Fort Gloster Industries Ltd.

Vs

Sethia Mercantile (P) Ltd.

Civil Appeal No. 573 of 1965

(J. C. Shah, V. Ramaswami – I, G. K. Mitter JJ)

19.03.1968

JUDGMENT

SHAH, J.-

The East India Jute & Hessain Exchange Ltd. - hereinafter called "the Association" - is recognized for the purpose of the Forward Contracts (Regulation) Act 74 of 1952 as an association concerned with the regulation and control of forward contracts in jute and jute goods. The Association has, under s. 11 of the Forward Contracts (Regulation) Act, with the previous approval of the Central Government, made bye-laws to regulate and control forward contracts in jute and jute goods, and for trading in Transferable Specific Delivery Contracts in raw jute and jute goods. Clause 1(a) in Ch. V of the bye-laws provides that no trading in Transferable Specific Delivery Contracts in any delivery or deliveries in raw jute and/or jute goods shall be effected otherwise than between members or through or with any member, or where the services of a broker, who is not a member, are employed by a member, otherwise than through a licensed broker. Clause 1(b) provides that all Transferable Specific Delivery Contracts shall be in writing in the prescribed forms.

The appellant and the respondent are members of the Association. On August 11, 1960, the appellant agreed to purchase and the respondent agreed to sell 750 bales of Pakistan raw jute at the rate of Rs. 103 per bale of 400 lbs. net ex-Narayanganj and/or Daulatpur and/or Khulna for delivery during October and/or November 1960. In the transaction W. Haworth & Co. (P) Ltd. acted as brokers for both the parties. According to the custom of the trade which is recognized by the bye-laws, the brokers sent a sold note on behalf of the respondent to the appellant, and issued a bought note on behalf of the appellant which was sent to the respondent. The goods contracted to be purchased by the appellant were to be imported from Pakistan. The appellant was in terms of the sold note to furnish to the respondent import licence and a letter of authority issued by the proper officer authorising the respondent or his nominee to import the requisite quantity of jute from Pakistan for delivery to the appellant. For importing jute from Pakistan, a letter of credit had, under the terms of the contract, to be opened by the respondent.

Differences arose between the parties in respect of the execution of the contract and on January 11, 1961, the appellant referred its claim for Rs. 1,17,750/- against the respondent to the Tribunal of Arbitration of the Bengal Chamber of Commerce and Industry, on the plea that the respondent had failed to open a letter of credit for importing the stipulated 750 bales of "jute cuttings" from Pakistan according to the terms of the contract.

On June 26, 1961, the respondent moved, before the High Court of Judicature at Calcutta on its original side, a petition under s. 33 of the Arbitration Act, 1940, inter alia, for the following orders :

(a) that the existence or validity or otherwise of the alleged arbitration agreement dated August 11, 1960, between the appellant and the respondent be adjudicated upon and determined by the High Court; and

(b) that it be declared that the alleged arbitration agreement is void, illegal and ineffective and of no effect and such arbitration agreement to be set aside.

The principal ground in support of the petition was that the terms of the bought and sold notes did not tally, and on that account there was no concluded contract.

In support of the petition one Sohanlal Sethia a director of the respondent affirmed an affidavit. The appellant filed its affidavit in reply contending, inter alia, that the sold note set up by the respondent in support of its petition under s. 33 of the Arbitration Act was not the sold note issued by the brokers at the time when the contract was entered into. An order was passed by the High Court under the proviso to s. 33 of the Arbitration Act directing that the petition be set down for hearing on evidence on the following issues :

"1. (a) Do the Bought and Sold Notes vary in material particulars as alleged in paragraph 2 of the petition ?

(b) If so, what is the effect thereof ?

2. (a) Is the Sold Note which has been produced in Court by the seller the original Sold Note ?

(b) If so, what is the effect thereof ?

3. Is there a subsisting arbitration agreement between the parties ?"

One Jitendra Nath Basu, Manager of the respondent, and one Sudhir Kumar De, Head Clerk of W. Haworth & Co. (P) Ltd., were examined in support of the case of the respondent. On behalf of the appellant Shib Narayan Mundhra, an employee of the appellant, was examined. A. N. Ray, J., declared that there was no concluded arbitration agreement dated August 11, 1960, between the parties. Against that order, this appeal has been preferred with special leave.

Two questions arise in this appeal :

(1) Whether there was a lawful contract for sale and purchase of jute cuttings between the appellant and the respondent; and

(2) Whether the sold note set up by the respondent was a fabricated document set up in collusion with W. Haworth & Co. (P) Ltd.

The High Court has answered both the questions in the negative.

The form of contract prescribed by the Bye-laws of the Transferable Specific Delivery reads as follows :

"The East India Jute & Hessian Exchange Ltd., Calcutta

APPENDIX IV Calcutta..... 19.....Transferable Specific DeliveryContract for Raw Jute.No. .....To Messrs.....Dear Sirs,##

We have, subject to the terms and conditions hereinafter referred to, this day, bought from/sold to..... by/your order and on your account, the following goods which are [Score out if not applicable.] Pakistan Jute/Jute :-

#----------##

Crop 19..... 19.... maunds/kilograms, bales of jute/mesta/Bimli/cuttings, of the mark, assortment and quality as per margin and in sound, dry storing condition at the rate of :-

Rupees

Rupees

Rupees

free to buyers' mill, siding and/or ghat.

Weight guaranteed at buyers' mill.

Delivery to :-

Shipment or despatch during :-

Payment :-

Arbitration :-

Re-weighment :-

The foregoing terms and conditions as well as other terms and conditions applicable to this contract are as per the terms and conditions of the Transferable Specific Delivery Contract for raw jute of the East India Jute & Hessian Exchange Ltd., Calcutta, and are subject to the bye-laws of that Exchange for trading in Transferable Specific Delivery Contracts for raw jute in force for the time being.

Brokerage at..... per cent.

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Yours faithfully,

Member/Licensed Broker.

The East India Jute & Hessian Exchange Ltd.---------- (CONFIRMATION SLIP)##

Received from Shri/Messrs. ..... his/their Contract No. ..... dt. ..... and I/we

> confirm having bought from/sold to..... through him/them....."

The respondent claimed that the terms of the bought and the sold notes issued by the brokers did not tally and there was on that account no contract between the parties. They claimed that whereas in the bought note under the heading "payment" it was recited : "Cash on presentation in Calcutta a full set of shipping documents and insurance cover", in the sold note tendered in evidence by the respondent no entry was made under that heading. In both the notes there was a note to the following effect :-

> "Buyers to provide import licence, during the shipment period serially to their purchase of Pakistan cuttings. In case of non-availability of licence in full or part thereof, the quantity thus remained will be treated as cancelled without any difference to either parties."

At the foot of the bought note it was recorded - "Sellers to open Letter of Credit", but no such recital was found in the sold note. Again at the foot of the bought note the rate of brokerage was not incorporated, whereas in the sold note it was stated that the rate of brokerage was 1 per cent. Ray, J., observed that the bought and the sold notes differed and on that account there was no contract between the parties. The learned Judge did not set out in detail what in his opinion were the differences between the two notes. But it is clear that he relied upon the discrepancy in the recital under the heading "payment". The term as to payment is an important term of a written contract. The bought and the sold notes have by the bye-laws to be in writing and in the prescribed form, and if there be any discrepancy between the two, i.e., the terms as to payment are specified in one note and not in the other, prima facie, there is no concluded contract. In Cowie and others v. William Remfry and others [3 M.I.A. 448.] the bought and the sold notes in respect of a contract for the purchase and sale of indigo differed in certain material terms. In an action brought by the sellers against the purchaser for non-performance of the contract contained in the sold note, the Judicial Committee held that the transaction was one by bought and the sold notes, and that the circumstances attending the purchaser's alteration of the sold note and affixing his initials, were not sufficient to make that note, alone, a binding contract, and that there being a material variation in the terms of the bought note with the sold note, they together did not constitute a binding contract.

Counsel for the appellant urged that a discrepancy between the terms of the bought and the sold notes may be explained by extraneous evidence, and that Cowie's case [3 M.I.A. 448.] merely lays down a presumption and not an absolute rule. Counsel relied upon the observations in Remfry's Sale of Goods in British India - Tagore Law Lectures 1910 at p. 69, and upon the opinion expressed in Woodroffe & Ameer Ali's Law of Evidence, 11th Edn., at p. 1533, that the rule laid down by the Judicial Committee raises merely a presumption which may be rebutted by evidence. Counsel also relied upon the observations of the Judicial Committee in Durga Prosad Sureka and others v. Bhajan Lall and others [L.R. 31 I.A. 122.] that :

> "In India a contract of sale can be proved by parole : and the bought and sold notes having in this instance been falsified, the aggrieved purchaser was entitled to disregard them and prove his contract by other and antecedent material. This he has done conclusively by the evidence of the broker and by the telegram."

But in Durga Prosad's case [L.R. 31 I.A. 122.] it was established the notes had been falsified; there was also evidence to show that the real contract was, and effect was given to that contract. In Cowie's case [3 M.I.A 448.] apart from the bought and sold notes there was no evidence of the

terms of the contract, and since the terms of the bought and sold notes differed, the parties were not ad idem. In Durga Prosad's case [L.R. 31 I.A. 122.] there was evidence of a parole contract and the bought and sold notes did not, because of fraud, correctly record the terms of that contract. Again in neither of these cases, the contract was required by law to be in writing and in a form statutory prescribed. But the transaction between the parties in the case in hand is governed by special rules of the Association which make it obligatory that the contract shall be in a particular form and in writing. Durga Prosad's case [L.R. 31 I.A. 122.] can, therefore, have no application in the present case.

In Radhakrishna Sivadutta Rai and others v. Tayeballi Dawoodbhai [[1962] Supp. 1 S.C.R. 81.] this Court cited Cowie's case [3 M.I.A. 448.] with apparent approval. In that case the contract was by the bought and sold notes. Gajendragadkar, J., speaking for the Court proceeded to consider the effect of the bought and sold notes according to the established custom of the mercantile world and accepted the contention for counsel for the respondent that according to the established commercial usage if there is any variation or disparity between the bought and sold notes, the consequence follows, from all legal principles, that no binding contract has resulted.

In view of the bye-laws of the Association which make it obligatory on the parties that the terms of the contract shall be in writing and that they shall be in the form prescribed, we are unable to hold that, apart from the terms of the bought and sold notes which by custom of the market are issued, evidence may be led to prove that the parties had agreed to certain terms not set out in the bought and sold notes.

In the bought note the price was made payable in "Cash on presentation in Calcutta a full set of shipping documents and insurance cover". There was no term in the sold note about the payment of price. Counsel for the appellant, however, contended that under the prescribed form the contract is made subject to the terms and conditions hereinafter referred to and it is expressly recited that "the foregoing terms and conditions as well as other terms and conditions applicable to this contract are as per the terms and conditions of the Transferable Specific Delivery Contract for raw jute of the East India Jute & Hessian Exchange Ltd., Calcutta, and are subject to the bye-laws of that Exchange for trading in Transferable Specific Delivery Contracts for raw jute in force for the time being". He submits that bye-laws 7(c) and 8(b) framed by the Association being made part of the contract, there is in truth no discrepancy between the bought and sold notes. In Ch. IX, bye-law 7(c) insofar as it is material, reads :-

> "In the case of Pakistan Jute, buyers to deliver to sellers, or sellers' nominee, letter of authority to import the Pakistan Jute or open confirmed, irrevocable Letter of Credit in terms of paragraph 8(b)(ii) within 14 working days from the commencement of the delivery period of the contract failing which there shall be free extension for delivery equal to the period of delay occurring after the 14 working days, ... If buyers do not deliver letter of authority or open confirmed irrevocable Letter of Credit within one month from the commencement of the delivery period of the contract, the sellers shall be entitled to exercise any one of the following options . . . . ."

Bye-law 8(b) which relates to payment or what is called "reimbursement" states, insofar as it is material :

> "In the case of Pakistan jute reimbursement shall be either :-

(i) Cash on presentation in Calcutta of a full set of shipping documents and insurance cover . . . . .

(ii) By confirmed irrevocable Letter of Credit for 100% of the value of goods, less transit insurance, Bengal Raw Jute Tax (as applicable to West Bengal) and freight "to pay", if any, to be opened by buyers with a scheduled Bank in Pakistan within 14 working days from the commencement of the delivery period of the contract . . . ."

Bye-law 7(c) contemplates two alternatives. Where there is a contract for the sale and purchase of Pakistan Jute, the buyer has to deliver to the seller, or seller's nominee, a letter of authority to import Pakistan Jute or to open confirmed, irrevocable Letter of Credit in terms of paragraph 8(b)(ii). Bye-law 8(b) also contemplates two alternatives : in the case of a contract for sale and purchase of Pakistan Jute payment has to be made in cash on presentation in Calcutta of a full set of shipping documents and insurance cover or by confirmed irrevocable Letter of Credit for 100% of the value goods. In the bought note in question it was recited that the buyer had to provide the import licence during the shipping period. Nothing was stated about the Letter of authority to import Pakistan Jute and the stipulation relating to the application to provide the import licence cannot be equated with the issue of a letter of authority to import Pakistan Jute. It is true that under bye-law 7(c) the buyer has to do one of the two things - he has to issue a letter of authority to import Pakistan Jute or to open a Letter of Credit in terms of paragraph 8(b)(ii) and under bye-law 8(b) payment may be either in cash on presentation of a full set of shipping documents and insurance cover or by confirmed irrevocable Letter of Credit. When nothing was written in the sold note, under the head "Payment", either of the two alternatives could be adopted. In the endorsement at the foot of the note, it was recorded that the seller had to open Letter of Credit, but this is not found in the sold note. This further emphasizes that the two parties could not be said to have agreed on how the payment was to be made. If the sold note produced in Court is genuine, we are unable to agree with counsel for the appellant that the terms of the contract were agreed upon between the parties. The bought and sold notes as produced in Court cannot be regarded as constituting a binding contract.

But the question whether the sold note "was fabricated" still remains to be considered. Ray, J., observed, after briefly summarising the evidence, that he was unable to act on the "suggestion of suspicion" and he did not believe that there was any foundation in the plea of fabrication of the document.

[Their Lordships remanded the case to the High Court with appropriate directions].

Appeal remanded.##

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