

CALCUTTA HIGH COURT

Mafizuddin Khan Choudhury

Vs.

Habibuddin Sheikh

A.F.O.D. No. 159 of 1950

(R.P. Mookerjee and P.K. Sarkar, JJ.)

25.07.1956

JUDGMENT

R.P. Mookerjee, J.

1. The plaintiff appellant had filed a suit for dissolution of a partnership with defendant No. 1 and for accounts. The plaintiff alleged that defendant Habibuddin had entered with him in partnership for carrying on business in silk in the District of Nadia. In Bhadra, 1352 B. S. the two partners agreed to start a spinning and reeling factory with the profits of the original business and purchased a machine and set up 12 ghais for the working of the factory. It was agreed that each would have a moiety share in the profits, assets and stock in trade of the factory and that on the dissolution of the partnership the partners would first of all repay back the capital contributed by each and then they would share equally the profits and the assets. The plaintiff further alleged that the management of the factory and of the business was entrusted to the defendant respondent who kept the funds and maintained accounts. The latter had refused either to pay the dues of the plaintiff appellant or to render accounts in spite of repeated demands and that he was appropriating to himself the funds and stock in trade of the business. The accounts previous to the starting of the factory were stated to have been mutually adjusted and the plaintiff prayed for accounts subsequent to that period and for the dissolution of the partnership.

2. The defendant respondent denied that there had been any partnership agreement between the parties. In the alternative it was pleaded that even if there had been an agreement as alleged the same was illegal under the Defense of India Rules, the Partnership Act and other laws in force at the time.

3. The learned Subordinate Judge passed a preliminary decree holding inter alia that there was a partnership as alleged by the plaintiff.

4. An appeal was taken to this Court by defendant No. 1 (Appeal from Original Decree No. 65 of 1945). This Court accepted the findings of the trial Court to the effect that the partnership alleged by the plaintiff had been established and that there had been no adjustment of accounts after Agrahayan, 1352 B. S. An objection was raised on behalf of the defendant that even if it be

found that there was a partnership such a partnership was illegal under the then existing laws and rules. This Court further held that there had been no proper trial so far as this alternative defense was concerned and an issue in the following form was framed and sent down to the lower Court :

"Is the contract of partnership illegal by virtue of the provisions of the Bengal Silk Control Order read with the Defense of India Rules? If so, is the suit maintainable?"

It was directed that if this issue were answered in favor of the defendant the suit would be dismissed, but if answered in favor of the plaintiff the suit would be decreed.

5. Although liberty was given to the parties to adduce additional evidence neither of the parties took advantage of the same. The learned Subordinate Judge has after remand held against the plaintiff on this point. The suit has accordingly been dismissed.

6. The plaintiff has appealed to this Court. The only point now before us is whether the partnership which had been found by this Court to have been proved to have been formed is hit by the provisions contained in Section 23, Contract Act.

7. For a proper appreciation of the objection raised by the defendant which has found favor with the trial Court reference need be made to the circumstances under which the partnership in question was created and to the relevant provisions of the Bengal Silk Control Orders.

8. The plaintiff's case in short is that while he and defendant No. 1 were carrying on a partnership business for the purchase and sale of silk they agreed to start a spinning and reeling factory. At that time silk spinning and reeling factories could be run only after obtaining license under the Control Orders to which reference will be made hereafter. It was arranged between them that the license was to be taken in the name of the defendant Habibuddin. Such license was obtained by the latter. Filature work was thereafter started. The defendant, however, failed to pay the plaintiff's legitimate share of dues.

9. During the last World War the Governor General of India declared an emergency under Section 102, Government of India Act, 1935. Rule 81 (2), Defense of India Rules, empowered the Central Government or the Provincial Government, for the purpose of securing the defense of British India or the efficient prosecution of the War or for maintaining supplies and services essential to the life of the community, to provide for

(a) regulating or prohibiting production, distribution, use, consumption, etc., of articles or things of any description whatsoever, and in particular for prohibiting, withholding from sale, either jointly or to specified persons or classes of persons of articles or things kept for sale or for requiring articles or things kept for sale to be sold either jointly or to specified persons or classes of persons or in specified circumstances;

(b) for controlling prices or rates at which any articles or things may be sold.

10. Rule 81(4), Defense of India Rules, made it punishable for any person who might contravene

any order made under this Rule.

11. During the War silk was an essential commodity required for the prosecution of the War as it was used for making parachutes and similar other things. The Government had, therefore, to regulate and control production, distribution, sale and purchase of silk.

12. On 8-3-1943, the Governor of Bengal promulgated the Bengal Silk Control Order, 1943. Under paragraph 4 of this Order,

"every person owning filature shall before the expiration of one month from the date on which he first becomes subject to the provisions of this paragraph apply to the Registering Officer appointed in this behalf by the Provincial Government to be registered as an owner in respect of such filature or such establishments."

13. The Control Order reserved powers to the Government to regulate trade, including purchase and sales by such persons owning filature for trading in raw silk.

14. On 16-5-1945, the Bengal Silk Control Order, 1945, was promulgated repealing the 1943 Control Order. Restriction against any person carrying on operations of filatures or Charka and selling of raw silk were continued subject to certain changes in the rules.

15. Paragraph 9 (1), Silk Control Order, 1945, prohibited the purchase of any raw silk by any person without a permit being issued by the Provincial Controller and also prohibited the sale of any raw silk to any person other than the Government Officer or agent authorized in this behalf by the Government or any person holding such a permit.

16. Paragraph 5 of the said Control Order further provided that no filature by any manufacturer or establishment by which silk is produced by reeling or cocoons with the help of any machinery other than the indigenous instrument, as defined in paragraph 3(7) of the Control Order, should be operated after the commencement of the Order unless the person owning it had been registered under that paragraph by an application to the Registering Officer before the expiration of one month from the date on which he first became subject to the Order; and the Registering Officer was given authority in the rules for refusing registration without assigning any reason.

17. Paragraph 6 of the same Order similarly provided that no one should be allowed to trade in raw silk unless he had been registered as a trader under that paragraph.

18. Paragraph 8 provided that such application should be made in such a form and with such particulars as might be prescribed.

19. Paragraph 20 of the said Order required every registered owner of any filature to keep books of accounts in prescribed forms and paragraph 21 required every registered trader to maintain certain books of accounts.

20. Paragraph 22 provided for inspection of such books of accounts with a view to securing compliance with the provisions of the Control Order.

21. Paragraph 23 authorized any Court trying any person for contravention of the Order to order forfeiture of any stock held by such person on conviction and Paragraph 24 provided for cancellation of the registration of any registered owner or trader on such conviction.

22. As stated already the filature factory started by the plaintiff and defendant No. 1 was registered under paragraph 5 of the Silk Control Order on 11-9-1945, in the name of defendant No. 1 as the owner thereof. The form of application prescribed for such registration required an application by one owner or all the owners in a body. The application made in the present case shows that defendant No. 1 was the only applicant for registration under the Control Order.

23. It is not the case of the plaintiff that he had made any application for such registration. The order on the application further shows that defendant No. 1 was registered as dealer of raw silk also.

24. The plaintiff has stated that the new machinery was purchased in the name of defendant No. 1 as the latter had obtained a license for running of ghaies. The license as a dealer also used to be granted to those who held license for kat ghaies.

25. According to the plaintiff he did not accordingly apply for a new or separate license in his name.

26. The learned Subordinate Judge has held the contract of partnership to be illegal on the ground that although the plaintiff, on his own showing, as a co-owner of the filature, carried on silk business in partnership with defendant No. 1, he did not and never intended or applied to get himself registered under the Silk Control Order as the owner of the filature or as a trader in silk. Accordingly the contract between the parties to operate the filature and to carry on the silk business without getting the name of the plaintiff registered was an illegal contract being forbidden by the said Control Order. He also held that defendant No. 1 having got his name registered as the owner of the filature under paragraph 5 of the Order and having obtained a license to trade in silk, the plaintiff had no right to sue him for accounts and to get a share of the profits.

27. Thus the ground on which this contract has been held by the Court below to be an illegal one is that the contract was made in contravention of the legal prohibition contained in the Silk Control Order and it has to be considered whether the said Order had the effect of making the partnership contract illegal.

28. Mr. Mitter contended on behalf of the plaintiff appellant that there was no provision in the Silk Control Order to make the contract for partnership to carry on such business to be illegal and that the contract in question was perfectly valid and legal when it was entered into. He contended further that the plaintiff and defendant No. 1 had already been doing business in partnership from before the Silk Control Order came into force. All that the two persons forming the partnership did subsequently in Bhadra, 1352 B. S. was to extend their business by the installation of a spinning and reeling factory after purchasing a machine.

29. Mr. Chakravarti, on the other hand, contended that since the Silk Control Order had come into force from May, 1945, i.e., before Bhadra 1352 B.S. the formation of a partnership or even

the extension of the existing partnership to start and operate a silk factory or filature with the help of machinery at that time was subject to the bar under the Silk Control Order. Registration of the filature under the provisions of the Control Order by all the owners thereof was necessary as a condition precedent to its functioning. He further contended that such arrangement or contract was prohibited. All the owners of the filature were required to be registered in order that the filature could be operated.

30. Section 23, Contract Act, provides that the consideration or object of an agreement is lawful, unless it is forbidden by law or the Court regards it as immoral or opposed to public policy. In each of these cases the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

31. As to what is to be regarded as forbidden by law, the test applied by the Courts has not been uniform. Prohibition, no doubt, may be either express or implied, but what is regarded to be the implication of a prohibition has led to different interpretations by different High Courts on the same sets of circumstances. The majority of these decisions is on different statutes for the regulation and control of excise articles. Most of the decisions in Madras are based upon Madras Abkari Act (I of 1886). Section 15 of the said Act provided that no liquor or intoxicating drug should be sold without a license having been obtained from the Collector. Sections 55 and 56 of that Act made contravention of the provisions of the Act or any rule or any order made there under or of any term of the license which may be issued to be punishable. Rule 27 framed under that Act provided that no privilege of supply or vending should be "sold, transferred or subrented without the previous permission" of the authority.

32. When a license is obtained by one person and he enters into a contract with another to form a partnership for the purpose of carrying on the business, it has been declared in a long series of decisions in Madras to be a contravention of the terms of the license and hence illegal.

33. In *Ramanayadu v. Seetharamayya*¹, a Full Bench of the Madras High Court considered the earlier decisions as regards the implication of the prohibitions in the Madras Abkari Act and the Rules framed thereunder and came to the conclusion that where one of the partners had become the successful bidder at the auction of a toddy shop before the formation of the partnership and no application had been made for the issue of the licence in the names of all the persons forming the partnership the partner continuing to sell or vend liquors was illegal inasmuch as the intention was to carry on the business in the name of the partner who obtained the license for the benefit of the entire body of the partners. Beasley, C.J., had observed that partnership for the purpose of carrying on a toddy shop business for which partnership was to be formed on a future date and to obtain license in the names of all the partners would not be illegal.

34. Subsequent to this decision divergent views came to be expressed as to whether the subsequent formation of or the existence of partnership from before a license is taken out would be differently treated.

35. In *Satyala v. Bhogavalli*², the view was

¹58 Mad 727 : AIR 1935 Mad 440

²AIR 1935 Mad 895 : 69 Mad LJ 490

expressed that a pre-license partnership was legal and that the rights of the partners in such a partnership would not be effected by the subsequent undertaking by the partnership of a license

obtained in the name of one of the partners. On the other hand, in *Rama Moopan v. Mutha Moopan*³, and *J. D. Italia v. D. Cowasjee*⁸, a contrary view was maintained.

36. The question came up for consideration before another Full Bench in *Velu Padayachi v. Sivasooriam Pillai*⁴, Horwill, J., delivering the judgment of the Full Bench observed that irrespective of the facts whether the contract for partnership was entered into before the license had been granted or subsequent to the issue of the license, the result would be the same. The partnership must be deemed to be void ab initio so far as it conducted the business as envisaged by the Madras Abkari Act.

37. The opinion was expressed in the following terms :

"From the above discussion it is evident that there is a long and consistent body of opinion of this High Court from *Marudamuthu Pillai v. Rangasami Moopani*⁵, onwards, with which we agree, that a partnership entered into for the purpose of conducting a business in arrack or toddy on a license granted or to be granted to only one of them is void ab initio, whether the contract was entered into before the license was granted or afterwards, in that it either involves a transfer of the license which is prohibited under Rule 27 and punishable under Section 56, or a breach of Section 15, Abkari Act, punishable under Section 55, because the unlicensed partner, by himself or through his agent, the other partner sells without a license. If a partnership is lawful at its inception, because it is not intended to infringe any provision of the Contract Act, it nevertheless becomes unlawful when it intends to conduct the business jointly on a license granted to one only of the partners."

It was held in both the Full Bench decisions referred to above that the agreement to work in partnership amounted to a transfer of the right in the business. The Full Bench approved of the earlier decisions in 24 Mad 401; *Thithi Pakurudasu v. Bheemudu*⁶, *Nalain Padmanabham v. Sait Badrinadh*⁷, and *Brahmayya v. Ramiah*⁹, It may be pointed out, however, that the reasons given by the learned Judges in the different decisions referred to above were not identical ones.

38. Whatever may be the grounds stated in the judgments of the Madras High Court, in our view, the foundation of the decisions can be traced to the provisions contained not merely in the relevant sections of the Act to which reference has been made, but more particularly to the provisions contained in Rule 27 framed under the Madras Act. As indicated already, R. 27 definitely ruled out any sale, transfer or subvending of the right. This was not only an extension of the mere prohibition as contained in the Act itself, but definitely made it illegal for any subletting or for any transfer of the rights of a licensee.

39. If we refer, however, to the decisions of the Bombay High Court, a different note was struck, and the rules governing Bombay Acts to which reference will be made were interpreted in a different way.

³ AIR 1940 Mad 705

⁵ ILR 24 Mad 401

⁷ 35 Mad 582

⁴ ILR (1950) Mad 987: AIR 1950 Mad 444

⁶ 26 Mad 430

⁸ ILR 1944 Mad 697

⁹ ILR 43 Mad 141

40. In *Champsey v. Gobordhandas*¹⁰, a license for the manufacture of salt had been obtained by

one of the members of a family. The brother and certain other persons joined into a partnership to share the profits of the business - a business which was managed by the licensee himself. The license was granted under Section 11. Salt Act (Bombay Act II of 1890), which prohibited the manufacture of salt without obtaining such a license. One of the conditions of the license was in somewhat similar terms to Rule 27 as framed under the Madras Akbari Act. The licensee under the Bombay Act could not sublet, sell, mortgage or otherwise alienate the whole or a part of the privilege granted to the licensee. Macleod, J., who decided the case sitting singly held that the admission of partners to share in the profits could not be considered as a subletting or alienating a part of the privilege unless there had been a document directly transferring to the partners a part of the right to manufacture or vend. Reliance was placed on an earlier decision of the Allahabad High Court in *Gauri Shankar v. Mumtaz Ali*¹¹, to which reference will be made by me at a later stage.

41. Reference may also be made to *Hormasji v. Pestanji*¹³, and *Ganesh v. Shripad*¹², at p. 672, where a different note was struck. In a later decision, however, in *Karson Sadashiv v. Gathu Shivaji*¹⁴, the decisions in ILR 12 Bom 422 and ILR 20 Bom 668 referred to above were distinguished. There is no reference in these cases to any rule against subletting or transferring. The Bombay view, therefore, is directly contrary to what has been held by the Madras High Court.

42. In ILR 2 All 411, the Full Bench of the Allahabad High Court while dealing with the provisions contained in Regulation VI of 1890 held that the question which fell to be decided by the Court when there was a dispute between the partners, one of such partners being the licensee of a ferry, was different from the test which was to be applied when the dispute was between the authority which had let out the ferry and the licensee and/or the persons interested along with the licensee. If the ferry continued to be managed by the person who was the holder of the permit under the Regulation, a contract for sharing the profits or for financing the venture would not be void under Section 23, Contract Act. The terms of the contract would be binding as between the partners though they would not in any way affect the Government.

43. So far as our Court is concerned the earliest decision is *Judoonath v. Nobin Chunder*¹⁵, The dispute arose when a claim was made by one for the price of liquor sold by him to a customer. Objection having been raised by the latter that the plaintiff was not the licensee under Act II (B.C.) of 1866, this Court following an English decision in *Ritchie v. Smith*¹⁶, and relying upon the observations of Maule, J., dismissed the plaintiff's claim on the ground that the plaintiff did not keep his shop as was required under the license issued by the Government. He had infringed the definite provisions contained in that Act in selling liquor himself and demanding payment for the same which nobody could do without having obtained a license for the same.

44. In somewhat similar circumstances a claim was made by the plaintiff in *Boistub Churn v. Wooma Churn*¹⁷, for the price of goods sold although he did not hold a license.

¹⁰19 Bom LR 381 : AIR 1917 Bom 250

¹²ILR 20 Bom 668

¹⁴ILR 37 Bom 320

¹¹ILR 2 All 411 (FB)

¹³ILR 12 Bom 422

¹⁵21 Suth WR 289

¹⁶(1848) 6 CB 462

¹⁷ILR 16 Cal 436

A Division Bench of this Court following the English authority already referred to held that the plaintiff not being the holder of the license was not entitled to claim the price of the goods sold which he had no right to sell In *Behari Lall v. Jagadish Chunder*¹⁸, Sale, J., was called upon to interpret the Bengal Excise Act of 1878. The Rules framed under that Act specifically provided apart from the conditions incorporated in the license that the right under a license was not transferable. A contract was entered into between the holder of the license and the plaintiff who claimed accounts under which he was entitled to the profits and to take part of the management with an indemnity clause which gave him the immunity from being liable for any loss. The learned Judge held that the plaintiff was not entitled to claim the benefits of that contract as he had under the same introduced himself into a business which was not transferable under the rules and that the rules of public policy would stand in the way of such a plaintiff being allowed any relief.

45. In *Jnanendra Nath v. Chandi Charan*¹⁹ Walmsley, J., was called upon to consider the same question about the rights of a partner along with one who was a licensee. There was some dispute between the parties whether there was any partnership at all or whether the defendant was a mere servant of the plaintiff who was a licensee. The plaintiff had sued the defendants for accounts alleging that the latter was his servant and he made an alternative case that if he was found to be partner there should be a dissolution of the partnership and the defendant should be called upon to render accounts. From the short judgment delivered by this Court it appears that there was a confusion in the lower Court as regards the status of the defendant. An order of remand was made by Walmsley, J., for the determination of the exact relationship of the parties with the further direction that if the finding was that the parties were partners and the terms of the partnership were such as to make it illegal on the principles laid down in *Beharilal v. Jagadish* (Supra) the suit should be dismissed.

46. There are two other decisions of this Court, *Rakhal Chandra v. Domodur Shaha*²⁰, and *Chandi Charan v. Jnanendranath*²¹, but there is no discussion of the principles underlying or the effect of the provisions contained in the restrictive statutes.

47. So far as this Court is concerned, therefore, the decisions are to this effect that a person who is not the holder of the license, where under the statutory provisions license is to be taken before the article in question can be sold by him, he is not entitled to get a decree from the Court for the value of the articles supplied, as allowing the claim of such a person would be violating the statutory provisions made restricting the sale to certain persons only. The decision in ILR 31 Cal 798, also can be supported, and in our view, that would be the proper angle from which to apply that decision that the authority is only applicable when there is a provision making the license non-transferable or inalienable.

48. In all the decisions referred to above the statutory provisions are about the license to be obtained for the sale of liquors or of other excisable goods. Our attention has been drawn by Mr. Chakravarti to a recent decision of the Andhra High Court in *Pisupati Rama Rao v. Tadepalli Papayya*²², which arose out of a dispute

¹⁸ ILR 31 Cal 798 : 8 Cal WN 635

²⁰ 15 Cal WN 169

¹⁹ 29 Ind Cas 480 : AIR 1916 Cal 657

²¹ 21 Cal WN 921 : AIR 1919 Cal 667

²² AIR 1954 Andhra 51

between the partners in connection with the running of a rice ration shop under the Madras

Rationing Order of 1943. Paragraph 13 of that Order provided that a ration document which included any permit or a document issued under the Order should not be used for obtaining any rationed article except by or on behalf of the person to whom such document was issued. Paragraph 16 of the said Order prohibited a person from transferring to any other person a ration document issued to himself. It was held that the business carried on by the partnership being a business of buying and selling rice in the ration shop with the aid of the license granted to one of the partners only, it involved the user of the said license or ration document by other persons. This amounted to a contravention of the provisions contained in paragraph 13 and involved the transfer of a ration document amounting to a contravention of paragraph 16 of the Order. Reference was made to the observations of the Full Bench in AIR 1950 Madras 444.

49. What is the ratio decidendi arising on the decisions referred to? What is regarded as forbidden by law under Section 23, Contract Act? Except for certain observations in some of the judgments of the Madras High Court, the decisions rest on the principle that when there is a definite provision forbidding sale, transfer or subletting of a license and a party claims a right for such subletting or transfer as has taken place the Court should refuse to enforce such contract as the consideration or object of such an agreement was definitely forbidden by law.

50. We do not overlook the observations made by the Madras High Court in *Ramanayudu v. Seetharamayya*²³, where a suit for the enforcement of a promissory note was thrown out by the Court on the extension of the principles contained in Section 23, Contract Act. The plaintiff in that case had obtained a promissory note from the defendant for advance to be made by the former for a partnership between the two, the latter alone having obtained the license. No permission had been taken from the Collector for the two persons to enter into the arrangement. The Madras High Court applied Rule 27 framed under the Madras Abkari Act and strictly enforced the same. The strict provisions of Rule 27 may be so interpreted, but we do not think that the rules of public policy which were attempted to be applied or introduced were properly applied in that case. We shall immediately proceed to consider whether the rules of public policy would affect the contract of the nature which we have been considering and shall take up this question again at that stage. Suffice it to say for the present that, in our view, the consideration of an object of agreement will not be deemed to be forbidden by law unless in the circumstances related above there is a specific provision forbidding transfer or sale of a right under a license.

51. We now proceed to consider whether the contract in question is hit by the other provision in Section 23 of the Contract Act, i.e., whether the object is opposed to public policy. Public policy has been described by one of the eminent Judges in England as an unruly horse, and there are series of decisions divergent in character where the Courts sometimes refused and on different occasions enforced an agreement. As has been observed it is a vague and perhaps unsatisfactory term, a treacherous ground for legal decision and a very unsuitable and treacherous foundation on which to build *Janson v. Driefontein Consolidated Mines Ltd*²⁴. All the same it has been and will be a just ground

²³ ILR 58 Mad 727 : AIR 1935 Mad 440 (FB)

²⁴(1902) AC 484

for a legal decision and the Court has to give a decision whether a particular contract militates against public policy. As was observed in *Evanturel v. Evanturel*²⁵:

".....determination of what is contrary to so called policy of the law necessarily varies from time to time. Many transactions are upheld now by our own Courts which a former generation would have avoided as being contrary to the supposed policy of the law. The rule remains, but its application varies with the principles which for the time being guide public opinion."

Similar observations were made in *Maxim Nordenfelt Guns and Ammunition C. v. Nordenfelt*²⁶, emphasising that rules of public policy did not belong to a fixed or customary law and they were capable on proper occasions of expansion and modification. Circumstances may change and make a commercial practice expedient which was formerly mischievous to commerce.

52. In spite of such difficulties however, the Court is not to shrink from applying rules of public policy, but they must deal with new and even if there be extraordinary cases which may arise on the growth of the society or on new circumstances and situations arising.

53. What is the rule of public policy which is here being affected by enforcing the contract in question? The circumstances under which the Defense of India Act was passed and the rules thereunder framed or the Control Orders issued were certainly occasions of emergency which confronted the country and the government. When there are such emergencies wide powers are vested in the executive government, and such powers are exercised by the authorities in the interest of the people of the country.

54. In the present case, trading in silk or the manufacture thereof was a war necessity. Only such persons as were certified by the authorities to be responsible or competent to manufacture would be the persons who would deal with them. Under the agreement to which reference has already been made the authority to manufacture was left with the defendant who was the holder of the license. He had no sufficient finance and had to approach the plaintiff for such financial assistance. Keeping in view the wider interest, if a licensee retains the control of the business but to help the Government and the country he has to fall back upon the financial assistance from others, there can be no rule of public policy which would militate against such a person approaching another for financial assistance. Looked at from another point of view assistance which would be obtained by him would be helping the object for which the license is being issued. If under the contract the plaintiff would have taken charge of the business in place of the defendant who was the holder of the license the position would have been different. Asking for financial assistance, therefore, without giving the latter party control over the business does not militate against any one of the provisions contained either in the Defense of India Rules or the Control Order.

55. It has, however, been argued before us that irrespective of the provisions contained in the contract the partnership itself has the effect of a transfer of the right in the license to the partnership. We would not express any final opinion at this stage as on the provisions

²⁵(1874) 6 PC 1

²⁶(1893) 1 Ch 630

in the Control Order as we do not find any restrictive clause which forbids the sale, transfer or subletting of the license. Whether this was an accidental slip or an intentional one is not for us to speculate. If there had been such a provision as there was in rule 27 under the

Madras Abkari Act to which reference has been made the position might have been different. It is, however, not necessary for us to go to that length or to express any opinion on that wider issue.

56. 'Prima facie', therefore, the contract in question did not involve any violation or contravention of the Silk Control Order, because the Order did not prohibit the formation of any partnership for the starting of a filature or for carrying on a silk business. All that it required was that the owners of the filature should get themselves registered according to the provisions of the Order. It is true that the partnership, so far as it related to the starting of the filature, had been formed after the said Order had come into force and defendant No. 1 had got his name registered as the owner of the filature under that Control Order. The Silk Control Order did not contain any provision corresponding to the sections of the Excise Laws prohibiting the transfer or subletting of the excise shop or to those contained in paragraphs 13 and 16, Madras Rationing Order, prohibiting the use or transfer of ration document. The Excise Laws or the Rationing Order prohibited a subletting of a business without a license or of the carrying on of the business without a ration document, such a license or ration document being considered to be a personal privilege which was granted on the express understanding that it was to be used by him and by him alone.

57. Reference may in this connection be made to the application for registration of filatures by defendant No. 1, exhibits C, C(1) and C(2), Where the word license is not used. The defendant is mentioned as being registered as the owner and dealer. The Silk Control Order on the face of it did not provide for the grant of a license as a personal privilege. Our attention has not been drawn further to any specific provision prohibiting the subletting of any silk business without a license. It only required the owners of the filatures or the traders in silk to get themselves registered as such within a certain time fixed under the Control Order. If any owner or trader failed to get himself so registered he could not carry on the business, but a transfer of such business to another person was not specifically prohibited by the Control Order. Nor did the Control Order require the registered owner of a filature or registered trader in raw silk to carry on the operation of the filature or the trade by himself. On the other hand, it was provided in the definitions of a registered owner of a filature and a registered trader that the said expressions should also include any agent of such owner or trader. The running of a filature or the carrying on of a trade cannot be done by the holder of the permit all by himself; he has to avail of the existence of different persons in different capacities.

58. According to the arrangement set out in paragraph 2 of the plaint, defendant No. 1 was in charge of the factory or of the filature and solely responsible for the management thereof. The plaintiff was in charge of purchasing silk cocoons from the villagers for the purposes of the factory the license for which stood in the name of the defendant No. 1. The arrangement, therefore, for conducting the business was that the defendant would manage the same and the plaintiff would function as agent of the defendant though a partner. It cannot be said that even if the extreme view which had been urged on behalf of the defendant could be accepted that such an arrangement was prohibited under the Control Order Defendant No. 1 having been in sole charge of management of the filature got himself registered as the owner thereof. The said defendant kept the accounts. So far as the Control Order was concerned, the plaintiff had no intention to evade it by not getting his name registered. The plaintiff, as has been found by this Court while remitting one issue only to the trial Court for decision, contributed a share of the capital for setting up the filature and the machine was purchased at a cost of Rs. 5000/-.

59. The Silk Control Order of 1945 was only a temporary measure and by an order published in the Calcutta Gazette on 7-3-1946 being Order No. 591 (Ind.), dated 28-2-1946, the Bengal Silk Control Order was repealed with effect from 1-3-1946. The partnership business continued, according to the plaintiff, till Sravan, 1353 B. S., i.e., about July, 1946. It continued even after the repeal of the Order. There is no reason why defendant No. 1 should not account for the profits of the business during the period the Control Order was in force or pay back the capital supplied by the plaintiff and give him a share of the assets. The source from which the machineries had been put up was the joint one of the plaintiff and the defendant.

60. The learned Subordinate Judge had held that as the original contract was illegal and void, the subsequent repeal of the Order could not legalise the agreement. As we have found that the contract was not illegal, there is no force in this contention, and we are not required to deal with the other question as to what would have been the legal position if during the continuance of the Control Order the agreement was unenforceable and whether it could be so after the repeal of the Control Order. We do not express any opinion on this line of argument as it is unnecessary.

61. The result, therefore, is that this appeal is allowed and the plaintiff's suit for accounts is decreed. A preliminary decree will be drawn up by the Court below in the usual form and the defendant No. 1 is to render accounts for period as already decided upon by this Court while dealing with Appeal from Original Decree No. 65 of 1948.

62. So far as the costs are concerned, this Court had already directed in Appeal from Original Decree No. 65 of 1948 that the costs of that appeal and of the trial Court before and after remand would abide the result. So far as the present appeal is concerned, in view of the special circumstances of this case, we direct that the parties will bear their respective costs in this Court.

P.K. Sarkar, J.

63. I agree.

Appeal allowed.