I accordingly refuse the application.

As regards costs, costs of all parties will be costs in the arbitration.

MACKINTOSH & Co. v. SCINDIA STEAM NAVIGATION Co., LTD.

Solicitors for the petitioners: Messrs. *Crawford, Bayley & Co.*

Solicitors for the respondents: Messrs. *Payne & Co.*

Application refused.

G. G. N.

ORIGINAL CIVIL.

SMALL CAUSE COURT REFERENCE.

Before Sir Lallubhai Shah, Kt., Acting Chief Justice, and Mr. Justice Crump.

MANILAL DHARAMSI, PLAINTIFF *v.* ALLIBHAI CHAGLA, DEFENDANT*.

1922. June 19.

Teji Mandi contracts—Whether wagering contracts—No presumption of wagers—Proof of common intention to deal in differences only, necessary—Common intention of parties, a question of fact—Indian Contract Act (IX of 1872), section 30—Practice.

Teji Mandi contracts cannot be held to be wagers on account of their apparent nature and characteristics alone without proof of the fact that the common intention of the contracting parties at the time of the contracts was to deal only in differences and in no circumstances to call for or to give delivery.

Jessiram Juggonath v. *Tulsidas Damodar*[1], considered.

CASE stated for the opinion of the High Court under section 69 of the Presidency Small Cause Courts Act, 1882, and under Order XLVI, Rule 1, of the Code of Civil Procedure, 1908, by S. F. Billimoria, Third Judge, Small Cause Court, Bombay.

* Small Cause Court Reference No. 4 of 1922.

(1) (1912) 37 Bom. 264.

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MANILAL DHARAMSI v. ALLIBHAI CHAGLA.

The plaintiff, Manilal Dharamsi, sued the defendant Allibhai Chagla in the Small Cause Court, Bombay, to recover brokerage for having brought about contracts for sale of camphor by the defendant to other dealers in Samvat Year 1975.

Among other defences the principal one raised by the defendant was that several of these contracts were Teji and Mandi contracts and that such contracts being by their very nature of a wagering and gambling character, the plaintiff was not entitled to recover brokerage thereon, he having knowingly assisted in bringing about and furthering the agreements to wager.

The contracts brought about by the plaintiff were for sale and purchase of camphor for the Vaida of Chaiter, Vaishak, Jesht and Asad of 1975.

Six of these contracts relating to goods of the total value of Rs. 1,12,250 were Mandi contracts wherein the defendant in consideration of a premium received by him from the other party gave the latter an option to sell to defendant on the due date a certain quantity of camphor at a fixed rate.

Six more of the contracts relating to goods of the total value of Rs. 92,000 were Teji contracts wherein the defendant in consideration of a premium received by him from the other contracting party gave the latter an option to buy from defendant on the due date a certain quantity of camphor at a certain rate.

The *modus operandi* in these Teji and Mandi contracts as explained by the referring Judge was as follows:—

"One party pays to the other a certain sum and therewith purchases from the other party an option to buy or to sell a fixed quantity of camphor on the due date from or to the other party at the rate named in the contract. If the contract is a Teji one and on the due date the market rate exceeds the rate fixed in the contract the person who has secured an option declares that he will buy and thereupon the party who has pocketed the premium has to

deliver the goods at the rate fixed or pay the differences between the ruling market rate and the rate agreed upon in the contract.

If the contract is a Mandi contract and on the due date the market rate falls below the rate agreed upon in the contract the party who has secured the option declares that he will sell and thereupon the party who has pocketed the premium has either to take delivery of the camphor and pay for it at the agreed rate or to pay differences between the agreed rate and the ruling market rate.

On the other hand in the case where the contract is for a Teji if the market rate on the due date is the same as the rate agreed upon in the contracts or falls below it, the party who has secured an option, makes no declaration in which event nothing happens and he loses the premium he has already paid. So likewise if it is a Mandi contract and the due date rate is the same as the rate agreed upon in the contract or rises above it the party who has secured an option makes no declaration and in the event nothing happens and he loses the premium he has already paid.

The party who has purchased the option may in spite of the fact that the market rate on the due date has risen above or fallen below the agreed rate declare option to sell or purchase respectively if it suits his purpose to do so, with due regard to his other operations and existing circumstances, but if he does declare an option he has to abide by it and give or take delivery as the case may be or pay differences if any."

It was proved before the trial Judge that in Teji and Mandi contracts actual deliveries of the goods were "at times" given and taken and prices paid as agreed in the contracts. But as it seemed to be the practice in the Small Cause Courts to dismiss summarily suits on Teji and Mandi contracts, the trial Judge referred the following question for the opinion of the High Court:—

"Are agreements of Teji and Mandi necessarily to be held as wagers on account of their nature and characteristics alone, or is evidence necessary to prove that the contracts were intended to be wagers?"

In his judgment accompanying the reference the trial Judge observed :—

"In my opinion the agreements by way of Gulli or Teji Mandi are not absolute contracts for sale and purchase at the date they are made. They become contracts of sale and purchase when the option to demand delivery or give delivery is exercised. Before the option is exercised

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they are agreements wherein one person for a cash consideration paid to him or promised to be paid on due date undertakes that he will place at the disposal of the other party a certain quantity of the commodity at a certain rate on the due date if such other party claims it or undertakes to take up and pay for a certain quantity if the other party wishes to get rid of that quantity. It is admitted that in such contracts goods are delivered and taken delivery of and paid for at times, on the option being declared to claim delivery or give delivery. Are then contracts of this nature necessarily wagering in their very inception? I think not. They may be wagers pure and simple, wanting the intention to give and take delivery at due date. They may, on the other hand, be contracts of insurance as above described with intention to give and take delivery if the need to do so arises. Agreements of wagers have been defined to be those wherein it is the express or implied intention of both parties that in no event is delivery of goods to be offered or demanded but that both must abide by the state of the market on due date and pay and receive differences only. I do not think, therefore, that agreements, whether of the description of Gulli or Teji Mandi, in which in some events delivery can be offered or claimed and does actually take place, can be stigmatised as wagers without proof that it was the common intention, express or implied, of both parties that in no event should delivery be offered or claimed."

The reference was heard.

Kania, for the plaintiff.

Kanga, Advocate-General, with *Petigara*, for the defendant.

Reference was made to the following authorities during argument:—*Manubhai* v. *Keshavji*[1]; *Jessiram Juggonath* v. *Tulsidas Damodar*[2]; *Ramchandra* v. *Gangabison*[3]; *Motilal* v. *Govindram*[4]; *Doshi Talakshi* v. *Shah Ujamsi Velsi*[5]; *Universal Stock Exchange* v. *Strachan*[6]; *Kong Yee Lone & Co.* v. *Lowjee Nanjee*[7]; *Forget* v. *Ostigny*[8]; *In re Gieve*[9]; *Bhagwandas Parasram* v. *Burjorji Ruttonji Bomanji*[10]; *Manilal Raghunath* v. *Radhakisson Ramjiwan*[11].

(1) (1921) 24 Bom. L. R. 60.
(2) (1912) 37 Bom. 264.
(3) (1910) 12 Bom. L. R. 590.
(4) (1905) 30 Bom. 83.
(5) (1899) 24 Bom. 227.
(6) [1896] A. C. 166 at p. 173.
(7) (1901) 29 Cal. 461.
(8) [1895] A. C. 318.
(9) [1899] 1 Q. B. 794 (C. A.).
(10) (1917) L. R. 45 I. A. 29.
(11) (1920) 45 Bom. 386.

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SHAH, AG. C. J. :—This is a reference from the Presidency Small Cause Courts, Bombay, under section 69 of the Presidency Small Cause Courts Act. The question referred to us is: "Are Teji Mandi contracts to be held as being wagers on account of their apparent nature and characteristics alone without any other proof of the intentions of the contracting parties or is evidence necessary to prove that such contracts were intended to be wagers?"

It appears from the terms of the reference that the learned Judge has felt some doubt on the point in view of the practice that is stated to be prevalent in the Presidency Small Cause Courts of treating such contracts as wagers without any further proof that they are wagers. The learned Judge was of opinion that the practice was not justified and that in every case of such contracts as in every other case, it must be proved whether the contracts were in the nature of wagers, that is, whether the common intention of the contracting parties at the time of the contract was to deal only in differences and under no circumstances to call for or give delivery.

In the first place, I desire to point out that this is hardly a question of law, or usage having the force of law, and I am not sure whether the reference could have been made. It was not only open to the Judge, but I think it was his duty, to decide, according to his view of the evidence in the particular case before him giving such weight as he might have thought proper to the practice referred to as obtaining in that Court.

But as the question is referred, I would answer the question in the negative, holding that it is necessary in such contracts as in any other contract to prove the common intention of the parties as a question of fact. In my opinion, the mere fact that the contract is a Teji

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contract or a Mandi contract or a Teji-Mandi contract with double option makes no difference to this point. It may be that if a party desires to prove that a particular contract of that description was a wagering contract, he may be able to do so with slight proof; and, under the circumstances of any particular case, it may be that the Court may be able to decide, without much outside evidence, as to whether that contract was in the nature of a wager or not. But to my mind it is essentially a question of fact which must be answered on the evidence in each case; and the mere fact of its being Teji-Mandi contract is not by itself sufficient to take it out of the ordinary rule that the party who pleads that the contract is void as it is in the nature of a wager has to prove that fact.

The practice is probably due to certain observations in *Jessiram Juggonath* v. *Tulsidas Damodar*[1] and in the earlier case of *Ramchandra* v. *Gangabison*[2]. The observations in *Jessiram's case*[1] at p. 272 clearly show to my mind that it is really unsafe to lay down any general proposition in this matter; and whatever the opinion formed by a particular Court on the evidence in that particular case may be, the only general proposition which, in my opinion, can be safely enunciated is that the fact of the contract being a wager must be proved by the evidence in the case on the essential point whether the common intention of the contracting parties was to deal only in differences. It is hardly necessary to refer to any authorities on this point. Having regard to the nature of these contracts, in my opinion, it is neither possible nor desirable to lay down any general rule that they must be presumed to be wagering contracts without any proof as to the common intention of the contracting

(1) (1912) 37 Bom. 264. (2) (1910) 12 Bom. L. R. 590.

parties. There is a recent judgment of Mr. Justice Kincaid in *Manubhai* v. *Keshavji*[1] where the same view is indicated. We do not desire to express any opinion on the evidence in this case, and by answering the question referred to us, we do not mean to say anything more than this that on the evidence in the case it is for the Court to decide whether in this particular case the contracts were wagering contracts or not.

Costs to be costs in the cause and to be taxed as on the Original Side.

CRUMP, J. :—I agree to the answer proposed to the question propounded by the Court of Small Causes. The difficulty that I feel in this matter is that I do not precisely apprehend what is the point of law that is submitted to us. The question as framed is: "Are agreements of Teji and Mandi necessarily to be held as wagers on account of their nature and characteristics alone or is evidence necessary to prove that the contracts were intended to be wagers"?

Now if it is to be taken that we are asked whether as a matter of law such contracts are necessarily to be held as wagers, then the answer clearly must be in the negative. For it is not even suggested that there is any rule of evidence or any other rule of law which can be held to exclude evidence as to the true nature of such contracts. It may be that as a matter of fact it has been found in practice that a large number of these contracts are wagering contracts, but that is no ground on which any rule of law can be based. All that can be said is that there is no legal presumption that a Teji or Mandi contract is a wagering contract, and that it must be dealt with as any other contract, and that the rules that have been laid down for determining

[1] (1921) 24 Bom. L. R. 60.

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whether a contract is a wagering contract or not are applicable to this case just as much as to other contracts. The test is well known. Where it is shown that the common intention of the parties was that in no case was delivery to be taken or given but that in all cases differences should be paid then the parties are wagering. It is impossible to my mind to go beyond that and it in effect furnishes the answer to the question propounded.

Solicitors for the plaintiff: Messrs. *Mehta, Lalji & Co.*

Solicitors for the defendants: Messrs. *Mulla & Mulla.*

Answer accordingly.

G. G. N.

ORIGINAL CIVIL.

Before Sir Lallubhai Shah, Kt., Acting Chief Justice, and Mr. Justice Crump.

1922.

June 21.

ABDUL LATIF USMAN, APPELLANT *v.* HAJI TAR MAHOMED AND ANOTHER, RESPONDENTS*.

Criminal Procedure Code (Act V of 1898), section 195 (7)—Sanction to prosecute—Order of a single Judge on the Original Side of the High Court granting or refusing sanction—Whether appeal lies from such order—Practice.

Under the general rule contained in sub-section (7) of section 195 of the Criminal Procedure Code, 1898, an appeal lies to the Court of Appeal in the High Court from an order made under the section by a single Judge on the Original Side of the High Court, granting or refusing a sanction to prosecute.

THIS was an appeal from the order of Kanga J. refusing sanction to prosecute Haji Tar Mahomed and Ali Mahomed Jivraj the constituted attorney and Munim respectively of the plaintiff Vali Mahomed Haji

* O. C. J. Appeal No. 148 of 1921 : Suit No. 2600 of 1920.