BOMBAY HIGH COURT

Shrinivasdas Lakshminarayan

Vs

Ramchandra Ramrattandas

(B Scott, Kt., C.J. Hayward, J.)

24.03.1919

JUDGMENT

Basil Scott, C.J.

1. This is an appeal from a judgment of Mr; Justice Beam an dismissing the plaintiff's suit,

2. The plaintiff sues for damages occasioned by his up-countery constituent failing to perform contracts for the purchase oi sovereigns entered into for him by the plaintiff for the Vaishakh and Jetha Vaidas of 1918.

3. The damages claimed were assesssd as of the 1st of July 1918 and no objection is taken to this date.

4. On the 22nd of August 1918 a Notification under the Defence of India Act (IV of 1915) was issued as follows:

No person shall sell or purchase or offer to sell or purchase any coin for an amount exceeding the face value of such coin or shall accept or offer to accept any such coin in payment of a debt or otherwise for an amount exceeding its face value.

4. By the same Notification 'coin' was defined as coin which is legal tender under any Enactment for the time being in force in British India.

5. Under the Indian Coinage Act, 1900, a sovereign is legal tender for Rs. 15. The Explanation to the Notification says that for the purposes of the rule the face value of the sovereign shall be deemed to be 15 rupees.

6. The contract having come to an end by the defendant's breach which is not disputed, the subsequent Notification does not operate so as to make it an illegal contract under the rule stated in Brewster v. Kitchell (1698) I Salk. 198 "that if H covenants to do a thing which is lawful and an Act of Parliament comes in and hinders him from doing it, the covenant is repealed."

7. It is, however, contended that the contracts were illegal in their inception under a previous Notification of 9th July 1917 in the following terms:"No person shall melt, break up or use otherwise than as currency, any current gold or silver coin." But a contract to purchase sovereigns is not in itself a user of the coins to be purchased, nor is there any evidence to establish that the ultimate buyer would use the sovereigns purchased otherwise than as a store of currency to be available in the event of the silver or paper token currency losing its purchasing power.

8. There remains, therefore, for the defence the main contention, on which the lower Court held against the plaintiff, viz., that the contracts for breach of which damages are claimed were contrary to public policy.

9. It is no doubt open to the Court to hold that the consideration or object of an agreement is unlawful on the ground that it is opposed to what the Court regards as public policy. This is laid down in Section 23 of the Indian Contract Act and in India therefore it cannot be affirmed as a matter of law as was affirmed by Lord Halsbury in Janson v. Driefontein Consolidated Meines, Limited (1902) A.C. 484, 491 that no Court can invent a new head of public policy, but the dictum of Lord Davey in the same case that "public policy is always an unsafe and treacherous ground for legal decision" may be accepted as a sound cautionary maxim in considering the reasons assigned by the learned Judge for his decision.

10. The following is, I think, a fair analysis of the reasons given by the learned Judge in the form of numbered propositions.

1. The definition of "public policy" is not exhausted by saying that only that can be said in the eye of the law to be against public policy which is either penal or unrecognized by Statute or Common Law.

2. Public policy is a much wider term and in its turn capable of sudden extensions under abnormal and temporary conditions.

3. It is doubtful whether such a situation as that created by wild gambling on the part of a very small body of purely selfish speculators in Bombay could possibly exist except under a bimetallic system.

4. In India we have a silver and a gold currency between which the Government has endeavored to fix a definite ratio.

5. The effect of gambling in the gold coinage has been to disturb that ratio and give gold a very much higher relative value to silver than merely as one branch of the currency it ought to have.

6. It is not a question of morality as have been the majority of cases where in England public policy has been the ratio decided.

7. Morality cannot apply to a case where the decisive factor is the maintenance at a very critical moment of the efficiency of the Government.

8. Conduct of private individuals tending to defeat and embarrass the whole scheme of Government finance must be opposed to public policy.

9. Money apart from the metal of which it is made is never intended for purposes of sale.

10. Therefore it ought not to be a medium of gambling speculation.

11. Under a bimetallic system its public function cannot be properly discharged if speculating in one or other of the branches of the currency materially alters the ratio which the financial operations of the Government require to be made permanent.

12. In order to finance great war operations and for internal administration a very considerable mass of gold currency was thrown into circulation.

13. What immediately happened showed that the desire for gold not for currency but for adornment or hoarding was withdrawing the whole of this gold currency from circulation and so defeating the Government's object.

14. In periods of emergency and crisis Government has the right to expect that the greed of gamblers shall not be given free play so as to disorganize financial policy.

15. In India public policy is at present defined by and coincides with the measures of Government.

16. Therefore in a peculiar case like this it would be difficult to get a clearer indication of what is opposed to public policy than the Government notification on the subject.

17. It is not correct to say the transactions in sovereigns at a price above the face value was made contrary to public policy in August 1918.

18. They must have been contrary to public policy already. The Notification merely declares what was long felt, that it was contrary to public policy.

19. If contrary in August it must have been so in June.

20. The general tenor of the Notification of June 1917 showed that in the opinion of Government any trafficking in gold coinage was opposed to the general interest of the country. So the

speculators may very well have known that though within the letter of the 1917 Notification they were running counter to its spirit.

21. In many cases buying a large quantity of sovereigns may be legitimate and even necessary but dealings of the kind in suit certainly had no other object in view than changing the relative values of rupee or sovereign as the Bulls or Bears proved successful.

11. Substantially the judgment comes to this:

A. Courts in India are not to be limited by English decisions in deciding what is and what is not contrary to public policy, for public policy is capable of sudden extensions under abnormal and temporary conditions.

B. The question of the maintenance of a bimetallic currency system is one which does not arise in England. Speculators are able to disturb the equilibrium of such a system and this is contrary to the public interest here in times of crisis such as the recent war.

C. In India public policy is defined by and coincides with the measures of Government. The Notification of July 1917 showed Government wished to prohibit the use of gold coins except for the purpose of currency. The Notification of August 1918 shows that trafficking in such coins had for some time theretofore been contrary to public policy and speculators should have known that though not transgressing the letter of the Notification of 1917 they were running contrary to its spirit in offering for sovereigns a price higher than the face value as fixed by Indian Enactments.

12. The objection to accepting such a proposition as A is forcibly stated in the passage from Marshall on Insurance cited by Lord Halsbury in *Janson v. Driefontein Consolidated Mines, Limited*[1]

To avow or insinuate that it might, in any case, be proper for a judge to prevent a party from availing himself of an indisputable principle of law, in a Court of justice, upon the ground of some notion of fancied policy or expedience, is a now doctrine in Westminster Hall, and has a direct tendency to render all law vague and uncertain. A rule of law, once established, ought to remain the same till it be annulled by the Legislature, which alone has the power to decide on the policy or expedience of repealing laws, or suffering them to remain in force. What politicians call expedience often depends on momentary conjunctures, and is frequently nothing more than the fine-spun speculations of visionary theorists, or the suggestions of party and faction. If expedience, therefore, should ever be set up as a foundation for the judgments of Westminster Hall, the necessary consequence must be that a judge would be at full liberty to depart to-morrow from the precedent he has himself established to-day; or to apply the same decisions to different,

or different decisions to the same circumstances, as his notions of expedience might dictate.

13. The remarks which I have grouped together under the head B are general observations on a technical and very intricate matter which has been considered in 1913/1914 by the Royal Commission on Indian Finance and Currency. In their Report dated the 24th of February 1914 the Commissioners say :The system actually in operation has...never been deliberately adopted as a consistent whole, nor do the authorities themselves appear always to have '. had a clear idea of the final object to be attained. To a great extent this system is the result of a series of experiments

14. In paragraphs 67 and 68 the Commissioners express the following opinion:67 With the argument that India should be encouraged to absorb gold for the benefit of the world in general we do not propose to deal. The extent to which India should use gold must, in our opinion, be decided solely in accordance with India's own needs and wishes, and it appears to us to be as unjust to force gold coins into circulation in India on the ground that such action will benefit the gold using countries of the rest of the world as it would be to attempt to refuse to India facilities for obtaining gold in order to prevent what adherents of the opposite school have called the drain of gold to India. In any case these arguments (which it will be noted are mutually destructive are irrelevant to the inquiry which we were directed to make and to the terms of reference, which confine us to a report on what is 'conducive to the interests of India.' They raise vast controversies upon subjects which are beyond our scope, while giving no reason for the adoption of either policy in India's own interest.

68. We conclude therefore that it would not be to India's advantage to encourage an increased use of gold in the internal circulation.

15. So much for general considerations connected with the currency system. They did not apparently demand before the outbreak of the war the continuance of sovereigns as part of the Indian Currency.

16. The learned Judge refers (para 12 supra) to a very considerable mass of gold currency being thrown into circulation during the war. I can find no reference to this in the recorded evidence, The learned Judge probably refers to the issue of gold for the financing of wheat stated by the Finance Minister to have been Rs.

19171918	...	...	...	92177040
19181919	...	...	...	18385740

(see proceedings of the Legislative Council of the Governor-General of the 26th February 1919). It is referred to in the narrative of the Finance Minister introducing the Financial Statement for

19191920 (Clause 15) in connection with the silver crisis of 1918 in these words : "Our thin line of rupees had been precariously supplemented by an issue of sovereigns in parts of India where gold is freely taken in payment for the crops ; but the benefit of this expedient was transient and its continuance unjustifiable" ; also in Clause 14 it is said : "To coin and issue our relatively small stock of gold would have been wasteful to a degree ; the premium upon the metal would have driven, and did in fact drive, any coined gold out of circulation immediately ; it was an emergency ration rather than a currency medium" (sea Proceedings of the Legislative Council of the Governor-General for 1st March 1919). This narrative introducing the Financial Statement was referred to in the argument of this appeal and I propose to refer to it again as a public document containing an authoritative statement of the financial position of the Government in 1918 when the Notification of August was issued from which inferences may be drawn as to the policy of the Government in issuing it.

17. In Clause 21 I find that from the beginning of 1916 silver rose greatly in value and the rupee slowly followed it: "It was impossible to face a position in which Government would be turning out rupees at a loss and placing a permanent premium on the export of its silver currency. It thus became necessary to fix a sterling exchange value for the rupee which would (insure that our coinage would not be liable to be smuggled out of India in indefinite quantities Accordingly, with effect from the 12th April, the rate for Council drafts was fixed on a basis of 1 Section 6b. per rupee for immediate telegraphic transfers....There was believed to be a considerable accumulation of funds (in India) seeking temporary investment in India for various reasonstaxation was heavier in England than here: hopes had been entertained of a further rise in exchange: money was being kept handy for post helium developments: and there was always the uncertainty about being able to recall spare money from England with the same promptitude as in former years."

18. I think it is fairly obvious that with exchange rising substantially above 1 Section 4d. per rupee it was to one's advantage, other things being equal, to buy sovereigns, for the holder of sovereigns could still convert each sovereign for 15 rupees, which would be worth for foreign remittances much more than 1 Section 4d. each. Other things, however, were not equal, for the prohibition of the import of gold, for which there is always a strong demand in India, had driven that metal to a premium and drove coined gold out of circulation immediately. One effect of the Notification of August 1918, if it was effective, would be to practically prohibit the sale of sovereigns and give their possessors the benefit of the rise of the rupee only upon exchange of sovereigns for rupees at the treasuries: thus the gold which disappeared from circulation after the wheat purchases of 1917/1918 might be brought back to the treasuries. This seems to me a possible explanation of the Notification.

19. The evidence in the case in my judgment throws no light on the question of public policy

raised for the defence.

20. There is evidence of a number of contracts for the sale of sovereigns held by Banks in China and Japan in 1916 and 1917, not of sovereigns in circulation in India. Such contracts were anterior to the prohibition of gold imports.

21. The proved contracts of 1918 were for small amounts which were all closed by cross contracts before the Vaida days.

22. In the judgment of the lower Court it is said: "We find a small ring of Bombay speculators greedily bulling and bearing the gold market, some selling and some buying with no other object than either to depress or raise the value of the sovereign relatively to the rupeesome three or four million sovereigns at least appear to have been nominally bought and sold between these bulls and bears. Of course there are many cases in which buying a large quantity of sovereigns may be perfectly legitimate and even necessary in the interests of trade, but dealings of the kind I have before me certainly had no other object in view than changing the relative values of the rupee and sovereign according as the bulls or bears proved successful." I do not find anything to support these conclusions in the recorded evidence. Out of four witnesses examined Ramdas the plaintiff in answer to the question "Instead of buying gold people used to buy sovereigns and melt them down into ornaments ?" said "I don't know, I can't say. They certainly hoarded sovereigns just like gold and other precious stones and metals. The piece goods merchants made large profits as they bought sovereigns and stored them."

23. Chhotalal when asked' "What did your master want all these sovereigns for ?" (i. e., those imported from China and Japan) said : "The people in the bazaar wanted them so we bought and sold to them. How can I say for what the people in the bazar wanted them ? I have never seen any sovereigns broken up and melted."

24. Narandas to the question 'People buy them, break them up or melt them ?" said "How can I possibly know that ?"

25. P.M. Dalal, while admitting that some sovereigns were broken up and melted said purchased sovereigns were also used for hoarding. They needed gold after the prohibition of import and got it by buying sovereigns. The premium on gold did not affect the purchasing value of the rupee or any note. The exchange value of the rupee had in fact gone up considerably.

26. The conclusion must, I think; be that no clear general head of public policy can be evolved which would justify the Court in holding the contracts in suit unlawful on that ground.

27. This is apparently the conclusion to which the learned Judge himself is driven when he falls

back in the last part of his judgment on the Notifications of June 1917 and August 1918 as indicia of what is contrary to public policy in connection with the gold currency.But if the case is to be decided on the notifications the contracts must be shown to be forbidden by law and would then fall under the first head of s, 23 of the Indian Contract Act and any reference to public policy would be irrelevant.

28. I have already stated why is my opinion the contracts are not obnoxious to the Notification of June 1917 and why they are untouched by the Notification of August 1918.

29. These Notifications were, so far as I can judge, emergency measures: the first aimed at the prevention of melting or other misuse of current gold coins; the second was perhaps devised to tempt back hoarded gold coins to the treasuries.

30. We set aside the decree and pass a decree for the plaintiffs for Rs. 6,755-13-0 with interest from the 1st July 1918 to this date. Costs and interest on judgment at six per cent.

Hayward, J.

31. I concur, but desire to add some remarks on the general proposition.

32. The Coinage Act, III of 1906, made gold coins legal tender at the rate of fifteen rupees to the sovereign. But it did not prohibit their use otherwise than as currency. The Defence of India Act Notification of the 29th June 1917 prohibited their use otherwise than as currency. The parties to these proceedings entered into transactions for the sale and purchase of gold sovereigns not at currency but at bullion rates for deliveries in May and June 1918. The Defence of India Act Notification of the 22nd August 1918 prohibited sales and purchases of sovereigns at mere bullion rates. The substantial dispute between the parties was whether their transactions were thus void as contrary to law and public policy within the meaning of Section 23 of the Indian Contract Act.

33. It was conceded by the learned Judge at the trial that the transactions were not void as contrary to law as the evidence did not establish any intention to use the sovereigns otherwise than as currency contrary to the Notification of the 29th Juno 1917 and as they took place before the Notification of the 22nd August 1918 making the sales and purchases of sovereigns at mere 'bullion rates unlawful. But it was held that the transactions were void as contrary to public policy as deducible from the subsequent Notification of the 22nd August 1918, which, it was held, rendered unlawful "this trafficking in one branch of the currency during the great war." It was conceded by the learned Judge that the transactions would not have been void as contrary to public policy in the sense of the principles guiding public opinion as understood by English judges and that it would be difficult "to give a convincing, logical and theoretical reason" for

holding them opposed to public policy ; but he did nevertheless so hold them and observed, "that keeping our eye on the transactions with which I am dealing there is no question of real public policy in the sense of wide-spread public opinion one way or the other...It would be absurd to suppose that the millions and millions of people, many of whom have never seen a gold coin in their lives, could possibly have any opinion one way or the other as to the policy of such conduct,. so probably in a very peculiar case of this kind it would be difficult to get a clearer indication of what is or what is not opposed to public policy than the Government declaration on the subject. Policy might of course be mistaken, policy might be unwise, but...that which is undertaken by a responsible Government as part of its policy and which cannot be criticized by the vast majority of those directly or indirectly affected by it must...be regarded as for the time being public policy and acts declared by the Government as likely to frustrate the beneficial maintenance or operations of that policy would ordinarily be taken to Call within the general category of acts contrary to public policy....The plain truth is that in India public policy at any rate for the present is defined by and coincides with the measures of Government." It has been urged before us on this appeal that the learned Judge ought to have bean guided by the dicta of the English judges and not to have extended the law of public policy under Section 23 of the Indian Contract Act so as to comprehend all the political policies from time to time of the Government in India.

34. It behaves us, therefore, to examine in some detail the dicta of the English judges. It is true that assertions of the wide discretion vested in the judiciary to determine public policy were made by Pollock C.B. in the leading case of *Egerton v. Earl Brownlow*[2]. But distinctions between the public good and political policies were drawn by Alderson and Parke BB. who expressed the preference for leaving extensions of the law in the matter of public policy to the Legislature. This case has been considered in detail by Sir Frederick Pollock at pp. 315 to 318 of the seventh edition of his Principles of Contract and he came to the conclusion that the final decision of the House of Lords depended not upon any extension of the law but upon the ground that the particular limitations in the will of the Earl of Bridgewater had a manifest tendency to the prejudice of good Government and the administration of public affairs and that this tendency had already been perfectly well recognised as contrary to public policy as understood by the Courts. It was said by Sir James Colvile in the case of *Evanturel v. Evanturel*[3] "that the determination of what is contrary to the so-called 'policy of the law' necessarily varied from time to time,...that the rule remains, but its application varies with the principles which for the time being guide public opinion" but Jessel M.E. observed in the case of Printing and Numerical *Registering Company v. Sampson*[4] that "you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires it is that contracts when entered into freely and voluntarily shall be held sacred

and shall be enforced by Courts of justice." It was also said by Lord Bram well that "Judges are more to be trusted as interpreters of the law than as expounders of what is called public policy" in his remarks against the extension of this branch of the law in *Mogul Steamship Company v. McGregor, Gow & Co*[5]. and Lord Halsbury stated that " it is inevitable that the particular case must be decided by a Judge: ho must find the facts, and he must decide whether the facts so found do or do not come within the principles...that is, a principle of public policy recognised by the law" when denying that a new head of public policy could be invented by a Court in the case of *Janson v. Driefontein Consolidated Mines, Limited*[6] There is finally the dictum of Farwell L.J. in the case of *Hyams v. Stuart King*[7] that "the doctrine of public policy is regarded nowadays as one rather for the Legislature than the Courts.' It seems to me that those dicta apply with peculiar force here. The present transactions were not immoral and were not manifestly opposed to the public good or to good government. They were not proscribed by public opinion for there was no public opinion. They were at the time permitted by the Government. It was indeed impossible to give any "convincing, logical or theoretical reason" for holding them opposed to public policy. It was however felt that they amounted to "trafficking in one branch of the currency during the great war "and that they, therefore, must have been opposed to the public financial policy, which "might be mistaken or might be unwise" and wherein experts notoriously differ, because that trafficking was subsequently prohibited by the Government. These were surely strong reasons for applying the dicta of the English judges and for leaving the exposition aud protection of the public financial policy to the Executive Government and the Legislature. There was, in my opinion, no substantial justification for holding that those dicta should be disregarded by Judges in India and that public policy should be interpreted under Section 23 of the Indian Contract Act as comprehending all the political policies from time to time of the Government of India.

35. Decree set aside.

Cases Referred.

1[1902] A.C. 484, 491 at p. 491
2(1853) 4 H.L.C. 1
3(1874) L.R. 6 P C. 1, 29
4(1875) L.R. 19 Eq, 462, 405
5[1892] A.C. 25, 45
6[1902] A.C. 484, 492
7[1608] 2 K.B. 690, 727