

1938

Present : Maartensz and Koch JJ.

PARAMSOTHY v. SUPPRAMANIAM

18—D. C. Jaffna, 211

Cheetu Club—Application of Ordinance to existing cheetus—Action for recovery of contributions—Ordinance No. 61 of 1935, ss. 5 (2) and 46.

The effect of section 46 (4) of the Cheetu Ordinance, No. 61 of 1935, is to make the Ordinance applicable to cheetus existing at the date of its commencement.

A contributor to a cheetu, which does not comply with the essential terms of section 3 (1), is precluded by section 5 (2) from maintaining an action for the recovery of his contributions.

Section 5 (2) applies both to an action for the recovery of contributions as well as to an action for the recovery of a prize.

THE defendants were the managers of a cheetu club which was opened in January, 1936. In June, 1937, the plaintiff as the highest bidder was entitled to the prize of Rs. 800 and a dividend of Rs. 8.38. As this sum of money had not been paid, the plaintiff sued the defendants for a return of the instalments, paid by him from January 1, 1936, to the end of May, 1937, aggregating Rs. 1,020. The learned District Judge held that, as the contributions of each subscriber had to be paid in instalments spread over a period of thirty-one months which was inconsistent with section 3 (c) of the Cheetu Ordinance, No. 61 of 1935, the action was not maintainable. From this order the plaintiff appealed.

*H. V. Perera, K.C. (with him M. Balasunderam and S. Sabapathipillai), for plaintiff, appellant.—*The plaintiff paid Rs. 1,020 up to the end of May, 1937. As he was the highest bidder at the auction held on that day, he became entitled to Rs. 800 and a dividend of Rs. 8.38. The club ceased to exist from that day. The learned District Judge decided the facts in favour of the plaintiff but held that the plaintiff could not maintain the action under the Ordinance, as the cheetu did not comply with section 3 (1) as there were thirty-one contributions.

The Cheetu Ordinance came into operation on April 1, 1937—*Gazette No. 8,226 of March 12, 1937.* The present cheetu was in existence on that day. Only chapter VII. applies in this case. The word "cheetu" is defined in section 2. Section 5 prohibits the promotion of certain cheetus, but the Ordinance has not penalized the past cheetus. Section 5 (2) deals with claims but not with an action claiming the return of the money. The Ordinance is not very clear. The word "cheetu" has not the same meaning in chapter VII. as in the earlier portions. The registration of the cheetu was a duty cast on the manager. Under section 29, the members may recover the money paid.

*S. J. V. Chelvanayagam (N. Nadarajah with him and A. Muthucumaroe), for the defendants, respondents.—*The position taken now by the plaintiff is not the same as that taken in the lower Court. The defendants did not take any objection as the plaint did not disclose a cause of action.

Under the Ordinance certain cheetus are legal and the rest are illegal. In the latter, exemptions of certain regulations may be allowed by the

Registrar. Then they would become legal. The provisions of chapter III. apply to all cheetus. The necessity of registration is indicated in chapter VII. Under section 5, the present action cannot be maintained.

M. Balasunderam, in reply.—Though there were thirty-one instalments, the interval between them is thirty months.

The Ordinance is for the control and registration of cheetus. It does not legalize or illegalize a-cheetu. No ordinance could be interpreted so as to have retrospective effect unless there were clear provisions in the ordinance itself to that effect.

Cur adv. vult.

June 1, 1938. MAARTENSZ J.—

The plaintiff-appellant in this action sued the defendants, who he alleged were the joint managers of an auction cheetu, to recover the instalments paid by him from January 1, 1936, to the end of May, 1937, aggregating Rs. 1,020.

The plaintiff averred that in June, 1937, he was as the highest bidder declared entitled to the prize of Rs. 800 and a dividend of Rs. 8.38, and that as the defendant failed to pay him this sum of Rs. 808.38 he became entitled to a refund of the amount contributed by him up to the end of May, 1937.

The defendants in their answer denied all the averments in the plaint and pleaded that the action was not maintainable "as the cheetu, if any, was not constituted as required by Ordinance No. 61 of 1935".

The action was tried on the following issues:—

- (1) Were the defendants joint managers of an auction cheetu for an amount of Rs. 930 to run for a period of 31 months from January, 1936.
- (2) Was plaintiff subscriber to two shares.
- (3) Did plaintiff become the purchaser of the collection in June, 1937, at a discount of Rs. 130.
- (4) What amount, if any, is plaintiff entitled to recover.
- (5) Is plaintiff seeking to enforce a right or claim contemplated by section 5 (2) of Ordinance No. 61 of 1935.
- (6) If so, is the plaintiff entitled to maintain this action.

Neither in the answer nor in the issues was it pleaded that the defendants were not personally responsible for the payment of the prize or that the contribution of the plaintiff had been distributed to the previous winners.

The plaintiff's evidence on the issues of fact was not rebutted and the District Judge answered them accordingly.

On the 5th and 6th issues he held that the action was not maintainable by reason of the provisions of sub-section (1) of section 3 and sub-section (2) of section 5 of the Cheetu Ordinance, No. 61 of 1935, and dismissed plaintiff's action with costs.

Section 3 (1) of the Cheetu Ordinance, No. 61 of 1935, enacts that "No scheme or arrangement purporting to be a cheetu shall be deemed to be a cheetu for the purposes of this Ordinance, unless at the time of the formation of that scheme or arrangement the persons joining as subscribers

and the person acting as manager agree upon and adopt each of the following essential terms and conditions":—The terms and conditions are set out in clauses (a) to (k).

Clause (c) enacts "that the contribution of each subscriber is to be paid to the manager in money in equal instalments of a specified value during a specified period not exceeding thirty months".

Section 4 enacts that "every scheme or arrangement which, notwithstanding that it purports to be a cheetu, is not based wholly on the essential terms and conditions set out in section 3 or which is based on terms and conditions inconsistent wholly or in part with those essential terms and conditions, shall for the purposes of this Ordinance be deemed only to partake of the nature of a cheetu".

Section 5 provides that "(1) No person shall promote or conduct, or aid, assist or take any part in the promotion or conduct of, any scheme or arrangement which only partakes of the nature of a cheetu within the meaning of section 4.

(2) No right or claim under any scheme or arrangement which only partakes of the nature of a cheetu within the meaning of section 4, shall be enforceable by action in any Court or Village Tribunal in this Island".

In the cheetu in question the contribution of each subscriber was to be paid during a period of thirty-one months. The District Judge held that the cheetu embodied a condition inconsistent with clause (c) quoted above, and was an arrangement partaking of the nature of a cheetu within the meaning of section 4. He held further that section 5 (2) applied to existing cheetus and that the action was not maintainable.

The District Judge also held that the cheetu did not comply with another essential condition, but that ruling is due to a misreading of the evidence and need not be considered.

The main contention in appeal was that the Ordinance did not apply to cheetus which were being conducted when the Ordinance came into operation. (The Ordinance came into operation on April 1, 1937.) These cheetus I shall refer to as "existing cheetus".

It was contended in the alternative (a) that section 5 (2) did not apply to actions for the recovery of contributions, (b) that in any event the plaintiff could, as the cheetu period had terminated, recover the amount of the contribution from the manager under the provisions of section 29 of the Ordinance.

The alternative contentions can be disposed of very shortly.

The terms of section 5 (2) are very comprehensive and in my opinion apply to an action for the recovery of contributions as well as to an action for the recovery of the prize. The decision in the case of *Sinnaturai v. Chinniah*¹ is not applicable to section 5 (2).

Section 29 of the Ordinance creates a right and the right cannot be enforced if the cheetu is one which only partakes of the nature of a cheetu and if the Ordinance is applicable to existing cheetus the plaintiff cannot proceed under the section.

¹ (1906) 10 N. L. R. 5.

As regards the main contention, it is laid down in Maxwell's *Interpretation of Statutes* (7th ed. by Bridgman), at page 186, that "No rule of construction is more firmly established than this: that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards a matter of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only". And at page 187 that, "It is chiefly where the enactment would prejudicially affect vested rights, or the legality of past transactions, or impair contracts, that the rule in question prevails. Every statute, it has been said, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in respect of transactions or consideration already past, must be presumed, out of respect to the legislature, to be intended not to have a retrospective operation".

The respondent contended that the provisions of chapter VII. of the Ordinance gave the Ordinance retrospective effect. This chapter is entitled "Transitory Provisions relating to Cheetus actually conducted at the date of the commencement of the Ordinance".

It provides (*vide* section 46 (1)) that, "Within one month after the date on which this Ordinance comes into operation, the manager of every cheetu of which the cheetu amount exceeds fifty rupees and which is actually being conducted at that date, shall furnish to the Registrar of Lands of the District in which the manager resides or has his place of business, a statement verified by affidavit and containing the terms and conditions of, and the following particulars relating to, that cheetu":—

The particulars required are:—

- (a) the name and address of the manager or of the company, firm or individual with a business name, conducting the cheetu ;
- (b) the cheetu amount ;
- (c) the date of the formation of the cheetu ;
- (d) the cheetu period ;
- (e) the names and addresses of the subscribers ;
- (f) the names of the several purchasers of the cheetu amounts already sold, and the amount of the respective prizes drawn by them ;
- (g) the manager's commission ;
- (h) the amount contributed up to that date as dividends each month to each of the subscribers.

Sub-sections (3), (4), and (5) enact as follows:—

- " (3) On receipt of a statement furnished under sub-section (1) the Registrar shall enter the particulars set out therein in a Register of existing cheetus, and shall forward to the Registrar-General the statement and all other information relating to the cheetu".
- " (4) The Registrar-General may of his own motion or on application made by the manager of any cheetu registered under this section, exempt that cheetu by an order under his hand from the provisions of all or any of the other sections of this Ordinance, either

unconditionally or subject to the condition that the manager shall give security for the proper conduct of the cheetu by the hypothecation in favour of the Crown of movable or immovable property approved by the Registrar and not less in value than twice the cheetu amount of that cheetu; and the provisions of all other sections of this Ordinance shall cease to apply to any cheetu in respect of which an unconditional order is so made or the condition so imposed as to the security to be given is duly fulfilled”.

“ (5) The failure to furnish a statement under sub-section (1), or any additional information or explanation called for under sub-section (2), in respect of any cheetu to which this section applies or the conducting of any such cheetu without fulfilling the condition as to the security to be given where such condition has been imposed by the Registrar-General, shall be an offence punishable with a fine not exceeding one thousand rupees or with imprisonment of either kind for a period not exceeding six months, or with both such fine and imprisonment, after summary trial by a Police Court notwithstanding that such penalty exceeds the limits imposed on its jurisdiction by any other written law”.

There is no positive enactment in this chapter that the Ordinance should apply to existing cheetus but sub-section (4) appears to do so by implication.

Now the usual phrase in an exempting clause is that the exempting authority shall have power to exempt from “all or any of the sections” of a Statute. Is there any significance in the introduction of the word “other” before the word “sections” in sub-section (4) ?

Was the word “other” used to limit the applicability of the Ordinance to existing cheetus to sections which cast a duty upon the manager? That would be the more reasonable construction if it could be justified for I do not think that the Legislature could have intended to deprive a subscriber to an existing cheetu which unfortunately did not comply with the essential conditions prescribed by section 3 of his rights of action, and leave intact the rights of action of a subscriber who was fortunate enough to subscribe to a cheetu which did comply with those conditions.

I am however of opinion that the general terms in which sub-section (4) of section 46 is expressed has the effect of making by implication, the Ordinance applicable to existing cheetus and that the plaintiff is precluded by sub-section (2) of section 5 from enforcing his claim by action by reason of the fact that the contributions of each subscriber are to be paid during a specified period exceeding thirty months.

I would accordingly dismiss the appeal with costs.

Koch J.—I agree.

Appeal dismissed.