

(1958) 04 CAL CK 0018
In the Calcutta High Court
Case No : Appeal No. 173 of 1957

Rayman and Company (India) Private Ltd.	APPELLANT
Vs	
Khardah Company Ltd.	RESPONDENT

Date of Decision : 15-04-1958

Acts Referred:

Arbitration Act, 1940 — Section 14(2)
Forward Contracts (Regulation) Act, 1952 — Section 2

Citation : (1959) 2 ILR (Cal) 351

Hon'ble Judges : P.B. Chakravartti, C.J.; Lahiri, J

Bench : Division Bench

Advocate : Subrata Roychoudhury and P.N. De, for the Appellant; R.C. Deb, for the Respondent

Final Decision : Allowed

Judgement

P.B. Chakravatti, C.J.—This is an appeal from an order of P.B. Mukharji, J., dated June 14, 1957, dismissing the Appellant's application for setting aside an award made against it by the Bengal Chamber of Commerce and Industry. The learned Judge delivered no judgment, but it appears from the minutes that he relied upon an earlier judgment of his own delivered in award case No. 27 of 1956. We have had that judgment brought up before us and have acquainted ourselves with the reasons which influenced the learned Judge in coming to the decision arrived at by him.

2. The Appellant was the seller under a contract, dated September 7, 1955, entered into with the Respondent for the sale of 750 bales of jute-cuttings of Pakistan., Jute-cuttings are raw jute. The delivery of the goods was spread out over three months, 250 bales being deliverable in October, 1955 and equal quantities in November and December following. The Appellant did not deliver any goods and pleaded as an excuse for the non-performance of the contract that interference by the Government of East Pakistan had made performance impossible. The Respondent would not listen to that plea and in due course it

submitted the dispute to the arbitration of the Bengal Chamber of Commerce and Industry in accordance with the arbitration agreement contained in the contract. The Appellant took part in the proceedings before the arbitrators and the only case it set up was a case on the merits.

3. Its defence did not succeed and the Chamber made an award against it for a sum of Rs. 41,250 which was very the sum claimed by the Respondent, together with interest at a certain rate.

4. After the Appellant had been served with a notice u/s 14(2) of the Arbitration Act that the award had been filed in this Court, it made the application out of which the present appeal arises. The principal ground on which it attacked the award was that the contract in question was wholly void in view of the provisions of the Forward Contracts (Regulation) Act of 1952. The illegality of the contract was said to have been discovered after the proceedings before the arbitrators had been over.

5. The case for the Appellant, more particularly put, was that the Forward Contracts (Regulation) Act of 1952 had been made-applicable to raw jute before the contract in question had been entered into and the contract being a transferable specific delivery contract, as defined in that Act, it was wholly void. The Respondent's reply was that the contract was not hit by the Act, because it was a non-transferable specific delivery contract and that, in any event, the Appellant, having entered into the contract and participated in the proceedings before the arbitrators with full knowledge of the provisions of the Act, but without raising any contentions thereunder, could not now be heard to say that the contract was unenforceable in law. The learned Judge appears to have accepted the latter contention of the Respondent. The only part of the judgment in the earlier case which applies to the present case proceeds on the footing that prima facie, the contract in the present case was a non-transferable one and that if it was really transferable, the point ought to have been taken before the arbitrators and if it was taken, the relevant facts could have been investigated and properly ascertained. The prima facie appearance of the contract being that it was non-transferable and that appearance not having been removed by evidence led before the forum which might have investigated the matter, no basis had, according to the learned Judge, been laid for impugning the contract on the ground that it offended against the Forward Contracts (Regulation) Act. The question raised by the Appellant was regarded by the learned Judge as a mixed question, of law and fact and, therefore, not a question which could be taken for the first time in application for setting aside the award.

6. The Forward Contracts (Regulation) Act was passed on December 26, 1952. The material portions of the Act did not come into force in any part of the country at once, nor did they come to apply to any class of goods by themselves. Notifications, as provided for in the Act itself, had to be issued by the Central Government so as to bring the Act into operation in a particular area and apply it to particular classes of goods as also to make forward contracts for the purchase

and sale of such classes of goods illegal, unless permission of Government was first obtained. A notification was issued on August 24, 1953, by which Chapters II to IV of the Act were brought into force and there was further notification on October 29, 1953, by which the Act was made applicable to forward dealings in raw jute. The present contract was entered into on September 7, 1955 and it was thus entered into at a time when in regard to forward dealings in raw jute the Act and an appropriate notification under it were both in operation. There was a subsequent notification issued on March 23, 1956, by which forward contracts relating to raw jute under which delivery was to be given at a mill's siding, were excepted from the operation of the Act, but that notification could not obviously apply to the contract we have before us.

7. The Act does not ban non-transferable specific delivery contracts, but bans transferable ones in respect of classes of goods to which it has been made applicable. "Non-transferable specific delivery contract" has been defined in Section 2(f) of the Act as "a specific delivery contract, the rights or liabilities under which or under delivery order, railway receipt, bill of lading, warehouse receipt or any other document of title relating thereto are not transferable". "Transferable specific delivery contract" has been defined in Section 2(n) in the rather curious form that it means "a specific delivery contract which is not a non-transferable specific delivery contract". I had occasion to examine the definition of "non-transferable specific delivery contract" in the case of *The Agarpara Company Ltd. v. Sumati Chand Kochar* (Appeal From Order No. 60 of 1958 decided on January 15, 1958), where I pointed out that the several non-transferabilities mentioned in the definition and separated by the word "or" were to be read conjunctively and not distributively and that, therefore, unless the rights and liabilities mentioned in the definition were all non-transferable, the contract concerned would not be a non-transferable one and would consequently be a transferable contract. It was contended on behalf of the Respondent in the present case that, on that view of the definition, there could not be any non-transferable contract at all, because under the general law, the rights under a contract would always be transferable and that, therefore, a more restricted view of the definition ought to be adopted in view of the policy behind the Act which was quite unmistakable. It was contended, in the second place, that in any event, the contract in the present case was bound up with an import licence held by the Respondent and that the effect of the provisions of the licence was to make the contract non-transferable. These contentions have to be examined.

8. Before I do so, however, it is due to the learned Judge that I must consider the reasons given by him in support of his decision. With great respect, it does not appear to me that whether a particular contract is a transferable or a non-transferable contract, in the view of the Forward Contracts (Regulation) Act, does not involve any issue of fact at all. The provisions of this Act are wholly unlike those of the Bengal Jute Goods Act which make contracts in jute goods illegal unless they were between persons who were habitual dealers in jute goods or owned godowns for their storage. In a case under the latter Act, it could

plausibly be argued that since the Act did not ban all contracts in jute goods, but only contracts between parties who did not possess certain qualifications, the question whether a particular contract was or was not within the mischief of the Act would depend upon whether or not the parties thereto possessed those qualifications and satisfied the requirements of being habitual dealers or owners of godowns. Whether or not they were such dealers or owners would be a question of fact. In the case of the contracts banned by the Act before us, however, it seems to me the first question is whether they relate to any goods of a notified class and that such, as well as the rest of the questions, bearing upon the legality of a contract are all questions of construction of either the Act or the contract or both. Outside the contract proper, the only relevant questions of fact are whether the contracting parties are recognised associations and whether permission of the Central Government was obtained, but in the present case, the Appellant's allegations in the negative with respect to both those matters were not even denied. All that the Respondent said before the Court and, therefore, would have said before the arbitrators if the question was raised there, was that the contract was a nontransferable contract. I do not, therefore, think that this is a case where the application of the Appellant could be thrown out on the ground that the questions now sought to be raised should have been raised before the arbitrators and that not having been raised there and the necessary questions of fact having remained undetermined, it could not be entertained at all. I may also add that if on a construction of the contract in the light of the definition given in the Act, it is found to be a transferable specific delivery contract, not the contract alone but the arbitration agreement contained in it as well would be void and clearly the arbitrators would have no jurisdiction to adjudicate on the dispute, far less to decide their own jurisdiction by deciding whether or not the contract was a valid contract. There could be no question in such a case of the parties who had submitted to arbitration being bound by estoppel.

9. To turn now to the contentions of the Respondent, it is said that if all the rights and liabilities mentioned in the definition of a "non-transferable specific delivery contract" have to be nontransferable in order that a contract may come under the definition, none would come under it at all. The benefit under a contract is always transferable, not only under the more liberal law of this country, but also under the stricter law of England, consequently, the right under a contract, provided they are not bound up with liabilities, would be transferable and if they were, the contract would always remain outside the definition of a nontransferable specific delivery contract. With regard to that contention it is only necessary to say that if, on a true construction of the words used by the Legislature, such a consequence comes to follow, the Court can do nothing to avert it and it would be wrong to adopt a construction, not warranted by the words of the law, merely on some speculative view as to the object of the Legislature. What we must see, and what a court of law must always see, is what the meaning of a provision of law is, according to the express words in which it has been embodied or the necessary intendment of the provision.

10. It appears to me that apart from the licence to which I shall presently advert, it can by no means be said that the contract in the present case was a non-transferable specific delivery contract. The benefits under a contract can always be transferred, though liabilities cannot be. In the case of a contract of purchase and sale, the buyer would be entitled to transfer his right to call for the delivery of the goods. This seems to be established by all authorities, both English and Indian. The case of a seller is a little more difficult, because when the contract is at an executory stage, he has only liabilities under it and, consequently, there may be nothing which he can transfer. But once he has delivered the goods, it is impossible to see why, if actionable claim are transferable under the Indian law, he cannot transfer his right to get the price from the buyer. So far as the general law is concerned, there appears to be no bar. It was however, contended that there was a bar in the special provisions of the contract before us, because Clause 3 required that it was the seller and seller alone who could obtain the price and it was clear from Clause 12 that the parties were relying on the personal status of each other in the trading world and, therefore, the buyer was relying upon such status of the seller. The contract was therefore said to approximate to the class in which some personal skill of one of the parties was involved. That contention does not appear to me to be correct, because what Clause 3 provides is that the seller will have to obtain a certificate from a schedule bank in East Pakistan, with which a letter of credit had been opened to the effect that the goods had been shipped to the buyer within the due date and will have to present that certificate to the buyer within a certain time. The clause provides further that if a proper certificate be presented within the proper time, the buyer shall accept the shipping documents up to a certain period and that payment will be made in cash on presentation of a full set of shipping documents. I do not see what there is in the provisions of Clause 3 which would prevent the seller from obtaining the required certificate from the Pakistan bank, presenting it to the buyer within the time stipulated and then transferring his right to obtain payment from the buyer to a third party and on presentation of the shipping documents as his agent. Although in presenting the shipping documents the transferee from the seller may act as his agent, he will not be an agent in receiving payment from the buyer, because the right to receive the payment has been transferred to him and has become his own right. It is to be noticed that the seller did not receive payment against drafts issued on an irrevocable letter of credit opened in his favour by the buyer. There is thus nothing in Clause 3 which would prevent the seller from transferring his right to obtain payment from the buyer which is a right under the contract, to a third party, although it may not be practicable to make the transfer till almost the last stage of the transaction. Nor is there anything in Clause 12 of the contract which indicates that it was intended to be limited to the immediate parties. All that Clause 12 says is that if either or both the parties is or are a member or members of the Indian Jute Mills Association, then if a party who is such member, is placed on the disapproved list of the Association, he shall be deemed to have committed a breach of the contract and the other party thereto shall be

released of all obligations thereunder. Assuming that the contemplation of Clause 12 is that the contract was to be limited to parties who were members of the Indian Jute Mills Association, it would seem that there would be nothing to prevent the seller or the buyer, if he had otherwise a right to transfer his benefits under the contract from transferring them to another member of the Association. Assuming that even that cannot be done in view of the provisions of Clause 12 it can by no means be presumed that one or other of the parties will be placed on the disapproved list of the Association and that the contract will come to an end. A contract will be a transferable contract if any rights under it are transferable under any circumstances. Even if Clause 12 of the contract carries the meaning contended for by the Respondent, although I see no trace of it in the words of the clause, it cannot be said that it makes the contract non-transferable because the clause would obviously not come into operation if a party being a member of the Association is not placed on the disapproved list. I do not, therefore, find anything in the contract, taken by itself, which makes it a non-transferable specific delivery contract.

11. The other argument is based on the terms of the licence held by the buyer to which the contract almost expressly refers, the jute contracted for was to be had from Narayangunge in East Pakistan and, at the relevant time, no imports of jute could be made from those territories except under a licence obtained under the Imports and Exports (Control) Act, 1947. The Respondent held a licence for the import of 50,000 maunds of raw jute, issued to it on September 23, 1955 and the licence appears to have been revalidated on December 2, 1956, up to January 31 of the year for another 36,500 maunds. The licence stated expressly that it was not transferable "except under a letter of authority from the authority who issued the licence or from any Import Trade Controller". It was with the reference to this provision that Clause 2 of the contract provided that the buyer was to deliver to the seller or the seller's nominee a letter of authority to import the goods covered by the contract. The position therefore was that the contract could be executed by the seller only if he could obtain the necessary import facilities and that what was stipulated between the parties was that the buyer would make it possible for the seller to import the goods against the licence held by itself. If the seller could procure Narayangunge jute from some other party, it would not be carrying out the terms of the contract, if such jute was tendered to the buyer.

12. The licence also contained an endorsement to the following effect:

The licence is issued subject to the condition that the goods will be utilised only for consumption as raw material or accessories in the licence holder's factory and that no portion thereof will be sold to any party.

13. It will thus be seen that first the licence is not transferable and secondly the goods imported under the licence are also not to be sold to any other party by the holder. It does not, however, follow at once that the contract is not transferable, because to show that the licence is non-transferable is not to show

that the contract also is so. But, as I have already observed, the contract is bound up with the licence and so far as the buyer is concerned, it appears to me that he cannot transfer even the benefits under the contract, because of the terms of the licence, although under the general law, he would have the right to transfer them. To transfer the benefit under the contract would be to transfer the right to obtain delivery of the goods from the seller, but since the licence enjoins that the goods imported under it are to be utilised in the licence-holder's factory and are not to be sold to any other party, it is clear that, for practical purposes, a transfer of the rights under the contract to a third party would be meaningless and impossible. No third party could utilise the goods obtained from the seller in his own factory nor could he obtain a transfer of them from the buyer without breaking the law. It must, therefore, be conceded that the effect of the licence is to hold the buyer himself to the contract and to the goods supplied under it and he cannot transfer the benefits under the contract without violating the terms of the licence. I need not consider the question of liabilities under the contract, because liabilities cannot be transferred at all. But this difficulty, it seems to me, does not extend to the seller, because as long as the goods supplied by him under the letter of authority given to him by the buyer are utilised by the buyer himself, there is nothing in the licence to prevent the seller from transferring his right to obtain from the buyer the price for the goods after they had been supplied. While the transferability of the buyer's rights under the contract is thus taken away by the licence, it leaves the transferability of the seller's right unaffected. If so, some of the rights under the contract remain transferable and, consequently, the contract must be held not to be non-transferable; specific delivery contract.

14. The special argument based upon the terms of the licence thus fails. So also fails the argument based on the special terms of the contract, particularly those contained in Clauses 3 and 12. The position in substance is that, under the well established principles of the general law, the rights or benefits under the contract were transferable, although the liabilities might not be and that the effect of the licence was only to extinguish the transferability of the rights of the buyer, but not also that of the rights of the seller. Mr. Dev asked, in what circumstances then would a contract be a non-transferable contract, as defined in the Act? I do not think it is for us to answer that question, because it may well be that the effect of the definition is to comprise all forward contracts relating to the notified classes of goods or it may be that if there is a specific stipulation in the contract that the rights under it will not be transferable, the liabilities being nontransferable under the law without any stipulation between the parties, there will be a contract satisfying the requirements of the definition. Whether or not that will be so is not a matter which calls for decision at our hands. All that we have to decide is whether the contract before us was a non-transferable specific delivery contract as defined in the Forward Contracts (Regulation) Act and for the reasons I have given, our conclusion is that it was not such a contract.

15. If the contract was not a non-transferable specific delivery contract, it was

clearly hit by the Act and if it was hit by the Act, it was wholly void including the arbitration agreement contained in it. The award passed by the arbitrators was thus also void.

16. For the reasons given above this appeal is allowed, the order of P.B. Mukharji, J., dated June 14, 1957, is set aside and the Appellant's application for setting aside the award is allowed in terms of the latter part of prayer (a) of the notice of motion.

17. As the point on which the Appellant succeeds was not taken at any earlier stage, there will be no order for costs, either before the learned Judge below or before us.

Lahiri, J.

18. I agree.