Kuju Collieries Ltd.

Vs

Jharkhand Mines Ltd. and Others

Civil Appeal No. 1865 of 1967

(P. Jagmohan Reddy, M. H. Beg, A. Algiriswami JJ)

12.08.1974

JUDGMENT

ALAGIRISWAMI, J. -

1. This appeal is against the judgment of the Patna High Court by Special Leave granted by this Court. It arises out of a mining lease granted by the Respondent No. 1 but alleged to have been done so in the name of the Respondent No. 1 by Respondent No. 2 in favour of Haricharan Singh J. D. & Co. on September 7, 1950. In pursuance of the lease a sum of Rs. 80,000 was paid to Respondent No. 1. The plaint allegation was that Respondent No. 1 was a Limited Company created by Respondent No. 2. There was an earlier lease in respect of the same property in favour of Respondents 3 and 4 which expired on April 4, 1950. Haricharan Singh J. D. & Co. later changed its name to Kuju Collieries Ltd. who are the appellants. As the plaintiff did not get the possession of the leased property it instituted a suit for recovery of possession of the leased property along with mesne profits and in the alternative for refund of the sum of Rs. 80,000 and certain other sums. The present appeal is, however, concerned only with that amount.

2. In the suit Respondent No. 1 and Respondent No. 2 took the stand that Respondent No. 1 was not created by Respondent No. 2, that the lease was by Respondent No. 1 and the amount was paid to Respondent No. 1 alone and not to Respondent No. 2. Respondent No. 1 also contended that the leased properties were handed over to the plaintiff, that they were not aware that Respondent 3 and 4 were resisting the plaintiff's claim and that Respondent No. 1 was not in any case responsible therefor and that therefore the plaintiff was not entitled to any relief. During the pendency of this appeal Respondents 2 and 3 died and their legal representatives have not been brought on record. The appellant is not claiming any relief against any of the other respondents except Respondent No. 1 and it is, therefore, unnecessary to refer to the attitude taken by them in the suit.

3. It is necessary at this stage to mention that after the institution of the suit the Bihar Land Reforms Act came into force as a result of which any lessee working a mine became a direct lessee under the State, and as the plaintiff was not working the mines any claim in respect of the possession of the mines became unenforceable. The appellant has, therefore, confined his claim to the sum of Rs. 80,000 as payable to it by Respondent No. 1.

4. The trial Court held that as the plaintiff was already in the business of mining and had the advantage of consulting its lawyers and solicitors and their lease deed was drawn up and prepared by solicitors, there was no occasion for the plaintiff to have been under any kind of ignorance of law and as the Mineral Concession Rules of 1949 rendered any stipulation for payment of salami illegal and the lease on that basis was also illegal, the plaintiff was not entitled to claim relief under Section

65 of the Indian Contract Act. It, therefore, dismissed the suit.

5. On appeal the High Court also held that neither Section 65 nor Section 72 of the Contract Act applied to the facts of the case.

6. We are of the view that Section 65 of the Contract Act cannot help the plaintiff on the facts and circumstances of this case. Section 65 reads as follows :

When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it.

The section makes a distinction between an agreement and a contract. According to Section 2 of the Contract Act an agreement which is enforceable by law is a contract and an agreement which is not enforceable by law is said to be void. Therefore, when the earlier part of the section speaks of an agreement being discovered to be void it means that the agreement is not enforceable and is, therefore, not a contract. It means that it was void. It may be that the parties or one of the parties to the agreement may not have, when they entered into the agreement, known that the agreement was in law not enforceable. They might have come to know later that the agreement was not enforceable. The second part of the section refers to a contract becoming void. That refers to a case where an agreement which was originally enforceable and was, therefore, a contract, becomes void due to subsequent happenings. In both these cases any person who has received any advantage under such agreement or contract is bound to restore such advantage, or to make compensation for it to the person from whom he received it. But where even at the time when the agreement is entered into both the parties knew that it was not lawful and, therefore, void, there was not contract but only an agreement and it is not a case where it is discovered to be void subsequently. Nor is it a case of the contract becoming void due to subsequent happenings. Therefore, Section 65 of the Contract Act did not apply.

7. The Privy Council in its decision in Harnath Kuar v. Inder Bahadur Singh ((1923) 50 IA 69, 67-77 : AIR 1922 PC 403) observed :

The section deals with (a) agreements and (b) contracts. The distinction between them is apparent by Section 2; by clause (e) every promise and every set of promises forming the consideration for each other is an agreement, and by clause (h) an agreement enforceable by law is a contract. Section 65, therefore, deals with (a) agreements enforceable by law and (b) with agreements not so enforceable. By clause (g) an agreement not enforceable by law is said to be void. An agreement therefore, discovered to be void is one discovered to be not enforceable by law, and, on the language of the section would include an agreement that was void in that sense from its inception as distinct from a contract that becomes void.

8. A Full Bench of five Judges of the Hyderabad High Court in Budhulal v. Deccan Banking Company (AIR 1955 Hyd 69 (FB) : ILR 1955 Hyd 101) speaking through our brother, Jaganmohan Reddy. J. as he then was, referred with approval to these observations of the Privy Council. They then went on to refer to the observations of Pollock and Mulla in their treatise on Indian Contract and Specific Relief Acts, 7th Edn. to the effect that Section 65, Indian Contract Act does not apply to agreements which are void under Section 24 by reason of an unlawful consideration or object and there being no other provision in the Act under which money paid for an unlawful purpose may be recovered back, an analogy of English Law will be the best guide. They then referred to the

reasoning of the learned authors that if the view of the Privy Council is right namely that "agreements discovered to be void" apply to all agreements which are ab initio void including agreements based on unlawful consideration, it follows that the person who has paid money or transferred property to another for an illegal purpose can recover it back from the transferee under this section even if the illegal purpose is carried into execution and both the transferor and transferee are in pari delicto. The Bench then proceeded to observe :

In our opinion, the view of the learned authors is neither supported by any of the subsequent Privy Council decisions nor is it consistent with the natural meaning to be given to the provisions of Section 65. The section by using the words 'when an agreement is discovered to be void' means nothing more nor less than : when the plaintiff comes to know or finds out that the agreement is void. The word 'discovery' would imply the pre-existence of something which is subsequently found out and it may be observed that Section 66. Hyderabad Contract Act makes the knowledge (Ilm) of the agreement being void as one of the pre-requisites for restitution and is used in the sense of an agreement being discovered to be void. If knowledge is an essential requisite even an agreement ab initio void can be discovered to be void subsequently. There may be cases where parties enter into an agreement honestly thinking that it is a perfectly legal agreement and where one of them sues the other or wants the other to act on it, it is then that he may discover it to be void. There is nothing specific in Section 65, Indian Contract Act or its corresponding section of the Hyderabad Contract Act to make it inapplicable to such cases.

A person who, however, gives money for an unlawful purpose knowing it to be so, or in such circumstances that knowledge of illegality or unlawfulness can as a finding of fact be imputed to him, the agreement under which the payment is made cannot on his part be said to be discovered to be void. The criticism that if the aforesaid view is right then a person who has paid money or transferred property to another for illegal purpose can recover it back from the transferee under this section even if the illegal purpose is carried into execution, notwithstanding the fact that both the transferor and transferee are in pari delicto, in our view, overlooks the fact that the courts do not assist a person who comes with unclean hands. In such cases, the defendant possesses an advantage over the plaintiff - in pari delicto potior est conditio defendentio.

> Section 84, Indian Trust Act, however, has made an exception in a case - where the owner of property transfers it to another for illegal purpose and such purpose is not carried into execution or the transferor is not as guilty as the transferee or the effect of permitting the transferee to retain the property might to be defeat the provisions of any law the transferee must hold the property for the benefit of the transferor.

This specific provision made by the legislature cannot be taken advantage of in derogation of the principle that Section 65, Contract Act, is inapplicable where the object of the agreement was illegal to the knowledge of both the parties at the time it was made. In such a case the agreement would be void ab initio and there would be no room for the subsequent discovery of that fact.

We consider that this criticism as well as the view taken by the Bench is justified. It has rightly pointed out that if both the transferor and transferee are in pari delicto the courts do not assist them.

9. A Division Bench of the Andhra Pradesh High Court in its decision in Sivaramakrishnaiah v. Narahari Rao (AIR 1960 AP 186) held that :

In order to invoke Section 65 the invalidity of the contract or agreement should be discovered

subsequent to the making of it. This cannot be taken advantage of by parties who knew from the beginning the illegality thereof. It only applies to a case where one of the parties enters into an agreement under the belief that it was a legal agreement, i.e. without the knowledge that the agreement is forbidden by law or opposed to public policy and as such illegal. The effect of Section 65 is that, in such a situation, it enables a person not in pari delicto to claim restoration since it is not based on an illegal contract but dissociated from it. That is permissible by reason of the section because the section is not founded on dealings which are contaminated by illegality. The party is only seeking to be restored to the status quo ante. Section 65 also does not recognise the distinction between a contract being illegal by reason of its being opposed to public policy or morality or a contract void for other reasons. Even agreements, the performance of which is attended with penal consequences, are not outside the scope of Section 65. At the same time, courts will not render assistance to persons who induce innocent parties to enter into contracts of that by playing fraud on them to retain the benefit which they obtained by their wrong.

They also referred with approval to the earlier decision of the Hyderabad High Court in Budhulal v. Deccan Banking Co. Ltd. (supra).

10. In a recent judgment of this Court in Shri Ramagya Prasad Gupta v. Sri Murli Prasad ((1974) 2 SCC 266) to which one of us was a party, this Court quoted with approval the observations of the Full Bench of the Hyderabad High Court in Budhulal v. Deccan Banking Company (supra). These decisions are in accordance with the view we have taken.

11. The Mineral Concession Rules came into force on October 25, 1949. As the lease came into force on September 7, 1950 and money was paid on that date, the fact that there was an earlier unregistered contract does not make any difference to the question at issue. Section 4 of the Mines and Minerals (Regulation and Development) Act, 1948 provides "no mining lease shall be granted after the commencement of this Act otherwise than in accordance with the Rules made under this Act, and any mining lease granted contrary to the provisions of sub-section (1) shall be void and of no effect". Under Rule 45 of the Mineral Concession Rules, 1949 "no prospecting license or mining lease shall be granted except to a person holding a certificate of approval from the Provincial Government having jurisdiction over the land in respect of which the concession is required". The plaintiff had no certificate of approval from the State Government. Under Rule 49 "no grantor of a prospecting license or a mining lease shall charge any premium in addition to or in lieu of the prospecting fee, surface fee, surface rent, dead rent or royalty specified in such license or lease". There was a stipulation for payment of a premium under the lease deed in favour of the plaintiff. Therefore, clearly the lease in favour of the plaintiff was contrary to the provisions of the Mines and Minerals (Regulation and Development) Act, 1948 and the Mineral Concession Rules, 1949 and as such void.

12. The further question is whether it could be said that this contract was either discovered to be void or became void. The facts enumerated above would show that the contract was void at its inception and this is not a case where it became void subsequently. Nor could it be said that the agreement was discovered to be void after it was entered into. As pointed out by the trial Court the plaintiff was already in the business of mining and had the advantage of consulting its lawyers and solicitors. So there was no occasion for the plaintiff to have been under any kind of ignorance of law under the Act and the Rules. Clearly, therefore, this is not a case to which Section 65 of the Contract Act applies. Nor is it a case to which Section 70 or Section 72 of the Contract Act applies. The payment of the money was not made lawfully, nor was it done under a mistake or under coercion.

13. We agree with the trial Court that the plaintiff should have been aware of the illegality of the agreement even when it entered into it and therefore Section 65 of the Contract Act cannot help it.

14. The appeal is, therefore, dismissed but in the circumstances without costs.

</html