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IN RE
BÁI
HARKHA.

The Joint Judge rejected this application, holding that the applicant had not made out a case sufficient for removing the guardian.

Thereupon Bái Harkha appealed to the High Court.

Gokaldás K. Párekh for appellant.

C. H. Setalvad for respondent.

PER CURIAM:—The effect of sections 47 (g) and 48 of Act VIII of 1890 is to allow no appeal from an order such as the Joint Judge has made, *viz.*, a refusal to remove a guardian. We, therefore, reject the appeal with costs.

Appeal dismissed.

APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Candy.

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August 1.

GANESH VITHAL (ORIGINAL PLAINTIFF), APPELLANT, *v.* SHRIPAD DATTOBA' NA'IK AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Tolls Act (Bombay Act III of 1875), Sec. 7†—Lease to levy tolls—Lessee, right of, to admit partners—Accounts, two sets of—False accounts kept to deceive Government.*

A lessee from Government of the right to levy tolls admitted into partnership with him the plaintiff and two others. One of the conditions attached to the lease prohibited sub-letting.

The plaintiff having brought a suit for his share of the profits realized in the transaction, the Judge dismissed the suit on the ground that the partnership was illegal, being of opinion that sub-letting and admitting a partner were identical.

Held, reversing the decree, that the partnership was not illegal.

Where in such a partnership two sets of account were kept, one true and the other false,

* Second Appeal, No. 945 of 1893.

† Section 7 of the Tolls Act (Bombay Act III of 1875):—

Every person other than the persons appointed to collect the tolls under this Act, who shall levy or demand any toll on any public road or bridge, or for passing through any bazar situated thereon, and also every person who shall unlawfully and extortionately demand or take any other higher toll than the lawful toll, or under colour of this Act seize or sell any property, knowing such seizure or sale to be unlawful, or in any manner unlawfully extort money or any valuable thing from any person under colour of this Act, shall be liable, on conviction before a Magistrate, to imprisonment for any term not exceeding six months, or to fine not exceeding Rs. 200, any part of which fine may be awarded by the Magistrate to the person aggrieved, but this remedy shall not be deemed to bar or affect his right to have redress by suit in the Civil Court of the district.

Held, that such practice, however reprehensible, was not illegal under section 7 of the Tolls Act (Bombay Act III of 1875), and did not disentitle the plaintiff to show as between himself and his partners what was the actual profit of the concern.

SECOND appeal from the decision of Ráo Bahádur Káshináth Bálkrishná Máraáthe, First Class Subordinate Judge of Dhárwár with appellate powers, varying the decree of Ráo Sáheb D. S. Sápre, Second Class Subordinate Judge of Hubli.

The plaintiff sued to recover from the defendants Rs. 1,145-14-9, alleging that the toll contract of Trímalkop, in the Hubli Táluka, was taken by him and the defendants jointly in the year 1889-90; that the profits realized at the end of the year amounted to Rs. 1,530-11-6, and that he was entitled to a moiety of the amount on account of his share. He further alleged that he had deposited with the defendants a sum of Rs. 761 as security and he claimed to recover that sum together with Rs. 5-7-0 as the costs of notice served by him on the defendants. Against the sums due by the defendants the plaintiff gave them credit for Rs. 385-14-0, and claimed the balance of Rs. 1,145-14-9.

Defendant No. 1 alleged that he alone had taken the contract, and he denied that the plaintiff was his partner.

Defendant No. 2 did not appear.

Defendant No. 3 answered that he was a servant of defendant No. 1, who was the sole owner of the contract in question.

The Subordinate Judge found that the plaintiff and defendants were partners in the contract, and that the plaintiff was entitled to recover the amount claimed minus the costs of notice, namely, Rs. 1,140-7-9.

At the last stage of the suit the defendants raised the point that the partnership contract on which the plaintiff relied, was void as being contrary to law and public policy, and, therefore, could not be enforced. In support of their contention they put in a copy (Exhibit 69) of the rules framed by the Collector of the district in connection with the toll contracts. The Subordinate Judge disallowed the contention, holding that these rules simply prohibited the sub-letting of such contracts.

On appeal by the defendants the Judge found that the profits realized amounted to Rs. 1,530-11-6, but he amended the decree

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by awarding to the plaintiff the Rs. 761, which were deposited by him with the defendants, and rejected the rest of the claim. The following are extracts from his judgment:—

Issue 6.—Are the private accounts kept in fraud on Government admissible in evidence?

The plaintiff admits in his deposition that the private accounts (which the Judge in a previous part of the judgment found to be accurate and show the actual profits) were kept in order to deceive Government. These accounts cannot, therefore, be made use of so as to derive any benefit accruing from the keeping of such accounts. It is held by the Bombay High Court, I. L. R., 12 Bom., 422, that the partners in an illegal contract cannot claim an account of the partnership profits. The ruling in I. L. R., 10 All., 577 is in the same spirit. The old Madras case (Madras High Court Reports, Vol. II, page 249) was decided on the following principle:—A defendant may plead the joint fraud of himself and the plaintiff as a bar to an action upon a contract which the plaintiff seeks to enforce by suit. The keeping of private accounts and the making of profits from a toll contract, which according to the accounts kept according to the rules laid down by the Collector of the district was a losing concern, clearly implies the levying of excessive tolls or the passing of no receipts for the tolls levied. Both these circumstances are penal according to the Tolls Act (Bombay Act III of 1875, section 7), and the keeping of private accounts inconsistent with the public accounts required by the Collector is perfectly illegal, and the private accounts set up by the plaintiff are, therefore, illegal and inadmissible in evidence.

Issue 7.—Does the private partnership of the parties entered into in spite of the Government rules furnish a good and legal cause of action?

The private partnership set up by the plaintiff was obviously entered into in contravention of the condition No. 10 of the lease of Firmalkop toll granted to the defendant No. 1. The conditions laid down by the Collector of the district as a representative of Government have the force of law according to section 10 introduced by Bombay Act No. V of 1881. If the defendant No. 1 entered into a partnership in violation of one of these conditions, the contract of partnership was of course illegal. The lower Court's opinion, that the conditions of the lease granted by the Collector do not prohibit a partnership taking up the lease expressly granted to one individual, is not, I believe, correct. Sub-letting and admitting a partner are identical, I think, and the alleged partnership cannot furnish a good or legal cause of action.

Issue 8.—Is the claim bad as against public policy?

It is, of course, against public policy to allow persons whom the Collector would not think eligible for the granting of a toll lease, to indirectly partake of the profits of a toll lease. The plaintiff distinctly admits in Exhibit 36 that the Collector had forbidden him from taking any toll contract. The plaintiff made default in paying instalments and thus inflicted loss of the public gains, and he was declared unfit to have anything to do with toll contracts. The plaintiff nevertheless takes contracts in other men's names and defeats the public reason for discarding him. It is clearly against public policy to help such a man in securing his share of profits of a toll contract. The claim for a share of profits cannot be awarded.

"Issue 9.—Is the plaintiff entitled to any relief ?

"It would, however, be unfair to prevent the plaintiff from taking back the money really deposited by him for the benefit of defendant No. 1 and others, who being *in pari delicto* with plaintiff cannot retain the moneys actually received by them with the purpose of returning them. The private accounts are, of course, admissible to the extent of the deposit. These and the oral evidence by itself prove that Rs. 761 were deposited as security for good behaviour. This amount must be returned."

The plaintiff preferred a second appeal.

Vásudeo R. Jogleker, for the appellant (plaintiff):—The Judge erroneously held that sub-letting a contract and taking partners in it are identical. What is prohibited by the rules is sub-letting, but they do not prohibit a man from taking partners. If a man takes a partner, his liability to the Collector does not thereby cease. The Collector holds him liable and not the partner. Sub-letting is prohibited, because it leads to complications. Sub-letting being specifically prohibited would be void as being opposed to law or public policy.

The Judge has left out of consideration the true accounts. In order to determine among the partners what was the correct amount of the profits, they are relevant evidence and are admissible.

Section 7 of the Tolls Act makes the demand of illegal tolls punishable, but it does not say anything with respect to accounts.

Nárdyan G. Chandávarkar, for respondent No. 1 (defendant No. 1):—There is no distinction between sub-letting and taking partners. By sub-letting a person is brought in who was not originally a party to the contract. The effect of taking a partner is the same. The prohibition of sub-letting impliedly prohibits the admission of a partner.

The plaintiff cannot now fall back upon the private accounts. The accounts kept according to the rules are to be considered the true accounts, and they show that the partnership concern has suffered a loss.

Shivrám V. Bándárkar, for respondents Nos. 2 and 3 (defendants Nos. 2 and 3):—The Judge has found that the amount actually but not legally due to the plaintiff was stated in the plaint, and he came to that conclusion on what are alleged to be

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the private accounts of the parties. But these accounts being illegal and, therefore, inadmissible in evidence, the Judge was wrong in referring to them. We submit that the Judge ought not to have awarded to the plaintiff the sum he deposited by way of security, because the deposit was made in furtherance of an object prohibited by law: Further, the alleged private accounts being illegal and inadmissible in evidence, the Judge was wrong in referring to them as proving the alleged deposit.

PARSONS, J.:—The first defendant leased from Government the levy of tolls at Tirmalkop for the year 1889-90 and admitted into partnership with him the plaintiff and the other two defendants. Plaintiff brought this suit for his share of the profits realized on the transaction.

The Judge of the lower appellate Court has found the partnership illegal, because Rule No. 10 of the conditions attached to the lease granted to the defendant No. 1 prohibited sub-letting, and he thinks that sub-letting and admitting a partner are one and the same thing. We cannot agree with him on this point. A sub-lease and a partnership are not identical, but denote different legal relationships. The prohibition of one would not necessarily mean the prohibition of the other, and we find that where Government intend to prohibit both, it does so in distinct terms (see the 15th* rule under the *Abkari Act*, page 437, of the *Legal Remembrancer's Compilation of General Rules in force in the Revenue Department, 1893*). The Judge further records his opinion that "it would be contrary to public policy to allow persons whom the Collector would not think eligible for the granting of a toll lease to indirectly partake of the profits of a toll lease." All, however, apparently that the Collector has to do, is to see that the person to whom he leases the right of levying tolls is solvent and able to pay the contract price. It certainly is no part of the Collector's duty to ascertain what the contractor or lessee does with the profits he may make, and we fail to see how his dividing

* Rule 15 under the *Abkari Act*—

(15) That he (lessee) will not, without the previous written permission of the Collector, sub-let, in whole or in part, the right to vend conferred upon him by this license or admit partners into his business.

them among five partners would be opposed to public policy, provided only that he was not forbidden to admit partners.

Lastly, the Judge has found that the private accounts filed by the plaintiff are illegal and inadmissible in evidence, because they were kept in order to deceive Government. This finding is the result of a strange confusion of ideas. The private accounts are, as the Judge says, entirely true and show the actual realizations. It appears, however, that other accounts were kept by the firm, which were concocted accounts intended to show that the contract was a losing concern. It would be these last accounts, if any, that were kept in order to deceive Government. We cannot, however, hold with the Judge that the keeping of two sets of accounts, one true and one false, however reprehensible the practice may be, is illegal and penal under section 7 of the Tolls Act (Bombay Act III of 1875); still less can we hold that it would disentitle the plaintiff to show as between himself and his partners what the actual profit of the concern was. Both the Courts agree that the actual profit made on the transaction is proved to amount to Rs. 1,530-11-6. In this, therefore, the plaintiff is entitled to his share.

We reverse the decree of the lower appellate Court and restore that of the Court of first instance, and award plaintiff his costs in the lower appellate Court and this Court.

Decree reversed.

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