APPELLATE CIVIL.

Before Mr. Justice Lentaigne, and Mr. Justice Carr.

1924

Mar. 3.

HIRJEE DEVRAJ & Co.

v.

MAUNG NYUN SHEIN.*

Illegal contract, money paid under—Recovery of the money paid, when permissible—In a suit for mere enforcement or for damages for breach of illegal contract, repayment cannot be decreed—Can plaint be amended to plead illegality and claim return of deposit?—Amendment of the plaint on appeal, where fresh suit time-barred.

Held, that where an executory contract is made for illegal sale of goods and the illegal contract has not been carried out but remains totally unperformed, it is open to a party to repudiate the illegal contract and on the avoidance of the same to recover any moneys deposited thereunder.

Held, also, that where the suit was framed for enforcement of the contract and for damages for breach, a decree for repayment of the money paid could not be passed, unless the plaint was amended.

Semble :—Where leave to amend the plaint was applied for on appeal, at a time when a fresh suit on the amended allegations would be barred by limitation, leave would be refused.

Hampden v. *Walsh,* (1876) 1 Q.B., 189 ; *Hermann* v. *Charlesworth,* (1905) 2 K.B., 125 ; *In re Great Berlin Steamboat Co.,* (1884) 26 Ch. D., 616 ; *Kearley* v. *Thomson,* (1890) 24 Q.B.D., 742 ; *Mearing* v. *Hellings,* (1845) 15 L.J., 158 ; *Savage* v. *Madder,* 36 L.J. Ex., 178 ; *Symes* v. *Hughes,* (1870) 9 Eq., 475 ; *T. P. Petherpermal Chetty* v. *R. Muniandy Servai,* (1901) 4 L.B.R., 266 ; *Tappenden* v. *Randall,* (1801) 5 R.R., 662—*referred to.*

Janardan Kishore Lal v. *Shib Pershad Ram,* (1915) 43 Cal., 95 ; *Taylor* v. *Bowen,* (1876) 1 Q.B.D., 291—*followed.*

This was an appeal from the decree of the District Court of Tharrawaddy dismissing the plaintiffs-appellants' suit (*a*) for damages due to the defendant's non-performance of two contracts dated the 19th June 1919 and the 4th July 1919 respectively for the sale of paddy and (*b*) for the return of the earnest-money paid by them in each case. The suit was instituted on the 8th May 1922. The provisions of

* Civil First Appeal No. 106 of 1923 from the decree of the District Court of Tharrawaddy in Civil Regular No. 17 of 1922.

Financial Department Notification No. 51 issued by the Government of Burma on the 17th May 1919 made the contracts illegal. On the 14th March 1923 the District Court held that the plaintiffs were not entitled to a decree either for damages or for the return of the earnest-money as the contracts were illegal, and dismissed their suit. Against this decree, the plaintiffs preferred their present appeal in the High Court wherein for the first time they abandoned their claim for damages and claimed only to recover the earnest-moneys deposited. The appeal came for disposal before a Division Bench composed of Lentaigne and Carr, JJ. with the result shown in their Lordships' judgments reported below.

It will be observed that while dismissing the appeal, Lentaigne, J., was of opinion that, in a properly framed suit, the plaintiffs would have been entitled to a refund of the earnest-moneys on the basis of the invalidity of the illegal contracts, but that such a claim having been raised for the first time only on appeal and being inconsistent with the cause of action as pleaded in the suit before the Court, the Court was precluded from exercising its discretion to allow the plaintiffs to amend their plaint in order to enable them to make such a claim, since a fresh suit would have been time-barred by limitation on the date when such inconsistent claim was first put forward. On the other hand, Carr, J., while concurring in the dismissal of the appeal on the ground that in their present suit the plaintiffs could recover nothing, preferred to express no opinion as to whether the plaintiffs might have been allowed to amend their plaint had they applied to do so, or whether they could have succeeded in a separate suit, if not time-barred.

P. H. Judge—for the Appellants.

Maung Pu—for the Respondent.

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LENTAIGNE, J.—On the 17th of May 1919 the Government of Burma, in exercise of powers conferred by Rule 11, sub-rule (2), clause (*b*) of the Defence of India (Consolidation) Rules, 1915, as subsequently amended, by a Financial Department Notification No. 51, prescribed with effect from that date that the maximum price at which unhusked rice (paddy) may be sold in Burma shall not exceed Rs. 150 per hundred baskets, each containing 46 lbs. weight of paddy delivered at the purchaser's premises in Rangoon, Moulmein, Bassein or Akyab, and that when delivery is taken at some other place, the maximum price shall not exceed the same rate less the actual cost to the purchaser of removing the paddy to whichever of these four places is the nearest.

The notification also points out *inter alia* that if any person sells or buys unhusked rice (paddy) at a price in excess of that fixed by the notification, such person shall be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to Rs. 1,000 or to three times the price paid by him for the paddy, if sold or bought, whichever is most.

On the 19th June 1919 the respondent and appellants' agent executed a set of bought and sold notes under which it was agreed that the respondent should sell and deliver at Gyobingauk 5,000 baskets of paddy to the appellants within 90 days from the date thereof at the rate of Rs. 180 per hundred baskets of 60 lbs.; and at the time of the transaction appellants' agent paid to the respondent Rs. 1,000 as earnest-money. These notes contain the words "sold" and "bought" in Burmese, but it is obvious that the contract only contemplates an executory contract or agreement to sell and deliver at a future date.

On the 4th July 1919 by another set of bought and sold notes the respondent agreed to sell and deliver to the appellants at Gyobingauk within 90 days from that date a further quantity of 5,000 baskets of paddy at the rate of Rs. 190 per 100 baskets of 60 lbs., and at the time of the contract the appellants' agent paid the respondent a sum of Rs. 1,000 as earnest-money.

No paddy was delivered under either of these contracts and the respondent refused to return the earnest-money or pay any damages.

On the 8th May 1922 the appellants instituted the suit now under appeal claiming damages for non-performance in each case on the ground that the market price had risen etc. and also claiming the return of the earnest-money in each case.

The respondent raised the defence that the contracts were wagering contracts, but eventually abandoned that defence and relied solely on this other alleged defence that the contracts were illegal because the contract price would exceed the maximum rate permitted under the notification.

The rate in the first contract of Rs. 180 per hundred 60 lbs. baskets is equivalent to Rs. 138 per hundred 46 lbs. baskets, and the rate in the second contract of Rs. 190 per hundred 60 lbs. baskets is equivalent to between Rs. 145 and Rs. 146 per hundred 46 lbs. baskets, but it was held that, when the freight and surcharge per railway waggon and four different classes of coolie charges for loading and conveying this paddy to, and unloading etc. the same at the nearest port of Rangoon are taken into consideration and added to these figures, the contract rate would exceed the maximum or control rate under the notification.

The District Judge held that the contracts were illegal and he dismissed the suit with costs, holding

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that the plaintiff, was not entitled either to damages or to a return of the earnest-money.

The present appeal is against that decision and the appellant claims that he is entitled to recover the sums paid as earnest-money on the strength of an unreported decision of a bench of this Court in connection with a similar executory agreement for the sale of paddy which had similarly been left totally unperformed and in respect of which agreement it had been found after a similar elaborate calculation that the contract rate, when converted into a rate for 46 lbs. baskets and with freight and other charges added, would exceed the control rate by Rs. 2-12-0 per hundred baskets; and on such finding it was held that the contract was in fact illegal, but that the illegality was not apparent on the face of the contract and could only be discovered by means of an enquiry into the cost of freight, handling and other charges, and that therefore the provisions of section 65 of the Indian Contract Act, would apply, and that since the contract had been discovered to be illegal the defendant was bound to refund any benefit which he had received under it.

In that case the decree for the refund of the deposits on the basis of the invalidity and avoidance of the contract had been in fact granted by the trial Court; and that too had been done long before the expiry of the prescribed period of limitation for the institution of a suit for such relief and at a time when it would have been open to the plaintiff to institute a fresh suit for that relief if leave had been refused for any amendment of pleadings necessary for the granting of such relief. In a subsequent part of this judgment I will point out some important differences between that case and the case now under appeal, where no relief was granted by the trial Court

and no application was made for such relief on the inconsistent basis until after the expiry of the period of limitation which would bar the institution of a fresh suit for such relief.

In the case now before me the defendant filed a statement purporting to show the equivalent of the control rate of Rs. 150 as amounting to Rs. 195-10-5 for one hundred baskets of paddy, and estimating the deductions to be made from that rate at Rs. 19-13-9 for the purpose of estimating what would be the proper control rate in force at Gyobingauk, and showing the rate of Rs. 175-12-8 as the alleged actual control rate for Gyobingauk. That statement assumes that the capacity of a 11½-ton wagon is only 400 baskets of paddy, but no evidence was produced in order to prove that fact. The Railway Goods Clerk who was the only witness examined as to the railway freights gave the ordinary advertised freight for a 11½-ton wagon and the surcharge imposed in addition to such advertised rates of freight, but his only evidence as to the capacity of such a wagon was to the effect that 11½ tons is equivalent of 7,160 viss. If a viss is treated as the equivalent or 3·60 lbs., the capacity would appear to be 429½ baskets of paddy each weighing 60 lbs. and not merely 400 baskets. A rectification of the figure on that basis would increase the control rate at Gyobingauk to Rs. 179-4-0. That alteration would not cure the technical legal defect because the contract rate of the first contract would still be about twelve annas above the control rate for 60 lbs. baskets and a little over nine annas above the control rate for 46 lbs. baskets. The contract rate for the second contract would, however, be more than ten rupees above the the control rate. The plaintiff did not appear to dispute any allegation as to the rates of freight or of

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coolie charges, and he produced no evidence to rebut the evidence of the Railway Goods Clerk or of the two traders examined for the defendant in order to prove coolie charges at higher rates than those in the statement. Both parties alleged that they had no knowledge of the notification at the time of the contracts, and the plaintiff's agent also alleged that he did not know the freight charges etc. Though the truth of the latter allegation may appear improbable on the part of the agent of a big paddy trader, I realise that it may be the truth, and I think it probable that the plaintiff's agent did not realise that the two contracts were illegal at the time when he made these contracts, because if he did realise that fact, it is difficult to see why he should have been so foolish as to pay such large sums as earnest-money and enter into the second contract at such a high rate, when the control rates would in all probability make his principal a certain loser when he resold the paddy, or milled the paddy and sold it as rice, under the similar control rates applicable to the sale of rice. These considerations indicating an absence of any improper motive might be points which would be taken into consideration on any question on which the Court was requested to exercise its discretion, but they do not appear to otherwise affect the legal question as to what rights the plaintiff had to obtain a refund of the earnest-money in a case where the illegal purpose had not been carried out.

I find however that the plaintiff waited three years, all but one or two months, before instituting the suit in respect of these two alleged contracts in respect of which he had paid such large sums as earnest-money without receiving anything in return, and the delay makes it probable that he must have been well

aware of the illegality when he instituted the suit. There has been considerable misunderstanding as to the law applicable to such cases, and this uncertainty was probably the cause of the great delay in instituting the suit, and it is unfortunate for the plaintiff that in his plaint he did not plead the illegality or his doubt, if he was still in any doubt, as to his proper remedy. His claim should have been based on an allegation of the invalidity of the contracts and a claim for the return of the earnest-money on that basis coupled with an allegation that the illegal object had not been carried out.

The object of the notification and the penalties imposed under the Defence of India Rules was to prevent the sale and delivery of paddy at rates higher than the specified control rate, and though the Defence of India Rules also brought offers to sell or to buy within the prohibition, I do not think that this point makes any difference. Many benami deeds executed by a debtor with the object of defeating his creditors would come within the provisions of either section 421 or 423 of the Indian Penal Code and I am not aware of any case in which the real owner was deprived of his right of suit by reason of these provisions of the penal law in a case (treated as coming within the test or rule now recognised), in which the fraudulent intention had not been carried out to the extent of partially defeating a creditor. The authorities show that the test turns on the question whether the intention to defraud creditors has been carried out or whether it still remains executory. In the present case each contract was clearly an illegal contract which could not be enforced, but that is not the deciding point as regards the right to obtain a return of the earnest-money or deposits on its avoidance. The contracts were also merely

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executory contracts for a sale and delivery of paddy in the future and so long as each contract remained totally unperformed, I am of opinion that the plaintiffs had the right to avoid the contract and claim the return of his deposits. It is admitted that no paddy was delivered, and consequently I am of opinion that the case comes within the general rule of law as enunciated in the following decisions which should not be limited to benami transactions.

The decision in *Tappenden* v. *Randall* (1), is an early decision on the point in relation to an agreement against public policy. In *Taylor* v. *Bowers* (2), which is cited in Benjamin on Sale of Goods, the question came before the English Court of Appeal; in that case the plaintiff, being in embarrassed circumstances, had made over all his stock-in-trade to one Alcock, and fictitious bills of exchange had been given by Alcock in plaintiff's favour, and the object of the transaction was to prevent plaintiff's creditors getting hold of the goods and so being paid in full; Alcock had subsequently made over the goods to the defendant who had knowledge as to how Alcock had obtained the goods, and therefore the case was really decided on the principles which would apply if Alcock was the defendant; it was held by the Queen's Bench Division that the fraudulent purpose not having been carried out, plaintiff was not relying on the illegal transaction, but was entitled to repudiate it and recover his goods from Alcock and therefore from the defendant who had knowledge as to how Alcock had obtained them. In the Court of Appeal this dicision was upheld and Mellish, L.J., summarised the law in the passage that "if money is paid or goods delivered

(1) (1801) 5 R.R., 662.

(2) (1876) 1 Q.B.D., 291.

for an illegal purpose, the person who had so paid the money or delivered the goods may recover them back before the illegal purpose is carried out; but if he waits till the illegal purpose is carried out, or if he seeks to enforce the illegal transaction, in neither case can he maintain an action; the law will not allow that to be done."

In *Kearley* v. *Thomson* (3), the plaintiff was not allowed to recover because the illegal purpose was in part performed, and Fry, L.J., appeared to doubt the correctness of the extent of the principle, and even the principle itself, as laid down in the above cited passage in the judgment of Mellish, L.J., but his remarks on this point were *obiter*, and he also expressly pointed out that there was another question as to what was the extent of the application of the principle, if the illegal purpose was carried into effect in a material part, and he then differentiated the case before him on the ground that the illegal purpose had in fact been carried out to a material extent.

In the case of *Hermann* v. *Charlesworth* (4), the question again came before the English Court of Appeal in a case in which the parties had entered into an illegal marriage brocage contract; and the defendant, a proprietor of a newspaper known as the "Matrimonial Post and Fashionable Marriage Advertiser," had introduced possible husbands to the plaintiff and incurred expenses for that purpose, but that was held not to be a part performance, and the plaintiff was allowed to recover £52-0-0 which had been paid to defendant under a receipt undertaking to return £47-0-0 if no marriage took place within nine months. Collins, M.R., when discussing

(3) (1890) 24 Q.B.D., 742. (4) (1905) 2 K.B., 123.

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the various authorities, cited the following passage of Health, J., in *Tappenden* v. *Randall* (1):—"It seems to me that the distinction adopted by Mr. Justice Buller between contracts executory and executed, if taken with those modifications which he would have necessarily applied to it, is a sound distinction. Undoubtedly there may be cases where the contract may be of a nature too grossly immoral for the Court to enter into any discussion of it; as where one man has paid money by way of hire to another to murder a third person. But where nothing of that kind occurs, there ought to be a *locus pœnitentiæ*, and a party should not be compelled against his will to adhere to the contract"; and later on he cited with approval the abovementioned passage of Mellish, L.J., in *Taylor* v. *Bowers* (2) and pointed out that the distinction between that case and *Kearley* v. *Thomson* (3), was that in the later case the illegal purpose had been largely carried out.

The above decisions were approved and followed by the Privy Council in the case of *T. P. Petherpermal Chetty* v. *R. Muniandy Servai* (5), where their Lordships applied the same principles to a benami transaction and made the following remarks:—"And further, the purpose of the fraud having not only not been effected, but absolutely defeated, there is nothing to prevent the plaintiff from repudiating the entire transaction revoking all authority of his confederate to carry out the fraudulent scheme and recovering possession of his property. The decision of the Court of Appeal in *Taylor* v. *Bowers* (2), and the authorities upon which that decision is based clearly establish this. *Symes* v. *Hughes* (6), and *In re Great Berlin Steamboat Co.* (7), are to the same effect. And the

(5) (1908) 4 L.B.R., 266; 1908, 35 Cal., 551. (6) (1870) L.R. 9 Eq., 475 at 490.
(7) (1884) L.R. 26 Ch.D., 616.

authority of these decisions, as applied to a case like the present, is not, in their Lordships' opinion shaken by the observation of Fry, L.J., in *Kearley* v. *Thomson* (3)."

I think that the principles enunciated in these authorities are directly applicable to cases like those now before me in which executory contracts are made for illegal sales of goods; and if the illegal sale has not been carried out and remains totally unperformed, it is open to a party to repudiate the illegal contract and on the avoidance of the contract to recover any moneys deposited thereunder.

A question, however, arises as to the meaning of a passage in *Taylor* v. *Bowers* (2), which was also quoted with approval in *Hermann* v. *Charlesworth* (4), in which Mellish, L.J., stated that—"If he waits until the illegal purpose is carried out, or if he seeks to enforce the illegal transaction, in neither case can he maintain an action; the law will not allow that to be done." It is clear that the law will not allow the party to enforce the illegal transaction, but I do not regard the passage as also meaning that if the party institutes a suit in order to enforce the illegal transaction, he will thereby lose his right to repudiate the transaction and to avoid it, at least, in a subsequent suit, or if he has elected to do so by an application to the Court to be allowed to amend in the same suit. For example, if a party has a doubt as to the legality or otherwise of a contract, I can see no reason why a party should not request the Court to decide on that question and to decide on the alternative questions as to what relief he should get, that is, to give him relief on the affirmation of the contract if the Court finds the contract to be valid, or in the alternative to give relief on the basis of the invalidity of the contract if the Court holds

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that the contract is invalid. I have noticed two old English decisions of 1845 and earlier in which a plaintiff had sued for recovery of a sweepstake as a winner, and when it was held to be illegal and a lottery, he asked that he should be given back his own stake, but that relief was refused in *Mearing* v. *Hellings* (8), on the technical ground that his particulars of demand had not given notice of such claim. I am therefore under the impression that the doubt on this point was based on a point of pleading and not on the substance of the case. The plaintiff could therefore have filed a fresh suit making the claim for avoidance of the contract and recovery of the deposit as on a new cause of action inconsistent with that of the previous suit. If that was the position I can see no reason why he should not be allowed to file a suit in the alternative, or why he should not, on the defence of illegality being taken, be allowed to apply for permission to amend in order to obtain such relief.

In the case now before me, the suit was not instituted until the 8th May 1922 and when instituted, it was a suit claiming the return of the deposits and damages on the basis of the alleged validity of the contract and the alleged breach by the defendant. When the defendant pleaded the defence of illegality, besides the defence of wagering which was subsequently abandoned, no application was made to the trial Court for an amendment of the plaint and there is no indication of any attempt to obtain a decree on the basis of the invalidity of the illegal contract. Judgment was delivered dismissing the suit on the 14th March 1923. The present appeal was filed on the 26th May 1923 and the

(8) (1845) 15 L.J., 158 ; 14 M. & W., 711.

claim that a decree should have been passed for the return of the deposit under section 65 of the Indian Contract Act appears to have been then raised for the first time. That claim was inconsistent with the cause of action as pleaded in the suit; and the question arises whether the Court should exercise its discretion to allow the plaintiff to amend his plaint in order to make such claim. As a fresh suit would have been barred by limitation on the date when such inconsistent claim was first put forward, and the defendant had acquired his right to take such defence against any such new claim inconsistent with the case as previously made, I do not think that an amendment to that effect should be allowed even if the case was still in the trial Court; but when the plaintiff has failed to make such claim in the trial Court, there is a stronger ground why he should not be allowed to make such claim on this appeal—see *Janardan Kishore Lal* v. *Shib Pershad Ram* (9).

For the above reasons, I would dismiss the appeal with costs.

CARR, J.—I agree in the main with my learned brother's judgment. The cases cited by him in which the plaintiff was held entitled to recover money paid under an unlawful agreement were all cases in which the suit was based, or was held to be based, on the repudiation of the agreement. *Hampden* v. *Walsh* (10) is another case of the same class.

In interpreting the meaning of the words of Mellish, L.J., in *Taylor* v. *Bowers*—" or if he seeks to enforce the illegal transaction, in neither case can he maintain an action : the law will not allow that to be done,"

(9) (1915) 43 Cal., 95. (10) (1876) 1 Q.B., 189.

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I desire to limit myself strictly to the case before me. In this case the plaintiff-appellants did sue to enforce the illegal transaction and in my view the above statement of the law, which appears to have met with general acceptance, shows that in this suit they cannot recover anything. Whether they might have been allowed to amend their plaint, had they applied to do so, and whether they could succeed in a separate suit, if not time-barred, are questions on which I prefer to express no opinion. In my view they do not arise. It is true that in this appeal the appellants have abandoned their prayer for damages but I cannot regard that as in any way equivalent to an application to amend.

Reference may be made to the case of *Savage* v. *Madder* (11), which supports the view that in this suit the plaintiffs must fail. The headnote runs as follows :—

"It is a good answer to an action for money had and received that the money was deposited in the hands of the defendant to abide the event on which a wager was made, and was claimed by the plaintiff as the winner of the wager, and that the plaintiff did not repudiate the wager, or demand back his money before the event thereof, and had never repudiated the wager, or claimed the money on any other ground than as the winner of the wager."

It was argued in that case that the plaintiff was at least entitled to get back his own deposit. This contention was not specifically dealt with in the judgments, but it was not allowed.

With regard to the unreported decision of a bench of this Court to which my learned brother refers I cannot myself see any distinction in essentials between that case and this. In my view the agreements in both cases were illegal and void *ab initio* and I do

(11) (1867) 36 L.J. Ex., 178.

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not consider that that fact is altered by the fact that certain enquiries and calculations were necessary in order to establish the illegality, or that the agreements are thereby brought within the purview of section 65 of the Contract Act. Had my learned brother agreed with me in this I think it would have been necessary to refer the question to a Full Bench, but as he is able to distinguish the two cases I do not think that is necessary.

I would dismiss the appeal with costs.

APPELLATE CIVIL.

Before Mr. Justice Duckworth, and Mr. Justice Godfrey.

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May 1

P.R.P.R. SOMASUNDRAM CHETTIAR
v.
Y.P.N. NACHIAPPA CHETTIAR.*

Charge on land—Transfer of Property Act (IV of 1882), section, 100—Stay of execution on security, order of the appellate Court for—Failure of the trial Court to take security as the lands already under an injunction, erroneously considered to be under attachment and further security therefore deemed unnecessary—Acquiescence in this arrangement by the judgment-creditor—Incomplete transaction intended to be a mortgage, whether good as a charge—Civil Procedure Code, Appendix G, form of security for stay.

In a previous suit against A, the respondents had obtained an injunction order before judgment on certain lands belonging to A. The suit was decided in favour of the respondents and that decision was confirmed on appeal. During the pendency of A's appeal, however, the appellate Court had ordered stay of execution on sufficient security being furnished to the trial Court by A. The trial Court on receipt of the appellate Court's order made the following entry in the diary :—" Judgment-debtor's property is already attached and therefore no further security is necessary. Decree-holder agrees." It further appeared from the record that the respondents (the then decree-holders) regarded the property in question as merely offered as *part-security* and that at that date they did not consider that security had actually been given. Sometime after the appellants instituted their suit, the subject of the present appeal, against the respondents, for a declaration that the lands in question were liable

* Civil First Appeal No. 87 of 1924 (at Mandalay) from the decree of the District Court of Kyaukse in Civil Regular No. 1 of 1923.