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these, the suit for the declaration was not maintainable. It is obvious that in that case the utmost that had happened was an irregularity in the omission to appoint a guardian *ad litem*. Even if the suit were to be decreed, the former would have had to be restored and proper guardians appointed. When the plaintiffs were not challenging the debt, the decree and the sale, their Lordships held that their right of redemption was lost. That case, therefore, is not in point. We accordingly allow this appeal and, setting aside the decree of the lower appellate court, restore that of the court of first instance with costs in all courts.

Appeal allowed.

Before Mr. Justice Iqbal Ahmad and Mr. Justice Kendall.

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DAYA RAM AND ANOTHER (PLAINTIFFS) *v.* MURLI DHAR AND ANOTHER (DEFENDANTS).*

Act No. IX of 1872 (*Indian Contract Act*), *section* 30—*Principal and agent—Wagering contract—Breach of contract by principal—Liability incurred by agent—Duty of principal to indemnify.*

A person who acts merely as a commission agent for the sale or purchase of goods for future delivery is not debarred from recovering his commission and such incidental expenses as he may have been put to, by reason of the fact that, as between the principals, the transaction may have been of the nature of a wagering contract. *Bidhi Chand* v. *Kachchu Mal* (1), *Hardeo Das, Nanak Chand* v. *Ram Prasad, Shyam Sundar* (2) and *Sobhagmal Gianmal* v. *Mukund Chand Balia* (3), referred to.

THIS was a plaintiffs' appeal arising out of a suit brought by them for the recovery of Rs. 3,346-6-0

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* Second Appeal No. 428 of 1925, from a decree of H. Beatty, Additional Judge of Saharanpur, dated the 28th of November, 1924, confirming a decree of Rama Das, Subordinate Judge of Saharanpur, dated the 26th of October, 1922.

(1) (1923) I.L.R., 45 All., 503. (2) (1926) I.L.R., 49 All., 438.
(3) (1926) I.L.R., 51 Bom., 1.

alleged to be due to them from the defendants respondents on account of certain *khatti* transactions.

The plaintiffs' case was that they carry on the business of commission agents for the purchase and sale of *khattis* and that, on instructions received from the defendants respondents by means of a telegram dated the 12th of March, 1916, they, on the 13th of March, 1916, sold, on the defendants' behalf, to certain persons eleven *khattis* and agreed to deliver the same to the purchasers in Jeth. They alleged that the defendants did not deliver the *khattis* in the month of Jeth, inasmuch as the rate of grain had risen in the interval, and in order to carry out their business with the vendees of the *khattis* they (the plaintiffs) had to pay the difference to the purchasers of the *khattis* between the market rate prevailing on the 13th of March, 1916, and on Jeth badi 15th. The plaintiffs alleged that they had to pay to the purchasers of the *khattis* a sum of Rs. 3,046-5-6 and this they were entitled to recover from the defendants, their principals, with interest, and were also entitled to get a certain amount on account of their commission.

The defence to the suit was that the transaction relating to the eleven grain-pits in dispute was by way of wager and, as a matter of fact, there was no intention to deliver the goods. It was further contended by the defendants that on account of certain amendments in the Gambling Act of 1867, a commission agent could not bring a claim in respect of losses sustained by him in connexion with *badni* transactions or wagering contracts.

Both the courts below held that the transaction in dispute was by way of wager, and, further, that the plaintiffs were, because of the provisions of the United Provinces Act No. I of 1917, disentitled to

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recover from the defendants the amount that the plaintiffs alleged they had paid to the vendees of the eleven *khattis*. The plaintiffs appealed to the High Court.

Babu *Piari Lal Banerji*, for the appellants.

Dr. *M. L. Agarwala* and Munshi *Baleshwari Prasad*, for the respondents.

The judgement of the Court (IQBAL AHMAD and KENDALL, JJ.), after stating the facts as above, thus continued :—

We are unable to agree with the decisions of the courts below. Even if it be assumed that the forward contract entered into by the plaintiffs as agents on behalf of the defendants was a wagering contract, the defendants cannot, as against the plaintiffs, who were their agents, plead the illegality of that contract as a defence in an action brought by the plaintiffs to recover from the defendants, their principals, any money that the plaintiffs had to pay to the vendees of the eleven *khattis* in consequence of the breach of the contract committed by the plaintiffs in not delivering the *khattis* on the due date. The plaintiffs, as the defendants' agents and acting in accordance with their directions, made a certain contract on behalf of the defendants with third parties. Under the contract so entered into, both the plaintiffs and the defendants were under an obligation to the purchasers of the eleven *khattis* to perform their obligations or to pay damages for their breach. The plaintiffs having entered into a contract with the purchasers of the eleven *khattis* as agents of the defendants, the defendants were *primâ facie* liable to indemnify the plaintiffs against any liability incurred in respect of that contract. It is to be remembered that the plaintiffs in no way stood to gain

or to lose anything by the contract which they entered into on the defendants' behalf. If the price of the grain had gone down in the interval between the date of the sale of the eleven *khattis* and the date on which delivery of those *khattis* was to be made to the purchasers, the benefit arising from the fall in the market rate would have gone to the defendants. The plaintiffs could not have been entitled to share in the benefit thus accruing to the defendants. Equally so, if there has been a loss because of the rise in the price of the grain between the date of the sale of the *khattis* and the date for the delivery of those *khattis* to the purchasers, that loss must be borne by the defendants, and if the plaintiffs have had to pay to the vendees of the *khattis* any amount on account of the loss occasioned by rise in the price of the grain, they are entitled to recover that amount from the defendants. As was pointed out by their Lordships of the Privy Council, in the case of *Sobhagmal Gianmal* v. *Mukund Chand Balia* (1), as between the plaintiffs and the defendants "neither party stands to win from or to lose to the other according to the fluctuation of price or any other event. The very essence of a wager between them is thus absent."

In short, even if the contract relating to the eleven *khattis* was by way of wager, there was no element of speculation so far as the plaintiffs were concerned. The plaintiffs were only entitled to get their commission for acting as agents of the defendants. In view of the decisions in the cases of *Bidhi Chand* v. *Kachchhu* Mal (2) and *Hardeo Das Nanak Chand* v. *Ram Prasad Shyam Sundar* (3), we hold that if the plaintiffs actually sold eleven *khattis* as agents on behalf of the defendants and if they had to make good to those

(1) (1926) I.L.R., 51 Bom., 1. (2) (1923) I.L.R., 45 All., 503.
(3) (1926) I.L.R., 49 All., 438.

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purchasers the difference between the market rate prevailing on the date of the agreement of sale and on the date of delivery, they are entitled to a decree for that amount as against the defendants.

But it is argued that a person entering into a wagering contract is guilty of an offence punishable under section 13 of Act No. III of 1867 as amended by United Provinces Act No. I of 1917, and that a person who acts as an agent and enters into such a contract on behalf of the principal is not entitled to recover any amount from his principal, inasmuch as an agent employed to do any illegal act is not entitled to be re-imbursed by the principal for the loss that he has sustained in consequence of acting as an agent for the furtherance of an illegal act. We are unable to agree with this contention. It is true that it is provided by Act I of 1917 that gaming includes wagering, and as such any person who is found wagering, in any " public street, place or thoroughfare " situated within the limits to which Act No. III of 1867 applies, will be guilty of an offence punishable under section 13 of that Act. But in the present case it is nobody's case that either the defendants or the plaintiffs were found wagering in any " public street, place or thoroughfare " and as such section 13 of Act No. III of 1867 has no application to the present case.

For the reasons given above we hold that if the plaintiffs really entered into a contract of sale of eleven *khattis*, in pursuance of the defendants' directions, and if they actually paid any amount on account of difference in the market rate to the vendees of the eleven *khattis*, they are entitled to a decree for the amount so paid by them as well as for their commission charges. But on these points there is no definite

finding by the lower appellate court. Accordingly before deciding this appeal we must have findings from the lower appellate court on the following points:—

1. Did the plaintiffs actually enter into a contract to sell eleven *khattis* on behalf of the defendants on the 12th of March, 1916?

2. Had the plaintiffs to pay the difference between the market rate prevailing on the date of the agreement of sale and the date of delivery to the purchasers of the eleven *khattis*, and if they had to pay, what amount did they actually pay?

3. What is the amount that is due to the plaintiffs on account of their commission from the defendants?

Parties will be allowed to adduce additional evidence. On receipt of the findings ten days will be allowed for filing objections.

Appeal decreed—Issues remitted.