
(1872) 08 CAL CK 0006

Calcutta High Court

Case No: None

C.W. Joseph

APPELLANT

Vs

E.R. Solano

RESPONDENT

Date of Decision: Aug. 3, 1872

Judgement

Sir Richard Couch Kt., C.J.

I cannot assent to Mr. Lowe's argument for the plaintiff that the consideration for the note for Rs. 7,000 was the withdrawing the advertisement and stopping the sale of the horses; that was the consideration for the promise in the letter of the 17th of January to give the note; but according to that letter the note was to be for the balance of the plaintiff's claim; that was the consideration for it. The payment of the note would satisfy the balance, and the plaintiff says he wag-to return the excess. Nor would the other view assist the plaintiff's case; for the balance of beta and lotteries and the money paid for tickets in the lottery are part of the consideration for the agreement of the 22nd December 1871. If the contract in the note is vitiated by that, the contract in the agreement is also vitiated by it. The agreeing not to enforce a contract which is void for illegality is an illegal consideration, and the contract is void--Chapman v. Black 2 B. & A., 588, Wynne v. Calender 1 Russ., 293, and Hay v. Ayling 16 Q.B., 423. The substituted contract stands in the same situation as the original. Now with regard to the Rs. 1,149, balance of beta and lotteries the bets by Act XXI of 1848 were void, and could not be recovered, but the betting was not illegal. But by Act V of 1844, all lotteries not authorized by Government are declared common and public nuisances and against law. Therefore that portion of the Rs. 1,149 which was won by lotteries was obtained by an illegal transaction. But it was not illegal for the defendant to receive the money, and having done so to pay the plaintiff his share or to promise to do so. An agent who has sold goods for his principal, and received the price, is bound to pay it over to his principal, although the contract of sale is illegal and void--"Farmer v. Russell 1B. & P., 296 and Bousfield v. Wilson 16 M. & W., 185. And where two persons joined in an illegal wager which they won, and the whole amount was paid to one of them, the other was held entitled to recover his share from the one who had received the whole--Johnson v. Lansley 12 C.B., 468. It is said in that case

that he is bound upon every principle of justice to pay it.. I therefore think that the note is not vitiated by the Rs. 1,149 being part of the consideration for it. But a different rule is applicable to the money paid for tickets in the Secundra Raffle. That was money paid in execution of an illegal purpose; to obtain a share in what was declared by the act to be a common and public nuisance and against law. It is settled that money so paid cannot be recovered--Cannan v. Bryce 3 B. & A., 179 and M"Kinney v. Robinson 3 M. & W., 434, and a note given for it is given on an illegal consideration-- Amory v. Merry weather 2 B. & C., 573. The money paid for the tickets is but a small part of the consideration for the note; but it is quite settled that, if the consideration is in part illegal, the promise is wholly void. I am therefore, of opinion that the plaintiff was not entitled to recover upon the note for Rs. 7,000.

2. But then this question arises, whether he may not recover in respect of so much of the consideration for it as is not illegal. The suit was instituted under Act V of 1866, and the plaint is only for the money due on the notes, but all the facts are stated in the plaintiff's written statement. Macpherson, J., says that in this suit the items of the account making up the balance for which the promissory notes were given were not properly in issue, but upon the whole he finds that these debts were admitted by the defendant to be due after full opportunity for consideration, and he cannot see that he has any excuse for saying that he was unfairly dealt with. In Mohummud Zahoor Ali Khan vs. Mussumat Thakooranee Rutta , the Judicial Committee having held that, on the face of the plaint, no relevant case was made against the defendants; but that in a suit properly framed, if he proved his case, he would be entitled to a decree against one, and considering that a new suit would probably be met by a plea of the Act of Limitations, allowed the appellant to amend his plaint, so as to make it a plaint against the defendant alone for the recovery of money due on a bond. They considered that the liability on the bond might be tried on the issues already settled, but they would not intimate any opinion upon them and the evidence, and remanded the suit for re-trial. Macpherson, J., having said that the items of the account were not properly in issue, I think we cannot now, if the plaint is amended, make a decree for the amount of the account, deducting the illegal items. We may allow the plaint to be amended, and an issue to be framed:--What amount is due to the plaintiff in respect of the consideration for the note? I think we have power to do this, and that it might have been done at the hearing if the plaintiff had applied for it.

3. The case of the plaintiff as to the note for Rs. 744 was that in the account delivered on the 15th of January, he had by mistakes given the defendant credit for Rs. 744 more than ha had received. It was in the item of "cash received from the Secretary of the Calcutta Races, balance of racing account." It was not illegal for the plaintiff to receive this money, or to give the defendant credit for it, and there is no illegality in the defend-ant giving a note for what he has been credited with by mistake. It is true that, if the mistake had not been made, the balance for which the note for Rs. 7,000 was given would have been greater. The sum against which this was credited would have been included in the note, and, as due upon it, could not have been recovered, because of the illegal part of the

consideration; but this sum was not an illegal claim, and the defendant would be liable to pay it, although the note could not be sued upon. The learned Judge seems to have treated the two notes as jointly forming a security for the whole balance after correcting the mistake, and to have considered he was bound to hold that both were tainted with illegality, I do not think we are bound to do this. The illegal part of the consideration was in the first note, and need not be held to extend to the second, Justice certainly does, not require this, if the transaction admits of a different meaning. With regard to this note I think the plaintiff is entitled to recover in the suit as now framed.

4. Upon the whole case I am of opinion that the decree dismissing the suit should be reversed; that the plaint should be amended by adding a claim for the consideration for the Rs. 7,000 note; and the case should be referred to a Judge to take the account and determine what is due to the plaintiff in respect of it. The plaintiff has partially succeeded in the appeal; but seeing that it might have been unnecessary if he had asked to have the plaint amended, and sought to recover upon the consideration for the note, I think each party should pay its own-costs of the appeal and if the hearing before Macpherson, J.

5. Macpherson, J. upon the same footing. The allowance of each of these items in the account, I must say, seems to me to stand precisely in the same relation to the original illegal act. It is not, however, very easy to deduct any very clear general principle from the decided cases by which it can be determined whether, where there has been an illegal contract and an illegal act done, a subsequent promise following there can be enforced. The subsequent promise is sometimes held to be "tainted" with the illegality, and sometimes not, And the Judges appear to me to have determined in each case according to their own judgment and discretion whether the illegal act is so far separable from the subsequent promise as that the latter may be enforced. In one set of cases, to use the words of Bullar, J.¹. the action is considered to be founded, not on the illegal contract, but on a ground totally distinct from it in the other set of cases, to use the words of Jervis, C.J., the new promise "springs from, and is the creature of, the illegal agreement." To which of these two classes does the present case belong? Did the promise contained in these promissory notes spring from, and was it the creature of, the original illegal agreements by the defendant to give the plaintiff a share in certain lotteries, and to pay for tickets in them, or was it a separate agreement? Was it made by the parties in the character of offenders against the Lottery Act, or was it made in a wholly different character? Expressed at length, the agreement contained in the first promissory note may be stated thus:--"Whereas you have trained kept, and expended money upon certain horses belonging to me at my request; and whereas you have paid certain moneys to the Secretary of the Calcutta Races at my request; and whereas you have paid for certain tickets in a lottery at my request; and whereas I have received certain sums of money for bets and lotteries on your account, for all which debts I mortgaged to you my horses, which horses you were about to sell; and whereas at my request you withdrew the advertisement for the sale,--I promise to pay you Rs. 7,000." The original illegal agreement to give the plaintiff a share in the lotteries, and to pay for the tickets, is so far

imported into these notes that, had that agreement not been made, the defendant would probably not have allowed, nor would the plaintiff have claimed, the whole of the item of Rs. 1,149, or any part of the items of Rs. 64 and Re. 16. But it does not seem to me that for this reason we are bound to say that the promissory notes spring from, and are the creature of, an illegal agreement. No doubt, the illegal promise which had been made was in some sort one of the matters upon which the defendant based his promise to pay, but so it was in many of the cases in which the promisee have been upheld. As therefore, I think the promissory notes are good and valid notes, it is not strictly necessary for me to say whether the plaintiff may now recover in this suit any portion of the claim in any other form. But as a matter of fact, I do fully concur with the Chief Justice in thinking that, in the view which he takes of the notes, we can and ought to allow the plaintiff so to recover.

¹ In *Harman v. Russell* 1 B & P., 222