

Modi & Co.

Vs

Union of India

Civil Appeal No. 395 of 1965.

(V. Ramaswami-I, V. Bhargava, J. C. Shah JJ)

07.12.1967

JUDGMENT

RAMASWAMI, J. –

This appeal is brought, by special leave, from the judgment of the Calcutta High Court dated September 18, 1963 dismissing an application under s. 33 of the Arbitration Act.

By its letter dated September 14, 1960, the appellant made an offer for sale to the respondent of 500 Bales (1,50,000 bags) 'B' Twills on the terms and conditions mentioned in the said letter. The offer was accepted by the Director-General, Supplies & Disposals on behalf of the respondent by his letter No. CAL/DL-1/5750-L/II/Modi/158 dated September 16, 1960. The appellant deposited with the Reserve Bank of India the sum of Rs. 20,182.50 p. towards security deposit on September 22, 1960, as required by the acceptance letter. The date of delivery fixed under the contract was November 30, 1960 and the respondent sent the appellant despatch instructions dated November 21, 1960, through the Director of Supplies & Disposals. On November 30, 1960 the appellant, however, intimated to the respondent that the contract was void and illegal and requested that the security deposit should be refunded. The case of the appellant was that the contract was in violation of the provisions of the Forward Contract (Regulation) Act, 1952 (Act 74 of 1952), hereinafter called the 'Act'. By his letter dated December 1, 1960 the Director of Supplies wrote on behalf of the respondent that the contract was legal and binding and as the appellant had failed to deliver the goods as provided in the agreement the respondent would purchase the goods at the risk of the appellant. The respondent incurred extra expenditure amounting to about Rs. 76,410 and after giving credit to the appellant for the amount of Security Deposit, a sum of Rs. 56,000 still remained due to be paid by the appellant to the respondent. As the appellant failed to pay, the respondent took recourse to the arbitration cl. 21 of the contract and appointed an Arbitrator to determine the dispute between the parties regarding the agreement. Before the Arbitrator could give his award, the appellant filed an application before the High Court under s. 33 of the Arbitration Act praying for a declaration that the arbitration clause was illegal and void and for an injunction restraining the respondent from prosecuting the arbitration proceedings. By its judgment dated November 19, 1963, the High Court held that the contract was a "non-transferable specific delivery contract" and was not hit by the provisions of the Act and accordingly dismissed the application of the appellant.

The question presented for determination in this appeal is whether the contract in question is a transferable or non-transferable specific delivery contract within the meaning of the Act.

Section 2(i) of the Act defines a "ready delivery contract" as meaning "a contract which provides for the delivery of goods and the payment of a price therefore, either immediately or within such period

not exceeding eleven days after the date of the contract..... ". A "forward contract" is defined under s. 2(c) as meaning "a contract for the delivery of goods at a future date and which is not a ready delivery contract". Section 2(m) defines a "specific delivery contract" as meaning "a forward contract" which provides for the actual delivery of specific qualities or types of goods during a specified future period at a price fixed thereby or to be fixed in the manner thereby agreed and in which the names of both the buyer and the seller are mentioned". Section 2(f) defines a "non-transferable specific delivery contract" as meaning "a specific delivery contract, the rights or liabilities under which or under any delivery order, railway receipt, bill of lading, warehouse receipt or any other document of title relating thereto are not transferable". Finally, s. 2(n) defines a "transferable specific delivery contract" as meaning "a specific delivery contract which is not a non-transferable specific delivery contract".

Chapter IV of the Act contains provisions conferring authority on Central Government to prohibit certain classes of forward contracts. Section 15(1) of the Act states as follows :

"15. (1) The Central Government may by notification in the Official Gazette, declare this section to apply to such goods or class of goods and in such areas as may be specified in the notification, and thereupon, subject to the provisions contained in Section 18, every forward contract for the sale or purchase of any goods specified in the notification which is entered into in the area specified therein otherwise than between members of a recognised association or through or with any such member shall be illegal."

Section 17 provides :

"17. (1) The Central Government may, by notification in the Official Gazette, declare that no person shall, save with the permission of the Central Government, enter into any forward contract for the sale or purchase of any goods or class of goods specified in the notification and to which the provisions of Section 15 have not been made applicable, except to the extent and in the manner, if any, as may be specified in the notification.

(2) All forward contracts in contravention of the provisions of sub-section (1) entered into after the date of publication of the notification thereunder shall be illegal.

(3) Where a notification has been issued under sub-section (1), the provisions of Section 16 shall, in the absence of anything to the contrary in the notification, apply to all forward contracts for the sale or purchase of any goods specified in the notification entered into on or before the date of the notification and remaining to be performed after the said date as they apply to all forward contracts for the sale or purchase of any goods specified in the notification under section 15."

Section 18(1) states that these provisions will not apply to non-transferable specific delivery contracts for the sale or purchase of any goods.

According to the scheme of the Act therefore contracts of sale of goods are divided into two categories, 'ready delivery contracts' and "forward contracts". Forward Contracts are classified into those which are "specified delivery contracts" and those which are not. Then again, 'specific delivery contracts' are divided into 'transferable specific delivery contracts' and 'non-transferable

specific delivery contracts'. Section 18(1) exempts from the operation of the Act non-transferable specific delivery contracts. The net result of these statutory provisions is that all forward contracts except those which are non-transferable specific delivery contracts, can be declared illegal by a notification issued under the Act.

Such a notification was issued in this case by the Central Government on March 29, 1958 which is to the following effect :

"In exercise of the powers conferred by sub-section (1) of Section 15 of the Forward Contracts (Regulation) Act, 1952 (74 of 1952) the Central Government hereby declares that the said Section shall apply to Jute/goods (Hessian cloth made of jute or bags made of such Hessian cloth and sacking cloth made of jute or bags made of such Sacking cloth) in the City of Calcutta.

Explanation :- "The expression 'City of Calcutta' means

(1) Calcutta as defined in clause (11) of Section 5 of the Calcutta Municipal Act, 1951, (West Bengal Act No. 33 of 1951), together with part of the Hastings North or South edge of Clyde Row and Strand Road to the river bank and the areas which were previously under the new defunct Tollygunge Municipality;

(2) The Port of Calcutta; and

(3) The Districts of 24 Parganas, Nadia, Howrah and Hooghly".

It was argued on behalf of the appellant that the contract in question was a forward contract within the meaning of the Act and was prohibited by the Government notification and therefore no right or liability accrued to the parties on the basis of the contract. The contention of the appellant was that the contract was not a non-transferable specific delivery contract as defined in s. 2(f) of the Act and as such it was illegal and void and the arbitration clause contained therein was of no effect and could not be availed of by either of the parties. We are unable to accept the argument put forward on behalf of the appellant as valid. The question as to whether the contract was a transferable or non-transferable specific delivery contract is a question which ultimately depends on a reasonable construction of the contract. On behalf of the appellant it was pointed out that there was no specific clause in the contract which prohibited the transfer of the rights and liabilities or which prohibited transfer of the bill of lading. But the absence of such a specific clause is not conclusive as to the intention of the parties. It is true that when a contract is reduced to writing we must look only to that writing for ascertaining the terms of the agreement between the parties but it does not follow from this that it is only what is set out expressly and in so many words in the document that can constitute a term of the contract between the parties. If upon a reading of the document as a whole, it can fairly be deduced from the words actually used therein that the parties had agreed on a particular term, there is nothing in law which prevents them from setting up that term. The terms of the contract can be expressed or there can be a necessary implication of a term from what has been expressed in the contract. The question therefore resolves in the ultimate analysis upon the construction of the terms of the contract between the parties. In this connection it is well-established that in construing such a contract it is legitimate to take into account the surrounding circumstances for ascertaining the intention of the parties. As was pointed out by this Court in *Khardah Company Ltd. v. Raymon & Co. (India) Private Ltd.*, [[1963] 3 S.C.R. 183], the absence of a specific clause prohibiting transfer is not conclusive one way or the other on the question whether there was an

agreement between the parties that the contract was to be non-transferable. What has to be seen is whether it could be held on a reasonable interpretation of the contract, aided by such considerations as can legitimately be taken into account that the agreement between the parties was that it was not to be transferred. In the present case, it should be noticed that the contract cannot be sublet or assigned by the seller under condition 10 read with para 3(b) of the "Conditions of Contract contained in Form D.G.S. & D. 68 governing contracts placed by the Central Purchase Organisation of the Government of India, 1959 edition". Para 3(b) states :

"(b) Subletting of Contract. - The Contractor shall not subject, transfer or assign the contract or any part thereof without the written permission of the Purchaser. In the event of the Contractor contravening this condition the Purchaser shall be entitled to place the contract elsewhere on the Contractor's account and at his risk and the Contractor shall be liable for any loss or damage which the Purchaser may sustain in consequence or arising out of such replacing of the contract."

So far as the buyer is concerned, the contract itself shows that the jute bags were intended for "packing foodgrains which were arriving in bulk" at an Indian port. The last paragraph of the letter of acceptance dated September 16, 1960 states that "the gunnies are very urgently required at the destination for packing imported foodgrains which are arriving in bulk" and "it was therefore of utmost importance that shipment of the total quantity ordered shall be made in the vessels nominated by the purchaser." There is also a specific provision in the contract that the "stores shall be inspected prior to shipment by the A.T.I.G.S., East India, Hastings, Calcutta, or his representative." There is also a further stipulation that after the goods are inspected arrangements should be made to ship the stores in accordance with the instructions contained in the contract and that goods which are not accepted in inspection should not be shipped. The name of the consignee is given in the contract as Asst. Director (Storage), Ministry of Food & Agriculture. Transit Shed No. 4, Visakhapatnam Port, Visakhapatnam and payment is to be made according to the procedure specified in the contract and the cost was debitable to the Pay & Accounts Officer, Ministry of Food & Agriculture, Bombay or New Delhi as the case may be under Head of Account "87-Capital Outlay on the Schemes of Govt. Trading-Schemes for purchases of Foodgrains A.I. (3)(I) expenditure in India Section IV Special Purchases both for Civil & Defence requirements - other Purchases - Purchase of gunnies for imported foodgrains". In view of all these circumstances we are of opinion that it was not contemplated by the parties that the rights under the contract should be transferred either by the buyers or by the sellers. It was pointed out for the appellant that normally the Bill of Lading partakes of the nature of a negotiable instrument and by endorsing it the holder of the Bill of Lading can transfer the property in the goods to which the Bill of Lading relates and by parting with it the holder parts not only with the property in the goods but also with their possession. The proposition contended for by Counsel for the appellant is no doubt correct, but the question in this case is not the abstract question as to what the purchaser could or might have done but what was in fact contemplated by the parties who were entering into the contract. For the reasons already given, we hold that on a proper construction of the terms of the contract and having regard to the surrounding circumstances there was an implied agreement between the parties that the rights and liabilities under the contract were not to be transferred and the Bill of Lading relating to the contract was also not to be transferred. It follows therefore that the contract in question was a non-transferable specific delivery contract within the meaning of s. 2(f) of the Act and the contract was not hit by the notification dated March 29, 1958 issued by the Central Government under s. 15(1) of the Act.

For the reasons expressed we hold that the decision of the Calcutta High Court dated September 18,

1963 is correct and this appeal must be dismissed with costs.

Appeal dismissed.

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