
(1952) 08 CAL CK 0036
In the Calcutta High Court
Case No : Award Case No. 134 of 1952

Bhudarmull Bazaz

APPELLANT

Vs

Uma Shankar Purushottamdas and Co.

RESPONDENT

Date of Decision : 26-08-1952

Acts Referred:

Arbitration Act, 1940 — Section 13
Contract Act, 1872 — Section 23
West Bengal Jute Goods Act, 1950 — Section 2

Citation : AIR 1953 Cal 618

Hon'ble Judges : P.B. Mukharji, J

Bench : Single Bench

Advocate : A.C. Bhabra, for the Appellant; P.P. Ginwalla, for the Respondent

Final Decision : Dismissed

Judgement

P.B. Mukharji, J.—This is an application by Bhudarmull Bazaz carrying on business under the name and style of Shivaramdas Bhudarmal under the Indian Arbitration Act for declaring the Award No. 139 of 1952 of the Bengal Chamber of Commerce dated 13-2-1952 as null and void, and for an order that there was no valid arbitration agreement in the contract dated 16-3-1951.

2. The matter arises out of a transaction relating to sale and purchase of jute goods. On 16-3-51, there was a contract being contract No. 0 by which the petitioner agreed to sell and deliver to the respondent 15000 bags of B. Twills at Rs. 231-10-0 per 100 bags on the terms and conditions contained in a sold note of that date and number passed by the brokers to the petitioner. That contract No. 6 dated 16-3-1951, contained the following arbitration clause:

"All matters, questions, disputes, differences and/ or claims arising out of and/or concerning and/ or in connection with and/or in consequence of relating to this contract whether or not the obligation of either or both parties under this contract be subsisting at the time of such dispute and whether or not this contract has been terminated or purported to be terminated or completed shall

be referred to the arbitration of the Bengal Chamber of Commerce under the rules of its Tribunal of Arbitration for the time being in force and according to such rules the arbitration shall be conducted."

3. At that time when this contract was made there was the West Bengal Jute Goods Act, 1950 (West Bengal Act 5 of 1950) in operation. It is now contended by the petitioner that this contract is void under that statute. It is argued that u/s 3 of that Act the State Government may, from time to time, if it so thinks fit, by notification in the Official Gazette prohibit the making of contracts relating to jute goods and may, by like notification, withdraw such prohibition. It is also provided by Sub-section (2) of Section 3 of that Act that when the making of contracts relating to jute goods is prohibited by notification, no person shall make any such contract or pay or receive any margin except, in the case of any such contract made prior to the date of the notification, to the extent to which the payment or receipt is allowable on the basis of the last closing rate in a notified market. The section goes on to provide that notwithstanding anything contained in any other law for the time being in force, every such contract made and every claim in respect of margin in contravention of the provisions shall be void and unenforceable. It is contended on behalf of the petitioner that this contract was entered into after this Act came into operation and after there was a notification u/s 3 of the statute. It is, however, not stated in the petition that there was a notification u/s 3, but learned counsel appearing for the applicant has stated before me that it was so. I will accept that to be a fact. It is not disputed by counsel for the respondent.

4. The main basis of the applicant's argument challenging the arbitration agreement and the award may be stated briefly. It is contended that by reason of the provisions in the statute which I have just mentioned this contract has become void and unenforceable. Therefore as the arbitration clause forms a part of this contract, this arbitration agreement is also void and unenforceable. Reliance has been placed on the decision of Sarkar J. in -- "Bhimraj Sethia v. Jiwanmull Tapuria from which there was an appeal, being A.F.O.O. No. 116 of 1950 (Cal) (A), but which appeal failed on a preliminary ground as being not a competent appeal. Reference has also been made to the observations of Viscount Simon L. C. in "Hayman v. Darwins Ltd." (1942) AC 356 . In answer Mr. Ginwalla, learned counsel for the respondent, has relied on the decision of the Court of Appeal of this Court in -- The State of Bombay Vs. Adamjee Hajee Dawood and Co., (C) and specially on observations appearing at page 148 of that report.

5. On behalf of the respondents, learned counsel has made three submissions. First, according to him, the original contract may or may not be hit by the West Bengal Jute Goods Act, 1950 and the Court before it can set aside the award must be satisfied that this is a contract which in fact comes within the mischief of the Statute. Secondly, in any event, there was a settlement contract which could not possibly come within the Act as being not a contract on a forward basis, and

thirdly, the basic question whether the parties are habitual dealers in jute or not being a question of fact could be decided by the arbitrators, and in fact and effect has been decided by the arbitrators in the circumstances of this case.

6. The question whether a settlement contract in jute is a contract on a forward basis or not within the meaning of Section 2 and the definition provided by the West Bengal Jute Goods Act, 1950 may first be disposed of briefly. The settlement contract in this case is dated April 19, 1951, and this is what appears on the contract:

"This is a settlement contract. Contract No. 6 dated 16-3-51. The present buyer will pay to the present seller a difference at Rs. 20/6 per cent bags on due date."

A settlement contract means that a contract which was made before delivery of jute is not extinguished by performance and delivery but it is settled by the payment of dues. The nature of the settlement contract was considered in -- Mohini Kanta Saha Chowdhry and others Vs. Preonath Niyogi and others, Mohesh Chandra Das and others, Sheikh Monaruddi and another and Mohesh Chandra Das and others Rankin J. delivering judgment observes that when a settlement contract is made, reselling the goods back again from the original buyer, the intention is not that after the settlement contract the first contract should be gone. The intention is that the two contracts should stand together so that there can be a set off as regards delivery and a set off as regards price, for everything except the difference. It is, therefore, clear to my mind that if the original contract is hit by the Jute Goods Act, then the argument treating the settlement contract containing an arbitration clause as an independent contract immune from the operation of that Act cannot be sustained. If the original contract was on a forward basis so as to come within the mischief of the Jute Goods Act, then the settlement contract must also on that basis be within the operation of the Act, for the simple reason that in the Settlement Contract the agreement or consideration, is to pay the difference with reference to a contract which itself was entered on the forward basis. I find myself in entire agreement with the view expressed by Rankin J., that the settlement contract and the original contract "stand together" and it is not the intention of a settlement contract that the first contract should be treated as altogether discharged.

7. But the main difficulty in this case on the way of the applicant arises on more fundamental grounds on the provisions of the Statute. Before the West Bengal Jute Goods Act, 1950 can be applied to a contract in order to make it void and unenforceable, it must be shown that it is a contract which comes within the operation of that statute. This Act prohibits making of contracts relating to jute goods and makes such contracts void and unenforceable. The impact of the statute is upon "contract relating to jute goods". It is not, however, any and every contract relating to jute goods that is made void and unenforceable. The Act was designed to provide for the prevention of "certain dealings" in jute goods. By Section 2(1) of the Act it is provided that a contract relating to jute goods means a contract relating to the sale or purchase of jute goods made on a

forward basis:-- (a) providing for payment or receipt as the case may be, or margin in such manner and on such dates as may be specified in the contract, or (b) by or with any person not being a person who (i) habitually deals in sale or purchase of jute goods involving the actual delivery or possession thereof, or (ii) possession, or has control over a godown and other means and equipment necessary for the storage and supply of jute goods.

8. Taking that definition certain major considerations become obvious. One is that it must be a contract relating to the sale or purchase of jute goods. The second is that it must be made on a forward basis. These two considerations are fundamental. In addition to these the considerations mentioned in Section 2(1) (a) or 2(1)(b) must be satisfied. Now all these considerations u/s 2(1) (a) or 2(1) (b) of the Act are considerations of fact. The petitioner in this case alleges that neither the petitioner nor the respondent was a person habitually dealing in the sale or purchase of jute goods involving the actual delivery or possession. It is also alleged that neither the petitioner nor the respondent possessed or possess any godown or other means and equipment necessary for the storage and supply of jute goods. These are the grounds on which the petitioner contends the contract comes within the operation of the statute. These are both questions of fact. They are denied and disputed by the respondent.

9. The question, therefore, is in this case confined within the limits of the controversy whether the contract is void or not on the basis of these disputed allegations of fact. In my opinion no contract can be said to be void under this statute unless it satisfies the requirements and considerations laid down in Section 2 of that Act and some of which considerations I have already set forth. In this case, therefore, the point is whether the petitioner and the respondent are not habitual dealers or whether they do not possess or control godown and other means and equipment for storage and supply. Until, therefore, that decision on fact is made, no one can say whether this particular contract comes within this statute so as to become void and unenforceable. But this itself being a dispute resting on facts can be referred to arbitration. I am not aware of any legal principle where a party claiming these facts and another party disputing them, can be prevented from submitting to arbitration that very fact. To my mind the problem here is first to determine these facts and then to determine if the contract is void on the basis of these facts. The first is a question of fact and the second a question of law. An arbitration clause can be so worded as to give the arbitrator jurisdiction to decide both such questions of fact and law. Whether the parties can do so in a particular case will depend primarily and fundamentally on the scope of the submission contained in the particular arbitration agreement and any other submission which has otherwise been made but which satisfies the requirements of the Indian Arbitration Act.

10. Now in this case what are the facts? The fact is that as early as 8-9-1951, the petitioner's attorney Mr. B.M. Bagaria wrote to the Registrar of the Tribunal of Arbitration that the contract between the parties was illegal, void and

inoperative. The petitioner pleads this letter in para. 14 of the petition before me. The letter definitely alleges that:

"The Chamber has no jurisdiction in the matter. The contract referred to between the parties is illegal and void and inoperative and no such contract could be entered into in view of the provisions of the law. Consequently the arbitration cannot be proceeded with.

If in spite of the above the Chamber want to proceed further in the matter, I shall thank you to please let me know. On hearing from you my clients will move the High Court at Calcutta."

Having said that, what the petitioner did was not what was stated in that letter. The petitioner did not move the High Court, but in fact by his letter of 7-12-1951, which is annexed to the affidavit-in-opposition of the respondent, asked for time to appear and to produce the necessary documents in the matter before the arbitrators. In fact the letter requested the arbitrators

"to hold your meeting at any date after the 20-12-1951, as otherwise my clients will be seriously prejudiced and they will not be able to produce necessary documents in the matter. You will appreciate that my clients should not be shut out in this manner inasmuch as on account of an unavoidable reason the gentleman has not been able to come to Calcutta and do the needful at present, who is acquainted with the fact of the said case."

The matter thereafter proceeded before the arbitrators and in fact on this request the arbitration was adjourned. The award was subsequently made on 13-2-1952, directing the petitioner to pay Rs. 3056/4/-.

11. As I read these letters of 8-9-1951 and 7-12-1951, as well as the submission, I have come to the conclusion that they together constitute a lawful submission even on the points of fact that are now being urged as a ground for invalidating the contract. Having taken the decision of the arbitrators after that submission and after asking for time from the arbitrators not only for witnesses to appear before the arbitrators but for the purpose of producing necessary documents, the one & only conclusion possible is that the petitioner could not prove the basic facts which alone would have brought this particular contract within the operation of the Statute and make the contract void.

12. Two courses were open to the petitioner, and it was for him to elect which course to adopt, if his contention was that on the facts of habitual dealing or possession and control of godown the parties were within the meaning of the statute, then he could have come to this Court to stop and stay the arbitration proceedings alleging those grounds before this Court. The other course was that notwithstanding this difference, that is, the petitioner claiming those facts of habitual dealing or possession or control of godown to be true and the respondent disputing such facts, they were prepared to compose this conflict by referring or submitting these very disputed facts to the decision of the

arbitrators. Having regard to the language of the scope of submission which includes all matters, questions, disputes and differences, I am of the opinion that this question of fact on which whether the contract was void or not was made to depend could also be a matter of submission before the arbitrators. The decision of the arbitrators having been obtained, it is in my view no longer open to the applicant to reagitate the same grounds of fact now before this Court in order to invalidate the arbitration clause. To permit such a course will be not only to allow a person to blow hot and cold but also to re-open a fact, on whose basis alone the contract could be avoided, and which fact was duly submitted to the arbitrators.

12a. A reference was made by Mr. Bhabra to the decision of Bachawat J. in -- "Pannalal Sagoreraull v. Fateh Chand Muralidhar 88 Cal L J 34 . In that case the award was impeached on the ground that the arbitrators took evidence on the merits ,as also on the question whether the contract which was denied by the applicant had been entered into between the parties. The learned Judge there held that the contract was good and valid and had expressed the opinion that the arbitrator need not proceed upon the assumption that there was a valid and binding contract, but it was proper for him to enquire into the fact of the existence of the contract upon which his jurisdiction depended in order to satisfy himself that prima facie he had jurisdiction. The learned Judge also held that the parties could always come to the Court which alone could determine if there was, in fact, a contract which conferred jurisdiction upon the arbitrator.

13. This case, however, has no application to the principle and facts that arise in the case before me. Here is a question not about the factual existence of a contract in the sense that an enquiry has to be made whether the parties at all entered in fact into a contract or into a submission. It is admitted here before me that the parties did enter into a contract but what is said is that the West Bengal Jute Goods Act, 1950, makes this contract void & unenforceable by reason of certain facts. But that statute has not made all contracts, as I have said, void and unenforceable. Before a contract could be made void and unenforceable under the statute it must be shown that it is a contract within the meaning of Section 2 of the statute. That depends again on the proof of certain facts. It is for the party who alleges those facts to exist to prove them and take all necessary steps to produce such proof. But it is equally open to the party not to press this difference on the question of facts because it may lead to a decision against him or to have the arbitrator's decision on such facts when this comes within the ambit of the arbitration clause.

14. A controversy of this character is, in this branch of jurisprudence, very often overlaid with dubious theories of arbitrator's power to decide his own jurisdiction. But legal propositions when taken in abstraction are a snare to lure the Courts and jurists to tempting errors of legal conclusions and arbitrator's power to decide his own jurisdiction is such a proposition which has been well known in history of legal disputes to have successfully raided the siren call for

false alarms and erroneous decisions. Primarily the arbitrator's jurisdiction depends always on the meaning and construction of the language of submission for arbitration. Then again on a properly worded submission an arbitrator can be made a judge not only of facts but also of law. But when the question of submission itself is in issue in the sense that the controversy is whether the parties concerned at all entered into a valid agreement for arbitration, then that controversy cannot be decided by the arbitrators. That jurisdiction belongs to the Courts. Because while arbitrator has only such jurisdiction as the parties by contract agree to give him the Courts have all the jurisdiction that has not been taken away and there is, therefore, all the difference on this point between an institution with enumerated powers such as the private forum of arbitration and an institution with residual powers such as the Courts. But where the question is not one whether there was at all a submission to arbitration, but whether certain facts exist which make the contract or the submission void and unenforceable in law or statute, the arbitrator's jurisdiction, is not thereby ipso facto ousted, if it is otherwise within the language and scope of the submission. In my view the present case is not one where the arbitrator is deciding his own jurisdiction in the sense I have just discussed. What he is deciding is a dispute of fact. That fact is, does the person habitually deal in sale or purchase of jute goods involving actual delivery or possession or does he possess or control a godown and other means and equipment necessary for storage and supply of jute goods. Beading the words of the submission in the arbitration clause with the relevant sections of the West Bengal Jute Goods Act 1950 which I have already discussed, I am of the opinion that the arbitrators were competent to decide that issue of fact. The Award that was finally made in this case, gave damages to the respondent. Implicit in such award is the finding that there was a contract, that such contract was valid and enforceable and that the party responsible for the breach of such contract is the applicant. In that view of the matter, it is not for this Court to agitate over again that issue of fact.

15. For these reasons, I dismiss this application with costs.