PATNA HIGH COURT

Jharia Coal-field Electric Supply Co. Ltd

Vs

Kaluram Agarwala

Letters Patent Appeal No. 13 of 1949

(Jha, C.J. and Reuben, J.)

21.12.1950

JUDGMENT

Jha, C.J.

1. This is an appeal by the deft, under Clause 10 of the Letters Patent from a judgment of a single Judge of this Ct. The pltf.'s suit is for the recovery of a sum of Rs. 646 (details of which are given in the schedules to the plaint), alleged to have been illegally realized from him by the deft, for the supply of electricity.

2. The pltf. is a businessman and runs a flour Mill and also a business for charging batteries on a commercial basis. The deft, is a limited liability company incorporated under the Indian Companies Act, 1913, (hereinafter referred to as "the Company") and supplies electricity in the Jharia Coal-fields and other places under a license granted by the Govt. of Bihar in 1941, under the Electricity Act, 1910 (IX (9) of 1910). The license lays down the rates at which electrical energy can be supplied by the Company to consumers for "domestic" purposes and for "power" purposes. Clause 10 of the license fixes the limits of the prices to be charged by the company for energy supplied by it. The rates are classified under two heads; (1) Domestic Supply, and (S) Power. The rates for "domestic supply" are:-

3. On 6-7-1942, the Bihar Electricity Control Order, 1942, made by the Governor of Bihar in exercise of his powers under Rule 81 of the Defense of India Rules, was published. Clause 3 thereof lays down the limits of supply of energy to industrial undertakings, and reads thus:

> "No supplier shall distribute energy for power to any industrial undertaking except in such quantities and at such times and under such conditions as may be directed :
> (a) by the Provincial Govt. in respect of any case on class of cases;
> (b) by the Electric Inspector and Electrical Engineer, Bihar, in respect of such cases or class of cases as may be specified by the Provincial Govt."

In January 1943, the pltf. filed three requisitions for the supply of electrical energy, (1) for

domestic purposes (2) for a flour mill and (3) for battery charging, and though no supply for battery charging was sanctioned by the Provincial Authority, the Company provided the pltf. with electricity for the three different purposes regulated by three different meters, for which he had to pay at three different rates. The supply started from February 1943, and went on up to June 1943 the charges were for lights and fans at 7 annas per unit under the heading "domestic purposes", and under the heading "power", for battery charging at 3 annas per unit, and for the flour mill at the special contractual rate of 2 annas per unit, subject to the usual rebates.

4. Mr. Sims, the then Electrical Engineer and Electric Inspector to the Govt. of Bihar, came to know that energy was being supplied to the pltf. for battery charging, and he directed that the supply for battery charging be stopped. His instructions to the company were that if consumers wished to utilise energy for battery charging, they should do so from the energy supplied for "domestic" purposes and within the limits imposed by the Control Order. Interpreting the view of Mr. Sims to be that it was open to the Company to permit consumers to use for commercial purposes energy supplied for "domestic" purposes within the prescribed limits the Company published a general notification on 24-5-1943, in a local newspaper, stating inter alia :

> "consumers are hereby informed that on and from 1-7-1943, the following rites will be charged for energy consumed : (1) for battery charging, radios and other unessential purposes at annas seven per unit."

5. On 29-5-1943, the Company also served a notice on the pltf. that the charge for current used for battery charging would be increased from 3 annas to 7 annas per unit. The pltf. thereupon wrote to the Company a protest letter objecting to the increase, but, in spite of the protest, he used the energy for battery charging and paid at the increased rate with the surcharges, which the Company purported to charge under clause 10, Electricity Control Order.

6. The present suit was brought, as already stated for recovery of Rs. 646, as set out in the different schedules to the plaint. The case of the pltf. is that he is entitled to claim the refund with interest inasmuch as the payments were made under protest.

7. The trial Ct. dismissed the suit with regard to the claim for refund of the money paid as the price of energy for battery charging (as set out in Schedule a), surcharge realized by the deft in respect of the use of energy for battery charging (as set out in Schedule c) and a charge, in excess of actual consumption of energy for the flour mill, made on the basis of a minimum consumption (as set out in Schedule B), but decreed the suit in regard to other claims. There was an appeal by the pltf. and also a cross-appeal by the deft, but both the appeal and the cross appeal were dismissed. Thereafter, there was a second appeal by the pltf. which came up for hearing before Meredith. J., who decreed the whole suit, but granted leave to appeal under the Letters Patent, Meredith J., summarizes the findings thus :

> "I have held that it (i.e. supply of energy for battery charging properly fell, and could only fall, under the heading 'power' and was not domestic supply at all. To the knowledge of both parties and with the consent of the Company it continued to be drawn by the pltf. in his capacity of the owner of an industrial undertaking from the special power plug and measured by the special meter supplied by the Company for that specific purpose."

8. On appeal under the Letters Patent, the only point urged by Mr. B.C. De, on behalf of the Defendant-Appellant. is that the pltf. is not entitled to the refund of Rs. 205 claimed on account of money realized by the Company at the increased rate for the supply of energy for battery charging, nor to the refund of the surcharge levied at 100 per cent, thereon. In other respects the decree in favor of the pltf. is not challenged. The argument of Mr. De is that, as the money was paid under an illegal agreement, and as the parties were in pari delicto and the illegal purpose has been carried out, the pltf. is not entitled to seek the aid of the Ct. for the relief.

9. In my opinion, the argument of Mr. De is unassailable. The supply of energy for commercial purposes must fall under the heading "power", the usual rate for which could not exceed 4 annas per unit under clause 10 of the license.

10. The pltf. and the deft, entered into the bargain in contravention of the provisions of clause 3 of the Control Order. Both parties knew that they were entering into an illegal agreement, the object of which was obviously opposed to law as well as public policy. They no doubt relied upon Mr. Sims' interpretation of the Control Order; but, in my opinion, Mr. Sims' interpretation seems to be a device intended to circumvent the mandatory provisions of the Control Order. The parties might have acted in ignorance of law, but that cannot be pleaded as an excuse, and the Ct. cannot help the pltf. who has not come to Ct. with a clean hand. The consideration of the bargain was illegal, and its object opposed to public policy. The Control Order was made on 5-7-1942 and duly notified in the Bihar Gazette (Extraordinary) on 6-7-1942. The parties had full notice of the order since the date of its publication in the *Gazette Mahadeo Prasad v. Emperor*[1] The conduct of the parties shows that both sides were in pari delicto, and the bargain, which was in fraud of the provisions of the statute, was carried out by them. Therefore, the money paid by the pltf. though under protest, is irrecoverable with the aid of Ct.

11. It is well settled that persons who have entered into an agreement forbidden by law or condemned by public policy are not entitled to seek the aid of a Ct. of law for any relief if they are in pari delicto and the illegal purpose of the agreement has been carried into effect. It is useful to recall in this connection the well-known observations of *Lord Mansfield in Holman Et Al', v. Johnson*[2], which reads thus

> "The objection, that a contract is immoral or illegal as between pltf. and deft, sounds at all time very ill in the mouth. of the deft. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the deft, has the advantage of, contrary to the real justice, as between him and the pltf. by accident, if I may so say. The principle of public policy is this ex dolo malo now, oritur actio. No Ct. will lend its aid
> to a man who founds his cause of action upon an immoral or an illegal act. If, from the pltf's. own stating or otherwise, the cause of action appears to arise ex
> turpi cause, or the transgression of a positive law of this country, there the Ct. says he has no right to be assisted. It is upon that ground the Ct. goes; not for the sake of the deft, but because they will not lend their aid to such a pltf."

Mellor J., enunciates the same principle in *Taylor v. Chester*[3], thus:

> "The maxim that 'in pari delicto potior ast conditio possidentis', is as thoroughly settled as any proposition of law can be. It is a maxim of law, established, not for the benefit of pltfs. or Defendant but is founded on the principles of public policy, which will not assist a pltf. who has paid over money or handed over property in pursuance of an illegal or immoral contract, to recover it back,' for the Cts. will not assist an illegal transaction in any respect."

Collins, M. R. in *Harse v. Pearl Life Assurance Co*[4]., has observed that:

> "It is clear law that where one of two parties to an illegal contract pays money to the other, in pursuance of the contract, it cannot be recovered back .... unless there can be introduced the element of fraud, duress, or oppression."

Halsbury in his Laws of England (vol. 7, 2nd edition, page 175) summarizes the law on the point thus:

> "If, however, the illegal purpose has been carried out or the contract has been substantially performed, money paid under the contract can no longer be recovered, except where it appears that the parties were not in pari delicto, for instance, where the pltf. shows that he was induced to enter into the contract by fraud, duress or oppression on the part of the defendant."

Equally explicit is the condemnation of such contracts by Swayne J. in *Meguire v. Corwine*[5], Lawyers' Ed. Book 25, p. 899 at p. 901). He says :

> "Frauds, of the class to which the one here disclosed belongs, are an unmired evil. Whether forbidden by a statute or condemned by public policy, the result is the same. No legal right can spring from such a source. They are the sappers and minors of the public welfare, and of free Govt. as well. The latter depends for its vitality upon the virtue and good faith of those for whom it exists, and of those by whom it is administered. Corruption is always the forerunner of despotism."

12. The Madras H. C. has held in *Ramanayudu v. Suryadevara Seetharamayya*[6], that money paid for carrying on an illegal contract is irrecoverable with the assistance of
Court. Chapman J. in *Bindeshwari Prasad v. Lakharaj Sahu*[7], has observed that

> "where the illegal portion of an agreement has been carried into effect, the
> whole matter is outlawed and the Court will not aid either party to retrieve his position if he is not able to show that he has been less to blame than the other."

On a revise of the authorities referred to above. I am clearly of the opinion that, where money is

voluntarily paid under an illegal agreement which has been carried into effect, the money so paid cannot be recovered back, if parties are in pari delicto and they had knowledge of the illegality of the agreement before payment.

13. Mr. Sanyal has urged on behalf of the pltf. that the payment was made by the pltf. not voluntarily, but under undue influence, coercion or oppression ; therefore, the pltf. is entitled to recover back the amount so paid, because he is less to blame than the deft, and in support of this contention he relied upon the case of *Ram Kumar v. Nanda Kumar*[8], In my opinion, the principle enunciated here has no application to the present case. In that case it was found, as a fact, that the transaction was the result of an undue influence practised upon the pltf. by the Defendant and so relief was granted. In the present suit the case of fraud, undue influence or oppression was not set out in the plaint, nor any issue raised or argument advanced in any of the Courts below. There is no material on the record to show that the defendant company in any way brought pressure, undue influence or coercion on the pltf. to take the supply of energy for "power" purposes and pay at the rate prescribed for "domestic" purposes. Therefore, the principles governing cases where relief has been granted against a bargain brought about by undue influence, fraud or coercion cannot apply to the present case. In my opinion, the agreement was made by the free consent of parties and there is no manner of doubt that the pltf. and the deft, were equally guilty in entering into the bargain, knowing full well that the transaction was in contravention of the provisions of the Control Order.

14. Mr. Sanyal has next contended that even if the agreement was void, the defendant, having received an advantage under it, must compensate the pltf., and in support of his contention he relies upon the provisions of Section 65, Contract Act, which provides that

> "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."

In my opinion, the provisions of Section 65 cannot govern the present case. The provisions of this section can apply only if the parties are competent to contract, and the agreement, though void from its inception, is discovered, after they have acted on the faith of it, to be not enforceable by law. It has no application where the parties, though competent to contract, were in pari delicto and they knew the unlawfulness of the agreement before they acted on it. Nor does it apply where the object of the agreement was illegal to the knowledge of both parties and they acted on it or derived
benefit therefrom. Mookerji J. in *Ledu v. Hiralal*[9], has observed that

> "the words of the section can only be aptly applied in such cases as that of an agreement which is subsequently found to be void on account of some latent defect or of circumstances unknown at the date of the agreement, or of an agreement which is afterwards made void by circumstances which supervene."

15. Mr. Sanyal has strongly relied on the decision of the P. C. in *Harnath Kuer v. Indar Bahadur Singh*[10],) and has urged that on the authority of this case the pltf. is entitled to be compensated under the provisions of Section 65, Contract Act. In my opinion, the facts of that case were quite

different and the principles enunciated by the Judicial Committee cannot apply to the present case. In the case before the P. C., money had been advanced to the deft, to prosecute his suit for a declaration that a certain will was not genuine. The deft, as the reversioner of the testator got a declaration that the will was a forgery, and he was held to be the reversioner. Before the succession opened, he transferred his right in two villages by a sale to the pltf.'s husband in consideration of the money advanced to him for the prosecution of the suit. When the succession opened, the pltf. brought a suit for possession of the villages with an alternative prayer for payment of money. The pltf. erroneously set up a case that the right of the deft, was to be determined by reference to the provisions of the Oudh Estates Act. Though the transaction took place before the T. P. Act came into force, it was settled law that the reversioner has only an expectancy in the lifetime of the limited owner, and such an expectancy was inalienable. The Judicial Committee pointed out that the agreement of sale was void from its very inception, and therefore, the pltf. was not entitled to any relief for the recovery of possession of the villages specified in the plaint. But as there had been no actings of the faith of this illegal agreement the parties were held to be relegated back to the position before the transaction of sale took place, and in this view of the matter the pltf. was held entitled to recover compensation, and in assessing the compensation their Lordships took into consideration the amount advanced to the deft, by the pltf.'s husband. Neither the consideration nor the object of the transaction of the loan was unlawful within the meaning of Section 23, Contract Act, Mookerjee J., in *Ledu v. Hiralal*[11], has succinctly put the law on the point thus:

> "It is plain that although where money has been paid under an unlawful agreement, but nothing else done in performance of it, the money may be recovered back, yet this exception will not be allowed if the agreement is actually criminal or immoral; where the contract is illegal because contrary to positive law or against public policy, an action cannot be maintained to enforce it directly or to recover the value of services rendered under it or money paid on it."

The principle, therefore, on which compensation was allowed to the pltf. by the Judicial Committee has no appln. to a case like the one before us.

16. Mr. Sanyal has lastly contended that, as the question raised was never argued at any earlier stage, it is not open to the applt. to raise this question for the first time before us. In my opinion, this point is equally unsustainable. As the question raised is

a pure question of law, and can be decided on the findings of the Courts below without investigation of any further fact, we have allowed the appellant to argue the question before us. In this connection I may quote the observation of Lord Reid in *Shiba Prasad v. Srish Chandra Nandi*[12],

> "The learned Chief Justice appears to have overlooked the provisions of Section 72, Contract Act. This section was only mentioned in passing by the Subordinate Judge, and it would seem that it was not argued, or only faintly argued, before the Subordinate Judge or in the H. C. that Section 72 applied to the case. The applt. the Respondent in the cross-

appeal, submitted to their Lordships that in these circumstances their Lordships should not now receive an argument based on Section 72, but their Lordships are unable to exclude from their consideration the provisions of a public statute. It is regrettable that their Lordships do not have the assistance of the view of the H. C. on this matter. Their Lordships impute no blame to the learned Judges of the H. C., but they feel bound to consider the argument which has now been adduced."

We are also fortified in this view by the decisions in *Maha Prasad v. Ramani Mohan*[13], *M. E. Moola Sons, Ltd. v. Perin R. Burjorjee*[14], and *Debt Charan v. Mehdi Hussain*[15], Under the circumstances, the appeal is allowed and the decree modified by disallowing the claim on account of the price received for energy supplied for battery charging and the surcharge thereon ; but as the point was not raised in any of the Cts. below, we make no order as to the costs of this appeal.

Reuben, J.

17. I agree.

18. That there is no inflexible rule against, the entertainment in a Letters Patent appeal of a point not raised previously appears from *Debi Charan v. Mehdi Hussain*[16], *Sattappa Gurusattappa v. Mahomedsaheb*[17], and *Fitzholmes v. Bank of Upper India, Ltd., 8 p. l. t. 377 : (AIR (14) 1927 p. C. 25)(Supra)*. The principle that should guide appellate Ct. in entertaining a new point has been well stated by Lord Watson in a passage which has been cited with approval by the Judicial Committee in *M. E. Moolla Sons Ltd. v. Perin B. Burjorjee, 59 i. A. 161: (AIR (19) 1932 p. C. 118)(Supra)*. His Lordship observed :

"When a question of law is raised for the first time in a Ct. of last resort upon the construction of a document or upon facts either admitted or proved beyond
controversy, it is not only competent but expedient in the interests of justice to entertain the plea. The expediency of adopting that course may be doubted when the place cannot be disposed of without deciding nice question of fact in considering which the Ct. of ultimate review is placed in a much less advantageous position than the Cts. below. But their Lordships have no hesitation in holding that the course ought not in any case to be followed
unless the Ct. is satisfied that the evidence upon which they are asked to decide establishes beyond doubt that the facts if fully investigated would have supported the new plea." (*Connecticut Fire Insurance Co. v. Kavanagh, (1892) A. C., 473 (61 L. J. P. C. 50(Supra))*).

19. A suggestion has been made that the Electrical Engineer and Electric Inspector sanctioned the supply of energy for battery charging in exercise of his power under sub-clause (c) of clause 3, Electricity Control Order. The reference is to the record made by Mr. Sims in his Note Book (Ex. c) and Tour Note (Ex. C (2)) of, a discussion he had with the Company and the pltf. on 11-9-1943. From these documents it appears to me that Mr. Sims did not purport to act in exercise of his power under clause 3, Electricity Control Order ; he merely interpreted the law as modified

by the Control Order and advised the Company and the pltf. as to the proper course to be pursued by them.

20. There is another answer to this argument. If this was a direction under clause 3, Control. Order, why should it not beheld that the charging of the domestic scale of prices was a condition imposed by Mr. Sims in exercise of his power under Clause 3, Control order ? If so, the supply made and the price realised was legal, and the pltf. not entitled to recover.

21. Another argument addressed to us was that the cases cited relate to contracts, but here there was no contract since the pltf. did not agree to the price and surcharge charged by the Company. I do not think that the fact relied on makes any difference. The principle enunciated by Lord Mansfield in the passage cited by my Lord the Chief Justice is that the Ct. will not aid a man who founds his cause of action on an immoral or illegal act; if on the pltf.'s own showing or otherwise the cause of action appears to arise ex turpi causa or from the transgression of a positive law of the country, the Ct. is entitled to refuse its help to the pltf. Consider the facts of the present case. Under the control order it was not permissible to supply energy for battery charging for commercial purposes without the sanction of the Provincial Govt., or of the Electrical. Engineer and Electric Inspector. To the knowledge of the company and of the pltf. this sanction had not been obtained. Nevertheless, the company supplied, and the plaintiff accepted, energy contrary to the provisions of the control order. There was a difference between the parties as to the proper charge for the supply, but the pltf. paid the price and surcharge demanded and went on doing this from month to month so that the illegal Supply of current to him might continue. Therefore, the money was paid in order to effect an illegal purpose and that illegal purpose was effected. Could there be a case more apt for the application of the principles enunciated by Lord Mansfield ?

22. It is useless for the pltf. to talk of coercion, and to urge that he was compelled to pay what was demanded because otherwise the supply of energy would have stopped. This contention might perhaps have been of avail if the pltf. had been entitled to a supply of the energy on a lower price than that demanded by the company. Here the pltf. was not entitled to the supply on any terms. Hence, the payment made by him, even though he made it under protest, was made to obtain an illegal supply and the Ct. will not help him to recover it.

23. Finally, I think that, for lack of mutuality, Section 65, Control Act, will not help the pltf. The pltf. wants under this section to recover the money paid by him to the Company but it is not possible to make him restore the advantage that he has himself derived, namely, the supply of energy. Another difficulty arises out of the argument just urged, namely, that there was no contract between the parties. If there was no contract, Section 65 has no application.

24. I would like to add that I see no reason to think that the interpretation given by Mr. Sims in Ex. C and Ex. C (2) was consciously intended to circumvent the law. His position is explained by another document., (Exhibit D (3) dated 30-7-1943) and he seems to have been honestly mistaken.
Appeal allowed.

Cases Referred.

[1]24 Pat. 781 : (AIR (33) 1946 Pat. 1 : 47 Cr. L. J. 497 F.b)
[2]1 Crow p. 342 : 98 E. R. 1120 at p. 1121
[3](1869) 4 Q. 15. 309 at pp. 313-14 : (38 L. J. Q. B. 225)
[4](1904) 1 K. B. 558 at p. 563 : (73 L. J. K. B. 373)
[5]10 U. S. S. C. 108
[6]58 Mad. 727 : (AIR (22) 1935 Mad. 440 F.B)
[7]1 Pat. L. J. 48 at p. 62 ; (AIR (3) 1916 Pat. 284)
[8]50 Cal. 639 at pp. 645-647: (AIR (11) 1924 Cal. 248)
[9]19 C. W. N. 919 at p. 923: (AIR (3) 1916 Cal. 266)
[10]50 I. A. 69 : (AIR (9) 1922 P. C. 403
[11] 19 C. W. N. 919 at pp. 921-22: (AIR (3) 1916 Cal. 266)
[12]28 Pat. 913 at p. 924 : (AIR (36) 1949 P.C. 297)
[13]41 I. A. 197 : (AIR (1) 1914 P. C. 140)
[14]59 I. A. 161 : (AIR (19) 1932 P. C. 118)
[15]1 Pat. L. J. 485 : (AIR (3) 1916 Pat. 317)
[16]1 Pat. l. j. 485 : (AIR (3) 1916 Pat. 317)
[17]60 Bom. 516: (AIR (23) 1936 Bom. 227)