APPELLATE CIVIL.

Before Hon'ble E. H. Goodman Roberts, Chief Justice, and Mr. Justice Mya Bu.

1936
Apl. 30.

MOHAMED VALLI PATEL
v.
THE EAST ASIATIC CO., LTD.*

Wager—Rice contracts—Forward contract for sale of rice—Fall of market price—Contract by buyer for resale of same quantity of rice to seller before delivery date—Absence of milling notices—"Difference bill"—"Amni samni" *transactions—Speculative contracts—Gamble in differences—Contract Act (IX of 1872), s 30.*

Contracts for the purchase and sale of goods may be highly speculative in character, but that is insufficient in itself to render them void as wagering contracts. To produce that result there must be proof that the contracts were entered into upon the terms that performance of the contracts should not be demanded, but the differences only should become payable.

Sukdevdoss v. *Govindoss & Co.*, 55 I.A. 32; *Universal Stock Exchange, Ltd.* v. *Strachan*, (1896) Ap. Ca. 166—*referred to.*

By a set of bought and sold notes dated the 24th day of September 1934 the plaintiffs agreed to sell to the defendants 5,000 bags of Kanaungtoe small mills special rice, at Rs. 228 per 100 baskets of 75 lbs. each, delivery *ex hopper* during the month of November 1934. No milling notices were ever issued and by October 23rd, when the market price had fallen, the parties entered into a new contract by which the same number and description of bags of rice were sold back to the plaintiffs by the defendants at the price of Rs. 213, *i.e.* at a price of Rs. 15 per 100 baskets less than that at which the defendants originally bought them. The plaintiffs demanded Rs. 2,250 from the defendants as damages, and sent them an invoice for the sum, calling it a "difference bill." The defendants pleaded wager and contended *inter alia* that the existence and form of the two contracts between the parties, known in the rice market as *āmni sāmni* transactions, was strong evidence that the whole transaction was a gamble in differences.

Held, that having regard to the true meaning of the two contracts and the evidence the defendants failed to establish their plea of wager, and the description of the invoice as a difference bill did not of itself mean that the transaction was one of gambling upon differences.

Per MYA BU, J.—If the sale and the resale of the commodity took place simultaneously, it would mean that the parties did not intend to deal with the actual stock, but only to deal in differences. But where a contract of sale is entered into, and subsequently either party finds it disadvantageous to fulfil the contract, and they mutually agree to enter into a contract of resale resulting in the liquidation of the damages, then such two transactions are not *per se* evidence of the parties' intention to wager.

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* Civil First Appeal No. 142 of 1935 from the judgment of this Court on the Original Side in Civil Regular Suit No. 82 of 1935.

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Rafi for the appellants. It is significant that the parties have entered into two reciprocal agreements exactly of the same description. Under one agreement the plaintiffs agreed to sell to the defendants a certain quality and number of bags of rice, and by another agreement exactly the same quantity and quality of rice were agreed to be resold by the defendants to the plaintiffs, subject to conditions which are the same in both. These transactions are known in the rice market as *āmni sāmni* transactions, and it is a feature of such transactions that no delivery of rice is given or taken, but only the difference in price is given or received. If the first contract was a genuine one and the defendants were liable on it for not being able to take delivery, a brief memorandum to pay damages would have sufficed, and the second contract need not have been entered into at all. There were no milling notices issued in this case and no delivery was ever offered. This is *primâ facie* evidence that the parties intended to gamble in differences only. The letter of demand by the plaintiffs' advocate and the invoice of the plaintiffs, called the "difference bill," indicate the plain intention of the parties that they had entered into a wagering contract only.

The explanations of the plaintiffs' manager are not reliable, and were made not in answer to any questions in examination-in-chief or in cross-examination.

Gregory (with him *J. K. Munshi*) for the respondents was not called upon.

GOODMAN ROBERTS, C.J.—This is an appeal from a judgment of Mr. Justice Ba U awarding the plaintiffs, the East Asiatic Company, Limited, the sum of Rs. 2,250 as damages for a breach of contract by

the defendants, the present appellants, in refusing to take delivery of certain rice purchased by them from the plaintiffs.

At the trial, the defence was that the contract in respect of which the suit was brought was a wagering contract, within the meaning of section 30 of the Indian Contract Act, which provides that agreements by way of wager are void and that no suit shall be brought for recovering anything alleged to be won on any wager, or entrusted to any person to abide the result of any game or other uncertain event on which any wager is made.

It was established, and is agreed, that the parties entered into an agreement, dated the 24th day of September 1934, whereby the respondents, plaintiffs in the Court below, were to sell, and the defendants to buy, 5,000 bags of Kanaungtoe small mills special rice, of 225 lbs. net weight each, at Rs. 228 per 100 baskets of 75 lbs. each. Provision was made in the bought note, which evidenced the contract, for delivery *ex hopper* during the month of November 1934, and there was reference to milling notices to be issued so that the purchaser's agent should attend the mill for the purpose of passing or rejecting the rice when it was ready for delivery within the stated time.

There is no evidence of any milling notices having been actually given, and indeed it is common ground that they were not given; for, by October 23rd the parties had entered into a new contract, Exhibit B, by which exactly the same number and description of bags were sold back to the plaintiffs by the defendants at the price of Rs. 213 per 100 baskets, that is to say, at a price of Rs. 15 per 100 baskets less than that at which the defendants originally bought them.

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Now, it is upon the true meaning and construction of these two contracts that this appeal turns. The plaintiffs (who are the respondents) say in effect: "we sold to the defendants at Rs. 228 in September for delivery in November. The market price fell, and it became obvious that the defendants were either not in a position to fulfil their contract by taking delivery, or, at any rate, were desirous of divesting themselves of their obligations thereunder. In these circumstances, in the month of October we met them in their difficulties and it was mutually agreed that a new contract should be entered into and the result was the contract evidenced by Exhibit B. Delivery of the rice had not then taken place. If both the contracts had been fulfilled we should have sold at Rs. 228 and re-purchased at Rs. 213 and our aggregate profit on the transaction would have been Rs. 15 per 100 baskets, or Rs. 2,250 in all. But neither contract was fulfilled, in the sense that the rice never left our mill."

And the plaintiffs' case is that upon a true construction of the two contracts the second contract fixes a sum of Rs. 2,250 as the consideration for the release of the defendants by the plaintiffs from their obligation to take delivery. This sum was arrived at by ascertaining the liquidated damages which should be payable upon breach of the first contract and the payment of which should discharge the defendants from their liabilities to the plaintiffs.

The defendants, on the other hand, put their case in this way. They say that there never was any intention to take delivery and that if what the plaintiffs say happened had actually occurred a new contract could have been substituted for the old one by a brief written memorandum and that the rice sale note, Exhibit B, need never have been prepared.

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The defendants say further that it is a feature of all transactions known as *āmni sāmni* transactions that there should be reciprocal agreements of this character ; and they seem to go further and to invite the Court to say that the mere fact of Exhibits A and B being in existence is strong evidence that the whole transaction was a gamble in differences, or that the construction sought to be placed on it by the plaintiffs will not bear examination by reason of the existence of these two documents alone.

Now, the defendants also rely, or they did at first rely, upon the language used in Exhibits 1 and 2. In Exhibit 1 Mr. Gregory, on behalf of the plaintiffs, wrote to the defendants on the 23rd of February 1935 and said :

> "That by a set of bought and sale notes, dated the 24th September 1934, my clients sold and you bought the above rice (500 tons of Kanaungtoe small mills special kind) at the rate of Rs. 228 per hundred baskets of 75 lbs. each and agreed to take delivery during November 1934. Subsequently, by a set of bought and sale notes, dated the 23rd October 1934, you sold and my clients bought 500 tons of the above rice at the rate of Rs. 213 per 100 baskets of 75 lbs. each and agreed to deliver during November 1934. Neither contracts were fulfilled by you and on the 16th November 1934 my clients submitted to you their difference bill amounting to Rs. 2,250."

Then, Exhibit 2, which was an invoice three months earlier in date also referred to the "difference" of Rs. 15 per 100 baskets between the two contract prices. Speaking for myself, I have formed the opinion that the description of this invoice as "a difference bill" does not of itself mean that the transaction was one of gambling upon differences, and is equally susceptible of the interpretation that the sum to be paid by the defendants under the new contract, in consideration of being exonerated from their liability to take and pay for the rice at the old

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rate was to be a sum agreed on as the difference between the market price in September and that which obtained when the market had fallen sometime about a month later. This particular point sought to be made does not really carry the appellants' case any further.

In those circumstances, having considered the issues the learned trial Judge held that once the plaintiffs had proved the existence of these contracts it lay upon the defendants, who sought to excuse themselves from performance, to prove that there was an intention at the time of entering into contract A that this contract should be a contract of wagering. To adopt the words of Cave J. in *The Universal Stock Exchange, Limited* v. *David Strachan* (1), which were quoted with approval by Vaughan Williams L.J. in *In re Gieve* (2),

"was there a secret understanding that the stock (in this case, the rice) should never be called for or delivered, and that differences only should be dealt with? If there was that secret understanding, then the plaintiff is entitled to recover his securities. If there was not that secret understanding, then he is not entitled to recover them."

The learned trial Judge stated the law to be applied with accuracy, and I also think that he framed the issues rightly. He carefully reviewed the other cases cited to him, and in particular he referred to the judgment of Lord Darling in the case of *Sukdevdoss Ramprasad* v. *Govindoss Chaturbhujadoss and Company* (3) dealing with a class of agreements analogous to those with which we are concerned here. Lord Darling said in that case:

"There can be no doubt that these various contracts were in character highly speculative; but, as was pointed out by the trial judge and by the judges on appeal, that is insufficient

(1) (1896) Ap. Ca. 166. (2) (1899) 1 Q.B.D. 794, 803.
(3) (1927) 55 I.A. 32.

in itself to render them void as wagering contracts. The authorities cited show that to produce that result there must be proof that the contracts were entered into upon the terms that performance of the contracts should not be demanded, but the differences only should become payable."

I find the last sentence in this judgment one which throws much light upon the facts and the law applicable to this case. In looking at the contracts to find their true meaning, the surrounding circumstances must, of course, be considered. The learned Judge, accordingly, considered a number of explanations which formed part of the evidence before him, and he accepted the evidence of Mr. Castonier, the plaintiff company's manager, and his explanation of the transactions which the defendants seek to describe as wagering transactions. Mr. Castonier said in explaining the transactions which were put to him in cross-examination by Mr. Rafi :

" We have sold from our mill. After that it may happen that we get an order from our Head Office for rice for shipment. Then, if we prefer to use our own paddy for milling that rice, we cannot also use the same paddy for our sales of small mills. Therefore we have to buy back small mills from the market. If it happens that the man we buy from is the same man that we previously sold to, then these differences arise."

Something approaching scorn was poured upon this explanation by Mr. Rafi, but I think that, short of explaining the precise facts relating to each entry in detail, the witness could not have given a better general illustration of his course of business or of the various contingencies which might from time to time arise in it. He put the matter succinctly and he satisfied the trial Judge and his evidence satisfies me that what at first sight may look like a gamble

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in itself may very well be capable of quite a different explanation.

Mr. Castonier went on in his evidence to offer an explanation for the reason for his not recording the second contract, B, in less compendious phraseology. He said :

"I think that if we had made a simple agreement like that, the defendant firm should have had to pay cash on the spot; but by signing a contract similar to Exhibit A he was given grace time to pay up till 15th December 1934."

Stopping there, there does not seem to be very much in the explanation, since the mere date for payment would not make it necessary to employ the language of Exhibit B. But I do not think that the way which was adopted was improper or illegal. It might be at the most suspicious if there was no explanation, but the fact that the same result could be attained by greater brevity is really not enough to enable this Court to decide that it was not a *bona fide* compromise or settlement and intended to be such by the parties at the time ; and what does seem important is the last sentence in Mr. Castonier's evidence, in which he says that it was not his suggestion that Exhibit B should be prepared at all, but it was the suggestion of the arbitrators and was made to Kika Bhai, the plaintiffs' broker.

Upon all these issues of fact Mr. Justice Ba U, who tried the case, accepted all the evidence adduced on behalf of the plaintiffs, and this Court would be indeed loth to disturb such findings of fact. The learned trial Judge heard the witnesses and he said in terms that he did not believe the evidence of the defendants' manager, Manilal Sanghibi. There was abundant evidence upon which he might find, as he did find, that the defendants put their affairs into the

hands of the Rice Merchants Association and asked to be helped out of their difficulties. Mr. Lakhia, the Secretary of the Association, was called as a witness, and his evidence was considered conclusive on this point in the Court below. Throughout the trial there was a very sharp cleavage in the evidence between the two conflicting cases which were set up. We have had before us the entire evidence given by appellants' witnesses in the Court below, and all the points which could be raised have been marshalled with great clearness and vigour by Mr. Rafi before us. For my part, I have come to the conclusion that no ground exists on which this Court would be justified in interfering with the decision of the Court below.

This appeal must, accordingly, be dismissed with costs. We allow five gold mohurs a day after the first two days' hearing in the trial Court, in addition to those allowed by the rules.

MYA BU, J.—I concur in the judgment of my Lord, the Chief Justice, which, if I may respectfully say so, deals with the points in controversy, both upon questions of fact and upon questions of law, so fully that I need add very little to it. I desire to make only a few general remarks.

There are a large number of rice speculative transactions among rice merchants in Rangoon. But rice speculative transactions are not necessarily transactions of wager. I am unable to conceive that rice speculative transactions, like other trade or business transactions of forward sales and purchases of stock for which there is a regular market, can ever be free from the idea of speculation. At the time of the contract the parties aim at making a profit out of such transactions. One side has in view

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a rise and the other a fall in the price of the commodity that is the subject-matter of the bargain and sale at the time when the time for delivery or completion of the sale arrives.

Therefore, in the present case, the transaction which culminated in the drawing up of the first set of bought and sale notes does not by itself show, although it is a speculative transaction, that it was a transaction amounting to a wagering contract. The law on the point is clear and that is that unless the parties to the contract intend at the time of entering into the contract that it should not be what it purports to be, but that it should be a transaction which was to be settled only upon the difference between the contract rate and the market rate prevailing at the time fixed for the completion of the contract, the transaction does not amount to a wager.

In the present case the transaction which culminated in the execution of Exhibit A, which sets out the original contract, has been described as an *āmmi sāmmi* transaction, by which term is meant a transaction of sale and resale between the same parties—sale by one to the other and resale by the latter to the former—of the same quantity of the stock which is the subject-matter of the transaction. If the sale and the resale took place simultaneously, *e.g.* sale by *A* to *B*, at a certain rate, of commodity deliverable at a future date and a resale by *B* to *A*, entered into simultaneously, of the same commodity deliverable at some future date at a higher or lower rate to be fixed or agreed upon subsequently, then it would be quite patent that at the time of the transaction the parties thereto did not intend to deal with the actual stock but only to settle the gain and loss merely upon the basis of the difference

which is to be calculated at the time of the maturity of the contract between the contract rate and the rate so fixed or, in the absence of rate fixed, the prevailing market rate. Also where the sale and resale are not simultaneous but the resale is intended or agreed upon by both the parties at the time of the sale the same result will follow. But where the contracts of sale and resale are not simultaneous and the resale is not in the contemplation of the parties at the time of the sale it is inconceivable that the contract of sale, which is a genuine transaction and not a wager at the time that it is entered into, should become merely a transaction of wager simply because on a subsequent occasion either the purchaser finding it disadvantageous to complete the purchase on the maturity of the contract, or the seller finding it disadvantageous to deliver the stock that he has to deliver under the contract, they mutually agree to enter into a contract of resale resulting in the liquidating of the damages payable at the time fixed for the completion of the original contract. The two transactions in the present case are in the nature of, firstly, a forward contract of sale by one party and purchase by the other, and next a contract of resale by the latter to the former resulting in absolving the original seller from his liability to make delivery on the due date and in absolving the purchaser from his liability to take such delivery, fixing the damages not on the difference between the contract rate and the market rate prevailing at the time of the originally intended delivery but on the difference between the rate mentioned in the contract of sale and that in the contract of resale. The resale which is set out in Exhibit B was a resale which was brought about a month after the date of the original sale set out in

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Exhibit A, and they are therefore not simultaneous transactions, and the two transactions do not possess any *primâ facie* evidence that at the time when the original contract mentioned in Exhibit A was entered into it was the intention of the parties that the resale in Exhibit B was to be brought into being in any event.

It is not disputed that unless the transaction can be shown to be from the very commencement a wager it cannot become a wagering contract merely because the later contract Exhibit B was entered into; but what the learned advocate for the appellants has urged before us, as he did before the trial Court, is that the transaction in Exhibit B should be regarded as a piece of evidence which supports the theory that the original contract of the 24th September, 1934, (Exhibit A) was intended by the parties as a wagering contract at the time that it was entered into. In addition to the support that he claims to receive from the contract of the 23rd October, 1934, (Exhibit B) the appellant firm also adduced evidence to show that it was the intention of the parties at the time that they entered into the contract of the 24th September, 1934, that there should be a resale of the same stock by the purchaser to the vendor. The oral evidence, as my Lord the Chief Justice has pointed out, has been carefully considered by the learned trial Judge, who saw the witnesses and who has weighed the evidence of both the parties in a careful manner. No very strong reason, such as would be sufficient to justify an appellate Court in interfering with the finding arrived at by the learned trial Judge upon the evidence, has, in my opinion, been shown. The oral evidence in the case, therefore, does not afford any material assistance to the appellant firm in establishing their allegation

that at the time of the original contract it was understood between the parties that it was to be either an *āmni sāmni* transaction or merely a gambling transaction of which the gain or loss is to be ascertained only upon the difference between the contract rate and the market rate prevailing at the time fixed for the completion of the contract. And, as I have observed, Exhibit B does not bear any *primâ facie* indication that it came into being in pursuance of the intention of the parties at the time of the original contract Exhibit A. *Primâ facie* it was a transaction which a buyer at the time that it was brought about would, in the trend of the market, have desired to effect, and a transaction which was of no advantage to the seller. The effect of the later contract is to relieve the seller under the original contract of the responsibility of making delivery as stipulated in the original contract ; and it accounts for the absence of the milling notices, which are notices tendering delivery. How, after the seller has been relieved of his responsibility to make delivery, the fact that he omitted to send a milling notice to his purchaser could operate as a circumstance tending to show that the original contract was not a genuine contract, but merely a wagering contract, I am at a loss to understand.

Exhibit 1, which was a lawyer's notice sent by the learned advocate for the respondent firm to the appellant firm on the 23rd February, 1935, carried with it the bill which was described as the "difference bill." "Difference bill," no doubt, it was, in the sense that it was a bill for the difference between the contract rate and the rate at which the parties subsequently agreed to liquidate the damages. But how the employment of the term "difference bill" can be regarded as an admission that the

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parties intended at the commencement only to settle the contract on the difference between the contract rate and the market rate prevailing at the time of the maturity of the contract, it is beyond me to see. Where the market is declining, unless the seller, to his own detriment, neglects to tender delivery, he has the advantage of the declining market. Supposing, under those circumstances, the seller duly tenders, but the buyer does not take, delivery : what is going to be the legal consequence? The buyer would be liable to pay damages calculated upon the difference between the contract rate and the lower market rate. If the market has risen and if the seller, not having stock in his possession, does not obtain stock at the prevailing rate and is, therefore, not in a position to tender, and does not tender delivery on due date ; what is the legal consequence? He would be liable to pay damages calculated upon the basis of the difference between the contract rate and the prevailing market rate at the time of the maturity of the contract. The expression "difference" used in that sense does not savour of any acknowledgment that the original transaction was a wager. It appears to us that this expression is used in that sense and in no other.

The appellant firm has clearly failed to make out its case that the transaction between the parties was void as being a wager.

G.B.C.P.O.—No. 17, H.C.R., 27-6-36—2,500.