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expect. The words in the later wajib-ul-arz "in case of urgent necessity" may be disregarded. They have no bearing upon the question of pre-emption. It is notorious that the records of the earliest settlements were often found to be unsatisfactory and incomplete, Hence the necessity for the more elaborate records that were prepard afterwards.

In my opinion the reasons given by the courts below, for holding that the earlier wajib-ul-arz was the record of a contract and that the custom set up by the appellant has not been proved by the wajib-ul-arzes are insufficient. I would allow this appeal, set aside the decree of the lower appellate court and remand the case through that court to the first court to be disposed of according to law.

BY THE COURT:—The order of the Court is that the decrees of the lower courts be set aside, and inasmuch as the suit was dismissed by both the lower court on a preliminary point and we have reversed their decisions upon this point, we remand the suit to the court of first instance, through the lower appellate court, under the provision of order 41, rule 23, of the Code of Civil Procedure, with directions to re-admit it under its original number in the file of pending suits and dispose of it according to law. Costs here and hitherto will abide the event.

Appeal decreed. Cause remanded.

APPELLATE CIVIL.

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October 25.

Before Mr. Justice Richards and Mr. Justice Tudball.

JAGAT NARAIN AND ANOTHER (DEFENDANTS) *v.* SRI KISHAN DAS (PLAINTIFF).*

Act No. IX of 1872 *(Indian Contract Act), section* 30—*Contract collateral to a wagering contract not unenforceable.*

Where an agent has incurred losses on behalf of his principal he is not disentitled to recover as against the principal by reason of the contract in respect of which such losses were incurred being a wagering contract. *Shibbo Mal* v. *Lachman Das* (1) followed. *Thacker* v. *Hardy* (2) referred to.

* Second Appeal No. 769 of 1909 from a decree of Austin Kendall, District Judge of Cawnpore, dated the 10th of May 1909, reversing a decree of Mohan Lal Hakku, Subordinate Judge of Cawnpore, dated the 10th of March 1909.

(1) (1901) I. L. R., 23 All., 165. (2) (1878) L. R., 4 Q. B. D., 685.

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THE plaintiff in this case conducted certain transactions as agent for the defendants for the sale and purchase of silver bars. These transactions resulting in a loss to the defendants, they drew certain hundis in the plaintiff's favour. The plaintiff sued on the hundis so drawn, and the main question raised in the suit was whether the consideration for them was or was not the losses incurred in the transactions above referred to, and if so, whether the amounts were recoverable, if, as was alleged, these transactions were of the nature of wagering contracts, no actual delivery of silver ever having been intended. The court of first instance (Munsif of Cawnpore) dismissed the suit. The lower appellate court (District Judge) decreed it. The defendants appealed.

Dr. *Tej Bahadur Sapru*, for the appellants.

The Hon'ble Pandit *Sundar Lal* and Dr. *Satish Chandra Banerji*, for the respondent.

At the first hearing the following order referring an issue to the lower appellate court was passed by the RICHARDS and TUDBALL, JJ. :—

"The learned Judge has decided in the plaintiff's favour, assuming that the hundis were given for money due to the plaintiff's by the maker of the hundis on a wagering transaction. He has arrived at the conclusion that the plaintiff carried on business in three different places, on the ground that the accounts of business transacted at these different places were separately kept. In our opinion the decision based on this presumption cannot possibly be supported. If the consideration for the hundis were illegal, having regard to the provisions of section 30 of the Indian Contract Act, the plaintiff is not entitled to recover, notwithstanding that he carried on business in different places under different names. The learned Judge has refrained from recording a finding as to whether or not the consideration for the hundis was illegal. We must accordingly refer the following issue for trial to the lower appellate court :—

"Was the consideration for the hundis sued on illegal, having regard to the provisions of section 30 of the Indian Contract Act.

"On return of the finding ten days will be allowed for filing objections."

The court below found that the hundis were executed by the defendants for money lost by the plaintiff, as their agents, on wagering contracts and on the appeal again coming on for hearing the following judgement was delivered :—

RICHARDS and TUDBALL, JJ.—This appeal came before us on the 3rd of May 1910. The suit was one on foot of certain hundis. The defence was that the hundis were given for the

value of certain goods which the plaintiff failed to deliver, and that there had been certain wagering contracts between the plaintiff and the defendants, and that the plaintiff wrongfully applied the hundis to the satisfaction, not of the price of the goods which had been purchased, but to the settlement of the wagering account. The court of first instance decided in favour of the defendants on the ground that the hundis represented a wagering contract. The lower appellate court, in the first instance refrained from going into the question as to whether or not the hundis were given in settlement of a wagering contract, and decided the case on the ground that the different branches of the plaintiff's firm in different cities were separate entities, and that even if the contracts were wagering contracts, they were not wagering contracts entered into with the Cawnpore branch of the plaintiff's business. We accordingly referred an issue to ascertain what was the real consideration for the hundis, and whether it was illegal having regard to the provisions of section 30 of the Indian Contract Act. The finding on this issue has now been returned, and the court has found that the hundis represent the amount due by the defendants to the plaintiff on accounts settled between them as principal and agent, in other words, that even assuming that the transactions were gambling transactions in the sense that it never was intended that actual delivery of goods should be made, nevertheless the wagering contract was not between the plaintiff or the other branches of his firm and the defendants, but that the silver bars were purchased and sold by the plaintiff from or to third parties as agent for the defendants. An objection has been filed to this finding on various grounds; but it has not been suggested that there was no evidence on which the court was entitled to come to the finding at which it arrived. It has been argued that this finding was a new case which was not put forward at any time by either of the parties, at least until the issue was referred. We find, however, that in the third ground of appeal to the lower appellate court the plaintiff, in effect, took this very ground, namely, that even if the transactions were in their nature gambling transactions because the delivery of the goods was not contemplated, nevertheless, the plaintiff was the agent

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of the defendants and was entitled to recover the loss he had sustained. We think that the finding on the issue is binding upon us, and that being so, we are bound by the authority of the case of *Shibho Mal* v. *Lachman Das* (1). In that case it was expressly held that an agent who has paid wagering losses for his principal is entitled to recover. The learned Judges decided on the authority of the case *Thacker* v. *Hardy* (2). This last mentioned authority was decided when the law in England in respect of gambling transactions was practically identical with the present law in this country as provided by section 30 of the Indian Contract Act. The result is that the appeal must be dismissed with costs.

Appeal dismissed.

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October 27.

Before Mr. Justice Sir George Knox and Mr. Justice Karamat Husain.

TOTA RAM (APPLICANT) *v.* RAM CHARAN (OPPOSITE PARTY)*.

Act No. VIII of 1890 *(Guardians and Wards Act), section* 17*—Guardian and ward—Considerations by which a court should be guided in the selection of a guardian.*

In considering the appointment of a guardian for a minor the proper test is the welfare of the minor. Where the applicant was a distant relation of the husband of a childless widow of some 12 or 13 years of age, who was living happily with her father, it was *held* that the father of the minor widow was her proper guardian. *Khudiram Mookerjee* v. *Bonwari Lal Roy* (3) referred to.

THIS was an application by one Tota Ram asking that the applicant might be appointed guardian of the widow of one Joti Prasad, a child some 12 or 13 years of age. The applicant was a distant relative of the deceased Joti Prasad. The widow, Musammat Reoti, was living under the care of her father Ram Charan. The court (District Judge of Aligarh) rejected the application and appointed Ram Charan as guardian of the minor. The applicant appealed to the High Court.

Babu *Benoy Kumar Mukerji*, for the applicant.

Dr. *Tej Bahadur Sapru*, for the opposite party.

KNOX and KARAMAT HUSAIN, JJ.—The District Judge of Aligarh had before him an application made by Tota Ram, admittedly a very distant relative of one Joti Prasad deceased.

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* First Appeal No. 24 of 1910 from an order of D. R. Lyle, District Judge of Aligarh, dated the 11th of December, 1909.

(1) (1901) I. L. R., 23 All. 165. (2) (1878) L. R., 4 Q. B. D., 685.
(3) (1889) I. L. R., 16 Calc., 584.