Ouseph Poulo and Three Others

Vs

Catholic Union Bank Ltd. and Ors

Civil Appeals Nos. 51 and 52 of 1962

(CJI P. B. Gajendragadkar, K. N. Wanchoo, K. C. Das Gupta JJ)

15.04.1964

JUDGMENT

GAJENDRAGADKAR, C.J. –

These two appeals arise from two suits Nos. 5 of 1947 and 32 of 1951; and the main point which they raise for our decision is whether the two documents executed by the appellants and two of the respondents are unenforceable as being opposed to public policy under section 23 of the Indian Contract Act (hereinafter called 'the Act'). The trial Court has answered this question in the affirmative, while the High Court of Kerala has taken a contrary view.

Poulo Varghese and Poulo Thommi who are the sons of Ouseph Poulo were carrying on trade in hill produce at Alwaye and in the course of their business, they had borrowed from the branch of the Catholic Union Bank Ltd. at Alwaye large amounts. In that connection, they had pledged goods with the Bank as security for the loan and the same had been deposited in a godown the key of which remained with the Bank. It appears that on the 10th February, 1947, the Officers of the Head Office of the Bank inspected the godown and it was discovered that there was considerable shortage of the goods pledged. Thereupon, the Secretary of the Bank lodged a complaint with the Police that Ouseph Poulo and his two sons who had dealings with the Bank as well as Poulo Joseph, another son of Ouseph Poulo, had colluded with the local Agent of the Bank and had fraudulently removed a substantial part of the pledged articles from the godown. The complaint also alleged alternatively that if the goods had not been fraudulently removed, then the security offered by Poulo Varghese and Poulo Thommi was grossly inadequate to cover the large amounts advanced to them, and that was the result of cheating. The Police registered this case and investigations began. At that time the parties settled their differences and the two documents in question were executed.

The criminal complaint was filed on the 13th February and the First Information Report was made on the 16th February, 1947. On the 22nd February, a hypothecation bond (Ext. 26) was executed by Ouseph Poulo, his wife, his three sons and the wife of another son in favour of the Bank for Rs. 30,000/-. This bound covered immovable properties belonging to the executants. On the 27th February, 1947, another document was executed by the same parties in favour of the Bank for Rs. 35,000/-; this document was called Kollappirivu Karar (Ext. B.). On the same day a receipt was executed by Poulo Varghese and Poulo Thommi which showed that the goods in the godown were valued at Rs. 10,000/- and were surrendered to the Bank in partial satisfaction of the debts due from them to the Bank. This was followed by a hire-purchase agreement by which the car owned by Poulo Thommi was transferred to the Bank and the same was conveyed back to him on a hire-purchase agreement; the value of this car was taken to be Rs. 5,000/-. The total amount due from Poulo Varghese and Poulo Thommi to the Bank was Rs. 80,024-5-9. As a result of the transactions

in which the parties entered, Rs. 10,000/- were made good by surrendering to the Bank the goods in the godown; Rs. 5,000/- by transferring the car; Rs. 30,000/- and Rs. 35,000/- by the hypothecation deed and the Karar respectively; that left a balance of Rs. 24-5-9 which was paid in cash. After this transaction had thus been concluded, on the 28th February the Secretary of the Bank made a statement before the police that the Bank's claim had been settled and that he and the Managing Director of the Bank was satisfied that no goods had been removed from the godown as alleged in the complaint and that in collusion with the Agent of the Bank, the debtors Poulo Varghese and Poulo Thommi had cheated the Bank by over-valuing the goods pledged, but that no further action was necessary to be taken in that behalf. In consequence, the criminal proceedings were dropped. That in substance, is the nature of the transactions, the character of which falls to be determined in the present appeals.

On the 15th December, 1947, Ouseph Poulo, the father, his son Joseph, Poulo's wife Aelia and Joseph's wife Thressia filed a suit in forma pauperis seeking cancellation of the two documents in question on the ground that they had been executed to stifle criminal prosecution and that they were also vitiated by undue influence, coercion and threat. The first defendant to this suit was the Bank and defendants 2 and 3 were the two debtors Poulo Varghese and Poulo Thommi, the sons of Ouseph Poulo. This was suit No. 5/1947.

While this suit was pending, the Bank instituted suit No. 32 of 1951 on the 26th February, 1951 and claimed to recover the amount due on the Karar from all its executants. The persons who had filed suit No. 5/1947 were defendants 1, 2, 5 & 6 in this suit and defendants 3 & 4 were the debtors Poulo Varghese and Poulo Thommi. These two sets of defendants filed two separate written statements; but the common plea raised by them was that the document on which the Bank's suit was based was unenforceable under s. 23 of the Act. The trial Court substantially upheld this defence with the result that suit No. 5/1947 was decreed and suit No. 32/1951 was dismissed. The Bank took this matter before the High Court by preferring two appeals Nos. 538 & 539 of 1954. The High Court has reversed the conclusion of the trial Court in regard to the character of the impugned transaction and in consequence, suit No. 5/1947 has been dismissed and suit No. 32/1951 has been decreed. That is how the plaintiffs in suit No. 5/1947 have come to this Court with a certificate issued by the High Court. During the course of this judgment, we will refer to the Bank as the Bank, the persons who brought suit No. 5/1947 as the plaintiffs and the two debtors as defendants 2 & 3.

Before dealing with the merits of the controversy between the parties, it is necessary to state briefly the true legal position in regard to the agreements which are held to be unenforceable on the ground that the consideration for which they are made is opposed to public policy. It is well-settle that agreements which are made for stifling prosecution are opposed to public policy and as such, they cannot be enforced. The basis for this position is that the consideration which supports such agreements is itself opposed to public policy. In India, this doctrine is not applicable to compoundable offences, nor to offences which are compoundable with the leave of the court where the agreement in respect of such offences is entered into by the parties with the leave of the Court. With regard to non-compoundable offences, however, the position is clear that no court of law can allow a private party to take the administration of law in its own hands and settle the question as to whether a particular offence has been committed or not, for itself. It is obvious that if such a course is allowed to be adopted and agreements made between the parties based solely on the consideration of stifling criminal prosecutions are sustained, the basic purpose of criminal law would be defeated; such agreements may enable the guilty persons to escape punishment and in some others they may conceivably impose an unconscionable burden on an innocent party under the coercive process of a threat of the criminal prosecution. In substance, where an agreement of this kind is made, it really

means that the complainant chooses to decide the fate of the complaint which he has filed in a criminal court and that is clearly opposed to public policy.

In dealing with such agreements, it is, however, necessary to bear in mind the distinction between the motive which may operate in the mind of the complainant and the accused and which may indirectly be responsible for the agreement and the consideration for such an agreement. It is only where the agreement is supported by the prohibited consideration that it falls within the mischief of the principle that agreements which intend to stifle criminal prosecutions are invalid. The sequence of events, no doubt, has relevance in dealing with this question; but from mere sequence it would not be safe to infer the existence of the prohibited consideration. If in order to put an end to criminal proceedings, an agreement is made in the execution of which persons other than those who are charged in a criminal court join, that may afford a piece of evidence that the agreement is supported by the consideration that the criminal proceedings should be terminated. If the nature of the liability imposed upon a debtor by a previous dealing is substantially altered with a view to terminate the criminal proceedings, that itself may be another factor which the Court may take into account in deciding whether the agreement is supported by the prohibited consideration. But in weighing the different relevant considerations in such a case, courts must inevitably enquire : did one party to the transaction make his promise in exchange or part exchange of promise of the other "not to prosecute or continue prosecuting" ? As Lord Atkin observed in Bhowanipur Banking Corporation Ltd. v. Durgesh Nandini Desi [(1942) I.L.R. I Cal. 1.], "In all criminal cases reparation where possible is the duty of the offender, and is to be encouraged. It would be a public mischief if on reparation being made or promised by the offender or his friends or relative mercy shown by the injured party should be used as a pretext for avoiding the reparation promised". That, however, is not to say that if reparation is made as a consideration for a promise to give up criminal proceedings, it would not amount to an abuse of the right of private prosecution and would not attract the provisions of s. 23 of the Act. The main point to remember is that the party challenging the validity of the impugned transaction must show that it was based upon an agreement to stifle prosecution. If it is shown that there was an agreement between the parties that a certain consideration should proceed from the accused parson to the complainant in return for the promise of the complainant to discontinue the criminal proceedings, that clearly is a transaction which is opposed to public policy (vide V. Narasimha Raju v. V. Gurumurthy Raju [[1963] 3 S.C.R. 687], Maharaja Srish Chandra Nandy v. Supravat Chandra [A.I.R. 1940 Cal. 337], Sudhindra Kumar Ray Chaudhuri v. Ganesh Chandra Ganguli [1939 I.L.R. I Cal. 241]; and Kamini Kumar Basu, v. Birendra Nath Basu [A.I.R. 1930 P.C. 100].

What then are the facts in this case on which the plaintiffs seek to challenge the correctness of the conclusion of the High Court that the impugned transactions are not invalid ? Dr. Seyid Muhammed for the plaintiffs has urged that in dealing with the present dispute between the parties, it is essential to remember that the complaint filed by the Bank against defendants 2 & 3 is found to be not a bonafide complaint and that, according to him, shows the true complexion of the impugned transactions. It is true that the trial Court has found that the complaint made by the Bank was not bonafide and the High Court has not in terms reversed that finding because the High Court disbelieved the direct evidence led by the plaintiffs and held that the agreement alleged by them was not proved. Dr. Seyid Muhammed, therefore, contends that there is a finding recorded by the trial Court which has not been reversed in appeal, and so, we should deal with the main point in the light of this finding. If we had been satisfied that the complaint filed by the Bank was deliberately and dishonestly filed, that no doubt would have assisted the plaintiffs to a very large extent; but after carefully considering the material evidence on this point, we are satisfied that the trial Court was in error in coming to the conclusion that the Bank had filed the complaint malafide. The complaint in

terms made three material allegations. It alleged that though the goods pledged by defendants 2 and 3 were of a very low value, they were entered in the godown and in the relevant books as being worth a much larger amount. It also alleged that the goods, though of a cheap quality, were described as a very superior quality; and it also said that substantial part of the goods pledged had been removed from the godowns for the purpose of causing loss to the Bank and for making unlawful profit. This complaint was filed against defendants 2 and 3 and plaintiffs 1 and 2, and another son Ouseph Poulo who is not a party to the present litigation. In regard to this last allegation of theft, the complaint also averred that the key of the godown use to be with the agent of the Bank at Alwaye and the said agent had absconded. The complaint mentioned that the lorry in which the goods were removed bore the registration No. 2923 and it belonged to the Qunani Motor Service.

When the Secretary of the Bank gave evidence he stated that on an enquiry being made on the spot, it was learnt that the goods had been removed in the particular lorry; but, later, no evidence was forthcoming to support that report. He, however, adhered to the case of the Bank that the goods which were found in the godown were hopelessly inadequate to serve as a security for the advance made to defendants 2 and 3. The argument is that the allegation as to theft was dishonesty made by the Bank in its complaint in order to apply coercive pressure against defendants 2 and 3 and the members of their family. Prima facie, this argument does appear to be attractive, and if it had been sustained, it might have helped the plaintiffs a good deal.

There is, however, clear evidence on the record which negatives this contention. As we have already seen, a receipt was passed in favour of the Bank surrendering the goods which were found in the godown to the Bank and these goods have been priced at Rs. 10,000/-. It is common ground that the goods which were pledged with the Bank were intended to serve as a security for as much as Rs. 80,000 and odd; and so, there can be no doubt whatever that the goods found did not satisfy that requirement. The number of bags which were mentioned in the receipt is 534; that again does not represent the total bags of goods pledged with the Bank. So, it is absolutely clear that the Bank realised on inspection of the godown that the security offered was wholly in-adequate and it may well be that on the spot some people reported that the pledged goods had been removed,. That is why the Bank stated all the material facts and alleged that either the substantial part of the goods which had been pledged had been removed, or the goods which had been pledged were not at all enough to cover the amount advanced. In any case, the agent of the Bank may have colluded with the debtors. Now, in the view of the receipt passed by the debtors and the members of their family in favour of the Bank in which the value of the goods found in the godown has been determined at Rs. 10,000/-, it would be unreasonable to suggest that the complaint made by the Bank was not bonafide.

Besides, in dealing with this dispute, it is essential to remember that defendants 2 and 3 have not entered the witness-box at all. They have left it to their father, mother, brothers and sister-in-law to fight this litigation. At every stage of the proceedings in both the suits, we come across points of dispute on which defendants 2 and 3 alone could have given evidence. Did they pledge goods worth the amount advanced to them ? If yes, did the Agent remove them, or were the goods which were originally pledged not of enough value and by collusion with the Agent, representation was made and accepted that they were valuable ? On all these matters, it was necessary that defendants 2 and 3 should have taken the oath to support the case made by the plaintiffs when they challenged the validity of the transactions in question. The High Court has seriously commented on the fact that defendants 2 and 3 have deliberately avoided to face the witness-box. In our opinion, in the circumstances of this case, this comment is fully justified.

There is another piece of evidence which is equally material and which is in favour of the Bank and that evidence relates to the subsequent conduct of defendants 2 and 3. We have already noticed that a motor car belonging to one of the debtors was sold to the Bank for Rs. 5,000/- and taken back on hire-purchase agreement. Indeed, this hire-purchase agreement is a part of the transaction which settled the dispute between the parties. It appears that the debtors failed to pay the instalments under the hire-purchase agreement and that led to a suit by the Bank. In this suit, the debtors filed an elaborate written statement containing 21 paragraphs; but we do not see any allegation that the hire-purchase agreement was a part of a transaction which was invalid and as such, the claim made by the Bank was not sustainable. In fact, this suit was decreed in favour of the Bank. The conduct of defendants 2 and 3 in not raising a plea against the validity of the hire-purchase agreement is not without significance.

Similarly, it appears that after the impugned transaction took place between the parties, defendants 2 and 3 applied to the Bank for further advance on the 11th April, 1947 and Mr. Ramakrishna Nair who is the principal witness for the plaintiffs in the present litigation and who was the Legal Adviser of the Bank, supported the debtor's request for advance. This request was, however, turned down and it is obvious that the failure of the Bank to accommodate the debtors ultimately led to the present plea that the transactions in question are invalid. Therefore, we are satisfied that the subsequent conduct of defendants 2 and 3 clearly shows that they are not prepared to take the risk of facing cross-examination and that is the reason that they have left it to their relatives to fight the present litigation.

It is in the light of this background that we have to consider the oral evidence in the case. The main witnesses on whose testimony Dr. Seyid Muhammed has relied are Mr. Nair P.W. I and Mr. Pillai P.W. 3. Mr. Nair is a practising lawyer and was at the relevant time the Municipal Chairman of Alwaye, whereas Mr. Pillai was a Municipal Councillor at that time. According to Mr. Nair, he took part in the execution of the relevant documents and advised the Bank. He stated that the documents were so executed for settling the criminal case. He also added that he told defendants 2 and 3 that if the mortgage deed and the agreement were got executed, the criminal case could be dropped and his explanation was that he made that statement because the Managing Director and the Bank's Secretary Joseph had told him to that effect. It appears that for assisting the Bank in filing the criminal complaint, this lawyer had claimed Rs. 500/-, but the Bank paid him only Rs. 200/-. That was one reason why he was dissatisfied. It also appears that he recommended to the Bank to give a loan to some persons including defendants 2 and 3 and his recommendation letters were ignored by the Bank. That was another reason why he was not feeling happy with the Bank. The High Court has taken the view that the statements made by this witness cannot be regarded as reliable or trustworthy; and we are not prepared to hold that the view taken by the High Court is so erroneous that we should reverse it. In any case, reading the evidence of this witness as a whole, we would be reluctant to come to the conclusion that there was an agreement between the Bank and defendants 2 and 3 at the relevant time which would attract the provisions of s. 23 of the Act. Our reluctance is based on the somewhat unsatisfactory character of the evidence given by this witness as well as on the fact that defendants 2 and 3 who could have given evidence on this point have not stepped into the witness-box. The onus to prove the illegal character of the transactions was obviously on the plaintiffs and their failure to examine defendants 2 and 3 must largely contribute to the final decision on the issue.

Mr. Pillai who is the other witness on whose evidence the plaintiffs rely has been characterised by the High Court as untrustworthy; but the infirmity in the evidence of this witness is that his evidence does not clearly or expressly lead to the conclusion that there was an agreement between the parties

that the document should be executed by the debtors in consideration for the Bank withdrawing the criminal proceedings. The answers which he gave are somewhat vague and indefinite, and it would be unsafe to make the said answers the basis of a definite finding against the Bank.

The last witness on whose evidence Dr. Seyid Muhammed has relied is plaintiff No. 1, the father, P.W. 7. His evidence is obviously interested and the fact that he has taken upon himself to speak to a transaction when defendants 2 and 3 who were directly concerned in the transaction did not come to give evidence, considerably detracts from the value of his statements. Therefore, having carefully considered the evidence in the light of criticism made by the High Court, we are not prepared to accept Dr. Seyid Muhammad's argument that he has made out a case for reversing the conclusion of the High Court.

In this connection, we ought to mention another point which is not irrelevant. The evidence given by the Secretary of the Bank, Joseph, shows that soon after the godown was inspected and before the complaint was filed, defendants 2 and 3 offered to the Bank to make up for the deficiency in the value of the pledged goods. They appealed to the Bank that the discovery made by the bank on inspection of the godown should not be disclosed to anybody and that they would immediately furnish sufficient additional security. In order to carry out this promise, they in fact delivered to the Bank certain documents of title in respect of the property which was ultimately mortgaged to the Bank; but all the documents of title were not handed over and that is where the matter stood when the complaint was filed. Later, the two impugned documents were executed and the complaint was withdrawn. The point on which Mr. Desai for the Bank has relied is that the evidence of the Secretary shows that an agreement to furnish additional security had been reached between defendants 2 and 3 on the one hand and the Bank on the other even before the complaint was filed, and so, it would be unreasonable to suggest merely from the sequence of subsequent events that the impugned documents were executed with the object, and for the consideration, of stifling the criminal prosecution. Mr. Desai argues, and we think rightly, that where the validity of an agreement is impeached on the ground that it is opposed to public policy under s. 23 of the Act, the party setting up the plea must be called upon to prove that plea by clear and satisfactory evidence, Reliance on a mere sequence of events may tend to obliterate the real difference between the motive for the agreement and the consideration for it. Did the parties offer to give security and execute the documents in consideration for the withdrawal of the criminal complaint by the Bank ? - that is the question which has to be decided in the present appeals, and in proving their case, the plaintiffs are expected to lead satisfactory evidence; and in our opinion, the High Court is on the whole, right when it came to the conclusion, that the evidence led by the plaintiffs is far from satisfactory. Therefore, we are satisfied that the view taken by the High Court is right and cannot be reversed.

The result is, the appeals fail and are dismissed with costs one set of hearing fees. The appellants have been allowed to file their appeals in forma pauperis, and so, we direct that they should pay court-fees which they would have had to pay if they had not been allowed to appeal as paupers.

Appeals dismissed.

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