ORIGINAL CIVIL

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Heaton.

1917. *March* 22.

ABRAHAM E. J. ABRAHAM, (PLAINTIFF) APPELLANT *v.* SARUPCHAND HOOKAMCHAND (DEFENDANTS) RESPONDENTS.*

Contract—Breach of contract—Measure of damages—Custom of the Bombay Silver Market—Shroffs, ostensible buyers and sellers—Shroffs acting for outside principals work either for Kacchi *or for* Pakki adat—Kacchi adat *distinguished from* Pakki adat—*Principal of* Kaccha adatia *may sue in his own name for damage or breach of contract without impleading the* Kaccha adatia.

On the 13th of July 1914, the plaintiff, a merchant, in the name of his *kachha adatia* and agent H and acting by his broker B entered into a contract whereby H agreed to buy and the defendants to sell 50 bars of silver at Rs. 75-5-0 per 100 tolas for the ensuing *Shravan*, i.e., August, *vaida*. The contract was entered into subject to the rules of the Panch Shroff Association whereby it was the duty of the defendants to tender a delivery order by the 12th of August 1914. On the 10th of August, the plaintiff tendered to H the price of bars and on the 11th H asked for a delivery order. The defendants failed to give a delivery order by the 12th August. The plaintiff thereupon sued the defendants without making H a party, for damages for breach of contract at the rate of Rs. 3-3-0 per 100 tolas, which was the difference in price between the contract rate and the rate prevailing in the market on the 13th of August. The defendants pleaded a custom of the silver market whereby the selling shroffs were not personally liable to the principal of the buying *adatia*. The defendants without prejudice further stated that the rate of Rs. 76-12-0 must be taken to be the highest buying and selling rate with reference to which damages could be assessed, as the Shroffs at a special meeting held on the 16th August 1914 resolved that where a party was not able to give delivery, silver bars could be bought and sold at Rs. 76-12-0.

Held (1) that the evidence called by the defendants fell far short of proving the custom alleged.

(2) that if at the date of breach damages were recoverable by the usual and recognised measure, it did not matter whether the *adatia* or the principal sued.

(3) that the ordinary law of principal and agent applied, and the plaintiff was entitled under the contract to claim the difference in price between the contract rate and the market rate at the time of breach.

*O. C. J. Appeal No. 68 of 1916.

It was not disputed at the trial that a custom of the Bombay Silver Market for forward contracts was that only Shroffs were the ostensible buyers and sellers though Shroffs might have and often did have outside principals for whom they were acting. The Shroffs, when acting for principals, worked sometimes for *kacchi adat* and sometimes for *pakki adat*. In the case of *kacchi adat* the *adatia* shroff guaranteed the performance of the contract to the other Shroff, but did not guarantee its performance to his own principal. In the case of *pakki adat* the *adatia* Shroff who then acted for a higher commission was liable as a principal both to his own employer and to the other Shroff.

SUIT for damages on breach of contract.

The plaintiff Abraham E. J. Abraham was a Jewish merchant of Bombay dealing in silver and other commodities. The defendants Sarupchand Hookamchand a firm were silver merchants carrying on business in partnership in Bombay.

On the 13th day of July 1914, the plaintiff's *kaccha adatia*, the firm of Hiralal Ramgopal entered into a contract through a broker named Bholaram with the defendants whereby the said firm contracted to buy and the defendants contracted to sell 50 bars of silver at the rate of Rs. 75-5-0 for 100 tolas for the ensuing *Shravan*, i.e., August, *vaida*. The contract was made subject to the rules of the Panch Shroff Association according to which it was the duty of the defendants to tender a delivery order in respect of the silver bought by 6 P. M. on the 12th day of August 1914.

On the 10th day of August 1914 the plaintiff tendered to Hiralal Ramgopal, the price of the bars. On the 11th August, Hiralal Ramgopal addressed through solicitors a letter to the defendants calling upon them to send a delivery order in respect of the bars. The defendants however failed to tender a delivery order by the 12th August, the market having gone against them. The market rate on the 13th August 1914 was Rs. 78-14-0 per 100 tolas.

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On the 4th day of August 1914, Great Britain had declared war against Germany. The Shroffs being alarmed at the prospects held a special committee meeting on the 11th day of August 1914 when the following resolution about the Shravan *vaida* was passed :—

"Delivery of silver appertaining to the Shravan Vaida shall be taken and given according to the usage. Where a party is not able to give delivery (the goods) shall be purchased and sold at the rate of Rs. 76-12, seventy-six and three-fourth and the transactions settled mutually."

In pursuance of the said resolution the defendants tendered on the 3rd September 1914, Rs. 2,012-8-0 to the firm of Hiralal Ramgopal who however refused to accept the same as their principal, the plaintiff, claimed a higher amount in damages for breach of contract.

The plaintiff thereupon filed the present suit on the 27th April 1916 to recover from the defendants Rs. 4,462-8-0 being the difference in price between the contract rate and the market rate on the *vaida* day. The plaintiff did not make his agent, Hiralal Ramgopal, a party to the suit. The defendants denied that they had any knowledge at the time the contract was entered into that the firm of Hiralal Ramgopal were the *kaccha adatias* of the plaintiff and contended that if they had known that the firm of Hiralal Ramgopal were not principals, they would never have entered into the contract in question. The main defence of the defendants was however set forth in para. 3 of their written statement which was as follows :—

"This defendant says that contracts in silver of forward deliveries are entered into only between recognised Shroffs and Choksis in the market and that such Shroffs and Choksis never enter into such forward contracts with persons who are not such recognised Shroffs or Choksis and that those persons who are not such Shroffs or Choksis have always to employ recognised Shroffs or Choksis whenever they desire to enter into such contracts in silver of forward deliveries and that according to the custom prevailing in the market there is no privity of contract between the Shroff and an outsider for whom another Shroff may have entered into a forward contract as his *kaccha adatia*, and the Shroff or the outsider can never claim either the performance of the contract or any damages

for breach thereof from each other and that the Shroffs consider the other Shroff who has acted as the *adatia* as principal and deal with him accordingly, the remedy of the outsider being only against the Shroff or Choksi employed by him.

This defendant therefore submits that under the aforesaid custom the plaintiff not being one of the recognised Shroffs or Choksis as aforesaid there is no privity of contract between the plaintiff and himself in respect of the contract sued upon and that the plaintiff is not entitled to sue this defendant for the breach of the said contract if there is any such breach on the part of this defendant as alleged in the plaint."

Lastly, the defendants submitted without prejudice that the proper rate for assessing the damages in respect of the contract in question was the rate of Rs. 76-12-0 per 100 tolas fixed by the Panch Shroff Association as it was difficult for vendors to give delivery on the *vaida* day owing to the sudden outbreak of war in Europe.

The suit was tried by Beaman J. who held that the custom set up by the defendants in para. 3 of the written statement was established and that the plaintiff had no remedy against the defendants whatever might be his remedy against his agent, Hiralal Ramgopal.

The plaintiff appealed.

Strangman (Advocate-General), *Talyarkhan* and *Mulla* for the appellant.

Desai and *Bahadurji* for the respondents.

SCOTT, C. J.—The plaintiff is a Jewish merchant dealing in various commodities.

The defendants are a firm of Marwari Shroffs dealing in silver in Bombay.

On the 13th of July 1914, the plaintiff in the name of his *kaccha adatia* or agent Hiralal Ramgopal and acting by his broker Bholaram, entered into a contract whereby Hiralal Ramgopal agreed to buy and the defendants to sell 50 bars of silver at Rs. 75-5-0 per 100 tolas for the ensuing Shravan *Vaida*.

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The contract was entered into subject to the rules of the Panch Shroff Association whereby it was the duty of the defendants to tender a delivery order by the 12th of August 1914.

On the 10th of August, the plaintiff tendered to Hiralal the price of the bars and on the 11th Hiralal wrote asking the defendants to send a delivery order.

No delivery order was given by the 12th.

The difference in price between the contract rate and the rate prevailing on the 13th was Rs. 3-3-0 which the plaintiff claims from the defendants as damages for breach of contract.

The main defences raised in the written statement are a custom of the silver market whereby the selling Shroffs are not personally liable to the principal of the buying *adatia*; non-liability on the ground that if they had known Hiralal was not a principal they would not have entered into the contract; and that the rate of Rs. 76-12-0 is the highest rate at which damages can be assessed. It is not disputed that a custom of the Bombay Silver Market for forward contracts is that only Shroffs are the ostensible buyers and sellers though Shroffs may have and often do have outside principals for whom they are acting. The Shroffs, when acting for principals, work sometimes for *kacchi adat* and sometimes for *pakki adat*. In the case of *kacchi adat* the *adatia* Shroff guarantees the performance of the contract to the other Shroff but does not guarantee its performance to his own principal. In the case of *pakki adat* the *adatia* Shroff, who then acts for a higher rate of commission, is liable as a principal both to his own employer and to the other Shroff.

This custom whereby only Shroffs are the ostensible parties is observed for two reasons agreeable to the Marwari Shroffs: first, that on every forward silver

transaction a commission becomes payable to one or both of the Marwari Shroffs; and, secondly, that the *adatia* Shroff guarantees to the other Shroff performance of the contract.

In practice it may be assumed that Shroffs carry out their contracts as between themselves as also with their constituents for the evidence discloses no instance of any dispute such as the present before the *vaida* of Shravan 1914. The Shravan *vaida* fell on the 12th and 13th August, the first month of the war and the Shroffs being alarmed at the prospects held a special meeting on the 16th August and resolved that where a party is not able to give delivery goods (silver bars) be bought and sold at Rs. 76-12-0.

The plaintiff, Abraham, claimed delivery both from the defendants of the 50 bars in suit and from another Shroff, Vinodiram, whom another *adatia* employed by Abraham had agreed to buy silver from on Abraham's account for the Shravan *vaida* and failing to get delivery sued the selling Shroff in each case for the difference between the contract rate and the actual market price of Rs. 78-8-0.

In the suit against Vinodiram, Abraham sued his *kaccha adatia*, Khetridas, in the alternative. In the present suit he has impleaded the selling Shroff alone.

The suit against Vinodiram was tried by Macleod, J. and the plaintiff obtained a decree against Vinodiram. The present case differs from Vinodiram's in that the defence of want of privity between Abraham and the selling Shroff is expanded and based upon an alleged custom of the market. The custom is stated thus in the written statement :—

"According to the custom prevailing in the market there is no privity between the Shroff and an outsider for whom another Shroff may have entered into a forward contract as his *kaccha adatia* and the Shroff or the outsider

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can never claim either the performance of the contract or the damages for breach thereof from each other and that the Shroff considers the other Shroff who has acted as the *adatia* as principal and deals with him accordingly, the remedy of the outsider being only against the Shroff or *Choksi* employed by him."

Beaman J., the trial Judge, has found the alleged custom established and dismissed the plaintiff's suit.

The evidence called by the defendants to prove custom was that of eight Marwari Munims, one of them being the man who represented the defendants at the making of the contract in suit.

In my opinion it falls far short of proving the custom alleged.

Foolchand, the defendants' former Munim, says he accepted the deal, which Bholaram, the broker, suggested and the cashier entered it in the defendants' books. Bholaram gave Hiralal's name as the Shroff. Though a non-Shroff or Choksi may be the real buyer or seller, his name is never entered. If Hiralal failed he would not consider the defendant had any claim against Abraham and only Hiralal could proceed against defendant. If there was in defendant's books any other name besides Hiralal's as buyer defendant might go against him. If Hiralal had not paid defendant's money was gone even though the constituent was worth crores of rupees. That is the system of the bazar.

Briladrai, Munim of Momraj Rambhagat, says: "A constituent cannot exact performance from the other Shroff. It is the recognised practice in the silver, linseed and cotton markets." He did not approve of Macleod J.'s decision which he thought would be a great hardship. In cross-examination he said: "Silver business can be done by Marwaris with any one. Some Marwaris may ask for the name of the constituent of the broker. There is no objection. Some good brokers

do enter into such transactions without naming a Shroff, they do it in their own names. When the *souda* is made if a Shroff has not been named the Shroff's name is left blank and the broker must bring the name later. If he brings the name of a shaky Shroff the name would not be accepted and a more substantial name would be required. Till the Shroff's name is given the broker himself is responsible."

Radhakissen says: "The constituent of the *adatia* Shroff cannot enforce contracts." He thinks Macleod J.'s judgment was against the practice of the Shroffs. The reason for the practice is to keep all the business in the hands of the Marwaris and to enable them to earn commission.

The remaining five Munims were pressed more closely upon the question of the constituent's remedies.

Motilal knows of no case in which knowing the name of the outsider (constituent) and on failure of the Shroff they lost their money and did not attempt to recover it from the man they knew to be the principal. He says: "It would be very difficult to trace the constituent. In *pakki adat* we are responsible to our constituents—in *kacchi adat* we are not. The constituent (in *kacchi adat*) has no remedy. Abraham may ask Hiralal to proceed against defendant at Abraham's cost. If he won't file a suit Abraham is helpless. He has no remedy against either Hiralal or defendant."

Laxmandas says: "If defendant cannot pay, Abraham loses his money. If defendant won't pay, Abraham can ask Hirlal to proceed against defendant at Abraham's cost. Hiralal is not liable to Abraham. He must tell Abraham that defendant is his seller but does not tell defendant of Abraham's identity. By lending his name the Shroff becomes responsible only to the other Shroff, not to his constituent."

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Narsingdas says: "In *kacchi adat* the constituent cannot file a suit against his own *adatia* in the event of the other Shroff becoming insolvent." At the close of his evidence he became hopelessly confused and said in the last resort: "the *kaccha adatia* is liable to his constituent."

Sukhdevdas says: "The constituent has rights—he can compel his own Shroff to bring a suit against the other and if his Shroff will not bring a suit then the constituent can bring a suit against his own Shroff direct."

Omkarmal says: "If defendant will not pay, Abraham might ask Hiralal to sue defendant. If Hiralal won't sue then Abraham can notify that if he won't sue he, Abraham, will sue Hiralal."

Thus the three last witnesses are driven by the manifest injustice of the position to say that Abraham might in the last resort sue Hiralal. Motilal and Laxmandas however say there is no such remedy.

It is difficult to see what the remedy could be unless damages for breach of duty. It could not be a right of action on the contract, for the *kaccha adatia* is only an agent, not a guarantor of his principal.

Probably the witnesses had not clearly in their minds the distinction between the respective consequences of *kacchi* and *pakki adat*. In *pakki adat* the principal of the *adatia* has no relation to the contractor on the other side of the *adatia*.

In the present case, as in the case before Macleod J., the unjust position has arisen, for the *adatia* declined to sue the defendant except for damages based upon an arbitrary and fictitious figure not related to the market price of the *vaida* day.

The truth appears to be that if damages are recoverable by the usual and recognised measure, i.e., the

difference between the contract price and the market price at date of breach it cannot matter whether the *adatia* or his principal sues, if any suit is necessary. The question who is the right person to sue is only of importance where the Marwari ring have, as here, fixed an arbitrary measure of damages for a particular *vaida*. It is then that they strive to confine the right of action to their own associate who will decline to claim damages from his principal except at a purely conventional rate.

The present situation had never arisen till August 1914 and there cannot be any custom or usage to cover it.

But the evidence of Hiralal's solicitors' letters is inconsistent with the notion that there is no connection between the *adatia's* buying constituent and the selling Shroff for Hiralal not only is careful to impress upon defendant that he is only acting as an agent but to impress upon Abraham that the latter ought to tender direct to the defendant (see Hiralal's letter of the 17th August) and yet, as Narsingdas admits, Hiralal knows the custom of the market.

We have here in the action of Hiralal the only concrete case on the record of the spontaneous action of an *adatia* in such circumstances.

In Macleod J.'s judgment we have the only concrete instance of the result of similar relations when carried to their ultimate conclusion.

In that suit no evidence of custom was tendered, nor was custom alleged. The evidence now produced is a very obvious attempt to manufacture a custom to avoid a similar result in this case.

The defence that the defendant would not have contracted if he had known that Hiralal was not a principal will not bear investigation for the defendant after Hiralal's letter asserting he was only an agent, actually

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tendered damages for breach at the rate he now seeks to impose on Abraham.

Fulchand, the defendant's Munim, is emphatic that he did not know or care who was Bholaram's principal. The defendant cannot therefore contend with any hope of success that Abraham cannot be allowed to take advantage of the contract if the ordinary law of principal and agent applies.

It is clearly proved that the market rate at the time of breach was Rs. 78-8-0.

Decree reversed. Decree for plaintiff in terms of paragraph (*a*) of the prayer of the plaint with costs throughout on defendant.

Solicitors for the appellant: Messrs. *Ardeshir, Hormasji, Dinshaw & Co.*.

Solicitors for the respondents: Messrs. *Malvi, Hiralal Mody & Co.*

Decree reversed.

G. G. N.

CRIMINAL REFERENCE.

Before Mr. Justice Heaton and Mr. Justice Shah.

EMPEROR *v.* PUNJA GUNI.[*]

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November 27.

High seas—Offence committed by a foreigner on a foreign ship—The ship 18 miles off Karwar coast—Jurisdiction of British Indian Court to try the accused—Admiralty Offences (Colonial) Act (12 & 13 Vic., c. 96)—Statute 23 & 24 Vic., c. 88—Merchant Shipping Act (57 & 58 Vic., c. 60), section 686.

[*] Criminal Reference No. 43 of 1917.