

Fort Gloster Industries Ltd.

Vs

Sethia Mercantile (P) Ltd.

Civil Appeal No. 573 of 1965

(S. K. Hegde, V. Bhargava, JJ)

03.02.1971

JUDGMENT

HEGDE, J. -

1. The facts of this case are fully set out in the order of this Court dated March 19, 1968 by which this Court required the High Court to take some additional evidence in the case. We shall briefly refer to those facts for giving a connected picture.
2. The appellant and the respondent are the members of the East India Jute and Hessian Exchange Ltd. (hereinafter called 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 recognised by the Bye-laws of the Association, the brokers sent a Sold Note on behalf of the appellant to the respondent and issued a Bought Note on behalf of the respondent to the appellant. 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 as a result of which on January 11, 1961, the appellant referred its claim for Rs. 1,17,750/- against the respondent to the Tribunal of Arbitration. The Association is recognised for the purpose of Forward Contracts (Regulation) Act 74 of 1952 as an Association concerned with regulation and control of forward contracts in jute and jute goods. The Association, has under section 11 of that 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 and Transferable Specific Delivery Contracts in raw jute and jute goods. Clause (a) in Chapter 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 Plea taken by the appellant in the claim made before the Tribunal was that the respondent had failed to open a letter of credit for importing the stipulated 750 bales of "jute cutting" from Pakistan according to the terms of the contract.
3. On June 26, 1961, the respondent moved before the High Court of Judicature at Calcutta on its

original side a petition under Section 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 respondents be adjudicated upon and determined by the High Court; and

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

4. The principal ground in support of the petition was that the terms of the Bought Note and the Sold Note did not tally and on that account, there was no concluded contract.

5. On the pleadings the High Court raised 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 the Court by the seller the original Sold Note ?

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

The High Court found that there was difference in material particulars between the Bought Note and the Sold Note. In view of that conclusion the High Court answered all the issues in favour of the respondent. A. N. Ray, J. (as he then was) declared that there was no concluded arbitration agreement between the parties. Against that order this appeal has been preferred with special leave.

6. This court in its order referred to earlier had ruled that 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 it shall be in the prescribed form. For finding out the contract relating to arbitration the Court cannot go outside the terms of the Bought and Sold Notes which by custom of the market are issued. It had further ruled that no evidence other than that afforded by the Bought and Sold Notes could be looked into for the purpose of finding out the terms of agreement.

7. If the Sold Note produced by the respondent is a genuine document then there is no dispute that it varies in material particulars from the Bought Note produced by the appellant and in that event there is no valid contract relating to arbitration between the parties. The appellant has challenged the genuineness of the Sold Note produced by the respondent. Its case is that Sold Note produced by the respondent must have been fabricated with the assistance of W. Haworth & Co. (P) Ltd. which concern was closely associated with the respondent's firm. The High Court rejected that contention and came to the conclusion that the Sold Note produced by the respondent is a genuine document. At the time of hearing of the appeal on the first occasion this Court felt that the respondent had not adduced all the evidence bearing on the question of genuineness of the Sold Note and hence it was necessary to give to the respondent further opportunity to adduce additional evidence. It accordingly directed the respondent to examine Sohanlal Sethia, Ranjit Singh Sethia, G. Simpson and Kanhaiyalal Kochar and other witnesses who may be concerned with or may throw light on the

issue of Bought and Sold Notes and to produce the contract registers, the "exercise-book" which has been referred to at paragraph 115 of the printed paper book by Jitendra Nath Basu and such other relevant documentary evidence which has a bearing on the preparation and issue of the Bought and Sold Notes by W. Haworth & Co. (P) Ltd. The respondent was also given an opportunity to examine any other witness if he desired to examine in support of its case. The appellant was afforded an opportunity to examine witness in rebuttal of the evidence of the respondent.

8. When the matter went back, the respondent examined only some of the witnesses mentioned in order of this Court. He pleaded that one of the witnesses asked to be examined had died in the meantime. Simpson was not examined on the ground that he was not available. After examining the witnesses produced in the Court and the production of some documents, the High Court sent back the record to this Court and the case came up for hearing in November 1969. After hearing the parties this Court by its order dated November 14, 1969 required the High Court to give its finding on the issue whether the Sold Note set up by the respondent was a fabricated document set up in collusion with W. Haworth & Co. (P) Ltd. It also required the High Court to record the evidence of Simpson and Kanhaiya Lal Kochar either by their personal presence or on commission. It further directed that following documentary evidence should be produced before the Court :

- (1) The Original Sold Note issued by W. Haworth & Co. (P) Ltd. to Mahabir Jute Trading Co. in respect of contract No. 1536;
- (2) Original letters sent by the respondent to Mahabir Jute Trading Co. relating to contracts No. 1535 and 1536;
- (3) Original Letters received by the respondent from Mahabir Jute Trading Co. in respect of these two contracts; and
- (4) The record of the Arbitration Tribunal relating to the claim of the respondent against Mahabir Jute Trading Co. which was registered as Arbitration Case No. 59 of 1961 of the Bengal Chamber of Commerce.

9. After the case went to the High Court for the second time the appellant examined several witnesses including one Shantinath Sarogi. The documents required to be produced by this Court were not forthcoming. The documents Nos. 1 and 4 mentioned above were in the possession of the Association. An official of the Association was examined to show that those documents had been destroyed in accordance with the rules after the withdrawal of the arbitration case instituted by the respondent against Mahabir Jute Trading Co. So far as the documents at Nos. 2 and 3 mentioned above are concerned, one of the partners of Mahabir Jute Trading Co. deposed to the fact that they were not traceable. The High Court accepted the evidence relating to the non-availability of the documents in question. That finding of the High Court was not challenged before us.

10. The High Court has come to the conclusion that the Sold Note produced by the respondent is a genuine document. It is the correctness of that finding that is in issue in this Court.

11. We may mention at this stage that Simpson has not been examined as a witness in the case. Evidence has been adduced to show that his whereabouts are not known. He had left for England and the place where he is residing at present is not known to the parties. The High Court has accepted the evidence adduced by the respondent to show that Simpson's where about are not known. That finding was not challenged before us. The evidence of the witnesses examined in this

case except that of Shantinath Sarogi do not throw much light on the genuineness of the Sold Note.

12. The main ground on which the genuineness of the Sold Note is challenged is that the press copy produced by W. Haworth & Co. (P) Ltd. does not tally with the Sold Note produced by the respondent. The High Court did not accept that contention. The respondent has examined Sarogi to prove that the press copy produced is the exact of the sold Note. The press copy had been prepared by mechanical process. Therefore it should be an exact copy. But there is slight difference in the alignment between the Sold Note and its press copy in certain places. Further some of the letters found in the Sold Note are not found in the press copy. According to Sarogi who claims to have experience of making press copies for over 20 years, there is nothing unusual in these differences. He deposed that the change in the alignment is due to slight folds in the paper on which the press copy is taken and the omission of letters is due to lack of pressure at certain places. This witness has been exhaustively cross-examined but nothing useful has been brought out from him to show that either he not a competent witness or that he was not impartial. The High Court has accepted his evidence and we see no reason to differ from the view taken by the High Court.

13. The appellant has examined Tarit Kumar Bakshi to show that there is material difference between the Sold Note and its press copy. His evidence has not been accepted by the High Court and the same was not commended for our acceptance at the hearing of the appeal.

14. It was urged by Mr. B. R. L. Iyengar, learned Counsel for the appellant that we should hold that the Sold Note in question is not genuine for the following reasons :

(a) that in the original affidavit-in-opposition filed by the respondent, the respondent did not allege that there was any difference between the Bought Note and the Sold Note.

(b) that the respondent had entered into a covering contract with Mahabir Jute Trading Co. on the footing that they had a valid contract with the appellant;

(C) that the Bought and Sold Notes should be identical. Before issuing them they must have been compared by the sub-broker and thereafter by the main broker and hence there was no possibility of any difference between the Bought Note and the Sold Note; and

(d) that the main brokers in this case were closely associated with the respondent and therefore there was every possibility for them to get a new Sold Note.

15. None of these criticisms in valid. In our opinion what had happened was that by oversight certain entries which had been made in the Bought Note were not made in the Sold Note. These omissions were evidently due to oversight. In the Bought Note price was made payable in "Cash on presentation in Calcutta a full set of shipping and insurance cover". There was no term in the Sold Note for the payment of the price. There were also some other minor omissions in the Sold Note. In our opinion all these omissions were due to carelessness. The brokers and sub-brokers did not care to carefully compare the Bought Note and the Sold Note. In fact the respondent was unaware of these omissions when it first filed its affidavit in opposition. Obviously it must have noticed these omissions at a later stage and now it is trying to take advantage of these omissions. Unfortunately according to law, for finding out the contract the Courts can only look into the Bought Note and the Sold Note. The respondent is now trying to take advantage of the law and defeat the claim of the

appellant. The press copy book is a regularly maintained book. We have examined that book. We do not think that there is any basis for coming to the conclusion that the book in question had been tampered with and a new press copy substituted. If the press copy book is held to be a genuine document then there can be hardly any doubt that the Sold Note is a genuine document. The omissions in the press copy book are satisfactorily explained.

16. For the reasons mentioned above this appeal fails and the same is dismissed. But in the circumstances of the case we direct the parties to bear their own costs both in the High Court as well as in this Court.

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