The Naihati Jute Mills Ltd.

Vs

Khyaliram Jagannath

Civil Appeal No. 44 of 1965

(J. C. Shah, S. M. Sikri, J. M. Shelat JJ)

19.10.1967

JUDGMENT

SHELAT, J. -

This appeal by special leave is directed against the judgment and order of the High Court of Calcutta rejecting the application by the appellants for setting aside the award in Award case No. 70 of 1959 passed by the Arbitration Tribunal constituted by the Bengal Chamber of Commerce.

The said Arbitration arose out of a contract dated July 7, 1958 whereunder the appellants agreed to purchase and the respondents agreed to sell two thousand bales of Saidpur N.C. Cuttings. The contract was in the standard from prescribed by the Indian Jute Mills Association. It provided that shipment or rail despatch from agencies was to be made during August and/or September and/or October and/or November, 1958. As the import of Pakistan jute required an import licence the contract provided :

> "Buyers to provide the sellers with the letters of authority and sellers to open letters of credit. If buyers fail to provide the sellers with import licence within November 1958 then the period of shipment would be upto December, 1958 and the price mentioned in the contract would be increased by 50 nP. If buyers fail to provide licence by December 1958 then the contract would be settled at the market price prevailing on January 2, 1959 for goods of January and February 1959 shipment."

One of the printed terms provided :-

> "Buyers shall not however be held responsible for delay in delivering letters of authority or opening letters of credit where such delay is directly or indirectly caused by or due to act of God, war, mobilisation, demobilisation, breaking off trade relations between Governments, requisition by or interference from Government or force majeure. In any of the aforesaid circumstances whereby buyers are prevented from delivering letters of authority or opening letters of credit within one month from the date of the contract, there may be a further extension of time (the delivery period to be extended accordingly) by mutual agreement between the buyers and the sellers otherwise the contract shall be deemed to be cancelled and sellers shall have no claim whatsoever against the buyers."

The contract also contained an arbitration clause whereunder all disputes and difference and/or claims arising/at of and/or concerning and/or in connection with and/or in consequence of or

relating to the contract whether the contract has been terminated or purported to be terminated or completed were to be referred to the arbitration of the Bengal Chamber of Commerce under their rules for the time being in force. On August 8, 1958 the appellants applied to the Jute Commissioner, Calcutta, for an import licence. On August 19, 1958 the Administrative Officer refused to certify the licence on the ground that the appellants had sufficient stock to carry on their factory for some months more. On August 26, 1958 the Licencing Authority refused to issue the licence. On November 29, 1958 the appellants requested the Jute Commissioner to certify the issue of a licence stating that by that time their stock had been considerably reduced. On December 11, 1958 the Jute commissioner refused to issue the licence and asked the appellants to meet their requirements from purchase of Indian jute. The respondents thereafter by their attorney's letter claimed damages from the appellants on the ground that the appellants had failed to furnish the licence provided by the contract. The appellants disclaimed any liability under the said contract and thereupon the disputes between the parties were referred to the said Tribunal. The Tribunal passed an award holding that the appellants failed to carry out their part of the contract and were liable to pay damages assessed at Rs. 34,000/- and interest thereon. Thereupon the appellants filed the said application to set aside the award.

In their said application, the appellants raised the following contentions; (a) that they could not be held to have committed breach of the contract as they had done all that could be expected of them to obtain the licence; (b) that owing to the intervening causes, in the present case a change in the policy of the Government, which the parties could not foresee when they entered into the contract, the contract become impossible of performance and that therefore under s. 56 of the Contract Act the contract ought to have been treated as void and (c) that the arbitrators had no jurisdiction as the arbitration clause in the said contract perished along with the contract. The respondents, on the other hand, denied that the performance of the contract become impossible, and asserted that in any event the appellants had taken upon themselves the absolute obligation to procure the licence and lastly that even if the contract was discharged by frustration, the arbitration clause would still survive as there would be disputes and differences between the parties as to whether (i) there was frustration and (ii) even if so, the consequences thereof. They pleaded that the contract could not be construed to mean that an unilateral allegation by one of the parties that there was frustration would put an end to the contract. If would be for the Arbitrators to decide whether the said contract was discharged by frustration.

The learned Single Judge who heard the application found that the contract could not be said to have been discharged by frustration, that the arbitration clause was wide enough to include the dispute whether there was frustration or not, and that the arbitrators were competent to adjudicate such a dispute. He also found in answer to the appellants' allegation that the arbitrators were guilty of legal misconduct that the appellants had failed to prove any such legal misconduct. The Division Bench who heard the appeal from the said order agreed with the learned Single Judge and dismissed the appeal. Hence this appeal.

> Section 56 of the Contract Act inter alia provides that a contract to do an act which, after the contract is made, becomes impossible, or by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful. It also provides that where one person has promised to do something which he knew, or, with reasonable diligence might have known, and which the promisee did not know to be impossible or unlawful, such a promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance. As envisaged by S. 56 impossibility of performance

would be inferred by the Courts from the nature of the contract and the surrounding circumstances in which it was made that the parties must have made their bargain upon the basis that a particular thing or state of things would continue to exist and because of the altered circumstances the bargain should no longer be held binding. The courts would also infer that the foundation of the contract had disappeared either by the destruction of the subject matter or by reason of such long interruption or delay that the performance would really in effect be that of a different contract for which the parties had not agreed. Impossibility of performance may also arise where without any default of party the contractual obligation had become incapable of being performed because the circumstances in which performance was called for was radically different from that undertaken by the contract. But the common law rule of contract is that a man is bound to perform the obligation which he has undertaken and cannot claim to be excused by the mere fact that performance has subsequently become impossible. Court in England have, however, evolved from time to time various theories to soften the harshness of the aforesaid rule and for that purpose have tried to formulate the true basis of the doctrine of discharge of contract when its performance is made impossible by intervening causes over which the parties to it had no control. One of such theories is what has been called the theory of implied term as illustrated in F.A. Tamplin Steamship Co. Ltd. v. Anglo-Mexican Petroleum Products Co. Ltd. ([1916] 2 A.C. 379) where Lord Loreburn stated :

"A court can and ought to examine the contract and the circumstances in which it was made, not of course to vary, but only to explain it, in order to see whether or not from the nature of it the parties must have made their bargain on the footing that a particular or a state of things would continue to exist. And if they must have done so, then a term to that effect would be implied; though it be not expressed in the contract."

He further observed :-

"If is in my opinion the true principle, for no court has an absolving power, but it can infer from the nature of the contract and the surrounding circumstances that a condition which was not expressed was a foundation on which the parties contracted ..... Were the altered conditions such that, had they thought of them, they would have taken their chance of them, or such that as sensible men they would have said, "if that happens, of course, it is all over between us."

The same theory in a slightly different form was expressed by Lord Watson in Dahl v. Nelson, Donkin & Co. ([1881] 6 A.C. 38) in the following words :-

"The meaning of the contract must be taken to be, not what the parties did intend (for they had neither thought nor intention regarding it), but that which the parties as fair and sensible men, would presumably have agreed upon if, having such possibility in view, they had made express provision as to their several rights and liabilities in the event of its occurrence."

In the first case the term is a genuine term, implied though not expressed; in the second it is a fiction, something added to the contract by the law. (Anson, Principles of the English Law of Contract, 22nd ed. 464) It appears that the theory of implied term was not found to be quite

satisfactory as it contained elements of contradiction. For, if the parties foresaw the circumstances which existed at the date of performance they would provide for them in the contract; if they did not, that meant that they deliberately took the risk and therefor no question of an implied term could really arise. In Russkoe v. John Strik & Sons Ltd. ([1922] 10 LI.L.R. 214 (quoted at p. 466 in Anson's Law of Contract, 22nd ed.)) Lord Atkin propounded the theory of disappearance of the foundation of contract stating that he could see no reason why if certain circumstances, which the court would find, must have been contemplated by the parties as being of the essence of the contract and the continuance of which must have been deemed to be essential to the performance of the contract, the court cannot say that when these circumstances cease to exist, the contract ceases to operate. The third theory is that the court would exercise power to qualify the absolutely binding nature of the contract in order to do what is just and reasonable in the new situation. Denning L. J. in British Movietones Ltd. v. London and District Cinemas Ltd. ([1951] 1 K.B. 190) expounded this theory as follows :-

> "Even if the contract is absolute in its term, nevertheless, if it is not absolute in intent, it will not be held absolute in effect. The day is done when we can excuse an unforeseen injustice by saying to a the sufferer."It is your own folly. You ought not to have passed that form of words. You ought to have put in a clause to protect yourself." We no longer credit a party with the foresight of a prophet or his lawyers with the draftsmanship of a Chalmers."

This theory would mean that the Court has inherent jurisdiction to go behind the express words of the contract and attribute to the Court the absolving power, a power consistently held not to be inherent in it. The House of Lords in the appeal from that decision [reported in 1952 A.C. 166] discarded the theory. In more recent times the theory of a change in the obligation has come to be more and more generally accepted. Lord Radcliffe, the author of this theory. In Davis Contractors v. Fareham U.D.C. ([1956] A.C. 166) formulated it in following words :-

> "Frustration occurs whenever the law recognises that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract."

It is not hardship or inconvenience or material loss which brings about the principle of frustration into play. There must be a change in the significance of obligation that the thing undertaken would if performed, be a different thing from that which was contracted for.

These theories have been evolved in the main to adopt a realistic approach to the problem of performance of contract when it is found that owing to causes unforeseen and beyond the control of the parties interning between the date of the contract and the date of its performance it would be both unreasonable and unjust to exact its performance in the changed circumstances. Thought none of them was fully accepted and the court construed the contracts coming before them applying one or the other of them as appearing to be more rational than the other, the conclusions arrived at were the same. The necessity of evolving one or the other theory was due to the common law rule that courts have no power to above a party to the contract from his obligation. On the one hand, they were anxious to preserve intact the sanctity of contract while on the other the Courts could not shut their eyes to the harshness of the situation in cases where performance become impossible by causes which could not have been foreseen and which were beyond the control of parties.

Such a difficulty has, however, not to be faced by the courts in this country. In Ganga Saran v. Ram Charan ([1952] S.C.R. 36) this Court emphasised that so far as the courts in this country are concerned they must look primarily to the law as embodied in sec. 32 and 56 of the Contract Act. in Satyabrata Ghose v. Mugneeram ([1954] S.C.R. 310) also, Mukherjee J. (as he then was) stated that sec. 56 laid down a rule of positive law and did not leave the matter to be determined according to the intention of the parties. Since under the Contract Act a promise may expressed or implied, in cases where the court gathers as a matter of construction that the contract itself contains impliedly or expressly term according to which it would stand discharged on the happening of certain circumstances the dissolution of the contract would take place under the terms of the contract itself and such cases would be outside the purview of sec. 56. Although in English law such cases would be treated as cases of frustration, in India they would be dealt with under sec. 32. In a majority of cases, however, the doctrine of frustration is applied not on the ground that the parties themselves agreed to an implied terms which operated to release them from performance of the contract. The Court can grant relief on the ground of subsequent impossibility when it finds that the whole purpose or the basis of the contract was frustrated by the intrusion or occurrence of an unexpected event or change of circumstances which was not contemplated by the parties at the date of the contract. There would in such a case be no question of finding out an implied term agreed to by the parties embodying a provision for disgrace because the parties did not think about the matter at all nor could possibly have any intention regarding it. When such an event or change of circumstances which is so fundamental as to be regarded by law as striking at the root of the contract as a whole occurs it is the courts which can pronounces the contract to be frustrated and at an end. This is really a positive rule enacted in sec. 56 which governs such situations.

The question then is, was there a change in the policy of the Government of India of a total prohibition of import of Pakistan jute as contented by the appellants which was not foreseen by the parties and which intervened at the time of performance and which made the performance of their stipulation to obtain a licence impossible ? It is clear from the circulars produced during the trial that as early as March 1958 the Government of India had issued warning that import of Pakistan jute would be permitted to the absolute minimum and that the jute mills should satisfy their needs by purchasing Indian jute. It appears that at the time when the parties entered into the contract the policy was to grant licence in the ratio of 5:1, that is, if an importer had bought 500 maunds of Indian jute he would be allowed a licence to import 100 maunds of Pakistan jute. This policy is indicated by the Circular dated July 17, 1958 issued by the Indian Jute Mills Association to its members. Such licences would be issued to mills who had stock of less than two months' consumption. As already stated, the appellants apply on August 8, 1958 for an import licence for 14,900 maunds and the Jute Commissioner declined to certify that application on the ground that they held stock sufficient to last them for some months. In November 1958, they applied again, this time stating that their stock had been reduced and in December 1958 they were told to buy Indian jute. The said Circular appears to show that the Government had not placed a total embargo on import of Pakistan jute. At any rate, such an embargo was not proved by the appellants. It appears, on the contrary, from the documents on record that the policy of the Government was that the licencing authorities would scrutinies the case of each application its merit.

What is however important in cases such as the one before us is to ascertain what the parties themselves contemplated at the time of entering the contract. That the appellants were aware that licence were not issued freely is evident by the provision of the contract themselves which provide that if the appellants failed to furnish to the respondents the import licence in November 1958 the period of shipment was to be extended upto December 1958 and the price in that event would be enhanced by 50 nP. The contract further provided that if the appellants were not able to furnish the

licence by December 1958 they would pay damages at the market rate prevailing on January 2, 1959 for January-February shipment goods. These clause clears indicate that the appellants were conscious of the difficulty of getting the licence in time and had therefore provided in the contract for excusing delay from November to December 1958 and for the appellants' liability to pay damages if they failed to procure it even in December 1958. The contract, no doubt, contained the printed term that the buyers would not be responsible for delay in delivering the licence but such delay as therein provided was to be excused only if occurred by such reasons as an act on God, war, mobilisation etc., and other force majeure. It is nobody's case that the performance became impossible by reason of such force majeure. As already stated when the appellants applied for the licence, the authorities refused to certify their application because they held at that time stock for more than 2 months. It is therefore manifest that their application was refused because of a personal disqualification and not by reason of any force majeure. Since this was the position there is no question of the performance becoming impossible by reason of any change in the Government's policy which could not be foreseen by the parties. No question also would arise of importing an implied term into the contract.

Assuming, however, that there was a chance of policy and that the Government in the intervening period had decided to place an embargo on import of Pakistan jute the question would still be whether the appellants were relieved that from liability for their failure to deliver the licence. A contract is not frustrated merely because the circumstances in which it was made are altered. The Courts have no general power to absolve a party from the performance of his part of the contract merely because its performance has becomes onerous on account of an unforeseen turn of events. (M/s Alopi Parshad & Sons v. Union of India [1960] 2 S.C.R. 793 at p. 808) The question would depend upon whether the contract which the appellants entered into was they would make their best endeavours to get the licence or whether the contract was that they would obtain it or else be liable for breach of that stipulation. In a case falling under the former category, Lord Reading C.J. in Anglo-Russian Merchants-Traders v. John Batt & Co. ([1917] 2 K.B. 679) observed that there was no reason why the law should imply an absolute obligation to do that which the law forbids. It was so said because the Court construed the contract to mean only that the sellers there were to make their best efforts to obtain the requisite permits. As a contract to such a case there are the cases of Pattahmull Rajeshwar v. K. C. Sethia ([1951] 2 All. E.R. 352) and Peter Cassidy Seed Co. v. Osuustickaanppa ([1957] W.L.R. 273) where the courts have observed that there is nothing improper or illegal for a party to take upon himself an absolute obligation to obtain a permit or a licence and in such a case if he took the risk he must be held bound to his stipulation. As Lord Sumner in Bank Lime Ltd. v. Capel (A) Co. Ltd. ([1919] A.C. 435 at p. 455) said :-

> "Where the contract makes provision (that is, full and complete provision, so intended) for a given contingency it is not for the court to import into the contract some other different provisions for the same contingency called by different name."

In such a case the doctrine of discharge by frustration cannot be available, nor that of an implied term that the existing state of affairs would continue at the date of performance. The reason is that where there is an express term the court cannot find on construction of the contract an implied term inconsistent with such express term.

In our view, the provision in the contract that whereas the delay to provide a licence in November 1958 was to be excused but that the contract was to be settled at the market rate prevailing on January 2, 1959 if the appellants failed to deliver the licencee in December 1958 clearly meant that the appellants had taken upon themselves absolutely the burden of furnishing the licence latest by

the end of December 1958 and had stipulated that in default they would pay damage on the basis of price prevailing on January 2, 1959. That being the position the defence of impossibility of performance or of the contract being void for that reason or that the court should spell out an implied term in the contract would not be available to them.

In the view that we take that the said contract cannot be said to be or to have been void and that in any event the stipulation as to obtaining the import licence was absolute, the question that the arbitration clause perished along with the contract and consequently the arbitrators had no jurisdiction cannot arise. But assuming that the appellants had established frustration even then it would not be as if the contract was a initio void and therefore not in existence. In cases of frustration it is the performance of the contract which comes to an end but the contract would still be in existence for purposes such as the resolution of disputes arising under or in connection with it. The question as to whether the contract became impossible of performance and was discharged under the doctrine of frustration would still have to be decided under the arbitration clause which operates in respect of such purposes. (Union of India v. Kishorilal) ([1960] 1 S.C.R. 514).

Mr. B. Sen for the appellants also raised two other questions, as to the legal misconduct on the part of the arbitrators and as regards interest on damages awarded by them. We need not however say anything about these two question as ultimate they were not pressed by him.

The last contention raised by him was that the arbitrators awarded damages on the basis of the market rate at Rs. 51 per maund instead of Rs. 65 which was the export price fixed by the Government of Pakistan. The argument was that such a basis was contrary to the public policy laid down by the Government of Pakistan and it would not be expedient on our part to give our imprimatur to an infringement by the arbitrators of such a policy. There is, in our view, no merit in the argument. The Government of Pakistan cannot lay down any public or economic policy for this country. If the arbitrator found the prevalent rate on January 2, 1959 in Calcutta to be Rs. 51 a maund there can be no objection to their adopting that rate for adjudicating the quantum of damages.

The appeal fail and is dismissed with costs.

B.R.K.P.S.

Appeal dismissed.

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