
(1934) 02 BOM CK 0019
In the Bombay High Court
Case No : First Appeal No. 183 of 1933

Pannaji Devichand

APPELLANT

Vs

Senaji Kapurchand

RESPONDENT

Date of Decision : 20-02-1934

Acts Referred:

Companies Act, 1956 — Section 4(2)

Citation : AIR 1934 Bom 361 : (1934) 36 BOMLR 786 : 152 Ind. Cas. 580

Hon'ble Judges : Murphy, J; Divatia, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Murphy, J.—This is an appeal from the decree of the First Class Subordinate Judge of Dharwar dismissing the plaintiffs' suit in the following circumstances. The plaintiffs, purporting to be a firm, filed a suit against the defendants, three separate firms at Bellary, praying for a decree for Rs. 3,09,960-6-0 with interest from November 13, 1918, at the rate of six per cent. per annum till date of suit, against the defendants' firm personally, and from their estates. They also prayed for future interest and costs.

2. The suit arose out of a certain transaction, which took place in October, 1918. It appears that about this time there was much activity in the Gadag yarn market. The agreements which are relevant to the appeal were three in number. The first was made on October 6, 1918, between some Marwadi firms and individuals, and the idea was to corner the market in what is called Count No. 20 of Gokak yarn. The corner failed to be secured and broke down.

3. This agreement was made between a firm named Pannaji Devichand and five other firms, or individuals. In the agreement, seven parties are mentioned, but one did not sign. Nine persons did sign and they represented six firms, more than one person having signed for a single firm in some cases. The result of this agreement was a kind of pool of yarn belonging to the parties to it in different

quantities, and the arrangement was that the person to whom the yarn belonged should be given credit for it by the pool at Rs. 14 in the case of yarn for delivery on one settlement day, and at Rs. 14-4-0 for a second. This syndicate was called by the name of the principal firm, Pannaji Devichand & Co. The remaining two documents are Exhts. A and B in the case. Exhibit A is an agreement between the larger firm of Pannaji Devichand and three Bellary firms, and was come to on October 13, 1918. It is both a partnership agreement and a forward contract. The partnership is between the larger Pannaji Devichand firm, called the company by the learned Subordinate Judge, and the three Bellary firms, and its provisions are for the doing of yarn business and dealing in 2,000 bales of Gokak Mill yarn. The larger firm, it was arranged, was to have a four anna interest in the profit or loss, and the three Bellary firms were to have four annas, six annas and two annas respectively.

4. As a forward contract, the document provides that the Bellary firm should have the option either to buy or to sell the 2,000 bales contracted for to the partnership as a whole, the buying price from the association being fixed at Rs. 17 per bundle, there being forty bundles in a bale, and the selling price at Rs. 15 per bundle. There was a condition that the larger Pannaji Devichand firm was not to sell any bales till the two thousand bales covered by this "Mogum" contract had been sold.

5. It is common ground that the defendant firms exercised their option, and elected to buy at Rs. 17 per bundle. But it was disputed whether this election took place on October 14 or 19, which last was the settling day. The prices for the forthcoming settlement on October 19 ruled high, and sales were made at over Rs. 17 per bundle, but the market then broke and a dispute arose between the larger Pannaji Devichand firm, and the defendants. It was because between October 13 and 19 the plaintiff firm had sold eight hundred bales at over Rs. 17 per bundle. The plaintiff firm, however, contended that these sales had nothing to do with the agreement in question, and that the Bellary firms had refused to take delivery. Notices were exchanged by the parties from October 24, one side demanding that the other should pay and take delivery, and the other charging the plaintiff firm with breach of contract. The Bellary firms, thereupon, filed a suit for taking an account of the partnership profits on the sale of the 800 bales, on October 27, 1918. The plaint in the present suit was filed on January 19 following. The Bellary suit was. tried first. It partly succeeded in the original Court, but when it went in appeal to the Madras High Court, that Court held, in Pannaji Devichand v. Senaji Kapurchand I.L.R(1926) Mad. 175, that the suit could not lie, since it disclosed a partnership consisting of more than twenty persons, and so transgressed the provisions of Section 4(2) of the Indian Companies Act. A further appeal to His Majesty's Privy Council failed. This suit had in the meanwhile beep, stayed, and was proceeded with on the final decision of the Bellary one. The plaint in the Bellary suit set out a partnership of twenty-two persons, fourteen plaintiffs and eight defendants, and was, on its face, a breach of the provisions of the Indian Companies Act, The present plaint does

not proceed on the same lines, though based on the same facts. The plaintiff firm here, the firm of Pannaji Devichand excluding the three Bellary firms, sought to recover from the Bellary firms damages for failure to take delivery of 1,500 bales on October 19, 1918, Rs. 3,12,627-9-0 with interest and costs. There has been a long trial in the Court below, and the suit has been dismissed. The plaintiffs are the appellants.

6. It is obvious that if, as found, by the learned Subordinate Judge, the larger syndicate of Pannaji Devichand included more than twenty persons, the suit must fail; but I think myself that though in form it is different to the Bellary suit, it must also fail for the same reason as that one did, for its basis is the contract, Exh. A, and Exh. A on its face includes a partnership agreement between the larger firm of Pannaji Devichand, and the three Bellary firms, and since the former one, even on plaintiff's case, includes sixteen persons and the three Bellary firms eight, there were twenty four individuals at least concerned and forming an association which, in turn, contracted with the three separate Bellary firms, which were also members of it.

7. Mr. Murdeshwar for the appellants has sought to get out of the difficulty involved by these facts in two ways. In the first place, he has argued that even though this association did comprise more than twenty persons, it was not an association for the purpose of doing business. For this interpretation of the word "sbusiness", he has relied on the case of *Smith v. Anderson* (1880) 15 Ch. D. 247, where Lord Chief Justice Brett defined "business" as containing an element of continuity in its transaction, i.e., a business must be not one single business act, but a series of acts. This was in view of the first part of the definition in the old English Act, which was in the same terms as the Indian Companies Act here applicable. The ratio decidendi was, that, since the first part of the definition contemplated a series of acts, the second part of the definition would similarly do so. Another case relied on by Mr. Murdeshwar was *Kirkwood v. Gadd* [1910] A.C. 422 431, where it is stated that the idea of business involves a repetition of acts, the sum of which constitutes the "business", and *Smithy. Anderson* is referred to.

8. The difficulty, in the present case, for applying this ruling, seems to me to be the terms of Exh. A on which the suit is really based. What is contemplated in Exh. A is that the three Bellary firms, forming part of the syndicate, should have the option of selling the 2000 bales contracted for at Rs. 15 per bundle, or buying them at Rs. 17. Thereafter, as I interpret the agreement, the 2,000 bales were to be sold by the firm of Pannaji Devichand, and presumably not sold in one transaction, but in different lots, and the proceeds of the sales were then to be divided, if there was a profit, or the loss, if there was one, was to be apportioned between all the firms forming the syndicate. I think it is Clear from this agreement that the intention was to do business, and that the distinction made by Mr. Murdeshwar is not a substantial one. The point has really been decided on the same facts by the Madras High Court in the case already quoted of *Pannaji Devichand v. Senaji Kapurchand*.

9. Mr. Murdeshwar's other point turns on the interpretation of the contract. His contention is that though the original arrangement was as contemplated in Exh. A, and its counterpart Exh. B, what really happened on October 19, which was the settlement day, was that by an agreement between the parties, being the Bellary firms and the small firm of Pannaji Devichand, who transacted the business of the larger syndicate of that name also, the original contract was modified to one of an offer to buy at Rs. 17 by the three Bellary firms, and an acceptance of that offer and an agreement to deliver 1,500 bales by the larger syndicate, and that the suit was really based on such an agreement and therefore did not involve any transaction by an illegally constituted syndicate.

10. In order to examine this point the plaint has to be looked at. It begins by reciting the negotiations which had preceded the agreement evidenced in Exh. A, and then goes on to say-

On the 19th October 1918, the said wahiwatdars of the defendants came to Gadag and accepted the proposal of Dhulaji regarding the purchase by them of 2,000 bales" from the plaintiff at the rate of Rs. 17 per bundle, and consented to share the profits and losses according to the shares mentioned in the above stated memo, namely:

Then comes the statement of the shares. Then it says-

This contract thus took place at Gadag on 19th October 1918 in the presence of many merchants and others, and accordingly the plaintiff sold 1,500 bales of yarn to the defendants on that day at the rate of Rs. 17 per bundle i.e., for Rs. 10,20,637-8-0 including customary Dharmadey after deducting 500 bales of plaintiff's one-fourth share out of 2,000, and debited the same (i.e., Rs. 10,20,637-8-0) in the plaintiff's account in the names of defendants on the same day.

11. Further on, in paragraph 5, it says-

As the defendants failed to pay the price and take delivery of the said 1,500 bales, the plaintiff issued a public notice, dated 9th November 1918, to the defendants as well as to the general public intimating that the said 1,500 bales would be sold on 13th November 1918 by public auction at Gadag.

and so on, and finally it states-

The cause of action arose on 19th October 1918 when the sale of 1,500 bales took place.

As the contract for sale of 2,000 bales took place at Gadag and so also the actual sale of them by plaintiff to defendants, and as the claim is more than Rs. 5,000 this Court has jurisdiction to entertain this suit.

12. The plaint is really rather confused, but it is quite clear that what it recites is not a novation of the old contract as urged by Mr. Murdeshwar. He says that it can be inferred from the plaint and the statement of facts in the plaint that the

suit really was one based on the agreement in Exh. A by which the defendants after exercising their option to buy or sell-and the defendants elected to buy-were bound to buy the whole of the 2000 bales and pay for them on the settling day; but I do not think the fact that what was sued for was the price for 1500 bales only is really significant, for since the plaintiffs had a one-fourth share in the profits, the obvious way of reckoning was to allot 500 bales out of the 2000 bales to the plaintiffs and 1500 bales to the defendants, though the defendants were really bound to pay for the 2000 bales and then divide the profit and loss. I think that neither of Mr. Murdeshwar's arguments, the first, that no "business" was contemplated within the terms of Section 4(2) at the Indian Companies Act, and the second that the contract evidenced by Exh. A went by the board, and that what really happened on October 19 was the entering into a new contract for a simple sale by the plaintiffs to the defendants of 1500 bales, are supported by the facts of the case.

13. The defendants' case throughout has been on the basis of their claim in the Bellary suit, that what happened was, that after the contract, Exh. A, was entered into, they exercised their option of buying or selling on October 14, that between that date and October 18, the plaintiff firm sold 800 bales to other persons, and that this was a breach of the condition in the agreement, that the 2000 bales contemplated by Exh. A were first to be sold by the plaintiff firm, before there was any sale on their own account.

14. There was a conflict of evidence as to this point in the Bellary suit. The finding was that the option had been exercised on the 14th and not on October 19, and it is clear, I think, on the evidence that this was, in fact, so.

15. There are several other points in the appeal including the question whether the plaintiff really sold the bales which had been refused delivery of by the defendants some time later. As to this it is clear to me that if there was an auction sale later on, it would not help the plaintiffs, for the assessment of damages would necessarily be as on October 19, the settling day, when the defendants failed to take delivery, and not on the date on which the auction was held. Moreover, as has been shown by the learned Subordinate Judge, there was really no auction sale at all. Certain purchasers are said to have bought the bales refused by the defendants, and a few days later, to have re-sold the same bales to the plaintiff's firm, the amount due being in some cases remitted, and the loss being all ultimately debited to the yarn "khata" of the plaintiff firm.

16. As I understand the pleadings and read the evidence, what is happening here on the basis of the agreement in Exh. A is not what has been suggested by Mr. Murdeshwar, but something quite different. The larger syndicate, which includes the plaintiffs and the defendants, is suing the defendants, its own members, for damages; for though the difficulty has been veiled by abandoning the claim as to 500 bales, as being the share of the now plaintiff part of the syndicate, and only claiming on 1500 bales, being the share of the now defendant part of the syndicate, the fact remains that if there was a firm constituted by Exh. A, it is

that firm that has been damaged and that that firm must sue as such, and cannot, so to speak, split itself into two parts, and maintain a suit of this kind one fraction against another.

17. In the Madras case the pleadings themselves disclosed the real nature of the suit since it was one for accounts: the device of pleading adopted in this one does not, I think, alter its real character of being essentially one for accounts as between different members of the association.

18. It is clear that here also it is the syndicate as a whole that is suing, and being formed of more than twenty persons, it cannot, not having been registered as a company, maintain the suit. I think the learned Subordinate Judge's decree is correct and that it must be confirmed and that the appeal must be dismissed with costs.

Divatia, J.

19. I concur. I agree on the first point argued in the appeal that the partnership in suit is an illegal association, as has been held with regard to this very partnership in *Pannaji Devichand v. Senaji Kapurchand* I.L.R.1926) Mad. 175. The learned advocate on behalf of the appellant has tried to distinguish that case from the present one on the ground that here the allegations in the plaint are different to those in the plaint in that case. But there is no substantial difference. It seems to me that the terms of the agreement are to the effect that what was to be divided between the parties was only the profit to be realized from these bales, and as sales were to be made and the profits divided into several shares, that transaction was clearly a partnership business and not a mere single venture, as has been held in AIR 1914 132 (Privy Council) .

20. On the merits of the case the question to be decided is which version is correct, that of the plaintiffs or that of the defendants. Under the agreement it is common ground that the defendants were to exercise the option of either purchase or sale with regard to the 2,000 bales. The difference between the parties is as to on which date that option was to be exercised. According to the appellants, the option had to be exercised only on the vaida day, which was Aso Sud 15th, while according to the defendants the agreement contemplated that the option was to be exercised at any time between the date of the agreement and the vaida day, i.e., between October 13 and 19, and it was on the latter date that the transaction was to be closed, and the delivery of the bales was to be given by them.

21. It is common ground that these 2,000 bales were to be sold first, before any other bales in the possession of the plaintiffs could be sold. Then, again, it is common ground that the plaintiffs had, at least on paper, a very large number of yarn bales to be disposed of, and that they had clearly an intention of cornering this particular kind of yarn in the Gadag market before the vaida day. The object of this agreement seems to be this, that as the plaintiffs themselves had a very large number of bales in their possession and as they intended to realize as

much profit from them as possible, they had to reduce their risk to a certain extent in case the market went against them by the time the vaida day arrived, and the defendants entered into this partnership with the plaintiffs for the common benefit of both the parties. The benefit to the defendants would be that they would be able to share in the profits at which these 2000 bales were to be sold, in case the rate of the market goes higher, and the plaintiffs were to profit inasmuch as in case the market went down these two thousand bales at least would be disposed of by this agreement.

22. Now, it is clear, on the evidence, that between October 13, on which date this contract was entered into, and the vaida day, the rates certainly did go high, with the result that by the time the Pournima day arrived, the rate was Rs. 17 and even more.

23. Now, the defendants' case is that as they had been given the right to make the option, they had to buy or sell these bales, and in view of the fact that the rate was rising from day to day, it was to their interest to exercise the option for the purchase of these bales, and that it was clearly profitable for them to exercise that option as soon as possible, so that after exercising their option by purchasing the bales at Rs. 17 they might be able to profit as much as possible by the settlement day by which time the rates were likely to go up. On the other hand, the plaintiffs contend that under the agreement the defendants had to make the choice only on the vaida day, and that that choice was to be made by them according to the prevailing rate on that particular day and that if the rate was rising they might exercise the option of purchasing, and if the rate fell they might exercise the option of selling.

24. Now, the contract itself does not specifically state as to whether the choice was to be exercised on a particular day. The wording of the contract is that 2,000 bales of the vaida of Aso Sud 15th were made the subject-matter of this contract, and the respondents' argument is that the 2000 bales being of that vaida, the choice with regard to them was to be made at any time before the vaida day arrived.

25. The appellants contend that the meaning of this expression is that it is on the vaida day alone that the option could be exercised, but there is no such phraseology in this agreement, and therefore we have to look to the general circumstances of the case and the probabilities in order to find out whether it was open to the defendants to exercise their option at any time between October 13 and 19. In my opinion it is plain that the parties contemplated that the defendants were to exercise their option at any time between these two dates: otherwise there was no meaning in giving that choice to the defendants. The appellants contend that even though the choice was to be made by them on the 19th, still they might have a margin of profit, because they might either choose to purchase or sell according to the trend of the market. But, although that may be a possibility by itself, that does not exclude the other possibility which, I think, is a greater possibility in this case, viz., that the market having risen by

that time, and there being every chance of the market rising from day to day, the defendants would naturally make up their mind to choose to purchase the bales as soon as possible, so that when the rate rises above that rate then there would be a clear margin of profit to be divided between the parties.

26. On this point various witnesses have been examined on both the sides in the Bellary Court, where originally the present defendants had filed a suit against the plaintiffs for the winding up and accounts of this partnership, and where their case was that they had already exercised their option on October 14 and that as many as 800 bales were sold soon after that and they demanded an account of the sale of these 800 bales, and also for the 1200 bales which remained undelivered. In the present case the parties have agreed that the depositions of the witnesses who had been examined in the Bellary Court on this point should be accepted and that evidence be treated as evidence in this case, and the only additional evidence on this point, that is given here, is that of Dhanaji who belongs to the 1st defendant firm, who is examined in this case as well as in the Bellary suit. The plaintiffs' manager, Dhuraji, was examined in the Bellary Court, but being afterwards dead he could not be examined in the present suit, nor has any of the other defendants been examined here, and we have, therefore, to fall back on the depositions in the Bellary Court, and I agree with the lower Court on this point on the evidence, viz., that in the circumstances of the case the version given by the defendants is more probable and natural than that given by the plaintiffs. The defendants' version which Dhanaji has given in the Bellary suit is shortly this, that as profits and losses were to be divided according to the shares agreed upon, under the agreement they exercised their option on the Navami day, which corresponds to October 14, and the merchants began to ask for the sale of the goods, that the plaintiffs had gone to Bellary and 800 bales were sold after the election was made by the defendants, and that with respect to the remaining 1,200 bales both the parties were to make joint exertions before the vaida day arrived, but that it appeared that after the plaintiff's return to Gadag, according to the defendants, they sold some of the bales but no account was kept of these bales, and ultimately when they came there on the vaida day they demanded an account of the 800 bales and also for an account as to the remaining bales; they stated the profits should be divided, or that, in any case, after deducting the share of the plaintiffs 900 bales should be handed over. The defendants' case further is that at that time some of the merchants interceded and a panchayat was formed with Gannaji, Sogaji and Jayashankar, as panchayatdars to settle the dispute between the parties, and as a result of that panchayat the panchayatdars fixed the rate of Rs. 17-4-0 for this particular kind of yarn.

27. It is common ground that the corner which the plaintiffs contemplated failed, and there were apprehensions in the minds of both the sides that the rates for the yarn would at once fall down and the defendants therefore were eager to get their share from the sale transaction of these 800 bales. The plaintiff's version is that on the vaida day the defendants came to Gadag and they made up their

choice of purchasing the bales, but instead of taking delivery of the bales, when they saw that the price was going up, they asked for an extension of the time for the payment of the price which the plaintiff granted, and the defendants went to their home in Bellary saying that they would send the money, but instead of sending the price of the bales, they sent a registered notice with a copy of a plaint which they had filed in the Bellary Court on the 23rd or 24th, to which the plaintiff replied on October 28, in which he repudiated the defendants' version and stated that the defendants had committed a breach by not taking delivery, and therefore the defendants were liable.

28. Now, it seems to me, that looking to the agreement itself it was clearly the intention of the parties not to demand delivery of the bales in specie, but to deal with the profits or losses according to the shares, and I think that the amount was to be divided between the parties after the defendants had exercised their choice, and this is also in part conceded by the present appellants who however say that the profits and losses were to be divided only if the defendants exercised their choice of purchasing the bales and not if they exercised their choice of selling. There does not appear to be any intrinsic evidence in this agreement and it is entirely silent as to what was to happen if the defendants purchased and not sold, and the 2000 bales being sold first would apply to both cases, and that being so, it would appear that the profits and losses themselves were to be divided in every case, i.e., whether the defendants elected to purchase or to sell, and if the profits were to be divided how would the plaintiffs treat this transaction on the night of the Pournami day as the vendor of the bales, except on the supposition of the defendants, having already exercised their option before that day, when the rate had fallen down considerably, so that the plaintiffs having in the meanwhile sold a large number of the 2000 bales, they wanted to appropriate the profits of the sale of these bales to themselves and not to give these profits to the defendants. No doubt, several witnesses have come forward to depose in the plaintiff's favour, and some also on behalf of the defendants, but the matter to my mind is to be decided not so much by the number of witnesses who have come forward on either side, but the intrinsic nature of the evidence which they speak to, and I have no doubt in the circumstances of the present case that the defendants' version is more probable than the plaintiff's. I may say that although the decision of the Bellary Court is not binding in this appeal, that Court has also held on the evidence that the defendants had to exercise their choice at any time between October 13 and 19, and as a matter of fact they did exercise their option on October 14. I say this because both the parties in this case have chosen to incorporate bodily the evidence given in that suit in the present suit, so that practically we have to decide this point on the same materials which were supplied by the parties to the Bellary Court, and, apart from the decision arrived at by that Court, I am inclined to hold independently of that decision that the defendants' version is more probable.

29. But, even assuming that the defendants did not make their choice on the

14th, but on the Patapati day, and did not take delivery of the 1,500 bales, so that it was the defendants who broke the contract and not the plaintiffs, the point still remains as to whether, and if so, what damages would the plaintiff be entitled to get. Now, on this point the plaintiff has come to the Court with this story. He says that as the defendants did not take the delivery on the vaida day, he had to borrow a large amount from creditors in order to meet his total liabilities, which included these 1500 bales for which the defendants had defaulted, and he made a debit and credit entry as to this in his khata and subsequently he gave defendants a notice that in case they did not take delivery of the bales, he would sell all bales at their risk. That notice according to them was given on November 9, 1918, and subsequently they held an auction sale on November 19, and as a result of this auction, they say that they realized about seven lakhs and odd, whereas the total loss to which they were put on account of the defendants' default was about ten lakhs and odd with the result that in spite of the resale having been held on the 13th there was a deficit of three lakhs and odd, for which they have brought a suit against the defendants.

30. Now, as to this re-sale, the plaintiffs' case was that on the 13th they sold these 1500 bales to seven persons and it is conceded that all these persons have re-sold the same bales to the plaintiffs immediately after this alleged auction sale, and it is further conceded that the plaintiff did not receive a single pie from any of these so-called auction purchasers, with the result that these 1500 bales have remained in plaintiffs' possession throughout. It is very difficult to understand how the plaintiffs can make a demand to claim three lakhs and odd damages on the basis of this bogus auction sale, and it has been conceded by the learned advocate on behalf of the appellant that this sale being bogus, he would not be able to claim damages on this ground, and therefore he shifts his ground in this Court and says that though he cannot demand damages on this basis, he can, however, demand damages on the basis that the defendants did not take delivery of these bales within three days after the notice reached them, and therefore he was entitled to damages on the basis of the difference between the contract rate and the market rate prevailing on the date of the breach, which, according to him, was October 27 or 28.

31. Now, on this point, the plaintiffs' case is-as it is admitted-that, according to the general provisions of law, they would be entitled only to damages on the basis of the difference between the contract rate and the market rate on the due date, which would be the 19th, or at the most October 20, but the plaintiffs say that the defendants had asked for an extension of time to pay of three or four days which they had granted, and as the defendants went to their native place at Bellary, and subsequently as they did not send the money the plaintiffs had to send a notice granting three days' time, and it was at the expiry of that period that the plaintiffs became entitled to sue for damages, and that therefore the due date should be taken three days after the notice reached them and not on the date on which the delivery was to be made.

32. Now, on this point it is important to note that in the plaint it is stated that the cause of action arose on October 19, 1918, when the sale of 1,500 bales took place. I think that this cause of action was correctly stated in the plaint, and as it is admitted by the defendant himself in his deposition that the bales were to be delivered on the Patapati day on which the settlement was to be made, we may take it that the bales were to be delivered on the 20th, but in no case can it be said that the date of the delivery or the date which is material for the assessment of damage would be any date later than October 20.

33. While discussing the merits of the case, I disbelieved the plaintiff's version, and therefore this part of the plaintiff's version that there was an extension of time has also to be disbelieved on the same ground, and also because there was no reason at all, if the defendants broke the contract on the 19th, why the plaintiff should agree with the defendant that they should be given further time for making payment, when-as is admitted by both the sides-the market was fast falling, because he knew at that time that if the market fell further the sale of the bales would realise much less price, and it is obviously the duty of the party against whom the contract is broken to minimise the damages as much as possible, and assuming that the contract was broken by the defendants, it was the duty of the plaintiff to give the defendants a notice as soon as possible, if he has in mind a re-sale of the bales. Therefore, on this evidence, even if the plaintiff is entitled to any damages it would be on the basis of the difference between the contract rate and the rate prevailing on the 19th, or at the most on October 20. The contention for the appellant is that on the night of the Pournami day the corner failed and the rates fell down considerably, and even on the next day the rates were below Rs. 17. In the present appeal he has asked for a rate at Rs. 13 so that he wants a difference of Rs. 4 per bundle. Now, it seems to me on the evidence that it cannot be said that the market rate on the 19th or the 20th was Rs. 13. On the other hand, the plaintiff himself has deposed to the rate of Rs. 17, on the 20th. He says in his deposition:

I delivered 100 bales to Siwaraj on 20th October 1918, 50 bales at Rs. 14 per bundle and 50 bales at Rs. 17-2-0 per bundle. The latter 50 bales at Rs. 17-2-0 per bundle related to the ready sales on Pournami. The former 50 bales related to bargain sales on the Padyami day, the vaidā day.

34. He also admits in his cross-examination that on Padyami day, i.e., the 20th October, he sold to various people from Rs. 14 to Rs. 17-9-6 per bundle, and that there were also sales from Rs. 17 to Rs. 17-9-6, and that he had entered as sold 50 bales on Ekam day at Rs. 17-2-0 per bundle. Even on the Saptami day, i.e., about 6 days after the Patapati day, he has admitted that the rates were from Rs. 17 to Rs. 17-4-0 per bundle, and that it was at that rate that he made a transaction of about 486 bales. But the appellants contend that this was the vaidā rate, in other words, this was the rate fixed for the previous delivery under which the account was to be made on the basis of the rate prevailing on the Pournami day, i.e., the vaidā day, although the transaction may be settled later,

and in some cases it has been said that the rates show the transaction of the next vaida, i.e., of Kartik Sud 15th, and for the purpose of the market rate we have to look to the rate of delivery of ready bales and not to any delivery by vaida. It is true that several of these transactions are vaida transactions-i.e., forward transactions-and not transactions of ready sale-as also are several transactions deposed to by one witness from Sholapur who says that he entered into several transactions with regard to yarn of this quality from the 20th October to the end of that month at rates varying between Rs. 17 to Rs. 18-5-0 per bundle. But if the plaintiff is entitled to damages he would be entitled to them only on the ground that there was a market for the goods of this quality. He says that there were very few ready transactions at Gadag, although there were some at Bellary, but the rates at Bellary are no proof. The plaintiff has given some evidence as to the rates at Sholapur and as to the rates of yarn in Bombay, but that rate is no guide for determining the market rate prevailing at Gadag on this day. Because, in the first place, the market rate at Gadag was admittedly very high in view of the attempted corner by the plaintiffs, and that therefore even though the corner failed on the vaida day, it cannot be said that either on the night of the same day or the next day the prices of yarn fell down to the same level as prevailed at Sholapur or Bombay. Besides, even if we take the rates prevailing in Sholapur or Bombay in order to arrive at the market rate at Gadag, we have to add to this rate the railway freight on these goods between these places and Gadag, and we have no evidence in this case as to the railway freight, so that we have really speaking no materials for determining the damages except the rates of certain forward transactions of goods of this description, and these transactions show that the prevailing rates were in most cases more than Rs. 17. It is true that some of the transactions appear to be between Rs. 15 and Rs. 17, but the plaintiff has not shown clearly as to what was the exact rate at the time when delivery could have been asked for. He himself having stated in the plaint that the cause of action arose on October 19, he was bound to prove what was the prevailing rate on that day, and even assuming that the rates fell down on the same day, when it was known to him that on the 19th the defendants were not able to take delivery, he ought to have taken steps to re-sell the very bales on the very day. On this state of the evidence the plaintiff has not proved to my mind that he is entitled to recover any damages, because he has not proved that he has suffered any.

35. As to the entry of certain losses which the plaintiff has in his books according to him on the same day, the learned Judge below is of opinion that these entries are subsequently got up, and it was only after the plaintiff knew that the defendants were going to take steps against him that these entries had been made by him about six or seven days later. We have been shown these entries, and also the original books, and though one may not go so far as to say that any pages have been removed from this book, it certainly does appear that the account of several days before the 14th, when the defendants made their option, does not appear in the plaintiff's books. We have an account of the Pournami

day where the transaction of 800 bales is shown. It would appear, therefore, that the mere fact of these entries in the plaintiff's books by itself would not show that the defendants were not to exercise their option earlier than the vaida day. It is admitted that in some cases the balances are not shown every day, and that the transactions of previous dates are entered on subsequent dates. Therefore, it is not proper to rely entirely on these entries, and the circumstances of the case being against the plaintiff, the plaintiff is not entitled to an inference in his favour from entries in his own account books, which are admittedly made after the transaction is alleged to have taken place. On this ground, I am of opinion that the defendants have not broken the contract, and even if they have, the plaintiff is not entitled to any damages.

36. I may mention one fact here. It is conceded by the learned advocate for the appellants that if the transaction with regard to the sale of 800 bales be regarded as a part of the transaction of the 2,000 bales in suit, then in that case it would clearly be illegal and the case would be governed by the decision in Pannaji Devichand v. Senaji Kapurchand, and that an association for the division of those profits would be illegal. If, therefore, it is true, as I have held to be on the merits of the case, that the defendants did exercise their option on the 14th, so that the transaction of the 800 bales between the 14th and the 19th was certainly a part of the transaction of the 2000 bales, and therefore the profits of this transaction were to be divided between the parties, it clearly follows that this is an illegal association and that the plaintiffs cannot make any claim on this basis as such a case would fall u/s 4(2) of the Indian Companies Act.

37. For these reasons, I agree with the decision of the lower Court and dismiss the appeal with costs.