
(1959) 12 RAJ CK 0004
In the Rajasthan High Court
Case No : First Appeal No. 44 of 1954

Firm Murlidhar Banwarilal

APPELLANT

Vs

Firm Kishorelal Jagannath Prasad and Others

RESPONDENT

Date of Decision : 02-12-1959

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 30 Rule 1
Contract Act, 1872 — Section 182, 217, 221, 30

Citation : AIR 1960 Raj 296

Hon'ble Judges : I.N. Modi, J

Bench : Single Bench

Advocate : Hastimal, for the Appellant; C.L. Agrawal, for the Respondent

Final Decision : Allowed

Judgement

I.N. Modi, J.—This is a regular first appeal by the plaintiffs Murlidhar and Banwarilal as owners of the firm Murlidhar Banwarilal against the judgment and decree of the Civi1 Judge. Alwar, dated the 22nd March, 1954, dismissing their suit for money.

2. The plaintiffs were a firm who at all material times carried on business of the sale and purchase of cotton seeds in the name of Murlidhar Banwarilal at Khairthal in Mandi Teiganj, District Alwar. The defendants are alleged to be owners of two firms Raghunath Sahai Kishorelal and Ramjilal Jainarain which also carried on business at Khairthal but which combined together and established a firm named Rughnath Sahai Kishorelal at Mirpurkhas, and this latter firm carried on business as commission agents.

The case of the plaintiffs, put briefly, was that they entered into certain forward transactions for the sale and purchase of cotton seeds under the commission agency of the defendants firm at Mirpur khas for the deliveries of May and October, 1947, and January, 1948, the particulars of which have been given in para 3 of the plaint but which need not be repeated here as there is no dispute

about these transactions having taken place as alleged.

It is admitted between the parties that the plaintiffs earned a profit of Rs. 17,755-13-9 in the transactions relative to the May delivery and that they suffered a loss to the extent of Rs. 953-2-0 in connection with the transactions relating to the October delivery and again earned a profit of Rs. 2,828-2-0 in connection with the transactions relating to the January 1948 delivery, and in this way they earned a total profit of Rs. 19,630-13-9.

As against this, it is also admitted that a sum of Rs. 1,332-9-3 was due from the plaintiffs to the defendants by way of the latter's commission charges and other incidental expenses, the net profit due to the plaintiffs thus being Rs. 18,298-4-6.

The plaintiffs added to this a sum of Rs. 1,000 which was also admittedly deposited by them with the defendants and acknowledged that they had received a sum of Rs. 13,000 from the defendants towards their profits on the aforementioned transactions.

The plaintiffs thus claimed that they were entitled to receive a sum of Rs. 6,298-4-6 and to this they added a further sum of Rs. 368-4-9 as interest at the rate of six per cent, per annum, and a further sum of annas 0-11-0 as expenses of the notice given to the defendants and filed the present suit for the recovery of Rs. 6,667-4-3 and also claimed pending and future interest. This suit was filed on the 26th July, 1948, in the court of the Civil Judge, Alwar.

3. The defendants admitted that the plaintiffs had entered into the suit transactions under their commission agency. They also admitted that they had realised profits amounting to Rs. 17,755-13-9 from third parties in connection with the transactions of the May delivery in June, 1947. They, however, raised a number of pleas contesting the suit, the material of these at this date being that all the transactions were of a character in which delivery was never intended to be given or taken nor was it ever given or taken in actual fact and that the parties had intended merely to deal in differences, and, therefore, these transactions were of a wagering nature and were not enforceable in law.

The defendants further pleaded that they did not recover any monies in connection with the transactions of October, 1947, and January 1948 deliveries and that they had paid Income Tax on behalf of the plaintiffs to the tune of Rs. 5,086-8-0 on the May, 1947, transactions and Rs. 810-2-6 on the January, 1948, transactions, the total amounting to Rs. 5,898-10-6, and, therefore, at the most, a sum of Rs. 401-10-3 would have been payable by them to the plaintiffs being the difference between the net profits of the transactions amounting to Rs. 6,298-4-6 as alleged by the plaintiffs and the Income Tax paid by them amounting to Rs. 5,896-10-6; but it was contended that, in any case, as they had not received the monies in connection with the October and the January settlements from the third parties concerned and as the entire transactions were bad for being of a wagering character, the plaintiffs were not entitled to recover anything from the defendants.

The only other, plea which is relevant to mention is that the defendants also contended that the plaintiffs had brought the suit in an improper form inasmuch as they were members of a joint Hindu family firm and a suit could not as such be brought in the name of the firm. The defendants also pleaded in this connection that they did not know who were the owners of the joint family business. For all these reasons, the defendants contended that the plaintiffs' suit deserved to be dismissed.

4. The trial court framed as many as fifteen issues and decided almost all of them in favour of the plaintiffs except the issues relating to the wagering nature of the suit transactions and the frame of the suit, and as these two last-mentioned issues were decided against the plaintiffs, it dismissed the suit but without costs.

5. In this appeal it is strenuously contended on behalf of the plaintiffs that the trial court has fallen into serious errors in dismissing the suit on the grounds on which it did.

6. The first question which falls for determination in the circumstances mentioned above is whether the suit transactions were of a wagering character and whether this plea is open to the defendants in the circumstances of this case. It was contended on behalf of the plaintiffs that the defendants were commission agents and that they had done business with third parties and had earned profits for them, the most part of which they had received on their own admission, and, consequently, it was not open to them to deny their liability to the plaintiffs in connection with them in so far as they had admittedly received the profits from third parties. Reliance was placed in this connection on the provisions of Sections 217 and 218 of the Contract Act.

It was also urged that the transactions were not of a wagering character although no delivery was actually given or taken by the parties in relation to them. These submissions were sought to be met on the side of the defendants by the contention that the defendants were Pucca Adatias according to the evidence led by the plaintiffs themselves, that it was never intended between the parties that deliveries of the cotton seeds purchased or sold should ever be given or taken (and none indeed was ever so given or taken), that all the contracts were squared up before the due dates, that the defendants being Pucca Adatias, their position was virtually that of principles and not of, agents and consequently in the circumstances referred to above, the suit transactions were of a wagering character and It was perfectly open to the defendants to raise that plea in law.

7. The important question to consider in this connection, therefore, is whether the defendants were Pucca Adatias and whether that by itself should be accepted as a ground for holding that the suit transactions had been entered into between the parties as principals to principals and that the position of the former was not that of commission agents at all.

8. But before we deal with this, let us see what was the nature of the suit

transactions between the parties. The plaintiffs' case as disclosed in the plaint is that some time in February, 1947, it was orally agreed between them and the proprietors of the firm Kishorelal Jagannath Prasad at Khairthar (where the parties lived) that the latter would do forward business in cotton seeds on behalf of the former according to their instructions, and that they would be responsible for giving or taking delivery or profits or losses as the case may be, and it was also agreed that the defendant firm would be entitled to receive Adat, dalali and dbarmada charges from the plaintiffs on every transaction of purchase and sale according to the custom in vogue in the mandi at Mirpurkhas.

It was further agreed that the defendants would be at liberty to demand margin-money if they thought it necessary and that interest thereon at the rate of 6 per cent, per annum would be payable. In para 2 of their written statement, the defendants denied that any such agreement had taken place at Kairthal, and according to them what was only agreed between the parties was that the business would be done according to the custom in vogue in the mandi at Mirpurkhas, and, inter alia, that the plaintiffs would pay (to the defendants) Income Tax at a certain rate which was specified in the written statement.

The defendants, however, clearly accepted in their pleading that all the dealings (which were to be in forward business) had been done under their commission agency though they contended that all these transactions were of a wagering nature, and [hat only differences had to be given or taken therein. It was further pleaded that such differences were usually given or taken after about 15 days of the due date and the commission agent was to be liable to pay the profits only when he received them from the third parties with whom the transactions came to be made but not otherwise.

It was also admitted that the defendants as "adatias" had received the sum of Rs. 17,755-13-9 by way of profits on transactions of the May, 1947, delivery from the several third parties concerned, but the plea was raised that no deliveries were ever given or taken in those transactions. As regards the transactions of October, 1947, and January, 1948, deliveries the case of the defendants was that the partition of India had taken place in August, 1947, and a terrible catastrophe had taken place in Mirpurkhas (which was in the then province of Sind) and so the defendants as well as the persons with whom they had done business for those Vaidas had to flee from there for their lives and therefore they had no opportunity to recover the profits from the third parties concerned and consequently they were not liable to pay anything to the plaintiffs on account of the latter transactions.

It is significant to mention that alternatively it was contended by the defendants that even if as alleged by the plaintiffs delivery was intended to be given or taken between the parties the plaintiffs had never asked them to give or take delivery, nor did they place the defendants in funds to take of give delivery and, therefore, the plaintiffs were not entitled to claim any profits in respect of their transactions. It is also important to mention at this stage that it is the common

case of the parties that practically all the transactions of purchase and sale had been covered by the plaintiffs by cross contracts by July, 1947, before the respective due dates with the result that so far as these parties are concerned, the transactions were settled by adjustment of differences only and no delivery was actually given or taken with respect to any of these transactions.

9. Now learned counsel for the defendants has laid very considerable stress on those portions of the: evidence of Harphool (P. W. 3) and the plaintiff Murlidhar (P. W. 6) wherein they deposed as follows :

P. W. 3 Harphool : "

^^QeZ fd"kksjhyky ls okfdQ gwa A ;g ehjiqj [kkl es dke djrh Fkh] iDdh vkMr fcrkSys dh deh"ku ,tsaV Fks A**

?I am acquainted with the firm Kishorelal Jagannath. It used to do business at Mirpurkhas. It traded as a Pakki Adat agent in cotton seeds.)

P. W. 6 Murlidhar :"

^^mUgksus dgk Fkk fd ge ehjiqj [kkl esa fcrkSys dh iDdh vkM+r dk dke dj jgs gS A**

(They i.e., the defendants had said that they were doing the business of Pakki Adat commission agents in Mirpurkhas).

Based on this foundation, learned counsel for the appellants (defendants?) sought to build up a strong edifice of the argument that the position of the defendants was not of commission agents at all but was of principals as against principals on the authority of Bhagwandas v. Kanji ILR 30 Bom 205 , Harcharan Das Somparkash Vs. Jai Jai Ram, Firm Ram Krishna Das Jawaharlal v. Firm Mutsaddi Lal Murlidhar AIR 1942 All 170 , and Sheo Narain Vs. Bhallar, and further contended that because the defendants were really principals and not agents, the principle according to which the inference of wager was almost irresistibly destroyed where such transactions are put through by an agent on the authority of Ismail Lebbe v. Bart-leet and Co. AIR 1942 PC 19, was no longer applicable and that the suit transactions were of a wagering character.

10. It was also contended in this connection that the circumstance that the defendants were Pakka Adatias took the case out of the principles of the division bench decision of this Court in Surajmal and Others Vs. Doongarmal and Others, to which I was a party and on which learned counsel for the plaintiffs placed strong reliance for his submission that being agents the plea of wager was not open to the defendants.

11. I have given this argument my very careful consideration and find myself unable to accede to it. It is true that the plaintiff Murlidhar as also his witness Harphool have purported to say that the defendants were Pakka Adatias. The use of this expression, however, is not enough, in my judgment, to attract the incidents of Pakka adat business so as to found a plea of wager between the

plaintiffs and the defendants.

There is no magic in the mere use of this expression, and it would be going very very far indeed to infer merely from the defendants having been characterised as Pakka adatias that they had transacted the given dealings as principals with and not as agents of the plaintiffs. I am fully conscious of the custom which has been recognised in some of the cases referred to above that a Pakka adatia may allocate business which he is asked to transact by life principal to himself as also of the principle that where the intention of both parties be established in such cases to deal in differences and differences only and under no circumstances to give or take delivery, a plea of wager may in such circumstances be well-founded.

For one thing, this custom has not been established so far as the market of the Mirpurkhas is concerned. There is not a shred of evidence on this point on the record and I am therefore unable to take such a practice for granted. For mercantile customs like these may vary in different places. Not a single witness of the defendants has testified to this custom, nor has any witness of the plaintiffs been cross-examined on this line of argument.

It would, therefore, be hardly legitimate to hold that because one of the witnesses of the plaintiffs or even the plaintiff Murlidhar thought that the defendants' firm was of Pakka adatias they were in the position of principals when they transacted the suit dealings for the plaintiffs. What matters, as I think, is, not the label by which the defendants may be called but the precise position they occupied with reference to the suit dealings and the practical and substantial manner in which the transactions were put through.

If I may say so in a nut-shell, the crucial test is whether the defendants had any personal interest of their own when they entered into the suit transactions or whether their interest was limited to their commission agency charges and certain out of pocket expenses or their right of indemnity against the principals in the event of loss. If the answer to the last-mentioned test is that the defendants had no personal interest of their own in the suit dealings beyond the charging of their commission and other customary charges and they had their right to be indemnified by their principals in case the transactions resulted in losses, then I have no hesitation in saying that the plea of wager by or against such a commission agent cannot be well-founded; for it cannot be predicated of such an agent that he stands to gain by the rise or fall in the market and was, therefore, wagering. See *Bhagwandas v. Burjori* AIR 1917 PC 101, and AIR 1942 PC 19, and *Kishan Lal and Another Vs. Bhanwar Lal*,

12. Let us now see how the aforesaid test applies to the transactions with which we are concerned in the present case.

13. It is admitted as to all the suit transactions which number about thirteen that the plain- tiffs squared them up by cross contracts before the due date. It is also not in dispute that in none of these transactions was actual delivery given or taken by the parties. It may also be accepted that it does not appear that the

plaintiffs knew with whom the defendants had transacted the business they had been asked to put through by the plaintiffs.

Be this all as it may, we have it from the defendants in their own Jawabdava diat they had never allocated the suit business or any part of it to themselves, and their case plainly was and is that they had transacted the suit business with third parties on behalf of the plaintiffs. They further admit that they had recovered Rs. 17,755/14/- from such third parties in connection with the transactions for the May, 1947, delivery, and that out of this they had sent Rs. 12,000/- to the plaintiffs and that a sum of Rs. 1013/14/3 was adjusted against their commission agency and dalali and other incidental charges and further they had paid a sum of Rs. 5086/8/- as Income Tax charges on behalf of the plaintiffs as against the balance of Rs. 4741/15/9 and thus a sum of Rs. 344/5/3 was due to them from the plaintiffs on account of the transactions of the May 1947 settlement.

As for the transactions relating to the October 1947 settlement, the defendants' version is that these transactions resulted in a total loss of Rs. 1124/9/0 and as to the January 1948 transactions, their case is that they resulted in a net profit of Rs. 1870/11/6. The defendants, therefore, argued that the plaintiffs on account of both these Vaidas were at the best entitled to a net profit of Rs. 746/2/9 or on all the transactions of the three Vaidas to a net profit of Rs. 401/10/3 only.

The defendants however roundly contended, and this is important to note, that they did not recover any monies on account of the October, 1947, and January, 1948, settlements and, therefore, they were not liable to pay any money on account of the transactions relative to the 1948 January settlement. It is thus clear beyond all shadow of doubt that the defendants (whether they be styled by the phrase Pakka adatis or not) had transacted the entire suit dealings with third parties and their position really was of ordinary commission agents and no more.

They had not allocated any of the suit dealings to themselves. In these circumstances, it seems to me to be utterly futile for the defendants to contend that their position in the matter of the suit dealings was that of principals as against the plaintiffs. On the other hand, their real position was that of commission agents pure and simple, and no more and no less. This position in my judgment becomes almost unassailable when we bear in mind what the defendants have said in their Jawabdava :

^^vly QjhdSu ls ftuls os lkSns fd;s tkrs gS clwy gksus ij gh vMfr;k mudh vnk;xh dk ftEesokj gS vkSj vnk;xh djrk gS A**

Translated in English, the aforesaid extract means this:

"The agent is responsible to make payments to the principal only on receipt of the profits from the third parties with whom business has been done and he then is under a liability to pay but not otherwise.""

Earlier the defendants admitted in Para 3 of the written statement (filed by Jagannath Prasad Kishorelal) that all the suit dealings had been got transacted by the plaintiffs through the commission agency of their; firm at Mirpurkhas.

In these circumstances, it seems to me that the conclusion is inescapable that the position of the defendants quoad the suit dealings was that of commission agents who had no personal interest in these dealings except that they were entitled to their own commission and other customary charges or to their right of indemnity in case of loss and that whether you call them Pakka adatias or not does not really make any difference to this real position which emerges from the pleadings and the evidence of the defendants themselves.

14. If the above conclusion is correct, as I doubtless think it is, then it follows as a corollary that the circumstance that no delivery was given or taken as between the parties to the suit is immaterial. As held in ILR (1958) 8 Raj 1162 : Surajmal and Others Vs. Doongarmal and Others,

"Where the modus operandi of the business is for the defendant to put through such transactions through a broker or a commission agent in his own name and the third parties did not know has (defendant's) name at all, the understanding being that the defendant would pay the broker or the agent commission charges or brokerage and would indemnify the latter, then a strong inference arises against the existence of a common intention to wager, though again such a presumption can be rebutted in a particular case.

In this lastmentioned class of cases where the business is done through a commission agent, ,it may be said possibly that the defendant's intention was to gamble, nevertheless, the contracts cannot be condemned as being violative of Section 30 for the reason that evidence would be lacking as to the original intention of such third parties because the principals have never been brought into contract with each other.

In such a case, the mere circumstance that the contracts were settled by payment of differences with the third parties on the day of settlement is no good proof of the original intention of the parties, because in the first place their minds never met and converged to produce the intended result, and secondly the want of delivery and payment of differences may be merely a matter of subsequent arrangement as suiting the convenience of both of them. It is true that such transactions are of a highly speculative character and are "Sutta"" transactions as characterised in common parlance; but even so they cannot be struck down as being of a wagering character within the meaning of Section 30 of the Contract Act.

Again, generally speaking, and in the absence of special law, the position as respects suits brought by an agent or a broker to recover his brokerage or commission in respect of transactions entered into by him in his capacity as a broker or a commission agent is that such suits can be successfully maintained, even though contracts in respect of which such claims are claimed are contracts

by way of wager on the principle that agreements collateral to wagering agreements do not fall within the mischief of the section and can be enforced in a court of law, unless of course it is established that the contracts which the commission agent or the broker entered into with third parties on behalf of his constituent are wagering contracts as between the plaintiff and those third parties."

These observations fully apply to the present case and "effectively negative the plea of wager and I unreservedly adopt them for the purposes of this case.

15. I have held above that the essential capacity of the defendants throughout the dealings in suit was that of an agent or a middleman and not of a principal, and any intention on their part to gamble in differences is neither here nor there and the plea of wager therefore is ill-founded.

16. But even if I were to assume for the sake of argument that the defendants were Pakka Adatias and so they stood in the relationship of principals to the plaintiffs, the question is whether to attract the applicability of Section 30 a common intention at the commencement of the business in suit to deal in differences and differences only and under no circumstances to give or take delivery is established in this case.

It has been held by their Lordships of the Privy Council in AIR 1917 PC 101, that even Pakki Adat dealings are a legitimate mode of conducting commercial business, and, therefore, I am not prepared to accept that merely because the defendants were Pakka Adatias they were necessarily gambling. On differences granting that actual delivery of goods was neither given nor taken.

As held by me in ILR (1958) 8 Raj 1162 : Surajmal and Others Vs. Doongarmal and Others, before the defendant can succeed in such a plea, he must establish that both parties to the contract had at the time of the commencement thereof agreed with each other that they would deal in differences only and under no circumstances call for or give delivery and that to produce such a result, it is not sufficient that an intention to deal in differences exists on the part of one of the contracting parties only and further that in order to ascertain the real intention of the parties, the court may well scan the surrounding circumstances of the case and can even go behind a written contract. (After discussing the evidence, (Paras 16a-18) His Lordship proceeded.)

I am prepared to concede that the suit transactions were highly speculative; but speculation is not necessarily wager and to confound the two would be to confuse the legitimate boundary lines between the two. Therefore, on the totality of all the considerations analysed above, I find it extremely unsafe to accept that the defendants have succeeded in establishing the plea of wager on this score also. My conclusion, therefore, is that from whichever point of view, one may examine the case, the plea of wager stands unsubstantiated and it cannot succeed. I hold accordingly.

19. This brings me to the question as to whether Section 218 of the Contract Act is attracted to the facts and circumstances of the present case. Section 218 reads as follows :

"Subject to such deductions, the agent is bound to pay to his principal all sums received on his account."

Thy permissible deductions are prescribed in Section 217. Section 217 is in these terms :

"An agent may retain out of sums received on account of the principal in the business of the agency all moneys due to himself in respect of advances made or expenses properly incurred by him in conducting such business, and also such remuneration as may be payable to him for acting as agent."

There is one more provision contained in Section 221 which may usefully be quoted in this connection:

"In the absence of any contract to the contrary, an agent is entitled to retain goods, papers and other property, whether movable or immovable, of the principal received by him until the amount due to himself for commission, disbursements and services in respect of the same has been paid or accounted for to him."

The effect of Section 217 is that before paying to the principal the monies received by an agent on the former's account, the agent is entitled to deduct monies due to him for. (1) the advances made, (2) expenses properly incurred in the conduct of the business and (3) his remuneration as agent. Then Section 221 permits the agent in the absence of a contract to the contrary to retain the property and papers of the principal in his hands until the amount due to him for commission, all proper disbursements made by him, and for remuneration for the services rendered, has been paid or accounted for to him.

In other words, the principal is the full owner of and has complete control over his property in the hands of his agent subject to the latter's statutory rights in the respects mentioned above. Therefore, an agent who has received monies on behalf of his principal is accountable to the latter for the payment thereof and he is under a legal obligation to do so subject of course to the provisions of Section 217 and Section 221.

Further more, there is authority for the proposition that this obligation on the part of the agent subsists even if the monies received by him are the fruit of a void or an illegal contract. The reason seems to me to be two-fold: first, that it does not lie in the mouth of the agent to take shelter behind such a plea in view of the position of strict confidence and trust in which he stands towards his principal. The second is that the other party from whom the benefit of the contract has been received by the agent has waived the objection as regards its illegality and paid the monies as a matter of fact.

Thus in *Bhola Nath v. Mul Chand* ILR 25 All 639, it was held by the Allahabad High Court relying on a number of English cases to which it is unnecessary to refer that if an agent receives money on his principal's behalf under an illegal or a void contract, the agent must account to the principal for the money so received and that he cannot set up the illegality of the contract as any justification for withholding the payment and that Section 30 of the Contract Act has no relevance to such a claim.

It is interesting to point out that in this case as in the case before me, the exact plea raised, by the agent was that the monies which were in his hands on behalf of his principal had been received by him as pertaining to contracts which were of a wagering character and therefore in respect of these the plaintiff could not have maintained any suit against the parties with whom they had been entered into owing to the bar of Section 30 of the Contract Act.

20. The same view was adopted by the Calcutta High Court in *Nagendrabala Dassi v. Guru Doyal Mukerji* ILR 30 Cal 1011, by the Madras High Court in *Pl. Pl. Palaniyappa Chettiar Vs. N.S.P. Chockalingam Chettiar*, and by the Nagpur High Court in *Haji Habib Haji Pir Mohammad v. Bhikamchand Jankilal Shop*, AIR 1954 Nag 306. With all respect, I am in full agreement with this view.

21. Now, the principle of these cases directly applies to the present case, as on the defendants' own showing, they had received a sum of Rs. 17,755/13/9 from third parties with whom they had done business on behalf of the plaintiffs for the May, 1947 delivery. It is further admitted that out of this amount, the defendants had only remitted Rs. 12,000/- to them and they declined to pay the balance on two grounds, the one, with which we are concerned at the present moment, being that the transactions out of which the profits arose were of a wagering character.

This plea can be of no avail to the defendants on the view of law discussed above. Confronted with this situation learned Counsel was driven to argue the position that his clients were principals and not agents at all qua the plaintiffs. I have however already dealt with this contention and reject it and need not repeat what I have said above.

22. It follows, therefore, that the defendants occupying as they essentially did, the position of agents of the plaintiffs in this case, they are bound to pay or account for Rs. 5,755/14/- less the sum of Rs. 1013/14/3, (that is Rs. 4741/15/9) which they were admittedly entitled to receive as their commission dalali and other charges. To put the whole matter tersely, the plea of wager in the circumstances of the case is or can be no justification in law for the defendants, and they must pay this amount to the plaintiffs unless they can account for it satisfactorily by any other method, and to their second line of defence in this connection, I propose to advert immediately.

23. Now let me turn to the plea of the defendants that they are not liable to pay this amount to the plaintiffs as they had paid the sum of Rs. 5086/8/- to the

Income Tax authorities as income tax payable by the plaintiffs on the profits of the business done for them. The trial court has decided this issue against the defendants, and, in my opinion, that finding is unexceptionable.

There is hardly any reliable evidence to prove the alleged payment. No receipt from the Income Tax department has been produced. The defendants have also not produced their books in, support of their version. It was contended that their account books had been left behind in Mirpurkhas when they fled from that place. There is not a word to support this statement anywhere on the record and naturally a strong adverse inference arises against them on this score. All that we have is the bare statement of defendant Jagannath Prasad who has stated that he had got the money paid through a pleader.

But strangely enough, he was unable even to give out the name of the pleader through whom he did so. It is also remarkable that on the defendants' own showing they never paid any income-tax on their own business. In these circumstances, I have not the slightest hesitation in holding that the plea of the defendants that they had paid the sum of Rs. 5086/8/- by way of Income Tax on behalf of the plaintiffs is an unmitigated falsehood.

24. This clinches the case of the defendants so far as the monies received by them as agents in connection with the transactions of the May, 1947, delivery are concerned. The net figure after all permissible deductions and the moneys already remitted by them on mis account are allowed works out to Rs. 4741/15/9, and the defendant's liability to pay this amount to the plaintiffs in my opinion is unquestionable.

25. I now turn to the transactions made for the other two vaidas. The October 1947 transactions need not detain us as they admittedly resulted in a net loss of Rs. 1124/9/-.

26. Now as to the transactions for the delivery of January 1948, it is common ground between the parties that they resulted in a profit of Rs. 2828/2/-. The defendants are rightly entitled to deduct the sum of Rs. 147/4/- out of this as commission and other charges. This leaves a balance of Rs. 2680/14/- which should be payable to the plaintiffs. The defendants however further claim a deduction of Rs. 810/2/6 on account of Income Tax paid on this amount also.

This claim is untenable for the very reasons which I have adduced in connection with the similar amount claimed as regards the transactions of May, 1947, delivery, and I need not repeat them and for precisely those very reasons I reject this claim. Apart from this, however, the defendants deny their entire liability to pay in connection with these transactions on the ground that they never received the profits of the January settlement, having been compelled to leave their place of business much before January.

This argument does not appeal to me as correct because the only transaction of sale of 2000 maunds of cotton-seeds entered into on the 22nd May, 1947, for the

January 1948 delivery was covered by a cross-contract of purchase of the same quantity on the 10th July, 1947. That being so, the rights and liabilities of the parties in connection with these transactions became crystallised on the 10th July, 1947, and, inasmuch as the prices had risen, the plaintiffs were given by the defendants a credit of Rs. 2680/14/- by way of profit, subject of course to the usual charges relating to commission agency, Dalali etc. amounting in all to Rs. 147/4/-.

The defendants, therefore, cannot be heard to say that because (the due date had not arrived, the plaintiffs cannot claim the profits earned. This argument would have been tenable if the transaction had stood over until the due date¹ and had not been settled by a cross contract before the due date. It cannot also be forgotten in this connection that the defendants have failed to produce their books of account in support of their version and further that they even went to the length of charging the amount of Rs. 810/2/6 by way of Income Tax payable on these profits.

It seems to me that this was done because the profits had been received and adjusted in the defendants' books to the credit of the plaintiffs. In these circumstances, I am disposed to hold the view that the plaintiffs are entitled to the amount of Rs. 2825/2/- on the January transactions less all reasonable deductions amounting to Rs. 147/4/- that is to a sum of Rs. 2680/14/-.

27. The resultant position, therefore, so far as the transactions of the October 1947 and January 1948 deliveries are concerned is that the plaintiffs are entitled to a net profit of Rs. 1556/5/-. If to this amount, the net profits admittedly received by the defendants on the May 1947 transactions amounting to Rs. 4741/15/9 is added, the total sum due to the plaintiffs works out to Rs. 6298/4/3 which is just the same which has been claimed by them in their plaint. On the findings at which I have arrived above, the plaintiffs are entitled to this amount.

28. The only other question in this connection is whether the plaintiffs are entitled to the sum of Rs. 368/4/9 claimed by them as interest on Rs. 6298/4/6 at the rate of six per cent per annum up to the date of suit which was filed on the 26th July, 1948. I am clearly of opinion that the plaintiffs are entitled to interest because the defendants should have remitted the amount of the profits to the plaintiffs soon after their receipt and they held this amount at their disposal without being further entitled to retain it. The rate of interest is perfectly reasonable, and, therefore, I see no reason to disallow the interest claimed.

29. The only other question which remains to deal with is whether the finding of the court below that because the suit was brought in the name of the joint Hindu family firm Murlidhar Banwarilal it deserved to be dismissed is correct. The factual position is this. The plaintiffs brought this suit in the name of the firm Murlidhar Banwarilal situate in Mandi Tejganj through Murlidhar aged 41 years and Banwarilal aged 19 years impleading the last two persons as plaintiffs Nos. 2 and 3. In para 1 of the plaint it was stated that the plaintiffs Nos. 2 and 3 were

the proprietors of the firm.

The plaint was also signed by Murlidhar and Banwarilal as proprietors of the aforesaid firm. It is obvious, therefore, that the plaintiffs did not mention in the plaint in so many words that they were a joint Hindu family firm. But be that as it may, it was the case of the defendants themselves that the plaintiffs were a joint Hindu family firm which position is indeed admitted on behalf of the plaintiffs. The contention of the defendants in the court below and here is that such a suit could not be brought in the name of the firm, as O. 30, C. P. C. has no application to such firms but to partnership firms only.

It was also contended that it had not been averred by the plaintiff Murlidhar that he had brought the suit as manager of the joint Hindu family firm consisting of himself and his son Banwarilal, and it was further contended that there was evidence on the side of the plaintiffs to show that there were two other sons of Murlidhar, who were joint with him. (See the evidence of P.W. 1 Ramakishen). Strong reliance was placed by the defendants in support of their contention on *Lalchand Amonmal Vs. M.C. Boid and Co.*,

30. In the last-mentioned case, the suit had been brought in the name of Messrs. Lalchand Amonmal, a joint Hindu family firm carrying on business, and the question arose whether this was permissible. It was held that a Hindu undivided family firm was not entitled to sue as a firm under Order 30, C. P. C. This case, to my mind, is distinguishable from the present case inasmuch as the suit here has not been brought merely in the name of the firm but in the name of the father who is presumably the head of the family and one of the sons who was a major and these have been mentioned in the title of the plaint.

There is no doubt that the suit was not properly brought in the name of the firm as Order 30 has no application to joint Hindu families carrying on business. All the same, the question arises whether this defect should be held to be fatal. On giving my very careful and anxious consideration to this aspect of the matter, I have arrived at the conclusion that the defect is in the circumstances of the case an irregularity which should not have the effect of vitiating the suit.

31. A similar point arose in *Lakhan Sao v. Firm Kani Ram Bhagwan Das* AIR 1938 Pat 270. There the suit had been brought by a joint Hindu family firm Kani Ram Bhagwan Das through Babu Kani Ram alias Kanhu Lal Marwari. It was held that this was not a suit brought in the name of the firm but it was a suit really brought by Kani Ram.

32. In an earlier case *Mohan Lal Ram Gopal Vs. Udai Ram-Sewa Ram and Others*, of the Patna High Court, a Division Bench took the same view on the ground that the plaintiff was suing not in the firm's name but in his own name and the mere fact that the firm's name was mentioned did not affect the matter.

33. The same view appears to have been taken in *Chhotelal Ratanlal v. Rajmal Milapchand* AIR 1951 Nag 448, although this was a converse case of certain

defendants having been sued in the firm's name.

34. It is not disputed in this case that Murlidhar was the father and therefore the head of the joint Hindu family consisting of himself and his sons. There is a strong presumption that the father was and is the manager of this family. That being so, it was open to him to bring the suit in his own name without impleading his son's. The fact that Murlidhar did not say in so many words that he was bringing the suit as manager does not, in my opinion, really affect the substance of the case.

I am, therefore, clearly of opinion that the defect is really one of form and does not affect the merits of the case and the plaintiffs should not be non-suited on this ground alone. I may also add that the defendants cannot be said to have been prejudiced by this defect in any manner whatsoever. I am therefore unable to agree with the finding of the trial court on this point and hold that the frame of the suit even though defective does not merit the dismissal of the suit on this ground.

34a. No other point was argued before me.

35. The result is that I allow this appeal, set aside the judgment and decree of the court below and decree the plaintiffs' suit against the defendants for Rs. 6298/4/6 as principal plus 11 annas as notice expenses and Rs. 368/4/9 as interest up- to the date of the suit, amounting in all to Rs. 6667/4/3. The plaintiffs will also be entitled to interest at the rate of 4 per cent per annum simple on the principal sum of Rs. 6298/4/6 from the date of suit upto the date of realisation. The plaintiffs shall receive their costs from the defendants here and in the court below.