APPELLATE CIVIL.

Before Mr. Justice Birdwood and Sir W. Wedderburn, Justice.

1885. *February* 19.

DA'YA'BHA'I TRIBHOVANDA'S (ORIGINAL PLAINTIFF), APPLICANT, *v.* LAKHMICHAND PA'NA'CHAND (ORIGINAL DEFENDANT), OPPONENT.*

Wagering contract—Suit to recover deposit paid on such contract—Contract Act (IX of 1872), Secs. 22, 24-30, and 65—Bombay Act III of 1865, Sec. 1—In pari delicto potior est conditio possidentis, application of the maxim—Plaint, amendment of—Deceit—Unilateral mistake.

On the 21st of January, 1883, the plaintiff contracted to purchase from the defendant the right to receive dividend on 50 shares of the Empress Mill at Rs. 37 *per* share, the plaintiff being under an impression that the dividend was to be declared on some subsequent day. The plaintiff deposited Rs. 100 with the defendant as part payment of the purchase-money. Subsequently it was ascertained that the dividend had been already declared on 17th January, 1883, (*i.e.* four days before the contract,) at Rs. 25. The plaintiff thereupon sued the defendant to have the contract declared cancelled, and sought to recover the deposit of Rs. 100, with interest. The Judge of the Court of Small Causes at Broach, being of opinion that the contract was in its nature a *satta* or wagering contract, rejected the plaintiff's claim. The plaintiff applied to the High Court, under its extraordinary jurisdiction, to set aside the lower Court's decision.

Held, that, in the first instance, the plaint, as framed, not disclosing any cause of action, ought to have been returned for amendment. It should either have alleged a mistake common to both parties to the contract, or should have contained an allegation of fraud, on the defendant's part, inducing the plaintiff to enter into the agreement. The mere circumstance, that the contract was "caused by one of the parties to it being under a mistake as to a matter of fact", would not, under section 22 of the Contract Act (IX of 1872), have made the contract voidable.

Held, also, that, if the contract was really a wager, the deposit could not be recovered under section 65 of the Contract Act, as its nature must, from the first, have been known to the parties. To an agreement, so known to be void, section 65 does not apply. If the contract was, in the intention of both parties, a wager, the suit would be barred by section 1 of Bombay Act III of 1865, which, though it formed a part of Act XXI of 1848, which is repealed by the Contract Act, is not, being a special Act, applicable to the Bombay Presidency, itself repealed. It must be read with section 30 of the Contract Act.

Held, also, that to constitute a wager, the transaction between the parties must "wholly depend on the risk in contemplation", and "neither party must look to anything but the payment of money on the determination of an uncertainty." But if one of the parties has "the event in his own hands", the transaction is not a wager. If the plaintiff's real contention was that defendant was aware of a declaration of dividends, at Rs. 25 *per* share, and by keeping plaintiff in ignorance of the fact induced him to enter into a wagering agreement for

* Extraordinary Civil Application, No. 122 of 1884.

payment of differences at a contract rate of Rs. 37 *per* share, then to a suit for the recovery of the deposit made to the defendant with reference to such an agreement, Bombay Act III of 1865 has no application. Wagering contracts are not illegal. They are simply destitute of legal effect. If fraud was practised on plaintiff, the maxim *potior est conditio defendentis* would not apply.

The High Court reversed the lower Court's decision, in order that the plaintiff might be given an opportunity to amend his plaint, so as to show that his action was one for deceit.

THIS was an application under the extraordinary jurisdiction of the High Court.

The plaintiff alleged that on the 21st January, 1882, he contracted to purchase from the defendant the right of receiving the dividend on 50 shares of the Empress Spinning and Weaving Company from 1st June, 1880, to 31st December, 1881, for the price of Rs. 37 *per* share; that he (the plaintiff) paid to the defendant under this contract Rs. 100 in part payment of the price; that the understanding in respect of the said transaction was that the dividend would be declared on some day subsequent to the one on which the contract was entered into; that the said dividend was found to have been declared, four days before the contract, at Rs. 25 per share; that neither the plaintiff nor his agent was aware of this fact, but that the defendant had full knowledge of it. The plaintiff now sued the defendant to recover the said sum of Rs. 100 advanced by him, together with interest thereon. The Judge of the Small Causes Court at Broach rejected the plaintiff's claim, on the ground that "the contract between the parties was in the nature of a wagering contract".

Against this decision the plaintiff applied to the High Court under its extraordinary jurisdiction.

A *rule nisi* was granted on 14th August, 1884.

The rule now came on for hearing.

Nagindás Tulsidás, for the defendant, showed cause.—This contract was rightly considered by the lower Court as a wagering contract. This was such a contract as falls within the purview of Bombay Act III of 1865, and the deposit by the plaintiff is not recoverable. The issue was not objected to in the lower Court and

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cannot now be objected to here. Even if there is an error of law here, the Court will decline to interfere in its extraordinary jurisdiction: see *Dámodardás* v. *Shaknáji*[1].

Gokuldás Káhándás, for the plaintiff, *contra*.—This was not a wagering contract. The Contract Act (IX of 1872) defines in section 30 what are wagering contracts and looks upon them as not illegal, but simply void. Act III of 1865 does the same. Section 65 of the Contract Act lays down that any consideration received under a void contract shall be restored to the person who paid it. These sections, construed together, entitle the plaintiff to recover back the deposit. The sections bar a suit based on such a contract, but do not apply to a case of recovering money from a person with whom it is deposited: see *Hampden* v. *Walsh*[2]; *Lacanssade* v. *White*[3]. When the contract was made, both the parties were ignorant of its nature, and under section 20 of the Contract Act the contract was void. Money paid even under an illegal contract as a deposit is recoverable: see Pollock on Contracts, p. 351.

BIRDWOOD, J.—The plaintiff sued to recover a sum of Rs. 100 paid to defendant, as a deposit, on account of the value of the dividends on 50 shares in the original capital of the Empress Spinning and Weaving Company, alleged to have been purchased by plaintiff for the period from the 1st June, 1880, to the 31st December, 1881. The defendant was the owner of the shares, and the alleged purchase was at the rate of Rs. 37 for each dividend. It is stated in the plaint that, when making the purchase on the 21st January, 1882, the plaintiff was under the impression that a dividend would be declared after that date; whereas it had already been declared on the 17th January, 1882.

From the evidence, it appears that the dividend declared was at the rate of Rs. 25 for each share.

The plaintiff asked that the deposit should be returned to him with damages, amounting to Rs. 6, for the wrongful detention of the money, on the ground that the contract of purchase must

(1) Printed Judgments for 1884, p. 294. (2) 1 Q. B. Div., 189.
(3) 7 Term. Rep., 535.

(on account of his ignorance of the fact, that when it was made a dividend had been already declared) be held to be "cancelled" or "void".

The plaint does not set forth any ignorance on the part of the defendant; nor, on the other hand, does it impute knowledge to the defendant of the fact that a dividend had been declared, and charge him with a fraudulent concealment of the fact from the plaintiff.

We think that the plaint should, in the first instance, have been returned for amendment, on the ground that it did not disclose a cause of action. It should either have alleged a mistake, common to both the parties, as to an essential matter of fact, by which the agreement between them was rendered void, and on the discovery of which the deposit was claimed, presumably under section 65 of the Indian Contract Act, 1872; or else, relief should have been claimed, (if that was really plaintiff's case,) on the ground that he had been induced to enter into the agreement by the fraud of the defendant. The mere circumstance, that the contract was "caused by one of the parties to it being under a mistake as to a matter of fact," would not have made the contract voidable. See section 22 of the Contract Act.

The plaint was not, however, returned for amendment; but the following issues were recorded by the Court of Small Causes, apparently without objection from either party:—

(1). Whether the contract between the parties was in the nature of a wagering contract?

(2). Whether the contract between the parties was entered into on the 19th or 21st January, 1882?

(3). When was the dividend of the Empress Mill declared?

(4). If it was declared on the 17th January, 1882, was the same within the knowledge of the defendant at the time when he entered into contract with the plaintiff?

(5). Whether the plaintiff is entitled to the refund of the earnest money?

After taking evidence, the Judge of the Court of Small Causes found on the first issue that the contract was a wagering contract;

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and, on that ground, and without trying the remaining issues, he rejected the claim, and directed each party to bear his own costs.

If the Judge's finding on the first issue be accepted as correct, for the purposes of this application, then the agreement between the parties was one merely "to pay differences", and not one directed to a commercial object. It was, therefore, void under section 30 of the Contract Act. But it does not follow that, if the plaint had been properly framed, the prayer contained in it must necessarily have been refused. If the plaintiff really sought to avoid the contract on the ground of a mistake as to a matter of fact, common to himself and the defendant, but if, nevertheless, the agreement between them was really a wager, then, indeed, section 65 of the Contract Act would, apparently, have had no application to the case; for if the agreement was one merely to pay differences, its nature must necessarily have been known to the plaintiff and defendant at the time when they entered into it, and they must be presumed to have known also that it was void. To such an agreement, so known to be void, section 65 does not, in terms, apply. And, again, under the supposed circumstances, section 1 of Bombay Act III of 1865 would have been a bar to the suit. That Act was intended to apply to suits upon contracts collateral to wagering transactions. It declares all contracts made to further or assist the entering into, effecting, or carrying out of agreements by way of gaming or wagering and all contracts by way of security or guarantee for the performance of such agreements or contracts to be null and void; and it prohibits suits for the recovery of sums paid or payable in respect of any such contracts; but it also applies to suits between the principals themselves to such contracts, and prohibits suits for the recovery of sums paid or payable in respect of any agreement by way of gaming or wagering, as well as suits for sums paid in respect of the contracts collateral to such agreements. Although Bombay Act III of 1865 is to be read and taken as part of Act XXI of 1848, which is expressly repealed by the Indian Contract Act, 1872, it cannot be held to be thereby repealed, by implication. Its provisions, being of a special character, and applicable only to the Bombay Presidency, are not affected by the general provisions contained in sections 24 to 30 of the Contract Act,

regarding "void agreements". It is not itself expressly repealed, and must now be read with section 30 of the Contract Act.

But the provisions of the Bombay Act were primarily intended to apply, and can, we think, be properly applied, in the case of principals, only to agreements, which, in the contemplation of both the parties, are strictly wagers. To constitute a wager, the transaction between the parties must "wholly depend on the risk in contemplation," "and neither must look to anything but the payment of money on the determination of an uncertainty" (Anson, Law of Contract, 3rd ed., p. 172). But if one of the parties has "the event in his own hands," the transaction lacks an essential ingredient of a wager. If the plaintiff's real contention was that defendant was aware of a declaration of dividends, at Rs. 25 per share, and, by keeping plaintiff in ignorance of the fact, induced him to enter into a wagering agreement for payment of differences at a contract rate of Rs. 37 *per* share, then we think that to a suit for the recovery of a deposit made to defendant, with reference to such an agreement, Bombay Act III of 1865 has no application. Nor do we think that such a suit would be barred by the maxim *in pari delicto potior est conditio possidentis*. In *Thistlewood* v. *Cracroft and Darley*[1] the plaintiff sought to recover a sum of money lost by him at play under the following circumstances. He was a stranger to the defendants, and had gone to a gaming house in St. James Street, at an early hour in the morning, and proposed to play with Cracroft at hazard for a larger sum than he chose to play for, "whereupon Darley, with whom C. had no previous communication, and whom he only knew by name, proposed to C. that each of them (C. and D.) should put down £50, and so form a bank to meet the losses that might ensue from playing for such high stakes, and that the profits and losses should be borne and divided equally between them. After playing for some time, they desisted, when it was found, upon reckoning up the money in the bank, which had never been removed from the table, or out of sight during the time of playing, that the defendants had jointly won from the plaintiff £841, which they

(1) 1 M. & S., 500.

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divided between themselves according to the agreement, after making a deduction of £126 for money lost by them to two persons in bets relating to chances in the course of the play, and another of £7 for the waiters. The plaintiff threw the dice himself during the whole time; and the money was won fairly in the course of play." At the trial before Lord Ellenborough, the defendants relied on the rule *potior est conditio possidentis*. His lordship inclined to this opinion, but directed the jury to find for the plaintiff for £708, reserving liberty to defendants to move on this point. Accordingly, a *rule nisi* was obtained for setting aside the verdict. It was made absolute on the ground that there had been fair play between the parties, and both were equally delinquent.

Lord Ellenborough, C.J., observed, however: "If the Court discovered any traces of foul play in this case, so as to form a shade of delinquency between these parties, by making it a case of oppression or fraud upon one, they would eagerly have interfered in order to administer relief"; and Le Blanc, J., said: "The transaction, no doubt, was illegal, but there seems to be no imputation of foul play, to entitle the plaintiff to ask for relief."

These remarks would apply with especial force in the present case, inasmuch as neither by section 30 of the Contract Act, nor by any other law in force in India, are wagering agreements rendered illegal, whether by express prohibition or by penalty. They are simply destitute of legal effect or void. That distinction was upheld in *Párakh Govardhanbhái* v. *Ransordás*[1]. That was a decision under Act XXI of 1848, and is applicable to cases under the present law.

From the way in which the issues were framed in this case, it would appear that plaintiff really imputed to defendant a fraudulent concealment of facts, by which he was induced to enter into an agreement with him, and make the deposit in respect of which this suit has been brought. We are of opinion that the decision of the lower Court must be reversed, in order that the plaintiff may be given the opportunity of amending the plaint, if so advised, so as to show that his action is really one for deceit.

(1) 12 Bom. H. C. Rep., 51.

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And if he so amends the plaint, the proper issues should be raised and tried.

The decision of the Court of Small Causes is, therefore, reversed, and the case remanded for retrial with reference to the foregoing observations. Costs, including costs of this application, to follow the final decision.

Decree reversed and case remanded.

APPELLATE CIVIL.

Before Sir Charles Sargent, Knight, Chief Justice, and Mr. Justice Nánábhái Haridás.

1885 *February* 24.

NIRVA'NA'YA (ORIGINAL DEFENDANT NO. 4), APPELLANT, *v.* NIRVA'NA'YA (ORIGINAL PLAINTIFF), RESPONDENT.*

Guardian—Minor—Lingáyat math—Compromise made by a father as guardian of his natural son—Suit by son to set aside compromise—Minor adopted by religious celebate.

C., who was the head of a Lingáyat *math*, died in 1862. The plaintiff, who was then a minor, claimed through his natural father R. to be C.'s heir. This claim was disputed by V. on behalf of his son, the defendant, who was also a minor. In 1863, pending legal proceedings between them, R. and V. compromised the dispute, and agreed that the *math* and the property appertaining to it should be divided between the plaintiff and the defendant in equal shares. In the present suit the plaintiff sought to set aside the compromise made on his behalf by his natural father R., on the ground that R. had no authority to make it, and that there was no necessity for it.

Held, that the plaintiff's natural father was his proper guardian to assert his rights, as adopted heir, against rival claimants, and that the compromise was binding.

THIS was a second appeal from the decision of C. F. H. Shaw, Judge of the district of Dhárwár, reversing the decree of Ráv Sáheb Rághavendra Rámchandra, Subordinate Judge of Saundatti.

The Lingáyat *math* situated at Ugargol and the lands attached to it originally belonged to one Chanmaláya, the recognized head of the *math*. Chanmaláya died on the 23rd of January, 1862, and soon afterwards disputes arose between Rácháya, the natural father of the present plaintiff, and the fourth defendant's father

* Second Appeal, No. 640 of 1882.