

(1895) 09 MAD CK 0004
In the Madras High Court

The Madras Mutual Benefit Permanent Fund	APPELLANT
Vs	
Ragava Chetti and Another	RESPONDENT

Date of Decision : 05-09-1895

Acts Referred:

Companies Act, 1956 — Section 4

Citation : (1896) ILR (Mad) 200

Hon'ble Judges : Subramania Ayyar, J

Bench : Single Bench

Judgement

Subramania Ayyar, J.—This is a suit by the official liquidators of an association, called the Madras Hindu Mutual Benefit Permanent Fund

for the recovery of Rs. 4,845-4-0 by the sale of two houses in Triplicane mortgaged under an instrument, dated the 16th December 1868,

executed by the father of the defendants, the late Parthasarathi Chetti, a member of the association, for Rs. 3,750 lent to him as such member

under the rules of the association. The loan and the mortgage are admitted, and it is only on questions of law that the parties are at issue.

2. The first of the questions is whether the mortgage sued upon is an illegal transaction as is contended on behalf of the defendants. The validity of

this contention depends upon the answer to the question whether the said association is one falling within the latter part of Section 4 of the Indian

Companies Act, which runs as follows:

No company, association, or partnership consisting of more-than twenty persons shall be formed after the commencement of this Act; for the

purpose of carrying on any business (other than banking) that has for its object the acquisition of gain by the company, association or partnership,

or by the individual members thereof, unless it is registered as a company under this Act, or is formed in pursuance of some other Act or of Letters

Patent." Now the Madras Hindu Mutual Benefit Permanent Fund, which was not formed for carrying on the business of banking, consisted of

more than twenty persons. It was formed after the said Act had come into force, and not in pursuance of any other Act, or of Letters Patent.

Consequently, if its purpose or one of its purposes was to carry on business that had for its object the acquisition of gain by the association or by

the individual members thereof, it became an absolutely illegal association since it was not registered as a company under the Act, the words of

Section 4 being in the language of Bkett, L.J., imperative and prohibitory and negative in re Padstow Total Loss and Collision Assurance

Association L.R. 20 Ch. D. 146, otherwise the association must be held to have been a lawful one.

3. To obtain a complete and accurate idea of the purpose for which the association was formed, not only paragraph 3 of the memorandum of

association, which purports to describe it, but some of the rules framed by the association have also to be taken into consideration. The said third

paragraph states the objects to be "to enable Hindus to assist one another and invest their savings chiefly on landed property, and the doing all such

other things as are incidental or conducive to the attainment of the above objects." Rule 6 provides for the payment of subscriptions of Rs. 2-8-0

per mensem per share by the members of the association. Rule 27 renders subscribers falling into arrears liable to pay interest on such arrears.

Rule 12 directs that the account of the share or shares of every subscriber shall be closed on the expiration of seven years from the date of his

admission, and Rs. 250 per share shall be paid in full discharge of his claim. Rules 13 to 25 and Rule 30 relate to the grant from the funds of the

association of loans to such of the subscribers as are desirous of borrowing from it and to other matters connected with such loans. Rule 31

prescribes the rates of interest to be charged on arrears of subscription and on the loans to be granted to the subscribers. Rule 37 provides for the

closing of the accounts of the association, for setting apart a certain amount of money towards the formation of a reserve fund, and for the

distribution of the surplus collections among the subscribers annually. Rule 39 directs that the reserve fund shall be broken up once in five years

and be divided among the subscribers.

4. The observations relied upon on behalf of the defendants, made by Brett, M.R. in *Shaio v. Benson* L.R. 11 Q.B.D. 570 the circumstances of

which are very similar to those of the present case are exactly in point. There the M.R. says ""If a man lends money to a friend on one occasion

even at interest, he is not carrying on a "business," but if he forms a fund of £1,000 and, from time to time lends money out of it, he is then

lending money to different persons at interest. Every one would say that this is the "business" of lending money, for it is carried on so long as any

profit can be made. The object is to lend money at intervals upon successive contracts, therefore the Thornhill Arms Society carries on a

"business." A society is not within Section 4 of the Companies Act, 1862, unless its business has for its object the "acquisition of gain." But

Thornhill Arms Society lends money at interest; therefore it is an association carrying on a "business" having for its object the "acquisition of gain."

Perhaps the association itself does not "gain" any profit by the "business," but the individual members do, and this seems to be sufficient to bring

the society within the prohibition of the section.... The Thornhill Arms Society carries on a business producing a gain, of which each shareholder

may partake. The members are divided into members who lend and members who borrow money. I do not see what the borrowing members gain;

but lending members gain and each member has the possibility of acquiring gain. Therefore the Thornhill Arms Society is prohibited by the

Companies Act, 1862, Section 4, and is illegal."" The argument which might be suggested against the above view that the words in Section 4 ""by

the individual members thereof ""mean"" by all the individual members thereof is referred to and noticed by the M.R. as well as by the Lords Justices

and is rejected as pointed out by Fry, L.J., on the ground that too minute or hypercritical a consideration of the terms of the section was not to be

adopted, and that the Act should be so construed as to carry out the main intention of the Legislature."" Upon the authority of this decision and

on that of the *Jennings v. Hammond* L.R. 9 Q.B.D. 225 approved of therein, I must hold that the Hindu Mutual Benefit Permanent Fund falls

within Section 4 of Act X of 1866 (which is almost identical in its terms with Section 4 of the English Statute) and is illegal. In *re Siddall* L.R. 29

Ch. D. 1 was strongly relied upon on behalf of the plaintiff. There the association was formed for the object of purchasing a freehold estate and reselling it in allotments to the members of the association. The deed was executed by all the members the name of each, the number of his allotment, the total amount he was to pay, and the amount of his monthly payment to be made in respect of it being specified in the schedule to the deed. The property was vested in trustees and its management was vested in a President, Vice-President, Secretary and a Committee. The deed contained provisions for the conveyance to the members of their allotments when they had paid up the whole amount payable in respect of them and for the forfeiture and sale of the allotments of defaulting members. Powers were given to the committee to make roads, drains, etc., on the land and the trustees were given the powers of borrowing money on mortgage with the consent of a general meeting. When all the mortgages had been paid off and all the allotments had been conveyed the society was to come to an end. It was held by the Court of Appeal (Baggallay, Bowen and Fry, L. JJ.) that the association was not formed for the purpose of carrying on any business that had for its object the acquisition of gain. The Lords Justices express themselves, however, in terms which seem to indicate that their decision might have been different but for earlier cases of *Crowther v. Thorley* 32 W.R. 330 and *Smith v. Anderson* L.R. 15 Ch. D. 247 by which they were bound. And Baggallay, L.J., observed: "I must confess that, if I had had to decide *Smith v. Anderson*; I possibly should not have entirely agreed with all that was decided in it. My views would to some extent have gone with those of the late Sir George Jessel, whose decision was reversed." Further, even assuming that the decisions in *re Siddall* L.R. 29 Ch. D. 1 and the cases which it followed were sound in themselves, it is clear that they are quite distinguishable from the present case, inasmuch as in none of them the object of the association was to carry, on the business of lending money for the acquisition of gain, as is the case here. In this respect as well as in many others the present case very closely resembles *Jennings v. Hammond* L.R. 9 Q.B.D. 225 and *Shaw v. Benson* L.R. 11 Q.B.D. 563 cited above which, therefore, notwithstanding the doubt expressed by Lindley, L.J., I think in the absence of any decisions on Section 4 of the Indian Act I shall not be justified in declining to follow. Having arrived at this conclusion I must also hold that the

mortgage on which this suit is based is an illegal transaction, inasmuch as it had for its object the carrying out of the illegal purposes of the

association and it was exactly for similar reasons the promissory notes sued upon in *Jennings v. Hammond* L.R. 9 Q.B.D. 225 and in *Shaw v.*

Benson L.R. 11 Q.B.D. 563 were held to be illegal. The plaintiffs, however, contend that the defendants are estopped from setting up the plea I

have dealt with above and seek to support that contention in two ways.

5. First, it is said that the order of Busteed, J., dated the 15th September 1877, directing that the association in question be wound up, bars the

defendants from raising the question of illegality herein as much as it was open to their father to raise it before the order was passed. Now there is

nothing to show that the late Parthasaradhi Chetti, either directly or indirectly, took any part in the judicial proceedings which resulted in the said

order. But it is urged on behalf of the plaintiffs that Parthasaradhi could have as a member of the association intervened if he wished in the said

proceedings, and, therefore, the circumstances that he was not actually a party to the order does not affect the binding character of the

adjudication. No authority was, however, cited in support of that proposition. Assuming that the principle that a party who has had full notice and

has had the opportunity of availing himself of the contest, but has omitted to take advantage of such opportunity will be bound by the decision is

applicable to proceedings connected with the winding up of companies, the point for consideration in the present case is in what circumstances an

order like that of the 15th September 1877 is to be held to be conclusive.

6. The authorities on this point seem to be very few. In *Ex parte Hargrove & Co.* L.R. 10 Ch. App. 545, Sir George Jessel, M.R., says: "'As I

understand the decision in the case of the London Marine Insurance Association L.R. 8 Eq. 176 (which followed other cases), where the

application is to strike out a debt or to obtain an order for a call or anything which may be called a subsidiary application on the winding up, it is

not open to any party to say that the winding up order ought not to have been made. Therefore an objection which amounts to this that there was

no jurisdiction to make the winding up order, or that the winding up order for some other reason ought not to have been made is not in the present

case admissible.'" The only other authority that I am aware of is a passage in

the judgment of Lord Halsbury in the case of *In re Bowling and Welby's Contract* 1895 1 Ch. 667 to which my attention was drawn on behalf of the plaintiffs. Lord Halsbury observes: "That leads me to consider what is the effect of the order that has been made for winding up, and which in some senses may be said to have been *res judicata*. I should think it probable that the order appealed against is binding on the association as an association and on every body claiming under it or taking title under it." Now the present suit is certainly in no sense a subsidiary application or proceeding in the winding up of The Madras Hindu Mutual Benefit Permanent Fund within the meaning of the ruling of Sir G. Jessel quoted above. And with reference to the dictum of Lord Halsbury cited on behalf of the plaintiffs, it is difficult to understand how the defendants are properly to be held as claiming under or taking title under the association represented by the plaintiffs, since the former are the representatives of the mortgagor whilst the latter are the mortgagees and since in truth it is the latter that derive their title from the person whom the defendants represent. I think, therefore, that the contention that the defendants are estopped from pleading the illegality in question fails in so far as it is based on the order of September 1877.

7. The second way in which the plea of estoppel is sought to be supported on behalf of the plaintiffs is this. The mortgage instrument sued upon having provided that the possession of the mortgaged property should pass to the mortgagees, the mortgagor at the same time executed another instrument whereby he agreed to retain possession of the property as their tenant on a rent of Rs. 18-8-0 per mensem. It is argued that as such tenant the late mortgagor was and the defendants, his representatives, are precluded from questioning that the plaintiffs have a valid title as mortgagees as it was in that capacity they let the property in December 1868.

8. As a matter of fact, there is no doubt that the two contracts are parts of one and the same transaction. In point of law, however, they are either distinct from each other and separate or are connected with one another and inseparable. The contention in question has to be dealt with reference to both these aspects.

9. I shall first take up the view that the mortgage is distinct and separate from the letting.

10. So far as the latter is concerned, there is no doubt that the defendants are prevented from saying that their landlord had no right to let the

houses, and it is also quite clear that the estoppel applies to all matters connected with, or arising out of, the contract by which the relation of

landlord and tenant was created. The estoppel could not, however, extend further and affect matters quite outside that contract. In *Carpenter v.*

Butter Parke, B. said: "'If a distinct statement of a particular fact is made in a recital of a bond or other instrument under seal and a contract is made

with reference to that recital, it is unquestionably true that, as between the parties to that instrument and in an action upon it, it is not competent for

the party bound to deny the recital. But there is no authority to show that a party to the instrument would be estopped in an action by the other

party not founded on the deed and wholly collateral to it, to dispute the fact so admitted; though the recitals would certainly be evidence.'" 8 M. &

W. 212. Yet the principle underlying the rule so laid down and followed in numerous cases, of which *In re Simpson* L.R. 2 Ch. D. 89 is, I believe,

the latest, seems to me to be fully applicable to this case also. For the right to recover the amount in question by the sale of the property mortgaged

accrues under the contract of mortgage and is absolutely unconnected with the letting, which *ex hypothesi* is distinct from the mortgage. In the view

under consideration, therefore, the plaintiff's argument on the point cannot be upheld.

11. I shall now examine the point with reference to the other view, viz., that the two contracts are inseparable parts of one and the same

transaction. If this be correct, it follows that the illegality which affects the mortgage taints the letting also. And in the face of a clear legislative

enactment like Section 4 of the Companies' Act, the law recognizes no estoppel as between persons who are in *pari delicto*, as the parties in the

present case are. In *Fairtitle v. Gilbert* 2 T.R. 169 171 which related to a case of mortgage by trustees, who had no power, according to the Act

of Parliament under which they purported to act, to grant the mortgage, *Ashurst, J.*, said: "'This deed, therefore, cannot operate in direct opposition

to an Act of Parliament which negatives the estoppel. "' The observations of Lord Denman, C.J. *Levy v. Horne* 3 Q.B. 757 with reference to the

statement of the law made by *Ashurst, J.*, in *Fairtitle v. Gilbert* 2 T.R. 169 would seem to confine the rule laid down in the latter decision to cases

in which the parties were aware or ought to be presumed to have been aware of the provisions of the enactment which prohibits the transaction

impeached. In the present case it is unquestionable that the mortgagees as well as the mortgagor as members of the association must be taken to

have known the provisions of Section 4 of the Act X of 1866, making the registration of such associations compulsory and rendering unregistered

associations illegal. Barrow's Case L.R. 14 Ch. D. 441 is another authority for the proposition that in a case like the present there is no estoppel.

There Bacon, V.C., says: ""But the doctrine of estoppel cannot be applied to an Act of Parliament. Estoppel only applies to a contract inter partes,

and it is not competent to parties to a contract to estop themselves or anybody else in the face of an Act of Parliament.... I am of opinion that, as

between the parties to this contract, there was no estoppel; they contracted to do a thing which in the result it was unlawful to do and which could

only have been made lawful by registration.

12. It thus appears to me that whichever of the two views discussed above is taken, the contention of estoppel urged on behalf of the plaintiff's is

unsustainable, and the suit must fail on the ground of illegality relied upon on behalf of the defendants.

13. The result is the suit is dismissed but without costs, since the defendants are the legal representatives of one who was a party to the illegality

that has led to the dismissal of the suit.