
(1953) 01 CAL CK 0003
In the Calcutta High Court
Case No : Arbitration No. 105 of 1952

Albion Jute Mills Co. Ltd.

APPELLANT

Vs

Jute and Gunny Brokers Ltd.

RESPONDENT

Date of Decision : 28-01-1953

Acts Referred:

Arbitration Act, 1940 — Section 2

Evidence Act, 1872 — Section 115

Raw Jute (Central Jute Board and Miscellaneous Provisions) Act, 1951 — Section 2(1), 5, 6, 7

Citation : AIR 1953 Cal 458 : (1953) 1 CALLT 122 : 57 CWN 541

Hon'ble Judges : Chakravartti, C.J.;Sarkar, J;Das Gupta, J

Bench : Full Bench

Advocate : A.C. Mitra and D.C. Sethia, for the Appellant;S. Chaudhry and P. Ginwalla, for the Respondent

Final Decision : Allowed

Judgement

Chakravartti, C.J.—This is a reference under Chap. 5, Rule 2, Rules of the Original Side, by Bachawat J. of an application made to him, praying that a certain award be declared null and void or, alternatively, that the validity and existence of the contract to which the award related, be adjudged and determined and that the award be set aside. The learned Judge thought that the questions raised before him were such that they might be dealt with more advantageously by a larger Bench, particularly in view of the fact that no appeal would lie from his decision on those questions. He thought further that the whole application might be dealt with by the larger Bench, because on the remaining questions too, the parties had agreed to proceed only on the affidavits.

2. The facts are simple, but in order to set out intelligibly the questions of law which have arisen out of them, it is necessary to refer first to the relevant provisions of law and their history.

3. In 1950, the West Bengal Legislature passed an Act, called the West Bengal

Jute (Control of Prices) Act, which was directed as regulating prices of jute and empowered the Government to fix maximum prices by notification. The Act, which was Act 6 of 1950, came into force on the 15th March of that year and maximum prices were fixed by certain notifications. On 14-12-1950, the Governor of West Bengal promulgated an Ordinance, called the Raw Jute (Central Jute Board and Miscellaneous Provisions) Ordinance (17 of 1950), for the better regulation of the jute trade. It was stated in the preamble "inter alia" that the owners of the jute mills were not being able to secure adequate supplies of jute at the maximum prices fixed under Act 6 of 1950 and it had become expedient to set up a Central Jute Board in West Bengal for ensuring an equitable supply of raw jute to the owners of the different jute-mills. Accordingly, Section 4 of the Ordinance provided for the constitution of a Central Jute Board "as soon as may be" after its commencement. By Section 6, provision was made for the manner in which contracts for the sale and purchase of raw jute between sellers and owners of jute-mills were to be entered into and it was laid down that such contracts would have to be made through the Central Jute Board according to a certain procedure. Section 5(1) prohibited the sale and purchase of raw jute to and by owners of jute-mills except in pursuance of a contract entered into in the manner provided for in Section 6 and Section 7(1) imposed a similar prohibition on giving and accepting delivery. Section 5(2) declared that any contract entered into for the sale or the supply of raw jute with the owner of a jute-mill except in the manner provided in Section 6 would be void and of no effect. Section 7(3) provided that Sections 5, 6 and 7 would come into effect on and from "the appointed day" which, u/s 2(1), meant the day specified by the State Government by notification in the Official Gazette as the appointed day for the purpose of the Ordinance. By a notification dated 29-12-1950 and published in an extraordinary issue of the Calcutta Gazette of the same date, 30-12-1950 was specified as the appointed day for the purposes of Sections 5, 6 and 7.

4. The Ordinance which consisted of 15 sections was subsequently replaced by an Act, called the Raw Jute (Central Jute Board and Miscellaneous Provisions) Act (6 of 1951) which added one more section. The Act came into force on 21-3-1951. The first fifteen of its sections were virtually verbatim reproductions of the corresponding sections of the Ordinance, and Section 16 newly added, read as follows:

"16. The Central Jute Board constituted, any rule made, any notification or license issued, any direction given, any contract entered into, any minimum price fixed, anything done or any section whatsoever taken under the Raw Jute (Central Jute Board and Miscellaneous Provisions) Ordinance, 1950, shall, on the said Ordinance ceasing to operate, be deemed to have been constituted, made, issued, given, entered into, fixed, done or taken under this Act as if this Act had commenced on the 14th day of December, 1950.

5. At all times material for the purposes of the present case, it was the Act which was in force. It has since been repealed by Act 14 of 1952 which came into force

on 5-8-1952, but nothing turns on that circumstance.

6. One other fact requires to be referred to. Section 6 of the Ordinance and the same section of the Act provided that any person, desiring to sell or supply raw jute to the owner of a jute-mill, must apply to the Board, giving all particulars, that the Board would thereafter select an owner of a jute-mill (who had signified his intention to buy raw jute to the Board in writing) with whom the applicant might enter into a contract, that the parties would have thereafter to enter into the contract by a date specified by the Board and that the prices for raw jute fixed under such contract were not to exceed the maximum prices, if any, as might be fixed under the West Bengal Jute (Control of Prices) Act, 1950. It appears that by a notification, dated 10-3-1951 and published in the Calcutta Gazette on 15-3-1951, the notifications, fixing the maximum prices, were rescinded. Thereafter, both when the Ordinance was in force and after the Act had come into operation, the Central Jute Board issued a series of Circulars by which it authorised owners of jute-mills to purchase raw jute up to the extent of the quotas respectively allotted to them "through normal trading channels", subject to their furnishing particulars of the contracts and of deliveries under them to the Board. Such Circulars were issued on 12-3-1951, 19-3-1951, 6-4-1951 and 5-7-1951, to mention only a few. Those Circulars were clearly inconsistent with the provisions of the Ordinance and the Act.

7. The facts relating to the dispute between the parties may now be stated. On 6-4-1951, which was after the Act had come into force, the petitioner, Albion Jute Mills Company, Ltd., entered into a contract with the respondent, Jute and Gunny Brokers Ltd., for the purchase from the latter of 5000 maunds of "Nikhil and/or Ashuganj Jute", at certain prices according to quality, "shipment during July and/or August, 1951, guaranteed." That contract was entered into by the parties acting for themselves through their brokers and not through the Central Jute Board. When shipping documents, together with the Bill, were presented to the petitioner by the respondent's Bankers, they were not accepted on the plea that the documents were not in order and delivery of the goods was not taken. The last date on which the documents were presented was 17-9-1951. On 26-9-1951, the Solicitors for the respondent wrote to the petitioner to say that the respondent had exercised its option of cancelling the contract and to demand payment of a sum of Rs. 1,95,000/- as damages suffered, computed at the difference between the contract price and the market price as on 17-9-1951." By a letter dated 5-10-1951, the petitioner denied liability to pay the amount claimed and thereafter, on 2-11-1951, the respondent referred the dispute to the arbitration of the Bengal Chamber of Commerce under the arbitration clause contained in the contract. The petitioner appeared before the Tribunal of Arbitration constituted by the Bengal Chamber, filed statements and adduced evidence, but did not attend the last sitting of the Tribunal which was held on 19-2-1951. An application for an adjournment made on that very day was refused and the Tribunal proceeded with and concluded the hearing. On 29-2-1952, the Arbitrators signed their award by which they allowed the

respondent's claim in full, with interest and costs. The award was filed in this Court on 23-4-1952 and on 9-6-1952, the present application was made.

8. Broadly speaking, it is prayed by the application that the award be declared void, because it was given with reference to a contract which was itself void by reason of not having been entered into in compliance with Section 6, Raw Jute (Central Jute Board and Miscellaneous Provisions) Act, 1951, and that it be set aside on certain grounds of misconduct on the part of the arbitrators, as also a certain illegality. Before us, the learned Advocate-General, who appeared on behalf of the petitioner, conceded that as to the merits of the award, his client had no case at all and he stated that, accordingly, he would not urge any ground other than the ground that the award was void and had no existence in law. The other questions raised in the application, the learned Advocate-General conceded, related to matters which were clearly within the jurisdiction of the arbitrators and for them to decide and he also did not think that he could rely on the refusal to grant an adjournment on 19-2-1952 as an instance of misconduct.

9. On the only ground urged by the learned Advocate-General, he referred to the provisions of Section 5(2) of the Act by which all contracts of the specified kind, not entered into in the manner prescribed by Section 6, were declared to be void and of no effect. The present contract being of the specified kind and not having been entered into in compliance with Section 6, was therefore, void and if it was void & of no effect, an award in relation to it was also void. Besides, the contract being void, the arbitration clause contained in it was also void and accordingly there was no valid arbitration agreement under which there could be a valid reference and! no valid reference upon which there could be a valid award.

10. Before Mr. Justice Bachawat, it was contended on behalf of the respondent that by the Circulars issued from time to time, the Central Jute Board had introduced an alternative method of selecting owners of jute-mills with whom contracts for the sale or supply of raw jute could be entered into and authorised such owners to enter into contracts through their normal trade channels, subject only to particulars of all transactions being furnished to the Board, and that, therefore, the present contract, having been entered into through the normal trade channel, was valid. Before us, Mr. Chaudhuri, appearing on behalf of the respondent, expressly abandoned that contention. He conceded that the Central Jute Board, being a statutory body, could act validly only if it acted within the rights and functions conferred on and assigned to it by statute and anything done by it in excess of its powers under the statute, like the issuing of the Circulars in question, was clearly without jurisdiction. It was therefore not possible for the respondent to plead the Circulars in answer to the petitioner's contention. Mr. Chaudhuri, however, contended that Act 6 of 1951 was itself ultra vires the State Legislature, that even if it was not ultra vires, Rs. 5, 6 and 7 of it were not in force on the date of the contract and in fact not in force at any time at all and that even assuming the contract and the arbitration clause, as a part of it, were void, there was still on the facts of the case a valid reference to

arbitration and a valid award which the petitioner could not question in view of the part it had taken in the arbitration proceedings.

11. It is perfectly clear that if the Act was a valid Act and it was in force on the date of the contract, there can be no escape from the conclusion that the contract is void. The learned Advocate-General referred to the rules framed under the Ordinance which were to be deemed to have been framed under the Act and which required the application containing the offer for sale to be in the prescribed form, and the delivery period to be one month from the date of the offer. But if the respondent did not apply to the Board at all and the contract was not entered into through the intermediation of the Board, no question of the application not having been in the prescribed form or of the delivery period not having been one month from the date of the offer, arises. Necessarily, the rules as to the details of the procedure to be followed in cases where the contract was entered into through the Board were not complied with. The only relevancy of the rules is that, read with section 8 which requires the application to contain the prescribed particulars and the contract to be on such terms and conditions as may be prescribed and with Section 14(2) which authorises the State Government to provide by rules for all or any of the matters required to be prescribed under the Act, they are equally mandatory. A contract, in order to be valid, must not only be entered into through the Board, as laid down in the Act, but it must also be entered into in the form and in accordance with/the procedure and on the terms and conditions prescribed by the rules, where, as to them, there is no agreement. Neither of the requirements having been complied with in the present case, the contract is plainly void and of no effect by reason of the provisions of Section 5(2) of the Act, provided the Act itself was valid and operative.

12. Mr. Chaudhuri, who did not lay much stress on his first and third points, contended that the Act was not valid, inasmuch as it was a piece of legislation relating to "Trade and Commerce with foreign countries: import and export across customs frontiers", which belonged to Item 41 of List I in Schedule 7 to the Constitution. I am entirely unable to accept that view of the Act. As for how it related to import and export, Mr. Chaudhuri instanced the case of an Indian citizen of West Bengal owning a jute-mill situated in Pakistan and another Indian citizen having raw jute to sell in that country and their entering into a contract in West Bengal. If both the Mill and the jute be in Pakistan, as in the case posed by Mr. Chaudhuri if I understand him aright, I do not see how any question of import or export arises. Assuming, however, that the mill is in West Bengal and the jute in Pakistan, and the owners of both the mill and the jute are West Bengal citizens who enter into a contract in West Bengal, even then I do not see that any question of import is involved in the provisions of the Act. The Act only deals with the manner in which and the party with whom a contract of sale shall be entered into, the price that shall be charged and the conditions as to the time of delivery and other details, such as may be prescribed by the rules, which shall be complied with. The right to import jute from outside India, the manner of

importing it or the duties payable are not dealt with by the Act at all. In the converse case of the jute being in India and the mill being in Pakistan also, no question of export is involved in the provisions of the Act, besides that the Act does not appear to be concerned with the owner of a jute mill situated in Pakistan, although he may be a citizen of West Bengal. It may be said that if such an owner is not selected by the Board, sale to him and consequently the export of any raw jute to his mill is made impossible, but even then the Act does not aim at producing any such result by means of controlling export and even if the "owner of a jute-mill", as contemplated by the Act, means the owner of a jute-mill situated in West Bengal or in India, which appears to be the meaning by reason of the definition of "jute-mill" in Section 2(5), control of export of raw jute is not the subject-matter of the Act, though some indirect control may be an incidental result in certain cases. In fact, export of raw jute out of India is controlled by other Acts and other regulations. In my opinion, the pith and substance of the present Act is clear. The preamble sets out the aims and objects of the Act and states that it was being passed in order to make adequate supplies of raw jute available to the owners of jute-mills at the maximum prices fixed by Act 6 of 1950 which they were finding it difficult to secure, to set up a Central Jute Board for ensuring an equitable distribution of raw jute between owners of the different mills, for better regulation of the jute trade and for the protection of the cultivators of jute. The Act itself provides for the constitution of a Jute Board, vests the Board with the control of sales of raw jute to mill-owners, makes it compulsory to enter into contracts for such sales through the Board, prescribes the method of entering into and carrying out such contracts, regulates the price chargeable under such contracts, provides for the fixation of a minimum price payable to cultivators and authorises the Government to control stocking of raw jute. Quite clear, the Act, in its pith and substance, is legislation in respect of "Trade and Commerce within the State" which belongs to Item 26 of List II and, as such, it was within the competence of the State Legislature.

13. Mr. Chaudhuri laid the greatest emphasis on his second point which was that Sections 5, 6 and 7 of the Act never came into force at all, not to speak of their having been in force on the date of the contract. Section 7(3) of the Act provides that Sections 5, 6 and 7 shall have effect on and from the appointed day and the point canvassed was whether any appointed day had been ever specified for the purposes of the Act. According to the definition of "appointed day" in Section 2(1), it means "the date specified by the State Government by notification in the Official Gazette as the appointed day for the purpose of this Act". The definition in the Ordinance was the same, except that instead of "this Act", it said "this Ordinance". It will be remembered that for the purposes of Sections 5, 6 and 7 of the Ordinance, a notification, dated 29-12-1950, specified 30-12-1950 as the appointed day. u/s 16 of the Act which has already been quoted in full, that notification must be deemed to have been issued under the Act, as if the Act had commenced on 14-12-1950. The contention of Mr. Chaudhuri was that although the Act might have to be deemed to have commenced on 14-12-1950 and

although the notification of 29-12-1950 might have to be deemed to have been issued under the Act, still the notification could not suffice to make 30-12-1950 the appointed day for the purposes of Sections 5, 6 and 7 of the Act, because it said and continued to say that the day specified in it was the appointed day "for the purposes of Sections 5, 6 and 7 of the said Ordinance". According to Mr. Chaudhuri, there was nothing to require the word "Act" to be read for the word "Ordinance", as occurring in the notification and therefore the notification, although it was to be deemed to have been issued under the Act, remained a notification specifying an appointed day for the purposes of the Ordinance. The result was that no appointed day was ever fixed for the purposes of the Act at all and therefore Sections 5, 6 and 7 of the Act never came into force.

14. In my opinion,, the contention of Mr. Chaudhuri carried technicality beyond reasonable limits and even as a technical argument, will not bear examination. If the notification of 29-12-1950 is to be deemed to have been issued under the Act. it must be deemed to have been issued u/s 2(1) thereof. Section 2(1) speaks of a notification, specifying a particular day "as the appointed day for the purpose of this Act" and, therefore, the notification of 29-12-1950, if it must be taken as a notification issued u/s 2(1) of the Act, must be taken as specifying the day mentioned in it as the appointed day for the purposes of Sections 5, 6 and 7 of the Act and not of those of the Ordinance. Mr. Chaudhuri appeared to contend that Section 16 brought only the issuing of the notification under the purview of the Act. but the text of the notification remained unaffected. In my opinion, that contention fails to take note of the effect of Section 2(1) of the Act on any notification which is or must be deemed to be, issued under It, specifying an appointed day. Besides, if the Act is to be deemed to have commenced on 14-12-1950, which was the date on which the Ordinance came into force, the Ordinance could not co-exist with the Act and the Ordinance being out of the way under the fiction created by Section 16, the Act remained as the only enactment in force on 29-12-1950 when the notification was issued. If in that context, the notification is to be read as issued u/s 2(1) of the Act, the effect, in my view, is to require that for "the purpose of this Ordinance", "the purpose of this Act" should be read. In my opinion, it is unnecessary to pursue further what appears to me to be only a verbal quibble and not an argument of substance. With regard to notifications "issued under the Ordinance, the plain meaning and effect of Section 16 is that they are to be treated as issued under the Act and for the purposes of the Act. If so, 30-12-1950 being the appointed day for the purposes of the Act, Sections 5, 6 and 7 were in force on 6-4-1951 and consequently they hit the contract.

15. The last contention of Mr. Chaudhuri was that although the contract might be void and the arbitration clause as a part of it might fail, still the piece of writing in which the arbitration clause was embodied remained and since the parties had in fact gone to arbitration, they ought to be regarded as having done so, not under the arbitration agreement as contained in the contract, but under a further agreement for which they utilised the piece of writing in which the arbitration

clause was expressed. I confess I find some difficulty in working out that argument. Mr. Chaudhuri had to find a written agreement in view of Section 2(a), Arbitration Act, but I do not see how he could requisition the arbitration clause contained in the contract for the purposes of an independent agreement. In the first place, the parties did not, in actual fact go to arbitration under an independent agreement after discarding the contract and it cannot therefore be right in law or correct in fact to treat them as having done what they did not in reality do. In the second place, the arbitration clause speaks of "all matters, questions, disputes, differences and/or claim arising out of and/or concerning and/or in connection with and/or consequence of or relating to this contract" and, therefore, that clause could not be availed of for the purpose of an independent agreement. Mr. Chaudhuri contended that the presence of the words "this contract" was no obstacle in his way, because there could be a dispute regarding an invalid contract and a reference to arbitration of such dispute and, therefore, one could reasonably imagine in the present case that there was a dispute about the. invalid contract and a subsequent agreement to refer that dispute to arbitration. The answer to that contention is that in fact there was no such subsequent agreement in the present case and, secondly, that a dispute as to whether there had been a contract at all, could not be a dispute arising out of or concerning a contract and therefore for an agreement to refer such a dispute, the language of the arbitration clause could not be appropriated. Mr. Chaudhuri then referred to the additional arbitration clause contained in Clause 14 of the contract and contended that that clause? at least furnished him with an agreement to refer a subsequent dispute about the invalid contract. Clause 14 is in the following terms:

"14. Additionally, the respective rights and obligations of the parties shall, in respect of all other pending or future contracts between them be such as if the preceding clause were specifically included in such contracts."

16. What this clause really means is not very clear. The plain meaning is that although an arbitration clause in terms of Clause 13 may not be contained in other pending contracts or in future contracts, nevertheless, such a clause shall be deemed to be included in them. In regard to future contracts, the clause seems to contain a contract to enter into another contract, which is a strange provision and in regard to pending contracts also, the position is very much the same or at least there is a contract to add a term to them. Be that as it may, this clause also, being equally contained in the contract, fell along with it and even if it were open to Mr. Chaudhuri to utilise it as a piece of writing, giving the form of an agreement, he would require to find a subsequent contract to which it could be attached. There was no such contract in this case. In my opinion, to try to make out the arbitration proceedings in the present case as having taken place in pursuance of a subsequent and independent agreement, is a vain endeavour.

17. Mr. Chaudhuri also contended, though very faintly, that the petitioner having taken part in the arbitration proceedings without protest, could not now turn

round and repudiate the award as void. In effect, he pleaded estoppel. In my opinion, that argument does not require serious examination. It was the respondent who went to arbitration and the petitioner made no representation to it of anything unknown to it by reason of which it was induced to alter its position. In any event, the contract and the award in relation to it are void under Act VI of 1951 and there could be no estoppel against a statute.

18. The sympathy of the Court must, however, be wholly with the Respondent. As the learned Advocate-General himself conceded, the petitioner's case was utterly unmeritorious on the facts. Having contracted to purchase the jute, it failed to take delivery on the disingenuous plea that documents were not in order, simply for the reason that instead of being consigned to the mill, the goods were consigned to the mill's jetty; and having taken the fullest part in the arbitration proceedings, it is turning round when the award has gone against it and repudiating the award. It is not difficult to guess the reason why delivery of the jute was not taken. The Jute Board is not without responsibility for the unfortunate position in which the Respondent finds itself, for, instead of enforcing the provisions of the Ordinance and thereafter of the Act, it sought to introduce an alternative procedure by Circulars of its own which it had no jurisdiction to do and which created an impression that despite the Act, private contracts were permissible and would be valid in law. That the Board knew that it was going against the Act and that the trade was paying no attention even to the modified procedure laid down by the Circulars, but was going in its own way or ways, as the parties did in the present case, appear sufficiently from a Circular, dated 17-8-1951. The act was disregarded by the petitioner as much as by the Respondent. In spite of all this, since the law allows the petitioner to take the plea of the invalidity of the contract and the award, the Court has no alternative but to give effect to the plea, if taken. The only relief which the Court can give to the Respondent is in the matter of costs.

19. In the result, we allow the application and declare the award to be null and void and the arbitration agreement to be invalid. But we direct that each party will bear its own costs, both before Mr. Justice Bachawat and before us.

Das Gupta, J.

20. I agree.

Sarkar, J.

21. I agree.