[FULL BENCH.]

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Present: Wood Renton A.C.J., Pereira and Ennis JJ.

FERNANDO *v.* RAMANATHAN *et al.*

118—D. C. Colombo, 33,487.

Opium Ordinance, No. 5 of 1899—Partnership for the sale of opium by the licensee with an unlicensed person—Action for share of profits.

Per PEREIRA J. and ENNIS J.—Where an issue is once framed in a case, the Court has no power to strike it out on the motion of either party. The issue must be retained to be eventually decided.

A Court can always *ex mero motu suo* raise a question in a case as to the legality of a contract sued upon or sought to be enforced.

Full Bench : *Per* PEREIRA J. and ENNIS J.—A deed is not invalid on the ground of illegality because it is contrary to what may be termed the policy of an Ordinance. It would be invalid for illegality if it contravened some specific provision of the Ordinance. Oral evidence not contradictory of or inconsistent with the express terms of a deed may be admitted to show that it is invalid on the ground of illegality.

Per PEREIRA J.—Public policy, unless it is based on well-established and clearly recognized principles, should not be made the ground of judicial decision.

WOOD RENTON J.—Although a contract or act may be made illegal by a statute passed for the protection of revenue alone, the presumption of illegality will be greater where the statute is one embracing other important objects of public policy as well, and where it contains prohibitory language, besides imposing a penalty. The history of the opium legislation in the country and the language and scope of Ordinance No. 5 of 1899 show conclusively that the Legislature intended, not merely or chiefly to protect the revenue, but to prohibit the sale of opium, except under conditions prescribed by itself, and that the law, as declared by Ordinance No. 5 of 1899, requires that no person shall sell opium as a principal unless he has been duly licensed to sell it at the particular shop or shops to which the license relates.

IN this case the plaintiff sought to recover from the original defendants, the managers of a certain business, his share of the profits of the said business, which the defendants expressly agreed by deed D 1 to account for.

The portions of the agreement material to this report are as follows :—

Whereas the parties of the first part or one or more of them have purchased the license for the sale of opium at the places enumerated in the first schedule hereunder written for the period of six months

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from the first day of January, 1910 : And whereas the parties of the second part or one or more of them have purchased the licenses to sell opium at the places enumerated in the second schedule hereunder written for the period of six months from the first day of January, 1910 :

And whereas the said parties of the first part have agreed with the said parties of the second part to carry on in partnership the business of selling opium at the said places enumerated in the first and second schedules hereto, and at other places at which they shall thereafter during the continuance of this agreement acquire the right to sell opium : Now this agreement witnesseth as follows :—

(1) The parties of the first part shall carry on in partnership with the parties of the second part at the places aforesaid the trade or business of selling opium.

(4) The management of the said business shall be in the hands of the said S. S. N. Ramanathan Chetty and M. K. M. P. R. Letchimanan Chetty, who shall carry on the said business to the satisfaction of the partners.

(7) The parties of the first part and the parties of the second part shall be entitled to the property and assets of the partnership and the profits thereof, and shall bear all losses, &c.

The learned District Judge (L. Maartensz, Esq.) dismissed the action, relying on *Meyappa Chetty v. Ramanathan*,[1] on the ground that the agreement was illegal.

The case was reserved for a Full Bench by Pereira J. and Ennis J. by the following judgment:—

PEREIRA J.—

In this case, as between the plaintiff and the original defendants, six issues were at first framed. Among them were the two following: (1) Was plaintiff a licensee under Government for the sale of opium? and (2) If not, can plaintiff maintain this action? At a later stage of the action these issues, as the record shows, were not " pressed " by the defendants, and the District Judge accordingly made order striking them out. Later still he framed the issue " Is the agreement sued upon contrary to the policy of the Opium Ordinance of 1899 and therefore illegal? " And having decided this issue in the affirmative, the District Judge dismissed the plaintiff's claim. The framing of the issue was moved for by the original defendants and some of the added defendants. Counsel for appellant now contends (1) that this issue is practically tantamount to the two issues struck out, and that having struck out those issues, the District Judge had no power to restore them in another form; and (2) that the issue did not arise as between the plaintiff and the added defendant. Of course, the striking off of the two issues mentioned above was done when the added defendants were not parties to the suit, and it was competent to the plaintiff and the added defendants to agree to the framing of this issue. They did not, however, so agree, and,

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

as between the plaintiff and the added defendants, the District Judge had no right to frame the issue, because, clearly, the issue was not one that arose as between these parties. In support of the other contention of the appellant's counsel, namely, that as between the plaintiff and the original defendants, the issue or its equivalent had been framed but struck out, and the Judge had therefore no right to re-frame it, he cited a case from the *Indian Law Reports* (*vol. 4, Calcutta Series, p. 572*), in which it was held that when the Court had once decided, as between the parties, that an issue did not arise and refused to frame it, it could not subsequently frame the same issue. That case has no application to the present. Here the issue had been framed, but on the motion of the defendants the Judge struck it out, Now, there is no provision in our Code for striking out issues once framed. While the Indian Code of Civil Procedure has such a provision, our Code curiously has provision only for amending issues and the framing of fresh issues. Clearly, under our Code an issue once framed must remain until decided. If the point involved in the issue is not pressed by either party, the fact may be noted and taken into consideration in the judgment, or if the issue goes to the root of the case, it may be decided and judgment entered accordingly; but the issue cannot be struck out. So that the two issues referred to above must be deemed to have remained to be decided. Moreover, the new issue framed by the Judge raises the question as to the legality of the agreement sued upon. I think that a Court can always *ex mero motu suo* raise such a question. No Court is bound to give judgment upholding a contract which, owing to its being against public policy or good morals or for some such reason, is illegal. I would for these reasons over-rule the appellant's objections to the issue framed by the District Judge as to the illegality of the contract sued upon. Now, the decision of the issue is, to my mind, likely to involve the solution of questions of some doubt and difficulty, and, possibly, as urged by the appellant's counsel, a re-consideration of the judgment in the case of *Meyappa Chetty v. Ramanathan.*[1] I therefore think that the District Judge's judgment on the issue should be dealt with in appeal by a fuller Bench, and I would suggest that the case be referred to a Bench of three Judges.

ENNIS J.—I concur.

F. J. de Saram, for the plaintiff, appellant.—The District Judge is wrong in holding without evidence that the effect of the agreement D 1 is the same as that of the agreement in the case of *Meyappa Chetty v. Ramanathan.*[1] On its face D 1 is not illegal, and contains no illegal conditions. It is not contrary to the policy of the Opium

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

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Ordinance. A deed should not be lightly presumed to be illegal. Where two constructions are possible, a construction that favours the validity of the agreement should be given to the deed (*Chitty on Contracts, 15th ed., p. 644*). The interpretation of what is the public policy of the Ordinance should be done with care. *Richardson v. Mellish*,[1] *Davies v. Davies*,[2] *Jamson v. Driefontein Consolidated Mines, Ltd.*[3] We must look to the preamble and the provisions of an Ordinance to discover its policy (*Maxwell, 5th ed., p. 635*). The Ordinance in question provides for certain checks on the accounts and methods of sale, which enable the Government to obtain information as to the profits for the purposes of revenue. The terms of D 1 are consistent with carrying on of the business according to the provisions of the Ordinance, and merely provide for the pooling of the profits and losses by the partners. This is only a form of insurance against loss; it is not illegal.

Meyappa Chetty v. Ramanathan [4] cannot be applied to this case. The facts found there do not exist here. Further, it was decided on the authority of *Padmanabhan v. Sarda*,[5] which was decided on the Indian Opium Act, which differs from our Ordinance. In *Padmanabhan v. Sarda* [5] and in the cases cited in it (*Marudamuthu Pillai v. Rangasamy Mooppan*,[6] *Shaha v. Shaha* [7]) it is clear that there was either a direct breach of the provisions of the act or of the rules under it, or of the conditions of the licenses. There is no such breach here, and the conditions of the license issued under the Ordinance are in our favour. There is no prohibition against transfer; a partnership does not necessarily involve a transfer (*Shankar v. Khan* [8]). Further, in the working of our Ordinance assignments of rights by licensees have been recognized by the Government, and are not considered contrary to its provisions. The policy of our Ordinance is to see that no opium is sold except under the control of a licensed person. The policy of the Ordinance is not to prohibit the sale of opium by unlicensed persons under the control of licensed persons. In the present case each shop is under the direct control of the licensee, and the profits of all the shops are massed together for dividing the profits.

The agreement in *Meyappa Chetty v. Ramanathan* [4] is not illegal, and that decision is not wrong. The difference between our Ordinance and the Indian Act was not pointed out in that case. Counsel also cited *Brown v. Duncan*,[9] *Hyams v. Stuart King*.[10]

H. A. Jayewardene (with him *Elliott*), for the first defendant, respondent.—The deed in question contains an agreement to carry on the business of selling opium in partnership. It is not merely

[1] *2 Bing. 252.*
[2] *36 Ch. D. 364.*
[3] *(1902) A. C. 484.*
[4] *(1918) 16 N. L. R. 33.*
[5] *35 Mad. 582.*
[6] *24 Mad. 401.*
[7] *(1874) 21 W. R. 289.*
[8] *(1879) 2 All. 411.*
[9] *(1829) 10 B. & C. 92.*
[10] *(1908) 2 K. B. 696, at pp. 727, 728.*

an agreement to share the profits. Each of the partners was a principal, and carried on the entire business actively. The agreement in question is against the spirit of the Ordinance. Even an agreement to share in the profits would be contrary to the policy of the Ordinance. But here the property was vested in all the partners. They were to manage the entire business, and the books were to be under the joint control of all. There is nothing to distinguish this case from *Padmanabhan v. Sarda* [1] and *Meyappa Chetty v. Ramanathan.*[2] There is an implied provision against transfer in the Ordinance.

Counsel also referred to *Peris v. Fernando.*[3]

H. J. C. Pereira, for the second defendant, respondent.

F. M. de Saram, for the third, fourth, seventh, and eighth added defendants, respondents.

F. J. de Saram, in reply.

Cur. adv. vult.

July 8, 1913. Wood Renton A.C.J.—

The point of law with which alone I am concerned in the present case is raised by the following issue: " Is the agreement sued on contrary to the policy of the Opium Ordinance, 1899, and, therefore, illegal? "

The learned District Judge, following the decision in *Meyappa Chetty v. Ramanathan,*[2] answered this question in the affirmative, and has dismissed the plaintiff's action with costs.

Although the first defendant-respondent was examined as a witness, and a few questions were put to the plaintiff by the District Judge himself with a view to determining his position under the agreement, the case has not been tried on evidence in the District Court. The District Judge recorded no finding on the evidence of the first defendant, but has disposed of the issue as to the legality of the agreement in suit on a construction of the language and scope of the agreement itself, possibly keeping the plaintiff's admissions to the Court in view. I propose in this respect to follow his example, with a reference, however, to the pleadings in the action for the purpose of ascertaining what the parties themselves understood the agreement to mean.

The agreement in question is a deed of partnership in the opium trade between the plaintiff, the defendants, and certain other parties. " The plaintiff," says the learned District Judge, " is a licensee with regard to some places only, and the effect of the partnership deed is to centralize in the hands of the members of the partnership the management of all the opium licenses granted to

[1] *35 Mad. 582.*

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

[3] *(1905) 1 Bal. 199.*

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different persons. The expenses of all the opium shops are to be defrayed from partnership funds. The management of the different shops is placed in the hands of Letchimanan (the second defendant), who, according to the deed (D 1), had only some licenses, and Ramanathan (the first defendant), who was not a partner and held no license."

The District Judge has, I think, interpreted the agreement correctly. It recites that " the parties of the first part " have purchased the opium licenses for the places specified in schedule I., and " the parties of the second part " those for the places specified in schedule II. The agreement is " to carry on the business of selling opium " at the places enumerated in these schedules. " The business already done at the places aforesaid" is "to be deemed and taken to have been done on account of the partnership. The management of the said business shall be in the hands of the said Ramanathan Chetty and Letchimanan Chetty, who shall carry on the said business to the satisfaction of the partners." The necessary funds are to be contributed, the expenses borne, and the profits divided, in certain specified proportions. " None of the partners shall, during the continuance of this agreement, be engaged or interested directly or indirectly in the business of selling opium, except under this agreement, and if any of the said partners shall be guilty of a breach of the provisions in this clause contained he shall pay to the said managers for the benefit of the partnership the sum of rupees one thousand (Rs. 1,000)." The pleadings and the issues make matters, if possible, clearer. The plaint sets out the effect of the deed by which the parties " agreed to carry on the business of selling opium," alleges that " the management of the said business and all its property, including all books of account, have always been in the custody and under the control of the defendants," and claims an account on that basis. The first and second defendants admit the partnership, but deny that they were managers of the business or in control of its property. One of the issues framed embodied the question, raised by these pleadings, whether the first and second defendants were managers of the business or not, and, apart from the brief examination of the plaintiff by the Court, the only evidence recorded in the case related to that issue.

The agreement sued on was, in my opinion, a partnership in the business of opium selling between persons, some of whom had, while others had not, licenses applicable to the places at which under the agreement the opium was to be sold. It is scarcely necessary to say that, for the purposes of such an agreement, each partner was engaged in " selling " opium, whether he did so directly or through the agency of a co-partner. If *Meyappa Chetty v. Ramanathan* [1] was rightly decided, the agreement with which we are here concerned was contrary to the policy of the Opium Ordinance, 1899

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

(No. 5 of 1899), and, therefore, illegal. The effect of *Meyappa Chetty v. Ramanathan* [1] is not to be whittled away by arguing that the case turned on the particular deed which the Court had to interpret. The *ratio decidendi* was this: " Section 6 of the Opium Ordinance, 1899 (No. 5 of 1899), is sufficient to stamp with illegality and render unenforceable rights arising under a partnership in the opium business when an unlicensed person claiming to have been a partner has been engaged as such in furthering its interests." Was then *Meyappa Chetty v. Ramanathan* [1] rightly decided? I will deal with this question first apart from, and then upon, the authorities.

The principle that has to be kept in view is clear. " If it be shown," said Parke B. in *Smith v. Mawhood*,[2] " that the Legislature intended to prohibit any contract, then whether this were for the purpose of revenue or not, the contract is illegal and void, and no right of action can arise out of it." " The question is," said Alderson B. in the same case (*ubi supra, at page 464*), " does the Legislature mean to prohibit the act done or not? If it does, whether it be for the purpose of revenue or otherwise, then the doing of the act is a breach of the law, and no right of action can arise out of it." Whether in any enactment the Legislature has prohibited a particular contract or act is a problem that has to be solved in the light of the letter and the spirit of the provisions of that enactment viewed as a whole. Although a contract or act may be made illegal by a statute passed for the protection of revenue alone (*Smith v. Mawhood* [2]), the presumption of illegality will be greater where the statute is one embracing other important objects of public policy as well (see *Boistub Churn Naun v. Wooma Churn Sen* [3]), and where it contains prohibitory language, besides imposing a penalty. The history of opium legislation in this country, and the language and scope of Ordinance No. 5 of 1899, under which the present case has to be decided, show conclusively that the Legislature intended, not merely or chiefly to protect the revenue, but to prohibit the sale of opium, except under conditions prescribed by itself, and that the law, as declared by Ordinance No. 5 of 1899, requires that no person shall sell opium as a principal unless he has been duly licensed to sell it at the particular shop or shops to which the license relates. The earliest enactment relative to the subject in Ceylon is Ordinance No. 19 of 1867, the short title of which describes it as " An Ordinance to restrict the use of Opium and Bhang," while the preamble recited that " it is expedient to restrict the use of opium and to prohibit the sale thereof except by duly licensed persons." Section 3 accordingly, combining the effect of the provisions of sections 5 and 6 of Ordinance No. 5 of 1899, provides that " it shall not be lawful for

[1] *(1913) 16 N. L. R. 33.* [2] *(1845) 14 M. & W., at page 463.*
[3] *(1889) I. L. R. 16 Cal. 436.*

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any person in any place (to which the Ordinance applies) to possess opium in any quantity beyond two pounds in weight, or to sell by wholesale or retail, or to offer or expose for sale or to suffer or permit to be sold, opium " without a license. The license may be revoked whenever the proper authority deems it expedient to do so (section 5), and a penalty is prescribed in case of breach of any of the provisions of the Ordinance (section 6). The form of the license to sell opium given in the schedule embodies an express statement of the particular shop at which the sale of opium is authorized under the license. This Ordinance was amended in details by Ordinances No. 4 of 1878, No. 9 of 1889, No. 2 of 1893, and No. 9 of 1897. These enactments were in turn repealed by Ordinance No. 5 of 1899, the preamble of which states that " it is expedient to consolidate and amend the law relating to the possession and sale of opium." Save that it does not reproduce the language of the preamble of Ordinance No. 19 of 1876, Ordinance No. 5 of 1899 re-enacts the substance of the entire body of provisions contained in that enactment and in the amending Ordinances. It declares unlawful the possession of opium exceeding a certain weight, or the sale, either by wholesale or retail, of any quantity of opium, without a license (sections 5 and 6). It constitutes a " proper authority " by which licenses may be granted (sections 4 and 7), and empowers the proper authority to refuse to grant any license at discretion, or to annex to the grant any conditions, prescribing certain conditions which, in any event, must be incorporated in the license (section 15 (1)). The license may be revoked by the proper authority for the breach of any of its conditions or "for any reason whatever" (section 15 (2)). Sales of opium are to be for ready money (section 16 (1)), and penalties are provided for breaches of the requirements of the Ordinance. Reproducing almost in terms a provision which will be found in Ordinance No. 19 of 1876 and its amending legislation, it excludes, from the general prohibition of possession or sale without a license, opium *bona fide* required for medical purposes—"the burden of proving whereof shall lie on the person alleging the same in his defence "—by any medical practitioner, chemist, or druggist (section 19). The insertion in the Ordinance of such an exception adds force to the view that but for its presence such possession or sale would be illegal. The form of license given in the schedule to Ordinance No. 5 of 1899 provides for the particular shop to which the license relates being specified. Although licenses for the sale of opium have been granted from 1867 downwards, not a single instance has been given to us of the grant of such a license to a syndicate as such, or of its being held that the grant of a license to one member of such a syndicate would legalize the sale of opium by its other unlicensed members. The terms of the license granted under Ordinance No. 5 of 1899, a form of which has been supplied to us, point to the conclusion that the license is intended to be, and is, a purely personal privilege. Although, in

those clauses which deal with such matters as their internal condition a reference is made to the " premises licensed "—a provision natural enough in view of the fact that the license is confined to the particular premises which it specifies—it is " the licensee " who has " to see that all receipts and disposals of opium are regularly entered in the stock book immediately the transaction takes place, all the columns in the book being correctly filled in, and the quantity in stock at the beginning and end of the day being clearly shown." It is " the licensee " who has to submit to " the proper authority " for approval the names of the persons whom he proposes to employ at the licensed premises. It is " the licensee " who has " to make an entry in a book to be kept for that purpose, giving the full name and address of the purchaser and giving the quantity sold to him, and the date of sale, whenever opium exceeding four drachms in weight is sold at any one time." Conditions of this character surely indicate—and others might have been cited to the same effect—an intention that each license shall relate to a specified shop, and that the business of selling opium at that shop shall be carried on, with such properly regulated assistance as may be necessary, by " the licensee " and by him alone.

It is argued, however, that the words " suffer or permit to be sold " in section 6 of Ordinance No. 5 of 1899 make a difference, and enable by implication " the licensee " to authorize an unqualified person to act for him as principal. I am wholly unable to agree. The words in question occur, as I have shown, in Ordinance No. 19 of 1867, the avowed object of which was to prohibit the sale of opium " except by duly licensed persons." Instead of restricting the prohibition contained in section 6 of Ordinance No. 5 of 1899, they enlarge its scope. The expression is one almost of common form in legislation of this character, and merely means that the licensee cannot shelter himself against a charge of having effected a prohibited sale by alleging that it was not his personal act where it took place by his permission or sufferance.

I come now to the authorities. *Padmanabhan v. Sarda* [1] is directly in point. The only points in regard to which the appellant's counsel sought to distinguish the Indian Opium Act—Act I. of 1878—from Ordinance No. 5 of 1899 were the absence in the former of the words " suffer or permit to be used," and the absence in the latter of any prohibition of transfer. I have already dealt with the phrase—to which such mystic force is sought to be attached—" suffer or permit to be used," and have nothing further to say about it. There is no prohibition of transfer in the Indian Opium Act. The prohibition referred to in *Padmanabhan v. Sarda* [1] was contained in the license. But the question of the transfer was only one of the points raised in the case. *Padmanabhan v. Sarda* [1] was expressly decided on the ground that the provisions of the Opium

[1] *(1911) 21 Mad. L. J. 425.*

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Act, like those of the Abkari Act, " as a whole show clearly that every person carrying on (the business) as a principal must be licensed," and that, " to hold that a person who has not got a license can still be a partner with one who has a license, and as such partner carry on the business with or without the other, would enable the unlicensed partner to evade the liabilities intended by the law to be cast on persons carrying on (that) business." " We ought perhaps to mention," the judgment proceeds, " that the appellant's vakil wishes to make out that his client did not really become a partner with the defendants, but merely became entitled to a share of the profits of the business in consideration of financing it, but this contention is obviously contrary to the case set out in the plaint, and we must decline to consider it." The plaint and the evidence of the plaintiff himself at the trial make these observations equally applicable to the present case. The decision of the High Court of Madras in *Padmanabhan v. Sarda* [1] is supported by a large body of analogous authorities. I will give two illustrations only. In *Shaha v. Shaha*,[2] Sir Richard Couch C.J. and Glover J. held that an agreement whereby the holder of a license for keeping a wine shop let the shop and the use of the license for a fixed term, receiving rent, was contrary to the policy of the law as declared in the Bengal Act II. of 1866, and therefore illegal. The appellant's counsel sought to distinguish this case by contending that it turned on the fact that there had been a direct contravention of the law. But that is not so. I have examined Act II. of 1866. It contains no direct prohibition of sub-letting. The report of the case shows that no such prohibition was contained in the license. The *ratio decidendi* is thus expressed: " The person to be licensed is the keeper of the shop, and it is intended that it shall be kept by the person who had the license. Keeping a shop is not letting it out to another person and receiving a rent for it. A man who lets his house or shop to another cannot properly be said to keep it; and when the law speaks of the keepers of these houses or places of entertainment, it must mean the persons who really keep them, that is, the persons who dwell in, and have the management and control of, them. This is what must be understood by keeping a house of entertainment."

And, again, " It is clear that what is intended is that the person who has the license shall keep the shop or place of entertainment, and shall be liable for the acts of his servant or the person who may be in charge of it. A contract of this kind, by which he lets the shop and the use of the license for a fixed term, receiving rent, is contrary to the policy of the law. It is in fact a contract to do that which the law intended should not be done, and it appears to us to come clearly within the rule that a contract to do that which is illegal, or is contrary to public policy, cannot be enforced."

[1] *(1911) 21 Mad. L. J. 425.*

[2] *(1874) 21 W. R. 289.*

In *Marudamuthu Pillai v. Rangasamy Moopan*[1] the plaintiff entered into an agreement with the defendant that they should be partners in the business of vending arrack and toddy, the plaintiff having a license for toddy and the defendant having a license for arrack. At the time this contract was entered into it was a rule of the Government, under the Abkari Act, that no person having a toddy license should be interested in an arrack business, and *vice versâ*. Subrahmania Ayyar and Davies JJ. held that the contract was void under the rule, but added, " apart from this, we should hold that the contract was invalid also on the ground that the license in each case was to be obtained by only one of the partners. The provisions of the Abkari Act, as a whole, show clearly that every person carrying on abkari business as a principal must be licensed under the Act. The reason is obvious that, unless he were licensed, there could be no control over him." The case of *Jamson v. Driefontein Consolidated Mines, Ltd.*,[2] to which I called the attention of counsel during the argument, only shows that the grounds of " public policy " at common law should not be extended by Courts of justice. It is no authority against the creation of statutory grounds of " public policy," and the cases that I have examined or cited in the course of this judgment, which might be multiplied indefinitely, prove that these may be created by the Legislature either expressly or by necessary implication.

In my opinion, the decision of the District Judge is right, and this appeal should, on the authority of *Meyappa Chetty v. Ramanathan*,[3] have been dismissed with costs by the Bench before which it originally came.

PEREIRA J.—

The plaintiff in this case is one of the parties to partnership deed No. 3,080 dated March 3, 1910 (D 1). The two defendants are also parties to that deed, and in addition to being members of the partnership constituted thereby, the defendants were the managers (appointed by means of the same deed) of the business of the partnership. The partnership has now been dissolved by effluxion of time, and the plaintiff sues the defendants for an account of their management and of the affairs of the partnership, and for the recovery of what may be found to be due to the plaintiff thereon. The added defendants are the other members of the partnership constituted by deed D 1. After issues were framed some evidence was taken by the District Judge, and, on February 19, 1913, he made order as follows: " The deed sued on was very similar in terms to deed held to be illegal in case No. 31,882, and I framed the following issue: ' Is the agreement sued on contrary to the policy of the Opium Ordinance, 1899, and therefore illegal? ' " And he eventually

[1] (*1900*) *I. L. R. 24 Mad. 401.*

[2] (*1902*) *A. C. 484.*

[3] (*1913*) *16 N. L. R. 33.*

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held that the agreement in question was illegal, and dismissed the plaintiff's claim. This Court has already pronounced upon the right of the District Judge to frame, at the stage of the case at which he did, the issue mentioned above, and the question now for consideration is whether that issue has been rightly decided. I confess I find it difficult to say where one should look to discover the "policy of an Ordinance." The preamble is perhaps the safest, and is certainly the most inviting, direction to look in, and the policy to be gathered from the preamble of the Ordinance in question, namely, Ordinance No. 5 of 1899, is the "consolidation and amendment of the law relating to the possession and sale of opium." If this is the policy that we are to concern ourselves with, I have no hesitation in saying that in deed D 1 there is absolutely nothing contrary to this policy. Of course we are now dealing with a repealed Ordinance, and if the District Judge had in view the Ordinance as regards the possession and sale of opium now in force, which, however, has no application to this case, the policy to be gathered from the preamble of that Ordinance (Ordinance No. 5 of 1910) is, it will be seen, the "restriction of the consumption of opium in Ceylon." Whatever the policy of the Legislature may have been in passing either Ordinance, the District Judge apparently thinks that the deed in question contravenes some "public policy," because at the very commencement of his order of February 19, 1913, he says, "The terms of the deed of partnership indicate that the agreement is contrary to public policy." If the policy of the one Ordinance or the other can be brought under that designation—"public policy"—and the deed is found to be contrary to that policy, there can be no question that it must then be pronounced to be null and void. But how are we to ascertain what the "public policy" is in respect of the possession, sale, or consumption of opium? Public policy, according to an eminent Judge, "is a very unruly horse, and when once you get astride of it, you never know where it will carry you" (see *Richardson v. Mellish* [1]). It has also been observed that public policy "does not admit of definition, and is not easily explained. It is a variable quantity, and it must vary with the habits, capacities, and opportunities of the public" (*per* Kekewick J. in *Davies v. Davies* [2]). There are certain time-honoured purposes which Courts have always regarded as matters of public policy, such as the encouragement of trade, the repression of vice, immorality, and lawlessness, &c., but in the presence of such conflicting opinions as now exist on questions as to what is best for the public good, what can be our guide in an attempt to discover new matters and things that can be said to be matters of public policy? "To allow this" (public policy), said Parke B. in a judgment cited with great approval by the Lord Chancellor in *Jamson v. Driefontein Consolidated Mines, Ltd.*,[3] "to be a ground of judicial decision

[1] *2 Bing. 252.* [2] *36 Ch. D. 364.* [3] *(1903) A. C. 496.*

would lead to the greatest uncertainty and confusion." The issue as framed can therefore, in my opinion, admit of only one answer, namely, an answer in the negative. If the alleged illegality of the agreement is to depend entirely upon its being contrary to the so-called policy of the Ordinance, I do not think there is much to be said against the validity of the agreement. But I think that the real question involved is whether the agreement "has been made for or about any matter or thing which is prohibited and made unlawful by Ordinance." Maxwell, in his work on the Interpretation of Statutes, citing numerous cases, clearly lays down the rule with regard to the invalidity of agreements of which the terms contravene the provisions of legislative enactments. He says (*p. 635, 5th ed.*), "It is, and has always been, an established rule of law that no action can be maintained on a contract made for or about any matter or thing which is prohibited and made unlawful by statute; such a contract is void." But he also says, "When the object of the act is sufficiently attained without giving the prohibition so stringent an effect, and where it is also collateral to or independent of the contract, the statute is understood as not affecting the validity of the contract." It is needless to consider whether agreement D 1 falls within this exception. In my opinion it does not come within the rule at all. If given a reasonable construction, there is no part of the agreement D 1 that contravenes any provision of the Opium Ordinance of 1899. The case of *Meyappa Chetty v. Ramanathan* [1] has been cited against this view. I do not think that I should look outside the four corners of the judgment if I am to treat the case as an authority on a question of law. Some of the terms of the deed in question in that case cited by His Lordship the Chief Justice do not appear in the present deed. Each case must depend upon its own facts and circumstances; and dealing with the deed in question in the present case, it seems to me that there is no part of it that can be taken objection to as being contrary to the provisions of the Opium Ordinance. The parties to the agreement are all persons who held licenses to sell opium at different places. They agree, in general terms, to carry on in partnership the trade or business of selling opium. This is covenant No. 1. The only other covenant that need be noticed is No. 3, by which it is provided that the management of the business is to be in the hands of the present defendants, "who shall carry on the said business to the satisfaction of the parties." Clearly, the duties and liabilities of the licensees with respect to their own respective licenses remain untouched. The agreement is no more than one to pool the profits, and there is no stipulation whatever allowing or requiring a partner to do anything that is forbidden by the Ordinance. That is the most important feature of the agreement. In the case of *Davies v. Makuna*,[2] a qualified medical practitioner agreed to serve an unqualified medical

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

[2] *29 Ch. D. 596.*

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practitioner as assistant in his profession as a medical practitioner. Practice by a person in the position of the latter as a medical practitioner was actually prohibited by Act 55, Geo. 3, c. 194, apparently in the interests of the public; and inasmuch as the agreement involved practice by him, it was held to be illegal. But the Judges who constituted the Court were of opinion that if the agreement did not involve actual practice by the unqualified practitioner it would be valid.

For the reasons given above, I am of opinion that agreement D 1 is a valid agreement.

Since writing the above I have seen the judgment of my brother Ennis, and I may say that I am in entire agreement with him. Of course my decision is that the agreement is *ex facie* valid. There is nothing in its terms that can be said to contravene any provision of the law, but, as my brother Ennis has pointed out to me, evidence is admissible under proviso 1 to section 92 of the Evidence Ordinance to prove any fact which would invalidate an agreement on the ground of illegality. I have carefully considered this proviso, and I find that it is largely based on the authority of the case of *Collins v. Blantern*,[1] where it was, in effect, held that, in the case of a deed, while, as a general rule, you cannot plead any matter *dehors* the deed itself, you may, in order to establish illegality, prove any matter not inconsistent with, or contradictory of, the express terms of the deed. The nature of the illegality provable in the present case I have already decided upon. I therefore agree to the order proposed by my learned brother, and would set aside the order appealed from with costs, and remit the case to the District Court for the trial of the other issues framed and of the question whether, in the execution of deed D 1, it was the intention of the parties to take the sale of opium out of the hands of the licensees of the respective shops.

ENNIS J.—

This case was reserved for consideration by a Full Court on the decision of the learned District Judge on the issue whether the agreement sued upon is contrary to the policy of the Opium Ordinance, and therefore illegal.

The District Judge found that the agreement in this case contained provisions similar to the provisions of the agreement in the case of *Meyappa Chetty v. Ramanathan*,[2] and, following that case, held the present agreement to be illegal.

It is urged on appeal that the agreements are not similar. It was pointed out that in the former case some of the parties were not

[1] *2 Wilson K. B. 347.*

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

licensees, and further, that in that case the parties took an active interest in the management of the several opium shops; while in the present case all the parties are licensees of one or other of the shops, and it is alleged that the partnership did not interfere with the management of the licensees in their respective shops, but only pooled the profits and losses.

I can see nothing in the terms of the agreement in this case indicating that it is against any public policy known to the common law, and there remains only the question whether it is illegal as being in contravention of any express prohibition of law or a prohibition implied by the imposition of a penalty.

Section 6 of the Opium Ordinance, 1899, prescribes that it shall not be lawful for " any person to sell . . . . . or suffer or permit to be sold, either by wholesale or retail, opium without a license authorizing such sale," and section 16 prescribes the penalty for the contravention of this provision. Section 15 provides that conditions may be attached to the license, and it appears that one of the conditions attached to the opium licenses is that the names of all persons employed on the licensed premises shall be endorsed on the license.

Nothing in the terms of the Ordinance or in the conditions of the license prohibit, in my opinion, a person carrying on the business of selling opium through persons duly licensed to sell; and the object of the Ordinance, which is to control the possession and sale of opium, would, it seems to me, be attained without extending the prohibition on sale contained in section 6 to the partners in a business carried on through duly licensed persons who have the control and management of the shops.

In the case of *Meyappa Chetty v. Ramanathan* [1] the judgments indicate that the agreement was such that the licensees had no direct control over the partnership shops for which they had acquired licenses, and that unlicensed persons were directly engaged in the management of the shops, and it was held that there was a contravention of the prohibition on sale contained in section 6 of the Ordinance.

In the Indian cases which were cited, it would seem that a breach of some express provision of the Indian Act, or of rules thereunder, or of the conditions of the license, was found.

In *Padmanabhan v. Sarda* [2] there was a condition in the license which prohibited the transfer of the right of the sale granted to the defendants, although in this case this was not the only ground of the decision.

In *Marudamuthu Pillai v. Rangasamy Mooppan* [3] there was a rule under the Act that " no person having a toddy license should be interested in an arrack business, and *vice versâ*."

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

[2] *35 Mad. 582.*

[3] *24 Mad. 401.*

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In *Shaha v. Shaha* [1] there was an agreement whereby the holder of a license for keeping a wine shop let the shop and the use of the license, and this was held to be contrary to the prohibition of sale without a license, as it was the intention of the Act that the shop should be kept by the person who had the license, although there was no express prohibition of letting either in the Act or rules.

The present case differs, in my opinion from *Meyappa Chetty v. Ramanathan*,[2] in that the agreement does not contain any provision which shows that non-licensed persons were to conduct the sales, and from the Indian cases, in that there is no prohibition against dealing with the license or any inference that the shops are to be " kept " by persons other than the licensees.

Whether the agreement is illegal on the ground that it was the intention of the parties to take the sale of opium out of the hands of the licensees of the respective shops can be decided only when all the evidence has been taken.

I would send the case back for further evidence and for decision on the facts and the other issues raised.

Sent back.

[1] (1874) 21 *W. R.* 289.

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