

(1959) 12 RAJ CK 0001
In the Rajasthan High Court
Case No : Special Appeal No. 2 of 1957

Municipal Committee, Kishangarh

APPELLANT

Vs

Maharaja Kishangarh Mills Ltd.

RESPONDENT

Date of Decision : 11-12-1959

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 7 Rule 7
Contract Act, 1872 — Section 65, 70
Kishangarh Municipalities Act, 1943 — Section 15

Citation : AIR 1961 Raj 6 : (1960) RLW 345

Hon'ble Judges : Sarjoo Prosad, C.J.; L.N. Chhangani, J

Bench : Division Bench

Advocate : N.M. Kasliwal, for the Appellant; R.P. Goyal, for the Respondent

Final Decision : Dismissed

Judgement

Sarjoo Prosad, C.J.—This is a special appeal against the judgment and decree of Bhandari J, sitting single, confirming in second appeal the decision of the District Judge, Jaipur. Leave to appeal has been granted by the learned Judge.

2. The appeal relates to a suit filed by the plaintiff-respondent, The Maharaja Kishangarh Mills Ltd., for recovery of Rs. 3539/7/- from the defendant Municipal Committee, which is the appellant here. The plaintiff alleged that the Municipal Committee Madanganj had borrowed on 9-7-1947 a sum of Rs, 3,000/- and agreed to pay interest at the rate of 6 per cent per annum, after the loan had been duly sanctioned by the Mahkama Khas of the then Kishangarh State. Later the Municipal Committee Madanganj merged in the Municipal Committee Kishangarh and plaintiff averred that, by virtue of the merger, the defendant became liable to pay the aforesaid amount with interest.

The defendant resisted the claim and its liability to pay the amount; but admitted that in any case the plaintiff could not recover more than Rs. 2,000/- which was the actual amount paid. By a subsequent amendment in the written statement the defendant further pleaded that the contract made on behalf of the Municipal

Committee Madanganj was not executed and signed in conformity with the provisions of section 15 of the Kishangarh Municipalities Act (Act IV of 1943-- hereinafter called the Act) and as such was not binding on the Municipal Committee Madanganj or on the defendant either. This defence found favour with the trial court which entirely dismissed the plaintiffs suit; but on appeal the learned District Judge, Jaipur decreed the claim for Rs. 2,000/- with interest Rs. 160/14, in all Rs. 2160/14. The decree has been confirmed by Bhandari J. and hence this appeal.

3. The only point which has been canvassed before us, as it was before the learned Judge, is that the contract for loan not being in conformity with section 15 of the Act, is not binding on the defendant. The section requires:

"Every contract made by or on behalf of the Committee whereof the value or amount exceed Rs. 20/- shall be signed by the President. If a contract to which this section applies is executed otherwise than in conformity therewith it shall not be binding on the Committee."

Admittedly in this case there was no contract in writing and on the terms of the above section, the contract as such cannot be enforced against the Committee. The question, however, which still falls to be answered is whether the plaintiff is entitled to recover the amount u/s 65 of the Contract Act. u/s 7 of the Act, the Municipal Committee has power and was competent to enter into a contract for loan and the finding is that it did in fact take a loan of Rs. 2,000/- from the plaintiff. Therefore, as pointed out by the learned Judge, the competency of the Municipal Committee Madanganj to take the loan is not challenged. All that is challenged is the binding nature of the contract on the ground of non-compliance with Section 15 of the Act.

It is also not disputed now that if the Madan- ganj Committee were liable, the defendant by virtue of the merger would be also liable. The rule of equity and justice requires that if in fact money has been paid to the defendant under an agreement, not otherwise unlawful, it should pay back the amount to the plaintiff even if for some reason the contract as such is not enforceable. The law safeguards against any unlawful enrichment at the cost of an innocent party and provides for restitution in all such cases. These equitable principles are embodied in sections 65 and 70 of the Contract Act and relief should be granted to the extent that these provisions justify. Section 65 of the Contract Act runs as follows:

"When an agreement is discovered to be void or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it."

The section postulates two classes of cases, where relief can be granted:

(1) when an agreement is discovered to be void; or,

(2) when a contract becomes void. In both these cases, if a person has received any advantage under such agreement or profited by such agreement or contract, he is bound to restore it or to make compensation for it to the person from whom such advantage or profit has been received. The section contains an equitable rule of restitution applicable to all such cases. Section 2(g) of the Contract Act defines that an agreement not enforceable by law is void, as distinguished from an agreement enforceable by law, which matures into a contract. Similarly, section 2(j) defines that a contract which ceases to be enforceable by law becomes void when it ceases to be enforceable.

Now, an agreement which may be quite lawful in itself may become unenforceable by law due to various circumstances, viz: where there is a formal defect in the execution of a document in which the agreement, according to law, is to be embodied; or, where there has been a failure of consideration due to mistake or other supervening causes. It is true that on the language of section 65 and for the application thereof the agreement must be "discovered to be void" and not where it is void from its very inception to the knowledge of both parties; but it is well known that where a person honours an agreement, otherwise lawful, and discharges his obligations thereunder, the agreement though not enforceable by law may still continue to be good and operative. It is only where he refuses to honour the agreement and the other party has notice thereof that the agreement may be "discovered to be void", because no longer then it is enforceable by law.

As it has been observed in some of the decisions bearing on the point, even an agreement which is ab initio void may attract the operation of section 65, provided there is no lack of capacity on the part of the parties to enter into the agreement and the parties are not in pari delicto, or in other words where the consideration for the agreement is not unlawful or immoral. Similar considerations would apply to a contract when it ceases to be enforceable. It is not necessary to anticipate all the circumstances in which an agreement is "discovered to be void" or a contract becomes void. These have to be determined on the facts of each case. The authorities on the point are too numerous to mention. Most of them have been amply reviewed by Sinha J. in *Ram Nagina Singh Vs. Governor-General in Council*, and in *Dharmeswar Kalita v. Union of India*, (S) AIR 1955 Assam 86, a decision to which I was myself a party.

The above decision was followed with approval in *Dominion of India Vs. Preety Kumar Ghosh and Another*, In the present case, the agreement itself is not intrinsically illegal or unlawful. The parties were competent to enter into the agreement. The Municipal Committee was authorised to take the loan from the plaintiff and the consideration itself was a legal and valid consideration. The only defect was in regard to the form in which the agreement had to be reduced u/s 15 of the Act in order to be enforceable as a contract.

4. The fact that the agreement is not enforce-able and is void is discovered when the obligation under the agreement is repudiated by the defendant and he

refuses to discharge the obligation in spite of demand. In the present case the discovery was made by the plaintiff when the agreement was challenged on the technical ground by an amendment of the written statement. Prior to the repudiation, the plaintiff had no reason to assume that the agreement which was otherwise quite lawful had become void on account of its being unenforceable by law. Therefore the advantage which the defendant derived under the agreement in question has to be restored to the plaintiff. The finding in this case is that a sum of Rs. 2,000/- was actually paid to the Municipal Committee Madanganj and the defendant Committee which is the successor thereof is therefore liable to pay back the amount to the plaintiff with interest thereon.

The various illustrations given in Section 65 sufficiently bring out the principle underlying that section. Of course, the benefit contemplated by the section must be received before the agreement is discovered to be void, or the contract becomes void. Any advantage received thereafter would not be covered by the section, because after the agreement or contract ceases to be enforceable and is found to be void, any advantage received is not within the terms of the agreement or the contract in question. It follows therefore that when an agreement is discovered to be unenforceable and not illegal and when a party has not been guilty of any conduct which would disentitle him to come to Court, there appears to be no reason why the principle underlying Section 65 should not be given effect to.

It would be extremely inequitable and unjust to hold that when a contract has been entered into by authorised persons and is found to be unenforceable for want of certain formalities, the advantage gained by that party should not be, when it was not intended to be gratuitous, restored or compensated. The relief which a person asks for u/s 65 is not forbidden by any law and it cannot be legitimately argued that in trying to secure such a relief he is attempting to do indirectly what he had been forbidden by Law to do directly.

5. Section 70 of the Contract Act is somewhat broader in its effect. It says:

"Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or restore, the thing so done or delivered".

It applies to those cases where irrespective of any contract or agreement, a person lawfully does something for another person or delivers anything to him which was never meant to be gratuitous and the other person has enjoyed the advantage, the latter is bound to make restitution to the former. Section 50 therefore applies where all these three elements are present; namely:

- (i) that a person has lawfully done something for another person or delivered something to him,
- (ii) that he does not intend doing so gratuitously and

(iii) that the other person has enjoyed the benefit thereof.

These elements are undoubtedly present even in this case. It is true that ordinarily, the provisions of Section 70 are not invoked where originally the obligation to restitution arises under any agreement or contract; but there should be no bar to the application of the principle underlying Section 70 also to such class of cases. " Section 70 proceeds upon a principle of quasi contractual relationship; and whether it be u/s 85 or under S, 70 the restitution or compensation is ordered not in any affirmation of the agreement or the contract but in disaffirmation thereof. On the above facts therefore, I have no hesitation in holding that the principles of Sections 65 and 70 of the Contract Act would apply to the case and the decision of Bhandari J. upholding the decree of the lower appellate court is a correct decision.

6. The learned counsel for the appellant urges that the relief under S, 65 of the Contract Act should not be granted where there is nothing to show in the pleading that any such relief claimed. It is suggested that in granting any such relief the court would be introducing a new cause of action which was not set up in the plaint and when the pleading was never sought to be amended on that line. Reliance has been placed on a decision of the Calcutta High Court in *New Churulia Coal Co. Ltd. Vs. Union of India (UOI)*,

Where further facts require to be investigated, it may be necessary to insist upon such an averment, in the pleading so as not to take the defendant by surprise before granting relief u/s 65 of the Contract Act; but if on the facts found there is no difficulty in granting the equitable relief, it would be unreasonable to refuse it on any such technicality. *Das Gupta C. J.* (as he then was) recognised this principle in his judgment in the above case relied upon by the defendant. He observed:

"I have, therefore, come to the conclusion that the mere fact that a claim u/s 65 of the Indian Contract Act on the basis that the contract had been discovered to be void, was not made by the plaintiff in his plaint, is not by itself a sufficient reason why he should not be allowed to raise that point. Where further facts require to be investigated, it would be reasonable to proceed by way of an amendment of the plaint to add such arguments, Where, however, further investigation of facts is not necessary, the Court would be justified in giving the plaintiff relief under the provisions of Section 65 of the Indian Contract Act even without a formal amendment of the plaint".

The learned Judge arrived at the above conclusion after discussing the judgments of the Supreme Court in *Srinivas Ram Kumar Vs. Mahabir Prasad and Others, Trojan and Co. Ltd. Vs. Rm. N.N. Nagappa Chettiar*, as also the decision of the Judicial Committee in *AIR 1943 29 (Privy Council)* In the decision of the Privy Council last mentioned, the plaintiffs sued to enforce a registered mortgage granted by the defendant's father. The deed contained a personal covenant to pay the interest half yearly and to repay the principal at the end of three years.

The plaintiffs sought relief both by sale of the mortgagee, property and by enforcement of the covenant. The defendant maintained that the mortgage sued upon was void. The trial court sustained the defendant's contention and dismissed the suit. Before the Chief Court on appeal, it was contended for the plaintiffs that they were at least entitled to relief u/s 65 of the Indian Contract Act.

The Chief Court, however, left the plaintiffs to seek their remedy by a separate suit, since the matter was not pleaded. On appeal to the Privy Council, it was held that the plaintiffs should not have been refused restitution u/s 65, even though that had not been pleaded as a separate ground of claim in the plaint. The learned Judges in the Calcutta decision *New Churulia Coal Co. Ltd. Vs. Union of India (UOI)*, held that the judgment of the Privy Council in AIR 1943 29 (Privy Council) was good law and had been affirmed by the Supreme Court in *Srinivas Ram Kumar Vs. Mahabir Prasad and Others*, On the facts of the case in question, they refused to grant relief u/s 65, because further facts had to be investigated. It appears that the plaintiff in that case being in need of Lancashire boilers, registered its requirement with the Department of Government which had been helping parties in India to obtain such boilers from abroad.

It appears that a Second-hand boiler had been allocated to the plaintiff for installation in his Colliery. The plaintiff sent a cheque for Rs. 34,000/- on account of the price of the boiler and took delivery of the same. His case was that the boiler supplied to him remained unserviceable in spite of repeated repairs and he, therefore, wrote to the De-partment to take back the boiler and to refund the price, as also the freight and the handling charges. The Department refused to do that and, therefore, the plaintiff sued for recovery of the price and other incidental costs. The main defence taken on behalf of the Government was that the contract was void inasmuch as it did not fulfil the requirement of Section 175(3) of the Government of India Act, 1935.

The agreement was held to be void, but the plaintiff wanted to recover the amount on the basis of Section 65 of the Indian Contract Act. Further facts, therefore, had to be determined whether actually the boiler in question was and remained unserviceable in spite of repeated repairs and that the plaintiff was justified in returning the same and recovering the price thereof. Therefore, no relief u/s 65 could be given without the investigation of those facts. The case, therefore, is not in point and is no authority for the contention that in the circumstances of this case, relief u/s 65 could not be given,

7. Another decision of the Privy Council to which reference can be usefully made in this context is the case in *Thakurain Harnath Kaur v. Indar Bahadur Singh*, AIR 1922 PC 403. In that case the suit was for possession of village on the basis of an instrument of transfer with alternative prayer for payment or refund of the consideration amount. The suit was dismissed by the courts in India and on appeal to the Privy Council, it was held in concurrence with those courts that the plaintiff's claim to the villages which rested on an instrument of transfer could

not create any interest, because it amounted to a transfer of a mere expectancy or change of succession, the transferor having been found to have no interest in the villages in question at the date of the transfer. The plaintiff, however, was allowed to recover the amount of Rs. 25,000/- which had been actually paid on account of the consideration for the transfer with interest, though this aspect of the case had not been satisfactorily presented or developed in the pleadings.

Their Lordships thought that there were materials on the record from which it could be fairly inferred in the peculiar circumstances of that case that there was a misapprehension as to the private rights of the transferor in the villages in question which he purported to sell by the instrument of transfer and that the true nature of those rights was not discovered by the plaintiff earlier than the time at which his demand for possession was resisted and that was well within the period of limitation. The relief was granted on the principle of Section 65 of the Contract Act. With reference to this section, the Judicial Committee observed:-

"So framed, the plaintiff's claim to compensation resis, not on any principle or formula of English Law, but on the words of this section, and it was to be seen whether the facts of this case come within its scope. The section deals with (a) agreements and (b) contracts. The distinction between them is apparent from Section 2. By Clause (e) every promise and every set of promises forming the consideration for each other is an agreement, and by Clause (h) an agreement enforceable by law is a contract. Section 65, therefore, deals with (a) agreements enforceable by law and (b) with agreements not so enforceable. By Clause (g) an agreement not enforceable by law is said to be void.

An agreement, therefore, discovered to be void is one discovered to be not enforceable by law, find, on the language of the section, would include an agreement that was void in that sense from its inception as distinct from a contract that becomes void."

8. To elucidate the principle, as said above, it is unnecessary to refer to English cases when the decision depends upon the interpretation of statutory provisions of sections 65 and 70 of the Contract Act. The two cases discussed by Bhandari J. in his judgment under appeal viz., the Full Bench case of Allahabad High Court in the case of Municipal Board Gonda Vs. Bachchu, and that of the Madras High Court in the case of Madura Municipality v. Alagirisami Naidu, AIR 1939 Mad 957, are very much in point as they appear to be parallel instances on facts.

9. We therefore, hold that the decision of Bhandari J. cannot be assailed. The appeal is with out any substance and must be dismissed with costs.