
(1971) 05 RAJ CK 0010
In the Rajasthan High Court
Case No : Civil First Appeal No. 131 of 1963

Satya Narain and Others

APPELLANT

Vs

Sardar Chand and Another and Nathmal

RESPONDENT

Date of Decision : 12-05-1971

Acts Referred:

Contract Act, 1872 — Section 23

Citation : (1971) RLW 476 : (1971) WLN 182

Hon'ble Judges : C.B. Bhargava, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

C.B. Bhargava, J.—This is an appeal from the judgment and decree dated 29th August, 1963, of the Senior Civil Judge, Ajmer.

2. Plaintiffs Sardar Chand and Santok Chand instituted the present suit to enforce their mortgage dated 3rd March, 1952, executed by Nathmal as Karta of the joint Hindu family consisting of himself and his sons in consideration of Rs. 7500/- with stipulation to pay interest at the rate of eight annas per cent per month. The mortgage debt was to be repaid within four years and the mortgagor having failed to repay the amount except the sum of Rs. 1125/- towards interest, the present suit was instituted for recovery of Rs. 11963.82 and in default of its payment for sale of the mortgaged property. Nathmal did not appear to contest the suit but his sons, some of whom were minors on the date of the mortgage, contested the suit denying the execution of the mortgage by their father as also the passing of the consideration of any family necessity. In paragraph 7 of the additional pleas of the written statement filed on behalf of defendants Nos. 2 and 3 it was stated that they had come to know that defendant No. 1 (Nathmal) indulged in speculative and gambling business of silver and executed the alleged mortgage-deed for speculative and gambling losses suffered by him. It was asserted that the father had no right to mortgage the ancestral family property and it was not binding upon the defendants.

3. On the above pleadings, the following issues were framed:

1. Did defendant No. 1 Shri Nathmal alias Nathulal executed the suit mortgage as Manager and Karta of the firm Ramdayal Bansilal, and was it duly attested also?
2. Did Shri Nathmal secure the mortgage money for legal necessity?
3. Even if issues 1 and 2 are decided in favour of the plaintiffs, is the document in suit not binding upon defendants 2 to 6?
4. Is the rate of interest claimed by the plaintiffs penal? If so, what is its effect?
5. Whether Nathmal indulged in Satta transaction in silver? If so, what is its effect on the present suit?

Both parties led evidence in support of the issues and the learned Judge upon a consideration of the evidence came to the finding that the mortgage-deed was executed by Nathmal in his capacity as father and Karta of the family of the defendants, that mortgage-debt was not borrowed by Nathmal for the purpose of expanding or improving the joint family business carried on in the name of Ramdayal Bansilal but was obtained to pay off antecedent debt due to Rameshwarlal P. W. 2 in respect of the wagering transaction of silver and that the antecedent debt was not tainted with immorality. In view of these findings, he passed a preliminary decree for sale in favour of the plaintiffs.

4. In this Court the findings about the execution of the mortgage-deed by Nathmal in favour of the plaintiffs has not been challenged. It is also not challenged that the money was due to Rameshwarlal from Nathmal in respect of the forward silver transactions made by him and that the amount of Rs. 7500/- was borrowed for the purpose of discharging the amount due to Rameshwar. What is challenged in this Court is this that the amount due to Rameshwarlal from Nathmal cannot be regarded as an antecedent debt so as to authorise Nathmal to mortgage the ancestral property for its payment. Secondly in view of finding of the lower court that the transactions of silver made by Nathmal with Rameshwarlal were by way of wager it follows as a necessary consequence that it was tainted with immorality, and the sons of Nathmal were not bound to pay it, nor had Nathmal any authority to mortgage the ancestral property for payment of such immoral debts.

5. The question about the powers of the manager and father to alienate the undivided estate was finally decided by the Privy Council in *Brij Narain v. Mangla Prasad* AIR 1924 P.C. 50 and the Board laid down five propositions and the third and fourth propositions were:

1.
2.
3. If he purports to burden the estate by mortgage, then unless that mortgage is

to discharge an antecedent debt it would not bind more than his own interest.

4. Antecedent debt means antecedent in fact as well as in time; that is to say, that the debt must be truly independent and not part of the transaction impeached.

5

In the earlier case that is Sahu Ram Chandra v. Bhup Singh AIR 1917 P.C. 61 upon which reliance is placed by the appellant's counsel, no different principle was laid down as to the interpretation of "antecedent debt" as would appear from the following observation:

In truth, in order to validate such a transaction of mortgage there must, to give true effect to the doctrine of antedecence in time, be also real dissociation in fact.

In regard to Sahu Ram's case (supra) the Judicial Committee in Brij Narain v. Mangla Prasad (supra) observed that:

the case of Sahu Ram Chandra v. Bhup Singh must not be taken to decide more than what was necessary for the judgment, namely, that the incurring of the debt was there the creation of the mortgage itself and that there was no antedecence either in time or in fact.

Therefore in order to determine whether the debt is antecedent or not, it has to be seen whether the debt was really antecedent or only set up as a cover to defraud the family. If the loan is taken on the understanding that the property would some time after be mortgaged for the said loan, it would not be regarded as an antecedent debt because there would be no dissociation between the two transactions for the simple reason that the mortgage was contemplated even at the time of the first transaction.

6. Applying these principles to the facts of the present case, it would appear that Nathmal was dealing in silver transactions through brokers with the firm of Rameshwarlal P.W. 2 several months before the mortgage in question. By the time the mortgage was executed, he had incurred losses in those transactions.

7. Now so far as Rameshwarlal is concerned, the transactions of Nathmal with him were quite independent and the plaintiffs though they were also dealing in silver transactions with, Rameshwarlal had nothing to do with Nathmal's transactions. There is nothing on the record to show that Nathmal ever contemplated to mortgage the property with Rameshwarlal. No one could predicate the result of the transactions when they were entered into whether they would result in profit or loss. It is only after he suffered losses and was required to pay them to Rameshwarlal that he must have felt the necessity of borrowing money on the security of the house. It was pointed out that it was through the instrumentality of Rameshwarlal that Nathmal secured the loan from the plaintiffs. That may be so, but it does in no way affect the antedecency of the debt. There is no connection between the losses suffered by Nathmal in his

transactions with Rameshwarlal and the money borrowed by him from the plaintiffs. In my opinion, the money due to Rameshwarlal for whose payment Nathmal mortgaged the house was quite independent and it was "antecedent" both in time and fact. I do not therefore, find any force in this contention.

8. The next contention is that the transactions of Nathmal with Rameshwarlal were of wagering nature as found by the court below. They were therefore void. No suit could be brought for recovering the losses incurred in such transactions and were therefore immoral debts. It may be observed that in the written statement, objection about the immorality of the debts was not taken and it was simply stated that Nathmal indulged in gambling and speculative business and the mortgage was executed for speculative and gambling losses suffered by him. However, in order to show that the transactions were of wagering nature it has to be proved that "the contract was entered into upon terms that the performance of the contract should not be demanded but only the difference in prices should be paid. There should be common intention between the parties to the wager that they should not demand delivery of the goods but should take only the difference in prices on the happening of an event." See *Gherulal Parakh Vs. Mahadeodas Maiya and Others*, . The same view was taken in a bench decision of this Court in *Harphool Chand v. Firm Kishorilal Jagannath Prasad* ILR 1961 Raj. 390 and it was held that:

Forward contracts are not necessarily wagering contracts. To make a contract a wager, it must be proved that from the very outset, the common intention of the parties was to make and accept no delivery but to deal with the differences in prices.

The burden of proof of the absence of any such intention to take or give delivery of the goods and to bargain only on the fluctuation of prices is on the person who challenges the transaction by way of wager.

Nathmal, who was himself a party to these contracts with Rameshwarlal and who could have proved that his intention at the time of contracts was not to take the delivery of silver in any case but to take difference only, has not entered the witness-box. Defendants have examined D.W. 3 and D W. 4 in this connection. Both these witnesses were brokers. D.W. 3 has stated that Nathmal in Smt. 2008 had entered into some contracts with two firms Amarchand Rameshwarlal and Amarchand Gopikishen through him and he has admitted that in such transactions if any party wanted to take delivery of the silver bars, it could take it. He has also admitted that Nathmal borrowed money from the plaintiffs to pay off the losses which he had suffered in his transactions with Amarchand Rameshwarlal. No doubt he has said that actual delivery of silver was not taken in regard to any transaction, but that by itself would not prove wager. Similarly D.W. 4 has admitted that delivery of silver bars could be taken if any party so wished. He has also stated that in no case delivery of silver bars was taken by Nathmal.

9. Rameshwarlal has been examined on behalf of the plaintiffs and he has admitted that Nathmal used to sell and purchase silver bars from him and that these transactions were ready silver, though he has admitted that Nathmal did not take delivery of silver bars in any case. On the basis of the above evidence it cannot be held that the defendants have succeeded in proving that the transactions in silver by Nathmal with Rameshwarlal were of wagering nature, and, in my view, the lower court has not come to a correct finding. It is true that from the documents Ex. A-1 to A-7 it appears that Nathmal had entered into transactions which were extravagantly out of proportion to his resources, but that again would not be enough to prove the wager.

10. Even assuming that the losses suffered by Nathmal in transactions of silver with Rameshwarlal were on account of wagering transactions, the question is whether they can be regarded as "Avyavaharik". The term "Avyavharik" has not had a uniform definition and has been commonly rendered in the judicial decisions as "illegal" or "immoral". But its translation by Colebrooke has been accepted by the Judicial Committee of the Privy Council as well as by the Supreme Court in *Section S.M. Jakati and Another Vs. S.M. Borkar and Others*, as the nearest approach to the true conception of the term used in the Smritis texts. Colebrooke translated it as "a debt for a cause repugnant to good morals." Whether a particular debt is repugnant to public morals has to depend upon the mental attitude of the judge and the degree of moral disabrogation it involves. On behalf of the appellant, no direct decision has been cited to show that debts incurred in wagering transactions are repugnant to public morals and thus "Avyavharik". In several cases, it has been held that speculative transactions are not immoral. In *Khemchand v. Narain Das* AIR 1926 Lah. 40 it was held that debts incurred in speculative transactions cannot be said to be immoral debts. In *Gulabchand v. Vadilal Sarabhai Co.* AIR 1950 Kut 78 it was held that:

Where the debt incurred by a Hindu father arises out of a transaction of actual buying and selling particular set of shares which results in a loss, the debt cannot be immoral or illegal merely because it was entered into with the intention of earning profit.

In *K. Devadattam v. Union of India* AIR 1958 A P. 131 it was held that:

Where a Hindu father as a Karta earns huge profits in a joint family business which is of a speculative nature, it is in respect of the huge profits made by the father that the Income Tax is imposed and if the family is in enjoyment of the properties acquired out of the income of the business, its members are liable to bear the burden of the tax. They cannot escape payment of the tax by taking refuge under the untenable plea that the father contracted debts for the business which was of a speculative nature and therefore the debts being tainted with immorality and illegality, the liability, of the sons was excluded by reason of the theory of pious obligation.

11. In *Mahadeodas and Others Vs. Gherulal Parakh and Others*, the question was

whether an agreement to enter into an agreement by way of wager was against public policy or immoral within the meaning of Section 23 of the Contract Act. On the question of immorality it was held that:

It is equally impossible for a court to hold that such dealing is immoral. On questions of morality opinions will differ even more violently than on questions of public policy. It is not for Judge, however, to enforce their own ideas of morality from the Bench. It will be an abuse of their position on the Bench if Judges apply their individual views on morality on questions of this nature in disregard of ideas of morality held by society in general. There is no justification in thinking that dealing in differences is regarded as immoral by people at large and so the court will not be justified in regarding it as immoral for the purposes of Section 23 of the Indian Contract Act.

Thus dealing in differences is neither forbidden by law nor should the court regard it as immoral or against public policy. A partnership for carrying on business in forward contracts is not illegal, And there is no bar to the recovery of amounts found due on accounting.

The above decision was approved by the Supreme Court in *Gherulal Parakh v. Mahadeodas* (supra) and the court held that:

The word "immoral" is very comprehensive word. Ordinarily it takes in every aspect of personal conduct deviating from the standard norms of life It may also be said that what is repugnant to good conscience is immoral. Its varying content depends upon time, place and the stage of civilisation of a particular society. In short, no universal standard can be laid down and any law based on such fluid concept defeats its own purpose. The provisions of Section 23 of the Contract Act indicate the legislative intention to give it a restricted meaning. Its juxtaposition with an equally illusive concept, public policy, indicates that it is used in a restricted sense; otherwise there would be overlapping of the two concepts. In its wide sense what is immoral may be against public policy covers political, social and economic ground of objection. Decided cases and authoritative text-books writers, therefore, confined it, with every justification, only to sexual immorality. The other limitation imposed on the word by the statute, namely, "courts consider immoral" brings out the idea that it is also a branch of the common law like the doctrine of public policy, and, therefore, should be confined to the principles recognised and settled by Courts. Precedents confine the said concept only to sexual immorality and no case has been brought to our notice where it has been applied to any head other than sexual immorality. In the circumstances, we cannot involve a new head so as to bring in wagers within its fold.

Though their lordships were dealing in that case with the interpretation of the term "immoral" as used in Section 23 of the Contract Act, but it does throw much light on the question whether the wagering transactions are repugnant to public morals. The court also observed while dealing with the question whether

wagering contracts are opposed to public policy.

The common law of England and that of India have never struck down contracts of wager on the ground of public policy; indeed they have always been held to be not illegal notwithstanding the fact that the statute declared them void. The moral prohibitions in Hindu Law texts against gambling were not only not legally enforced but were allowed to fall into desuetude. In practice, though gambling is controlled in specific matters, it has not been declared illegal and there is no law declaring wagering illegal. There is no definite head or principle of public policy evolved by Courts or laid down by precedents which would directly apply to wagering contracts. Even if it is permissible for Courts to evolve a new head of public policy under extraordinary circumstances giving rise to incontestable harm to the society wager is not one of such instances of exceptional gravity, for it has been recognised for centuries and has been tolerated by the public and the State alike.

Though wagering contracts or speculative transactions may be foolish but they cannot be regarded as repugnant to public morals. They are legitimate means of earning and there are associations in all big commercial cities through whose medium forward transactions of highly speculative nature are made, I am, therefore, unable to agree with the learned Counsel for the appellant that the losses suffered by Nathmal were immoral debts.

12. There is no more point which has not been taken notice of by the lower court and that is that the defendants had not only to prove that the antecedent debts were immoral but also that the plaintiffs had noticed that they were so tainted. The evidence in this case does show that the plaintiffs were also dealing in silver transactions with Rameshwarlal P.W. 2. But there is no evidence that they had knowledge of the real nature of Nathmal's transactions with Rameshwarlal. In *Luhar Amrit Lal Nagji Vs. Doshi Jayantilal Jethalal and Others*, it was held that:

Where ancestral property has been alienated either under a conveyance executed by the father in consideration of an antecedent debt, or in order to raise money to pay off an antecedent debt, or under a sale in execution of a decree for the father's debt, the sons who challenge the alienation have to prove not only that the antecedent debts were immoral but also that the purchasers had notice that they were so tainted. In this respect no valid distinctions can be made between a mortgage and a purchase and the above principle will apply to a mortgage created by the father.

13. I, therefore, do not find any force in this appeal which is accordingly dismissed with costs.