

(1964) 02 AP CK 0003

In the Andhra Pradesh High Court

Case No : C.R.P. No's. 713 and 716 of 1961

Rajaram Sampat Kumar Rathi and Another	APPELLANT
Vs	
Sha Kapoor Chandji Kishorilal, Firm by Manager Mukamchand	RESPONDENT

Date of Decision : 25-02-1964

Acts Referred:

Contract Act, 1872 — Section 23, 30
Negotiable Instruments Act, 1881 (NI) — Section 118

Citation : AIR 1964 AP 537

Hon'ble Judges : Sharfuddin Ahmed, J

Bench : Single Bench

Advocate : Y. Suryanarayana, for the Appellant; G. Balaparameswari Rao, for the Respondent

Final Decision : Allowed

Judgement

Sharfuddin Ahmed, J.—These two revisions 713 and 716 of 1961 arise out of a common order of the Additional Subordinate Judge, Kakinada and made in S. C. Suits Nos. 251 and 252 of 1960 on his file.

2. The two suits were filed by the plaintiff-respondent against the petitioner-defendant alleging that his was a registered firm carrying on business at Kakinada. The petitioner-defendant's was a joint family firm carrying on business at the same place and one Raja Ram the father is the managing member of the family; that on 1-12-1959 the petitioner-defendant borrowed a sum of Rs. 900/- and executed a promissory note agreeing to pay the said amount with interest at 1-0-6% per mensem. In the second suit the amount claimed was Rs. 1500/- and the promissory note was dated 27-11-1959.

3. The petitioner-defendant pleaded that the two notes are not supported by any valid consideration. He was carrying on his speculative business in castor seeds, cotton, silver and gold with one Umed Mall. The petitioner-defendant used to purchase and sell by forward contracts and neither party had any time to take actual delivery of the articles at any stage. The contracts were being adjusted by

settling differences. In that connection the amount was found due and pronotes were executed in the name of the plaintiff-respondent who is also a partner of the firm and a brother of Umedmal. As the contracts were wagering contracts, their claims were not enforceable.

4. The point at issue in the lower court was whether the suit notes were the result of wagering contracts. The learned Additional Subordinate Judge on a consideration of the evidence adduced on either side, came to the conclusion that the liabilities of the defendant-petitioner under the pro-notes arose out of wagering contracts. The conclusion reached by him, in his own words reads as under:--

"On the question of fact, I am satisfied that there is no evidence on the side of the plaintiff that cash passed under the pronotes, but only the liability of the defendants under a wagering contract has been put an end to by the execution of the suit promissory notes."

In spite of the said conclusion, he decreed the suits on the grounds that the pronotes in favour of the plaintiff-respondent had put an end to the liability under the wagering contract, which though void, are not illegal or opposed to public policy relying on a decision in *Gherulal Parakh Vs. Mahadeodas Maiya and Others*, . It is against this order that the two revision petitions have been filed.

5. The learned counsel for the petitioner contended that once the court had come to the conclusion that the consideration for the notes was a wagering contract it should not have granted a decree in favour of the plaintiff. The mere fact that the plaintiff was a third/party, would not be sufficient to justify the passing of a decree particularly when it has been brought on record that the plaintiff was the brother of Umedmal with whom the respondents had entered into wagering contracts. There is no denying the fact that the conclusion of the lower court as to the nature of the liability is indisputable. At more than one place in the impugned order, it has been found by the lower court that the respondents had entered into wagering contracts with Umedmal and Umedmal was a brother of the plaintiff-respondent. In the concluding portion of para 8 the Court has observed as under:--

"I therefore find on the point that the defendants in these suits entered into wagering contracts with Umedmal."

In para 9 it is stated that the plaintiff in both the suits is one Mukamchand who is a brother of Umedmal and he has also signed some of the wagering contracts entered into by the defendant with Umedmal. Further, it was observed that there is no evidence on the side of the plaintiff that cash passed under the pronotes. It is therefore clear that the contention of the plaintiff that the notes were executed for cash consideration has been negatived. There would have been no difficulty if the plaintiff had proved that the notes were executed in his favour on payment of cash either to Umedmal or to the defendant and he was unaware of the nature of the transaction between Umedmal and the petitioner; a decree in his favour on

that basis would have been unassailable. But once it is brought on record that no cash consideration preceded the transaction and the plaintiff was aware of the wagering contract between his brother and the petitioner, it has to be determined how far the petitioner was liable to meet the demand.

6. It is well settled that a wagering contract cannot be enforced as being hit by section 23 of the Contract Act.

7. In *Pottimurthi Sadasivayya Vs. Tadepalli Venkata Narayana and Co.*, it is held that contract, object of which is to evade the provisions of the Special Contracts Prohibition Order 1944, is illegal and unenforceable. Further that damages for the breach of such illegal contract cannot form consideration for promise to pay them by another contract. The latter contract is also illegal and unenforceable.

8. The same view has been taken in the case of *Perosha Cursetji Parakh v. Manekji Dossabhoy* ILR 22 Bom 899 it was observed that as between the original parties a promissory note which has for its consideration a debt due of a wagering contract is void and therefore not binding in the hands of the original payee.

9. In *Kali Kumari Baisnabi Vs. Mono Mohini Baisnabi*, the Court had to consider the enforcement of a wagering agreement by alteration of the form of action based on another agreement. It was held that where agreement is illegal or immoral or one which is hit by section 23 of the Contract Act, the money due under the agreement cannot be recovered by change in the form of action based on another agreement which is naturally connected with it or has for its support the original illegal agreement, whether the plaintiff has to rely upon the illegal agreement or whether it is brought out by the defendants is immaterial. All that is material is intimate connection between the two.

10. The ratio of decisions in these cases is when the consideration for the claim is the wagering contract, it cannot be enforced notwithstanding any subsequent agreement when there is intimate connection between the two. The intendment is obvious viz., that the agreement which has been declared by law to be void would not be enforced in some other garb by a subsequent agreement in some altered form; otherwise the very purpose of the legislation would be defeated. It however excludes from its purview such transactions which are entered into by a third party bona fide without being aware of the nature of the transaction. To illustrate: if B is liable to A on the basis of wagering contract and approaches C and obtains a loan from him for payment to A without disclosing the nature of the transaction between him and A and C advances loan bona fide, the claim of C against B would be enforceable. But if C knowing full well that the transaction between A and B arose out of wagering contract, undertakes to pay the amount to A or B, he does it at his own risk. This seems to be the position in the instant case viz., that a brother of Umedmal who has signed on some of the wagering contracts, chooses to secure a pronote in his favour without pasting any consideration to the petitioner. The intimate connection between the two

transactions is therefore obvious and in the light of the rulings cited above, the claim does not seem to be enforceable.

11. The trial Court has based its decision on the case of Gherulal Parakh Vs. Mahadeodas Maiya and Others, wherein the question for consideration was whether the agreement of a partnership for carrying on wagering transaction was legal or not. It was held that the suit partnership was not unlawful within this meaning of section 23 of the Indian Contract Act. I think the said case is distinguishable on faces. There one of the partners was trying to recover half the amount from the other partner in respect of the payment he has made to the third party. The claim was resisted on the ground that the partnership was for wagering purpose and as such illegal. It was held that the partnership was not unlawful though its object was to carry on wagering transaction. In the instant case the claim is in respect of the wagering transaction itself and on evidence it has been found that the suit promotes were without consideration. The lower Court therefore was not justified in granting a decree in favour of the plaintiff-respondent merely because a presumption arises in respect of the promissory notes. No doubt u/s 118 of the Negotiable Instruments Act there is a presumption that every negotiable instrument is made or arises for consideration. But when it is established on evidence that there was no consideration for the said documents, the presumption stands conclusively rebutted.

12. On a consideration of the facts of the case therefore I am inclined to agree with the contention of the learned counsel for the petitioner that the suit promotes were without consideration and as such no decree could be passed against the petitioners-defendants on that basis. In the result the C.R.Ps. are allowed with costs throughout setting aside the decree passed by the lower court.