(1953) 04 GUJ CK 0002

In the Gujarat High Court

Case No : First Appeal No. 37 of 1950

Dhruv Chhotalal Khushalchand APPELLANT

Vs

Gandhi Gulabray Pragji RESPONDENT

Date of Decision : 25-04-1953

Acts Referred:

Contract Act, 1872 — Section 30
Defence of India Act, 1971 — Section 3, 3(1), 3(2), 5
Defence of India Rules, 1962 — Rule 80B, 81, 81(2), 81(3)

Citation : (1953) 04 GUJ CK 0002

Hon'ble Judges : Shah, C.J;Baxi, J

Bench : Division Bench

Advocate : C.N. Shah, for the Appellant; G.B. Joshi, for the Respondent

Final Decision : Allowed

Judgement

Shah, C.J.—This is an appeal from the decree of the Civil Judge, Senior Division, Jamnagar, dismissing the Appellant Plaintiff''s suit to recover Rs. 71977-11-0 or. account of losses incurred on certain forward contracts in groundnuts entered into by the Defendant through the pakki adat of the Plaintiff from 11th July 1947 to 12th December 1947. The claim was disputed by the Defendant on grounds, inter alia, that forward contracts in groundnuts were prohibited by an Order of the Nawanagar State No. W/2614 dated 11th November 1943 called the Oilseeds (Forward Contracts Prohibition) Order, 1943, and no suit to recover losses on forward contracts could lie, and that the contracts were wagering transactions and were void u/s 30, Contract Act. He denied some of the dealings as not having been entered into by him and pleaded payment of Rs. 19,000/-. He also tools technical objections as to the frame of the suit and the verification of the plaint.

2. The trial Judge found that the Oilseeds (Forward Contracts Prohibition) Order, 1943, of the Nawanagar State was in force at the date of the suit contracts, which prohibited forward contracts in groundnuts and the Plaintiff could not

recover on such contracts, and in this view he dismissed the suit with costs. He found that the contracts were not wagering and that dealings sued upon had been duly proved. He further found that Rs. 14,000/- had been paid by the Defendant and that Rs. 56,227-11-0 and interest would be due to the Plaintiff in case the contracts were held not to be prohibited and were enforceable.

3. It is conceded by Mr. Shah for the Appellant that in case the Oilseeds (Forward Contracts Prohibition) Order, 1943, of the Nawanagar State was in force at the date of the suit contracts, then the Plaintiff could not recover on the basis of the said contracts. His contention however is that the said Order had lapsed and was not in force at the material dates. The Order was made by the Nawanagar State in exercise of its powers under Sub-rule (2) of Rule 81 of the Defence of India Rules, as applied to the Nawanagar State, and it is common ground that the Defence of India Act and the Rules made thereunder expired and ceased to have application with effect from 30-9-1946, viz., six months after the termination of the war, which latter officially happened on 30-3-1946. Therefore, the Order prohibiting forward contracts in oilseeds would cease to be in force as from that date unless it was continued in force in time by a competent Order of the Nawanagar State.

The Nawanagar State had promulgated an Order No. 3333 of 1946 dated 29th October 1946 called the Essential Supplies (Temporary Powers) Order, 1946, which, as its preamble stated, was intended to provide for the continuance, during a limited period, of powers to control the production, supply and distribution of, and trade and commerce in certain commodities. Foodstuffs was one of the commodities and it included edible oilseeds. By Section 3 of the Order, powers were given to the Dewan of the State to issue orders providing for regulating or prohibiting the production, supply and distribution of any essential commodity and trade and commerce therein and other incidental orders. Section 5 provided for the continuation in force of existing orders, and was in the following terms:

Until other provisions are made under this Order, any order, whether notified or not, made by whatever authority under Rule 80-B, or Sub-rule (2) or Sub-rule (3) of Rule 81 of the Defence of India Rules, in respect of any matter specified in Section 3, which was in force immediately before the commencement of this Order shall, notwithstanding the expiration of the said rules, continue in force so far as consistent with this Order and be deemed to be an Order made u/s 3: and all appointments made, licences or permits granted and directions issued under any such order and in force immediately before such commencement shall likewise continue in force and be deemed to be made, granted, or issued in pursuance of this Order.

The words "which was in force immediately before the commencement of this Order" occurring in the Section must be given their natural meaning, and a plain reading of the Section undoubtedly shows that what the Section provided was- that all those orders which had been made under Rule 80-B or Sub-rule (2) or

Sub-rule (3) of Rule 81 of the Defence of India Rules in respect of matters relating to the production, supply and distribution of and trade'' and commerce in essential commodities, were to continue in force provided however they were in force immediately before the commencement of this Order. This Order No. 3333 of 1946 came into force from the date of its publication in the State Gazette, viz., on 7-11-1946, and therefore those orders which were in force on that date would continue in force by virtue of this Order. By necessary implication it will also mean that those orders which were not in force immediately before the commencement of this Order will not be covered by Section 5 and will not continue in force.

The point therefore is whether the Oilseeds (Forward Contracts Prohibition) Order, 1943, was in force immediately before the commencement of Order No. 3333 of 1946, i.e., whether it was in force on 7-11-1946. The Order would expire in the natural course six months after the termination of the War, unless it was kept alive by a timely Order of the Nawanagar State and as to this it has not been shown that it was so kept in force by any such fresh Order of the Nawanagar State. That is also not the case of the Defendant. The Order must therefore be taken as having died a natural death and not to be in force on the date of the Order No. 3333 of 1946, and if it was not in force on either 29-10-1946 or 7-11-1946 then evidently it will not be covered by S. 5 of the Order and will not continue in force, with the result that forward contracts in groundnuts which were transacted after 30-9-1946 will not be hit by the prohibition contained in the Oilseeds (Forward Contracts Prohibition) Order, 1943, and will be enforceable.

4. The learned Judge below has read Order No. 3333 of 1946 along with Order No. 3335 (3334 stated in the lower Court''s judgment is not correct) and has construed the former as having been issued by virtue of the powers contained in Order No. 3335 of 1946; and Mr. Joshi for the Respondent has also taken the same contention before us. Now the two Notifications Nos. 3333 and 3335 are dated the same date, viz., 29-10-1946 and they are both published in the Gazette dated 7th November 1946. The Order published by Notification No. 3335 is entitled Emergency Provisions (Continuance) Order, 1946, whereas the Order notified by No. 3333 is called the Essential Supplies (Temporary Powers) Order, 1946.

According to Mr. Joshi it should be taken that there was a mistake in numbering the two notifications, and that Notification No. 3335 should really have been numbered as Notification No. 3333 and the other one as No. 3335. It is urged that only then can the promulgation of the Essential Supplies (Temporary Powers) Order, 1946, notified by No. 3333, could have been issued, which in other words means that the Essential Supplies (Temporary Powers) Order, 1946, could not have been promulgated unless the Emergency Provisions (Continuance) Order, 1946, (notified by, No. 3335) was first promulgated.

Now, in the first place, there is no warrant for the assumption that there has been a mistake in numbering the two notifications. There is no material to support the suggestion and in the absence of anything to show that a mistake has really crept in, it would be wrong to assume that it was so and to proceed on that basis. The contention is also not sustainable on the merits, and the two orders considered, together rather suggest that they have been made independently and that the Essential Supplies (Temporary Powers) Order, 1946, is not dependent upon the Emergency Provisions (Continuance) Order, 1946.

By Section 3 (1) (i) of the latter, the provisions of the Defence of India Rules mentioned in the first column of the Schedule to the Order were to continue in force and to have effect subject to the modifications specified in the second column thereof. Sub-clause (ii) thereof provides that any order or the instrument made under or in pursuance of the said provisions, and in force immediately before the expiry of the Defence of India Act, 1939, shall continue in force so far as consistent with the provisions as continued in force by this Section and be deemed to be made under the Provisions so continued in force.

Sub-section (2) of Section 3 says that references in Sub-section (1) to the Defence of India Rules shall be construed as references to those rules as in force immediately before the commencement of this Order. According to Mr. Joshi some of the Orders passed under the Defence of India Rules had been withdrawn by the Nawanagar State and that some orders were still in force and that Sub-section (2) is intended to refer to such orders as were in force in the Nawanagar State. Mr. Shah on the other hand contends that the words ''Rules as in force'' in Sub-section (2) mean the Defence of India Rules as amended. However this difference as to the interpretation of the above words is not material to the real point in dispute and is of little consequence.

(5) Reverting to Sub-section (1), Clause (i) it is clear that only those rules which are mentioned in the first column of the schedule are to continue in force and to have effect as stated in the second column thereof. One of these rules is Rule 81 relating to General Control of Industry, and the entry in the second column says that for this rule the following rule shall be substituted. Clause (1) thereof says that the Nawanagar Darbar so far as appears to them to be necessary or expedient for maintaining supplies and services essential to the life of the community may by order provide, and it sets out the items in respect of which the Nawanagar State may make the orders. It is plain that it is only in respect of the items stated in the sub-clauses of Clause (1) out of those envisaged by Rule 81 of the Defence of India Rules, that the Nawanagar State armed itself with the authority to issue orders, and these provisions do not include the power to make an order regarding foodstuffs, cotton and woolen textiles, paper etc. No doubt it was competent to the Nawanagar State, if it appeared to the State to be necessary or expedient for maintaining supplies and services essential to the life of the community, to promulgate orders, but then it has restricted these powers to the items specified in column two of the schedule.

It is equally true that foodstuffs which include edible oilseeds might be covered by the expression supplies essential to the life of the community but they have not been mentioned in the second column of the Schedule, and simply because the power to issue orders in respect of supplies was kept in the Nawanagar State it will not include foodstuffs. A plain construction of the provisions of the substituted rule in column two is that only those items which have been mentioned in the said column were intended to be within the purview of the rule and not those which were not mentioned. In effect the supplies and services essential to the life of the community to be safeguarded were those stated in column two and not the Ors. . The provisions of Rule 81 of the Defence of India Rules which were to continue in force by reason of Section 3(1) (i) were those stated in the second column and not Ors. , and any order which had been made in respect of the said provisions under the Defence of India Rules and which was in force immediately before the expiry of the Defence of India Act, i.e., in force on the 30th September 1946, was to continue in force under Sub-rule (ii) of Section 3(1). As foodstuffs are not included in the second column of the Schedule against Rule 81, any orders made in respect thereof and which were in force on 30-9-1946 would not continue in force by reason of that fact.

Therefore the Essential Supplies (Temporary Powers) Order, 1946, issued by Notification No. 3333 of 1946, cannot be deemed to be an order issued in exercise of the powers contained in Clause (i) of the substituted rule appearing in column two of the Schedule referred to above. That Order does not mention that it has. been made and promulgated in exercise of the powers contained in the above said substituted rule, and, in my opinion, it is not correct to read into the order any connection with the Notification No. 3335 of 1946, and it should be treated as a separate and independent Order by itself. It follows that any matters governed by the said Order must be dealt with by reference to its own language.

6. Now, as I observed at the outset, S. 5, Essential Supplies (Temporary Powers) Order, 1946, continues in force only such orders as were in force immediately before the commencement of the Order and since it has not been shown that the Oilseeds (Forward Contracts Prohibition) Order, 1943, was in force at the commencement of the Essential Supplies (Temporary Powers) Order, 1946 the same cannot be taken as having been continued in force. It may be that the idea in promulgating this Order was to keep alive the said Order or any similar orders, but the provisions of the Order as made read otherwise and they speak of keeping alive only such orders as were in force on the date of its commencement. It appears that the authority which promulgated this Order lost sight of the fact that the orders made under Rule 81 of the Defence of India Rules had already expired on 30-9-1946 and twenty-nine days had already passed and that there were no orders in force on the date the Order was promulgated or was to come in force.

In our opinion the appropriate thing was to state in Section 5 any order which was in force immediately before the expiry of the Defence of India

7. Mr. Joshi has disputed the lower Court''s findings which have gone against the

Defendant, and the first of these relates to the nature of the contracts. His contention is that these are wagering contracts and are void u/s 30, Contract Act. Now the Plaintiff is doing business at Jamnagar in groundnuts and other commodities both on his own account & as commission agent. The Defendant, who has a chemist and druggist trade in East Africa and is related to the Plaintiff, had come to Jamnagar and was living here at the material time and it was during his stay at Jamnagar that he entered into the transactions sued upon, through the Plaintiff. It is common ground that in the dealings entered into by the Defendant, the Plaintiff was acting throughout as a pukka adatia. Pakki adat dealings are well established as a legitimate mode of conducting commercial business, and it is not suggested that the acts of a pakka adatia as such are unlawful.

8. The incidents of pakki adat dealings have been laid down in - Bhagwandas v. Kanji 30 Bom 205 (A),and they are that the pakka adatia has no authority to pledge the credit of the up- country constituent to the Bombay merchant, that no contractual privity is established between the up-country constituent and the Bombay merchant, and further that the up-country constituent has no indefeasible right to the contract (if any) made by the pakka adatia on receipt of the order, but the pakka adatia may enter into cross- contracts with the Bombay merchant either on his own accounts or on account of Anr. constituent, and thereby for practical purposes cancel the same. The pakka adatia is under no obligation to substitute a fresh contract to meet the order of his first constituent.

Therefore as between a pakka adatia and the constituent both are principals with reference to the contract, and it does not matter in the least whether the pakka adatia has entered into other contracts with third parties to cover any contracts or not. It is entirely a matter of his discretion and choice to enter into contract with third parties, but so far as he and the up-country constituent are concerned, the contract between them is complete. Now here the fact that the Defendant was not an up-country constituent but was from Jamnagar itself makes no difference, and it is not disputed that the dealings between him and the Plaintiff were on the basis of pakki adat. No doubt even though the Plaintiff may have entered into covering contracts with third parties, it is open to the Defendant still to show that so far as the contracts between him and the Plaintiff were concerned, they were wagering and the onus of doing so will be on the Defendant.

9. As was pointed out in Bhagwandas Parasram v. Burjorji Ruttonji AIR 1917 PC 101 (B), no doubt the contract of a pakka adatia, as that of anyone else, may be by way of wager but the onus of proving that it was so was on the Defendant. Their Lordships held that speculation does not necessarily involve a contract by way of wager and to constitute such a contract a common intention to wager is essential. In - Sukdev- doss v. Govinddoss and Co. AIR 1928 PC 30 (C), it was held that the mere fact that the contracts are highly speculative is insufficient in itself to render them void as wagering contracts; to produce that result there

must be proof that the contracts were entered into upon the terms that performance of the contracts should not be demanded and that differences only should become payable. Again, in - smail Lebbe v. Bartleet and Co. AIR 1942 PC-19 (D), in dealing with wagering contracts, their Lordships stated as follows:

The essence of a bet is that both parties agree that they will pay and receive respectively on the happening of an event in which they have no material interest. The transaction may'' be cloaked behind the forms of genuine commercial transactions: but to establish the bet it is necessary to prove that the documents are'' but a cloak and that neither party intended them to have any'' effective legal operation. Where the documents show an ordinary commercial transaction, and in conformity with them, one of the parties incurs personal obligations on a genuine transaction with third parties so that he himself is not a winner or loser by the alteration of price, but can only benefit by his commission, the inference of betting is irresistibly destroyed. In such cases the fact that no delivery is required or tendered is of practically no value.

This decision is particularly apt to the facts of the present case because so far as the Plaintiff is concerned he incurs personal obligations on the transactions with third parties and he himself is not a winner or loser by the alteration of price, but merely gets the benefit of his commission. Therefore even though here delivery had not been actually taken or given and the transactions had been squared up by an adjustment of the claims that fact will not vitiate the transactions.

10. As stated by Chimanlal Purshottamdas Shah Vs. Nyamatrai Madhavlal, , in order to constitute a wagering contract, neither party should intend to perform the contract itself, but only to pay the differences. In other words, the common intention of both parties at the time of entering into contract must be not to call for or give delivery from or to each other.........In order to ascertain the real intention of the parties, the Court must look at all the surrounding circumstances and can even go behind a written contract. But mere speculation is something quite different from a wager. Speculation is the practice of buying and selling goods, lands, stocks and shares, etc., in order to profit by the rise or fall in the market value as distinct from regular trading or investment.

11. In AIR 1937 345 (Nagpur) , it was observed that there is nothing illegal in speculating. It is a common place of the stock exchange, and the law only strikes at gaming and not speculating. The difference between speculation and wagering contracts is well illustrated by the following observation from the Laws of the Stock Exchange by Sir Walter Schwabe:

A very large number of dealings'' on the stock Exchange are of a speculative nature; persons buy and sell shares for a future date, with the hope of making a profit by the rise or fall in price, and often without the least intention, or even ability, either to pay for the securities, or to deliver them, but meaning to resell or repurchase before the time for delivery arrives. This method of doing business is by no means confined to stocks and shares, but is every day occurrence in almost all commodities: and as far as the distinction between speculation and gaming is concerned, it makes but little difference whether the commodities are actually paid for and held with a view of selling again at a profit, or whether the matter is arranged by a resale before the time for delivery. Such dealings are perfectly legitimate: Forget v. Ostigny (1895) AC 318 (G), per Lord Herschell. Gaming and wagering contracts, on the other hand are not real dealings at all; they may take the form of purchases and sales, but they are, in fact, mere bets on the market price of commodities at a future date. For a contract to be a gaming and wagering contract, there must not only be no intention on the part of either party to deliver or take delivery of the commodities, but also no obligation on either to do so; there must be an agreement or understanding that all the buyer has to do is to receive from, or pay to the seller the difference between the price of the bargain and the price at some future date. Further, the essence of gaming and wagering is that one party is to win and the other to lose upon a future event, which at the time of the contract is of an uncertain nature. Thacker v. Hardy (1877) 4 QBD 685 (H)per Cotton L.J. at p. 695.

The position therefore is that contracts are not wagering contracts unless it be the intention of both the contracting parties at the time of entering into the contracts under no circumstances to call for or give delivery to each other.

(12-14) (His Lordship after examining the facts, and evidence and holding that the plea of wagering contract was not substantiated proceeded further:) Mr. Joshi had laid stress on the fact that the parties are near relations, that the Defendant was doing business as a chemist and druggist in East Africa and was not accustomed to trading in groundnuts and that his intention must have been to only deal in differences. He urged that in spite of the fact that the transactions were numerous and totalled 2,74,000 maunds of sale and purchase of groundnuts, in not a single case had delivery been given or taken, and that neither the Plaintiff nor the Defendant had kept a godown. These facts however do not by themselves indicate that these were wagering contracts. The fact that all these transactions were squared up and in none of them was delivery either given or taken does suggest that these were speculative transactions, but in the absence of an agreement between the parties at the outset that in no circumstances was delivery to be asked for or taken and that differences only were to be adjusted, it will not be correct to hold that these were wagering contracts. As pointed out in AIR 1917 PC 101 (B), the mere fact that as to the greater part of the commodity there was no delivery, but an adjustment of claims, cannot alone vitiate the transactions. There is nothing wrong in adjusting the differences so long as the parties are not absolved in any event from delivering the commodity. The Plaintiff had in the present case purchased or sold in order to cover the contracts with the Defendant and he was in a position to give delivery if it had been asked for. The Defendant himself is a well-to-do party and he too was in a position to take or give delivery if necessary. Therefore there is no substance in the contention that delivery had not been either given or taken in this case. The question of taking or giving delivery would occur on the due date, viz., in the month of Magshar, but by that time all the transactions had been squared up and no question of taking or giving delivery therefore did remain. In view of the pleadings and the state of the evidence in the case and the Defendant''s own conduct, the plea that the contracts were wagering is untenable and must be rejected.

(15-19) (His Lordship, examining the evidence, rejected the defence contentions that joint transactions of the Plaintiff and himself have been included in his separate account and that they were all losing transactions selected for the purpose and that the payment made by the Defendant was in full settlement of his liability proceeded further:) The suit is brought in the name of Chhotalal Khushalchand as proprietor and manager of Rajnikant Chhotalal, and Mr. Joshi''s contention is that the suit in the name of the Plaintiff alone is not maintainable it being a joint family firm, and that it should have been brought in the name of the member of the family constituting the joint family firm. However there is no scope for this contention because the Plaintiff avers in his counter statement, Ex. 3, that he is the sole proprietor of this business which he carries on in the name of Rajnikant Chhotalal and that his sons Rajnikant and Jaisukh merely attend to the business as members of the family and have no interest in the said business. The frame of the suit has to be judged with reference to the Plaintiff''s own case and since he avers that he is the sole proprietor of the business it should be taken that the business is not owned by a joint family firm, and that the Plaintiff Chhotalal is entitled to sue in his own name as the sole proprietor.

20. Another technical objection made for the Defendant was that the verification of the plaint is not proper. The plaint is verified by Jethalal Zaverchand Patalia and one Soni Sojpal Kachra who have been given the power of attorney by the Plaintiff Chhotalal. Under Order 6 Rule 15, Code of Civil Procedure. a pleading is to be verified by the party or by one of the parties'' pleader or by some other person proved to the satisfaction of the Court to be acquainted with the facts of the case. No doubt the verification of the plaint by Jethalal and Sojpal was disputed in the written statement, but no issue on the point was sought by the Defendant and it appears that the contention was given up. Had the point been pressed evidence might have been led and the Court would have then been in a position to judge whether it was proved to its satisfaction that the persons verifying the plaint were acquainted with the facts of the case. Apart from this aspect of the question, Jethalal, Ex. 32, says that the suit has been brought on the strength of the Plaintiff''s books and of what the Plaintiff had represented to them. It is true he has not himself gone into the accounts but has accepted them as he found them. In the circumstances of the case that can be taken as sufficient acquaintance with the facts of the case in order to enable him to verify the plaint. The Defendant himself has said nothing against the verification in the course of his evidence. Therefore even if the question was open, we would hold that the plaint has been properly verified.

21. The result is that after giving credit for Rs. 14000/- the Defendant remains

indebted to the Plaintiff in the sum of Rs. 56,227-11-0 on account of the losses. The Plaintiff will be entitled to claim interest having regard to the mercantile usage and this position has not been disputed before us. In fact Mr. Joshi has not addressed us on the point of interest. The interest due on the claim proved works out to Rs. 1400/-, and together with it the Plaintiff becomes entitled to Rs. 57,627-11-0.

22. In the result therefore we allow the appeal, reverse the decree of the lower Court and award to the Plaintiff a sum of Rs. 57,627-11-0 together with proportionate costs of both the Courts. The rest of the claim is dismissed, the Plaintiff paying the Defendant''s costs on the rejected claim in both the Courts and bearing his own.

Baxi J.

23. I agree.

