
(1961) 05 CAL CK 0012
In the Calcutta High Court
Case No : A.F.O. No. 86 of 1960

Bakubhai and Ambalal Ltd. APPELLANT
Vs
Bengal Corporation Private Ltd. RESPONDENT

Date of Decision : 11-05-1961

Acts Referred:

Forward Contracts (Regulation) Act, 1952 — Section 1(2), 17, 20

Citation : AIR 1962 Cal 1

Hon'ble Judges : U.C. Law, J; P.B. Mukharji, J

Bench : Division Bench

Final Decision : Allowed

Judgement

1. The only point in this appeal is whether Contract No. 8702 dated London, the 13th December 1955, for sale of Indian linseed oil is illegal u/s 17(2) of the Forward Contracts (Regulation) Act, 1952 so that an English Award made thereon dated the 29th October 1956 is unenforceable u/s 7 of the Arbitration (Protocol and Convention), Act, 1937 on the ground that the contract is contrary to public policy or the law in India.

2. The buyer is Bakrubhai and Ambalal Ltd. an English Company incorporated in England under the English Companies Act and carrying on business at Baltic Exchange Chambers, 24 St. Mary Axe, London, E. C. 3, England. The seller is the Bengal Corporation Private Ltd., a Company incorporated in India under the Indian Companies Act and carrying on business at 14, Netaji Subhas Road, Calcutta. The Indian sellers failed to deliver the goods. The English buyers took arbitration proceedings under the contract in England, with notice to the Indian sellers for damages for nondelivery, and obtained an Award for damages.

3. The appellants after having obtained the Award in England made the application here in this Court to file the Award on the ground that the respondent carried OH business at its registered office in Calcutta. This application, was made u/s 5 of the Arbitration (Protocol and Convention) Act. The learned Judge,

A. N. Ray, J., dismissed the application of the appellants on the ground already stated. One point that was argued before him, no longer material before us in appeal, was that this being a c. i. f. contract was a contract for sale of documents and therefore not a contract for sale of goods hit by the Forward Contracts (Regulation) Act, 1952. The learned Judge rightly held that this was not a contract for sale of documents but was a contract for sale of goods. The point was concluded also by a number of Division Bench decisions of this Court.

4. The second point argued before the learned Judge, and now falling to be determined in this appeal, was that the Forward Contracts (Regulation) Act made this particular contract illegal. The learned trial Judge came to the conclusion that it was against the law and public policy in India and the Award could not be enforced u/s 7 of the Arbitration (Protocol and Convention) Act. For this purpose the learned Judge relied on his own decision in Special Suit No. 1 of 1958 between Bakubhai and Ambalal Ltd. v. Shree Bhagwatee Oil Mills (P) Ltd., D. 12-9-1958. That case was also a case of linseed oil.

5. Before any conclusion can be reached suggesting that this particular contract is illegal and against public policy, it is essential to analyse the Notification No. Section R. O. 242, dated the 24th/25th January 1955 issued by the Government of India in exercise of the powers conferred by Section 17 of the Forward Contracts (Regulation) Act, 1952, for that Notification is alleged to make this contract illegal. By that Notification the Central Government prohibited any person from entering into any forward contract in any place in India without the permission of the Central Government. The material portion of that Notification reads as follows:

"No person shall, save with the permission of the Central Government enter into any forward contract in any place in India for the sale or purchase of any of the goods specified in the Schedule therein set out."

Now, the Schedule contained, among other items, linseed oil, which is the subject matter of this appeal,

6. It will be at once seen from the very terms of the Notification that all forward contracts are not absolutely prohibited. The Notification does not make all forward contracts in all circumstances and without qualification illegal. What is done by this Notification is that such forward contracts could be entered into with the permission of the Central Government but not without it. Therefore there is no absolute illegality or bar against entering into a forward contract in linseed oil. A person with the permission of the Central Government is competent to enter into such a forward contract. The contract, therefore, in this case is not ipso facto on its terms illegal or prohibited by this Notification. It would only be illegal if it is found as a fact that there was no permission of the Central Government as required thereunder.

7. We are satisfied on the facts of this case that it has not been proved or established satisfactorily that there was no such permission of the Central

Government. The reasons why we are satisfied will appear conclusively from these indisputable circumstances. The respondent deliberately avoided assertion of this fact that there was no permission of the Central Government in respect of this contract at all relevant time and crucial occasions. At the stage of the formation of the contract when an offer was being made, the respondent expressly made a "firm" offer of linseed oil. A "firm" offer without requisite permission is unthinkable. There was no suggestion made at that stage that the respondent, being a Calcutta business company trading and dealing in linseed oil, did not know of the pre-existing Notification of January 1955. It therefore can be taken as a fact that before making that offer and proposing to sell these goods under such a contract the respondent company had taken and armed itself with the permission of the Central Government. No party can be presumed to do an illegal act. Secondly, at no stage of the correspondence was any suggestion made that the contract was hit by this Notification On the ground that no permission of the Central Government had been taken. On the contrary, the respondent asked for extension of time to fulfil this very contract. Such extension of time was granted by the appellant. It was expressly pointed out by the appellants' letter of the 11th June 1956 that they were offered linseed oil with a May Bill of Lading and that many steamships like S. Section "Sandar", S. Section "Espa", S. Section "Karmala" all of which steamers were loaded in Calcutta had tenderable linseed oil available. Even then the respondent did not tell the appellants that it had no permission of the Central Government. I have no doubt in my mind that if a trading company had no requisite permission of the Central Government for selling such goods under such a contract, it will at any rate even at this stage say that it was without such a permission and the contract is illegal and could not be performed. Lastly even when the respondent is refusing to appear before the Arbitrators, the only point which the respondent takes in its letter dated the 22nd September 1956 is about the scope of the arbitrations clause and not the ground that there was no permission of the Central Government to enter into this contract. Indeed, nothing was said at any stage by the respondent that this particular contract was illegal on the ground of the absence of such permission until in its affidavit-in-opposition in these very proceedings to the appellants' application and such affidavit was affirmed on the 4th March 1958. Even then the averment in that affidavit which is contained in paragraph 3(d) thereof is significant in many ways. It only Says this:

"Neither the petitioner nor the respondent had obtained any permission from the Central Government to enter into the said contract or to sell or purchase the said goods."

It is not disclosed in the affidavit whether the respondent was unaware, as a business company, of this well-known Notification and still more well known Statute, the Forward Contracts (Regulation) Act, 1952, although it would not have mattered for ignorance of law could be no excuse. The buyer foreign company registered abroad is likely to presume that the Indian seller is selling the goods within the limits of the Indian law and has taken all necessary

permission required by the Indian law It is not even, said in the affidavit that there was any attempt by the respondent company to get the. permission and that such attempt failed. No correspondence between the respondent and the Government of India on this point is either disclosed. It is a vague and bald assertion on an affidavit without: the slightest details after so many years of the contract and not corroborated by any independent evidence or even circumstance, This allegation in the affidavit was naturally not admitted by the appellants in their affidavit. The whole course of the conduct of the respondent company is, in our view, consistent with the only possible conclusion that the respondent had the permission as otherwise they would have taken that objection at the earliest stage or certainly at a very much earlier stage when the depute started and during the arbitration proceedings.

8. With the rise in the price for linseed, one does not know whether the seller with the permission was not selling to more profitable buyers. Now, the arbitration clause in this contract specifically includes (1) any dispute arising out of this contract like the quality or weights and (2) any other dispute arising out of this contract. I have already stated that this fact that the respondent had not the permission of the Central Government was not even raised before the Arbitrators. It is not here the question whether the Arbitrators" could decide tills dispute or not but the point is that this signal fact that there was no permission was not) even suggested as a ground to make the contract illegal. The respondent, therefore, fails to establish either before the Arbitrators or even before this court that it had in fact no permission of the Central Government to enter into the contract.

9. As a matter of last resort, Mr. Bhabra appearing for the respondent argues that u/s 17 of the Forward Contracts (Regulation) Act both the buyer and the seller must have the permission of the Central Government. Now, there are many answers to this argument. Assuming that Mr. Bhabra is right, this argument does not meet the facts of the case. If the respondent had obtained permission of the Central Government to sell these goods to this particular buyer, then no further additional permission by the buyer is required because that one permission of the Central Government would include both the buyer and the seller. Secondly, a foreign buyer cannot be presumed to know that his Indian seller is not acting within the limits of the Indian law. On the contrary, he would presume that the Indian seller is selling his goods within the limits of the Indian law. In this context, it is essential to emphasize two very significant aspects of this case. One is the expression in the Notification, "in any place in India", and the other is Section 1(2) of the Forward Contracts (Regulation) Act, 1952, which expressly says that the Act extends to the whole of India except Jammu and Kashmir. In other words, the (intention is clear that the Act was not intended to have extra-territorial operation although Parliament has certainly power to pass laws having extra-territorial operation. But this Act is not such an Act. This Act was passed to stabilise internal prices and really to prevent unguided and unregulated speculation in forward contracts in the Indian market. Therefore, the

whole object of the Notification under the Act was to control such forward contracts by insisting upon the permission of the Central Government so that the Central Government could check whether Such forward contracts were purely speculative or genuine. In this case there is no question that the contract was genuine and there is no allegation that it was otherwise.

10. In addition to these aspects, one other consideration is that section 20(1)(c) of the Forward Contracts (Regulation) Act makes contravention a penal offence punishable with imprisonment or with fine or with both and it is hardly likely that a foreigner or a foreign company was intended by this intra-territorial as opposed to extra-territorial statute to be enmeshed in the crimes of this country when in good faith such a foreign buyer would be entering into a contract with an Indian seller. In this context of the facts and circumstances of this appeal, it is, therefore, not unreasonable to hold that a foreign buyer would naturally presume that the Indian seller would satisfy all the Indian laws before performing the contract. It is unnecessary to refer to any decisions on the point except the one of a Division Bench of this Court in *Pratabmull Rameshwar Vs. K.C. Sethia (1944)*, Ltd.,

10a. For these reasons, we must hold that the learned Judge's decision in Special Suit No. 1 of 1958, D/- 12-9-1958 and its application to the present judgment under appeal were erroneous.

11. The judgment under appeal must therefore be set aside and the appeal allowed with costs here and below. There will be an order in terms of prayers (a) and (c) of the petition directing the Award to be filed and judgment and decree in accordance with such award. The execution of the decree will be stayed for a period of six weeks from this date

12. Certified for two Counsel.

13. Let the order be drawn up expeditiously.

Law, J.

14. I agree.