

CALCUTTA HIGH COURT

Walter Mitchell

Vs

A. K. Tennent

(Page, J.)

23.04.1925

JUDGMENT

Page, J.

1. By consent the evidence which has been adduced before me is to be treated as evidence in both suits subject to the extent to which the evidence or any part thereof may be relevant to particular issues in either of the two suits.

2. The matters in controversy arise out of a dispute relating to an alleged order given by Tennent to Mitchell to back a horse called "Better Hope" at the Barrackpore Races on the 2nd April 1923. I take Colonel Tennent's suit first.

3. The claim in this suit is to recover the sum of Rs. 9,000 being the balance of a sum which it is alleged was received by Mitchell as the proceeds of a bet made by Mitchell on behalf of Tennent, the residue Rs. 11,000 having been paid on the 4th April 1923 by Mitchell to Tennent. There is an alternative claim to recover Rs. 20,000 under an alleged agreement set out in the plaint.

4. Now, in my opinion, the first claim in this suit is wholly misconceived. Neither in this country nor in England has the Legislature gone so far as to enact in express terms that betting transactions are illegal, but it is clear that both in India and in England the Legislature regards it as undesirable in the public interest that any assistance should be afforded by Courts of Law to enforce obligations which have been created in connection with betting or wagering transactions. In India it has expressly been enacted that "agreements by way of wager are void; and 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" (Contract Act, Section 30). Similar provisions obtain in England, but up till 1892 it was not deemed necessary on grounds of public policy, in England to include within the ambit of the legislation relating to betting and wagering transactions in which a principal had instructed an

agent to back a horse for him. Accordingly, it was held by a majority of the Court of Appeal in 1884, confirming the decision of Mr. Justice Hawkins, that where a principal had instructed an agent to make a bet for the principal, and the bet had been lost, although the agent who had in fact made the bet was not liable to a suit to recover the sum which he had staked, nevertheless, if the agent paid the bet which he had lost, he was entitled to recover from his principal the sum which he had paid on his behalf. Brett M. R., however, in a dissenting judgment, observed that "the plaintiff's business, although it may not be illegal, is directly objected to by the law, and the contracts made by him in his business cannot be enforced: it is a business of which the law ought not to take notice, and, therefore, the inconvenience and the loss which the plaintiff may suffer in his objectionable business, form no ground for an action for revoking an authority which the principal ought not to have given": *Read v. Anderson*¹ Similarly in *Bridgers v. Savage*² the Court of Appeal decided that where a principal had instructed an agent to make a bet for him, and the agent had done so and had received the proceeds of the bet, the principal was entitled to recover from the agent the sum which he had received on the principal's behalf. Now, in 1892 an Act was passed by which the Legislature enacted that in the Circumstances that I have set out the agent would not be entitled to recover from the principal the moneys which he had paid to the bookmaker in respect of the bet which was lost. The Legislature must, I think, have been moved to pass the Gaming Act of 1892 because it was regarded that public opinion had become more enlightened, and that the exigencies of public policy demanded that further restrictions should be placed upon the efficacy of wagering transactions. Now, although legislation has not been passed to overrule the converse proposition of law laid down in *Bridgers v. Savage*³. the principle which underlies the legislation of 1892 must apply, in my opinion, as well to the one set of circumstances and to the other. If it is regarded as contrary to the public interest that the agent who has effected a bet, and has paid money to the bookmaker on behalf of his principal, should be entitled to reimbursement from the principal, I fail to see why it is not equally against public policy to permit the principal where his agent has received the proceeds of a successful bet to recover from the agent the sum which he has received. If and when it becomes necessary to determine that question, it must not be taken that I should hold without further argument that in this country a principal is entitled, to recover the proceeds of a bet which has been received on his behalf by his agent. It seems to me that to permit him to do so would be to act in opposition to the dictates of public policy relating to betting transactions. It is unnecessary, however, finally to determine that question in this case, because no evidence has been adduced to prove that Mitchell backed "Better Hope" on behalf of Tennent, or otherwise, or at all, or that he received the proceeds of the bet see also *Cohen v. Kittell*⁴ *T Cheshire v. Vaughan Bros*⁵ and *Maskell v. Hill*⁶. With respect to the alternative claim, if the plaintiff proves the agreement which he has alleged, his cause of action (if any) has not yet arisen. For these reasons, in my opinion, the suit by Tennent against Mitchell is misconceived, and must be dismissed with costs.

5. As regards the suit brought by Mitchell against Tennent different matters arise for consideration. The suit is brought to recover the amount due under four cheques drawn by Tennent in favour of Mitchell amounting in the aggregate to Rs. 11,000. The first cheque bears date 1st October 1921. It is drawn in favour of Mitchell by Tennent for Rs. 2,500; there are two similar cheques, dated 1st November and 1st December, and a fourth cheque dated 1st January for Rs. 3,500. The execution of these cheques is admitted, and the payment of Rs. 11,000 as the consideration for executing the same is also admitted. In the alternative, Mitchell claims the like sum as being money lent and repayable upon demand, such demand having been made before the suit was filed.

6. Now, the first defence which is raised is that the cheques in suit are not cheques at all because, although they purport to have been executed on the 1st October, 1st November, 1st December 1923, and 1st January 1924, respectively, in truth and in fact all of them were drawn by Tennent and delivered to Mitchell on the 4th April 1923. In my opinion, there is no substance in this contention. A cheque is defined in the Negotiable Instruments Act (XXVI of 1881, Section 6) as "a bill of exchange drawn on a specified banker and not expressed to be payable otherwise than on demand". In India a post-dated cheque is admissible in evidence although it bears a stamp representing duty payable in respect of a cheque, and not the ad valorem duty payable in respect of a bill of exchange : *Ramen Chetty v. Mahomed Ghose*⁷ *Motilal Shivlal v. Jagmohandas Vundravandas*⁸ The cheques in suit are "not expressed to be payable otherwise than on demand" and, in my opinion, such post-dated cheques are cheques, and after the due dates may be sued upon as cheques: *The Royal Bank of Scotland v. Tottenham*⁹

7. Now, since these documents are negotiable instruments, the execution of which, and the consideration for which, are admitted, it is not permissible, pursuant to the provisions of Section 92 of the Indian Evidence Act, to adduce oral evidence to contradict or vary or alter the terms thereof. But Under Section 92, proviso (3), it is provided that "the existence of any separate oral agreement constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property may be proved". Now, the true construction, in my opinion, to be placed upon that proviso is that the provisions thereof are inapplicable in a case in which any obligation under the written contract has attached, and that if the effect of the alleged contemporaneous oral agreement is merely to suspend the performance of the obligations contained in the written contract, evidence of such oral agreement cannot be admitted. On the other hand, it is permissible to adduce evidence of a contemporaneous oral agreement under which the parties to the written contract agreed that until the happening of a certain event no obligation whatever under the written agreement should attach, or, in other words, that until the condition precedent has been fulfilled, the written agreement should be and remain inoperative

and of no effect: *Jugtanund Misser v. Nerghan Singh* (1880) I. L. R. 6 Calc. 433(Supra). *Cohen v. The Bank of Bengal*¹⁰ *Ramjibun v. Oghore Nath Chatterjee*¹¹ *Vishnu Ramchandra v. Ganesh Krishna Sathe*¹²

8. Now, the question of fact which I have to determine in this suit is whether Tennent has proved to my satisfaction a separate agreement which amounts to a condition precedent within the meaning of proviso (3) of Section 92 of the Evidence Act. The material facts are as follows: A dispute arose on the 2nd April 1923 during the course of the racing at Barrackpore as to whether Tennent had instructed Mitchell to back a horse which ran in one of the races, viz., "Better Hope", Rs. 5,000 each way, that is, for a win and for a place. Tennent consistently has maintained that such an order was given to Mitchell. On the other hand, Mitchell has protested with equal vigour that no such order was given to him. "Better Hope" won the race. I do not propose to determine that issue in this suit for the following reasons: after the race was over Tennent and Mitchell discussed the disputed order, but could arrive at no satisfactory conclusion as to what should be done for the purpose of settling the matter. On the morning of the 4th April, however, Mitchell and Tennent went together to the Royal Calcutta Turf Club, and saw Captain Howard, the Secretary. Captain Howard refused officially to interfere in the matter, but stated that each of the parties had better put up a case which he would lay before the Stewards of the Turf Club. At that time both Mitchell and Tennent had expressed their willingness to have the question as to whether this order had been given, and the indebtedness (if any) of Mitchell thereunder, adjudicated upon by some impartial person or persons. After leaving the Turf Club the parties repaired to Spence's Hotel, and either at Spence's Hotel, as Tennent alleges, or at Tennent's place of business, as Mitchell asserts, an agreement was finally arrived at between the parties. Mitchell stated that the final arrangement which was reached at Tennent's place of business was to the following effect: there was a balance of Rs. 1,500 in respect of racing commissions executed by him for Tennent, which was due and owing by Tennent. On the other hand there was Tennent's claim for Rs. 25,000 in respect of the alleged order to Mitchell to back "Better Hope". Mitchell stated that at that time he thought that Tennent was a man of substance and in a good position, and that he could assist Mitchell by supporting Mitchell's application to obtain a license as a bookmaker from the Turf Club, and that some four or five weeks previously he had promised to grant a loan to Tennent to help him to tide over his immediate financial difficulties if Tennent failed to make money by backing horses at the Barrackpore Meeting. He further stated that finally it was arranged between the parties that if Tennent gave up his disputed claim to Rs. 25,000 Mitchell would forego the debt of Rs. 1,500 which admittedly Tennent owed to him. He further stated that as Tennent was agreeable that this course should be taken the parties agreed that Mitchell should lend Tennent Rs. 11,000 upon the security and in accordance with the terms of the four cheques in suit. I am unable to accept Mitchell's story as regards this alleged

arrangement. It seems to me that such a story is entirely inconsistent with two admitted facts: (1) that on that very day Tennent wrote a letter addressed to the SS. "Naldera" at Bombay to Mitchell, who in fact travelled by that vessel to Australia, the terms of which are inconsistent with the arrangement which Mitchell alleges had been arrived at; (2) on the 11th May 1923 Mitchell in Sidney received from the Turf Club a letter enclosing Tennent's application for the adjudication of the dispute with reference to this alleged order, and calling upon Mitchell to state what he had to say in respect thereof. To that letter Mitchell sent no reply. If the matter had finally been settled in the sense which Mitchell stated in the witness box, to my mind the natural and reasonable course for Mitchell to take would have been to have written to the Stewards of the Turf Club informing them that there was nothing to adjudicate upon inasmuch as the matter had been amicably and finally settled in the sense which he stated in the witness box. Nowhere in any document at any time has Mitchell set out the terms of this alleged agreement, and, in my opinion, no such agreement was ever arrived at. On the other hand, Tennent gave his version of the agreement which was arrived at on the 4th April at Spence's Hotel, and in considering which of the two stories ought to be accepted, it must be borne in mind that until the written statement was filed in Mitchell's suit Tennent had not put into writing the terms of the agreement to which he deposed in the witness' box, and farther that both in the letter to Mitchell to which I have referred, and in his application to the Turf club, Tennent had referred to a loan from Mitchell. According to Tennent after the interview which admittedly the parties had with Captain Howard in the morning of the 4th April Tennent was fortified in the view he held that any reasonable tribunal would find in his favour if an enquiry were to be held in respect of the disputed order. On the other hand, there is no doubt that Mitchell was extremely dissatisfied with the result of the interview with Captain Howard. Tennent stated that at Spence's Hotel both he and Mitchell maintained that his own story was the correct one. What was to happen? How was the dispute to be settled? Now, racing men are accustomed, and rightly accustomed, to have their debts of honour settled promptly; ex concessis Mitchell was leaving India that very day, and it was obviously in harmony with the environment in which they as racing men spend so much of their time that the matter should forthwith be settled. It was important for Tennent, because it was most undesirable, as he was so closely connected with racing circles, that a dispute of this nature should remain outstanding. He was also anxious that the matter should immediately be settled, because the whole of the liability in respect of this bet had not been undertaken by himself, and he had to meet his obligations to his friends. It was also extremely desirable in the interest of Mitchell that the matter should immediately be adjusted, for Mitchell had been a bookmaker, and was anxious to be reinstated, and to obtain a license to "stand up" at the races in Calcutta and Barrackpore. He was also extremely anxious to obtain the good offices of Tennent in order to enable him to obtain a license to carry on business as a bookmaker. Now, in these circumstances it was only natural that some arrangement should have been arrived at. Tennent's version of the

arrangement which was arrived at was to this effect. Mitchell stated that he must leave Calcutta that every afternoon, and that he was going to Australia, but that he would be back in Calcutta in September. Mitchell urged that under the circumstances the matter could not be adjudicated upon until he came back, and suggested that the best way to get over the immediate difficulty was that he should let Tennent have Rs. 11,000 (which was about half of the sum that Tennent claimed), and that when he came back in September the dispute could immediately be submitted to the arbitrament of some one or more impartial persons; and that if it was decided that no order had been given, and that Mitchell was not liable to pay Rs. 20,000 or any sum to Tennent, after the adjudication had taken place Tennent should repay the Rs. 11,000 which Mitchell had handed to him. On the other hand, if the adjudication resulted in a manner favourable to Tennent, and the decision was that Mitchell was bound to pay Tennent, then it was suggested that the Rs. 11,000 should be retained by Tennent, and that Mitchell should pay to Tennent any further sum which might have been awarded to him. Tennent agreed to this arrangement, and suggested that if the money was given to him he should give a receipt for it. Mitchell, on the other hand, stated that he would not be content with a receipt, but would like to have something tangible as security, such as cheques; Tennent after some demur agreed, and the first cheque was dated 1st October and the other cheques on subsequent dates because Mitchell, had assured Tennent that he would return in September and the matter would be decided between them before the 1st October.

9. Now, in my opinion, that is the substance of the agreement which was concluded between the parties, and the effect of that agreement was not to contradict or to vary the terms of the four cheques, but to create a condition precedent to the attachment of any obligation under the four cheques, which would remain inoperative until after the adjudication had taken place. In my opinion, such an agreement comes within the terms of proviso (3) of Section 92 of the Indian Evidence Act.

Cases Referred.

- 1(1884) 13 Q. B. D. 779, 782
- 2(1885) 15 Q. B. D. 363
- 3(1885) 15 Q. B. D. 363
- 4(1889) 22 Q. B. D. 680
- 5[1920] 3 K. B. 240
- 6[1921] 3 K. B. 157
- 7(1889) I. L. R. 16 Calc. 432
- 8(1904) 6 Bom. L. R. 699
- 9[1894] 2 Q. B. 715
- 10(1880) I. L. R. 2 All. 598
- 11(1897) I. L. R. 25 Calc. 401
- 12(1921) I. L. R. 45 Bom. 1155