

Privy Council Appeal No. 21 of 1920.

Bengal Appeal No. 19 of 1919.

Chandra Kanta Das, since deceased (now represented by Manindra
Nath Das and others) - - - - - *Appellants*

v.

Parasullah Mullick - - - - - *Respondent.*

FROM

THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 9TH MAY, 1921.

Present at the Hearing :

VISCOUNT HALDANE.

LORD ATKINSON.

SIR JOHN EDGE.

[*Delivered by VISCOUNT HALDANE.*]

The question in this appeal arises in a suit by which it was sought to have decided that the plaintiff, who is the appellant, was entitled to recover a sum of Rs. 5,400, with interest amounting to Rs. 67-8, as due to him under certain agreements. The defence was a charge of fraud in obtaining the agreements, and as a separate defence, that the main agreement was invalid as being in restraint of trade. The learned Additional Subordinate Judge of Khulna in Bengal, who tried the case, decided it in favour of the appellant for the modified amount of Rs. 5,280, the difference being given on the footing that the respondent (being the defendant) was entitled to a small amount for compensation, on the ground of partial failure of consideration. As to this difference, no substantial controversy has been raised, and their Lordships do not think that any question is before them for decision in relation to it.

When the case went on appeal to the High Court at Fort William, the decree of the Subordinate Judge was reversed. Chatterjee, J., held that the parties were never *ad idem*. the

respondent having been misled by the appellant, and further that there was no real goodwill to assign, such as was the basis of the agreement on the part of the appellant. But he thought that as the respondent had entered into possession on the footing of the agreement, although inoperative, he ought to make compensation to the appellant to the extent of Rs. 1,000. Walmsley, J., the other member of the Court of Appeal, was of opinion that there was nothing fraudulent to render the agreement inoperative on that ground. But he held that it was void as contravening Section 27 of the Indian Contract Act, which makes every agreement by which anyone is restrained from exercising a lawful profession, trade or business, void. The trial Judge had been of opinion that the case came within the exception to the section which provides that it is not to apply where there is a sale of the goodwill, but Walmsley, J., held otherwise, on the ground that there was no real goodwill.

The appeal comes before their Lordships *ex parte*, and they have scanned the case presented for the appellant with some closeness. But, particularly having regard to the fact that the learned Judge who tried the suit found that there was nothing to establish fraud on the part of the appellant in obtaining the agreement, and that this opinion met with the concurrence of Walmsley, J., and also because of the character of the evidence itself, they are of opinion that the agreement was, apart from the point of law arising under the Contract Act, a valid agreement.

All that it is necessary to observe is that there was a dispute between the appellant and the respondent. Each of them had passenger ferry boats on a river. The respondent had entered on this business first. But he had not been prosperous, and the appellant gained an advantage over him by securing better landing-places and negotiating facilities for collecting dues. In 1910 the parties, who had had controversies, entered into agreements for putting an end to them. Under one of these, called the Kistibandi bond, executed by the appellant in favour of the respondent, the former purported to sell to the latter the goodwill of his trade in plying the ferry boats, and every description of interest and ownership which the appellant had acquired in several river landing-places for plying the boats, as well as the settlements obtained for the collection of tolls. The price was to be Rs. 5,400, payable by instalments, with interest, and if default was made in payment of any instalment the entirety was to become due at once. No question of title was to be raised by the respondent.

Default in payment was made, and the appellant has instituted the present suit. Much evidence was taken on the question of fraud, but for the reason already given their Lordships do not think it necessary to enter on this question. It has been, in their opinion, satisfactorily disposed of in the Courts below. The question that remains is that raised as to the operation of Section 27 of the Contract Act. This section has, under the express exception which it contains, no application if there was here a

genuine sale of the goodwill of the business. It ought to be observed that, in addition to the transfer of goodwill and other assets already referred to, there was an agreement or kotala executed about the same date by the appellant in favour of the respondent. Under this document the appellant contracted that, in consideration of the Rs. 5,400, he sold his rights in the landing-places and settlements and in the goodwill of the business of plying the ferry-boats, and that he ceased to have any rights thereto. The respondent was to be able to enjoy and possess these rights by exercising whatever right the appellant had in them, and the latter was not to be able to make any obstacle in the respondent's enjoyment of the same. The appellant further undertook to close the business of plying the particular ferry-boats, and that if he ever carried on the business again he would return the whole amount of the consideration.

Their Lordships are of opinion that this transaction amounted to a sale of a real goodwill, and they are unable to agree with the views expressed in the judgment of the High Court. They entertain no doubt that what took place was a sale of the good-will, within the meaning put on the expression in such cases as *Churton v. Douglas* (Joh. 174); *Trego v. Hunt* (1896, A.C. 7); and *Inland Revenue Commissioners v. Müller* (1901, A.C. 217): and as used in the same sense in Section 27 of the Indian Contract Act. Accordingly they are of opinion that the decree of the Subordinate Judge must be restored, and that the appellant is entitled to his costs of this appeal and in the High Court. They will humbly advise His Majesty accordingly.

In the Privy Council.

CHANDRA KANTA DAS, SINCE DECEASED (NOW
REPRESENTED BY MANINDRA NATH DAS
AND OTHERS)

v.

PARASULLAH MULLICK.

DELIVERED BY VISCOUNT HALDANE.

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