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of the disputed ghats was granted by Sumer from whom the defendants claimed title. In our opinion the right which the plaintiff claimed in respect of the ghat is a right to property and is a right which is heritable under the Hindu law. The plaintiff is therefore entitled to the four ghats which he has claimed. The widow of Chedi Tiwari made a will in respect of these ghats in favour of Sumer, but this will could not have any effect after her death, and therefore under the will the defendants cannot be held to have acquired any title. The will, however, proves one fact, namely, that the ghats belonged to Chedi Tiwari and were subsequently in the possession of Musammat Parbati, his widow.

In these circumstances we are of opinion that the court below ought to have decreed the plaintiff's claim in respect of the four ghats in addition to his claim in regard to the house. The plaintiff is also entitled to mesne profits in respect of the ghats and those mesne profits should, we think, be determined in further proceedings under order XX, rule 12, of the Code of Civil Procedure.

We accordingly allow the appeal, modify the decree of the court below and grant a decree to the plaintiff for possession of the four ghats claimed by him and also for mesne profits to be determined as aforesaid under order XX, rule 12. The appellant will have his costs of this appeal and also in the court below as regards this part of the claim.

Appeal decreed.

Before Mr. Justice Gokul Prasad and Mr. Justice Stuart.

SRI NEWAS (PLAINTIFF) *v.* RAM DEO (DEFENDANT)*

1920

April, 14.

Contract—Wagering contract—Criteria for determining whether a speculative contract is also a wagering contract.

When persons who are in a position to carry out a contract at the time of making the contract or can reasonably be expected to be in that position when the time of performance falls due, contract to receive or deliver goods at a future date, such contracts are not necessarily wagering contracts because an element of speculation enters into them, even if the contract provides for the

* Second Appeal No. 561 of 1919 from a decree of E. H. Ashworth, District Judge of Cawnpore, dated the 30th of January, 1919, confirming a decree of Kshirod Gopal Mukerji, Subordinate Judge of Cawnpore, dated the 21st of May, 1919.

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alternative of receiving or paying on differences instead of for actual delivery. The determination whether the parties intend to take delivery is important in arriving at a decision as to whether such contracts are or are not by way of wager, and another important essential is whether the parties are dealing with actual commodities that they are handling or expecting to handle, or agreeing to settle an account according to fluctuation in prices of commodities in which they do not have and can not expect to have any real title.

THE facts of the case sufficiently appear from the judgment of the Court.

Dr. *Kailas Nath Katju*, for the appellant :—

In view of the fact that both parties had cloth shops the burden of proving that the contract was a wagering contract lay heavily on the defendants. Speculation does not necessarily make a contract a wager. Every forward contract is a speculation. The mere fact that one party to a contract for sale of goods did not intend to deliver, even if known to the other party, does not vitiate the contract unless there is a bargain that delivery is not to be called for; *Bhagwandas Parasram* v. *Burjorji Ruttonji Bomanji* (1).

Babu *Saila Nath Mukerji*, for the respondent :—

The agreement on the face of it shows that no delivery was intended. The fact that the plaintiff was at liberty to *purchase or sell* at Rs. 12-12 clearly indicates that the intention was to take the difference. Since it was not certain whether the plaintiff would buy or sell no delivery could possibly have been contemplated. This is what the courts below have clearly found, and the finding is one of *fact*. Moreover, the court of first instance found that the plaintiff appellant was not in a position to take delivery of the cloth even if the defendant had made a tender. That finding has not been disturbed by the lower appellate court. Under such circumstances the courts below were quite right in finding that the transaction was a wagering contract; *The Universal Stock Exchange, Limited* v. *David Strachan* (2), *In re Gieve* (3) and *Kong Yee Lone & Co.* v. *Lowjee Nanjee* (4). The case reported in I. L. R., 42 Bombay, refers to *pakki adhat* or wholesale import. In the present case it has not been shown that either party was a *pakka adhatia* or wholesale importer.

(1) (1917) I. L. R., 42 Bom., 373. (3) (1899) L. R., Q. B. D., 794.
(2) (1896) L. R., A. C., 166. (4) (1901) I. L. R., 29 Calc., 461.

Dr. *Kailas Nath Katju* was heard in reply.

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GOKUL PRASAD and STUART, JJ. :—The facts of the suit out of which this appeal has arisen are as follows :—Sri Newas of Cawnpore, who alleges that he keeps a shop for the sale of cloth in Kahu Kothi, Cawnpore, instituted a suit against Ram Deo Agarwala, whom he alleges to be another cloth dealer in Dal Mandi, Cawnpore, on the following allegations. He stated that on the 1st of July, 1917, the parties had agreed that Sri Newas should pay Ram Deo Rs. 250 which Ram Deo was to retain in any circumstances, that on the 15th of February, 1918, Sri Newas should be at liberty to purchase 250 *thans* of *markin* of specified quality from Ram Deo at Rs. 12-12 a piece or to sell to Ram Deo 250 pieces at the same price. The contract was a contract which appears to be not unusual in certain towns in India and is known as a *nazrana sauda*. Under it, one party pays to the other party so much money out and out, the receiver of the money is safeguarded if the market fluctuates within certain limits, but if the market fluctuates outside those limits he loses money. The case for the plaintiff in the court of the Subordinate Judge was that on the 15th of February, 1918, (the date fixed for the purchase or sale of the cloth) the price of *markin* which was fixed in the agreement at Rs. 12-12 a piece had risen to Rs. 18-12 and that he had demanded delivery of 250 pieces at that price and that, since the defendant had neither given delivery of the cloth nor paid damages, he sued him for Rs. 1,500 damages. The defendant denied that he entered into any transaction. He denied receipt of the Rs. 250. He further set up that such a transaction, even if proved, was bad as a wagering transaction. The learned Subordinate Judge found that the defendant had entered into the transaction as alleged by the plaintiff and had received Rs. 250. He found that the parties had never had any intention of buying and selling cloth and that their intention had simply been to receive or pay on differences according to the state of the market. He found that the plaintiff was not in a position to make delivery or take delivery on due date. He laid stress on the fact that the plaintiff had not produced his accounts to show whether he could take delivery or make delivery on due date. He dismissed the suit holding that the transaction was a wagering

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transaction and permitted the defendant to retain the Rs. 250. In appeal the learned District Judge arrived at the following conclusion. He found that the defendant had entered into the contract with the plaintiff and had received Rs. 250. He found that the transaction was a wagering transaction and dismissed the appeal. He did not enter into the question as to whether the plaintiff was or was not in a position to make or take delivery. The decision of the case in the courts below has not been satisfactory. Several points have been lost sight of. No attempt was made to discover the exact position of the parties in the cloth trade. It is not denied now that both parties are cloth merchants. If both parties are cloth merchants the court should have arrived at some decision as to the extent of their business, whether they were or were not in a position to buy or sell 250 pieces of *markin*, what were their financial resources, and how such a transaction as that suggested would affect them. Both courts have in our opinion jumped to a conclusion that the transaction must be a wagering transaction without considering the conditions of the parties as throwing light upon the nature of their intentions. The law as to wagering contracts is discussed in many decisions. We need only refer to the decisions in *The Universal Stock Exchange, Limited* v. *David Strachan* (1), *In re Gieve* (2), *Kong Yee Lone & Co.* v. *Lowjee Nanjee* (3) and *Bhagwandas Parasram* v. *Burjorji Ruttonji Bomanji* (4). The law may be generally stated to be as follows. When persons, who are in a position to carry out contract at the time of making the contract or can reasonably be expected to be in that position when the time of performance falls due, contract to receive or deliver goods at a future date, such contracts are not necessarily wagering contracts because an element of speculation enters into them even if the contracts provide for the alternative of receiving or paying on differences instead of for actual delivery. The determination whether the parties intend to take delivery is of course important in arriving at a decision as to whether such contracts are or are not contracts of wager, and another important essential is whether the parties are dealing with actual commodities that they are handling or

(1) (1896) L. R., A. C., 166. (3) (1901) I. L. R., 29 Calc, 461.

(2) (1899) L. R., Q. B. D., 794. (4) (1917) I. L. R., 42 Bom, 373.

expecting to handle, or agreeing to settle an account according to fluctuation in prices of commodities in which they do not have and cannot expect to have any real title. We do not think that the learned District Judge approached the decision of the case from these points of view. We accordingly send the case back to his successor to decide the following remanded issues :—

(1) Was (*a*) Sri Newas (*b*) Ram Deo in a position to sell or purchase 250 *thans* of *markin* at prices varying from Rs. 12-12 to Rs. 18-12 a *than* (i) on the 1st of July, 1917, (ii) on the 15th of February, 1918 ?

(2) Did Sri Newas ask Ram Deo to deliver him 250 *thans* of *markin* on or about the 15th of February, 1918 ?

The parties will be allowed to produce evidence on these points. The learned District Judge will, after hearing the evidence and the arguments and considering the evidence previously adduced, decide these issues and return the evidence and his findings to this Court within two months from the date of the receipt of this order. Ten days will then be allowed for objections.

Issues remitted.

Before Sir Grimwood Mears, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji.

RAMA SHANKAR PRASAD (PLAINTIFF) *v* GHULAM HUSAIN AND OTHERS (DEFENDANTS).*

1921

April, 9.

Act No. IV of 1882 (*Transfer of Property Act*), *sections* 82 *and* 56—*Mortgage—Contribution between several properties subject to same mortgage—Part of mortgaged property passing to auction purchasers at a court sale—Mortgage money realized from property remaining in hands of mortgagor—Mortgagor's right of contribution against the auction purchasers.*

Some out of several properties covered by a mortgage were sold, subject to the mortgage, in execution of a simple money decree against the mortgagor. The mortgagee then brought to sale in execution of his decree on the mortgage a village, L., which still remained in the possession of the mortgagor, and the proceeds of the sale of this village being insufficient to satisfy the decree, subsequently caused a share in another village, D, in the possession of the mortgagor, to be sold. In this way the mortgage decree was fully satisfied. Thereafter the mortgagor brought a suit for contribution against the auction

* Second Appeal No. 86 of 1919 from a decree of I. B. Mundle, Additional Judge of Gorakhpur, dated the 29th of October, 1918, confirming a decree Shambhu Nath Dube, Second Additional Subordinate Judge of Basti, dated the 31st of May, 1918.