

Emperor Vs. Thavarmal Rupchand

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Court : Mumbai

Decided On : Nov-09-1928

Reported in : (1929)31BOMLR158

Judge : Mirza and; Baker, JJ.

Appeal No. : Criminal Appeal No. 643 of 1927

Appellant : Emperor

Respondent : Thavarmal Rupchand

Disposition : Appeal allowed

Judgement :

Mirza, J.

1. This is an appeal by the Government of Bombay from an acquittal of the accused by the Chief Presidency Magistrate, Bombay, on a charge of keeping a common gaming house under Section 4(a) of the Bombay Prevention of Gambling Act, IV of 1887.

2. The main points for consideration in this appeal are :-

(1) Whether the warrant under which the accused was arrested was legal;

(2) Whether the articles seized from the accused's room were instruments of gaming; and

(3) Whether the business the accused was conducting in the place raided was gaming.

3. The learned Magistrate has found that the warrant of arrest was illegal and that the business in which the accused was engaged was not of a wagering nature. It can also be gathered from the judgment that the Magistrate was of opinion that the prosecution had failed to prove that any of the books or articles seized from the accused's room or person were instruments of gaming.

4. The objection taken on behalf of the accused to the warrant is that it is vague as regards the localization of the gaming, that there is no sketch or plan annexed to the warrant, and that the municipal number of the accused's tenement is not inserted in the description of the place set out in the warrant. It is also contended on behalf of the accused that the three buildings to which the warrant refers are not properly described. The Magistrate is of opinion that there cannot be any doubt that the warrant does specify with sufficient details the open space referred to in the warrant, but holds that the warrant in this case is in the nature of a general warrant and hence bad in law. He holds that the warrant does not contain a proper description of the houses or the rooms which were to be raided. The description contained in the warrant according to the Magistrate is both erroneous and vague. The description in the warrant to which exception is taken is as follows:-

A certain place situate at New Satta Gully off Sheikh Memon Street in the 'Pen space partially covered by a tarpaulin which is bounded by the three chawls known as Motishaw, Narsidas Jeykisandas and Dwarkadas Jeykisandas chawls and also the otlas and rooms on the ground-floors of the said three (chawls which open on to the said open space.

The evidence shows that the private gully by which the chawls in question are approached has acquired the name in the locality of 'the New Satta Gully'. It is in close proximity to what was known as 'the Satta Gully' where business of a highly speculative, if not gambling, nature was originally being carried on. Since the new

business came to be established in the present locality, the approach to these business premises has come popularly to be known as 'the New Satta Gully', to distinguish it from the original Satta Gully which is now known as 'the Old Satta Gully'. Although the public are using the New Satta Gully it is doubtful whether they have yet acquired a right of way over it by user. The Bombay Municipality does not claim it as a public road but the municipal officials for their own guidance have marked it in their private books as the 'New Satta Gully.' The evidence also establishes that the main approach to the New Satta Gully is from Sheikh Memon Street. The evidence also shows that at the time of the raid and some time prior thereto there was a tarpaulin which partially covered a certain open space bounded by three chawls in this locality. According to Newland's plan the whole property is known as Motishaw's chawl. Motishaw apparently was the original owner of this property. The property has since passed through different hands and consists now of eleven chawls, five on one side of the open space or 'New Satta Gully' and six on the other side. The whole property was recently owned by one Jeykisanadas. Since his death, by a consent decree in 1915 in a suit in this Court, the property has been divided between his two sons Narsidas Jeykisanadas and Dwarkadas Jeykisanadas. The five chawls on one side of the open space or 'New Satta Gully' are allotted to Narsidas and the six chawls on the other side to Dwarkadas. By the terms of the consent decree Narsidas and Dwarkadas and their respective tenants are given the right to use the open space or Gully. The evidence, however, does not satisfactorily establish that the chawl described in the warrant as Motishaw's chawl refers to a chawl exclusively known by that name. According to the evidence that description might very well apply to any of the eleven chawls situated in the locality. The evidence does not show that the other two chawls referred to in the warrant as Narsidas Jeykisanadas chawl and Dwarkadas Jeykisanadas chawl are known respectively by those names. According to the evidence these two chawls would each be known as Motishaw's chawl as much as any of the eleven chawls in the locality. The particular nomenclature adopted by the warrant in respect of the three chawls seems no doubt to be incorrect and may be said to amount to a misdescription. They are, however, in my opinion, sufficiently identified by reference to the further description that the shops and rooms on the ground-floors of the said three chawls

open on the said open space which is partially covered by a tarpaulin. This description can apply only to certain three chawls out of the eleven and not to any of the remaining eight. It is further clear from the evidence that since July 1925 the Shri Mahajan Association had established its office on the second floor of one of these three chawls and had enlisted a large number of members who were doing business under its auspices in what is known as Kacha Khandi. For the purposes of that business the Mahajan had utilized the ota on the ground-floor of its office for keeping a board on which cotton rates were published from time to time. It also regarded the open space in front of its office? as the building compound where it would be permissible for its members to transact business in Kacha Khandi. Owing to these new activities a number of brokers and merchants had rented office-rooms on the ground-floors of three out of the eleven chawls and business in Kacha Khandi was being openly transacted in these rooms as well as in the open space roughly bounded by the three chawls. It is clear from these circumstances that the tarpaulin was put up on the open space in order to protect from the sun and rain the brokers, merchants, and members of the public who resorted to the place to transact business. The learned Magistrate was of opinion that the partial covering of the open space by a tarpaulin was not of much importance as it had since been removed. I do not agree with that expression of opinion as in my judgment what we are primarily concerned with in this case is to ascertain how the property looked at the time of the raid and some time prior thereto and not what changes it has since undergone.

5. Mr. Coyajee has relied on this point upon an additional circumstance. It appears that within the area covered by the warrant there are a pan or betelnut shop and an old cloth shop. The police-officers did not raid the pan shop but they raided the cloth shop and arrested certain persons and seized certain articles there. Later on they released these persons and returned the articles to them, Mr. Coyajee contends that a warrant which is so general as to include in its purview the betelnut and cloth shops must be regarded as a general and vague warrant.

6. Section 6 of the Bombay Prevention of Gambling Act empower the Commissioner of Police in the City of Bombay on complying with certain conditions to give authority by special warrant under his hand to any Inspector or other

superior officer of police of not less rank than a Chief Constable:-

(a) to enter,...by night or by day, and by force, if necessary, any such house, room or place, [as described in the warrant], and

(b) to take into custody and bring before a Magistrate all persons whom he finds therein, whether they are then actually gaming or not, and

(c) to seize all instruments of gaming, and all moneys and securities for money, and articles of value reasonably suspected to have been used or intended to be used for the purpose of gaming, which are found therein, and

(d) to search all parts of the house, room or place, which he shall have so entered, when he shall have reason to believe that any instruments of gaming are concealed therein, and also the persons of those whom he shall so find therein or take into custody, and to seize and to take possession of all instruments of gaming found upon such search.

7. The powers given under this section are very wide and are apt seriously to interfere with the liberty and property of the subject. This section should be strictly construed and the conditions required for its coming into operation should be strictly complied with. In describing the place in the warrant it is necessary that there should be great accuracy and freedom from ambiguity. In *Emperor v. Ahasbhai* (1925) 28 Bom. L.R. 272. a Division Bench of this Court has held that the question of the legality of the warrant issued under the provisions of Section 6 of the Gambling Act is in the nature of a preliminary objection. In that case the warrant referred only to house No. 486 Budhwar Peth, Poona City, when the house actually searched was not 486, but 484, and on that description the Court held the warrant to be illegal, That case, however, in my opinion, can be distinguished from the present.

8. The warrant in that case gave no other description of the place as there was in *Emperor v. Krishna Rutna Dalvi* (1904) 6 Bom. L.R. 52. or in *Emperor v. Jhunni* (1905) 2 C L.J. 243. In the case before us the warrant does not give a description of the place which would identify it with some place other than the place which was

actually raided.

9. In considering whether the place mentioned in the warrant is sufficiently identified we cannot overlook the fact that the place was being put to a particular use, namely, of carrying on the business of Kacha Khandi. Halsbury in his Laws of England, Vol. XV, in the article on 'Gaming and Wagaring', paragraph 599, states :-

The 'place' and the 'use' to which it is put are conceptions very closely connected, for the localisation of the business of betting underlies them both. Once it is established that a business of betting is carried on, if then it is found that the business is localised so that people may fairly be said to resort to the place where it is carried on, the place is sufficiently defined. [See Powell v. Kempton Park Racecourse Co. [1899] A.C. 143] And as the localisation is brought about by the kind of use to which the place is put, its presence is a question of fact. [See Brown v. Patch [1899] 1 Q.B. 893.]

It is clear from the evidence that this place comprising the open space partially covered with a tarpaulin, the otlas and the rooms on the ground-floors of the three chawls opening out into the open space were all being used substantially as one place for the purpose of Kacha Khandi business. The cloth shop and pan shop included in the area would not, in my opinion, materially alter the general character of the place as one where Kacha Khandi business was being carried on. Although the description of the three chawls appears to be inaccurate in some particulars, it is clear from the rest of the description contained in the warrant that the inaccuracy is not so material or substantial as to mislead a stranger if one were to go to the locality and attempt to find the place intended to be raided, with the help of the warrant. The inaccuracy does not, in my opinion, amount to more than a misdescription and is not of a nature to vitiate the warrant.

10. The learned Magistrate is of opinion that the 'special warrant' referred to in Section 6 of the Gambling Act has reference, in addition to its being addressed to a particular officer or officers, to a particular house or a particular owner or occupier of that house. The words 'house, room or place' contained in Section 6, in his opinion, have reference to a particular house, room or place, or to houses,

rooms or places if they are owned by one and the same person and are used for a common purpose. There is nothing in the section which, in my judgment, would restrict its operation to the class of cases set out by the Magistrate. Houses, rooms or places, in my opinion, should be taken broadly as meaning houses, rooms or places apart from the more restricted notion of a tenement. If the houses, rooms or places have substantially been utilized for the common purpose of gambling it would not matter, in my judgment, if the houses, rooms or places comprised more than one tenement. I am unable to agree with the learned Magistrate's opinion that if the warrant comprised more than one tenement it would be a general and not a special warrant unless all the tenements were held by one and the same person who used them for the common purpose of gaming. The term 'special warrant,' in my opinion, has reference only to the limitation as regards the person or persons who would be competent to execute it. The special warrant when issued authorises the officer or officers named therein to do all the things that are detailed in the warrant. The warrant issued under Section 98 of the Criminal Procedure is not a special warrant as it can be endorsed over to any other police-officer of similar rank. In the case of a special warrant the only person who can execute the warrant is the officer who is named in the warrant. The warrant in this case, in my judgment, did not cease to be a special warrant because it applied at the same time to a large number of tenements and persons. The common purpose for which the tenements were held was to transact Kacha Khandi business in them within a particular area, and as the warrant applies substantially to this area which for practical purposes may be regarded as a market for Kacha Khandi transactions, it does not, in my opinion, suffer from the infirmity of being general, indefinite or vague.

11. Disagreeing with the learned Magistrate's view, I hold that the warrant issued by the Deputy Commissioner of Police and executed by the officers mentioned therein was a legal warrant under Article 6 of the Gambling Act.

12. With regard to the second point, whether the articles found in the accused's room were instruments of gaming, the point is not free from difficulty. Reliance is placed by the prosecution in this connection, on the three account books seized from the accused's room : (1) a book containing apparently a record of

transactions in American Futures; (2) a book containing a record of transactions in Kacha Khandi; and (3) a book containing a record of Teji Mandi transactions entered into by the witness Akbarbhai. By the Gambling Act as since amended 'instruments of gaming' include 'any document used as a register or record or evidence of any gaming.' If it can be (shown, therefore, that any of the above books was used for the purpose of registering or recording any gaming transaction it would fall within the definition of 'instruments of gaming.' This would appear to imply that the transactions recorded in the books must be shown to be gaming transactions before the books can be relied upon as 'instruments of gaming.' In Emperor v. Chaganlal (1904) 6 Bom. L.R. 249. a Division Bench of this Court has held that a person keeping for his profit a place where brokers and others carry on Jota business, i.e., wagering from day to day on the total sale of cotton bales in Liverpool, and where the wagering books are kept or used, was guilty of keeping a common gaming house. To the same effect is the ruling in Emperor v. Lakhamsi (1904) 6 Bom. L.R. 1091., where it was held that a single page of paper used for registering wagers is an instrument of gaming within the meaning of Article 3 of the Bombay Prevention of Gambling Act, 1887. In Emperor v. Manilal : (1915)17BOMLR1080 . a Division Bench of this Court has held that a book used for recording entries of the bets made by those frequenting a place is an instrument of gaming.

13. The first book relied on by the prosecution appears from its contents to be a register or record of transactions in American Futures. According to the witness Dady Mehta, a transaction in American Futures is a gamble in the rise or fall of the price of American cotton in New York. This, he says, is determined every day on the receipt of the closing rate of American cotton which is generally received in Bombay at about 2 a. m. The business according to him is closed for the day and is not carried over. The transaction is also known according to this witness as Jotta Patia which is a place where they do this class of wagering business. The unit in this gambling is 100 pice. A man can take any number of units. Mr. Dady Mehta gave it as his opinion that the entries shown to him from this book were a register of transactions in American Futures. In cross-examination Mr. Dady Mehta was unable to explain how certain items in this book were arrived at. The Government Pleader took us through several of the entries which are exhibited

from this book including those which Mr. Mehta was unable to explain in the lower Court and showed that the items could be explained by the application of the rules relating to American Futures as deposed to by Mr. Dady Mehta.

14. The matter of these entries was particularly within the knowledge of the accused. Section 106 of the Indian Evidence Act requires that when any fact is especially within the knowledge of any person, the burden of proving that fact should be upon him. The accused has given no explanation of the entries appearing in this book either in his written statement or in the evidence of the witnesses he called. Mr. Coyajee, on his behalf, has not been able to show in what particular the explanation given by the Government Pleader can be said to be erroneous. He contends that it was for the prosecution expert witness Dady Mehta to have given such explanation and as he has failed to do so, his evidence on the subject should be totally disregarded. The entries having been exhibited and the evidence of the expert having shown that a certain general rule is applicable to transactions in American Futures, it is open, in my opinion, for the Court to consider whether the exhibit on the face of it bears out what the witness has stated about it in his evidence. I am satisfied from the internal evidence afforded by this book that it contains a register of transactions in American Futures, Inspector Wagle in his evidence has stated that when he raided the accused's room he saw the accused transacting business in American Futures and in Eacha Khandi This witness has not favourably impressed the Magistrate who calls him over-zealous and with regard to some of his answers that he talks sheer non-sense and naturally does not understand what he says. Supported as his evidence on this point is by the finding of a book which prima facie contains a, record of transactions in American Futures, I would not be inclined to disbelieve his evidence that when he raided the accused's room he found accused engaged in transacting business in American Futures. The business in American Futures has come to have a well-known meaning in business circles, According to Mr. Dady Mehta there are two ways of dealing in American Futures. The first is known as business in Kacha American which is to buy or sell American Futures. This business, when it was being done in Bombay in the past, used to commence on a Saturday and was automatically cut on the Saturday following on the basis of the last closing rates wired from New York. No delivery of cotton was given, taken, or

contemplated. In 1918 or 1919 the operators in this business put a stop to it. That was due to delay in getting out cables from America owing presumably to war conditions. According to Mr. Mehta this kacha American Futures was precursor of the kacha Khandi transactions taken up by Shri Mahajan Association in 1925. The second form of business in American Futures, according to Mr. Dady Mehta, consisted in gambling on the prices of American cotton in New York cabled out from day to day. The business was closed circuit every day and was not carried over.

15. The learned Magistrate has referred to the case of *Bassoon v. Tokersey* I.L.R (1904) Bom. 616: 6 Bom. L.R. 521. as laying down that dealings in American Futures are not necessarily agreements by way of wager. The facts in that case show that instructions were given to Sassoon & Co. to purchase American cotton which they did in pursuance of their instructions. At all material times Sassoon & Co. were carrying on business in partnership as merchants and bankers in Bombay, Liverpool and elsewhere. The evidence showed also that the contracts were in the ordinary form, that under such contracts delivery was ordinarily demanded and given, that the purchases made were ordinary purchases for future delivery, and that they were made under contracts in the ordinary form for future delivery in the form in which cotton is ordinarily bought and sold for future delivery and in the form in which delivery is demanded and given, Under the contracts in that case no delivery was made to the defendant, but that was because the cotton was sold by reason of the defendant's failure to deposit cover for the deficiency in price. The transactions to which that case refers are, in my opinion, very different from the transactions commonly known in this country as American Futures which are as described by the witness Dady Mehta and as they appear in the accused's book. I do not agree with the learned Magistrate that the decision in *Bassoon v. Tokersey* would cover transactions of the kind disclosed by the accused's account book. The burden of proof to show that the account book did not bear the interpretation which, on the face of it, it seems to invite was clearly on the accused, and, in the absence of any explanation from him or on his behalf to rebut the presumption which naturally arises, I must hold that this book falls within the definition of an instrument of gaming.

16. With regard to the book containing a register of Kacha Khandi transactions, the explanation given by the accused is that Kacha Khandi transactions constitute a legitimate business and are practically on the same footing as the transactions carried on by the East India Cotton Association by means of forward contracts commonly known as 'Hedge' contracts. The differences between the two forms of transactions according to the accused are : (1) a difference in the unit for business, and (2) a difference in the amount and manner of brokerage. In a forward contract of the East India Cotton Association the minimum unit for business is one-hundred bales; under the rules of the Mahajan Association the minimum is five bales. Under the East India Cotton Association Rules, brokers are permitted to charge maximum brokerage at the rate of annas eight per cent, on the total price realised by the bales. This brokerage once charged covers the transaction until it is finally closed on the due date or by means of a cross-contract before due date. No fresh brokerage becomes claimable if the contract is carried forward from one settlement day to another until the due date of delivery. Under the rules of the Mahajan Association the maximum brokerage allowed is two annas per each bale and has no reference to the value realised, According to the accused the contracts are capable of being carried forward from week to week, but each time such forward transaction takes place the constituent has to pay fresh brokerage as if it were a new transaction. The accused relies upon certain resolutions of the Mahajan Association passed both before and subsequent to the date of the raid, and certain deliveries given and taken subsequent to the date of the raid. In my opinion what happened after the raid would be irrelevant except in so far as it might throw light on the situation as it existed at the time of the raid and prior thereto.

17. The Mahajan Association was formed on June 25, 1925. Its memorandum of association is dated July 17, 1925, and it commenced work on July 22, 1925, From the exhibits put in, it appears that they quoted from day to day the rates for Broach Old Cotton of July-August 1925 delivery. They were unable, however, to produce evidence from their market of any delivery given or taken of Broach Old Cotton of July-August delivery. On August 15, 1925, the Mahajan Association purported to open an Arbitration Committee to decide disputes arising from Souda transactions. This would seem to indicate that they at this date contemplated that

there might be genuine transactions with regard to which a committee of arbitrators might be required to arbitrate. On October 24, 1925, a Defaulting Committee was appointed and on October 27, 1925, a Parakh Committee or Surveying Committee was appointed. This again would seem to indicate that the intention of the Mahajan Association was to do genuine business. But they have not adduced evidence of any genuine business dispute which these Committees were at any time called upon to adjust. On November 27, 1925, it is alleged that a Muccadam was appointed. The evidence on the point, however, does not appear to be of a convincing nature and the letter relied upon is one about which some doubt may be entertained.

18. The term Kachi appearing in Kachi Khandi is in contrast with the term Pakki appearing in Pakki Khandi. According to the learned Magistrate the only difference between the two is that in Kachi Khandi the minimum unit for forward business is five bales and in Pakki Khandi it is one-hundred bales, This, however, does not seem to be the essential difference between the two. The fixing of the minimum unit is a matter of convention and may be changed from time to time, although there is no evidence that it has been so changed in the past, by the rules of the East India Cotton Association as by the rules of the Mahajan Association. If the purpose were to gamble, i. e., receive or pay differences only without contemplating delivery of cotton under any circumstances, a system which places the minimum of the transaction at five bales would appeal to a larger class of individuals, particularly the lower middle and poorer classes, than a system which puts its minimum at a hundred bales. The differences to be paid or received would naturally be greater if the number of ~~~ bales is larger. The literal meaning of the term Pakki or Pakka is ripe or fully developed, and that of Kachi or Kacha unripe or imperfect. Generally speaking, when dealing with certain measurements we find that a Pakka Seer is fuller than a Kacha Seer. The distinction, in my opinion, seems to turn on the fact that a Kacha Khandi consists of one bale and a Pakka Khandi of two bales. When the object is only to gamble it would facilitate calculation if the unit resorted to were of a Kacha Khandi which is equivalent to one bale and not a Pakka Khandi which is equivalent to two bales. The rules of the Mahajan Association and the evidence in the case, abundantly establish that what was contemplated in the Kacha Khandi transaction was the cutting of the

transaction itself every Saturday and paying or receiving differences as the case might be. No provision was made in the rules of the Mahajan Association as they stood prior to January 21, 1926, for the carrying forward of any of the transactions from one settlement day to another. The analogy between the 'Hedge' forward contract of the East India Cotton Association and the Kacha Khandi transaction, though at first sight it may seem to apply, is as a matter of fact illusory. In a 'Hedge' contract, no doubt, sometimes there need not be a written contract or Kabala; in the Kacha Khandi transactions, as they were being carried on, there never was a written contract or Kabala. There was a memorandum or entry only in the books of the broker or merchant. Such a mode of transacting business might be permissible when the business is between a broker and a broker, or as in the case of the East India Cotton Association's 'Hedge' contracts when they are entered into as a cover for already pending business, but in dealing with members of the public in respect of business which in no sense could be regarded as a cover for pending business one would under normal conditions expect a written contract or Kabala. Under the East India Cotton Association Rules, Badla or transactions which are carried forward from settlement day to settlement day until the vaida date are provided for, and even in 'Hedge' contracts the liability to give or take deli-; very is not altogether eliminated. The settlement days of the East India Cotton Association are less frequent than those of the Mahajan Association. Broadly speaking, they are on two days in a month. The settlement is intended to be for the protection of the brokers and intermediate parties and for regulating and controlling the transactions periodically before the due date. It does not follow from that system that a transaction which has been entered into is cut or closed according to the prevailing rate in the market on the settlement day next following. In case of default in payment of difference the transactions may be so closed. But what seems to be in contemplation is that under normal conditions the transaction would be carried forward from one settlement day to another until the due date of delivery, and in the meanwhile the account would be kept clear by paying or receiving differences on the intervening settlement days according to the then prevailing rates. Under the rules of the Mahajan Association, the transaction itself would be automatically closed according to the rate prevailing on the Saturday following the transaction. Such a mode of doing business in cotton lends support

to the statement made by Mr. Dady Mehta that the Kacha Khandi business done under the auspices of the Mahajan Association was only a revival of the old mode of gambling in American Futures. There appears to be a close analogy between Kacha Khandi and Kacha Americans. The old business of American Futures popularly known as Kacha Americans commenced on a Saturday and was automatically closed on the following Saturday. So is the Mahajan's business of Kacha Khandi, No delivery was given, taken or contemplated, in Kacha Americans. So it seems is the case in Kaoha Khandi. There is force in Mr. Mehta's contention that in Kacha Khandi business there is only a contract as to rate but no contract as to commodity. The very term Kacha as applied to Kacha Khandi seems popularly to stand for a transaction in which no delivery is given, taken or contemplated, as was the notion in Kacha Americans. Kacha Americans were not carried forward nor it would seem are Kacha Khandi transactions, at any rate, as they were entered into up to January 21, 1926.

19. The term Kacha as applied to cotton Soudas, as the evidence in this case shows, has come to acquire a special significance in the bazaar as meaning cotton Soudas in which no delivery is given, taken or contemplated. The business of Kacha Americans had made the public familiar with that notion: when gambling in Kacha Americana ceased in 1918 or 1919 it was immediately transferred to Kacha Khandi. When the Mahajan took up in 1925 the business of Kacha Khandi they knew very well that they were continuing the gambling business under its familiar name. The Mahajan's repeated profession that the business in Kacha Khandi which they had taken in hand was genuine and intended to benefit the producers and consumers of cotton was, as the evidence in the case shows, a mere pretence and camouflage at least up to the date of the raid.

20. Begraj Gupta states that the kinds of business- done in Bombay in cotton are (1) Pakka Souda, and (2) Kacha Souda. By Pakka Souda business he means a business where delivery is to be taken and-given and the transactions are according to law. Pakka business, in his opinion, is done only in the Marwadi Bazaar and at Sewri. By Kacha Souda he means Soudas where the rates are cut and no delivery is given, taken or contemplated. This business, in his opinion, is done in Motishaw's chawl. He further states that in Kacha Khandi the unit is five

Khandis. In Pakka business, he says, by Khandi they mean two bales, and in Kacha business, by Khandi they mean one bale. The accused's witness Batilal admits that the business in Kacha Khandi was originally cut on every Saturday. The Mahajan Association rented a godown from February 3, 1926, after the raid. According to the accused's witness Mohanlal, bye-laws for delivery were made on March 18, 1926. The accused's witness Bishamberlal admits that the rate was fixed every Saturday and the transaction would be closed every Saturday. He also admits that if the transaction was to be closed every Saturday there would be no question of taking or giving delivery. He says 'this was the nature of the business up to a little time before the Police raid.' Mohanlal further admits that before January 21, 1926, the date of the raid, the Mahajan Association had no contract forms, and no resolution had been passed that they were to deal in Broach Cotton or for forward delivery only.

21. The transactions entered in the Kacha Khandi book of the accused show on the face of them that they are settlements of balances in accordance with the rules and practice of the Mahajan Association prior to January 21, 1926, of cutting transactions every Saturday and paying or receiving differences only. It is clear that the transactions of Kacha Khandi as they were being put through up to the date of the raid were gaming or wagering. A book which contains a register of such transactions, as the accused's book does, would necessarily be an instrument of gaming.

22. With regard to Akbarbhai's Teji Mandi transactions, the entries show that Rs. 4 per bale were charged for Teji Mandi on forty bales and the rate of cotton was Rs. 60-8 leaving out the figure of hundreds to the left as it is the practice in these books to do. According to Akbarbhai's evidence he was charged Rs. 5 for brokerage which works out at as. 2 per bale. He paid Rs. 80 for Teji Mandi and was asked by the accused to see him on the following Monday in order to ascertain and take away any profits that might have accrued to him from the transaction. It is clear from the language used by the accused that he must have been ware at the time that Akbarbhai was not entering into any genuine transaction to cover him against any possible loss to be incurred by fluctuations in the rates of cotton pending the date of settlement or the date of delivery, but that

his object was to gamble in the rise and fall of the cotton market and either to lose his deposit entirely if the market remained firm and unchanged, to make a profit if the fluctuation exceeded the margin of two for a rise and two for a fall, or to minimise his loss if the fluctuations remained within the prescribed limit.

23. In *Manilal v. Allibhai* : (1922)24BOMLR812 . a Division Bench of this Court, on a reference from the Small Cause Court, has held that Teji Mandi contracts should not be held to be wagers on account of their apparent nature and characteristics, and that it is necessary in such contracts, as in any other contracts, to prove the common intention of the parties as a question of fact. A Teji Mandi contract, although it is of a highly speculative nature, may, under certain circumstances, be regarded as a legitimate business and may act as an insurance against the fluctuations of a constantly changing market like the market in Broach Cotton. In *Jessiram v. Tuleidas* : (1912)14BOMLR617 , Beaman J. described a Teji Mandi contract as follows (pp. 623, 624):

The party selling the double option is really doing no more than backing the stability of the market against its possible fluctuation. The party buying the double option is backing the fluctuations of the market against its stability and it is pretty obvious that where these are the only or the principal contracts between the parties, there can be no real intention or desire to do genuine business. Thus the seller of a double option for a future *vaida* takes a unit such as a bale of cotton or a bar of silver or a bag of rice at the price of the day, say Rs. 100, and sells the double option at say Rs. 20 per unit. This means, as I understand *teji mandi*, that if by the settling day the market has either gone up or down more than ten points, the purchaser of the double option by electing to be buyer or seller according as the market has risen or fallen at due date will make profit to that extent out of the seller of the double option. If, for instance, on settling day the selling price of the unit is Rs. 88 or Rs. 112, the purchaser of the *teji mandi* by declaring himself a seller or a buyer would make a profit of Rs. 2 per unit; while if the market neither rises nor falls more than ten points either way, the purchaser of the *teji mandi* is a loser to the extent of the difference.... Where, however, the Court is not concerned with the simple *teji mandi* but *teji mandi* 'applied' to the ordinary forward contracts current,... the true nature of the double transaction becomes more difficult to

analyse and understand. I expect, however, the real explanation is that teji mandi is not in reality applied at all to the subject matter of a particular forward contract but is merely entered into by way of a side contract and hedge upon a part or whole of it.

The Teji Mandi transaction of Akbarbhai had no reference to any forward previous transaction which he had entered into through the accused or any other broker. According to the evidence, the accused made no inquiry as to the position in life of Akbarbhai and whether he would be able to fulfil his engagement in case he exercised his option to sell or purchase the forty bales of cotton at the current rate of the Saturday settlement date. The evidence leads to one inference only that the accused clearly understood that Akbarbhai was staking Rs. 80, his loss being restricted to that amount and his profit depending upon the possible fluctuations in the Broach Cotton market between the date of his purchase and the settlement date. It is clear from the evidence that the transaction was purely a wager, and the book registering the transaction would, therefore, come within the definition of an instrument of gaming.

24. It is contended by Mr. Coyajee that the accused acted as a broker, and whatever may have been the intention of his constituent it cannot be said that he participated in any common intention of gaming or wagering. From the accused's account book, Exhibit 18 in the case, it appears that the accused did not act as an ordinary broker. To a large extent he acted as a principal. He seems to have acted as a stake-holder for his constituents and was interested in the transaction to the extent of making good either party's default to the other. In many of the transactions where he has not been able to find a constituent to enter into a cross transaction in order to balance his liability he has appropriated the transactions to himself. The position the accused has occupied in these transactions, in my opinion, amounts to that of a stake-holder or a book-maker who after having received the stake or bet secures himself as far as possible by taking a counter bet from another person. The main consideration for such cross transactions would be that the accused would make his commission and be immune from liability if the constituents with whom he is dealing are on both sides solvent parties.

25. In *Doshi Talakshi v. Shah Ujamsi Velsi* I.L.R (1899) Bom. 227 : 1 Bom. L.R. 786, a Division Bench our Court has held that where the course of dealings was such that none of the contracts were ever completed except by payment of differences between the contract price and the market price on the vaida day, the transactions would be a mere gambling for differences and the broker would not be entitled to maintain a suit for his brokerage and any losses sustained by him.

26. Mr. Coyajee has relied upon the case of *Thacker v. Hardy* (1878) 4 Q.B.D. 685 where the plaintiff who was a broker was employed by the defendant to speculate for him upon the stock exchange : to the knowledge of the plaintiff the defendant did not intend to accept the stock bought for him, or to deliver the stock sold for him, but expected that the plaintiff would so arrange matters that nothing but differences should be payable by him. The plaintiff accordingly entered into contracts on behalf of the defendant, upon which the plaintiff became personally liable; and he sued the defendant for indemnity against the liability incurred by him and for commission as broker. The Court held that the plaintiff was entitled to recover; for the employment of the plaintiff by the defendant was not against public policy, and was not illegal at common law, and, further, was not in the nature of a gaming and wagering contract against the provisions of 8 & 9 Vic. C. 109, Section 18. That case, in my opinion, turned upon the common law of England as modified up to that time by the statute 8 & 9 Vic. c. 109 to which different considerations would apply.

27. Having regard to the opinion I have formed on the two main points in this case with reference to the legality of the warrant and the seizing of the instruments of gaming, the accused would be rightly convicted on the presumption that arises under the Gambling Act. It is not necessary, therefore, to labour the remaining point, viz., whether the accused was actually gambling. So far as the Kacha Khandi business was concerned the accused observed no secrecy about it, and from the conduct of the Mahajan Association and its members it appears that they openly challenged the police to prove that what they were doing under the guise of the rules of their Association was illegal. If the evidence of Inspector Wagle is to be believed, the accused was also doing business in American Futures and in Ank Farak both of which are ordinarily gambling transactions. The evidence would

seem abundantly to justify a finding that the accused was gambling in Kacha Khandi. The acquittal of the accused by the Magistrate, in my opinion, is erroneous and should be set aside. As this is the first case of its kind in Bombay and gambling transactions in Kacha Khandi were tolerated for a long time before this test case was brought, the punishment, in my opinion, should not be too severe.

28. We set aside the Magistrate's order of acquittal, convict the accused under Section 4(a) of the Bombay Prevention of Gambling Act, IV of 1887, and sentence him to pay a fine of Rs. 50 or in default undergo three weeks' simple imprisonment.

Baker, J.

29. This is an appeal by Government against the acquittal of the accused Thavarmal Rupchand on a charge under Section 4(a) of the Bombay Prevention of Gambling Act IV of 1887. The accused was charged with keeping a common gaming house and was acquitted by the Chief Presidency Magistrate. This case, known as the Kacha Khandi case, arose as follows :-

30. In July 1925 an Association called the Mahajan Association having its offices at Motishaw's chawl in the city of Bombay was formed with the ostensible object of trading in cotton.

31. The formation of this Association was viewed with disfavour by the East India Cotton Association, which had been recognised by Government as the official body controlling the cotton trade. The chairman of the East India Cotton Association, Sir Purshottamdas Thakurdas, wrote to Government that the Mahajan Association was merely an Association for gambling in cotton, and was not carrying on any legitimate business.

32. Ultimately on January 21, 1926, Motishaw's chawl was raided by the police under a special warrant, and 327 persons, including the present accused, were arrested for gambling. The accused Thavarmal and his Mehta were tried by the Chief Presidency Magistrate and acquitted, and Government have preferred this

appeal against the acquittal.

33. The present case is a test case and has been argued for several days.

34. Two points arise for consideration :

1. Whether the warrant is legal?

2. Whether the transactions carried on by the accused fall within the purview of the Bombay Prevention of Gambling Act?

35. The accused is a member of the Mahajan Association. Although the second point gives rise to many questions of law and fact, the real point is only whether the accused who is a broker was carrying on genuine business ultimately leading to actual delivery of cotton, or whether he was merely gambling in differences, no delivery being in contemplation.

36. The learned Chief Presidency Magistrate was of opinion that the warrant was bad because it gave an erroneous and vague description of the place to be searched and consequently no presumption could arise under Section 7 of the Act.

37. There are two plans on the record. The place in question consists of a number of chawls with an open space between them, which at the material time was covered or partly covered with tarpaulins, situated in New Satta Gully off' Sheikh Memon Street. Entering from Sheikh Memon Street five chawls on the right belong to Narsidas and six chawls on the left to Dwarkadas, the passage between being used in common by the owners. They are brothers and there was a partition between them in a High Court suit.

38. It is now admitted that the whole of these chawls are known as Motishaw's chawl. The offices of the Mahajan Association are situated on the first floor of one of the chawls belonging to Dwarkadas. The open space between the two blocks appears to have been used as a market. The ground-floors of the chawls are let out separately as shops and offices, and are separately numbered. The room of the present accused is No. 14 of one of the blocks belonging to Narsidas. The warrant which is at p. 56 of the print defines the place to be searched as follows:-

A certain place situate at New Satta Gully off Sheikh Memon Street in the open space partially covered by a tarpaulin which is bounded by the three chawls known as Motishaw, Narsidas Jeykisandaa and Dwarkadas Jeykisandas chawla and also the otlas and rooms on the ground-floors of the said three chawls which open on to the said open space.

39. It is in evidence and is not disputed that the whole block of buildings is known as Motishaw's chawl. There is no single chawl known as Motishaw's chawl, or as Narsidas Jeykisandas and Dwarkadas chawl. On the other hand the learned Magistrate has found in his judgment (p. 43 of the print) that at the game time there cannot be any doubt that the warrant does specify with sufficient details to identify or locate the open space in question.

40. He, however, holds that:-

The open space in question is not in the occupation of any one individual or firm. It is a common passage belonging to the two brothers Dwarkadas and Narsidas kept open for the benefit of all those who live in the surrounding chawls and to which the public have free and unhindered access at any time in the day. It is not in the occupation of any single individual or firm. The covering of a part of it by tarpaulin was only accidental. It is not in existence now. It was put up probably to shield the public from rain and sun. There is nothing to show that it was ever in the use and occupation of any one.

41. He, therefore, holds that it is a public street or thoroughfare within the meaning of Section 12 of the Act.

42. Now, in the present case, we are not concerned with the open space because the accused was arrested and the alleged instruments of gaming were found in his room which is No. 14 on the ground-floor of a chawl belonging to Narsidas on the western side of the open space, nor is there any charge against him of gaming in this open space. But though the learned Magistrate is correct, strictly speaking, in saying that this space is open to the public (and the plan shows that access to old Satta Gully is obtained through this open space) I have not the slightest doubt that this open space which is immediately in front of the premises of the Mahajan

Association is used as a market where cotton business is carried on. It is not uncommon in Bombay and indeed in other cities also for business to be carried on in the open air. It is highly improbable that a tarpaulin would be put up to protect mere passers-by from sun and rain. We have the evidence of several police-officers, which is referred to in detail in the judgment of the learned Magistrate, that cotton dealings are carried on to a large extent in this open space which is immediately in front of the rooms or offices of the various dealers and in addition to this we have a reference to it at p. 72 of the print in Ex. 22, which is an extract from the minutes of the Managing Committee of the Mahajan Association for July 21, 1925, which refers to the passing of a resolution prohibiting the doing of any other business except business in cotton in the compound of the Association while the bazaar is working.

43. The offices of the Association are in the first floor of a house fronting on this open space. It is not suggested that the Association owns any compound elsewhere or that there is any other open place which could be described as the compound of the Association. I have not the least doubt that this open space is the compound referred to and that business in cotton is carried on there by the members of the Association including those who occupy offices adjacent to the open space.

44. There has been a great deal of argument with regard to the warrant and various cases have been quoted, but each case must be decided on its own facts.

45. The simple test which I propose to apply is whether the description in the warrant is sufficient to enable a stranger to find the place to which the warrant was intended to apply.

46. No doubt a warrant which mentioned a wrong street or a wrong number of a house in the correct street would be misleading, because a stranger would go to a place other than that to which the warrant was intended to apply.

47. There is no doubt that the warrant in this case was intended to apply to the place where the members of the Mahajan Association carry on business. New Satta Gully off Sheikh Memon Street is mentioned and it is admitted by the learned

Chief Presidency Magistrate that the open space partly covered by a tarpaulin is sufficiently identified. The mistake is as to the three chawls which are said to bound it and are described as Motishaw's, Naraidaa' and Jeykisandas', whereas there are no shawls known by these names. The whole of the place is known as Motishaw's chawl. There are six chawls on the one side of the open space and five on the other. On the other hand the warrant describes the open space as bounded by three chawls and refers to the otlas and rooms on the ground-floors of the three chawls which open on to the said open space, and it is contended by the Government Pleader that if, as is admitted, the open space is sufficiently described, the chawls opening on to it are also sufficiently described. The plan shows that the room occupied by the accused is on the ground-floor of one of the chawls opening on to the open space in question and as the warrant gives authority to search the otlas and the rooms of the three chawls which open on to the open space the police had authority to search it.

48. I do not attach any importance to the names of the chawls if they are sufficiently described. It is a fact that the buildings on the right belong to Narsidas and those on the left to Dwarkadas and that the whole locality is known as Motishaw's chawl. The number of the buildings also appears to be uncertain. According to witness Bapubhai Desai (p. 25) called for the defence who made the plan Exhibit 14 there are seven buildings and a small shed. He made a survey in February 1926 and states that entering from Sheikh Memon Street there are on the right two four-storeyed buildings and further on there is another building separate from the two. This makes three on the right. On the left there are four buildings and a separate shed. There is also another shed attached to the second building. If the sheds are counted as buildings this makes six on the left. In all nine, or, omitting the sheds, seven. The plan, Exhibit 14, put in for the defence shows three blocks of buildings on the right and one on the left.

49. The Managers of Narsidas and Dwarkadaa property have been called. Harilal (p. 26), Manager of Narsidas, says :-'There are in all about eleven buildings, My Seth owns five of them and his brother owns the remainder.'

50. Narotamdas (p. 25), Manager of Dwarkadas, does not give the number of buildings.

51. But it is not shown that there are more than three chawls opening on to the open space or that this description applies to any other three chawla in this locality.

52. The learned Counsel for the accused has argued that as all the chawls are known as Motishaw's chawl and no particular building is known as such, it would have been open to the police to search any of the eleven chawls. But the warrant specifies the chawls which bound the open space and the otlas and rooms of the said three chawls which open on to the said open space.

53. Supposing the warrant had merely mentioned the buildings as Motishaw's chawl opening on to the open space there would have been no misdescription. Though there may be a number of chawla in the part known as Motishaw's chawl it is not shown that there are more than three which answer to the description in the warrant, i. e., which bound the open space, and the open space being sufficiently identified I am of opinion that a person given this warrant would be able to find the chawls intended by the warrant.

54. It is in evidence that the rooms in the chawls are separately numbered, but the absence of numbers would not vitiate the warrant if the buildings to be searched are otherwise sufficiently described: cf. Emperor v. Krishna Rutna Dalvi (1904) 6 Bom. L. R 52. Bhanji v. Emperor (1925) 27 C L.J. 905, and Emperor v. Jhuwni (1905) 2 C L.J. 243. I am of opinion that the warrant is not bad for misdescription.

55. Turning to the other part of the case, this presents a good deal of difficulty. In the accused's room were found books of account which, it is contended, were used for recording gambling transactions and are therefore instruments of gaming under the rulings in Emperor v. Tribhovandas I.L.R (1902) Bom. 533: 4 Bom. L.R. 271. Emperor v. Chaganlai (1904) 6 Bom. L.R. 249. Emperor v. Lakhamsi (1904) 6 Bom. L.R. 1091. and Emperor v. Manilal : (1915)17BOMLR1080 . But, in order that the presumption under Section 7 of the Act should arise, it is necessary to prove that these books record gaming transactions, and as the books themselves

are not easy to understand, and the accused has not explained the transactions, the case is one of some difficulty. A marked currency note for Rs. 100 given by the Deputy Commissioner of Police to the witness Akbarbhai was also found at the data of the raid which is January 21, 1926. The evidence is voluminous and the arguments have lasted nearly a week. The prosecution in this case are instructed by the East India Cotton Association which is the body recognized by Government as controlling the cotton trade of Bombay. Vide Bombay Cotton Contracts Act XIV of 1922. The present case is really a fight between the East India Cotton Association and the Mahajan Association of which the accused Thavarmal is a member. Stated broadly, the case for the prosecution is, that the object of the Mahajan Association was not to do genuine business in cotton but to gamble in the differences in cotton prices, no delivery of actual cotton being contemplated, and all contracts being finally closed every Saturday at the prices ruling at Sewri, the East India Cotton Association's market.

56. The case for the defence is that the Mahajan Association is doing genuine business in forward contracts in Broach cotton only, and that the only difference between it and the East India Cotton Association is that its minimum is five bales, while the East India Cotton Association's minimum is a hundred bales, and that it has a weekly settlement every Saturday while the East India Cotton Association has a fortnightly settlement. The East India Cotton Association does business in other varieties of cotton besides Broach.

57. The raid in question occurred on January 21, 1926, and we are only concerned with the method of doing business up to that date.

58. Presumably, as a result of that raid, the Mahajan Association subsequently passed a number of resolutions relating to the hiring of godowns, etc., and have put in a delivery book relating to deliveries of cotton in April 1926.

59. It is in evidence that there is only one crop of Broach cotton in the year which comes in about March or April, and it is the case for the defence that as the Mahajan Association started business in July 1925 there could be no question of delivery of Broach cotton which was not due till March or April of the following year. It is in evidence that business is some times done in the old crop, but it is not

the case of the Mahajan Association that their members dealt in that.

60. The case-law on the subject of wagering contracts is voluminous, but the general result of all the numerous cases quoted, which are nearly all civil cases, is the same, viz., that the Court must probe into the real intention of the parties. If their intention was that there should be delivery there is no wager, but if neither party had any intention to give or take delivery it is otherwise : cf. *Universal Stock Exchange v. Strachan* [1896] A.C. 166. *In re Gieve* [1899] 1 Q.B. 794. and *Doshi Talakshi v. Shah Ujamsi Velsi* I.L.R (1889) Bom. 227: 1 Bom. L.R. 786.

61. It is the contention of the prosecution that the operations of the Mahajan Association and of the accused as a member of that Association were pure and simple gambling in differences in cotton prices, and as all transactions were closed, or as the witnesses say 'cut' every Saturday, there was originally no question of carrying over any contract to a subsequent settlement day. Consequently, there could be no question of delivery of cotton, none being available in the market, and the whole object of each and every transaction was simply that the parties should pay or receive the difference between the price at which they had contracted to buy or sell and the closing price at Sewri on Saturdays. No contract could be more than a few days in existence, consequently it was impossible for any party to get ready cotton even if it was available (which at that time of the year it could not be) nor were there any facilities for storing it. The whole business consisted simply of paper transactions with no connection whatever with the actual commodity, the only controlling factor being the closing price of cotton at Sewri every Saturday.

62. The case is further complicated by the introduction of Teji Mandi transactions, but I do not think I need go into details as regards them, because whatever was the form of the dealings between the parties, the essential point in this case is whether the common intention of the contracting parties was to deal only in differences.

63. Assuming that the accused dealt in Teji Mandi transactions, the observations of Beaman J. in several cases of this Court as to the essentially wagering character of such transactions have been disapproved of in later cases: cf, *Manilal*

v. Allibhai : (1922)24BOMLR812 where it was held by Shah Ag. C.J. and Crump J. that no general proposition can be laid down that there is no legal presumption that a Teji or Mandi contract is a wagering contract and the usual test must be applied, viz., where it is shown that the common intention of the parties was that in no case delivery was to be taken or given but that in all cases differences should be paid, then the parties are wagering.

64. The only question in this case, therefore, is whether the transaction with which we are concerned represent genuine business transactions or are only paper transactions with no reference to genuine purchases and sales.

65. In order to decide this point it will be necessary to give a brief history of the Mahajan Association before coming to the actual dealings of the accused.

66. But I will first refer to an argument which has been raised by the learned Counsel for the defence, based on the English case of *Thacker v. Hardy*' (1878) 4 Q.B.D. 685. It is argued that the accused acted merely as a broker and that there can be no presumption of gambling when a broker intervenes between two principals who are unknown to each other, nor can the broker who was merely to carry out the instructions of his clients be held responsible for their intentions even though they may have no intention of giving or taking delivery, and that he derived no gain from the transaction, except the commission he was to receive, whatever might be the result of the transaction. The position of the accused, however, does not seem to be that merely of a broker.

67. Exhibit No. I-3-C at p. 63 of the print is a translation of an account in accused's books for February 6, 1926. It contains a large number of credit and debit entries which balance each other, amounting altogether to Rs. 2845. Each credit item has a corresponding debit item. These entries are in the names of various constituents but in several instances the entry is credited or debited to the account of accused himself.

68. There are no serial numbers and I have had to count the entries.

69. On p. 63 item No. 8 on the credit side is 200 credited to Seth Khata (i. e. the owner of the business-the accused). The corresponding entry on the debit side is in three items, 100 to Vardo Magan, 75 to Japan (presumably some Japanese operator) and 25 to Bhimraji. As there is an entry of 57-0-0 against item No. 8 the 200 does not represent money but units, whether bales of cotton or what are called, according to the prosecution, Dediya.

70. Again on p. 64 the last item but one on the debit side is 50 debited to the account of Shah (i. e. proprietor).

71. The first item on p. 65 is 150 credited to Shah Khata followed by a number of figures, and on the debit side 50 debited to Shah.

72. Similarly, the last two items on the debit side are 50 and 100 debited to the account of Shah, This makes 150 which is balanced by four items of 50, 65, 15, 20 debited to four different constituents.

73. The accused has not explained to what these entries refer. I will deal hereafter with the explanation put forward by the prosecution, but the point I am on now is that it appears from the ~~ entries, of which there are eighty on the credit side and eighty-one on the debit side, that the accused as far as possible covered each credit transaction by a corresponding debit transaction with another customer, but when he could not do so, he took on the transaction himself, the entry in such cases being credited to the Shah or Sheth Khata, meaning himself. The result would be that he himself would take the profit or pay the loss resulting at the closing of the transaction.

74. In order to do this he must have been perfectly conversant with the nature of the transactions, which are all entered in one running account, and the argument that he acted merely as a broker and was ignorant of the nature of the transactions entered into by his clients appears to me to be untenable.

75. As I have already said the case of the prosecution is that the sole object of the Mahajan Association was to deal in differences, no delivery of actual cotton being contemplated, and all contracts being closed every Saturday at the rate prevailing

in the Sewri market. The Mahajan Association carried on business quite openly, and freely placed their books at the disposal of the police. Their contention is that they were doing genuine business in forward contracts in Broach cotton.

76. I do not propose to go in detail into the objects of the Association as set forth at great length in the record. The prosecution contend that these objects as put forward in the books of the Association are all camouflage designed to conceal the real object which was gambling pure and simple.

77. The material dates are :

78. The Mahajan Association was formed on June 25, 1925, (p. 69).

79. It was registered with the Registrar of Companies on July 18, 1925.

80. It commenced business on July 22, 1925.

81. On July 29, 1925, Sir Purshottamdas Thakurdas, the Chairman of the East India Cotton Association, addressed a letter (p. 116) to Government in which he described the business carried on by the Association as Kacha Khandi transactions, which are purely gaming and wagering transactions in which delivery of the cotton Article 24, is not given or taken or contemplated and is in fact impossible in that particular form of transaction.

82. The Mahajan Association appointed an arbitration Committee on August 15, 1925, (p. 73), to settle disputes with regard to Soudas (transactions).

83. It was decided that four members should be sent to Sewri every Saturday to ascertain the closing rates.

84. On August 27, 1925, articles were adopted, Exhibit 24, pp. 74-97.

85. On October 15, 1925, a meeting was held at which reference was made to the necessity of hiring godowns for the purpose of storing the goods of those members who desire to take or give delivery when the 'Vaida' arrives.

86. This would seem to indicate that delivery was not contemplated in all cases.

87. On October 27, 1925, a Parakh (testing) Committee was appointed.

88. On October 28, 1925, Sir Purshottamdas Thakurdas sent a second letter to Government advertng to a resolution of the Mahajan Association, dated October 15, 1925, referring to delivery, p. 124, On January 4, 1926, there was an extraordinary meeting of the Association at which several resolutions were passed (p. 100). One (No. 2 at p. 101) is of importance and may be given in full. It runs as follows:-

The rates in respect of the settlement of whatever transactions may be standing during the current week shall be paid on every Saturday at 2-30 half past two o'clock (B.T.) in the noon, at which time each broker shall carry forward every transaction of purchase or sale that has remained standing, whatever there may be on his account or his customer's account, to the transactions of the next week, so that the said transaction may continue further.

89. The following resolution provides that transactions up to the closing of the bazaar on Friday shall be included in the Saturday settlement, but an exception is made in the case of Teji Mandi transactions entered into on Friday which, with transactions entered into on Saturday, are considered as new transactions, i. e., go over to the following week.

90. Payment of differences at the settlement is to be made on Monday afternoon.

91. I shall again refer to this resolution later on.

92. On January 21, 1926, the police raid took place.

93. On January 30, 1926, the Association entered into a lease for godowns.

94. According to the delivery book deliveries commenced in April 1926.

95. This case deals with a highly technical subject. But the only point at issue is whether there was any delivery in contemplation, and the question is whether the proceedings of the Association are consistent with any intention to give or take delivery.

96. In view of the fact that the defence case is that the Association only dealt in forward transactions in Broach cotton (new crop), which was not available till May 1926 the fact that there were no deliveries before that date and no godown accommodation is not inconsistent with genuine business. It is argued that the appointment of the Parakh (Survey) Committee in October is camouflage as there was then no cotton which could be surveyed and tested. It is further argued that none of the contracts on which delivery was given is prior to the raid, and that no merchant has been called to prove that he actually gave or took delivery. In fact though they have not actually said so the prosecution seem to imply that the delivery book. Exhibit 34, p. 226, is also camouflage or forgery.

97. This is, however, a matter of inference and I do not think that it is proved that the dealings of the Mahajan Association after the raid were not consistent with the intention to give or take delivery.

98. But, in my opinion, the strongest argument which the prosecution put forward is that all transactions were closed every Saturday. If that is proved there could be no delivery in contemplation and the transactions would be purely wagering. The fact that the rates at which settlements were made were obtained from Sewri every Saturday is not conclusive, as the settlement has to be fixed at some rate. The East India Cotton Association also has settlements though at longer intervals. But, if a transaction entered into at the earliest on a Saturday is finally closed on the following Saturday, it seems to be entirely inconsistent with any intention to give or take delivery as no cotton could be received within such a short period at that time of the year.

99. In this connection I may refer to the evidence of defence witness Bishamberlal at p. 32. He states that the rate was fixed every Saturday and if persona wished to carry forward the transactions they could do so at certain rates :-

The rate was fixed every Saturday. The transactions would be closed every Saturday. The differences to be received or paid would be made on Monday. New business would be started half an hour before the old business was closed. The two transactions old and new would be distinct. If the transaction was to be closed every Saturday there would be no question of giving or taking delivery. This was

the nature of the business up to a little time before the polios raid.

100. At the close of his deposition in answer to a question from the Court he stated:-

The transaction of the Mahajan Association is always carried forward since the starting of bho Mahajan Association.

101. This, however, is not true on the papers of the Association itself. Exhibit P 1 at p. 66 is Resolution No. 6 at the meeting of the Managing Committee of the Association on July 21, 1925. It runs as follows :-

The proposal for fixing the bazaar rates on every Saturday was submitted by Rainrikhdas Parsaram Puria. In connection with the same it was unanimously resolved as follows :-

Now for the present as regards any ' Soda ' (transactions) that might have remained outstanding, the same shall be settled at the closing market rates ruling at Shivri every Saturday in the evening and that settled rate shall be noted on the board on behalf of the Association and legal advice taken as to the form in which this resolution should be passed...

102. It will be noted that no provision was made for carrying over contracts to the next settling day, and that, there was no such provision is to my mind clear from the Resolutions on pp. 67, 68, Exhibit P 3 and P 4. Exhibit P 3 is an extract from the minutes of the Managing Committee of December 22, 1924. It runs thus.-

After that the matter of calling the adjourned Extraordinary General Meeting of our Association at an early date and of speedily deciding the question of abstaining from squaring the outstanding Sodas at market rates, but carrying the same forward after paying for or receiving the differences at the rates which may be fixed by the Quotation Committee on being brought forward a lengthy discussion was held in regard to the game and the meeting was adjourned without arriving at any definite decision.

103. Exhibit P 4, p. 68, is an extract from the minutes of the meeting of December 29, 1925. It runs:-

After some discussion took place in regard to the practice of squaring the outstanding Sodas at the rates of settlement on Saturday which being followed at present the rough draft of the scheme prepared in connection with the same was read out and... it was proposed to call the adjourned Extraordinary General Meeting for January 4, 1926, and that sanction be obtained from the General Board in respect of the scheme which has been prepared by our Committee in regard to the matter of carrying forward the Sodas that might remain outstanding at the end of the week. Passed unanimously.' This scheme came into force from January 23, 1926, (p. 102). I have already referred to the Resolution for carrying forward contracts which was passed on January 4, 1926 (p. 101).

104. From this evidence, which is taken from the books of the Mahajan Association itself, it is clear that up to the passing of this scheme on January 4, 1926, there was no machinery for carrying over contracts, and that the practice was to square the outstanding Sodas on every Saturday, as is admitted in Exhibit P 4.

105. This supports the statement of the prosecution witness Dady Mehta, Secretary of the East India Cotton Association, at p. 17, that the business called Kacha Khandi commenced on Saturday:-

No delivery was ever given or taken to my knowledge or contemplated. Cutcha is the term used in opposition to Pukka which contemplates delivery and in Cutcha no delivery is ever contemplated nor is any delivery given or taken. In Cutcha Khandi there is a contract only as to rate but there is no contract as to commodity. There is another essential form of difference between the two, viz., that in Pukka transaction, the transaction can be carried forward and last up to the date of delivery. In Cutcha the business gets automatically closed on Saturday following.

106. The evidence of Begraj Gupta, a cotton broker and Honorary Secretary of the Cotton Brokers' Association (p. 21), is to the same effect. He says (line 32):-

The rate of Broach prevailing in Pucca transaction at 4 p.m. on a Saturday is taken as the cutting rate, Now-a-days the rates are not cut.' At p. 22 (1, 63): 'In our bazaar the differences in rates are fixed and paid every fortnight but in Khandi Bazaar the contract itself is cut'. P. 23 (1, 15): 'In Kasha Khandi transactions contracts cannot continue. The Mahajan Association has now passed a resolution for carrying business over or in other words for keeping the transaction standing. This carrying on was introduced about February last. Before January last they did not have this carrying forward contracts. They did not carry forward the same transaction but entered into separate contracts.

107. The statement of these witnesses is borne out by the minutes of the Mahajan Association itself and I accept them as correct.

108. I hold that from the date of the commencement of business by the Mahajan Association in July 1925 up to the coming into force of the resolution on p. 101, which began to operate from January 23, 1926, all contracts were automatically closed on Saturdays at the rate prevailing in the Sewri bazaar, and that consequently there could be no question of delivery, which was physically impossible. Their own witness Bishamberlal at p. 32, 1. 32, has admitted that if the transaction was to be closed every Saturday there would be no question of taking or giving delivery.

109. It follows that as the persons engaging in such contracts had no intention of giving and taking delivery their only intention was to take and receive differences, that is their common intention was to wager, and the contracts are wagering contracts and the persons taking part in them fall under the definition in Section 3 of the Bombay Prevention of Gambling Act. It has been urged by the learned Counsel for the defence that the East India Cotton Association witnesses have admitted that in their market. Hedge contracts are settled by setting off one against the 1928 other and not by delivery, and that a large number of Hedge contracts are settled from day to day, This may be so, but the difference, as I understand it, is that in legitimate business Hedge or Cover contracts are ancillary or subsidiary to the main contract and are merely designed to protect the operator against loss. There may be many settling days between the making of the original contract and

the date of delivery, but the original contract continues to subsist and ultimately ends when delivery is given or taken. The subsidiary Hedge or cover contracts may be settled in various ways but that does not affect the ultimate obligation to deliver or take delivery of the actual cotton itself. This is a different matter to a contract which ends automatically in a maximum period of a week and in which the parties have no intention to deliver.

110. I am, therefore, of opinion that the description of these operations of the Kacha Khandi market by Sir Purshottamdas Thakurdas in his letter at p. 116 was correct.

111. I must, however, say that from the date of the Resolution regarding carrying over contracts coming into force (January 23, 1926), the matter bears a different aspect, and from that date the operations of the Association would be prima facie legitimate, unless it were shown that the resolution was mere camouflage and not intended to be acted upon, That, however, is not a question in this case. As a matter of fact we find that a jodown was hired, a Mukkaclam (for delivery) was appointed, and as far as appears from the record actual deliveries given in April and May, so that I do not say that the Association is not now carrying on legitimate business.

112. But the resolution regarding the carrying over contracts came into force on January 23, 1926, two days later than the police raid on 21st.

113. This brings me to the business carried on by the accused.

114. In view of the conclusion at which I have arrived after a careful study of the record, that the transactions carried on by the Association up to January 23, 1926, were such that no delivery was contemplated or indeed possible, the remainder of the case, that is, the nature of the transactions carried on by the accused, presents little difficulty. It is not the case of the accused that he carried on business otherwise than according to the rules and practice of the Association. His written statement (Exhibit 13, p. 38) is to the effect that he does business under the constituted rules and bye-laws of the Association. Para, 7 refers to the carrying forward of contracts at the settlement rates, which I have already dealt with at

length.

115. It follows that if no delivery was given or taken up to the date of the police raid the accused is in the same position as the rest of the Association.

116. But in this case we have also the instance of Akbarbhai, a panseller (p. 14), who was given a marked Rs. 100 note by the police for the purpose of betting on Teji Mandi. The accused admits this contract and the marked note was found in his shop. The entry appears in accused's books at p. 68, 40 (credited) to Akbarbhai, 60 8-0.

117. Owing to the police raid this transaction was not carried through.

118. Akbar is a pan-seller and not a dealer in cotton. He says himself he knows nothing of cotton dealings. No enquiry was made as to his solvency. He went there on January 21 (Friday) and was told to come on Monday to see if he had made any profits. The learned Magistrate admits at p. 48 of his judgment that Akbar who, it is evident, entered into a transaction in Kacha Khandi for forty bales neither contemplated giving nor taking delivery, but he holds that accused is a broker and placed the transaction with his other constituents.

119. I have already referred to the 1'acfc that the accused himself took up the responsibility of some of the transactions himself and that he was perfectly aware of the nature of these, viz., that no delivery was ever contemplated.

120. I hold that Akbar's transaction was gambling pure and simple.

121. It is quite immaterial for the purposes of this case as to the manner in which the transactions were settled. The accused has not explained the entries in his books, and though the prosecution have attempted to explain this they have not been very successful in so doing.

122. Once it is held that the transactions simply represent payment of differences it matters little how the differences are calculated, and whether the units are bales of cotton or what are called, according to the prosecution, Dediya. It is unnecessary to go into details of Teji Mandi. It matters little whether the accused

was dealing in American Futures or not. His accounts are unintelligible and he is the only person who could explain them, which he has not done. I am satisfied that the accounts represent transactions in differences only and have no relation to genuine transactions leading to actual delivery. They are, therefore, wagering contracts and as such within the definition of wagering in the Act. I disagree with the view taken by the learned Magistrate, and I am of opinion that the accused is guilty and should be convicted.

123. This being in that case, and as far as I know the first case in which dealings in cotton have been held to be amenable to the criminal law, for the numerous cases on the point are all civil cases, I do not think it necessary to inflict more than a nominal punishment, and I, therefore, agree in the order proposed by my learned brother.

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