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unexplained. There is his conduct and the conduct of the other members of the family with reference to the agreement of 1870 and to the suit of 1876 brought by Adimulam Pillai. Again there is his conduct immediately preceding the gift now impugned. Added to all this, there is a mass of evidence given by witnesses who are in a position to know the facts and who, with the exception of those belonging to the family, are not said to be interested or untrustworthy. I think that the custom has been sufficiently proved and that the appeal ought, therefore, to be allowed.

APPELLATE CIVIL—FULL BENCH.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, Mr. Justice Parker, and Mr. Justice Subramania Ayyar.

ESHOOOR DOSS (PLAINTIFF), APPELLANT,

v.

VENKATASUBBA RAU (DEFENDANT), RESPONDENT.*

Contract Act—Act IX of 1872, s. 30—Wagering contract—Contract for differences.

A on various occasions, agreed to sell to B certain amounts of Government of India promissory notes, amounting in all to the nominal value of four and a quarter lakhs, for delivery on the following 30th of November. On the 28th of November, B agreed to sell to A Government of India promissory notes of the nominal value of four and a quarter lakhs for delivery on the 30th of November. A did not perform his contract to sell, and B now sued to recover, by way of damages, the difference between the prices at which A had agreed to buy and sell. It appeared that it had been the intention of both plaintiff and defendant that no delivery should be made under the agreements, but that the differences only should be paid:

Held, that the plaintiff was not entitled to recover, for the reason that the agreement sued on was void under Contract Act, section 30, as being a gambling transaction.

APPEAL under Letters Patent, section 15, against the decree of the High Court in the case of *Eshoor Doss v. Venkatasubba Rau* already reported(1).

* Letters Patent Appeal No. 60 of 1894.

(1) I.L.R., 17 Mad., 480.

Mr. R. F. Grant for appellant.

Mr. E. Norton for respondent.

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COLLINS, C. J.—The only question to be decided in this appeal is what was the intention of the parties when they entered into the transaction in question. The appeal from the decision of Mr. Justice Davies was originally heard by the late Sir T. Muttusami Ayyar and Mr. Justice Best, and there was a difference of opinion between the two learned Judges as to the intention of the parties at the time the contract was entered into. The plaintiff, a sowcar, alleges that he entered into a contract with the defendant to buy from him Government 4 per cent. paper, that it was an honest commercial transaction, and that he expected the defendant to deliver to him the amount he bought, viz., Rs. 4,25,000 on the date named in the contract, and he would have been ready to pay for the same. The defendant, a retired vakil, on the other hand contends that it was a gambling transaction, that neither he nor the plaintiff intended that any paper should be delivered, but that the differences only should be paid. The law on this subject appears to be clear that agreements between buyers and sellers of shares and stocks, to pay or receive the differences between their prices on one day and their prices on another day, are gaming and wagering transactions, and in India are void under section 30 of the Contract Act.

The plaintiff Raja Eswara Doss was called on his own behalf and deposed that he in October and November 1891, through a broker, had bought the Government paper from the defendant to be delivered on the 30th November 1891, that he also sold the defendant on the 28th November Rs. 4,25,000, and that therefore he claimed the difference in the price of the Government paper, the value of the paper being higher on the day he sold than it was in October when he bought.

The plaintiff's second witness was a Mr. Berry, who describes himself a stock-broker; he has had dealings in Government paper with both plaintiff and defendant; but he does not say that he ever delivered any paper to either of them; he says there is a settling day for completing transactions on the principle of a banking clearing house; he admits there are many transactions in Government paper in which no paper changes hands, and native dealers generally meet their contracts by asking the purchasers to take delivery from somebody else, and paying or receiving the

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difference or by selling back—that is their custom. The plaintiff's third witness was Venkatachella Chetti, a dealer in Government paper and a shopkeeper; he is largely indebted to plaintiff; he had dealings with the defendant in Government paper and tried to obtain his differences; he describes the methods employed in these transactions; he says there is no intention at the time of purchase that Government notes should be actually delivered or money paid, but at the time of settlement a letter is given authorizing the vendor to deliver to the purchaser and the purchaser to take from the vendor; he says he has bundles of such letters; he also says that, when plaintiff went to defendant's place on the 30th November, he did not ask for delivery of the paper, but only for differences. It is worthy of remark that the plaintiff, who deals in many lakhs of Government paper, gives no instance in which he either delivered or received Government paper, except on one single occasion just before he brought this suit.

The defendant's evidence was to the effect that the differences were only to be paid and no paper was to be delivered; the plaintiff's broker said plaintiff was a good man and would pay the differences, and he said the plaintiff had made similar enquiry about defendant.

The defendant's second and third witnesses are brokers, and the third negotiated some of the plaintiff's sales, and it appears from their evidence that gambling in Government paper is very common in Madras; one witness says it has been going on for twelve years; the entry in the contract of a date for delivery is merely nominal and differences only are paid and received.

The evidence satisfies me that both plaintiff and defendant intended that differences only should be paid, and were perfectly aware that they were entering into a gambling transaction.

I would dismiss this appeal and with costs.

PARKER, J.—The judgments of the learned Judges proceed on the basis that the intention must be mutual, and the only point on which they differ in opinion, is as to whether, at the time of making the contract, the plaintiff regarded and intended it as a contract for the payment of differences only. That this was the intention of the defendant is not disputed, but it is urged that the plaintiff fully intended and was prepared to accept and deliver the Government paper if necessary.

It is contended that this case is exactly similar to *Tod v. Lakshmidas Purshotandas*(1). In that case as in this the contracts were in the usual mercantile form and were made through brokers, the principals not being brought into contact with each other at the time the contract was made. In the Bombay case, however, it was found that, though the transactions were highly speculative and usually cancelled one another, it was not proved to be the intention of both the contracting parties, under no circumstances, to call for and give delivery from or to each other.

In the present case it is observable that the same broker acted for both parties, and that, though they were not brought into contact at the time defendant contracted to sell Government paper to plaintiff, each had made enquiry beforehand of the broker, not whether the other would be able to deliver Government paper, but whether he would be able to pay differences. When, on November 28th, it was rumoured that defendant was in difficulties, plaintiff with others, who had bought paper from defendant, went to his office and asked not whether the paper would be forthcoming, but whether differences would be paid. This was before the execution by plaintiff to defendant of a sale note for the amount bought. The evidence as to this conversation shows that it was never even suggested that defendant should perform his contract by the delivery of paper. The sole question discussed was the payment of differences. Defendant offered 8 annas premium, which plaintiff would not accept, and finally it was arranged by Vencatachella for plaintiff that the full amount of differences should be paid, but that six months' time should be given.

Though plaintiff has been engaged in these transactions for a considerable time, there is evidence that he only passed paper on one single occasion. This was in 1892 about two months before the present suit was brought and after defendant had, by exhibit B on 3rd December 1891, repudiated his legal liability to pay the differences. In 1892 the plaintiff must of course have realized the importance of being able to show that paper did sometimes change hands at settling day in settlement of these transactions.

I agree in the conclusion of the late Mr. Justice Muttusami Ayyar that plaintiff fully understood the contract was for the payment of differences only. I would dismiss this appeal with costs.

(1) I.L.R., 16 Bom., 441.

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SUBRAMANIA AYYAR, J.—I also agree in the conclusion that the plaintiff fully understood that the contract was for the payment of differences only. I have nothing to add to the reasons for this conclusion so fully stated by the late Mr. Justice Muttusami Ayyar or to the observations of PARKER, J., in his judgment. The appeal fails and should be dismissed with costs.

Branson & Branson, attorneys for appellant.

Wilson & King, attorneys for respondent.

APPELLATE CIVIL.

*Before Sir Arthur J. H. Collins, Kt., Chief Justice, and
Mr. Justice Best.*

EDWARD CLARKE (DEFENDANT), APPELLANT,

v.

THE CHAIRMAN, OOTACAMUND MUNICIPAL COUNCIL
(PLAINTIFF), RESPONDENT.*

District Municipalities Act (Madras)—Act IV of 1884, ss. 47, 63—Land tax—Land unappropriated to buildings.

A municipal council under the Madras District Municipalities Act has no power to levy a tax on any land exceeding seven and-a-half per cent. on the annual value of such land.

The meaning of the term "lands unappropriated to any building" in Madras District Municipalities Act, section 63, clause (2) considered.

SECOND APPEAL against the decree of T. Weir, District Judge of Coimbatore, in appeal suit No. 33 of 1894, reversing the decree of A. F. Elliot, Acting Subordinate Judge of Nilgiris, Ootacamund, in original suit No. 67 of 1893.

The plaintiff, who was the Ootacamund Municipal Council, sued by its chairman to recover Rs. 559-14-0 alleged to be due from the defendant, in respect of three half years ending the 30th September 1893, on account of a tax imposed under the Madras District Municipalities Act, section 63, clause (2). The defendant denied that the land in question was unappropriated to any

* Second Appeal No. 1738 of 1894.