
(1901) 09 MAD CK 0002
In the Madras High Court

Vappakandu Marakayar and Another APPELLANT
Vs
Annamalai Chetti and Another RESPONDENT

Date of Decision : 24-09-1901

Acts Referred:

Contract Act, 1872 — Section 20

Citation : (1902) ILR (Mad) 561

Hon'ble Judges : Moore, J; Davies, J

Bench : Division Bench

Judgement

Moore, J.—It is shown that, on the 3rd August 1896, the defendants entered into an agreement (exhibit D) with the first plaintiff under which

it was provided that the first plaintiff should lend to the defendants a sum of Us. 1,500 on the risk ""yogyam"" as to the meaning of this term--vide

Asan Kuthu Sahib Mercoyar v. Ramanathan Chetti ILR 22 Mad. 26 of a ship called the Henrietta Elisabeth which had started from Negapatam on

the 23rd July 1896 for the Nicobars. The terms of this agreement, as I read them, were that the vessel was to sail from the Nicobar Isles to

Rangoon and Moulmein and thence to Negapatam, that if she returned safe to Negapatam the defendants should, on the 20th March 1897, repay

to the first plaintiff the sum Borrowed from him together with interest at the rate of 18 per cent, per annum, but that if the vessel did not return the

first plaintiff lost his money. There are certain other provisions as to what should happen in case the vessel should not have returned to Negapatam

by the 20th March, but should be ascertained to be, safe elsewhere on that date, which need not be considered as they do not affect the present

case. It is admitted that the vessel was lost at sea on the 26th July 1896. The plaintiffs sue for the recovery of the amount actually advanced by the

first plaintiff (Rs. 1,450), together with interest, on the following grounds, that the vessel was unseaworthy when she left Negapatam, that the captain was guilty of negligence in not at once putting back to Negapatam when the vessel sprung a leak on the 23rd July and that, as the vessel was lost before the agreement (exhibit D) was entered into, it has become void. The District Munsif dismissed the suit but the Subordinate Judge on appeal gave the plaintiffs a decree.

2. Both the Courts have held, and there can be no doubt rightly, that it has not been shown that the vessel was in an unseaworthy condition when she left Negapatam. The District Munsif found further that it had not been proved that the captain was guilty of any negligence, but the Subordinate Judge has set aside his finding on this point on the ground, as it would appear, that the burden was on the defendants to show that the captain was justified in not putting back to Negapatam and that they had not done so. There is no evidence whatever to show that the captain was guilty of any negligence or that he did not exercise a sound discretion in proceeding on the voyage. The question is however immaterial as the risk of loss through negligence on the part of the captain was one of the risks to which the first plaintiff was liable under the terms of exhibit D. The main ground on which the Subordinate Judge has reversed the decree of the District Munsif and given the plaintiffs a decree is that, as both parties to exhibit D were on the date on which it was executed under the impression that the Henrietta Elizabeth was on that day safe, while as a matter of fact she had been lost some days previously, they were both under a mistake as to a matter of fact essential to the agreement entered into between them and that consequently that agreement was void under the provisions of Section 20 of the Indian Contract Act. It appears to me that the finding of the Subordinate Judge on this point cannot be upheld. He observes that it was no doubt the case that the time fixed for the repayment of the debt was eight months from the date on which the ship started from Negapatam, but holds that it was nowhere stated in exhibit D that the plaintiffs undertook the risk retrospectively from the date of the departure of the ship, This is clearly a mistake. The wording of exhibit D shows beyond all doubt that the risk which formed the basis of that agreement commenced from the 23rd July 1896 as set out in the document, because it

was on that day that the vessel sailed from Negapatam and commenced to incur the perils of the deep. Such, it is clear from the wording of the document, was the intention of the parties. It follows that it cannot be held that the agreement entered into by exhibit D was void u/s 20 of the Indian Contract Act, and that the defendants are consequently, as has been contended here, bound u/s 65 of the same Act to restore to the plaintiffs the sum that they received under the terms of that agreement. It does not appear to me to be necessary to refer to the several cases relating to policies of marine insurance that have been referred to at the hearing of this second appeal, as I agree with the Subordinate Judge in holding that exhibit D cannot be held to be in any sense a policy of marine insurance. The Subordinate Judge has given the plaintiffs a decree for the recovery of the loan made by them under exhibit D on the strength of the provisions of Sections 20 and 65 of the Indian Contract Act. As his finding to that effect cannot, in my opinion, be supported for the reasons already given, I would set aside his decree, restore that of the District Munsif, and dismiss the suit with costs throughout.

3. The memorandum of objections filed by the respondents is dismissed with costs.

Davies, J.

4. I concur throughout. It appears from Blackstone (volume 2, pages 458 et. seq.) that agreements similar to this were in vogue in England up to the time of the passing of 19 Geo. II, cap. 37, under the names sometimes of *foenus nautium* and sometimes *usura maritima* but as they were considered to give an opening for usurious and gaming contracts they were disapproved by the said Statute. Fortified by that pronouncement it seems to me that the present agreement is an agreement by way of wager, and therefore void u/s 30 of the Indian Contract Act, and I would dismiss the suit on that ground also.