
(1967) 10 AP CK 0002

In the Andhra Pradesh High Court

Case No : Civil Revision Petition No. 434 of 1965

Malladi Seetharama Sastry

APPELLANT

Vs

Naganath Kawlwar and Sons

RESPONDENT

Date of Decision : 06-10-1967

Acts Referred:

Contract Act, 1872 — Section 23, 65
Provincial Small Cause Courts Act, 1887 — Section 25
Telegraph Act, 1885 — Section 20A, 4, 5, 7
Telegraph Rules, 1951 — Rule 178(4)
Transfer of Property Act, 1882 — Section 53A

Citation : AIR 1968 AP 315

Hon'ble Judges : Sambasiva Rao, J

Bench : Single Bench

Advocate : C. Sitaramayya, for G. Venkatramasastry, for the Appellant; D. Govinda Rao, for the Respondent

Final Decision : Dismissed

Judgement

1. This is a revision petition u/s 25 of the Provincial Small Causes Courts Act. The plaintiff, whose claim to recover a sum of Rs. 1219-97 nP. from the defendant, has been rejected by the lower court, has preferred this revision petition. The amount the plaintiff sought to recover represents the principal and interest due to him from the defendant towards telephone charges from April, 1956 to 7th September 1956; the principal amount being Rs. 900-56 Ps.

2. The plaintiff was a resident of a house in Vijayawada bearing Municipal Door No. 6/142. He applied for and was given a telephone connection in the year 1853. The defendant is a firm located in the building in the same town bearing door No. 11-25-22 and situated within 60 yards from the plaintiff's building. The defendant requested the plaintiff that the telephone might be installed in its building so that it could use it for its rice export business. As the plaintiff had no immediate need for a telephone he acceded to the request of the defendant. The telephone bearing No. BJ 122 was accordingly installed in the defendant's

premises. The defendant was using it since its installation in 1954. The defendant however, defaulted in the payment of the telephone charges from April 1956. The demand notices were however issued to the plaintiff as the telephone stood in the name of the plaintiff. Though he brought this matter to the notice of the defendant the latter failed to pay the amount. Even a registered notice dated 16th June 1958, issued by him to the defendant to pay the arrears of the telephone bills was of no avail. The plaintiff was therefore obliged to pay the telephone charges himself, which he did in two instalments -- (1) Rs. 500/- on 16th July 1958 and (2) Rs. 400-9-0 on 24th August, 1958. Even though the defendant was informed of these payments and demand was made by the plaintiff to reimburse him the defendant did not comply with the demand. The plaintiff was therefore, obliged to file the suit.

3. The defence was a total denial of this arrangement, viz., that the telephone bearing No BJ 122, which was issued in the name of the plaintiff was at the latter's request. It was further contended that any sub-letting, assignment or transfer of a telephone was clearly prohibited by the conditions governing the contract under which a subscriber obtains an installation and that the agreement which was pleaded by the plaintiff violates the statutory provisions and was void and unenforceable u/s 23 of the Indian Contract Act. It was also contended that the suit claim was barred by limitation.

4. The trial court found that the case of the plaintiff was true and that the agreement pleaded by him with regard to the Installation of the telephone No. 122 in the defendant's premises and the undertaking given by D. W. 1 for payment of the charges due for the telephone was true. It, further found that the suit was not barred by limitation. Having found these questions in favour of the plaintiff the trial court, however held that the arrangement pleaded by the plaintiff and the suit claim made by him were hit by the provisions of Section 23 of the Contract Act. and that, therefore, the suit relief could not be granted to the plaintiff. It further held that Section 65 of the Contract Act had no application to the case. Aggrieved by this rejection of his claim by the trial court the plaintiff has come up in revision.

5. The only point that has been urged before me by the learned counsel for the plaintiff-petitioner is that the lower court was wrong in coming to the conclusion that the prohibition of a transfer of the benefit of the telephone by the plaintiff to the defendant was opposed to public policy and that the suit claim was hit by Section 23 of the Indian Contract Act. The learned counsel has contended that the Indian Telegraph Act, 1885 which will be hereinafter referred to as the Act. in accordance with which the plaintiff had entered into an agreement with the Government for the installation of the telephone was only a fiscal enactment and any prohibition of a transfer contained in the agreement would not bring the plaintiff's arrangement with the defendant within the mischief of Section 23 of the Contract Act.

6. On the other hand the learned counsel for the defendant-respondent

contended that the prohibition of a transfer contained in the agreement was an absolute one and that the Act is not merely a fiscal enactment but is also intended to safeguard the national safety and provide amenities to the general public. Penalties are provided under the Act for contravention of the conditions of the agreement and, therefore it is a case to which Section 23 of the Contract Act would clearly apply.

7. In order to appreciate and adjudicate upon the relevant contentions of the parties it is necessary to refer to the material provisions of the agreement which the plaintiff entered into with the Government for the installation of the telephone. Though neither the original nor a copy of the agreement between the plaintiff and the Government for the installation of telephone No. 122 was produced, the defendant filed a specimen copy of the agreement which was marked as Ex. B-3 in a case. The lower court proceeded on the basis that Ex. B-3 represents a correct version of the agreement and before me it has been admitted by both the parties that it does so. I, therefore, accept Ex. B-3 as the true and correct specimen of the agreement which the plaintiff entered into with the Government for the installation of telephone No. 122. Clause (1) makes the agreement subject to the provisions of the Act and the Rules made thereunder Clause (10) provides that if the subscriber commits any breach or fails to observe and perform any of the clauses, terms, provisions, covenants or conditions of the agreement the Government may determine the agreement by a notice in writing without prejudice to any other right or remedy of the Government. Clause (11) is the most material condition and it states that-

"The subscriber shall not, without the previous consent in writing of Government assign, sublet or otherwise transfer the telephone or the benefit of this agreement to any other party provided that such consent shall not be unreasonably withheld in the case of bona fide transfer of the business of the subscriber in connection with which the telephone was then being used to a third party approved by the Government who on such transfer will execute an agreement with Government on terms similar to those contained in these presents."

It would also be relevant in this connection to notice the preamble to the agreement which includes in the definition of the expression "the subscriber" "permitted assignee" also. The learned counsel for the petitioner has clearly stated before me that what his client did was a clear case of assignment or transfer of the telephone within the meaning of Clause (11). There is one other clause in the agreement which may also be relevant, viz., Clause 17. which provide that the subscriber shall give all reasonable assistance to the officials and workmen of the Posts and Telegraphs Department and that the said officials are empowered after giving notice, to enter on the subscriber's premises at all reasonable times for effecting such repairs or for restoration, removal of, for examination of a telephone apparatus. It is seen from these different clauses that the intention of the agreement was that the subscriber shall keep and

maintain the telephone apparatus in his own premises and any transfer by him of the same was prohibited. The only case of transfer of the telephone that is contemplated by the agreement is when the subscriber transfers the business in connection with which he has been using the telephone, to a third party. But, such transfer must be approved by the Government. The further condition is that previous consent of the Government in writing must be obtained for such transfer. That is why once that previous consent in writing of the Government is obtained, when there is a bona fide transfer of the business takes place, then the transferee become a "permitted assignee" within the meaning of the preamble. Such "permitted assignee" is also required to execute the agreement with the Government on terms similar to those contained in the transferor's agreement. No transfer of the telephone under any other circumstances is contemplated by the agreement. Even in case of permitted transfers the instances on obtaining the previous consent of the Government in writing appears to be very material and significant. It seems to my mind, clear that any assignment or transfer of the telephone without the previous consent of the Government in writing is absolutely prohibited by the agreement.

8. The objects and the provisions of the Act also are to my mind equally significant. Though the preamble to the Act merely says -

"Whereas it is expedient to amend the law relating to the telegraphs in India, It is hereby enacted as follows. "

The object of the Act and its amendments are stated in the Statement of Objects and Reasons. The main object of the Act is stated to be to give power to the Government and to any company or person licenced u/s 4 of the Act to place telegraph lines under or over property belonging whether to private persons or public bodies. The second intention is stated to be to provide for the regulation of telegraph lines constructed by the Government but leased to companies or individuals by whom they are worked. The object of the 3rd amendment which was of the year 1914 is to prescribe penalties for breach of the rules made u/s 8 of the Act for the conduct of the telegraphs worked under licence or lease. The third amendment is stated to have added provisions to the Act empowering the Government to prescribe moderate fines for the breach of the rules. The agreement between the plaintiff and the Government was made as per provisions of Clause (1) thereof subject to the provisions of the Act and the rules made thereunder. Section 4 of the Act provides for the grant of licences and it has not been disputed before me that the agreement between the plaintiff and the Government was made under the provisions of Section 4 of the Act. Section 5 empowers the Government to take possession of the licensed telegraphs and to order interception of messages in cases of occurrence of any public emergency or in the interests of the public safety. Section 7 confers power on the Government to make rules for the conduct of telegraphs. Clause 7 (2) (e) provides for making of rules relating to conditions and restrictions subject to which any telegraph line or apparatus shall be established, maintained, worked etc., and Clause 7(3) (1)

provides for making of rules relating to prescribing fines for breach and continuing breach by licensees. Section 8 empowers the government to revoke any licenses granted u/s 4 on the breach of any of the conditions contained in the licence. Part IV of the Act deals with penalties, Section 20, the first section in that part, provide? for levying of penalties for establishing, maintaining or working unauthorized telegraphs. Section 20A is the next provision in Part IV which lays down as under-

"If the holder of a licence granted u/s 4 contravenes any condition contained in his licence he shall be punished with fine which may extend to Rs. 1,000/-and with a further fine which may extend to rupees five hundred for every week during which the breach of the conditions continues."

Section 20A, therefore, makes it clear that the breach of condition committed by the plaintiff by assigning or transferring the telephone to the defendant has made him liable to be punished not only with a single fine which may extend to Rupees 1,000/- but also with a further fine which may extend to Rs. 500/- for every week during the continuance of the breach.

9. Having regard to the provisions and the declared objects and aims of the Act and taking into consideration importance of the telegraph (which includes the telephone) as a great public amenity and utility service and also as a very important, useful and effective source of communication for the State as well as the community at large, to my mind it seems to be futile to contend that the Act is merely a fiscal enactment intended merely to protect the revenue. It is undoubtedly a highly valued and useful public utility service. Its object is not only to facilitate the administration of the country but also to protect it in cases of emergency and to create an amenity to the general public. I am not, therefore, inclined to hold that the Act is merely one, the object of which is to protect the revenues. On the other hand I am of the opinion that the object of the legislature in making the Act and imposing conditions and the system of penalties, is to effectively provide a modern public amenity and utility service and the maintenance of public administration, order and safety. It has already been noticed that Section 20A of the Act which governs the agreement of the plaintiff with the Government provides for imposing not merely a single penalty but also for penalties for every week during which the breach of the condition continued. Under the circumstances I have no doubt that the claim of the plaintiff based on such a breach falls within the mischief of Section 23 of the Contract Act.

10. This view of mine finds support in the following passages from text books and decisions.

11. The learned author Anson in his law of Contract has this to say on the broad basis of distinction, between Statutes designed for the protection of public revenue and those which are made in the public interest.

"The effect in such a case depends on the proper construction of the particular statute. But where the words of the statute leave room for doubt as to its

intentions, it is material to ask whether the object of the Act in imposing the penalty is merely to protect the revenue or whether its objects, one of its objects, is to protect the General public or some class of the general public by requiring that the contract shall be accompanied by certain formalities of conditions as for example, registration in the case of a money-lender. In the latter case, it is probable that the act for the doing of which the penalty is imposed is impliedly prohibited by the statute and therefore, illegal."

A similar passage from Halsbury's Laws of England, Simonds Edition, 8th Volume, (at page 141) may be usefully extracted:

"Where penalty is imposed by statute upon any person who does a particular act, this may or may not imply a prohibition of that act. It is a question of construction in each case where the Legislature intended, to prohibit the doing of the act altogether, or merely to make the person who did it liable to pay the penalty. If the penalty is recurrent, that is to say, if it is imposed not merely once for all but as often as the act is done, this amounts to a prohibition. Where the object of the Legislature in imposing the penalty is merely the protection of the revenue the statute will not be construed as prohibiting the act in respect of which the penalty is imposed. "

In *Holman v. Johnson* (1775) 1 Compcas. 341 Mansfield, C. J. stated the principle in the following words:

"The objection that a contract is immoral or illegal as between plaintiff and defendant sounds 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 on 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 say so. 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 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 the Court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff."

Adopting this rule laid down by Mansfield C. J., in a case where there was transfer of property in fraud of creditors of the transferor and the transferee laid the suit for possession of such property and the transferor raised the defence of fraud their Lordships of the Supreme Court in *Immani Appa Rao and Others Vs. Gollapalli Ramalingamurthi and Others*, observed:

"Therefore we are inclined to hold that the paramount consideration of public interest requires that the plea of fraud should be allowed to be raised and tried, and if it is upheld the estate should be allowed to remain where it rests. The adoption of this course, we think, is less injurious to public interest than the alternative course of giving effect to a fraudulent transfer "

I, therefore, hold that the arrangement set up by the plaintiff with the defendant is prohibited and forbidden by law and opposed to public policy and the plaintiffs claim comes within the mischief of Section 23 of the Contract Act.

12. The learned counsel for the petitioner has relied upon a number of decisions in support of his contention. The first line of the cases are Pamulapati Bhushayya Vs. Kommareddy Chinnapareddi and Another, . Kommalapati Venkatadri v. Kommalapati Govinda Raju 1960-2 Andh WR 151 Chandaji Sukhraj and Company Vs. Lal and Co. (Tobacco Trading Company) and Others, .

13. All of them arise under the Central Excises and Salt Act and considered the question of legality of partnerships entered into in tobacco trade. All the said decisions proceeded on the view that the Central Excises and Salt Act as a whole is designed for the protection of the revenue. The second basis of those decisions was that apart from their being a positive prohibition against partnerships under the rules thereunder Rule 178(4) of the Act contemplates the confirmation of partnerships between a licensee and persons who are not licensees. In view of these two considerations their Lordships have held that the partnerships in the tobacco trade were not hit by Section 23 of the Contract Act. Thus these decisions do not help the plaintiff-petitioner in this case, because as I have held supra the provisions of the Act and the agreement are vitally different from those of the Central Excises and Salt Act. and the rules made thereunder:

14. The learned counsel for the petitioner has also relied upon three decisions of the Bombay High Court; Bhikanbhai v. Harilal Ramdinshet Marwadi ILR (1900) 24 Bom 622. Nazarali Syed Imam v. Babamia Dureyatimsha ILR 40 Bom 64 :(AIR 1915 Bom 2441) and Bhagwant Genuji Girme Vs. Gangabisan Ramgopal,

15. Parsons, J., observed at page 625 in the decision in ILR1900 24 Bom 622-

"When conditions are prescribed by a statute for the conduct of any particular business or profession and such conditions are not observed agreements made in the course of such business or profession are void, if it appears by the context that the object of the Legislature in imposing the condition was the maintenance of public order or safety or the protection of the persons dealing with those on whom, the condition is imposed. But they are valid if no specific penalty is attached to the specific transaction and if it appears that the condition was imposed for merely administrative purpose e.g., the convenient collection of the revenue."

Even from this decision it is clear that the legality of any arrangement or claim is to be decided on the basis of the consideration whether the object of the legislature in imposing the condition was the maintenance of public order or safety or the protection of the persons dealing with those on whom the condition is imposed. In the view I have taken about the Act and also in view of the fact that not only single penalties but also continuing penalties are attached to specific breaches and continuing breaches this decision on the other hand lends support to the view I have taken.

16. The case in *Nazaralli Sayad Imam Vs. Babamiya Dureyatimsha*, was a case where a partner was taken by a forest contractor and upon objection being taken to the agreement of partnership it was held that although the terms of the agreement prohibited the taking of the partner, the fact that the forest officers could revoke the licence, the licensee's act in taking a partner could not be regarded as being against law or defeating the provisions of any law.

17. In the third case viz.. in *Bhagwant Genuji Girme Vs. Gangabisan Ramgopal*, it was held that a partnership formed solely with a view to take all contracts at a public auction was in itself not Illegal. The provisions of the Act are different from the Act under consideration. These decisions of the Bombay High Court do not, therefore give support to the petitioner's contention.

18. The learned counsel appearing on both sides have stated before me that they have not been able to find a case directly dealing with the Act under consideration in this case. I have been, therefore obliged to consider the provisions of the Act and the agreement in detail and my conclusion is that the lower court is right in rejecting the plaintiff's claim holding that the arrangement on which it is based is hit by Section 28 of the Contract Act.

19. The lower court has also rejected the plaintiff's contention u/s 65 of the Contract Act. In this case there is no doubt that the illegal purpose was carried out in full. Therefore, the exception of *locus poenitentiae* does not apply to this case The Court will not render any assistance in the recovery of the money if there is even a part performance of the illegal contract. I am therefore, satisfied that the view taken by the lower court in this regard also is correct.

20. No other point has been argued. Therefore, the revision must fail and it is dismissed with costs.