

(1973) 09 KAR CK 0001
In the Karnataka High Court
Case No : First Appeal No. 19 of 1970

B. Channabyre Gowda and Others

APPELLANT

Vs

State of Mysore

RESPONDENT

Date of Decision : 07-09-1973

Acts Referred:

Citation : AIR 1974 Kar 136

Hon'ble Judges : Sadanandaswamy, J; Bhimiah, J

Bench : Division Bench

Advocate : N.V. Ramachandra Rao, for the Appellant; Annadanayya Puranik, Govt. Pleader, for the Respondent

Judgement

Sadanandaswamy, J.—The appellants are the defendants and this appeal is filed against the decree passed by the Principal Civil Judge, Bangalore, in O.S. 16/68. The suit filed by the respondent-State of Mysore for recovery of Rs. 77,610-7-0 has been decreed. The plaint allegations are these: The privilege of vending toddy in Hosakote Taluk for the period from 1st July, 1954, to 30th June, 1955, was auctioned and the first defendant took up the contract of vending toddy and obtained licence therefor agreeing to pay a monthly rental of Rs. 12,401/- and other cesses and deposited two months' rent in advance. Since the 1st defendant was the highest bidder, his bid was accepted. The second defendant stood surety for the due performance of the obligations under the contract by the 1st defendant and executed a bond.

The 1st defendant paid the agreed rent upto October, 1954 and thereafter committed default in the payment of monthly rent due to the plaintiff. Consequent on the default by the first defendant the plaintiff exercised its option to hold a fresh sale and notified the re-sale of the privilege of vending toddy, but no re-sale was actually held and the 1st defendant continued to exercise the privilege of vending toddy till the end of the lease period. The plaintiff was also entitled under the Rules to collect the dues by disdaining the daily sale proceeds realised by the 1st defendant at the spot, and by such attachment, a sum of Rs.

1731-14-6 was collected and adjusted towards the arrears of rent. After adjusting the said sum and the security deposit, the 1st defendant became due in a sum of Rupees 77610-7-0 including the cesses due and the interest at 6 1/4% upto 1-1-56.

The defendants filed separate written statements. The 1st defendant admitted having taken up the right of vending toddy, but he denied his liability to pay the other cesses. He alleged that only Rs. 62,005/- would be the correct amount in item (i) of the plaint claim and not Rs. 64,989-12-9. He also contended that the Deputy Commissioner executed an agreement in favour of the defendant, that the said document remained with the plaintiff and that the alleged contract is illegal and void as the Deputy Commissioner had no power to enter into the contract on behalf of the State as contemplated under law. He therefore denied his liability to pay any part of the suit claim. The second defendant also denied his liability contending that he was not a party to the contract between the 1st defendant and the plaintiff. In the reply statement, the plaintiff denied that the Deputy Commissioner had entered into any written contract with the defendants. Issues were framed and evidence was recorded. On 31-10-60, the suit was decreed in favour of the plaintiff. The defendants appealed to the High Court in R.A. 156/61 and R.A. 157/61.

On 7th June, 1966, the appeals were allowed by consent of all the parties and the suit was remanded to the Lower Court with the direction that it should be tried de novo, the parties were allowed to amend their pleadings and to lead such further evidence as they chose to and the evidence which had already been recorded was to-be treated as part of the record in the case. After remand, the plaintiff applied for amendment of the plaint. On 16-10-1968 the amendment was allowed. The additional contention taken by the plaintiff was that if the Court comes to the conclusion that the agreement entered into with the 1st defendant is void under the provisions of Article 229 of the Constitution of India, the plaintiff is entitled to the sum claimed in the plaint as compensation u/s 70 of the Contract Act. It was stated that since the act of conferring the privilege to sell toddy by the defendant was not intended to be done gratuitously and since the defendant has enjoyed all the benefits thereof, the defendant is bound to pay compensation to the plaintiff and that the said compensation would be Rs. 77,610-7-0. The order of 16-10-1968 gave time for amendment of the plaint as well as for additional written statement of the defendants till 21-10-68.

On 21-10-68, the second defendant's counsel prayed for time to file the additional written statement. Time was given till 28-10-68. Since the Judge was on casual leave on 28-10-68, the case was adjourned to 11-11-68. On that date, the defendants and their counsel were absent. Since there was no additional written statement filed the Court observed that there is no additional issue framed and posted the case for evidence to 21-11-68. After several adjournments, on 19-6-1969 both sides filed memos stating that there was no more evidence. Thereupon, the case was posted for arguments to 25-6-1969 on

which date, arguments were heard and judgment was pronounced on 30-6-1969, decreeing the suit.

The issues framed are the following:--

- (1) Was there no valid contract between the plaintiff and the defendant?
- (2) Was the contract terminated subsequent to October, 1954?
- (3) Is the suit not maintainable?
- (4) Are the defendants not liable for cesses, etc.?
- (5) Is the 2nd defendant not liable for the suit claims?
- (6) To what relief, if any, is the plaintiff entitled?

The Lower Court held on the 1st issue that there was no valid contract; on the 2nd issue that the contract was not terminated subsequent to October, 1954; on the 3rd issue that the suit is maintainable; on the 4th issue that the defendants are liable for cesses and on the 5th issue that the second defendant is liable for the suit claim.

2. In the lower Court, at the time of arguments, it was not contended for the plaintiff that the contract was in accordance with law. The Lower Court, therefore, proceeded to consider the plaintiff's claim u/s 70 of the Indian Contract Act. It came to the conclusion that the agreed amount of monthly rental should be deemed to be the benefit retained by the defendants which they are liable to pay to the plaintiff and that u/s 70 of the Contract Act, the defendants are liable for the suit claim. It further held that even though the surety bond executed by the second defendant was not registered, that circumstance would not affect the debt and the personal covenant contained in the document and that both the defendants are liable for the suit claim.

3. It is contended by Mr. Ramachandra Rao, on behalf of the appellants, that though the Court allowed the application of the plaintiff for amendment of the plaint after remand, the amendment was not carried out in time, that the plaintiff could not rely upon the amended plaint to urge its rights u/s 70 of the Contract Act and that the lower Court is in error in granting relief to the plaintiff under that provision. After remand, the plaintiff filed an application for amendment of the plaint under O. VI, Rule 17, Civil Procedure Code, on 9-8-1966. After hearing the parties, the Court allowed the application and gave time for amendment of the plaint by the plaintiff till 21-10-1968. In the application for amendment of the plaint, the plaintiff had prayed that it may be permitted to file an amended plaint. The amended plaint was filed in the Office of the Court on 7-11-68. It was signed only by the plaintiffs' Advocate. 7-11-68 was not a date on which the case had been posted for hearing before the Court. Along with the amended plaint, an application was filed seeking permission to file the amended plaint on 7-11-68. That application does not seem to have been brought to the notice of the Court and no order appears to have been passed on that application. The

amended plaint was therefore filed 17 days after the time fixed by the Court for amendment of the plaint.

M. Rama Chandra Rao relied on the decision in *Roop Kishore v. Jug Raj*, ILR (1953) 3 Raj 988. In that case, the plaintiffs filed an amended plaint beyond the time fixed by the Court and it was held that they were not entitled to file the amended plaint beyond the time fixed by the Court. Under Order VI, Rule 18 if the party who has obtained leave to amend his pleading does not amend it within the time fixed for that purpose by the Court, he shall not be permitted to do it after the expiration, of such time, unless the time is extended by the Court. In the present case, there is no order of the Court extending the time for amendment of the plaint. The learned High Court Government Pleader relied on the decision in *Gaj Kumar Chand v. Lachman Ram*, (1911) 14 Cal LJ 627. In that case, the plaintiff prayed for addition of the second defendant, a subsequent alienee from the 1st defendant. This application was granted and he was added as a defendant. The plaint, however, was not amended and did not disclose any cause of action against the second defendant. But no objection was taken by the added defendant in his written statement to the effect that the plaint did not disclose any cause of action against him. The trial proceeded on the assumption that the plaint had been amended and it was held that the defendant cannot take the plea in the Appellate Court that the suit ought not have been allowed to proceed against him.

In the present case, the defendants did not file any additional written statement since the amended plaint had not been filed within the time fixed by the Court. In the Calcutta case, the defendant did file the written statement after the amendment of the plaint and did not raise the objection as to the want of cause of action against him. In the present case since no fresh evidence was adduced by the plaintiff in support of the allegations in the amended plaint, the defendants also did not adduce any further evidence after remand. Hence, the observations made in the Calcutta case do not apply to the present case.

He next relied on the decision in *Rahmat Bi Saheba and Others Vs. R. Krishna Doss Lala*, In that case, though the amendment was not carried out within the time fixed by the Court, an application for extension of time to carry out the amendment of the plaint had been filed. An order had been passed on that application to the effect that orders will be passed on that application along with the judgment. When judgment was delivered, the Court said "Amendment will be made by the Court". The Judge directed the office of the Court to carry out the amendment and this was done. It was held that there was sufficient compliance with the provisions of Order VI, Rule 18. It is thus seen that the amendment was carried out according to the orders of the Court and it must be deemed to be an order extending the time for amendment of the plaint. In the present case, there is no such order extending the time fixed by the Court. Hence, that decision has no application to the facts of this case. The lower Court was therefore in error in treating the amended plaint as one filed in compliance with Order VI, Rule 18.

The plaintiff could not proceed on the basis of the amended plaint.

4. The learned Government Pleader contended that even if the amended plaint is ignored and the original plaint only is considered as the plaint in the case, the plaintiff is entitled to rely upon the provisions of Section 70 of the Indian Contract Act even in the absence of an express pleading in that behalf. He relied on the decision in Venkataswami v. Narasayya, AIR 1965 Andh Pra 191. In that case, the plaintiff stated that in the alternative, the defendant having made the collection of fees payable during the time of the contract to the plaintiff, he is entitled to recover the amount by way of damages. The observation of the Privy Council in AIR 1943 29 (Privy Council) to the effect that

a defendant who when sued for money lent pleads that the contract was void can hardly regard with surprise a demand that he restore what he received thereunder

was relied on and it was held that the plaintiff was entitled to relief u/s 70 of the Indian Contract Act, though there was no pleading to that effect. It was held that the plaintiff's claim could also be sustained on the equitable principle of unjust enrichment. This decision supports him.

5. Assuming that the plaintiff could rely upon the provisions of Section 70 of the Contract Act, we have to consider whether the plaintiff is entitled to the relief claimed in the plaint. The privilege of vending toddy was conferred by the plaintiff on the first defendant, and it can be assumed that the plaintiff did not intend to do so gratuitously. Therefore, if the first defendant had enjoyed a benefit out of such a privilege, he is bound to make compensation to the plaintiff in respect of the same. It has been held in AIR 1948 56 (Privy Council) that u/s 65 of the Contract Act, the plaintiff could not recover any sum unless he proved the value of the "advantage" which the defendants received under the contract. Similarly, u/s 70, the burden is on the plaintiff to establish that the first defendant enjoyed the benefit which he is bound to restore to the plaintiff. Exhibit P. 3 is the statement of demand and credits relating to the lease period prepared from the accounts maintained by the plaintiff. It shows the amounts credited to the account of the first defendant during the lease period. The first defendant, in his evidence, admits the correctness of the amounts credited to his account in Exhibit P. 3. Even if we take into consideration the averments in the amended plaint, it is stated that the plaintiff was entitled under the Rules to collect dues by disdaining the daily sale proceeds realised by the first defendant at the spot and that by such arrangement Rs. 1,731-14-6 was collected and adjusted towards the arrears found due by the first defendant. It is also stated in the amended plaint, that since the defendant enjoyed the benefit of the privilege of vending toddy he is bound to make compensation to the plaintiff and that such compensation would be Rupees 77,610-7-0.

In the original plaint also the same amount is claimed. It represents the monthly rental due from October 1954 to April 1955 after adjusting the security deposit

for the months of May and June 1955 and the amount of Rs. 1,731-14-6 collected by disdaining of the sale proceeds as well as cesses and interest due. There is no other allegation even in the amended plaint as to what the benefit was to the first defendant. Two witnesses were examined on behalf of the plaintiff. P.W. 1 is the Excise Clerk.

* * * *

So, the evidence of these P.Ws. does not throw any light as to what benefit was derived by the first defendant. He has stated that he ran the toddy shops for 2 or 3 months and after that he could not pay the instalments regularly and therefore, the Government re-sold the right in public auction, that no bidders came forward to purchase them and that thereafter he was asked to run the shops and to pay to the Government whatever he got from the sale realisations. He has further stated that there was no contract between him and the plaintiff. It is further elicited that this was the only contract of excise taken in his life and that he has not kept accounts during the period of the lease. He has further stated that every month the Amildar was demanding the arrears of rent from him and re-selling the right on his non-payment. He has further stated that whenever he paid towards the suit transaction, it was deposited and his rights were being re-sold to others so that he could not make use of his privilege or realise any benefit from the contract. He has stated that only thereafter when no bidders came forward, the Deputy Commissioner would ask him to run the shop and deposit whatever he could conveniently pay. He has further stated that in the end the Government itself managed the shops for about one month and 20 days. He has produced Ext. D-1 series which are the receipts given for the deposits made by him.

D.W. 2 is the second defendant who is the elder brother of defendant-1, Though he has stated that he never stood surety for the 1st defendant, in his cross-examination he has admitted that he has put his signature to Ext. P-2, the surety bond, that he is literate and that he has studied Kannada and English unto Lower Secondary. Some of the receipts in Ext. D-1 series show that amounts have been realised by "Galla Jafthi", during the period of these lease subsequent to October 1954.

There is no evidence adduced on behalf of the plaintiff to show that the first defendant made any profit out of the contract entered into by him with the plaintiff. The first defendant had to get the toddy tapped from the trees in the area allowed to him and to get the toddy sold through shops. He has to maintain his own (sic) for the tapping of the toddy as well as for its sale in the toddy shops. There is no evidence adduced on behalf of the plaintiff to show that the realisations from the sales of toddy exceeded the expenses incurred by the first defendant. Even in the amended plaint it has not been pleaded that the first defendant actually made any profit out of the contract. It has not been suggested to D.W. 1 in cross-examination that he made any profit out of the contract.

The lower Court has decreed the suit since it came to the conclusion that it must be deemed that the 1st defendant got a benefit out of the contract and that such benefit must be deemed to be the total of monthly rentals which he had agreed to pay under the contract. It is no doubt true that when the first defendant entered into the contract, he hoped that after paying the agreed monthly rentals he would still make a profit. In other words, the sale realisations, he hoped, would be over and above the expenses incurred by him including the payment of the monthly rentals to the plaintiff. But it cannot be assumed that the first defendant did make a profit out of the suit transaction.

6. The learned Government Pleader relied on the decision in *Pannalal Vs. Dy. Commissioner, Bhandara and Another etc.*, In that case, a contractor had built hospital buildings. It was held that in the absence of any other material the contract between the parties provided a useful basis for calculating the benefit which accrued to the defendants under Sec. 70 of the Contract Act. It was not contended on behalf of the defendants in that case that the rates agreed upon and the rates enhanced were not fair rates or that anybody else would have undertaken the Work at cheaper rates. It was held that the only reasonable way of arriving at the value of the benefit derived by the Government was on the basis of the rates agreed upon (including future increases in rates by P.W.D.) and that it would be a fair indication of the value of the work done by the plaintiff-contractor. On the basis of this decision it is contended that the monthly rental agreed upon by the defendant would afford a fair basis for determination of the benefit which accrued to him. The case before the Supreme Court was one of a building contract. The quantum of work done for the defendant by the contractor was definite and ascertainable. The only dispute was with regard to the rates at which payment had to be made to the contractor. It is in those circumstances that it was held that the benefit which accrued to the defendant can be calculated on the basis of the rates agreed upon between the contractor and the person for whose benefit the building had been put up.

In the present case, it is not possible, to estimate the value of the privilege of vending toddy which was conferred on the first defendant by the plaintiff in terms of money. The plaintiff has failed to prove that the first defendant made any profit by the utilisation of the privilege of vending toddy conferred on him. Ext. P-3 shows the amounts credited by the 1st defendant towards the arrears of rents due by him subsequent to October 1954. During part of the period of the lease after the 1st defendant began committing defaults, the plaintiff exercised its right of seizing the realisations at the toddy shops. It is in the evidence of the first defendant that though a re-auction was held by the plaintiff, there were no bidders. These circumstances go to show that the first defendant could not have made any profit out of the suit transaction. In any case, it was open to the plaintiff to plead and adduce evidence to show that the first defendant did make profits out of the suit transaction and to claim that benefit from the 1st defendant as being payable to the plaintiff u/s 70 of the Contract Act. There is no evidence to show that the first defendant made any profits out of the suit

transaction. The plaintiff has therefore, failed to establish that any benefit accrued to the first defendant from the suit transaction. The plaintiff is therefore not entitled to any relief under S. 70 of the Contract Act. The lower Court was in error in awarding relief under S. 70 of the Contract Act on the basis that the monthly rental agreed to by the first defendant represented the benefit which accrued to him out of the suit transaction.

7. It is next urged by Mr. Puranik High Court Government Pleader that the plaintiff is entitled to succeed even on the basis of the original plaint since, according to him the contract entered into by the plaintiff with the first defendant was one in exercise of the statutory power of the State under the Excise Act, and not one entered into under the Executive Power of the State, and that the contract is not void even if it is not in compliance with Article 229 of the Constitution of India. He relied on the decision in *State of Mysore v. Dasappa Naidu*, (1968) 1 Mys LJ 69, wherein it has been held that if a contract is made on behalf of the State in exercise of its statutory power. Art. 229(1) of the Constitution has no application. That was a case in which a contract had been made u/s 25 of the Mysore Excise Act. We have to consider whether the plaintiff is entitled to succeed on the basis of the original plaint itself. In para 2 of the plaint, it is alleged that the defendants took up a contract of vending toddy and obtained licence thereafter agreeing to pay a monthly rental of Rs. 12,401 and other cesses, and defaulted after October 1954 in the payment of the monthly rentals. The cause of action is stated to be on 1-10-54 and the subsequent dates of default. The defendants called for certain particulars under Or. VI, R. 5, C.P.C. The particulars sought for were whether the contract referred to in Para 2 of the plaint was oral or written the date on which the same was entered into, the terms thereof and if written calling upon the plaintiff to produce the same to the Court.

In reply, the particulars furnished by the plaintiff were as follows:

The contract of vending toddy in Hoskote Taluk commenced from 1-7-1954. The excise sale was held by the Deputy Commissioner as per Excise Rules. The defendants bid in the public auction and as they were the highest bidders, they were given the said contract as per the Rules. They also agreed to pay a monthly rental and other cesses leviable under Excise Law.

In the written statement of the first defendant it was alleged that the Deputy Commissioner executed a written agreement in favour of the defendant which is with the plaintiff and that the said contract is illegal and void as the Deputy Commissioner has no power to enter into such a contract on behalf of the State.

In the reply statement, it was stated that it is not true that the Deputy Commissioner entered into any written contract with the defendants as averred in the written statement of the first defendant and that the first defendant is out to strict proof of the same. Ext. P-1 is the notification dated 3-4-1954 giving notice that the exclusive privilege of selling country liquors etc., in the District of

Bangalore, Mandya, Mysore and Hassan would be put up to public auction by the Deputy Commissioners of the District concerned or the Revenue Assistant Commissioners on the dates and at places described in the schedule annexed to the notification and subject to the conditions set forth in the notification.

Ext. P-2 is the unregistered security-bond executed by the defendants. It states that there is an excise contract in the name of the first defendant and that the properties mentioned therein are given as security for the abovesaid contract. Ext. P-3 is a statement of payments prepared on the basis of the relevant register showing the amounts due on the 10th of every month during the period of the contract, the amounts credited by the first defendant as well as the amounts adjusted towards his account and the balance due from the first defendant. Ext. P-4 series are the documents executed by the first defendant. They are nine in number. They refer to different toddy shops. They state that the first defendant undertakes to abide by the terms and conditions embodied in the licence referred to therein granted by the Deputy Commissioner in his favour in respect of the shops for sale of toddy. None of these documents contains the terms of the contract between the parties. The liability of the first defendant cannot be established by relying upon any of these documents. Ext. P-4 series refer to but do not set out the conditions and terms contained in the licences issued by the Deputy Commissioner in respect of each of the shops. Unless the licences are produced it is not possible to ascertain the terms of the contract. Hence, the liability of the first defendant cannot be ascertained in the absence of proof of the terms of the contract entered into by the first defendant with the plaintiff. The liability of the second defendant depends upon the liability of the first defendant since he is merely a surety. In spite of the particulars having been called for by the first defendant from the plaintiff before the written statements were filed, the plaintiff has not furnished the required particulars. The plaintiff has not stated whether the contract is in writing or not. Though the plaintiff was asked to produce the documents relied upon by it to the Court, the plaintiff has not produced the same before the filing of the written statement. Even thereafter, the plaintiff has failed to produce the document or documents which set out the terms of the contract between the first defendant and itself even during the trial.

It was contended by Mr. Puranik, that the first defendant has admitted his liability to pay Rs. 62,005/- in his written statement. In para 3 of the original plaint it was stated that the monthly rental due from October 1954 to April 1955, after adjusting the security deposit for the months of May and June, was Rupees 64,989-12-9. In the written statement, the first defendant stated that the amount of Rs. 64,989-12-9 claimed in item 1 of para 3 of the plaint is not correct and that it would be only Rs. 62,500/-. But it was further contended in the written statement that the Deputy Commissioner had executed a written agreement in favour of the defendant which is with the plaintiff and that it is illegal and void. He also pleaded that subsequent to October 1954, the right of selling toddy was Put to auction by the plaintiff and even if there had been a

valid contract, it had been terminated. He further pleaded that he is not liable to pay the suit amount and prayed for dismissal of the plaintiff's suit.

Under these circumstances, the allegations referred to in the written statement cannot be construed as an admission to pay Rs. 62,005/-. The defendant only contested the correctness of the calculation made by the plaintiff to arrive at the figure Rs. 64,989-12-9 and stated that the proper calculation would only show the figure Rs. 62,005/-. Since the plaintiff has failed to prove the terms of the contract and since there is no admission on the part of the first defendant, the plaintiff is not entitled to claim any amount from the first defendant on the basis of the contract alleged to have been entered into by the first defendant in favour of the plaintiff. Hence, the plaintiff cannot also ask for any relief against the second defendant.

The appeal is therefore allowed the judgment and decree of the lower Court are set aside and the suit is dismissed. In the circumstances of the case, the parties shall bear their own costs in this appeal.