

Sheo Narain Vs. Bhallar

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Court : Allahabad

Decided On : Oct-28-1949

Reported in : AIR1950All352

Judge : Agarwala, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Order 6, Rule 2; [Contract Act, 1872](#)
- Sections 30, 182, 231, 232 and 233

Appeal No. : Civil Revn. No. 122 of 1947

Appellant : Sheo Narain

Respondent : Bhallar

Advocate for Def. : J. Swarup, Adv.

Advocate for Pet/Ap. : P.N. Shukla ; and H.N. Seth, Adv.

Disposition : Application allowed

Judgement :

ORDER

Agarwala, J.

1. This is a plaintiff a application in revision against a decree of a Judge of the Court of Small Causes, Kanpur, dismissing his suit.

2. The plaintiff brought a suit for recovery of a sum of Rs. 956 on the basis of Bahi Khata accounts. According to him, the defendant entered into various transactions of sale and purchase of bullion between 24th October 1944 and 13th May 1946. The allegation in the plaint was that the plaintiff was an arhatia and also did transactions on his own behalf in the sale and purchase of bullion and that the defendant under his arhat entered into transactions.

3. The defence was that no transactions were entered into at all, but that the amount shown by the plaintiff as credited to the defendant's account was a loan advanced by the defendant to the plaintiff. In the alternative it was pleaded that if the transactions were entered into by the defendant, then they were wagering and the plaintiff could not recover.

4. The trial Court came to the conclusion that the transactions were in fact entered into, as alleged by the plaintiff, and that the defendant's plea that he had advanced loans to the plaintiff was false. It further came to the conclusion that the transactions were wagering in their nature and that the plaintiff could not recover. The learned Judge considered the case from two aspects treating the plaintiff as kucha arhatia and also treating him as pucca arhatia. He held that if he was a kucha arhatia, there was not proof that the plaintiff paid the losses to third parties. If he was a pucca arhatia, then also since the transactions were wagering, the defendant was not liable. He also recorded a finding that the plaintiff was a pucca arhatia.

5. In this revision, learned counsel appearing for the applicant has urged two points, firstly, that it was not open to the defendant to take up the plea of the transactions being wagering in view of his plea that no transactions were entered into at all, and secondly, that the transactions were not wagering and that the plaintiff having been found to be a pucca arhatia was entitled to recover. On the other hand, Mr. Jagdish Sarup, for the defendant opposite party, has urged that the finding of the lower Court that the plaintiff was a pucca arhatia was not correct.

6. As regards the contention that the defendant was not entitled to put forward inconsistent pleas, I may at once state that I am not convinced that it is sound. In support of his argument, learned counsel has referred to the cases of Mohd.

Baksh Khan v. Hussein Bibi, 15 Cal. 684 : (15 I. A. 81 P. C.), Iyyappa v. Ramalakshman, 13 Mad. 549; Johar Mal Chetram, 39 Bom. 715 : (A. I. R. (2) 1916 Bom. 115) and Bhimnath Misra v. Jagannath Prasad, A. I. R. (12) 1925 Pat. 674 : (89 I. C. 814).

7. In Mohammad Baksh Khan v. Hussein Bibi, 16 Cal. 684 : (15 I. A. 81 P. C.), the plaintiff alleged that the deed of gift was a fabricated document and her signature upon it was a forgery. She also alleged that in any case the deed of gift was obtained by undue influence. Lord Macnaghten in delivering the judgment of the Board observed :

'On 16th March 1882 issues were settled. Amongst the issues was this : '2nd, whether the hibanama on behalf of Shahzadi Bibi is genuine and valid and executed with her knowledge and consent, or whether it was manufactured without her knowledge and consent, or whether it was executed under undue influence ?' In their Lordships' opinion the latter part of the issue ought not to have been admitted. It was absolutely inconsistent with the case made by the plaintiff. It only becomes possible on the assumption that the alleged cause of action is unfounded.'

In spite of these observations, however, his Lordship went on to consider the issue whether the hibanama had been obtained under undue influence. This case as also the case reported in Iyyappa v. Ramalakshman, 13 Mad. 549, were considered in a case of this Court reported in Jino v. Manon, 18 ALL. 125 : (1896 A. W. N. 1) and it was held that a plaintiff could claim in his plaint two alternative reliefs which were inconsistent.

8. In Joharmal v. Chetram, 39 Bom. 715 : (A. I. R. (2) 1916 Bom. 115), the defendant had taken the plea that the contracts sued upon were not entered into and in the alternative if the contracts were proved to have been entered into, they were wagering contracts. It was observed :

'As they (defendants) deny that they ever made these contracts or authorised defendant 4 to make them, I confess, I do not see how they can possibly be in a position to contest the character of the contracts. It hardly lies in the mouth of a

person to say in one and the same breath, 'I did not make a contract but if I did make a contract I am sure it was a wager,' that is in effect the form the defence has taken here, but waving that logical difficulty I may say that there is no evidence worth the name led by the defendants to prove that the contracts sued upon were wagers.' It will be observed that the learned Judge in that case did not lay it down as a rule of law that, in no case, an inconsistent plea be entertained. All that his Lordship seems to have in mind was the difficulty of believing a defendant who puts forwards inconsistent claims. In any case, the observation was obiter because the learned Judge went into the question and found that the contracts were not wagering.

9. In *Bhimnath Misra v. Jagarnath Prasad*, A. I. R. (12) 1925 pat. 674 : (89 I. C. 814), there was a claim for recovery of possession with mesne profits on the ground that the plain-tiff was the heir of the last owner and that the deed of trust, said to have been executed by the last owner, was invalid. It was pleaded in the alternative that if the deed of trust was executed, the trustee should render accounts and should be removed for breach of trust. Mullick J. was of opinion that this alternative plea could not be taken in view of the allegation that no trust deed had been executed. But as an issue on the alternative plea had been raised in the Court below without any objection by the other side, his Lordship observed that the issue had to be decided. The other learned Judge, Boss J., did not seem to share the view of his brother Judge on this point.

10. On the other hand, there are cases in which it has been held that inconsistent pleas can be raised. In *Dwarka v. Ram Jatan*, 1930 A. L. J. 1537 : (A. I. R. (17) 1980 ALL. 877), Sen and Niamatullah JJ. held that the suit was not liable to dismissal and that the plaintiff could lay claim to a plot of land by right of ownership and in the alternative by way of easement. They approved of the decision in *Jino v. Manon*, 18 ALL. 123 : (1896 A. W. N. 1) and of the manner in which the dicta of the Privy Council decision in *Mohammad Baksh Khan*, (16 Cal. 684 : 15 I. a. 81 P. C.) had been disposed of in that case. Their Lordships also referred with approval to a Full Bench decision of the Madras High Court in *Subha Rao v. Lakshmana Rao* : AIR1926 Mad728

'It is clear that a man is not finally precluded from claiming the benefit of an easement merely because in the course of legal proceedings he made an unfounded claim to be the owner, however strongly the making of such a claim might weigh against him.'

11. In the Full Bench case of the Calcutta High Court in Narendra Nath v. Abhoy Charan, 31 Cal 51 at p. 54 : (4 C. L. J. 437) it was observed that:

'That inconsistency of the two allegations may be, and probably would be, a ground for viewing them both with the greatest suspicion, but does not, as a matter of pleading, render the suit not maintainable.'

I think that the correct view of the law on the point is that which has been laid down in the above quotation from the Full Bench case of the Calcutta High Court.

12. The next contention is that the lower Court was wrong in holding that the transactions were wagering. The burden of proving that the contracts were wagering was on the defendant. He entered into the witness box, but while denying the entering into of the contracts, he did not say a word about their wagering nature. No other evidence was produced. On behalf of the plaintiff, the Munim was examined. He admitted that in no transaction delivery had been taken by the defendant. The lower Court held the transactions to be wagering on the sole ground that in these transactions which numbered about one hundred no delivery had ever been given. In my opinion, the fact that in no transaction was delivery ever given or taken is not conclusive of the matter and the burden that rests upon the defendant to prove that a contract which was entered into by him was in the nature of a wagering contract, is not discharged by merely proving that delivery was not given. It may be that a person enters into a genuine transaction of purchase or sale which he can fulfil to the letter by giving or taking delivery of the goods contracted for; but on finding it more convenient to enter into a cross transaction which obviates the necessity of making delivery or receiving delivery, he enters into cross transactions and makes a settlement on the basis of difference in the profit or loss. Such a course of dealing does not necessarily stamp the transactions as wagering. What has to be proved in order to establish that a transaction was a wagering one is the fact that it was agreed between the

parties that no delivery was ever to be demanded or given. There is no evidence of such a contract between the parties in the present case. The mere fact that delivery was, in fact, not given does not prove that it was not given because there was a term in the original contract to that effect. In every case the terms of the contract have to be proved. If the terms of the contract have been proved, and they show on their face that delivery was to be given or taken, and it is alleged by the defendant that it was agreed that the term about delivery was not to take effect, but that differences alone were to be paid, then the fact of non-delivery, coupled with certain other facts may induce the Court to believe the defendant instead of the plaintiff. These facts are that financial condition of the parties, and their capacity to deliver the goods in fulfilment of the contract. There is no evidence in the present case that the defendant was financially unable to pay the amount which would be due from him on the transactions entered into by him and to take delivery of the goods contracted for, or that having regard to the state of the market he could not possibly be able to deliver the goods contracted for. In the absence of any such proof, it could not be held that the transactions, were wagering.

13. Learned counsel for the opposite parts has referred to certain observations made by a Bench of this Court in *Firm Ram Krishna Das Jawahar Lal v. Firm Mutsaddi, Lal Murli Dhar*, A. I. R. (29) 1942 ALL. 170: (I. L. R. (1942) ALL. 289). It was observed in that case that:

'It comes, we think, therefore, to a question of fact--what is their real intention? That brings us back to the circumstances of the present case. There was a long series of very substantial contracts over a period seven months, in not one of which was there any genuine delivery of goods, except conceivably, in one small case. These contracts were all based upon terms which were as we have shown singularly appropriate to mere gambling transactions. Indeed, the contracts were themselves headed as 'forward' contracts.'

It will be observed that the decision in that case was based not merely upon the fact that almost in no case was delivery of goods given, but on the additional fact that the terms of the contract were such as 'were singularly appropriate to mere

gambling transactions.' That decision must therefore be confined to cases in which the right to receive or give delivery is so hedged in by conditions that it is more or less illusory. In my opinion, upon the evidence on the record, it could not be held that the transactions were wagering.

14 Learned counsel for the opposite party has urged that even though the transactions were not wagering, the plaintiff cannot recover because he was a kucha arhatia and has failed to prove that he paid losses to third parties on behalf of the defendant. The finding of the lower Court is that the plaintiff was not a kucha arhatia, but was a pucca arhatia. Learned counsel has contended that this finding is not sustainable. The finding is based upon, 'the absence of all indication in the plaintiff's account books as to the persons with whom the plaintiff entered into contracts on defendant's behalf and that he paid the loss to any other person on account of even one transaction out of more than 100 transactions.'

15. The basic distinction between a kucha and a pucca arhatia is that a kucha arhatia acts as an agent on behalf of his constituent and never acts as a principal to him. The person with whom he enters into a transaction on behalf of his constituent is either brought into contact with the constituent, or at least the constituent is informed of the fact that the transaction has been entered into on his behalf with such and such other person.

16. In *Sobhagmal v. Mukund Chand*, 51 Bom. L. (A. I. R. (13) 1926 P. C. 119), their Lordships described the incidents that attached to a transaction entered into by a kucha arhatia:

'When a kucha arhatia enters into transactions under instructions from and on behalf of his up-country constituent with a third party in Bombay, he makes privity of contract between the third party and the constituent, so that each becomes liable to the other, but also he renders himself responsible on the contract to the third party. He does not ordinarily communicate the name of his constituent to the third party, but he informs the constituent of the name of the third party. The position, therefore, as between himself and the third party is that he is agent for an unnamed principal with personal liability on himself. His remuneration consists solely of commission, and he is in no way interested in the profits or losses made

by his constituent on the contracts entered into by him on his constituent's behalf.'

It will be observed that although the kucha arhatia may not communicate the name of his constituent to the third party, he informs the constituent of the name of the third party.

17. In the case of a pucca arhatia, the agent makes himself liable upon the contract not only to the third party, but also to his constituent and- he does not inform his constituent as to the person with whom he has entered into a contract on his behalf.

18. In *Bhagwandas Narottam Das v. Kanji Deoji*, 30 Bom. 205 : (7 Bom. L. R. 611), the incidents attaching to a pucca arhatia were described as follows:

'(1) That the pucca arhatia has no authority to pledge the credit of the up-country constituent to the Bombay merchant, and that no contractual privity is established between the up-country constituent and the Bombay merchant;

(2) That the up-country constituent has no Indefeasible right to the contract (if any) made by the pucca arhatia on receipt of the order, but the pucca arhatia may enter into cross contracts with the Bombay merchant either on his own account or on account of another constituent and thereby for practical purposes cancel the same ;

(3) The pucca arhatia is under no obligation to substitute a fresh contract to meet the order of his first constituent.'

19. In the present case, the entries in the plaintiff's account-books show that in no transaction was the name of the third party, with whom the contract of sale or purchase was entered into, ever mentioned. The defendant looked up to the plaintiff to fulfil his contracts. The plaintiff, it appears, made himself personally responsible to the defendant for the performance of the contracts. In these circumstances, I consider that the learned Judge was right in coming to the conclusion that the plaintiff was a pucca arhatia.

20. As the plaintiff acted as a pucca arhatia and the contracts were not wagering, he was entitled to recover the amounts due to him. The suit should have been decreed.

21. I, therefore, allow this application in revision, set aside the order of the Court below and decree the plaintiff's suit with costs in both the Courts.

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