**(1966) 04 CAL CK 0010**

**In the Calcutta High Court**

**Case No :** Matter No. 26 of 1966

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| Ashoka Marketing Limited | APPELLANT |
| Vs | |
| Megna Mills Company Ltd. | RESPONDENT |

**Date of Decision :** 04-04-1966

**Acts Referred:**
Forward Contracts (Regulation) Act, 1952 — Section 11(1), 11(2), 11(3), 15, 15(1)

**Citation :** (1966) 2 ILR (Cal) 510

**Hon'ble Judges :** A.N. Sen, J

**Bench :** Single Bench

**Advocate :** R.C. Deb and A.C. Bhabhra, for the Appellant;Subimal C. Roy and Sankar Ghose, for the Respondent

**Final Decision :** Dismissed

## Judgement

A.N. Sen, J.—This is an application for determination of the existence and validity of an arbitration agreement and for a declaration that there is no valid arbitration agreement between the parties in respect of the contracts mentioned in the petition.

2. The facts relevant for the purpose of this application may be briefly indicated.

3. The Megna Mills Go. Ltd., the Respondent herein, has at all-material times been and is still, a member of East India Jute and Hessian Exchange Limited. The said East India Jute and Hessian Exchange Limited, which is hereinafter referred to as the said association, is the only association recognized under the provisions of the Forward Contracts (Regulation) Act, 1952 (Act 74 of 1952). The Applicant Ashoka Marketing Limited is not a member of the said association. On or about December 21, 1962, a transaction had been entered into by and between the parties herein in writing by the letter dated December 21, 1962, which is set out hereunder:

Telegram: ''MARKASHOKA'' Telephone: 22-5851-5852-53

 

Regd. Off: CALCUTTA. 22-6534-8187-88

ASHOKA MARKETING LIMITED

18A, Brabourne Road, CALCUTTA?1 Date December 21, 1962

The Megna Mills Company Ltd.,

16, Strand Road,

Calcutta 1.

Dear Sirs,

We have today bought from you the following goods:

Description: Jute Carpet Backing cloth bound on Cardboard Cores-152" wide.

Weight: 9 oz. on 36"

Wrap ends: per Inch 15.

Weft ends: Per Inch 13.

Oil content: Up to 2%

Quantity: 5,000 Rolls, each roll having continuous length

of 300 yards approximately

Rate: Rs. 4,000/- per ton

Delivery: 500 Rolls monthly: March ''63'' to December 1963.

All other terms and conditions of the East India Jute and Hessian Exchange standard contract will be applicable to this contract. Please sign your acceptance on the duplicate copy of this letter.

Thanking you,

Yours faithfully, FOR ASOKA MARKETING LTD., Sd. Nemi Chand Jain Managing Director.

For Pro. Megna Mills Company Ltd. Sd, A. Chatterjee.

4. On or about December 9, 1963, another transaction had been entered into by and between the parties in writing by the letter dated December 9, 1963, which is set out hereunder:

Telephone: 22-1661 (12 Lines)

Telegrams: ''CALTIVIC''

THE MEGNA MILLS COMPANY LTD. Registered Office: 16, Strand Road, Calcutta--1, 9th December 1963

Messrs. Ashoka Marketing Ltd.,

 

18A, Brabourne Road, Calcutta

Dear Sirs,

Jute Backing Cloth 152"-9 oz/36".

We would confirm having bought from you the following goods:

(1) Description- Jute Carpet Backing Cloth bound on Card board Cores-152"

(2) Weight- 9 ozs/36"

(3) Wrap ends- Per inch 15.

(4) Weft ends- Per inch 13.

(5) Oil content- Upto2%

(6) Quantity- 2500 Rolls, each roll containing a continuous length of 300 yds. approximately.

(7) Rate- Rs. 3,150/- per ton.

(8) Delivery- 2000 Rolls, ready. 500 " December 1963.

All other terms and conditions of this Contract will be governed by the bye-laws of The East India Jute and Hessian Exchange Ltd. for trading in Transferable Specific Delivery Contracts. Please sign the duplicate copy of this letter as a token of your acceptance.

Yours faithfully, For Pro The Megna Mills Company Ltd. Sd. Illegible.

For Ashoka Marketing Ltd.

Sd. Nemi Chand Jain

Managing Director

5. In respect of the transaction mentioned in the letter dated December 21, 1962, three thousand tons of Jute Carpet Backing Cloth had been, delivered by the Respondent from time to time and the Applicant had paid for the same.

6. Disputes and differences had arisen between the parties with regard to the transactions mentioned in the aforesaid letters and by its letter dated December 17, 1965, the Respondent referred the same to Bengal Chamber of Commerce and Industries for arbitration. Pursuant to the said reference Bengal Chamber of Commerce and Industries is taking steps to proceed with the arbitration and by the letter dated January 14, 1966, addressed by the Registrar, the Bengal Chamber of Commerce and Industries Tribunal of Arbitration, to the Applicant, the Registrar has called upon the Applicant to submit its statement.

7. This application has thereupon been made by the Applicant company.

8. It is the case of the Applicant that the contracts contained in the aforesaid

letters of December 21, 1962 and December 9, 1963 are unenforceable being illegal and void under the provisions of the Forward Contracts (Regulation) Act, 1952; and therefore, there cannot be any question of any arbitration with regard to the same.

9. The validity of the transactions mentioned in the said two letters is the principal point for determination in this application.

10. It is the contention of the Applicant that the transactions mentioned in the aforesaid two letters were and are Transferable Specific Delivery Forward Contract within the meaning of the Forward Contracts (Regulation) Act, 1952 (hereinafter referred to as the said Act) and were entered into by the Applicant, which is not a member of the said association and the Respondent, which is a member of the said association, in Jute goods in the city of Calcutta as defined in the notification No. S.O. 376, dated March 29, 1958, issued by the Central Government u/s 15 of the said Act and that the said transactions were not in accordance with the said Act or the bye-laws of the said association or in the forms prescribed and were and are void and illegal.

11. Mr. R.C. Deb, Learned Counsel for the Applicant, has referred to Sub-sections (c), (m) and (n) of Section 2 of the said Act which provide:

(c) "Forward contract" means a contract for the delivery of goods at a future date and which is not a ready delivery contract;

(m) "Specific delivery contract" means a forward contract for the actual delivery of specific qualities or types of goods during a specified future period at a price fixed thereby or to be fixed in the manner thereby agreed and in which the names of both the buyer and the seller are mentioned;

(n) "Transferable specific delivery contract" means a specific delivery contract which is not a non-transferable specific delivery contract and which is subject to such conditions relating to its transferability as the Central Government may, by notification in the Official Gazette, specify in this behalf.

12. Mr. Deb submits that the transactions mentioned in the said two letters are clearly "Transferable Specific Delivery Contracts" within the meaning of the said definitions and the provisions of the said Act apply to them.

13. Mr. Deb has next referred to Sub-section 11(1) of the said Act which empowers the recognized association to make bye-laws for the regulations and control of forward contracts subject to the previous approval of the Central Government. He has also referred to Clauses (f) and (g) of Sub-section (2) of Section 11 of the said Act. The said clauses read as follows:

11(2)(f): In particular and without prejudice to the generality of the foregoing power, such bye-laws may provide for the terms, conditions and incidents of contracts including the prescription of margin requirements, if any and conditions relating thereto and the forms of contracts in writing.

 

11(2)(g): In particular and without prejudice to the generality of the foregoing power such bye-laws may provide for regulating the entering into, making, performance, rescission and termination of contracts, including contracts between members or between a commission agent and his constituent, or between a broker and his constituent, or between a member of the association and a person who is not a member and consequences of default or insolvency on the part of a seller or buyer or intermediary, the consequences of a breach or omission by a seller or buyer and the responsibility of the commission agents arid brokers who are not parties to such contracts.

14. Mr. Deb has submitted that pursuant to the provisions contained in Section 11 of the Act, East India Jute and Hessian Exchange Limited, the only recognized association has made bye-laws and the bye-laws relevant for the purpose of this application are contained in Working Manual, vol. III (Bye-laws for Trading in Transferable Specific Delivery Contracts in raw jute and jute goods as amended up to July, 1963 and Rules for the conduct of business in these contracts) of the East India Jute and Hessian Exchange Limited.

15. Mr. Deb refers to Regulation 15 of the bye-laws under ch. V of the said Working Manual, vol. III and the said Regulation 15 reads as follows;

No member Shall enter into any transferable specific delivery contract in raw jute and/or jute goods otherwise than on the terms and conditions prescribed under these bye-laws.

16. Relying on this clause Mr. Deb contends that the Respondent who is a member cannot enter into any contract otherwise than on the terms and conditions prescribed under the bye-laws and it is his contention that the transactions complained of have been entered into by the Respondent in contravention of the terms and conditions prescribed under these bye-laws. He has drawn my attention to Regulation 1(b) of the bye-laws under ch. V of the said Working Manual, vol. III and the said Regulation 1(b) provides:

All Transferable Specific Delivery Contracts shall be in writing in the prescribed forms (Appendix II for jute goods and Appendix IV for raw jute).

17. Mr. Deb has argued that the said bye-law requires that the contracts must be entered in the prescribed form which is at p. 81 of the said Manual and it is his argument that the contracts in question contained in the said two letters are not in the form prescribed by the bye-laws. He submits that this bye-law should be strictly complied with. It is his contention that all the terms and conditions mentioned in the said prescribed form must be incorporated in the contract to render the same valid, although it may not be absolutely necessary that such contracts will have to be entered into only on such printed or published forms, if there be any.

18. Mr. Deb has relied on the decision of the Privy Council in the case of Radhakisson Gopikisson (Firm) v. Balmukund Ramchandra (Firm) (1932) L.R. 60

 

IndAp 63. This was a case under Bombay Cotton Contract Act (Bombay Act XIV of 1922) and the validity of the contracts had been challenged on the ground that they contravene by-law 81 of the statutory by-laws, which contained the following provision:

81. Contracts between agents and their constituents, e.g., between a member and a non-member or between a member acting as an agent and a member acting as his constituent shall be subject to the by-laws and shall be in writing in the form given in the appendix (pages 67, 68, 69 and 70), provided that, to such contracts by-laws 130 to 163 inclusive shall not apply. A member whose constituents has agreed in writing to sign the prescribed form of contract and fails or refuses to do so after terms have been arranged shall be treated in all respects as if he had done so and both parties shall have the rights and remedy accorded by these by-laws.

19. In construing the said bye-law their Lordships of the Judicial Committee observed:

Their Lordships are of the opinion that the form prescribed is, in its terms; applicable to contracts between a commission agent and his constituent and that the parties in the present case were bound to comply with the bylaw and its form. They are unable, however, to agree with the view that the form is a stereotyped one and that literal compliance with it is essential; in their opinion, the contract must contain all the terms and conditions set out in the form in order to comply with it. For instance, in the prescribed form the main terms and conditions are contained in the Memorandum of Contract (on page 68 of the by-laws) sent by the agent to his constituent, in which the former reports the fulfilling of the order by a purchase or a sale, as the case may be, in Bombay. If identical terms and conditions, instead of being in the Memorandum sent by the agent, were contained in the initial order by the constituent, their Lordships are of the opinion that there would be pro tanto sufficient compliance with the by-law.

20. Relying on these observations Mr. Deb contends that the contract must in any event contain all the terms and conditions set out in the prescribed form, even if it be not necessary to record the same in any particular form; and it is his contention that the contracts in question recorded in the two letters, clearly do not contain all the terms and conditions mentioned in the prescribed form. He has argued that even if the omnibus clauses in the said two letters, namely the clause: "All other terms and conditions of the East India Jute and Hessian Exchange Standard Contract will be applicable to this contract" in the letter of December 21, 1962 and the clause: "All other terms and conditions of this contract will be governed by the bye-laws of the East India Jute and Hessian Exchange Ltd., for trading in Transferable Specific Delivery Contracts" in the letter of December 9, 1963, are taken to mean that the other terms and conditions will be deemed to apply, they can apply only as far as possible; and by no stretch of imagination can the term or condition contained in Clause 2 of the prescribed form which reads: "Buyer to give clear working days'' notice to place

 

goods alongside", be made applicable to the contracts in question and it is also difficult to apply the various other terms and conditions mentioned in the said form. Mr. Deb has further submitted that for proper compliance with the bye-law, the terms and conditions prescribed in the form must be fully and properly set out in the contract itself. Mr. Deb has contended that an agreement for arbitration which has, the effect of ousting the jurisdiction of Civil Courts must be unequivocally and expressly agreed upon and in any event, in the agreements mentioned, there is no definite and clear arbitration agreement Which can be enforced.

21. Mr. Subimal Roy, Learned Counsel, for the Respondent, has submitted that the contracts are valid and subsisting. He has not seriously disputed that the contracts are Transferable Specific Delivery Contracts, though he sought to argue that portion of the transaction mentioned in the letter of December 9, 1963, relating to delivery of 2000 rolls, was a Ready Delivery Contract and not a Forward Contracts. Mr. Roy has contended that there has been no violation of any provision of the Act or of the bye-laws; and it is his contention that by virtue of the omnibus clauses, contained in the two letters which have already been referred to, all terms and conditions prescribed by the bye-laws including the provisions relating to arbitration must be deemed to be included and incorporated in the contract. It is his contention that the terms and conditions mentioned in the said letters are not in any way inconsistent with or contrary to the terms and conditions mentioned in the prescribed form; and to contravene the provisions of the said bye-laws, the terms and conditions of the contract must be inconsistent with and contrary to the provisions of the bye-laws and the terms and conditions set out in the prescribed form. Mr. Roy finally submits that even if there be any contravention of any provisions of the Act or of the bye-laws, the same does not necessarily render the transaction void or illegal; and it is only the violation of specified provisions which may affect the validity of the transactions. Mr. Roy has drawn my attention to Section 15 of the said Act, the relevant portion whereof, is set out hereunder:

Section 15

(1) The Central Government may by notification in the Official Gazette, declare the section to apply to such goods or class of goods and in such areas as may be Specified in the notification and thereupon, subject to the provisions contained in Section 18, every forward contract for the sale or purchase of any goods specified in the notification which is entered into in the areas specified therein otherwise than between members of a recognized association or through or with any such member shall be illegal.

(2) Any forward contract in goods entered into in pursuance of Sub-section (1) which is in contravention of any of the bye-laws specified in this behalf under Clause (a) of Sub-section (3) of Section 11 shall be void--

(i) As respects the rights of any member of the recognized association which has entered into such contract in contravention of any such bye-law and also

(ii) As respects the rights of any other person who has knowingly participated in the transaction entailing such contravention.

(3) Nothing in Sub-section (2) shall affect the right of any person other than a member of the recognized association to enforce any such contract or to recover any sum under of in respect of such contract:

Provided that such person had no knowledge that such transaction was in contravention of any of the bye-laws specified under Clause (a) of Sub-section (3) of Section 11.

(3)(A). Any forward contract in goods entered into in pursuance of Sub-section (1) which at the date of the contract is in contravention of any of the bye-laws specified in this behalf under Clause (aa) of Sub-section (3) of Section 11 shall be illegal.

22. It may be noted that there is no dispute that by notification No. S.O. 376 dated March 29, 1958, the provisions of the said Section 15 have been made applicable to the transactions in question. The said notification has been set out in para. 9 of the petition.

23. Section 11(3)(a) and (aa) provide as follows:

11(3). The bye-laws made under this section may

(a) specify the bye-laws the contravention of any of which shall make a contract entered into otherwise than in accordance with the bye-laws void under Sub-section (2) of Section 15;

(aa) specify the bye-laws the contravention of any of which shall make a forward contract entered into otherwise than in accordance with the bye-laws illegal under Sub-section (3A) of Section 15.

24. Mr. Roy has also drawn my attention to Regulation 17 of the bye-laws under ch. V, in the said Working Manual, vol. III, which reads as follows:

17. Any transferable specific delivery contract entered into in raw jute and/or jute goods which at the date of the contract is in contravention of the provisions of any of the bye-laws 1(c), 13, 14, 15 and 16 of Chapter V shall be illegal under the provisions of Section 15(3A) of the Forward Contracts (Regulation) Act, 1952.

25. Relying on the aforesaid provisions Mr. Roy has argued that there has been no violation of any of the provisions which render the transaction illegal or void. According to him, if there has been any violation, the violation is of Regulation 1(b) of the bye-laws in ch. V of the said Working Manual, vol. III and the violation of bye-law 1(b) does hot render the contract void or illegal. Mr. Roy has also referred to the decision in the case of Hirji Bharmal Vs. Bombay Cotton Ltd., . In this case the contracts were governed by Bombay Forward Contracts Control Act (64 of 1947) and the bye-laws framed thereunder. The validity of the

 

contracts in question had been challenged on the ground that the contracts were not in accordance with bye-law 80 which provided that Delivery Contracts between members acting as principals or between a member acting as a principal and a non-member would be made in the form provided in that behalf and contained in the Appendix (Form A). The contracts in suit were Forward Delivery Contract within the meaning of bye-law 80. The contracts were in the requisite form, but they did not bear the signature of the buyer. The contracts had to be in two parts and one part had to be signed by the seller and the other by the buyer and the defect in the contracts relied upon was that the buyers had never signed these contracts and therefore, there was a non-compliance with the bye-law. A Division Bench of the Bombay High Court had come to the following finding (at p. 414):

We agree with the learned trial Judge that the signature of the buyer in the form of the contract is an important and essential characteristic of the form and although the form may comply with every other requisite, if it fails to comply with this important requisite, viz., that it does not bear the signature of the buyer, then the contract cannot be said to be in the form provided in the Appendix (Form A) to bye-law 80.

26. Notwithstanding the aforesaid finding, the Bombay High Court on a construction of the relevant provisions of the bye-laws held that the said non-compliance did not invalidate the contracts.

27. Mr. Roy has argued that the present Act arid the bye-laws contain specific provisions as to contravention of which regulations would render the contract illegal or void and unless any such pro-visions are infringed, the contracts remain valid and binding.

28. Mr. Roy has submitted that the decision Supra cited by Mr. Deb, dealt with bye-laws the violation of any of which rendered the contract bad; and the bye-laws therein did not contain similar provisions as in the present case, specifying breaches of which would render the contract illegal or breaches of which would render the contract void.

29. Mr. Roy has drawn my attention to the fact that part of the contract recorded in the letter of December 21, 1962, had, in fact, been performed and 3000 tons had already been delivered and paid for and he contends that the Applicant having failed to perform; the contract, has now made the application mala fide to avoid its liabilities.

30. Contracts in question in my view are clearly Transferable Specific Delivery Contracts and the provisions of the Forward Contracts (Regulation) Act, 1952 and the bye-laws framed thereunder by East India Jute and Hessian Exchange Ltd., the recognized association, apply to these contracts. It is not in dispute that the bye-laws contained in Working Manual, vol. III, of the East India Jute and Hessian Exchange Ltd. (Bye-laws for Trading in Transferable Specific Delivery Contracts in raw jute and jute goods and Rules for the conduct of business in

 

those contracts) are the relevant bye-laws applicable to the transactions in question.

31. In my opinion the contracts contravene Regulation 1(b) of the bye-laws in ch. V of the said Working-Manual, vol. III, which apply to the transaction in question. I agree with Mr. Deb and I accept his contention that the contract is not in compliance with the said bye-law 1 (b) and all the terms and conditions contained in the said prescribed form, particularly the term contained in Clause 2 thereof relating to notice, ate not incorporated or included in the contracts in question.

32. The question that requires consideration is--what is the effect of this contravention?

33. In case of contracts governed by the Forward Contracts (Regulation) Act, 1952 and the bye-laws framed thereunder, the violation of each and every provision does not necessarily vitiate the transactions and I agree with the contention of Mr. Subimal Roy that to render a contract illegal or void, there must be violation of specified provisions which have such effect. I am, however, of the opinion that in the instant Case, the contracts in question not only Violate Regulation 1(b) but also violate Regulation 15 of the bye-laws in ch. V of the said Working Manual, vol. III.

34. Bye-law 1(b) of ch. V of the said Working Manual, vol. III, requires that all Transferable Specific Delivery Contracts shall be in writing in the prescribed forms and in the instant case the prescribed form is in Appx. II at p. 81. "Prescribed form" has been denned in Regulation 1(13) of the bye-laws in ch. I of the said Working Manual, vol. III, to mean "the form prescribed by the Board or a Committee or a Sub-committee thereof for the purpose of any provisions of these bye-laws." The relevant prescribed form at p. 81 contains various terms and conditions. The terms and conditions contained in the prescribed form are, therefore, terms and conditions prescribed by the said Act and the bye-laws thereunder framed and the said terms and conditions must be included in every contract. If all the said terms and conditions are not included into the contract entered into by any member, the effect is that the member enters into a contract otherwise than on the terms and conditions prescribed under the bye-laws; and thereby the member concerned contravenes bye-law 15 of ch. V of the said Working Manual, vol. III. The contravention of the said bye-law 15 renders the contract illegal under the provisions of bye-law 17 of ch. V of the said Working Manual, vol. III.

35. In the instant case the Respondent not having included in the contracts in question all the terms and conditions contained in the prescribed form, had entered into contracts otherwise than on the terms and conditions prescribed by the bye-laws and had thereby contravened bye-law 15. The contracts in question are, therefore, rendered illegal under bye-law 17. If the contracts are illegal, the same cannot be enforced and there cannot be any question of any arbitration in

 

respect thereof.

36. In view of my finding that the transactions are illegal and there cannot be any question of any arbitration with regard to any claim in respect thereof, I do not consider it necessary to deal with the other contention of Mr. Deb that the arbitration clause cannot in any event be invoked even if the contracts were valid.

37. I have given the matter very anxious and earnest consideration in view of its commercial importance. I have taken into consideration the subsequent conduct of the parties and the submission of Mr. Roy that I should give commercial interpretation to the transaction. In my view the subsequent conduct of the parties is irrelevant and immaterial for the purpose of construing the contracts and the intention or conduct of the parties cannot cure the illegality of the transactions under the statute. It is to be borne in mind that the Act and the bye-laws thereunder have been framed to regulate Forward Contracts, as the name of the Act itself suggests; and it is essential that the commercial people who choose to deal in such contracts must act in accordance with the provisions of the statute and the bye-laws framed thereunder.

58. In the result the application succeeds. I hold that the contracts between the parties are illegal and there is no valid arbitration agreement. I make a declaration in terms of prayer 2 of the Notice of Motion. In the facts and circumstances of this ease I direct that each party will pay and bear its own costs of this application.

39. Certified for two counsel.

 