State of Gujarat

Vs

Manilal Joitaram & Co.

Criminal Appeal No. 250 of 1964

(Shelat, M. Hidayatullah, C. A. Vaidialingam JJ)

08.11.1967

JUDGMENT

HIDAYATULLAH, J. -

In this appeal by certificate under Art. 134(1)(c) of the Constitution the State of Gujarat appeals against the judgment, March 14, 1963, of the High Court of the State acquitting the respondents of diverse offences under the Forward Contracts (Regulation) Act, 1952. Originally 31 persons were charged before the Judicial Magistrate, Ahmedabad, who acquitted 14 and convicted the rest. The present respondents, who are 11 in number (accused 1 to 9, 11 and 12), were convicted under s. 20(1)(c) of the Act and fined Rs. 51/- (15 days' S. I. in default). They were also convicted under s. 21(b) of the Act but no separate sentence was imposed. Nine of them (accused 1 to 9) were further convicted under s. 21(c) of the Act and fined Rs. 25/- (one week's S. I. in default). The remaining accused were convicted under s. 21(b). All appealed to the Court of Sessions Judge. The conviction of accused 1 to 9, 11 and 12 was maintained but conviction under s. 20(1)(b) was substituted for that under s. 20(1)(c). The other accused were convicted of all the charges. The High Court was then moved in revision. All the accused were acquitted of all the charges. The State Government now appeals.

All respondents are members of the Ghee and Tel Brokers Association Ltd., Ahmedabad. Nine of them are Directors and two of these are President and Secretary of the Association. The accused, who are not before us, were brokers and servants of the Association or of the brokers. The prosecution case is this : The Association has an office where the members and brokers used to enter into contracts for the sale and purchase of groundnut oil. These contracts were largely speculative. A large number of contracts used to be entered into but were not performed by actual delivery and payment of price. They were adjusted on a due date after the expiry of a fixed period. This period was generally from the 5th of one calendar month to the 25th of the following month and the latter was the due date. On each Saturday during the period the Association exhibited the prevailing rate and according to that rate cross transactions entered earlier were adjusted and the persons in loss deposited money representing their particular losses with the Association. On the due date all outstanding transactions were finally adjusted by cancelling sales against purchases and delivery used to be ordered in respect of the balance which had to be completed by the end of the month of the due date. During the stated period extensive trading through sales and purchases took place without any delivery. Each member could enter into as many transactions of either kind as he liked provided that each transaction was in multiple of 50 Bengali Maunds. Between March 5 and April 25, 1957 the total transactions put through totalled 4,33,600 Bengali Maunds but the actual delivery on the due date was about 5,500 Bengali Maunds only, that is to say, just over 1 1/4 per cent. The share of the several operators in these deliveries was insignificant and the deals were really forward

transactions in which there was no intention to take or give delivery. The prosecution, therefore, submitted that these were forward contracts prohibited under the Act and as the Association was not recognised the offences charged were committed. The High Court having acquitted all the accused the State contends now that the acquittal recorded by the High Court is wrong and proceeds on a misapprehension of the provisions of the Act and of the facts on which the charges rested.

To consider the submissions of the parties the relevant provisions of the Act, which has been passed, among other things, to regulate forward contracts, will have to be seen. Before we do so we may first glance at some definitions leaving out those attributes of the terms defined in which we are not interested. "Forward contract" under the Act means a contract which is not a ready delivery contract but a contract for future delivery (S. 2(c)). A "ready delivery contract" is one in which there is delivery and payment of price either immediately or within a period which is not to exceed 11 days even by consent of parties or otherwise (S. 2(i)). The expressions "transferable specific delivery contract" and "non-transferable specific delivery contract" are defined with reference to the latter expression which means a specific delivery contract, the rights or liabilities under which are not transferable (S. 2(f)) and "specific delivery contract" means a forward delivery contract which provides for actual delivery of specific qualities or types of goods either immediately or during a period not exceeding 11 days at a price fixed thereby or to be fixed in the manner thereby agreed and in which the names of both the buyers and sellers are mentioned (S. 2(m)).

The effect of these definitions is clearly to distinguish, firstly, forward contracts from ready delivery contracts by limiting the time in which ready delivery contracts must be completed by delivery and payment of price; secondly, to distinguish between transferable and non-transferable specific delivery contracts; and finally to distinguish forward contracts in which there is either no provision for actual delivery or the parties are not named, from a specific delivery contract.

The Act then proceeds to lay down in Chapter III the conditions of recognition of Associations. Since this Association was admittedly not recognised it is unnecessary to review the provisions of that Chapter. Chapter IV then makes certain provisions regarding forward contracts and option in goods. Chapter V then provides for penalties. The relevant provisions of these two Chapters need to be carefully considered. Section 15(1) declares illegal forward contracts in notified goods and on the notification so issuing every forward contract in notified goods otherwise than between members of a recognised association or through or with any such member, becomes illegal, and the contract itself becomes void, except in the case of a person who has no knowledge that the transaction is prohibited. We are not concerned with ss. 16 and 17 and may omit them from consideration. Then comes s. 18, sub-section (1) whereof provides :

> "18. Special provisions respecting certain kinds of forward contracts. -
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> (1) Nothing contained in Chapter III or Chapter IV shall apply to non-transferable specific delivery contracts for the sale or purchase of any goods :
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> Provided that no person shall organise or assist in organising or be a member of any association in any area to which the provisions of Section 15 have been made applicable (other than a recognised association) which provides facilities for the performance of any non-transferable specific delivery contracts by any party thereto without having to make or to receive actual delivery to or from the other party to the contract or to or from any other party named in the contract."

This sub-section read with ss. 20 and 21 is at the foundation of the charge and as s. 19 is irrelevant here, we may proceed to read them at once. We are concerned only with cls. (b) and (c) of sub-s. (1) of s. 20 and (b) and (c) of s. 21 and will, therefore, omit the other clauses :

> "20. Penalty for contravention of certain provisions of Chapter IV. -
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> (1) Any person who -
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> #(a).....##
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> (b) organises, or assist in organising, or is a member of, any association in contravention of the provisions contained in the proviso to sub-section (1) of Section 18; or
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> (c) enters into any forward contract or any option in goods in contravention of any of the provisions contained in sub-section (1) of Section 15, Section 17 or Section 19.

shall on conviction, be punishable with imprisonment for a term which may extend to one year, or with fine, or with both.

> #..... ."##
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> "21. Penalty for owning or keeping place used for entering into forward contracts in goods. - Any person who -
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> #(a) . . . . . .##
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> (b) without the permission of the Central Government, organises, or assists in organising, or becomes a member of, any association, other than a recognised association, for the purpose of assisting in, entering into or making or performing, whether wholly or in part, any forward contracts in contravention of any of the provisions of this Act, or
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> (c) manages, controls or assists in keeping any place other than that of a recognised association, which is used for the purpose of entering into or making or performing, whether wholly or in part, any forward contracts in contravention of any of the provisions of this Act or at which such forward contracts are recorded or adjusted, or rights or liabilities arising out of such forward contracts are adjusted, regulated or enforced in any manner whatsoever, or
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> #. . . . .##

shall, on contravention, be punishable with imprisonment which may extend to two years, or with fine, or with both."

The respondents were charged under ss. 20(1)(b), 20(1)(c) and 21(a), (b), (c) and (f). As the State does not press its case under s. 21(a) and (f) they have been left out. Before we analyse the penalty sections it is necessary to see whether the case falls within s. 18(1) of the Act. It is established in the case that the Association was unregistered. It is also clear that the contracts, although they appeared to be non-transferable specific delivery contracts were not intended to be completed by delivery

immediately or within a period of 11 days from the date of the contract. In fact week after week contracts were cancelled by cross-transactions and there was no delivery. Instead of payment of price losses resulting from the cross-transactions were deposited by the operators in loss with the Association. Further, on the due date also, there was no delivery but adjustment of all contracts of sales against all contracts of purchase between the same parties and delivery was of the outstanding balance. Even this delivery was often avoided by entering into fresh contract at the rate prevailing on the due date, as part of the transactions in the next period. There is evidence also to establish this. In other words, the transactions on paper did seem to comply with the regulations but in point of fact they did not and the Association arranged for settlement of the entire transactions (barring an insignificant portion if at all) without delivery.

Turning now to the provisions of sub-s. (1) of the 18th section it is clear that the provisions of Chapters III and IV would not have applied to the respondents if their transactions were true non-transferable specific delivery contracts. They would have been so if the nature of the transaction, not on paper, but in actuality was such as the Act contemplates. This is why the proviso to s. 18 has been added to prohibit certain things. The proviso enacts that no person shall organise or assist in organising or be a member of an association (except a recognised association) which provides facilities for the performance of any specific delivery contract without having to make or to receive actual delivery. The Legislature contemplates that the first sub-section of s. 18 might be complied with in the documents evidencing the contract but in actuality the contract might be differently performed and has, therefore, provided for the identical situation which arises in this case.

Now the difference between the Magistrate and the Sessions Judge arose on the application of the first sub-section of s. 18 with its proviso. The Magistrate felt that the transactions were not non-transferable specific delivery contracts and the matter fell within the proviso. Having found this, it is not a little surprising that he did not apply s. 20(1)(b), which was clearly attracted. His reasoning on this point is difficult to appreciate. He seems to think that as the first sub-section of the eighteenth section dealt with non-transferable specific delivery contracts, it had no application here. Therefore, the charge of being members of an association in contravention of the proviso thereto did not survive and hence no offence under s. 20(1)(b) was disclosed. In this the Magistrate was clearly in error. Section 18(1) speaks of true non-transferable specific delivery contracts but the proviso at the same time makes it illegal for an unrecognised association to so arrange matters that non-transferable specific delivery contracts will be worked out without actual delivery. The Magistrate should have seen that the conduct of the members of this unrecognised association was precisely this and was, therefore, prohibited by the proviso and directly punishable under s. 20(1)(b). An offence under that clause of s. 20(1) and also under cl. (c) of that section read with s. 15 was made out. There was no question of considering the matter first under the main part of the first sub-section and then to put the proviso out of the way because the first sub-section did not apply. The Magistrate, however, convicted the members under s. 21(b) for organising an unrecognised association for the purpose of assisting in or entering into or making or performing, whether wholly or in part, any forward contracts in contravention of the provisions of the Act and further under s. 21(c) for managing, controlling or assisting in keeping a place other than that of a recognised association where forward contracts in contravention of the Act or at which forward contracts are recorded or adjusted or rights or liabilities arising out of such forward contracts are adjusted, regulated or enforced in any manner whatsoever.

When the respondents appealed to the Sessions Judge, the conviction under s. 21(b) and (c) was confirmed and the other conviction was altered from s. 20(1)(c) to s. 20(1)(b). The Sessions Judge rightly pointed out that the so-called non-transferable specific delivery contracts were so arranged

that they could be resolved after the period of eleven days and without actual delivery. The Sessions Judge was of the opinion that the respondents had acted in breach of the proviso to s. 18(1) and were clearly guilty of the offence. In a precise and clear judgment the Additional Sessions Judge explained the pertinent sections and rightly held the proviso to s. 18(1) and s. 20(1)(b) applicable.

The High Court then in revision held that it was not open to the Sessions Judge to alter the conviction from s. 20(1)(c) to s. 20(1)(b) as the acquittal under the latter section by the Magistrate was not appealed against and in an appeal from a conviction there could be no change of finding to convert an acquittal into conviction. The High Court also held that no offence under s. 21(b) or (c) was made out. In a fairly long judgment the High Court pointed out that the decision of this Court in The State of Andhra Pradesh v. Thadi Narayana [[1962] 2 S.C.R. 904] prohibited the alteration of the finding. The High Court then went further to hold that there could not be a conviction under s. 20(1)(c) as the Sessions Judge had acquitted the appellants and there was again no appeal against that acquittal. The High Court also set aside the conviction under s. 21(b) and (c). The High Court reached its conclusion on the basis of the finding of the Sessions Judge that the contracts entered into were non-transferable specific delivery contracts and the appellants were, therefore, not guilty of the offence under s. 20(1)(c) of the Act. The High Court then proceeded to reason that as no part of the Act prohibited performance of non-transferable specific delivery contracts otherwise than by making or receiving actual delivery, the acts of the appellants were not offences under the Act. The learned Judge while dealing with s. 18(1) proviso observed :

> "The performance of a non-transferable specific delivery contract by a mode other than giving and taking of actual delivery would be contrary to law only if there is some provision of law which prohibits it. But unfortunately for the prosecution, the Legislature has not chosen to enact any such provision. The only nearest approximation I could find was the proviso to sub-section (1) of Section 18 but that proviso does not prescribe that a non-transferable specific delivery contract shall be performed by making and receiving actual delivery and that the parties to such a contract shall not perform it otherwise than by making and receiving actual delivery. All that it enacts is that no person shall organise or assist in organising or be a member of any association in any area to which the provisions of Section 15 have been made applicable (other than a recognised association) which provides facilities for the performance of any non-transferable specific delivery contract by any party thereto without having to make or receive actual delivery to or from the other party to the contract or to or from any other party named in the contract. What this proviso seeks to achieve is to secure that no Association other than a recognized Association shall provide facilities for performance of a non-transferable specific delivery contract by the parties thereto without having to make or receive actual delivery. But it is a long step in the argument to conclude from the proviso that performance of a non-transferable specific delivery contract otherwise than by making and receiving actual delivery is prohibited. The language of the proviso cannot bear any such extended artificial construction....."

The learned Judge was clearly in error and misunderstood the connection between the first sub-section and its proviso. Distinction is made in the proviso between recognised and unrecognised associations. Persons can organise and assist in organising or be member of an association which is recognised even if the association provides for performance of non-transferable specific delivery contracts without actual delivery. The prohibition is against persons arranging for avoidance of delivery through an unrecognised association and read with the penalty sections, it is clear that such

acts are rendered illegal. If the acts are illegal then non-transferable specific delivery contracts by members of unrecognised associations become illegal also. They are forward contracts and being entered into otherwise than between members of a recognised association or through or with any such member are rendered illegal by s. 15.

Thus there is no doubt whatever in the case that offences under s. 21(b) and (c) were committed. It is enough to read these clauses to see that they fit the acts of nine respondents (accused 1-9) and their position vis-a-vis the unrecognised association of which they were directors makes them liable to penalty under s. 21(b) and (c) but the remaining two respondents (accused 11 and 12) being only members are liable to penalty under s. 21(b) only. As regards the other offences under s. 20(1)(b) and (c) we are clear that these offences were also committed. But as the Sessions Judge acquitted them under cl. (c) and there was no appeal to the High Court we say nothing about it. As regards the offence under s. 20(1)(b) the Magistrate did not clearly record a finding of acquittal. However, his reasoning seems to be in favour of holding that the clause did not cover the case as the contracts were not non-transferable specific delivery contracts. His finding was the reverse of the finding of the Sessions Judge. The question thus remains whether the Sessions Judge could alter the finding in an appeal from a conviction (and the High Court too if it so chose) when it was a question of choosing between two clauses of a penalty section depending on whether the true nature of the contracts was as held by the Magistrate. The ruling of this Court cited earlier was invoked to suggest that such a course was not possible for the Sessions Judge or the High Court. We do not pause to consider whether the ruling prohibits such a course and if it does whether it does not seek to go beyond the words and intendment of s. 423(1)(b) of the Code of Criminal Procedure. This is hardly a case in which to consider such an important point. We, therefore, express no opinion upon it. It is sufficient to express our dissent from the High Court on the interpretation of the Act and hold the respondents guilty of infractions where the ruling does not stand in the way.

We accordingly set aside the acquittal of the respondent under cls. (b) and (c) of s. 21 and restore their conviction under those clauses as confirmed by the Sessions Judge. We sentence all the respondents to a fine of Rs. 25 (or one week's simple imprisonment in default) under s. 21(b). No separate sentence under s. 21(c) is imposed on the respondents who were original accused Nos. 1-9. The appeal shall be allowed to the extent indicated in this paragraph.

Appeal allowed in part.

Zila Parishad MoradabadVsNundan Sugar Mills, Amroha.Civil Appeal No. 596 of 1966(Sikri, J.)18.07.1967.JUDGMENTSIKRI, J. - This appeal by special leave is directed against the judgment of the High Court of Allahabad accepting a petition under Art. 226 of the Constitution and directing the District Board, Moradabad, not to levy upon M/s Nundan Sugar Mills, Amroha, respondent before us, circumstances and property tax for any one year exceeding the sum of Rs. 200. The High Court held that no special resolution of the Board had been passed, nor had a notification been made imposing the tax, under s. 119 and s. 120, respectively, of the United Provinces District Boards Act, 1922 (U.P. Act of 1922) - hereinafter referred to as the Act. The relevant fact out of which this appeal arises are these : On July 28, 1925, it was notified under sub-s. (2) of s. 120 of the Act that the District Board of Moradabad, in exercise of the powers conferred by s. 108, sub-s. (2) of the Act has imposed the following tax, with effect from September 1, 1925 : "A tax on all persons ordinarily residing or carrying on business in the rural area of the Moradabad District according to their circumstances and property, at the rate of four pies per rupee on the total taxable income; provided that the total amount of tax imposed on any person shall not exceed Rs. 200. Provided also that no income once assessed shall be reassessed". On May 28, 1927, the District Board took action upon a

memorandum prepared by the Chairman of the District Board. The memorandum of the Chairman pointed out : "..... the maximum amount of tax recoverable from an assessee should be raised from Rs. 200/- to Rs. 500/- P.A. Hence proposal (c) framed under section 115 sanctioned by G.O. No..... dated 28-7-25 so be modified as to read as under : "That there shall be a rate of tax 4 pies in the rupee.... provided that the total amount of tax imposed on any person shall not exceed Rs. 500/-....." The resolution of the Board was in these terms : "The bye-laws be modified accordingly after necessary publication and sanction. The assessing officer to assess them at 2 pies (sic) in anticipation of final sanction". On January 11, 1928, the Government of United Provinces issued a notification amending the rules for the assessment and collection of a tax on circumstances and property in the rural areas of the Moradabad District. The following rule 16 was added : "16. The total amount of tax imposed on any person shall not in any year exceed the sum of Rs. 500/-." On August 31, 1931, the Board passed another resolution approving the following memorandum : "..... The words and figures 'Rs. 500' be substituted by 'Rs. 2,000' in rule 16 of the rules for the assessment and collection of a tax on circumstances and property in the rural area of the Moradabad district published with Government Notification No..... dated 11-1-1928". The exact terms of the resolution were : "Resolved unanimously that the memo, be approved and necessary action be taken on it. If publication is required, it be done and Government be moved to accord sanction for the same". On March 18, 1932, the Government of United Provinces issued a notification amending rule 16. The amendment was in the following terms : "In Rule 16 published with notification No. 33/IX-185(14-24) dated January 19, 1928 'Rs. 2,000' shall be substituted for 'Rs. 500". It appears that no further action was taken by the District Board to enforce this amendment in rule 16 or the amendment dated January 11, 1928. Further action is contemplated by ss. 119 and 120, read with s. 121 of the Act. These sections may be reproduced in full. "119. Resolution of board directing imposition of tax - Upon receipt of the copy of the rules sent under the preceding section, the board shall by special resolution direct the imposition of the tax with effect from a date (to be specified in the resolution) not less than six weeks from the date of such resolution". "120. Imposition of tax - (1) A copy of the resolution passed by the board under Section 119 shall be submitted to the State Government. (2) Upon receipt of the copy of the resolution the State Government shall notify in the official Gazette the imposition of the tax from the appointed date, and the imposition of a tax shall in all cases be subject to the condition that it has been so notified. (3) A notification of the imposition of a tax under sub-section (2) shall be conclusive proof that the tax has been imposed in accordance with the provisions of this Act". "121. Procedure for altering taxes - The procedure for abolishing or suspending a tax, or for altering a tax in respect of the matters specified in clauses (b) and (c) of sub-section (1) of Section 115 shall, so far as may be, be the procedure prescribed by Sections 115 to 120 for the imposition of a tax". Clauses (b) and (c) of sub-section (1) of s. 115, referred to in s. 12, read : "(b) the persons or class of persons to be made liable and the description of the property or other taxable thing or circumstance in respect of which they are to be made liable, except where and in so far as any such class or description is already sufficiently defined under clause (a) or by this Act; (c) the amount or rate leviable from each such person or call of persons;" It is common ground that the procedure laid down in ss. 115 to 118 has been followed by the Board. The only dispute between the parties is whether it is necessary that a resolution should be passed under s. 119 and a notification issued under s. 120 before effect can be given to a notification made under s. 118 altering the rules. In other words, was it necessary to pass a resolution under s. 119 after the issue of the notification dated March 18, 1932, or the notification dated January 11, 1928, referred to above ? Both the learned Single Judge, and the Division Bench who heard the appeal from the learned Single Judge, have come to the conclusion that without a resolution under s. 119 and a notification under s. 120, no tax can be levied in pursuance of the notification dated March 18, 1932, or notification dated January 11, 1928. It may be mentioned that the High Court directed the

District Board not to levy upon the petitioner circumstances and property tax for any year exceeding the sum of Rs. 200/-. There is no dispute that the Board could levy upon the petitioner tax up to the sum of Rs. 200/-. The learned counsel for the appellant contends that if the procedure laid down in ss. 115 to 118 has been followed, it is not necessary that there should be resolution under s. 119 and a notification under s. 120. He says that rules can be made under s. 172, read with s. 176, of the Act, and once rules are made there is nothing more to be done. But there is one fallacy underlying the argument of the learned counsel, and that is that it misses the object of ss. 119 and 120 which is to fix the date from which the tax can be imposed. If no date is fixed, no tax can be imposed. Once the Board passes a special resolution under s. 119, it has to go to the Government under s. 120, and then the Government notifies the imposition of tax from the appointed date. It is then that the notification becomes conclusive proof of the fact that the tax has been imposed in accordance with the provisions of this Act. Sub-clause (3) of s. 120 clearly proceeds on the basis that the imposition of tax takes place on a notification issued under s. 120 and not on the issue of a notification under s. 118. The learned counsel invited our attention to Raza Buland Sugar Co. Ltd. v. Municipal Board, Rampur ([1965] 1 S.C.R. 970) but we are unable to see how that case assists him. No question of S. 119 and 120 being directory arises in this case because, in our view, without a resolution under s. 119 and a notification under s. 120, no tax can be imposed. The learned counsel also urges that :- (a) no writ petition is maintainable challenging a pre-Constitution matter, and (b) the respondent not having appealed under s. 128 of the Act, the petition was not maintainable. In our view, there is no merit in these contentions. The respondent is being charged tax now. He is entitled not to be taxed except under the authority of law, vide Art. 265 of the Constitution. There is no question of challenging any pre-Constitution matter. The respondent is challenging a post-Constitution action on the ground that there is no authority of law for the action. Regarding the second point, the High Court held that an appeal to the District Magistrate under s. 128 was not likely to be of much assistance to the petitioner and rejected the contention. It is well-settled that a provision like s. 128 does not oust the jurisdiction of the High Court to entertain a petition under Art. 226 and it is for the High Court to exercise its discretion whether to entertain the petition or not. The learned counsel has not pointed out anything to us to show that the discretion has not been properly exercised. In the result the appeal fails and is dismissed with costs. Appeal dismissed.

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