PETITIONER:
FIRM OF PRATAPCHAND NOPAJI

Vs.

RESPONDENT:
FIRM OF KOTRIKE VENKATTA SETTY & SONS ETC.

DATE OF JUDGMENT12/12/1974

BENCH:
BEG, M. HAMEEDULLAH
BENCH:
BEG, M. HAMEEDULLAH
KRISHNAIYER, V.R.
GOSWAMI, P.K.

CITATION:
1975 AIR 1223 1975 SCR (3) 1
1975 SCC (2) 208

ACT:
Indian Contract Act (9 of 1872) Section 23, 222 and 224-Scope of-collateral agreement, when illegal.

HEADNOTE:
The appellant firm sued for amounts as due to indemnify it under S. 222 of the Contract Act, on the strength of payments said to have been made by the firm to third parties on behalf of the respondents who were alleged to have directed the appellant to enter into 'Badla' transactions for them. These transactions are contracts for speculation in rise and fall of price of groundnut and oil seeds purchased only notionally without any intention to actually deliver them to the purchasers. In such a transaction, the purchaser is not at all expected to make a demand for actual delivery of goods ostensibly sold.
Confirming the judgment of the High Court, held that, having regard to the objects 'of the prohibition imposed by the Central Government on forward contracts on groundnut seeds and oil-seeds in the interest of general public, so that supply at reasonable rates of those essential commodities is not jeopardised; the absolute terms of the prohibition; the penalties imposed for its infringement; and the careful manner in which only those contracts which are for actual. delivery and supply to bona fide purchasers are excluded from the prohibition;, the contracts were tainted with unlawfulness of their object and are forbidden by law, and hence are struck by the provisions of s. 23 of the Contract Act. [19B-D; 20 D-E]
(1) If an agreement is merely collateral to another or constitutes an aid facilitating the carrying out of the object of the other agreement which, though void, is not in itself prohibited within meaning of s. 23, it may be enforced as a collateral agreement. If, on the other hand, it is part of a mechanism meant to defeat what the law has actually prohibited, the courts will not countenance a claim based upon the agreement, because, it will be tainted with an illegality of the object sought to be achieved which is hit by the section. The object of an agreement cannot be said to be forbidden or unlawful merely because the agreement results in what is known as a 'void contract'. A

void agreement when coupled with other facts, may become part of transaction which creates legal rights, but this is no so if the object is prohibited or 'mal in se'. [12D-G]
(2) The question whether the parties through whom the appellant actually alleged carrying out the contracts set up between himself and defendants, could themselves be regarded as Principals or agents of the appellants, will be immaterial if the objects of the contracts are found to be tained with the kind of illegality which is struck by s. 23 of the Contract Act. Again, the mere fact that the contracts were entered into at Kurnool in the State of Andhra Pradesh would also not make any difference in principle if the object of the contracts which were to be carried out at Bombay were of such a kind as to be hit by the section. [13A-C]
(3) The contracts between the appellant and the respondents are not wagering contracts, though each Party knew that their object was to indulge in speculation. [10C-D]
Bhagwandas Parasram v. Burjori Ruttomji Bomanji 45 I.A. 29, 33, referred to.
(4) But, the forward contracts violated the provisions of two Orders issued under s. 2(2) of the Bombay Forward Contracts Control Act, 1947. [16A-B]
2L379Sup.CT/75
2
(5) Moreover, s. 17 of the Essential Supplies (Temporary Powers) Act, 1946, kept alive the provisions of the Oil-seeds (Forward Contracts Prohibition) Order, 1943. The Central Act is enacted for the control of production, supply and distribution of essential commodities and covers food stuffs, Under s. 2(c) of the Act food stuffs include edible oil-seeds and oils, and s. 7(2) makes the contravention of any Order under s. 3, relating to food stuffs a crime and punishable with imprisonment. [16E; 17A-D]
(6) The Central Government has issued a notification under s, 5 of the Oil-seeds (Forward Contracts Prohibition) Order but the two conditions imposed for excluding contracts relating the groundnuts are not satisfied in the ,present case, They are (a) the contracts must be in respect of specified qualities or types, and (b) must be for specific deliveries aid are not transferable to 3rd parties. The word 'and' cannot be read as 'or' and both conditions must be satisfied. The contracts, in the instant case, set up by the appellant, were not and could not have been for actual delivery because they were only 'Badla' transactions. If the contracts were not for genuine or actual delivery but only for speculation on differences in prices the condition for the exclusion of the contracts from the Purview of the control Order, which contemplates actually intended delivery,would not be satisfied. The contracts were, therefore, prohibited under the provisions of the Essential Supplies Act, 1946 read with Central Order of 1943, and hence the contracts were not merely void but illegal in the sense that their objects are forbidden. [18F-19B]
(7) A claim for indemnification under s. 222, Contract Act, is only maintainable if the acts, which the agent is employed to do, are lawful. Agreements to commit criminal acts are expressly and specifically excluded by s. 224 from the scope of any right to an indemnity. The provisions of the Order of 1943 are applicable throughout India are not confined to forward contracts entered into or meant to be carried out in any particular part of India and their violation is a crime, The objects of the contracts set up by the appellants cannot be carried out by merely entering into them outside Bombay or engaging third parties as sub-agents

or in any other capacity to execute them. [20C-D]
(8) The High Court rightly relied on those decisions holding agreements ,collateral to prohibited contracts to be also unenforceable, because, the taint attaches to them which makes them also contrary to public policy. Such ;agreements fall within the class of cases mentioned in Gherulal Parakh v. Merhadeodas Maiya & Ors. [1959] (2) Suppl. S.C.R. 406, where harmful results of permitting the contracts, in terms of injury to the public at large, are evident and indisputable. [19G-H]

ARGUMENTS:

For the Appellants: (1) The only contested point which survives in the appeal is whether the plaintiffs acted lawfully when they-entered into contracts with the firms of P.W. 2 and P.W. 3 on behalf of the defendants.
(2) In considering the above question it is important to notice that the ,firms of P.W. 2 and P.W. 3 were themselves the commission agents of the plaintiffs in these transactions. The findings of both the lower courts are (a) that the plaintiffs were the commission agents of the defendants for the said transaction; (b) that the plaintiffs acting as principals (i.e. without disclosing their position as agents of the defendants) employed the firms of P.W. 2 and P.W. 3 as commission agents to carry out the transactions and (c) the firms of P.W. 2 and P.W. 3 acting as principals entered into the transactions with the firms of P.W. 1.
(3) These being the relevant facts, the question is whether the contracts between the plaintiffs on the one hand and firms of P.W. 2 and P.W. 3 on the other were unlawful by virtue of (a) Bombay Act III of 1865, (b) the Bombay Forward Contracts Control Act. being Act LXIV of 1947 and (c) the Oil 'Seeds (Forward Contract Prohibition) Order, 1943.
3
(4) The contracts between the plaintiffs and firms of P.W. 2 and P.W. 3 were not unlawful under the 1865 Bombay Act for the following reasons :-
(a) The plaintiffs did not enter into any agreements "by way of wager" (in the words of section _30 of the Contract Act) with the firms of P.W. 2 and P.W. 3 as they had nothing to gain or to lose by the _rise or fall of the forward market rates of oil seeds. A wagering contract requires that the gain of one party to the contract should be the loss of the other party thereto (vide 45 I-A, 29; 39 Bom. L.R. 1083; 1879 Q.B.D. 685; Pollock & Mulla's Indian Contract and Specific Relief Acts, page 313; Halsbury's Laws of England, 4th Edition Vol. 1 para 809). By the same test, the principal contracts between the firms of P.W. 2-3 and the firm of P.W. I were also not wagering contracts. The fact is that the defendants indulged in speculative transactions through the agency of the plaintiffs, but it is well settled that speculative transactions do not by themselves result in wagering agreements. The courts below erroneously held, merely from the fact that no deliveries were given or taken, that the transactions were by way of wager. The lower courts failed to realise that when one party to the transactions (defendants in this case) is interested in speculating on market fluctuations, he cancels One contract by a cross contract, with the result that no delivery takes place, although both the contracts are for delivery, Since there were no wagers in the present case, the Bombay 1865 Act has no application.
(b) The 1865 Bombay Act does not contain any punitive provision. It merely declares certain agreements to be void. Even supposing the agreements between the plaintiffs

and the firms of P.W. 2-3 were for wager (which they clearly were not), they would merely be void and not unlawful by virtue of the Bombay Act. Even in that case_ the plaintiffs as agents are entitled to recover their dues from the defendants, as held by this Hon'ble Court in Gherumal Parakh's case [1959] Supp. 2 S.C.R. 406. Obviously the Bombay 1865 Act was not operative in the region where the contracts between the Plaintiffs and defendants took place,

(5) The contracts between the plaintiffs and the firms of P.W. 2-3 were not unlawful under the Bombay Forward Contracts Control Act No. LXIV of 1947 for the following reasons :-

(a) Even the principal contracts between the firms of P.W. 2-3 and the firm of P.W. 1 were not unlawful under s. 8 of the Act. The contracts did not violate clause 1(a) of s. 8 of the said Act, because the defendants failed to point out any bye-law of the Bombay Oil Seeds Exchange Ltd. which rendered agreements made in contravention thereof unlawful (vide 59 Bom, L.R. 4). The agreement also did not contravene clause 1 (b) of s. 8 since one of contracting parties, namely the firm of P.W. 1 was a member of the Bombay Oil Seeds Exchange Ltd. (vide page 32 line 21 and page 55 line 26.)

(b) In any case, the transactions between the plaintiffs on the one hand, and the firms of P.W. 2-3 on the other, were as between principal and agent, and since these transactions did not Come under the definition of forward contracts, they were not affected by the provisions of the '1947 Bombay Act.

(6) The transactions between the plaintiffs and the firms of P.W. 2-3 were not unlawful under the Oil Seeds (Forward Contract Prohibition) Order. 1943 read with the Notification issued thereunder (page 285 of the paper book) for the following reasons :-

(a) The contracts between the firms of P.W. 2-3 and the firm of P.W. 1 Were "forward contracts" as defined by clause 2(ii) of the 1943 Order, but not the agency contracts between the plaintiffs on the one band and the firm, of P.W. 2-3 on the other. These latter contracts were therefore not affected by the 1943 order and were not unlawful. As deposed to by the plaintiffs' Partner P.W. 4 (Paper book page 83 line 11), the plaintiffs had never authorised the firms of P.W. 2-3 to enter with any illegal contracts. The Badla transactions, which the plaintiffs had authorised the firms of P.W. 2-3 to

4

enter into, could have been brought about by P.W. 2-3 without infringing the conditions laid down in the Notifications issued under the 1943 Order. The two conditions in the Notifications were that the contracts should be for specific delivery and that the deliveries thereunder should not be transferable to third parties. There is nothing in the nature of Badla transactions which requires that they should not be for specific delivery or that the deliveries thereunder should be transferable. Since it was open to the firms of P.W. 2-3 to carry out the instructions of the plaintiffs in a lawful manner, the act of the plaintiffs in entering into the contracts with the firms of P.W. 2-3 was not an "unlawful Act" within the meaning of s. 222 of the Contract Act and the plaintiffs are therefore entitled to be indemnified by the defendants.

(b) The High Court was, with respect, wrong in differing from the trial court which held that the contracts between the firms of P.W. 2-3 and the firm of P.W. I were for specific delivery. In the case of Badla transactions, the

mere fact that no deliveries actually take place should not lead to the inference that the contracts were not for specific delivery. Both the cross contracts in Badla transactions are for specific delivery, but no delivery takes Place because the later contract cancels the effect of the earlier one. This is clear from the evidence of P.W. 2 from 'pages 39 to 43, were the witness gives details of specific delivery contracts for the purchase of 400 tons of groundnut of a particular date (vaida), subsequent cross contracts for the sale of 400 tons of groundnut of the same vaida, and contemporaneous contracts for the purchase of 400 tons of groundnut of the next vaida. Each of these contracts were for specific delivery. On the' other question of transferability, however, both the courts below, have held that the deliveries under these contracts, were not made nontransferable. To that extent the contracts between the firms of P.W. 2-3 and P.W. 1 may come under the mischief of the 1943 Order. It was, however, open to the firms of P.W. 2-3 to carry out the instructions of the plaintiffs in a lawful manner.

(c) Having entered into lawful contracts with the firms of P.W. 2 and 3, the plaintiffs were justified in paying the losses incurred in these transactions. It was no part of the duty of the plaintiffs to go to Bombay and find out whether there was any lacuna in the contracts between the firms of P.W. 2-3 and the firm of P.W. 1 so as to enable the plaintiffs to avoid paying the dues of the firms of P.W. 2-3 (vide Halsbury's Laws of England, 4th Edn. Vol. 1 paras 808 and 809; also s. 223 Contract Act.)

(d) S. 224 of the Contract Act has no application to the facts of the present case, because the plaintiffs did not commit any criminal act in entering into contracts with the firms of P.W. 2-3 while carrying out the instructions of the defendants.

(e) After the issue of the notifications on 31st May, 1943, the provisions of the 1943 Order were no more prohibitory. The provisions were only regulatory.

For the Respondents

1. Concurrent Findings of the Courts Below

1.1. There are concurrent findings of the High Court and the trial court, holding inter alia,

(a) that the suit contracts between the plaintiffs and the defendants would defeat the provisions of law or are prohibited by law and would thus become unenforceable under s. 23 of the Indian Contract Act;

(b) that the suit contracts are in the nature of wagering contracts and are not capable of enforcement;

(c) hat the plaintiffs are not entitled to indemnification from the defendants under s. 222 of the Contract Act.

5

2. S. 23 of the Contract Act

2.1. The suit agreements fall within the ambit of s. 23 of the Contract Act in that they are (a) forbidden by law and (b) if permitted they would defeat the provisions of law.

2.2. The suit contracts have as their 'object' or 'consideration' (mentioned in s. 23 of the Contract Act) the doing of something which is forbidden under the Central Order of 1943 or under the relevant Bombay Act of 1947.

2.3. No question of extra-territoriality of the Bombay Acts would arise in view of the fact that although the Bombay Acts would apply only to Bombay State, nevertheless, the Agreements between the parties was with the sole object of breaking the said law. The,, terms 'object' 'consideration', 'forbidden by law' and 'defeat the provisions of any law', under s. 23 of the Contract Act on a

true and proper construction operate in respect of any law and there is no requirement in the said section that such a law must be enforced at the place where such an agreement to break the said law was entered into. It is enough to attract the provisions of s. 23 that the Agreement is entered into with the object of defeating a law and it is not an additional requirement that such law which is sought to be defeated should be in force at the spot or the place where the agreement is entered into. If the contrary interpretation urged by the plaintiffs is accepted, it would lead to a perpetuation of a device to defeat the provisions of law. To take an instance, supposing there is a law of prohibition of intoxicating liquor in force in Delhi, and if two people want to enter into an agreement to break that law against manufacturing and selling such liquor and make the agreement enforceable, all that they need do is to step across the border into Haryana little beyond Palam Airport, enter into an agreement and cross back to Delhi and still make an agreement enforceable in the Haryana Courts. Such an interpretation would not be in consonance with the tenor of s. 23 of the Contract Act.

2.4. Even if the suit agreement between the plaintiffs and defendants were independent agreements, they would be hit by s. 23. As a matter of fact, the said agreement between the plaintiffs and P.Ws. 2, 3 and 4, in Bombay and only in that sense have been termed collateral and such 'collateral' agreements would equally come within the ambit of s. 23.

2.5. The illegality of the agreement would also arise by being devoid of any consideration on law since P.W. 4 was under no lawful obligation to Pay the moneys to P.W. 2 and 3 in respect of the said agreement nor were P.W. 2 and 3 under a legal obligation to pay moneys to P.W. 1.

3. Forward Contract Prohibited by law, :

3.1. The suit transancts, as concurrently held by the Courts below, are forward contracts, prohibited by the Central Order of 1943 and the Bombay Act of 1947. Both the Courts below have also found that transacts are not exempted under the notifications of exemption since the transactions were admittedly of transferable nature (as admitted by P.W. 1 himself).

3.2. In finding the legality of the suit transants and the plea of exemption in respect of them. what is relevant is whether the transactions generally are transferable (as. admitted by P.W. 1) and not whether each transaction was in fact transferred or not.

4. Indemnification under v. 222 of Contract Act:

4.1. The suit agreements are in the nature of an employment of the plaintiffs by the defendants and of P.W. 2 and 3 by P.W. 1 and to do acts which are criminal according to the concerned laws in view of the fact that such offences render the concerned person liable to fine or improsnment. By rea-
6
sons of S. 222 of the Contract Act, the defendants are not liable in law to indemnify the plaintiffs against the consequences of the said criminal acts for violating the concerned laws.

4.2. S. 222 of the Contract Act requires that the defendants should indemnify P.W. 4 only if the said P.W. 4 was bound to make payment for the illegal agreements to P.W.s. 2 and 3. P.W. 4 was not so bound and therefore the defendants were not liable to indemnify P.W. 4. Since the agreement of agency was null and void, unlawful and illegal and was further devoid of consideration, it cannot form a legal and valid basis for the indemnification claim.

4.3. The agreement of agency in this case cannot be

disassociated from the consideration or the object of the agreement within the meaning of S. 23 of the Contract Act in deciding whether the said agreement of agency is null and void, unlawful and illegal.

4.4. The agreements for the sale and purchase of oil seeds in Bombay are in fact between the defendants (represented by P.W. 4) and P.Ws. 2 and 3. The transactions between P.Ws. 2 and 3 on the one hand and P.W. 1 on the other do not militate against the fact of the illegal agreements between P.W. 4 on one side and P.Ws. 2 and 3 on the other, acting towards each other as principals on either side. P.W. 4 paid P.Ws. 2 and 3 on the basis that P.Ws. 2 and 3 are the principals with whom he was dealing as a principal himself, that P.Ws. 2 and 3 and P.W. 4 himself were commission agents does not affect this fact. This fact of their having acted as principals is a finding on an issue given by the High Court and the trial court.

4.5. If P.W. 2 and 3 were not the principal Parties to the illegal agreements P.W. 4 had no justification at all to pay them in respect of the said agreements and to claim indemnification from the defendants under S. 222.

4.6. There is no implication of extra territorial jurisdiction in either the Bombay legislature or in the Bombay Courts involved in the plea of the defendants. The agreements between the defendants (acting through P.W. 4) and P.Ws. 2 and 3 (or even P.W. 4) are agreements to which the Bombay Law applies and the lawful enforceability of which agreement in the Bombay State must be established before P.W. 4 can call upon the defendants to indemnify him for payments made in the Bombay state in respect of the said agreements. The payments are even otherwise invalid under the laws relating to sale and purchase of oil seeds in India.

5. Wagering Contracts :

5.1. The four sets of agreements (a) between P.W. 4 and PW. 2, (b) between P.W. 4 and P.W. 3. (c) between P.W. 2 and P.W. 1 and (d) between P.W. 3 and P.W. 1 for the purchase and sale of groundnut and castor seed were contracts as between principal and Principal and amounted to wagering contracts prohibited and rendered null and ’void, unlawful and illegal by Bombay Act III of 1865.

5.2. The law in Bombay State relating to wagers and the law in India relating to prohibition of sale and purchase of oil seeds cannot be circumvented by the agreements referred to in paragraphs above being made between agents of principals and instead of principals themselves. Qui facit per alium facit per se. A person might not do by means of another what he is prohibited from doing himself.

5.3. A wagering contract does not cease to be one by the intervention of commission agents. or by a principal or his agent entering into such a contract with another agent or that agent’s principal.

5.4. The decision in [1959] Supp. 2 S.C.R. 406 and [1955] 1 S.C.R. 439 do not apply to this case because firstly they do not deal with prohibited

7

forward contracts in Bombay or elsewhere and secondly they do not involve violation of the law of wagering contracts to the State of Bombay under Bombay Act III of 1965.

5.5. It is to be further noticed that the suit transactions do not conform to the requirements of bye law 123 concerned because there were neither no contracts notes at all or in a few cases (in which there were contract notes) they were not in conformity with the prescribed forms.

5.6. The duty of courts in Kurnool to prevent the

circumvention and violation of Bombay law cannot be less than the duty of British courts to prevent circumvention and violation of foreign law when the foreign law is no repugnant to British law and when the foreign country is a friendly country.

6. 'Badla' Transactions :

6.1. 'Badla' automatically involves two or more forward contracts.

JUDGMENT:

CIVIL APPELLATE JURISDICTION : Civil Appeals Nos. 2382 to 2384 of 1968.

Appeals by special leave from the judgment & decree dated the 27th September, 1967 of the Andhra Pradesh High Court in A. No. 4-6,/ 1962

M. C. Chagla, V. M. Tarkunde, H. K. Puri and K. K. Mohan, for the appellant. (In all the appeals)

B. V. Subramanian, A. V. Rangam and A. Subhashini, for respondent Nos. 2 & 3 (In C.A. No. 2382/68) and for respondent nos. 1 & 5.

(In C.A. No. 2384/68)

The Judgment of the Court was delivered by

BEG, J.-The three consolidated appeals before us by grant of special leave are directed against a common judgment of the High Court of Andhra Pradesh, by which the plaintiff's appeals in three suits, filed on similar facts, were dismissed. They can be decided by us or. the question whether the contracts set up by the plaintiff-appellant were struck by the provisions of Section 23 of the Contract Act. The section reads as follows :

> "23. The consideration or object of an agreement is lawful. unless-it is forbidden by law; or
> is of such a nature that, if permitted, it would defeat the provisions of any law; or
> is fraudulent; or
> involves or implies injury to the person or property of another; or
> the Court regards it as immoral, or opposed to public policy.
> In each of these cases, the consideration or object of an agreement is said to be unlawful. Every, agreement of which the object or consideration is unlawful, is void".

8

The appellant, Firm of Pratapchand Nopaji, is the plaintiff. in all the three suits, but the defendants of each suit, the respondents before us, are different. The plaintiff claimed Rs. 78,201.15 ans. in ,,original suit No. 106 of. 1954, Rs. 13,978.4 ans. in original suit No. 107 of 1954 and Rs. 91,697.4 ans. in original suit No. 114 of 1954, as amounts due to indemnify him under section 222 of the Contract Act on the strength of payments said to have been made by the plaintiff to third parties on behalf of the defendants who are alleged to have directed the plaintiff to enter into "badla" transactions for them. Three other suits, claiming amounts alleged to have been borrowed, also filed by the same plaintiff, were tried together with these three suits; but, we are not concerned here with the other three suits from the dismissal of which no appeal was preferred.

The character of the contract set up in each case is brought out by paragraph 3 of the original suit No. 106 of 1954 where the plaintiff said :

"The defendants are big merchants and have been carrying on trade outside Dhone, even in places like Bombay. They wanted to do the business of purchasing and selling groundnut seeds and oil seeds in Bombay market and for this purpose engaged the plaintiffs as commission agents to contact with Bombay Commission Agents, who were entering into contracts with customers for purchasing or selling groundnut seeds and castor oil seeds, according to the orders of the defendants which the plaintiffs were, communicating to them. The Bombay commission agents used to give intimation to the plaintiffs of the fact of having executed the orders (the contracts of sale or purchase) and the terms, the rate etc., of the contracts. The plaintiffs were immediately, communicating the information to the defendants. The business was according to the custom prevailing in the, Bombay market, viz. the custom of Badla. The defendants not only agreed in general to abide by the custom of Badla, but specifically consented to every such Badla. At the request of the defendants the transactions were settled after undergoing a few badlas. Such settlements were beneficial to the defendants as the market was falling and delay would have meant greater loss when the market was falling the Bombay agents were pressing for cash settlement on pain of declaring them as defaulters which will result in a disability to do any further business. The defendants knew this state of affairs and they realised that a settlement was the only course beneficial to them. So they specifically told the plaintiffs that they must at any cost preserve their reputation in the Bombay market and with plaintiffs. The defendants hence agreed to pay the amount and on their request and on their behalf the plaintiffs paid all amounts due to the Bombay Commission Agents according to the Patties sent by the Bombay Agents in respect of the transactions relating to the defendants. The defendants also agreed-to pay to the plaintiffs interest on the

9

amounts so advanced by the 'plaintiffs for payment to the Bombay agents. The Bombay, Commission agents 'were sending parties-of 'transactions to the plaintiffs. As already stated, at the request of the defendants, the plaintiffs' paid all such losses and other charges according to the patties sent by Bombay Commission agents on the promise of the defendants to repay all such amounts to the plaintiffs with interest. The extracts of the accounts filed with this plaint show the transactions and the amounts paid by the plaintiffs at the request of and on behalf of the defendants".

The plaintiff's case was that the authority to engage in Badla transactions on forward contracts, which are contracts for the delivery of specified goods on future dates, implied what is known as "continuation" or "carrying over" in the

terminology of the Stock Exchange. The meaning of such a transaction is given, in Halsbury's Laws of England-3rd Edn. Vol. 36 at p. 547 (para 842) as follows

> "If a purchaser of securities during a dealing period does not wish to complete his purchase during the next following settlement period he may arrange to resell for the current account the securities which he has agreed to buy for that account, and to purchase for the new account. Conversely, a seller of securities during a dealing period who does not wish to deliver during the next following settlement period may arrange to repurchase for the current account the securities which he has agreed to sell, and to sell for the new account. Such an arrangement is known as a continuation or carrying over".

This is explained further and distinguished from a loan (at page 548para 845) :

> "Continuation or carrying-over is in form and in law a sale and repurchase, or a purchase and resale, as the case may be. It is a new contract, and not merely getting further time for, the performance of the old contract.
>
> A continuation being a contract of sale and repurchase and not a loan, the original seller becomes again the, absolute owner of the securities carried over, and is not bound to redeliver the identical.securities but an equal amount of similar securities. If, therefore, he sells the securities taken in by him and makes a profit thereon, he may retain it to his own use. In the case of a loan, however, if the lender sells the securities deposited, the borrower may charge him with the price obtained for them if he finds it to his interest to do so".
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> Under the Defence of India Rules, the definition of Badla provides that it "includes a contango and a backwardation and any other arrangement whereby the performance of any
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> 10
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> obligation under a contract to take or give delivery of securities within a stipulated period is postponed to some future date in consideration of the payment or receipt of interest or other charges".

"Carrying-over or "continuation" is also given as one of the meanings of the term "contango" or "back-wardation" in Halsbury's Laws of England-3rd Edn. Vol. 36 at p. 548. If we substitute "goods", in respect of which forward contracts are made, for "securities", we get the exact nature of the transactions set up by the plaintiff in each case. They are nothing short of contracts or speculation in rise and fall of prices of goods purchased only notionally without any intention to actually deliver them to the purchasers. In such a transaction, a purchaser is not at all expected to make a demand for actual delivery of goods ostensibly sold. We :find considerable force in the plaintiffs contention that at least contracts between the plaintiffs and defendants were not wagering contracts although we think, in agreement with the High Court, that each party knew that their object was to indulge in speculation. In Bhagwandas Parasram (A firm) v. Burjori Ruttomji Bomanji,(1) after examining the facts of a case in which a firm of "pucca

adatias" was authorised. by a defendant intending to speculate in differences, to sell and then to resell for the purpose of making profits, it was found that, as the plaintiff could not be said to either lose or benefit correspondingly from variations in price, there could be no agreement in the nature of a wager between the principal and the agent whatever may have been intentions of the principal. It wag held that, in a wagering contract, there has to be mutuality in the sense that the gain of one party would be the loss of the other on the happening of the uncertain event which is the subject matter of a wager. It was pointed out there (at p.33) :

> "Speculation does not necessarily involve a contract by way of wager, and to constitute such a contract a common intention to wager is essential. No such intention has been proved'.

We, therefore, accept the contention of the appellant that there was no wagering contract between the plaintiff and any of the defendants

The next question we may consider is whether the contracts set up could be said to be collateral contracts quite unaffected by the objects or intentions of defendants in entering into these contracts which involved making of other contracts which may or may not be wagering contracts but were not "prohibited". Strong reliance was placed upon Gherulal Parakh v. Mahadeodas Maiya & Ors.,(2) where the object of a contract or partnership was to enter into forward contracts for the purchase and sale of wheat so as to speculate in rise and fall of price of wheat in future. The object of the partnership was held to be not illegal, within the meaning of section 23 of the Contract Act, although

(1) 45 I.A. p. 29 @ 33.
(2) [1959] 2 supp. S.C.R. 406, 431.

11

the business for which the partnership was formed was held to involve wagering. The position was thus summarised there (at p. 431)

> "The aforesaid discussion yields the following results (1)Under the common Law of England a contract of wager is valid and therefore both the primary contract as well as the collateral agreement in respect thereof are enforceable; (2) after the enactment of the Gaming Act, 1845, a wager is made void but not illegal in the sense of being forbidden by law, and thereafter a primary agreement of wager is void but a collateral agreement is enforceable; (3) there was a conflict on the question whether the second part of s.18 of the Gaming Act, 1845, would cover a case for ',lie recovery of money or valuable thing alleged to be won upon any wager under a substituted contract between the same parties : the House of Lords in Hill's case (1921) (2) K.B. 351) had finally resolved the conflict by holding that such a claim was not sustainable whether it was made under the original contract of wager between the parties or under a substituted agreement between them; (4) under the Gaming Act, 1892, in view of its wide and comprehensive phraseology, even collateral contracts, including partnership agreements, are not enforceable; (53) s. 30 of

the Indian Contract Act is based upon the provisions of s. 18 of the Gaming Act, 1845, and. though a wager is void and unenforceable, it is not forbidden by law and therefore the object of a collateral agreement is not unlawful under s.23 of the Contract Act; and (6) partnership being an agreement Within the meaning of s.23 of the Indian Contract Act, it is not unlawful, though its. object is to carry on wagering transactions. We, therefore, hold that in the present case the partnership is not unlawful within the meaning of s. 23(A) of the Contract Act.

Re. (ii) Public Policy : The learned Counsel for the appellant contends that the concept of public policy is very comprehensive and that in India, particularly after independence, its content should be measured having regard to political, social and economic policies of a welfare State, and the traditions of this ancient country reflected in Srutis, Smritis and Nibandas. Before adverting to the argument of the learned Counsel, it would be convenient at the outset to ascertain the meaning of this concept and to note how the Courts in England and India have applied it to different situations. Cheshire and Fifoot in their book on "Law of Contract", 3rd Edn., observe at page 280 thus :

The public interests which it is designed to protect are so comprehensive and heterogeneous, and opinions as to what is injurious must of necessity vary so greatly with the social and moral convictions, and at times even with the political views, of different judges, that it forms a treacherous and unstable ground for legal decision..... These questions

12

have agitated the Courts in the past, but the present state of the law would appear to be reasonably clear. Two observations may be made with some degree of assurance.

First, although the rules already established by precedent must be moulded to fit the new conditions of a clanging world, it is no longer legitimate for the Courts to invent a new head of public policy. A judge is not free to speculate upon what, in his opinion, is for the good of the community. He must be content to apply, either directly or by way of analogy, the principles laid down in previous decisions, He must expound, not expand, this particular branch (if the law.

Secondly, even though the contract is one which prima facie falls under one of the recognized heads of public policy, it will not be held illegal, unless its harmful qualities are indisputable. The doctrine, as Lord Atkin remarked in a leading case, should only be invoked in clear cases in which the harm to the public is substantially incontestable, and does not depend upon the idiosyncratic inferences of i few judicial minds..... In popular language..... the contract should be

given the benefit of the doubt."

If an agreement is merely collateral to another or constitutes an aid facilitating the carrying out of the object of the other agreement which, though void, is not in itself prohibited, within the meaning of section 23 of the Contract Act, it may be enforced as a collateral agreement. If, on the other hand, it is part of a mechanism meant to defeat what the, law has actually prohibited, the Courts will not countenance a claim based upon the agreement because it will be tainted with an illegality of the object sought to be achieved which is hit by section 23 of the Contract Act. It is well established that the ,object of an agreement cannot be said to be forbidden or unlawful merely because the agreement results in what is known as a "void contract". A void agreement, when coupled with other facts, may become part of a transaction which creates legal rights, but this is not so if the object is prohibited or "mala in se". Therefore, the real question before us is : Does the agreement between the parties in each case, which was to be carried out in Bombay, so connected with the execution of an object prohibited by either a law applicable in Bombay or a law more widely applicable so as to be hit by Section 23 of the Contract Act?

A question which has been raised before us is whether the plaintiff, who entered into contracts with third parties, who appeared as witnesses in the cases now before us, so that these third parties made the purchases and settlements in Bombay, the payments for which are the subject matter of suits, was dealing with them as a principal to principal. The High Court had found that the relationship between the plaintiff and the third parties he employed to conclude the transactions was that of a principal to principal. The question whether the

13

parties through whom the, plaintiff actually alleged carrying out of the contract set up between. the plaintiff and the defendants could themselves be regarded as principals or agents of the plaintiffs-.will become quite immaterial if the objects of the contracts are found to be tained with the kind of illegality which is struck by Sec. 23 of the Contract Act. Again, the mere fact that the contracts between the plaintiff and the defendants were entered into at Kurnool in the State of Andhra Pradesh would also not make any difference in principle if the objects of the contracts which were to be carried out at Bombay were of such a kind as to be hit by Sec. 23 of the Act. The, principle which would apply, if the objects are struck by Sec. 23 of the Contract Act, is embodied in the maxim : "Qui facit per alium facit per se" (What one does though another is done by oneself). To put it in another form, that which cannot be done directly may not be done indirectly by engaging another outside the prohibited area to (lo the illegal act within the prohibited area. It is immaterial whether, for the doing of such an illegal act, the agent employed is given the wider powers or authority of the "pucca adatia", or, as the High Court had held, he is clothed with the powers of an ordinary commission agent only.

In view of the opinion already expressed by us, that, at any rate, the initial contracts between, the plaintiff and the defendants were not really wagering contracts, we need not deal with the provisions of the Bombay Act No. 3 of 1865 for Avoiding Wages which are declared void by Sec. 30 of the Indian Contract Act. We will, however, consider the applicability of the provisions of Bombay Forward Contracts

Control Act, No. 64 of 1947 (hereinafter referred to as the 'Bombay Act') and of the) Oilseeds (Forward Contract Prohibition) Order, 1943, (hereinafter referred to as the Control Order), which was kept alive by the provisions of Sec. 17 of the Essential Supplies (Temporary Powers) Act, 1946 (hereinafter referred to as 'the Central Act').

Sec. 2, sub s. (3.) lays down

> "Contract" means a contract entered into, made or to be performed in whole or in part in any notified area relating to the sale or purchase of any goods to which this Act applies :
> Provided that the Provincial Government may by notification in the Official Gazette direct any contract or class of contracts to be excluded from the provisions of this Act, subject to such conditions as the Provincial Government may deem fit to impose"-,

Sec. 2, sub-s. (3) lays down:

> " 'Forward Contract' means a contract for the delivery of goods at a future date and which is not ready delivery contract:"

Sec. 2, Sub. s. (4) enacts

> "'Goods' means any kind of movable property and includes securities but does not include money or actionable claims;"

Sec. 2, sub. s. (7) reads

14

> " Option in goods' means a contract for +.he purchase or sale of a right to buy, or a right to sell, or a right to buy or sell goods in future and includes a gully, a teji, a mandi or a tejimandi in goods;"

Sec. 2, sub.s. (9) says

> "Ready delivery contract means a contract which provides for delivery and payment of price either immediately or within such number of days not exceeding seven after the date of the contract and under such conditions as the Gazette, specify in this behalf in respect of any particular goods";

Sec. 2, sub. s. (1) provides

> "'Recognised association' means an association which is for the time being recognised by the Provincial Government as provided in Section 3";

The recognition of associations is governed by Sec. 3 of the Act, and Sec. 6, sub. s.(1) gives the power to every recognised association to "subject to the sanction of the Provincial Government, make and, from time to time, add to, vary or rescind bye-law for the regulation and control of forward contracts in goods for which such association has been recognised".

Sec. 6, sub. s.(2)(f) refers specifically to the power of the recognised Association to lay down, "the terms, conditions and incidents of contracts and the forms of such contracts as are in writing"; and, Sec. 6, sub.s. (2) (g) covers :

> "regulating the entering into, making, performance, rescission and termination of contracts, including contracts between members, or between a commission agent and his constituent or between a broker and his constituent or between a jatthawala or muccadum and his constituent or between a member of the recognised association, and a

person who is not a member, and the consequences of insolvency on the part of a seller or buyer or intermediary, the consequences of a breach or omission by a seller or buyer and the responsibility of commission agents, muccadums and brokers not parties to such contracts";

Section 6, sub. s. (2) (i) indicates that "the method and procedure for settlement of claims and disputes including settlement by arbitrations"; :Section 6, sub. s. (3) says :

"The bye-laws may provide that the contravention of any of the bye-laws shall-

(i) make a contract which is entered into, made or is to be performed otherwise than in accordance, with the bye-laws void or illegal;

(ii) render- the member liable to explusion, suspension, fine or other non-monetary penalty".

15

Sec. 8 of the Bombay Act deals with the illegality of the contracts and its consequencies as follows

"(1) Every forward contract for the sale or purchase of, or relating to, any goods, specified in the notification under sub-section (3) of section I which is entered into, made or to be performed in any notified area shall be illegal if it is not entered into, made or to be performed-

(a) in accordance with such by-laws, made ’under section 6 or 7 relating to the entering into, making or performance of such contracts, as may be specified in the bye-laws, or

(b) (i) between members of a recognised association,

(ii) through a member of a recognised association, or

(iii) with a member of a recognised association, provided that such member has previously secured the written authority or consent, which shall be in writing if the bye-laws so provide, of the persons entering into or making the contract, and no claim of any description in respect of such contract shall be entertained in any civil. court.

(2) Any person entering into or making such illegal contract shall on conviction, be punishable with imprisonment for a term which may extend to six months or with fine or with both".

Section 9 of the Bombay Act lays down :

"(1) Notwithstanding anything contained in this Act or in any other law for the time being in force on a notification being issued by the Provincial Government in the Official Gazette, options or such kinds of options in such goods and in the whole of the Province of Bombay or such part thereof as may be specified in the notification shall be illegal.

(2) Any person entering into any option made illegal under sub-section (1) shall, on conviction, be punishable with imprisonment which may extend to six months or with fine or with both".

The Andhra Pradesh High Court had reached the conclusion that it was not necessary to decide the question whether provisions of Sec. 8 clause 1 (a) had been contravened probably because no bye-law made under Section 6 or 7 of the Bombay Act had- been placed before it. No such bye-law has been pointed out to us. We are, therefore, not in a position to hold that there has been an infringement of any bye-law. The High Court had, however, held that there had been a contravention of Sec. 8(1)(b) of the Bombay Act inasmuch as only one of the third parties, namely, Shivdanmal Agarwal & Co., whose partner Ganga Ram was examined as P.W.1, was shown to be
16
a member of a recognised association. We do not consider it necessary to decide this question either as it appears to us that the Andhra Pradesh High Court was,correct in holding that the forward contracts under consideration violated the provisions of the two orders set out below

(1) No. 7561/33-D(4), which reads

> "In exercise of the powers conferred by the proviso to clause (2) of section 2 of the Bombay Forward Contracts Control Act, 1947 (Bom. LXIV of 1947), the Government of Bombay is pleased to direct that the following contracts shall be excluded from the provisions of the said Act namely
> Forward contract for specific delivery of any variety of oil seeds for specified price the delivery order, railway receipts or bill of lading against which are not transferred to the third parties, made or entered into before the 19th December, 1950, and outstanding on that date".
> No. 7561/33-D(2) which says
> "In exercise of the powers conferred by sub-section (1) of Section 9 of the Bombay Forward Contracts Control Act, 1947 (Bom. LXIV of 1947) the Government of Bombay is pleased to direct that all options in all varieties of oil seeds shall be illegal in Greater Bombay".

Moreover, as regards oil seeds, we find that the Central Act enacted for the control of production, supply, and distribution of essential commodities, covers "food-stuffs" which, under Sec. 2(c), "include edible oilseeds and oils". Section 3 (2) (c) to (g) of the Central Act authorises the Central Government to pass orders for the purposes given as follows :

> (c) for controlling the prices at which any essential commodity may be bought or sold;
> (d) for regulating by licences, permits or otherwise the storage, transport, distribution, disposal, acquisition, use or consumption of any essential commodity;
> (e) for prohibiting the withholding from sale of any essential commodity ordinarily kept for sale;
> (f) for requiring any person holding stock of an essential commodity to sell the whole or a specified part of the stock at such prices and to such persons or class of persons or in such circumstances, as may be specified in the order;
> (g) for regulating or prohibiting any class of commercial or financial transactions relating to foodstuffs or cotton textiles,

which, in the opinion of the authority making the order are, or if unregulated are likely to be, detrimental, to public interest;"

17

Section 7(2) of the Central Act provides that

"If any person contravenes any order under, Section 3 relating to foodstuffs.....

(a) he shall be punishable with imprisonment for a term which may extend to three years and shall also be liable to fine, unless for reasons to be recorded the court is of opinion that a sentence of fine only will meet the ends of justice; and

(b) any property in respect of which the order has been contravened or such part thereof as to the court may seem fit shall be forfeited to the Government.....

As already indicated, Sec. 17 of the Central Act keeps alive the provisions of Oil-seeds (Forward Contract Prohibition) Order, 1943. The provisions of this Control Order appear to us to be so important for the decision of the question before us that we reproduce it below in toto. It runs as follows :

"1. This order may be called the Oilseeds (Forward Contracts Prohibition) Order, 1943.

(2) It extends to the whole of British India.

(3) It shall come into force at once.

2. In this order....

(i) "contract" means a contract made, or to be performed in whole or in part in British India relating to the sale or purchase of oilseeds,

(ii) "forward contract" means a contract for the delivery of oilseeds at some future date;

(iii) "oilseeds" means any of the oilseeds for the time being specified in the first column of the schedule to this Order;

(iv) 'specified date' in relation to any 'oilseeds means the date specified against those oilseeds in the second column of the schedule to this Order.

3. No person shall after the specified date for any class of oilseeds, enter into any forward contract in any of those, oilseeds.

4. Notwithstanding any.custom, usage or practice,' of the trade, or the terms of any contract or any regulation of and association relating to any contract....

(1) every forward contract in any class of oilseeds outstanding at the close of business on the specified date shall be deemed to be closed out at such rate as the Central Government may by notification in the Official Gazette fix in this behalf, and different rates may be fixed for different classes of contracts;

-L379 Sup. CI/75

18

(2) all differences arising out of any contract so deemed to be closed out shall be payable on the basis of the rate fixed as aforesaid and the seller shall not be found to give and the buyer shall not be bound to take delivery;

(3) payment of all differences legally due from a member of an association to another member of such association in respect of any forward contract closed out under this clause shall be made to the clearing house of the association and for the purposes of calculating such differences the rate

fixed by the Central Government under sub-clause (1) shall be deemed to be the settlement rate fixed by the association under its bye-laws or other regulations which shall, for the relevant purpose, continue to have effect subject to the provisions of this Order.

(5) The Central Government may, by Notification in the Official Gazette, exclude any contract or class of contracts from the provisions of this Order. (Noti. No. P and S.C, 75(1)/43, dated 31st May, 1943)."

A Notification was issued on 31-5-1943 under Sec. 5 of the above mentioned Order, the relevant part of which reads as follows:

> "I Forward Contracts for groundnut, linseed, mustard seed, rapeseed or toriaseed of specified qualities or types and for specific delivery at a specified price.... not transferable to third parties are excluded from- the provisions of this Order (Noti. No. P & S.C. 75 (2)/43, dated 31st May, 1943)
>
> 11. No P.& S.C. 75 (A) 1/43 -In exercise of the powers conferred by clause 5 of, the Oilseeds (Forward contracts Prohibition) Order, 1943, the Central Government is pleased to exclude the following class of contracts from the provisions of the said Order, namely:-
>
> "Forward contracts for castor seed, cotton seed or sesamum (tit or jinjil) or specific qualities or types and for specific delivery orders, railway receipts or bills of lading against which contracts are not transferable to, third parties."

Learned Counsel for the appellant contended that the Contracts under consideration for groundnut seeds and castor seeds are excluded under the above mentioned notification because they satisfy, in each case, the first of the two alternative conditions of exclusion. These conditions for contracts for sale of ground-nut seeds are : (1) they must relate to specified qualities or. types for specific deliveries at a specified price; and, (2) they should not be transferable to third parties. Excluded forward contracts for castor seeds must (a) be in respect of specified qualities or types; and (b) be for specific delivery orders, railway receipts, or bills of lading against which are not transferable to third parties. The Trial Court had accepted the contention that it is enough that one of the two conditions are satisfied and bad read the word ’and’ in the above mentioned notification is the equivalent of the disjunctive

19

’or’. The contention of the respondents, that the High Court rightly, held that the word "and’ cannot be converted into an "or" and that both the conditions must,be satisfied for an exemption, appears to us to be correct. We,, therefore, hold that the contracts under consideration before us were prohibited under the provisions of the Essential Supplies Act read with the Central Order of 1943. They were not shown to be covered by the conditions for their exemption from prohibition.

Having regard to the objects of the prohibition imposed by the Central Government on forward contracts on, inter-alia, ground-nut seeds and oil-seeds, in the interest of the general public, so that the supply at reasonable prices of commodities essential to the life and well being of masses of the people is not jeopardized, the absolute terms of the

prohibition,the penalties imposed for its infringement, and the careful manner in which only those contracts are excluded from the prohibition which are for actual delivery and supply to bang fide purchasers, we agree with the High Court that the contracts under consideration are tainted with an unlawfulness of their object and are forbidden by law.

The High Court had given very good reasons for accepting the view of the Trial Court that the contracts under consideration could not possibly be for actual delivery, It observed that the total quantity of groundnut seeds alone shown to have been originally purchased on behalf of the defendants was 950 tons which would have required two special goods trains to transport them from Bombay to Kurnool, where such a huge quantity of ground-nut seeds could not possibly be required. Indeed, Kurnool itself has so much of groundnut seeds that, far from importing any, it exports them. The plaintiff did not specifically set up any case of contracts for actually intended delivery. On the other hand, contracts set-up were for Badla transactions, which are not, as we have already indicated, understood to be contracts for actual delivery. To assume in intention to demand actual deliveries from the mere form of the contracts would be to believe, very naively, that they were contracts for the proverbial carrying of coals to Newcastle. If, as both the Trial Court and the High Court have rightly held, the contracts were not for genuine or actual delivery but only for speculation on differences in price, even the first condition for exclusion of these transactions from the purview of the control order, which contemplates actually intended delivery, would not be satisfied. Hence, we have no doubt in our minds that the contracts were not merely void but illegal in the sense that their objects are forbidden.

We think that the High. Court correctly distinguished and refused to apply authorities recognising the enforceability of agreements collateral to what are merely void Agreements. It rightly relied on decisions holding agreements collateral to prohibited contracts also to be unenforcible because a taint attaches to them which makes them also contrary to public policy. Such agreements fall within the class of cases mentioned in Gherulal Parakh's case (supra) where harmful results of permitting the contracts, in terms of injury to the public at large, are evident and indisputable.

20

In Shivnarayan Kabra v. The State of Madras(1), this Court dealing with the objects of similar legislation contained in the Forward Contract (Regulation) Act, 1952, said at page 144:-

> "...the Act was passed in order in order to put a stop undesirable forms of speculation in forward trading and to correct the abuses of certain' forms of forward trading in the wider interests of the community and, in particular, the interests of the consumers for whom adequate safeguards were essential. In our opinion, speculative contracts of the type covered in the present case are included within purview of the Act".

The result is that we think that he objects of contracts set up by the plaintiff cannot be carried out by merely entering into them outside Bombay or engaging third parties as sub-agents, or, in any other capacity, to execute them. The provisions of the Control Order are applicable throughout India and are not confined to forward contracts entered into

or meant to be carried out in any particular part of India. Their violation is a criminal offence. A claim for indemnification, under Sec. 222 Contract Act, is only maintainable if the acts, which the agent is employed to do, are lawful. Agreements to commit criminal acts are expressly and specifically excluded, by Section 224 of the Contract Act, from the scope of any right to an indemnity. These appeals are, therefore, liable to be dismissed on merits, but, inasmuch as both sides to the unlawful agreements are in "pari delicto", we set aside the decrees for costs awarded to the defendants and direct that the parties will bear their own costs throughout. Subject to this modification of decrees for costs we dismiss in three appeals before us.

V.P.S. Appeals dismissed.

21