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ASTON, J. :—I concur with the judgment of the learned Chief Justice. In my opinion the reference should be answered as there stated, for the reasons given.

It is unnecessary, therefore, to discuss the question whether a plaintiff, whose claim to recover possession of property after alleged unlawful dispossession has been rejected or disallowed in a Mámlatdár's Court, is in a better position as regards limitation if he subsequently sues in the regular Civil Court on the same bare possessory right than if he had not sued unsuccessfully in the Mámlatdár's Court.

ORIGINAL CIVIL.

Before Sir Lawrence H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Batty.

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SIR E. SASSOON AND OTHERS (PLAINTIFFS), APPELLANTS, *v.* TOKERSEY JADHAWJEE (DEFENDANTS), RESPONDENTS.*

Contract Act (IX of 1872), section 30—Wagering Contracts.

In order that a transaction may fall within section 30 of the Indian Contract Act, there must be at least two parties, the agreement between whom must be by way of wager, and both sides must be parties to the wager.

It is of the essence of a wager that each side should stand to win or lose, according to the uncertain or unascertained event, in reference to which the chance or risk is taken; in other words, to make an agreement a wager there must be a common intention to bet.

THE plaintiffs filed two suits against two firms, one carrying on business in the name of Tokersey Jadhawji and the other in the name of Motiram Jadhawji. Substantially both firms did the same kind of business and in the present case one suit would have been filed but for the fact that in the former firm there were two partners who were not connected with the latter firm.

The plaintiffs' business with the defendants consisted mainly of dealings in American cotton, and these two suits were brought in respect of deficiencies arising on the resale of certain American cotton purchased by the plaintiffs on behalf of the two firms and

* Suit No. 695 of 1901, Appeal No. 1281.

not taken delivery of by them and resold by the plaintiffs on their behalf.

The evidence in the two suits being identical, both suits came on together and were tried as one before Mr. Justice Tyabji, who delivered one judgment. By their written statement the defendants denied their liability to the plaintiffs and without prejudice to their other defences set up the plea that the dealings in question were gambling and wagering transactions and that, therefore, in any event the defendants were not liable for the sums claimed in these suits. The defendants also prayed for the return of a title deed deposited by them by way of equitable mortgage with the plaintiffs which the defendants alleged had been deposited in consideration of the plaintiffs waiving their right to call for deposits by way of margin in case the cotton market was to any extent depreciated. The plaintiffs alleged that the said security was deposited by way of collateral security against the separate indebtedness and liabilities of the defendants in respect of their separate transactions and claimed a charge on the property to which the title deed referred.

At the hearing the following issues were raised:—

1. Whether the plaintiffs duly executed the instruction of the defendants and made agreements for the purchase of cotton as requested by the defendants?

2. Whether, if so, the said agreements were contracts or agreements by way of gaming and wagering?

3. Whether the title deed in the plaint mentioned was not deposited on the terms set out in the written statement?

4. Whether having regard to the said deposit the plaintiffs were entitled to make the sale on the defendants' account as alleged in the plaint?

5. Whether the plaintiffs are entitled to the relief prayed or any part thereof as against the immoveable property in the plaint mentioned?

6. Whether the defendants are entitled to recover the title deed as prayed in their written statement?

Mr. Justice Tyabji found issues 1, 2, 4 and 6 in the affirmative and issues 3 and 5 in the negative. Issues 3 and 4 were abandoned by the defendants. The suit was dismissed with costs in both cases. Against this decision the plaintiffs appealed.

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SASSOON v. TOKERSEY.

Scott (Advocate General), *Kirkpatrick* and *Inverarity*, for the appellants.

Lowndes and *Jardine*, for the respondents.

JENKINS, C. J.:—The original plaintiffs to suit No. 695 of 1901 were the members of the firm of Messrs. David Sassoon and Co., who carried on business in partnership as Merchants and Bankers at Bombay, Liverpool, and elsewhere. David Sassoon and Company, Limited, to whom the firm subsequently transferred their business, including the claim sought to be recovered in this suit, have since been added as plaintiffs.

The defendants are Tokersey Jadhawji, Motiram Jadhawji, Purshotam Umersey, and Bhagchand Kanji, members of the firm of Tokersey Jadhawji, trading in partnership as merchants, and Mr. Macleod, the Official Assignee of the estate and effects of Motiram Jadhawji, one of the members of Tokersey Jadhawji. The plaintiffs to the companion suit No. 696 of 1901 are the same and the defendants are Motiram Jadhawji and Tokersey Jadhawji, trading in partnership under the style of Motiram Jadhawji.

The two suits arise out of transactions initiated by instructions to David Sassoon and Co. to purchase American cotton as follows: on the 15th March, 1901, instructions were given by Motiram Jadhawji to purchase 400 bales, and by Tokersey Jadhawji to purchase 100 bales for delivery in July-August; on the 26th March instructions were given by Motiram Jadhawji to purchase 500 bales for delivery in August-September; and on 23rd April instructions were given by Motiram Jadhawji to purchase 1,500 bales and by Tokersey Jadhawji to purchase 500 bales for delivery in August.

The course of dealing throughout has been the same in respect of each order, and it will suffice to state the history of one of these transactions, as that will describe what was done in the others.

On the 15th of March, 1901, the Bombay Branch of David Sassoon and Co. cabled their London Branch to buy 500 bales of American cotton July-August delivery. This was done in pursuance of instructions from Motiram Jadhawji to buy 400

bales, and from Tokersey Jadhawji to buy 100 bales for July-August delivery.

On the same date Tokersey Jadhawji addressed to Messrs. David Sassoon and Co. the following letter:

DEAR SIRS,

I beg to confirm the instructions to you this day by your Bombay firm on my account to purchase 100 bales of American cotton July-August delivery at market rate and I shall telegraph to you again when I wish the cotton sold. In the event of its not being previously disposed of, I hereby agree to your selling the cotton at the best price obtainable on its being tendered for delivery so that you may not have to take it up. I also agree to pay the customary charges thereon and one and a half per cent. commission on the sale amount. In the event of prices declining, I agree to deposit with you a sufficient amount to cover the deficiency in price. Should I not do so, you may sell the cotton at market rate.

(*Sd.*) TOKERSEY JADHAWJI.

Thereupon Messrs. David Sassoon and Co. purchased from Messrs. Corrie MacColl and Co. 500 American bales to be delivered in Liverpool during July-August, 1901.

The terms of the transaction are set out in a letter of the 15th March, 1901, Ex: $\frac{S.\ J.\ B.}{2}$, which is in these terms:

DEAR SIRS,

We have this day sold to you 236,000 lbs. American cotton net weight to be contained in five hundred American bales more or less to be delivered in Liverpool during July-August 1901 on the basis—

400 four pence fifty-five and a half sixty-fourths	...	4·55½
100 four pence fifty-six sixty-fourths ...	...	4·56

With customary brokerage to us for Middling on the terms of the printed Rules of the Liverpool Cotton Association, Limited, as endorsed and subject to Clearing House Regulations and the Arbitration Bye-laws of the Association.

The cotton to be taken with mutual allowances to be settled by arbitration, but any lot below Low Middling may be returned by the buyer under the provisions of Rule 7.

Each 47,200 lbs. to be treated as a separate contract if required.

(*Sd.*) CORRIE MACCOLL & Co.

Messrs. Corrie MacColl on the same day purchased from Moon Bower and Co. 400 and 100 bales for the same delivery. The terms are set forth in Ex: $\frac{R.\ T.}{1}$, which runs as follows:

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DEAR SIRS,

We have this day sold to you the following American Cotton Futures as per As. 3, Contract Form of the Liverpool Cotton Association, Limited, and subject to its rules and regulations :—

Quantity.	Position.	Price per lb.
400	July-August, 1901.	4·55⅛
100	„ „	4·56

MOON BOWER & Co.

At the end of April there was a fall in prices, and this continued with the result that Messrs. David Sassoon and Co. pressed the Bombay purchasers to deposit a sufficient amount to cover the deficiency in price. Accordingly on the 13th of May, 1901, there was deposited with the plaintiff firm by way of equitable mortgage a title deed to cover this deficiency, and on the 26th of July a sum of Rs. 7,000 was deposited as further security.

On the 8th of August, 1901, the plaintiff firm wrote to Tokersey Jadhawji as follows :—

DEAR SIR,

Owing to the continued heavy decline in American cotton please take note that unless you send us a further deposit of Rs. 5,000 by 1 o'clock to-morrow (Friday) we shall wire instructions to London to sell off your open contracts with us.

Begging immediate attention.

P. pro DAVID SASSOON & Co.,
(*Sd.*) HENRY SOLOMON.

On the 9th of August, 1901, a telegram was sent by the plaintiffs' Bombay Branch to their London Branch to sell all the cotton purchased under the orders to which I have referred, and on that same day the sale was effected. This sale resulted in a loss, and in respect of the transaction to which suit No. 695 of 1901 relates, the plaintiffs, after giving the defendants credit for certain amounts, claim by this suit Rs. 7,600 and interest.

To this claim the plea has been set up that the transactions were gambling and wagering transactions.

The suit came on for hearing before Tyabji, J., and the following issues were raised : 1. Whether the plaintiffs duly executed the instructions of the defendants and made agreements

for the purchase of cotton as requested by the defendants? 2. Whether, if so, the said agreements were contracts or agreements by way of gaming and wagering?

On both these issues the learned Judge found in the affirmative and he accordingly dismissed the suit. From this decree the present appeal is preferred, and the sole question argued before us has been whether the transactions were by way of wager or not.

In cases of this description there is a danger of confounding speculation, or that which is popularly described as gambling, with agreements by way of wager; but the distinction in the legal result is vital.

The Indian Contract Act in section 30 provides that agreements by way of wager are void; but that a transaction may fall within this provision of the law there must be at least two parties, the agreement between them must be by way of wager, and both sides must be parties to that wager.

Now it is of the essence of a wager that each side should stand to win or lose according to the uncertain or unascertained event in reference to which the chance or risk is taken.

In *Hampden* v. *Walsh*[1] a wager was described as a contract by A to pay money to B on the happening of a given event in consideration of B paying money to him on the event not happening, while in *Carlill* v. *Carbolic Smoke Ball Company*[2] a more elaborate definition is formulated by the present Lord Brampton on the same lines. The first question then that we must ask ourselves is at what stage of the transaction does this alleged agreement by way of wager come in.

The frame of the issues I have read suggests that it was the agreements made by the plaintiffs in England that were by way of wager, and with this suggestion I will first deal.

Now one of the agreements in England is evidenced by the delivery contract of the 15th March, 1901, Ex. $\frac{S. J. B.}{2}$, which I have read, and which may be taken as typical of all the delivery contracts connected with the transactions in suit.

(1) (1876) 1 Q. B. D. 189 at p. 192.

(2) (1892) 2 Q. B. 484 at p. 490.

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It will be noticed that it incorporates the printed rules of the Liverpool Cotton Association, Limited, and it has not been suggested before us in argument that those rules as they stand point to an agreement by way of wager.

At the same time the evidence all points the other way. Thus it has been sworn that the contract is in the ordinary form, that under such a contract delivery is ordinarily demanded and given, that the purchases made in March and April were ordinary purchases for future delivery, and that they were made under contracts in the ordinary form for future delivery, in the form in which cotton is ordinarily bought and sold for future delivery, and in the form in which delivery is demanded and given. This evidence has not been impugned and I think we should accept it as trustworthy.

But then it is argued that, when the facts are investigated, it becomes obvious that, notwithstanding the terms in which the agreements are expressed, the transactions in suit were by way of wager, and what is relied on for this purpose is the fact that under them no delivery was made, and that David Sassoon and Co. practically never do take delivery.

Under the contracts which come in question in this suit it is true no delivery was made, but then the cotton was sold by reason of the defendants' failure to deposit cover for the deficiency in price, and it is instructive to observe the defendants' attitude in this matter as disclosed by the correspondence.

On the 8th of August, 1901, Sassoons wrote to Tokersey Jadhawji that unless a further deposit was sent by 10 o'clock the next day they would wire instructions to London to sell off the open contracts.

On the 10th of August Tokersey Jadhawji writes as follows:—

DEAR SIRS,

I am in receipt of your Memo. of this day informing me of the sale of 600 bales of cotton purchased on our account through you and am very much surprised at it. Please note that I do not accept the validity of the sale which I dispute.

(*Sd.*) TOKERSEY JADHAWJI.

A letter in the like terms was on the same day sent by Motiram Jadhawji. Though there was no delivery under these agreements, it is proved that in respect of earlier transactions which

matured in April, May and June, tenders were made in six instances (see Ex. $\frac{S.\ J.\ B.}{33}$).

None of these tenders were accepted, the cotton being sold in accordance with the terms of the original letter of instructions, and it is suggested that these tenders were mere blinds, made with a view to give the transactions an appearance that did not really belong to them. This suggestion however rests on no basis, and I can see no reason on the record for a conclusion that those who tendered to Messrs. Sassoons acted otherwise than in good faith.

Dealing in American futures may be speculative, but there is no evidence in this case that would justify us in holding that they are necessarily agreements by way of wager.

Mr. Comber in his cross-examination says:

"There is at times a lot of speculation going on in the market. I should think 90 per cent. of the whole business would be *bonâ fide* and 10 per cent. would be speculative. I am speaking of American futures. I mean 90 per cent. is bought and sold either with the intention of delivery or as cover on some transaction. When we buy cotton as cover it is no intention on part of the purchaser that he will take delivery. If under exceptional circumstances he changed his mind and wanted delivery he would get it. When I say he can always get delivery that is supposing he is dealing with a sound man. That rests on that (*sic*) if my seller is solvent he can always get delivery except in covers in American futures. As a rule there is an enormous deal. More American cotton is sold than is grown and a great deal more is sold in Liverpool than comes here. I can't give statistics. So if in any one month all the people who had purchased ahead for delivery in that month were not to resell and were to ask for delivery, they could not get it because there would not be enough cotton to go round. Of 90 per cent. *bonâ fide* delivery about ½ are covering purchases and ½ would be purchases for delivery. All what I have said about covering purchases relates to my constituents' business as well as mine. I make the covering purchases for constituents. I make them to order, but I don't know whether they are covering purchases or not."

It has been argued before us that purchases for cover cannot be treated as *bonâ fide* business and a doubt has been suggested as to how far, therefore, Mr. Comber's evidence can be relied on. But it is easy to see why Mr. Comber as a business man so classes purchases for cover. The sympathetic movement of the prices of cotton of different classes is a matter of common knowledge, and, as the phrase a "purchase for cover" implies, it

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would not in business be regarded as an unrelated transaction, but as a legitimate means of diminishing risks.

How far this view would meet with approval in a Court of law we need not now enquire, as I see no reason for not accepting Mr. Comber's statement that delivery to a very considerable extent takes place under contracts incorporating the rules of the Liverpool Cotton Association.

In the face of this evidence, which stands uncontradicted, it would be impossible to hold that no *bonâ fide* business is done under contracts framed as those now in question are, and we have no sufficient materials for holding that in this particular instance the contracts into which Messrs. Sassoons entered on the defendants' instructions were agreements by way of wager, that is to say, that they were agreements simply for differences without any intention on either side to deliver.

The sole circumstance on which the defendants rely, the absence of any proof that Sassoons ever take delivery, may be relevant to their intention, but we have nothing in the facts of this case that would entitle us to infer therefrom an intention on the part of their vendors only to wager, and, as I have already pointed out, to make an agreement a wager there must be a common intention to bet.

Then it has been contended that, even if the English contracts were not by way of wager, still the agreements between Sassoons and the defendants were.

But this disregards the express terms of the contract and the essential element of a wager. Under the contract Sassoons were merely Commission agents, entitled as such to their proper remuneration and to reimbursement of expenses, but they took no risks: the only risk that was suggested before us was that which might be the sequel of supervening insolvency, but obviously that is not a risk which converts an otherwise legitimate contract into a wager, and I can find nothing which supports the view that the contract between the parties was not in accordance with the document.

There is an argument advanced by the learned Judge, which I may here conveniently notice: he would impale the plaintiffs on the horns of a dilemma; for he says in effect that the English

contracts were wagers or they were not: if they were wagers, then the plaintiffs obviously are not entitled to recover; if they were not, the result will be the same, since then they would have failed to comply with the authority under which they purported to act.

But in my opinion the second of these horns will not stand the strain to which it is put. The instructions, in my opinon, were not an authority only to enter into wagering contracts: it cannot be, and in fact before us has not been, suggested that the contracts actually made were not in accordance with the instructions, and we have already held they were not agreements by way of wager. The defect of the learned Judge's argument will on analysis be found to be that he has failed to distinguish the rights created by the contracts from the mode in which those rights may subsequently have been dealt with.

So far I have dealt with the case on the basis of section 30 of the Contract Act, but from my conclusions it equally follows that Bombay Act III of 1865 affords no defence to this suit, for in the view I take neither the contracts of Sassoons with the defendants nor the English contracts are agreements by way of wager, and so there is no foundation for the application of bar created by the Bombay Act. There must, therefore, be a personal decree for the amount claimed with interest and also the usual mortgage decree in respect of the deposit of title deeds by way of equitable mortgage.

There will be a similar decree in the second suit, save that in place of a direction for sale of the mortgaged property there will be liberty to apply in the first suit for the application of the surplus proceeds of the sale therein decreed. The plaintiffs must in each suit receive their costs throughout from the defendants therein and will be at liberty to add the same to their security.

Decree reversed.

Solicitors for the Appellants: *Messrs. Crawford, Brown & Co.*

Solicitors for the Respondents: *Messrs. Payne & Co.*