

(1925) 02 MAD CK 0057
In the Madras High Court

Khoday Gangadara Sah

APPELLANT

Vs

A. Swaminadha Mudali and Others

RESPONDENT

Date of Decision : 17-02-1925

Acts Referred:

Citation : AIR 1926 Mad 218 : (1925) 22 LW 679

Hon'ble Judges : Shrinivasa Aiyanger, J

Bench : Division Bench

Judgement

Shrinivasa Aiyanger, J.—The only point that arises for determination in this suit is quite simple and though not frequently arising is of considerable importance. The plaintiff's suit is for the taking of the accounts of a partnership between himself and the three defendants. That a partnership agreement was made between these parties it is not disputed. The terms of the partnership have been reduced to writing and are to be found in the admitted copy filed as Ex. A. Defendants 2 and 3 have not contested the claim of the plaintiff and are apparently themselves anxious that the accounts of the partnership should be taken and the profits or losses ascertained and distributed

2. The contest in the case which raises the only point for determination has been put up only by the 1st defendant and has reference merely to the validity of the contract sought to be enforced. The point as put by the learned Counsel for the 1st defendant is this : the partnership contract was made in the Mysore State within the territories of His Highness the Maharaja and had reference to a business in arrack carried on by the plaintiff under a license obtained by him from the Mysore Government. Under the terms of the license granted to the plaintiff he was not entitled, without the previous permission of the Deputy Commissioner, to do what he purported to do, namely, take into his business as partners the Defendants 1, 2 and 3. No such permission was obtained by the plaintiff and, therefore, his act of entering into the partnership agreement was an act forbidden by the law and, therefore, void and, therefore, unenforceable. If this contention should be upheld, it follows that the plaintiff's suit must fail. And on

the other hand, if this contention should fail, the plaintiff would be entitled to a preliminary decree for the taking of the accounts of the partnership and the matter will have to be referred to the Official Referee for the taking of the usual accounts.

3. To begin with, I regret to state that neither the learned Counsel for the 1st defendant nor the learned vakil for the plaintiff seemed to have paid any consideration to an important aspect in this case, namely, that whereas the contract was made and was apparently intended to be performed entirely within the Mysore State, this suit has been instituted in this Court. And in fact both sides argued the case before me as if there were no such complication and it was a simple case of the contract being or not being illegal according to the law of the Mysore State. The law of that State, however, it was recognized had as being the law of a Foreign State to be proved as a matter of fact by the expert witness, an advocate at Bangalore, who has been called for the purpose. The question, therefore, has not been properly argued before me on the footing of a contract sought to be enforced in a British Court, but made and intended to be performed in a Foreign State and that a Protected State under the protection of the British Government and subject to its suzerainty. The 1st question that has to be determined in such cases is: What is the law applicable to the particular contract in question ? that is to say, by the application of which law should it be determined whether the contract in question is void for illegality as urged. Fortunately there is no serious difficulty in this case with regard to the law applicable, because whether we take the law applicable generally in the first instance as the law which the parties intended that the contract should be governed by or as the law of the place where the contract was made or as the law of the place where the contract was intended to be performed, it is in every case the same law, the law of the Mysore State. No evidence has been adduced before me and no argument addressed to show that the intention of the parties was that the contract should be governed by any law other than the law of the Mysore State. We may also presume that as the contract was apparently intended to be performed in its entirety within the Mysore State the parties intended that the contract should be governed by the law of that very State. This being settled, the questions that next arise for consideration are : (a) whether according to the law of the Mysore State this contract of partnership was forbidden : (b) whether if so forbidden, the provision of law forbidding was only a fiscal or taxing enactment or a provision of law based on the public policy of only a particular State or whether the prohibition is founded on natural justice or some moral principle which, if it is not, ought to be, recognized in international jurisprudence.

4. As regards the first question whether under the law of the Mysore State the suit contract of partnership was illegal and void, it must be observed, to begin with, that the question "What a foreign law is on a particular point" is a question of fact and has to be proved by the parties setting it up. No evidence has been adduced before me as to what the law of contracts is with regard to the

illegality and unenforceability of contracts which are entered into in violation of rules of law or against public policy. I have reason to believe that the law of contracts in that State is the same as the Indian Contract Act, But this was, however, bound to be established and not be left merely to inference. The 1st defendant on whom the burden of proof lay to establish satisfactorily all matters necessary for enabling the Court to come to the conclusion regarding the illegality of the contract did not give any evidence with regard to it. I may, however, observe in passing that from Ex. III it does appear as if the Indian Contract Act has been bodily adopted by the Mysore State. But while it is true that most of the Indian Statutory law has been adopted in the Mysore State, it also appears that in some cases changes have been made in the enactments so adopted, and I am, therefore, not in a position, in the absence of satisfactory evidence, on the point to say what the law of the Mysore State is with regard to the illegality of contracts.

5. In these circumstances, all that I can do is to proceed on the assumption that, as indicated by Ex. III, the Contract Act in force in the Mysore State is the same as the Indian Contract Act. Section 23 of that Act provides, amongst other things, that the consideration or object of an agreement is lawful unless it is forbidden by law or is of such a nature that, if permitted, it would defeat the provisions of any law or the Court regards it as immoral or opposed to public policy. It further provides that every agreement of which the object or consideration is unlawful is void.

6. The question then is whether the partnership agreement is one of which the consideration or object is unlawful within the meaning of Section 23 of the Contract Act. This would depend obviously on the terms and conditions of the licenses granted to and obtained by the plaintiff. But neither he nor the 1st defendant has produced the original license or even a copy. The Court has virtually been asked by both parties to assume that the terms and conditions of the licenses were in the common form as appearing in Ex. 1(b). Clause 16 of the general conditions of retail vend licenses is as follows:

No privilege of supply or vend shall be sold, transferred or sub-rented without the Deputy Commissioner's previous permission, which will only be given if the applicant is prepared to forfeit his deposit already made except in cases where the Deputy Commissioner sees reason not to enforce the penalty. Nor, if the Deputy Commissioner so orders, shall any agent be appointed for the management of any such privilege without his previous approval.

7. On behalf of the 1st defendant my attention has been drawn to a case decided by the Mysore High Court and reported in the Mysore Law Journal Reports, Vol. 1. p. 90, proved by the expert witness called for the 1st defendant and marked as Ex. III in the case. That case, however, refers only to a case of sub-letting actually covered by the terms of Clause 16 of the conditions. Generally speaking, it cannot possibly be contended that the mere fact that a licensee enters into a partnership with others or another in respect of profits or losses of the business

for the carrying on of which he has obtained a license necessarily involves either a sale, transfer or sub-letting of the license. There may no doubt be partnership agreements which involve or include a transfer of the interest in the license itself. There is, therefore, no warrant for supposing that every partnership agreement must necessarily violate such a condition as set out in that clause.

8. Mr. N. Narasimha Aiyangar, Advocate at Bangalore, has also referred in the course of cross-examination to a case reported in the 9th Vol. of the Mysore Chief Courts Reports, p. 316, where it was held in that State that a partnership entered into by a licensee in such circumstances was not illegal, and he also told me that that decision is regarded as good law upto date and has not been overruled. The partnership agreement in this case, Ex. A, does not contain any words of sale, transfer or sub-letting. No doubt in terms, as also necessarily as the result of a partnership agreement, the partners are constituted agents or managers of the concern. But the last sentence in Clause 16 of the general conditions indicates that if it was intended to prevent any agent being appointed for the management of any such privilege without the previous permission of the Deputy Commissioner, a special order of the Deputy Commissioner should be made, that is to say, in other words, generally speaking the appointment of a manager for the management of the privilege may be made without any previous permission, and if the Government should deem fit to prevent any such thing being done a special condition or order is required to be made by the Deputy Commissioner. No such special order or condition has been proved in this case. The effect of a partnership agreement is only to constitute the partners the agents of each other, and it, therefore, follows that the terms of Clause 16, far from forbidding the appointment of such agents for management, impliedly allows such appointments except in cases where it is specially forbidden. Having regard, therefore, to the terms of Clause 16 and also the judgment of the Chief Court already referred to, I cannot but hold that according to the law of the Mysore State, as recognized and acted upon by the subjects of that State, a partnership agreement with reference to a license of the kind in question is not an agreement the consideration or object of which is unlawful. In this view which I have arrived at with regard to the question in issue, I am, therefore, bound to hold that the suit contract was not unlawful or void. This would be sufficient for the purpose of disposing of the issue. But the learned Counsel for the 1st defendant has referred me to various judgments of the High Courts in India for the purpose of showing that under clauses similarly worded in Abkari licenses issued by the British Government, the Courts have held that a partnership agreement is an agreement forbidden by law and therefore unlawful. It seems, however unnecessary to refer to the decisions of the British Indian Courts in the matter. If there is a particular statutory enactment or a provision or rule having the force of law in a particular State and the highest Court in that state has decided that having regard to the terms of such enactment or rule, a partnership agreement in those circumstances is not illegal, I cannot hold that such an agreement is illegal because the British Indian Courts have held them to be

illegal in very similar circumstances.

9. In my view, therefore, any detailed examination of the decisions of the British High Courts in India is unnecessary. I may, however, briefly refer to them because after a careful examination of those cases, I have come to the conclusion that even on the principles decided in those cases the partnership agreement in this case could not be held to have been unlawful.

10. The case of *Marudamuthu Pillai v. Rangasami Mooppan* [1901] 24 Mad. 401 was one of the cases referred to and relied upon for the first defendant. The decision in that case proceeded upon a clause which is entirely different in its terms and scope from the clause in the present ease. There are, no doubt, observations in the judgment of the learned Judges in that case regarding the principle underlying the provisions of the Abkari Act and also with regard to the partnership agreements entered into by or with the licensee being illegal. Those observations were not necessary for the decision of the case and were merely obiter dicta. With all respect, therefore, the learned Judges that decided the case I cannot regard it as a binding decision more especially when that I have to consider is not a British Indian license but a license issued by the Mysore State, which in some important respects materially differs from the terms that the learned Judges were considering. Further I may also in this connexion observe that the learned Judges who came to the conclusion in that case that the rules under the Abkari Act were not merely for the protection of the revenue but also to regulate liquor traffic in the interests of the public were not confronted in the license with any such condition as that the previous permission by the Deputy Commissioner for the sale, transfer or sub-renting of the privilege of supply or vend will only be given if the applicant is prepared to forfeit his deposit already made except in cases where the Deputy Commissioner sees reason not to enforce the penalty. Further in the case of the license the learned Judges were considering, there does not appear to have been any such clause as the following.

Nor, if the Deputy Commissioner so orders shall any agent be appointed for the management of any such privilege without his previous approval.

11. The case of *Nalain Padmanabham v. Sait Badrinadh Sarda* [1911] 35 Mad. 582 was under the Opium Act and proceeded on the narrow ground that the terms of the Act prescribed that no one shall sell opium except as permitted by the Act and were different from the corresponding provisions in the Abkari Act. Further the learned Judges also relied for their decision on the terms of the partnership agreement with regard to which they observed as follows:

It is contended for the appellant that the admission of the plaintiff to partnership with the defendant is not a transfer. We are of the opinion that it is. It is no doubt true that every contract of partnership is not necessarily a transfer but it is equally clear that such a contract may in many cases involve a transfer. Thus if two persons agree to start a business in partnership and to contribute capital therefor, there is no transfer involved in the transaction. But if one person

carrying on a trade and possessing stock and capital admits another into partnership with himself making the stock and capital the joint property of both, it is impossible to contend that there is not a transfer in such a case.

12. The Tamil document filed in this case is far from clear and while there is no doubt that all the profits and losses were agreed to be divided amongst the four partners in equal shares I have been unable to find in the document any words of transfer even though I have no doubt whatever that a transfer must have been intended by the parties. But if, as stated in the case of *Marudamuthu Pillai v. Rangasami Mooppan* [1901] 24 Mad. 401, the object of the rules framed for the purpose of preventing sale, transfer or sub-renting is that the Government should not lose its control over the license, it is impossible to see, how, by the mere fact that a license admits certain persons into partnership with him, the control that the Government has over the license is in any manner or decree lost. Moreover, when the terms of a contract are reduced to writing and the question is whether the contract is illegal by reason of its seeking to do what is forbidden by law and the contention is that the agreement operates as a transfer, such a transfer should not merely be presumed but must appear in the document if not in terms at least as necessarily involved. There is no transfer so far as I can see either of the business or of the stock in trade or of any interest in the license ; and I think what the parties really intended was only that the profits and losses of the concern should be shared by them.

13. The next case cited to me by the learned Counsel for the first defendant was *Brahmayya v. Ramiah* [1920] 43 Mad. 141. With all respect it seems to me that the correctness of that decision is open to doubt. The clause in the license which the learned Judges were construing was as follows:

The privilege of supplying and vending shall not without the permission of the Collector previously obtained, be sold exchanged or sub-leased, nor if the Collector has ordered can an agent be appointed, without his permission previously obtained, for exercise of any such privilege.

14. Construing this clause, this is what the learned Judges say:

The clause prohibits sale by a stranger and the employment of an agent. In our opinion the taking of a partner has the effect, ordinarily of selling a portion of the business to him. It has certainly the effect of making him an agent for the sale of liquor.

15. I cannot possibly understand how the learned Judges came to the conclusion on a construction of the clause that apart from any special order of the Collector which is not referred to in the decision, the appointment of an agent was regarded as forbidden. The clause states that no agent can be appointed only if the Collector has so ordered. This would ordinarily mean and imply that in cases where the Collector has not so ordered the appointment of an agent would not be illegal. Therefore, unless it be that in that case it was admitted by both parties that the Collector had made an order forbidding the appointment of an agent, it

is impossible to understand the judgment or regard it as properly decided. Further the observation of the learned Judges that in their opinion the taking of a partner with him has the effect ordinarily of selling a portion of the business to him, is too general and sweeping to be accurate ; and in that respect I have no hesitation in stating that the law with regard to it is much more accurately stated by Benson and Sundara Ayyar, JJ., who decided the case of *Nalain Padmanabham v. Sait Badrinadh Sarda* [1911] 35 Mad.582.

16. On the other hand the case of *Natla Bapiraju Vs. Puram Achuta Rajaju and Another*, , decided by Miller and Krishnaswami Aiyar, JJ. is an authority for a decision that a partnership agreement with a licensee is not in all cases and under all circumstances illegal.

17. These are the Madras cases that were cited to me.

18. In the case of *Karsan v. Gatlu Shivaji* [1913] 37 Bom. 320 Sir Basil Scot, C.J., and Chandavarkar, J., held that the Indian Legislature was by no means blind to the possibility of partnerships being entered into by licensees in which other persons may become interested in the sale of liquor and that the object of granting the license is to have control over the person who is authorized to sell the liquor and in order that the sale of the liquor may not pass out of his control to unauthorized persons. Proceeding on this reasoning, those learned Judges held that a partnership was not prohibited by the terms of a license which merely forbade selling transferring or sub-letting.

19. In the case of *Champsey Dossa v. Gorddhandas Kessowji* [1917] 19 Bom. L.R. 381, Mr. Justice Macleod, sitting singly on the Original Side, held with reference to the terms of the license granted for manufacture of salt that the admission of partners to share in the profits cannot be considered as a subletting or alienation of a part of the privilege unless there has been a document directly transferring to the partners a part of the right to manufacture or vend. He accordingly held that a partnership agreement was not illegal which was entered into by a licensee who under the terms of the license was forbidden to sublet, mortgage or otherwise alienate the whole or any part of the privilege granted by the licensee of manufacturing salt on the land.

20. In the case of *Gauri Shankar v. Mumtaz Ali Khan* [1878] 2 All. 411 Oldfield, J., who was one of the Pull Bench of that Court held apparently with the concurrence of the Chief Justice and Mr. Justice Spankie that a partnership "contract was not contrary to the conditions of a lease of a ferry under which a transfer or sub-lease by the lessee was forbidden.

21. In none of the cases decided in the Calcutta High Court, and to which reference was made, was this question regarding partnership raised or considered.

22. In these circumstances having regard to the state of the case-law not only in Madras but in British India generally the weight of considered judicial opinion is

against regarding a mere partnership agreement as being against a provision of law which, merely prohibited sale, transfer, or sub-letting. As Mr. Justice Macleod of the Bombay High Court points out, and as Mr. Justice Miller and Mr. Justice Krishnaswami Ayyar, JJ., and Benson and Sundara Ayyar, JJ., have held, a partnership agreement does not necessarily involve any transfer by the licensee to the persons he admits as partners. No doubt a partnership agreement might also effect a transfer forbidden by law in which case it would be bad, not because it was a partnership agreement, but because it was a deed of transfer. In the present case, in the agreement filed before me, no words have been relied upon for the purpose of showing that they are words of transfer or operate to effect any transfer of property the transfer of which is forbidden by law. As I read the document the arrangement entered into by the partners was quite consistent with the licensee remaining as the legal owner but bound in equity to account for all the profits and losses to his other partners.

23. In any case, as I have already stated, what I have to consider is not whether, apart altogether from the law of the Mysore State, such a contract would or should be upheld by this Court, but only whether according to the law of the Mysore State the contract was void in its inception. If according to that law, as deposed to by the expert witness entering into a partnership with regard to the rights of a licensee is perfectly legal, this Court is bound to hold that, according to the law to which the contract is subject, the contract is not void or unenforcible, and I am glad to think that the rules of international law do not oblige the Courts of a foreign country to regard as against the law or as opposed to public policy and, therefore, void, any contract which the High Court of the very State in which the contract was intended to be performed, and by the law of which it was intended to be governed, would not so regard it.

24. Some difficulty no doubt might have arisen if, according to the state of the Mysore Law the contract would be illegal and the ground of illegality should appear to be not any fundamental principle of morality or ethics or public policy but some regulation, which, as in this case, has for its chief purpose the realization of revenue, and such a State happened also to be, as in this case, a Protected Indian State. It is possible that even in those circumstances British Indian Courts might feel compelled to give effect to the law of the Protected Indian State as it may be found to be. But in the present case no such question arises.

25. I have, therefore, come to the conclusion that the defence of illegality set up by the 1st defendant regarding the plaintiff's claim to enforce the contractual obligation has not been made out. There would, therefore, be a preliminary decree in the suit declaring the partnership between the plaintiff and Defendants 1, 2 and 3 each being entitled to equal shares of profits and losses of the partnership and directing the usual accounts of the partnership to be taken from the 1st day of July, 1919 as provided in the partnership agreement. The 1st defendant who was chiefly responsible for protracting this litigation so long, will

pay the plaintiff the taxed costs of the suit up to date. The costs to be incurred before the Official Referee will be dealt with at the time of passing the final decree in the suit.