way Company to charge the rates mentioned in it, and the Company were not, in our opinion, called upon to give any further evidence of the requisite sanction.

However, it has been urged that section 28 was, itself, *ultra vires*, because it was said the East India Company could not delegate the necessary "sanction" to the Government of Bombay; but the Act of Incorporation left it to the East India Company, without any restriction whatever, to enter into such agreement with the Railway Company, in all respects, as it might think best in furtherance of the objects and purposes for which the Company was formed; and the East India Company could, therefore, fix whatever form of sanction it thought best to insist on.

We must, therefore, confirm the decree, with costs on the appellants.

*Decree affirmed.*

Attorney for appellants:—Mr. *Mirza Husein Khán.*

Attorneys for respondents:—Messrs. *Little, Smith, Frere and Nicholson.*

## ORIGINAL CIVIL.

*Before Mr. Justice Farran.*

J. H. TOD AND OTHERS, PLAINTIFFS, *v.* LAKHMIDA'S PURSHOTAMDAS, DEFENDANT.*

1892. *January* 23, 26, 28, 29.

*Contracts for forward delivery—Settlement by payment of differences—Satta, or wagering contracts—Assignment of contract—Right of assignee to sue in his own name—Endorsement and delivery of contract, effect of.*

The defendant was sued by the plaintiffs, as assignees of one Shivji Prágji, for "differences" on certain contracts of purchase and sale of cotton and seeds. The defendant contended that these contracts being in the nature of *satta*, or wagering contracts, no suit would lie in respect of them.

The defendant was not a dealer in produce, and entered into these contracts as a speculation. His *modus operandi* was, when he entered into a contract of purchase or sale, to sell or purchase again the same quantity, in one or more contracts, either with the original vendor, or some one else, so as to secure the profit or ascertain the loss, before the "*Vayda*" day. The contracts were in the usual mercantile form, and were entered into through brokers, the principals not being

* Suits Nos. 237 and 310 of 1891.

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brought into contact with each other until after the contract was made. Shivji Prágji's procedure was similar. Shivji was a *mukádam* and guarantee broker to the plaintiffs; and he, too, entered into these contracts as a speculation, intending to settle them before the "*Vayda*" day, but prepared, if forced to do so, to perform them in kind.

*Held*, that the contracts sued on were not shown to have been agreements by way of wager. It was a highly speculative mode of doing business, but there is no law against speculation as there is against gambling. Contracts are not wagering contracts, unless it be the intention of both contracting parties, at the time of entering into the contracts, under no circumstances to call for, or give delivery, from, or to, each other. In this case, even the defendant—seeing that he did not know with whom contracts might be made on his behalf by his brokers—must have contemplated the possibility of being called on to give, or take, delivery.

The defendant also contended that the contracts in question were not assignable without his assent, which had never been asked or given; and that the plaintiff could not, therefore, maintain this action.

*Held*, that the objection was a good one. An assignment of a contract (as distinguished from an assignment of a debt, or other chose in action) to be effectual, must amount to a novation, which requires the assent of the other party to the contract (section 62, Contract Act IX of 1872).

The defect, however, was allowed to be cured by adding Shivji Prágji as a plaintiff.

The legal effect of the endorsement and handing over of such contracts considered.

THE plaintiffs brought two suits (*viz.*, No. 237 of 1891 and No. 310 of 1891) against the defendant for monies alleged to be due in respect of certain contracts entered into by him for the purchase and sale of goods.

The plaintiffs claimed as assignees of the said contracts.

In the first suit the plaintiffs claimed Rs. 2,457 from the defendant as 'differences' due in respect of certain contracts made by the defendant for the purchase and sale of cotton.

The plaint in that suit alleged that on the 5th January, 1891, the defendant contracted to sell and deliver to one Shivji Prágji 100 candies of Broach cotton, at Rs. 202 per candy, deliverable between the 15th and 25th March, 1891; that on the 28th January, 1891, a certain contract for the purchase of the same quantity of similar cotton, at Rs. 214 per candy, deliverable at the same time, which the defendant had made some months previously with one Ranchordás Morárji, was transferred to

the said Shivji Prágji; and "it was agreed between the said Shivji Prágji and the defendant, and it is the custom of the said trade, that the said contracts should be set off the one against the other, and the differences between the prices in the said two contracts, *viz.* Rs. 12 per candy, paid to the said Shivji Prágji."

The plaint further alleged that on the 8th December, 1890, the defendant contracted to sell to the said Shivji Prágji 100 candies of cotton, at Rs. 172 per candy, deliverable between the 15th and 25th March, 1891, and on the 21st December, 1890, the defendant contracted to purchase from the said Shivji Prágji 100 candies of similar cotton, at Rs. 180 per candy, deliverable at the same time, "and it was agreed in manner aforesaid that the said contracts should be set off, and the difference of Rs. 8 per candy paid by the defendant to the said Shivji Prágji."

Certain other contracts for the purchase and sale of cotton were entered into between the same parties, and dealt with in the same way.

The plaint alleged that the said Shivji Prágji had early in March, 1891, assigned all the said contracts to the plaintiffs, and that the plaintiffs thus became entitled to be paid the differences on the due dates of the said contracts, amounting to the sum of Rs. 2,457.

The defendant in his written statement alleged *(inter alia)* that the contracts mentioned in the plaint were *sutta* wagering contracts, and that it was never intended that any delivery of goods should be made. He also denied that the contracts had been assigned to the plaintiffs, and that they were entitled, as assignees, to sue.

In the second suit (No. 310 of 1891) the plaintiffs claimed Rs. 12,500 from the defendant as damages for the non-delivery of rape-seed. In this case also the plaintiffs sued as assignees of the said Shivji Prágji. The plaint alleged that by three contracts, dated, respectively, 24th December 1890, 2nd January, 1891, and 2nd March, 1891, the defendant sold 400 tons of rape-seed, at Rs. 6-5-0 per cwt., deliverable in April and May 1891: that early

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in March, 1891, Shivji Prágji assigned the said three contracts to the plaintiffs; that notice of the assignment had been duly given to the defendant; and that the defendant had failed to deliver the rape-seed to the plaintiffs, who had thereby sustained a loss of Rs. 12,500. The defendant answered, as before, that the contracts sued on were wagering contracts, and that the plaintiff had no right to sue.

*Jardine* and *Scott* for plaintiffs:—Contracts can be assigned, unless the obligation under them is of a personal character. In Bombay it is the common practice to assign such contracts as are sued on in this case. It is clear that the defendant himself regarded the contracts as assignable—*Mulji Govindji* v. *Náthabha*; *Hirachand*(1); *Arkansas Smelting Co.* v. *Belden Co.*(2); *British Waggon Co.* v. *Lea*(3); *Brice* v. *Bannister*(4). These contracts are not wagering contracts. As to what are wagering contracts, see *Thacker* v. *Hardy*(5).

*Kirkpatrick* and *Anderson* for defendant:—Such contracts as these cannot be assigned, and plaintiffs are not entitled to sue. A buyer cannot assign to another person the seller's obligations to him, without the seller's consent. The assignee might be in insolvent circumstances, or otherwise be, in the seller's opinion, a person with whom it is undesirable to deal. He should not be forced to deal with him against his will. Where anything remains to be done by the assignor, the contract is not assignable. If the contract is to be assignable, a clause to that effect should be inserted—Pollock on Contracts (5th Ed.), p. 206 *et seq.*, p. 448 *et seq.*; *Boulton* v. *Jones*(6); Benjamin on Sales (4th Ed.), 64, 388; *Humble* v. *Hunter*(7); *Robson* v. *Drummond*(8); Indian Contract Act IX of 1872, Secs. 39, 40, 41, 40, 93, 94; *Toomey* v. *Rúma Sahi*(9); *British Waggon Co.* v. *Lea*(10). These contracts were clearly mere wagers—Bombay Act III of 1865; *Anupchand Hemchand* v. *Champsi Uyerchand*(11).

(1) I. L. R. 15 Bom., 1.
(2) 127 U. S., 379.
(3) 5 Q. B. D., 149.
(4) 3 Q. B. D., 569.
(5) 4 Q. B. D., 685.
(6) 2 H. & N., 564.
(7) 12 Q. B., 310, 317.
(8) 2 B. & Ad., 303.
(9) I. L. R., 17 Calc., 115.
(10) 5 Q. B. D., 149.
(11) I. L. R., 12 Bom., 585.

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FARRAN, J. :—In the first of the above suits, a decree is sought against the defendant for Rs. 2,457, being the differences on certain contracts for the purchase and sale of cotton which the defendant entered into ; and in the latter he is sought to be made liable in damages to the extent of Rs. 12,500 for the non-delivery of 400 tons of rape-seed which he contracted to sell. The suits, though not consolidated, were practically heard together. One ground of defence is common to both, namely, that the contracts sued upon are agreements by way of wager, and void under section 30 of the Contract Act. I shall deal with this plea in the first instance.

The defendant is a man possessed of some household property, and was, until lately, a partner in a piece-goods shop in the cloth-market, the care of which, he says, he left to his partners. In the latter half of the year 1890, acting under the advice of a broker, Hirji Devji, he entered into a series of speculative transactions through him for the purchase and sale of produce. As to these, he says, that it was never intended that delivery should be taken or given under them, and that they were, in fact, wagers upon the prices of the produce specified in the contracts. The contracts with which these suits are concerned, were these. [His Lordship stated the particulars of the contracts, and proceeded :—]

From consideration of the contracts I have set out, it is clear that the *modus operandi* of the defendant was, when he entered into a contract of purchase, to sell again the same quantity in one or more contracts, either to the original vendor, or to some one else, so as either to secure the profit, or to ascertain the loss, before the "*Vayda*" day ; and in a similar way to deal, *mutatis mutandis*, with produce which he sold. Against that he used, as a rule, to buy before the "*Vayda*" day. This mode of dealing, when the sale and purchase were to and from the same person, of course had the effect of cancelling the contracts, leaving only differences to be paid. When they were to different persons it put the defendant in a position vicariously to perform his contracts. This is, no doubt, a highly speculative mode of transacting business ; but the contracts are not wagering contracts, un-

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less it be the intention of both contracting parties, at the time of entering into the contracts, under no circumstances to call for, or give delivery, from or to each other. There is no law against speculation, as there is against gambling. The contracts which the defendant entered into are in the usual mercantile form. The cotton contracts are expressed to be made in accordance with the rules of the Bombay Cotton Trade Association, omitting the cancelling clause; and they were entered into through a broker. I find it, as a fact, that, except in very rare cases, the principals are not brought into contact with each other before the contract is made; nor, when the bargain is struck with the broker, do they know the name of the person with whom they are contracting. That is divulged by the bought and sold notes. The defendant says that, before the first rape-seed contract was made with Shivji Prágji, he saw the latter and arranged that delivery was not to be given or demanded in any case; but that is quite inconsistent with his evidence in the other case, and is apparently invented because I excluded evidence of conversations between the defendant and the broker Hirji in that suit as not being evidence against Shivji. Hirji Devji and Shivji Prágji deny it, and I feel pretty confident that the usual practice was followed in the case of all the contracts between the defendant and Shivji Prágji. When, therefore, the defendant launched his contract orders, he did not know, in fact, with whom the contracts would be made. It is, therefore, somewhat difficult to believe him when he says that he believed that he could not, in any event, be called on to perform them in kind. The broker Hirji undertook no personal responsibility, and was not shown to have been a *sutta* broker, though no doubt a good many of the contracts he negotiated were settled by differences. That he advised the defendant to speculate I can well believe; and also that he told the defendant that he would make a profit.

Shivji Prágji, the person with whom the defendant entered into most of the contracts, is the *mukádam*, and guarantee broker of Tod Durant & Co. On his own account he appears to speculate largely in produce. His *modus operandi* rather resembles that of the defendant, and when he sees a profit in his

contracts, he realizes it by means of a cancelling contract, if he can. That, he says, is the way of doing business all the world over. I find that I have not recorded his answers in the exact words which he used. A *satta* contract, he says, he never entered into, even in his dreams. His contracts are entered into with all classes. He has contracts with such firms as Ralli Brothers, Lyon Brothers, and Graham & Co., and can hardly have supposed that they would not demand the goods if it suited their purpose. He has sometimes been compelled to deliver. At the same time he has no godowns for goods of this class, though he has for myrabolams and gum; and he keeps only one pencil book to record his own private transactions. Even this he has not produced, and has thereby added to the difficulty I feel in dealing with the case. I cannot, however, say that its non-production was intentional. It appears to be the practice in Bombay to enter largely into contracts for the purchase and sale of produce still ungrown, for future delivery. The vicissitudes of the market frequently render resales advisable; and a highly speculative mode of business is thus engendered. The same expected produce is sold and resold, over and over again. Sanguine minds engage in these transactions, hoping for profit, and trusting to their own forecasts as to the probable future of the market. This is, I think, what Shivji Prágji has done; but with the intention of performing his contracts in kind if called upon to do so. The contracts he has entered into were real contracts, upon which he was liable to be called on to deliver, or receive, produce at the "*Vayda*" day; and, though usually settled, were not wagers. The remarks of the Judges in *Thacker* v. *Hardy*[1] are apposite in this connection.

I see nothing to differentiate his contracts with the defendant from his other contracts. As to the defendant's contract with Ranchordás Morárji, there is nothing to show that it was a wagering contract at all on the part of Ranchordás, if such an individual existed. I must, therefore, hold that the contracts sued upon are not shown by the defendant to have been agreements by way of wager.



(1) 4 Q. B. D., 685.

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The next question which arises for consideration, is with reference to the assignments of the above several contracts, and the validity of such assignments.

On the 28th January, 1891, by an endorsement on the contract paper (exhibit G) Ranchordás Morárji purported to sell, and Shivji Prágji purported to purchase, the contract which the defendant had previously entered into with Ranchordás Morárji to purchase from him 100 candies of cotton at Rs. 214 per candy. This was evidently intended to be a complete assignment of the contract, and gives rise to the question whether such assignment could be made without the assent of the defendant, so as to create a *novation*. There is no evidence in the case of any arrangement which amounts to a novation in fact, such as is contemplated by section 62 of the Contract Act.

Let us see the position of the parties. Under this contract (exhibit G) Ranchordás Morárji undertook to deliver 200 bales Broach cotton to the defendant, and the defendant agreed to accept and pay for the same at the rate of Rs. 214 per candy, during the "*Vayda*" time. Was it competent for Ranchordás Morárji, without the assent of the defendant, to rid himself of that liability, and to substitute Shivji Prágji as the person responsible to the defendant? The question, it appears to me, must be considered without reference to the price of the cotton at the date of the assignment. If at that time the contract has become onerous, and is likely to continue so, an affirmative answer to the question would enable a solvent contracting party to transfer his assured liability to the shoulders of a pauper. A merchant might assign all his unprofitable contracts to his peon, and retain his profitable ones for himself. If at the time of the assignment the market is in *equilibrio*, but a fall is feared, a merchant might in like manner get rid of his apprehended liability, and the firm to which he had contracted to deliver at the "*Vayda*" would be left with a right to call on a peon for the produce contracted for at the contract rate, which might then be much lower than the market rate. If at the time of the assignment the market rate is lower than the contract rate, there would, it is true, be no disadvantage to the purchaser if the vendor assigned his contract. It would, the market con-

tinuing the same, be to his advantage that the assignee should not perform his contract. But after the assignment the market might change, and a contract, which was beneficial to the assignor when he assigned, might become onerous before the date of performance arrived. On principle it appears to me immaterial whether the contract be onerous, or profitable, at the time of assignment; a purchaser is entitled to call upon the person with whom he contracted to fulfil his contract, and the latter cannot get rid of his liability by transferring it to a third person, but must himself perform his contract personally, or vicariously. The authorities bear out this view. The Contract Act has no section bearing upon the assignability of a contract, except section 62, which is confined to cases of *novation*, and section 40, which shows what contracts a promisor is bound to perform personally, and what he may perform by employing a competent person to carry out.

Pollock on Contracts (5th Ed., p. 187,) lays down the law thus:—"The creditor can demand performance from the debtor, or his representatives. He cannot demand, *nor can the debtor require him to accept, performance from any third person;* but the debtor, or his representatives, may perform the duty by an agent." The same rule is repeated at p. 191. "Another branch of the same general doctrine is that the debtor cannot be allowed to substitute another person's liability for his own without the creditor's assent. A contract cannot be made except with the person with whom one intends to contract. When a creditor assents, at the debtor's request, to accept another person as his debtor in place of the first, this is called a novation" p. 193. "Generally speaking, the liability on a contract cannot be transferred so as to discharge the person or estate of the original contractor, unless the creditor agrees to accept the liability of another person instead of the first. Again, rights arising out of a contract cannot be transferred if they are coupled with liabilities," &c. p. 453. The Supreme Court of the United States laid down this latter proposition as law in *Arkansas Smelting Co.* v. *Belden Co.*[1].

(1) 127 U. S., 379.

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The case of *Brice* v. *Bannister*[1] is not inconsistent with this view. It merely decides that the money payable, or to become payable, under a contract may be assigned though the contract be still executory. In the *British Waggon Co.* v. *Lea*[2], all that was ruled was that the British Waggon Company had not disqualified themselves from fulfilling their contract by contracting with the Parkgate Company to repair the waggons. I can find no authority for the proposition that a contract, as distinguished from a debt, or other chose in action, has been held to be assignable in equity. That a debt, or chose in action, can be assigned, so as to enable an assignee to sue for it in his own name in this Court, is, I think, clear. Cunningham's Contract Act, 5th Ed., p. 212, and cases there referred to, are authorities for that proposition, and I have never heard it questioned in this High Court. Mr. Scott, for the plaintiff, contended that by the custom of the trade in Bombay the incident of assignability was attached to contracts of this class. Without considering how far such an incident could be attached to a contract, it is sufficient to say that the evidence of the plaintiff negatives such a custom. It, therefore, seems to me that the defendant was not bound to recognise Shivji Prágji as the assignee of the contract of the 10th August 1889, and that he has come under no liability to Shivji Prágji in respect of that contract. The account in the first suit must be made up, leaving that contract out of consideration.

At the end of February, 1891, Shivji Prágji, being indebted to the plaintiffs, handed all the cotton contracts he had made with the defendant, including the Ranchordás Morárji contract, to the plaintiffs, and endorsed his name on the back of them all. There can be no doubt but that he thereby intended to assign all benefit accruable under them to the plaintiffs, and that the plaintiffs are, as against him, entitled to the benefit of the contracts. As I felt some doubt whether there had been an assignment in law, I allowed Shivji Prágji to be joined as a plaintiff under section 27 of the Civil Procedure Code. No difficulty, therefore, remains as to which of the plaintiffs should technically sue the defendant.

(1) 3 Q. B. D., 569. (2) 5 Q. B. D., 149.

Early in March, 1891, Shivji Prágji handed over the rape-seed contracts (exhibits A, B and C in Suit No. 310), under which he had purchased 400 tons from the defendant, to the plaintiffs, Tod Durant & Co., endorsing his name on them, in order to reduce the debt which he then owed to Tod Durant & Co. The "*Vayda*" time had not then arrived. For the reasons which I have already given, I cannot treat this as an assignment of the contracts, out and out, to Tod Durant & Co. Notwithstanding that handing over and endorsement, Shivji Prágji continued liable on these contracts to the defendant. Mr. Tod states that purchasers often so hand over and endorse contracts of purchases to them, and that it is a very common custom to do so, but that the transferor still remains liable under the contract.

What, then, is the legal effect of such endorsement and handing over? It seems to me to operate, when communicated to the vendee, as a direction to the latter to deliver the goods comprised in the contract to the transferee, and to accept the price from him. He puts the transferee in his own place to perform the contract, as under section 40 of the Contract Act he is entitled to do. If the transferee accepts the goods, and pays the price, the contract is performed, and no question can arise. If he fail to do so, the vendor can recover damages from his original purchaser, but has no cause of action against the transferee of the contract. When Shivji Prágji endorsed the rape-seed contracts to Tod Durant & Co. he says that he informed the defendant that he had done so. This the defendant denies. It is, however, admitted that Shivji and the defendant did converse about the rape-seed contracts in March, and it would be strange if Shivji did not inform the defendant the way in which he had dealt with them. On the 21st May, 1891, Mr. Tod wrote to the defendant notifying the handing over of the rape-seed contracts by Shivji Prágji to the plaintiffs, and asking for delivery of the rape-seed. [His Lordship after reviewing the evidence on the point found that this letter had been duly received by the defendant, and continued :—]

It is not perhaps strictly necessary that I should find on this

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point, as I have no doubt but that Shivji spoke to the defendant about the assignment, and asked him to deliver to Tod.

In this view of the case, Shivji Prágji is entitled to receive damages from the defendant for non-delivery. As in the case of the cotton contracts, he has handed the documents to the plaintiffs against the debt he owes. Entertaining doubt whether this operates as an assignment in law, I allowed the application which Mr. Scott made at the opening of the case, and directed that Shivji Prágji be made a plaintiff, instead of a defendant. [His Lordship then discussed some questions of fact as to which evidence was given, but which are not material to this report, and ultimately gave judgment for the plaintiffs in both suits, with costs.]

Attorneys for the plaintiffs:—Messrs. *Conroy and Brown.*

Attorney for the defendant:—Mr. *E. Wilkin.*

## ORIGINAL CIVIL.

*Before Mr. Justice Parsons.*

1892.

*January* 15; *March* 17.

FATIMA'BIBI AND ANOTHER, PLAINTIFFS, *v.* FATIMA'BIBI, DEFENDANT.*

*Insolvency—Vesting order—After-acquired property—Right of insolvent or his assignee to sue—Official Assignee—Practice—Parties.*

One Rahimtulla became possessed of certain properties in 1872 and 1881. In 1866, Rahimtulla had presented a petition in insolvency, and a vesting order had been duly made. No final order of discharge was ever made; and Rahimtulla died in 1888. The plaintiffs sued, as the heirs of Rahimtulla, for their shares in the said properties. It was objected (i) that, looking to the insolvency of Rahimtulla, the plaintiffs had no interest in his estate, and (ii) that the Official Assignee, as the assignee of the estate and effects of Rahimtulla, was a necessary party to this suit.

*Held*, that the properties in question, coming to Rahimtulla after his insolvency, vested in him, subject only to the right and claim of the Official Assignee should he think fit to assert it, and that the plaintiffs, as representatives of Rahimtulla, could maintain the action.

*Held*, also, that the Official Assignee was not a necessary party to the suit, though, in case of a decree in plaintiffs' favour, notice thereof should be given to him by the Court.

* Suit No. 576 of 1890