

GOPU
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VELU
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vs.
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years ago. On the death of Nataraja Chetty there was litigation as to who was entitled to succeed him as trustee and it was held by this Court on appeal that his son and heir, Kolandavelu, was so entitled. No one claiming as the heir of the other predeceased trustee came forward, and for a considerable period Kolandavelu was the sole trustee. In the latter part of 1895, Kolandavelu appointed Sami Royar as his co-trustee in the place of the second trustee named in the will. The will itself conferred no power on either of the trustees, or on any one else, to fill up vacancies in the office of trustee. Section 73 of the Indian Trusts Act does not extend to trusts such as that created by Appakutti, and it is settled law that, in the absence of a power under the instrument creating the trusts or by virtue of some statutory provision, a trustee as such has no power to appoint any person as trustee either in his own place or to act jointly along with him. It follows, therefore, that the appointment relied on by Sami Royar under exhibit I conferred on him no right to act as trustee, and the present suit brought by him as trustee is unsustainable.

We accordingly reverse the decree of the Subordinate Court and dismiss the suit with costs throughout.

APPELLATE CIVIL.

*Before Sir S. Subrahmaniam Ayyar, Officiating Chief Justice,
and Mr. Justice Davies.*

1905.
March 30, 31.

SOMU PILLAI (PLAINTIFF), APPELLANT,

v.

THE MUNICIPAL COUNCIL, MAYAVARAM (DEFENDANT),
RESPONDENT.*

Contract Act IX of 1872, ss. 23, 65—An agreement tending to create a monopoly void as opposed to public policy—Madras District Municipalities Act IV of 1884, s. 191, cl. 2, and s. 282, cl. 2—Construction of statutes, observations on—Refund of money obtained under a void agreement.

Agreements having for their object the creation of monopolies are void as opposed to public policy under the English Common Law and under section 23 of the Indian Contract Act.

* Second Appeal No. 507 of 1903, presented against the decree of F. D. P. Oldfield, Esq., District Judge of Tanjore, in Appeal Suit No. 821 of 1901, presented against the decree of M.R.Ry. A. Rajagopala Ayyar, District Munsif of Mayavaram, in Original Suit No. 263 of 1900.

The power conferred by section 191, clause 2 of Madras District Municipalities Act IV of 1884 on the Chairman of a Municipality to license places for selling meat, etc., only empowers him to consider the propriety of granting or withholding licenses in each case and not to enter into agreements which must preclude him from considering any such application except from a particular person or persons.

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A power to interfere with the ordinary rights of citizens will not be inferred in the absence of express grant unless it be necessarily implied as incidental to other powers expressly granted or is indispensable to repress the mischief contemplated and advance the remedy given.

Rossi v. Edinburgh Corporation, (L.R. (1905), A.C., 21), referred to.

Logan v. Pyne, (43 Iowa, 524; 22 Am Rep., 261, 262), followed.

Doubts as to the existence of such powers must be resolved against the Corporation and in favour of the public.

Where a municipal body receives license fees under a void agreement, it must, when the agreement is set aside, refund the amount so received; and a suit to recover such amount will not be barred by section 262 (2) of Madras Act IV of 1884.

Discretionary power to grant licenses conferred by section 191, clause 2, District Municipalities Act, does not empower Municipalities to refuse licenses unless clear grounds exist for so refusing.

SUIT for damages. Plaintiff brought this suit against the Municipal Council of Mayavaram for damages alleged to have been sustained by him in consequence of a breach by the defendants of a contract entered into between the defendants on the one hand and the plaintiff and one Kanni Rowthan (who had released his rights under the contract in favour of the plaintiff) on the other. The contract alleged in the plaint was that the defendant undertook to grant and secure to the plaintiff the exclusive right of selling flesh within the municipal limits of Mayavaram for a period of one year in consideration of the payment to the defendant of Rs. 100 on account of fees and Rs. 50 as security. The defendant contended *inter alia* that there was no undertaking to give the plaintiff any such exclusive right as was alleged; that the claim was barred under section 261 (3) of the Municipalities Act, and that the damages claimed were excessive. The two issues considered on this appeal were—

(1) Whether the plaintiff could recover license fees levied from him, or any damages, having regard to section 262 (2) of the District Municipalities Act?

(2) Whether the monopoly set up by the plaintiff was invalid? The District Munsif found that the agreement was valid; that the suit was not barred by section 261 (3) of the District Municipalities

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On appeal the District Judge held that the agreement relied on was void, and dismissed the plaintiff's suit with costs.

Plaintiff preferred this second appeal.

T. Rangachariar for the Hon. Mr. P. S. Sivaswami Ayyar for appellant.

V. Krishnaswami Ayyar and *T. V. Gopalaswami Mudaliar* for respondent.

JUDGMENT.—The plaintiff brought this suit for Rs. 1,760 damages alleged to have been sustained by him by the breach of a contract stated to have been entered into with him by the Municipal Councillors of the town of Mayavaram. The lower Appellate Court without giving findings upon certain matters of fact arising in the case, dismissed the suit on the ground, among others, that the alleged agreement was, upon the plaintiff's own showing, void as one intended to create a monopoly.

This decision is clearly right. The first paragraph of the plaint states the effect of the agreement sued upon thus:—"The plaintiff and one Nagore Kanni Rowthan entered into a contract with the defendant on the 12th April 1899 whereby in consideration of Rs. 100 paid by the plaintiff to the defendant on account of fees and Rs. 50 paid as security, the defendant undertook to grant and secure to the plaintiff the monopoly or exclusive right of selling flesh within the municipal limits of Mayavaram for one year from the said date." Whether the agreement relied on was one which, with reference to section 44 of the District Municipalities Act (IV of 1884), it was competent for the Chairman to enter into without the previous sanction of the Councillors and if not whether it was actually sanctioned by the Councillors, and embodied in writing as required by the provisions of the said Act are points in controversy. There is no doubt, however, that, owing to some disputes between the butchers who were in the habit of selling meat in Mayavaram about the time the agreement is stated to have been entered into and the Municipal Council, the then Chairman of the Municipality made an arrangement with the plaintiff and Kanni Rowthan to the effect stated in the passage quoted above from the plaint and received the sum of Rs. 150 from the plaintiff and Kanni Rowthan. Mr. Ranga Chariar on behalf of the plaintiff referred to sections 113 and 191, clause (2) of the

District Municipalities Act, and urged that it was competent to the Municipal authorities to enter into the arrangement in question and that it was valid. Section 27 of the Indian Contract Act (IX of 1872) to which some reference was made in the course of the argument has of course no application to a case such as the present. The question really is whether the agreement is not one opposed to public policy and therefore void under section 23 of the said enactment. No one denies that, under section 113 of the District Municipalities Act, the funds raised under the provisions of the enactment are to be applied in connection not only with the specific purposes enumerated in the section but also in connection with "other measures of public utility calculated to promote the safety, health, comfort or convenience of the people." But it is difficult to see what all this has to do with the present question.

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The other provision of the Act relied on by Mr. Ranga Chariar, viz., section 191, clause 2, lays down that "no place in any municipality shall be used for selling or storing for sale any flesh or fish intended for food, unless a license for such use of the place has been previously obtained from the Chairman." The argument with reference to this provision was that a sale of meat in an unlicensed place was unpermitted, that it was absolutely in the discretion of the Commissioners to grant or withhold licenses under the above provision, that it was consequently open to them to restrict the grant of licenses to any individual chosen by them, and that it followed that an agreement such as that in question was authorized under the Act. This argument is obviously unsound. The manifest intention of the provision in regard to the grant of licenses in respect of places where meat is to be sold is mainly to empower the Municipal authorities to guard against the prevalence of insanitary conditions in the use of such places. *Primâ facie* it would be the duty of the Commissioners to grant licenses to applicants in the matter unless clear grounds for refusal existed with reference to the object in the view of the law in prescribing the necessity for the issue of such licenses. Be this as it may, unquestionably as pointed out by Mr. Krishnaswami Ayyar on behalf of the defendants, the decision as to the propriety of granting or withholding the license must be made in each case with reference to its particular circumstances and it would be a direct violation of their duty for the Commissioners to resolve beforehand that no application in the matter would be entertained or considered except

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from a person or persons selected by them. Though no doubt full effect should be given to the purpose of provisions in enactments constituting local bodies such as the municipality here so as to repress the mischief contemplated and advance the remedy given, yet, that the language of these enactments is not to be stretched to cover attempts made, under the colour of such legislative provisions, to interfere in any way with the exercise of the ordinary rights of citizens, will be seen from the recent decision of the House of Lords in *Rossi v. Edinburgh Corporation*(1) cited by Mr. Krishna swamy Aiyar. (See specially the observations of the Lord Chancellor at page 26 and of Lord Davey at page 28.) It is thus evident that neither of the provisions in the District Municipalities Act relied on on behalf of the plaintiff affords the slightest foundation for the contention that the agreement in question is warranted by that enactment. That under the English Common Law agreements having for their object the creation of monopolies are void as opposed to public policy is beyond dispute and the same is equally true under section 23 of the Indian Contract Act. The American cases to which we referred in the course of the argument are almost on all fours with the present case. In *Logan v. Pyne*(2) it was held by the Supreme Court of Iowa that where a city had been authorized by its charter to license, tax and regulate omnibuses, it had no power to grant an exclusive right to run omnibuses within its limits. In *In re Lowe*(3) the Supreme Court of Kansas ruled that an ordinance providing that the Mayor and Council may appoint two or more persons as scavengers who shall have the exclusive privilege of removing garbage not only from public premises but from private premises as well, was an attempt to create a monopoly and was therefore void; and in the *City of Bloomington v. Whal*(4) it was laid down by the Supreme Court of Illinois that an ordinance of a city confining the sale of meats to two lots in the city was invalid as tending to create a monopoly. The general principles to be followed in cases like the present were stated in *Logan v. Pyne*(2) cited above, thus :—"The power of Municipal Corporations is strictly confined within the limits prescribed by the statutes creating them and will not be extended by the Courts upon mere inference.

(1) L.R., (1905), A.C., 21.

(2) 43 Iowa, 524; 22 Am. Rep., 261.

(3) 54 Kansas, 757; 27 Lawyer's Reports annotated, 546.

(4) 46 Illinois, 469, cited Century Digest, vol. 35, 241 Q. (4) C.

It always depends upon express grant or must be necessarily implied as incident to other powers expressly granted or indispensable to the object and purpose for which the corporations were created. Doubts as to the existence of such powers must be resolved against the corporations and in favour of the public. A Municipal Corporation can grant, if at all, exclusive privileges for the protection of business which, without prohibitory legislation, would be free to all men, only under express legislative grant of power. Monopolies being prejudicial to the public welfare, the Courts will not infer grants thereof, refusing to presume the existence of legislative intention in conflict with public policy." We need scarcely add that in this statement of the law we entirely concur. The District Municipalities Act containing nothing that warrants the creation of the monopoly in question, the plaintiff's claim for damages fails, and it is unnecessary to consider the other contentions as to limitation, &c., raised on behalf of the defendants.

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We think, however, that the plaintiff is entitled to a refund of the Rs. 150 paid to the municipality. No doubt a portion of this sum was treated as fee for licenses to the plaintiff permitting him to sell flesh and fish in certain localities in the town. But we are unable to agree with the suggestion on behalf of the councillors that that amount should be viewed as collected under the provisions of the Act and therefore under section 262 (2) of the Act not recoverable by suit. In our opinion the payment of the sum in question was in truth made as a part and parcel of the void arrangement, and under circumstances which render it equitable that the same should be returned by the municipality.

The decree of the lower Appellate Court will be modified by awarding to the plaintiff Rs. 150, each party paying his costs.