

(1998) 03 MAD CK 0151
In the Madras High Court

S.A. Amirthavalli

APPELLANT

Vs

Selva Perumal Nadar (Died) and Others

RESPONDENT

Date of Decision : 25-03-1998

Acts Referred:

Contract Act, 1872 — Section 63

Citation : (1998) 2 LW 164 : (1998) 2 MLJ 632

Hon'ble Judges : S.S. Subramani, J

Bench : Division Bench

Judgement

S.S. Subramani, J.—Plaintiff in O.S.No.161 of 1977, on the file of District Munsif's Court, Tuticorin, is the appellant.

2. Suit filed by the plaintiff-Firm was one for recovery of money against the defendant. Plaintiff-Firm is a salt merchant at Tuticorin and defendant

was a manufacturer of salt at Arumuganeri. In 1974 there was scarcity of wagons to load salt in the Railway Stations. It was regulated on quota

basis. Being a salt manufacturer, defendant was entitled to allotment of wagons on turn basis. Defendant had orally agreed with the plaintiff at

Tuticorin to place the wagons to be allotted to him at Arumuganeri on quota to be utilised by the plaintiff. The wagons included open and covered,

and defendant had agreed to place five open wagon and four covered wagons at the disposal of the plaintiff. For that purpose, defendant had

received from plaintiff Rs. 4,650. But the defendant had committed breach of contract. He placed 2 open wagons and 4 covered wagons at the

disposal of plaintiff. After appropriating a sum of Rs. 2,000 towards the supply of wagons, a sum of Rs. 2,650 was due from the defendant.

Therefore, plaintiff issued a notice asking for return of the amount. Defendant refused to pay the amount and that necessitated the filing of the suit.

3. It is the case of the defendant that the alleged contract is illegal and unlawful, and it is void and unenforceable. He also pleaded some other

contract. According to him, it was the plaintiff who committed the breach.

4. The trial court dismissed the suit on the ground that the contract between the parties is illegal and against public policy. The view taken by the

trial Court was that allotment of wagons was regulated by Railways and that is for the benefit of the general public. Defendant who was entitled to

a priority in the allotment of wagons had entered into a contract with the plaintiff for making use of wagons allotted to him. This is per se illegal and,

therefore, plaintiff is not entitled to recover the amount.

5. When the matter was taken in appeal, the lower appellate court said that even though the defendant has not pointed out any Rule or Section

either under the Indian Railways Act or any other provision of law, that such a contract cannot be entered into, since the priority was given only to

the defendant, allotment of wagons by defendant to the plaintiff for payment was against public policy. The appeal was also dismissed.

6. It is against the concurrent judgment, the second appeal is filed on the following substantial question of law:

Whether the contract in question between the appellant and respondent is opposed to public policy?

7. Even before this Court, the respondent was not in a position to show that the oral contract of this nature is prohibited by any law, or that it is

illegal. Again, the agreement between the parties was to allot seven open wagons and seven covered wagons. A major portion of the contract is

yet to be completed. Even if the motive or contract is not recognised by law, plaintiff, if he is withdrawing from the contract and wants only return

of the amount parted by him, I do not think that the decisions of the courts below could be accepted. The plaintiff does not want specific

performance, but it wants only withdrawal from the contract, or to get back the money which it paid.

8. In "Pollock & Mulla - Indian Contract and Specific Relief Acts" - 11th Edition (1994) (Reprinted 1995), at page 361 commenting on Section

63 of the Indian Contract Act, the learned Author has said thus;

The courts will refuse to enforce an illegal agreement at the instance of a person who is himself a party to the agreement or fraud : ""In pari delicto

potior est conditio defendentis", e.g., paid to a charitable institution on a promise that the Secretary will secure the plaintiff a Knighthood which

never materialised. But there are exceptional cases where a man will be relieved of the consequences of an illegal contract, They are:

(a) Where the illegal purpose has not yet been substantially carried out before it is sought to recover the money paid or goods delivered in

furtherance of it;

(b) Where the plaintiff is not in *pari delicto* with the defendant;

(c) Where the plaintiff has not to rely upon the illegality to make out his claim.

Where parties are not in *pari delicto* the less guilty party may be able to recovery money paid or property transferred under the contract. This

possibility may arise in three situations.

First, the contract may be of a kind made illegal by Statute in the interests of a particular class of persons of whom the plaintiff is one.

Secondly, the plaintiff must have been induced to enter into the contract by fraud or strong pressure.

Thirdly, a person who is under a fiduciary duty to the plaintiff will not be allowed to retain property or to refuse to account for moneys received, on

the ground that the property or the moneys have come into his hands as the proceeds of an illegal transaction.

In *Sita Ram Vs. Radhabai and Others*, , their Lordships have considered this question in detail. In fact, the extract given supra from the textbook

on the Indian Contract Act is found in the decision of the Supreme Court.

10. In *Abdul Jabbar v. Abdul Muthaliff* AIR 1989 Mad. 12, their Lordships followed an earlier decision of the Supreme Court in *Smt.*

Surasaibalini Debi Vs. Phanindra Mohan Majumdar, and extracted the following passage, which according to me, is relevant for our purpose:

It is true that if the plaintiff seeks the assistance of the Court to effectuate an unlawful transaction, the courts will refuse to assist him. Where,

however, the plaintiff is seeking to enforce his title to property and it is not an integral part of his pleading which he must prove to entitle him to

relief that there was between him and the defendant an unlawful transaction or arrangement which he seeks to enforce, the plaintiff will be entitled

to the assistance of the court, even if the initial title of the plaintiff is rooted in an illegal transaction.

[Italics supplied]

11. learned Counsel for the respondents was also not in a position to bring to the notice of the Court that the contract pleaded by the plaintiff is

prohibited by any law or by any Notification. It is true that for a manufacturer of salt, priority is given in the allotment of wagons. In the mutual

dealings between plaintiff and defendant, I do not think that there can be any prohibition of using their wagons, which is intended for the use of the

defendant also. Under the above circumstances, I do not think that the decisions of the courts below that the contract between the parties is

affected by public policy and illegal, and consequently, the plaintiff is not entitled to recover the amount, could be supported.

12. The fact that the plaintiff has paid the amount, and the contract has not been fully completed, is admitted. Substantial portion of the contract has

not been executed. Under these circumstances, the plaintiff is entitled to succeed.

13. The question of law is, therefore, found in favour of the appellant. The judgments of both the courts below are set aside. Second appeal is

allowed with costs throughout in all the courts. Pending C.M.Ps. are closed.