C.A. 108/60.

SACKS v. MUSSARY AND OTHERS

In the Supreme Court sitting as a Court of Civil Appeal

Silberg J., Sussman J. and Cohn J.

Arbitration—Setting aside of submission by reason of intention to conceal criminal offence—Distinction between civil and criminal aspects—Applicant himself party to intention to conceal—In pari delicto—Arbitration Ordinance, sec. 3.

The appellant and the respondents carried on business in partnership, and differences having arisen between them a submission to arbitration was signed in which the arbitrators were invited "to investigate, consider and decide the amount which Mr. Edgar Sacks (the appellant) is to pay to the partnership", this being an amount "which Mr. Edgar Sacks has to refund to the partnership on account of damages and losses caused by him." The District Court found that the subject matter of the arbitration was in fact joint property which the appellant was alleged to have stolen, and that the parties, in submitting the dispute to arbitration, intended and agreed to conceal a felony and refrain from disclosing the matter to the Police. Nevertheless an application by the appellant to set aside the submission on the ground of the above intention and agreement of the parties was refused, and an appeal was lodged.

Held, dismissing the appeal:

Per Sussman J.

1) If, incidental to the signing of a submission to arbitration relating to a criminal matter, the parties should also agree to suppress the criminal aspect, even by implication only, the submission to arbitration will become an illegal transaction which the court will not enforce.

2) The civil and criminal aspects of the case are two distinct matters, and while the criminal charge may not serve as the subject matter of an arbitration, the parties may submit the civil dispute to the decision of an arbitrator.

3) The evidence in the present case merely shows that the appellant was interested "that the matter should not be publicised", and that does not necessarily imply an agreement to suppress a prosecution and cover up a criminal matter.

Per Silberg J.

Even if the factual contentions of counsel for the appellant had been proved, his application could not succeed, for the parties were not at least *in pari delicto*, and in fact the "turpitude" was on the part of the appellant himself.

Per Cohn J.

There was abundant evidence to support the conclusion of the District Court, but

as the appellant did not come to court with clean hands and in fact initiated the whole matter, his application must fail.

Israel cases referred to:

(1) *C.A.* 11/56—*Egged (E.S.D.) Ltd. and others v. Moshe Sapir* (1958) 12 *P.D.* 739.
(2) *C.A.* 94/50—*A.B. v. C.D.* (1950) 4 *P.D.* 791.
(3) *C.A.* 110/53—*Harry Jacobs v. Ya'akov Kartoz* (1955) 9 *P.D.* 1401.

English cases referred to:

(4) *Russell v. Russell* [1880] *Ch. D.* 471.
(5) *Jones v. The Merionethshire Permanent Benefit Building Society* [1892] 1 *Ch.* 173.
(6) *Flower and others v. Sadler* [1882] 10 *Q.B.D.* 572.
(7) *Williams v. Bayley* [1886] *L.R.* 1 *H.L.* 200.
(8) *Ward v. Lloyd* [1843] 64 *R.R.* 847.

Sharf for the appellants.
Gitzelter for the respondents.

SUSSMAN J. The four parties to this action were in partnership in the business of fruit and vegetable merchants. At the end of 1955 differences of opinion arose among them, which they submitted for decision by two arbitrators in the following terms:

> "Whereas we, the undersigned, Edgar Sacks, Dov Lederman, Moshe Brick and David Mussary, are partners in a supermarket for fruit and vegetables under the name of "Rassco Market" situated in the Rassco district in North Tel Aviv.
>
> And whereas it has become necessary to ascertain the amount which Mr. Edgar Sacks has to refund to the partnership on account of damages and losses caused by him.
>
> And whereas all parties agree to submit to arbitration the ascertainment of such sums as hereinafter provided.
>
> Now therefore all the undersigned parties hereby agree to submit to arbitration by two arbitrators, Yehudah Goldenberg Advocate and Joseph Ronnen, the accountant of the said business, to investigate, consider and decide the amount which Mr. Edgar Sacks is to pay to the partnership, taking into account the above circumstances, in his [sic] absolute discretion, and it shall be within his [sic] authority

to make a compromise award without needing to give reasons for their [sic] award.

The arbitrators shall not be bound by any rules of procedure and shall not be limited as to time for making the award".

The arbitration proceedings dragged on for close on three years and at the end of 1958 the appellant who was the defendant before the arbitrators made it known that he was dissatisfied. He requested a stay of the arbitration proceedings and made application to order the arbitrators to state a special case to the court. Pending the hearing of this application by the court, the parties agreed that instead of this application, the court should consider another application which had been made earlier, namely, the appellant's application for leave to set aside the arbitration, in accordance with section 3 of the Arbitration Ordinance.* The learned judge refused this application with leave to appeal to this court. Hence this appeal.

2. The main argument of counsel for the appellant is that the arbitration agreement should be invalidated since by agreeing to proceed before arbitrators the parties had in effect agreed to conceal a criminal offence. It appears that the respondents had accused the appellant of stealing joint property and at first wished to state this expressly in the arbitration agreement but afterwards agreed to give the arbitration agreement a more neutral form and therefore merely said that the appellant had caused damage to the partners, which he was called upon to make good.

Mr. Sharf for the appellant argued forcefully that according to the finding of the trial judge at p. 6 of his judgment, the real intention of the parties in submitting the matter to arbitration was to conceal it from the police, and if that were so, there was an agreement for concealing a criminal charge which the court will not enforce.

3. I have not found in the evidence before the judge any support for his conclusion that the parties agreed to conceal a felony and to refrain from disclosing the matter to the police. The evidence merely shows that the appellant was interested "that the matter should not be publicized." The appellant's desire that the matter should not become

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* "3. A submission, unless a contrary intention is expressed therein, shall be irrevocable except by leave of the court or agreement of the parties, and shall have the same effect in all respects as if it had been made an order of court."

public knowledge does not necessarily imply an agreement to suppress a prosecution and to cover up a criminal matter. In the well-known case of *Russell v. Russell* (4), the court said that if two persons enter into an arbitration agreement and one of them in breach of the agreement sues the other, the court will not exercise its discretion to stay the action in order to enable the arbitrators to proceed, if the plaintiff has been accused of a criminal offence or of some other dishonourable conduct, and therefore desires to clear his name in public and not in the private sessions of the arbitrators. Here the intention certainly was not that if the arbitrators were to consider the claim, the matter would not be disclosed to the police. When one person steals something from another a criminal offence has been committed, but the thief is also obliged to return the stolen article and make good the loss he caused the other. The civil and criminal aspects of the case are two distinct matters. The criminal charge certainly cannot serve as the subject matter of an arbitration, but the parties may submit the civil dispute to the decision of an arbitrator. As Mr. Sharf said, an arbitration agreement is in the nature of a compromise, but why should not the injured party compromise with the thief his civil claim?

It is true that if, incidentally to the signing of the submission to arbitration, the parties should also agree to suppress the criminal aspect, even by implication only, the submission to arbitration would then become an illegal transaction which the court will not enforce.

4. Mr. Sharf sought support for his submission from *Egged v. Sapir* (1) where this court decided that the "internal" tribunal of a cooperative society is not competent to deal with an "indictment" preferred against one of the members of the society. From the very expression "indictment" used in that case, it is clear that in bringing the matter before the tribunal of the society the directors of the society intended to assume powers which were not theirs, and to deal with matters in the competence of the Attorney-General and the police. But in the case before us the civil matter alone was submitted to the arbitrators. I do not see what there is to prevent a person who has suffered an injury to claim compensation either in court or before an arbitrator, even where the act amounts to a criminal offence.

5. Mr. Sharf drew our attention to sec. 67 of the Civil Wrongs Ordinance, 1944, which requires the courts to see that the police receive information of the facts of an action if those facts support a criminal charge. I find nothing to prevent an arbitrator as well from observing the mandate of the section, nor have I found in the Ordinance any

intimation whatever that an arbitrator is not competent to deal with a claim for damages even if it appears to him that one of the parties is suspected of a criminal offence, particularly where, as in the present case, the respondents can also rely upon the partnership agreement and are not confined to the provisions of the Ordinance.

6. I have said that even if a civil matter is submitted to the award of an arbitrator, the arbitration agreement will—like any other agreement—be tainted if the parties have agreed to frustrate the administration of justice by agreeing to cover up an offence. Mr. Sharf argues rightly that such an agreement to conceal an indictable offence need not be made expressly but it is sufficient if it is made by implication. In support, he cited the judgment in *Jones v. The Merionethshire Permanent Building Society* (5). The facts were that the agreement was made not with the debtor himself who had been accused of stealing money but with his relatives, and the court inferred, as an implied term, that in consideration for the promise of those relatives to compensate the injured party the latter agreed to keep silent about the criminal aspect of the matter.

But when the agreement is made between the creditor and the debtor himself, we follow the rule established in *Flower v. Sadler* (6), upon which the judge in the present case also relied: see also *A.B. v. C.D.* (2). This rule is to the effect that even if the creditor has threatened the debtor with criminal proceedings to make him pay the debt, this does not amount to coercion or duress in respect of which a court of Equity would hold the agreement invalid, had it been made with a third party: see *Williams v. Bayley* (7). The reason for this distinction is that when a man seeks to collect a debt owed him by the debtor, the court does not deal with him as scrupulously as it does when enquiring into the conduct of a person who binds himself contractually with a third party who "volunteers" to pay the debt of another in order to impose upon him responsibility for making good the damage caused him by that other person. Prima facie it may be contended that whenever a creditor has threatened a debtor to institute criminal proceedings, it may generally be inferred that if the debtor yields and pays the debts, the creditor will refrain from turning the matter over to the police, on the principle that "a positive may be deduced from a negative."But if the courts were to go as far as to hold that in every such case there was an implied agreement to suppress a crime, they would in effect frustrate the principles established in *Flower v. Sandler* (6), and more than a century before that in *Ward v. Lloyd* (8). I do not lay down that even in the case of an agreement entered into between the creditor and the debtor himself—as distinct from an agreement between the creditor and a third party who

pays the debt on behalf of the debtor—such a condition to suppress a crime is *inconceivable*, but Mr. Sharf has not referred us to any precedent which deals with this matter, and in the *Jones* case (5), as stated, the agreement was not made with the debtor himself.

7. The conclusion which I have reached may be tested in this way. Suppose that for one reason or another the respondents had informed the police of the crime which was committed. Would they have thereby broken the agreement with the appellant? They certainly would not have broken an express term and I see no reason for concluding that they would have broken an implied term. The respondents have agreed not to take legal action against the appellant, but I have not found that they agreed to keep the matter secret from the police.

8. Since I have reached this conclusion, I see no need to express an opinion concerning the question raised before us, whether the appellant, the person charged with theft and desirous that the matter should not be made public, is at all entitled to the assistance of the court.

For these reasons I would dismiss the appeal and affirm the judgment of the District Court.

SILBERG J. I concur in the judgment of my learned colleague, Sussman J., since I am also of the opinion that the factual contentions of counsel for the appellant have not been proved. My concurrence is not, however, to be construed as acquiescing in the view that if "an agreement for suppression" among the parties had been established, we would have had to allow the appeal. It seems to me that even in such a case the appellant would have gone away empty-handed, because then the rule *ex turpi causa non oritur actio* would apply. In *Jacobs v. Kartoz* (3), it was held that where the parties are *in pari delicto* the plaintiff cannot rely upon the illegal contract to affirm it, nor upon its illegality to avoid it. The applicant in the present case was the appellant who sought to have the arbitration agreement set aside. Without deciding positively whether the appellant himself—as distinct from the opposing side—would indeed have been guilty of an offence under sec. 129 of the Criminal Code Ordinance*, the turpitude in the matter was certainly not borne equally by both sides—on the contrary, it was greater on the part of the appellant. For this reason alone the appellant cannot persuade the court to grant his application.

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* "129. Any person who asks, receives or obtains, or agrees or attempts to receive or obtain...benefit of any kind for himself...upon any agreement of understanding that he will...or will abstain from...prosecution for...a felony,...is guilty of a misdemeanour."

COHN J. The learned judge in the District Court established as a fact that "It was the intention of the parties that, instead of bringing the matter to the attention of the authorities, proceedings should take place before arbitrators", and further that "the true intention in making the arbitration agreement was to settle the matter in a form that would not involve proceedings before a criminal court." In my opinion there was abundant evidence before the court on which it could make such findings, and this court should not interfere with findings of fact of a court of first instance. For myself I accept Mr. Sharf's argument that the learned judge erred in the conclusion of law which he drew from these facts in holding that there was here no offence under sec. 129 of the Criminal Code Ordinance. 1936. I myself have no doubt that in view of the findings of fact of the learned judge there is no escaping the conclusion that, at least prima facie, an offence under sec. 129 was proved. This section does not speak, as English law apparently does, of the stifling of the prosecution. This section is satisfied if the compounding is expressed by the grant of any benefit whatever, or by the concealment of a crime from the authorities, or even by delay in prosecuting the charge or withholding evidence in connection therewith.

If there was no actual compounding here—and I express no opinion as to whether there was such or not—Mr. Sharf is right in his argument that there was at least some delay and since the parties intended, as indicated, that the arbitration between them should take the place of a criminal action, the conditions set out in sec. 129 have been met.

Nevertheless, I agree with my learned colleagues that this appeal should be dismissed. My reason is that this appellant does not come with clean hands any more than the respondents who under sec. 129 are the principal offenders. Not only did the appellant assist, by counsel and deed, in submitting the relevant matter to arbitration and concealing it from the criminal court but, according to the evidence which reached the court, it was he who initiated the whole matter, even if only for the purpose of avoiding publicity; and he cannot now be heard in argument as if he were not the prime mover.

Appeal dismissed.
Judgment given on November 7, 1960.