

(1973) 02 RAJ CK 0016
In the Rajasthan High Court
Case No : First Appeal No. 56 of 1967

Nathmal Bhaironbux and Co. and Others	APPELLANT
Vs	
Kashi Ram and Others	RESPONDENT

Date of Decision : 12-02-1973

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 20 Rule 16, Order 26 Rule 11, Order 26 Rule 12(2), Order 8 Rule 6, 97
Contract Act, 1872 — Section 182, 215, 218, 23, 34

Citation : AIR 1973 Raj 271 : (1973) WLN 505

Hon'ble Judges : Kan Singh, J

Bench : Single Bench

Advocate : C.D. Mundhra, H.G. Mohta and M. Mohta, for the Appellant; S.K. Mal Lodha, for the Respondent

Judgement

Kan Singh, J.—This is a defendants' appeal arising out of the final decree in a suit for accounts awarding Rs. 10,545.06 paise to the plaintiff-respondents with interest at 6 per cent, per annum from Kartik Sudi 1 of Samvat 2013 upto the date of realisation.

2. The plaintiffs who were a joint Hindu Family carried on business in wool at Bikaner in the name of Kashi Ram Sewa Ram and Manak Chand Dwarka Das. According to them, the defendants were a firm who carried on business both at Bikaner which was then Head Office and at Bombay where they had a Branch Office. The plaintiffs' case, in brief, was that on 17-8-54 the defendants entered into an agreement with the plaintiffs to sell their wool on agency basis for a commission of Re. 1% for the work to be done. It was further agreed that if the wool were to be sold in Bombay the defendants would be charging an extra amount of annas 8 per bale as labour charges. The defendants were to sell the plaintiffs wool at Bikaner, Bombay and in foreign countries. One of the terms of dealing was that the wool was to be delivered by the plaintiffs to the defendants after weighment and fixing a basic yield. I may pause to mention that raw wool that is collected includes some inferior stuff and impurities therein and,

therefore, a basic yield is fixed for a particular consignment and if on subsequent examination the yield is found to be above or below the basic yield, a pro rata adjustment upwards or downwards in the price is to be made. It was, therefore, agreed that if the yield of a particular consignment was found to be higher than the basic yield, the plaintiffs would be entitled to have the excess price to that extent and, if the yield were found to be less than the basic yield, the plaintiffs would get less amount proportionately. The plaintiffs proceeded to say that they had delivered wool to the defendants both at Bikaner and Bombay and further they had exported wool to England through the defendants agency. The defendants, however, did not render accounts of the various transactions which the plaintiffs were entitled to get being their principals and, therefore, the suit was brought for accounts and for whatever sum as may be found due to the plaintiffs on going into the accounts.

The defendants resisted the suit on a number of grounds. They admitted that a transaction of 24 bales had taken place between them and the plaintiffs at Bikaner, but they averred that the accounts thereof had been settled. As regards the other transactions it was averred that they had taken place at Bombay. It was also submitted that the firms Bhaironbux and Company and Nathmal Bhaironbux and Company, Bombay were two independent partnership firms. The former, therefore, denied the transactions taking place at Bombay and the latter firm took the plea that the Court at Bikaner was not competent to entertain the suit which could have been filed in a Bombay Court only.

3. The learned District Judge framed 12 issues Including the relief. As some arguments have been advanced about the effect of one of the issues, I may reproduce the issues hereunder:--

"1. Is the plaintiffs' suit maintainable in this Court in respect of the plaintiffs' transactions with Nathmal Bhaironbux, & Co., Bombay?

2. Was there an agreement between the plaintiffs firm and the defendant firm as stated in para 3 of the plaint? P.

3. Is the plaintiffs' suit bad for mis- joinder of causes of action? D.

4. Was defendant No. 3 Manaklal a Partner in the defendant firm? P.

5. Is Asaram Kalla necessary party in this case? D.

6. Is the plaintiffs' suit barred by limitation? D.

7. Were the defendants entitled to debit the plaintiffs with Dharmada and insurance charges and Dalali? D.

8. Has the defendant rendered accounts to the plaintiffs, and, as such, the plaintiffs' suit is not maintainable? D,

9. Whether the plaintiffs firm is not registered, and, as such, the suit is not maintainable? D.

10. Whether the plaintiffs have no cause of action against the defendant, and, as such, their suit is not maintainable? D.

11. Did the defendant remain agent of Manak Chand Dwarkadas, and, as such, the plaintiffs can file a suit regarding those transactions? P,

12. Relief."

4. Both the parties adduced their evidence. Issues Nos. 1 and 3 were decided against the defendants. Regarding Issue No. 2 the learned District Judge held that it was satisfactorily proved that the relationship between the plaintiffs and the defendants was that of principal and agent on payment of Re. 1/- per cent, as "Adat" to the defendant. About the propriety of other "charges with which the defendant had debited the plaintiffs, the learned District Judge said that this question would be gone into by the Commissioner and then decided by the Court before the passing of the final decree, if any. Having made these observations the learned Judge decided the issue in plaintiffs' favour and against the defendant. Issues Nos. 4, 5 and 6 were decided against the defendant. About Issue No. 7, the learned District Judge observed that it would be decided before passing a final decree. Issues Nos. 8, 9, 10 and 11 were decided against the defendant. In the result, the learned District Judge passed a preliminary decree for rendition of accounts of the suit transactions in favour of the plaintiffs and against the defendants. In order to ascertain the amount that may be due from one party to the other the learned District Judge appointed a Commissioner to examine the accounts of the parties in respect of the suit transactions and to submit his report. This preliminary decree was passed on 25-3-60. It was challenged by the defendants by an appeal to this Court, but a Division Bench dismissed the appeal on 30-7-65 and affirmed the preliminary decree.

5. The accounts were then examined by the Commissioner appointed by the learned District Judge and on receipt of the Commissioner's report the learned District Judge took into consideration the objections filed by both the parties to that report and set down the following issues for determination:

"1. Are the defendants entitled to get Dharmada, Insurance charges, Commission, Dalali, Mukadami and godown charges from the plaintiff? If so, what is that amount? (D)

2. Is the interest charged not correct? If so, what should be the amount of interest? (P)

3. Are the yield certificates produced by the defendants not of the plaintiffs' goods? If so, what would be the effect? (P)

4. Did the defendants not get the yield of the 24 bales of wool re-tested as directed by the plaintiffs? If so, what would be its effect? (P)

5. Were the 24 bales of wool 257 Rattals less in weight and the plaintiffs are not entitled to receive Rs. 779-10-0 for that deficiency in weight? (D)

6. Are the plaintiffs entitled to get Rs 2060-5-0 from the defendants on account of deficiency in the yield of 25 bales? (P)
7. Are the plaintiffs entitled to receive from the defendant Rs. 993/5/3 on account of the 8 bales of wool? (P)
8. Are the plaintiffs entitled to receive Rs. 6880/15/6 on account of the transaction of 29 bales of wool from the defendants? (P)
9. Was the wool of 25 bales of 87% yield? If so, are the plaintiffs entitled to receive Rs. 2195/7/6 on that account from the defendants? (P)
10. Are the plaintiffs entitled to receive Rs. 1403/6/6 from the defendants on account of the transaction of 24 bales of wool? (P)
11. Are the plaintiffs entitled to receive Rs. 3882/- from the defendants on account of 34 bales transaction? (P)
12. Did the defendants pay Rs. 3806/8/- to M/s. Mukanlal Motilal, Rs. 1494/13/- to M/s. Ridhi Sidhi and Rs. 339/2/- to M/s. Ramdhan Shivbux on behalf of the plaintiffs and these amounts can be adjusted by them against the plaintiffs? (D)
13. Are the defendants entitled to adjust out of Bikaner transactions Rs. 85/2/- on account of telegram, telephone charges and Rs. 53/12/- on account of the encashment of the Hundis? (D)
14. Are the defendants entitled to deduct Rs. 520/4/9 on account of commission charges, Rs. 6/- on account of telegram charges and Rs. 1057/3/- on account of Steamer freight charges from the price of 29 bales of wool? (D)
15. To what relief the parties" are entitled.

Additional issues.

16. Whether Ex. 6 was written by Motilal as a specimen and no liability is created thereby? (D),
17. Was the lot of 25 bales reduced by 165 Ibs. and the defendants are not liable to pay Rs. 441/12/- as its price? (D)
18. Was the weight of 19 bales reduced by 146 lbs. and the defendants are not liable to pay Rs. 533/13/- for that reduction? (D)
19. Was the weight of 29 bales reduced by 162 lbs. in India and 100 lbs. in England and the defendants are not liable for the price of that reduction? (D)
20. Are the defendants entitled to deduct Rs. 894/10/- on account of low yield of 20 bales in Bombay account? (D)
21. Were the defendants entitled to keep the 25 bales in their personal accounts? (D)
22. Are the defendants entitled to deduct Rs. 1540/15/6 on account of the low

yield for 25 bales kept by them in their personal account? (D)

23. Are the defendants entitled to deduct Rs. 210/3/3 on account of Arat, Rupees 12/9/3 on account of Dharmada, Rs. 25/- on account of Mukdami, Rs. 18/12/- on account of labour charges, Rs. 62/8/- on account of godown rent, Rs. 12/9/3 on account of insurance charges and Rs. 3/2/- on account of telegram charges for 25 bales of wool kept in their own account? (D)

24. Are the plaintiffs not entitled to receive Rs. 1242/11/- on account of the 5% margin of price of 25 bales withheld by the defendants, while paying the 80% price as advance? (D)"

6. After the framing of the issues the parties were given an opportunity for producing their evidence, but they did not produce any evidence. Consequently the "learned District Judge heard the arguments, considered the case in respect of each transaction separately and reached the conclusion "thrift the plaintiffs were entitled to get Rupees 10,545.06 paise from the defendant. Accordingly, he decreed the plaintiffs" suit as mentioned at the outset.

7. The defendants have come up in appeal whereas the plaintiffs have filed their cross-objection.

8. Learned counsel for the appellants, in assailing the decree of the learned District Judge, contends that the contract of agency as per para 3 of the plaint has not been proved; in particular it has not been held that it was agreed by the defendants that they would be liable for the shortages.

9. Then the learned counsel submitted that the appellant had applied for the summoning of witnesses by the Commissioner through whom he wanted to produce certain accounts of the parties with whom the Bombay firm had dealings in respect of the suit transactions, but that application was not allowed. Then the learned counsel argued that the burden of some important issues was wrongly placed on the defendant by the Trial Court and the defendant-appellants had not produced their evidence by way of protest.

10. Learned counsel then challenged the conclusion reached by the learned Trial Judge as regards the various transactions and the issues pertaining thereto.

11. I propose to dispose of first the contention of the learned counsel regarding the question whether the agreement of agency as per para 3 of the plaint can be taken to have been established. I may then deal with the question whether the burden of issue has been wrongly allocated and the defendant, in the circumstances, should be afforded an opportunity to produce his evidence. I propose to deal with the submissions relating to the various transactions separately hereinafter in the light of the arguments advanced by learned counsel for the parties.

12. Now so far as the contract of agency between the parties as such was concerned, it was subject-matter of Issue No. 2. I have quoted the issue from

the judgment of the learned District Judge dated 25-3-60. Learned counsel for the appellants wants me to infer from the observations of the learned District Judge made in this judgment, while discussing Issue No. 2, that what the learned District Judge has decided was that the relationship between the plaintiffs and the defendant was proved to be that of principal and agent on payment of Re. 1/- per 100 as "Adat" to the defendant, but regarding the propriety of other charges the question had been left open to be gone into in the final decree.

13. Learned counsel also drew attention to the issue as has been reproduced by the learned Judge in the judgment. The issue that was framed in Hindi was as follows:--

^^D;k eqnbZ;ku dh QeZ dk eqnk;ysfge dh vkM+rk eqvkgnk gLo nQk 3 vthZ nkok gqvk A

In the issue in Hindi the contract of agency is mentioned as such but in the issue (English translation) as reproduced in the judgment contract of agency has not been referred to as such. According to learned counsel, therefore, the finding in the preliminary decree is only about the existence of relationship of principal and agent between the parties and as regards the commission that was payable by the plaintiff to the defendant, but all other terms of agency including the one for liability for shortages was not decided and consequently they were required to be gone into and decided at the time of the final decree.

14. I have considered the matter. The issue as reproduced in the judgment of the learned District Judge is only a translation and it is true it does not speak of the contract of agency as such, but the issue does specifically take in the averments in Para 3 of the plaint. Therefore, the question is whether the agreement of agency as stated in para-3 of the plaint can be said to have been put in the issue and covered by the finding arrived at by the learned District Judge. Para-3 of the plaint runs as follows:--

^^?3? eqnsb;ku dh QeZ dk"khjke] Isokjke] ekidpUn o nqokjdknkl us QeZ eqnk;sykgqe uFkey] esjk cd"k ,.M dEiuh gsM vkfQl fcdkusj ls rk- 17&8&54 dks chdkusj esa ;g ekfgnk fd;k fd eqnsb;ku] eqnk;sykgqe dh vkMr esaa mu ih h o lqQn o puipk chdkusj o cacbZ esa cspsxsa A vkSj foyk;r cspus ds oklrs Hkstsx&eqnk;sykge dks vkMr 1@& Qh lnh nh tkosxh vxj eky cEcbZ esa cspk tkosxk rks vykok vkMr ds vB vkuk Qh xk?B ckckr etnwjh vkSj nh tkosxh vkSj tks eky foyk;r Hktk tkosxk ml esa tks [kjp% okfto foyk;r dk gksxk oksg eqnsbZ;ku vnk djsxsa A fglkc fdrkc dqy chdkusj esa gksxk A tks xk?B csph tkosxh A muesa ftudk csfldbZYM dk;e fd;k tkosxk A vxj tkap djus ij bZYM eqdfjjZ djnk eqnsb;ku ls ft; nk gksxk rks mlh dnj equkQk eqnsbZ;ku dk gksxk vxj bYM eqdjhjZ djnk ls de gksxk rks eqnsb;ku uqdlku nsus ds ftEesokj gksxsa A eky rksy dj fn;k tkosx&&k fMyhoj fd;k tkosxk ckn es ?kVrh c<rh dh ftEesokjh eqnsbZ;ku dh ugh gksaxh&&eqnsabZ;ku dk tks Hkko dk;e gks tkosxk mlh ls dher ckn feugkbZ vkMr etdwj o etnwjh o [kjp okftc foyk;r ,sMokal is"kxh fy;k gqok dkV dj eqnsbZ;ku olwy djus ds eqlrsgd gksxsa A bl ekfgns dks eqnbZ;ku us dcwy dj fy;k vkSj blds

rsgR djkcKj "kq: gqvK A**

15. Having read the above paragraph of the plaint which has been denied by the defendant as also the issue framed by the learned District Judge in Hindi and its translation as reproduced in the judgment I am satisfied that the gist of the averments made in para-3 of the plaint were put in issue. The operative part of the finding of issue No. 2 was that the issue was decided in plaintiffs' favour and against the defendants. It is true, the learned District Judge has observed that the propriety of other charges with which the defendants have debited the plaintiffs would be gone into by the Commissioner and then decided by the Court before the passing of the final decree, but then they would very well refer to the charges claimed by the defendant which were subject-matter of issue No. 7. They were like Dharmada, insurance and "Dalali". One does not call the shortage a charge or expense to be incurred. Therefore, the dear meaning of the finding on issue No. 2 is that the agreement of agency as between the plaintiffs and the defendants as stated in para-3 of the plaint was taken as proved. This will undoubtedly cover the terms of agency as contained in para 3 of the plaint. Whatever has been decided by the preliminary decree cannot be re-agitated at the time of the final decree.

16. Then as regards the defendant filing any application for summoning of witnesses before the Commissioner it is sufficient to say that the Commissioner does not take over the functions of the Court in the matter of summoning witnesses and recording evidence as such. He has to go into the accounts and deal with such questions as incidentally arise in the course of the scrutiny or examination of the accounts. If at all, the defendant wanted that any witnesses should be examined by the Commissioner then it was his duty to make an application before the Court itself. Learned counsel invited my attention to an application made by the defendant on 23-3-61 to the District Judge. In this application a prayer was made to summon the witnesses with their "Bahis" and other papers, but no order seems to have been passed on this application except that it be filed. I am not satisfied that this application was pressed by the party. Naturally, therefore, I enquired of the learned counsel if on the receipt of the Commissioner's report any objection had been taken regarding the non-issuing of processes for the examination of witnesses as desired by the defendant and the learned counsel was not in a position to submit that any such objection was raised. That being so, I do not find any sufficient reason for holding that the defendant had been denied the opportunity of producing his witnesses or accounts or documents through them.

17. Now, as regards the burden of issues placed on the defendants it is enough to say that looking to the pleadings of the parties the burden cannot be said to have been wrongly allocated on the defendant in respect of the issues of which the defendant-appellant is making grievance. Learned counsel referred me to Issues Nos. 1, 5, 12, 13, 14, 17, 18, 19, 20, 23 and 24. Issue No. 1 has already been decided in favour of the defendant. Learned counsel, however, contends

that a Commissioner's report is evidence in the case according to Sub-rule (2) of Rule 12 of Order 26, CPC and, therefore, to the extent the conclusions of the Commissioner were in favour of the defendants the burden for the issues pertaining to them should have been placed not on the defendant, but on the plaintiff. I may read Rule 12 of Order 26, Civil Procedure Code.

"Rule 12 (1) The Court shall furnish the Commissioner with such part of the proceedings and such instructions as appear necessary, and the instructions shall distinctly specify whether the Commissioner is merely to transmit the proceedings which he may hold on the inquiry, or also to report his own opinion on the point referred for his examination.

(2) The proceedings and report (if any) of the Commissioner shall be evidence in the suit, but where the Court has reason to be dissatisfied with them it may direct such further inquiry as it shall think fit."

18. The nature and scope of the enquiry which the Commissioner can make is limited. He is not expected to decide any matter like a Court, but has to go into the accounts and on consideration of the same submit his report to the Court. He is only TO assist the Court so that the Court may be able to appreciate the accounts and come to its own decision. The report of the Commissioner is no doubt evidence in the case, but bearing in mind the functions of the Commissioner whatever observations that the Commissioner makes on the basis of his examination of the accounts is really what is the evidence. In other words, after going into the accounts whatever he states to be ;he effect of such accounts will be truly evidence, but not the conclusions that he may ike to draw on disputed questions, as if he were a Court. Though the rule makes the report submitted by the Commissioner to be evidence in the case, the same value cannot be attached to that part of the report in which the Commissioner draws his conclusions like a Court as would be given to the observations made by the Commissioner regarding the accounts as a result of his scrutiny or examination of such accounts. The framing of the issues will be based on the pleadings and the statements of the parties as also an tne material documents that the parties may have produced. Therefore, the Court in the framing of issues after the Commissioner's report in a proceeding following a preliminary decree may take the Commissioner's report into account, but then one cannot lay down as a general rule that in respect of the conclusions drawn by the Commissioner in favour of a party the burden of the issues pertaining to them should not be placed on such party. How the burden of an issue is to be allocated depends upon all the facts and circumstances relevant for consideration at that stage. Therefore, I am unable to accept the contention that the burden of the above mentioned issues was wrongly placed on the defendants. If the defendants did not choose to adduce any evidence by way of protest then I am afraid a fresh opportunity at this stage cannot be afforded to them to lead evidence and the matter has to be decided on whatever material is available on record.

19. The dispute between the parties is regarding the yield, the loss in weight and

other miscellaneous expenses like Dharmada and the charging of interest. In respect of one transaction there is a dispute even regarding the rate. These will be examined while considering each transaction regarding which the parties are at issue.

20-32. Now, I may take up the various transactions. (After dealing with the first and second transaction and partly with the third transaction between the parties, The Judgment proceeded),

33. Learned counsel for the appellants has argued that the learned District Judge was in error in not accepting the commission at 5% that was paid to the Rallis (India) Ltd. Learned counsel maintains that really speaking this was not the so-called commission, but consideration for the Rallis (India) Ltd. affording facility of export against their own export quota. In other words, it was the actual price for the quota paper. Therefore, learned counsel submits that whatever has been debited against the plaintiffs on this account should have been allowed in entirety. In respect of the other 29 bales also this question had been raised by learned counsel for the respondent in his cross objection that the price of quota paper should not have been allowed. Therefore, I propose to deal with the question first.

34. To regulate the exports and imports of the goods from and to India there is the Imports and Exports (Control) Act, 1947, hereinafter to be referred to as the "Act". As foreign exchange is earned by exports and is expended in imports the Parliament had enacted this legislation. An elaborate machinery has been provided under the Act. Section 3 of this Act provides that the Central Government may by order published in the Official Gazette, make provisions for prohibiting, restricting or otherwise controlling, in all cases or in specified classes of cases, and subject to such exceptions, if any, as may be made by or under the order, the import, export, carriage coastwise or shipment as ships stores of goods of any specified description, and the bringing into any port or place in India of goods of any specified description intended to be taken out of India without being removed from the ship or conveyance in which they are being carried. Section 4 provides for continuance of existing orders made under Rule 84 of the Defence of India Rules, and Section 5 which is a penal provision provides that if any person contravenes, or attempts to contravene, or abets a contravention of any order made or deemed to have been made under this Act or any condition of a licence granted under any such order, he shall, without prejudice to any confiscation or penalty to which he may be liable under the provisions of the Sea Customs Act, 1878, be punishable with imprisonment for a term which may extend to one year, or with fine, or with both.

35. In exercise of the powers u/s 3 and Section 4-A of the Act the Central Government had made the Export (Control) Order, 1954. Clause 3 of this order provides that save as otherwise provided in this order no person shall export any goods of the description specified in Schedule I, except under and in accordance with a licence granted by the Central Government or by any officer specified in

Schedule II. Clause 4 makes provision for applications for licence. Clause 5 lays down the conditions of a licence. It, inter alia provides that the licensee shall not, except with the permission in writing of the licensing authority or any person authorised by it in this behalf transfer the licence and further that the goods for the export of which the licence is granted shall be the property of the licensee at the time of the export. Wool is shown in the Schedule as one of the commodities subject to export control. Therefore, it is necessary that for the export of wool the exporter shall have a licence and further that the goods for the export shall be the property of the licensee at the time of the export. Thus, if one pays the price for the so-called purchase of quota paper which is the colloquial name for a licence that cannot be countenanced because it will involve contravention of Exports (Control) Order in two ways. Firstly, it will be tantamount to the transfer of the privilege under the export licence, and secondly, it will be export of goods by a person namely, the exporter, even though they are not his property. Any such agreement for the payment of price for the quota paper or the facility for export will be abetment of the offence. Where the object of the agreement is manifestly unlawful one party cannot recover anything from the other, if he has spent anything in the fulfilment of such an unlawful object. Learned counsel for the appellants submitted that the goods were exported by Rallis (India) Ltd. in the one case and Moolchand and Company in the other under their own names respectively. This may be so, but there is nothing to show that the title in the goods had been actually transferred to the exporters. If that were so, then there could hardly be any question of claiming shortages in the landed weight or price paid by the ultimate buyers in England for the goods. The entire trend of events was pointing to the position of the defendant being the person who was exporting the goods. In other words, he was acting as an agent of the plaintiff for that matter and the title in the goods remained with the plaintiffs till it came to be transferred to the ultimate buyers in England. The intervening parties were acting as the agents or brokers for that matter, but were not claiming any title in the goods themselves. They were only charging their commission when the goods passed through their hands. In such a case, therefore, Courts cannot recognise the charges that the agent may have spent in securing the so-called export quota papers in the case of 29 bales or the facility from Rallis (India) Ltd. for arranging export in respect of the 8 bales. The defendants themselves have characterised the so-called commission of 5% charged by Rallis (India) Ltd. as an amount paid by way of price of quota paper (vide ground No. 17 of the memo of appeal). That being so, I am unable to accept the contention of the learned counsel for the payment so far as the cross objection regarding the price claimed by the defendants as that paid for quota papers is concerned has to be allowed. This amount is Rs. 1833/15/- which the plaintiffs are entitled to get from the defendant.

36-40. (After dealing with the rest of, the items in this transaction the judgment proceeds).

41. Re.: 4. This transaction relates to 25 bales of wool and is subject-matter of

sub-para (4) of para 4 of the plaint. The bales were sent to the defendants at Bombay on 26-2-1955. The defendants informed the plaintiffs that there was an offer of Rs. 21/3/- per Rattal for these bales (vide Ex. 56). This was followed by a telegram intimating that the bales could fetch 74 Pence per Rattal. Finally, on 3-5-1955 the defendants gave a telegram that the bales had been sold at the rate of Rs. 2/12/6 per Rattal. The plaintiffs informed the defendants by their telegram dated 12-5-1955 that if the sale transaction had not been finalised it may be cancelled as there was an offer of Rs. 2/14/- per Rattal for these bales. The defendants replied vide a telegram Ex. 57 that the sale cannot be cancelled as it was settled after having a talk with Shri Motilal on phone. It may be mentioned that Shri Motilal was one of the partners of the plaintiffs' firm. It emerged before the Commissioner, however, that the defendants had retained the bales for themselves and then sold them. In other words, they were first purchased by the defendants themselves and then exported.

42. The defendant informed the plaintiffs that the yield of the bales was 72.90%. The yield which was taken as basis for the settlement of price was 80% Further the defendant sent a "Bijak" (invoice or bill) to the plaintiffs showing that the consignment weighed 7266 Rattals. The plaintiffs claimed that the weight of the consignment was 7377 Rattals.

43. The learned District Judge came to the conclusion that the defendants were not entitled to appropriate the bales to themselves and in doing so they had acted in violation of Section 215 of the Contract Act. According to the learned Judge, as the defendants had misconducted themselves as agents, they were not entitled to any remuneration in respect of this consignment and further the defendants were responsible for the payment of the full value of the bales to the plaintiffs. The plaintiffs were thus held entitled to Rs. 3684/4/3 on this account and they were not held entitled to Rs. 1212/11/- which was on account of the margin of 5% charged by Mool Chand and Company at the time of making payment of The price to the defendants. Thus, the learned Judge found that the plaintiffs were entitled to recover an amount of Rupees 4926/12/3 from the defendants in respect of this transaction.

44. The defendants have challenged this in their appeal whereas the plaintiffs in their cross objection have questioned the adjustment of Rs. 1540/15-9 on account of the difference in yield. It was argued that the defendants had not been able to show that the yield of the bales was only 72.90% and not 80% or above.

45. Thus it is evident that the four points that require consideration in respect of this transaction are: (1) utilisation of the goods by the defendants themselves, (2) regarding the difference in yield, (3) regarding the difference in weight, and (4) the rate at which the plaintiffs could demand the price of the bales.

46. Learned counsel for the appellants argued that the defendants were having a quota or licence in their own name for export in accordance with the provisions

of the Imports and Exports Act, 1947 and the Exports (Control) Order, 1954 issued thereunder and according to the provisions of the Act and the Exports (Control) Order only the goods belonging to the exporter himself could be exported by him. Therefore, so far as this consignment was concerned, submits learned counsel, the defendant was entitled to export the goods on his own account. Learned counsel further submitted that the position of the defendant vis-a-vis the plaintiffs was that of a pukka Adatia and as Pukka Adatia the defendant could allocate the contract of the goods to himself vis-a-vis his constituent the plaintiffs. Reliance was placed on *Gordon Woodroffe and Co. Vs. Sheikh M.A. Majid and Co.*, and *Phoolchand and Others Vs. Laxminarain*, .

47. Learned counsel for the respondents, on the other hand, contended that the defendants had never disclosed to the plaintiffs that they were appropriating the bales to themselves. They had thus clearly acted in breach of their duty as plaintiffs' commission agents and consequently if they had derived any benefits or profits out of the transaction they have to make good the profits to the plaintiffs and further on account of their having misconducted themselves as agents they would not be entitled to their remuneration.

48. In *Gordon Woodroffe and Co. Vs. Sheikh M.A. Majid and Co.*, their Lordships pointed out that it was well established that even an agent can become a purchaser when an agent pays the price to the principal on his own responsibility. Learned counsel further invited attention to *Phoolchand and Others Vs. Laxminarain*, in which I had occasion to consider the relationship between a Pukka Adatia and his constituent. After reviewing a number of cases it was observed that in certain respects a Pukka Adatia may be taken to be a principal in that he can allocate the transaction to himself and himself buy from and sell to his constituent as a principal. It was added that he was not entirely shorn of his character as an agent. Therefore, the statutory provisions of the Contract Act defining the rights and obligations of an agent, vis-a-vis the principal would continue to apply to him with full force. Consequently as agent Pukka Adatia is bound to carry out the directions of his constituent. In the present case the position is overlain by the requirements of the Exports (Control) Order and the Imports and Exports Act, 1947. I have already referred to the provisions and have pointed out that the exporter can export only his own goods but not the goods belonging to others and any contravention of the relevant provisions regarding it is a crime. It is common knowledge that parties do manipulate their dealings in such a way that goods of one are sent by another without purchasing them actually but by charging the so-called price of the quota or a substantial amount in the shape of more than the usual commission. The Courts, however, cannot recognise such a practice or course of dealings in which the contravention of the provisions of the Act or the Exports (Control) Order are involved. The dealings would be rendered unlawful in that event. Therefore, if in the present case the defendants utilised the goods as belonging to themselves, for the purposes of export then that cannot be held to be beyond the scope of their authority. Even as agents the defendants were duty bound to act within the

framework the scheme of the Imports and Exports Act and the Exports (Control) Order. Learned counsel for the respondents submitted that the defendants in that event should not have exported the goods, but should have kept them or sold them locally at Bombay.

49. Now, two considerations enter here at this point. The first thing is whether the defendants should have kept the good indefinitely. I do not think this would have been a business like proposition. One may be faced with fluctuations in price and the party may also have to incur extra expenditure on account of godown charges or the like, or loss of interest for that matter. Then one has to keep in view as to what was the frame of mind of the parties at that time. This is disclosed by a letter dated 9-5-1955 written by the plaintiffs to the defendants. The relevant extract may be quoted below:--

^^rkj ,d o dkxt ,d vkidk feyk ckap ds ekywe fd;k A xkaB 25 ihyh ds /kkeyh 2A11A6 fy[kh gS lks HkbbZth blds okLrs eSus vkidks igys Hkh fy[kk gS fd xkaB 25 ihyh 2A14A6 ?kj iM+k gS lks cgqr uqdlku iM+s gS bl ckLrs vk"kk j[krs gS fd c[kr ij dksVsdh iksft"ku Bhd gqtkos rks cspuk Bhd gS ----- IQn xkaB 20 fyfeV 3A9 vkuk fn;k ihyh xkaB 25 iM+r 2A14 lwa vk/kkuk ;k c[kr ij 2A13 ij lkSnk fudyrk fnls rks cspus dh dksf"k"k djuk Hkwy er djuk th A**

50. On 12-5-1955, the defendants had given a telegram to the plaintiffs intimating that the bales had been sold at Rs. 2/12/6 per Rattal. This telegram was immediately replied by the plaintiffs the same day i. e. 12-5-1955 vide letter C-56 that:

^^rkj ,d vkidk vkt fnu ds 9AA cts feyk A ihyh xkaB 25] 2 :- 12 vk- 6 ik- esa csph gS A ftlds cnys esa rkj fn;k gS fd ukeatwj fyfeV 2A14A&dh nh gS A HkbbZth cgqr lkspu dh ckr gS dksVs dk Hkko Ms< lkS ds c[kr 2 :- 12 vk- dh Hkh /kke.kh Fkh vckj 115 ds Hkko es vki 2 :- 12 vk- 6 ik- esa csprs gS lks eSa jkstkuk Mkd esa fy[krk gwa fd gekjs ?kjsa iM+r k gS 2A14A6 ls ?ij iM+s gS lks ?ps Hkko ysus dh dksf"k"k djuk lks vki gekjsa dkxtksa ds lekpkj ckps ugha gS vkSj eksrhyky Qksu esa dgk Fkk fd 2 :- 13 vk- o lk<s rsjg vkusdksVs ds Hkko 135 ds Hkko esa gS vkSj fQj vHkh Hkh dgk Fkk fd fnu vkB ns[kuk ihyk eky gekjs ?ps iM+rs dk eky gS gekjs uqdlku ugha Mkyuk A vckj cktkj es dqN :[k ?ps gksus dk Vkbe gS A vkus QkSju csp fn;k gS rks dgka eky tkrk rks ugha de ls de cktkj rks nsa[kuk pkfg, vkSj lkSnk dPpk gksxk lks dsUly djuk A vxyh /kke.kh 2A14A& dh Fkh ml eqrkfcd cspuk vkSj /kke.kh dk rkj nsuk pkfg, A**

51. The above letter shows that the plaintiffs had suggested that the goods should have been sold at Rs. 2/14/- per Rattal; more so when the market had upward trend those days. The defendant was, therefore, asked to cancel the transaction, if it had not been finalised. The two letters read in conjunction, to my mind, lead to the inference that the plaintiffs wanted their goods to be sold. The limits of price have also been indicated though not with precision. Now if the defendant could have sold the goods to third parties within the limits suggested by the plaintiffs, there is no good reason to think why he could not have retained

the goods for himself if he was having a licence or quota for himself for exporting the goods. As already observed, he could export his own goods and, therefore, if the defendant was in a position to export the goods he could very well purchase the plaintiffs' goods. What should be the proper rate at which the defendant could purchase the goods will be discussed hereinafter, but so far as the question of purchasing the goods by the defendant himself is concerned that cannot be said to be unwarranted or beyond the scope of the defendant's authority. Therefore, I find myself unable to agree with the learned District Judge on this point that the defendants could not have appropriated the goods to themselves. It is true, the defendants had not informed the plaintiffs, that they had kept the goods, before the matter came to be examined by the Commissioner, but that should not, in my view, affect the true legal relationship or the right of the party flowing therefrom. As already observed, the matter had to be examined keeping in view the provisions of the Imports and Exports (Control) Act and the Exports (Control) Order, 1954.

52. I may then turn immediately to the next question as to at what rate the plaintiffs had to be paid by the defendant. Letter C-55 shows that the plaintiff had disapproved the offer of Rs. 2/11/6 per Rattal, but he indicated the limit that if the ponds could be sold for Rs. 2/14/- per Rattal they may be disposed of and the defendant should not ignore this. The lower limit was indicated as Rs. 2/13/-, but that was to be in the event of some difficulty arising. The second letter C-56 also shows that the plaintiff was not averse to the goods being sold at Rs. 2/14/- per Rattal. Therefore, looking to all the circumstances when the defendants have themselves purchased the goods the plaintiff should not be placed in a worse position than what he would have been, had the goods been sold to a third party. All in all, therefore, I am of the opinion that the plaintiffs should get the price at the rate of Rs. 2/14/- per Rattal.

53-67. (After discussing the rest of the items in transaction 4 and also with transactions 5 to 8, the Judgment proceeded):

68. Re : 9. Transaction No. 9 which is subject-matter of issue No. 11 relates to quota papers for 34 bales of wool. The plaintiffs' case was that they had in their favour two orders No. Gen. C-14-1520/54 dated 1-12-1954 IUC No. OICC/CHA/M2/ June, 1956 for 500 Rattals of wool and another Gen. No. C/14/1941/51 dated 30-4-1955 IVC No. 01/01/E2A/M2 upto 2nd June, 1956 in their favour in the name of their firm Manakchand Dwarkadas. According to the plaintiffs, the goods were purchased by the defendants as commission agents of the plaintiffs and exported, but the defendants had not rendered any account in respect of them. The plaintiffs further averred that the defendants had informed the plaintiffs that the profit in respect of 17 bales was Rs. 112/- per bale, but they did not send any bill or any other paper and as regards the other 17 bales the defendants did not intimate anything to the plaintiffs.

69. The Commissioner looked into the documents placed before him by the parties and he also examined them. He came to the conclusion that the entries

regarding purchase or sale were fictitious. According to him, nothing had been purchased or sold in respect of these quota papers by the parties. Really the quota papers were sold to other parties. These parties were Vijai Singh & Company and Peerdan Om Prakash. The quota paper was sold to Vijai Singh & Company at the rate of Rs. 112/- per bale and the latter had issued a cheque for a sum of Rs. 880/- in favour of the firm Manakchand Dwarkadas. Similarly, the other quota paper was sold to the firm Peerdan Om Prakash for Rs. 640/-.

70. The Commissioner was of the view that the plaintiffs were entitled to recover the price of the two quota papers, in ail Rs. 1672/- from the defendants. The learned District Judge agreed with the Commissioner. He observed that it was the responsibility of the defendants to realise the amount of the quotas from the parties concerned and, if they failed to do so, they cannot be absolved of their liability to pay the amount to the plaintiffs. Consequently the learned District Judge held that the plaintiffs were entitled to receive Rs. 1672/- from the defendants.

71. Learned counsel for the defendant-appellants has assailed this finding. He contends that the transaction was altogether illegal in that, according to law, the transfer of the quota paper or the licence for export was forbidden and it was an offence. Therefore, according to learned counsel, this amount cannot be realised by the plaintiffs from the defendants. Learned counsel for the respondents, on the other hand, contests this position. He submits that the defendants being the agent of the plaintiffs was bound to pay whatever amount the defendant had realised or could have realised from the other parties. Learned counsel placed reliance on a number of cases, such as, Firm Murlidhar Banwarilal Vs. Firm Kishorelal Jagannath Prasad and Others, ; Babulal Swarupchand Shah Vs. South Satara (Fixed Delivery) Merchant's Association Ltd. and Another, ; Haji Habib v. Bhikamchand Jankilal Shop AIR 1954 Nag 306 and Kedar Nath Motani and Others Vs. Prahlad Rai and Others,

72. I may once again remind myself of the relevant statutory provisions which have been referred to in the earlier part of this judgment. According to Section 3 of the Act, the Central Government may, by order published in the Official Gazette, make provisions for prohibiting, restricting or otherwise controlling, in all cases or in specified classes of cases, and subject to such exceptions if any, as may be made by or under the order the import, export, carriage coastwise or shipment as ships stores of goods of any specified description. This includes wool.

73. Section 5 of the Act lays down that if any person contravenes, or attempts to contravene, or abets a contravention of, any order made or deemed to have been made under this Act or any condition of a licence granted under any such order, he shall, without prejudice to any confiscation or penalty to which he may be liable under the provisions of the Sea Customs Act, be punishable with imprisonment for a term which may extend to one year, or with fine, or with both. u/s 3 of the Act Exports (Control) Order, 1954 was issued. Clause 5 of the order which lays down the conditions of the licence provides that it shall be

deemed to be a condition of every licence that the licensee shall not, except with, the permission in writing of the licencing authority or any person authorised by it in this behalf, transfer the licence and further that the goods for the export of which the licence is granted shall be the property of the licensee at the time of the export.

74. The so-called quota paper is nothing but a licence under the Exports (Control) Order, 1954 for exporting the goods. It was, therefore, not legal to have transferred it and further goods of another could not have been exported by virtue of that licence or quota paper. A person who contravenes the condition of the licence or abets the condition of the licence renders himself guilty u/s 5 of the Act.

75. Both the parties have admitted that the entries regarding the sale or purchase of the goods were fictitious and it is the third parties who had exported their goods under colour of this quota or licence in the name of the plaintiffs' firm. The quota paper itself was sold and what the plaintiff seeks to realise from the defendant is the price of the two quota papers or licences. The question, therefore, arises whether this is permissible. I have perused the cases cited by learned counsel for the respondents. The last one namely, the Supreme Court case Kedar Nath Motani and Others Vs. Prahlad Rai and Others, has dealt with the question exhaustively and, therefore, I need not make a detailed reference to the earlier cases. Suffice it to say that in the Nagpur case AIR 1954 Nag 306 Hidayatullah, J., as he then was, had reviewed a number of English and Indian cases and formulated certain principles. In the Supreme Court case Kedar Nath Motani and Others Vs. Prahlad Rai and Others, the judgment of the Court was delivered again by Hidayatullah, J. as he then was, Here again, all the relevant cases were reviewed. The earliest case to which a reference was made was Holman v. Johnson (1775) 1 Cowp 341 : 98 ER 1120) and the following observations of Lord Mansfield were quoted in extenso :--

"The principle of public policy is this; *ex dolo malo non oritur actio*. No Court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If from the plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causa* or the transgression of a positive law of this country, there the Court says he has no right to be assisted. It is upon that ground the Court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it; for where both are equally in fault, *potior est conditio defendantis*."

76. From the above observations it is clear that no Court will lend its help to a person who bases his claim upon an immoral or illegal act. The rule is known as "*ex turpi causa*". It was further observed by their Lordships that there were some exceptions or supposed exceptions to the rule of *ex turpi causa*. Those exceptions had been stated by Salmond in his book (Second Edition at page

352). Their Lordships had quoted the following passage therefrom:--

"So if A employs B to commit a robbery, A cannot sue B for the proceeds. And the position would be the same if A were to vest property in B upon trust to carry out some fraudulent scheme: A could not sue B for an account of the profits. But if B, who is A's agent or trustee, receives on A's account money paid by C pursuant to an illegal contract between A and C the position is otherwise and A can recover the property from B, although he could not have claimed it from C. In such cases public policy requires that the rule of *turpis causa* shall be excluded by the more important and imperative rule that agents and trustees must faithfully perform the duties of their office."

Williston in his *Book on Contracts* (revised edition), Vol. VI, has discussed this matter at p. 5069, para 1785 and in paras 1771 to 1774 he has noted certain exceptional cases, and has observed as follows:

"If recovery is to be allowed by either partner or principal in any case, it must be where the illegality is of so light or venial a character that it is deemed more opposed to public policy to allow the defendant to violate his fiduciary relation with the plaintiff than to allow the plaintiff to gam the benefit of an illegal transaction."

Then their Lordships referred to some more English and Indian cases including *Bigos v. Bousted*, (1951 1 All ER 92) and extracted the following principles :--

"The correct position in law, in our opinion, is that what one has to see is whether the illegality goes so much to the root of the matter that the plaintiff cannot bring his action without relying upon the illegal transaction into which he had entered. If the illegality be trivial or venial, as stated by Williston and the plaintiff is not required to rest his case upon that illegality, then public policy demands that the defendant should not be allowed to take advantage of the position. A strict view, of course, must be taken of the plaintiff's conduct, and he should not be allowed to circumvent the illegality by resorting to some subterfuge or by misstating the facts. If, however, the matter is clear and the illegality is not required to be pleaded or proved as part of the cause of action and the plaintiff recanted before the illegal purpose was achieved, then, unless it be of such a gross nature as to outrage the conscience of the Court, the plea of the defendant should not prevail."

77. In the present case the parties were right from the beginning in *pari delicto*. They had admitted that the entries regarding the sale or purchase of bales of wool between them in respect of this transaction were fictitious and what had really happened was that the quota or the licence had been parted with in favour of third parties for gain. They were thus trying to circumvent the provisions of the Exports (Control) Order. As already observed, the restrictions on exports and imports have been placed with a view to earning and conserving the foreign currency which was so necessary for the country's economy. Therefore, any subterfuge employed by the parties and thereby circumventing these provisions

is clearly against public policy and national interest. It is a criminal activity and, therefore, cannot receive the approval of Courts. The case, to my mind, does not fall within the recognised exceptional categories. The Courts have recognised the wholesome principle based on the relationship of trust or confidence between a principal and his agent and the agent cannot refuse to account to his principal if he has realised anything on behalf of the principal from third parties, though the contract or transaction entered into or undertaken may be animated with an illegal purpose. But, in all such cases there is either money advanced by the principal to the agent or goods or property supplied, out of which the agent has made a gain and it was in those circumstances that it was held that the case would come under the exceptions to the rule *ex turpi causa*.

78. Now, the licence or the quota paper is no property. Licence granted under the Exports (Control) Order is a personal privilege conferred on a party. When the licence is transferred by one party to another he is thereby not transferring or handing over any property or goods. Therefore, in such a case it cannot be said that the agent has made any illegal gain from out of the property or goods belonging to the principal. The case would thus clearly fall within the ambit of the rule *ex turpi causa* itself. The Court, therefore, cannot aid or help a party who wants to make a recovery in respect of the unlawful or illegal transaction which amounts to an offence under the law. The cause of action would very much include the illegal purpose or act. In the case before Modi, J. the gains were in respect of illegal contract, but the facts do not show that the illegality was of a character amounting to an offence under the law.

79. That -being so, the learned District Judge was not right in allowing the plaintiffs' claim in respect of this transaction and consequently I reverse the finding of the learned Judge on issue No. 11.

80. Learned counsel for the appellants wanted to argue that they were entitled to appropriate an amount of Rs. 1456/- but they had not taken any ground in the memo of appeal and consequently the learned counsel presented an application under Order 41, Rules 22 and 33, Civil P. C. at the conclusion of his arguments. Order 41, Rule 22, Civil P. C., to my mind, is not attracted in the present case. It is the defendants' appeal which covers this issue or transaction. As such I had indicated while hearing the arguments that this application is to be dismissed and I only now note this fact.

81. Re: 10. Regarding transaction No. 10 there is no dispute.

82. Re: 11. This relates to the sale and purchase of 25 bales of wool. According to the plaintiffs, a forward contract in respect of 25 bales of wool was entered into in the commission agency of the defendant by the plaintiffs in the name of their firm Manakchand Dwarkadas on Asoj Sudi 12 of Samvat 2012. This was for the Vaida of October next. The bales were purchased at 72 Pennies per Rattal at Bikaner. They were sold by the defendants at 75 Pennies per Rattal. The plaintiffs, therefore, claimed their profit of Rs. 1050/- from the defendants.

According to the plaintiffs, the defendants had furnished them the account in respect of this transaction, but had thereafter failed to pay the amount or to give account of the expenses. The Commissioner came to the conclusion that the plaintiffs were, entitled to recover the amount of Rs. 1050/- from the defendants. For this the Commissioner relied on the accounts given by the defendants to the plaintiffs (Ex. 6). The Commissioner repelled the contention of the defendants that Ex. 6 was executed not in respect of any transaction, but it was by way of specimen. The learned District Judge agreed with the Commissioner. He observed that even a credulous person would not believe that Motilal (defendant) would write Ex. 6 as a specimen in his own hand. Accordingly, the learned District Judge allowed the plaintiffs' claim for Rs. 1050/- in this regard.

83. Learned counsel for the appellants has reiterated that Ex. 6 was only a specimen and no transaction had really been entered into by the parties. Apart from it, learned counsel submitted that this was a wagering contract and, therefore, not enforceable. I have perused Ex. 6. There is no substance in the ingenious plea that this was only a specimen. This is an account of the transaction. As regards the contract being a wagering one, there is nothing on the record to show that the parties never had the intention of giving or taking delivery of the goods. Since the defendants had denied the very transaction itself, it is difficult to hold on the material available that this was a wagering contract. Accordingly, there is no reason to disturb the finding of the learned District Judge for this transaction.

84. Then there is a finding about issue No. 12. The issue is to the effect whether the defendants had paid Rs. 3806/8/- to Messrs. Mukanlal Motilal, Rs. 1494/13/- to Ridhi Sidhi and Rs. 339/2/- to Messrs. Ramdhan Shivbux on behalf of the plaintiffs and whether these amounts can be adjusted by them against the plaintiffs. The last two items namely, the amounts said to have been paid to Messrs. Ridhi Sidhi and what is alleged to have been paid to Messrs. Ramdhan Shivbux have been the subject-matter of discussion under transaction No. 3. Now, only the item of Rs. 3806/8/- has to be dealt with. With respect to it the learned District Judge had observed that no arguments were advanced before him. Both the learned counsel are one in contesting this observation. The defendants have challenged this and so have the plaintiff-respondents in their cross-objection. The defendants had claimed adjustment of Rs. 5640/7/- for what they had paid to third parties on behalf of the plaintiffs. The Commissioner while making a comparison of the Khatas of the two parties pertaining to Samvat years 2011 and 2012 had observed that the defendants had correctly debited these amounts against the plaintiffs as, according to him, they had to make payment of the amounts standing in their name in the Khata of Mukanlal Motilal. The learned District Judge had accepted the conclusion of the Commissioner.

85. Learned counsel for the respondents has submitted that these amounts did not relate to the suit transactions or dealings and while in going into the accounts the Commissioner or the learned District Judge for that matter should

have confined themselves only to the suit transactions or dealings. Apart from this, learned counsel submitted that there is no proof whatsoever that these amounts had really been paid to the third parties. Learned counsel pointed out that the defendant had not made any statement in this regard and the account books of the defendant were not such as were regularly kept in the course of the business and were thus not sufficient to fasten the liability in respect of these items. It was submitted that in the Bombay account books "Mal" was not made regularly in the Makal Bahi and in the Bikancr books the "Mill" or the entries were of 15 days. Thus, according to learned counsel, the adjustment could not have been made in respect of this item against the outstandings of the suit transaction.

86. Learned counsel for the defendant-appellants, however, submits that the accounts of the parties had been gone into by the Commissioner and the defendants could legitimately claim an equitable set off in respect of whatever amounts were outstanding against the plaintiffs. Learned counsel maintains that the account books were regularly kept. He also submitted that on a proper interpretation of the plaint the transactions other than those specifically mentioned can be said to have been covered by the pleadings and thus the Commissioner or the learned District Judge for that matter were justified in taking note of the debit against the plaintiff in respect of this item.

87. Now, I may here turn to the plaint. Paragraph Nos. 1 and 2 are introductory. Paragraph No. 3 speaks of the agreement regarding the sale of wool. Paragraph No. 4 gives the details of the various transactions. Sub-paras (1) to (11) thereof cover the transactions which have been dealt with in this judgment. Then there is paragraph 5 and learned counsel for the defendants submits that it is this paragraph which covers the other transactions as well. I may, therefore, read the relevant portion of this paragraph.

^ ^ mijksDr fglkc glN nQs 4 vjth nkos esa eqnk;srkgqe dh vkMr esa 24 xkaB chdkusj esa o 192 xkaB cEcbZ o foyk;r esa dqy 216 xkaB fcdh gS vkSj 34 xkaBks dk dsVsdK eky x;k gS A o 35 xkaB ds fjdkMZ ds lksNs gq;s g bu dqy xkaBks esa eqnbZ;ku dks tks ,sMokal ctfj; gqaMh o uxnh chdkusj o cEcb? esa olwy gqvk gS&&mldh ri"khy eqnbZ;k; dh ogh;kr esa ekStwn gS A dqN eky eqnbZ;ku us eqnk;sykgqe ls chdkusj esa [kjhn djds HkstK gS A mldk fglkc Hkh ntZ ogh;kr gS A eqnbZ;ku dks iMls iqnk;sykgqe jk Hkjkslk Fkk&&tkS ;kus eqnsbZ;ku dks eqnk;rkgqe us Hksts gSa&&eqnk;rkgqe ds ;g dgu ij o brehuku fnykus ij fd ckn e eqdfey fglkc fn;k tk;sxk o le>k fn;k tkoxk&&ljfVfQDV ns fn;s tkosxsa o xyfr;ka nqjLr dj Hksts okftc gksxk eqnbZ;ku dks n fn;k tkcsxk A eqnbZ;ku es dfqN ikuksa dk viuh ogh;kr esa v/kwjK bUnjkt fd;k&&ts uk eqdEey gS A eqnbZ;ku dks eqnk;sykgqe u uk fglkc fn;k uk fgcko le>k;k uk lJfVfQdV fn;s vkSj uk xyfr;ka nqjLr dh gS A blfy;s eqnbZ;ku cgh es fcdjs dk fglkc uk eqdEey gS A eqnbZ;ku eqLrsgd bl "kHkj ds gS fd mijksDr eky dh ckcr eqn;rkgqe ls eqdEey fglkc le> dj tjs okfto olwy djs&&lkgwdkjH lwn vkB vkuk Qh lnh ekgokj gS A bl fglkc ls lwn eqnbZ;ku viuh jde ij o olqyh ikus ds eqLrsgd gS&&ftldh ckor ;g

nkok gS A**

88. Learned counsel submits that in this paragraph what is stated to be "transactions of record" relate to the transactions in respect of which adjustment was made. I am afraid the plaint cannot reasonably lend itself to that interpretation. The "record transactions" or what are forward contracts relate to 35 bales and this is subject-matter of transaction covered by Ex. 6 which has been discussed under transaction No. 11. Now, perusal of the preliminary decree of the learned District Judge dated 25-3-1960 shows that it was for rendition of accounts of the suit transactions. The learned District Judge had further said that for the purpose of ascertaining the amount of money due to or from any party it was necessary that an account should be taken of the suit dealings between the parties and having said this the learned District Judge ordered the appointment of a Commissioner to examine the accounts in respect of the suit transactions and to submit his report. Thus the examination of the accounts in the course of the final decree has to be confined within the framework of the preliminary decree. In other words, the accounts had to be examined in respect of the suit transactions or dealings and not in respect of other transactions or dealings.

89. Now, a word about the plea of the learned counsel that by way of equitable set off the defendant could claim credit for whatever was outstanding against the plaintiffs. In the first place, there is no plea founded on equitable set off in the written statement. Then as their Lordships had laid down in *Raja Bhupendra Narain Singha Bahadur Vs. Maharaj Bahadur Singh and Others*, a plea in the nature of equitable set off is not available when the cross demands do not arise out of the same transaction. Ex-hypothesi the items claimed by the defendant by way of adjustment not being in relation to the transactions which were the subject-matter of the suit or the preliminary decree for that matter no equitable set off could be claimed. Accordingly, I am unable to agree with the learned District Judge that the defendant was entitled to make an adjustment for a sum of Rupees 3806/8/- and I reverse the finding of the learned District Judge in this regard.

90. Finally, learned counsel for the defendant submitted that the suit was one for accounts and what sum would be payable by the defendant to the plaintiff or vice versa could be known only after the accounts were settled. Therefore, learned counsel argued that in such a case the Court should not have awarded pendente lite interest from the date of the suit, but if interest were to be awarded, it should have been from the date of the final decree and not from any date anterior to it. Learned counsel then submitted that the interest at 6% was excessive though learned counsel did not dispute the position that so far as the balance actually found standing in the name of the plaintiff was concerned (vide the defendants' books) namely, Rs. 2904/15/- interest at 6% might be awarded. Learned counsel fortified himself by reference to *Juggomohun Ghose v. Manickchand* (1857) 7 Moo Ind App 263 (PC) ; *Mahabir Prashad Rungta Vs. Durga Datt*, and *Veeraswami v. Bandaru Chitti Naidu* AIR 1948 Mad 231.

91. In Juggomohun Ghose's case (1857) 7 Moo Ind App 263 their Lordships of the Privy Council were called upon to consider the provisions of the Legislative Act No. XXXII of 1839, by which the provisions of Statute 3rd and 4th Will IV., c. 42 were extended to India. Section 28 of the Statute, inter alia, enacted :--

"Upon all debts of sums certain, payable at a certain time, the Court before which they may be recovered, may, if it shall think fit, allow interest to the creditor, at a rate not exceeding the current rate of interest from the time when such debts or sums certain were payable, if such debts or sums be payable by virtue of some written instrument at a certain time." The language of the above section to my mind, is not analogous to the provisions of Section 34, Civil P. C. The latter vests a wide discretion in a Court so far as awarding of pendente lite and future interest is concerned. The case is, therefore, clearly distinguishable.

92. In the Supreme Court case, Mahabir Prashad Rungta Vs. Durga Datt, their Lordships observed:--

"That it was well settled that interest as damages cannot be awarded. Interest up to date of suit, therefore, was not claimable. As regards interest pendente lite until the date of realisation; such interest was within the discretion of the Court."

In that case their Lordships allowed interest pendente lite at 4% per annum.

93. In the Madras case AIR 1948 Mad 231 which was a suit for dissolution of partnership and for accounts the learned Judge observed that interest should be allowed only from the date of the final decree.

He further observed that in a suit for dissolution of existing partnership and for accounts, interest should be allowed to the plaintiff only from the date of the final decree by which the amount, if any, is found due from the defendant to the plaintiff and not from the date of the plaint, since until the accounts have been taken it is impossible to say what if anything, is due from any partner to his co-partners.

94. Learned counsel for the respondent, on the other hand, relied on Basant Kumar v. Roshanlal AIR 1954 Nag 300. This was a suit for accounts by agent against the principal. It was argued that interest prior to the ascertainment of the accounts cannot be given. The argument was repelled by the learned Judges in the following words:--

"There is no warrant for the proposition that in a suit for accounts interest prior to the ascertainment of the account cannot be given, as agent is liable to pay interest on failure to pay the money over at the request of the principal. Similarly, there is no excuse for the principal who, being in possession of accounts, could have struck the account when the demand was made by the agent and hence, in a suit against him by the agent for accounts, the award of interest from the date of demand till the institution of the suit is proper."

It was added that the award of interest, thereafter, pendente lite and subsequent

to the decree till realisation was, however, a matter of discretion for the Court u/s 34, Civil P. C. and the proper stage for the exercise of that discretion was while passing the final decree.

95. I am clear that the Court is vested with a wide discretion in the matter of award of pendente lite and future interest., Whether interest should be awarded pendente lite or for future and if so, at what rate are matters which lie within the discretion of the Court though such discretion has to be exercised judicially in the light of the facts and circumstances of each case. The circumstances as would guide the determination of the question being varied cannot all be put down in any rigid formula. The discretion, by and large, has to be exercised in the light of the facts and circumstances of the case in hand.

96. In the present case the accounts were not such as could be easily be appreciated. The number of the sittings that the Commissioner had taken and also the fact that the report is a lengthy document go to show that there was much to be said by each side. It was not a case where one could just look into the accounts of one party only and arrive at a figure. Many controversial items had to be determined and adjudicated upon. Therefore, in this case it will be just and proper to order that the interest is made payable from the date of the final decree till realisation.

97. As regards the rate of interest, since the parties have themselves been charging interest at 6% per annum, the rate should be 6% per annum from the date of the final decree till realisation.

98. The result of the above discussion is that in respect of transaction No. 1 the plaintiffs' cross objection has to be allowed to the extent of Rs. 331.48 paise, also in respect of transaction No. 3 plaintiffs' cross objection has to be allowed to the extent of Rs. 2537.07 paise and as regards transaction No. 5 the cross objection has to be allowed to the extent of Rs. 894.62 paise. As regards issue No. 12, the plaintiffs' cross objection has to be allowed to the extent of Rs. 3806.50 paise. This totals to Rupees 7569.67 paise.

99. Likewise, the defendants' appeal has to be allowed in respect of transaction No. 4 to the extent of Rs. 3968.84 paise and in respect of transaction No. 9 to the extent of Rs. 1672.001 paise; total Rs. 5640.84 paise.

100. The outcome of this is that the decree of the trial Court will be increased in favour of the plaintiff-respondents and against the defendant-appellants to the extent of Rs. 1928.83 paise and it shall now stand at Rs. 12473.89 paise. The decretal amount shall carry interest at 6% per annum from the date of the final decree of the trial Court till realisation.

101. The appeal and the cross objections are decided in the above terms.

102. The parties will get the costs of this appeal in proportion to their success or failure here.

103. Before parting with this case I have to pay tribute to both the learned counsel for their thorough preparation of the case and for giving full assistance to the Court without which it would not have been easy to wade through thousands of documents and entries. Also I must pay tribute to the Commissioner who has gone into those bulky accounts with care and to the learned District Judge who had dealt with the case.