ORIGINAL CIVIL.

Before Lort-Williams J.

GOAL DAS DAGA

v.

MANICK LAL BAITY.*

1940

May 15, 16, 17, 21.

Gaming and Wagering—*Brokers' claim against customer—Customer, if can set up plea of gaming and wagering.*

The plaintiff acted as broker on behalf of the defendant for sale and purchase of jute. The defendant never intended to give or take delivery and was simply gambling in differences, but the plaintiff was not a party to those gambling transactions.

Held that the plea of gaming and wagering could not be set up by the customer against the broker's claim.

Thacker v. *Hardy* (1) referred to.

ORIGINAL SUIT.

The relevant facts of the case are set out in the judgment.

N. C. Chatterjee and *G. K. Mitter* for the plaintiff. The plaintiff acted as broker and was not making anything out of the transactions except his brokerage. He was no party to the gambling transactions, but only carried out his instructions as broker. The defence of gaming and wagering is not open to the defendant: *Thacker* v. *Hardy* (1); *Karunakumar Datta Gupta* v. *Lankaran Patwari* (2).

J. C. Sen for the defendant. The transactions were gambling transactions and therefore unenforcible. The parties did not contemplate

*Original Suit, No. 884 of 1939.

(1) (1878) 4 Q. B. D. 689. (2) (1933) I. L. R. 60 Cal. 856.

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delivery. It was understood that only differences in the prices should be paid. The defendant was acting as a principal and not as a broker.

LORT-WILLIAMS J. The plaintiff is a broker and a member of the East India Jute Association, Limited. The defendant also is a broker.

The plaintiff's claim relates to a number of transactions in jute carried out by the plaintiff for and on behalf of the defendant and upon his instructions. These resulted in a sum of Rs. 16,511-15 becoming due to the plaintiff upon January 28, 1939.

On January 30, 1939, the defendant paid to the plaintiff Rs. 5,000 on account, leaving a balance of Rs. 11,511-15. Adding to this interest amounting to Rs. 153-9-6, the plaintiff's claim is Rs. 11,665-8-6.

Under the rules of the Association, future contracts of purchase or sale of jute are made between members of the Association only, that is to say, the Association only recognises its members in these transactions. They are forward contracts and are made for a period of three months and each week during the period of the three months a clearing rate is fixed by the Board of Control of the Association and periodical payments of margins have to be made on the basis of the difference between the contract rates and the clearing rates. At the end of the period of three months, if the contract has not been adjusted meanwhile, delivery has to be made.

Some members of the Association both act as brokers and enter into contracts direct as principals with their customers. Other members act only as brokers and never make any such direct contracts.

The plaintiff never acts otherwise than as a broker and this is confirmed by a mass of documentary evidence. For his services he charges commission and

this is all that he gets out of any business which he does on behalf of his customer. The method of doing such business is as follows :—

The customer either rings up the plaintiff on the telephone or goes to see him at his office. He instructs him either to sell or purchase so many bales of jute on behalf of the customer. Thereupon, the plaintiff goes downstairs into the Exchange and makes an appropriate contract with a member of the association. He then returns to the telephone or to his office and tells his customer what he has done. In the evening, in some cases, he goes to see the customer and obtains confirmation of the deal so as to avoid any mistake. The transaction is then entered in his books.

Another rule of the Association is that one member does not pay or receive directly from the other member, he pays or receives from the Association itself, and the Association pays or receives from the other party to the contract. The result is that in all such transactions the member makes himself liable to the Association for the business which he has done on behalf of his customer.

In the present case the result was that the plaintiff had to pay to the Association out of his own pocket the sum of Rs. 16,511-15, and all that he has received up to the present from the defendant is the Rs. 5,000 to which I have referred, and commission which he earned on the various transactions.

A further condition of the transactions was that interest at six per cent. would be calculated on the periodical margins and would run in favour of either party after the closing of the transaction.

It is admitted that the plaintiff has been acting for the defendant for a number of years and that all dealings and transactions between them up to January

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13, 1939, were adjusted and paid except an outstanding sale of 1,500 bales by the defendant at Rs. 36-12.

From that date up to January 21, there were a number of other transactions which are set out in the annexure to the plaint. Thus sales on behalf of the defendant were made to the extent of 2,250 bales, and purchases on his behalf to the extent of 3,750 bales, and they resulted in the loss which is represented by the amount paid by the plaintiff to the Association.

The plaintiff's brokerage was originally at the rate of six pies per bale, and subsequently three pies per bale.

The defendant alleges that there never was any intention on behalf either of himself, or of the plaintiff, or in fact of any members of the Association either to take or give delivery of jute, and that in respect of all such transactions no one contemplated anything except that the differences in the prices of jute should be paid. He admits, however, that the plaintiff was entitled to commission at the rate of three pies per bale on the closing of each transaction. He admits also that the various purchases and sales were as stated by the plaintiff, but he alleges that on January 18, 1939, he asked the plaintiff to purchase the 1,500 bales and the 2,250 bales, which I have mentioned, against the subsisting contracts for sales in respect of the same number of bales by the defendant, instead of which, according to the defendant, the plaintiff failed and neglected to close the various contracts for sale on January 18, and subsequently closed the transactions on the 21st contrary to the defendant's directions, and the defendant, therefore, refused to be bound by what he termed the unauthorised act of the plaintiff.

Further, he alleges that on January 30, the accounts were adjusted on the basis of the instructions actually given to the plaintiff, and were settled for the sum of Rs. 5,000 which the defendant paid and

the plaintiff accepted in full satisfaction of his claims in respect of all transactions outstanding.

Further, the defendant alleges that all the transactions were gambling transactions, and therefore, illegal and inoperative.

It will be observed at once that the defendant relies upon inconsistent allegations. He alleges on the one hand that contracts in respect of differences only, and therefore, gambling transactions, were made between him and the plaintiff acting as a principal, yet in the same breath he talks of asking the plaintiff to purchase certain bales from him, and alleges that the plaintiff failed and neglected to carry out the defendant's instructions and closed the transactions contrary to his directions, and therefore committed acts which were unauthorised by the defendant.

Further, that the accounts were adjusted upon the basis of the instructions actually given.

Every one of these statements is wholly inconsistent with the story that the plaintiff was acting as a principal. They are consistent only with and appropriate to the allegations of the plaintiff that he acted throughout only as an agent and broker. Obviously instructions cannot be given to a principal, nor can the principal be charged with failing and neglecting to carry out instructions.

With regard to the plaintiff's closing of the transactions on the 21st January instead of the 18th, I accept his evidence rather than that of the defendant. He struck me as a reliable witness and everyone of his statements is corroborated by entries in his books. On the other hand, I am not at all satisfied with the evidence of the defendant. Obviously he has been unfortunate, has been gambling and has lost, and as so often happens in such cases he has set up a plea of gaming and wagering.

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Upon the assumption therefore that the plaintiff was acting only as a broker, it is obvious that he had no interest whatever in postponing the closing of the transaction from the 18th to the 21st January. Upon whichever date, all that he could expect to receive was his brokerage. In fact the defendant accepted this position and could give as the only reason for the plaintiff's failure to carry out his instructions on the 18th that he had forgotten to make the necessary contracts and close the deals.

After careful consideration, I do not think that this is likely to have occurred, because, in the absence of written orders and instructions, the plaintiff makes a practice of making the contracts with the members of the Association immediately after he has received instructions from his customer.

With regard to the alleged settlement on January 30, I am satisfied that the plaintiff's story is true and that the Rs. 5,000 was only a payment on account, the defendant being at that time unable to settle the whole of the claim. He said that he had suffered much loss and he asked the plaintiff to pay the sum due to the East India Jute Association, that is to say, the balance of the defendant's losses, and that he would pay the plaintiff later on.

Subsequently there was an attempt to settle the claim between the plaintiff and the defendant made by a mutual friend or business acquaintance named Dawlal Singhi. The defendant upon that occasion said that he had not got the money and though he was willing to pay the full amount he could not pay in cash, but was willing to execute a *hundi* for that amount. The plaintiff said that no settlement could be arrived at unless a cash payment was made, and so the matter ended.

I am satisfied that the plaintiff acted throughout as a broker and made nothing out of these transactions except his brokerage. It is true that the defendant

never intended to give or take delivery and was simply gambling in differences. But there is nothing whatever to show that the plaintiff was a party to those gambling transactions. It takes at least two to make a gaming and wagering contract, and while the defendant no doubt never had any intention except to gamble, I am satisfied that the plaintiff was no party to any gaming or wagering contract and simply carried out his instructions as a broker. Whether the defendant gambled or not was no business of his. It was immaterial to him what the defendant chose to do so long as he received his brokerage or commission on each transaction.

There can be no doubt that where a broker acts on behalf of his customer and the customer gambles, the customer cannot set up a plea of gaming and wagering against the broker's claim.

In *Thacker* v. *Hardy* (1)—

The plaintiff, a broker, had been 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 would 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 his commission as broker.

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 Vict., c. 109, s. 18.

The facts in that case are almost upon all fours with the facts of the present case and in a sense it was a much stronger case in favour of the defendant because there the broker had full knowledge of the intentions of the customer and engaged himself to carry out speculation on behalf of that customer.

(1) (1878) 4 Q. B. D. 685.

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In the present case, the facts are quite different. I am satisfied that any question of speculating on behalf of the defendant never arose, nor was there any discussion about differences between the plaintiff and the defendant. The plaintiff being in the position of a broker only did not care one way or another whether the defendant gambled or not.

In these circumstances, there can be no answer to this claim. There must be judgment for the plaintiff for the amount claimed with costs.

Suit decreed.

Attorney for plaintiff: *C. C. Bose.*

Attorneys for defendant: *K. K. Dutt & Co.*

A. C. S.