

(1959) 09 BOM CK 0007
In the Bombay High Court
Case No : A.F.O.D. No. 240 of 1955

Babulal Swarupchand Shah

APPELLANT

Vs

South Satara (Fixed Delivery) Merchant's Association Ltd.
and Another

RESPONDENT

Date of Decision : 08-09-1959

Acts Referred:

Contract Act, 1872 — Section 182, 218, 23

Citation : AIR 1960 Bom 548 : (1960) 62 BOMLR 304

Hon'ble Judges : Patel, J;Mudholkar, J

Bench : Division Bench

Advocate : V.V. Albal, for the Appellant; Sharad Manohar, for Y.V. Chandrachud, for the Respondent

Judgement

Petel, J.

(1) This is an appeal by the plaintiff against the dismissal of his suit by the Civil Judge, Senior Division, at Sangli.

(2) The plaintiff is doing business in groundnuts and turmeric at Sangli. The defendant No.e is a public limited company, which came into existence in the year 1951. the company was founded, as provided by Art. 3, for the purpose and the object of promoting the business of the Sangli Bazar in various commodities, wuch as, turmeric, groundnut oil and othe roil-seeds etc. and to regulate the same and it was also epecifically provided by sub-clause (b) that the further object was to regulate forward dealings in the abovementioned cammodities, which were not prohibited so far or would not be prohibited in future. The purposes were to provide all possibel facilities to the producing agriculturists, to encourtage and help them, to grow the best kind of agricultural produce,. and such other purposes. There were 50 or 60 share-holders of the company. amongst them was the plaintiff, who held his share in the name of his minor brother, mahendrakumar Babulal. Now, this defendant-company followed a Clearing House System as provided for by one of the Acticles - Article 36 - and

under the Company bye-law, appointed the defendant No. 2 the Clearing Agent on 8-12-1951. the transactions in question were made according to the bye-law No. 24 framed by the defendant-company between the plaintiff and some other share-holders. It was the duty of the defendant No. 1 as clearing agent to distribute the money due to the members of the association from Co-members after it was paid by them. the transactions in question were between the 8th of December 1951 to the 19th of March 1952,. On 19-3-1952 the Company (i.e. the Board of Directors) declared the rates at which all transactions had to be squared up and it further declared that the debtor-members should make the deposit as required by the rules with the defendant-company in order that the amount be distributed to the creditor members concerned on the next day. According to the Plaintiff, the plaintiff had to receive from his debtor-members a sum of R. 14,430-5-0 and he had to pay to his creditor members Rs. 1,254-6-0. Thus the plaintiff was entitled to receive a sum of Rs. 13,575-15-0 from the defendant-company. According to the plaintiff three of the members who were indebted to him had defaulted and did not pay in full in Clearing House. Taking into account the defaults of the three members, according to the plaintiff, he would be entitled to receive a sum of Rs. 9,470 from the defendants No. 1 and 2 and interest of Rs. 804-15-0 thereon at the rate of 6 per cent per annum, making a total of Rs. 10,274-15-0.

(3) The defendants contested the suit. The defendant No. 1 denied that any declaration was made as stated by the plaintiff. It also denied that neither the association nor the defendant No. 2, the Clearing Agent, are responsible to any member as such for the amount due to them from the debtor-members. It denied the correctness of the form submitted by the plaintiff and, therefore, said that the suit was defective. The defendant No. 1 also denied that it was the agent or the trustee of the plaintiff. it contended that as full payment of the amount was not made by the debtor-members to the defendant-company, the plaintiff was not entitled to claim any amount. that the suit of the plaintiff would be barred because the forward transactions in turmeric were held to be illegal by the Supreme Court on 29-5-1952. That the plaintiff was not entitled to any amount of interest in the suit. The defendant No. 2 practically accepted the statement of the defendant No. 1 and made the same contentions. He contended that it was his duty to deposit the amount with the defendant No. 1 and since the entire amount was not received from the debtor-members he deposited a sum of R. 11,518-5-0 in Bank of maharashtra, Sangli, into account of the defendant No. 1. He is, therefore, not liable to pay any amount to the plaintiff.

(4) The learned Judge held that the plaintiff proved that the defendant No. 1 had agreed to make payment to creditor members of the amount due from the debtor members to the creditor member of the defendant No. 1 association declared on 20-3-1952 that clearing agent could distribute the amounts due to creditor members and the defendant No. 1 failed to distribute the amount accordingly.

(5) The learned Judge also answered in favour of the plaintiff the issue No. 2 and held that R.I 13,175-15-0 were due to the plaintiff as creditor member from the members of the defendant No. 1 association on 20-3-1952. He however, held in favour of the defendants that the transactions in respect of which the amounts were claimed were against policy and as such the plaintiff was not entitled to recover the amount claimed by him from the defendants No. 1 and 2. In the result he dismissed the plaintiff's suit. It is against this dismissal of his suit that the plaintiff has come to this Court in appeal.

(6) The first question that would arise is whether the relationship of principal and agent as between the plaintiff and the defendant has been established by the plaintiff and the extent of that relationship. Now, this company was formed with an avowed purpose of regulating the dealing in forward transactions in several commodities. As such it had framed certain rules. The rules of the company show that the members parties who had made transactions with each other had to meet and settle their liabilities and after settling the liability of each other they had to fill up certain documents provided by the company. The rule also specifically provides that after filling up the forms and giving them to the Clearing agent, i.e. the Company defendant No. 1, the debtor members had to pay up the amount to the company within a fixed time as provided. It also further provides that the company after deducting a commission of one anna per rupee should distribute the amount to the creditor members towards their dues from the debtors-members. From the evidence also it appears that the transactions were entered into directly by the members with each other and the procedure which we have referred to above was thereafter followed in settling the transactions as has been admitted by the Chairman of the defendant No. 1-company, in his evidence. He says that after the clearing rate was declared, the creditor members and the debtor members concerned had to adjust their accounts and the balance was to be struck amongst them, and thereafter "C" form was filled in. Form "D" however, was filled in by the debtor-members and submitted to their creditor members but form "C" was submitted to the clearing Agent (the company) by the creditor members. He has also further stated that after 12 O'clock on Monday the amount due was to be deposited with the clearing agent by the debtor members. That also is the case of the plaintiff. It is clear, therefore, that the agency of the defendant No. 1 was limited only to the extent of the collection of the amounts due from each of the members and after deduction of its commission payment to the creditor members, who were entitled to collect the amount from these debtor members. The company had nothing to do with the actual transactions themselves which were entered into by the members directly, with each other nor even with the settlements. Even if therefore, the Transactions were illegal, the agency itself was not illegal.

(7) The learned Counsel appearing for the defendants has argued that there was no relationship of agent and principal. Now, it is not necessary that there should be any formal agreement expressly made for the purpose. Rule 24 which we have referred to earlier and the evidence of the chairman, lead to only conclusion

that the relationship between the defendant and the plaintiff was that of an agent and a principal and the defendant No. 1 was the agent of the plaintiff for receiving the amounts from other members of the company. there is no substance in the argument that the defendant. No. 1 was not proved to be the agent of the plaintiff.

(8) The second argument which has been advanced in this case and which had appealed to the Court below was that forward transactions in turmeric were illegal and, therefore, the plaintiff was not entitled to recover any amount on the footing of these transactions. Now, it seems that the forward transactions in turmeric were prohibited under the Defence of India Rules. Under the Clause 3 of the Spices (Forward Contracts Prohibition) Order, 1944, forward contracts in turmeric among others were prohibited. Thereafter the Essential Supplies (Temporary Powers) Ordinance of 1946 came into force and that was thereafter replaced by the Essential supplies (Temporary Powers) Act (XXIV of 1946). In these provisions there was no reference to spices as such. But the provisions were applicable in regard to food stuffs. Under a saving clause all previous notifications consistent with the Act continued in operation. A question, therefore, arose whether forward transactions in turmeric were illegal under those provisions. In the case of *The State of Bombay Vs. Virkumar Gulabchand Shah*, , the accused was prosecuted for the breach of the provisions of the Essential Supplies (Temporary Powers) Act, 1946 read with the Spices (Forward Contracts Prohibition) Order, 1944, relating to turmeric. The Additional City Magistrate, First Class at Sangli, held that the accused was guilty and sentenced him to imprisonment and fine. On appeal the Sessions Judge, South satara at Sangli, relied upon a judgment of this court and held that the transactions in turmeric were not controlled under the provisions of the Spices (Forward Contracts Prohibition) Order 1944, and quashed the conviction of the accused. An appeal by the State to the High Court also failed. Thereafter an appeal by the State to the Supreme court, succeeded, and it was there held that turmeric was an article of food and that the provisions of the Spices (Forward Contracts Prohibition) Order, 1944, in their application to turmeric were saved under the Essential Supplies (Temporary Powers) Act, 1946. It was under the authority of this judgment that forward transactions in turmeric are rendered illegal.

(9) It has been argued by Mr. Albal that the illegality of the transactions between the member inter se did not affect the Present question at all. The defendant No. 1 as the agent of the plaintiff having received the amount on his behalf from the debtor members was bound to pay over the amount to the plaintiff. It is argued on the other hand by the learned Counsel for the defendant that since the transactions were from their inception illegal, the plaintiff was not entitled to claim nor was the defendant liable to pay the amount even on the assumption that he was the agent.

(10) The defendant's resistance to the suit is founded upon the maxim *ex turpi*

causa non oritur actio. But it is not regarded as a matter of defence. The reasons and the basis of the rule is clearly stated by Lord Mansfield, C. J., in *Holman v. Johnson* (1775) 1 Cowp 341 as below:-

"The objection, that a contract is immoral or illegal as between plaintiff and defendant, sound at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff by accident, if I may so say. The principle of public policy is this : *ex dolo malo non oritur actio*. No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causa* or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground that Court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and the defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it; for where both are equally in fault, *potior est conditio defendentis*".

(11) The question that arises is, does this rule apply in the present case? The plaintiff says it does not and the defendant says it does.

(12) The case of *Bowmakers Ltd. v. Barnet Instruments Ltd.* (1944) 2 All ER 579 illustrates the limits of the application of the rule. *Du Parcq LJ* says at p. 582:-

"*Prima facie*, a man is entitled to his own property, and it is not a general principle of our law (as was suggested) that when one man's good have got into another's possession in consequence of some unlawful dealings between them, the true owner can never be allowed to recover those goods by an action. The necessity of such a principle to the interests and advancement of public policy is certainly not obvious. The suggestion that it exists is not, in our opinion, supported by authority. It would indeed be astonishing if (to take one instance) a person in the position of the defendant in *Pearce v. Brooks* (1866) 1 Ex 213 supposing that she had converted the plaintiff's broughman to her own use, were to be permitted, in the supposed interest of public policy, to keep it or the proceeds of its sale for her own benefit. The principle which is in truth followed by the Courts is that stated by Lord Mansfield, that no claim founded on an "illegal contract will be enforced, and for this purpose the words illegal contract" must now be understood in the wide sense which we have already indicated, and no technical meaning must be ascribed to the words "founded" on an illegal contract"; the form of the pleadings is by no means conclusive. More modern illustrations of the principle on which the Courts act are *Scott v. Brown, Doering, McNab and Co.* 1892-2 QB 724 and *Alexander v. Rayson* 1936 1 KB 169. But as *Lindley, L. J.*, said at p. 729, in the former of the cases just cited:

"Any rights which he (plaintiff) may have irrespective of his illegal contract will,

of course, be recognised and enforced".

(13) The defendant seeks naturally to rely on the observations in *Harry Parker Ltd. v. Monson* (1940) 2 KB 590 : (1940) 4 All ER 199:-

"With regard to the second contention, I can see no difference in principle between the case of a principal seeking to recover money handed to an agent for an illegal purpose and that of one principal seeking to recover money paid by him to another principal in pursuance of an illegal contract. In neither case will Court assist the parties, whether the claim be to obtain money paid for an unfulfilled or partly fulfilled illegal purpose or by way of damages for breach of an illegal contract".

Assuming that the rule should apply between principal and agent it is consistent with the rule as stated by Lord Mansfield in (1775) 1 Cowp 341. This case cannot help the defendant since in that case the amount sought to be recovered was given to the agent for an illegal contract and what a party himself could not do he could not do through the agent and, therefore, the rule applied. See *Sykes v. Beadon* (1879) 11 Ch D 170.

(14) He also relies on the case in *Goswami Shri Purushotamji Maharaj v. B. Robb* ILR 8 Bom 398. It appears that the defendant had paid the cess for several years except for the years 1875, 1876 and 1877. It also appears from the judgment that the defendant did not agree to be the agent of the plaintiff but the amount was levied from the supposed agent by way of compulsion and it is with reference to these facts that it was observed that the object of the agreement was of such a nature that, if permitted, it would defeat the provisions of Act XIX of 1844. The amount was being held by the defendants themselves against whom payment was to be enforced. The case, therefore, has no application.

(15) This Court has in *Shivram Govind v. Viswanath Govind*, 58 Bom LR 154: ILR (1956) Bom 185, considered the question. It is there said

"as the claim against the defendant was not based on the illegality of the contract which had already been acted upon, the defendant was bound to pay the plaintiff's share to him".

We are of the view that where the cause of action is not founded either on the illegal contract or on its breach, the party's right to possess his own chattels will be enforced against those who without any right detain the same or convert it to their own use even if it appears either from the pleadings or evidence led at the trial that they have come in possession of the defendants as a result of an illegal transaction.

There can be no doubt that there are occasional exceptions to this rule, as suggested in *Bowmaker's* case 1944 2 All ER 579 .

(16) The question whether or not the rule applies as between principal and agent is a much wider question. In the case of *Jahi Habib Haji Pir Mohamed v.*

Bhikamchand Jankial Shop, in AIR 1954 Nag 306 each of the learned Judges have given strong reasons for the opposing views though they agreed to dismiss the appeal on another ground. We do not decide that question as in this case it is clearly not necessary to do so, since we are of the view on the above reasoning that the rule in question does not apply to the facts of this case. The Court below was clearly in error in holding that the plaintiff could not succeed, on the authority of this case.

(17) It is also argued that in this case all the members had not made payments in the company and until all the payments were made the plaintiff can have no right to recover the amount. Now, the plaint shows that three of the members had not made the payments. The rules of the company provide that if the amount due from debtor-members were not paid to the defendant No. 1 by the time provided then such members had to be declared defaulters. But it does not appear anywhere in the rule that unless those amounts were collected the creditor members would not be paid; if that is so, it stands to reason to hold that the creditor members would receive their amounts after deduction pro rata, which the company was bound to pay them. There is no substance in this argument either.

(18) Under the circumstances, the plaintiff must succeed and his claim to the extent of Rs. 9,470 from the defendant No. 1 must be allowed.

(19) The plaintiff has claimed a sum of Rs. 804-15-0 as interest at 6 per cent per annum on the amount claimed by the plaintiff. In the plaint he founds this claim as damages. There is no agreement averred, to pay the interest as claimed by the plaintiff. Mr. albal, however, relies on notices, Exs. 43, 44, 65 and 67, which are telegrams, informing the defendant No. 1 that it would be liable to pay damages if the amount was not paid. This is not enough to sustain a claim for interest. It does not state what the rate of interest would be nor the particulars of the period. Moreover, if any amount were to be given by way of damages the plaintiff has not shown what are the damages that he has suffered. In this view of the matter he is not entitled to receive any amount by way of interest from the defendant No. 1.

(20) So far as the defendant No. 2 is concerned he was made a clearing agent by the defendant-company. He was therefore, clearly a servant of the company. There can, therefore, be no personal relationship of agent and principal between him and the plaintiff, there being no privity. He had deposited the amount collected by him as clearing agent from the debtor members in the Bank to the credit of the defendant No. 1. Clearly therefore, the plaintiff is not entitled to a decree against the defendant No. 2 at all.

(21) The result is that there will be a decree in favour of the plaintiff and against the defendant No. 1 for a sum of Rs. 9,470 with interest at 4 percent on the amount decreed from the date of the suit to the date of recovery, which we direct defendant No. 1 to pay to the Plaintiff.

(22) The plaintiff will get his costs of the suit and the appeal from the defendant No. 1. So far as the defendant No. 2 is concerned the suit as also his appeal must be dismissed with costs.

(23) Appeal allowed.