APPELLATE CIVIL

Before R. P. Khosla and Inder Dev Dua, JJ.

HIRALAL-MAHABIR PERSHAD,—*Appellant.*

versus

MUTSADDILAL-JUGAL KISHORE,—*Respondent.*

R.F.A. 102-D of 1966.

May 3, 1966.

Evidence Act (I of 1872)—S. 34—Entries in books of account regularly kept—Whether relevant—Such entries alone—Whether sufficient to charge any person with liability—Some independent evidence—Whether necessary.

Held, that under section 34 of the Evidence Act, entries in books of account regularly kept in the course of business are relevant whenever they refer to a matter in which the Court has to enquire, but such statements cannot alone be sufficient evidence to charge any person with liability. The practice of admitting such entries has its origin in a kind of moral necessity and that such is the general course of business that no proof could be furnished of the payment of small transactions between men without resorting to the entries which they themselves have made in the form of account. But unscrupulous and interested parties may manufacture testimony on their own behalf. It is for this reason that even though when account-books are regularly kept in the course of business, entries therein are rendered relevant if they refer to a matter in which the Court has to enquire, but nevertheless, the statements in the form of such entries are not alone considered sufficient evidence to charge any person with liability. The attending circumstances are accordingly always taken into consideration by the Court. The entry should purport to record the whole of the transaction alleged and the appearance of the book containing entries must be honest and no suspicious dealing should be apparent. The entries should not be a recital of past transactions but an account of transactions as they occur, of course, not necessarily to be made exactly at the time of occurrence. It is sufficient if they are made within a reasonable time when the memory could be considered recent. Such entries, though relevant, are only corroborative evidence and it has to be shown further by some independent evidence that the entries represent honest and real transactions and that the moneys were paid in accordance with these entries.

Regular first appeal from the decree of the Court of Shri Pritpal Singh, Sub-Judge, 1st Class, Delhi, dated the 28th day of May, 1956, dismissing the suit with costs.

BISHAMBER DAYAL AND DAYA KISHAN, ADVOCATES, for the Appellant.

D. D. CHAWLA AND K. L. ARORA, ADVOCATES, for the Respondent.

JUDGMENT

DUA J.—This is a plaintiff's appeal from the judgment and decree of the learned Subordinate Judge, 1st Class, Delhi, dated 28th May, 1956, dismissing the suit for the recovery of Rs. 7,126, with costs.

The suit was founded on the allegations that the plaintiff-firm had been appointed as *pakka arhtia* by the defendants to enter into certain deals on the latter's behalf. The plaintiff-firm, it was averred, was doing the business of Commission Agents as *pakka arhtia* in respect of forward delivery of silver, Gur, gold, etc. in accordance with the rules of the Vishnu Exchange Ltd., Delhi, the East Punjab Trading Co. Ltd., Delhi and Shri Maha Lakshmi Bullion Exchange Ltd., Delhi. The defendants in August, 1949, appointed the plaintiff as their *pakka arhtia* for entering into transactions of forward delivery in respect of Gur, silver and gold according to the rules of the aforesaid chambers which were fully known to the defendants. Arhat and other expenses and interest according to the customs obtaining in the market together with the chamber expenses, according to the rules of the aforesaid chambers, were also agreed to be paid. The defendants were alleged to have entered into transactions shown by letters A, B, C, D, G and H in respect of silver, gold and Gur mentioned in the schedule which was attached to the plaint. Up to 7th November, 1949, the accounts were apparently squared up. Later on, from 9th November, 1949 to 14th February, 1950, the defendants entered into transactions in respect of silver and Gur shown in the schedule attached to the plaint and marked with letters E, F and I. In transaction marked by letter E, there was a profit to the defendants, whereas in transactions marked with letters F, and I, the defendants had suffered losses. The total loss mentioned in the plaint was stated to be a sum of Rs. 6,169|-|6. To this was added the interest claimed by the plaintiff and the decree was claimed for a sum of Rs. 7,126, as mentioned earlier.

According to the written statement, the defendants did not have any dealings through the plaintiff-firm as *pakka arhtia*. Knowledge of the rules of the chambers mentioned by the plaintiff was also denied. Similarly, appointment of the plaintiff-firm as *pakka arhtia* was controverted. The contents and correctness of the schedules

A, B, C, D, E, F, G, H and I too were denied. The defendants admitted to have received an amount of Rs. 250 as profit from the plaintiff-firm, but otherwise the allegations contained in paragraph No. 4 of the plaint were controverted. The contents and correctness of the entries in the *bahis* of the plaintiff were also denied. In the additional pleas, it was averred that the transactions alleged to be the subject-matter of the suit were by way of wager and according to the defence no suit could be brought for the recovery of any amount because the same were based on wagering agreements. It was further pleaded that on 15th February, 1950, the Government of India issued a notification by means of which all forward (Satta) contracts with regard to Gur Shakkar were banned and it was further ordered in that notification that all previously contracted forward contracts (Satta) were also covered by the said notification and were to be considered as cancelled. The transactions in controversy being forward (Satta) contracts relating to Gur Shakkar, were thus fully covered by the said notification. For this reason also, the plaintiff-firm could not claim any amount on the basis of such contracts. The account-books of the plaintiff-firm were stated to have been illegally and fraudulently fabricated and false entries were alleged to have been made therein in order to get over the notification of the Government by ante-dating the entries in regard to the said transactions. Finally it was pleaded that the plaintiff-firm in having paid the alleged losses on behalf of the defendants, though such payment was not admitted, acted without authority and against the interest of the defendants and, therefore, even if the plaintiff-firm had proved actual payments to some parties, which payments were not admitted, it was not entitled to recover the same from the defendants.

In his statement, Shri K. L. Arora, Advocate for the defendant, on 12th December, 1952, admitted the existence of contracts shown as A to H in the schedule attached to the plaint, but he added that the same had been entered into with the plaintiff as principal and not as *pakka arhtia*. Receipt of profits in respect of these contracts on 7th November, 1949, was also admitted. Contracts mentioned in I(J) for the due date Phagun Shudi 15, Sambat 2006 were not admitted. All the contracts were stated to be of wagering character and, therefore unenforceable. It was added that all forward transactions in respect of Gur had been declared illegal by the Government on 14th February, 1950.

After this statement, the plaintiff's counsel expressed a desire to plead in reply that the plaintiff had acted as Commission Agent and had paid losses for the defendants to third parties. As such, the losses were recoverable even if the contracts were held to be wagering. The Court allowed the plaintiff to file a replication which was done on 12th March, 1953.

On the pleadings, the following issues were settled:—

(1) Whether the defendants entered into Gur transactions mentioned in the Schedule I, filed by the plaintiff, as *pakka arhtias* ?

(2) Did the plaintiff-firm actually enter into transactions in dispute on behalf of the defendants with other parties and pay them the losses in question ?

(3) Whether the transactions in suit are of wagering character, and if so, to what effect ?

(4) Whether the Gur transactions in suit were declared illegal on 14th February, 1950, by the Government and what is its effect ?

(5) Whether the dealings between the parties were as between principal and principal ?

(6) To what amount by way of losses, Arhat, interest and other incidental expenses are the plaintiffs entitled to ?

(7) Did the plaintiff-firm have authority to settle the transactions on 14th February, 1950, or 15th February, 1950, before the due date, and if not, what is its effect ?

(8) Relief.

On 26th February, 1954, the defendants amended their written statement with the permission of the Court by correcting the date of one of the notifications as 15th February, 1950, instead of 14th February, 1950. During the course of evidence, the plaintiff wanted to elicit from Shri Sudesh Mittar, Accountant of Vishnu Exchange Ltd., appearing as P.W. 1, about the settlement of transactions standing on 14th February, 1950, by the Exchange before due dates but the same was successfully objected to by the defendants on the ground of absence of plea to that effect. The plaintiff thereupon desired to amend

the plaint, which prayer was granted and amended plaint, written statement and replication were filed. This gave rise to the following additional issues :—

(9) Whether the Vishnu Exchange Ltd. had authority to pass Resolution referred to in para 5A of the plaint, and are the defendants bound by the same ?

(10) Whether the said Resolution was ante-dated and a fraud on the Government Notification, dated the 15th February, 1950? If so, to what effect ?

The lower Court discussed issues Nos. 1, 2 and 5, together and came to the conclusion that transactions between the parties had been entered into as principal and commission agent and not as principal and principal, the transactions mentioned in "I" are not fabricated, and that the plaintiff-firm did not actually pay losses to the third parties. Issue No. 3 was also decided in favour of the plaintiff and the transactions were held not to be wagering in nature. Issues Nos. 7, 9 and 10 were also discussed together and the Court came to the conclusion that the defendant-firm had not agreed to abide by the rules and regulations of the Vishnu Exchange and also that there was nothing on the record to show that the defendants had specifically authorised the plaintiff-firm to enter into contracts through the said exchange on their behalf. The plaintiff-firm had thus no authority to settle the transactions in dispute on 14th February, 1950, before the due date. The Court also concluded that though the Vishnu Exchange had authority to pass the disputed resolution on 14th February, 1950, it did not pass the same on that date and the same was passed subsequently and ante-dated in order to avoid the effect of the notification, dated 15th February, 1950. The Gur transactions for the forward delivery were declared void on 15th February, 1950, by Government notification and the defendants were not bound by the resolution of the Exchange. Issue No. 6, in view of the decision on other issues, did not arise for decision. The plaintiff's suit was accordingly dismissed.

On appeal in this Court, the learned counsel for the plaintiff-appellant has taken us through the evidence on the record and has addressed elaborate arguments on various aspects of the controversy. The counsel has tried to persuade us to hold that the payment of losses to third parties by the plaintiff on behalf of the defendants has

been fully established on the present record and that if that is established, then according to his submission, the plaintiff would be entitled to a decree. He has, however, also submitted that the notification does not affect the transactions in dispute in this case and that the Vishnu Exchange had passed the relevant resolution in question on 14th February, 1950.

Dealing with the question of payment of losses, the learned counsel has referred us to the accounts of the chamber printed at pp. 113 to 116 of the printed paper-book (Exhibit P.W. 1/49 and Exhibit P.W. 1/48). These are copies of the accounts of Messrs. Hira Lal Mahabir Pershad from 1st October, 1949 to 10th March, 1950. The counsel has made a reference to some of the entries and has tried to persuade us to hold that these entries support the plaintiff's version that the losses had been paid by the plaintiff to third parties on behalf of the defendants. It is noteworthy that in these account-books it is nowhere stated as to who was the recipient of the various amounts which, according to the learned counsel, were paid on behalf of the defendants: nor have those persons to whom the amounts were paid been produced, leave alone the question of production of the account-books of those third parties. But let us see the oral evidence in regard to these accounts.

Shri Sudesh Mittar, a 23 years old Accountant of Vishnu Exchange Limited (called the Chamber), has appeared as P.W.1. He first appeared on 11th June, 1954, when he deposed that he had been an employee of the Exchange since six preceding years. He has proved the signatures of Jai Narain on the daily reports of the plaintiff as a member of the Chamber, the copies of which were exhibited as P.W. 1/1 to 23. The Court also directed the originals to be filed and ordered that the originals when filed should be exhibited as P.W. 1/24 to 46, but at the bar no reference has been made to these documents before us. According to this witness, the Chamber maintained regular books of account in respect of forward transactions. According to him, the Chamber entered into Khatta Bahi, the total of daily transactions of the trading members. He then produced a copy of the account of the plaintiff's transactions from 8th October, 1949 to 29th February, 1950. But our attention has not been drawn to any accounts from which we can find the details of the transactions and the persons to whom payments were made as a result of the settlement of accounts. While this witness was being examined, the plaintiff desired to amend his plaint, which prayer was allowed on

7th December, 1954. P.W. 1 was again recalled on 6th April, 1955 and he produced a copy of the proceedings of the Exchange, dated 14th February, 1950, from the minutes book, P.W. 1/50—a document which having not been relied upon was allowed on payment of costs. The bye-laws of the Exchange were also produced: Exhibit P.W. 1/51. In cross-examination, it was elicited that the register containing resolutions of the Exchange was not paged and the original register did not bear the witness's signatures. The register for agenda of meetings was also not produced. This witness was unable to tell the Court as to who were the brokers of the transactions in dispute.

At this stage, I may appropriately advert to the legal position in regard to entries in account-books. Under section 34 of the Evidence Act, entries in books of accounts regularly kept in the course of business are relevant whenever they refer to a matter in which the Court has to enquire, but such statements cannot alone be sufficient evidence to charge any person with liability. The rule embodied in this section is apparently an exception to the general rule as to admissions in section 21 and the principle seems to be to admit only such statements recorded by a party in his own behalf as are ordinarily considered by their nature and circumstances beyond his power to tamper with undiscovered, to the purposes of a particular case. It is indeed based on circumstantial guarantee of trustworthiness inspired by moral certainty. The practice of admitting such entries has its origin in a kind of moral necessity and that such is the general course of business that no proof could be furnished of the payment of small transactions between men without resorting to the entries which they themselves have made in the form of account. But unscrupulous and interested parties may manufacture testimony on their own behalf. It is for this reason that even though when account-books are regularly kept in the course of business, entries therein are rendered relevant if they refer to a matter in which the Court has to enquire, but nevertheless, the statements in the form of such entries are not alone considered sufficient evidence to charge any person with liability. The attending circumstances are accordingly always taken into consideration by the Court. The entry should purport to record the whole of the transaction alleged and the appearance of the book containing entries must be honest and no suspicious dealing should be apparent. The entries should not be a racital of past transactions but an account of transactions as they occur, of course, not necessarily to be made exactly at the time of occurrence. It is sufficient if they are

made within a reasonable time when the memory could be considered recent. Such entries, though relevant, are only corroborative evidence and it has to be shown further by some independent evidence that the entries represent honest and real transactions and that the moneys were paid in accordance with those entries. The appellant's learned counsel has drawn our attention to a Bench decision of this Court in *Kaka Ram-Sohan Lal* v. *Firm Thakar Das-Mathra Das* (1), but I am unable to find anything in the reported case which runs counter to the view just expressed by me. There is no quarrel with the rule of law laid down by the Supreme Court in *Narayandas* v. *Sangli Bank* (2), cited by the appellant, to the effect that to support a plea of payment, passing of cash payment need not be shown and payment is possible by means of transfer entries in books of account, and indeed this rule of law is binding on us, but it has little relevance to the facts before us because we are not impressed by the entries produced in the case in hand. *Lodna Colliery Co. Ltd.* v. *Bholanath Rai and others* (3), merely lays down that in a limited Company, books and papers kept in the usual course of business are the best evidence. This rule is again unexceptionable but has little applicability to the facts of the present case. The decision in *Jagat Singh Rai* v. *Jagat Singh Kawatra & Sons* (4), in which the plaintiff had produced account-books and deposed that they were regularly kept and were correct and he was not cross-examined on the point and his testimony supported by the account-books was held legally sufficient to establish his claim, is also of little assistance to the plaintiff in the case in hand, for the facts here are materially different. Similarly, the decision in *Suraj Prasad* v. *Mt. Makhna Devi, etc.* (5), does not advance the appellant's case.

Examining the accounts produced in the case in hand, they would have been of considerable assistance to the plaintiff-appellant had the corresponding entries in the account-books of third parties to whom payments were alleged to have been made, as also in those of the plaintiff-appellant, been proved to tally with those produced. In the absence of such evidence or of other independent evidence corroborating or corroborated by the entries produced, I find it a

(1) A.I.R. 1962 Punj. 27.
(2) A.I.R. 1966 S.C. 170.
(3) A.I.R. 1954 Cal. 233.
(4) A.I.R. 1933 Lah. 212.
(5) A.I.R. 1946 All. 127.

little difficult to found the liability of the defendants on the basis of the daily entries on the record. Once the conclusion of the Court below discrediting the plea of payment to third parties as a result of the alleged settlement is upheld, no other point can sustain the appeal. In regard to the notification, the appellant has taken two alternative positions. In the first instance, according to him, the resolution to settle the accounts before time was passed before the date of the notification and, therefore, the notification did not affect the appellant's case. Secondly, he has argued that the notification is wholly inapplicable to the case in hand. In either case, in my opinion, the appellant cannot succeed because of our conclusion that no payments are proved to have been made as a result of the alleged settlement. Reference to a Single Bench decision of this Court in *Thakar Das Bagai* v. *Dr. C. N. Bhargava* (6), by Shri Bishamber Dayal is, therefore, hardly relevant. The decision in *Abdulla Ahmed* v. *Animendra Kissen Mitter* (7), in which the rule of law laid down by Viscount Simon. Lord Chancellor *in Luxor (Eastbourne) Ltd.* v. *Cooper* (8), that contracts with commission agents do not follow a single pattern and in each case one has to ascertain the express terms of a given contract, is also of little assistance to the appellant.

For the foregoing reasons, this appeal fails and is hereby dismissed but without any order as to costs.

R. P. KHOSLA, J.—I agree.

K.S.K.

APPELLATE CIVIL

Before J. N. Kaushal, J.

GURDIAL KAUR,—*Appellant.*

versus

MUKAND SINGH,—*Respondent.*

F.A.O. No. 40-M of 1963.

May 3, 1966.

Hindu Marriage Act (XXV of 1955)—S. 9—Application under—Relationship of husband and wife denied by the Respondent—Special Courts under the Act—Whether can determine the matter.

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(6) 1963 P.L.R. 1054.
(7) (1950) 1 S.C.R. 30.
(8) 1941 A.C. 108.