

(1999) 09 OHC CK 0022
In the Orissa High Court
Case No : O.J.C. No. 15013 of 1997

Rajat Kumar Rath and Another	Vs	APPELLANT
Government of India and Others		RESPONDENT

Date of Decision : 15-09-1999

Acts Referred:

Contract Act, 1872 — Section 23
Government Savings Banks Act, 1873 — Section 15
Post Office (Monthly Income Account) Rules, 1987 — Rule 17, 18

Citation : AIR 2000 Ori 32 : (1999) 2 OLR 562

Hon'ble Judges : A. Pasayat, Acting C.J.; B.P. Das, J

Bench : Division Bench

Final Decision : Allowed

Judgement

A. Pasayat, A.C.J.

1. Petitioners call in question legality of directions as contained in the orders dated 6-6-1997 and 26-9-1997 (vide Annexures 13 and 16 respectively to the writ application) passed by opposite party Nos. 1 to 4. By the aforesaid directions the petitioners have been called upon to refund certain amounts received then as interest.

2. Factual position is almost undisputed and is essentially as follows :

Petitioners opened accounts in the General Post Office, Bhubaneswar captioned "Monthly Income Scheme" (in short, the "Scheme"). The deposits are hereinafter referred to as MIS deposits. On different dates nine accounts were opened by the petitioners jointly. Additionally one account was opened by petitioner No. 1. The first account, i.e., MIS No. 1292 was opened on 3-6-1994 for a sum of Rs. 1,20,000/- and on the same day Savings Account No. 575272 was opened in the name of petitioners. The arrangement was that the monthly interest accrued shall be credited automatically to the Savings Bank Account. When subsequent Monthly Income Scheme deposits were opened there was an endorsement for

automatic credit of interest every month in the Savings Account. Subsequently another Savings Account was opened jointly in the names of petitioners bearing No. 575659. That was done on the date four MIS accounts were opened on 28-12-1994. Endorsements were made in the MIS deposit books as well as the Savings Account Book for automatic credit of interest every month. In respect of 8 of the MIS deposits, automatic credit of interest monthly was to be done in the Savings Account No. 575272, while in other two MIS deposits automatic credit of interest was to be done every month in Joint Savings Account No. 575659. On the basis of objections raised by the opposite parties-postal authorities to the effect that no interest would be payable in excess of the maximum balance of Rs. 4,08,000/-, petitioners were directed to refund a sum of Rs. 90,415/ which according to the postal authority, the petitioners had earned as interest by making excess deposit in MIS accounts. Information given to the petitioners by the postal authority reveals that under the Post Office Monthly Income Account Rules, 1987 (in short, the "Rules") framed u/s 15 of the Government Savings Banks Act, 1873 (in short, the "Act") a limit was fixed up to which the deposits can be accepted by the post office. It is the case of opposite parties that the deposit having exceeded the amounts specified in the Rules, the petitioners were not entitled to get interest. Petitioners took the stand that no such objection was ever raised by the postal authorities when they opened the accounts. They were fully aware and conscious of the amount being deposited in various accounts and in fact they had given an impression to the petitioners that the rule is not being insisted upon, and rigidly followed.

3. Petitioners' stand in essence is that on 28-12-1994 when the deposits exceeded the limit prescribed, there was no objection raised by the postal authorities and they accepted the deposits and the petitioners went on getting monthly interest in the Savings Bank Account. If the authorities have committed any mistake, the petitioners should not be made to suffer. They could have deposited the amounts elsewhere and with the very same postal department, and invested the amounts in other Schemes like Indira Vikas Patra, Kisan Vikas Patra, National Savings Certificates etc. In all these deposits interest that would have accrued to the petitioners would have been much more than which was granted to their accounts under MIS deposits. The audit authorities made objection after three years and that cannot be a ground to cause financial loss to the petitioners. Had the objection been pointed out immediately, the question of petitioners being required to refund interest received would not have arisen. Additionally it is submitted that under the Rules, the Government of India has power to relax any provision if it causes undue hardship to the depositors. All the relevant documents were sent by the petitioners to the Government of India in the Ministry of Finance with copy to the Ministry of Communication and the Senior Post Master for taking note of the peculiar circumstances and for withdrawing the orders passed for refund of the Interest received. But no positive action was taken.

4. Mr. P.K. Khuntia, learned Additional Standing Counsel (Central) appearing for

the opposite parties submitted that the Rules are clear and there is no scope for the petitioners to make a grievance. Even if it is accepted for the sake of argument that there was any lack of communication by the departmental authorities, that cannot be a ground for by-passing the statutory prescriptions. Emphasis is laid on Rules 17 and 18 of the Rules to contend that the direction for recovery is in order. Reference also has been made to the undertaking by the petitioners to the effect that they shall keep the amount single or joint at any time within the limits specified in the relevant rule and also furnish on demand from the Post Office Savings Bank, particulars of all such accounts. Stand is taken that had the petitioners disclosed that total deposit in M.I.S. which was accepted as permissible amount, the peculiar situation now prevailing would have been avoided. It is accepted that request was made for waiver of the condition, but it was not felt necessary for making reference to the Finance Department, as in similar cases in the past such requests have been turned down.

5. At this juncture it is to be noted that the petitioners could not have been permitted to make deposit's beyond the permissible limits. But it was open to them to make deposits under other Schemes. In fact it is fairly accepted by the learned Additional Standing Counsel for Central Government that had the petitioners deposited the money in some other Schemes floated by the State Government or banks, they would have fetched interest. It is evident from the records that the petitioners were at no point of time asked to withdraw the amount in excess of the prescribed limit. It is not a case where the concerned authorities were not aware of the total extent of the deposit made by the petitioners. The Savings Bank Pass Books themselves reflect the total amount of deposit received from the various deposits and were being duly credited.

6. The only question that needs to be decided in a case of this nature is whether the transactions are covered u/s 23 of the Indian Contract Act, 1872 (in short, the "Contract Act"). Said provision reads as follows :

"23. What considerations and objects are lawful and what not.--- 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 is fraudulent; or involves or implies injury to the person or property of another, or the Court regards it as immoral, or opposed to public policy.

In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void."

Though the contract may have been ille-gal, the transaction independent of that and the effect of it has to be considered, In the light of what has been stated by the apex Court in B.O.I. Finance Ltd. Vs. Custodian and Others, As was observed by the apex Court in the said case, even if it is assumed that the contracts were not severable and they were composite agreement, with the ready leg having

been performed, the illegality of the forward leg contained in the agreements cannot affect the transfers which had already taken place. With reference to the observations made in *Alexander v. Ravson* : (1936) 1 KB 169 it was held that if pursuant to an agreement to do an illegal act a transaction in part takes place which would otherwise be valid if there was no such prior agreement, then notwithstanding the illegality of the contract the said completed transaction itself cannot be regarded as invalid. It is important to distinguish between the enforcement of executory provisions arising under an illegal contract or other transaction and the enforcement of rights already acquired under the completed provisions of such a contract or transaction.

7. u/s 23, contracts opposed to public policy and immoral would be really void and not illegal, and in that respect Indian law seems to deviate from English law. At this stage, the distinction between void contracts and illegal contracts may be noticed. A void contract is one which has no legal effect. An illegal contract though resembling the void contract in that it also has no legal effect as between the immediate parties, has this further effect that even transactions collateral to it become tainted with illegality and are, therefore, in certain circumstances not enforceable. If an agreement is merely collateral to another or constitutes an aid facilitating the carrying out of the object of the other agreement which though void, is not prohibited by law it may be enforced as a collateral agreement. If on the other hand it is part of a mechanism meant to carry out that the law has actually prohibited, Court cannot countenance a claim based on the agreement it being tainted with an illegality of the object sought to be achieved, which is hit by the law. Where a person entering into an illegal contract premises expressly or by implication that the contract is blameless such a promise amounts to collateral agreement upon which the other party if in fact innocent of turpitude may sue for damages.

8. It is not a case where the petitioners are seeking enforcement of an illegal contract. On the other hand, the interest which has already accrued is sought to be withdrawn. It is necessary to quote paragraphs 64 and 66 of the judgment in *B.O.I. Finance Ltd. Vs. Custodian and Others*, which sum up the position in law. They read as follows :

"64. The validity of the transfer of the securities has to depend on the provisions of the Transfer of Property Act and the Sale of Goods Act relating to transfer and not to the validity of the agreement preceding the transfer. Like any other movable goods the securities could validly be purchased on delivery against payment of price as per Sections 4, 19 and 20 of the Sale of Goods Act. The price paid, while taking delivery was the consideration for the transfer of the securities. When the transfer of title has taken place the agreement between the parties preceding this cannot invalidate the transfer. The ratio of the decisions in *Sajan Singh v. Sardara* All 1960 SC 167 and *Tinsley v. Millingan* (1993) 3 AllER 65 and the observations of Rajgopal Ayyanger, J. in *Smt. Surasaibalini Debi Vs. Phanindra Mohan Majumdar*, are clearly applicable in the present case.

66. The following conclusions from the aforesaid discussion :

(A) Infringements of the instructions issued by the Reserve Bank of India under the Banking Regulations Act prohibiting the banks from entering into buy-back arrangements do not invalidate such contract entered into between the banks and its customers.

(B) The ready forward contract is severable into two parts, namely, the ready leg and the forward leg. The ready leg of the transaction having been completed, the forward leg, which alone is illegal, has to be ignored.

(C) With the ready leg having been performed the illegality of the forward leg contained in the agreements cannot affect the transfers which had already taken place."

9. It has to be noted at this juncture that during pendency of the writ application, orders were passed directing the G. P. O. to permit the petitioners to close the account in excess of the so called limit and the petitioners were allowed to withdraw Rupees 3,60,000/- on 6-12-1997, and some of the accounts were closed.

10. It has to be further noted that there is power of relaxation and the Central Government has been given power to relax. The stand that in similar cases the prayer for relaxation has been turned down by the Central Government cannot be a ground not to take action on the prayer made by petitioners for relaxation. Relaxation can be done in particular cases. The conditions or situations prevailing in one case cannot be equated with another. While considering a case of relaxation, the Central Government can if considers necessary, deal with a particular situation in a just and equitable manner. The Rules are beneficial in nature and the object is to give relief to a person who has acted bona fide.

11. The general principle is that every one has a right to waive and to agree to waive the advantage of a law or rule made solely for the benefit and protection of the individual in his private capacity which may be dispensed with without infringing any public right or public policy. Thus the maximum which sanctions the non-observance of the statutory provision is *cuilibet licet renuntiare juri pro se introducto*. (See Maxwell on Interpretation of Statutes, Eleventh Edition, pages 375 and 376). If there is any express prohibition against contracting out of a statute in it with no question can arise of any one entering into a contract which is so prohibited, but where there is no such prohibition it will have to be seen whether an Act is intended to have a more extensive operation as a matter of public policy. In Halsbury's Law of England, Volume 8, Third Edition, it is stated as follows in paragraph 248 at page 143 :

"As a general rule, any person can enter into a binding contract to waive the benefits conferred upon him by an Act of Parliament, or, as it is said, can contract himself out of the Act, unless it can be shown that such an agreement is in the

circumstances of the particular case contrary to public policy. Statutory conditions may, however, be imposed in such terms that they cannot be waived by agreement, and, in certain circumstances, the legislature has expressly provided that any such agreement shall be void,"

In the footnote it is pointed out that there are many statutory provisions express to apply "notwithstanding any agreement to the contrary", and also a stipulation by which a lessee is deprived of his right to apply for relief against forfeiture for breach of contract (Law of Property Act, 1925).

12. In view of the position in law, in the peculiar circumstances, we are of the view that it is not a case covered by Section 23 of the Indian Contract Act, and therefore, the direction for recovery is not sustainable.

The writ application is allowed, but in the peculiar circumstances without any order as to costs.

B.P. Das, J.

13. I agree.