Sent back.

1931

Present : **Lyall Grant J. and Maartensz A. J.**

SWAMINATHAN CHETTY *v.* GORDON DOUGLAS *et al.*

286—*D. C. Colombo*, 31,784.

Contract Illegal consideration—Money lent to Turf Commission Agent—Share of profits—Promissory note.

Where the plaintiff lent money to the defendants on a promissory note for the purpose of carrying on business as Turf Commission Agents and the defendant agreed to give the plaintiff a share of the profits in the business as part consideration for the loan,—

Held, that the money was not recoverable.

THE plaintiff sued the defendants on a promissory note for the recovery of a sum of Rs. 4,000 with interest. Only the third defendant filed answer, and stated that the note was granted to the plaintiff on his undertaking among other things, to enter satisfaction of a judgment in a case and to apply the balance in financing the business of Turf Commission Agents, carried on by the defendants. At the trial, certain issues were framed of which the fifth was as to whether the consideration for the note was illegal. The third defendant gave evidence and produced an agreement having reference to the loan. This agreement was signed by all the defendants only. But the plaintiff admitted that he agreed to its terms. He further admitted that the defendants agreed to pay him 15 per cent. interest and in addition agreed to give him a share in the profits of a bucket shop.

The learned District Judge, however, held that the loan was not in fact used for purposes of the Turf Commission Agency and gave judgment for the plaintiff.

H. E. Garvin, for defendant, appellant.—The plaintiff admits that the money was lent to the defendants for the purpose of carrying on the business of Turf Commission Agents. It was even part of the agreement that the plaintiff was to take a share of the profits. The money is therefore not recoverable at law. He who lends another money with which to gamble or wager has no right to recover it. (*Walter Pereira's Laws of Ceylon, p.* 600 ; *Van Leeuwen* 4–14–5 ; *Halsbury, vol. XV. p.* 278).

Hayley, K.C. with him *E.F.N. Gratiaen*, for plaintiff, respondent.—The evidence discloses that the defendants did not require money to pay their losses on wages. The money lent by the plaintiff was therefore clearly employed for some other purpose. It has been held in England that a loan to bookmakers is recoverable where there is no evidence of the illegal purpose of the loan, for the money may have been required for rent, salaries, &c. (*Humphrey v. Wilson.*[1])

[1] *(1929) 141 L. T. 469.*

Under the Trusts Ordinance, No. 9 of 1917, section 86, a person to whom property is transferred for an illegal prupose which is not carried out into execution holds the property in trust for the transferor. The plaintiff is therefore entitled to recover his money unless there is strict proof that the money was spent, and lost, by the defendants on the wagering contracts.

The evidence discloses that the defendants were successful in the Turf Commission Agency business. The money is therefore recoverable at law. If A successfully stakes money on B's behalf on a wager, B is entitled to recover the proceeds from A. (*Maasdorp III., 28.*)

Garvin, in reply.

March 30, 1931. LYALL GRANT J.—

This is an appeal from a decision of the District Judge of Colombo rejecting the defence in an action on a promissory note. The plaintiff is a Chetty and he sued the defendants on a promissory note dated December 21, 1928, for the sum of Rs. 4,000, with interest thereon at the rate of 15 per cent. per annum.

There were three defendants, but only the third defendant entered a defence. He admitted the he signed the note but stated in paragraph 2 of his answer that the note was granted to the plaintiff on his giving the following undertaking :— (1) to enter satisfaction of judgment in a certain case, (2) to pay a third party a sum of Rs. 1,505, and (3) to apply the balance in financing the business of Turf Commission Agents carried on by the defendants. The defendants also stated in paragraph 3 that part of the agreement was that he should transfer to the plaintiff, as security for the advance, a certain motor car and that, in addition to the interest payable on the note, the plaintiff was to receive a sum equivalent to one-fourth of the nett profits of the business of Turf Commission Agents so long as any sum remained outstanding on the note. The defendant also averred that the plaintiff in breach of his undertaking failed to enter satisfaction of judgment and had only advanced a sum of Rs. 1,700.

The defendant pleaded that the note sued upon was not enforceable in as much as it contained false statements as to the sum actually borrowed, and also that the plaintiff, who was a money lender, had failed to comply with the requirements of section 8 (1) of Ordinance No. 2 of 1918. Section 8 (1) provides that a money lender should keep a regular account of each loan, clearly stating each item incidental to it and entering them regularly in a book.

At the trial the issues agreed to were the following :—

(1) Was the note sued upon given on the undertaking set out in paragraphs 2 and 3 of the answer ?

In this connection it was admitted that the plaintiff did not enter satisfaction of the decree in the District Court case.

(2) Does the note contain false statements as to the sum actually borrowed, sums paid, and the interest charged ?

(3) Is the note a fictitious one ?

(4) Has the plaintiff complied with section 8 (1) of Ordinance No. 2 of 1918 ?

(5) Was there consideration for the said note, if so, is the consideration illegal ?

The third defendant gave evidence in support of the statements in his answer and he produced an agreement dated December 21 having reference to this loan. This agreement was signed by all the defendants but not by the plaintiff ; the plaintiff, however, admits that it was submitted to him and agreed to by him. The plaintiff gave evidence and denied altogether the version of the transaction given by the third defendant. He said that he paid the full amount Rs. 4,000 in money deducting nothing for interest. He admitted that the defendants agreed to pay him at the rate of 15 per cent. and in addition to give him a share in the profits of what he called

a bucket shop. He also stated "I was to be a shareholder of the profits. I was not to be liable for the losses".

The plaintiff admitted that he subsequently paid the sum of Rs. 1,500 to Don Andris on account of the car, but insisted that this was not part of the Rs. 4,000 borrowed.

The agreement, which is admitted by both parties, after narrating that the three defendants have requested the plaintiff to advance to them the sum of Rs. 4,000, "to be utilized towards the business of the Baillie Street Commission Agency" and that he has agreed to lend the sum of Rs. 4,000, and they have agreed to "repay the sum of Rs. 4,000 with interest stipulated in the said note on demand at twenty-five per cent. of the profits out of the said business of Baillie Street Commission Agency", proceeds to provide that the defendants agreed to pay the plaintiff the agreed profit "soon after each race is over, and the said 'defendants' further agree with the said 'plaintiff' not to transfer, assign, mortgage, or in any other way dispose of the said business without the written consent of the said 'plaintiff'".

There is a proviso that the plaintiff is not to be liable for the losses of the business.

The learned District Judge does not accept the evidence for the defence. He says that, if there was an agreement that part of the money should be utilized for payment to Don Andris for a car, and that Rs. 1,500 was to be taken by the plaintiff in satisfaction of the judgment he had obtained against the first defendant, that could easily have been inserted in the agreement, and he proceeds "the only purpose for which D 1 was executed was in order to make the position between the parties quite clear". He therefore accepts the plaintiff's story that the full amount of Rs. 4,000 was paid, and he finds for the plaintiff on the first, second, and third issues, viz., that the note was not fictitious and does not contain any false statements with regard to the sum actually borrowed or interest charged.

Again on the fourth issue, he finds that the defendants have failed to prove that the note does not comply with section 8 (1) of Ordinance No. 2 of 1918.

He then proceeds to discuss the fifth issue. In discussing this, he says that the defendant apparently borrowed the money for the purpose of paying Andris and possibly to pay off other liabilities. He finds that the loan was not in fact used for the purposes of the Agency, but that it was used for some other purpose.

The learned Judge then proceeds :— "I hold therefore that the money lent by the plaintiff was not intended to be used for the purpose of the Commission Agency, and was not in fact used for that purpose".

I find some little difficulty in understanding how the learned Judge can hold in the first place that the defendant's story is untrue and that the money was lent on the terms and for the purposes embodied in the agreement and on the facts, that is, that the whole Rs. 4,000 was to be used for the purposes of the Commission Agency, and later, on another issue, find that the money lent by the plaintiff was not intended to be used for the purposes of the Commission Agency.

The onus of proof in such a case as the present is, of course, upon the defence, and I think the safest plan is to accept only those parts of the defendant's story which are accepted by the plaintiff. If one does this, as has been done by the learned District Judge, in considering the first four issues, it follows that upon these issues the judgment must be confirmed, but different considerations apply when one comes to consider the fifth issue.

The question is to be considered on this issue is whether this was a gaming contract such as will preclude the plaintiff from recovering any money paid on the contract.

The law on Gaming in Ceylon is very shortly set out in *Walter Pereira's Laws of Ceylon, p.* 600, where he says, *inter alia*, " He who lends to another money with which to gamble or wager has no right to recover it ". This is a quotation from Van Leeuwen.

Van Leeuwen says in 4.14.4 " Whatever any one has given for an unlawful or otherwise dishonest purpose, that is if the improper purpose is on the side of the receiver alone, may be demanded back, but if the improper purpose be on both sides the payment made thereunder holds good ", and in 4.14.5 " for this reason the winner in gaming, or gambling, cannot lawfully recover his promised winnings, and on the other hand, he who has once paid, has no right to receive it back ; so much so that he who lends another money with which to gamble or wager has no right to claim it back again ".

The South African Law is given in *2 Nathan, paragraph* 768, *p.* 614. After setting out the law as defined by Van Leeuwen, Nathan refers to a distinction drawn by Voet, which, he says, has been supported in the South African Courts. The distinction is as follows :— " If a third party who has no interest in the wager or unlawful game, lends money to a player, the lender can recover the money lent ; but if the lender is himself a player, or interested in the result of the stake or game, he cannot recover."

The plaintiff here admits that the money was intended to be used for the purposes of the Baillie Street Commission Agency, in accordance with the agreement, and that part of the consideration for the loan was that he should receive one-fourth of the profits of the business to be calculated after each race was over. The position in which the lender here put himself was, it seems to me, to make himself interested in the result of the profits of the business, in other words, interested in the result of the stake or game.

We were, however, referred to the case of *Humphrey v. Wilson and others,*[1] where it was held by the Court of Appeal in England on the English Gaming Acts " that a loan to a firm of bookmakers for the general purposes of the business and charged by deeds on the assets of the partnership in the absence of proof that the money was required for the purpose of making bets, is not illegal as being for the re-imbursing or repaying of any money knowingly lent or advanced for betting ".

The reasons for this decision are stated by the Lord Chief Justice, who bases it on the following grounds :—

" It is admitted, as I have said, that the plaintiff knew that the defendants carried on business in partnership as bookmakers, and that the money was lent to be used as capital for the partnership. But there is not otherwise any evidence of the particular purposes for which the money was intended to be used, or of the plaintiff's knowledge of these purposes. The loan may have been required for the payment of betting duty, or rent, or salaries of employees, or for the discharge of other existing liabilities of the partnership. In these circumstances it cannot, I think, be said, that the defendants, upon whom the onus of proof lies, have established that the money was knowingly lent or advanced for betting."

The English Statues appear to have the same effect as the Roman Dutch Institutional writers, *i.e.*, " money knowingly lent or advanced for betting " appears to be the same as what Van Leeuwen meant by " money lent with which to gamble or wager ".

Accepting this English decision as applicable to a case brought under Ceylon law, I think a distinction must be drawn.

If the plaintiff here had merely lent the money to the partnership for the purposes of their business he would have been in the same position as the plaintiff

[1] 141 *Law Times*, 469.

in the case just cited. In the present case, however, the plaintiff admits that he was to be a shareholder in the profits of the business. It may be argued that it is possible to separate the proviso that gave a share in the business from the proviso expressed on the face of the promissory note—to give effect to the one and not to the other. I do not however think that one can dissect the contract. Either the whole transaction is a legal one or it is illegal.

I think it is illegal for the reason that the person who lent the money interested himself, as part of the transaction, in the business, which was an illegal business. In other words, he became himself a player interested in the result of the stake or game.

I am, of opinion, therefore that he must fail in his action on the promissory note.

The case may seem a hard one and the defendant may seem to have gained an advantage totally undeserved, but it is not for his benefit that the law is made. It is made to discourage gambling and the support of gaming establishments.

I would set aside the judgment of the learned District Judge and direct that the plaintiff's action be dismissed as against the third defendant but without costs in this Court or in the Court below.

MAARTENSZ A.J.—

This was an action for the recovery of a sum of Rs. 4,000 alleged to be due on a promissory note made by the defendants.

The third defendant contested the claim alleging that the note sued on was granted to plaintiff on his undertaking (*a*) to enter satisfaction of judgment in case No. 29,906 of this Court—the first defendant was plaintiff's judgment-debtor in that action for a sum of Rs. 1,500 ; (*b*) to pay to one Don Andris Appuhamy a sum of Rs. 1,505 ; and (*c*) to apply the balance in financing the business of Turf Commission Agents, and that there was a failure of consideration except for a sum of Rs. 1,700.

The following objections of law were also taken to the claim, namely, (1) that the note contained false statements as to the actual amount borrowed, the sum paid and interest charged, and was therefore fictitious within the meaning of Ordinance No. 2 of 1918 ; (2) that the plaintiff, a money lender, has failed to comply with the requirements of section 8 (1) of Ordinance No. 2 of 1918 and cannot therefore maintain the action ; and (3) that there was no consideration for the said note, or alternatively that the plaintiff cannot recover as the consideration, if any, is illegal.

The action was tried on the following issues :—

(1) Was the note sued upon given on the undertaking set out in paragraphs 2 and 3 of the answer ?

It was admitted that the plaintiff did not enter satisfaction of the decree in D. C. No. 29,906.

(2) Does the note contain false statements as to the sum actually borrowed, sums paid, and the interest charged ?

(3) Is the note a fictitious one ?

(4) Has plaintiff complied with section 8 (1) of Ordinance No. 2 of 1918 ?

(5) Was there consideration for the said note, if so, is the consideration illegal ?

The only witnesses called were the plaintiff and the third defendant. The learned District Judge rejected the evidence for the defence as it was inconsistent with the terms of a contemporaneous agreement signed by the defendant. This agreement, or rather a copy of it, marked D 1, was produced by the third defendant. He had to produce it in support of his plea that the consideration for the note was illegal. On the issue whether the consideration was illegal the learned District Judge held that on the evidence of the third defendant no money

was required for the business of a commission agency and that the loan was not, in fact, used for the purpose of the agency but for some other purpose.

The contention in appeal was that the learned District Judge had erred in accepting a part of the case for the plaintiff and a part of the evidence for the defence so as to complete the plaintiff's case. It was argued that the evidence for the defence should have been accepted and judgment entered only for the admitted amount or plaintiff's claim dismissed on the ground that the money had been lent for the purpose of gaming.

The difficulty in the case arises from the fact that the third defendant's plea that the money was lent for the purpose of gaming is inconsistent with the principal defence that there was a partial failure of consideration.

The first question for determination is whether the money lent was lent for the purpose of gaming.

The third defendant's evidence is that second defendant and two others were running a bucket shop (that is, a place in which the business of taking bets on horse-racing is carried on and totalizator dividends paid to those people who back winning horses less a small per cent. commission) and plaintiff suggested that second defendant should take it over and run it with first and third defendants. They agreed and plaintiff said he would pay Don Andiris Rs. 1,500 and enter satisfaction of his judgment against Porrit for Rs. 1,500. The balance was to be drawn upon as required.

The third defendant admitted that a "bucket shop" was a ready money business for which no capital was required.

The effect of third defendant's evidence is that plaintiff, in consideration of the defendants starting a bucket shop and paying him a share of the profits, agreed to pay off certain debts due from them amounting to Rs. 3,000, and gave the first defendant Rs. 200 and kept Rs. 800 to be drawn by the defendants as required.

The Chetty's case is that he lent the defendants Rs. 4,000 at 15 per cent. interest and a share in the profits of the bucket shop.

The terms on which the money was lent were embodied in the agreement D 1. This agreement, after reciting that the first defendant is the proprietor of the Baillie Street Commission Agency and that the second and third defendants are assisting him in the management of the business, sets out that—

> "The parties of the first, second, and third part have requested M. T. T. K. R. S. Saminathan Chetty to lend and advance to them the parties of the first, second, and third parts a sum of Rs. 4,000 to be utilized towards the business of the Baillie Street Commission Agency and the said M. T. T. K. R. S. Saminathan Chetty has agreed to lend and advance the said sum of Rs. 4,000. The party of the first, second, and third part being (*sic*) agreed to repay the said party of the fourth part the said sum of Rs. 4,000 with interest stipulated in the said note on demand, at twenty-five per cent. of the profits out of the said business of Baillie Street Commission Agency. The books of the said business shall be open to the inspection of the said M. T. T. K. R. S. Saminathan Chetty at all reasonable hours during day time. The party of fourth part shall not be liable for the losses to the said business.
>
> "The parties of the first, second, and third part hereby agree to pay the said M. T. T. K. R. S. Saminathan Chetty the agreed profit soon after each race is over and the said parties of the first, second, and third part further agree with the said M. T. T. K. R. S. Saminathan Chetty not to transfer, assign, mortgage, or in other way dispose of the said business without the written consent of the said M. T. T. K. R. S. Saminathan Chetty."

The agreement clearly establishes that the loan of Rs. 4,000 was to be utilized towards the business of the Baillie Street Commission Agency. The passage that the 25 per cent. of the profits was to be paid to plaintiff soon after each race was over establishes, with equal clearness, that the Baillie Street Commission Agency was the bucket shop business as described by the third defendant.

The next question is whether the money lent for the purpose set out in the agreement is recoverable.

The Roman-Dutch law on the point is briefly set out in *Kotze's Translation of Van Leeuwen, Volume* 2, *p.* 116, thus :—

> "In like manner, whatever any one has given for an unlawful or otherwise dishonest purpose, that is if the improper purpose is on the side of the receiver alone, may be demanded back. Even where the transaction has been completed, just as if it had been tacitly stipulated that what the laws do not permit the receiver to retain, must be given back. But if the improper purpose be on both sides the payment made thereunder holds good.
>
> "For this reason the winner in gaming, or gambling, cannot lawfully recover his promised winnings, and on the other hand he who has once paid has no right to receive it back; so much so that he who lends another money with which to gamble or wager has no right to claim it back again."

Does this rule apply to money lent for carrying on a business such as is described in D 1 ? Appellant's counsel argued that a business of this nature was a breach of the provisions of section 3 of the Gaming Ordinance, No. 17 of 1889, and the contract was therefore illegal or at least against public policy.

The relevant provisions of section 3 enact that (*a*) " unlawful gaming " shall include the act of betting in or at a common gaming place ; (*b*) a " place " shall include any house, office, room or building; and (*c*) that a " common gaming place " shall include any place kept or used for betting or the playing of games for stakes and to which the public may have access with or without payment ".

The appellant cannot invoke the assistance of this section as there is no evidence that the business was to be carried on at a place falling within the definition of a common gaming place.

In South Africa it has been held that even where money advanced for an illegal purpose is not applied to that purpose it cannot be recovered where the lender is also, as in this case, guilty of turpitude (*Sandeman v. Solomon*,[1] *Digest of South African Case Law, Consolidated Ed. Bisset & Smith, vol. II., p.* 1190).

It appears to me that the loan in this case was a loan for the purpose of gambling or wagering and therefore prohibited by the Roman-Dutch law. I am therefore of opinion that the fifth issue should have been answered in the affirmative.

It was also argued that the note contained false statements as to the interest charged and the actual amount borrowed. The learned District Judge rejected the third defendant's evidence that only a sum of Rs. 1,700 had been paid and was in view of that finding right in holding that the note did not contain any false statement as to the sum or sums actually paid. But I am unable to agree with him that it does not contain a false statement regarding the interest charged.

The rate of interest mentioned in the note, on the body of it as well as in the particulars required by the Money Lending Ordinance, No. 2 of 1918, is 15 per cent. The document D 1, however, which the District Judge accepted in preference to the evidence of the third defendant, recites that the amount of the note should be paid back with the interest stipulated on the note and (the word " at " in P 1 is clearly a mistake

[1] (1907) 28 *N. L. R.* 140.

for "and") 25 per cent. of the profits out of the business referred to in P 1. The share of the profits payable to the plaintiffs is clearly part of the interest payable on the note and the note therefore did not set out correctly the rate of interest payable.

The note is, therefore, not enforceable under the provisions of section 10, sub-sections (1) and (2), of the Money Lending Ordinance, No. 2 of 1918.

I accordingly set aside the judgment appealed from and dismiss plaintiff's action. As regards costs, I agree with the order of my brother Lyall Grant.

Appeal allowed.