ORIGINAL CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Scott.

ANUPCHAND HEMCHAND, (PLAINTIFF), *v.* CHA'MPSI UGERCHAND, (DEFENDANT).*

1888. *August* 17.

Evidence—Evidence Act I of 1872, *Sec.* 92, *Proviso I—Contract—Wagering contract—Bombay Act III of* 1865—*Oral evidence admissible to prove a contract to be a gaming transaction.*

In an action on a contract for the purchase and sale of goods on a certain day the defendant pleaded that the contract was a wagering contract; that the parties never intended to give or take delivery of the cotton, and that the contract was, therefore, void.

Held that oral evidence was admissible to prove the defence set up by the defendant.

THIS was a reference to the High Court by Mr. Spencer, Acting Chief Judge of the Small Causes Court of Bombay, under section 69 of the Presidency Small Cause Courts Act XV of 1882. The learned Judge stated the case as follows :—

"This is a suit brought to recover from the defendant the sum of Rs. 543-6-0 under the following circumstances :—

"2. On the 2nd of November, 1886, the defendant by an agreement in writing made through a broker, copy translation of which is annexed and marked A, (*see note*) contracted to sell to the plaintiff fifty full-pressed bales Broach ginned good class cotton of the crop of the year 1943 at the price of Rs. 204-8-0 *per khandi* deliverable between the 15th and 25th of March 1887. A counterpart of A, signed by the plaintiff, was given to the broker who negotiated the contract, for delivery to the defendant, and was produced by his counsel at the hearing.

"3. The plaintiff in his evidence stated that the price of the above description of cotton continued to rise after the contract

* Reference from the Court of Small Causes, Suit No. 8275 of 1887.

Note (Contract A).—"To Sá Motilál Sákulchand written by Sá Karamchand Chapsi. To wit. I have agreed to purchase from you fifty *paki* (full-pressed) bales of new Broach ginned good class cotton of the crop of the *Samvat* year 1943. The price thereof is at the rate of Rs. 227½ *per khandi*, less 5½ *per cent.* rebate. As to the fixed time for delivery thereof, I am duly to receive the same in full from the 15th day of March in year 1887 up to the 25th day of March. Through the broker Lalluchand Dongarsi. *Samvat* 1943, 9th *Fálgun Vud*, Friday, 18th March 1887."

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was made, and that, some days after the time for delivery, one Wastárám called on him on behalf of the defendant, and stated that the defendant's cotton was not likely to arrive in time and asked him to settle contract (A) at the bázár rate. The plaintiff expressed his willingness to do so through a broker, and on the 18th March, 1887, he agreed through a broker, Lalu Dongar, to settle the difference in price at Rs. 227-8 *per khandi*. The broker thereupon brought him an agreement signed by the defendant, whereby he contracted to purchase from the plaintiff the same quantity and description of cotton deliverable on the same dates at Rs. 227-8 *per khandi*. Copy translation of the agreement is annexed and marked (B) (*see note*). A counterpart of this second agreement signed by the plaintiff was delivered to the defendant by the broker, and was produced by the defendant's counsel at the hearing. The plaintiff further stated that if he had not been asked to settle contract (A), he would have insisted on the cotton being delivered on due date. The plaintiff by his summons claimed the difference between the two rates of Rs. 204-8 and Rs. 227-8 *per khandi*, at which he had agreed to buy and sell the cotton.

"4. No evidence was called on behalf of the defendant to contradict the evidence of the plaintiff, but it was contended by his counsel (1) that agreement (A) was a wagering contract; that the parties never did intend to give or take delivery of cotton, but to pay the difference in price, and that it was, therefore, void under section 30 of the Indian Contract Act; and (2) that there was no evidence that the defendant had agreed to pay the damages claimed—agreement (B) being unambiguous in its terms, and oral evidence not being admissible to connect it with agreement (A).

"5. For the reasons given in my judgment, copy of which is annexed, and on the authority of the case there cited—*Jugger-*

Note (Contract B).—To Sá Motilál Sákulchand written by Sá Karamchand Chapsi. To wit. I have agreed to deliver to you fifty *paki* (*i. e.* full-pressed) bales of new Broach ginned good class cotton of the crop of the *Samvat* year 1943. The price thereof is at the rate of Rs. 204½ *per khandi*, less 5½ *per cent.* rebate. As to the fixed time (for delivery) thereof, it is to be duly delivered in full from the 15th March, 1887, up to the 25th March. Through the broker Sá Ratanchand Saváicnand. The 2nd November, 1886. The 6th *Kartuk Sud*, 1943.

nauth Sew Bux v. *Rám Dyál*[1]—I refused to admit oral evidence, which was tendered to show that agreement (A) was intended to be a wagering contract, and I also held there was evidence that the defendant had agreed to pay to plaintiff the difference between the rates in agreements (A) and (B.)

"6. I, therefore, gave judgment for the plaintiff; but on the application of the defendant's counsel that judgment is contingent on the opinion of the High Court on the following questions:—

"*First.*—Was oral evidence admissible for the purpose of showing that agreement (A) was a contract by way of wager?

"*Second.*—Was oral evidence admissible for the purpose of showing that agreement (B) was intended to operate by way of a settlement of the damages which would become due to the plaintiff by the non-fulfilment of the first agreement?

"7. If the High Court should be of opinion that I was in error in refusing to take evidence on the first point, I request that the case may be remitted to this Court for the purpose of taking such evidence."

There was no appearance for the plaintiff.

Telang appeared for the defendant:—He contended that the contract was a wager on the value of goods at a certain date, and was, therefore, void. To prove the contract void was to invalidate a document, and for this purpose evidence was admissible under the Evidence Act I of 1872, sec. 92, proviso I. That clause was not considered in the Calcutta case of *Juggernauth Sew Bux* v. *Rám Dyal*[2]. He cited Bombay Act III of 1865; Contract Act IX of 1872, sec. 40; *Thacker* v. *Hardy*[3].

August 28. SARGENT, C. J.:—The first question referred to us is whether oral evidence is admissible to prove that a contract for the purchase and sale of goods deliverable on a certain day was in reality a gaming transaction, on the ground that neither party intended there should be an actual buyer and seller, but only that the difference between the price when the bargain was made and the price at the time fixed for delivery should be paid

(1) I. L. R., 9 Calc., 791. (2) I. L. R., 9 Calc., 791.
(3) 4 Q. B. Div., 685.

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by one or other of the parties. By Bombay Act III of 1865[1] all contracts, whether by speaking, writing or otherwise, knowingly made to further or assist, &c., shall be null and void. Now a contract in terms for the sale and delivery of goods at a certain time, but upon the understanding that it is not to be carried out, and only the difference of the prices paid, is a wagering contract; or, as Mr. Justice Lindley said in *Thacker* v. *Hardy*[2], "a time bargain, in the sense of an unenforceable bargain." It is true that such a transaction is not declared by the Act to be illegal, but the existence of such "understanding" between the parties, or, in other words, of such an intention on their part is a fact within the interpretation clause of the Evidence Act, illustration (*d*); and as it would invalidate the contract by making it "null and void" might be proved under section 92, proviso I of that Act, which provides that any fact (as interpreted by section 3) may be proved which would invalidate the document. The case of *Doe dem. Chandler* v. *Ford*[3] is an illustration of this rule. There evidence was allowed to be given by the defendant that the annual value of the property on which an unregistered annuity was charged was less than the annuity, although there was a covenant by defendant in the annuity deed that the property was of equal value; the object being to show that the annuity was null and

(1) Act III of 1865, Sec. 1. "All contracts, whether by speaking, writing or otherwise, knowingly made to further or assist the entering into, effecting or carrying out agreements by way of gaming or wagering, and all contracts by way of security or guarantee for the performance of such agreements or contracts shall be null and void; and no suit shall be allowed in any Court of Justice for recovering any sum of money paid or payable in respect of any such contract or contracts, or any such agreement or agreements as aforesaid.

Sec. 2. "No suit shall be allowed in any Court of Justice for recovering any commission, brokerage, fee or reward in respect of the knowingly effecting or carrying out, or of the knowingly aiding in effecting or in carrying out, or otherwise claimed or claimable in respect of, any such agreement by way of gaming or wagering, or any such contract as aforesaid, whether the plaintiff in such suit be or be not a party to such last-mentioned agreement or contract, or for recovering any sum of money knowingly paid or payable on account of any persons by way of commission, brokerage, fee or reward in respect of any such agreement by way of gaming or wagering or contract as aforesaid."

(2) 4 Q. B. Div., at p. 632. (3) 3 Ad. & Ell., 649.

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void for want of registration under Act 53, Geo. III, c. 141. In *Grizewood* v. *Blane*(1), where two contracts in form for the sale and purchase of shares in certain railway companies to be delivered by a certain date were declared on, evidence was admitted in order to prove that the transaction amounted to gambling; that at the time of entering into the contracts neither party meant to sell or purchase the shares; and in *Thacker* v. *Hardy*(2), where the case was much discussed, no doubt was thrown on the admissibility of such evidence, although the Court thought that the jury were probably wrong in their conclusion. Lastly, in *Magan lál Hemchand* v. *Manchhábái Kalliánchand*(3), where the contract was in force for the sale of a share in the Mazagon Company, the case was remanded by the Court of appeal for trial on the issue "whether the contract was a wagering, with liberty to both parties to produce evidence." The effect of proviso I to section 92 does not appear to have been considered, at any rate from the above point of view, in *Juggernauth Sew Bux* v. *Rám Dyál*(4). We must, therefore, answer the first question in the affirmative, and remand the case to the Small Cause Court for the purpose of taking evidence.

Attorney for the defendant—Mr. *E. Wilkin.*

(1) 11 C. B., 526.
(2) 4 Q. B. Div., 685.
(3) 3 Bom. H., C. Rep., 79, O. C. J.
(4) I. L. R., 9 Calc., 791.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Birdwood.

KHUSHA'L PA'NA'CHAND, (ORIGINAL DEFENDANT), APPELLANT, *v.* BHIMA'BA'I, (ORIGINAL PLAINTIFF), RESPONDENT.*

1886. *August* 9.

Decree—Execution—Sale in execution—Certificate of sale—Confirmation of sale, effect of—Title of auction-purchaser without certificate of sale.

The plaintiff as an agriculturist sued the defendant, to redeem certain land mortgaged to him with possession by her deceased husband. The defendant (the mortgagee) pleaded that he had bought the mortgagor's interest in the property at an auction-sale held in execution of a decree obtained against the mortgagor (the plaintiff's husband), and that, therefore, the right to redeem was gone. The defendant was, however, unable to produce a certificate of sale, and the Subordinate Judge held, therefore, that he had failed to prove his title, and ac-

* Appeal, No. 5 of 1886, from order.