
(1951) 07 P&H CK 0015
In the Punjab And Haryana At Chandigarh
Case No : Civil Revision No. 46 of 1949

Parmeshwari Das Mehra and Sons	Vs	APPELLANT
Firm Ram Chand Om Prakash and Another		RESPONDENT

Date of Decision : 04-07-1951

Acts Referred:

Contract Act, 1872 — Section 13, 56

Citation : AIR 1952 P&H 34

Hon'ble Judges : Weston, C.J;Khosla, J;Falshaw, J

Bench : Full Bench

Advocate : Bhagirath Das, for the Appellant; N.L. Saloja, for the Respondent

Judgement

Weston, C.J.—These seven revision applications have come before a Full Bench on a reference made by me in consequence of a decision of a Division Bench in "Messrs. Rama Kand Vijay Parkash v. Messrs. Gokal Cliand Gian Chand", Civil Revn. No. 114 of 1949, the facts of which were similar to those of the present seven matters.

2. These seven matters arose in this way. The present applicants, a firm Messrs. Parmesh-war Das Mehra and Sons of Amritsar, had entered into separate individual contracts with the present seven respondents, who are firms or individuals of Amritsar trading in piece goods, by which Messrs. Parmeshwar Das Mehra and Sons were to supply certain classes and quantities of American piece-goods. The seven con-"tracts were -entered into on dates between the 29th of November 1946 and the 25th of December 1946. Deposits varying from Rs. 350/- to Hs. 1,700/- were paid by the various respondents to Messrs. Parmeshwar Das Mehra and Sons. The contracts were C. I. F. Karachi, shipments being either January-February 1947, or February-March 1947. It appears that the goods of the several contracts arrived at Karachi after some delay, and deliveries were offered by Messrs. Parmeshwar Das Mehra and Sons to the seven respondents on dates between the 26th of June 1947 and the 12th of July 1947. All seven respondents refused delivery on the grounds that both the quantities and

qualities offered for delivery were not according to the particular contract. In some instances also it was objected that delivery was not offered at the time stipulated in the contract. The contracts in all instances were executed on identical printed forms, and execution of the contracts was not disputed. One of the terms of the contracts provided for arbitration, and this term ran as follows:

"All other terms and conditions as of Karachi piece-goods contract. Any dispute or claim of whatever nature relating to or arising out of this contract, shall be referred to arbitration of two European Merchants engaged in the piece-goods trade at Karachi, one to be appointed by each party and in accordance with the provisions of the Indian Arbitration Act No. 3 (sic) of 1940."

3. In or about September 1947 Messrs. Parmeshwar Das Mehra and Sons called upon the various respondents to refer the disputes arising consequent on the respondents' refusal to take delivery to arbitration in the manner provided by the arbitration clause, and they nominated a Mr. Godbert, General Manager of Fleming Shaw & Co. of Karachi as their arbitrator. The respondents refused to proceed under the arbitration clause, and after notices, respondents filed applications u/s 33 of the Arbitration Act in the Court of the Subordinate Judge first class, Amritsar, challenging the validity and enforceability of the arbitration clause. The learned Subordinate Judge by a common order dated the 30th of November 1948 on these applications held that the arbitration clause in the contracts was no longer operative and directed that it should be deemed to have ceased to have effect. He based his conclusion upon a number of grounds. Firstly, he held the phrase "Karachi piece-goods contract" appearing in the arbitration clause to be meaningless, and the contract therefore to be void for uncertainty. Secondly, he considered that Mr. Godbert, the person nominated as arbitrator by Messrs. Parmeshwar Das Mehra and Sons, did not fulfil the qualifications required for an arbitrator under the arbitration clause as he was not a merchant on his own account Thirdly, he held that the Indian Arbitration Act, 1940, by reason of partition "must have ceased to have any force in Pakistan". Lastly, he held that the difficulty, expense and danger of parties and their witnesses in going to Karachi was sufficient to make the contract of arbitration inoperative.

4. When the revision applications came before me, reliance was placed for the respondents on the Bench decision I have already mentioned. The case there was between different parties but the facts were very similar. There was a piece-goods contract C. I. F. Karachi entered into between the parties in January 1947 with an identical arbitration clause. There was again repudiation of the contract by the purchasers, and notice given by the sellers calling upon the purchasers to nominate their arbitrator and nominating as the sellers' arbitrator the same gentleman Mr. Godbert who was nominated in the present seven cases. There again the purchasers filed an application in the Amritsar Court u/s 33 of the Arbitration Act asking that the arbitration agreement should be set aside as unenforceable. In that case the Subordinate Judge, apparently not the Judge

who decided the present seven matters, had refused to set aside the arbitration. The matter came before Mr. Justice Kapur in revision who referred it to a Division Bench. The Division Bench held that the contract has been frustrated as a result of circumstances which had arisen consequent on the partition of India immediately before the arbitration was sought to be held.

5. There can be no doubt from the judgment given and from the statements now made at the Bar that the case before the Bench proceeded largely on the basis, accepted by both sides, that it was necessary for the parties and their witnesses to appear before the arbitrator at Karachi. The learned Judges held that it was difficult, dangerous and expensive for Hindus at the material time to proceed from Amritsar to Karachi, and that on this ground it was wholly unreasonable to hold the parties to the agreement of arbitration at Karachi into which they had entered. On this ground alone the decision can be justified. But in the judgment reliance was also placed on other grounds, namely that the parties agreed to arbitration in India which by reason of partition had become impossible, that there was an implied term of the contract that the continuance of the contract would depend upon the continuance of the state of affairs which existed in India as it then was, and that the parties contracted to be governed by the laws of India to be administered in India by the Courts of India. It was because of doubt whether such grounds were of themselves sufficient to absolve parties from their contracts to arbitrate! that I made the reference in the present matters.

6. In the present cases there were no pleadings that the several respondents desired to be present personally at the arbitration or desired to take witnesses from Amritsar or any other place in India to the place where the arbitration under the contract was held. Assuming that place to be Karachi, I can see no reason to assume either the desire or necessity of the respondents to be personally present or to take witnesses to Karachi. The system of commercial arbitration at Karachi is of many years standing. Sufficient" reference to it appears in the Report of the Civil Justice Committee, 1926 in Chap. 13 on Arbitration at page 208 of the Report, and in the Note on Arbitration by Mr. B.C. Kennedy, then Judicial Commissioner, Sind, appearing at page 222 of the same Report. When there is no dispute as to execution of the contract what the arbitrator, expert in such matters, ordinarily has to consider are the terms of the contract, the quantity and quality of the goods, usually as in these cases available for inspection at the place of import, and he then decides whether the goods conform to the contract and whether delivery has been offered at the proper time and in the proper manner. I understand that none of the respondents saw the goods before rejecting them, and "prima facie" at least evidence of the respondents and of any witnesses from Amritsar of: India would not assist the arbitrator in the slightest degree. Mr. Mahajan for the respondents has insisted on what he calls the fundamental right of parties to appear before the arbitrator who decides that case. If their personal appearance was wholly unnecessary I am not able to accept the argument that the arbitration agreement should not be enforced merely because their personal presence was

something which in the circumstances supervening became something which could not reasonably be achieved. There is nothing to indicate any difficulty in the way of parties being represented before the arbitrator. As I have mentioned, no plea was raised that the personal appearance of the respondents or of any witness at Karachi was necessary or even desired by the respondents. Apart therefore¹ from the circumstance that in case of necessity there was nothing to prevent the respondents from requesting the arbitrator to come to Amritsar, for conducting part of the arbitration proceedings, it seems to me that the difficulty, danger and expense of travel to Karachi at the material time in the year 1948 did nothing to prevent the proceedings in arbitration taking place as contracted between the parties, and are no grounds in themselves for absolving the respondents from their admitted agreement to arbitrate.

7. The question, however, whether the partition of India which took place between the making of the contract and the time when arbitration was sought does free the parties of their obligation to arbitrate is common both to the present seven cases and to "Rama Nand's case", (Civil Revn. No. 114 of 1949). It seems to me, with respect, that the judgment of the Bench goes too far on this aspect of the case, although, "as I have indicated, the decision can be justified on the ground of the position accepted by the parties of the necessity of their personal presence at Karachi.

8. A large number of cases have been cited before us on the principle of frustration of contracts. I think the principle so far as applicable to cases such as the present has been as well stated as anywhere in "British Movietones, Ltd. v. London and District Cinemas. Ltd." 1950 2 All E R 390 where it was said :

"The judgments show that, no matter that a contract is framed in words which, taken literally or absolutely, cover what has happened, nevertheless, if the ensuing turn of events was so completely outside the contemplation of the parties that the Court is satisfied that the parties, as reasonable people, cannot have intended that the contract should apply to the new situation, then the Court will read the words of the contract in a qualified sense; it will restrict them to the circumstances contemplated by the parties; it will not apply them to the un contemplated turn of events, but will do therein what is just and reasonable."

9. The question in my opinion reduces to this: "whether the circumstances arising from partition have produced a state of things so completely outside the contemplation of the parties that those parties could never have" intended arbitration in the manner provided by the contract to proceed in such a state of things?" Mr. Mahajan's argument is mainly based on the assertion that the parties must be taken to have contemplated arbitration in India, and by reason of partition, arbitration, according to the contract would be arbitration in Pakistan, that is to say, arbitration in a foreign country. He does not suggest that arbitration in a foreign country of itself is in any way illegal. He has urged that arbitrators acting in Karachi will be in no way amenable to orders of the Court at Amritsar. But in this respect, at least at the material time, an arbitrator acting in

Bombay would have been no more amenable to the jurisdiction of the Amritsar Court than an arbitrator now at Karachi. By reason of their applications u/s 33 of the Indian Arbitration Act the respondents have settled all doubt that the Amritsar Court is the Court to deal with the awards if awards are made. Clearly, it is not the intention of the present applicants to invite the Jurisdiction of a Karachi Court; and it seems quite unnecessary to speculate on the possible consequences should the awards be filed in one of the Karachi Courts. The argument that the arbitration was necessarily to be under the Indian Arbitration Act does not seem an argument of substance. Section 18 (3) of the Indian Independence Act provided for the continuance of existing laws in Pakistan, and there is no suggestion that the Indian Arbitration Act has ceased to have effect in Pakistan or to have been subjected to material amendments. The application of the Arbitration Act of course will really arise at Amritsar after an award has been filed there. It is true that the arbitrator may not be bound to observe orders, such as orders to stay, made by the Amritsar Court. But clearly the Amritsar Court would refuse to pass a decree upon an award made in direct contravention of any order to the arbitrator issued by it. In point of fact, it appears that the arbitrator Mr. God-bert did stay his proceedings following an injunction issued by the Amritsar Court.

10. Commercial parties are not usually concerned or interested in politics. The mere fact that partition has taken place or the circumstance that relations between the two States are not exactly those which might have been anticipated has very little bearing when judging the probable conduct which the parties as reasonable men would have adopted had the fact of early partition been present in their minds when they made the contract. It is, I think, for the respondents seeking to avoid their obligations to show that circumstances have changed in such manner that they cannot reasonably be held to their contract of arbitration. If as I think, no practical difficulty whatever existed at the material time in the arbitration being conducted at Karachi, where the goods were, by arbitrators engaged in trade in the class of goods involved, experience in commercial arbitration of this sort, then I can see no reason to assume that the supervening event of partition is such as to render the contract one which should not be enforced.

11. On the minor points raised by Mr. Mahajan for the respondents little need be said. I see no reason to assume without evidence that the term "Karachi piece-goods contract" appearing in the contract is meaningless. In any event, it will be for the arbitrator or arbitrators to decide on the meaning of the contract: see *Rupchand Bothra Vs. Pannalal Johorilal*,

12. The suggestion that the arbitrator named by Messrs. Parmeshwari Das Mehra and Sons did not possess the qualifications required by the agreement seems to me without force. I do not accept that the term "merchant" as used in contracts of this kind must be restricted to persons trading entirely on their own account. A "merchant" is a person who trades in goods, that is to say, who buys and sells

goods. It may not include a manufacturer of goods but I think it includes a General Manager, as Mr. Godbert was, of a trading company. The test, it seems to me, is whether the person does buy or sell goods on his own initiative, and it appears that Mr. Godbert as General Manager satisfied this test. It is immaterial in my opinion whether he was remunerated by a share of the profits or, as it appears, by salary.

13. My conclusion therefore would be that the present cases are distinguishable from "Rama Nand's case", (Civil Revn. No. 114 of 1949) on the basis that in the present cases it was neither pleaded, admitted nor shown that personal attendances either of parties or of witnesses at Karachi were necessary. I consider that the conclusion expressed in "Rama Nand's case", that the contract of arbitration was frustrated by reason of the partition, in that Karachi became what may be called foreign territory, is not correct, at-least in its application to cases such as the present, that there is no reason to hold that the arbitration contracted by the parties was materially affected by the partition and its consequences, and that therefore there is no reason to absolve the respondents from the contracts into which they entered. I would therefore make the rules absolute in these seven cases, set aside the orders made by the learned Subordinate Judge and reject the applications filed by the respondents u/s 33 of the Arbitration Act. I would direct the respondents to pay the costs of the applicants which I would assess at Rs. 50/- in each case.

Khosla, J.

14. I am obliged to my Lord the Chief Justice for extending me the courtesy of seeing the judgment prepared by him. I agree generally with the opinion expressed by him but would like to add a few words of my own particularly because I was a party to the decision in "Messrs. Rama Nand Vijay Parkash v. Messrs. Gokal Chand Gian Chand" AIR 1951 Sim 189 which occasioned the present reference.

15. The decision of the case before us depends upon a proper interpretation of the second clause of S. 56 of the Indian Contract Act, which is in the following terms :

"A contract to do an act which, after the contract is made becomes impossible, or, by reason of some event which the promisee could not prevent, unlawful, becomes void when the act becomes impossible or unlawful."

The impossibility contemplated here appears to be absolute impossibility. There are five instances appended to the section, but I cannot help observing that a little more ingenuity might have been displayed in choosing them. This is regrettable as the framers of the Act could have drawn their inspiration from the vast and prolific field of English law. Indeed the decisions of the Indian High Courts follow the spirit if not the letter of the English common law in interpreting this section and there is almost a consensus of opinion that the impossibility contemplated is not absolute impossibility but impossibility as denned in the

English common law. It is therefore necessary to consider how the doctrine of frustration has been defined by the English Courts. A great many English cases were cited before us in which this question was considered, but in none of them has the principle been set out so clearly and succinctly as in "Joseph Constantine Steamship Line, Ltd. v. Imperial Smelting Corporation, Ltd." (1941) 2 All ER 165 and "British Movieionews, Ltd, v. London and District Cinemas" 1950 2 All ER 390. Lord Wright, while delivering judgment in the first case, observed that the doctrine of frustration had been somewhat empirically evolved with the object of doing what is reasonable and fair. Viscount Maugham, while delivering his opinion in the same case, referred to the different types of cases in which frustration may occur. He observed :

"First, in cases resembling the present, where there has been the destruction of a specific -thing necessary for the performance of the contract. Secondly, where performance becomes virtually impossible owing to a change in the law. Thirdly, where circumstances arise which made the performance of the contract impossible in the manner and at the time contemplated. Fourthly where performance becomes impossible by reason of the death or incapacity of a party whose continued good health was essential to the carrying out of the contract."

In that case a ship was chartered to load a cargo, but, on the day before she should have proceeded to her berth, an explosion occurred in the auxiliary boiler, which made it impossible for her to undertake the voyage at the scheduled time. The charterers claimed damages from the shipowners for failure to load a cargo. The question in that case was whether, on a plea of frustration of the contract, the onus lay upon the party alleging frustration or on the party denying the frustration, and the view taken by the House of Lords was that frustration had, in fact, occurred in the circumstances. In "British Movietonews, Ltd. v. London District Cinemas, Ltd." 1950 2 All ER 390 Denning, L. J., observed :

"No matter that a contract is framed in words which, taken literally or absolutely, cover what has happened, nevertheless, if the ensuing turn of events was so completely outside the contemplation of the parties that the Court is satisfied that the parties, as reasonable people, cannot have intended that the contract should apply to the new situation, then the Court will read the words of the contract in a qualified sense; it will restrict them to the circumstances contemplated by the parties; it will not apply them to the un contemplated turn of events, but will do therein what is just and reasonable."

16. In these two decisions is contained the essence of the principle governing frustration of contracts. It is clear that if there is an entirely unanticipated change of circumstances the question will have to be considered whether this change of circumstances has affected the performance of the contract to such an extent as to make it virtually impossible or even extremely difficult and hazardous. If that be the case, the change of circumstances not having been brought about by the fault of either party, the Courts will not enforce the contract. If on the other hand the change of circumstances has had no material

effect on the contract and has not rendered the contract difficult of performance, the contract will be enforced notwithstanding the change of circumstances. Therefore the decision of the point will depend on what the nature of the contract was, what the parties had to do in order to give effect to it and whether the change of circumstances had made it impossible for the parties to perform it. In the present case it must be conceded that the parties, when they entered into this contract, did not contemplate that there would be a partition of the country and Karachi would become part of foreign territory, but the question for our decision is whether this change of circumstances has materially affected the performance of the contract. If it was necessary for the parties to go to Karachi and to take witnesses there, the contract could not be performed, for it is clear that non-Muslims could not during 1947, go to Karachi without running very great risks. But if the arbitration could have been done without the parties having to go to Karachi the changed circumstances cannot be said to have had any material effect on the contract. The decision in "Rama Nand"s case AIR 1951 HP 189 decided by Kapur, J., and myself proceeded on the assumption that it was necessary for the parties to go to Karachi and appear before the arbitrator in person and it was further necessary for them to take non-Muslim witnesses to Karachi. Parties had produced evidence at the trial that it was extremely, hazardous for non-Muslims to go to Karachi and counsel for both sides who addressed us in that case assumed that parties had, in fact, to go to Karachi. It was never at any stage alleged that the contract of arbitration could have been performed by the parties remaining in India, and that being so I must reiterate my belief in the correctness of that judgment. In every case the Courts must in the words of Denning, L. J., do "what is just and reasonable." Therefore it cannot be laid down that in every contract of this type frustration will occur merely by reason of the fact that Karachi is now part of a foreign country. My considered view therefore is that (1) the mere fact that Karachi has become part of foreign territory is not sufficient to frustrate a contract of the type which obtains in the case, before us, (2) the mere fact that non-Muslims experience difficulty in going to Karachi is not by itself sufficient to avoid the contract and (3) if it is established as a matter of evidence that it was necessary for the parties to go to Karachi during 1947, then I would say that frustration occurred because the changed circumstances were entirely unanticipated and the change was material to the perform-once of the contract and made it virtually impossible. In the present case it has not been alleged that it was essential for the parties or either party to go to Karachi. Indeed Mr. Daya" Krishan Mahajan argued before us that the arbitrator could have been asked to come to Amrit-sar where both parties reside and only on a refusal by the arbitrator could an objection of this nature have been taken. It seems to me that in the present case the arbitrator could, have given his decision without requiring the presence of either party and the parties could have presented their case before the arbitrator without having to go to Karachi in person In the circumstances I would hold that there was no frustration in the present case and agree with the order proposed by my lord the Chief Justice.

Falshaw, J.

17. I agree with the order proposed and have nothing to add to the observations of my lord the Chief Justice and my learned brother Khosla J.