

Messrs. Basant Lal Banarsi Lal

Vs

Bansi Lal Dagdulal

Civil Appeal No. 264 of 1956

(P.B. Gajendragadkar, A.K. Sarkar, K. Subha Rao, K.N. Wanchoo, J.R. Mudholkar JJ)

30.11.1960

JUDGMENT

SARKAR, J. -

The appellant is a commission agent and pucca aratiya and has been acting as such for the respondent since November 7, 1951, in the course of which various contracts were made between them in Greater Bombay. On February 26, 1952, two of such contracts were outstanding, one of which was in respect of groundnuts and was a forward contract.

In March 1952, disputes arose between the parties as to whether these contracts had been closed, each side making a claim on the other on the basis of its own contention. Eventually, on March 18, 1952, the appellant referred the disputes to arbitration under the arbitration clause contained in the contracts. On October 7, 1952, the arbitrators made one composite award for Rs. 22,529-15-9 against the respondent in respect of the said disputes. It is not very clear whether this award covered other disputes also.

This award was duly filed in the Bombay City Civil Court under the Arbitration Act, 1940, for a judgment being passed on it. Thereafter, on July 17, 1953, the respondent made an application to the Bombay City Civil Court for setting aside the award contending that forward contracts in groundnuts were illegal as the making of such contracts was prohibited by the Oilseeds (Forwards Contract Prohibition) Order, 1943, issued under the Essential Supplies (Temporary Powers) Act, 1946, and hence the arbitration clause contained in the forward contract in groundnuts between the parties was null and void. It was said that the award based on that arbitration clause was therefore a nullity. The appellant's answer to this contention was that the Essential Supplies (Temporary Powers) Act did not apply to Greater Bombay where forward contracts were governed by the Bombay Forward Contracts Control Act, 1947, hereafter called the Bombay Act, and as the contract in groundnuts had been made in terms of that Act, it was legal, and, therefore, the award in terms of the arbitration clause contained in it was a valid and enforceable award. The learned Principal Judge of the Bombay City Civil Court accepted the respondent's contention and set aside the award. An appeal by the appellant to the High Court at Bombay against the judgment of the City Civil Court failed. The appellant has now come to this Court in further appeal.

The only question in this appeal is whether the Essential Supplies (Temporary Powers) Act, which was passed by the Central Legislature in 1946, applied to Bombay? If it did, then the Oilseeds (Forward Contract Prohibition) Order, 1943, hereafter called the Oilseeds Order, issued under it would make the contract in groundnuts illegal and no award could be made under the arbitration clause contained in it. This is not in dispute.

Now, the Oilseeds Order was first passed in 1943 under r. 83 of the Defence of India Rules. The Defence of India Rules ceased to be in force on September 30, 1946. In the meantime however, as the situation had not quite returned to normal in spite of the termination of the war, the British Parliament passed an Act on March 26, 1946, called the India (Central Government and Legislature) Act, 1946 (9 & 10 Geo. VI, Ch. 39), hereafter called the British Act. Section 2 of this Act provided that the Central Legislature of India would have power to make laws with respect of various matters therein mentioned notwithstanding anything in the Government of India Act, 1935, and that that power could be exercised during the period mentioned in section 4 and further that the laws so made to the extent they could not have been otherwise made, would cease to have effect at the expiration of that period. The Governor General under the powers reserved in section 4 and subsequently, the Constituent Assembly of India, under the powers conferred on it under the Indian Independence Act, 1947, extended the period mentioned in section 4 of the British Act from time to time and eventually up to March 31, 1951. It would be unprofitable for our purposes to refer to the various statutory provisions and orders under which this was done for, the extension is not in dispute.

Under the powers conferred by the British Act, the Governor-General promulgated the Essential Supplies (Temporary Powers) Ordinance, 1946, which came into force on October 1, 1946. On November 19, 1946, the Central Legislature under the same powers, passed the Essential Supplies (Temporary Powers) Act, 1946, hereafter called the Central Act, repealing the Ordinance and substantially incorporating its terms. The Central Act originally provided that it would cease to have effect on the expiration of the period mentioned in section 4 of the British Act. As the life of the British Act was extended from time to time, suitable amendments were made in the Central Act extending its life also. Our Constitution came into force on January 26, 1950 and by virtue of Art. 372 the Central Act was continued as one of the existing laws. On August 16, 1950, under powers conferred by Art. 369 of the Constitution. Parliament passed the Essential Supplies (Temporary Powers) Amendment Act, 1950 Act LII of 1950, amending the Central Act in various respects and extending its life up to December 31, 1952. By another amendment made by Act LXV of 1952, the life of the Central Act was extended till January 26, 1955.

Section 3(1) of the Central Act is in these terms :

"The Central Government, so far as it appears to it to be necessary or expedient for maintaining or increasing supplies of any essential commodity, or for securing their equitable distribution and availability at fair prices, may by notified order provide for regulating or prohibiting the production, supply and distribution thereof, and trade and commerce therein."

Section 2 of the Act provides that foodstuffs would be an essential commodity within the meaning of the Act and would include edible oilseeds. We have earlier stated that the Oilseeds Order was originally passed under the Defence of India Rules, which expired on September 30, 1946. The Ordinance of 1946 continued in force, orders issued under the Defence of India Rules in so far as they were consistent with it and provided that such orders would be deemed to be orders made under it. Section 17(2) of the Central Act provided that an order deemed to be made under the Ordinance and in force immediately before its commencement would continue in force and be deemed to be an order made under it. As a result of the Ordinance and the Central Act replacing it and the extension of the life of the latter from time to time, the Oilseeds Order so far as it related to edible oilseeds including groundnuts, continued in force after the expiry of the Defence of India Rules till January 26, 1955. That Order, as so continued, prohibited the making of forward contracts, that is to say, contracts providing for delivery at a future date, in respect of certain

specified oilseeds including groundnuts. It is the respondent's contention that it is because of this order, read with the Central Act, that the contract in groundnuts between the parties was illegal and therefore the award made under the arbitration clause contained in it was void.

Now the British Act under which the Central Act was passed, provided in sub-sec. (4) of section 2 that,

"Sub-section (2) of section 107 of the Government of India Act, 1935, and sub-section (2) of section 126 of that Act shall apply in relation to a law enacted by virtue of this section with respect to any matter being a matter with respect to which a Province has power to make laws as if that matter were a matter specified in Part II of the Concurrent Legislative List."

Section 107(2) of the Government of India Act, 1935, laid down that,

"Where a Provincial law with respect to one of the matters enumerated in the Concurrent Legislative List contains any provision repugnant to the provisions of an earlier Federal law..... then if the Provincial law, having been reserved for the consideration of the Governor-General has received the assent of the Governor-General the Provincial law shall in that Province prevail.....". It would follow from these provisions that if a Provincial Act which had received the assent of the Governor-General, contained anything repugnant to a Central Act passed under the powers conferred by the British Act, then in the Province concerned, the Provincial Act would apply and not the Central Act.

Now, the Bombay Act which had been passed by the Provincial Legislature of Bombay in 1947, came into operation in 1948. That Legislature had power to pass the Act and the Act had received the assent of the Governor-General. At that time the Central Act deriving its force from the British Act, was in operation. If, therefore, the Bombay Act was repugnant to the Central Act, in Bombay, the Bombay Act would apply and not the Central Act. This is not in dispute. The appellant contends that the Bombay Act is so repugnant and therefore the Central Act cannot render the forward contract in groundnuts made in Greater Bombay, illegal and void.

The question, therefore, is whether the Bombay Act contains any provision repugnant to the Central Act. The preamble for the Bombay Act states that it was enacted as it was thought expedient to regulate and control forward contracts and for certain other matters. Section 1 of this Act came into force at once and gave power to the Government to bring into force by notification the remaining sections of the Act in the whole of the Province of Bombay or parts thereof on such date and in respect of such goods as might be specified. The Government of Bombay issued notifications under this section on December 19, 1950, applying the remaining provisions of the Act to the area called Greater Bombay in respect of all varieties of oilseeds as from the said date. Section 8 of the Bombay Act provides as follows :

S. 8. - (1) Every forward contract for the sale or purchase of, or relating to, any goods specified in the notification under sub-section (3) of section 1 which is entered into, made or to be performed in any notified area shall be illegal if it is not entered into, made or to be performed -

(a) In accordance with such bye-laws, made under section 6 or 7 relating to the

entering into, making or performance of such contracts, as may be specified in the bye-laws, or

(b) (i) between members of a recognised association,

(ii) through a member of a recognised association, or

(iii) with a member of a recognised association, provided that such member has previously secured the written authority or consent, which shall be in writing if the bye-laws so provide, of the person entering into or making the contract, and no claim of any description in respect of such contract shall be entertained in any civil court.

(2) Any person entering into or making such illegal contract shall, on conviction, be punishable with imprisonment for a term which may extend to six months or with fine or with both.

"Recognised association" is defined in the Bombay Act as an association recognised by the Provincial Government and on December 19, 1950, the Bombay Oilseeds Exchange Limited was recognised as such an association by the Government of Bombay. The appellant is a member of this association. The contracts between the parties were all expressly made subject to the rules and regulations of this Association. The case before us has proceeded on the basis that the impugned contract in groundnut had been made in compliance with the requirements of section 8 and there is no finding to the contrary by the Courts below. We have hence to proceed on the same basis.

The appellant contends that section 8 of the Bombay Act and section 3 of the Central Act are repugnant to each other. Now section 8 of the Bombay Act, it will be noticed, does not purport to make any contract legal. Its only effect is to render forward contracts in all varieties of oilseeds illegal if not made in compliance with its terms. The learned Advocate for the appellant says that the effect of section 8 was to render a forward contract in all oilseeds made in terms of it, legal and, therefore, a repugnancy arose between its terms and the terms of the Oilseeds Order issued under the Central Act which made forward contracts in edible oilseeds illegal. The learned Advocate referred to various other provisions of the Bombay Act and the bye-laws of the Association made in terms of the Act to show that the Bombay Act was intended to cover the entire field of forward contracts with respect to all varieties of oilseeds and was therefore intended to oust the operation of the Central Act in Greater Bombay with regard to the forward contracts covered by the former. It does not seem to us that a reference to the other provisions in the Bombay Act or to the bye-laws, is relevant in deciding the question. If the effect of section 8 of the Bombay Act was not to render forward contracts made in terms of it legal, then no question of repugnancy with the Central Act can arise whatever may be the scope of the Bombay Act and the provisions in the bye-laws.

Therefore, it seems to us that the question is whether section 8 of the Bombay Act by its terms makes any forward contract legal. Section 3 of the Central Act, as already seen, gives power to the Central Government to prohibit trade and commerce in oilseeds. That Act, therefore, enables the Central Government to make forward contracts in essential commodities as defined in it, illegal. That is what the Central Government did by the Oilseeds Order in so far as edible oilseeds are concerned.

We find nothing in section 8 from which it can be said that it rendered any contract legal. Its only intent and effect is to declare forward contracts illegal. We think that the matter was very correctly put by Chagla, C.J., who delivered the judgment of the High Court. He said, "All that Sec. 8 does is to declare that forward contracts will be illegal unless they comply with the procedure laid down in Sec. 8. But it is one thing to declare a certain contract illegal. It is entirely another thing to declare an illegal contract legal. Sec. 8 does not even make an attempt to declare that forward contracts declared illegal by the Central legislation shall be legal if they comply with the technicalities laid down in Sec. 8. The assumption underlying Sec. 8, it seems to us, is that forward contracts which the Legislature is dealing with are legal contracts, but even if they are legal they are declared to be illegal unless they are performed or made or entered into in the manner laid down in Sec. 8". With these observations we fully agree.

In regard to the contention that section 8 of the Bombay Act necessarily implies that contracts made in terms of it would be legal, it seems to us that there is no such necessity indicated in the Act. The Act clearly intends only to create an illegality, that is to say, as Chagla, C.J. said, it takes a legal contract and imposes on it certain conditions and makes it illegal if those conditions are not fulfilled. If a contract is already illegal, there is no scope for applying the Bombay Act. Furthermore, the Bombay Act deals with all kinds of goods. Sub-section (4) of section 2 of this Act defines goods as any kind of movable property including securities but not including money or actionable claims. Now the Central Act only applies to essential commodities as defined in it. Therefore, there would be many contracts to which the Central Act would not apply and such contracts may be rendered illegal by the Bombay Act if they come within its scope and are made in disregard to the conditions laid down in section 8.

We, therefore, come to the conclusion that there is no repugnancy between the Bombay Act and the Central Act. It follows that there is no scope for applying the provisions of section 107(2) of the Government of India Act, 1935. That would be the position in 1948, when the Bombay Act came into force and the Central Act was already in existence. Both the Acts would then be applying to Greater Bombay as there is no inconsistency between them. Article 372 of the Constitution continued both these Acts after the Constitution came into force and there is nothing in the Constitution which provides that any one of two existing laws, both of which had applied up to the coming into force of the Constitution, would apply to the exclusion of the other. It follows that in 1951 or 1952, when the contract in groundnuts-which it is not disputed, was a forward contract within the meaning of both the Acts-was made, both the Acts applies to it. The Constitution had not affected such application. That being the position, the contract in groundnuts must be held to be illegal under the Central Act which clearly prohibited the making of it. The Bombay Act could not make it legal for, as we have said, it was not intended to make any contract legal. It would follow that the arbitration clause contained in that contract was of no effect. It has therefore to be held that the award made under that arbitration clause is a nullity and has been rightly set aside. The award, it will have been noticed, was however in respect of disputes under several contracts, one of which we have found to be void. But as the award was one and is not severable in respect of the different disputes covered by it, some of which may have been legally and validly referred, the whole award was rightly set aside.

The appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.

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