

(1970) 11 KL CK 0018
In the High Court Of Kerala
Case No : Second Appeal No. 1154 of 1967

Ayissa and Another

APPELLANT

Vs

Prabhakaran

RESPONDENT

Date of Decision : 06-11-1970

Acts Referred:

Contract Act, 1872 — Section 56, 65

Citation : AIR 1971 Ker 239

Hon'ble Judges : P. Subramonian Poti, J

Bench : Single Bench

Advocate : M.G. Sen, for the Appellant; K.N. Karunakaran and K.G. Devarajan, for the Respondent

Final Decision : Allowed

Judgement

P. Subramonian Poti, J.—The question that arises for decision in this second appeal is whether plaintiffs are entitled to claim the return of an amount of Rs. 1500/-paid as earnest money in connection with the purchase of a property on the plea that there was frustration of contract. The defendant and his three minor sisters obtained the suit property under a gift deed. An agreement was entered into by the defendant purporting to be on, his behali and on behalf of his minor sisters as their guardian to sell the suit property to the plaintiffs for Rs. 26,500/-. An amount of Rs. 1500/- was paid on that day towards the consideration to be kept in the hands of the defendant as earnest money. The agreement was executed on 14-11-1961 and it provided that plaintiffs were to take the sale deed within 2 months after payment of the balance consideration. Plaintiffs complained in the suit that the defendant did not obtain a certificate authorising him as guardian to alienate the rights of the minor sisters and therefore execution of the sale deed became impossible. Plaintiffs further allege that when the execution became impossible for this reason, they demanded the return of the amount of Rs. 1500/-paid whereupon defendant complained that default had been committed by the plaintiffs and for that reason earnest money

paid was liable to be forfeited in terms of the agreement entered into on 14-11-1961. Defendant contended that there was no agreement to obtain any certificate from the District Court authorising alienation of the minors' property and therefore the defendant could not be found to be in default for that reason. It was said that actually the plaintiff was not ready with the money and hence he defaulted the taking of the sale deed. The question which therefore arose was which of the parties defaulted in the performance of the contract. The trial Court found that the defendant had defaulted and for that reason plaintiffs were found to be entitled to the decree. The appellate court reversed this, holding that the default was really on the part of the plaintiffs and therefore, they were not entitled to seek recovery of the plaint amount.

2. Defendant is a Hindu governed by the Hindu Mitakshara Law. He entered into the agreement, Ext. A1, purporting to act on behalf of his minor sisters and promising to sell the rights of the minor sisters in the suit property. He was not the legal guardian of the minors. Their father was alive and he was the legal guardian. Defendant could not have executed the sale deed in regard to the property of the minors to the plaintiffs. The interests of the minors were separate from that of the defendant as each had a specific share under the gift deed from the father. Defendant had only 1/4 right in the property agreed to be conveyed. The Hindu Minority and Guardianship Act, 1956 provides that the natural guardian of a minor may seek permission from the Court to transfer immovable property of the minor. Such an application can be made only by the natural guardian of the minor and the natural guardian within the meaning of that Act has been defined as any of the guardians as specified in Section 6 of that Act. In the case of a Hindu minor, the father, and after him, the mother, are the natural guardians of the properties of such minor. Therefore the defendant could not have sought permission from Court to transfer the properties of the minor as he was not the natural guardian. In these circumstances, it was not possible for the defendant to transfer the suit property to the plaintiffs as agreed to by him under Ext. A-1. It is true, if he wanted he could have sold his share which was only 1/4th. The contract being for the sale of the entire property, the fact that he could sell his portion, will not be an answer to the contention that the contract was not possible of performance in the circumstances. It was a contract which, by its very nature, was incapable of being performed and if so Section 56 of the Indian Contract Act, 1872 operated to render such a contract void. Section 56 of the Act runs as follows :--

"56. An agreement to do an act impossible in itself is void.

A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.

Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know, to be impossible or unlawful, such promisor must make compensation to such

promisee for any loss which such promisee sustains through the non-performance of the promise."

Illustration (c) to this section may also be extracted here:--

"(c) A contracts to marry B, being already married to C. and being forbidden by the law to which he is subject to practise polygamy. A must make compensation to B for the loss caused to her by the non-performance of his promise". An agreement to do an act may be impossible even at the time it is entered into or it may become impossible by reason of a supervening event. Both classes of cases are contemplated u/s 56. An agreement may be impossible because the object or purpose of the agreement may be an illegal one. It may also be impossible not because of the illegality in the object of the agreement, but because of the incompetency of the parties to the agreement to act in terms of the agreement

3. Where a person agrees to transfer a property, which does not belong to him, to another, it is not as if the contract is impossible because of any illegality. It is impossible because one cannot transfer the interest of another in that another's property. It is not a physical impossibility. Possibly one may conceive of a man without authority executing a transfer. The result would be that it would not convey any right. Impossibility conceived in Section 56 is not physical impossibility, but a situation in which such performance, if made, would be useless and will not be operative to achieve the object for which the agreement was entered into.

4. If that be the case, in view of the fact that defendant could not have transferred the interests of his three minor sisters the agreement must be taken to have been impossible of performance and therefore frustration must be found. Section 56 must therefore apply to the facts of this case.

5. Section 65 of the Contract Act deals with the obligation of a person who has received advantage under a void agreement or a contract that becomes void. That Section runs as follows :--

"65. When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it."

A person who has gained advantage has to disgorge it in a case where an agreement entered into is subsequently discovered to be void or the contract subsequently becomes void. The latter situation presupposes that on the date of the agreement it was valid, but by subsequent events the agreement has become void. This may be by subsequent legislation or by other subsequent events which make it impossible to perform the contract. Section 56 of the Contract Act also conceives of situations where the agreement was capable of performance on the date of the agreement but becomes impossible by

supervening events. Such cases are cases where the contract "becomes" void within the meaning of Section 65. The case before me is not one where the contract "becomes" void subsequent to the date of the agreement. There is no case that any subsequent supervening event rendered the agreement entered into by the parties void. Impossibility, if at all, was there even at the inception and therefore, this is, if at all, a case to which the first part of Section 65 applies.

There is considerable controversy as to the meaning of the term "discovered to be void" in the first part of Section 65. Whether it applies to contracts which were void ab initio was a matter on which there was no unanimity among the Courts in India. But the controversy seems to have been set at rest by the decision of the Privy Council in *Harnath Kuar v. Indar Bahadur Singh* 50 Ind App 69 : (AIR 1922 PC 403). The Privy Council, construing the section, laid down that an agreement discovered to be void is one discovered to be not enforceable by law, and, on the language of the section, would include an agreement that was void in that sense from its inception as distinct from a contract that becomes void. It is true that the section excludes cases where parties were actually aware that the contract was void on the date of the agreement. This follows from the very words in the section "discovered to be void." There is nothing to discover if the parties were aware of the fact that the contract was void even when they entered into the agreement. Counsel for the respondent wants to take it a step further. According to him, even if the parties were not actually aware that the agreement was void, if it was void because of some provision of law then the parties who must be deemed to have known the law must have known that the contract was to do something impossible and therefore the case could not be one where there is a subsequent discovery of the real nature of the agreement. I will examine that question here. There is a further contention that Section 65 applies only to cases where there is actually an agreement which agreement is found to be void. According to the respondent where one of the parties to the contract is under any incapacity there is no agreement at all and if so there is no case of any agreement being discovered to be void. In a case where a contract is entered into by a minor with another, there is no contract at all and Section 65 will have no application in such a case and it cannot be urged that there is an agreement which was discovered to be void. But in this case though the agreement was not by the minors what is urged is that the same rule must be applied when a person incompetent to transfer property agrees to transfer it. According to learned counsel, that would again be a case where there is no agreement, so much so, there is no question of application of Section 65. This again, I will examine here. Yet another contention urged is that in any view of the matter, it cannot be said that, on the facts, the agreement was subsequently discovered to be void by the plaintiffs in the case and if so there could be no claim for damages.

6. It is true that parties are presumed to know the law. When an agreement is entered into for an illegal purpose or with an illegal object, the parties must be presumed to have known that such purpose or object is illegal and in such a case

even if it is pleaded that the parties had not actually known that the contract was illegal, Section 65 cannot have application as the case would not be one where the agreement was "discovered" to be void. But this cannot be the case where neither such object nor the purpose is illegal and there is no illegality attached to the agreement entered into between the parties. The fact that a party had no authority to transfer the property of the persons whom he purports to represent is not a circumstance which attracts the presumption that the other party should be aware of the law which disables the promisor from entering into the agreement. In such cases whether the person who purports to transfer the property of the other was competent to do so will depend upon the facts of the case. It cannot be said that the want of competency of the person who wants to transfer the property must be presumed to be known to the other. Reliance by learned counsel for the respondent on the decision of the Patna High Court in *Dhanna Munda and Another Vs. Mt. Kosila Banian*, is, I am afraid, misplaced. That is a case where the contract was void because it was contrary to certain provisions of law and it is in that context alone that it was said that parties must have known that the contract was illegal and there is therefore no scope for subsequent discovery. This cannot be extended to cases where there is no illegality attached to the contract. That answers the first of the points urged.

7. It was held by the Privy Council in *Mohori Bibee v. Dhurmodas Ghose*, (30 Ind App 114) (PC) that Section 65 has reference only to agreements which have, in fact, come into existence, but are void. If no agreement actually comes into existence, there is no question of considering whether it is subsequently discovered to be void. The case before the Privy Council was one of a minor entering into a contract and the question was whether such a contract was to be deemed to have existed at all. If such a contract does not exist, there is no question of invoking Section 65. This cannot be extended to a case where a guardian of a minor or a person who purports to act as guardian of a minor enters into a contract. So far as that person is concerned, he, being *sui juris*, is entitled to enter into a contract, but the contract is one to do an act which is impossible and it is for that reason the contract becomes void. It cannot be said that in such a case there is no agreement at all and therefore there cannot be any question of the agreement being discovered to be void later. It is true that the decision in *Kalipada Keer v. Purnabala Dassi* (AIR 1943 Cal 269), holds the view canvassed by the respondent's counsel. Applying the decision in 1903 30 I A 114) (PC), the Calcutta High Court held that the reasoning of the decision must apply to a case where a guardian enters into a contract without authority. Certainly the view taken by the Calcutta High Court is not justified by the reasoning in the decision of the Privy Council and I see" no reason to agree with the view taken by the Calcutta High Court. I do not see any justification for reading such an exception to Section 65 of the Indian Contract Act. 1872.

8. The decision of the Privy Council in (1903) 30 Ind App 114) (PC), was referred to by the Patna High Court in *Abhi Singh and Others Vs. Daso Bhogta and Another*, . The real scope of the decision was explained by the Patna High Court

in these words :

"Where the incapacity is in relation to the property and not a general incapacity, then even if a contract is ab initio void. Section 65 must come into operation. There is a distinction, however, where there is utter want of capacity to contract. To that class is the case of (1903) 30 IA 114 . (PC), where Section 65 could not be invoked because a minor had no capacity to contract at all."

I am in respectful agreement with what has been said by Sarjoo Prosad J., in the Patna decision and that again is sufficient answer to the Calcutta decision in (AIR 1948 Cal 269). It therefore follows that the agreement executed by defendant is one which comes u/s 65 of the Indian Contract Act, 1872 and if the agreement was "discovered" to be void later by parties coming to know that it was impossible of performance, then defendant may be liable to disgorge the advantage obtained by him under Ext. A-1.

9. On the facts of the case, there is no difficulty in deciding the question as to whether the void character of the agreement was known to the parties on the date of the agreement or it was discovered subsequently. Even at the time when parties issued notices to each other, each trying to hold the other liable for the default, they had, apparently, not discovered the fact that defendant was not in a position to execute the sale deed because he was not competent to convey the interests of the other minors. This was natural because it was understood that under the Hindu Law, a de facto guardian can, under justifying circumstances, alienate the properties of the minor, unlike in the case of minors governed by the Mohammadan Law or such other personal laws which defined the powers of the guardian. The decision in Hunooman-pershad Pandey v. Mt Babooee Mundraj Koonweree (1857) 6 M I 393 (PC), was followed so far as Hindu minors were concerned for more than a century and on the basis of this decision an exception has been recognised in the case of Hindu Minors. Possibly, that is the reason why parties to Ext. A-1 agreement took it that the defendant could transfer the interests of the minors. But in 1956 the Hindu Minority and Guardianship Act, 1956 had come into force. That Act restricted the power of the guardian to alienate the properties of a Hindu minor governed by that Act. That restriction was that a valid sale could be effected only with permission of the Court and such permission could only be obtained by the natural guardian of the minor. Of course, a person who was appointed as a guardian by Will or a person who was declared to be so by a Court or appointed guardian by the Court could also exercise the powers of the guardian subject to certain restrictions and limitations. It is, of course, not the case of either party that the defendant was declared as such guardian. Therefore, as it was, the defendant could not have alienated the properties of the minors and he could not have also obtained any certificate authorising any such transfer on behalf of the minors. It is natural that in the circumstances neither party was aware of this fact. They might have become aware of this when they came to Court or possibly sometime after the date of the agreement. If so, this would be a case where the parties would not

have known that the act agreed to was impossible on the date of Ext. A-1, but could have discovered the fact later. That would be sufficient to attract Section 65 of the Indian Contract Act, 1872 and if it is so attracted, then this is a case where plaintiffs will be entitled to call upon the defendant to pay back the amount received by him under Ext. A-I and that is the claim made in the suit. Hence I find that the claim is well founded.

In the result, in reversal of the decree of the Court below, I allow the second appeal. The decree of the Court below is set aside and the decree of the trial Court is restored. In the circumstances of the case. I direct both parties to suffer costs in this second appeal.