1954

Virendra Singh and Others
v.
The State of Uttar Pradesh.

Bose J.

It was not denied that if the present action of the State cannot be defended as an act of State it cannot be saved under any provision of law. Whether the State would have the right to set aside these grants in the ordinary Courts of the land, or whether it can deprive the petitioners of these properties by legislative process, is a matter on which we express no opinion, It is enough to say that its present action cannot be defended. Article 31(1) of the Constitution is attracted as also article 19(f). The petitioners are accordingly entitled to a writ under article 32(2). A writ will accordingly issue restraining the State of Uttar Pradesh from giving effect to the orders complained of and directing it to restore possession to the petitioners if possession has been taken.

The petitioners will be paid their costs by the State of Uttar Pradesh. The intervener will bear its own.

Writ allowed.

KISHAN LAL AND ANOTHER

v.

BHANWAR LAL.

1954

May 12.

[MEHR CHAND MAHAJAN C.J., MUKHERJEA, VIVIAN BOSE, BHAGWATI and VENKATARAMA AYYAR JJ.]

Indian Contract Act (IX of 1872), s. 222—Contract of agency —Agent's right of indemnity against principal—Whether hit by the notification prohibiting forward contracts of purchase and sale of bullion.

The respondent as principal entered into several forward contracts for the purchase and sale of bullion through the appellant's firm at Indore who worked as commission agents for the respondent. The transactions resulted in a loss and the appellants who had to pay the amount of loss to third parties on behalf of the respondent as the agents brought the suit for recovery of the amount in the Court in Jodhpur where the respondent resided. It was pleaded by the respondent that according to the law prevalent there as contained in the notification of the Marwar Government dated the 3rd June, 1943, all forward business contracts in bullion in which the date fixed for delivery exceeded 12 days were

1954

Kishan Lal and Another v. *Bhanwar Lal.*

illegal and therefore a suit on the basis of these transactions was not maintainable.

Held, that the suit was really not one to enforce any contract relating to the purchase or sale of bullion which comes within the prohibition of the notification but was one by an agent claiming indemnity against the principal for the loss which the agent had suffered in carrying out the directions of the principal. The right to such indemnity was founded on the statutory provision contained in section 222 of the Indian Contract Act and the acts of payment made by the plaintiffs on behalf of the defendant were lawful acts as all the transactions took place and the payments were made outside Marwar and therefore the suit was not hit by the notification.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 88 of 1953.

Appeal under article 132(1) of the Constitution of India from the Judgment and Order dated the 11th September, 1951, of the High Court of Judicature for the State of Rajasthan at Jodhpur in D. B. Civil Appeal (Ijlas-i-Khas) No. 6 of 1950.

H. J. Umrigar, Narain Andley and *Rajinder Narain* for the appellants.

Radhey Lal Aggarwal and *B. P. Maheswari,* for the respondent.

1954. May 12. The Judgment of the Court was delivered by

MUKHERJEA J.—This appeal is on behalf of the plaintiffs and has come before us on a certificate granted by the High Court of Rajasthan, under article 132(1) of the Constitution, on the ground that the case involves a substantial question of law as to the interpretation of the Constitution. The appellant has also put in a petition praying for leave to urge other grounds on the merits of the case.

The suit, out of which this appeal arises, was brought by the appellants, as plaintiffs, on the 16th August, 1946, in the District Court I at Jodhpur in Rajasthan against the defendant respondent, claiming to recover from the latter a sum of Rs. 10,342 annas odd together with interest and costs. The plaintiffs, at all material times, carried on the business of commission agents both at Indore and Jodhpur under the name and style

of "Kanmal Kishenmal" and "Kanmal Surajmal" respectively and their case is that between September and December, 1945, the defendant entered into several forward contracts for the purchase and sale of bullion through the plaintiffs' firm at Indore. These transactions proved unprofitable to the defendant and except a small profit of Rs. 103 annas odd which one of these transactions fetched, every one of the rest ended in loss and the loss aggregated to a sum of Rs. 21,423-1-6 pies. It is averred in the plaint that this entire amount was paid to third parties at Indore by the plaintiffs on behalf of the defendant and that the plaintiffs received, in all, a sum of Rs. 11,457-8-0, which the defendant paid from time to time, towards these losses, to the plaintiff's firm at Jodhpur. The plaintiffs were therefore entitled to the balance of Rs. 9,861 which together with interest came up to Rs. 10,342 and this was the claim laid in the plaint.

The suit was transferred from the District Court to the Original Side of the High Court at Jodhpur and the defendant filed his written statement in the High Court on the 27th October, 1947. The defence was a complete denial of the plaintiffs' claim and it was contended *inter alia* that the transactions in suit amounted to wagering contracts and according to the law prevalent in Marwar, as contained in the notification of the Marwar Government dated the 3rd June, 1943, all forward business contracts in bullion, in which the date fixed for delivery exceeded 12 days, were illegal and were punishable as criminal offences. No suit was therefore maintainable on the basis of these transactions.

On these pleadings a number of issues were raised of which issue No. 5 stood thus :

"Are the transactions in dispute in the suit illegal and the present suit in respect of these transactions is not maintainable on account of the notification dated 3rd June, 1943 ?"

The suit came up for hearing before a single Judge of the Jodhpur High Court sitting on the Original Side. No evidence was adduced by the parties and the case

1954

Kis.an Lal and Another
v.
Bhanwar Lal.

Mukherjea J.

was heard only on issue No. 5 which was treated as an issue on a pure question of law. It was held by the learned Judge that, as it was admitted by the plaintiffs that the contracts to which the suit related covered a period exceeding 12 days, they came within the prohibition of the notification referred to above and a suit based upon them was not maintainable in law. The judgment shows that a contention was raised on behalf of the plaintiffs that the notification was confined only to contracts made in Marwar or intended to be performed in that place, and as the contracts in suit were all entered into at Indore, they could not be hit by the notification. This argument was repelled by the learned trial judge on a two-fold ground. It was said in the first place that as the suit was actually brought in the Jodhpur Court, the plaintiffs could not avoid facing the notification and the Jodhpur Court could not give them a relief in violation of its own laws. The other reason assigned was based upon section 13 of the Civil Procedure Code and it was said that if the plaintiffs could and did get a decree on the basis of these transactions in the Indore Court and wanted to enforce the same as a foreign judgment in the Court of Jodhpur, the latter would be justified in refusing to give effect to such judgment under section 13 of the Marwar Civil Procedure Code, on the ground that such judgment was founded on a breach of law in force in Marwar. In this view the learned Judge, by his judgment dated the 2nd March, 1948, dismissed the plaintiffs' suit.

The plaintiffs thereupon took an appeal, against this judgment, to the Appeal Bench of the Jodhpur High Court and the appeal was heard by a Division Bench consisting of Nawal Kishore C. J. and Kanwar Amar Singh J. The learned Judges accepted the legal position taken up by the plaintiffs, that the contracts could be void only if they were entered into at Marwar or were intended to be performed, either wholly or partly, at Marwar. Admittedly they were entered into at Indore outside Marwar, but the learned Judges held that from the fact that certain payments were made by the defendant and accepted by the plaintiffs towards these contracts at Marwar, it could be inferred that it

was a term of the contracts that they would be performed at Marwar. Another point raised on behalf of the plaintiffs, that as the notification of 3rd June, 1943, itself came to an end by efflux of time on the 30th September, 1946, there was no obstacle in the way of the plaintiff's obtaining a decree at any time after that, was repelled by the learned Judges on the ground that as the contracts themselves were illegal, at the time when they were entered into, by reason of their violating the provisions of the notification, the fact that the notification subsequently ceased to be operative could not make the illegal contracts lawful. The result was that by its judgment dated the 24th September, 1948, the appellate bench of the High Court dismissed the appeal.

The plaintiffs thereupon with the leave of the Court took an appeal against this decision to the Ijlas-i-Khas of the State of Jodhpur as it then existed. While the appeal of the plaintiffs was pending before the Ijlas-i-Khas of the Jodhpur State, the integration of the various States of Rajasthan took place and the United States of Rajasthan was formed on the 7th of April, 1949. The Rajasthan High Court Ordinance was promulgated by the Rajpramukh of Rajasthan on the 21st June, 1949, and on the 29th of August following, the High Court of Rajasthan was constituted. Another Ordinance known as the 'Rajasthan Appeals and Petitions (Discontinuance) Ordinance, 1949' provided, by section 4, that pending appeals before the Ijlas-i-Khas of any of the covenanting States if they related to judicial matters were to be heard by a special Court to be constituted by the Rajpramukh. This section was amended by an amending Ordinance dated the 24th of January, 1950, and all these pending appeals were directed to be heard and disposed of by the Rajasthan High Court established under the Rajasthan High Court Ordinance of 1949. In accordance with this provision the appeal of the plaintiffs was transferred to the High Court of Rajasthan for disposal. The Constitution of India came into force on the 26th of January, 1950, and when the appeal came up for hearing before the Rajasthan High Court a preliminary point was raised as to whether the

1954

Kishan Lal and Another v. *Bhanwar Lal.*

Mukherjea J.

appeal should not be transferred to the Supreme Court for disposal under article 374(4) of the Constitution. The matter was referred for consideration by a Full Bench, and the Full Bench decided that article 374(4) of the Constitution had no application to the present case and the appeal was to be heard by the High Court of Rajasthan. The appeal was then placed for hearing before a Division Bench of the Rajasthan High Court and by their judgment dated the 11th of September, 1951, the learned Judges dismissed the appeal and affirmed the decision of the Courts below. Against this judgment the plaintiffs got leave to file an appeal to this Court under article 132(1) of the Constitution and that is how the matter has come before us.

The only constitutional point involved in the appeal is whether article 374(4) of the Constitution is attracted to the facts of the present case and whether the appeal should therefore have been transferred to this Court for disposal instead of being heard and disposed of by the Rajasthan High Court. In view of the fact that we have acceded to the prayer of the appellants and have granted them leave to urge other grounds relating to the merits of the case in support of the appeal, this constitutional point has nothing but an academic importance and is not pressed by the appellants. We would therefore proceed to consider the points upon which the learned counsel for the appellants has attempted to assail the propriety of the decision of Rajasthan High Court on its merits.

The learned Judges of the Rajasthan High Court took the view, and it seems to us quite properly, that the Courts below were not right in treating issue No. 5 as raising a pure question of law where no investigation of facts was necessary. The High Court has pointed out that the defendant while raising the plea of illegality of the contracts in his written statement, nowhere alleged that the contracts were entered into at Marwar or were intended to be performed there. On the other hand the plaintiffs expressly averred that the contracts were made at Indore. The one fact from which the appeal bench of the Jodhpur High Court drew the conclusion that the contracts were intended to be

performed, partly at least, at Marwar, was that certain payments towards the lossess resulting from the transactions were made by the defendant to the plaintiffs' firm at Marwar. This, as the Rajasthan High Court points out, does not necessarily lead to the inference that it was a part of the original agreement entered into by the parties, that the performance was to be made at Marwar. The payments might have been made, as a matter of convenience, upon express instructions from the Indore firm. It is also pointed out that if the general principle of law is that it is the debtor who has to seek the creditor, as the defendant ranked here as a debtor by reason of the losses suffered in the business, it was for him to seek the plaintiffs at Indore and not for the plaintiffs to seek him at Jodhpur. The suit, it is to be further noted, was brought at Jodhpur only on the allegation that the defendant resided within its jurisdiction. There was no averment in the plaint that any part of the cause of action arose within its jurisdiction.

On all these grounds the Rajasthan High Court was of opinion that the Courts below should have either framed a specific issue on facts or if they thought that issue No. 5 was sufficiently wide to cover the question of fact as well, they should have given an opportunity to the parties to lead evidence for arriving at a finding whether the contracts were to be performed in whole or in part in Marwar. The learned Judges themselves were inclined to send the case back, on remand, in order that evidence might be adduced on this point. But they did not take this step as they were told that the contracts were entered into by telegrams and no terms of any sort were settled between the parties, it being understood that the business was to be conducted according to the custom and usage of the market.

The learned Judges further discussed a question of Private International Law, apparently raised on behalf of the defendant, that even if the contract was made outside Marwar and not intended to be performed there, still the Court of Marwar should refuse to enforce the contract as it was illegal according to the *lex fori,* that is to say the law of the place where the suit was brought.

1954

Kishan Lal and Another
v.
Bhanwar Lal.

Mukherjea J.

This contention of the defendant was not accepted and it was held that if the contract was enforceable by the law of the place where it was made or where it was to be performed, it could not be held unenforceable in Jodhpur on the ground of its being opposed to public policy as the prohibition in the notification was not general in its nature and the contract in question cannot be said to be opposed to any basic ideas of morality or public policy. After saying all these however, the learned Judges of the Rajasthan High Court dismissed the suit on the short point that even if the sale or purchase under the contracts might have taken place outside Marwar yet the notification not only hit the contracts of sale and purchase but the contract of agency itself relating to such transactions. It is said then that in the case of *Pakki Adat,* primarily the place of payment of profit is the place where the constituent resides and in the present case the plaintiffs had alleged themselves to be *Pakka Adatias.* Consequently the agency contract would be hit by the notification as it was to be performed at Jodhpur where the defendant lives. We do not think that the learned Judges' approach to the case has been a proper one or that the reasoning adopted by them can be accepted as sound.

By the notice of 3rd June, 1943, an additional rule, namely, rule No. 90(c) was added to the Defence of India Rules as applied to Marwar. Sub-rule (2) of rule 90(c) laid down that no person shall enter into forward contract or option in bullion. In sub-rule (1) "forward contract" was defined to mean 'a contract for delivery of bullion at a future date, such date being later than 12 days from the date of the contract'; and a "contract" was defined to mean 'a contract made or to be made or to be performed in whole or in part in Marwar relating to the sale or purchase of bullion.' The present suit is really not one to enforce any contract relating to purchase or sale of bullion which comes within the prohibition of this notification. It is a suit by an agent claiming indemnity against the principal, for the loss, which the agent had suffered, in carrying out the directions of the principal. The right to such indemnity is founded on the statutory provision

contained in section 222 of the Indian Contract Act which stands as follows :

"The employer of an agent is bound to indemnify him against the consequences of all lawful acts done by such agent in exercise of the authority conferred upon him."

Here the plaintiffs paid the losses resulting from the transactions to third parties, on behalf of the defendant, in exercise of the authority conferred upon them by the latter. These acts of payment were certainly lawful acts if we assume, as indeed we must, that all these transactions took place and the payments were made outside Marwar. It is the statutory right which flows from the contract of agency that the plaintiffs are seeking to enforce against the defendant and the suit has been brought in the Jodhpur Court as the defendant resides within that jurisdiction. The fact that in case of *Pakki Adat* the place of payment is normally where the constituent resides is immaterial for our present purpose. A contract for sale or purchase of bullion may be entered into by and between the parties directly or it may be made through agents. In either case if such contract is not entered into at Marwar, nor is it agreed to be performed wholly or in part in Marwar, it would be outside the notification and cannot be held to be illegal. The fallacy in the reasoning of the learned Judges lies in the fact that the contract between principal and agent, which is entirely collateral to the contract of purchase and sale, has been held by them as coming within the prohibition of the notification merely on the ground that payment, by the agent to the principal, of the profits of the transaction could be made or demanded at the place where the principal resides. In our opinion the right to indemnity, which is an incident of the contract of agency, is not hit by the notification at all and is a matter which is entirely collateral to a forward contract of purchase and sale of bullion which the notification aims at prohibiting. We hold therefore that the Courts were not right in dismissing the plaintiffs' suit on the ground that the contracts upon which the suit was based were illegal by reason of their contravening the provisions

1954

Kishan Lal and Another
v.
Bhanwar Lal.

Mukherjea J.

of the notification. The result is that we set aside the judgments of the Courts below and send the case back to the Original Court of Jodhpur in order that it may be tried on all the other issues raised in the suit after giving opportunity to the parties to adduce such evidence as they want to adduce. The plaintiffs appellants will have their costs up to this stage. Further costs will abide the result.

Order accordingly.

1954

May 28.

SURAJ MALL MOHTA AND CO.

v.

A. V. VISVANATHA SASTRI AND ANOTHER.

[MEHR CHAND MAHAJAN C.J., S. R. DAS, VIVIAN BOSE, BHAGWATI and VENKATARAMA AYYAR JJ.]

Taxation on Income (Investigation Commission) Act (XXX of 1947) ss. 5(1), 5(4)—Extent and range different—S. 5(4) and s. 34 of Indian Income-tax Act (XI of 1922)—Deal with same class of persons—Properties and characteristics the same—Procedure under the two Acts different—Section 5(4)—Whether ultra vires *Art. 14 of the Constitution.*

Sub-section (4) of section 5 of the Taxation on Income (Investigation Commission) Act, 1947, does not deal with the same class of persons as are said to have been grouped together in sub-section (1) of section 5 of the Act as persons who to a substantial extent evaded payment of taxation on income. On a plain reading of the section it is clear that sub-section (4) of section 5 is not limited only to persons who made extraordinary profits and to all persons who may have evaded payment of taxation on income irrespective of whether the evaded profits are substantial or insubstantial and therefore the scope of sub-section (4) of section 5 is different from the scope of sub-section (1) of section 5 both in extent and range.

Sub-section (4) of section 5 of the Act, obviously deals with the same class of persons who fall within the ambit of section 34 of the Indian Income-tax Act and are dealt with in sub-section (1) of that section and whose income can be caught by the proceeding under that section.

It is not possible to hold that all such persons who evaded payment of income-tax and do not truly disclose all particulars or material facts necessary for their assessment and against whom a report is made under sub-section (4) of section 5 of the impugned