

Rasamoy Chowdhury Vs Anil Krishna Dawn and Others

Court: Calcutta High Court

Date of Decision: March 18, 1986

Acts Referred: Contract Act, 1872 & Section 23

Citation: 90 CWN 725

Hon'ble Judges: Sukumar Chakraborty, J; A. M. Bhattacharjee, J

Bench: Division Bench

Advocate: N.R. Chatterjee and Kasinath Day, for the Appellant; A.K. Motilal and A.L. Bose, for the Respondent

Final Decision: Dismissed

Judgement

1. The predecessor-in-interest of the defendants Nos. 1, 2 and 5 was the holder of a stall in the Hogg Market which is a municipal market

belonging to the Corporation of Calcutta and he used to run his shop therein. The plaintiff's case is that being unable to run his business, the said

predecessor of the dependants Nos. 1, 2, and 5 (hereinafter "defendants" for short)" decided to transfer the shop to the plaintiff for valuable

consideration". But as the relevant Rules of the Corporation did not allow such transfer, the plaintiff was sought to be taken in as a partner by the

said predecessor. The plaintiff, however, asserts with utmost emphasis in his plaint and also in his deposition in Court that though apparently the

transaction was given the shape and the color of a partnership and a Deed of Partnership was also executed, in reality the transaction was an out

and out transfer and "" was intended for transferring the license and the business"" In the plaint, the plaintiff has referred to the terms of the Deed of

Partnership in great details asserting repeatedly that the transaction in reality amounted to a transfer under the garb of a partnership and has gone to

such a length as to state that ""the Partnership Deed was created only to hoodwink the Rule debarring transfer.

2. The case of defendants, however, is that the transaction entered into by their predecessor with the plaintiff was a partnership pure and simple

and that the partnership has, on the death of the predecessor, automatically come to an end by operation of law and they have accordingly

approached the Corporation so that the stall and the business may exclusively be restored to them. Hence this suit by the plaintiff of a declaration

that "" the business and possession of the shop"" stood ""duly transferred in favor of plaintiff", ""than the plaintiff is the rightful occupier of the suit-

shop-room"" and that "" the plaintiff is entitled to have his name mutated alone as a sole occupier, in the alternative, as joint-occupiers with the

defendants nos. 1,2 and 5 in the records of the Corporation of Calcutta"" and for other incidental and consequential relief"s.

3. We are afraid that if the purpose of the plaintiff was and is, as stated by him in paragraph 6 of the plaint, ""to hoodwink the Rules debarring

transfer"", he has chosen the most inappropriate place in coming to the court which exists to uphold the laws and the rules and not to help a person

to hoodwink or circumvent them. The learned trial Judge has dismissed the suit and for the reasons to be indicated hereunder, which are, however,

different from those adopted by the learned judge, we have no doubt that he was perfectly right in throwing the suit out.

4. As already noted, the disputed stall is in the Municipal Market belonging to the Corporation of Calcutta. Under S. 449(1) of the Calcutta

Municipal Act, 1951, which contained the relevant law at the material time, ""no person shall, without a license from the Commissioner sell or

expose for sale any animal, article or thing whatsoever in any municipal market"". Now if a person having a license for a stall in a Municipal Market

transfers the stall and/or the business carried on therein, and the transferee proceeds to carry on business in such stall, the transferee would then be

doing so "" without a license"" in his favor in that behalf within the meaning of s. 449(1) OF the Calcutta Municipal Act, 1951 and the license in the

name of his transfer or can not in any way help him to come out of the mischief of S. 449(1) prohibiting business in a Municipal stall except by a

licensed stallholder. Such a transfer, therefore, enabling the transferee to carry on business without a license in a Municipal stall would have for its

object something which is forbidden by S 449(1) and the transaction would also be such as would defeat the provisions of that S 449(1). The

transaction would, therefore, squarely come within the mischief of S. 23 of the Contract Act and would be void there under. The plaintiff in his

plaint and also in his deposition has made it expressly clear that he proceeded to purchase the shop from the predecessor of the defendants even

though he found on enquiry that he would not be able to get the license for the stall transferred to him. That makes it cresol clear that the whole

object of the plaintiff was to carry on business in that Municipal stall under the cover of he license of his transferor and thus to carry on business

without a license"" in his favor in clear violation of s 449(1) of the Calcutta Municipal Act The object thus being, as already noted, something which

was forbidden by law and the transaction being of a nature which if permitted, would defeat the provisions of law, no court can assist the plaintiff in

achieving this object and lend any countenance to any such transaction.

5. As already noted, the case of the plaintiff is that as the intended transfer of the stall would not have been permissible under the law, the

transaction, though intended to be a sale, was shaped as and was given the color of a partnership. As also already note, the case of the defendants

is that the transaction was intended to be and was also in effect a partnership pure and simple. The terms of the Deed of Partnership, Ext E, make

it abundantly clear that the plaintiff was sought to be admitted not as ampere financing partner only to share the profits of the business, but was also

to carry on the business himself. The Deed of Partnership, Ext. E, would show that the plaintiff was ""to regularly attend the business,"" ""to take steps

to stop anything which will undermine or prove harmful to the business"", ""to look after the outgoing of he said business and meet all establishment

charges as well as Income Tax and Sales Tax demands"", ""to be in charge of the accounts"", ""to meet all liabilities of the said business"", while the

predecessor of the defendants was to receive only Rs. 300/- ""by way of fixed profit in lieu of his share"" but not to ""bear any loss, if there be any, of

more than Rs. 100/- in any one year

6. As already note, S. 499(1) of the Calcutta Municipal Act prohibits carrying on business in a Municipal stall without a license. Now if a licensee

of a stall admits a partner and the arrangement is such that the unlicensed partner by himself or through their licensed partner or otherwise, carries

on business in that stall, then the unlicensed partner would be carrying on business in that stall, then the unlicensed partner would be carrying on

business in a Municipal stall ""without a license"" within the meaning of S 449(1) of the Calcutta Municipal stall ""without a license"" within the meaning

of S 449(1) of the Calcutta Municipal stall ""without a license"" within the meaning of S 449(1) of the Calcutta Municipal Act. Such a partnership

would also, therefore, have as its object something forbidden by S 449(1) o the Calcutta Municipal Act and would be of a nature, which, if

permitted, would defeat the provisions of that Section, and would, therefore, be void under S 23 of the Contract Act.

7. Our view would find full support from the Full Bench decision of the Madras High Court in Velu Padayachi V Sivasoorirm (AIR 1950 Mad 4)

In that case, S. 15 of the Madrs Abkari Act prohibited vending of arrack without a license and it was held (at 447) that in view of such prohibition

the purpose of S. 5 would be defeated if under the license granted there under to one person to vend arrack, another person, whom he had

admitted as a partner, could also vend arrack without any license in his favor. It was pointed out (at 449) that the very purpose of S. 15 prohibiting

vending of arrack without a license would stand frustrated under such partnership as in that case the unlicensed partner by himself or through his

agent, the licensed partner, would nevertheless be selling arrack without license. It is true that in a single-Judge decision of the Bombay High Court

in *Champsey Dossa v. Gordhandas* (AIR 1917 Bom 250), a partnership entered into by a licensee under the Bombay Salt Act was held to be

lawful even though the licensee was prohibited from transferring his privilege under the license and his decision was approved by the Privy Council.

Council in *Gordhandas v. Champsey Doss* (AIR 1921 PC 137) The Privy Council, however, simply affirmed the Bombay decision without any

discussion at all on any question of fact or law. But as it would appear from the Bombay judgment, the licensee in that case admitted some

members of his family only to share the profits of the business, but those partners were given no part at all in the business of manufacture of salt and

therefore, the unlicensed partners were not doing anything for which a license under the Bombay Act was necessary.

8. Licenses granted to the predecessor of the defendants under S. 449(1) of the Calcutta Municipal Act have been proved as Ext. I series and it

has been urged that under the express terms and conditions of the license transfer and partnership in respect of the stall are permissible with the

sanction of the Corporation and that such sanction was obtained in this case. Condition no. 2 printed at the back of such licenses runs thus:-

That no stall-holder shall sub-let the use of stall or any portion thereof or transfer his title interests or any portion of interest in the business

conducted in the stall or admit or discharge any partner in the business without special sanction being first obtained from the Corporation in that

behalf".

9. Now if S. 449(1) prohibits carrying on business in any Municipal Market without a license, it may be difficult to understand as to how any

condition in any such license can permit any transfer or partnership in respect of such a stall or the business carried on therein which would enable

a transferee or a partner of the licensee to carry on the business in such stall without a licence in his favour under S. 449(1). If S. 449(1) forbids, as

it expressly does, carrying on business in a stall, unless the person carrying on the business has a licence under that Section, then it may be difficult

to conceive how even a formal permission of the Corporation under Condition No. 2, sanctioning transfer or partnership in respect of a business

carried on in a stall, unless the transferee or the partner has also become a licensee or a co-licensee in respect of such stall. But this question need

not detain us here as even assuming that a special sanction as envisaged in Condition No. 2 would enable a licensee to transfer his business or

admit a partner therein there is absolutely no satisfactory evidence on record to show that any such sanction was ever obtained from or accorded

by the Corporation in respect of the transaction entered into by predecessor of the defendants with the plaintiff To prove such special sanction he

only piece of evidence to which our attention has been drawn is Ext. 2 which reads thus:-

TO WHOM IT CONCERNS

Certified that the recorded occupier of Stall No (old) 48 S. S. Hogg Market, as per the Regd. Deed of Partnership dated 11th August, 1967 has

taken Sri Rasamoy Chowdhury as partner in the stall. The Deed of Partnership has been certified by our Ch. Law Officer on 7 12 67 to be in

order. The daily rent of the Stall is Rs 2/- and the sanctioned business of the stall is suit-case, steel trunks, hand bags and traveling requisites.

This Deptt has got no objection if necessary licence is issued in the name of the partner Sri Rasamay Chowdhury.

Sd/- Illegible 12.3.68

Offg Head Clerk

S S Hogg Market

Corporation of Calcutta

10. Obviously this was not a sanction by the Corporation and it was at most a recommendation of the officiating Head Clerk that the proposed

partnership might be allowed and that the licence might be issued in the name of the plaintiff, the proposed partner. If ""necessary licence"" as

suggested in Ext. 2, was issued in the name of the plaintiff there would have been no question of any violation of S 449(1) of the Calcutta

Municipal Act. It is also obvious that if such sanction, as prayed for, was really granted by the Corporation, the licences in respect of the stall

would have been issued in the name of the plaintiff either alone or along with the predecessor of the defendants. But no such licence has been

shown to have been issued under S. 449(1) and the licences exhibited in this case, Ext. 1 series, are in the name of the said predecessor alone. It is

true that one licence in Ext. 1 series appears to be jointly in the names of the plaintiff and the said predecessor of the defendants. But that was a

mere Trade Licence under Ss. 218 and 219 of the Calcutta Municipal Act which are granted to all persons carrying on any trade, profession or

calling anywhere within Corporation and has got nothing to do with carrying on business in a Municipal stall and the licence specifically required

therefore under S. 449(1) produced in this case show only the predecessor of the defendants to be the sole licensee.

11. In our view, therefore, there was no merit in the suit, nor any merit in this appeal arising therefrom and the learned trial judge was right in

dismissing the suit. We accordingly dismiss the appeal with costs.

Sukumar Chakravarty, J.

12. I agree