Seth Banarsi Das

Vs

The Cane Commissioner & Another

Civil Appeal No. 226 of 1960

(S.K. Das, J. L. Kapur, A.K. Sarkar, M. Hidayatullah, Raghuvar Dayal JJ)

06.12.1962

JUDGMENT

HIDAYATULLAH J., -

This is an appeal on a certificate granted by the High Court of Allahabad under Article 133(1)(c) of the Constitution against its judgment and order dated February 2, 1956. By the judgment, under appeal, which was passed in a Letters Patent Appeal, the Divisional Bench confirmed the order of a learned single judge dismissing the petition of the appellant under Art. 226 of the Constitution. Seth Banarsi Das, the appellant before us, was the petitioner in the High Court and the two respondents before us, namely, the Cane Commissioner, U.P. Lucknow, and the Cane Marketing Society Ltd., Bijnor, were the opposite parties. The petition asked for a number of writs in the alternative, but its purport was to seek to prohibit the two respondents from continuing certain proceedings pending before the Cane Commissioner under rule 23 of the United Provinces Sugar Factories Control Rules, 1938. That rule provides for arbitration in disputes touching agreements entered into by sugar cane factories and cane growers for supply of sugar cane as laid down by the United Provinces Sugar Factories Control Act, 1938.

The facts of the case are as follows :-

> The appellant was at the material time the lessee and "Occupier" of Shiva Prasad Banarsi Das Sugar Mills, Bijnor, for five years from the crushing season 1946-47 to 1950-51. The second respondent is the Cane Marketing Society Ltd., Bijnor, which is a society registered under the Uttar Pradesh Co-operative Societies Act, and one of its objects is to supply sugar cane grown by its members to the sugar mills. Before the control of sugar cane, cane growers, whether they belonged to a co-operative society or not, sold sugar cane directly to the factories and made supplies from any area as it suited them. The United Provinces Sugar Factories Control Act was passed for the purpose of licensing of sugar factories and for regulating the supply of sugar cane intended for use in such factories and the price at which it may be purchased and for such other matters as may be incidental thereto. The broad outline of the Act and the rules framed thereunder may be given here.

Under the Act the control of sugar cane grown in the State was vested in an officer known as the cane Commissioner and Advisory Committees and Sugar Control Board were to be appointed to advise upon and effectuate control of sugar and sugar cane. There was a scheme for licensing of factories with which we are not concerned in this case. Chapter IV of the Act made provision for regulating the purchase of sugar cane. Under s. 14, the State Government could require the

'Occupier' of any factory to submit to the Cane Commissioner an estimate in the prescribed form and manner of the quantity of sugar cane which would be required in his factory during a crushing season. This estimate was examined by the Cane Commissioner who after consulting the Advisory Committee in that area, published it with such modifications, if any, as he thought fit to make. Under s. 15 the Cane Commissioner, in consultation with the Advisory Committee (if any) and the 'Occupier' of the factory, could issue an order declaring an area to be 'a reserved area' for the purpose of supply of sugar cane to a particular factory. Section 18 then provided as follows :-

> "18. Purchase of cane in reserved area. - (1) A cane-grower or a Cane-growers' Co-operative Society in a reserved area may offer, in the form and by the date prescribed, to supply to the occupier of the factory for which the area is reserved cane grown by the cane-grower or by the members of such Cane-growers' Co-operative Society as the case may be, not exceeding the quantity, if any, prescribed for such grower or Cane-growers' Co-operative Society.
>
> (2) The Occupier or manager of a factory for which an area is reserved shall enter into an agreement, in such form, by such date and on such terms and conditions as may by prescribed to purchase the cane offered in accordance with sub-section (1) :
>
> Provided that, he shall not enter into an agreement to purchase cane from a person who is a member of a Cane-growers' Co-operative Society.
>
> (3) Except with the permission of the Provincial Government, cane grown in a reserved area shall not be purchased in such area by a purchasing agent, or by any person other than occupier of the factory for which such area has been reserved.
>
> (4) Cane grown in a reserved area shall not be sold by any person other than a cane-grower' or a Cane-growers' Co-operative Society :
>
> Provided that a cane-grower or a Cane-growers' Co-operative Society may deliver cane intended for use in a factory through another cane-grower or through a carrier.
>
> (5) During the crushing season the Provincial Government may, if it is satisfied that there is likely to be in the area reserved for a factory any quantity of cane available for sale to the occupier of the factory in excess of the quantity for which he is required to enter into agreements, direct that cane shall not be purchased outside the reserved areas until the occupier of the factory enters into agreements to purchase all the cane offered to him in the reserved area :
>
> Provided that such prohibition shall not apply in respect of cane for the supply of which agreements in writing have been entered into before such direction was issued."

In addition to the reserved area, s. 19 provided for declaration of assigned area, and purchase of sugar cane therein. The factory was authorised to take its supplies also from the assigned area. The important difference between the two areas was that the factory was bound to enter into agreements with cane growers or cane growers' co-operative societies in an area reserved for the factory for the prescribed quantity of sugar cane but in an assigned area, the factory could enter into an agreement for a specified quantity of sugar cane as the factory desired. In other words, in a reserved area if sugar cane of the prescribed quality was offered by the cane grower or cane growers' society, the

factory was bound to purchase that cane up to the prescribed quantity but in an assigned area the factory was at liberty to purchase cane, as it needed, subject to its entering into an agreement for the purpose.

In addition to the reserved and assigned areas there was a third category, namely, areas which were neither reserved nor assigned. We are not concerned with such areas or the provisions dealing with the purchase of sugar cane from such areas. Section 27 provided for certain penalties. Sub-section 3(b) provided as follows :-

> "(3) If the occupier or manager of a factory -
>
> #x x x x##
>
> (b) intentionally fails to enter into agreements as required by section (2) of section 18. ..... he shall be punishable with fine which may extend to two thousand rupees"

Section 30 gave power to the Government to make rules. The material portions of section 30 for our purpose are as follows :-

> "30 Power to make rules. - (1) The Provincial Government may make rules to carry out the provisions of this Act.
>
> (2) In particular and without prejudice to the generality of the foregoing power, such rules may provide for;
>
> #x x x x##
>
> (u) the reference to the Cane Commissioner of disputes relating to the supply of cane for decision or if he so directs to arbitration, the mode of appointing an arbitrator or arbitrators, the procedure to be followed in proceedings before the Cane Commissioner or such arbitrator or arbitrators, and the enforcement of the decisions of the Cane Commissioner or the awards of arbitrators;"

In exercise of the powers conferred by the last quoted section, the following rules (among others) were framed :-

> "15. Purchase of cane growing in a reserved area. - (1) The occupier or manager of a factory shall estimate or cause to be estimated by 30th September, the quantity of sugarcane with each grower enrolled in the Growers' Register and shall submit the estimates to the Collector. The Collector may, after such enquiries as he considers necessary, modify the estimates and cause them to be published in such manner as he may direct. In framing these estimates, sugarcane grown in more than one-third of the area of land suitable for sugarcane cultivation in the holding of each grower may be excluded.
>
> (2) A cane-grower or a cane grower's co-operative society in a reserved area may offer in form 10, Appendix III, by the 15th October each year to supply during the crushing season to the occupier or manager of the factory for which the area has been reserved, cane not exceeding, in the case of a cane-grower, the quantity estimated in accordance with sub-rule (1).

(3) The occupier or manager of the factory for which the area is reserved shall enter into an agreement with the cane-grower or the cane growers' co-operative society as the case may be, in forms 15 and 18 respectively or in any other form approved by the Cane Commissioner within a month of the offer mentioned in sub-rule (2).

(4) The occupier or manager of a factory shall spread the purchase made in the reserved area in an equitable manner and shall in the case of cane-grower of the reserved area make purchase of cane only after issuing requisition slips.

In order to comply with this rule the occupier or manager shall cause identification cards to be distributed to all cane-growers of the reserved area to whom requisition slips have been issued and shall maintain a record of the same. He will also keep a record of the requisition slips issued and distributed to the growers and returned by them.

(5) Cane grown in a reserved area shall not except with the permission of the Cane Commissioner be purchased by any person without the previous issue at convenient centres in the reserved area of requisition slips and identification cards to the growers, by the occupier or manager of the factory for which the area is reserved.

(6) Requisition slips and identification cards to members of a 'cane-growers' co-operative society shall not be issued except by such society.

(7) In case of a dispute whether a particular system adopted for the purchase of cane grown in the reserved area is equitable or not, the dispute may be referred to the Cane Commissioner whose decision shall be final"

"23. Arbitration (1) Any dispute touching an agreement referred to in section 18(2) or section 19(2) of the Act shall be referred to the Cane Commissioner for decision, or if he so directs to arbitration. No suit shall lie in a civil or revenue court in respect of any such dispute.

(2) If the Cane Commissioner directs the reference of a suit to arbitration, it shall be referred to a sole arbitrator acceptable to the parties concerned. In case no sole arbitrator is acceptable to both parties, the dispute in question shall be referred to a Board of Arbitration, consisting of one representative of each party and an umpire acceptable to both representatives. If the representatives or the parties are unable to elect such an umpire within a fortnight, the Cane Commissioner shall either himself Act as umpire or nominate one. The umpire shall be the President of the Board of Arbitration and shall have a vote in case of disagreement between the representatives.

(3) The sole arbitrator or the President of the Board of Arbitrator shall have the full power of a court in respect of summoning the parties, witnesses and records.

(4) The decision of the sole arbitrator or Board of Arbitration shall be final and binding on both parties and shall not be called in question in any civil or revenue court.

(5) The sole arbitrator or the Board of Arbitration shall give an award within the time fixed by the Cane Commissioner, failing which the Cane Commissioner may decide

the dispute himself or appoint another arbitrator or arbitrators for the purpose.

(6) Any party considering himself aggrieved by an award may appeal to the Commissioner of the Division in which the factory is situated within one month of the date of the communication of the award and the Commissioner shall pass such order as he deems fit.

(7) The Commissioner's order in appeal shall be final.

(8) On application to the Civil Court having jurisdiction over the subject matter of the decision or award, the decision of the Cane Commissioner, or the award of the arbitrator or atbitrators, or the Commissioner's order in appeal against an award, shall be enforced by the Court as if such decision, award, or order in appeal were a decree of that Court."

"25. Penalties. - (1) Any person contravening any of the provisions of these rules for which no penalty has been provided in the Act or not obeying a lawful order or direction conveyed to him in writing which the Cane Commissioner or a Collector or an Inspector is authorised to pass or issue shall be punishable with fine which may extend to Rs. 750 :"

(Proviso omitted)

We are concerned with the crushing seasons of 1949-50 and 1950-51. In these two years, the Cane Marketing Society offered sugar cane by Form 10. According to the appellant, the Society should have offered 85% of its net estimated crop but it made an offer in both the years which was less than 85% and actually supplied a quantity which was still less. The relevant figures for the two years, according to the appellant, were as follows :-

1949-50 1950-51 (In Lacs of Maunds)Net estimated Crop 45.82 55.20Less 15% 6.82 8.2885% which should have been offered 39.00 46.92Opposite party No. 2 32.00 32.00offered to sell finallyShortage in offer 7.00 14.92Actually supplied 23.11131 29.7954Actual shortage 15.88869 17.1246##

The appellant therefore preferred a claim to the Cane Commissioner for compensation for the short supply calculated at one anna per maund of sugar cane, by an application dated October 31, 1950. This was preceded by a long correspondence which began in June 1950. Of this correspondence a few of the letters have been printed in the record of the case. The first letter is by the appellant to the Cane Marketing Society Ltd., Bijnor, in which a claim for Rs. 1,02,116-13-0, as compensation on account of short supplies in the season 1949-50 was made. The next letter in August, 1950, showed that the Society was claiming a sum of Rs. 1,64,094-4-6 as commission for the years 1948-49 and 1949-50 and that the appellant was setting up a counter claim for Rs. 1,04,890-2-9 as compensation for short supply. On November 4, 1950, the appellant wrote a final letter giving the accounts and sending a cheque for Rs. 22628-13-0 in full satisfaction of the claim. This cheque was accepted by the Society but under protest. The real dispute was about the compensation for short supplies which the Society did not admit. According to the Society they had a claim for Rs. 2,63,624-2-6 and they also moved the Cane Commissioner under Rule 23(1) of the U.P. Sugar Control Act and Rules, 1938, for arbitration. The Cane Commissioner, who had not acted on the letter of the appellant, then passed an order on July 26, 1951, calling upon the parties to be present

before him on August 18, 1951, for the decision of the dispute. On September 3, 1951, the appellant filed a petition under Art. 226 of the Constitution for a Writ of Certiorari to quash the proceedings pending before the Cane Commissioner, for a Writ of Prohibition for restraining the Cane Commissioner from continuing the proceedings and for a writ of quo warranto for a declaration that the Cane Commissioner had no right to assume the office of arbitrator in the dispute. In support of the petition the appellant contended that there could be no arbitration in this dispute because the agreement was not a proper agreement as the Society had omitted to complete the prescribed from XII by leaving the Schedule, the area of cultivation and the estimated yield, blank and as the agreements were not signed by the Mills who did not accept them in their incomplete state. In the alternative, it was contended the Rule 23 offended against Art. 14 of the Constitution because it provided two different methods of decision of the disputes - one by the Cane Commissioner and the other by arbitration - leaving it to the arbitrary will of the Cane Commissioner to choose which it should be in a particular case, and by providing an appeal in one case, and not in the other. It was further contended that the provision in sub-Rule (6) of Rule 23, which provided for an appeal went beyond the rule-making power of the Provincial Government as no such power was conferred on it by s. 30 of the Act and sub-Rule (6) being unseverable, the whole of Rule 23 must fail and that there could be no action by the Cane Commissioner.

The petition was heard by Chaturvedi, J., and was dismissed. A special appeal under the Letters Patent was heard by Mootham, C.J., and C.B. Agarwala, J. Both of them concurred in dismissing the appeal but there was a difference as to sub-Rule (6) between the learned judges. According to the learned Chief Justice, in making sub-Rule (6) of Rule 23 the Provincial Government had exceeded its power and the Rule was invalid but the sub-Rule was severable and the rest of the Rule was validly framed. According to Agarwala, J., the sub-Rule was properly framed and there was a right of appeal both against the order of the Cane Commissioner as well as the award of the arbitrators to the Commissioner of the Division. Both the learned judges held that the provisions of Rule 23 were not discriminatory and thus not void under Art. 14. In this appeal the same points, which were urged before the High Court, have been urged before us.

The scheme of the Act and the Rules analysed above shows that the purchase of sugar cane was regulated. There were reserved areas, assigned areas and other areas. Supplies from a reserved area were meant for a factory for which the area was reserved and forms were prescribed for offer, agreements etc. so that the scheme might not be defeated by parties contracting out of the scheme. We are not concerned with the merits of the rival contentions about short supply or unpaid commission. Those are matters for adjudication elsewhere. We are only concerned with the legality of the proceedings before the Cane Commissioner. This dispute has been referred to him under Rule 23 not only by the Society but earlier also by the appellant. The appellant now says that he had made a mistake and seeks to avoid a decision by the Cane Commissioner or by arbitrator and has set up two contentions. The first is that by reason of three defects in the agreement of 1949-50 season and two in the agreement of 1950-51 season there is no binding contract as is contemplated by s. 18(2) and the agreement not having come into force the Commissioner has no power to Act under Rule 23. The defects are :

(a) Absence of signature for the mills in both agreements,

(b) Schedule left blank in both agreements,

(c) Two blanks left in the agreement for 1949-50 season where an area and a quantity had to be mentioned.

The second contention is that Rule 23 enjoining arbitration is void under Arts. 13 and 14 of the Constitution as, on its face it allows discrimination and sub-Rule (6) of Rule 23 making provision for an appeal is beyond the rule-making power conferred by s. 30 of the Act and that sub-Rule being unseverable Rule 23 as a whole fails. We shall deal with the first contention separately and the other two points in the second contention together.

The first question thus to consider is whether there is a binding contract between the parties or not. Clause No. 10 of the agreement which is in the prescribed form, says that "all disputes touching the agreement shall be decided by arbitration as provided for in the rules and no suit shall lie in a civil or revenue court in respect of any such dispute". The exclusion of the jurisdiction of courts is also provided in Rule 23(1). If the agreement were binding the matter would have to be referred to arbitration as laid down in Rule 23. The agreement was challenged in the petition under Article 226 on four grounds. Three of them deal with the facts in dispute with which we are not concerned. The last was that "no agreement was entered into at all between the parties as contemplated under s. 18(2) of the U.P. Sugar Factories Control Act and in the form No. 12 as prescribed under the Rules made thereunder." The defects that are pointed out now, it is said, make out that there was no agreement at all.

To begin with the agreement was accepted on both sides and was acted upon. The appellant himself moved the Cane Commissioner for the enforcement of the agreement on October 31, 1950. He now says that this was under the erroneous belief that even without a written agreement Rule 23 applied. Even in the proceedings before the Cane Commissioner the appellant caused an appearance to be made and asked for time. No objection that there was no valid agreement, was taken. In his letters to the Society the appellant relied upon the agreements and calculated his compensation and the commission of the Society on its basis. The appellant sent requisitions for supplies for sugar cane in accordance with Rule 15(5) and (6) and the agreement. He accepted bills and paid for them. The appellant had the signed form 10 and also form 12 with him. He could have got the blanks filled in and also signed the agreement but evaded doing this. By his conduct the appellant appears prima facie to have accepted the agreement though now he is relying on his own default and petty omissions in the form. Now it must be remembered that this form was prescribed so that the scheme of the Act and Rules should work smoothly, and the purchase and sale of sugar cane should follow a particular pattern. The failure to enter into an agreement in the prescribed form was made an offence to compel the factories to keep to the scheme. Here the form in fact has been used. All the terms are included and none has been altered or new terms added. The agreement has also been acted upon. The question is whether the want of signature of the complaining party and the existence of the blanks render the contract void and non-existing.

There is no doubt that in the agreement for the season 1949-50 the area of the crop in one place and the approximate yield from that area in another have not been filled in the blank space provided for that purpose. The form in 1950-51 has no such blanks. The agreement was preceded by from No. 10 which showed these particulars. That form was with the appellant and it supplied these two details, namely, the area under cultivation and the estimated yield. Indeed, the two forms between them contained all the particulars which are required to be entered in body of the agreement. As regards the schedule to the agreement the headings read as follows :-

#Village Area under sugarcane Approximate Remarks Deal : Ratoon : Plant yield in Mds.##

If the appellant required this information it could have been furnished. The Schedule merely gives details village by village of the area under cultivation mentioned in form No. 10 and the body of the

agreement and also shows the quality grown in each village. This is obviously to facilitate requisitions being sent and the appellant if he has any complaint on this score can raise it in the proceedings. The banks in the body of the agreement for 1949-50 thus are insignificant. Those details were already mentioned in form 10. They do not bear upon the terms which are quite unaffected by the omissions. The form for 1949-50 season was therefore not invalid because of the omissions in the body of the agreement. The schedule was intended to record the details of the crop grown but those details were not an integral part of the agreement or its terms. The agreements for 1949-50 and 1950-51 season were therefore not invalid for this reason also.

This leaves over the absence of the signature of the party who had the custody of the document and who is now complaining of its absence. It is somewhat odd that he should complain of the lack of his own signature because it is tantamount to his making a virtue of his own lapse. The argument is therefore attempted to be put on a legal foundation and it is that s. 18(2) used mandatory language and attached penal consequences and the slightest deviation in a material respect and particularly the lack of signature of one of the contracting parties renders the agreement null and void. What the law requires is that the cane growers and the factories should, in view of the scheme, conform to certain terms and conditions which have been predetermined so that the scheme of rationalisation does not fail. For this purpose a form is prescribed and the form shows the place where the parties have to sign in token of their acceptance. Of course, the terms could be accepted orally but the section requires that the contract should be in a particular form and hence in writings. As to signatures it was held by Duke L.J. as he then was in Ruf (T.A.) & Co. v. Pauwels ([1919] 1 K.B. 660, 670.) as follows :-

> "As to the suggestion which was made that the words 'contract in writing' imports a contract made by means of a writing or writings signed by both parties, I do not think the words necessarily have that meaning. A document purporting to be an agreement may be an agreement in writing sufficient to satisfy the requirements of an Act of Parliament though it is only verified by the signature of one of the parties. Re Jones (1895) 2 Ch. 719."

The learned Attorney General, however, contends that the prescriptions of s. 18(2) being mandatory they had to be followed to the letter. He urges that in as much as the Act and the rules prescribe a penalty for breach the section cannot but be regarded as mandatory in all its parts. He assumes that the appellant may be guilty and punished but, says he, the mandatory provision not having been followed according to the letter there can be no resulting valid contract. A large number of rulings on how to distinguish between mandatory and directory provisions of law were cited before us in support of the contention. More cases were cited to show that where a form is prescribed, the formal alone must be used otherwise there is no contract. We shall only briefly refer to them.

The general rule as to which provision of law can be regarded as mandatory and which directory is stated in Maxwell on the Interpretation of Statutes at page 364 :-

> "It has been said that no rule can be laid down for determining whether the command (of the statute) is to be considered as a mere direction or instruction involving no invalidating consequence in its disregard, or as imperative, with an implied nullification for disobedience, beyond the fundamental one that it depends on the scope and object of the enactment. It may, perhaps, be found generally correct to say that nullification is the natural and usual consequence of disobedience, but the question is in the main governed by considerations of convenience and justice (R. v.

> Ingall (2) 2 Q.B.D. 208, per Lush, J.), and, when that result would involve general inconvenience or injustice to innocent persons, or advantage of those guilty of the neglect, without promoting the real aim and object of the enactment, such an intention is not to be attributed to the legislature. The whole scope and purpose of the statute under consideration must be regarded. The general rule is, that an absolute enactment must be obeyed or fulfilled exactly, but it is sufficient if a directory enactment be obeyed or fulfilled substantially."

This rule has been applied in many cases both in India and in England. In State of U.P. v. Manbodhan Lal Srivastava ([1958] S.C.R. 533.) this Court observed that no general rule can be laid down but the object of the statute must be looked at and even if the provision be worded in a mandatory form, if its neglect would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty and at the same time would not promote the main object of the Legislature, it is to be treated only as directory and the neglect of it though punishable would not affect the validity of the acts done. These observations have been followed in other cases and recently in Bhikraj v. Union of India (A.I.R. (1962) 113, 119.) it was observed that where a statute requires that a thing shall be done in a particular manner or form but does not itself set out the consequences of non-compliance the question whether the prescription of law shall be treated as mandatory or directory could only be solved by regarding the object, purpose and scope of that law. If the statute is found to be directory a penalty may be incurred for non-compliance but the act or thing done is regarded as good. It is unnecessary to multiply these cases which are based upon the statement in Maxwell which is quoted over and over again.

Now the prescription of the law in the present case was that the cane growers and the factory must enter into an agreement in a prescribed form. That form has in fact been used, only there are certain blanks and the appellant has not signed where he was expected to do so. Reliance is placed by the appellant upon a decision of the House of Lords reported in Thomas v. Kelly ((1888) 13 App. Cas. 506.) particularly the observations of Lord Macnaghten where a distinction was made between the words "in accordance with the form" and "in the form". It is argued that the Act and the rules in the present case require the agreement to be in the form prescribed and not in accordance with the form. It is submitted that a substantial compliance may be permissible when the words of the statute are "in accordance with the form" but that strict compliance is necessary when the words are "in the form" : The form in Thomas v. Kelly ((1888) 13 App. Cas. 506.) was in a different category from their form which we have. Under the statute, which prescribed the form (a bill of sale), it was provided that a bill of sale given by way of security was void unless made in accordance with the form. The form used there being not in accordance with the form prescribed was held to be void though there are observations to show that if this consequence had not been attached a departure from the statutory form in any thing which was not a characteristic of that form would not have been fatal. In the body of the bill of sale executed in that case there was no description of the things intended to be assigned and this portion was regarded as characteristic of the form prescribed.

There are some cases of this Court in which the prescribed forms have been considered. In two cases under the Representation of the People Act, 1950, the form for making a security deposit which was prescribed, was not strictly followed but it was held that it was merely a matter of form and as there was substantial compliance the penal consequences did not ensue. See Jagan Nath v. Jaswant Singh ([1954] S.C.R. 892.) and Kamaraja Nadar v. Kunju Thevar ([1959] S.C.R. 583.), In Hari Vishnu Kamath v. Syed Ahmed Ishaque ([1955] 1 S.C.R. 1104.) votes not given in the form prescribed were held to be invalid because the form prescribed was considered to be essential and an intention of the voter expressed otherwise than in the form prescribed was considered to be an

intention not expressed at all. In Radhakisson Gopikisson v. Balmukund Ramchandra ([1932] L.R. 60 I.A. 63.) a by-law provided that contract between agents and their constituents shall be in the form prescribed. It was held by the Privy Council that a literal compliance with the forms was not essential if the contract contained all the terms and conditions set out in the form but it was otherwise if it did not.

In the present case the form prescribed set out a number of conditions and these have all been incorporated in the agreement which has been executed by the society. In other words the form has been used. There is no deviation from the prescribed form except in respect of the three defects which we have mentioned earlier. We have pointed out that the failure to execute the agreement in the form is made an offence but no other consequence is indicated if the form is not followed. The utmost that can be said is that if the form which was used included conditions which were at variance with the conditions in the prescribed form a contract might not have resulted. But we need not express any opinion on this, because in this case the terms as stated in the prescribed form are the terms in the form used. We have pointed out that no consequence attaches to the failure to observe the form except punishment by fine and s. 18(2) is capable of being read as directory. Even if it be read as mandatory we have shown already that the failure of the appellant to sign the form is not a matter of which he can take advantage regard being had to his own conduct. The blanks also do not matter in view of the existence of form No. 10 which supplied the information accidentally omitted from the agreement. The form is also sufficiently identified by the signature on behalf of the Society and it has been acted upon not only by the Society but also by the appellant who is complaining of the want of signature. In our opinion, the agreement was binding. It may be pointed out that the arbitration clause in the agreement was enforceable, if agreed to, even without the signature of the appellant as it is settled law that to constitute an arbitration agreement in writing it is not necessary that it should be signed by the parties and it is sufficient if the terms are reduced to writing and the agreement of the parties thereto is established. See Jugal Kishore Rameshwardas v. Mrs. Goolbai Hormusji ([1955] 2 S.C.R. 857.).

In our opinion even if the section be held to be mandatory to the extent that the terms as prescribed should appear in writing, that is complied with in this case. There was thus a binding contract between the parties and the dispute was to be resolved as required by Rule 23.

The appellant has an alternative argument by which he challenges the validity of Rule 23 itself. He says that Rule 23 permits the Cane Commissioner to follow two different methods for the adjudication of the disputes. One method is that the Cane Commissioner can himself hear and decide the dispute and the other is that he can direct the parties to have their dispute decided by arbitration. It is said that Rule 23 thus confers on the Cane Commissioner an arbitrary power to proceed with some cases in one way and in some cases in another because there is no guiding principle. It is also contended that one of the procedures, (namely the decision by the arbitrators) gives a right of appeal from the award to the Commissioner of the Division while there is no right of appeal in the other (namely, decision by the Cane Commissioner) and there is thus discrimination between those persons whose case is decided by the Cane Commissioner and those whose case is decided by arbitration. It is contended that the Commissioner is given an arbitrary power to discriminate between one case and another in as much as he can decide one case himself and refer another to arbitration and the rule thus offends against the equal protection clause contained in Art. 14 of the Constitution. Reference is made to those cases in which this Court has ruled that in such circumstances the law is void. It is also contended that Rule 23 contains a provision for appeal but sub-r. (6) providing for an appeal goes beyond the power conferred by s. 30 which confers the rule-making power on the Provincial Government. It is also said that sub-r. (6) is not severable from the

rest of the Rule because the Provincial Government would not have made a rule for arbitration in that form if it was not able to enact a rule giving a right of appeal to an aggrieved party when there was arbitration. It is thus contended that sub-r. (6) allowing the right of appeal should be struck down as ultra vires the Provincial Government and the whole rule because sub-r. (6) is not severable from the rest of the rule.

The arguments are somewhat conflicting. If sub-r. (6) was ultra vires the Provincial Government and must be struck down then one of the reasons on which the complaint of discrimination is based must disappear, provided the sub-r. is severable, because the decision in either case then would be final. It is only if it is unseverable that other considerations would arise. It is therefore necessary to see if s. 30 of the Act confers power to provide for appeal from the award of the arbitrators. An appeal is no doubt a creature of statute and does not lie in the nature of things. Under the general law relating to arbitration there is no appeal against an award. The power to provide for an appeal by a rule must, therefore, flow from s. 30 of the Act. Section 30 first confers a general power to make rules and then enumerates, as illustrative of the general power, certain topics on which rules in particular may be made. The general power is conferred by the first sub-section which reads :-

> "The Provincial Government may make rules to carry out the provisions of this Act."

It is argued by the appellant that this sub-section does not use the common formula "carry out the purposes of this Act" and the Provincial Government could only provide for an appeal if a provision enabling it to do so existed in the Act, and no such provision regarding appeals is to be found. The other side relies upon sub-s. (2) which says that rules may provide for :

> "(u) the reference to the Cane Commissioner of disputes relating to the supply of Cane for decision of if he so directs to arbitration, the mode of appointing an arbitrator or arbitrators, the procedure to be followed in proceedings before the Cane Commissioner or such arbitrator or arbitrators, and the enforcement of the decisions of the Cane Commissioner or the awards of arbitrators."

It is contended that this clause confers on the rule-making authority the power to make rules regarding disputes relating to the supply of cane for decision by arbitration and being itself a provision of the Act, rules can be made to carry out this provision. The appellant however contends that clause (u) mentions only four matters and the provision of an appeal is not one of them. In our opinion, clause (u) conferred a general power to make rules for the resolving of disputes either by the Cane Commissioner or if he so directs by arbitration and to give effect to the latter part of this provision arbitration with an appeal from the arbitrator's decision would be giving effect to the provisions as a whole. In this sense sub-r. (6) providing for an appeal against the decision of the arbitrators must be considered as a rule giving effect to the provision of s. 30(2)(u) providing for the resolving of disputes by arbitration. Sub-Rule (6) was thus within the rule-making power of the Provincial Government and it is unnecessary to discuss whether it is severable or not from the rest of the rule.

We shall now pass on to the main contention in this case, that Rule 23 provides for two different types of procedures to be followed at the option of the Cane Commissioner. If it could be said that the rule, as framed, allows the Cane Commissioner to discriminate between one party and another, then the rule must offend Article 14. We shall, therefore, see whether there is any room for discrimination at the hands of the Cane Commissioner. It is necessary in this connection to see first whether the Cane Commissioner can compel a party to go to arbitration against his will. The rule

says that any dispute touching an agreement shall be referred to the Cane Commissioner for decision or if he so directs to arbitration. It also provides that no suit shall lie in a civil or revenue court in respect of any such dispute. At first sight, it does look as if the Cane Commissioner can pick and choose between two disputes of like nature, keeping one two himself and sending another for decision by a sole arbitrator or Board of arbitrators. But the purport of the first sub-Rule is that an arbitration can be with the permission of the Cane Commissioner and parties cannot go to arbitration without the permission of the Cane Commissioner. The rest of the rule shows that there can be no arbitration without the consent of the parties. If the reference to arbitration is purely on a voluntary basis then there can be no complaint that two different procedures are provided for the solution of the same kind of disputes. If parties cannot be compelled to go to arbitration and refuse to go to arbitration then the Cane Commissioner must decide the dispute himself. If this view was correct then there is but one mode of deciding disputes, namely, by the Cane Commissioner and an alternative mode, no doubt, under the direction of the Cane Commissioner but only if the parties agree, by arbitration. Therefore, the provisions regarding arbitration cannot be compared with the procedure before the Cane Commissioner, and the provision for an appeal in the former but prima facie not in the latter loses all significance. The procedure of arbitration with the appeal included really applies only if both sides accept that procedure willingly. To determine whether the procedure involving arbitration is voluntary or not we shall have to examine Rule 23 in some detail but before we do so we shall advert to s. 46 and three other sections of the Arbitration Act. That section provides :-

> "The provisions of this Act, except sub-section (1) of section 6 and sections 7, 12, 36 and 37, shall apply to every arbitration under any other enactment for the time being in force, as if the arbitrations were pursuant to an arbitration agreement and as if that other enactment were an arbitration agreement, except in so far as this Act is inconsistent with that other enactment or with any rules made thereunder."

It was admitted before us by the learned counsel for the appellant that s. 46 in its first part does not apply but it was argued that s. 8, 9 and 10 of the arbitration Act must be considered in deciding whether the arbitration is purely on a voluntary basis or not. We have thus to compare the provisions of Rule 23 with those of these sections to find out if the rule prevails over the sections.

Rule 23(2) provides that when the Cane Commissioner directs the reference of the dispute to arbitration "it shall be referred to a sole arbitrator acceptable to the parties concerned". It is thus clear that arbitration by a sole arbitrator can only be by consent of parties. New if the matter were governed by s. 8 of the Arbitration Act it would be open to any party to serve the other party with a written notice to concur in the appointment and after a lapse of a fortnight the Court could be moved to make the appointment. This provision is clearly inconsistent with what happens in the same circumstances under the Rule. The Rule provides : in case no sole arbitrator is acceptable to both parties the dispute in question shall be referred to a Board of Arbitration, consisting of one representative of each party and an umpire acceptable to both representatives. The Board is a three-member board and this eliminates from consideration s. 8. It also excludes s. 9, of the Arbitration Act which deals with situations in which the reference is to two arbitrators and if one party fails to appint his arbitrator the other party after appointing his own arbitrator can give a notice and the appointed arbitrator becomes the sole arbitrator. Under Rule 23 this cannot happen. Section 9 is thus inconsistent with a three-member board which is the sine qua non of the Rule. The Rule provides that each party must appoint his own arbitrator and then the umpire is to be chosen by the two representatives. The Cane Commissioner comes into the picture again when the representatives are unable to agree regarding the umpire. But there is an initial stage at which any of the parties can

frustrate the arbitration by declining in limine to select his own arbitrator. The arbitration must therefore be by agreement or it cannot take place at all. It remains to mention s. 10. That section has no relation to the appointment of arbitrators to begin with. It deals with the position of the third arbitrator chosen by two arbitrators appointed by the parties. That stage does not reach at all if one of the parties does not appoint his arbitrator.

It is thus quite clear that ss. 8, 9 and 10 of the Arbitration Act do not apply being inconsistent with Rule 23. It is also quite clear that the decision by the Commissioner is the normal mode of disposing of disputes regarding the supply of sugar cane. The Cane Commissioner has the power to direct that the dispute be referred to arbitration but the rules show that there can be no arbitration unless the parties themselves agree. If it is to a sole arbitrator then the sole arbitrator must be acceptable to the parties concerned. If parties do not agree about the sole arbitrator the arbitration is by a Board of arbitrators consisting of one representative of each party and an umpire acceptable to both representatives. The Rule stops short of providing what is to happen if a party does not appoint his representative and the Arbitration Act furnishes no answer because it is inconsistent with the Rule. It is, therefore, obvious that the arbitration must be with the consent of parties and they must express this consent either by selecting an agreed sole arbitrator or by appointing their representative on the Board. This choice is entirely theirs. If the parties do not agree thus far there can be no arbitration at all and the case must be disposed of by the Cane Commissioner himself. Where there are two procedures one for every one and the other if the disputants voluntarily agree to follow it, there can be no discrimination because discrimination can only be found to exist if the election is with someone alse who can exercise his will arbitrarily.

It remains to consider an argument which was raised by Mr. Veda Vyasa at the end of the hearing but which was not urged by the learned Attorney General and it is that there may be discrimination in as much as the Cane Commissioner may refer some disputes to arbitration and keep some to himself even though in all__ of them parties wish for arbitration. In other words, the discrimination is said to exist the other way round that is to say not because there are two modes from which one may be selected arbitrarily but because parties in some cases may be deprived of their election to proceed by arbitration. As we have said the normal mode is decision by the Cane Commissioner with a possibility of arbitration by the agreement of parties. It is most unlikely that the Cane Commissioner would decline to refer a dispute to arbitration where the parties agree that it should be so referred. Where the Cane Commissioner declines to make a reference the question may arise whether he could not be compelled to do so and also whether his decision given against the wishes of the parties would be binding on the parties. But we cannot say that the rule offends Article 14 because the Cane Commissioner may himself decide a dispute which the parties wish to go to arbitration. In our opinionhe agreement was a binding agreement and Rule 23(6) of the U.P. Sugar Factories Control Rules 1938 was not ultra vires the Provincial Government and the Rule as a whole does not offend Article 14 of the Constitution. This appeal must therefore fail. It is dismissed with costs.

RAGHUBAR DAYAL, J. -

I have had the advantage of perusing the judgment of my learned brother Hidayatullah, J., and I agree that there was a binding contract between the parties and, in view of cl. 10, the dispute was capable of being referred to arbitration. I however, do not agree that r. 23 of the U.P. Sugar Factories Control Rules, 1938 is not discriminatory.

Sub-r. (1) of r. 23 provides that the dispute be referred to the Cane Commissioner for decision or, if

he so directs, for arbitration, and thus gives discretion to the Cane Commissioner to direct that the dispute touching the agreement be referred to arbitration. There is nothing to guide his discretion. The procedure contemplated seems to be that when a party approaches the Cane Commissioner for the settlement of the dispute, the Cane Commissioner may either proceed to decide the dispute himself or may direct the party to go to arbitration.

There is nothing in this sub-rule to suggest that the Cane Commissioner can refer the dispute to arbitration by arbitrators only when the parties agree to have the dispute so settled. In the absence of such a provision, the discretionary power of the Cane Commissioner cannot be restricted. There seems to be no justification for taking the clause 'if he so directs' to be 'if he so directs on the parties agreeing to have the dispute settled by arbitrators'.

Clause 10 of the agreement in Form 12, together with the direction of the Cane Commissioner, amounts to the arbitration agreement. Once the Cane Commissioner has given the necessary direction the dispute is to go to the sole arbitrator acceptable to the parties concerned. This is what sub-r. (2) provides. In case no sole arbitrator is acceptable to both the parties, the dispute is to be referred to a Board of Arbitration. The parties can thus avoid arbitration by the sole arbitrator by their not agreeing to any particular person to act as sole arbitrator.

If the parties do not accept any sole arbitrator each of the parties has to appoint one representative to the Board of Arbitration and the representatives so appointed, then appoint an umpire acceptable to them. It is suggested for the respondent that in case a party does not wish the matter to be referred to the Board of Arbitration, it can easily avoid it by not appointing a representative and that in that contingency, the Cane Commissioner will have to decide the dispute himself. If the parties agree to appoint a representative, the reference of the dispute to the Board of Arbitration would be a reference with the consent of the parties and therefore no question of discrimination can arise, even if the incidents of the dispute decided by the Cane Commissioner himself and by the Board of Arbitration be different.

Sub-r. (2) or any other sub-rule of r. 23, does not provide what is to happen when any of the parties does not appoint a representative. It does not necessarily follow from the absence of such a provision that the dispute goes back to the Cane Commissioner for decision or that the Cane Commissioner is empowered to withdraw his direction of referring the dispute to arbitration. Rule 23 has no such express provision in this regard, though sub-r. (5) expressly provides for the Cane Commissioner to take charge of the dispute afresh in another contingency. Once the Cane Commissioner has directed reference of the dispute to arbitration, he, in the absence of any provision in the rules empowering him to do so, is not to withdraw that direction and take over the decision of the dispute himself. The omission to provide for such a contingency can only mean that the rule does not contemplate a party not nominating his representative. This appears to be more reasonable to suppose than to hold that the reference of the dispute reverts to the Cane Commissioner who had already decided not to decide the dispute himself.

Further, the party's nominating a representative would not make the reference to arbitration a voluntary Act. The parties have no choice. They had to enter into an agreement in Form 12. Their agreeing to cl. 10 of the agreement is not voluntary but is due to statutory requirement. So is their agreement to nominate representative to the Board of Arbitration as they cannot go to a Civil Court for the decision of the dispute in view of sub-r. (1).

There is nothing in r. 23 to indicate that the decision of the dispute by the Cane Commissioner is the

normal procedure contemplated by the rule. Of course, the Cane Commissioner can act as an umpire if he so desires in case the two representatives appointed by the parties to the Board of Arbitration are unable to elect an umpire within a fortnight of the reference to them. In case the Board of arbitration does not give the award within a time fixed by the Cane Commissioner, the dispute is to be deemed to have been freshly referred to the Cane Commissioner, sub-r. (5) in these circumstances, empowers the Cane Commissioner to decide the dispute himself or to appoint another arbitrator or arbitrators for the purpose.

It is clear from the various provisions of r. 23 that there is a difference in the procedure for the dispute being decided by the Cane Commissioner and the dispute being decided by the arbitrator or Board of Arbitration. In the former case, the decision of the Cane Commissioner is final and enforcible by the Civil Court referred to in sub-r. (8). In the latter case, the award of the sole arbitrator or the Board of Arbitration is appealable to the Commissioner of the Division in which the factory is situated and the Commissioner's order is final and enforcible by the Civil Court. It follows that the procedure provided by r. 23 for decision of the dispute touching the agreement is such that parties similarly situated may have the dispute decided by different persons and by different procedures according to the inclination of the Cane Commissioner whose discretion in this matter is uncontrolled by any guiding principles. The rule therefore offends against Art. 14 of the Constitution and is void.

It is also contended that sub-r. (6) providing an appeal to the Commissioner against the order of the arbitrator or Board of Arbitration is void as the State Government had no power to make a provision about appeal. Sub-s. (1) of s. 30 of the U.P. Sugar Factories (Control) Act empowers the State Government to make rules to carry out the provisions of that Act. There is nothing in the Act to the effect that provision be made for an appeal against the award of the arbitrator or arbitrators. A rule providing for appeal against the order of the arbitrator or arbitrators is therefore not a rule to carry out any provision of the Act. Clause (u) of sub-s. (2) of s. 30 states that the State Government may make rules to provide for the reference to the Cane Commissioner of disputes relating to the supply of cane for decision or, if he so directs, to arbitration, the mode of appointing arbitrator or arbitrators, the procedure to be followed in proceedings before the Cane Commissioner and such arbitrator or arbitrators and the enforcement of the decisions of the Cane Commisioner or of the award of the arbitrators. It is true that these provisions relate to the settlement of disputes between the parties, but that by itself does not mean that the State Government can provide for appeals against the orders of the arbitrator or arbitrators. These provisions of cl. (u) do not expressly state that the rule can provide for an appeal against the award of the arbitrator. Provisions of cl. (u) make no reference either for the provision of an appeal or for the procedure to be followed by the appellate Tribunal, or for the enforcement of the order of the appellate Tribunal. The absence of such reference establishes that cl. (u) did neither contemplate nor empower the State Government to make rules providing an appeal against the award of arbitrator or arbitrators. Further, the order of the Commissioner is not an award and this is recognised by the language of sub-r. (8) of r. 23 which refers to the decision of the Cane Commissioner to the award of the arbitrator or arbitrators and to the Commissioner's order in appeal. The provision for an appeal in sub-r. (6) therefore is not to be treated as something ancillary to the provision for settling disputes between the parties by the Cane Commissioner for which object cl. (u) empowered the State Government to make rules with respect to certain matters. The right to appeal is a substantive right and is to be conferred on a party by or under the Act. The Act must either provide for the appeal or enact that the rules framed thereunder may provide for appeals against certain orders of decisions. In the absence of such a provision in the Act, the rules cannot provide for appeals. I am therefore of opinion that sub-r. (6) is void.

It is true that if sub-r. (6) is struck down as void, there would not be any substantial difference between the procedure to be followed by the Cane Commissioner or the Arbitrator or Board of Arbitrators in deciding the dispute, but it does, not necessarily follow from this that r. 23 minus sub-rule (6) and other incidental deleted provisions, is valid. It is difficult to say that sub-r. (6) is severable. The existence of sub-r. (6) and other consequential provisions makes it clear that the State Government which made r. 23 provided for the decision of the dispute by the arbitrator or arbitrators subject to an appeal against the award. It will be sheer speculation to say that the State Government would have made provision for the dispute to be settled by arbitrators if it had known that it could not make any provision for an appeal against that order. I am therefore of opinion that the entire r. 23 is to be struck down both because in its present form it is discriminatory and because sub-r. (6) is void in asmuch as the State Government had no power to enact it and it is not servable from the rest of the rule.

I would therefore allow the appeal with costs and order the issue of a writ quashing the proceedings pending before the Cane Commissioner and prohibiting him to continue those proceedings.

BY COURT : In accordance with the opinion of the majority, this Appeal is dismissed with costs.

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