

A

TOTA RAM

v.

B

DUKHI PRASAD

[SUPREME COURT, 1979 (Dyke, J.), 27th July]

Civil Jurisdiction

C *Mining Ordinance (Cap. 125). Agreement entered into in writing, then submitted to and approved by Director—not null and void.*

M. Pillay for Plaintiff.

S. D. Sahu Khan for Defendant.

D

Plaintiff claimed \$11,990 from defendant being an amount allegedly due under an agreement of 11 April, 1970. The sum represented the price (less \$10 deposit) for the sale of plaintiff's share in a prospecting lease granted by the Director of Mines to the parties. Defendant claimed:

“The agreement was null and void by virtue of the provisions of the Mining Ordinance (Cap. 125)”

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The defendant counterclaimed for \$1,000, he said he had paid as a further sum on account; and that this sum should be returned to him since the agreement was null and void. The plaintiff admitted receiving this sum; to that extent his claim was reduced. Defendant relied on the Ordinance s.46(1) which read:

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“The holder of a mining tenement or of any interest therein shall not transfer or otherwise deal in his right of interest, or any part or share thereof in any manner whatsoever without first obtaining the approval in writing of the Director and no evidence of any such dealing shall be admissible in any court unless such prior approval has been obtained.”

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The Court noted that the words “null and void” do not appear in it; though they do appear in s.46(2). Evidence showed that the parties did apply for approval and did agree on the transfer on 17 April, 1970 drawn by a solicitor and subsequently approved on the document by writing by the Director.

The fees for approval were paid, the agreement was stamped and the transfer registered by the Director of Mines on 29 April, 1970.

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Other evidence showed the lease had been renewed (presumably by defendant) and the area covered by it varied on 17 August, 1970. Plaintiff cited authority viz *Harnam Singh & Anor. v. Bawa Singh* 6 F.L.R. 31, though there the relevant statute did

provide that instruments purporting to transfer native land would if approval not first given be null and void. The Court of Appeal refused to find illegality.

The defendant referred to authorities (cited below).

Held: Verdict for plaintiff for \$11,990 and costs. The Judge said—

“... it is clear the agreement was entered into and reduced to writing so it could be immediately submitted to the Director for his approval (as it was so submitted and was approved).”

He rejected the claim that the document was null and void.

Cases referred to:

Kulamma v. Manadan (1968) 2 W.L.R. 1074.

Chalmers v. Pardoe (1963) 3 All ER 552.

Curragh Investments Ltd. v. Cook (1974) 3 All ER 658.

Denning v. Edwards (1960) W.L.R. 801.

Ramkhelawan v. Mohanlal 4 F.L.R. 37.

Harnam Singh and Bakshish Singh v. Bawa Singh 6 FLR 31

DYKE, J.

Judgment

The plaintiff claims the sum of \$11,990.00 from the defendant in respect of an amount due and owing under an agreement entered into between the plaintiff and the defendant dated 17/4/70.

The plaintiff and defendant were partners in a mining venture in respect of which a prospecting licence had been granted by the Director of Mines, both parties having a 50% interest in the partnership. Under the agreement the plaintiff purported to sell his share in the partnership to the defendant for the price of \$12,000, of which the sum of \$10 was to be paid upon the execution of the agreement.

The only evidence given was by the plaintiff and his witnesses and the defence rested entirely on legal argument that the agreement was null and void by virtue of the provisions of the Mining Ordinance (Cap. 125). The counterclaim by the defendant alleged that he had paid a further \$1,000 on account, and that this sum should be returned to him since the agreement was null and void. The plaintiff has admitted receiving this sum from the defendant on account so to that extent the plaintiff's claim will be reduced.

As a result of previous proceedings judgment was given for the plaintiff in default of appearance, and bankruptcy proceedings started against the defendant.

This judgment was later set aside, so that the bankruptcy proceedings had to be terminated. By consent copy of an agreement between the parties was produced, dated 17/4/70. This was drawn up by and signed by both parties in the presence of a solicitor acting for both of them. It purports to be effective immediately, though I notice that stamp duty was not paid until 27/4/70.

A At the top right hand cover there is writing purporting to show the approval of the Director of Lands dated 22/4/70. Also by consent was submitted an application for approval of a dealing in a mining tenement, relating to the transfer, (and with a copy of the agreement annexed) dated and signed by both parties and their solicitor, on 17/4/70, the fees for which were paid on 20/4/70. The application was approved by the Director of Mines on 22/4/70, and the approval states—

B “The instrument of transfer shall be properly stamped and returned to me within 30 days from the date of this notice of approval, by the person in whose favour it is drawn, for registration, together with the prescribed registration fee.”

C These instructions were clearly complied with, stamp duty of \$60 was paid on 27/4/70 and a transfer of a mining tenement transferring the plaintiff's interest in the prospecting licence to the defendant was approved by the Director of Mines on 29/4/70 and registered the same day.

The prospecting licence itself shows that the plaintiff's interest was transferred to the defendant on 29/4/70 and it shows that the licence was subsequently renewed from year to year, presumably by the defendant, up till 31/10/75, and an area covered by the licence was even varied on 17/8/70.

D In fact, the defendant entered into another agreement on 5/10/70 to transfer a half share in the licence to one Shiu Ram, although there is no evidence that this was proceeded with.

The argument of counsel for the defendant is quite simply that the agreement between the plaintiff and the defendant was null and void because of the provisions of section 46(1) of the Act which are as follows—

E “The holder of a mining tenement or of any interest therein shall not transfer or otherwise deal in his right or interest, or any part or share thereof in any manner whatsoever without first obtaining the approval in writing of the Director and no evidence of any such dealing shall be admissible in any court unless such prior approval has been obtained.”

F It should perhaps be noted that the provision does not say that any such dealing shall be null and void, which is significant because section 46(2) does provide an example where such words are used—i.e.

“Every dealing in a mining tenement or interest therein shall be in writing and shall state the full and true consideration passing between the parties thereto, otherwise the dealing shall be null and void.”

G There is no doubt that before the plaintiff and defendant signed the agreement on 17/4/70 they had not got prior approval in writing from the Director of Mines. But what is equally clear is that this was not a case where they were going ahead regardless of what the Director might later say. The same day they sought approval for the transfer of the plaintiff's rights, and complied with all the necessary formalities. The necessary approval was granted by the Director within a few days, and there has never been any complaint by the Director that they had acted before getting his approval. Indeed common sense would suggest that some sort of negotiation or dealing would always be necessary before the Director was brought into the picture and that it would assist the Director to know the terms of any agreement reached, and it seems to me that whether or not words such as “subject to approval of the

Director of Mines being given" were added to the agreement the position with regard to the application of section 46(1) of the Ordinance is the same. It would appear that the plaintiff paid \$10 to the defendant under the terms of the agreement, but other than that nothing further was done until the approval of the Director was obtained. A

The plaintiff, in answer to the defendant's argument, refers to the case of *Harnam Singh and Bakshish Singh v Bawa Singh* 6 FLR 31, where a similar situation existed but where the words of the statute were in stronger terms than in the present case i.e. "All instruments purporting to transfer, charge or encumber any native land or any estate therein to which the consent of the Board has not been first given shall be null and void." B

In the judgment of the Court of Appeal it was said—

"The agreement in my opinion has created no illegality at all. It is a necessary preliminary in obtaining the essential consent before the land is actually disposed of." C

And later after having set out the terms of the statute quoted above the court went on—

"That section is clear and unambiguous and needs no further comment as to its effect. It also supports my opinion that, under section 12, such an instrument is merely inoperative until consent is given and is not null and void. I cannot accept as serious, the suggestion that details of an oral arrangement can be orally related, or incorporated in a letter to the Board which would then consider whether or not to consent. There clearly must at least be something in the nature of a document which, signed by the parties, sets out in sufficient detail the terms of the proposed dealing." D

I would also refer to the case of *Kulamma v Manadan* (1968) 2 WLR 1074 a case of the Judicial Committee where the court was equally reluctant to give a strict interpretation to a similar provision in the Native Land Trust Ordinance. E

The defendant has referred to a number of cases in support of his argument that the agreement was unlawful, and null and void.

Chalmers v Pardoe [1963] 3 AER 552, which refers to *Harnam Singh's* case—and incidentally, appears to approve it on its facts,—but which on its own facts, because there had been not merely an agreement, but full performance without consent, was decided the other way. F

Curragh Investments Ltd. v Cook [1974] 3 AER 658 which does not appear to be of much assistance to the court.

Denning v Edwards [1960] 3 WLR 801 seems if anything to favour the plaintiff. Part of the case concerned the prior approval of the Governor to dealing with land in part of Kenya and at p.806 of the judgment of the Judicial Committee Viscount Simonds said— G

"It has been argued that the consent of the Governor must be obtained before the agreement [i.e. to sell] is entered into and that subsequent consent is insufficient. Some form of agreement is inescapably necessary before the Governor is approached for his consent. Otherwise negotiation would be impossible. Successful negotiation ends with an agreement to which the H

- A consent of the Governor cannot be obtained before it is reached. Their Lordships are of the opinion that there was nothing contrary to law in entering into a written agreement before the Governor's consent was obtained. The legal consequence was that the agreement was inchoate till that consent was obtained. After it was obtained the agreement was complete and completely effective."
- B It is true that in that case the agreement had a provision making it subject to the necessary consent being obtained—unlike the present case, but the decision in the case does not seem to turn upon that fact, although it perhaps helped the Court to come to its decision.
- Ramkhelawan v Mohanlal* 4 FLR 37. In that case, the necessary consent was never obtained and so the transaction was never effective or lawful.
- C *Ramdin v Pyara Singh* Criminal Appeal No. 13 of 1977 is another case, like *Chalmers v Pardoe*, where the parties had gone ahead regardless of the necessary consent so that the whole transaction became an unlawful one, and the parties could not recover on the strength of an agreement tainted with illegality. That is not the case here since it is clear the agreement was entered into and reduced to writing so it could be immediately submitted to the Director for his approval (as it was so submitted and was approved).
- D In the event I find for the plaintiff and give judgment for him for the sum of \$10,990, and costs.

Judgment for the Plaintiff.