

(1967) 06 CAL CK 0026

In the Calcutta High Court

Case No : Appeal from Original Decree No. 199 of 1961

Coal Products Ltd.

APPELLANT

Vs

Prafulla Chandra Mitra

RESPONDENT

Date of Decision : 02-06-1967

Acts Referred:

Defence of India Rules, 1939 — Rule 81(2), 89(2)
Essential Supplies (Temporary Powers) Act, 1946 — Section 17(2)
Essential Supplies (Temporary Powers) Ordinance, 1946 — Section 5
Sales of Goods Act, 1930 — Section 23, 55(1), 55(2)

Citation : (1968) 1 ILR (Cal) 1

Hon'ble Judges : P.B. Mukharji, J;A.N. Sen, J

Bench : Division Bench

Advocate : M. Hazra and R.L. Sinha, for the Appellant; S.K. Acharyya and S.K. Roy, for the Respondent

Final Decision : Allowed

Judgement

P.B. Mukharji, J.—This is an appeal from the judgment and decree of Mr. Justice S.P. Mitra dismissing the Plaintiff's suit for the recovery of a sum of Rs. 35,152-6-0 in respect of delivery and supply of coal by the Plaintiff to the Defendant.

2. The foundation of the learned trial Judge's judgment is based on the conclusion which he expressed in the following terms:

The Plaintiff would have succeeded in this suit but for my decision that the contract sued upon is illegal and void and in any event the suit is not maintainable inasmuch as there was no contract of sale between the parties.

3. The issues raised before the learned trial Judge were as follows:

(1) Was there an agreement between the parties as alleged in para. 1 of the plaint?

(2) Did the Plaintiff supply coal to the Defendant pursuant to the agreement alleged in para. 1 of the plaint?

(3) Was the Defendant appointed commission agent on terms and conditions alleged in para. 1 of the written statement?

(4) Was there a memorandum of agreement entered into by the parties on December 19, 1954, as alleged in para. 3 of the plaint?

(5) Is the suit maintainable inasmuch as there was no contract of sale between the parties as alleged in the plaint?

(6) To what relief, if any, is the Plaintiff entitled?

4. It will be seen from the above issues that the illegality of the contract was not an issue at all. The Defendant in fact did not raise the issue of illegality in the original written statement. He got further opportunity to raise it in the amended written statement, but even there in the amended written statement he did not take the point of illegality of the contract in suit.

5. On Issue No. 4 the learned trial Judge answered the question in the affirmative overruling, inter alia, the Defendant's contention that the agreement was a forgery. On Issue No. 2 the learned trial Judge held that the Plaintiff-Appellant did supply coal to the Defendant pursuant to the agreement, as alleged in para. 1 of the plaint, and answered the issue in the affirmative. The learned trial Judge also expressed the view on Issue No. 1 that there was an agreement between the parties as alleged in para. 1 of the plaint and answered the same in the affirmative. On Issue No. 3, the learned trial Judge found the same against the Defendant and he answered the issue in the negative. He held that the Defendant was not a commission agent which the Defendant alleged in para. 1 of the written statement. On Issue No. 5, the learned trial Judge held against the Plaintiff and it was one of the grounds on which he dismissed the suit.

6. The main point argued in this appeal before us is the illegality of the contract in suit. The Appellant contends that the contract is not illegal and that the learned trial Judge was entirely wrong in holding that it was an illegal contract and preventing the Plaintiff from suing upon such contract and obtaining his relief. It is the part of the contention of the Plaintiff-Appellant on this point that the learned trial Judge should never have allowed the suit to be dismissed on this point when there was no pleading and no issue at all. What the learned trial Judge has done is to proceed upon the doctrine of ex facie illegality. He holds that the contract is illegal on the face of it and, therefore, the Court should take judicial notice of such illegality of the contract and deny relief on the claim based upon the contract. The question, therefore, turns on the construction of the contract in suit and on the construction of the provisions of the Colliery Control Order, 1945.

7. In order to focus the attention on this point, it will be appropriate to quote the finding of the learned trial Judge on this point. He expressed his conclusions in

the following terms:

In my view the contract on which the Plaintiff relies is illegal in itself. Clause 12E of the Colliery Control Order, 1945, clearly provides that no person shall acquire or purchase or agree to acquire or purchase any coal from a colliery except under the authority of the Central Government. The Defendant by this contract was agreeing to acquire or purchase coal from the Plaintiff without the authority of the Central Government already had and obtained. Both the parties to the contract knew that the Defendant did not have the requisite authority. And that is why Clause 8 of the contract (Ex. A) provides that the Defendant undertakes to arrange for disposal of the coal after obtaining necessary permissions from the authorities. It cannot, therefore, be said that the contract was lawful in its inception, but there has been an illegality in the performance of it by the Defendant. No Court should enforce this illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of such a contract.

It is, therefore, necessary to examine Clause 8 of the contract in suit and Clause 12E of the Colliery Control Order, 1945, to see how far this finding can be sustained. Clause 12E of the Colliery Control Order, 1945, reads as follows:

No person shall acquire or purchase or agree to acquire or purchase any coal from a colliery and no colliery owner or his agent shall despatch or agree to despatch or transport any coal from the colliery except under the authority and in accordance with the conditions contained in a general or special authority of the Central Government. The functions of the Central Government under Clause 12E shall also be exercised by the officer so specified.

8. The import of this clause in the Colliery Control Order, 1945, is clear. The first part is directed against a person acquiring or purchasing or agreeing to acquire or agreeing to purchase. The second part is that this acquisition or purchase must be from a colliery. Reading these two limitations and qualifications, the meaning of the first part of Clause 12E is that no such person shall acquire or purchase coal or agree to do the same from a colliery except under the authority and in accordance with the conditions contained in a general or special authority of the Central Government. That is the third limitation, viz., that an authority in accordance with the conditions contained in a general or special authority of the Central Government is required for any person acquiring or purchasing or agreeing to do the same. We shall leave out for the purpose of our consideration the latter part of Clause 12E which relates to despatch or transport of coal from the colliery by a colliery owner or his agent which is also required to be under similar authority, because nothing turns upon that fact in the present appeal. In fact, it is the common case that the latter half of Clause 12E regarding the despatch on transport is satisfied by the Plaintiff Appellant.

9. Analysing and dissecting the first half of Clause 12E of the Colliery Control Order material for the purpose of this appeal, it is essential to bear in mind the following features:

- (1) It is directed against a purchaser or an intending purchaser and no one else.
- (2) It is directed in respect of coal from a colliery and not coal from anywhere else.

10. It is the Defendant's case that this was coal from a colliery and that this is a case where the Defendant had no authority to acquire or purchase or agree to do the same. In other words, the Defendant having entered into this contract in suit and having had full benefit thereunder and the contract having been performed by delivery and sale now pleads his own illegality, and his own legal disqualification in not having the necessary authority as a bar to this claim of the Plaintiff.

11. The expression "coal from a colliery" requires interpretation, "Colliery" is defined by Clause 2(2) of the Colliery Control Order, 1945, inter alia, as follows:

Colliery means any mine or open working where the getting of coal is the principal object of the mining, quarrying or other operations carried on therein.

12. Admittedly the coal in suit was not coal from "a colliery" within meaning of that expression. The colliery in this case was Victoria Colliery in the district of Burdwan. That was where the colliery worked and where the pit-heads existed and from there the Railways carried the coal. The actual sale and disposal of this coal in suit was from a coal dump at Bhadreswar in a different district. viz., the district of Hooghly.

13. We shall presently show that the entire approach of the learned trial Judge was wrong on this point because he failed to appreciate that this was not coal from a colliery and that this basic condition for attracting Clause 12E of the Colliery Control Order was absent in this case. He should, therefore, have held that Clause 12E of such Colliery Control Order had no application to the contract in suit. For this purpose, we shall now proceed to analyse in the contract in suit.

14. To begin with, the learned trial Judge missed this basic implication of coal from the colliery as the foundation for attraction of Clause 12E of the Colliery Control Order. He does not discuss at all in his judgment under appeal this basic requirement for attracting Clause 12E of the Colliery Control Order.

15. Now, the memorandum of agreement in this suit is dated December 19, 1954. The parties to the contract are the Plaintiff-Appellant Coal Products Ltd. as the first party and Prafulla Chandra Mitra as the second party, who is the Defendant in suit and who is carrying the business in the name and style of P.C. Mitra and Co.

16. The very opening recital of this contract points to the opening of a coal dump at Bhadreswar in the following terms:

Whereas the second party approached the first party to open a coal dump at Bhadreswar ghat and despatch Grade II slack or dust coal upto 200 wagons under spare capacity, and accordingly 182 wagons have been despatched by the

first party on the following terms and conditions mutually agreed to by and between the parties as follows.

17. What thereafter follows are the terms and conditions. They are set out in 13 different clauses.

18. Clause 3 of this agreement expressly states that the said coal has been consigned in the name of the first party and the property of the said coal will not pass to the second party until the full price and freight paid in respect of the same as hereinafter stated.

In other words, the coal until paid off fully in price and freight, the title does not pass to the Defendant. This is also confirmed by Clause 2 of the agreement. It has already been provided in Clause 2 that the Plaintiff-Appellant will debit the Defendant the freight paid/advanced or hereinafter paid/advanced. The next important clause is Clause 4 of the agreement which again expressly provides:

The entire coal in the said coal dump will remain solely at the risk and responsibility of the second party including the risk of fire etc. and all charges of unloading, stacking, supervision and delivery will be borne by the second party as all other expenses.

This clause definitely indicates that after the coal reaches the coal dump at Bhadreswar it will remain at the risk and responsibility of the Defendant. Finally, in Clause 5 of the agreement it is again expressly stipulated:

The second party or their representatives shall be entitled to take delivery or to give delivery to customers of any quantity of coal stacked in the said coal dump or from the Railway wagons against payment of the full price with freight of the coal so to be taken delivery or at the rates paid by customers and the first party shall credit the said money towards the money due to them by the second party.

This Clause 5 clearly provides that the time for taking delivery or giving delivery to the customer is after the coal had reached the coal dump and the place from where the Defendant is to give such delivery to the customer or to take delivery is the coal dump at Bhadreswar and not the colliery within the meaning of Clause 2(2) of the Colliery Control Order read with Clause 12E of the same Order.

19. One of the relevant clauses in this agreement is Clause 8 which provides:

The second party undertakes to arrange for disposal of the said coal after obtaining necessary permissions from the authorities and also assures and undertakes not to dispose of or move any coal without prior payment for the quantity to be so delivered. In case of contravention the second party will be liable under Indian Penal Code without prejudicing the first party's other rights.

20. The learned trial Judge apparently found that this Clause 8 was an offending clause which made the contract illegal. He also reads a motive in this clause by suggesting knowledge that both the parties knew that the Defendant did not have the requisite authority and that was the reason why they put in this

expression "after obtaining necessary permissions from authorities" in Clause 8.

21. We are satisfied that the learned trial Judge was entirely wrong on this point. In the first place, it is admitted in evidence, and it is the common case of the Defendant that all this coal which the Defendant took from the coal dump at Bhadreswar was sold only to permit-holders and nobody else. Therefore, the necessary permission was there and it was under such permissions that the coal was disposed of. In this connection it is necessary to emphasise the very clear answers giving by Indrajit Kumar Mitra, the Defendant's son, who gave evidence in this case (the Defendant himself not having come to the box) to Qq. 34-46. He definitely admits there by saying:

We would sell the coal to the customers who would go there, i.e., the permit-holders and we would sell that coal at the controlled rate.

22. In the second place, Clause 8 of this contract really is not concerned with the permission or authority to acquire or purchase coal or agree to do the same as contemplated in the first part of Clause 12E of the Colliery Control Order. This Clause 8 expressly relates to the Defendant's undertaking to arrange "for disposal of the coal". In fact, "disposal" under Clause 2(3)(b) of the Colliery Control Order means disposal of (i) ownership or any proprietary interest, (ii) the right to possession and (iii) possession, whether or not accompanied by any disposal of ownership or to any proprietary interest or of the right to possession. In fact, the evidence is that the goods in suit were duly disposed of and sold to permit-holders. They naturally are persons who had the permission from authority of the Government to buy the coal.

23. Finally Clause 12 of the agreement stipulates:

the second party shall keep the first party informed of all facts and circumstances relating to storage, stocking and disposal of the said coal. In case the second party fails to dispose of the coal or clear the dues of the first party by the 14th day of March, 1955, the first party is empowered and will have full authority and right to sell coal and to issue delivery orders in such case the quantity that may actually be delivered are adjustable from the bill of the first party and also the first party will credit @ Rs. 8 (Rupees eight) per ton as Railway freight and handling charges for the aforesaid quantity.

24. This again is a clause which stipulates that the Defendant has to keep the Plaintiff informed of all the facts and circumstances relating to storage, stocking and disposal of the coal. That is perfectly legal and consistent with the terms of the Colliery Control Order and this clause does not commit any breach of that Colliery Control Order. Indeed, the Plaintiff here insists upon being informed as to how the goods have been stored, stocked and disposed of by the Defendant from the dump.

25. Finally Clause 12 of the agreement stipulates:

For purpose of determining the lien of the first party the first party Coal Products

Ltd. shall be deemed to be the unpaid seller and the property for that purpose will not be deemed to have passed to the said second party P.C. Mitra and Co. and the first party shall be entitled to exercise all rights as unpaid sellers of goods in respect of which the property has not passed to the buyers including right of stoppage, delivery etc. The above contract is between the first party and the second party according to the principal to principal system.

Now, this clause again indicates the true nature of this contract and confirms the agreement about the title and property in the coal as already mentioned in Clauses 3 and 7. Clause 12 expressly provides that for the lien of the Plaintiff who shall be deemed to be the unpaid seller. In other words, the property will not be deemed to have passed to the Defendant so that the Plaintiff has all the rights of unpaid seller.

26. This confirms the construction and the view that the coal is not sold under this agreement from a colliery within the meaning of Clause 12E of the Colliery Control Order, 1945, read with Clause 2(2) of the same Order, but it was from a coal dump which was outside the purview and the operation of the Colliery Control Order.

27. It is wrong in our opinion to consider that any of these clauses in the memorandum of agreement dated December 19, 1954, was ex facie illegal or on the face of it directly hit by any of the provisions of the Colliery Control Order. The learned trial Judge had no material and no evidence before him to come to the finding that the Plaintiff-Appellant by this agreement agreed that the Defendant should purchase or agree to purchase the coal from the Plaintiff without the necessary authority under Clause 12E of the Colliery Control Order. It was all the more erroneous on the part of the learned Judge to come to such a conclusion on the facts and circumstances of this case, there being no pleading or issue or evidence on the point. In fact, this is the difficulty when a point is decided without pleading, without issue and without any evidence. We need only refer here to some of the documents on record and exhibited in this suit, whose implications the learned trial Judge missed.

28. One such document is a communication Ex. 21 of the Government of India, Ministry of Production, Deputy Coal Commissioner (Distribution), 1 Council House Street, Calcutta. This exhibit is addressed to the Divisional Suptd., Eastern Railway, Asansol. The relevant parts of this document are set out as follows:

Dear Sir,

The following sanction is issued under Spare Capacity name of the consignee M/s. Coal Products Ltd. C/o P.C. Mitra and Co. Bhadreswarghat--Victory Colliery--copy to M/s. Coal Products Ltd., P.O. Pandaveswar, Dist. Burdwan--copy to P.C. Mitra and Co., 5/C, Ram Krishna Lane, P.O. Baghbazar, Calcutta. Sd. Dy. Coal Commissioner (Distribution).

Here is clear and unmistakable sanction in express terms. Surely, if it was the

case of the Defendant that the contract was illegal on the ground that the Defendant himself had not the necessary sanction, then the learned trial Judge should have allowed the parties to amend the pleadings. He allowed the Defendant to amend his written statement once, but even then this plea of lack of requisite sanction or authority was never taken by the Defendant. The learned Judge should have also raised an issue on that point and also directed evidence on such point, because it was not then a case of ex facie illegality at all but a case where illegality is attributed by reason of the absence of Defendant's sanction or permission from the authority concerned, which is a fact which must be determined on evidence and brought on record as a fact. It is a question of fact only. Fact must be fairly established before a contract can be condemned as illegal under the Colliery Control Order on the ground that there was no requisite sanction or permission. That is what the learned trial Judge missed.

29. That is incidentally not the only document. There is also the document marked Ex. 22--again a communication of the Government of India, Ministry of Production, Deputy Coal Commissioner (Distribution), 1 Council House Street, Calcutta, dated October 16, 1954, addressed to the Divisional Superintendent, Asansol, regarding sanction etc. which inter alia, states as follows:

Dear Sir,

Re: Sanction etc....

I am enclosing a copy of letter of 14.10.54 from Coal Products Ltd. Victory Colliery for your information. You are requested to refer to this office circular No. Rat/38/SPC of 23.9.54 and inform this office why indents are rejected against the above sanction. Please delete the words "spare capacity" and treat them as Ad hoc sanctions and meet indents accordingly, if not already done--Sd. Deputy Coal Commissioner (D). Copy to Coal Products Ltd. P.O. Pandaveswar--copy to P.C. Mitra and Co. 5/C, Ram Krishna Lane, P.O. Baghbazar, Calcutta.

These letters expressly speak of "sanctions", and if they are not sanctions it is difficult to see what other sanction for contract is necessary under the Colliery Control Order in this case. The Plaintiff should have been told what is the sanction that the Defendant did not have what was the condition that the Defendant did not fulfil and what was the lack of authority under Clause 12E of the Colliery Control Order which made the contract illegal. There being no pleading, no issue and no evidence, the whole thing was decided on mere argumentative submission and on no material.

30. This was a real surprise at the trial--a surprise in argument without any basis of facts and evidence. It was a surprise because at no stage whatever was this point taken by the Defendant that they did not have the necessary sanction or authority from the Government under Clause 12E of the Colliery Control Order. The bills in this case were submitted by the Plaintiff in September and November, 1954. On receipt of the bills the Defendant never raised a protest or objected to these bills. Nor did he say that the contract was tainted by illegality and he was

not liable to pay. Indeed reminders followed from the Plaintiff to the Defendant on December 12, 1954 and March 23, 1955. Not a word was said in reply to these reminders that the contract was illegal because of lack of sanction and no payment would be made thereunder. Again there is on record Ex.W, a letter dated June 13, 1955, from the Plaintiff to the Defendant claiming again the money due on the bills and noting also the fact of delivery of 907 tons 15 1/2 cwt. of coal to the consumers as directed by the Plaintiff. No answer in writing was given by the Defendant even to the letter of June 13, 1955. What the Defendant's case now is that he made a payment of Rs. 5,000 on June 30, 1955. According to the Defendant this payment of Rs. 5,000 was made in full payment of the Plaintiff's dues although the dispute had started before June 30, 1955, and there were written demands for payment of the bills submitted by the Plaintiff. There was no acknowledgment taken by the Defendant in writing from the Plaintiff to say that these Rs. 5,000 were in "full payment". In fact, it has been found and we also confirm the finding that the payment of Rs. 5,000 was not full payment at all. Indeed the Defendant under document marked Ex. 59(a)--entry of ledger book on June 30, 1955--records payment of Rs. 5,000 without stating that it was in full and. final payment. Although this ledger entry corresponds to p. 81 of the cash book, yet the Defendant did not think it wise to produce that page of the cash book which is the primary entry of this account.

31. All these are intended to show that throughout the period when those bills were being made and submitted, demands were being made for payment, the Defendant never said that the bills were not payable because the contract was illegal on the ground that the Defendant himself had not acquired the authority or permission from the Government as required under Clause 12E of the Colliery Control Order. Even after all this period of bills and demands for payment, the Defendant never in the stage of correspondence or even in the stage of pleadings raised this question of fact that he himself had not the necessary authority or permission and, therefore, this contract was hit by Clause 12E of the Colliery Control Order. All these documents and conduct only confirm the conclusion which we have arrived at that the contract in suit could not be held to be illegal on the ground that the Defendant was not supposed to have any sanction or authority, which he never alleged or proved at any stage of the trial.

32. In fact, when the letter of demand in this suit was issued marked Ex. Z dated July 5, 1955, the Plaintiff made it clear that there were three bills showing the amounts due against each. It also gave the allowance to coal sold amounting to 907 tons and 15 1/2 cwt. In the penultimate paragraph of that letter it also refers to the receipt of the said sum of Rs. 5,000 by cheque and pointed out to the Defendant that he had assured to clear the rest of the dues by July 4, 1955, but failed. It is also distinctly alleged in that letter of demand:

The terms of payment with you was to send payment on the day you sell coal from Bhadreswar dump, but recently it is discovered that you have disposed of the entire stock without sending payment, so you are liable for breach of trust

and compel me to take such action which I will be advised by the company's lawyer; but at the same time I would request you to kindly send the dues by next post to avoid unpleasant action.

The only answer or reply given by the Defendant to this letter of demand is dated July 6, 1955, marked Ex. 36, raising for the first time disputes regarding the quantities, rates on handling charges and alleged payment of the sum of Rs. 5,000 as being payment in full. But the real point of this reply is that the Defendant had not even then discovered his point about illegality nor even then he had discovered at that stage that he had not the sanction of any authority either at the instance of the Plaintiff or on his own.

33. On the fact we again repeat it was unfortunate that this point was allowed to be raised and decided without evidence and without marshalling evidence on the point. The evidence on behalf of the Defendant, to say the least, is very shaky and hesitant on this point of sanction. Again in the evidence of the Defendant's son Indrajit Kumar Mitra in answer to Qq. 260 to 264, his significant replies were that the Defendant did not make any application to the Controller of Food Supplies on the "Defendant's own form" suggesting thereby that this sanction was obtained on other forms and, in fact, we have already referred to the significant documents on the point marked Exs. 21 and 22. In fact, on this evidence this Court is bound to hold that there was necessary sanction in full compliance with the requirement of Clause 12E of the Colliery Control Order.

34. All these facts and considerations go to establish certain specific points. The first point is that there is no *ex facie* illegality. We see no clause in the memorandum of the agreement in this suit which we can pick out and say that by merely looking at this and without having any evidence the Court can say that this was a contract which is prohibited by law or which is against any provision of the law of the country. Secondly, Clause 12E of the Colliery Control Order in the first half is directed against the buyer and not the seller. It does not prohibit the Plaintiff to sell in this case. Why should the seller, therefore, must be presumed without evidence that he knew that the Defendant had not fulfilled the condition which again is not true on the facts and which again was never an issue, which was never raised or tried on facts or in evidence? Thirdly, here is a contract between the two contracting parties. It was a contract as to how the coal would be despatched and sold. The parties were entitled to assume that each had the necessary qualifications to enter into the agreement. Supposing for an illustration that two apparently adult parties enter into a contract and it is found later on that one of the parties is a minor. The minority of one party will make the contract void, but surely that is not the doctrine of *ex facie* illegality. If there is no statement in the contract itself that one party was a minor it will be presumed that each party has entered into the contract with full conscience and qualification. If subsequently the minor challenges such a contract he has got to prove the fact of his minority at the time of the contract and the condition of his minority before the contract can be condemned by the Court. The learned trial

Judge misdirected himself in concluding that Clause 8 of the Contract in suit providing for the disposal of the coal by the Defendant after obtaining the necessary permission showed either *ex facie* illegality or knowledge. On the contrary this Clause 8 insisting on necessary sanction and expressly saying that notwithstanding whatever offences the buyer might commit in that respect under the Indian Penal Code, rather suggests that the seller was an innocent party and he certainly did not know whether the Defendant had or had not any disqualification in the shape of absence of necessary authority or permission which the Clause 12E of the Colliery Control Order imposes and requires the buyer to have. The seller is quite within his right to stipulate that seller's claim will not be prejudiced by any failure on the part of the Defendant in respect of any permission or sanction from required authority.

35. On the letter of demand as indicated above there was a preliminary tussle in the Criminal Court on or about July 9, 1955. It was ultimately dismissed on the ground that the dispute was of civil nature on or about December 1, 1955. This suit was thereafter instituted on or about January 14, 1956.

36. The Defendant takes the most self contradictory stand. He made the case in his written statement denying the whole agreement in writing dated December 19, 1954, and challenging at the trial that the whole agreement was a forgery and that he did not enter into that agreement at all. If the agreement was forgery, then what was the point in alleging that it is illegal? The Defendant perhaps realised that his case of forgery would fail and he wanted to endure his retreat from liability under the contract by condemning it as illegal under the Colliery Control Order. But then he hardly realised that to accept his plea of his own illegality would mean he has committed an offence punishable with imprisonment. This belated attempt of the Defendant to raise the question of legality, therefore, is thoughtless to the extreme and very near the situation of the Defendant cutting his own nose to spite the Plaintiff, for his defence amounts to this that he would rather go to jail than pay the price of goods but which he himself in his turn sold and pocketed the money.

37. This Court states its conclusions in those terms. We hold and find that (i) this is not a case of *ex facie* illegality where illegality is apparent on the face of the document; (ii) that the illegality in this case is dependant on the fact whether the Defendant had obtained sanction or permission from the required authority under the first part of Clause 12E of the Colliery Control Order; (iii) that such fact not being pleaded in the written statement or raised as an issue should not had been allowed to be raised and decided at the trial; (iv) that the learned trial Judge went wrong on the fact in holding that there was actually no permission or authority as required under Clause 12E of the Colliery Control Order, whereas in fact from such documents as Exs. 21 and 22, as well as from the evidence of the Defendant's son quoted above, it is proved that necessary and requisite permission from the authority was in fact obtained and (v) that this contract and the sale of coal not being from a colliery at all but from a coal dump far away

from the colliery and from an entirely different district does not at all come within the purview and operation of Clause 12E of the Colliery Control Order.

38. In this view it will not be necessary to discuss in detail the controversial legal question, how far and to what extent, the Defendant can plead his own fault in self defence to deny the claim on a contract on the ground of its illegality. But out of deference to the arguments and submissions made from the Bar we shall make a brief review of the point.

39. In *Sajan Singh v. Sardara Ali* (1960) A.C. 167 the House of Lords came to the conclusion that

notwithstanding the contract for the sale of the lorry was unlawful, yet when in pursuance of the contract the lorry was sold and delivered to the Plaintiff, the property in it passed to him; and thereby he derived the right to immediate possession of the lorry, which entitled him to sue the Defendant in detinue.

The House of Lords also held that

the Plaintiff had actual possession of the lorry at the time the Defendant seized it and was entitled to sue in trespass.

Accordingly, in that case, the Plaintiff's claim succeeded. There also the document of sale was alleged to be a forgery, but that allegation failed and the document was held to be genuine. There also no question of illegality appeared on the pleadings. Lord Denning at p. 176 of that report points out that

although the transaction between the Plaintiff and the Defendant was illegal, nevertheless it was fully executed and carried out; and on that account it was effective to pass the property in the lorry to the Plaintiff.... The reason is because the transferor, having fully achieved his unworthy end, cannot be allowed to turn round and repudiate the means by which he did it, he cannot throw over the transfer.

Finally, at p. 178, Lord Denning concluded with these remarks:

Their Lordships would only add this: If the law were not to allow the Plaintiff to recover in this case, it would leave the Defendant in possession of both the lorry and the money he received for it. Their Lordships are glad to have been able to reach the conclusion that, on the facts of the present case, this is not the law.

40. In another case reported in the same volume--*Kiriri Cotton Co. Ltd. v. Ranchhodas Keshavji Dewani* (1960) A.C. 192--Lord Denning again had to consider this question to law. His Lordship expressed the view at p. 202 of the report on the dictum of Lord Ellenborough in *Langton v. Hughes* (1813) 1 M. and S. 593, 569 where Lord Ellenborough had said:

What is done in contravention of an Act of Parliament, cannot be made the subject-matter of an action.

by making the following observations:

In considering the validity of this reasoning, their Lordships would point out that observation of Lord Ellenborough was made in a case where a party was seeking the aid of the Court in order positively to enforce an illegal contract. It should be confined to cases of that description. His observation has no application to cases such as the present, where a party is seeking to recover money or property transferred under an illegal transaction. In such cases the general principle was stated by Littledale J. in *Hastelow v. Jackson* (1828) 8 B. and C. 221, 226: If two parties enter into an illegal contract and money is paid upon it by one to the other, that may be recovered back before the execution of the contract but not afterwards. In accordance with this principle, so long as the illegal transaction has not been fully executed and carried out, the Courts have in many cases shown themselves ready to entertain a suit for recovery of the money paid or property transferred.

After having made those observations Lord Denning proceeds to say at p. 203:

It is clear that in the present case the illegal transaction was fully executed and carried out. The money was paid. The lease was granted. It was and still is vested in the Plaintiff. In order to recover the premium, therefore, the Plaintiff must show that he was not in *pari delicto* with the Defendant. That was, indeed, the way he put his case in the pleadings.

41. The case, therefore, turned on the issue whether the parties were in *pari delicto*. So far as this doctrine of *pari delicto* is concerned, there is a Division Bench decision of this Court to which I was a party, viz., *Pran Ballav Saha v. Tulsibala Dassi* (1958) 63 C.W.N. 258 where observations made at pp. 271-272 may be seen.

42. Reference should also be made to the case of *A.R.P.L. Palaniappa Chettiar v. P.L.A.R. Arunasalam Chettiar* (1962) A.C. 294. There the father brought a suit against the son for re-transfer of land from the son which was hit by a Malayan Law or Regulation. The House of Lords there came to the conclusion that the father was not entitled to a re-transfer of the land from the son. The father had of necessity to disclose in the proceedings that he had practised a deceit on the public administration of which act the Courts were bound to take notice even though the son had not pleaded and, therefore, it was held that the father could not use the process of the Courts to get the best of both worlds to achieve his fraudulent purpose and also to get his property back.

43. Dictum of Lord Mansfield in *Holman v. Johnson* (1775) 1 Cowp. 341 (343) that

No Court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act.

was applied. At pp. 298 and 299 of the above report the argument is noticed that there was no evidence that the father circumvented the Malayan Rubber Regulations and reliance was placed on the observations of James L.J. in *Haigh v.*

Kaye (1872) L.R. 7 Ch. 469 (473), namely,

If a Defendant means to say that he claims to hold property given to him for an immoral purpose, in violation of all honour and honesty, he must say so in plain terms, and must clearly put forward his own scoundrelism if he means to reap the benefit of it.

It was argued in that case that a Defendant, to support such a case as the present, should give evidence to show that what was in the minds of the parties at the time was dishonest and illegal.

44. Lord Denning in dealing with this argument at p. 301 of the report observed that:

The Plaintiff had no reason to disclose any illegality and did not do so. It was the Defendant who suggested that the transaction was entered into for a fraudulent purpose. He sought to drag it in without pleading it distinctly and he was not allowed to do so.

In the case of *Haigh v. Kaye* Supra, Lord Denning points out that there was express pleading and disclosure of illegality as in the case which His Lordship was considering. Finally at p. 303 of that report Lord Denning distinguished this case from his Lordship's decision in *Sardara Ali v. Sajan* Supra by the following observation:

The difference, however, is this: In *Sardara Ali v. Sajan Singh* the Plaintiff founded his claim on his right of property in the lorry and his possession of it. He did not have to found his cause of action on an immoral or illegal act. He was held entitled to recover. But in the present case the father has of necessity to put forward, and indeed, assert his own fraudulent purpose, which he has fully achieved. He is met therefore by the principle stated long ago by Lord Mansfield: "No Court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act", see *Holman v. Johnson* Supra. Their Lordships are of opinion that the Courts should not lend their aid to the father to obtain a retransfer from the son.

45. The net result of all these decisions is that in any event there must be a pleading and an issue and the facts must show whether the contract is illegal or void.

46. Here in the appeal before us the contract is not *ex facie* illegal. The contract is said to become illegal because of fact of absence of requisite sanction. But then that fact has to be proved and established to bring the contract within the mischief of law. But until these facts and events are established in evidence no Court is entitled to condemn a contract on the ground of presumed illegality which is not patent on the face of the contract. Dealing with a hire-purchase agreement the English Court of Appeal in the recent decision of *Snell v. Unity Finance Co. Ltd.* (1964) 2 Q.B.D. 203 emphasised the need of bringing all the relevant facts to clearly establish the illegality. See also the observations of

Diplock, L.J. in that case at p. 221 of that report.

47. On the question of pleading in such cases the learned editors of the 21st edition of Chitty on Contracts (vol. I, p. 467) state the law in these terms:

If an action rests on a contract which is on the face of it is illegal the Court ought to dismiss the claim, whether the illegality is pleaded or not, but either the agreement sued on must show its illegality on its face or, if facts relating to such an agreement are relied on, the Plaintiff's case must have been completely presented. Where, however, the contract is not *ex facie* illegal, but its illegality depends upon the whole of the surrounding circumstances the Court will not, as a general rule, entertain the question unless it is raised by the pleadings, for it is not entitled, as against the Plaintiff, to take isolated facts as representing the whole setting.

We associate ourselves with the view expressed above as representing the correct law on the point. This view is supported by the observations of the House of Lords in *North Western Salt Co. v. Electrolytic Alkali Co.* (1914) A.C. 461 (469). By this test and principle also the Appellant in this case must succeed.

48. There is also another important principle of law which the learned editors of Chitty on Contracts of the above edition also point out at the same p. 467, vol. I, and that is in these terms:

But the presumption of law is in favour of the legality of a contract; and therefore, if it be reasonably susceptible of two meanings or two modes of performance, one legal and the other not, that interpretation is to be put upon it which will support it and give it operation and it lies upon the party attempting to set aside a transaction for illegality to prove it.

See the observations of Lord Ellenborough, C.J., in *R. v. The Inhabitants of Haslingfield* (1814) 2 M. and S. 558 and the observations of Bowen, L.J. in *Hire-Purchase Furnishing Co. v. Richens* (1887) 20 Q.B.D. 387. By this yardstick of presumption, the Respondent Defendant cannot successfully resist this appeal.

49. This Court considers it unnecessary to go into the intricacies of the different classes of contracts which may be enforced even though they are illegal. For instance, it has been laid down that where the object of a particular statute is merely to protect the revenue, it is not regarded as prohibiting the enforcement of a contract entered into in breach of the statutory provisions. Thus, where a statute required a seller of goods to take out a licence and to have his name painted on his place of business, it was held that a seller who had not taken out a licence might yet sue for the price of goods sold as *Smith v. Mawhood* (1845) 14 M. and W. 452; 153 E.R. 552 to which reference was made by Mr. M. Hazra, learned Counsel appearing for the Appellant. Again where the statute aims at the protection of the public or the promotion of some object of public policy, the inference is that contracts made in contravention of its provisions are wholly prohibited. See the decision in *Mahmoud v. Ispahani* (1921) 2 K.B. 716, applied

in the subsequent decision in *Bostel Brothers v. Hurlock* (1949) 1 K.B. 74 and cited as an authority on these distinctions in *Chitty on Contracts* (vol. II, 2nd ed., pp. 676 and 677).

50. It will be, therefore, not necessary for us to discuss in detail authorities like *Bhikanbhai v. Hiralal Ramdinshet Marwadi* ILR 24 Bom. 622 which was a case under the Tolls Act, Bombay, imposing a condition that the Plaintiff should not sublet the tolls without the permission of the Collector previously obtained. In that case the Plaintiff sublet the tolls to the Defendants without the permission of the Collector, and sued to recover a certain amount which the Defendants promised to pay for the sublease. The Defendants contended that the contravention of the condition of the lease was illegal and opposed to public policy and, therefore, the contract was void, but the Court held that the Plaintiff was entitled to succeed and that the agreement to sublet was not in that sense illegal or opposed to public policy merely because it was forbidden under a pecuniary penalty by conditions imposed in the lease to the Plaintiff and that the penal consequences of the breach were limited to the specific penalty and did not make the contract void.

51. We must say that the class of statutory prohibition in Clause 12E of the Colliery Control Order, although it does not apply here at all the facts of the instant appeal before us, is not concerned with protection for revenue but is in promotion of public interest and comes directly under public policy. The penalty is serious in this case and could even be imprisonment under the Indian Penal Code. See *The Superintendent of Stamps Vs. Tejmal Nihalchand Shah*, .

52. A recent decision is *Babulal Agarwala Vs. Vijaya Stores, Firm*, by a Division Bench authority of the Orissa High Court, decides a case of alleged contravention of Orissa Foodgrains (Control of Movements and Transactions) Order, 1943. The contract in that case was challenged as illegal on the basis of that particular Order. The terms of the agreement impeached included a contract by the Plaintiff with the Defendant to supply paddy to the latter who was admittedly the purchasing agent on behalf of the Government of Orissa, and, agreement was entered into two days after the Orissa Foodgrains (Control of Movements and Transactions) Order, 1943, came into force. It was found that both parties were aware of that Order and that any contract in respect of rice or paddy was prohibited by law except in accordance with the provisions of that Order. The agreement in that case provided that the Defendant undertook to obtain a licence to enable the Plaintiff to carry out the terms of the agreement as stipulated between them. The responsibility for the performance of the contract, in accordance with the law, was undertaken by the Defendant, and the Plaintiff was to carry out the terms of the contract only in accordance with the requirements of law. There also the Defendant undertook to obtain permission from the Government for the Plaintiff to purchase, supply and deliver the commodity. These provisions are similar to Clause 8 of the agreement that we are considering in this appeal. It was held by the Orissa High Court that there

was nothing in the terms of the contract which should suggest an intention to contravene or evade the provisions of the Control Order. Far from attributing any such intention to the parties, it was held there that the agreement made it clear that the parties were conscious of the prohibition enacted by law and expressly provided for acting in accordance with the requirements of law. Now that is exactly what Clause 8 stipulates in the agreement in the present suit before us. It was held there also on this point that the agreement at its inception was not contrary to law. See the observations of Panigrahi, C.J. at pp. 51, 52 and 53 of that report.

53. What remains now to consider is one more authority of the Supreme Court in *Waman Shrinivas Kini Vs. Ratilal Bhagwandas and Co.*, . The observations of the Supreme Court at p. 693 of that report confirmed the view already expressed in the decision mentioned above on the doctrine of *in pari delicto*.

54. Before we conclude this branch of the case it will not be inappropriate to make a reference of the fact that the Colliery Control Order was passed under the powers conferred by Sub-rule (2) of Rule 89 of the Defence of India Rules, 1939. The penalty is provided under Essential Supplies (Temporary Powers) Act (XXIV of 1946). Section 17(2) of that Act provided that any order made under the Essential Supplies (Temporary Powers) Ordinance would be deemed to continue in force and be deemed to be an order under that Act. Now Section 5 of that Ordinance continues in force any order made by whatever authority under Rule 81(2) of the Defence of India Rules. The penalty under the Essential Supplies (Temporary Powers) Act (XXIV of 1946) which is the penalty now for persons offending against the Colliery Control Order and this penalty is simple imprisonment as stated already.

55. For the reasons stated above and on the authorities we set aside the finding and conclusion of the learned trial Judge on this point and hold that the contract in the suit is not illegal.

56. The only other point urged in this appeal before us relates to the maintainability of the suit on which ground also the learned trial Judge has dismissed the suit. Here again, it would be appropriate to find out what the learned trial Judge actually did. His finding is:

I hold therefore that this suit for price is not maintainable in view of the terms of the agreement set out in paragraphs 1 and 3 of the plaint.

57. In coming to that conclusion the learned trial Judge says that Section 55(2) of the Sale of Goods Act requires that the price, or a part of it, shall be payable, not only irrespective of delivery but on a day certain, "which means at a time specified in the contract not depending on a future or contingent event." According to the learned trial Judge, in none of the contracts relied on by the learned Counsel, there was any time specified for payment irrespective of any future or contingent event.

58. Here again the learned trial Judge was looking at the clauses of the contract and trying to come to conclusion whether on such a contract and its terms it could be a suit for price. What the learned trial Judge failed to appreciate is that, when a suit is brought on the ground of breach of contract, the Court may also have to look at the events subsequent to the contract. A breach of a contract *ex hypothesi* takes place after the contract. If the events subsequent to the contract show, whatever the nature of the contract was, whether the title or property passed or not at the time of the contract if the subsequent events show that the goods were appropriated and dealt with by the Defendant, then a suit for price will be competent at the date when the suit is brought. The main error of the learned trial Judge on this point in coming to the conclusion lies in his failure to look at the subsequent events that have taken place in this case after the execution of the contract on December 18, 1954.

59. Mr. Hazra, appearing for the Appellant, has relied on Section 23(i) of the Sale of Goods Act which says:

Where there is a contract for the sale of unascertained or future goods by description and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be express or implied, and may be given either before or after the appropriation is made.

Therefore, Mr. Hazra argues that, u/s 55(1) of the Sale of Goods Act under this contract of sale, the property in the goods has passed to the buyer if the buyer wrongfully neglects or refuses to pay according to the terms of the contract. Hence, Mr. Hazra contends that the present suit for price is competent.

60. Mr. Hazra for the Appellant relies on four significant facts. In the first place, the fact is that the goods in suit were delivered by the Plaintiff to the Defendant without insisting on prior payment as stipulated in the contract. Therefore, it is no use trying to rely on a clause in the contract that before payment of the full price with freight the title to the goods was not intended to pass to the buyer. The buyer, the Defendant in this case, appropriated the goods and in fact sold them. Therefore, what else could this suit be except one for price?

61. The second fact is that actually the bills were made. The details about how they were made or when demands were made have already been set out elsewhere in the judgment. The bills indicate and show that the goods had not only been delivered to the Plaintiff, but they had been disposed of and that so much by way of price was due by the Defendant to the Plaintiff-Appellant. There was no protest and no objection on this point. Therefore, that again shows that the title had passed to the Defendant and he had in fact made use of that title in selling those goods to the Defendant's customers.

62. The third fact is that demands were made for payment of these bills.

63. The fourth fact is the payment of Rs. 5,000 by the Defendant-Respondent towards these bills.

64. After consideration of these four significant facts it is impossible for the Defendant-Respondent to contend that the title did not pass. The title not only had passed but he has used the title and sold the goods and he has realised the money by sale. Where there is already a part payment of the price, I do not think it is open to the Defendant to contend that the suit for price will not lie for the balance. In fact, in the very reply to the Defendant (marked Ex. 36) dated July 6, 1965, which we have already noticed, it is the Defendant's case that they had paid all the dues in full and the last payment was made on June 30, 1955, which is the payment of Rs. 5,000.

65. The learned trial Judge's failure to appreciate these facts and events vitiates his judgment on this point of maintainability. We, therefore, for reasons stated above set aside his finding on this point. We hold that the suit was maintainable in the facts and circumstances of this case. In that view of the facts, no further legal discussion about the nature of a suit for price is called for.

66. We set aside the learned trial Judge's findings and conclusion on the above two points, (i) illegality of the contract and (ii) non-maintainability of the suit. But we confirm the learned trial Judge's findings and conclusion on other points.

67. The result is that this appeal must be allowed and the suit must succeed. There will be a decree for Rs. 35,152-6-0. The judgment will carry interest at the rate 6 per cent per annum on the principal sum of Rs. 27,086-14-3. There will be no interim interest. The Plaintiff-Appellant is entitled to the costs of the appeal as well as costs of the trial Court. Certified for two counsel for this appeal.

A.N. Sen, J.

68. I agree.