Scindia Steam Navigation Co. Ltd.

Vs

Union of India

Civil Appeal No. 10 of 1959

(P.B. Gajendragadkar, K. Subha Rao, M. Hidayatullah JJ)

31.08.1961

JUDGMENT

P. B. GAJENDRAGADKAR, J. –

This appeal by a certificate issued by the Bombay High Court under Article 133(1) (a) of the Constitution arises out of a suit initially filed on the Original Side of the Bombay High Court (Suit No. 232 of 1951) by the Bombay Steam Navigation Co. Ltd. (hereafter called the B. S. N.), and the Eastern State Navigation Co. Ltd. (hereafter called the E. S. N.), against the respondent, the Union of India to recover a sum of Rs. 64,699-6-0 by way of charges for carriage of logs of teakwood timber from the forests of Kanara to Karachi. A further sum of Rs. 445-4-0 was also claimed for storage charges of the said logs at Marmagoa. This latter claim was given up at the time of the hearing of the suit. The B. S. N. then merged in the Scindia Steam Navigation Co. Ltd., and so the latter company came on the record in place of the B. S. N. This company is the first appellant before us. The E. S. N. was in liquidation and so its liquidations have joined the present litigation as plaintiff 2 and so they are appellant 2 in this Court.

The E. S. N. had a ship called Azadi. It appears that the B. S. N looked after the business of the E. S. N. and arranged on its behalf freight to be carried by the ship belonging to it. In 1947 there was an agreement between the B. S. N. as representing the E. S. N. on the one hand and the Conservator of Forests, North Kanara, representing the North-Western Railway on the other for the carriage of logs of teakwood timber from the forests in Kanara, first by rail to Marmagoa and then by a steamer belonging to the E. S. N. from Marmagoa to Karachi. Pursuant to this agreement 636 tons of timber were shipped by the Steamer Azadi which left Marmagoa on July 23, 1947. It is common ground that the conditions of the bill of landing provided that the appellants had the right to have the logs of wood remeasured at Karachi but it was agreed between the railway and appellants that freight should be paid on the basis of 70% more than the measurements shown by the records of the forest department of South Kanara. In the plaint as it was originally filed freight had been claimed on the said basis; but it appears that before the learned trial judge this claim was given up and in consequence the amount claimed was reduced from Rs. 64,699-6-0 to Rs. 44,449/-. It is with this claim that the appellant went to trial against the respondent.

Soon after the Azadi reached Karachi the partition of India into the two Dominions of India and Pakistan took place on August 15, 1947, and that led to a good deal of correspondence between the parties which shows that the appellants were sent from pillar to post, from one authority to the other, but ultimately their efforts to recover the amount due under the contract failed. That is why the appellants had to file the present suit against the respondent. Their claim against the respondent is based on Article 8(1) (b) of the Indian Independence (Rights, Property and Liabilities) Order, 1947,

(hereafter called the Order). In the alternative the same amount is claimed on the footing of a Press Communique alleged to have been issued by the respondent on May 22, 1948.

The respondent denied this claim. It was urged that the suit as framed was not maintainable and that the plaint did not disclose a cause of action. It was alleged that the suit was barred by limitation. On the merits the respondent's case was that the appellants' claim was not covered by the Press Communique and that the Press Communique could not afford the appellants a valid cause of action. The appellants contention that the relevant clause of the Order justified the claim was also denied.

On these pleadings eleven substantive issues were framed by the learned trial judge. On the principal issue between the parties which related to the applicability of Article 8(1) (b) of the Order to the appellants' claim the learned judge found that the appellants' claim attracted the provisions of the said article. In coming to this conclusion the learned judge no doubt noticed the fact that on August 15, 1947, the North-Western Railway which originally ran through the Provinces which subsequently became part of Pakistan as well as through some of the Provinces which formed part of India was divided between the Dominions of India and Pakistan into two sections, and the section that was allotted to the share of Pakistan continued to be known as North-Western Railway, while the extention of the railway in the territory of India came to be known as Eastern Punjab Railway. According to the learned judge "if the timber that was carried to Karachi was for the purposes of North-Western Railway as a whole it was obviously at the date, the 15th of August, 1947, which is the appointed date, for the purpose both of that part of the North-Western Railway which went to the Dominion of Pakistan as well as for that part of the North-Western Railway which came to the Dominion of India and became the Eastern Punjab Railway". On this view the learned trial judge reached the conclusion that the suit contract cannot be said to be exclusively for the purposes of the Dominion of Pakistan as required by Article 8(1) (a) and so it must be deemed to be a contract falling under Article (8) (1) (b). The learned judge then considered the alternative claim made by the appellants on the Press Communique in question and came to the conclusion that the said Communique did not afford a valid basis for the claim. It was not an agreement between the two Dominions, and so it could not attract the provisions of Article 3(1) of the Order. The appellants' case was that the said Communique represented an agreement between the two Dominions and so it fell within Article 3(1) of the Order and that made the respondent liable for their claim. This contention has been rejected by the learned trial judge. The plea of limitation raised by the respondent was rejected by the learned judge on the ground that the claim made by the appellants was saved by acknowledgment made by the respondent. With the findings recorded by the learned judge on the other issues we are not concerned in the present appeal. It the result the appellants' claim for Rs. 42,449/- was referred to the Commissioner for taking accounts in order to ascertain the amount due to the appellants having regard to the terms of the contract.

This decree was challenged by the respondent by its appeal before the Court of Appeal in the said High Court. The Appeal Court agreed with the trial judge in rejecting the alternative basis on which the appellants had made the claim. On the question about the applicability of Article 8(1) (b) of the Order the Appellant Court differed from the trial judge, and held that the suit contract fell within Article 8(1) (a) of the Order. According to the finding of the Appeal Court the contract was for purposes which as from the relevant date were exclusively purposes of the Dominion of Pakistan and so the respondent was not liable under it. On this view the Appeal Court did not think it necessary to consider the question of limitation. Two additional grounds were sought to be raised before the Appeal Court on behalf of the appellants in support of the decree passed by the trial court. It was urged that by its conduct the respondent was estopped from disputing the validity of

the appellant's claim and that there was novatio which made the respondent liable. The Appeal Court took the view that both these pleas were pleas of fact which could not be allowed to be raised for the first time in the appeal. As a result of the conclusion that the suit contract fell under Article 8(1) (a) of the Order the decree passed by the trial court was reversed and the appellants' suit was dismissed with costs. Certain cross-objections had been filed by the appellants claiming additional relief against the respondent, but since the appellants failed on the principal question cross-objections were also dismissed with costs. The appellants then applied for and obtained a certificate from the High Court and with the said certificate they have come to this Court with the present appeal.

Before dealing with the merits of the contentions raised by Mr. Purshottam in this Court on behalf of the appellants it is necessary to read the relevant provisions of the Order. This Order was issued on August 14, 1947, and was made by the Governor-General in exercise of the powers conferred on him by section 9 of the Indian Independence Act and all other powers enabling him in that behalf. The appointed day under the Order was August 15, 1947. Under Article 3(1) it was provided that the provisions of the Order related to the initial distribution on rights, property and liabilities consequential on the setting up of the Dominions of India and Pakistan, and that the same shall have effect, inter alia, subject to any agreement between the two Dominions. Articles 4 and 5 dealt with land and vesting thereof in the two Dominions as therein prescribed. Article 6 provided that the provisions of Articles 4 and 5 shall apply in relation to all goods, coins, bank notes, and currency notes which immediately before the appointed day vested in His Majesty for the purposes of the Governor-General in Council or of a Province as they applied in relation to land so vested. Article 8(1) with which we are concerned in the present appeal reads thus :

> "8(1) Any contract made on behalf of the Governor-General in Council before the appointed day shall, as from that day -
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> (a) if the contract is for the purposes which as from that day are exclusively purposes of the Dominion of Pakistan, be deemed to have been made on behalf of the Dominion of Pakistan instead of the Governor-General in Council; and
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> (b) in any other case, be deemed to have been made no behalf of the Dominion of India instead of the Governor-General in Council;
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> and all rights and liabilities which have accrued or may accrue under any such contract shall, to the extent to which they would have been rights or liabilities of the Governor-General in Council, be rights or liabilities of the Dominion of Pakistan or the Dominion of India, as the case may be. "

It is unnecessary to set out the rest of the provisions of the Order.

The question about the scope and effect of the provisions of Article 8(1) (a) and (b) has been considered by this Court in Union of India v. Chaman Lal Loona ([1957] S. C. R. 1039). In that case two previous decisions of the High Courts have been expressly approved, and so it may be convenient to refer to those two decisions first. The first decision which has been approved by this Court is the judgment of the Bombay High Court in The Union of India v. Chinubhai Jeshingbai ((1952) 54 B. L. R. 561). In that case the firm of Chinubhai Jeshingbai was doing business at Baroda. By three sale notes executed on March 10, 1947, it had purchased from the Government of India certain quantities of long-cloth which were lying at the Ordinance Parachute Factory at

Lahore. Under the said sale notes Rs. 37,000/- and odd had been paid by the plaintiff firm of Chinubhai Jeshingbai to the defendant the Union of India. One of the terms of the contract was that the goods, the subject-matter of the contract, had to be stamped. Owing to the disturbances caused by serious communal riots in Lahore in August, 1947, the goods could not be stamped and remained unstamped even after partition. The plaintiff thus failed to secure the performance of the contract or refund of the money paid by it in respect of the said contract either from the Government of India or from the Government of Pakistan, and so it filed the suit in question for recovery of the amount. Justice Coyajee, who heard the suit, decreed the plaintiff's claim. On appeal the decree was set aside and the case was remanded for the trial of an issue framed by the Court of Appeal. The issue thus remanded was whether the goods covered by the three sale notes were lying in the territory constituting the Dominion of Pakistan by the Independence Act of August 15, 1947.

Considering Article 8(1) (a) and (b) the High Court held that in giving effect to the said article an artificial test had been prescribed "and the test may be either, if the contract had been entered into on August 15, 1947, whether it would have been a contract for the purposes of the Dominion of Pakistan, or, if the Dominion of Pakistan had been in existence when the contract was entered into, whether it would have been a contract for the purpose of Pakistan. " It was then pointed out that it was difficult to understand how it was possible to argue that "when a State or a Dominion enters into a contract in respect of property or goods belonging to it, it is not a contract for the purposes of that State or Dominion". In other words, according to this decision, in applying the tests prescribed by Article 8 it would be relevant to enquire to whom the property or goods which is the subject-matter of the contract belonged on the appointed day. In that particular case no finding had been recorded by the trial court as to where the goods lay on the relevant date and so an issue was framed in that behalf and remanded for a finding. In other words, the Appeal Court took the view that if the goods lay in Pakistan and thus became the property of Pakistan the contract in question would undoubtedly fall under Article 8(1) (a) and not under Article 8(1) (b).

The second decision to which reference must be made is the judgment of the Calcutta High Court in Krishna Ranjan Basu Ray v. Union of India, representing Eastern Railway & Ors. (A. I. R. 1954 Cal. 623) According to this decision a suit for compensation for non-delivery of goods consigned with the Bengal and Assam Railway prior to August 15, 1947, for delivery at a place which had fallen to Pakistan is not maintainable against the Union of India. In coming to this conclusion the High Court held that "it was wrong to consider the earning of profit as the purpose of the contract. The purpose of the contract was the carriage of goods, and where the destination was some point in Pakistan it seems to be reasonable to hold that the purpose was the purpose of Dominion of Pakistan. Where, on the contrary, the carriage was to a point which remained in the Indian Dominion it would be a purpose of the Dominion of India. " A contrary view taken by the said High Court in Union of India v. Loke Nath Saha (A. I. R. 1952 Cal. 140(A)) was dissented from.

We will now revert to the decision of this Court in Chaman Lal Loona's case ([1957] S. C. R. 1039). S. K. Das, J., who spoke for the Court, posed the question raised for the decision of the Court in these words : "what is the proper meaning of the expression 'a contract for the exclusive purposes of the Dominion of Pakistan", and he answered it with the observation that "we assent to the view expressed by Chagla, C. J., in Union of India v. Chinubhai Jeshingbhai ((1952) 54 B. L. R. 561) and quoted with approval to the tests to which we have already referred. " The learned judge has also expressly approved of the decision in Krishna Ranjan Basu's case (A. I. R. 1954 Cal. 623) and disapproved the contrary view expressed in Union of India v. Loke Nath Saha (A. I. R. 1952 Cal. 140(A)). In the case of Chaman Lal Loona ([1957] S. C. R. 1039) this Court was dealing with a contract entered into on behalf of the Governor-General in Council for the supply of fodder to the

Manager, Military Farms, Lahore Cantonment, which was in Pakistan on August 15, 1947. The trial Court had found that the contract was not enforceable against the Union of India, but this conclusion was reversed by the High Court on the ground that the fodder constituted military stores under the exclusive control of the joint Defence Council on the appointed day, and that it was liable to be transferred to anywhere in India. This Court held that even if it be assumed that the High Court was right in holding that the fidder was liable to be transferred to anywhere in India, the contract must nevertheless be held to be one exclusively for the purposes of Pakistan and the Union of India could not made liable thereunder. This conclusion was based on the fact that the purpose of a contract is not to be confused with the ultimate disposal of the goods supplied thereunder, since such disposal can in no way determine or modify the contract. It would thus be seen that in considering the nature of the contract in the present appeal either of the two artificial tests approved by this Court must be applied. Does the application of either of the said tests justify the answer given by the Appeal Court ? That is the main question which arises for decision before us.

It is clear that the fact that the contract in question was made by the Conservator of Forests, Kanara, is immaterial in determining its character under Article 8(1), nor is it relevant to consider the fact that the contract had been made on behalf of the North-Western Railway. It is obvious that all contracts prior to the appointed day were made by the officers of the Government of India or by or on behalf of the said Government; and so both the Courts below are rightly agreed that in determining the character of the contract who initially made the contract with the appellants is of no relevance. Similarly the respondent cannot rely on the fact that the contract was made on behalf of the North-Western Railway and the original North-Western Railway has now been split up into two sections, the Pakistan section being known by the name of North-Western Railway and the Indian section being known by the name of Eastern Punjab Railway. It may be that the North-Western Railway on whose behalf the contract was made now runs in Pakistan alone, but that is hardly relevant for determining the character of the contract. In dealing with this question we must look at the substance of the contract and not its form.

It is true that the timber which was carried to Karachi under the contract was for the purposes of the North-Western Railway as a whole and there is no evidence on the record to show that it was intended to be used for that section of the said Railway which ran either through Sind or Western Punjab which subsequently formed part of Pakistan. On the other hand, the Appeal Court has found that the goods were lying in Karachi from August 15, 1947, to December 1947, and that it can be taken to be established that these goods were in the Dominion of Pakistan on the relevant date, and had been in fact used for the purposes of the North-Western Railway which was in the Dominion of Pakistan. We have already seen that the purpose of the contract is not to be confused with the ultimate user or disposal of the goods, but it appears that the learned trial judge was somewhat in fluenced by the fact that the goods under the contract were original intended for the use of the North-Western Railway as a whole and since the use of the said railway as a whole could not be said to be limited to the use of Pakistan alone the contract was not exclusively for the purpose of Pakistan. It is only in that context that we have referred to the finding of the Appeal Court that in the circumstances of this case there can be no doubt that the goods which lay in Karachi from August 15, 1947, to December 1947, have in fact been used by the North-Western Railway which fell to the share of the Dominion of Pakistan.

Now, applying the tests approved by this Court the question which we have to ask ourselves is : If the said contract had been made on August 15, 1947, would it have been a contract for the Dominion of Pakistan or not ? We have seen the nature of the contract. It was a contract for the carriage of logs of teakwood timber from the Kanara forests to Karachi for the purpose of the

railway. The destination of the delivery of goods was Karachi, and the object of securing the goods was to use them for the railway. In such a case it is difficult to resist the conclusion that if this contract had been made on August 15, 1947, it would not have been exclusively for the purposes of the Dominion of Pakistan. It is inconceivable that on the appointed day a contract could have been made for the shipment of goods to Karachi unless the contract was for the purposes of the Dominion of Pakistan. If the contract had been even partially for the purposes of India shipment of all the goods to Karachi would not have been the term of the contract. The same result follows if we apply the alternative test. If Pakistan had existed on the date of the contract, in our opinion, the contract as made would obviously and clearly be for the purposes of Pakistan. That is the view taken by the Appeal Court, and we see no reason to differ from it.

In this connection the Appeal Court has taken into account the fact that the goods had become the property of Pakistan by virtue of Article 6 of the Order so that on the appointed day the goods the shipment of which was the subject matter of the contract were the property of Pakistan. If that be so, we do not see how we can escape the conclusion that the application of either of the two artificial tests prescribed by Article 8(1) will inevitably lead to the conclusion that the contract had been made exclusively for the purposes of Pakistan. We have already seen that the tests enunciated by the Bombay High Court in the case of Chinubhai Jeshinghbai ((1952) 54 B. L. R. 561) have been expressly approved by this Court in the case of Chaman Lal Loona ([1957] S. C. R. 1039). It is true that in terms the significance of the vesting of the title in the goods by the operation of Article 6 of the Order to which the Bombay High Court attached considerable importance in the case of Chinubhai Jeshingbhai ((1952) 54 B. L. R. 561) has not been noticed by this Court, and so in that sense it may be permissible to urge that that part of the judgment had not been expressly approved. However, such a contention, in our opinion is purely technical. We are inclined to hold that the alternative tests which have been expressly approved by this Court are wholly consistent with the consideration of ownership to which the Bombay High Court attached importance, and is both relevant and material in the application of the said tests. If the goods which are the subject matter of the contract have become the goods of Pakistan that would be a relevant and material fact in considering whether the contract in question if made on the appointed day would have been made by Pakistan, or whether Pakistan would have made the said contract if it had been in existence on the actual date of the contract. Therefore, in our opinion, the Appeal Court was right in coming to the conclusion that the suit contract fell within the scope of Article 8(1) (a) and the assumption made by the appellants that Article 8(1) (b) could be invoked against the respondent is not well founded.

The next question which requires to be considered is whether the appellant's claim on the alternative ground of the Press Communique is well-founded. Let us first read the Press Communique :

> "The Government of India has been considering for some time the question of arranging for the speedy payment of the outstanding claims in respect of supplies and services rendered to the undivided Government of India up to and before the date of partition.
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> At the time of the partition there was an arrangement between the Dominions that each Dominion would pay the claims arising in its area subject to subsequent adjustment, particularly those relating to areas now included in Pakistan, are still outstanding due partly to disturbances in the Punjab and large-scale movement of population and partly to the discontinuance of payment by the Pakistan Government, from about the middle of December last owing to difference of opinion between the

> two Governments about the liability for these payments. In order to avoid hardship to the suppliers and contractors the Government of India, after careful consideration have decided that they should undertake the initial liability for these payments and recover Pakistan's share through Debts Settlement. "

Mr. Purshottam contends that this Communique represents an agreement between the two Dominions and so under Article 3(1) of the Order the appellants' claim can be justified on the strength of this agreement alone even if the said claim fails under Article 8(1) (b). The Courts below have held that the appellants had failed to prove that the Communique in question represents an agreement between the two Dominions. They have construed the Communique as amounting to no more than a unilateral declaration made by the Union to which Article 3(1) cannot apply. Mr. Purshottam quarrel with the correctness of this conclusion. In support of his argument Mr. Purshottam has taken us through the whole of the relevant correspondence. We may briefly indicate the broad features of the said correspondence. It appears that on July 10, 1948, the Director-General, Railway Department, Government of Pakistan, Karachi, wrote to the General Manager, N. W. Railway, Lahore, in regard to the question about the disposal of pre-partition claims outstanding against the undivided Government of India. In this letter he set out the contents of the Press Communique on which the appellants rely. The Collector of Stores, Karachi, draw attention of the appellants to the said Communique by his letter dated July 19, 1948. In their correspondence with the railway authorities the appellants have sometimes described this Communique as joint press notification. Similarly, in their letters written to appellant 1 the railway authorities in Pakistan also have described the said Communique as joint notification "said to have been issued by the Dominions of India and Pakistan". Then we have some letters from the railway authorities in India which would show that the appellants' claim was being considered by them. We have, for instance, a letter addressed to the Stores Accounts Officer, E. P. Railway, Delhi, by the Headquarters Officer at Delhi in which the appellants' claim is indicated at serial numbers 4 and 5, and the Stores Accounts Officer is asked to deal with it. The Administrative Officer, E. P. Railway, Delhi, wrote to appellant 1 to say that its claim had been registered and that further action would be taken when orders of the Railway Board had been received. The appellants then reminded the railway officers from time to time and on August 5, 1950, their attorneys were told that the claim was still under verification by the N. W. Railway and until it is verified by the F. A. & C. A. O., N. W. Railway, Lahore, it could not be finalised. The attorneys of the appellants then enquired as to how much time to process of verification would take; but since no satisfactory answer was given the appellants filed the present suit. It is, however, clear that some attempts were made by the railway authorities in India for getting the appellants' claim verified but the said attempts did not succeed. Indeed, the learned Attorney-General, for the respondent, has filed an affidavit by Mr. R. L. Takyar. Legal Assistant, Northern Railway, Baroda House, New Delhi, which shows that in pursuance to the assurance given by the learned Advocate-General before the Bombay High Court attempts were made by the respondent to have the appellants' claim verified but the said attempts failed, and it adds that "in the absence of the verification of the claim and the authorisation by the Pakistan Government, the Union of India was not in a position to make any payment ex gratia to the appellants". We sympathise with the grievance made by the appellants that they have been driven from pillar to post and have yet received no satisfaction to their claim either from the Pakistan Government or from the respondent; but the difficulty in the way of the appellants is that the statements in the correspondence to which we have been referred do not at all justify the appellants' claim that the Communique represents an agreement between the two Dominions. First of all the appellants should have taken proper steps to prove the said Communique and should have called upon the respondent to produce all relevant documents in respect of the alleged agreement on which the appellants relied.

Besides, the terms of the Communique themselves negative the theory that the Communique represents an agreement between the two Dominions. The communique expressly refers to the discontinuance of payment by the Pakistan Government from about the middle of December owing to difference of opinion between the two Governments about the liability of these payments, and it proceeds to state the decision of the respondent that in order to avoid hardships to suppliers and contractors the respondent had decided that it should undertake initial liability for these payments and recover Pakistan's share through Debt Settlement. That sometimes in the course of the correspondence the Pakistan authorities referred to the Press Communique as a joint Communique can hardly assist the appellants in showing that the Communique was the result of an agreement between the two Dominions. It is not unlikely that there may have been some agreement between the two Dominions because the conduct of the railway authorities in India can be satisfactorily explained only on the basis of some agreement or other, but unfortunately the appellants have not produced sufficient or satisfactory material to prove their case that there was a specific agreement between the two Dominions which brought into play the provisions of Article 3(1) of the Order. On the material produced by the appellants the Courts below have made a concurrent finding that no such agreement had been proved. Having gone through the correspondence to which our attention was drawn we are satisfied that the appellants cannot successfully attack the validity or correctness of the said concurrent conclusion. Therefore, if the theory of an agreement between the two Dominions fails the Press Communique cannot help to sustain the appellants' claim against the respondent. It is not suggested by the appellants that the unilateral statement which is contained in the Press Communique can itself without anything more help to sustain the appellants' claim.

Then Mr. Purshottam wanted to contend that the respondent was estopped from disputing its liability under the contract and he also wanted to urge the ground of novatio. His contention was that the facts necessary for the purpose of pleading estoppel and novatio were available on the record and in the interest of justice he should not be precluded from urging those points on the ground that the appellants had not taken the said points in the trial court. We are not impressed by this argument. There can be no doubt that both the pleas are pleas which can be effectively raised only after pleading the relevant and material facts; and since no relevant or material fact had been averred in the plaint on which either of the two pleas can be raised and no issue was asked for in the trial court in respect of either of the said pleas the Appeal Court was justified in refusing leave to the appellants to raise the said pleas for the first time in appeal. In our opinion, Mr. Purshottam is not right in contending that the Appeal Court was unduly technical when it refused leave to the appellants to raise the said pleas. We have already seen that on the pleadings as many as eleven issues were framed by the learned trial judge. The plaint itself is an elaborately drawn document, and so the appellants cannot be heard to complain if for their failure to make adequate and proper pleadings they are not allowed to raise the plea of estoppel or novatio at the appellate stage. In our opinion, therefore, the Appeal Court was right in not permitting the said pleas to be raised in appeal.

In the result the appeal fails and is dismissed with costs.

SUBBA RAO, J. –

I regret my inability to agree in regard to the application of Article 8(1) of the Indian Independence (Rights, Property and Liabilities) Order, 1947 (hereinafter called the Order), to the facts of the case.

The facts are fully stated in the judgment of my learned brother, Gajendragadkar, J. I shall, therefore, briefly restate only those facts relevant to the question raised under Article 8(1) of the Order.

The Eastern Steam Navigation Company had a ship called "Azadi". In 1947 the Bombay Steam Navigation Company Ltd., acting on behalf of the Eastern Steam Navigation Company entered into an agreement with the Conservator of Forests, North Kanara, acting on behalf of the North-Western Railway, for the carriage of logs of teak-wood from the forests of Kanara by rail and from Marmagoa by steam ship belonging to the Eastern Steam Navigation Company to Karachi. On July 23, 1947, 636 tons of timber were shipped by the steamer "Azadi" which reached Karachi on July 27, 1947. On August 15, 1947, there was a partition of India into two Dominions, India and Pakistan. Before the partition, the North-Western Railway, though its head office was at Lahore, was running its trains through an area of which one part is now in India and the other part in Pakistan, After the partition, the said Railway was divided between the two Dominions. The Indian section of the Railway thereafter came to be known as the Eastern Punjab Railway and the Pakistan section retained its original name. Subsequently, the Eastern Steam Navigation Company went into liquidation, and the Bombay Steam Navigation Company merged in the Scindia Steam Navigation Company. The said two Companies filed O. S. No. 232 of 1951 in the High Court of Judicature at Bombay on its Ordinary Original Civil Jurisdiction against the Union of India for recovering a sum of Rs. 64,699-6-0, the freight payable to them, but later on reduced their claim to Rs. 44,449/-. Tendolkar, J., who tried the suit, held that the contract was for the purpose of the North Western Railway as a whole and, therefore, on the appointed day it was not exclusively for the purpose of the Dominion of Pakistan within the meaning of Article 8(1) of the Order; and in that view he held that the suit was maintainable against the Union of India. On appeal, Chagla, C. J., and S. T. Desai, J., held that, as on the appointed day the goods belonged to Pakistan, the contract was exclusively for the purpose of the Dominion of Pakistan; with the result, they differed from Tendolkar, J., and dismissed the suit. Hence the present appeal.

Learned counsel for the appellants contended that the expression "purposes in Article 8(1) of the Order relates to the purposes of the contract, that is, the purposes of the North Western Railway, and that the division bench of the Bombay High Court was clearly wrong in holding that the ownership of the goods on the appointed day had any bearing in ascertaining the purposes of the contract. To put it differently, the argument was that the purpose of the contract was to supply goods to the North Western Railway, and that on the appointed day the entire North Western Railway did not fall exclusively within the Dominion of Pakistan and, therefore, the purposes of the contract were not exclusively for that Dominion. Learned Attorney-General argued that, as under Article 6 of the Order the goods which were the subject-matter of the contract vested in the Dominion of Pakistan on the appointed day, the contract must be held to be for the purposes of that Dominion.

As the argument turned upon Article 8(1) of the Order, it would be convenient at the outset to read the same.

Article 8(1) : Any contract made on behalf of the Governor-General in Council before the appointed day shall, as from that day, -

> (a) if the contract is for purposes which as from that day are exclusively purposes of the Dominion of Pakistan, be deemed to have been made on behalf of the Dominion of Pakistan instead of the Governor-General in Council; and
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> (b) in any other case, be deemed to have been made on behalf of the Dominion of India instead of the Dominion of India instead of the Governor-General in Council; and all rights and liabilities which have accrued or may accrue under any such contract shall, to the extent to which they would have been rights or liabilities of the

> Governor-General in Council, be rights or liabilities of the Dominion of Pakistan or the Dominion of India, as the case may be.

This Court has laid down the true scope and effect of the said Article in Union of India v. Chaman Lal Loona ([1957] S. C. R. 1039). Therein, this Court approved the following observations of Chagla, C. J., in Union of India v. Chinubhai Jeshingbhai (I. L. R. [1953] Bom. 117, 130) :

> "The test that must be applied in an artificial test and the test may be either if the contract has been entered into on August 15, 1947, whether it would have been a contract for the purposes of the Dominion of Pakistan, or if the Dominion of Pakistan had been in existence when the contract was entered into, whether it would have been a contract for the purposes of Pakistan. "

In that case the purpose of the contract was to supply fodder to the Manager, Military Farms, Lahore Cantonment, which farms were in Pakistan on the appointed day. This Court, therefore, held that the said contract was exclusively for the purposes of the Dominion of Pakistan as from the appointed day. But the question now raised in this case, namely, that whatever might have been the original purposes of the contract, if on the appointed day the goods covered by the said contract had statutorily vested in the Dominion of Pakistan, the purposes must be deemed to be exclusively those of Pakistan, did not arise for decision in that case. That question falls to be decided in the present case. The test laid down by Article 8(1) of the Order, as interpreted by this court, is to ascertain whether, if the contract had been entered into on August 15, 1947, it would have been a contract exclusively for the purposes of Pakistan. Though, by fiction, the date of the contract is shifted to August 15, 1947, there is no statutory change in the terms of contract, including the purposes for which it was entered into. The purpose of the contract, therefore, has to be ascertained by the terms of the contract and not by any other extraneous considerations, statutory or otherwise. The scope of the fiction cannot be extended beyond the limits prescribed by the Article.

The Article applies not only to executed contracts but also to contracts which are only executory or which are broken. The expression "purposes" shall be given the same meaning in its application to the three situations. If the test of statutory vesting of the goods, situated on the appointed day in the Dominion of Pakistan, is applied to the three situations, it would lead to an obvious anomaly. Take the present contract. If it was not executed and the plaintiffs had to file a suit for specific performance, the suit should have been filed in India; if the contract was broken and the plaintiffs had to file a suit of damages, it should also have been filed in India. But if the contract was executed and all the goods reached Pakistan on the appointed day, the suit should have been filed in Pakistan. If it was executed but only a portion of the goods had reached Pakistan on the appointed day and the other portion happened to be within the Indian borders, the suit should have been filed in India. This anomaly would not arise if the expression "the purposes of the contract" was given its natural meaning, namely, the purposes for which the contract was entered into, that is, in the present case for supplying goods to the North Western Railway.

There is a fallacy in the argument advanced on behalf of the Union. There is an essential distinction between the purpose of the contract and the statutory vesting of the goods thereunder in one or other of the two Dominions. The purpose of the contract was neither determined nor modified by the subsequent statutory vesting of the goods in the Dominion of Pakistan; that statutory vesting was a part of a scheme different from that embodied in Article 8 of the Order. Article 6 of the Order says :

> "The provisions of Articles 4 and 5 of this Order shall apply, in relation to all goods,

> coins, bank notes and currency notes which immediately before the appointed day are vested in His Majesty for the purposes of the Governor-General in Council or of a Province as they apply in relation to land so vested".

Article 5(2) says :

> "All land which immediately before the appointed day is vested in His Majesty for the purposes of the Province of Bengal shall on that day in the case of land situated in the Province of East Bengal, vest in His Majesty for the purposes of that Province; in the case of land situated in the Province of West Bengal, vest in His Majesty for the purposes of that Province; and in any other case, vest in His Majesty for the joint purposes of those two Provinces".

These provisions have nothing to do with rights and liabilities of the respective Dominions under contracts entered into on behalf of the United India with the citizens of that country; those rights are separately dealt with by Article 8 and we have to look to its provisions to ascertain its import. Articles 5 and 6 were entered as a rough and ready method to prevent disputes between the various Provinces in regard to properties, movable, and immovable, situated therein on the appointed day. This was only a part of a scheme of allocation of assets between the various Provinces.

Further, if the respondent's argument be accepted, it would lead to various incongruities. What would be the position if the head office of the Railway was in Lahore and most of the railway lines were in that part of the United India which is now India ? Though the goods were for the purposes of the Railway and though the entire Railway fell outside the Dominion of Pakistan, the theory of vesting would make the purposes exclusively for Pakistan. What would be the position if the entire Railway was in India, and the goods were sent via Karachi, but on the appointed day they were in Pakistan on their outward journey to India ? On the basis of the argument, though in fact the purposes were exclusively for the Dominion of India, they would be exclusively those of Pakistan. Conversely, though the purpose of the contract was for a railway as a whole functioning within an area which is now the Dominion of Pakistan, and the goods were on the appointed day in the Dominion of India, the goods would be for the purposes of India, though under the contract they were for the purposes of the railway which is now wholly Pakistan. Though in all these cases the purposes of the original contract was for India or for Pakistan, another fiction would have to be introduced to attributed a purpose different from the original one depending upon the accidental situs of the goods on the appointed day and also depending upon the exigencies of transit.

Reliance is placed upon the decision of a full bench of the Bombay High Court in The Union of India v. Chinubhai Jeshingbhai ((1952) 54 Bom. L. R. 562). There, Chagla, C. J., observed at p. 568 thus :

> "It is difficult for us to understand how it is possible to argue that when a State or a Dominion enters into a contract in respect of property or goods belonging to it, it is not a contract for the purposes of that State or Dominion. Sir Jamshedji contends that "for the purposes" must be construed to mean "a contract which enures for the benefit of a particular Dominion". In our opinion that is not at all the proper test. Once it is conceded that property belongs to a particular State or Dominion and the State or the Dominion enters into a contract with a third party in respect of that property or goods, then the contract in its very nature is for the purposes of that State or Dominion. Article 8 introduces a legal fiction and converts by that legal fiction a

> contract which was originally entered into by the Governor-General in Council to a contract for the purposes of one Dominion or the other".

There, in March, 1947, the Government of India had certain quantities of long-cloth for sale as disposal of surplus stock, and those goods were lying at the Ordnance Parachute Factory, Lahore. Those goods were purchased by the plaintiffs therein, who were residents of Baroda, by three sale notes executed on March 10, 1947. The contract was, therefore, for the purpose of purchasing goods situated in Lahore. The said goods continued under the control of the Dominion of Pakistan after August 15, 1947. In those circumstances, the High Court might have been justified, though I am not expressive my opinion on the same, in holding that the contract was for the purposes of the Dominion of Pakistan. One of the learned Judges, who was a party to that decision, did not understand the decision to lay down that whatever might have been the original purpose of the contract the statutory situs of the goods in respect of which the said contract was entered into would have the effect of making it a purpose of that Dominion in which the said goods were situated on the appointed day; for, in the present case, he held that, though the goods were in Pakistan on the appointed day, the contract was not for the purposes which were exclusively for the purposes of the Dominion of Pakistan. Though this question did not directly fall to be decided in Union of India v. Chaman Lal Loona ([1957] S. C. R. 1039, 1050), some observations made by this Court in a different context may usefully be referred to. There, though the fodder was supplied to the Military Farms at Lahore, in the Joint Defence Council had powers of control over it and to send it to whichever place wanted it to be sent. On that basis it was contended that the purpose of the contract was not for the purpose exclusively for the Dominion of Pakistan. This Court in rejecting the contention observed thus :

> "We say this with great respect, but this line of reasoning appears to us to be due to a lack of proper appreciation of the distinction between the 'purposes of the contract' and the 'ultimate disposal of the goods' supplied under the contract. The purpose of the contract is not determined nor modified by the ultimate disposal of the goods supplied under the contract, nor even by the powers of control exercised over the goods after the contract had been performed by the respondent".

On the same reasoning it may also be held that the purpose of the contract is different form the statutory vesting of the goods covered by the contract in a particular Dominion. I, therefore, hold on a fair reading of the provisions of Article 8 of the Order that the purposes of a contract shall be for the purposes mentioned in the contract, though either of the Dominions would have to be substituted for the Government of the United of India, having regard to the fact whether the said purposes would be attributable exclusively to the Dominion of Pakistan.

If so, the simple question would be, what were the purposes of the contract ? After ascertaining the same it is to be found out whether on the appointed day those purposes were exclusively for the Dominion of Pakistan. The correspondence between the Conservator of Forests, who was acting on behalf the North Western Railway, and the appellants, and the bill of lading show that the Company agreed to carry the goods for the North Western Railway, Karachi, and that the freight was to be paid by the said Railway. Now the original North Western Railway admittedly covered an area part of which is now in Pakistan and the other part in India. It is an accident that the old name is retained by that part of the Railway now in Pakistan and a new name is given to that part which is now in India. It may well have been that the Pakistan part of the Railway was also given a new name. Therefore, the fact that the Pakistan sector of the old Railway retains its old name does not affect the question. It is the substance that matters and not the form. The purpose of the contract was to

convey the goods to that Railway which is now in both the Dominions and, therefore, the purposes of the contract were not exclusively for the Dominion of Pakistan. If so under Article 8(1) (b) of the Order, the contract shall be deemed to have been made on behalf of the Dominion of India instead of the Governor-General in Council, and the liability accrued under the contract shall be the liability of the Dominion of India.

In the result, the decree of the High Court is set aside and that of Tendolkar, J., is restored. The appeal is allowed with costs throughout.

BY COURT : In accordance with the judgment of the majority of the Court, the appeal fails and is dismissed costs.

Appeal dismissed.

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