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"If an order has been made in the exercise of the discretion of the Court, and some one who is oppressed, or thinks himself oppressed by that order, appeals, saying that the Court has exercised its discretion wrongly, that person, if he is in contempt, cannot be heard to say anything of the kind until he has purged his contempt. *Garstin v. Garstin*⁽¹⁾ is an instance of that kind."

Then he goes on :—

"But when you come to the case of a order which it is suggested may have been made without jurisdiction, if upon looking at the order one can see that that really is the ground of the appeal, it seems to me that such a case has always been treated as one in which the Court will entertain the objection to the order, though the person making the objection is in contempt."

That, therefore, draws the difference between an order made in the discretion of the Court and the case where the objection is that it is made without jurisdiction.*

W. L. W.

* Note :—At this stage Counsel informed the Court that an arrangement had been arrived at between the parties. [Ed.]

(1) (1865) 4 Sw. Tr. 73.

APPELLATE CIVIL.

*Before the Honourable Mr. Chandavarkar, Acting Chief Justice, and
Mr. Justice Heaton.*

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June 21.

ISMALJI YUSUFALLI (ORIGINAL DEFENDANT 1), APPELLANT, v.
RAGHUNATH LACHIRAM MARWADI (ORIGINAL PLAINTIFF),
RESPONDENT.*

Salt Act (Bom. Act II of 1890), sections 11 and 47⁽¹⁾—Salt pans—Lease under a license from Collector—Lessee not to sublet without Collector's permission—Sub-lease by the lessee without such permission—Deposit by sub-lessee with lessee—Illegal contract—Suit by sub-lessee to recover deposit cannot lie.

Y obtained from Government a lease of certain salt pans to manufacture salt under a license. One of the conditions of the lease was that the lessee should not sublet the salt pans without the written permission of the Collector.

* Second Appeal No. 538 of 1907.

(1) Sections 11 and 47 of the Salt Act (Bom. Act II of 1890) are as follows :—

11. No salt shall be manufactured and no natural salt and, except under the provisions of section 14, no salt-earth shall be excavated or collected or removed, otherwise than by the authority and subject to the terms and conditions of a license

Without any such permission, however, Y sublet the pans to R who, as a security for the performance of the conditions of the sub-lease, deposited a sum of Rs. 1,000 with Y. The sub-lease was acted upon and on the expiration of its term R brought a suit for the recovery of the deposit from the representative of Y, the latter denied R's right to recover the deposit on the ground that it formed a consideration for an agreement which, having been forbidden by law, was illegal.

Held, dismissing the suit, that the defendant's plea should prevail. The real object and the necessary effect of the sub-lease was to enable the plaintiff to manufacture salt without a license in the guise of a sub-lease although that was forbidden by law and by the terms of the license.

SECOND appeal from the decision of Gulabdas Laldas, First Class Subordinate Judge of Thana, with appellate powers, confirming the decree passed by J. H. Betigiri, Subordinate Judge of Bassein.

The plaintiff sued to recover Rs. 1,906 under the following circumstances:—

Yusufalli Tajbhoy, a resident of Bombay and father of defendant 1, obtained from Government, represented by the Collector of Salt Revenue for the Presidency of Bombay, a license for the manufacture of salt in four salt pans in the Thana District for a period of five years from the 1st October 1899. The license was taken in partnership with Lukmanji Sulemanji, defendant 2. Clause 9 of the license was as follows:—

to be granted by the Collector in this behalf: Provided that no such license shall be necessary for any process of manufacture of salt on which duty has been paid.

47. Whoever, in contravention of this Act, or of any rule or order made under this Act, or of any license or permit obtained under this Act—

(a) manufactures, removes or transports salt; or

(b) excavates, collects or removes natural salt, or salt-earth; and whoever:

(c) except in the exercise of some power or the discharge of some duty conferred or imposed upon him under this Act or any other enactment at the time in force, receives or, without lawful excuse, retains contraband salt knowing or having reason to believe the same to be contraband salt;

shall for every such offence be punished with fine which may extend to five hundred rupees, or with imprisonment for a term which may extend to six months, or with both.

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9. I shall not sublet the Agars or salt beds without permission from the Meherban Collector Saheb of Salt Revenue for the Presidency of Bombay; on breach of this condition, the lease should be cancelled and Agars should be taken over in their possession by the Government.

Afterwards Yusufalli Tajbhoy sublet two out of the four salt pans, without the permission of the Collector, to the plaintiff Raghunath Lachiram under an agreement dated the 10th September 1900. One of the conditions of the sub-lease was that the sub-lessee should keep a sum of Rs. 1,000 in deposit with the lessor.

Yusufalli died in October 1900, and his son defendant 1 got a fresh license from the Collector on the 13th January 1902. The term of the fresh license was three years commencing from the 1st October 1901 to the 30th September 1904. After the grant of the fresh license to defendant 1 the plaintiff obtained a fresh sub-lease from him on payment of Rs. 1,000 as deposit under the terms of the agreement dated the 10th September 1900. Defendant 1 passed a receipt to the plaintiff for the amount. After the expiration of the term of the license the defendants having refused to restore the amount of the deposit to the plaintiff, he, on the 20th October 1904, brought the present suit for the recovery of the amount, namely Rs. 1,000, together with interest, Rs. 96, alleging that it was obtained from him through coercion and praying in the alternative that if the refund of the amount could not be ordered for any reason, he should be awarded damages of Rs. 1,000 on account of the defendants having infringed the terms of the agreement, dated the 10th September 1900.

Defendant 1 urged *inter alia* that the Court had no jurisdiction to try the suit, that the sub-lease to the plaintiff dated the 10th September 1900, was forbidden by the terms of the license granted to his father by the Collector, that the same was therefore illegal and plaintiff could not claim any relief under it, that the plaintiff voluntarily and for his benefit took a fresh sub-lease and paid Rs. 1,000 by way of compromise, that there was no coercion practised as alleged in the *plaint* and that the claim was time-barred as the defendant's father died on the 11th October 1900 and as the license granted to the deceased by the Collector

and the sub-lease to the plaintiff terminated on that day, while the suit was filed on the 20th October 1904.

Defendant 2 contended, in addition to the defences raised by defendant 1, that he was not a partner of defendant 1's father and that he had nothing to do with the plaintiff's sub-lease and the deposit of Rs. 1,000.

The Subordinate Judge found that the Court had jurisdiction to entertain the suit, that the plaintiff's sub-lease of the 10th September 1900 was contrary to the terms of Yusufalli's license, that the plaintiff paid Rs. 1,000 to defendant 1 on the 23rd September 1903 through coercion, that the suit was not time-barred and that defendant 2 was partner with the deceased father of defendant 1. He, therefore, awarded the claim as against both the defendants on the following among other grounds :—

On the strength of sections 12 and 47 of the Bombay Salt Act (II of 1890), it was contended before me that the sub-lease in Exhibit 42 was wholly illegal, inasmuch as under it, plaintiff was given the right to manufacture, remove, etc., salt, which were acts which a licensee alone could do and which, if done, by a stranger would entail on him the penalties in section 47 above. I cannot accede to this agreement as it is not a fair one and as it does not state the whole truth. For a man may do all or any of the acts penalised in section 47 above and without incurring the penalties, so long as he does so under the shelter of some license and under its protecting wings. The case would certainly have been otherwise if the licensee and he alone bodily were permitted under the license to do the things mentioned in section 12 above. But facts and every day experience are otherwise and point clearly to the contrary. Clause 19 itself of the leases in Exhibits 51 and 71 clearly lays down that other persons purporting to act on behalf of the licensee would be allowed to make vahivat in the salt beds and their acts would be treated as the acts of the licensee himself by the authorities of the Customs and Salt Department. It follows therefore that the said authorities would not recognize persons who claimed rights independent of the licensee or adversely to him or who were objectionable on any other grounds. In this very case it is admitted by defendants that plaintiff acting on behalf of defendant 1 and his father has successfully carried out the terms of the four years' agreement in Exhibit 42 and without in any way coming into conflict with the authorities of the Salt Department. Further clause 16 in Exhibits 51 and 71 expressly authorizes the executants in them to appoint their agents with powers-of-attorney, with a view to facilitate the sale and removal of salt, in cases where the licensee himself is unable to be personally present. As regards the law applicable to the case I follow I. L. R. 24 Bom. 622. It is not shown

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that the Salt Act of 1890 forbids subletting or that it attaches any penalty to such transaction. Section 13 of the said Act gives power, no doubt, to the Commissioner, subject to the directions of Government, to impose certain conditions in the license to be issued. Under one of the conditions so imposed in Exhibits 51 and 71, the executants in them were only liable to forfeit their leases for subletting them, in case the authorities thought fit to do so for administrative purposes. The Salt Act (1890), I need hardly say, is passed for the benefit of the revenue, as is the Act imposing tolls considered in the decision above quoted. A reference to sections 7 and 10 of the Tolls Act will bring into relief the analogy this case bears to the one quoted. I, therefore, find that the contract in Exhibit 42 is not illegal and that the present suit is maintainable.

On appeal by defendant 1 the decree was confirmed. With respect to clause 9 of the license the Judge in appeal made the following observations :—

The contract to sublet was certainly prohibited by the terms of the license or lease in favour of Yusufally Exhibit 71, clause 9, and again by similar paragraph in Exhibit 51 which was executed in 1902 by defendant in renewal of his deceased father's agreement. The prohibition, however, is not absolute and may be removed by the Collector of Salt Revenue for Bombay. The only penalty imposed was that if any pans were sublet to a third person without the Collector's permission the license was liable to be recalled and the lands to be resumed. Though the plaintiff manufactured and sold the salt in the two salt pans of Bhati and Juna for four years without the contract under Exhibit 42 having been sanctioned by the Collector no objection was raised by the authorities concerned.

I am not convinced that the combined effect of sections 11, 12 and 47 of Bombay Act II of 1890 is to render the contract contained in Exhibit 42 illegal, the prohibition against subletting and alienations in other ways contained in clause 5 of the parwanas 90 to 93 without the Collector's permission appears to be re-affirmation of the term in clause 9 of Exhibits 71 and 51 and does not appear to render the contract to sublet illegal or criminally punishable, and this case is rightly held by the lower Court as falling within the rule enunciated in the decision on page 622, I. L. R. 24 Bom.

Defendant 1 preferred a second appeal.

H. C. Coyaji with *G. K. Dandekar* for the appellant (defendant 1) :—We submit that the view taken by the lower Courts as regards the sub-lease is not correct. The plaintiff undertook to manufacture salt under the sub-lease on his own account. He was to pay us the sum of Rs. 14,000 and odd per year and to manufacture salt at his own expense. He admitted in his deposition that he was the owner of profit or loss. Thus the

plaintiff's act of manufacturing or selling salt without a license from the Collector was contrary to section 11 of the Salt Act. The object of both the parties in granting and accepting the sub-lease was to enable the plaintiff to manufacture and sell salt in contravention of the Salt Act. Such manufacture or sale is made punishable by section 47 of the Act.

The object of the sub-lease was illegal under section 23 of the Contract Act as being forbidden by the Salt Act. It was of such a nature that it defeated the provisions of the Salt Act. There is no case decided under the Salt Act, but we rely on the principle of the rulings in *Hormasji Motabhai v. Pestanji Dhanji-bhai*⁽¹⁾, *Raghunath Lalman v. Nathu Hirji Bhat*⁽²⁾ and *Gopalrao v. Kallappa*⁽³⁾.

V. B. Pradhan for the respondent (plaintiff):—We contend that our sub-lease was not in contravention of the original lease within the terms of section 47 of the Salt Act. We got authority to manage two salt pans under the original lease and all our acts were protected by that lease. Besides such a sub-lease is recognized by the Salt Department itself as observed by the lower Court. The rulings quoted have no bearing on the present case as they were cases under the Abkari and Opium Acts. The Salt Act is an Act for fiscal purposes and there is no personal element involved in granting a license under that Act as in the other two. The present case is governed by the principle laid down in *Gauri Shankar v. Mumtaz Ali Khan*⁽⁴⁾ and *Bhikanbhai v. Hiralal*⁽⁵⁾. The latter case is stronger on facts than the present. The condition against subletting is for the benefit of Government, but the licensee is bound by the sub-lease. The subletting can at the most be treated as a breach of the condition attached to the license. Whenever the Legislature want to penalize such a breach of condition, they explicitly say so.

Compare the wording of section 45, clause (c), of the Abkari Act (V of 1878). A similar provision is not made in the Salt Act which merely prescribes the penalty of the forfeiture of the

(1) (1887) 12 Bom. 422.

(2) (1894) 19 Bom. 626.

(3) (1901) 3 Bom. L. R. 164.

(4) (1879) 2 All. 411.

(5) (1900) 24 Bom. 622.

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license. Government did not forfeit the defendant's license though they were aware of the management by us.

Granting that no one but the original licensee or his manager can manage the salt pans under the Salt Act, then we say that our management was on behalf of the original licensee because our agreement with the original licensee, Exhibit 42, contains a clause that we were to hold a power-of-attorney from him and that shows that we were to be his *vahivatdars* under the Act.

CHANDAVARKAR, Ag. C. J.:—The facts in this second appeal are shortly these:—One Yusufalli, father of the appellant, obtained from Government a lease of certain salt pans under a certain license, one condition of which was that the lessee shall not sublet the salt pans without the written permission of the Collector. Without any such permission, however, Yusufalli sublet to the respondent, who, as security for the performance of the conditions binding on him under the sub-lease, deposited a sum of Rs. 1,000 with Yusufalli. The respondent accordingly entered on possession of the salt pans under his sub-lease. Some time after that, Yusufalli having died, the appellant, his son, obtained a fresh lease with a fresh license from Government and the respondent obtained a sub-lease from the appellant on the same terms as those contained in the sub-lease obtained from Yusufalli. For this sub-lease the appellant had obtained no permission from the Collector as required by the license. The respondent deposited a sum of Rs. 1,000 with the appellant to secure the performance by him of the conditions of the new sub-lease; the sub-lease was acted upon; its term expired; and the respondent paid all that was due under it to the appellant. The suit out of which the second appeal arises has been brought by the respondent to recover the deposit of Rs. 1,000, because the appellant denied the respondent's right to that amount on the ground that the amount in question formed a consideration for an agreement, which, having been forbidden by law, was illegal. This was the defence to the action raised in both the Courts below and it has failed there.

The ground on which both those Courts have proceeded in overruling the plea of illegality is that the contract to sublet is not

absolutely prohibited by the license granted by the Collector to the appellant. But that view of the dealing between the parties ignores the real nature and object of the deposit to recover which the present suit was brought.

Under section 11 of the Salt Act (Bombay Act II of 1890) the manufacture of salt without a license is prohibited subject to a proviso which is not material to our purpose here. Section 47 of the Act makes such manufacture an offence and renders any person committing it liable to punishment.

The real object and necessary effect of the agreement between the appellant and the respondent was to enable the latter to manufacture salt without a license in the guise of a sub-lease, although that was forbidden by law and by the terms of the license.

These facts support the application to this case of the principle of law enunciated by this Court in *Hormasji Motabhai v. Pestanji Dhanjibhai*⁽¹⁾ and *Raghunath Lalman v. Nathu Hirji Bhat*⁽²⁾.

But a point is raised for the first time in the second appeal by the learned pleader for the respondent. He states that his client manufactured salt not only under a sub-lease but also as manager under a power-of-attorney from the appellant. This case was not made in the Court below; and there is no evidence in support of it. Even if there had been, it is difficult to see how the power-of-attorney could have helped the respondent's case as *ex concessiois* it existed side by side with the sub-lease. The illegal object of the transaction being clear upon the facts, the power-of-attorney could only have proved that by means of it the parties intended to disguise the real object of the agreement and defraud the Government.

The decree must be reversed and the claim rejected. Each party to bear his own costs throughout.

HEATON, J. — I agree that the decree must be reversed and the claim rejected.

(1) (1887) 12 Bom. 422.

(2) (1894) 19 Bom. 626.

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It was assumed by the lower Court that the agreement was an agreement to sublet certain salt-pans, which was prohibited by the license which Yusufalli obtained, and we must take it that that is so. In the lower Court it was contended otherwise, but now it has been sought to establish that the plaintiff acted on behalf of defendant No. 1 and not on his own account. That, however, is a question of fact. It was not made good in the lower Court and we cannot go into it here. The question, therefore, is whether the object of the agreement is forbidden by law within the meaning of section 25 of the Contract Act. It seems to me that it is, for the object was to enable the plaintiff to manufacture salt without a license, and the law says that no salt shall be manufactured otherwise than by the authority of a license granted by the Collector.

Decree reversed.

G. B. R.

APPELLATE CIVIL.

Before Mr. Justice Batchelor and Mr. Justice Beaman.

1909.
July 2.

KISANDAS RUPCHAND AND ANOTHER (ORIGINAL DEFENDANTS),
APPELLANTS, v. RACHAPPA VITHOBA SHILWANT AND OTHERS
(ORIGINAL PLAINTIFFS), RESPONDENTS.*

*Civil Procedure Code (Act V. of 1908), O. VI, r. 17—Amendment of pleadings.
—Defence of the bar of limitation—Practice as to amendment of plaint.*

The plaintiffs alleging that in pursuance of a partnership agreement they delivered Rs. 4,001 worth of cloth to defendants, sued for an order for the dissolution of the partnership and accounts. The Subordinate Judge found that the plaintiffs did deliver Rs. 4,001 worth of cloth to the defendants as alleged; but he came to the conclusion that no partnership was created and held that the suit as framed would not lie. The plaintiffs appealed mainly on the ground that the partnership had been created and that the suit was in order. When the appeal came on for hearing this plea was abandoned; the plaintiffs admitted that the facts stated in their plaint did not constitute a partnership and prayed for leave to amend by adding a prayer for the recovery of the Rs. 4,001. At this date the claim for the money was barred by limitation.

* Second Appeal No. 23 of 1908.