SETH BADRI PRASAD AND OTHERS

v.

SETH NAGARMAL AND OTHERS

1958

December 9.

(JAFER IMAM, S. K. DAS and J. L. KAPUR, JJ.)

Maintainability of Suit—Unregistered company—Suit by members for accounts—New point—Rewa Companies Act, 1955, s. 4(2) —Indian Partnership Act, 1932 (IX of 1932), s. 69(3)(a).

When cloth control was introduced in Rewa State, 25 cloth dealers of Budhar, including the thirteen appellants, formed themselves into an Association to collect the quota of cloth to be allotted to them and to sell it on profit. The Association functioned through a President and a pioneer worker; they kept accounts and distributed profits. After cloth had been decontrolled and the work of the Association had come to an end, the appellants filed a suit against the first respondent for rendition of accounts for a portion of the period that he had been President of the Association and for realisation of the amount found due with interest. The suit was decreed by the trial Court but was, on appeal, dismissed by the Judicial Commissioner. In appeal before the Supreme Court, the first respondent raised, for the first time, a preliminary objection that the suit was not maintainable as the Association consisting of more than 20 persons was not registered as required by s. 4(2) of the Rewa State Companies Act, 1935, and that consequently the members of the Association had no remedy against each other in respect of its dealings and transactions. The appellants objected to the raising of the new plea and contended that, nevertheless, the suit was maintainable.

Held, that the suit was not maintainable. In view of s. 4(2) of the Act the Association was illegal. The reliefs claimed for rendition of accounts in enforcement of the illegal contract of partnership necessarily implied recognition by the Court that the Association existed of which accounts were to be taken. The Court could not assist the plaintiffs in obtaining their share of the profits made by the illegal Association.

U. Sein Po v. *U. Phyu*, (1929) I.L.R. 7 Rang. 540, not applicable.

Held further, that the new point ought to be allowed to be raised. The question was a pure question of law and did not require the investigation of any facts. The objection rested on the provisions of a public statute which no court could exclude from its consideration.

Surajmull Nargoremull v. *Triton Insurance Company Ltd.*, (1924) L.R. 52 I.A. 126; *Sri Sri Shiba Prasad Singh* v. *Maharaja Srish Chandra Nandi*, (1949) L.R. 76 I.A. 244, followed.

The analogy of s. 69(3)(a) of the Indian Partnership Act, 1932, did not apply, an under that Act an unregistered firm was

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not illegal. Besides, the suit was not one for accounts of a dissolved firm but of an illegal Association which was in existence at the relevant time.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 125 of 1955.

Appeal from the judgment and decree dated November 20, 1951, of the former Court of Judicial Commissioner, Vindhya Pradesh, in Civil First Appeal No. 47 of 1951, arising out of the judgment and decree dated June 4, 1951, of the Court of Additional District Judge, Umaria, in Civil Original Suit No. 17/19/17 of 1950.

Sardar Bahadur, for the appellants.

Achhru Ram, *B. C. Misra* and *P. K. Chakravarty*, for the respondents.

1958. December 9. The Judgment of the Court was delivered by

S. K. Das J.

S. K. DAS, J.—This is an appeal on a certificate granted by the erstwhile Judicial Commissioner of Vindhya Pradesh, which is now part of the State of Madhya Pradesh. On behalf of respondent no. 1, Nagar Mal, who was defendant no. 1 in the suit, a preliminary objection has been taken to the effect that the suit was not maintainable by reason of the provisions of s. 4 of the Rewa State Companies Act, 1935, and the appeal filed by the plaintiffs must, therefore, be dismissed. As this preliminary objection was not taken in any of the two courts below, learned counsel for the appellants wanted time to consider the point. Accordingly, on October 28, 1958, we adjourned the hearing of the appeal for about a month. The appeal was then heard on November 27, 1958.

As we are of the opinion that the preliminary objection must succeed, it is necessary to state the facts only in so far as they have a bearing on it. When cloth control came into force in Rewa State, the cloth dealers of Budhar a town in that State, formed themselves into an Association to collect the quota of cloth to be allotted to them and sell it on profit wholesale and retail. The Association at Budhar consisted of 25 members who made contributions to the initial

capital of the association which was one lac of rupees. No formal Articles of Association were written; nor was it registered. The Association functioned through a President and a pioneer worker; they kept accounts and distributed the profits. Respondent no. 1, Nagar Mal, was the President of the said Association from January 1946 to June 26, 1946. Before that, Seth Badri Prasad, one of the plaintiffs-appellants before us, was the President. Nagar Mal ceased to be President after June 26, 1946, and Seth Badri Prasad again became President. The Association worked till February 1948; then cloth was decontrolled and the work of the Association came to an end. On June 25, 1949, thirteen members of the Association out of the twenty-five brought a suit, and in the plaint they alleged that respondent no. 1, who was President of the Association, from January 1946 to June 1946, had given an account of income and expenditure for the months of January, February and March, 1946, but had given no accounts for the months of April, May and June, 1946. They, therefore, prayed —

(a) that defendant no. 1 (Nagar Mal) be ordered to give the accounts of the Cloth Association, Budhar, from the beginning of the month of April 1946 to June 26, 1946;

(b) that defendant no. 1 be ordered to pay the amount, whatever is found due to the plaintiffs on account being done, along with interest at the rate of annas 12 per cent. per month; and

(c) that interest for the period of the suit and till the realisation of the dues be allowed.

Besides Nagar Mal the other eleven businessmen, who were members of the Association, were joined as proforma defendants, some of whom later filed an application to be joined as plaintiffs. Though the plaint did not mention any particular transaction of the Association during the period when Nagar Mal was its President, the judgments of the courts below show that the real dispute between the parties related to the sale of cloth of a consignment known as the Gwalior consignment. It appears that in April 1946 a consignment of 666 bales of cloth had come from Gwalior

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and an order was passed by the Cloth Control Officer that the consignment would be allotted to Nagar Mal who would give the Association an option of taking over the consignment; if the Association did not exercise the option, the consignment would be taken over by Nagar Mal. It appears that there was some dispute as to whether the other members of the Association were willing to take over the consignment of Gwalior cloth. We are not concerned now with the details of that dispute because we are not deciding the appeal on merits. It is enough if we say that ultimately there was an order to the effect that only 390 bales should be allotted to the Association out of which Nagar Mal had given the Association benefit of the sales of 106 bales, and the dispute related to the share of profits made on the remaining 284 bales.

Respondent No. 1, Nagar Mal, raised various points by way of defence, his main defence being that none of the members of the Association were entitled to any share in the profits on the sales of 284 bales of Gwalior cloth.

The learned District Judge, who dealt with the suit in the first instance, passed a preliminary decree in favour of the plaintiff-appellants. The decree directed Nagar Mal to render accounts of the Cloth Association at Budhar from April 1, 1946 to June 26, 1946, and it further directed that leaving out 106 bales of Gwalior cloth which Nagar Mal gave to the Association, an account should be rendered of the rest of the 390 bales and the profits on the sale thereof shall be according to the capital shares of the members of the Association. Nagar Mal preferred an appeal to the learned Judicial Commissioner of Vindhya Pradesh, who reversed the finding of the learned District Judge and came to the conclusion that the other members of the Association were not entitled to participate in the profits made on the sale of 284 bales of the Gwalior cloth and inasmuch as Nagar Mal had rendered accounts with regard to all other transactions, the suit for accounts must fail. He accordingly allowed the appeal and dismissed the suit.

The preliminary point taken before us is founded on

the provisions of s. 4 of the Rewa State Companies Act, 1935. Sub-section (1) of s. 4 relates to banking business. We are concerned with sub-s. (2) of s. 4 which is in these terms :—

"4(2). No company, association or partnership consisting of more than twenty persons shall be formed for the purpose of carrying on any other business 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 a Charter from the Durbar."

Mr. Sardar Bahadur, who has appeared on behalf of the appellants and who took time to consider the point, has now conceded before us that the aforesaid provision was in force in the Rewa State at the relevant time when the Association was formed at Budhar and he has further conceded that the said provision was in force till the Indian Companies Act came into force in the said area in 1950. We must, therefore, decide the preliminary point on the basis of the provision in s. 4(2) of the Rewa State Companies Act, 1935.

Now, the preliminary point taken on behalf of respondent no. 1 is this. It is contended that by reason of s. 4(2) aforesaid, the Cloth Association at Budhar was not a legal Association, because it was formed for the purpose of carrying on a business which had for its object the acquisition of gain by the individual members thereof and further because it was not registered as a Company under the Rewa State Companies Act, 1935; nor was it formed in pursuance of a charter from the Durbar. It has been contended before us on behalf of respondent no. 1 that by reason of the illegality in the contract of partnership the members of the partnership have no remedy against each other for contribution or apportionment in respect of the partnership dealings and transactions. Therefore, no suit for accounts lay at the instance of the plaintiffs-appellants, who were also members of the said illegal Association.

We consider that this contention is sound and must be upheld. On behalf of the appellants, Mr. Sardar

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Bahadur has urged the following points in answer to the preliminary objection: firstly, he has contended that we should not allow the preliminary objection to be raised at this late stage; secondly, he has contended that even though the Association was in contravention of s. 4(2) of the Rewa State Companies Act, 1935, the purpose of the Association was not illegal and a suit was maintainable for recovery of the contributions made by the appellants and also for accounts; thirdly, he has contended that on the analogy of s. 69(3)(a) of the Indian Partnership Act, 1932, it should be held that the appellants had a right to bring a suit for accounts of the Association which was dissolved in February 1948.

We proceed now to consider these contentions of learned counsel for the appellants. The first contention that respondent no. 1 should not be allowed to raise an objection of the kind which he has now raised at this late stage can be disposed of very easily. The objection taken rests on the provisions of a public statute which no court can exclude from its consideration. The question is a pure question of law and does not require the investigation of any facts. Admittedly, more than twenty persons formed the Association in question and it is not disputed that it was formed in contravention of s. 4(2) of the Rewa State Companies Act, 1935. A similar question arose for consideration in *Surajmull Nargoremull* v. *Triton Insurance Company Ltd.* (1). In that case sub-s. (1) of s. 7 of the Indian Stamp Act (II of 1899) was pleaded as a bar before their Lordships of the Privy Council, the section not having been pleaded earlier and having passed unnoticed in the judgments of the courts below. At p. 128 of the report Lord Sumner said:—

"The suggestion may be at once dismissed that it is too late now to raise the section as an answer to the claim. No court can enforce as valid that which competent enactments have declared shall not be valid, nor is obedience to such an enactment a thing from which a court can be dispensed by the consent of the parties, or by a failure to plead or to argue the

(1) (1924) L.R. 52 I.A. 126, 128.

point at the outset: Nixon v. Albion Marine Insurance Co., (1867) L. R. 2 Ex. 338. The enactment is prohibitory. It is not confined to affording a party a protection, of which he may avail himself or not as he pleases".

In *Sri Sri Shiba Prasad Singh* v. *Maharaja Srish Chandra Nandi* (1), the provisions of s. 72 of the Indian Contract Act were overlooked by the High Court; the section was only mentioned in passing by the Subordinate Judge and it appears that the bar of s. 72 of the Indian Contract Act was not argued or only faintly argued before the Subordinate Judge or in the High Court. In these circumstances, their Lordships of the Privy Council held that they were unable to exclude from their consideration the provisions of a public statute. In our view, the same principle applies in the present case and s. 4(2) of the Rewa State Companies Act, 1935, being prohibitory in nature cannot be excluded from consideration even though the bar of that provision has been raised at this late stage.

On his second contention learned counsel for the appellants has relied on *U. Sein Po* v. *U. Phyu* (2). That was a case in which three members of an association formed for carrying on a rice business claimed a decree (i) declaring the respective shares of the subscribers to that association and (ii) directing that the plaintiffs be repaid their shares after reconverting the property of the association into cash and after payment of all debts and liabilities. The association, it was found, consisted of twenty-seven members; it was not registered and its formation was in contravention of sub-s. (2) of s. 4 of the Indian Companies Act. The lower court granted the decree asked for and this was affirmed in appeal by the High Court. The learned Judges referred to the decision in *Sheppard* v. *Oxenford* (3) and *Butt* v. *Monteaux* (4), and rested their decision on the following passage of "Lindley on Partnership" (the learned Judges quoted the passage at p. 145 of the 9th edition but the same passage will be found at pp. 148-149 of the 11th edition):

(1) (1949) L.R. 76 I.A. 244. (2) (1929) I.L.R. 7 Ran. 549.
(3) (1855) 1 K. & J. 491; 69 E.R. 552.
(4) (1854) 1 K. & J. 98; 69 E.R. 345.

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"Although, therefore, the subscribers to an illegal company have not a right to an account of the dealings and transactions of the company and of the profits made thereby, they have a right to have their subscriptions returned; and the necessary account taken; and even though the moneys subscribed have been laid out in the purchase of land and other things for the purpose of the company the subscribers are entitled to have that land and those things reconverted into money, and to have it applied as far as it will go in payment of the debts and liabilities of the concern, and then in repayment of the subscriptions. In such cases no illegal contract is sought to be enforced; on the contrary, the continuance of what is illegal is sought to be prevented."

We do not think that the decision aforesaid, be it correct or otherwise, is of any help to the appellants in the present case. The appellants herein have not asked for a return or refund of their subscriptions; on the contrary, they have asked for a rendition of accounts in enforcement of an illegal contract of partnership. The reliefs they have asked for necessarily imply a recognition by the court that an association exists of which accounts ought to be taken. When the association is itself illegal, a court cannot assist the plaintiffs in getting accounts made so that they may have their full share of the profits made by the illegal association. The principles which must apply in the present case are those referred to in the following passage at p. 145 of Lindley on Partnership (11th edition):

"The most important consequence, however, of illegality in a contract of partnership is that the members of the partnership have no remedy against each other for contribution or apportionment in respect of the partnership dealings and transactions. However ungracious and morally reprehensible it may be for a person who has been engaged with another in various dealings and transactions to set up their illegality as a defence to a claim by that other for an account and payment of his share of the profits made thereby, such a defence must be allowed to prevail in

a court of justice. Were it not so, those who—*ex hypothesi*—have been guilty of a breach of the law, would obtain the aid of the law in enforcing demands arising out of that very breach; and not only would all laws be infringed with impunity, but, what is worse, their very infringement would become a ground for obtaining relief from those whose business it is to enforce them. For these reasons, therefore, and not from any greater favour to one party to an illegal transaction than to his companions, if proceedings are instituted by one member of an illegal partnership against another in respect of the partnership transactions, it is competent to the defendant to resist the proceedings on the ground of illegality ".

It is true that in order that illegality may be a defence, it must affect the contract on which the plaintiff is compelled to rely so as to make out his right to what he asks. It by no means follows that whenever money has been obtained in breach of some law, the person in possession of such money is entitled to keep it in his pocket. If money is paid by A to B to be applied by him for some illegal purpose, it is competent for A to require B to hand back the money if B has not already parted with it and the illegal purpose has not been carried out: see *Greenberg* v. *Cooperstein* (1). The case before us stands on a different footing. It is a claim by some members of an illegal association against another member on the footing that the association should be treated as legal in order to give rise to a liability to render accounts in respect of the transactions of the association. Such a claim is clearly untenable. Where a plaintiff comes to court on allegations which on the face of them show that the contract of partnership on which he sues is illegal, the only course for the courts to pursue is to say that he is not entitled to any relief on the allegations made as the courts cannot adjudicate in respect of contracts which the law declares to be illegal (*Senaji Kapurchand* v. *Pannaji Devichand* (2)). The same view, which we

(1) [1926] 1 Ch. 657.

(2) A.I.R. 1930 P.C. 300.

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think is correct, was expressed in *Kumaraswami* v. *Chinnathambi* (1).

As to the last contention of learned counsel for the appellants, based on the analogy of s. 69(3)(a) of the Partnership Act, it is enough to point out that under the Indian Partnership Act, 1932, an unregistered firm is not illegal; there is no direct compulsion that a partnership firm must be registered, though the disabilities consequent on non-registration may be extremely inconvenient. Moreover, the suit before us was not one for accounts of a dissolved firm, but for accounts of an illegal association which was in existence at the relevant period for which accounts were asked. We do not think that the argument by analogy is of any help to the appellants; in our opinion, the analogy does not really apply.

For the reasons given above, we hold that the preliminary objection succeeds. The appeal is accordingly dismissed. As the preliminary objection was taken at a very late stage, we direct that the parties must bear their own costs of the hearing in this Court.

Appeal dismissed.

(1) I.L.R. [1951] Mad. 593.