SUPREME COURT OF INDIA

Ms.Khimji Poonja and Company

Vs

Shri Baldev Das C.Parikh

C.A.No.26 of 1949

(H.J.Kania,CJI., Saiyid Fazal Ali and B.K.Mukherjea,JJ., M.Patanjali Sastgri and S.R.Dass,JJ., M.C.Mahajan,J.,)

14.03.1950

JUDGMENT

S.R.Das,J.,

1. This appeal arises out of an application made by the Respondent under the Indian Arbitration Act, 1940, praying inter alia that the arbitration agreement contained in certain contract notes including contract note No. 17996 sent by the Appellants to the Respondent be declared to be invalid, void and unenforceable and be set aside and that a purported award made by the arbitrators appointed in terms of the said contract notes be set aside. That application came to be made in the following circumstances :

2. The Appellants were and are members of the East India Cotton Association Ltd. The Respondent, however, was not and is not a member of that Association. In April, 1945, the Respondent employed the Appellants as his agents to effect forward contracts for the sale and/or purchase of cotton according to the rules, regulations and bye-laws of that Association. Between the 9th April, 1945, and the 10th August, 1945, the Appellants as such agents put through various contracts for sale and/or purchase of cotton for July, 1945, and September, 1945, deliveries and sent to the Respondent contract notes in respect of each of such contracts. All the said contract notes were in printed forms, a specimen copy whereof is set out at pages 12 to 15 of the Paper Book. On the 10th August, 1945, the purchase of 900 bales of cotton at Rs. 432 per candy for September 1945 delivery remained outstanding. According to the Respondent, on the 11th August, 1945, the Respondent instructed the Appellants to close the said outstanding purchase by selling 900 bales for September 1945 delivery at a rate not less than Rs. 426 per candy, which is said to be the prevailing market rate on that date. As the Respondent did not receive any contract note from the Appellants in respect of the closing transaction of 900 bales, the Respondent on the 18th August, 1945, put on record his aforesaid instructions and asked the Appellants to send the contract note. The Appellants, however, deny that any instruction was given by the Respondent on the 11th August, 1945, for closing the outstanding contract. They deny the receipt of the Respondent's letter of that date. According to the Appellants the 21st August, 1945, was a clearing date

and on that clearing a sum of Rs. 18,900 become due and payable by the Respondent to the Appellants and that instead of paying up his dues the Respondent concocted the false story of having given instructions to the Appellants to close the outstanding purchase. The Appellants by their letter of the 22nd August, 1945, repudiated the allegations in the Respondent's last mentioned letter and called upon the Respondent to pay up Rs. 18,900 and gave notice to him that if he failed to pay up the amount by noon of the 23rd August, 1945, the Appellants would be compelled to square up the outstanding contract at their discretion on account and at the risk of the Respondent. The Respondent on the 24th August, 1945, denied having fabricated any false story and repudiated liability for Rs. 18,900 and returned the Appellant's bill. On the 27th August, 1945, the Appellants closed the outstanding contract for purchase of 900 bales by selling the same at Rs. 356 per candy for September, 1945, delivery and along with their letter dated the 27th August, 1945, sent contract note No. 17996. The Respondent by his letter dated the 28th August, 1945, reiterated the story of previous instruction for closing the contract, denied having given any instruction to the Appellants to close the contract on the 27th August, 1945, and returned the contract note No. 17996. On the 28th August, 1945, the Appellants wrote to the Respondent claiming Rs. 34,313 and expressing the desire to refer the disputes to arbitration in terms of the arbitration agreement contained in the contract notes. Both parties appointed their respective arbitrators. The arbitrators entered upon the reference and eventually fixed the 24th October, 1945, for a meeting of the arbitrators. The Respondent alleges that he received the notice of meeting only on 22nd October, 1945, and could not attend the meeting on the 24th October, 1945, as he had to appear before the Income Tax Officer on the same day. Accordingly, the Respondent sent his agent to attend the arbitration meeting and to obtain an adjournment. The arbitrators, however, rejected the application for adjournment and made an ex parte award on the same day for Rs. 34,313 and interest and costs. Being aggrieved by the award the Respondent on the 10th November, 1945, filed an appeal to the Board of the Association. The Respondent's allegation is that pending the said appeal he discovered that the contract notes rendered by the Appellants from time to time including the contract note No. 17996 were not in accordance with the prescribed official form of contract notes of the Association and he was advised that in the premises the contracts were void under the provisions of the Bombay Cotton Contracts Act (IV of 1932) and that, that being so, there was no arbitration agreement between the parties under which there could be any reference to arbitration on which any award could be made. The Respondent thereupon amended his memorandum of appeal to the Board pointing out the invalidity of the contracts and at the same time made a substantive application to the High Court under the Indian Arbitration Act for the reliefs already summarised above.

3. In order to appreciate the rival contentions of the parties it is necessary to refer to the relevant provisions of the Bombay Cotton Contracts Act, 1932, and the bye-laws of the said Association. Section (8)(i) of the Bombay Cotton Contracts Act, 1932, runs as follows :-

> "Save as hereinafter provided in this Act any contract (whether either party thereto is a member of a recognised cotton association or not) which is entered into after the date on which this Act comes into operation and which is not in accordance with the bye-laws of any recognised cotton association shall be void."

There is no dispute that the East India Cotton Association is one of the recognised cotton associations for the purposes of the said Act. Bye-laws 80 and 82 of that Association are in the terms following :-

"80. Delivery Contracts between members shall be made on the Official from given in the Appendix. Hedge Contracts between members may be verbal or in writing and when in writing shall be in one or other of the forms given in the Appendix. Whether verbal or written all contracts shall be subject to the bye-laws, provided that in the case of Delivery Contracts Bye-laws 149 to 163 inclusive shall not apply.

82. Contracts between members acting as commission agents on the one hand and their constituents on the other shall be made subject to the bye-laws and a contract note in the form given in the Appendix (pages 92, 93, 94 and 95) shall be rendered in respect of every such contract. Bye-laws 130 to 166 (inclusive) shall not apply to these contracts."

Bye-law 51-A originally required a deposit at a rate not less than Rs. 25 per bale and accordingly the contract note submitted by the agent to the constituent used to contain the following clause at the end of the clause relating to payment of margin :-

"In addition to the above, the deposit (not carrying interest) payable under bye-law 51-A, namely, at a rate not less than Rs. 25 per bale shall, when demanded, be made by you to me/us in Bombay."

4. During the war bye-law 51-A was amended by reducing the minimum amount of deposit from Rs. 25 per bale to Rs. 12-8-0 per bale and accordingly the Government of Bombay by a Notification made on the 19th September, 1945, in exercise of the powers conferred by the Bombay Options in Cotton Prohibition Act, 1939 (Act XXV of 1939) provided that the contract note should also be amended so that the clause last quoted above should read as follows :-

"In addition to the above, the deposit (not carrying interest) payable under bye-law 51-A, namely, at a rate not less than Rs. 12 1/2 per bale shall, when demanded be made by you to me/us in Bombay."

5. In order to enforce war-time controls another amendment of the bye-laws was made whereby a new bye-law was added as bye-law 65-A. In view of this last mentioned amendment and in order to bring the contract note between the agent and the constituent into line with this new bye-law the Government of Bombay by the same Notification dated the 19th September 1944 directed the inclusion of the two following clauses in the contract note, namely :

"If this contract is a contract for sale, then if between us and other members of the East India Cotton Association we become, under the bye-laws, the first seller of the

cotton so sold and if the last buyer exercises the right given by bye-law 65-A, you will then be bound by the provisions of that bye-law as between you and us.

If this contract is a contract of purchase, and if between us and other members of the East India Cotton Association Ltd., we become the last buyers unless we shall have received express instructions from you in writing to the contrary, before the commencement of the delivery period if the contract is entered into before the commencement of the delivery period, or with the order if the contract is entered into during the permitted days of trading in the delivery period, we shall be at liberty at our option and without any further reference to you to exercise the right given to the last buyer under bye law 65-A, and if we so exercise the right you will be bound by the provisions of that bye-law as between you and us."

6. After all these amendments the contract note to be rendered by an agent to the constituent had to be in the form, a specimen copy whereof is set out at pages 17 and 18 of the Paper Book. The contracts between the Appellants and the Respondent were made after the aforesaid contract note form came into vogue. The official Contract Note form to be used after the aforesaid amendments opens with the following clause :-

"I/we have this day sold/brought for you in Bombay subject to the following conditions and to the Bye-laws of the East India Cotton Association Ltd., in force from time to time and subject also to my/our usual charges and terms of business as Commission Agents."

7. Then are inserted particulars of the description, quantity, price etc., of the cotton which is the subject-matter of the contract. Then follows the clause for payment of margin, the last sentence of which provides for payment of deposit payable under bye-law 51-A as amended, namely, at a rate not less than Rs. 12 1/2 per bale. At the end of the form are to be found the two new clauses required to be incorporated in every Contract Note by the Government Notification already referred to.

8. The Contract Notes actually rendered by the Appellants to the Respondent, however, were in forms, a specimen copy whereof is set out at pages 12-15 of the Paper Book. A comparison of the two forms of the contract notes will reveal the following differences :-

(1) In the contract note rendered by the Appellants to the Respondent the last sentence providing for deposit at the end of the margin clause is missing. There is, however, a rubber stamp impression on the top of the back of the contract to the following effect :-

"In addition to the above, the deposit (not carrying interest) payable under bye-law 51-A, namely, at a rate not less than Rs. 25 per bale shall, when demanded, be made by you to me/us in Bombay."

9. Evidently, this rubber stamp provision is a reproduction of the sentence that used to be found at the end of the margin clause before bye-law 51-A was amended and the clause itself was amended by the Government Notification of 1944. (2) The two new clauses required to be inserted in the contract referred to above have also been omitted.

10. The contention of the respondent was that the contract notes actually issued were not in accordance with the bye-laws of the Association and were accordingly void under Section 8 of the Bombay Cotton Contracts Act, 1932, and that, that being so, the arbitration agreement incorporated in the contract note was also void and there could be no reference to arbitration and there could be no award as purported to have been made by the arbitrators on a reference under the void contracts.

11. The matter was dealt with by Mr. Justice Chagla who overruled the contentions of the Respondent and dismissed the application on 2nd July 1946. The learned Judge pointed out that whereas bye-law 80 required that delivery contracts must be made on the official from and that the hedge contracts, when made in writing, must be made in the form given in the Appendix, clause 82 did not require that the contracts between members acting as commission agents on the one hand and their constituents on the other must be in writing or in particular form. According to the learned Judge bye-law 82 required two things, namely :-

> "(i) that the contracts referred to therein should be made subject to the bye-laws, and
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> (ii) that a contract note in the prescribed form should be rendered in respect of every such contract. The learned Judge was of the opinion that section 8 of the Bombay Cotton Contracts Act, 1932, only avoided the contracts in case of contravention of the first requirement, namely, if the contracts were not made subject to the bye-laws, but had no concern with the contravention of the second requirement, namely, if the contract notes were not in the prescribed form. The learned Judge appears to have made a distinction between a contract and a contract note which was a mere evidence of the contract. According to him, even if the contract note was not in the prescribed form, that fact did not affect the pre-existing contract which had only to be made subject to the bye-laws but need not have been made in writing at all. Accordingly, the learned Judge dismissed the application. Being aggrieved by that decision, the Respondent went up on appeal which was heard by Stone C.J. and Coyajee J. who accepted the appeal, set aside the dismissal of the Respondents' petition and gave the declaration prayed for and set aside the award. The Appellants have now come up on appeal before us after having obtained the necessary certificate from the Bombay High Court. We find ourselves in agreement with the decision of the appellate Court. Ordinarily, when a contract between the parties is reduced to writing, the writing becomes the repository of the contract and that writing only can be looked at to ascertain what the contract between the parties is, and if that writing is not in accordance with the bye-laws, the contract itself must be void. We do not, however, feel pressed to emphasize this aspect of the matter, for, assuming that there was a pre-existing oral contract between the parties dehors the written contract note, as held by Chagla J. we have yet to see whether the so-called pre-existing oral contract was in

accordance with the bye-laws, for if it were not, then it would be hit by section 8 of the Bombay Cotton Contracts Act, 1932. There is no suggestion that the terms of the so-called pre-existing oral contract were in any way different from the terms subsequently recorded in the contract notes actually issued. In the first place we find that the last sentence in the margin clause, in order to be in accordance with the bye-laws, should have been as follows :-

"In addition to the above, the deposit (not carrying interest) payable under bye-law 51-A, namely, at a rate not less than Rs. 12 1/2 per bale shall, when demanded, be made by you to me/us in Bombay."

12. Instead of that sentence, we have the rubber stamp impression reading as follows :-

"In addition to the above, the deposit (not carrying interest) payable under bye-law 51-A, namely, at a rate not less than Rs. 25 per bale shall, when demanded, be made by you to us in Bombay."

13. The respondent contends that this term is not in accordance with the bye-laws of the Association. The Appellants on the other hand contend that there is no discrepancy, because a provision for a rate not less than Rs. 25 per bale does not contravene or is not inconsistent with the provision for a rate not less than Rs. 12 1/2 per bale. In other words, any rate above the rate of Rs. 12 1/2 may be stipulated in accordance with the terms of business to which the contract was subject, for it did not contravene the requirement that the rate should not be less than Rs. 12 1/2. It is true that the opening clause of the contract note makes the contract subject to the Appellants' usual charges and terms of business, but the contract is at the same time subject to the bye-laws of the Association. In order to reconcile the two, such terms of business as are not inconsistent with the bye-laws can only be permitted to prevail. The rubber stamp provision clearly imposes on the respondent as the constituent the liability to deposit a higher amount as the minimum amount to be deposited and is to that extent not in accordance with bye-law 51-A. Apart from this consideration there is another serious objection to the rubber stamp provision. The language of that rubber stamp provision clearly indicates that it purports to summarise and set out what is payable under bye-law 51-A. In fact, as already stated above, bye-law 51-A had been amended and what is payable under the amended bye-law is not at a rate not less than Rs. 25 but at a rate not less than Rs. 12 1/2. Therefore, the rubber stamp provision wrongly summarises and sets out the provisions of bye-law 51-A and consequently is not in accordance with that bye-law.

14. The contention of the Respondent has been and is that by reason of the omission of the two clauses at the end of the contract note actually issued by the Appellants it was not in accordance with the bye-laws. The learned Attorney-General appearing for the Appellants contends that the contract was expressly made subject to the bye-laws and, therefore, the provisions of the new bye-law 65-A were by reference incorporated in the contract. This contention, we are satisfied, is unsound. Bye-law 65-A in terms regulates the relationship between members and incorporation thereof in a contract between a member agent and an outsider constituent will make no sense and on a plain reading will be meaningless. Further,

under bye-law 65-A the last buyer has certain options. The outstanding contract being one for purchase of 900 bales, the Appellants, if they became the last buyers, could, under that bye-law, exercise any of those options at their own discretion. In the second of the two clauses which have been omitted from the contract note this option has been made subject to express instructions of the constituent to the contrary, for it provides that the Appellants as agents would be free to exercise their option -

> "unless I/We shall have received express instructions from you in writing to the contrary before the commencement of the delivery period if the contract is entered into before the commencement of the delivery period or with the order if the contract is entered into during the permitted days of trading in the delivery period."

15. By reason of the omission of the two clauses, this right of the respondent as constituent is not made a term of the contract between the parties. It follows, therefore, that the so-called pre-existing oral contract is not in accordance with bye-laws on this ground also.

For reasons stated above, this appeal fails and must be dismissed with costs.

Patanjali Sastri,J.,

16. I agree that this appeal should be dismissed with costs, but I would prefer to rest my decision solely on the ground of the omission to include in the contract in question the two clauses newly added in the prescribed form in order to give effect to bye-law 65-A.

17. Appeal dismissed.