
(1937) 03 BOM CK 0022
In the Bombay High Court
Case No : First Appeal No. 122 of 1933

Chimanlal Purshottamdas Shah

APPELLANT

Vs

Nyamatrai Madhavlal

RESPONDENT

Date of Decision : 15-03-1937

Acts Referred:

Contract Act, 1872 — Section 30

Citation : AIR 1938 Bom 44 : (1937) 39 BOMLR 1083 : 173 Ind. Cas. 205

Hon'ble Judges : Rangnekar, J;Macklin, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Rangnekar, J.—The appellant, who is a certified broker and a member Nyamatrai of the old Share Bazar of Ahmedabad, is seeking to enforce a mortgage bond executed by the respondent in his favour to secure the loss which the respondent may sustain in respect of the share business transacted by his orders and by his direction in the Share Bazar at Ahmedabad. He is also seeking to recover the balance due to him in respect of such share transactions which was not covered by the mortgage bond. His total claim is Rs. 7,741 with interest at six per cent, on it. The respondent pleaded that the transactions in suit were gambling and wagering and, therefore, void in law, and that as the consideration for the mortgage bond was illegal, the mortgage bond could not be enforced against him. The learned Joint First Class Subordinate Judge of Ahmedabad accepted the defence raised by the respondent and dismissed the plaintiff's suit. The plaintiff now appeals.

2. It appears from the evidence that in Samvat year 1989 the appellant was working as a sub-broker of one Vadilal Chakubhai, who was a sharebroker and a member of the Stock Exchange of Ahmedabad, and as such sub-broker he put through various transactions of sale and purchase of various shares for the respondent from Jeth delivery to Aso delivery 1985. Thereafter the plaintiff himself became a certified broker, and the transactions of Aso delivery, which

were outstanding, were transferred to him by Vadilal. The dealings between the parties continued until Maha delivery in Samvat 1986. Shortly after the respondent commenced to do business on the Stock Exchange through the plaintiff, he executed the mortgage in suit to secure any loss which may result from his business up to Rs. 5,000 and asked the plaintiff to open a sharafi khata up to the extent of Rs. 5,000.

3. Obviously the burden of proving that the transactions in suit were wagering and gambling transactions was on the respondent; but it so happened that on one of the minor issues the burden rested on the plaintiff, and the plaintiff had to go into the witness-box at the outset. It is on the admissions made by the plaintiff in his cross-examination that the respondent relies in support of his defence, and the learned Judge held that the defendant had succeeded in establishing his defence. Unfortunately, there has been no discussion in the judgment as to the evidence on behalf of the respondent. All that he alleged in his evidence was that he had lost all his property and that the plaintiff, who was the son of a friend of his, tempted him to speculate on the Stock Exchange, agreeing not to hold him responsible for giving or taking delivery as the case may be and promising that he would so manage the business that no loss would fall on the defendant. The law on the subject is contained in Section 30 of the Indian Contract Act, which is in the terms following:?

Agreements by way of wager are void; and no suit shall be brought for recovering anything alleged to be won on any wager....

4. As observed by Cotton L.J. in *Thacker v. Hardy* (1878) 4 Q.B.D. 685 the essence of gaming and wagering consists in the agreement that one party is to win and the other party is to lose upon a future event, which at the time of the agreement is of an uncertain nature, that is, that if the future event turns out one way the plaintiff is to win, and if it turns out the other way he is to lose. In order to constitute a wagering contract, neither party should intend to perform the contract itself, but only to pay the differences. In other words, the common intention of both parties at the time of entering into the contract must be not to call for or give delivery from or to each other. Such intention is a question of fact. There can hardly be any direct evidence of it, and though an agreement in writing may ostensibly be for the purchase and sale of goods deliverable on a certain day, oral evidence is admissible to prove that the intention of the parties was only to pay the differences. In order to ascertain the real intention of the parties the Court must look at all the surrounding circumstances and can even, go behind a written contract. But mere speculation is something quite different from a wager. Speculation, as Murray defines it, is the practice of buying and selling goods, lands, stocks and shares, etc., in order to profit by the rise or fall in the market value as distinct from regular trading or investment. As Farran C.J. observed in *J.H. Tod V. Lakhmidas Purshotamdas* ILR (1892) Bom. 441 there is no law against speculation, as there is against gambling." Speculative transactions therefore have to be carefully distinguished from agreements by

way of wager, and, as pointed out in Pollock and Mulla's Commentary on the Indian Contract Act (6th ed.) at pp. 244-245:?

This distinction comes into prominence in a class of cases where the contracts are entered into through Brokers. The modus operandi of the defendant in this class of cases is, when he enters into a contract of purchase, to sell again the same quantity deliverable at the same time in one or more contracts, either to the original vendor or to some one else, so as either to secure the profit, or to ascertain the loss, before the vaida day; and, when he enters into a contract of sale, to purchase the same quantity before the vaida day. This mode of dealing, when the sale and purchase are to and from the same person, has the effect, of course, of cancelling the contracts, leaving only differences to be paid. When they are to different persons, it puts the defendant in a position vicariously to perform his contracts. This is, no doubt, a highly speculative mode of transacting business; but the contracts are not wagering contracts, unless it be the intention of both contracting parties at the time of entering into the contracts, neither to call for nor give delivery from or to each other? It may well be that the defendant is a speculator who never intended to give delivery, and even that the plaintiffs did not expect him to deliver; but that does not convert a contract, otherwise innocent, into a wager. Speculation does not necessarily involve a contract by way of wager, and to constitute such a contract a common intention to wager is essential. It is in cases of the above description that there is a danger of confounding speculation, or that which is properly described as gambling, with agreements by way of wager; but the distinction in the legal result is vital.

5. As illustrations of this modus operandi reference may be made to three cases. In *J.H. Tod v. Lakhmidas Purshotamdas*, in which the transactions were in Broach cotton, the contracts were entered into through a broker and were made by bought and sold notes and the principals were never brought into contact with each other. It was held that this would raise a presumption against the existence of a common intention. In *Perosha Cur-setji v. Manekji Dossabhoy* ILR (1898) Bom. 899 the dealings were in Government paper and shares of a mill. In *Sassoon v. Tokersey* ILR (1904) Bom. 616 : Bom. L.R. 521 the dealings were in American futures. In both cases the contracts were made by a broker with third parties in his own name according to the practice of the trade and he sued to recover from the defendant the loss paid by him on behalf of the defendant. It was held that the presumption against the existence of a common intention to wager was still stronger than in the first case, because the defendant did not know at all with whom the broker had contracted on his behalf. The broker may be a sutta broker or a mere agent for gambling, but the fact is immaterial for he is not a contracting party and it is the intention of contracting parties alone that is material in these cases. In all these cases the contention on behalf of the defendant was that the contracts were wagering contracts, but it was held that, though the transactions were of a highly speculative character and though, so far as the defendant personally was concerned, he entered into the contracts as gambling transactions, there was no evidence to show that the other contracting

party had also the intention to gamble.

6. I shall now refer to two well-known English cases which have a material bearing on the point of distinction between speculative transactions entered into through a broker according to the practice of the market and wagering transactions as such. In *Thacker v. Hardy* (1878) 4 Q.B.D. 685 the facts were that the plaintiff, who was a stock broker and a member of the London Stock Exchange, 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 knew that unless he could arrange matters for the defendant as the latter expected, the defendant would be unable to meet the engagements which the plaintiff might enter into for 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. It was held that the plaintiff was entitled to recover. Bramwell L.J. said as follows (p. 690):-

The bargains made by the plaintiff upon behalf of the defendant were what they purported to be: they gave the jobber a right to call upon the broker or the principal to take the stock, and they gave the broker the right to call upon the jobber to deliver it. There was nothing in the transaction from which the jobber could tell whether the transaction was bona fide, that is, for the purposes of investment, or whether it was a mere speculation.

Cotton L.J. observed as follows (p. 695);?

It was assumed by the counsel for the defendant that by the bargain between him and the plaintiff he was liable for only the difference, whatever should happen to the plaintiff; and it was contended that a contract of that kind would be null and void, as being against the provisions of 8 & 9 Viet. c. 109. I will assume that the plaintiff was in a certain sense acting as principal; nevertheless there was no gaming or wagering in the contract.

The learned Lord Justice, after pointing out the essence of gaming and wagering, proceeded to observe as follows (p. 695):?

The plaintiff was to derive no gain from the transaction; his gain consisted in the commission which he was to receive, whatever might be the result of the transaction to the defendant. Therefore the whole element of gaming and wagering was absent from the contract entered into between the parties.

7. These observations were cited with approval and the case followed by Privy Council in *Forget v. Ostigny* [1895] A.C. 318. At p. 322 the Lord Chancellor observed as follows:?

In the Courts below much stress was laid on the fact that the respondent was

known to the appellant to be a bank clerk with a small salary and possessed of little other means. This was regarded as bringing home to him the knowledge that the respondent had in view not investment but gambling. The other circumstances mainly relied on were that the respondent never asked for nor received delivery of any of the shares purchased; that the purchase-money was raised by a loan procured by the appellant; that the respondent was not in a position to furnish the whole of the purchase-money, and, in fact, only provided the appellant with a small margin.

It may well be that the appellant was aware that in directing a purchase to be made the respondent did not intend to keep the shares purchased, but to sell them when, as he anticipated would be the case, they rose in value; that his object was not investment but speculation. To enter into such transactions with such an object is sometimes spoken of as "gambling on the Stock Exchange"; but it certainly does not follow that the transactions involve any gaming¹ contract. A contract cannot properly be so described merely because it is entered into in furtherance of a speculation. It is a legitimate commercial transaction to buy a commodity in the expectation that it will rise in value and with the intention of realizing a profit by its resale. Such dealings are of every-day occurrence in commerce. The legal aspect of the case is the same whatever be the nature of the commodity, whether it be a cargo of wheat or the shares of a joint-stock company. Nor, again, do such purchases and sales become gaming contracts because the person purchasing is not possessed of the money required to pay for his purchases, but obtains the requisite funds in a large measure by means of advances on the security of the stocks or goods he has purchased. This, also, is an everyday commercial transaction. For example, a merchant who has to pay the price of a cargo purchased before he resells it obtains in ordinary course the means of doing so by pledging the bill of lading.

Then his Lordship referred! to the observations of Bramwell L.J. and Cotton L.J. set forth above.

8. It is clear, therefore, that when transactions are entered into through the medium of a broker according to the usage of a particular market, there is a very strong presumption against the existence of a common intention to wager. The position, is well put in Pollock and Mulla's commentary on the Indian Contract Act (6th edn.) at p. 236, in these terms:?

This infrequently happens when agreements of a speculative character are entered into through the medium of brokers, and when, according to the practice of the market, the principals are not brought into contact with each other, nor do they know the name of the person with whom they are contracting, until after the bought and sold notes are executed. Under circumstances such as these when a party launches his contract orders he does not know with whom the contracts would be made. And this presumption is considerably strengthened when the broker is authorised by the principal to contract with third persons in his (the broker's) own name; for the third person may in such case remain

undisclosed" even after the contract is made.

9. It was argued in this case on behalf of the appellant that the element of wager can never enter into contracts brought about by a broker. I am unable to accept the contention. Although, as pointed out above, there is a very strong presumption, it can be rebutted by evidence of a common intention to wager, even though the contract was brought about by a broker, and *Eshoor Doss v. Rau* (1895) ILR 18 Mad. 306, F.B. is a good illustration.

10. In the very large and numerous transactions carried on through a broker everyday in silver, cotton, linseed, stocks and shares, etc., the principals are hardly if ever brought into contact with each other before the contract is made, nor do they know, generally speaking, the names of the persons with whom they are contracting through the broker when the contract is made. It is the broker who is looked up to for fulfilment of the contract. The question then arises, when the broker sues his constituent, who is the other party to the contract whose intention has to be inquired into in order to accept the defence of wager raised by the constituent? The question was answered by Tyabji J. in *Perosha Cutsetji v. Manekji Bossabhoy* ILR (1898) Bom. 899 in the words following (pp. 904-05):?

In one sense it was the plaintiff, in another sense the parties with whom the plaintiff, acting as broker for the defendant, made the contracts.... The contracts on the face of them are regular, formal contracts in the usual form for the sale or purchase of Government paper and shares.

11. It cannot be disputed?and has not been disputed in this case?that, according to the course of business well known in the share market, the broker receives an order from his constituent and he puts through the business in the market generally with other brokers who are also members of the Stock Exchange or sometimes with a jobber, and the constituent never comes into contact with third parties with whom the contract is eventually made. Not only that, but the names of third parties are not disclosed to the broker's constituent, and according to the usage the broker remains liable to his constituent to fulfil the contract. Mr. Thakor, therefore, was driven to argue that the plaintiff was not merely a broker or a middleman but the contracts in this case between him and the defendant were as between principal and principal or, to use the learned Counsel's language, the plaintiff acted as a pucca adatyā. In my opinion, there is no evidence in the case to support the contention. The facts here are that the transactions are admitted and proved. The defendant gave orders from time to time to buy or sell certain shares in the market. When the plaintiff was acting as a sub-broker of Vadilal, the orders were put through in the market through the latter, and the latter paid" moneys in the market on behalf of the defendant. When the plaintiff himself commenced to work as a certified sharebroker, the same procedure was followed. In each case, memos were sent to the defendant at the proper time advising him of the particular transactions being effected in the market. Two of such memos were put in by way of a sample. The rest were offered" for inspection to the defendant. The plaintiff's books of account showing

how the business was done were produced for inspection. It is difficult, in my opinion, therefore, to accept the contention that the plaintiff acted as a principal in the transactions. This case was never made out in the lower Court, and there is no reference to this contention either in the cross-examination of the plaintiff or in the issues.

12. These, then, being the principles, the question is, whether upon the evidence the Court can raise a legal inference as to the existence of a common intention of the parties to wager.

13. The important facts found by the learned Judge were : (1) that the defendant at the time when he commenced to deal in shares was without any business and had no ostensible property except a house which he mortgaged to the plaintiff to secure the loss sustained in the dealings to the extent of Rs. 5,000; (2) that no delivery was either given or taken, although business was done to the extent of Rs. 7,00,000; (3) that the plaintiff admitted that on one occasion he sold twenty-five Calico shares for the defendant, although he knew that the defendant was not in possession of any such shares; (4) that the plaintiff took no further security after the limit of Rs. 5,000 was reached, although there was further loss incurred by the defendant; (5) that the plaintiff himself in the case of one particular delivery did not give or take delivery from any of his other constituents for whom he had done business in the market; and (6) that the plaintiff took no deposit from any of his other constituents, although he took a security of at least Rs. 5,000 from the defendant.

14. Some of these facts are undoubtedly important, but, in our opinion, they are not conclusive of the issue in the case, having regard to the real nature of the transactions, the position of the parties and the usage. In *Forget v. Ostigny* the facts were similar. There, as here, the defendant was a person of small means and had speculated to a large extent. The contentions based upon this as also on the facts that the respondent was not in a position to furnish the whole of the purchase money and in fact only provided the appellant with a small margin, in this case only Rs. 5,000/-, were disposed of by the Lord Chancellor by observing that it may be that the object of the respondent was not investment but speculation. As to fact No. 2 in this case, I cannot do better than quote the Lord Chancellor's words at p. 323 Said he:?

Much stress was laid on the fact that the respondent never asked for delivery of any of the shares purchased, and that the appellant never tendered such delivery. The question whether a contract is intended to be executed by delivery according to the obligations expressed upon the face of it is no doubt an important test for determining whether it is a real one or only a gambling arrangement under the guise of a commercial contract.

Then, the magnitude of the transactions, though relevant and important, is not, in our opinion, sufficient by itself to rebut the presumption against wager in contracts brought about by a broker for his constituent with third parties in the

market and in accordance with the usage of the market. This was pointed out in *Dady v. Mctdhuram* (1903) 5 Bom. L.R. 768 where the transactions were in Government paper to the extent of about half a crore of rupees. Then, again, it is not suggested that the plaintiff was ever called upon to give or take delivery either by the defendant or by any of his other constituents and failed to do so. There was no evidence in the case about this and no suggestion even in the cross-examination. To deal in differences only is one thing. It is quite another thing where both parties agree that under no circumstances should Either of them require the other to give or take delivery. A person may be in a position to give or take delivery and yet may agree to settle the contracts by differences only. It was not suggested that the third parties, who were the other parties to the contract, were not in a position to give or take delivery. Fact No. 3 may show again that the appellant knew that the respondent was speculating, but apart from that there is nothing to show that on that occasion he could not have procured the twenty-five shares if the other party to the contract had insisted on delivery. The remarks I have made as to fact No. 1 apply to fact No. 4. The remarks made above as to fact No. 2 apply to fact No. 5. Fact No. 6 merely shows that the appellant did not consider the respondent to be as sound a party as his other constituents.

15. The case here was simple. Upon the evidence, the plaintiff was a certified sharebroker; he sold or purchased certain shares for the defendant at his request and by his direction and informed him from time to time. This is not in dispute. The position which then ensues is so well put in *Forget v. Ostigny*, that I am tempted to quote the observations of the Lord Chancellor which are as follows (p. 322):?

The appellant having] entered into these contracts as agent for the respondent, the latter was *prima facie* bound to indemnify the former against any liability incurred in respect of them. He was, on the other hand, exclusively entitled to tile benefit of them. If the shares purchased increased in value the result was a gain to the respondent and did not involve any loss to the appellant. If, on the other hand, the shares decreased in value, while the respondent sustained a loss no gain resulted to the appellant. In neither contingency, therefore, did the respondent's gain involve a loss to the appellant. His remuneration was in any event a fixed commission of 1/2 per cent. It would be, of course, an abuse of language to apply the term "bet" to such a transaction. Their Lordships cannot think that it is any more legitimate to speak of it as a gaming contract between the appellant and the respondent.

16. That, in our opinion, is the position here. The learned Judge has not approached the case from the proper point of view. It is not as if he was unconscious of the distinction between an ordinary case of contract directly between parties and where the contract is brought about by a broker and the latter is suing the constituent for being indemnified against the loss in the contract. At p. 9 of the print the learned Judge observes as follows:?

Different considerations apply where the suit is brought by a broker or an agent against his principal to recover his brokerage or commission in respect of transactions entered into by him as such or for indemnity of losses incurred by him in such transactions on behalf of his principal. It has accordingly been held that a broker or an agent may successfully maintain a suit against his principal to recover his brokerage, commission or the losses incurred by him, even though the contracts in respect of which the claim is made are contracts by wager.

Having said this, the learned Judge disposes of the point by observing as follows :-

The law is, however, different in the Presidency of Bombay. In this Presidency, contracts collateral to or in respect of wagering contracts are prevented from supporting a suit by the special provisions of Bombay Act III of 1865.

Then he quotes the section and concludes as follows :?

The result therefore is that, though an agreement by way of wager is void, a contract collateral to it or in respect of a wagering agreement is void in the Bombay Presidency.

With great respect to the learned Judge, the section has no bearing on the question arising in this case. All that the section means is that contracts collateral to or in respect of wagering transactions cannot be enforced. But in order to bring the case within the meaning of that section the transactions in respect of which the brokerage, commission or losses are claimed must amount to a wagering agreement. The result of this enactment is to put a contract collateral to an agreement by way of wager on the same footing as the agreement itself. Such a collateral contract is void in the Bombay Presidency, though not in other provinces. The following observations of Pollock and Mulla on the point are pertinent:?

...it is no answer to a suit by a broker in respect of such a claim against his principal that, so far as the defendant was concerned, he entered into the contracts as wagering transactions with the intention of paying the differences only, and that the plaintiff must have known of the inability of the defendant to complete the contracts by payment and delivery, having regard to his position and means. It must, further, be shown that the contracts which the plaintiff entered into with third persons on behalf of the defendant were wagering contracts as between the plaintiff and those third persons." (Indian Contract Act, pp. 242-243, 6th edn.).

It is difficult to appreciate the introduction of Section 1 of Bombay Act III of 1865 into this case. If the contracts were wagering, they were void u/s 30 of the Indian Contract Act; if not, there was an end to the defendant's case.

17. In the result, therefore, the decree made by the learned Joint First Class Subordinate Judge must be reversed. As the claim is not disputed on merits, there will be a decree in favour of the appellant for Rs. 5,000, with interest

thereon at six per cent, from February 28, 1930. There will be the usual preliminary mortgage decree for this amount; six months' time for redemption. There will be a decree for Rs. 1,851 with interest at six per cent, on judgment. The defendant must pay the costs throughout. Liberty to the appellant to tack on the costs to the mortgage amount, with further interest thereon at six per cent. The decree made by the Joint First Class Subordinate Judge for Rs. 722 in favour of the defendant will be set aside. The appellant to give credit for Rs. 722 received by him against the decree for Rs. 1,851.

Macklin, J.

18. I agree.