

BOMBAY HIGH COURT

Champsey Dossa

Vs

Gordhandas Kessowji

(Macleod, J.)

16.02.1917

JUDGMENT

Macleod, J.

1. This suit was originally filed by four of the sons of Dossa Ebji against a fifth son and two other persons, praying that the defendants might be restrained by an injunction from excluding the plaintiffs from their share in the partnership in this suit, or, in the alternative, that the partnership might be dissolved from the date of the suit and the affairs thereof might be wound up under the directions of this Honourable Court.

2. The first plaintiff died after the suit was filed and his son has been added as the fourth defendant. The fourth plaintiff apparently had some disputes with his co-plaintiffs and his name was struck out from the record as plaintiff and added as the fifth defendant, The family to which the parties belong was joint and undivided, and for many years they had been carrying on business in salt. I need not go further back than 1909 when there was a family agreement, a part of which referred to a certain business in salt carried on at Bhaynder in which there were two outside partners, who are the second and the third defendants to this suit. The business was carried on in the name of Kessowji Dossa and the joint family had a share of eleven annas, the second defendant had a share of three annas and the third defendant two annas.

3. In 1911, Gordhandas, the son of Kessowji, separated from the family, and a fresh agreement was entered into by which it was arranged that out of the eleven-annas share of the joint family in the business of Kessowji Dossa, Gordhandas should have a four-annas share, and the other members who remained joint, a seven-annas share.

4. The business of manufacturing salt at Bhaynder was carried on under agreements with certain persons who held licenses from Government for long periods, and who are styled "Shilotries." Exhibit C is an example of one of these licenses, Clause 5 of which is as follows: That he, the licensee, shall not without the written permission of myself, i.e., (the Collector of Salt Revenue)

or of my successor in office for the time being, sublet, sell, mortgage or otherwise alienate whole or in part the privilege granted by this license of manufacturing salt on the land within the aforesaid limits.

5. Whenever the licensee obtained permission to sublet, that was endorsed on the license in the following form: The above-mentioned Shilotries have leased out the said salt works to Gordhandas Kessowji for five years from the date the 1st of June 1905 and, therefore, all the aforementioned conditions apply to him.

6. In the partnership agreements that I have referred to, executed in 1909 and 1911; nothing is said about the subletting or alienation of the rights which Gordhandas had obtained to manufacture salt; the only agreement is that the parties shall share in the profits of certain shops in certain proportions, It has now been argued by the first defendant's Counsel that these agreements of partnership were illegal and that, therefore, the plaintiffs cannot sue under them for a partnership account.

7. Under Section 11 of Bombay Act II of 1890, no salt shall be manufactured and no natural salt and, except under the provisions of Section 14, no salt-earth shall be excavated or collected or removed, otherwise than by the authority and subject to the terms and conditions of license to be granted by the Collector in this behalf. Section 47 provides a penalty for any one who, in contravention of the Act, or of any Rule or order made under the Act, or of any license or permit obtained under the Act, manufactures, removes or transports salt, etc.

8. The only question is whether Gordhandas having admitted certain persons to share in the profits which he derived from the manufacture and sale of salt thereby sublet, sold, mortgaged or otherwise alienated whole or in part the privilege granted by the license for manufacturing salt on the land within the limits mentioned in the license.

9. In *Gauri Shankar v. Mumtaz Ali Khan*¹ the defendant had taken a lease for three years of a Government ferry and covenanted with the Magistrate, who granted the lease, not to underlet or assign the lease without the leave or license of the Magistrate and Mumtaz subsequently admitted another person as his partner to share with him the profits to be derived from the lease. It was held by the Full Bench that such partnership was not void by reason of the covenant not to underlet or assign the lease. Mr. Justice Oldfield, one of the referring Judges, was of opinion that the admission by the lessee of a partner to share the profits could not come within the meaning of the words "sub-lease" or "transfer" and Mr. Justice Pearson accepted this view in the final judgment.

10. It is not disputed that if Gardhandas had sublet or alienated the rights which he obtained from

the Shilotries or had entered into any agreement with third parties, whereby he gave up entirely the management and control of the manufacture of salt under the license, that would have amounted to a breach of the condition.

11. In *Ismailji Yusufali v. Raghunath Lachiram Marwadi*² Yusufalli obtained from Government a lease of certain salt pans to manufacture salt under a license. One of the conditions of the lease was that the lessee should not sublet the salt pans without the written permission of the Collector. Without any such permission, however, Yusufalli sublet the salt pans to an outsider, who, as a security for the performance of the conditions of the sub-lease, deposited a sum of Rs. 1,000 with Yusufalli. On the expiration of the term, a suit was brought for the recovery of the deposit from the representative of Yusufalli, who denied the right to recover the deposit on the ground that it formed a consideration for an agreement which had been forbidden by law and was illegal. The defendant's plea prevailed and the suit was dismissed. The Court held that the real and necessary effect of the sub-lease was to enable the plaintiff to manufacture salt without a license in the guise of a sub-lease, although that was forbidden by law and by the terms of the license. The question was not discussed there whether the Court will distinguish between Acts relating to public policy and Acts passed for the protection only of the Revenue. Although under Section 23 of the Indian Contract Act, the consideration or object of an agreement is unlawful, if it is of such a nature that, if permitted, it would defeat the provisions of any law, it must be noted that the Courts in India seem to recognise the distinction which has been drawn by the Courts in England between Acts the object of which is to impose conditions in order to maintain the public order or safety or the protection of the persons dealing with those on whom the conditions are imposed, and Acts in which conditions are imposed merely for administrative purposes, for example, the convenient collection of revenue : see *Brown v. Duncan*³ But in the view I take of this case, it is not necessary to deal with that question.

12. In *Karsan Sadashiv Patil v. Gatlu Shivaji Patil*⁴ the first defendant had obtained a license under the Abkari Act to sell country liquor. One of the conditions of the license was that the licensee should not sell, transfer to another person, or sub let his right to sell country liquor obtained under the license and he should not enter into any kabuliyat for the exercise of the said right, which, in the opinion of the Collector, is in the nature of a sub-lease. After obtaining the license, the defendant admitted a partner into the business, who afterwards brought a suit for an account of what was due on the partnership. A question having arisen as to whether the contract for partnership was forbidden by law and opposed to the policy and general tenor of the Act and, therefore, not enforceable in a Court of Law, it was held that the omission in the license sanctioned by Government in the year 1903 of all reference to the question of sub-letting a part of the right to vend or of admitting persons into the business only pointed to the inference that the Abkari authorities had decided not to prohibit the taking up of other persons into partnership

in the profits derived from the selling of liquor under an Abkari license.

13. There is no doubt that in the license in that case there seems to have been no prohibition against sub-letting a part of the right to vend; and by the conditions of the license in this case, the licensee is prohibited from sub-letting the whole or a part of the privilege, but I do not think that any importance ought to be attached to that condition. The admission of partners to share in the profits cannot be considered as a sub-letting or alienation of a part of the privilege, unless there has been a document directly transferring to the partners or attempting to transfer to the partners a part of the right to manufacture or vend;

14. Mr. Inverarity was prepared to call evidence to prove that the licensees for the manufacture of salt have almost invariably had partners who provided capital for the undertaking and shared in the profits, and that the salt authorities were perfectly -aware of this practice and had never raised any objection to it. Certainly, as far. as this family is concerned, they have been dealing in salt for a very large number of years and sharing in the profits, although the license was in the name of only one of their number. But even if the authorities did not object to that, it might still be said that that would not prevent the admission of partners being illegal if that was the law. In so far as I conceded that that would be a correct argument, no useful purpose would be served by calling this evidence, whatever the attitude of the authorities may be. I prefer to decide the case, as far as I am concerned, on what I consider a far better ground, that the agreements of 1909 and 1911 do not infringe the conditions imposed upon Gordhandas by the various licenses which he held for the manufacture of salt. The evidence shows, apart from that, that Gordhandas was the man who actually superintended the manufacture of salt; Dayabhai and Ranchhoddas lived at Bhaynder and worked at the shop, keeping the accounts, arranging for the weighing and the selling of salt, while the other partners were in Bombay receiving the sale proceeds from Bhaynder, mostly daily, paying the customs duties and doing other business necessitated by the work of the partnership. Therefore, none of the partners except Gordhandas had any part in the manufacture of salt and, therefore, it cannot be said that the effect of those agreements was to infringe the provisions either of the licenses or of Section 11 of Act II of 1890. Therefore, the first defendant is not entitled to exclude, or rather was not entitled to exclude, his partners from sharing in the profits in the business, and there must be a dissolution of the partnership and accounts taken not, I think, from the date of the suit, but from the time the partnership came to an end in September 1918 under the agreement.

15. Certain issues were raised by the third defendant. The first was whether the suit is not bad for misjoinder of defendants and causes of action. So far as the claim with regard to the six padavas is concerned, his contention was a good one and, therefore, it has been excluded from this suit. The first defendant admits that the six padavas belong to the plaintiffs, but he claims a lien on

them until his share in some other property has been ascertained. However, I have nothing to do with that question now in this suit.

16. The other issue was whether this Court had jurisdiction to try the suit as regards the cause of action relating to the third defendant. The grounds for questioning the jurisdiction of the Court were that the third defendant did not sign the agreement, that he lived at Bhaynder and the business was carried on at Bhaynder. As a matter of fact, the agreement was signed in Bombay and the third defendant was present and attested it. As the agreement referred to other matters concerning the family, the outsider partners in the Bhaynder salt business did not execute it, but there is no doubt that the third defendant agreed to the terms in Bombay and that the agreement was made in Bombay and a part of the business was carried on in Bombay; and therefore, with leave, this Court has jurisdiction to try the suit with regard to the third defendant.

17. On the issues Nos.6 and 7, which were raised for the plaintiffs, and related to a certain lease obtained by Gordhandas, which was to run for five years from the 30th June 1915, it is admitted by the first defendant by his Counsel that if the partnership was a good one, the partners would be entitled to the benefits of that lease and, therefore, the profits derived under the lease must go into the partnership accounts.

18. There will be a reference to the Commissioner to take account for the partnership on the basis of my findings.

19. Costs.--Plaintiffs' costs will be paid out of the assets. The first defendant must pay the plaintiffs' costs of issue No. 1 and his own costs of that issue. The remainder of his costs will be paid out of the assets.

20. The third defendant must pay plaintiffs' costs of issue No. 5 and his own costs of that issue.

21. Defendants Nos. 2, 3, 4, and 5 will be paid one set of costs between them (out of the assets).

22. Mr. Setalvad asks for directions of the Court about one existing lease which will run up to 1920.

23. Mr. Inverarity replies no order can be made until the Shilotri and the Collector are communicated with.

24. Order.--I make an order for sale by the Commissioner of the interest of the defendant under the lease referred to. There is no doubt that the consent of the Shilotri and the Salt Collector will have to be obtained so that the purchaser can obtain a good title. I have no doubt that the Shilotri and the Salt Collector will put no obstacles in the way when the circumstances are explained to them. The first defendant is the only person who is entitled under the lease. If he chooses to do

nothing under the lease, then there is nothing to be done.

25. Parties to have liberty to bid at the sale.

Cases Referred.

12 A. 411 : 1 Ind. Dec. (N.S.) 791

23 Ind. Cas. 779 : 33 B 636 : 11 Bom. L.R. 748

3(1829) 10 B. & C 93 : 5 Man. & Ry. 114 : 8 L.J.K.B. (O.S.) 60 : 109 E.R. 385

419 Ind. Cas. 442 : 37 B. 320 : 15 Bom. L.R. 227