delivery orders on which delivery of goods could be demanded passed between the various parties. He also finds on the evidence that the goods after passing from the plaintiffs to the defendants and going through other hands ultimately reverted by purchase to the plaintiffs and states that however much one may suspect that the speculative element entered into these transactions, as no doubt it did "the evidence is insufficient to prove that the contracts were wagering contracts. As regards the explanation for the goods ultimately coming back to the plaintiffs after passing through various hands the learned Judge says:

A buyer may sell with the knowledge that the person to whom he sells will pass on the goods, and if the market is - rapid and transfers take place quickly he may very well contemplate that the person who ultimately claims the goods may be the last of a long chain of buyers, and if the market were against him when he is called upon to deliver he might well think it to be the wisest course to buy back "the goods at the end of the circle and wait for an advance in the market price. Thus it may happen that a perfectly legitimate series of transactions take place without the goods having physically left his possession and it may well be that the state of the market was such that the documents of title to the goods, in this case called patta patties, changed hands so rapidly that the seller in each particular case may have thought it extremely improbable that he would ever be called upon to give delivery to his immediate buyer.

5. This is the chief explanation which the learned Judge gives for the goods passing back within a week to the plaintiffs and to hold that the transactions were not wagering contracts. There is, however, no evidence to support any of the assumptions made by the learned Judge. Although the goods passed through nearly ten hands, no witness suggests that the reasons given by the learned Judge were the reasons for not asking for or taking delivery of any of the goods. Mr. Srinivasa Aiyangar who appeared for the respondents stated that he did not rely on any of these facts to explain the fact of the goods coming back to plaintiffs within so short a time. The other reason given by the learned Judge is that all the defendants' witnesses negative the supposition that there was any understanding that the difference in price should be paid and he states that all the defendants' witnesses agree that they would have been compelled to take, or entitled to ask for, delivery as the case may be, unless and until they had passed a patta patti, which was in fact a document of title to the goods to their sub-purchaser. Here again the learned Judge seems to have fallen into an error as it is clear from the evidence that all the defendants' witnesses are not agreed on this point. There are only two witnesses called for the defendants who state that if delivery was demanded it ought to have been given whereas the other

witnesses for the defendants state that no goods could, according to the agreement between the parties, be demanded at all. These are the two points emphasized by the learned Judge in his judgment for coming to the conclusion that the contracts were not wagering contracts and unfortunately both these points cannot be supported.

6. The appeal is mainly concerned with 100 bales which were agreed to be sold by the plaintiffs to the defendants. The contract for 100 bales was entered into on the 21st of November 1922, and Ex. VII is the contract, The goods agreed to be sold under this contract are 100 bales 4,000 bundles of No. 40s. Japan any ticket without "Warship" November Vaida, delivery from 21st November 1922 to 30th November 1922 at Rs. 15-4-6 per bundle. There are other terms mentioned in the contract which it is not necessary to consider. On the face of it this contract no doubt like all wagering contracts cannot be differentiated from contracts for supply of goods so far as the terms on the paper go. The price of these 100 bales, according to the contract, would be the large sum of Rs. 61,125. It is conceded that as regards these bales there was no delivery given or taken of the goods though patta patties or delivery orders in respect of the bales passed through several hands and in the short space of seven days all the 100 bales which passed through various hands came back to the plaintiff.

7. So far as patta patties or delivery orders are concerned, it is common ground before us in appeal that these 100 bales in smaller lots passed through several hands before they ultimately came to the hands of the plaintiffs. As regards 20 bales, they passed through the hands of A.K. Jusub, Amruth Lal, the plaintiffs and the defendants. As regards 5 bales they passed through the hands of Seshachalam Chetti, Amruth Lal, the plaintiffs and the defendants. As regards 10 bales they passed through the hands of Ragavayya Chetti, Chota Lal, Amruth Lal, Kapurchand, the plaintiffs and the defendants. As regards 5 bales, they passed through the hands of Umedmal, the plaintiffs and the defendants. As regards 15 bales, they passed through the hands of Jusub, Raghavayya Chetti, the plaintiffs and the defendants. As regards 20 bales, they passed through the hands of Raghavayya Chetti, the plaintiffs and the defendants. As regards another 20 bales, they passed through the hands of J. Hussain, Raghavayya Chetti, the plaintiffs and the defendants. As regards 5 bales, they passed through the hands of Goculdass Moganlal, Raghavayya Chetty, the plaintiffs and the defendants. It appears that, though in some cases contracts relating to a few bales were entered into before the 21st November 1922, when the patta patties and adjustments were made, the bales relating to the earlier contracts were appropriated towards the 100 bales which are the subject matter of the agreement of the 21st November 1922. It is clear from the documentary evidence that before disputes arose as regards the contract of the 21st November what was done was that each of the above parties simply passed on delivery orders and an unstamped bill for the alleged price of the goods-nobody paid any money or delivered any goods-and these in turn passed on to the intermediate persons. (The judgment then dealt with the oral evidence in the

case and came to the following conclusion.)

8. I think it is difficult on this evidence to come to the conclusion that as regards 100 bales there was any intention actually to deliver the goods and receive actual cash payments. On the contrary, I think, the evidence makes it clear that the intention of the parties was simply to adjust the differences. I have given the names of the various persons who were interested in these various bales. It is significant that from the 21st to the 30th November (the period during which the contract had to be performed) nobody makes delivery of a single bale and nobody receives a rupee in cash. Delivery orders are passed on, orders for payment are passed on and we find ultimately that what was done was that patta patties were made. It is significant also that the havala chits which are supposed to represent the amount of the actual cash payable under these contracts are not even stamped as hundies when passed; they are not even endorsed so as to negotiate them; they are not so drawn up that they could be negotiated ; and they are not stamped probably to prevent any action being brought on them but are merely passed on from hand to hand to facilitate adjustment of differences. This shows to my mind that these were drawn up simply for the purpose of adjusting differences and lending an air of reality to the transaction. The parties must have known that these memoranda would be very useful; but it is hardly likely that the large sums which, if the plaintiffs' case was true, represented the actual value of the goods which were sold would have been made payable in this manner if the agreement was that the goods should be actually delivered and the payments should be made in cash. There is no reasonable explanation why although so many persons were concerned in these 100 bales, these 100 bales ultimately came to the hands of the plaintiffs according to the chits and patta patties, and why it is that not one of these persons wanted a single bale or rupee out of these various transactions, but were content to pass havala chits and to make patta patti settlements.

9. A great deal was said by Mr. Srinivasa Ayyangar for the respondents about three other transactions which are referred to in paragraph 3 of the defendants' written statement. The case for the plaintiffs was that they sold to the defendants 135 bales, that out of these bales 15 bales were adjusted by setting them off against the 15 bales which the defendants had to deliver to the plaintiffs, and that the balance of 120 bales were actually delivered either by delivering the goods or by the passing and acceptance of delivery orders. The defendants' case was that there four contracts: (1) Contract No. 153, dated 9th October 1922, for 25 bales at Rs. 15-5-6 per bundle in respect of which 15 bales were set off as aforesaid and 10 bales were adjusted by the exchange of patta patties"; (2) Contract No. 154 dated 9th October 1922, for 10 bales at Rs. 15-6-0 per bundle in respect of which all the bundles were delivered ; (3) Contract No. 157, dated 20th October 1922, for 10 bales in respect of which 5 bales were delivered and the balance of 5 bales were adjusted by making patta patties ; and (4) Contract No. 172, dated 21st November 1922, for 100 bales which I have referred to. The plaintiffs, in order to give colour to their case, have

clubbed together other contracts and claimed for the whole after giving credit for what they have received. The defendants, in order to support their case as regards 100 bales have attempted to show that all the four contracts referred to were wagering contracts. Both the plaintiffs and the defendants and the other intermediate merchants are in fact dealers in yarn and they are not purely speculators gambling in differences. It is not uncommon among merchants who do real business also to enter into gambling contracts and the fact that in respect of some of the contracts goods were actually delivered is no ground for assuming that the other contracts were real transactions, and not mere agreements to adjust differences. What the Court has to see in each case is the real nature of the transaction. In *Kong Yee Lone & Co. v. Lowjee Nanjee* [1902] 29 Cal. 461, Lord Hobhouse observes:

Two parties may enter into a formal contract for the sale and purchase of goods at a given price, and for their delivery at a given time. But, if the circumstances are such as to warrant the legal inference that they never intended any actual transfer of goods at all, but only to pay or receive money between one another according as the market price of the goods should vary from the contract price at the given time, that is not a commercial transaction, but a wager on the rise or fall of the market.

10. I do not think that as regards the 100 bales the transaction was one where goods intended to pass, but was really one for adjustment of differences.

11. A number of cases were cited on both sides but I think that beyond laying down certain principles which guide Courts in arriving at a conclusion as to whether a contract is a wagering contract or one for actual delivery of goods the cases are not of much help. As observed by Batchelor, J., in *Motilal v. Oovindram* [1906] 30 Bom. 83, each case must depend on its own evidence and a study of the reported decisions can afford little help except as indicating the classes of facts upon which the Courts have based their judgments.

12. As in the case of benami transactions-up to a certain point there can be no distinction in form or in the recitals which would differentiate a wagering contract from a bona fide agreement to sell and deliver goods. The parties scrupulously keep up to the forms. There is a contract to sell which is couched in the usual terms relating to forward contracts for sale and delivery of goods. The concern of the parties in the case of wagering contracts -is to give such appearances as would enable people to gamble in such a way as to evade the provisions of the law. In this connexion the observations of Lord Herschell in *Universal Stock Exchange v. Strachan* [1896] A.C. 166, are instructive. Dealing with the terms of business which the customers were called upon to sign and which were to constitute the contractual relations between the parties, the learned Judge observes as follows:

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 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.

13. In such cases great ingenuity is exercised to make it appear that there was a real transaction when there was none. In *Doshi Talakshi v. Shah Ujamsi Velsi* [1900] 24 B m. 227, the merchants, to give an air of reality to the transaction, framed rules which were to govern the contracts made between them and which provided with an unqualified emphasis that cotton must be delivered, that all gamblers in differences should be excluded and that they were to find no place among the cotton dealers of Dhobra. All the contracts which were entered into contained those rules. Sir Lawrence Jenkins, G.J., observes:

Now, if only we could stop at this convenient spot, look only to the contracts and the rules, all would be well, for they repel the idea of anything that savours of a wager. Unfortunately, however, that cannot be; for the law says that we must find, as best we can, the true intentions of the parties; we must not take them at their written word, but we must probe among the surrounding circumstances to find out what they really meant. This I take to be the result of the decision of the House of Lords in the case of *Universal Stock Exchange, Limited v. Strachan* [1896] A.C. 166, which has since been followed in the more recent case of *In re Gieve* [1899] 1 Q.B. 794. We are not and we must not be, bound by the mere formal rectitude of the documents, if in fact there lurks behind them the common intention to wager, and parties cannot be allowed to obtain from the Courts any sanction for their wagers merely because they use a form which is not a true expression of their common purpose and intentions.

14. The formality of the various transactions and the passing of chits providing for payments of money and passing of delivery orders purporting to cover the goods which were sold and which passed through various hands until they came back to the plaintiffs cannot by themselves show that the transaction as to 100 bales was not a wagering contract. As I said before, we find that the 100 bales, the price of which according to the contract would be a very large sum, were contracted to be sold by the plaintiffs to the defendants on the 21st of November 1922 under the contract Ex. VII delivery to be given on any date between the 21st and the 30th of November 1922. The plaintiffs did not have these goods to deliver. To keep up appearances a telegram was sent to Calcutta to despatch 75 bales, but the plaintiff's agent admits that these 75 bales were never despatched and that they could not reach Madras in time to be delivered. We find that ultimately these 100 bales came back to the plaintiffs and that not one of these several merchants ever delivered one bale of these 100 bales or received one pie in cash for the price in respect of the various transactions entered into. It was all a question of passing on delivery orders and havala chits. I do not think that this

was merely a coincidence, each party having a real contract for sale and delivery and each party accepting mere delivery orders and unstamped havala chits for large sums of money without receiving a rupee. I am clearly of opinion that all that the parties intended was to settle differences. In all these cases the real question is whether there was any intention to deliver goods. No doubt, as pointed out by their Lordships of the Privy Council in *Bhagwandas Parasram v. Burjorji Ruttonji* [1918] 42 Bom. 373, 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 or claims vitiate the transaction, but the question remains "whether an actual delivery was contemplated or a mere adjustment of differences." Great reliance was placed by the respondents' vakil on the evidence of two witnesses whom I have already referred to, that if one party insisted on the goods being delivered, delivery should be made; but they state that in these cases nobody wanted delivery but that everybody was satisfied with chits. If the contract was a wagering contract in its inception, the mere fact that in certain contingencies delivery could be asked for would still render the contract unenforceable as a wagering contract: see *Universal Stock Exchange v. Stretchan* [1896] A.C. 166 and *In re Gieve* [1899] 1 Q.B. 794.

15. As regards the plaintiffs' claim for the price of the goods, I find it difficult to see how on the evidence they can sue for the price of the goods unless there was actual delivery or tender, or unless it is proved that the defendants agreed to accept the delivery orders on third persons as equivalent to delivery so as to exonerate the plaintiffs from delivering the goods and limiting the recourse of the defendants to the persons on whom delivery orders were drawn up. A delivery order is merely an authority to the buyer to take possession of the goods in the hands of a third party and ordinarily at the back of the delivery order there should be goods which could be delivered under it. In this case I am satisfied on the evidence that there were no goods in the possession of the plaintiffs which could be delivered or tendered and it was not seriously disputed before us in the arguments that the actual goods never existed with the plaintiffs for delivery. Nor is the evidence sufficient to support the view that the defendants accepted these delivery orders as equivalent to the actual delivery of the goods and undertook to pay a large sum of about Rs. 70,000 without getting delivery of a single bale. In the absence of anything that may be equivalent to a novation and the discharge of the plaintiffs from the obligation to deliver, and the acceptance of an equivalent obligation by third persons to deliver goods, the plaintiffs would not be entitled to sue for the price. In this case I do not think that any such facts have been established. Even assuming, therefore, that the contract was not a wagering contract, the plaintiffs can only get the difference between the contract rate and the market rate on the date of the performance and this, it is admitted,

would be a very small sum of about Rs. 600 or 700. I am of opinion that the plaintiff's claim in respect of the 100 bales fails as the contract was merely a wagering contract and that they are only entitled to any sum that may be due in respect of the first three contracts referred to in the defendants' written statement. As regards these contracts, as pointed out already, patta patties were made in respect of 10 bales of Contract No. 153. As regards Contract No. 154, all the bales were delivered. As regards Contract No. 157, five bales were delivered on 14th November 1922, and patta patties were exchanged in respect of five bales on 27th November 1922. All that the plaintiffs will be entitled to is the amount due on the bales delivered. There will be a decree only for Rs. 2,325-4 0 with interest at 6 per cent. from date of decree in favour of the plaintiffs. We allow the appeal in so far as it relates to 100 bales and dismiss the plaintiffs' suit as regards the balance. As the appellants have succeeded substantially the respondents will pay the appellants' costs here and in the Court below.

Krishnan, J.

16. The question for decision in this appeal is whether the suit transactions are wagering agreements not enforceable in law or whether they are proper commercial dealings.

17. The plaintiff and the defendants are both merchants who carry on business in Madras of various kinds including trade in yarns and cotton goods. The plaintiff's case in the plaint is that he sold and delivered to the defendants 135 bales of 40 bundles each of Japan yarn of 40 counts under 3 contracts-the 1st, dated 9th October 1922, for 25 bales at Rs 15-5-6 a bundle, the second, dated 20th October 1922, for 10 bales at Rs. 14-4-0 a bundle, and the third, dated 21st November 1922, for 100 bales at Rs. 15-4-6 a bundle, and he sues for the price of these goods. Contracts were forward contracts for delivery at the end of November. He also mentions another contract of 24th October 1922, whereby he purchased from the defendants 15 bales of similar goods deliverable at the same date at the end of November at Rs. 14-15-0 a bundle. He states that this last contract was settled between the parties by being set off against 15 bales of the first contract above mentioned and he claims in this suit as one of the items due Rs. 243-12-0, the calculated difference between the buying and selling prices. As regards delivery of the balance of 120 bales, the allegation in the plaint is that they were delivered partly by actual delivery of the goods and partly by "the passing and acceptance of delivery orders. "

18. The defendants pleaded that there was a practice among certain merchants in the Madras market of making contracts ostensibly for sale and purchase of yarn, but with no intention whatever of performing them by delivery of goods or payment of price, the sole intention being to pay differences on the due date. No deliveries were to be asked for, but to keep up appearances what are called "patta patties" in the form of delivery orders were given to the buyers by the sellers addressed to their own vendors and "havala chits" in the form of orders for payment were given thereafter by the buyers for the prices and where a man

had a havala chit given by a previous buyer from him he merely handed it over to his seller as equivalent to the amount mentioned in it. On the due date fixed for performance, contracts would have been so made that patta patties would have ultimately reached the hands of the original vendors and a completed ring of dealers formed; the parties will then meet together and compare their havala chits and settle the differences payable and will pay and receive amounts due by or to each on that footing.

19. It is stated in the defendants' written statement that there was a "local usage or custom in the market" as above described and that neither delivery of goods nor payment of price was made, but only differences were paid. The defendants pleaded that the suit contracts were all contracts of the above character and were, therefore, unenforceable in law being wagering agreements. As regards the 15 bales which were actually delivered, they pleaded that those bales had nothing to do with the suit contracts but were delivered towards other contracts which were ordinary commercial transactions between the parties.

20. The question raised has obviously to be decided on the evidence as to the exact nature of the contracts and the understanding between the parties when they were made. The law on the point is fairly clear as it has been laid down in numerous cases which have been cited to us. All authorities are agreed that however legal and genuine may be the appearance of the contract on the face of it, it is still a wagering contract if it was intended by both the parties that differences only were to be paid and that the contract was not to be performed by delivery of goods or payment of price. It is then clearly a gamble on the fluctuations of the market price of the particular goods, dealt with. While no doubt the Court should exercise great care in discriminating between mere speculative transactions in trade and gambling transactions, it should not be misled by mere appearance of things, but must look beneath the surface and find out, if it can, the real nature of the transactions. In the first case cited to us which is the leading case on the point, namely: that of *The Universal Stock Exchange v. Strachan* [1896] A.C. 166, their Lordships pointed out that in such cases the whole transaction has to be looked to to find out its true-nature. Lord Herschell said at p. 175:

The proposition amounts to this that parties who intend 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. The proposition contended for by the learned Counsel for the appellants would really lead to that result, and I should require-much consideration before I gave my assent to a proposition

involving such, consequences.

21. This case was followed in *In re Gieve* [1899] 1 Q.B. 794, where the Court held that in spite of an alternative arrangement that stock was to be actually delivered on payment of a small extra price, the main contract was one to pay differences and the whole transaction was vitiated as a wagering agreement. These two cases were followed by Sir Lawrence Jenkins, C.J., and Candy, J., in the case of *Doshi v. Shah Ujamsi* [1900] 24 B m. 227, where their Lordships referred to the previous Bombay cases of *J.H. Tod v. Lakhmidas Purshotamdas* [1892] 16 Bom. 441 and *Perosha Cursetji v. Manekji Dossabhoy* [1898] 22 Bom. 899, which were both cases which dealt with speculative but real commercial transactions as the learned Judges found that the intention to gamble was not established on the evidence. The learned Chief Justice says:

We are not and we must not be bound by the mere formal rectitude of the documents if in fact there lurks behind them the common intention to wager.

22. And again observes:

They (that is, the surrounding circumstances) and the position of the parties and the history of dealings of this class are legitimate though not exclusive matters for our investigation into the true intention of the parties.

23. In the case next cited of *Kong Yee Lone & Co. v. Loujee Nanjee* [1902] 29 Cal. 461, their Lordships of the Privy Council held that the suit contracts were wagering transactions as from the evidence it appeared that the parties could not have intended purchase and delivery of goods, but only the payment of differences though between them there were other contracts of a real commercial character which were performed by delivery of rice and they reversed the decree of the Court below which had held that these were not wagering contracts "having regard to the fact that the rice was in certain instances delivered and paid for."

24. In Madras a case arose in 1895 regarding dealings in Government promissory notes, *Eshoor Doss v. Venkatasubba Rau* [1895] 18 Mad. 306. It was held that as the intention of parties was that no delivery of the stock should be made, but only differences were to be paid, the agreement was void as a wagering one u/s 30 of the Contract Act.

25. The question had to be considered again by the Privy Council in the case of *Bhagwandas Parasram v. Burjorji Buttonji* [1918] 42 Bom. 373. In that case their Lordships point out that speculation does not necessarily involve a contract by way of wager and that to constitute such a contract a common intention to wager is essential. They also point out that even where one party is a speculator and did not intend to deliver and the other knew it, yet in the absence of a bargain or understanding, express or implied, that the goods were not to be delivered, a contract otherwise innocent will not become a wager and that the mere fact that as to the greater part of the goods there was no delivery but only an adjustment

of claims will not vitiate the transaction. This case lays down what should be considered to be only a speculative bargain as distinguished from a wagering one and is in a line with the cases in *J.H. Tod v. Lakhmidas Purshotamdas* [1892] 16 Bom. 441, *Perosha Cursetji v. Manekji Dossabhoy* [1898] 22 Bom. 899, *Ajudhia Prasad v. Lalman* [1903] 25 All. 33, *Joshi Narbadashankar v. Mathuradas* [1910] 34 Bom. 519 and *Manilal Dharamsi v. Allibhai Ghagla* AIR 1922 Bom. 408.

26. The only other case that need be referred to is the case of *Manilal Raghunath v. Badhakisson Ramjiwan* [1921] 45 Bom. 386. In that case the learned Judges held that the contract was a wagering one. That case was referred to principally for the discussion in it of the Privy Council decision in *Bhagawandas Parasram v. Burjorji Ruttonji* [1918] 42 Bom. 373, above cited. We are, however, bound to follow the Privy Council. The question for us in the present case is whether on the evidence it falls within the class of cases dealt with in *Bhagawandas Parasram v. Burjorji Ruttonji* [1918] 42 Bom. 373 and similar cases above cited or under *Strachan's* case and other cases of wagering agreements.

27. Before considering the evidence as to the nature of the suit transactions it will be convenient to state what I understand to be the meanings of the two expressions "patta patti" and "havala chits" which are frequently used in this case. "Patta patti" is a Gujarati word recently introduced into Madras from the north; it means literally "adjustment" or "settlement." Ex. VI series which are some of the patta patties filed in the case show what they are like. They are in the form of delivery orders given by the seller to the buyer for the goods mentioned in them, on some third party who has made a contract to sell the same goods to the seller. Ex. VI is a patta patti with one K.G. Raghava Chetti which plaintiff gave to the defendants for 10 bales of the 100 bales contract he made. The defendants accepted the patta patti for those bales and it is signed by their agent, Trimbak Lal. Although called delivery orders these patta patties are not really delivery orders but are merely what may be called token delivery orders as no goods are delivered under them. They are used only as a settlement or adjustment of delivery. As in these transactions where patta patties are used the original seller becomes the ultimate buyer before the "vaida" or the date fixed for performance no actual delivery is contemplated or is necessary. Witnesses have been asked about the meaning of patta patti and there is a body of evidence on the point. The defendants' second witness Rupsingh has explained what he understands by patta patties. He says that it is not intended that goods should be delivered under a patta patti. In fact it is issued when there are no corresponding goods available for delivery. The evidence of Raghavalu Chetti, D.W. 4, further explains how patta patties are utilized. D.W.7, a clerk of one of the merchants who took part in the sales and purchases in this case says that "patta patti" means "Sending round delivery order to several persons without goods." Plaintiff's own agent Govinda, P.W.1, says "patta patti" means "adjustment of deliveries" and that if all parties agree patta patties are made. P.W. 2 says "patta patti" means "if a person sells and the same contract is sold to different persons and again it comes to the seller and if the parties agree then to

save labour patta patti is made. "Plaintiff's vakil naturally tries to make out that the issue of "patta patti" is merely an adjustment of delivery in an ordinary commercial transaction if the parties agree to it at or before the "vaida" date. But I am inclined to think on the evidence that patta patties are not generally used unless the contract in its inception was understood as not requiring performance by delivery. It may be that in exceptional circumstances a real contract is subsequently settled by the issue of patta patties and payment of difference. Plaintiff has shown one such case but one may safely infer that the giving of patta patties by the seller, at any rate, where the seller does not get the permission of the buyer to do so beforehand but gives it as a matter of course, indicates that the parties did not intend to give or receive delivery of the goods.

28. Havala chits are given in such transactions by the buyer to the seller for the price just as patta patties are given for goods. It is in the form of a letter by the buyer to the seller addressed to the former's buyer to pay a certain sum of money representing the price of goods to the addressee of the letter, and to debit the amount in the former's account. They are not promissory notes as the learned trial Judge seems to have thought but are in form orders to pay to a named person. They are not ordinary hundies and they are not negotiable instruments in form. Ex. IV is a sample of them. They are written on pieces of paper and are issued, according to the evidence in the case, in connexion with patta patties when money is not intended to be paid. They are also really mere tokens. The fact that they are written often on dirty and torn pieces of plain paper without any stamp or any other formality would seem to indicate that they did not represent money but were mere tokens to show the price agreed to, so as to enable the parties to calculate the differences afterwards.

29. There is a good deal of evidence in the case which there is no reason to distrust that some of the merchants in Madras did enter into contracts ostensibly for the purchase of goods but in reality only to pay or receive difference on the "Vaida" date and in connexion with such transactions patta patties and havala chits were exchanged without any idea of delivering the goods or paying the price. There can be no doubt on the authorities that such transactions are wagering transactions unenforceable in law as they are really a form of gambling on the fluctuations of prices in the market. The defendants contended that all the three plaint transactions were of this nature but plaintiff asserted them to be real and valid commercial transactions. The main dispute between the parties is, however, as regards the third contract of 100 bales. As regards the balance of 20 bales, 15 bales were settled by exchange and plaintiff claims Rs. 246-14-0 as due on that account. Plaintiff also claims the price of five bales actually delivered which defendants admit. The defendants admit in all Rs. 2,325-4-0 as due and plaintiff has not attempted to prove more is due. The 20 bales are thus accounted for and the dispute is thus confined to the 100 bales' contract. It is not, therefore, necessary to consider the other two contracts except perhaps in so far as they have a bearing on the nature of the last contract.

30. With regard to the 100 bales" contract what happened is this. Plaintiff made an agreement with defendants on 21st November 1922, for sale of 100 bales to him at Rs. 15-4-6 a bundle, Vaida being at the end of November. No goods were delivered by the plaintiff in pursuance of this contract but plaintiff gave patta patties for the whole lot. There was some confusion raised in this connexion with reference to a lot of five bales which plaintiff actually delivered because of a mistake made by defendant's clerk Rupsingh who entered these goods in defendants book as having been delivered towards the 100 bales" contract. The goods were sent by plaintiff for one of the other contracts as appears from his books and Ex. XVI. The delivery, it is clear, was not made by the plaintiff for this contract and the entry in defendants" book is purely a mistake as explained by Rupsingh. I do not think that this mistake can properly be relied on as showing that the 100 bales" contract was to be performed by actual delivery of goods as was attempted to be done by the plaintiff's vakil before us. I have no doubt that whole of 100 bales" contract was settled by delivery of patta patties. Plaintiff had no goods to deliver except some nine bales in his godown as shown by his stock book Ex. E. Plaintiff's agent says he sent two telegrams, D-1 and D-2 for goods from his Calcutta branch but it is very doubtful whether they refer to the goods of the 100 bales" contract. In any case it is admitted that he could not have got the goods from Calcutta in time by the "Vaida" date which was the end of November. When plaintiff made the contract he had not sufficient patta patties with him to make up the 100 bales. He had patta patties only for 25 bales with him and he proceeded, therefore, to make contracts with other dealers for 75 bales. He arranged to get from Raghavalu Chetti patta patti for 60 bales for this contract, ten bales from Kapurchand and five bales from Umedmal who were all dealers who had similar contracts with the defendants through intermediaries. The defendants filed before us a list of these contracts the general correctness of which was admitted by the plaintiff's vakil. Of the patta patties for 25 bales which plaintiff had in hand when he made the 100 bales" contract, 20 of them he got from Amritlal Mangaldas who got them from one A.K. Jusub who got them from the defendants. The remaining five also he got from Amritlal who got them from one V.C. Seahachell am Chetti who got them from defendants. He obtained all these in October. The 60 bales he obtained from Raghavalu Chetti after he made his contract with defendants; the latter had got 20 from defendants directly, 20 from one J. Hoosain to whom defendants had sold, 15 from A.K. Jusub who had got them from defendants and five from one Maganlal who had got them from defendants. The ten bales patta patti which plaintiff got from Kapurchand, he got from Amritlal who had got them from Chotalal who got them from Raghavalu Chetti who had them from defendants. The remaining five bales he got from Umedmal who got them from defendants. Not one of these men had any goods corresponding to the contracts. Several of them who have been called say that they had no idea of delivering goods at all or paying the price. Havala chits were given in token by all these dealers, the plaintiff having refused to take them when tendered to him by the defendants under Ex. XX. Plaintiff's agent does not say that the defendants agreed with him to take patta patties for the

100 bales before he proceeded to provide himself with such patta patties. He did it as a matter of course and when they were tendered to the defendants they accepted them without any demur. It is only when plaintiff refused to take havala chits and the amount of the differences tendered by the defendants but insisted on payment of price that trouble arose.

31. The plaintiff's conduct in buying up patta patties from men who had them directly or indirectly from the defendant and thus completing the ring, without obtaining defendants' consent beforehand that they would accept such patta patties, and in tendering them to defendants in lieu of the goods and the conduct of the defendants and of the various dealers who are involved in these transactions, who gave patta patties and received havala chits and who had none of them any goods to deliver and who say they had no intention to do so or to pay the prices show clearly to my mind that the defendant's version is true, that the contract for 100 bales was a mere wager and the only idea was to settle differences on the Vaida date. Plaintiff was not playing the game when he turned round and refused to accept the havala chits and insisted on the payment of the price. It is explained that he did so because Raghavalu Chetti, from whom he got patta patties for 60 bales and to whom he would owe about Rs. 30,000 if prices were to be paid, had become his debtor to the extent of Rs. 60,000 or Rs. 70,000 on account of other dealings, and was in an insolvent condition. If he could get the price from defendants he could set-off this Rs. 30,000 against the Rs. 70,000 and thus reduce his claim against Raghavalu and reduce to that extent the loss he may suffer by Raghavalu's insolvency. In fact he has brought a suit claiming such a set off. Plaintiff has attempted to give a colour of reality to his dealings after disputes arose by tendering the purchase money to some of the persons from whom he got patta patties. One of them is Amritlal; his gumastah D.W. 5 says plaintiff sent a cheque for Rs. 14,795-5-0 on 4th January 1923, and when asked whether his master had paid Seshachellam and Joosaf from whom he had got patta patties he said they would not receive the money but wanted havala chits. D.W. 8, the agent of Kapurchand, was also paid the price Rs. 6,064-6-0 on 16th December 1922. D.W. 9, Umedmal says that plaintiff forced him to take money Rs. 3,031 on 4th January 1923, and he put it in the suspense account. No inference in favour of the plaintiff can be drawn from these payments ; if anything they show the plaintiff's anxiety to make a wagering transaction look real.

32. On the whole of the evidence, I have come to the conclusion that it is proved that the contract in question here is a purely wagering one and is unenforceable. The suit so far as it refers to it must be dismissed. There will be a decree in plaintiff's favour for the amount admitted Rs. 2,325-4-0 and further interest at 6 per cent. from date of decree. The rest of the plaintiff's suit is dismissed with defendant's cost in both Courts.

33. By consent of both parties the figure in the decree which is given as Rs. 2,325-4-0 will be altered into Rs. 2,975-15-0. To this will be added Rs. 243-12-0

the sum which is admitted to be due in paragraph 3 of the written statement.