
(1892) 03 CAL CK 0014
In the Calcutta High Court

Nur Ali Dubash

APPELLANT

Vs

Abdul Ali

RESPONDENT

Date of Decision : 04-03-1892

Acts Referred:

Contract Act, 1872 — Section 27

Citation : (1892) ILR (Cal) 765

Hon'ble Judges : Pigot, J; Macpherson, J

Bench : Division Bench

Judgement

Pigot and Macpherson, JJ.—The plaintiff sues upon an agreement entered into between him and all the defendants. His claim in this suit is made against defendant No. 1 alone, the other defendants being made parties pro forma.

2. Plaintiff and defendant No. 7 are ghat serangs or stevedores, and defendants 1 to 6 are dubashes at the port of Chittagong. The plaintiff says that there being competition between plaintiff and the defendants, they sustained serious losses in their respective business, and hence they entered into an agreement dated 27th August 1888.

3. The plaintiff's case is that under that agreement the defendant No. 1 became bound to allow the plaintiff to act as ghat serang of a certain ship, the Madagascar, which arrived at Chittagong, and of which defendant No. 1 was dubash; that defendant No. 1 refused to allow plaintiff so to act; that this refusal caused loss to the plaintiff; and that defendant No. 1 thereby became liable under the agreement to pay the plaintiff Rs. 1,000 as damages for this breach of it.

4. The defendant No. 1 contended (besides other defences which were not gone into) that the contract was illegal, and that the suit could not be maintained. The Munsif held that the consideration for the promise sued on consisted of an agreement by the plaintiff which was, as being in restraint of trade, illegal u/s 27 of the Indian Contract Act; that the defendant No. 1's agreement was therefore

made without consideration, and dismissed the suit.

5. The Subordinate Judge set aside the judgment of the" Munsif and remanded the case for a trial on the merits. The appeal is against this order.

6. The agreement upon which the suit is brought contains divers stipulations between the dubash parties to it, regulating, as between themselves, their competition for the custom of ships arriving in the port, which need not be referred to here. The articles of the agreement material to the present case as affecting the ghat serang parties, are Nos. VII, VIII, and IX, in which plaintiff is referred to as ghat serang No. 7, and, defendant No. 1 as dubash No. 4. They are as follows: (Set out above.)

7. It should be noticed that it was part of the defendant's case, on which an issue was raised, that the Madagascar was not, in fact, within the meaning of the agreement, the "third ship" contemplated by it, but a fourth ship, plaintiff having refused the third. This question of fact has not of course been decided, the Munsif having held that the agreement as to the "third ship" was itself without consideration and could not be enforced by suit; and the appeal is upon that question alone.

9. We agree with the Munsif, and, for the reasons given by him, we think the consideration for the promise by defendant No. 1 to the plaintiff contained in article IX was the agreement by the plaintiff in articles VII and VIII; and that the effect of those articles was absolutely to restrain the plaintiff from carrying on the business of a dubash, and also to create a partial restraint upon his power to carry on the business of a stevedore. As to, the first, nothing need be said; as to the second, the case of *Collins v. Locke* B.L.R. 4 App. Cas. 674 shows (were authority needed for the proposition) that the plaintiff's agreement "to act only as ghat serang of the said five ships" and not to "do any services to ships belonging to anybody else" (save his old ships), was in partial restraint of trade in the strict legal meaning of the expression.

10. The case of *Madhub Chunder Poramanick v. Rajcoomar Doss* lay 14 B.L.R. 76s down that in Section 27 of the Contract Act, it was intended to prevent not merely a total restraint from carrying on trade or business, but a partial one. That decision has been always followed. In the last case in which it has been referred to *Mackenzie v. Striramiah* ILR 13 Mad. 472; *Handley, J.* though declining to apply the principle in the particular case before him, thus summarises the decisions as establishing "that Section 27 of the Indian Contract Act does away with the distinction observed in English cases following upon *Mitchel v. Reynolds* 1 Sm. L.C. 9th Ed. p. 430 between partial and total restraint of trade, and makes all contracts falling within the terms of the section void, unless they fall within the exceptions."

11. We think the decision of the Subordinate Judge cannot be sustained on any of the grounds on which he bases it, so far as we are able to appreciate them. There was in the agreement before us a partial restraint upon the exercise of a

perfectly well-known trade or business: this was under the law void, as it did not come within any of the exceptions to the Act.

12. It is not necessary to consider the effect of Section 24 of the Contract Act upon the case; whether, even had the stipulation in partial restraint of trade not been illegal, the defendants agreement would not nevertheless have been void, part of the consideration for it having been the undertaking by the plaintiff absolutely to refrain from carrying on the business of dubash: probably that would be the proper construction of the contract.

13. The appeal is allowed, the order of the Subordinate Judge is set aside, and the decree of the Munsif dismissing the suit restored. Appellant to have his costs throughout.