

(1940) 09 BOM CK 0004
In the Bombay High Court
Case No : O.C.J. Suit No. 195 of 1940

Rai Saheb Ulfatrai Hukumchand

APPELLANT

Vs

Nagarmal Gopimal Rao

RESPONDENT

Date of Decision : 24-09-1940

Acts Referred:

Citation : AIR 1941 Bom 211 : (1941) 43 BOMLR 269

Hon'ble Judges : Blackwell, J

Bench : Single Bench

Judgement

Blackwell, J.—The plaintiff, who carried on business at Delhi, employed the defendants, who carry on business in Bombay, as his pakka adatis to effect for him forward transactions in gold, silver, cotton and linseed. Certain transactions were outstanding on October 5, 1939, and the plaintiff says that on that date the defendants wrongfully closed those transactions. He gave to the defendants instructions to close those transactions upon the footing that they were still outstanding on October 14, 1939, and says that if the defendants had carried out those instructions, as they were bound to do, a sum of Rs. 4225-10-9 would have been found due to him on taking the accounts between the parties. The defendants, on the other hand, say that they were entitled to close the outstanding transactions on October 5, 1939, and that, upon the footing that they were so entitled, a sum of Rs. 67-5-3 is payable to them by the plaintiff on taking the accounts on that day, and they counterclaim for that amount.

2. It is necessary to ascertain what terms were arrived at for conducting the business between the parties, this being in dispute. The plaintiff before employing the defendants had previously employed Messrs. Dhanpatmal Diwanchand to effect his forward transactions. One Ramnarain Jauhar was a partner in that firm. According to the plaintiff, he had arranged terms with Ramnarain Jauhar upon which the business was to be done including the payment of deposit and margin in respect of the various commodities. Ramnarain Jauhar joined the defendant firm. In the correspondence, to which I shall presently refer, he

described himself as a partner in the defendant firm. According to the evidence of the defendants he was not a partner, but was employed for the purpose of introducing business with a possible partnership in view. This makes no difference, because although he has, according to the: defendants, improperly signed the letters, to which I shall refer, as a partner, the defendants accept responsibility for them.

3. On August 12, 1939, the defendants by Ramnarain Jauhar wrote to the plaintiff asking him to place his business with them. In reply the plaintiff by his letter of August 14, 1939, asked the defendants to let him know their commission charges and lowest rates, and also upon what basis they would do business with him. In reply the defendants by Ramnarain Jauhar wrote a letter dated August 16. In that letter the defendants first set out the various charges which they would make for adat. They then said as follows:--

We shall do forward business for four lots of wheat or linseed or one hundred bales of cotton or ten or twelve bars of silver without any deposit. Deposit will be necessary for more business (than this). As regards the business done without deposit, God forbid, if there is any loss in such transactions, you shall have to pay the same here at the same time.

The letter went on to say that the limit there mentioned could be increased or decreased when the business was done fairly, and it requested the plaintiff to send them business.

4. The plaintiff maintained that the whole of the terms upon which he was to do business with the defendants were contained in this letter. He conceded, however, that some arrangement would have had to be come to in regard to the amount of deposit for business exceeding the limits mentioned in the letter. In order to get over this difficulty, after referring to the arrangement previously made between him and Ramnarain Jauhar on behalf of the firm of Dhanpatmal Diwanchand as to the rates of deposit, he said that he assumed that those rates would be applicable to the business done between himself and the defendants. He did not profess to say that any such arrangement was come to with the defendants, and it was not suggested that there was any oral interview, the matter depending merely upon the letter of August 16, 1939. In fact whenever the plaintiff placed an order with the defendants they sent him with a covering letter written contracts in duplicate, one part signed by themselves, and they requested the plaintiff in the covering letter to sign the other part and return it to them. Thus in the defendants' letter of August 27, 1939, with reference to the initial transactions, the defendants referred to a telegram which they had sent to the plaintiff intimating to him that they had carried out his instructions, and stated that he must have received the telegram and noted the transactions. Then they said that they enclosed three contracts in respect of the transactions in question and requested the plaintiff to send to them the confirmation notes duly signed by him. In every case, except the last linseed contract of October 2, to which I shall refer later, the plaintiff received such contracts, signed the

confirmation notes, and returned them to the defendants. He said in his evidence that he treated those confirmation notes merely as confirmation of the amount of goods bought or sold and the rates, and paid no attention to the terms, and that he was not obliged to do so. I do not believe him. I think that he knew perfectly well that the terms were contained in the contracts sent to him, but whether he knew that or not his conduct in signing those confirmation notes, in my opinion, makes the terms therein contained binding upon him. The result is that I hold that the business was done on the terms contained in the various contracts sent by the defendants to the plaintiff, except so far as those terms were cut down by what was contained in the letter of August 16 in reference to commission and the right given to the plaintiff to do forward business up to a certain limit without deposit.

5. A further question arising is as to the proper construction to be placed upon the paragraph in that letter, which I have already quoted in full, in regard to the plaintiff's right to do forward business without any deposit. According to the defendants, the word "or" in that paragraph means what it ordinarily would mean, viz., that it gave to the plaintiff alternative rights to do business in respect of the different classes of commodities mentioned up to the limits mentioned. According to the defendants, if the plaintiff did business in four lots of linseed, for instance, he would not be entitled, while such a contract was outstanding, to do business in any of the other commodities without paying a deposit. For the plaintiff it was argued that the word "or" should be given an inclusive or non-alternative sense. It was contended that it was the intention of the parties to do business in various commodities which are mentioned in the letter, and that the intention was to give the plaintiff the right to do business in any of those commodities up to the limit mentioned. If this had been the intention, I should have expected the word used to be either "and" or "and/or". I have to remember that a pakka adatia, who does forward business without an initial deposit, may incur a considerable risk if the market suddenly drops. In construing this part of the letter, therefore, I feel bound to give a strict meaning to the use of the word "or". I accept, therefore, the construction contended for by the defendants, and hold that once the plaintiff has done business to the limit mentioned in any one of the commodities specified, if he wishes to do business in any of the other commodities, he must, so long as the business already done to the limit mentioned is outstanding, pay deposit in respect of the further business.

6. In order to see what the position was on October 5, 1939, when the defendants closed the transactions of the plaintiff which were then outstanding, because he failed to comply with a demand to remit the sum of Rs. 2000, I propose to review the transactions briefly. On August 25, 1939, the plaintiff instructed the defendants to sell 500 tolas of gold for Aso delivery. The contract relating to that sale is exhibit (C). This form of contract applies both to this gold transaction and to the various silver transactions which the plaintiff effected. Clause 3 is the clause which deals with initial deposit and, further margin, and it will therefore be useful to refer to it once and for all in connection with the gold

and silver transactions. It is in the following terms:--

I/we hereby agree to place with you a deposit for margin at the rate of Rs. 100/- after one Peti silver and Rs. 250/- for 250 tolas of gold and I/we agree to maintain such deposit and to forthwith deposit with you in Bombay such further sum or sums of money as you may from time to time require as further margin and I/we agree that the amount of such further margin from time to time required by you shall be in your absolute discretion. Interest at 6% per annum will be credited to me/us on the amount of the margin for the time being standing with you. If I/we fail to pay you the required margin within the time given after demand by letter or telegram addressed to my/our usual or last known residence or place of business, it shall be lawful for you without any notice to me/us to close my/our contract or to act as advised on my/our risk and on my/our account.

It will be observed that this clause imposes an obligation upon the constituent to deposit without demand the initial deposit mentioned and to maintain such deposit. As regards the further margin it will also be observed that the constituent is to pay such further margin as may be required, i.e., he is not bound to pay further margin in respect of gold and silver unless and until a demand is made upon him to do so. Further the right to close is made conditional upon a demand by letter or telegram and a requirement to pay margin within the time given in that letter or telegram. It is important to bear this point in mind having regard to what happened later in this case and to a contention by the defendants that they were entitled to treat a fall in the silver market of Rs. 630 on a silver contract then outstanding as included in a general demand for Rs. 2000 without making any specific demand for further margin in reference to the outstanding silver contract.

7. On the sale of gold effected on August 25, there was an obligation upon the plaintiff by virtue of this clause to pay Rs. 500 as initial deposit. That sum was not paid. The defendants did not ask for payment, nor did they even debit that amount to the plaintiff. At the time when this sale was effected the plaintiff also applied nazrana at the rate of eleven annas per tola on five hundred tolas for the Aso vaida in respect of which he became liable to pay a premium of Rs. 364-1-9. The plaintiff contends that he was under no obligation to pay the sum of Rs. 500 the initial deposit, because he had effected the nazrana transaction; but by virtue of the double option he could at the due date declare himself either a buyer or a seller, and it by no means followed that he would declare himself a buyer against the sale of five hundred tolas of gold. The defendants contend that these transactions were independent and that they were under a risk having regard to possible fluctuations in the market in respect of the sale of 500 tolas of gold, because the plaintiff might not have declared himself a buyer and closed that transaction by a purchase, but might, on the contrary, have declared himself a seller. In my opinion the defendants' contention is right. I hold that Rs. 500 were payable and maintainable. The defendants, however, were entitled to waive

payment of that sum for as long as they pleased, and as they did not even debit the amount to the plaintiff and inform him that they had done so, I think that they must be treated as having waived payment up to October 5, and that the plaintiff was entitled to assume that they had done so; but, when October 5 arrived, I think that the defendants were entitled to bring that sum into account in considering what the credit and debit relationship between them and the plaintiff was, but to enable them effectually to do so I think that it was incumbent upon them, if they were going to call for margin on that date, upon the basis that they were bringing that sum into account, to inform the plaintiff clearly as to what the position then was.

8. As regards the sum of Rs. 364-1-9, the premium payable on the nazrana, the plaintiff contends that that sum was not payable by him until the due date, viz., October 31, 1939. With their letter of August 27, 1939, the defendants" sent to the plaintiff a bill debiting that amount to the plaintiff and requesting him to credit the same to their account. The plaintiff did not object, and I hold that that amount became payable by him as from August 26, 1939.

9. The first transaction in silver was a purchase of ten bars on August 25, 1939. That being the first transaction no initial deposit was payable in respect of it. On September 2, 1939, the plaintiff purchased a further lot of ten bars of silver. The plaintiff recognised his obligation to pay a deposit in respect of that purchase in his telegram to the defendants of September 2, 1939, in which he said that he was sending money. By their telegram of September 3, 1939, the defendants requested him in reference to that purchase of silver to remit Rs. 1000. But the payment of that deposit was not insisted upon, no doubt because the market rose. It was not debited to the plaintiff by the defendants, and the purchases of August 25 and September 2 were closed by two contracts of sale dated September 19 and 26, 1939. As the result of this closing there was a profit to the plaintiff of Rs. 2344-11-3 and Rs. 1757-4-3 amounting in all to Rs. 4101-15-6. The defendants credited those sums to the plaintiff on September 20 and 27, 1939, and sent with their letter of October 3 bills showing those credits. It is to be observed that there is no debit in those bills for any initial deposit. The defendants" manager first said with regard to this that the defendants had no right to look to the plaintiff for the deposit of Rs. 1000 of the purchase of September 2 after the closing. After the overnight adjournment, however, he changed his evidence and said that the defendants notwithstanding the closing had the right to retain a deposit of Rs. 1000 up to the due date, viz., October 13, 1939. He said this although that: sum had not been paid, nor debited, nor demanded. I hold that the defendants had no right to this deposit after those transactions were closed.

10. The plaintiff purchased one hundred bales of cotton on September 16, 1939, at the rate of Rs. 220 per candy, and a further one hundred bales of cotton on September 26, 1939, at the rate of Rs. 198-8 per candy, the delivery date in each case being April/May, 1940. The contracts relating to those purchases are

exhibits (E) and (H). The contracts contain a provision for the payment of margin to be paid and maintained by the plaintiff until completion of the contract. The amount payable is, however, left in blank. Counsel for the defendants, after the plaintiff's case was closed, asked for leave to amend paragraph 4 of his points of defence by adding at the end thereof the following words:--

Although in the contract for cotton the amount of rupees for margin is kept blank, according to the custom and usage of the market well known to the plaintiff the said amount was Rs. 500 for 50 bales or Rs. 1000 for hundred bales.

The defendants' attention had been specifically drawn to the point in paragraph 2 of the points of reply, and he had made no application to amend his written statement. I refused leave to amend both because I thought that it was too late after the plaintiff's case was closed, and because where the contract itself makes provision for the payment of margin but the amount is left blank, I thought that there was no room for the application of a custom or usage of the market and that if the parties had not chosen to fill up the blanks they must be treated as having agreed that no initial deposit as contemplated by the written contract should be paid. I hold that no initial deposit was payable in respect of either of these contracts. Each contract contains a further provision that difference between the contract price and the market price arising against the constituent owing to fluctuations of the market was to be paid by the constituent in cash to the defendants in Bombay as and when they arise. That imposed an absolute obligation upon the plaintiff to pay, and it is common ground that the sum of Rs. 1975 was payable owing to fluctuations in the market in respect of both these purchases of cotton on October 5, 1939.

11. On October 2, 1939, the plaintiff purchased a further ten bars of silver for the Aso vaida at Rs. 59-4. An initial deposit of Rs. 1000, in my opinion, became payable and maintainable; by him having regard to the construction which I have placed on the provision as to the limit up to which commodities could be purchased without deposit in the letter of August 16, 1939. That sum was not paid, nor was it debited by the defendants to the plaintiff, nor did they call upon him to pay it, but he remained liable to pay it on October 5, 1939.

12. On October 2, 1939, the plaintiff purchased from the defendants seven lots of linseed, 3500 maunds, at Rs. 6-4-6 per maund. Exhibit (J) is the contract. Clause 5 provides for the payment on demand of an amount equivalent to twenty-five per cent. of the price of the contract of each transaction as an initial deposit and margin, and that margin was to be retained by the defendants until the completion of the contract. Clause 6 provides for the payment of the requisite amounts of money covering the difference due to fluctuations of the market, from time to time, as and when the same arise. These latter amounts are payable without demand. This was the first transaction which the plaintiff put through with the defendants in linseed. The contracts for this and the purchase of the silver of October 2, 1939, were enclosed in the defendants' letter to the plaintiff of October 3, 1939. He did not receive that letter till October 5 or 6,

1939. It was argued for the plaintiff that until he received the contracts he would not know what the amount of initial deposit payable was. He has, however, conceded that he knew that linseed transactions were all made subject to the articles and bye-laws of the Marwadi Chamber of Commerce, and twenty-five per cent of the contract price is the amount required to be paid as initial deposit according to those articles and bye-laws. I think that the) plaintiff must be treated as having agreed to pay that amount, but under Clause (5); of the contract no initial deposit is payable until a demand is made and no specific demand was made for such deposit. No initial deposit, therefore, was payable. It is common ground that Rs. 765 was payable by the plaintiff in respect of the fall in the market on this linseed contract by October 5, 1939. Although he had not received the contract by the morning of October 5, he knew from the letter of August 16, 1939, that he was liable to make payments in respect of a fall in the market.

13. On the morning of October 5, 1939, the position therefore was as follows:-- The plaintiff had standing to his credit Rs. 4101-15-6, the profit on his closed silver transactions and was liable to pay to the defendants Rs. 364-1-9 the premium on the nazrana, and Rs. 1,975 and Rs. 765 in respect of the fall in the market on cotton and linseed. On that footing he had to his credit Rs. 997-13-9. At the same time he was under an obligation to pay Rs. 500 in respect of the sale of gold effected on August 25, and Rs. 1,000 in respect of the purchase of silver effected on October 2, 1939, unless the defendants waived compliance with that objection. As I have already pointed out, it was open to the defendants, if they chose to do so, to waive payment of initial deposits. If they thought that their constituent was a substantial party they might very well waive compliance with that requirement of the contract. It is important to bear this in mind, because when the defendants made, as I shall presently point out, a demand for Rs. 2,000 on October 5, while the plaintiff must be taken to have known that he was liable to pay the premium on the nazrana and the loss in respect of the fall in the market on the cotton and the linseed transactions, it by no means follows that he must be taken to have known that the defendants were also insisting upon payment of Rs. 500 on the sale of gold in August and Rs. 1,000 in respect of the purchase of silver on October 2. He may very well have thought, the defendants not having debited him in fact with either of those sums, and not having asked for payment or informed him that they had debited him, that the defendants were not insisting upon payment of those sums, and that he was in credit with the defendants to the extent of Rs. 997-13-9. In his evidence he said that he looked into the accounts and found that the demand for Rs. 2,000 was not justified.

14. On October 5, 1939, there was also a fall in silver to the extent of Rs. 630 and a fall in gold to the extent of Rs. 2,125, but both these sums were payable only if required, and no demand had been made. If a demand had been made, under the terms of the contracts, the defendants would only have been justified in closing the gold and silver transactions if they had given a time for payment of

the required margin, and it had not been paid within the time required. This must be borne in mind in considering the demand made on October 5, and the terms in which it was couched.

15. On October 3, 1939, the defendants sent to the plaintiff a telegram quoting rates, and they sent a similar telegram on October 4. The contention of the defendants is that the plaintiff ought to have known from these telegrams that the defendants were drawing his attention to the fall in the market with the object of his providing them with margin in consequence of that fall. Neither of those telegrams, however, makes any demand for margin.

16. On October 5, 1939, the defendants sent off at 7-15 a.m. a telegram to the plaintiff, which was received at the telegraph office in Delhi at 8-43, giving the rates and saying "Remit two thousand wire." It is not in evidence at what time that telegram was delivered at the plaintiff's office at Delhi, but he admitted that it must have been received at his office by 10-30 a.m., and was read by his son, but he stated that he did not see it himself till about 11-30 a.m. He said further that after attending to other business he looked into the figures and came to the conclusion that the demand for Rs. 2,000 was not justified, and that he made up his mind to telephone to the defendants in Bombay after 8 p.m. that night, when he could do so for half rates.

17. The defendants not having heard from the plaintiff closed his outstanding transactions at about 3-15 p.m., on October 5, 1930, and sent a telegram to the plaintiff informing him of the rates at which they had closed.

18. It is in controversy as to whether the plaintiff telephoned to the defendants on that night or not. He said that he did so and spoke to Ramnarain Jauhar and told him that the closing was unjustified. I do not think it makes any difference whether the plaintiff telephoned that night or not, and therefore I do not go into that question.

19. On October 6, 1939, in the evening the plaintiff sent a telegram to the defendants in which he acknowledged the receipt of their last telegram and said "No right to close buy same difference of rates if any will be settled afterwards". It is contended that this telegram is an acceptance of the closing by the defendants. No acceptance of the closing was pleaded. An application was made for leave to amend paragraph 11 of the points of defence by adding after the words "on the said October 5, 1939" the following words:

The plaintiff accepted the said alleged breach by his conduct in remaining silent till the night of October 6, 1939, and by sending his telegram on the night of October 6, 1939, containing the words "Received--no right to close buy same--difference of rates if any will be settled afterwards," on that ground and also in law.

I refused leave. The proposed amendment: introduced questions of fact. The plaintiff's case was closed and he had had no opportunity of tendering any

evidence which might have been necessary if acceptance of the breach had been pleaded. As a matter of construction I am clearly of opinion that the telegram of October 6, 1939, was not an acceptance of the closing. It states in terms that the defendants had no right to close. The request which follows to the defendants to buy a like quantity of the commodities, in my; opinion, was an offer by him to the defendants to restore the status quo ante, and as an inducement the plaintiff offered in the telegram to pay differences in rates if any there were. I am quite unable, as the defendants would have me do, to construe this telegram as meaning that he accepted the defendants' right to close and was requesting them by that telegram to do fresh business independently of the closing. As to the submission made on behalf of the defendants that the plaintiff accepted the closing by doing nothing till the night of October 6, 1939, this was not pleaded, and quite apart from that the plaintiff in my opinion was entitled, if he chose, to say nothing. Unless he accepted the closing, he was, I think, in law entitled to look to the defendants to carry out the contracts at the due date. He made it clear, I think, that he did not accept the closing by his telegram of October 6, 1939. By their telegram of October 6, 1939, the defendants placed upon the plaintiff's telegram the construction which I place upon it. In that telegram they insist that they had closed rightfully and that they could do fresh business only against margin. Thereafter the plaintiff did nothing until October 14, 1939, when he sent a telegram to the defendants instructing them to close the purchases which he considered to be still outstanding by selling equivalent quantities. This the defendants declined to do.

20. Were the defendants justified in closing because the plaintiff did not comply with their demand to remit Rs. 2,000 made on October 5, 1939? In my opinion they were not. As was pointed out by their Lordships of the Privy Council in *Diwanchand v. Weld & Co.* (1925) 28 Bom. L.R. 1488 p.c., contracts, effected in different markets for different quantities of particular commodities with different delivery dates, evidenced by separate memoranda, are in law for all purposes distinct the one from the other, and the liabilities of the parties thereof in respect of each are separate. I have drawn attention to the different provisions in the different contracts as to the liability of the plaintiff to pay initial deposit or margin. In some cases a demand is required, in some cases it is not. I have pointed out that, apart from the initial deposit of Rs. 500 in respect of the gold transaction and Rs. 1,000 in respect of the outstanding silver transaction, the plaintiff was still in credit with the defendants on October 5, 1939, in the sum of Rs. 997-13-9. I have also pointed out that, the defendants being entitled not to insist upon the payment of initial deposit, if the plaintiff did not pay it and the defendants neither debited him with the amount to his knowledge, nor made any demand, the plaintiff was in my opinion entitled to assume that the payment of initial deposit was not for the time being insisted upon. This being the position, the defendants made a demand upon the plaintiff to remit Rs. 2,000 without specifying what it was for. It is true that the market was falling heavily and that on the morning of October 5 the defendants could have insisted not only upon

the payment of initial deposits, if they had asked for them, but also upon payment of a loss of Rs. 630 in silver and Rs. 2,125 in gold if they had asked for payment of these losses, in addition to the losses in cotton and linseed which I have taken into account in stating in what amount the plaintiff was at that moment in credit. I am, however, clearly of opinion that where there are separate outstanding transactions with different provisions as to initial deposit and margin, the commission agent, or pakka adatia, if he wants to insist upon the payment of margin, so as to give him a right to close any transaction for non-compliance with the demand, must specify to the constituent in respect of what outstanding transaction the demand is made, and what is the amount of the demand in respect of it. The constituent may wish to comply with the demand in respect of some transactions so as to keep them alive, and not wish to comply with it in regard to others. Quite apart from the question what exact amount was due by the plaintiff to the defendants on October 5, 1939, in my opinion the defendants, having made one general demand for Rs. 2,000 in reference to all the outstanding transactions, were not entitled to close all those outstanding transactions, that demand not having been complied with.

21. Even, if the demand for margin, made in the form in which it was made, had been justified, I am of opinion that the time allowed by the defendants to the plaintiff to comply with it was wholly unreasonable, assuming that the telegram making the demand is taken to have been received by the plaintiff by 10-30 a.m., on October 5, 1939. It was in my opinion wholly unreasonable for the defendants to close all the outstanding transactions by 3-15 p.m., in the afternoon as they did. The period between 10-30 a.m., and 3-15 p.m., in my opinion was not sufficiently long to give to the plaintiff an opportunity of complying with the demand if he had been minded to do so.

22. My attention was drawn, in support of the plaintiff's argument that the closing was wrongful, to Ganpat Mal-Sundar Das v. Kehr Singh-Balwant Singh & Co. (1937) ILR 18 Lah. 683, where the facts were somewhat similar to the present case. On the facts of the present case I hold that the closing was wrongful.

23. The next question arising is, what is the result in law of a wrongful closing by a pakka adatia of his constituent's outstanding contracts. I was referred to Michael v. Hart & Co. [1901] 2 K.B. 867. In that case the defendants, a firm of stock brokers, in pursuance of a contract in that behalf bought shares on the Stock Exchange on behalf of a principal, and contracted that they would at any time before the settling day, if so directed, sell the same upon the principal's behalf. Before the settling day arrived the defendants in breach of their contract sold the shares without the principal's consent. Wills J. held that in an account taken between the defendants and the principal the latter was entitled to be credited, in respect of the shares so wrongfully sold, with the highest price that the same might have realised in the market at any time between the date of the sale and the settling day. The case went to the Appeal Court and is reported in

[1902] 1 K.B. 483, Collins M.R., in the course of his judgment, pointed out that where there has been an anticipatory breach of a contract that has not of itself the effect of rescinding the contract, for there must be two parties to a rescission. It gives the other party to the contract the right if he chooses to treat the contract as rescinded; on the other hand, he may refuse to treat the contract as rescinded and hold the party repudiating the contract to his obligation when the time for performance arrives. Having regard to the opinion expressed by the Appeal Court in that case in the course of the hearing, the parties came to an agreement and the case was decided upon the footing that the plaintiff was entitled to insist on performance of the defendants' contract at the end of the May settlement, and to measure his damages with reference to the prices of the stocks at that date. The question whether the plaintiff had a right to have the damages estimated with reference to the highest prices at which the stocks had stood in the interval between the closing of the plaintiff's account and the end of May, as Wills J. had decided, was left open. On the authority of that case, if the defendants had been merely commission agents, I should have held that the plaintiff, not having accepted the closing of the contracts, was entitled to treat them as if they had not been closed and to look to the defendants to carry them out on the respective due dates of the contracts.

24. The defendants, however, are not ordinary commission agents, they are pakka adatias, and I have to consider whether that fact makes any difference. In *Kanji v. Bhagvanmdas* (1904) 7 Bom. L.R. 57, (and on appeal at p. 611), Chandavarkar J. drew attention to the custom that when a pakka adatia receives a second order from his constituent to enter into a cross-contract and cover his first order against the due date, the pakka adatia is not bound to carry out the second order in case owing to loss of credit he is unable to do so, and all that he is bound to do is to inform the constituent accordingly so as to enable the latter to put through his order through some other pakka adatia. In *Baldeosahai Surajmal & Co. v. Radhakishan Joharilal* (1938) 41 Bom. L.R. 308, I expressed the opinion that the judgment in the case of *Kanji v. Bhagvandas*, by necessary implication, involved a positive custom that when a pakka adatia receives a second order from his constituent to enter into a cross-contract to cover his first order, the pakka adatia is bound to do so unless circumstances exist which relieve him from that obligation. The case of *Baldeosahai Surajmal & Co. v. Radhakishan Joharilal* went to the Appeal Court, and neither of the Judges in the course of their judgments appear to have thrown any doubt upon my view of that custom. Having regard to the opinion which I have expressed, I approach this case as if the defendants had not wrongfully closed the outstanding transactions. If they had not closed the outstanding transactions it was open to them at any time to insist upon payment of any initial deposits unpaid, or to demand payment of margin by a proper notice or notices in that behalf and to close the plaintiff's outstanding transactions if he failed to comply with specific demands made in reference to the specific contracts in that behalf. The defendants made no such demands but maintained the position that they had

rightfully closed the transactions. The plaintiff by his telegram of October 14, 1939, called upon the defendants to close his outstanding transactions. In my opinion he was entitled to do so. He had not failed to comply with any lawful demand for margin, and when the plaintiff gave the defendants instructions to close they did not rely upon any ground which could properly relieve them from the ordinary obligation of a pakka adatia to act on the instructions to close before the due date; all that they said was, in their telegram in reply, that they could do fresh business against deposit. I have come to the conclusion that the transactions must be treated as still outstanding, that the plaintiff was entitled to give the order to close, that the defendants ought to have acted upon that order, and that the plaintiff is entitled to be put in the position in which he would have been placed if they had carried out his instructions. This case in my opinion differs from that of *Michael v. Hart & Co.*, [1901] 2 K.B. 867. because of the peculiar obligation imposed upon the commission agent to close at any time upon instructions before the due date. But for that special obligation, I should have held that the plaintiff's right to an account would have depended upon the prices reigning at the due date. But, because of the special obligation imposed by custom on a pakka adatia, my view is that the plaintiff is entitled to have an account taken on the footing of the prices prevailing on October 14, 1939. The figures upon that basis are set out in exhibit (H) to the plaint. Upon the figures prevailing in the market on that day, the plaintiff sustained a loss of Rs. 525 in cotton, he made a profit on the silver transaction of Rs. 630 and on the linseed of Rs. 382-13-0. Bringing into account those two last sums and his original profit on the previous silver transactions and deducting therefrom the loss in cotton and the sum of Rs. 364-1-9 for the premium on the gold, the amount due and payable by the defendants to the plaintiff on October 14, 1939, if the plaintiff's instructions had been acted upon, would have been Rs. 4,225-10-9.

25. The plaintiff, in my opinion, is entitled to recover that sum and the defendants fail on their counter-claim.

[After recording findings on the issues his Lordship concluded:]

26. I pass a decree in favour of the plaintiff for Rs. 4,225-10-9 with interest thereon at six per cent. per annum from the date of the filing of the suit, viz., February 3, 1940, till judgment. The plaintiff will also have the costs, including costs of the Chamber Summons for directions, and interest on judgment at six per cent. per annum. The counter-claim is dismissed with costs. Having regard to the strenuous manner in which this suit has been contested and the length of time it has taken, I do not think it proper to quantify the costs, but allow them to be taxed in the usual way.