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a statement in the judgement that the defendants had "no objection to the mosque being used." This seems to be a mere statement relating to the litigation then before the court. In the present case the plaintiffs expressly claim that the mausoleum and a certain specified plot are waqf property. In our opinion this question was finally decided in the previous litigation which held that it was not waqf. Under these circumstances we think that the decree of the court below was correct and ought to be affirmed. We accordingly dismiss the appeal with costs.

Appeal dismissed.

1914
May, 1.

Before Sir Henry Richards, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji.

BISHESHAR DAYAL AND ANOTHER (PLAINTIFFS) *v.* JWALA PRASAD AND ANOTHER (DEFENDANTS)*

Act No. IX of 1872 (*Indian Contract Act*), *section* 30—*Wagering contract—Purchase of grain pit through agent—Intention of parties.*

The plaintiffs, who were commission agents, purchased for the defendants at their request a grain pit. The defendants, however, did not pay the price agreed upon and the plaintiffs resold the pit at a loss. They then sued the defendants to recover the loss on the resale of the pit and their commission. *Held* that, whether or not it might have been the intention of the parties that the grain pit should be resold as it was, the defendants making a profit or bearing a loss on the transaction, the transaction between the parties was not a wagering contract within the meaning of section 30 of the Contract Act. *Forget* v. *Ostigny* (1) and *Jagat Narain* v. *Sri Kishan Das* (2) followed.

THE facts of this case were as follows:—

The plaintiffs alleged that they purchased a grain pit full of grain for the defendants under their instructions. Under a custom prevailing at Hapur the defendants were bound to take delivery of the goods before a certain time, but that they failed to do so. Thereupon the plaintiffs under the terms of the contract sold the grain at a loss and brought the present suit for recovery of the difference in price and their commission. The defence was that the transaction was of a gambling nature. The court of first instance found that the grain pit as a matter of fact existed; that it was purchased for the defendants under their instructions, but

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* Second Appeal No. 140 of 1913 from a decree of D. L. Johnston, District Judge of Meerut, dated the 24th of September, 1912, reversing a decree of Mohan Lal Hukku, Subordinate Judge of Meerut, dated the 1st of July, 1912.

(1) (1895) A. C., 318. (2) (1910) I. L. R., 33 All., 219.

that it was not the intention of the defendants that they should take delivery of the grain, but it was to be sold through the plaintiffs as agents for the defendants who were to get the profits or pay the loss. It found that the transaction did not amount to a gambling transaction and gave the plaintiffs a decree. The lower appellate court came to a different conclusion and dismissed the suit.

The plaintiffs appealed to the High Court.

Dr. *Satish Chandra Banerji* (with whom the Hon'ble Dr. *Tej Bahadur Sapru*), for the appellants.

It is an admitted fact that the grain pits were in existence, it is also admitted that the plaintiffs bought the grain pits as defendants' agents. The plaintiffs were merely commission agents who acted *boná fide* and on the defendants' refusal to take delivery, had sold the goods at the market rate. As far as they are concerned it is immaterial whether the defendants intended to take delivery or not or whether the defendants bought the grain pits with the intention of gambling. This is not a case where two principals enter into an agreement with the clear intention and knowledge that they are entering into a gambling transaction. But in a case like the present one when there is a third party in between and acts *boná fide* and pays earnest money and is forced to sell the goods and suffer a loss it cannot be said that there is any presumption in law which would make the contract invalid; *Shibho Mal* v. *Lachman Das* (1), *Forget* v. *Ostigny* (2) and *Sir E. Sassoon* v. *Tokersey Jadhawjee*, (3).

Mr. *B. E. O'Conor* (with whom Munshi *Gulzari Lal*), for the opposite party :—

In this case there was a clear finding of the court below that plaintiffs were themselves gamblers and these pits have been changing hands constantly and have all along been treated as a paper transaction. The mere fact that grain pits were in existence would make no difference. What the courts have to see is the intention of the parties ; *Kong Yee Lone & Co.* v. *Lowjee Nanjee* (4). The present case was easily distinguishable from cases relied on by the other side. Here is a case in which an agent entered into a contract knowing full well that the transaction he was

(1) (1901) I. L. R., 23 All., 165.
(2) (1895) A. C., 318.
(3) (1901) I. L. R., 28 Bom., 616, (621).
(4) (1901) I. L. R., 29 Calc., 461.

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entering into was a mere paper transaction. Now he comes forward and claims equitable relief. He further submitted that such a contract was *ab initio* void under section 30 of the Contract Act. It is clear from the finding of the court below that both the parties entered into a contract with the intention of gambling and it cannot be contended that such a contract is not a wagering contract.

RICHARDS, C. J., and BANERJI, J.—This appeal arises out of a suit in which the plaintiffs claimed money from the defendants as payable to them in connection with the sale of the contents of a grain pit. The plaintiffs in their plaint alleged that they were commission agents and were employed by the defendants to purchase the grain pit, that they did purchase it on behalf of the defendants, but that subsequently, the defendants being unwilling or unable to pay the balance of the purchase money or to give security, the grain pit was re-sold at a loss, and their claim is made up of their commission and the difference between the price at which the pit was purchased and re-sold. The defence was that the transaction was a gambling transaction, and further that the pit was re-sold without the authority of the defendants. The court of first instance granted a decree to the plaintiffs holding that the transaction was not in the nature of an agreement by way of wager, within section 30 of the Indian Contract Act. The lower appellate court held that the transaction was a gambling transaction and that the money could not be recovered. Hence the present appeal.

In our opinion the actual facts have been ascertained by the court of first instance and the lower appellate court has not in any way dissented from such findings of facts. No doubt it has drawn certain legal inferences from those facts. The facts are as follows. The grain pit in question with its contents did in fact exist. It originally was purchased by the plaintiff. It was sold to various persons, and eventually was purchased by the plaintiff as commission agents on behalf of the defendants. It is contended on behalf of the respondents that all these sales were mere paper transactions and that the plaintiffs themselves were all along the owners of the grain pit. This clearly is not so ; and is not the finding of either of the courts below. The defendants by their written statement

admitted that the plaintiffs were commission agents. They also admitted that the grain pit in question was purchased on their behalf by the plaintiffs as their commission agents. We have looked into the evidence of the principal defendant, Parmanand, and we find that what the learned Subordinate Judge says at page 11 about the transaction is quite justified. It may be assumed for the purposes of the present case that there was very small probability of the defendants ever clearing the grain pit and that the probabilities were that they would resell the contents of the grain pit through the plaintiffs as commission agents, getting the benefit of any rise in prices or suffering any fall. It may also be assumed that the plaintiffs were aware that this was the intention of the defendants. Parmanand in his evidence admits that there were a number of other transactions of a similar nature and that upon one occasion he actually took delivery of grain and cleared the pit. The question that we have to decide is whether under these circumstances the plaintiffs are prevented by the provisions of section 30 A. of the Indian Contract Act from recovering the moneys which they had to pay to the vendor of the grain pit. In our opinion they are not. On the facts stated above the case is very similar to the case of *Forget* v. *Ostigny* (1) and also to the case of *Jagat Narain* v. *Sri Kishan Das* (2). On the principle of these cases it cannot be said that the claim of the plaintiffs is based on an "agreement by way of wager."

It is contended that the grain pit was sold unlawfully and without the authority of the defendants. We have looked into the contract, and we find that there was an express provision that, if there was any question as to the solvency of the purchaser and if he failed to pay the balance of the purchase money or to give security, the contents of the pit might be resold. The learned Subordinate Judge says :—"Parmanand admits that the plaintiffs made demands and that he had no money to pay, and was offering to make *itminan*. His partner Jwala Prasad made promises of payment but did not or could not keep them." Under these circumstances and having regard to the terms of the contract, it is quite clear that the contents of the grain pit were liable to be

(1) (1895) A. C., 318. (2) (1910) I. L. R., 33 All., 219.

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resold and accordingly the defence on this ground cannot be sustained.

The result is that we allow the appeal, set aside the decree of the lower appellate court, and restore the decree of the court of first instance with costs.

Appeal allowed.

REVISIONAL CRIMINAL.

Before Mr. Justice Chamier.

1914
May, 1.

SITAL PRASAD *v.* THE MUNICIPAL BOARD OF CAWNPORE*.

Act (Local) No. I of 1900 (*United Provinces Municipalities Act*), *section* 147—*Conviction for disobedience to notice—Continuing breach.*

After a conviction under section 147 of the United Provinces Municipalities Act the person convicted cannot be permitted to challenge the correctness of that conviction as often as he is prosecuted for continued disobedience of the order of the board.

IN this case one Sital Prasad was ordered by the Municipal Board of Cawnpore to pull down a *chajja* which was alleged to be in a ruinous and dangerous condition. On his disobeying the order he was prosecuted under section 147 of the Municipalities Act and was fined Rs. 5. As he persisted in disobeying the Board's order he was prosecuted again and was fined Rs. 20 at the rate of Rs. 2 for each day that elapsed since the original conviction. At the second trial he wished to challenge the correctness of the first conviction by showing that the Board's notice was illegal and so forth. The Magistrate refused to allow this to be done Sital Prasad then applied in revision to the High Court.

Mr. *A. P. Dube*, for the applicant.

The Assistant Government Advocate (Mr. *R. Malcomson*) for the Crown.

CHAMIER, J.—The applicant was ordered by the Municipal Board of Cawnpore to pull down a *chajja* which was alleged to be in a ruinous and dangerous condition. On his disobeying the order he was prosecuted under section 147 of the Municipalities Act and was fined Rs. 5. As he persisted in disobeying the Board's order he has been prosecuted again and he has been fined Rs. 20 at the

* Criminal Revision No. 223 of 1914 from an order of H. G. S. Tyler, District Magistrate of Cawnpore, dated the 5th of February, 1914.