

Sunil Kumar S/O Late Darshan Lal vs Pratap S/O Late Hari Singh on 13 July, 2020

IN THE COURT OF Ms VANDANA JAIN
ADDITIONAL DISTRICT JUDGE-07 (SE)
KET COURTS NEW DELHI

RCA No. 15/19
[HEARING THROUGH CISCO WEBEX]

In the matter of:

Sunil Kumar S/o Late Darshan Lal
Rio A-2/1313, J.J. Colony,

Madanpur Khadar, New Delhi-110076

toe Appellant,
VERSUS
Pratap S/o Late Hari Singh
Rio A-2/1374, J.J.Colony,
Madanpur Khadar,
New Dethi-110076
veo Respondent

Date of Institution : 29.01.2019
Date of Reserving: 03.07.2020

Date of Judgment _ : 13.07.2020

JUDGMENT

1. The present appeal has been filed by the appellant/plaintiff against the impugned judgment and decree dated 27.11.2018 passed by Ld Trial Court whereby the suit of the appellant/plaintiff was dismissed.

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2. Brief facts of the present case are that plaintiff/appellant (hereinafter referred to as appellant) was the organizer/cashier of three committees in which specific number of persons participated. Defendant/respondent (hereinafter referred to as respondent) represented himself as the member of all the three committees. On 11.09.2011, appellant organized committee of Rs. 1,00,000/- for a period of 20 months in which there were 20 members and contribution of each person was fixed to be Rs. 5000/-. It was agreed that each member would be entitled to receive the committee's amount in his turn by auction or tender. It was also stipulated that if any member would not contribute his share in the said committee, then the organizer/cashier of the committee would have to pay on his behalf to the other members of the committee and he will be entitled to recover the paid amounts from the defaulter member. The list of all 20 members is given in suit plaint which includes

respondent's name.

3 It is further stated that respondent received the committee amount on behalf of Vishwanath Shukla and Mamta (the other two participants), as they were his nominee. It is stated that till 08.06.2012 i.e. 10th month of the committee, respondent participated in auctions and collected the committee amount of Rs.

Vishwanath Shukla and collected another committee amount of Rs 52,000/- from the committee on his turn on 15.01.2012 and also contributed the respective shares. However, from 15.07.2012 to 16.04.2013 i.e. from 11th month to 20th month of the aforesaid committee, even though the defendant/respondent had taken per member profit i.e. Rs, 9265/- each (total Rs. 18,530/-) but he did not pay the contribution in the said committee, which the appellant/plaintiff had to pay. The amount was Rs. 40,735/- each for both the members i.e. the respondent/defendant as well as for his nominee in the committee, totalling Rs. 81,470/- which was paid by appellant/plaintiff to the other members of the committee.

4 Similarly, on 02.10.2011 the appellant/plaintiff organized second committee of Rs. 42,000/- which was for fourteen months in which there were fourteen members and contribution of each member was fixed at Rs. 3000/- per month. Respondent/defendant again defaulted and the appellant/plaintiff had to pay Rs. 14,049/- for both the members i.e. the defendant as well as for his nominee in the committee totalling Rs. 28,098/-, to the other members of the committee.

5. Again on 05.02.2012, the appellant/plaintiff organized third Sunil Kumar Vs. Pratap { x i t e a c } neato committee of Rs. 50,000/- for a period of 10 months in which there were 10 members and contribution of each person was fixed to be Rs. 5000/-. Respondent/defendant defaulted again and the appellant/plaintiff had to pay Rs. 23,600/- on behalf of the respondent/defendant to the other members of the committee.

6. It is stated that appellant had paid total amount of Rs. 1,33,168/- in all the aforesaid three committees. It is further stated that on the last date of auction of committee i.e. on 15.04.2013, appellant had adjusted Rs. 28,685/- i.e. contribution share of Mamta, wife of defendant/respondent, on her request in order to extinguish the partial liability of the respondent. Thereafter, again on 06.01.2014, Mr Jagesh also paid Rs. 23,000/- on behalf of respondent in order to extinguish the partial liability of the respondent. During the course of the aforesaid committees, defendant/respondent also contributed less amount of Rs. 1685/- from his share of contribution. Therefore, respondent/defendant is liable to pay remaining amount of Rs. 93,148/- alongwith interest @ 6 % p.a. to the appellant/plaintiff.

7. Written statement was filed by respondent at a belated stage which was not taken on record by Ld Trial Court.

8. Thereafter, following issues were framed on 03.02.2017.

4. Whether the plaintiff is entitled to recovery of the amount and interest as sought for ? OPP

2. Relief.

9. Appellant led his evidence and examined four witnesses. He examined himself as PW-1. PW-2 is Govind, one of the participants of two committees. PW-3 is Mahesh, one of the participants of two committees. PW-4 is Jitender Chauhan, one of the participants of committee.

10. Respondent/defendant did not turn up for cross examination of any of the plaintiffs witnesses. He also did not lead his evidence.

11. Thereafter, suit of the appellant was dismissed vide impugned judgment and decree dated 27.11.2018 by the Ld Trial Court.

42. Ld counsel for appellant has argued that impugned judgment dated 27.11.2018 is bad in law as Ld Trial Court has not appreciated the evidence of the plaintiff and documents relied upon by him. It is further argued that Ld Trial Court had wrongly appreciated the preliminary objection of the respondent in the written statement as written statement was never taken on record by Ld Trial Court.

13. It is further argued that Ld Trial Court wrongly held that no replication to written statement was filed by appellant. It is a matter of fact that no copy of WS was ever supplied by the respondent to appellant.

14. It is further argued that Ld Trial Court has failed to appreciate that appellant is otherwise entitled for relief u/s 65 & 70 of the Contract Act.

15. It is further argued that Ld Trial Court has neither correctly appreciated nor applied and virtually ignored the judgment Fakir Chand Seth Vs. Dambarudhar Bania AIR 1987 Ori 50.

46. It is further argued that Ld Trial Court wrongly equated or compared the committees with chit and further wrongly held that the impugned committees fall within the definition of chit and prize chit and thus barred under section 4 of the Chit Funds Act, 1982 and Section 3 of the Prize Chits and Money Circulation Schemes (banning) Act, 1978.

47. It is further argued provisions of Section 23 of Contract Act will not be applicable in the present facts and circumstances of the case in view of the Section 65 & 70 of Indian Contract Act.

48. It is further argued that Ld Trial Court failed to appreciate the facts that even if the aforementioned provisions as relied by the Ld Sunil Kumar Vs. Pratap Page 6 of 18 SS Ye SQ ee Ey Trial Court is to be correct, the agreement between the parties of the present case comes within the meaning of Section 65 of the Act. It is further argued that Ld Trial Court has failed to apply the ratio decidendi of the Judgment of case of "Kuju Collieries Ltd Vs. Jharkhand Mines Ltd AIR 1974 SC 1892" passed by Hon'ble Supreme Court of India.

19. I have heard the arguments through CISCO Webex and have perused the record carefully.

20. Respondent has failed to appear in this court despite service. It is also pertinent to mention here that respondent had appeared before Ld Trial Court and also filed the written statement which was eventually not taken on record and thereafter he was proceeded ex parte at the stage of cross examination of plaintiff witnesses.

21. Ld counsel for appellant has challenged the impugned on various grounds. On perusing the record of the Ld Trial Court, it is seen that written statement was filed by defendant, however, vide order dated 03.02.2017, the written statement was not taken on record and, therefore, observation of Ld Trial Court that the replication was not filed is erroneous. It is clarified that written statement of the respondent/defendant was never taken on record by Ld. Trial Court. Therefore, question of filing of replication does not arise.

22. The issue of recovery was framed by the Ld Trial Court on the very same date Le. 03.02.2017 and the onus to prove the Same was put upon the plaintiff. Plaintiff examined himself as PW- 1 and examined three other witnesses in Support of his case in order to prove that he had made payments to the other members due to the default made by respondent/defendant. There was no challenge to the testimony of the any of the witnesses and there is nO reason to disbelieve the same,

23. Ld Trial court had dismissed the suit of the appellant/plaintiff purely on legal grounds holding that the suit of the plaintiff is not maintainable in view of the Chit Funds Act, 1982, Section 23 of the Indian Contract Act and The Prize Chits and Money Circulation Schemes (Banning) Act 1978. It was observed by Ld Trial Court that transactions were barred under the aforesaid Acts. Ld counsel for appellant while arguing on appeal had simply stated that Ld Trial Court had wrongly compared the committee with the Chits and wrongly held that these committees fall under Section 4 of the definition of Chit Funds Act 1982 and Section 3 of The Prize Chits and Money Circulation Schemes (Banning) Act 1978. Ld counsel G for appellant had not substantiated this argument with any reason. Merely a bad plea that the committee has been wrongly equated with the Chit under the aforesaid Acts is of na significance.

24. Section 2 (b) of the Chit Funds Act 1982 is reproduced herein under for the sake of convenience:-

" (b) "chit? means a transaction whether called chit, chit fund, chitty, kurt or by any other name by or under which a person enters into an agreement with a specified number of persons that every one of them Shall subscribe a certain sum of money (or a certain quantity of grain instead) by way of periodical instalments over a definite period and that each such subscriber Shall, in his turn, as determined by lot or by auction or by tender or in such other manner as may be specified in the chit agreement, be entitled to the prize amount."

25. The agreement is defined under Section 2 (e) of Contract Act. It is nowhere written that it should be in writing. The very pleading of the appellant that he floated/organized the first committee of Rs. 1,00,000/- in which twenty members participated and second committee of Rs. 42,000/- in which fourteen members participated and third committee for Rs. 50,000/- in which ten members

participated, itself indicate that there were promises amongst the appellant and other members for consideration for each other resulting into an agreement. Therefore, first condition of their being an agreement under Section 2 (b) of the Chit Funds Act is complied with.

28. Secondly agreement should be between specified number of persons. In all the three committees, specific numbers of persons were mentioned. Therefore, second ingredient is also satisfied.

27. The third ingredient is that it should be for certain sum of money which is also there.

28. Fourth requirement is of a definite periodical installment. The periodical installments were also fixed as written in the plaint itself. Therefore, the committee as organized by the appellant as pleaded in the suit definitely falls under the definition of (Chit) under the Chit Funds Act 1982.

29. Section 4 of the said Act prohibits the chit, floating of chit without obtaining the previous sanction of the State Government. Admittedly, no permission has been taken by the appellant. Therefore, it is very clear that all the three committees organized/floated by the appellant were barred under the provision of Chit Funds Act 1982.

— 30. Section 23 of the Indian Contract Act clearly provides that the agreement which is forbidden by law is unlawful, Therefore, as far as arguments of the Ld counsel for appellant with respect to the ey ?

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A a vide & WON application of Provision of Chit Funds Act are concerned, the same is not tenable However, it is to be seen whether in view of Section 65 and 70 of Indian Contract Act, 1872, Section 23 of the said Act applies or not

31. Ld counsel for appellant has relied upon Fakir Chand Seth Vs, Dambarudhar Bania AIR 1987 Ori 50 and has argued that this Judgment has not been correctly appreciated by Ld Trial Court and the Ld Trial Court has also failed to appreciate Section 65 and 70 of the Indian Contract Act

32. As far as this argument is concerned, Section 65 & 70 of the indian Contract Act becomes relevant and they are reproduced herein under for the purpose of reference:-

Section 65 of Indian Contract Act:- Obligation of person who has received advantage under void agreement, or contract that becomes void. 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, er to make compensation for it to the person from wham he received it Section 70 of the indian Contract Act- Obligation of person enjoying benefit of non-grattituous act. Where a

person lawfully does anything for another Person, or delivers y Y ie i x ays "

EAL \ SSS anything to him, not intending to do so gratuitously, and Such other person enjoys the benefit thereof. the latter is bound to make Compensation to the former in respect of. ar to restore, the thing so done ar delivered

33. The careful perusal of the judgment passed by Hon'ble Orrisa High Court in Fakir Chand Seth (Supra) shows that in that case, the plaintiff had advanced a sum of Rs. 15.000/- to the defendant for Supply of paddy and a document was executed in this regard. It was Stipulated in the said agreement that the defendant shall Supply some amount of bags of fine paddy and some amount of super fine paddy at specific rates. Plaintiff's case was that defendant neither supplied the paddy nor returned the advance. A suit was fled. Defendant denied the execution of any document and also denied having received any amount in advance. He also took an additional plea that plaintiff was not a licensed dealer and he could not purchase huge amount of paddy as mentioned in the agreement as contract of sale and purchase of paddy was illegal and void as per The Orrisa Rice and Paddy Control Order, 1965 and therefore, unenforceable agreement is void u/s 23 of the Indian Contract Act The Hon'ble Court held that this transaction was surely hit by provisions of The Orrisa Rice and \ XN OM oun a Se Paddy Control Order but the court took into consideration as to whether plaintiff would be entitled to refund of the advance given him in view of Section 65 & 70 of indian Contract Act and observed that these Sections were applied.

34. Hon'ble Orrisa High Court relied upon judgment passed by Hon'ble Supreme Court in Kuju Collieries Ltd Vs Jharkhand Mines Ltd & Ors AIR 1974 SC 1892. This case was of mining.

35. Ld Trial Court in this case held that plaintiff could not take the rescue of Section 65 as he was already in mining business and had the advantage of consulting its lawyers and solicitors. And their lease deed was prepared and drawn up by solicitors and there was no occasion for the plaintiff to has been under any kind of ignorance of law with regard to the Mineral Concession Rules 1949 rendering any stipulation for payment of Salami illegal and consequently making the lease illegal. Though the Hon'ble Supreme Court appreciated the reason given by the Ld Trial Court for not giving the benefit of Section 65 of the Indian Contract Act to the plaintiff.

36. However, Hon'ble Supreme Court clearly defined the scope of Section 65 of the Indian Contract Act in the following words:-

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SSEOH SPEAKS Of an agreement being discovered to he void ie MIB the . me ;

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; far nhs a Mhensfore. nat a contract. it means that it was void. It may- he ih ff = f ~ " 7 nat the parties or one of the parties to the agreement may not have, when they entered into the agreement, known that the agreement was in law not enforceable. They might have come to know later that the agreement was not enforceable. The second part of the section refers to a contract becoming void. That refers to a case where an agreement which was originally enforceable and was, therefore, a contract.. becomes void due to subsequent happenings. in both these cases any person who has received any advantage under such agreement or contract is bound to restore such advantage, or to make compensation for it to the person from whom he received it.

37. In Kuju Collieries Ltd (Supra) Hon'ble Supreme Court held that there are two parts in Section 65 of Indian Contract Act.

Reading of the abovesaid observations indicates that Hon'ble Sunil Kumar Vs. Partap Page 14 of 18 Supreme Court has segregated between the void agreements into two parts. One when the party/parties had knowledge of the same to be illegal at the time of entering into it and the other, when parties/party may not have known about its illegality or unenforceability, at the time of entering into such agreement. It is observed therein that in second category of cases, any person who has received any advantage is bound to return it to the person from whom he has received it.

38. The Hon'ble Orissa High Court in Fakir Chand Seth (supra) also referred to decision of Hon'ble Bombay High Court wherein defendant pleaded in a similar kind of situation that the ignorance of the statutory provision cannot be set up as a defence but the said plea was not accepted.

39. Hon'ble Orissa High Court in Fakir Chand Seth (supra) further relied upon AIR 1960 Andh Pra, 186 Sivaramakrishniah v. Narhari Rao, wherein it was held :-

"In order to invoke S.65 the invalidity of the contract or agreement should be discovered subsequent to the making of it. This cannot be taken advantage of by parties who knew from the beginning the illegality thereof. It only applies to a case where one of the parties enters into an agreement under the belief that it was a legal agreement, i.e. without the knowledge that the agreement is forbidden by law or opposed to public policy and as such illegal. The effect of S.65 is that, in such a situation, it enables a person not in pari delicto to claim restoration since it is not based on an illegal contract but dissociated from it. That is permissible by reason of the Section because the action is not founded on dealings which are contaminated by illegality. The party is only seeking to be restored to the status quo ante. S.68 also does not recognise the distinction between a contract being illegal by reason of its being opposed to public policy or morality or a contract void for other reasons. Even agreements, the performance of which is attended with penal consequences, are

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not outside the scope of S.65. At the same time, Courts will not render assistance to persons who induce innocent parties to enter into contracts of that nature by playing fraud on them to retain the benefit which they obtained by their wrong".

40. In another judgment *Shaukat Ali Khan Vs. Balu Khan* 1991 AIR (Del) 190, Hon'ble Delhi High Court clearly noted that:-

It is not the case set up that the plaintiff knew about the illegality of the transaction at the time the contract was made and the payments were made in the partnership firm.

So, it has to be held that the contract was discovered as void only when the contention has been raised in this Court for the first time by the teamed counsel for the defendant despite the fact that the defendant has not filed any written statement to contest this suit. So, even if the contract is held to be void even then the plaintiff is entitled to get back his money as compensation from the defendant.

41. The sum and substance of the judgment *Fakir Chand Seth* (supra) discussed above is that if on the facts of a case, it is found that the parties were not aware that the agreement was not enforceable at the time of entering into and the same was discovered later on, then Section 65 of Indian Contract Act, 1872 would be squarely applicable. The judgment *Fakir Chand Seth* (supra) relied upon by the counsel for appellant/plaintiff is squarely applicable to the facts of the present case and the Trial Court has erroneously discarded the same without going into the complete factual matrix and the observations made therein.

42. In the present case respondent/defendant has filed the written statement but it was not taken on record so there was no defence. The plaintiff/appellant witnesses were not cross examined by the defendant/respondent's counsel and from the record it is clear that the defendant had stopped appearing deliberately.

Section 65 of the Indian Contract Act, 1872 is squarely applicable to this case and the appellant is entitled to receive the amount paid by him. Hence, appeal is allowed. Impugned judgment and decree dated 27.11.2018 is set aside.

43. Decree of Rs. 83,168/- is passed against the respondent along with simple interest @ 9% per annum from the date of institution of suit till 31.12.2019. Keeping in view the financial condition due to COVID-19 Lockdown, simple interest @ 7% per annum is granted from 01.01.2020 till realization.

44. Decree sheet be prepared. No order as to cost.

45. Appeal file be consigned to Record Room.

46. Trial Record be sent back to Trial Court along with copy of the order.

(VANDANA JAIN) Additional District Judge-07/SE Saket Courts, New Delhi.

Announced through CISCO Webex on 43.07.2020.

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