
(1929) 01 BOM CK 0020
In the Bombay High Court
Case No : First Appeal No. 8 of 1926

Appa Dada Patil	Vs	APPELLANT
Ramkrishna Vasudev Joshi		RESPONDENT

Date of Decision : 09-01-1929

Acts Referred:

Companies Act, 1956 — Section 4
Contract Act, 1872 — Section 43

Citation : AIR 1930 Bom 5 : (1929) 31 BOMLR 1187 : (1929) ILR (Bom) 652 : 121 Ind. Cas. 581

Hon'ble Judges : Patkar, J; Amberson Marten, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Amberson Marten, Kt., C.J.—This case involves a large number of interesting points which counsel have had some difficulty, not unnaturally, in dealing with. It is an unusual case on which specific authority is scanty; and at the outset a point arises which does not seem to have been taken in the Court below. The suit is in form a simple one, namely, by the plaintiff for the balance of an account in cross-dealings in goods and money between him and the thirteen defendants and some others, He pleaded, and it is a fact, that he deposited in the first instance a sum of Rs. 9,000 on August 16, 1918. Then followed sales and purchases by him through the defendants, the result of which was that by October 23, 1919, Rs. 5,552 were due to him.

2. I have said "defendants", but therein lies one of the difficulties. The shop, to use the plaintiff's expression, with which he was dealing, was called "The Dudhgaon Vyapari Mandal", or "The Dudhgaon Commercial Association." The defence is that this association consisted of far more than twenty persons at all material dates, and that accordingly it was illegal u/s 4 of the Indian Companies Act, and that therefore neither the association itself nor the individual defendants are liable. The learned Judge found that the association was an illegal

association, but he held that defendants Nos. 1, 2 and 3 were liable to the plaintiff because they were respectively the promoter, the manager and the chairman of the association, and that accordingly by analogy to Sections 245 and 246 of the Indian Contract Act relating to holding out in partnership matters, they were liable to third persons like the plaintiff.

3. Now at the outset there is a point not taken in the Court below, but which requires to be dealt with. It is this: The plaintiff himself was a trader in the Miraj State. The shop in question with which he dealt was within the Sangli State, which is a Native State, It is true that the defendants reside at Dudhgaon in British India, and that the Sangli shop, with which the plaintiff dealt, was under the control of or was a branch of the Dudhgaon shop. But that raises this point. Assuming for the sake of argument that an association on more than twenty persons was illegal in Dudhgaon in British India, would a similar business carried on by them in a Native State be illegal according to the law of the Native State ?

4. In the first place, the Indian Companies Act on the face of it by Section 1(3) extends to the whole of British India including British Baluchistan and the Santbal Parganas. There is nothing in the case before us to show that in the State of Sangli, or as a matter of fact in the State of Miraj, the Indian Companies Act applies.

5. Further the transactions were all effected with the Sangli shop, and the accounts were sent from the Sangli shop. I refer in particular to the accounts, Exhibits 92, 93, 94, 95 and 96. Those were the parties or accounts sent from the association to the plaintiff, giving credit for the moneys received and debiting the plaintiff with goods supplied to him. That being so, I would hold on the facts of this case that the transactions between the plaintiff and this Sangli shop were governed by the law of the Sangli State. If that is so, then the Indian Companies Act does not apply to the Sangli State, and I do not think that the association or the members forming it were committing an illegal act so far as the State of Sangli was concerned.

6. It may be that in proceedings inter se between the members of the association itself different questions would arise as to the legality of the acts of its members or agents who had acted in this way; but in a contract for sale or purchase in the Sangli State alone, and governed by the law of Sangli, I do not think that it is a valid defence that by the law of some other country the defendants ought not to have traded in numbers of this sort.

7. It is only right to say that this point was taken by this Bench at the end of the case, and that, to some degree, we have to give an off-hand opinion on it. That last observation applies also to some other points in the case, because owing to the press of litigation in this Court we have largely to depend on the industry of counsel in citing to us the relevant authorities and raising the material points of law. But nevertheless it seems to me that one valid answer to the above defence of the present appellants is that the Indian Companies Act did not apply to the

transactions in question in the State of Sangli.

8. But putting that point on one side, and assuming for the sake of argument that the Indian Companies Act did apply, the evidence is unsatisfactory as to precisely when this association was formed, and when it first consisted of more than twenty members. It has to be borne in mind that the present appellants are only defendants Nos. 2 and 3. Defendant No. 1 is not before us. And so far as I am aware, none of the books or the ordinary accounts of the association have been put in evidence in this case. Apart then from certain correspondence and the statement Exhibit 100, filed in the Subordinate Court, and the evidence of the plaintiff and his witnesses, there is nothing, I think, to answer this question of fact as to the precise date of the formation of the company.

9. The evidence of the plaintiff is in effect that he -dealt with the "shop" and that he dealt actually with defendants Nos. 1 to 6 in the shop. But in the course of the case, the plaintiff did that which has often been adversely commented on in the Privy Council, for he proceeded to call defendant No. 1 as his own witness. He obtained no leave to cross-examine, and in fact defendant No. 1 makes several statements about the formation of the company and its history which may be true or may not be true. In particular there is the statement put in as Exhibit 100 which was filed in the Sangli Court. This statement was made in May or June 1921, and if that statement is accepted, then it would appear that there were more than twenty members of this association at the date, at any rate, when the plaintiff began his business with the defendants. I would refer in particular to paragraph 11 of his evidence where defendant No. 1 says that "the number of shareholders up to Shrawan 1840 (August-September 1918) was 89, the amount being Eg. 7,975."

10. In that state of the evidence, I propose to deal with the remaining points on the assumption that the defendants have made out their case that this was an illegal association as it consisted of more than twenty members. This is further borne out by the manner in which the issues have been framed, in particular issue No. 1 which says that the association "was not registered according to law". Let that be so.

11. Then the next question is whether the plaintiff would be entitled to recover from this illegal association, the goods he entrusted to them or the price of those goods, or alternatively the money that he deposited with them, I put it in that alter native form because he paid certain sums in cash, and he also either sent to them or sold to them certain goods. Here it is important to remember in the first place that we are not dealing with a dispute between members of an illegal association inter se. This is not a suit by one member of an illegal association to wind up the association or to recover his subscription or to recover his share of the assets of the illegal body. Still less is it a case where an illegal association is itself suing to obtain the benefit of the contract which it has entered into. But even in a case between members of an illegal association it was recently held by Mr. Justice Tomlin in *Greenberg v. Cooperstein* [1926] 1 Ch. 657 that

notwithstanding that the association may be illegal, the Court is not debarred from affording relief to the members asking for the return of money paid into the hands of agents for application for an illegal purpose, by granting an account, The learned Judge says (p. 665) :?

I do not myself believe that the law is as powerless that when money is in the hands of persons who have received it for application for an illegal purpose, it cannot protect the contributors or enable them to recover it before it has been applied for this illegal purpose.

12. Then at page 666 he says :?

I am happy to think that the law is not as feeble that it cannot protect the subscribers by ordering an account; but in saying this, I am expressing no opinion as to what will take place after the account has been taken and by what means if any the defendants may discharge themselves of the money they have received.

13. My brother Patkar has drawn attention to two recent decisions of the Allahabad High Court, one in *Mewa Ram v. Ram Gopal* I.L.R.(1926) All. 735 and the other in *Madan Lal v. Janki Prasad*. I.L.R.(1926) All. 319 . In the former of these two cases, the majority of the Judges held that in the case of an illegal association of that sort, none of its members can sue in a Court of law for partition of the existing assets. In the other case this decision was followed, and the Bench decided that even though it was inconsistent with *Green-berg's* case, they would follow their own procedure. That interesting point may be left for decision by our High Court at some future date, if and when it arises.

14. As I have already stated, we have to deal with a case of a "third party and not with the members inter se. Now here the authorities give some indication that a third party is not necessarily defeated by an illegality in the constitution of the body with which he is dealing. For instance in *Lindley on Partnership*, 9th Edition, at page 140, it is said :?

The illegality of a partnership affords no reason why it should not be sued. It cannot indeed be effectually sued by any person who, being aware of all the facts, seeks to enforce a demand arising out of a transaction tainted with the illegality which affects the firm; but the illegality of the firm does not per se afford any answer to a demand against it, arising out of a transaction to which it is a party, and which transaction is legal in itself. Unless the person dealing with the firm is *particeps criminis*, there can be no *turpie causa* to bring him within the operation of the rule *ex turpi causa non oritur actio*; and he, not being implicated in any illegal act himself, cannot be prejudiced by the fact that the persons with whom he has been dealing are illegally associated in partnership.

15. Some support for that proposition is obtained from the judgment of Lord Justice Hellewell in *In re South Wales Atlantic Steamship Co* (1876) 2 Ch. D. 763(1876) 2 Ch. D. 763. There it was held that a winding-up order could not be

obtained against an illegal company. But Vice Chancellor Malins, at the end of his judgment, says (p. 772):?

The result will be that, having given credit, they must recover the money from those to whom they gave credit. If they make out a case against them all, and establish a liability, they will get it at law, but it is impossible for them to do so under the machinery of this Act (namely, the Companies Act).

16. And then Lord Justice Mellish says (p. 781) :?

I should be very unwilling to hold, unless I find myself absolutely compelled to do so, that a purely innocent person who employs a partnership of this kind can be prevented from maintaining an action against all the members of it who are practically interested in it, because, without his knowing it, they happen to be more than twenty. Suppose a common ordinary partnership were carrying on this business, it seems to me a very extraordinary thing that a creditor should have any obligation put upon him to inquire whether the partners were more than twenty or not.

17. In *Doolan v. Midland Railway Co.* (1877) 2 App. Cas. 792 the plaintiff Doolan sued the company for negligence in carrying his cattle on one of their steamships. The defence in the lower Court was that the railway company had no power to carry on a steamship business, and therefore that that part of their business was illegal, and they were not liable, But as to that point Lord Blackburn says (p. 806):?

It is impossible to suppose that the Legislature intended those companies who were wrongfully working steamers to be in a better position than those who were rightfully working them; and the Act should not be so construed if the words permit of any other construction. And even if the words compelled this construction, I think the railway could not set up its own wrong, against a Plaintiff who contracted with the company in innocence and ignorance. Doolan and the Midland Railway Company are not in *pari delicto*. Doolan might perhaps set up against the Midland Railway Company that it was acting illegally, if it would in any way help him (which I do not think it in any way could), but it does not lie in the mouth of the railway company to set up its illegality, even if it would help it, which I do not think it would.

18. Then I may refer to another case of *West London Commercial Bank v. Kitson* (1884) 13 Q.B.D. 360 . There the directors of the company had accepted certain bills on exchange on behalf of the company signing their own names as directors, whereas in fact the company had no power to accept bills. It was there held that the defendants were personally liable as by their acceptance they represented that they had authority to accept on behalf of the company which being a false representation of a matter of fact and not of law, gave a cause of action to the plaintiffs, who had acted upon it. That to some degree is more like our Sections 245 and 246 of the Indian Contract Act on which the learned trial Judge relied by analogy.

19. That being so, I do not think that I am troubled by cases such as that of *Manekji Sorabji v. C.N. Cama* (1866) 3 B.H.C.R. 159 because that was a case brought by a member of a company, namely, a transferee of shares to compel the directors to give up the share certificates which had come into the possession of the bank or alternatively for damages: That was not a case of a third party, That case more resembles the case already referred to before Mr. Justice Tomlin, and those two cases in the Allahabad High Court.

20. The difficulties on this branch of the law are exemplified by the decision of Mr. Justice McCardie in *Jeffrey v. Bamford* [1921] 2 K.B. 351 where the learned Judge goes at length into the authorities dealing with the position of a betting partnership, and to what extent remedies would lie in a partnership of that nature. The case law is also dealt with at length in the dissenting judgment of Mr. Justice Sulaiman in *Mewa Ram v. Ram Gopal* (1926) ILR 48 All. 735 which I have already referred to. But even in that case Mr. Justice Walsh thought that there was no case either in India or in England on all fours with the one then before the Court. And so far as the arguments in the present case extend, we have not been referred to any case which is precisely on all fours with the one we have to decide today. It does not mean that there is no such case if a further search was made, but we have to deal with this appeal as it is presented to us.

21. Doing that we have to decide whether in law a suit of this nature would lie by a creditor. The conclusion I have arrived at is that it would. And certainly if Mr. Justice Tomlin's view in *Greenberg v. Cooperstein* [1926] 1 Ch. 657 is correct, then a fortiori the case of a creditor should succeed, I should have made it plain that it is not shown here that the plaintiff was aware of the illegality of the association, nor is it shown that he was informed that its members numbered more than twenty. In my judgment the plaintiff was induced by the invitation held out to him by the first three defendants in particular to trade with the association. In that respect I may refer to the two invitations, Exhibits 91 and 97, which were sent out, the first one signed by defendants Nos. 1 and 2 and the second signed by defendants Nos. 1, 2 and 3.

22. Next, as to the liability of the present appellants, defendants Nos. 2 and 3, it is said that defendant No. 1 was the responsible man, and that they ought not to be made liable. But it is clear to my mind on the evidence before us that the one was the manager and the other the chairman of the shop. The invitations bear that out, and so does the other evidence in the case. I am satisfied, therefore, that the learned Judge was correct in holding that all these three men were actively interested in the shop, and in carrying on the business which was transacted with the defendants. It seems to me, therefore, that even if this was an illegal partnership, they at any rate are liable to the plaintiff.

23. It is next stated that the plaintiff could not sue some of the members of the partnership. But it is not necessary to sue all partners as far as this Court is concerned. The contention to the contrary has been negatived by high authority, to which my learned brother will refer. Accordingly there is nothing in that point.

24. Lastly, it was urged that in any event the claim was barred by limitation. That depends on whether the suit is one for the original deposit of Rs. 9,000 or for an account in respect of it, or whether it is really for the balance due on a mutual, open and current account. When one looks at the patts that have been put in, it is clear to my mind that the original deposit of Rs. 9,003 has long since been accounted for by the defendants as the result of the earlier transactions, and that on the contrary, there was for some time afterwards a substantial balance in the defendants' favour and that it was only in the final account that the balance turned once more in favour of the plaintiff. I refer to the accounts, Exhibits 92 to 9ft. Further if these are looked at carefully, it will be seen that the balance of one account was carried as opening item on the credit or debit side of the next account and so on. To my mind, therefore, it is clear that there was here, particularly having regard to the large number of cross items, a mutual, open and current account between the parties. That being so, the proper Article to apply, in my opinion, is Article 85, and not Article 62 of the Indian Limitation Act which we were invited to apply. On this basis the suit is within time.

25. Under these circumstances, the conclusion that I have arrived at is that the decision of the learned Judge was correct, Consequently, this appeal must be dismissed with costs.

26. The cross-objections are allowed, and interest is to be awarded at six per cent, on the principal sum, namely, on Rs. 5,103-11-9 from the date of the suit to payment, This will be as against defendants Nos. 2 and 3. Defendant No. 1 has not been served with the cross-objections and consequently as regards him the original decree will stand. Defendants Nos. 2 and 3 will pay the plaintiff's costs of the cross-objections.

Patkar, J.

27. In this case the plaintiff sued to recover the balance of an account with the defendant company having its head office at Dudhgaon. The branch office conducted business in Sangli, a Native State. The plaintiff's suit is resisted first on the ground that the defendant company was formed in an illegal manner and therefore the suit was not maintainable against it, and secondly, on the ground of limitation. The learned Subordinate Judge held that the defendant company was an illegal association within the meaning of Section 4 of the Indian Companies Act but defendants Nos. 1, 2 and 3 were liable to the plaintiff's claim on the analogy of Sections 245 and 246 of the Indian Contract Act. This appeal is filed by defendants Nos. 2 and 8, Defendant No. 1 has not appealed.

28. The first question, therefore, arising in this appeal is whether the present suit is maintainable against defendants Nos. 1, 2 and 3 The contention raised on behalf of the defendants is that the suit is not maintainable on the ground that the company was illegal within the meaning of Section 4 of the Indian Companies Act. The business was conducted in Sangli, a Native State, and it has not been shown to us that the company would be illegal according to the law prevalent in

Sangli State. Assuming, however, that the prohibition contained in Section 4 of the Indian Companies Act is applicable to a trading company in Sangli, the question is whether the plaintiff's suit is maintainable on the ground that he was ignorant of the illegality affecting the defendant company. The evidence in this case is not quite clear as to whether the company was illegal at the time when the plaintiff opened his transactions with the defendant company, Defendant No. 2 has not gone into the witness box, and defendant No. 1 was examined on behalf of the plaintiff, Taking the evidence of defendant No. 1 as true, it appears that in Shravan 1840 (about September 1918) when the plaintiff entered into transactions with the defendant company, the number of the shareholders was 89. If that evidence is accepted it would follow that the company was illegal within the meaning of Section 4 of the Indian Companies Act as the number of partners was more than twenty.

29. But the question still remains whether the plaintiff, who entered into transactions with the defendant company in ignorance of the circumstances which resulted in the illegality of the defendant company, can be non-suited with regard to the transactions which he entered into with the defendant company bona fide and in ignorance of the facts. In *Mewa Ram v. Ram Gopal* I.L.R.(1926) All. 735 it was held that when an association, formed for the purpose of gain, is unregistered, although under the law it ought to have been registered, and the business of the association has been going on for some years, none of its members can sue in a Court of law for partition of the existing assets. The decision of the Allahabad High Court does not appear to be consistent with the decision in *Greenberg v. Cooperstein* [1926] 1 Ch. 657. The point, however, came for decision subsequently before the Allahabad High Court in *Madan Lal v. Janki Prasad* I.L.R.(1926) All. 319 where the previous decision in *Mewa Ram v. Ram Gopal* was followed on the ground that the well-known rule, that where all parties were equally in fault the law favoured him who was actually in possession, was applicable even to a claim for partition where the plaintiff claimed to be in joint possession with the defendants. These cases do not apply to the facts of the present case where the plaintiff is not a member of the illegal partnership, but is a stranger who entered into the transactions with the defendant company bona fide and in ignorance of the facts which affected the legality of its constitution. It is laid down in *Lindley on Partnership*, 9th Edition, at page 140 :?

The illegality of a partnership affords no reason why it should not be Sued. it cannot indeed be effectually sued by any person who, being aware of all the facts, seeks to enforce a demand arising out of a transaction tainted with the illegality which affects the firm; but the illegality of the firm does not per se afford any answer to a demand against it, arising out of a transaction to which it is a party, and which transaction is legal in itself. Unless the person dealing with the firm is *particeps criminis*, there can be no *turpis causa* to bring him within the operation of the rule *ex turpi causa non oritur actio*; and he, not being implicated in any illegal act himself, cannot be prejudiced by the fact that the

persons with whom he has been dealing are illegally associated in partnership. So, if a partnership or company has been established by fraud, and persons have been induced to join it by false and fraudulent representations, still the fraud so perpetrated affords no answer to a creditor of the firm, unless that creditor has himself been party to the fraud.

30. This view is supported by the judgment of Mellish L.J. in *In re South Wales Atlantic Steamship Co.* (1876) 2 Ch. D. 763 and by the judgment of Lord Blackburn in *Doolan v. Midland Railway Co.* (1877) 2 App. Cas, 792

31. I think, therefore, that the plaintiff being a stranger and not a member of the partnership can maintain a suit to recover, the balance due on an account of the transactions with the defendants.

32. It is urged on behalf of the appellants that the suit is not maintainable against the defendants in this case as the liability was incurred by the persons who constituted the partnership and are not all joined as defendants in the Suit. But u/s 43 of the Indian Contract Act and according to the decisions of this Court in *Lukmidas Khimji v. Purshotam Haridas, Oodhowji Wallji and Goculdas Jewraz* I.L.R.(1882) . 6 Bom. 700 and *Motilal Bechardass v. Ghella bhai Hariram* I.L.R. (1892) 17 Bom. 6 a suit can be maintained against some of the partners, for the liability is joint and several. In this connection I may also refer to the cases of *Mathuradas Canji Matani Vs. Ebrahim Fazalbhoj*, ; *Narayana Chetti v. Lakshmana Chetti* I.L.R.(1897) Mad. 256; and *Muhammad Ismail Khan v. Saad-ud-Din Khan* I.L.R(1927).Lah. 217. I think that the objection urged on behalf of the appellants on this point is not sustainable.

33. The last point urged on behalf of the appellants is that the suit is barred by limitation and reliance is placed on Article 62 of the Indian Limitation Act. The account produced in this case clearly shows that it was a mutual, open and current account between the plaintiff and the defendants. There were transactions on each side creating independent obligations on the other and the balance has shifted from one side to the other. I may refer in this connection to the cases of *Satappa v. Annappa* I.L.R(1922) . 47 Bom. 128 and *Ganesh v. Gyanu* (1897) ILR 22 Bom. 606 . I think, therefore, that the proper Article applicable to the present case is Article 85 of the Indian Limitation Act and that the suit is within time.

34. On these grounds I think that the decision of the lower Court is correct and this appeal must be dismissed with costs.

35. The cross-objections are allowed as against defendants Nos. 2 and 3 only with costs and interest is awarded at six per cent, on Rs. 5,103-11-9 from the date of suit till payment.