KERALA HIGH COURT

Justice V. R. Krishna Iyer

K. P. VASUDEVAN PILLAI v. KUMARAKOM CENTRAL VYAVASAYA COOPERATIVE SOCIETY

Citation(s): 1971 KHC 180 : 1971 KLT 837

JUDGMENT

1. I decide this case with some trepidation as the principal point involved is beset with difficulties.

2. A Cooperative Society governed by the Travancore - Cochin Cooperative Societies Act, 1951, brought the present suit on the strength of Ext. P1 of 1963 claiming that money had been lent under that promissory note to the defendant which the latter had defaulted to return. The defendant countered the claim by denying the execution of Ext. P1 and challenging the competency of the person who signed the plaint to represent the lender Society. The Trial Court was not satisfied with the proof of Ext. P1. Nor with the competency of the plaintiff society to lend to a non-member like the defendant, having regard to the statutory bar contained in S.37 of the Act. Of course, even the extreme position taken up by the defendant that the plaint had not been signed by a person entitled to represent the Society as President somehow appealed to that court. The result was that the suit was dismissed. The lower appellate court had no hesitation in upholding the genuineness of the note and its validity, making light of a difficult question of law. Ultimately, the suit was decreed. The defendant has come up in second appeal. As is obvious, a question of fact bearing on the execution of Ext. P1 and a question of law as to the enforceability of Ext. P1 in the teeth of S.37 arise for determination. The challenge of the identity and competence of the President who signed the plaint has been feebly echoed in this court. But in the light of the evidence of Pws. 1 and 2 that the plaint has been signed and verified by the President of the Cooperative Society and that he has the authority to represent it in litigation, there is no merit in this rather frivolous contention.

3. Ext. P1, according to PWs. 1 and 2, has been executed by the defendant. Indeed, the contravention of the genuineness of Ext. P1 by the defendant is considerably weakened by the desperate suggestion that probably the signatures in Ext. P1 (and Ext. P2, a previous note) are true, but that they must have been made out on blank papers signed and handed

over by the defendant to Pw. 2 for other purposes. The learned District Judge also notes the resemblance of the signatures in Exts. P1 and P2 with the admitted signatures of the defendant in the Vakkalath and the written statement. In the light of the evidence and the other circumstances in the case there is no ground for disturbing the finding of the learned District Judge that Ext. P1 is genuine.

4. The promissory note, which is the basis of the suit, emerges from an earliertransaction. Ext. P2 dated 28-6-1960 is also a promissory note executed by the defendant. The account books of the Society, Exts. P3 to P9, also relate to the borrowing by the defendant and it is difficult to reach the conclusion that there could have been a scheme of concoction of several documents to rope in the defendant. Affirming the finding of genuineness of Ext. P1, I move on to the main question argued at the bar as to whether S.37 of the Travancore - Cochin Cooperative Societies Act, 1951 (Act X of 1952) inhibits an action on the strength of a lending in contravention of that provision. S.37(1), (2) and (3) read as
follows:

"*37. (1) A registered society shall not make a loan to any person other than a member: Provided that, with the general or special sanction of the Registrar, a registered society may make loans to another registered society.*
(2) *Save with the sanction of the Registrar, a registered society shall not lend money on the security of movable property other than agricultural produce.*
(3) *Notwithstanding anything contained in sub-sec.(1) and (2), a registered society may make a loan to a depositor on the security of his deposit."*

The defendant argues that since he is not a member of the Society there is a ban on a loan being made to him and so, Ext. P1 is forbidden by law within the meaning of S.23 of the Indian Contract Act. The consequence of this illegality, counsel argues, is that the suit is not maintainable and he invokes well established principles and cites numerous decisions in this behalf.

5. I must confess that in the ultimate decision of this case I am considerably influenced by the object of courts being to administer justice In this case, the plaintiff Society has undoubtedly lent the money to the defendant and the result that enables him to keep it without returning, on principles of law, may appear to make justice and law hostile to each other. Public policy is what is usually relied upon by courts in refusing relief to a party who seeks its assistance in enforcement of a contract which is illegal or immoral, but it is

clear that courts must be careful, as some judges have pointed out, particularly Mr. Justice P. B. Mukherjea in Pranballay Saha v. Tulsibals Dassi (AIR 1958 Cal. 713), that the remedy should not be worse than the malady.

6. The point is not free from difficulty because in the face of the statutory prohibition against lending by a society to a non-member, and the action is laid only on the basis of the loan it is reasonable to contend that the plaintiff has acted without power or capacity when it lent to the defendant and in such a case there was not even a contract born. Moreover, to enforce such a contract of loan on the basis of principles and exceptions would virtually amount to undoing the statutory prohibition itself which incorporates a high legislative policy. Counsel's contention is that S.65 and 70 of the Contract Act also are not attracted. In cases where a rule of public policy, exalted as a statutory prohibition, is sought to be circumvented by resort to S.65 and 70 it may mean that the court is setting at naught the enacted policy. The embargo on loans to non-members is imposed by many statutes relating to Cooperative Societies in this country as has been noticed by a Division Bench of the Lahore High Court in Nabi Baksh v. Muhammadi (AIR 1929 Lah. 330). The object of forbidding loans to non-members is to drive home to the people in the country the benefits of cooperative action by becoming the members of societies. If members and non-members stand on the same footing in the matter of loans, purchases and other facilities, the spirit of the cooperative movement fails. Mr. Calvert in his Law and Principles of Cooperation states the reasons for the restriction thus:
'Obviously, it is little use making elaborate provision for the selection and retention of honest members if loans can be made to non-members not subjected to the same process. This is a principle of all cooperative associations, the confining of benefits to the members and must be the object of all societies." It is thus clear that S.37, corresponding to S.29 of the Central Act, embodies a wholesome principle of public policy in relation to the cooperative movement. The question arises as to what happens if in violation of S.37 a loan is made to a non-member, as in this case. A direct decision, as it were, is found in the Lahore case just now referred to by me. A cooperative Bank, in breach of the ban against loans to non-members, advanced money to the defendants who resisted the action for recovery of the loan pleading S.29 of the Central Act as rendering the transaction as illegal and unenforceable. Holding that such a lending is illegal, the court nevertheless decreed the suit by a device of legal dichotomy, if I may say so. The court split up the lending into two parts "(1) to advance the money which is illegal and (2) to repay the money advanced, which is perfectly legal and enforceable." In Coltman v. Coltman (30 Weekly Reporter 342) the Court of Appeal dealt with a somewhat similar case where the advance was unauthorised by the statute. And the lender, a friendly society, sued to recover the money. Jessel M. R. said in that case:

"I am not satisfied that an express provision in the Act of Parliament that the trustees should not lend money upon personal security would have made any difference. The loan would have been wrong, it would have been an appropriation of the society's money to their own use, but there would not have been any such illegality in the transaction as would preclude the trustees from recovering the money lent."

Their Lordships have also relied upon Turner v. Bank of Bombay (ILR 25 Bom. 52) and Ayers v. South Australian Banking Co., 1871 (3) P. C. 548) in this connection. The American view adverted to in that decision by Skemp J. also lends support to the stand that the court must do justice between the parties and compel the borrower to repay the money. The following passage from the judgment in Rankin v. Emigh (1910 (218) U. S. 27) is instructive:

"It was held although restitution of property obtained under a contract which was illegal because ultra vires, cannot be adjudged by force of the illegal contract, yet, as the obligation to do justice rests upon all persons, natural and artificial, if one obtains the money or property of others without authority the law independently of express contract, will compel restitution of compensation."

Finally, the Lahore Judges took the view that if the object of the contract was opposed to public policy or contrary to statute in cases where there was excess of authority or contravention of the law "*the illegality was over and done with when the loan was made". However, the illegality being thus 'over' with the lending, the Society could recover the money made over to the defendant* "on the principle that the defendant ..... at the time of taking the money made an implied promise to repay". There is nothing illegal in that. Although there is a great deal of straining on the part of their Lordships to reach a just conclusion, I am not too sure whether the law is so clear as all of that. However, in the present case, the reasoning appeals to me.

7. A single Judge of this Court, faced with a similar situation of justice versus law, plumped for the former. That was a case where the plaintiff, a wholesale dealer in food grains, had sold and supplied rice to a retailer, but when the price was demanded, the buyer refused and relied on the Rationing Order to contend that the transaction was illegal and, therefore, unenforceable. There was also a plea that the wholesaler did not have the licence in his own name but had it in his brother's name which was prohibited by law. The learned Judge read S.23 and 65 of the Contract Act and held that if the transaction was unlawful

and void, still the plaintiff was entitled to a return of the food grains supplied to the defendant under such a void transaction in view of S.65 of the Contract Act. His Lordship was skating on thin ice, if I may so with great respect, when he observed: *"In the transaction between the plaintiff and the defendant there is no illegality of any serious type. But for the rationing order the transaction would have been a perfectly lawful one. Though on account of an emergency, the State exercised control over the distribution and sale of food grains and made any contravention thereof a punishable offence, it does not mean that the transaction was illegal though it may be unlawful. Admittedly the sales concerned Were between a wholesaler and retailer. Where the sale of food grains was only to a licensed retailer the contravention of the rationing order, if any was only technical. The Courts will not refuse relief when one party has obtained a benefit under a void transaction on promise of paying compensation therefor and later on turned round to say that the transaction is illegal and therefore he bad not to pay. I accept the view of the Courts below*."

Although the reasoning in that ruling is a little shaky there is no doubt that justice has been furthered in that case.

8. If the two decisions I have referred to are entitled to acceptance, and, I see no reason why they should not be, notwithstanding some reservation that I have, the plaintiff is entitled to a decree in this suit.

9. Counsel for the appellant emphasises that "*An ultra vires borrowing by persons affecting to act on behalf of a company or other statutory association does not give rise to any indebtedness either at law or in equity on the part of such company or association. It is not, therefore, open to the House to hold that in such a case the lender has an action against the company or association for money had and received*." (Anson's Law of Contract, 20th Edn., p. 428). That was a case of a borrowing by a statutory body unlike here. What we are concerned with is a loan granted to a person in contravention of a statutory mandate. In such a case, I feel that the Society is not a guilty party operating, as it does, through human agency and the mala fides, if any, of the representatives of the Society should not be visited on the Society itself. It is difficult to postulate that the plaintiff and the defendant in such a case are *in pari delicto*. Again, once the loan has been made, it is as good as the representative of the Society having taken away the money of the Society and made it over to the defendant, and discovering this disappearance of funds the Society is trying to get it back. It is not open to a defendant, who has benefitted by taking a loan, to challenge the validity of the loan in such a case. The reasons adopted in the

decision reported in ILR 25 Bombay 52 supports this approach. In Coltman v. Coltman already referred to by me, Sir, George Jessel said:
"I am not satisfied that an express provision in the Act of Parliament that the trustees should not lend money upon personal security would have made any difference. The loan would have been wrong, it would have been an appropriation of the society's money to their own use, but there would not have been any such illegality in the transition as would preclude the trustees from recovering the money lent. It seems to me that to hold it to be incompetent to maintain an action under those circumstances would be to say that it was incompetent for a trustee, who had improperly appropriated the money of the society and lent it in his own name, to take steps to enable him to restore it. How the persons who borrowed it, there being no illegality in the borrowing on their part, and no illegality in their agreeing to repay the money so borrowed, and no illegality in the purpose to which they were intending to apply it, can set up the doctrine that they are relieved from their liability by reason of the money having originally belonged to a friendly society, is a thing which I am quite unable to understand." In the same decision Brett L. J. observed:

'The only objection to this loan is that it was made without authority. But it does not seem to me that the borrower can set up as a defence to an action that the person, who lent him the money and to whom he has made a promise to repay that money, had no authority to lend it to him. That is an objection which it is not for him to take. The contract is, if you will lend me so much money, I will pay you that money back on demand. The consideration is the handing over the money. That is not illegal. The promise to pay back money which you have borrowed is not illegal. The money was not borrowed for any illegal purpose, in order to do an illegal or immoral thing, and I cannot see that there is anything illegal in the contract. The only objection is, that those who made the contract with the debtor had no authority to make it, and that is an objection which he cannot take." The conclusion is that it does not He in the mouth of the defendant in this case to challenge the validity of the loan or the authority of the society to lend.

10. We must make a distinction between a case of an act forbidden by law or is illegal or immoral and one like the present act which is void being without authority. To raise the objections that apply to the first category in the second class of cases is, in the language of Mr. Justice P. B, Mukerjea, sounding a false siren or a false alarm. I am satisfied that the money lent in this case can be called back by the Society. I do not think it very necessary to deal with every decision cited at the bar although many of them are of the highest authority being of the Supreme Court because they do not have a direct bearing on the specific point at issue and deal largely with S.65 and 70 of the Indian Contract Act.

11. The only other question is as to whether the defendant can be compelled topay interest at 12%. In the present case, partly because of the principles of restitution that may apply, and largely because of the conduct of the Board of directors in by passing S.37, I do not think it proper to direct the defendant to pay interest up to the date of the suit. In this context, I must mention that the Board of Directors of the Society have been consistently ignoring S.37 of Act X of 1952. The suggestion that they helped a friend in difficulty only worsens the offence. It is becoming frequent for Directors of Societies to defy wholesome provisions of law calculated to conserve the resources committed to their custody for ulterior purposes and I am sure this is a case where (he Registrar of Cooperative Societies and the State Government will look closely into the affairs of the plaintiff society and insist that other societies do not violate with impunity S.37 of the Act.

12. Except to the extent of the minor modification regarding interest, I affirm the decree of the lower appellate court and dismiss the appeal with costs.

A copy of this judgment will be sent to the State Government.