

(1954) 06 BOM CK 0001
In the Bombay High Court
Case No : A.F.O. No. 127 of 1953

Basantlal Banarsilal

APPELLANT

Vs

Bansilal Dagdual

RESPONDENT

Date of Decision : 29-06-1954

Acts Referred:

Bombay Forward Contracts Control Act, 1947 — Section 6, 7, 8, 8(1)
Constitution of India, 1950 — Article 254, 254(2), 369
Defence of India Rules, 1962 — Rule 81(2)
Essential Supplies (Temporary Powers) Act, 1946 — Section 7
Government of India Act, 1935 — Section 107

Citation : AIR 1955 Bom 35 : (1954) 56 BOMLR 1000 : (1955) ILR (Bom) 49

Hon'ble Judges : Chagla, C.J.;Dixit, J

Bench : Division Bench

Advocate : Hemendra K. Shah, M.P. Amin, General and Tyabji Dayabhai and Co, for the Appellant; J.C. Bhat, C.J. Shah and Mansukhlal Hiralal and Co., for the Respondent

Judgement

Chagla, C.J.—This is an appeal from a judgment of the Principal Judge of the City Civil Court, setting aside an award on a petition made for that purpose by the opponents. On 7-11-1951, the appellant was employed by the respondent as a "pueca adatia" to effect certain transactions in groundnuts, linseed, castor seeds and gold. On 26-2-1952, two transactions of purchase were outstanding. One was of 300 tons of groundnuts and the other was of 25 tons of linseed. Both these were forward transactions for April-May delivery. The case of the respondent was that he gave instructions to the appellant to close the transaction on 26-2-1952.

In fact the appellant closed it on 5-3-1952, and his allegation was that he was asked to close the transaction on that date. As a result of the closing of the transaction on 5-3-1952, certain " amount became due by the respondent to the appellant. In respect of this a dispute arose and dispute was referred to arbitration under the provisions of the Bombay Oil Seeds Exchange, Ltd. The

arbitrator made his award on 7-10-1952, awarding to the appellant about Rs. 22,000. This award was filed in the City Civil Court, and the respondent filed a petition to set aside the award. As already pointed out, the petition succeeded and the award was set aside.

2. Now, the award has been set aside only on one ground and that ground is that forward transaction in groundnuts and linseed are illegal and therefore the whole contract including the term with regard to submission for arbitration cannot be enforced and therefore the arbitration was bad and the award resulting from that arbitration was equally bad. Under Rule 81 (2) of the Defence of India Rules an order was issued on 29-5-1943, and by Clause 3 of this order it was provided that no person shall, after the specified date, for any class of oil seeds, enter into any forward contract in any of those oil seeds, and in the schedule groundnut and linseed were mentioned as oil seeds in respect of which no forward contract could be entered into from 31-5-1943.

The Defence of India Act expired on 31-9-1946. The British Parliament then enacted 9 and 10 Geo. VI, 1939, and by this statute it was provided that the Central Legislature would have the power to legislate with regard to certain subjects which were in the Provincial List until the date mentioned in that statute, and pursuant to this power conferred upon the Central Legislature the Temporary Powers Emergency Act of 1946 was passed, and under this Act the order of 29-5-1943, was continued.

In 1947 the Bombay Legislature passed the Bombay Forward Contracts Control Act, 1947 (Act 64 of 1947), and by Section 8 of that Act it declared forward contracts of any goods specified in a notification to be issued u/s 1 (3) to be illegal if these were not entered into, made or performed in the manner laid down in that section, and a notification was issued u/s 1 (3) on 19-12-1950, by the Government of Bombay by which it recognised the Bombay Oil Seeds Exchange, Ltd., as an authorised body which had the power to put through forward transactions under certain circumstances, and on that very day it applied the Act to all varieties of oil seeds.

The Essential Supplies (Temporary Powers) Act would have expired on 1-4-1951, by reason of the provisions of 9 and 10, Geo. VI, 1939, but in the meanwhile our Constitution had been enacted and Article 369 of the Constitution gave to Parliament, during a period of five years from the commencement of the Constitution, the power to make laws with respect to certain matters enumerated in the Concurrent List, and among the matters enumerated were:

"(a) trade and commerce within a State in, and the production, supply and distribution of, cotton and woollen textiles, raw cotton (including ginned cotton and unginned cotton or Kapas), cotton seed, paper (including newsprint), foodstuffs (including edible oilseeds and oil), cattle fodder (including oil cakes and other concentrates) coal (including coke and derivatives of coal, iron, steel and mica)."

In exercise of the power conferred by this article Parliament passed Act 52 of 1950 on 14-8-1950. This Act continued the original Essential Supplies Act with certain Important amendments up to 31-12-1952, and when the transactions in dispute were entered into, the two laws which were on the statute book and which were in operation were the Bombay Act-64 of 1947 and the Essential Supplies Act as amended by Act 52 of 1950.

3. Now, it is not disputed by Mr. Shah on behalf of the appellant that if effect is to be given to the Parliamentary statute, Act 52 of 1950, then undoubtedly the contracts in respect of which the award is made are illegal, because the prohibition to which attention has been drawn contained in the order of 29-5-1943, was continued by Act 52 of 1950. "But what is urged is that the Bombay Legislature has removed the illegality with regard to the contracts in respect of oil seeds, and as the Provincial Act is subsequent to the Central Act and as the subject was in the Concurrent List, the Provincial Legislature had the power to do so.

For this purpose reliance is placed on Section 107 of the Government of India Act and Article 254 of the Constitution. In our opinion both these provisions are substantially the same. Therefore, turning to Article 254 of the Constitution, it provides:

"(1) If any provision of a law made by the Legislature of a State is repugnant to any provision of a law made by Parliament which Parliament is competent to enact, or to any provision of an existing law with respect to one of the matters enumerated in the Concurrent List, then, subject to the provisions of clause (2), the law made by Parliament, whether passed before or after the law made by the Legislature of such State, or, as the case may be, the existing law, shall prevail and the law made by the Legislature of the State shall, to the extent of the repugnancy, be void."

Therefore, in the hierarchy of legislation in India a higher place was naturally accorded to laws passed by Parliament, and the Constitution enacts that "if a law is passed both by the Legislature of a State and by Parliament with regard to the same subject matter, then if there is any repugnancy between the provisions of the two laws, the law of Parliament shall prevail. This is subject to Clause (2) which is the important provision and that provides:

"Where a law made by the Legislature of a State specified in Part A or Part B of the First Schedule with respect to one of the matters enumerated in the Concurrent List contains any provision repugnant to the provisions of an earlier law made by Parliament or an existing law with respect to that matter, then, the law so made by the Legislature of such State shall, if it has been reserved for the consideration of the President and has received his assent, prevail in that State."

Therefore, if the State Legislature passes a law subsequent to the law passed by Parliament and the State Legislature wants in any way to depart from the provisions of the law as laid down by Parliament, it could do so provided it

satisfies the condition, viz., that it reserves the bill for the consideration of the President and the President gives his assent.

The principle underlying this clause is clear, viz., that the President should apply his mind- to what Parliament has enacted and also consider the local conditions prevailing in a particular State, and if he is satisfied that Judging by the local conditions a particular State should be permitted to make a provision of law different from the provision made by Parliament, he should give his assent and thereupon the State legislation would prevail. There is a proviso to this Clause (2) and that is:

"Provided that nothing in this clause shall prevent Parliament from enacting at any time any law with respect to the same matter" including a law adding to, amending, varying or repealing the law, so made by the Legislature of the State."

This again emphasises the omnipotence of Parliament. Even though the State law may contain a provision assented to by the President and may have contained a provision of law different from the provision contained in the Parliamentary statute, it is open to Parliament to legislate again with regard to the same matter. This proviso contains certain, words which do not find a place in the corresponding section of the Government of India Act, and the words are,

"including a law adding to, amending, varying or repealing the law so made by the Legislature of the State."

In our opinion it is clear that these words do not in any way restrict the competence or jurisdiction of Parliament, They are illustrative words, elaborating and making clear the power and competence of Parliament to pass a law with regard to the same subject-matter with regard to which the State Legislature has passed a law, and what the proviso emphasises is that this law passed by Parliament can in terms amend, vary or repeal a law passed by the Legislature of the State.

The only possible difference that can be suggested between this provision and the provision in the Government of India Act is that whereas under the Government of India Act it may be said that the Central Legislature could pass a law on any particular subject and that law would prevail provided there was a repugnancy between that law and the law passed by the Provincial Legislature, the Central Legislature could not deal directly with any State legislation.

The departure made under the Constitution is that wider power is conferred upon Parliament directly to tackle State legislation and to amend, vary or repeal State legislation. But it is impossible to contend that the additional words contained in the proviso in any way restrict the competence of Parliament. Whether under the Constitution or under the Government of India Act, the Central Legislature or Parliament had always the power to override any legislation passed by a Provincial or state Legislature provided the subject it dealt with found a place in the Concurrent List, and that important principle is reiterated in Article 254 and

the proviso to Clause (2) merely emphasises that important principle.

4. The position here is that we have to start with a Central legislation in the Essential Supplies Act and that legislation prohibits forward contracts in oil seeds. Then we have the Subsequent Provincial legislation enacted in 1947, and what is contended is that- that legislation has "removed the prohibition against the illegality of forward contracts in oil seeds.

In this respect two contentions have got to be borne in mind. In the first place it is argued, and in our opinion with considerable force, that when we look at Section 8 of the Bombay Act, it does not purport to remove the illegality imposed by the Central Act. All that Section 8 does is to declare that forward contracts will be illegal unless they comply with the procedure laid down in Section 8. But it is one thing to declare a certain contract illegal; it is entirely another thing to declare an illegal contract legal. Section 8 does not even make an attempt to declare that forward contracts declared illegal by the Central legislation shall be legal if they comply with the technicalities laid down in Section 8.

The assumption underlying Section 8, it seems to us, is that forward contracts which the Legislature is dealing with are legal contracts, but even if they are legal they are declared to be illegal unless they are performed or made or entered into in the manner laid down in Section 8. It seems to us a rather violent interpretation of Section 8, not justified by the language used by the Legislature,, that the Bombay Legislature solemnly wanted to make a departure from the law laid down by the Central Legislature and to declare forward contracts in oil seeds legal although the Central Legislature thought that they should be illegal.

Mr. Shah says that although Section 8 in terms does not say so, inferentially we must come to the conclusion that the Legislature wanted to legalise forward contracts provided the technicalities set out in Section 8 were complied with. When there is a specific piece of legislation declaring a certain contract to be illegal, we must be satisfied that the State Legislature expressly applied its mind to the prohibition contained in the Central law and having applied its mind wanted to make a departure in the local law. It is rather difficult to take the view that Section 8 affords any indication that the Bombay Legislature did have that intension, and we are inclined to agree with the learned Principal Judge who has taken the view that Section 8 of the Bombay Act does not remove the illegality. If this argument were to be accepted, then there would be an end of the matter and the appeal should fail. But It is just as well to refer to certain other contentions that have been advanced at the bar.

5. It is urged by Mr. Bhat on behalf of the respondent that even assuming the ban was removed, it was not done till 19-12-1950, on Which date the notification was issued. Mr. Bhat says that as far as Act 64 of 1947 is concerned, it does not refer to contracts in any commodities. It was left to the Government by notification to apply the Act to certain articles and that -was done on

19-12-1950. Mr. Bhat says that the provision of Article 254(2) can only apply provided there is legislation in respect of a subject under the Con-current List and in which legislation there is repugnancy as compared with the Central legislation, and Mr. Bhat's argument is that the repugnancy only arises when the notification is issued on 19-12-1950, and this repugnancy cannot prevail on two good grounds: (1) that it is not legislation by the Legislature, and (2) no assent was given by the President to this notification. Therefore, neither the Governor General nor the President ever applied his mind to the departure that the Bombay Legislature had made with regard to certain contracts which the Central Legislature had declared to be illegal.

In our opinion it is unnecessary to decide this point because there is equal force in Mr. Shah's argument that what the Government of Bombay was doing was merely carrying out the mandate of the Legislature which had already been given in 1947 and the efficacy of the notification should be judged not as of 19-12-1950, but as of the passing of the legislation in 1947.

6. It is then urged by Mr. Shah that once the Bombay Act was passed in 1947 and received the assent of the Governor General, there is no subsequent legislation which has altered the position with regard to the prohibition against entering into forward contracts in the State of Bombay. Mr. Shah says that the Bombay Act removed the illegality and that illegality has not been again imposed by any Central law. His answer to Act 52 of 1950 is that it is merely an extension of the Act of 1943 and if the Act of 1946 was modified in its application to Bombay legally, that modification has not been in any way disturbed by Act 52 of 1950.

Mr. Shah relies on a Judgment of this Court in -- *The State of Bombay Vs. Heman Santlal Alreja*, for the proposition that when an Act is passed extending an Act already on the statute book, no new law is created; only further life is given to the law which is already in operation; and Mr. Shah says that Act 52 of 1950 merely gave new life to the Essential Supplies Act of 1946 and in giving life to that old Act it did not in any way purport to legislate contrary to the provisions of Act 64 of 1947,

It is difficult to accept the view that Act 52 of 1950 is merely the extension of the Essential Supplies Act of 1946. In the first place, when we look at Act 52 of 1950 itself, it is an Act passed for the purpose of amending the Act of 1946, and you find in the body of this Act many provisions which substantially amend the provisions of law contained in the Act of 1946. To give only one illustration, Section 7 of this Act provides an entirely different scheme of penalties for contravention of orders made under the Act from the scheme contained in the original Act of 1943.

The other important consideration which leads us to the view that this is not an extension of the old Act is that this Act was passed in exercise of a power expressly conferred by the Constitution upon Parliament by Article 369. But for

Article 369, as already pointed out, the Act of 1946 would have expired on 1-4-1951, and Parliament would have had no power to legislate with regard to these matters. But the Constitution, for a period of five years, conferred upon Parliament the power to legislate upon certain matters which were in the State List as if they were in the Concurrent List, and it is in the exercise of this special power that Act 52 of 1950 was passed.

It is, therefore, difficult to accept the position that all that Parliament was doing when it passed Act 52 of 1950 was extending the life of the Essential Supplies Act of 1946. It was not a normal legislative activity on the part of Parliament. In the course of its ordinary legislative activity it had no power to extend the life of the Essential Supplies Act of 1946, and it would have died a natural death on 1-4-1951. It was really a different legislative activity on the part of Parliament when it put Act 52 of 1950 on the statute book. It was an activity, the justification for which was to be found in Article 369 and which was in the exercise of the power conferred by that article.

7. The final argument advanced by Mr. Bhat on which also in our opinion it is not necessary to pronounce any opinion is that even assuming all that Mr. Shah says is correct, the contracts in these proceedings have not been entered into according to the formality laid down in Section 8 of the Bombay Act. The formality on which reliance is placed is contained in Section 8 (1) (a) which says:

"(1) Every forward contract for the sale or purchase of, or relating to, any goods specified in the notification under sub-section (3) of Section 1 which is entered into, made or to be performed in any notified area shall be illegal if it is not entered into, made or to be performed-

(a) in accordance with such bye-laws, made u/s 6 or 7 relating to the entering into, making or performance of such contracts, as may be specified in the bye-laws,....."

Now, the Bombay Oil Seeds Exchange, Ltd., has been recognised under the Act and it has framed bye-laws, and attention is drawn to bye-law 123 which provides that contracts between members acting as commission agents on the one hand and their constituents on the other shall be made subject to the bye-laws and contract note in the prescribed form, shall be made; and what is pointed out is that although a contract note was given by the appellant who is a member of the association to the respondent who is not, the contract note was not in the prescribed form.

It is said that the association has not even prescribed the form and it is urged that bye-law 123 is mandatory and it is mandatory in two respects that the form of a contract note has to be prescribed and the only contract note that can be given by the commission agent is the contract note in the prescribed form.

As against that Mr. Shah contends that there can be no contravention of this bye-law if no form is prescribed by the association. It is only if the form was

prescribed that the obligation would arise on the part of the commission agent to give the contract note in the prescribed form. If no form is prescribed, it is impossible for the commission agent to carry out this bye-law. We must admit that there is force in Mr. Shah's contention and it may be that there has been no contravention of this bye-law. It seems to us rather strange that the association which "was recognised long time ago has not yet thought fit to prescribe a form as required by bye-law 123.

8. We think it sufficient to rest the decision of this appeal on the ground mentioned by the Principal Judge that In any view of the case Bombay Act 64 of 19-17 does not remove the prohibition imposed by the Central law, and also on the ground that even if it did remove the prohibition, the prohibition has been re-imposed by Act 52 of 1950 which is a subsequent legislation passed by Parliament. The result is that the appeal fails and must be dismissed with costs.

9. Appeal dismissed.