Present : De Sampayo J. and Dias A.J. 1920.

PETER *v.* COORAY.

117—D. C. Colombo, 53,071.

Agreement to advance money to toddy renter in consideration of getting share of the profits — Is agreement a violation of the Excise Ordinance ?

Defendant, who had purchased toddy rents, entered into an agreement with the plaintiff to pay him two-fifths share of the profits in consideration of plaintiff advancing to defendant moneys whenever required for the purpose of the business. The business was to be carried on by the defendant, and was to be under his sole control and supervision.

Held, that the agreement was ~~valid~~ void in law.

THE facts appear from the following portion of the judgment of the District Judge :—

The plaintiff avers in his plaint that the defendant purchased from Government the privilege of selling toddy from October 1, 1917, to September 30, 1918, at Hettiyawatta, Marshall street, Modera, Lansiyawatta, and Timbirigaspitiya. That at defendant's request he advanced a sum of Rs. 9,000 for the purpose of carrying on the business, and the defendant agreed to give him two-fifth share of the profit and that a sum of Rs. 4,200·76 is due to him, as a sum of Rs. 10,501·90 was earned as profits.

The defendant denies his liability, and alleges that the agreement is bad in law; that the rents of the toddy taverns referred to in the plaint were purchased by his son Patrick Cooray; that he signed the agreement X as agent of his son Patrick Cooray; and that there were no profits.

According to the evidence of the plaintiff the defendant told him a few days before the sale that the rents of the toddy taverns referred to in the plaint were to be sold, and after the sale the defendant told him

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he had purchased the rents, and asked him to advance him (defendant) money from time to time to carry on the said business. Plaintiff agreed to advance the money in consideration of his receiving a two-fifths share of the profits, and at his request the defendant signed document X. Subsequently, the plaintiff learnt that the rents had been purchased by defendant in his son's name.

The plaintiff advanced defendant from time to time Rs. 15,000 to Rs. 20,000. In September, 1918, it was found that the defendant owed plaintiff Rs. 9,000. This amount was secured by nine promissory notes, which are the subject of other actions.

The evidence of Lewis Perera makes it clear that the rents of three of the taverns were purchased by or in the name of defendant's son, Patrick Cooray, and two in the name of one B. A. Fernando. On these facts the defendant contends that plaintiff cannot maintain the action against him as he did not purchase the privilege of selling the toddy at the taverns in question.

I have no doubt, however, that Patrick Cooray and B. A. Fernando were the defendant's nominees, and that the rents were purchased for the defendant. The defendant admitted that he found the money for Patrick Cooray.

This view is supported by the document X signed by the defendant. It runs as follows :—

"Five shares of the following five toddy taverns : Hettiyawatta, Marshall street, Modera, Lansiyawatta, Timbirigaspitiya.

"Two shares to Mr. J. R. Peter.

"One share to Mr. J. Cooray.

"Two shares to Patrick. Mr. Peter should look into all and be responsible for the transaction."

I have no doubt that the defendant made the agreement deposed to by the plaintiff.

Even if the defendant did not himself carry on the business of selling toddy at the taverns in question, he is, in my opinion, liable on his agreement; but on the evidence it appears to me that Patrick Cooray was merely the defendant's agent, and I find on the first issue that defendant did carry on the business of selling toddy at the taverns in question.

As regards the fifth issue, too, I find that the defendant was the real purchaser of the taverns, and he is liable, although his name is not on record, as the purchaser, and I answer the fifth issue in the affirmative.

Before dealing with the third issue, I shall dispose of the fourth issue, which raises a question as to the legality of the agreement on the ground of it being against public policy. On this issue plaintiff's counsel relied on the cases of *Meyappa Chetty v. Ramanathan et al.*[1] and *Mohideen v. Saibo.*[2]

In the case of *Meyappa Chetty v. Ramanathan,*[1] the two defendants and three others entered into a partnership deed for acquiring the whole of the opium licenses and thus secure the monopoly of the opium traffic throughout the Island. The plaintiff, who was not a party to the deed, sued the defendants for an eighth share of the profits, averring that the defendants had by a verbal agreement of partnership agreed to give him an eighth share of the profits.

It was held that the action was not maintainable, as it was founded on a partnership which was illegal as being contrary to the policy of the Ordinance, on the ground that the control and management of the

[1] *(1913) 16 N. L. R. 33.* [2] *(1913) 17 N. L. R. 17.*

shops were vested, not in the hands of the licensees, but in the hands of a syndicate, of whose existence the licensing authorities were presumably not aware.

In the case of *Mohideen v. Saibo*,[1] the plaintiff was a licensee and occupant of two stalls for the sale of mutton in the Kandy market. He entered into an agreement with defendant by which defendant was to carry on the business under plaintiff's license, and pay plaintiff Rs. 100 a month.

The plaintiff sued to recover the instalments, and it was held that the agreement was illegal, being in contravention of by-laws of the Municipal Council of Kandy, which prohibits (*a*) a person from using or occupying a stall without a license; (*b*) a stall holder from transferring his license; (*c*) any person other than a licensee from occupying a stall.

Plaintiff's counsel contended that the agreement sued on in this case was an entirely different character, and relied on the case of *Fernando v. Ramanathan*.[2]

In the case of *Fernando v. Ramanathan*,[2] the plaintiff sued on a partnership agreement. The parties of the first part had bought the privilege of selling opium at certain places, and the parties of the second part had purchased the privilege of selling opium at certain other places, and they agreed to carry on the business in partnership. The management being vested in two of the parties to the agreement, Pereira J. and Ennis J. held (Wood Renton C.J. dissenting) that the case of *Meyappa Chetty v. Ramanathan*[3] was not an authority for holding that the agreement sued on was illegal, as being contrary to public policy, and they held, further, that the agreement was not illegal.

In considering whether a contract is against public policy, each case must, as stated by Pereira J. in the case of *Fernando v. Ramanathan*,[2] depend on its own facts and circumstances.

What are the facts and circumstances in this case? They are, shortly, as stated, a promise by the defendant to give the plaintiff a two-fifths share of the profits derived from the sale of toddy in certain taverns in consideration of the plaintiff advancing him money from time to time to carry on the business of selling toddy at those taverns. It is clear that the plaintiff was to receive a share of the profits, if any, in lieu of interest.

The arrangement did not, unlike the agreement in the cases cited, vest the plaintiff with any control of the business of selling toddy at the taverns, nor did he take the place of the licensee as in the case of *Mohideen v. Saibo*.[1]

I am therefore of opinion that there was nothing in the contract which rendered it illegal on the ground that it contravened the provision of any Ordinance. I answer issue (4) in the negative.

The agreement between the parties was as follows :—

This indenture made and entered into at Colombo on August 30, 1918, between Kurukulasuriyage Simon Fernando of No. 117 of Modera street in Colombo of the first part, Mututantri Patabendige Johannes Cooray of Moratuwa of the second part, and Joseph Rajadurai Peter of Kotahena in Colombo of the third part.

Whereas the said Kurukulasuriyage Simon Fernando and the said Mututantri Patabendige Johannes Cooray have purchased from the Government of Ceylon toddy rent for the taverns situate at Marshall

[1] *(1913) 17 N. L. R. 17.* [2] *(1913) 16 N. L. R. 337.*
[3] *(1913) 16 N. L. R. 33.*

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street and Modera street in Colombo, Potuwila in Colombo District, and Palliawatta in Negombo District, and have obtained from the Government licenses for sale of toddy at the said places for the period commencing October 1, 1918, and ending September 30, 1919:

And whereas the said Kurukulasuriyage Simon Fernando and the said Mututantri Patabendige Johannes Cooray and the said Joseph Rajadurai Peter have agreed to enter into these presents for the purpose of securing for the said taverns a regular supply of toddy, and for the purpose of determining the matter of distribution of the income and profits of the said business:

Now, the indenture witnesseth that it is hereby agreed between the said Kurukulasuriyage Simon Fernando and the said Mututantri Patabendige Johannes Cooray and the said Joseph Rajadurai Peter as follows:—

(1) The said Kurukulasuriyage Simon Fernando shall and will daily from October 1, 1918, to April 30, 1919, procure, transport to, and supply at the Marshall street tavern 125 gallons or more of good toddy at the rate of 35 cents a gallon.

(2) The said Mututantri Patabendige Johannes Cooray shall and will daily from the said October 1, 1918, to the said April 30, 1919, procure, transport to, and supply at the Marshall street tavern, between the hours of 6 A.M. and 5 P.M., 125 gallons or more of good toddy at the said rate of 35 cents a gallon.

(3) The said Kurukulasuriyage Simon Fernando shall from May 1, 1919, to September 30, 1919, procure, transport to, and supply at the said Marshall street tavern 250 gallons or more of good toddy, between the hours of 6 A.M. and 6 P.M., at the said rate of 35 cents a gallon.

(4) In the event of the said Kurukulasuriyage Simon Fernando and the said Mututantri Patabendige Johannes Cooray failing to supply within the said hours the said quantity of toddy, the party in default shall pay into the joint account in respect of the said taverns a sum of 30 cents per each gallon short of the said quantity of toddy. provided, however, that in the event of the said Mututantri Patabendige Johannes Cooray supplying during the period October 1, 1918, and April 30, 1919, any toddy after the hour . . . .

(5) And toddy remaining unsold at the said tavern shall be converted into vinegar at the said Marshall street tavern and sold on the joint account of the said Kurukulasuriyage Simon Fernando and the said Mututantri Patabendige Johannes Cooray, and the amount realized thereby paid to the said Joseph Rajadurai Peter into the said joint account of the said Kurukulasuriyage Simon Fernando and the said Mututantri Patabendige Johannes Cooray.

(6) The registered tavern keepers for the said tavern shall be appointed by the said Kurukulasuriyage Simon Fernando and the said Mututantri Patabendige Johannes Cooray, but either of them shall be at liberty at his own cost to appoint a supervisor at any one or more of the said taverns.

(7) The amount realized by the sale of the toddy during the course of each day shall be paid to the said Joseph Rajadurai Peter at the end of such date, who shall collect the same at the said taverns, and be responsible for the custody thereof after the payment of the same to him or to any person or persons employed by him for the purpose of collecting the said moneys; upon receipt of the said moneys a proper receipt shall be granted therefor by the said Joseph Rajadurai Peter or his agent to the said tavern keeper.

A. St. V. Jayawardene (with him *B. F. de Silva*), for defendant, appellant.

Arulanandan, for plaintiff, respondent.

Cur. adv. vult.

May 5, 1920. DE SAMPAYO J.—

In this case a question of law arises for decision. The plaintiff alleged in his plaint that the defendant obtained from the Government the privilege of selling toddy for twelve months, commencing from October 1, 1917, at certain places in the District of Colombo, and that " the said business was to be carried on by and was to be under the sole control and supervision of the defendant, and the said business was carried on entirely by the defendant during the whole of the said period." He further alleged that for the purpose of carrying on the said business the plaintiff advanced to the defendant certain moneys on an agreement by the defendant to give the plaintiff two-fifths share of the profits of the said business. He estimated the profits made by the defendant at Rs. 10,501·90, and claimed in this action the sum of Rs. 4,200·76 as his two-fifths share of the profits.

The defendant in his answer took issue on the facts as alleged, and stated that the privilege of selling toddy in the said places, or " the rent," as it is called, was purchased, not by himself, but by his son Patrick Cooray, and that the actual agreement was a partnership agreement between the plaintiff and Patrick Cooray. He further pleaded, as a matter of law, that the alleged agreement was against public policy, and in contravention of the Excise Ordinance, 1912, and that the action was, therefore, not maintainable.

The facts as found by the District Judge were that the defendant did enter into the agreement pleaded by the plaintiff; that the defendant was the real purchaser of the toddy rent; that Patrick Cooray, who was a mere lad of nineteen years, was only a nominal licensee; and that the defendant in his own right carried on the business of selling toddy at the taverns in question. The District Judge, however, decided the question of law in favour of the plaintiff on the authority of *Fernando v. Ramanathan*,[1] and gave plaintiff judgment as claimed. The defendant has appealed.

Section 17 of the Excise Ordinance, No. 8 of 1912, prohibits the sale of excisable articles except on a license from the Government Agent, and section 43 makes it an offence to sell excisable articles " in contravention of the Ordinance or any rule or order made thereunder, or of any license, permit, or pass obtained under the Ordinance." Under section 18, a person, to whom the exclusive privilege of selling has been granted, cannot exercise his privilege until he has obtained a license in that behalf from the Government Agent, and under section 24 the license may be subject to such

[1] *(1913) 16 N. L. R. 337.*

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restrictions and such conditions as the Governor may direct. Section 31 empowers the Governor to make rules, *inter alia*, prescribing the restrictions under and the conditions on which any license may be granted. By Excise Notification No. 29 dated March 4, 1914, the Governor acting under section 24 directed that no privilege of manufacture, supply, or sale, or any interest therein, shall be sold, transferred, or sub-rented without the Government Agent's previous permission (see *Government Gazette* No. 7,010 of May 9, 1919). It is clear to my mind from the above-recited provisions and the general tenor of the Excise Ordinance and the rules framed thereunder that the licensee alone is to carry on the business of selling excisable articles, and that it is illegal for anyone else to do so either without a license or under the colour of a license granted to another person. The case of a mere servant may be governed by special considerations, but the defendant was not in the position of a servant or even an agent. The situation as disclosed by the above facts is that the defendant sold toddy without a license, or was in the position of a transferee of his son Patrick Cooray's privilege and license, and was, in fact, the sole person interested in the business, and that this act of carrying on the business of selling toddy during the period in question was in contravention of the Ordinance, and therefore illegal. This point appears to me to be covered by the authority of *Meyappa Chetty v. Ramanathan* [1] and *Mohideen v. Saibo*.[2]

The case of *Fernando v. Ramanathan* (*supra*), on which the District Judge relied, is distinguishable. That was the case of a partnership agreement between the grantees of separate licenses to sell opium in separate places, and the only issue which the Court had to consider was whether the agreement was "contrary to the policy of the Ordinance." The majority of the Judges laid down that each case must depend on its own facts and circumstances, and after analyzing the terms of the agreement and comparing them with the provisions of the Opium Ordinance, No. 5 of 1899, the learned Judges came to the conclusion that the agreement in that case did not contravene the policy of the Ordinance or any of its provisions. The character of the Excise Ordinance of 1912, with reference to which the present case must be decided, and the facts, as stated above, appear to me to distinguish that case from this. The Indian and English authorities on this subject are cited and discussed in the dissenting judgment of Wood Renton C.J., and I need not refer to them particularly here. I think it must be held that in the circumstances the defendant contravened the Ordinance. The act of the defendant in carrying on the business of selling toddy being thus found to be illegal, the plaintiff, who is obliged to set it up in support of his own claim, is precluded from deriving any benefit therefrom.

[1] *(1913) 16 N. L. R. 33.*

[2] *(1913) 17 N. L. R. 17.*

I am of opinion that the plaintiff cannot maintain this action, and I would set aside the judgment in his favour and dismiss his action, with costs in both Courts.

DIAS A.J.—

The plaintiff brought this action to recover from the defendant, M. J. Cooray, the sum of Rs. 4,200·76, being two-fifths share of the profits arising from the toddy rents of five taverns during the period of twelve months ending on September 30, 1918. He alleged in his plaint that the defendant bought from Government the privilege of selling toddy in those taverns, and that the business was to be carried on by him and to be under his sole control and supervision, and that the business was so carried on entirely by the defendant during that period. For the purpose of carrying on the business the plaintiff and defendant entered into an agreement, in terms of which, *inter alia,* the plaintiff was to advance to defendant moneys whenever required, and in consideration thereof the plaintiff was to have two-fifths share of the profits. That agreement was embodied in a writing (marked X) signed by the defendant, who allotted two shares to the plaintiff, one share to the defendant, and two to Patrick (the defendant's son). The plaintiff accordingly advanced from time to time sums amounting to Rs. 23,000, of which the major part was repaid to him, leaving in September, 1918, a balance of Rs. 9,000 still due on the advance account.

For that sum the plaintiff brought a separate action, and has already recovered Rs. 7,000. The present action relates only to the share of profits in terms of the alleged agreement.

Several issues of fact and law were raised and dealt with in the District Court, but, I think, it is unnecessary to go beyond the principal one which strikes at the root of the case, namely, whether the agreement relied on by the plaintiff was against public policy or the provisions of the Excise Ordinance (No. 8 of 1912), and, consequently, void. The policy of the Ordinance and the intention of the Legislature were clearly to control and regulate the manufacture, sale, and possession of toddy and other intoxicants by restricting the privilege to certain persons specially licensed by Government. Section 20 of the Ordinance permits such a licensee to let or assign the whole or part of his privilege to another, but only with the express sanction of the Government Agent. Rule 13 made under the Ordinance by the Governor in Executive Council enacts that "no privilege of manufacture, supply, or sale, or any interest therein, shall be sold, transferred, or sub-rented without the Government Agent's previous permission, nor, if the Government Agent so orders, shall any agent be appointed for the management of any such privilege without his previous approval." Hence, any act done or agreement entered into in violation of any of these

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provisions must necessarily be contrary to the policy of the Ordinance, and, consequently, unlawful, and no action can be maintained to enforce such an agreement. It is admitted in this case that the persons in whose names the licenses were obtained were Patrick in respect of three of the taverns and one B. A. Fernando in respect of the remaining two, and it is not suggested that either of them had the Government Agent's authority to assign or sublet their privileges to the defendant or anyone else. The learned District Judge has found that the real purchaser of these rents was the defendant, and that Patrick and B. A. Fernando were only his nominees. They were mere dummies to deal with the Government Agent, while the defendant was the *de facto* renter. The evidence justifies that finding, and, moreover, it was on that footing that the plaintiff himself entered into his agreement with the defendant to share profits as expressly set out in paragraphs 2 and 3 of his plaint. Thus, it is perfectly clear that the defendant and the plaintiff attempted to enjoy the privileges conferred on the licensees without the consent of the proper authority, and entered into this agreement in respect of them. Though the learned District Judge came to that conclusion with regard to the defendants' true position in their venture, he has held that this agreement was not void by reason of anything contained in the Ordinance, but I am of a different opinion. It was a clear infringement of the policy of the Ordinance and of the rule above referred to. This Ordinance is much stricter in its provisions than the Opium Ordinance (No. 5 of 1899), on which the case of *Fernando v. Ramanathan*[1] was decided. That case was decided by a Full Bench, where Pereira and Ennis JJ. (Wood Renton C.J. dissenting) held that a deed of partnership between some opium licensees and strangers was not invalid simply because it was contrary to what may be termed the policy of the Ordinance, but that it would be invalid only if it contravened some specific provision of the Ordinance. In the present case, as I have already stated, both the policy of the Ordinance and one of its express provisions have been violated.

The plaintiff's action is, therefore, not maintainable, and must be dismissed, with costs in both Courts.

Set aside.

[1] *(1913) 16 N. L. R. 337.*