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FULL BENCH.

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[437] FULL BENCH.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, Mr. Justice Brett, Mr. Justice Stephen, Mr. Justice Mitra and Mr. Justice Woodroffe.

BENI MADHAB DASS *v.* SADASOOK KOTARY.*

[28th January, 1905.]

Evidence—Oral evidence—Evidence Act (I of 1872), s. 92, proviso (i)—Wagering contract—Written agreement—Agreement, validity of—Contract, real nature of.

Upon the true construction of s. 92 of the Evidence Act (I of 1872), and specially having regard to proviso (*i*) of that section, the decision in the case of *Juggernauth Sew Bux* v. *Ram Dyal* (1) cannot be regarded as law.

In order to enable a Court to arrive at a decision whether or not an agreement is void on the ground that it is by way of wager, the party who sets up that it is, should be allowed to go into evidence to prove that it is so.

Kong Yee Lone & Co. v. *Lowjee Nanjee* (2) referred to.

Per WOODROFFE, J. If the validity of a written agreement is impeached, it is no defence to point to the apparent rectitude of the document and to claim protection from enquiry under the rule embodied in s. 92 of the Evidence Act, which exists against the contradiction and variance of the terms only of those instruments, the validity of which is not in question. The instances mentioned in proviso (*i*) of that section are illustrative and not exhaustive.

[Ref. 3 L. B. R. 100 (F.B.)]

REFERENCE to Full Bench on appeal by the defendant.

This was an action by the plaintiff-respondent for recovering the balance due from the defendant appellant on account of certain transactions in silver bars. The plaintiff stated his claim to be the difference in price of 534 bars of silver sold to and purchased from the defendant, amounting to Rs. 36,317, out of which it was admitted that the defendant had paid Rs. 20,000, and the claim was for the balance Rs. 16,317. Bought and [438] sold notes passed between the parties of which the following is a copy:—

"I have this day sold by your order and on your account to Babu Saligram Bhagwan Das (10) ten only bar silver of seventeen or seventeen and half betterness at Rs 73-3 (seventy-three and annas three only) inclusive of present import duty (*i.e.*, this rate includes only 5 per cent. import duty; if in future the duty be increased or decreased by the Government at any time before delivery having been taken of the said silver by the buyers, the duty should be added to or deducted from the above price proportionately per 100 bars. No allowance for betterness. Each bar to weigh 3.000 tolas; if more or less either party will pay the difference according to the due rate to be declared at 6 P.M on the due date.

Delivery and cash on the eighth day from Katik Soodi Poornima of the Sambat year 1964. 'Patan' should be completed the day previous to the due date. If the seller has got silver in the Bank he must hand over to the buyer a delivery order on the Bank by 9 P.M. on the Patan day. Delivery order on the Bank for less than (5) five bars will not be accepted.

In absence of such delivery order on the Bank the seller will be required to deliver the silver to the buyer on payment of the value of the silver at his own place or at any place other than the Bank by 6 P.M. on the day of due date.

If the seller fails to deliver the silver by 6 P.M., the buyer will purchase the silver at the market rate on the seller's account and hold him responsible for the difference, if any; if the buyer fails to take delivery of the silver by 6 P.M., the seller

* Reference to Full Bench in Appeal from Original Civil, No. 44 of 1904 in suit No. 834 of 1903.

(1) (1883) I. L. R. 9 Cal. 791. (2) (1901) I. L. R. 29 Cal. 461; L. R. 28 I. A. 239.

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will resell the silver at the market rate on the buyer's account and hold him responsible for the difference, if any. Brokerage from seller at 1 anna per 100 tolas."

The defendant set up the defence that the transactions were by way of wager only.

The action was originally tried by SALE, J.; and his Lordship in giving judgment for the plaintiff observed as follows :—

"The defendant denies liability alleging that the transactions are of the nature of wagering contracts, neither party intending to give or receive delivery of goods, but only to receive or pay differences of price. The plaintiff denies the contracts are wagering transactions and relies upon the facts that, although in respect of the transactions in suit no actual deliveries were either given or taken, there was an option exercisable by the parties under a custom of trade to insist upon actual deliveries under certain circumstances. In accordance with a ruling of this Court which has governed the practice for the last 20 years, the Court is bound to gather the intention of the parties from the terms of the contracts and cannot look at the surrounding circumstances to modify or contradict, the plain language of the documents containing the terms of the contracts. This ruling is laid down in the case of *Juggernauth Sew Bux* v. *Ram Dyal* (1), and it has governed the interpretation [439] of a long series of transactions in rice, Government paper, opium and gunny-bags where the terms of the contracts between the parties were similar to the terms of the contracts in the present case and accordingly these transactions have been regarded as ordinary commercial transactions and not wagering contracts. Reliance is placed by the defendant on the ruling of the Privy Council in *Kong Yee Lone & Co.* v *Lowjee Nanjee* (2), and it is contended that this ruling has destroyed the authority of the ruling of this Court laid down in the case referred to. The Privy Council case does not in express terms overrule the decision of this Court in the case *Juggernauth Sew Bux* v. *Ram Dyal* (1) although no doubt the effect of the Privy Council case is to weaken very much the authority of that case. I do not think therefore it is open to me in a Court exercising Original Jurisdiction to refuse to follow a decision of the Court exercising Appellate Jurisdiction over this Court. So long as that decision has not been questioned or set aside by a Court of equal or superior Jurisdiction, I feel bound to add that though I have followed the ruling in *Juggernauth's* case (1) for many years, I have always regretted the decision of this Court in that case because it has regulated a practice in this Court which has, in my opinion, had the effect of fostering and encouraging a gambling spirit among a certain class of the commercial community. If it were open to me to look at the surrounding circumstances connected with the contracts in suit, I should have no difficulty in holding that they were wagering contracts and not genuine commercial transactions."

There was an appeal by the defendant from the judgment of SALE, J., which came on for hearing before MACLEAN, C. J., HARINGTON AND BODILLY, JJ., and their Lordships made the following order of reference for the decision of the question mentioned therein by a Full Bench :—

"The plaintiff is suing for damages for an alleged breach of contract for the sale and purchase of silver bars. There were several contracts, all in the same form. They are set out in the paper-book. On their face they appear to be ordinary mercantile contracts. The defendant alleges they were merely contracts for differences, and, in effect, were wagering contracts, and he claims to be entitled to go into evidence to prove this. The plaintiff contends that, having regard to the decision of a Division Bench of this Court in the case of *Juggernauth Sew Bux* v. *Ram Dyal* (1) the defendant cannot do this, whilst the defendant urges that he is so entitled, having regard to the observations of their Lordships of the Privy Council in the case of *Kong Yee Lone & Co.* v. *Lowjee Nanjee* (2). The case [440] of *Juggernauth Sew Bux* v. *Ram Dyal* (1) was not followed by the Madras High Court in the case of *Eshoor Doss* v. *Venkatasubba Rau* (3), or by the Bombay High Court in the case of *Anupchand Hemchand* v. *Chamsi*

(1) (1888) I. L. R 9 Cal. 791.
(2) (1901) I. L. R. 29 Cal. 461 ; L. R. 28 I. A. 239.
(3) (1894) I. L. R. 17 Mad. 480.

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Ugerchand (1). Incidentally the question was touched upon in the case of *J H. Tod* v. *Lakhmidas Purushotamdas* (2). We incline to the opinion that the case of *Juggernauth Sew Bux* v. *Ram Dyal* (3) cannot, in the face of observations of the Judicial Committee in the case above referred to, be now considered as law.

In these circumstances the question we submit for the consideration of the Full Bench is, whether the decision of *Juggernauth Sew Bux* v. *Ram Dyal* (3). p. 791, is now to be regarded as law?"

Mr. *Hill* (Mr. *A Chaudhuri* and Mr. *Knight* with him) for the appellant. *Juggernauth Sew Bux* v. *Ram Dyal* (3) was wrongly decided and has been practically overruled by the Privy Council in *Kong Yee Lone* v. *Lowjee Nanjee* (4), nor has it been followed by the other High Courts : see *Eshoor Doss* v. *Venkatasubba* (5), *Anupchand* v. *Champsi Ugerchand* (1) and *J H. Tod* v. *Lakhmidas* (2). Parol evidence is admissible to prove the real nature of the contract.

[MACLEAN, C. J., We will hear the other side.]

Mr. *Dunne* (Mr. *Sinha* with him) for the respondent. Proviso (*i*) to s. 92 of the Evidence Act was considered in *Juggernauth Sew Bux* v. *Ram Dyal* (3). The facts that may be proved in order to invalidate a written document are enumerated in that proviso, and the fact sought to be proved in this case does not come under any of them. It cannot be said that the question of "illegality" arises, because illegality involes the question of consideration (see s. 23 of the Contract Act); there is no question of consideration here. The Privy Council has not overruled *Juggernauth Sew Bux* v. *Ram Dyal* (3) by their judgment in *Kong Yee Lone & Co.* v. *Lowjee Nanjee* (4).

[441] MACLEAN, C. J. The question submitted to us is whether the decision in the case of *Juggernauth Sew Bux* v. *Ram Dyal* (3) can now be regarded as law. With every respect to the learned Judges, who decided that case, I should have been of opinion, apart from the expression of judicial opinion in the case which I shall refer to in a moment, that, upon the true construction of section 92 of the Indian Evidence Act, and specially having regard to proviso (*i*) of that section, that case had not been properly decided. It seems to me that the learned Judges have not given sufficient effect to the proviso in question. Without going into detail, it seems to me that it would be very difficult to hold that the case here did not fall within the precise terms of that proviso. But if there were any doubt upon this, it seems to me that that doubt is set at rest by the observations of their Lordships of the Judicial Committee in the case of *Kong Yee Lone & Co.* v. *Lowjee Nanjee* (4). One can hardly suppose that the learned Judges, who then composed that Committee, in making the observations they did, could have lost sight of the provisions of section 92 of the Evidence Act, which is as binding in Rangoon as in Calcutta. Their Lordships say : —" Two parties may enter into a formal contract for the sale and purchase of goods at a given price, and for their delivery at a given time. But if the circumstances are such as to warrant the legal inference that they never intended any actual transfer of goods at all, but only to pay or receive money between one another according as the market price of the goods should vary from the contract price at the given time, that is not a commercial transaction, but a wager on the rise or fall of

(1) (1888) I. L. R. 12 Bom. 585.
(2) (1892) I. L. R. 16 Bom. 441.
(3) (1883) I. L. R. 9 Cal. 791.
(4) (1901) I. L. R. 29 Cal. 461 ; L. R. 28 I. A. 239.
(5) (1894) I. L. R. 17 Mad 480.

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the market. The question is, of which nature were the dealings which formed the consideration for the notes sued on? Were they for genuine purchases of rice, or only for payment of money by one or the other according to the changes and chances of the market?" How is the Court, in adjudicating on the case, to ascertain what the circumstances are, or what the real nature of the dealings was, unless the party who sets up that it is a wagering contract is allowed to go into evidence [442] upon the matter? Under section 30 of the Contract Act, agreements by way of wager are void. How is the Court to arrive at a decision whether or not an agreement is void on the ground that it is by way of wager unless it is open to the party, who sets up that it is, to go into the evidence? Upon these grounds, I think that the question referred to us must be answered in the negative, namely, that the case mentioned in the question submitted cannot be regarded as law, and that with this intimation of our opinion the case must go back to the referring Court. The costs of this reference will be left to that Court to deal with.

BRETT, J. I agree with the Chief Justice.

STEPHEN, J. I also agree with the Chief Justice.

MITRA, J. I also agree with the Chief Justice.

WOODROFFE, J. I agree that the question referred to the Full Bench should be answered in the negative. The rule of evidence which is embodied in the first paragraph of section 92 of the Indian Evidence Act presupposes the validity of the transactions evidenced by the documents to which that rule is to be applied. If therefore, that validity is impeached, it is no defence to point to the apparent rectitude of the document and to claim protection from enquiry under a rule which exists against the contradiction and variance of the terms only of those instruments the validity of which is not in question. In such cases, the Court is not bound by what has been described as the mere paper expressions of the parties, and is not precluded from enquiring into the real nature of the transaction between them. The first proviso to that section, therefore, declares that any fact may be proved which would invalidate any document. To prove that a contract is void as by showing that it is an agreement by way of wager is to invalidate it. It has been suggested, however, that the only cases in which oral evidence may be given to invalidate a document are those specifically [443] mentioned in proviso (i), namely, fraud, intimidation, illegality, want of due execution or capacity, want of failure of consideration or mistake. But in my opinion this is not so, as the instances given are not exhaustive, but, as appears from the use of the words "such as," are set out by of way of illustration only. Assuming then that, as has been argued, the present case does not come within the term "illegality" (which it is unnecessary to consider), it is still within the words of the proviso. The admissibility, therefore, of such evidence as that which the defendant seeks to give in this case is not only not excluded by the general rule which is embodied in section 92, but is expressly recognized by the first proviso to that section.

Case remanded.

Attorneys for the appellant: *Manuel*, and *Agarwalla*.

Attorney for the respondent: *N. C. Bose*.