Where the damages sustained can be assessed and it is below the deposit amount, it will not be forfeited. I think *Srinivasa* v. *Rathanasabhapathy*(1) is rightly decided.

Under the Indian Contract Act the vendor can recover only the damages sustained by breach of contract and if he rescinds the contract he must restore the deposit.

As in this case no damage has been sustained and there is no plea to that effect, I would dismiss the appeal with costs.

WALLIS, J.—As my learned brother is in favour of confirming the decree of the lower Court, the appeal is dismissed with costs.

The memorandum of objections is dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Abdur Rahim.

KADIR IBRAHI ROWTHEN AND OTHERS (DEFENDANTS NOS. 1 TO 5 AND FIRST AND FIFTH DEFENDANTS' REPRESENTATIVES), 1909. November 14, 15.

APPELLANTS IN SECOND APPEAL NO. 466 OF 1904 AND PETITIONERS IN CIVIL REVISION PETITION NO. 113 OF 1904),

v.

ARUNACHELLAM CHETTIAR AND OTHERS (PLAINTIFFS AND FIFTH PLAINTIFF'S REPRESENTATIVES), RESPONDENTS IN ALL.*

Trusts Act, II of 1882, *s.* 36—*Lease by trustee for term exceeding twenty-one years not void but only voidable.*

A lease by a trustee for a term exceeding twenty-one years is not void and illegal under section 36 of the Indian Trusts Acts, but only voidable at the instance of the *cestui que trust.*

SECOND APPEALS and Civil Revision Petition against the decrees of H. Moberly, District Judge of Madura, in Appeal Suits Nos. 445 and 444 of 1902 and 51 of 1903, presented against the decrees of T. Srinivasa Ayyangar, District Munsif of Paramagudi, in Original Suits Nos. 3 of 1901, 21 of 1901 and 18 of 1901, respectively.

The plaintiffs in these suit were the lessees of the Ramnad zamindari under a lease deed, dated the 28th September 1899, executed by the Diwan Trustee Rao Bahadur Venkataranga Aiyar

(1) (1893) I.L.R., 16 Mad., 474.

* Second Appeals Nos. 465 and 466 of 1904 and Civil Revision Petition No. 113 of 1904.

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in whose favour the Raja of Ramnad executed a settlement deed for the zamindari on the 12th July 1895. The defendant was the tenant and pattadar of the village Rajasingamangalam. The lease deed entitled the plaintiff to recover from the tenants the arrears due by them to the zamindari till fasli 1308.

This suit was brought by the plaintiff to recover rent for faslis 1307–1309.

The defendant pleaded *inter alia* (1) that plaintiff's suit was barred by section 42 of the Code of Civil Procedure Act XIV of 1882 as the cause of action arose along with that is S.C. No. 582 of 1900 on the file of the Lower Appellate Court brought against the defendant for arrears of fasli 1306; (2) that as plaintiffs had taken a lease for over twenty-one years the lease was not valid under section 36 of the Indian Trusts Act and so their title as landlord based under the lease deed was not valid.

These contentions were over-ruled by both the Lower Courts. The District Munsif's judgment dealing with the latter was as follows:

"The defendant's contention is that, opposed to the law enacted in section 36 of the Indian Trusts Act, the plaintiffs' first lease deed, being for a term of 25 years (more than 21 years allowed under the section), is legally invalid and the plaintiffs could not claim title as landlords thereunder and could not take proceedings under Act VIII of 1865 and collect rent from tenants. It is not denied by the plaintiffs that section 36 of the Trusts Act applies to their lease. The last paragraph of section 36 says 'Except with the permission of a Principal Civil Court of original jurisdiction no trustee shall lease trust property for a term exceeding 21 years from the date of executing the lease.' Admittedly no sanction or permission of the Principal Civil Court was obtained by the trustee here for executing the lease deed of September 1899 to plaintiffs for a longer term than 21 years. So the whole question is what is the legal and proper construction of the words—no trustee shall lease trust property for a longer term than 21 years; in other words, what is the legal effect of a lease deed for 25 years, such as the one in the present case, whether it is illegal and invalid in the sense that no legal rights could pass thereunder, whether it is legally void or only voidable. The section quoted above says nothing; it is silent on the point. By executing a lease deed for 25 years instead of 21 years, the trustee has simply exceeded the

power given him by law. Whether this excess of power or authority invalidates the lease in toto or makes it valid as to the term allowed by law and invalid as to the excess, or makes the lease only voidable at the instance of the beneficiary we have to consider. On general principles of law as laid down in Broom's legal maxims, 5th edition, page 177, wherein it is stated that a lease for 20 years by person empowered to lease for 10 years is valid for a term of 10 years, the present lease may be held valid or good for 21 years though executed for 25 years."

"The provision in the act relating to trustee's power to lease for a term of 21 years is intended solely, I believe, for the benefit and in the interest of the beneficiary and therefore where that limitation is transgressed by the trustee, the beneficiary may avoid the lease or even ratify it, if he likes. It strikes me therefore that the lease for 25 years is only voidable at the option of the beneficiary and not void. The words are 'no trustee shall lease for longer term than 21 years' and not that a lease for more than 21 years is invalid. They govern the trustee's powers *in* respect of the trust property and as between the trustee and the beneficiary the former shall be liable to make good to the latter any loss arising from the transaction. The provision of law in question does not contemplate or was not intended to contemplate any question of public interest and the protection thereof, nor is based on any grounds of public policy, so that a transaction involving a violation or trangression thereof might be termed illegal or unlawful, and no rights and obligations could pass thereunder. Such a transaction could be regarded as *ultra vires* the trustee and not *malum prohibitum*. No authorities have been cited and no arguments addressed by the defendant's pleader in support of his contention that the lease is illegal. On the other hand the construction I put on the provision in Trusts Act which is contended for by the plaintiffs is the only right and proper construction is amply borne out by authorities. Section 29 of the Guardian and Wards Act contains a similar wording as to the powers of a guardian to alienate the ward's property. It says 'he (guardian) shall not without previous permission of the Court.

(*a*) mortgage or charge or transfer by sale, gift, etc..... any, part of the immoveable property of his ward or

(*b*) lease any part of that property for any term exceeding 5 years.'

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"To avoid any misconception as to the effect of the words 'shall not mortgage &c.' or 'shall not lease, etc.' Section 30 provides that a disposal of immoveable property by a guardian in contravention of the provision in section 29 is voidable at the instance of any other person affected thereby. The Trusts Act is a private enactment (relating to private trusts) and the Guardian and Wards Act is also a similar enactment. Almost similar words used by the legislature in both the Acts have been thus explained in the latter enactment, though not in the former. Similar words therefore in the Trusts Act already quoted must by way of analogy be construed and explained in a similar manner and the lease for more than 21 years should therefore be held only voidable at the instance of the beneficiary who could be affected thereby. The law laid down in section 30 of Act VIII of 1890 as to the legal character of the disposal of ward's property by a guardian in contravention of the prohibition contained in section 29 is followed in I.L.R., 22 Madras, page 289, and I.L.R., 24 Calcutta, page 671."

"Again the words 'he shall not be entitled to bring the property to sale", &c., in section 99 of the Transfer of Property Act have been construed, as making a sale brought in contravention of the prohibition contained in the said section only voidable and not void, on the ground that the provision was intended only for the benefit of a certain class of persons, persons who had a right to the equity of redemption and not for protection of public interest, nor as laying down a rule of General Policy (See *Mayan Pathuti* v. *Pakuran*) (I.L.R., 22 Mad., 348)."

"Finally the Bombay High Court in *Turner* v. *The Bank of Bombay* (I.L.R., 25 Bom., 52) have, in construing the words in section 37 of the Presidency Banks Act (Act XI of 1876) which run "*The Director shall not make any loan* or advance (c) upon mortgage or in any other manner upon the security of any immoveable property or the documents of title relating thereto", &c., . . . held that the Director's transaction in violation of the prohibition contained in the said section is not illegal but would be only unauthorised and wrong or would be an excess of authority as against the shareholders for which the Directors would have to be responsible to the shareholders or corporators in respect of any loss occasioned thereby. In the original and appellate judgments in this case the English cases are quoted to show that a transaction

in violation of similar terms of a statute is not illegal but only unauthorised and the distinction between what is unauthorised or *ultra vires* in the literal sense, and what is illegal (*malum prohibitum* or *malum inse*) is pointed out clearly and forcibly."

Defendants appealed to High Court.

A. Krishnaswami Ayyar for *P. R. Sundara Ayyar* for appellants.

T. Rangaramanujachriar for first to fourth respondents and *S. Srinivasa Ayyangar* for first to fourth and seventh respondents.

JUDGMENT.—We do not think that the suit is barred by section 43, Civil Procedure Code, Act XIV of 1882. The small cause suit was not framed as a suit for the rent of fasli 1306. It was based on an alleged entrustment of the paddy of the zamindar to the tenant for safe custody. The cause of action therefore for non-payment of rent in the present suit is different from that in the small cause suit.

The appellant further contends that the lease under which the plaintiff's claim is wholly invalid and void because it is for a term of twenty-five years, whereas section 36 of the Indian Trusts Act enacts that no trustee shall lease trust property for a period exceeding twenty-one years except with the permission of the Court. He relies on the case of the *Bishop of Bangor* v. *Parry*(1). That was a case on the construction of the language of section 29 of the Charitable Trusts Amendment Act, 1855. It related to a charitable trust and the learned Judge who decided it relied on a decision under section 3 of Stat. 13 Eliz., c. 10, in which the language of the statute is that the leases there referred to are "utterly void and of non-effect to all intents, constructions and purposes." In section 36 of the Indian Trusts Act there is no such declaration that leases in excess of twenty-one years are void. Each statute must be construed with reference to its own language and scope. The Indian Trusts Act refers to private trusts. Section 36 is intended for the benefit of the *cestui que trust*, and this is secured better by treating such leases as voidable than by holding that they are necessarily illegal and void. We are of opinion that such leases are not void as being *malum prohibitum*, and illegal *per se*, though they no doubt are voidable at the instance of the *cestui que trust*. The District Munsif has dealt fully

(1) (1891) 2 Q.B., 277.

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with this question in paragraphs 11 to 15 of his judgment, and we are of opinion that the cases quoted by him *Sinaya Pillai* v. *Munisami Ayyan*(1) and *Mayan Pathuti* v. *Pakuran*(2) and *Turner* v. *The Bank of Bombay*(3), justify us in the view that we take as to the proper construction to place on section 36 of the Trusts Act.

We therefore dismiss these second appeals and the civil revision petition with costs.

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Krishnaswami Ayyar.

1909. December 9.

MAHOMED ESUF (DEFENDANT), APPELLANT,

v.

RAJARATNAM PILLAI (PLAINTIFF), RESPONDENT.*

Trade mark, infringement of—Essentials necessary to maintain action for.

It is settled law that a dealer in, or a manufacturer of a particular article who adopts a name for that article, whether the name be a purely fancy name or a descriptive name, cannot restrain another dealer from using the same name simply upon the ground that the article so named has acquired a reputation, even though it may be that the public have grown accustomed to buy the article in question only relying on the name and without examining the quality of the article. For a man to be entitled to restrain another from using a particular name with reference to a commodity he must show that the public have grown to associate that particular name with himself as the manufacturer of, or dealer in, the article.

Barlow v. *Govindram*, [(1897) (I.L.R., 24 Calc., 364), referred to.]

SECOND APPEAL against the decree of M. Mundappa Bangera, Subordinate Judge of Trichinopoly, in Appeal Suit No. 93 of 1906, presented against the decree of M. J. Veeraragava Aiyar, District Munsif of Trichinopoly, in Original Suit No. 321 of 1903.

The plaintiff sued for an injunction to restrain the defendant from passing off cigars of his own manufacture as the goods of

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(1) (1899) I.L.R., 22 Mad., 289.
(2) (1899) I.L.R., 22 Mad., 348.
(3) (1901) I.L.R., 25 Bom., 52.
* Second Appeal No. 36 of 1908.