Timblo Irmaos Ltd., Margo

Vs

Jorge Anibal Matos Sequeira and Another

Civil Appeal No. 1868 of 1968

(CJI A.N. Ray, M.H. Beg, Jaswant Singh JJ)

16.12.1976

JUDGMENT

BEG, J. –

1. The plaintiff - appellant Timblo Irmaos Ltd., (hereinafter referred to as 'the Company') had sued Jorge Anibal Matos Sequeira and has wife (hereinafter referred to as 'Sequeiras') for recovery of Rs. 2, 82, 141 claimed under a contract of January 23, 1954, and a sum of Rs. 1,14,700, claimed under another contract of February 4, 1954. The Sequeiras counter-claimed Rs. 3 lakhs as price of 8000 tons of iron ore supplied to the company; and pleaded that a sum of Rs. 1,13,000, advanced by the Company to the Sequeiras was to be adjusted after final determination of the amount due a price of goods sold and supplied.

2. The Sequeiras are holders of a mining concession. They, it was alleged, had entered into the two contracts, one of January 23, 1954, through their attorney, Ramesh Jethalal Thakker (hereinafter referred to as Thakker Junior), for supplying 8000 tons of iron ore, altered in some respects, by a later agreement, and the other of February, 4, 1954, alleged to be binding on the Sequeiras although entered into through Jethalal C. Thakker (hereinafter referred to as 'Thakker Senior'), the father of R. J. Thakker. The most important clause in the contract of January 23, 1954, was that iron ore should be loaded in a ship 'Mary K' at Marmagoa, and that the loading must be done at the rate of 500 tons per "whether working day" of 24 hours. Under the contract, the rate of demurrage for not loading the ship in time was to be paid at the rate of US $800.00 per day and pro rata for each fraction of a day. The buyer company was to pay what was called "despatch money" at half the rate of demurrage for time saved in loading. The payment of Rs. 55,000 as soon as delivery by loading began. The buyers were also to establish a letter of credit, before January 27, 1954, in favour of the sellers, the Sequeiras, of the full value of the iron ore after deducting Rs. 55,000 paid initially, and Rs. 1/4 per gross ton awaiting final settlement by presentation within ten days, at the bank named in the agreement, by presentation of the certificate of weigh issued by the Master of the vessel. Certificates of the quality and specifications and of final weighment were to be sent by the buyers after the vessel's arrival at the port of discharge.

3. The second agreement of February 4, 1954, relates to loading of 6000 to 9000 tons of iron ore of given quality and specifications in the ship 'Mary K' at the minimum rate of 500 tons per day commencing delivery with 24 hours of the buyer notifying the requirements to the seller. It also contained other stipulations similar to those of the first one. The important point to note about this agreement is that it is signed by Jethalal C. Thakker as the attorney of his son Ramesh Jethalal Thakker.

4. It appears that the clause relating to initial payment was challenged so that the sellers, Sequeiras, were paid Rs. 1,13,000 between January 25, 1954, and July 22, 1954. It also appears that there was delay in delivery for which the plaintiff claimed demurrage. There were also complaints about alleged departure by the seller from the specifications agreed upon. The Sequeiras, the sellers, had, it seems, also applied for an interim injunction so that the ships' loading capacity may be checked. Under orders of the Court, an inspection of the ship was made and a report was submitted by an expert on March 15, 1954, after the determination of its loading capacity so that the ship could finally sail only on March 16, 1954.

5. The Margao Comarca Court, where the claim and the counter-claims were filed, held that the seller's attorney. Thakker Junior, who had received Rs. 1,13,000, which had to be deducted from the price of the iron ore supplied, was not duly authorised by the power of attorney executed by the Sequeiras to sell. The Court did not find enough material to reach a definite conclusion about the quantity of ore supplied and left that to be determined in execution proceedings. It, however, held the first contract to be binding between the parties as it had been ratified by the seller and acted upon by the buyer. But, the second contract was held to be not binding upon the Sequeiras as Thakker Junior was found to have been given only a limited authority so that the could not constitute his father his attorney for the purpose of executing the second agreement. The trial Court accepted the basis of the counter-claim of the Sequeiras and found that the company had committed breaches of contract but left the quantum of damages to be determined in execution proceedings.

6. The decree of the Trial Court was substantially affirmed in appeal. Nevertheless, the Additional Judicial Commissioner, Goa, Daman and Diu, had modified the decree, the appellant company has come up to this Court in appeal as of right. Two questions arise for determination before us. The first is whether the second contract of February 5, 1954, was duly covered by the authority conferred by the Sequeiras upon their attorney, Ramesh Jethalal Thakker, or not. The second relates to the amount of demurrage, if any, payable by the Sequeiras, the defendants-respondents to the plaintiff-appellant.

7. On the first question, the Judicial Commissioner concentrated on the dictionary meaning of the word "exploitation" used in the power of attorney executed by the Sequeiras in favour of Thakker Junior. The learned Judicial Commissioner took the meaning of the word from Chambers' 20th Century Dictionary which gave : "the act of successfully applying industry to any job, as the working of mines, etc.; the act of using for selfish purposes". The learned Judicial Commissioner also referred to the inability of learned Counsel for the company to cite a wider meaning from the Oxford Dictionary which the learned Counsel had carried with him to the Court. The Judicial Commissioner then ruled :

> Hence, I see no escape from the conclusion that on the basis of the power of attorney given by Sequeira to Ramesh the latter could not have entered into any agreement for sale of ore extracted from the mine belonging to Sequeira on his behalf. Consequently, Sequeira is not bound by the agreement dated February 4, 1954.

8. As already mentioned by us, the first contract of January 23, 1954, was held to be binding despite this finding because the parties had acted upon it and dealt with each other on the basis that such a contract existed. We think that this background can be taken into account as indicating what the parties themselves understood about the manner in which the words used in the power of attorney dated January 17, 1953, executed by Sequeiras in favour of Thakker Junior was related to the actual facts or dealings between or by the parties. Moreover, the power of attorney had to be read as a

whole in the light of the purpose for which it was meant. As it is not lengthy, we reproduce its operative part. It reads :

> Jorge Anibal de Motos Sequeira married, major of age, businessman, landlord, residing in Panjim, whose identity was warranted by witnesses, said in the presence of the same witnesses that by the present letter of attorney he appoints and constitutes his attorney Mr. Ramesh Jethalal, Bachelor, major of age, businessman, from Bombay, residing at present in Bicholim and confers on him the power to represent him, to make applications allegations, and to defend his right in any public offices or Banks, to draw up and sign applications, papers, documents and correspondence; specially those tending to acquire petrol, gunpowder, train, transport vehicles, machines, furniture (alfaias) and other instruments used in mining industry, apply for and obtain licences for importation and exportation, to give import and export orders, even temporary, sign applications, suits, and only other things necessary, attach and withdraw documents, make declaration, even under oath and in general any powers necessary for the exploitation of the mine named Pale Dongor situate at Pale for the concession of which the said Sequeira applied and which he is going to obtain to impugn, object, protect and prefer appeals upto the higher Courts, notify and accept notifications and summons in terms of Sections 35 and 37 of the I.P.C., to use all judicial powers without any limitation, to subrogate these powers to some one else. This was said and contracted. The witnesses were Bablo Panduronga Catcar and Xec Adam Xecoli, both married, landlords, major of age from Bicholim who sign below.

9. Apparently, practice and custom have some bearing on these transactions in Goa. It is this reason that, although the power of attorney was executed by Mr. Sequeira, yet, his wife was impleaded, according to the practice in Goa, and no objection was raised either on the ground that she was wrongly impleaded or that the power of attorney was vitiated on the ground that it was executed only by her husband. In any case, the subsequent agreement of January 23, 1954, which was held to have been acted upon, and the similar agreement of February 5, 1954, of which also the defendants were bound to have and did have full knowledge, were never repudiated by Sequeiras, before the filling of the suit before us. Indeed, the agreement of February 5, 1954, appears to be a sequel to the first agreement of January 23, 1954. We do not think that the two could be really separated in the way in which the judicial Commissioner thought that they could be by holding that the one was acted upon whereas the other was not. In any case, the second was the result of and a part of the same series of dealings between the parties.

10. We do not however propose to rest our findings on the ground that the parties are bound by the second agreement due to some kind of estoppel. We think that the terms of the power of attorney also justify the meaning which the parties themselves appear to have given to this power of attorney that is to say a power to conduct business on behalf of the Sequeiras in such a way as to include sales on behalf of Sequeiras.

11. We think that perhaps the most important factor in interpreting a power of attorney is the purpose for which it is executed. It is evident that the purpose for which it is executed must appear primarily form the terms of the power of attorney itself, and, it is only if there is an unresolved problem left by the language of the document, that we need consider the manner in which the words used could be related to the facts and circumstances of the case or the nature or course of dealings. We think that the rule of construction embodied in proviso 6 to Section 92 of the Evidence Act, which enables the Court to examine the facts and surrounding circumstances to which the language

of the document may be related, is applicable here, because we think that the words of the document, taken by themselves, are not so clear in their meanings as the learned Judicial Commissioner thought they were.

12. As we have already mentioned, the learned Judicial Commissioner chose to concentrate on the single word "exploitation" torn out of its context. The word "exploitation" taken by itself, could have been used to described and confer only such general powers as may be needed for the working or exploitation of the mine. But, the earlier parts of the document show that the main purpose of the document was to give power to Thakker Junior to represent Mr. Sequeira not only in litigation and financial affairs but "to draw up and sign" various "documents and correspondences". It is true that the power to sell is not specifically mentioned in the document. The nature of the documents and the correspondence which Thakker Junior could sign on behalf of Mr. Sequeira is also not clarified. Instances of particular kinds of business to be transacted by the agent in the course of "exploitation" of the mien are given, such as "acquisition of petrol, gunpowder, train, transport vehicles, machines, furniture and other instruments used in mining industry". It is difficult to see how any documents even for these special purposes could be signed without a power to buy and sell on behalf of the Sequeiras. Furthermore the power expressly includes giving of "import and export orders". Now, the conduct of a business so as to give necessary orders for purposes of exporting and importing must, we think, by a necessary implication, include the power to sell what is excavated from the mine to be exploited. Otherwise, how could iron ore be exported? It is a well-known rule of construction that powers necessary and incidental to the effective exercise of the powers conferred will be implied.

13. The learned Judicial Commissioner had, in our opinion, over-looked several well-known rules of interpretation : firstly, that, a word used in a document has to be interpreted as a part of or in the context of the whole; secondly, that, the purpose of the powers conferred by the power of attorney have to be ascertained having regard to the need which gave rise to the execution of the document, the practice of the parties and the manner in which the parties themselves understood the purpose of the document; and, thirdly that, powers which are absolutely necessary and incidental to the execution of the ascertained objects of the general powers given must be necessarily implied.

14. Applying the rules of interpretation of the document indicated above, it seems to us that the true meaning of the document will be seen to be that which the parties themselves understood it to be, that is to say, one which included the power to sell iron ore. Once we reach this conclusion it is not difficult to see that Thakker Senior was duly authorised to execute and sign on behalf of Thakker Junior because this is covered by the express words of the power of attorney : "to subrogate these powers to someone else". The mode of construction which we have indicated seems to use to be borne out by the very authorities cited on behalf of the defendants-respondents to which we will now advert.

15. Learned Counsel for the respondents seemed to place much reliance on Bryant, Powis, and Bryant, Limited v. La Banque De Peuple (1893) AC 170, 177, 179) , where it was observed (at p. 177) :

> Nor was it disputed that powers of attorney are to be construed strictly - that is to say, that where an act purporting to be done under a power of attorney is challenged as being in excess of the authority conferred by the power, it is necessary to show that, on a fair construction of the whole instrument, the authority in question is to be found within the four corners of the instrument either in express terms or by

> necessary implication.

It was also held there (at p. 179) :

> To put it shortly, the power of attorney authorized Davies to enter into contracts or engagements for three specified purposes : (1) the purchase or sale of goods; (2) the chartering of vessels; and (3) the employment of agents and servants; and, as incidental thereto, or consequential thereon, to do certain specified acts and other acts of the same kind as those specified. If the instrument be read fairly, it does not, in their Lordships' opinion, authorize the attorney to borrow money on behalf of the company, or to bind the company by a contract of loan. It appears to their Lordships that the words quoted in the judgment of the Court of Queen's Bench are to be read in connection with the introductory words of the sentence to which they belong, 'for all or any of the purposes aforesaid". So read, the words in question do not confer upon the agent powers at large, but only such powers as may be necessary in addition to those previously specified, to carry into effect the declared purposes of the power of attorney.

16. We think that the passages quoted above correctly lay down the law which is applicable in this country as well and which we are applying here. The method of construing a power of attorney indicated above fully supports our view that the document we have to construe confers a power to sell iron ore on behalf of the Sequeiras.

17. We were then referred to Jonmenjoy Coondoo v. George Alder Watson 10 ILR Cal 901, 912 : 11 IA 94 (PC), where it was held that a power of attorney which expressly conferred the power upon the agent to "negotiate, make sale, dispose off, assign and transfer or cause to be assigned and transferred at his discretion" Government notes, deposited with him for safe custody, did not include the power to lend or pledge. In this case, the ratio-decidendi seemed to be that lending or pledging would defeat the purpose of the power of attorney which expressly conferred the power to sell. Obviously, if what was to be sold was to be sold was loaned or pledged, it could not be easily sold. As we have noticed above, the powers deemed to be conferred by necessary implication must serve the purpose of the document and not frustrate it. The Privy Council observed (at p. 912) :

> The appellant's Counsel relied mainly upon the word 'negotiate', and also upon 'disposed of'. In order to seen what was intended by these words, they must be looked at in connection with the context, as well as with the general object of the power. This appears to their Lordships to have been to sell or purchase for Watson Government promissory notes and other securities, not to borrow or lend money upon them. If the word 'negotiate' had stood alone, its meaning might have been doubtful, though, when applied to a bill of exchange or ordinary promissory note, it would probably be generally understood to mean to sell or discount, and not to pledge it. Here it does not stand alone, and, looking at the words with which it is coupled, their Lordships are of opinion that it cannot have the effect which the appellant gives to it, and, for the same reason, 'dispose of' cannot have that effect.

We think that this case also bears out the mode of construction adopted by us.

18. We were then referred to Adaikappa Chettiar v. Thomas Cook & Son (Bankers) Ltd. (AIR 1933 PC 78 : 64 MLJ 184), where the well-known principles of ejusdem generis was applied to hold that

general words following words conferring specifically enumerated powers "cannot be construed so as to enlarge the restricted powers there mentioned". In this case, the purpose of the general power was subordinated to the specific powers given which determined the object of the power of attorney. There is no deviation in this case from the general rules of constructions set out above by us. We have indicated above that implied powers cannot go beyond the scope of the general object of the power but must necessarily be subordinated to it. In fact, in a case like the one before us, where a general power of representation in various business transactions is mentioned first and then specific instances of it are given, the converse rule, which is often specifically stated in statutory provisions (the rules of construction of statutes and documents being largely common), applies. That rule is that specific instances do not derogate from the width of the general power initially conferred. To such a case the ejusdem generis rule canto be applied. The mode of construing a document and the rules to be applied to extract its meaning correctly depend not only upon the nature and object but also upon the frame, provisions, and language of the document. In cases of uncertainty, the rule embodied in proviso 2 to Section 92 of the Evidence Act, which is applicable to contracts can be invoked. Thus, the ultimate decision, on such a matter, turns upon the particular and peculiar facts of each case.

19. Coming now to the second question, we find that the findings of fact recorded by the Judicial Commissioner are unexceptionable. Firstly, it was found that, although under the contract, the defendants-respondents could load iron ore at any time during 24 hours, which included the night, yet, the defendants were prevented from doing so owing to the failure of the plaintiff to provide either sufficient lighting or enough winches to enable due performance of the contract. Secondly, it was admitted that the appellant never opened a letter of credit with the named bank by January 27, 1954, as promised by it. Thirdly, the delay in loading was held to be due to the fault of the company. The Judicial Commissioner rightly concluded that the company had not discharged its own part of the contract so that it could not claim demurrage or damages. Indeed, it was found that the company did not have to pay any demurrage at all to the shippers for delayed departure.

20. Learned Counsel for the appellant relied strongly on the following terms in the contract of January 23, 1954 :

> Demurrage (if any) in loading payable by Seller at the rate of US $800.00 per running day fraction of day pro rata. Buyers to pay despatch money at half the demurrage rate for all time saved in loading. Payment either way in Portuguese Indian rupee currency at the rate of exchange of Rs. 476 for US $100.00.

The contention was that this created an absolute liability to pay for delay in loading irrespective of whether the company had to pay the shippers any demurrage. It was urged that the liability was upon the seller irrespective of whether such payment had to be made to the shipping company or not. We think that the demurrage could not be claimed when the delay in loading was due to the default of the respondents (sic appellant himself) themselves. It is apparent that the basis upon which the agreement to pay demurrage rested was that the appellant will afford proper facilities for loading. When the appellant itself had committed breaches of its obligations, it is difficult to see how the respondents could be made responsible for the delay in loading. We think that the Judicial Commissioner had rightly disallowed this part of the claim.

21. In the result, we partly allow this appeal, set aside the finding of the Judicial Commissioner as regards the binding nature of the contract dated February 5, 1954. We hold that this document embodied the terms of an argument which was legally binding on both sides before us. The case will

now to back to the trial Court for determination of the liabilities of the parties to each other for alleged breaches of contract except to the extent to which the findings negative the claim to demurrage and the admitted payment of Rs. 1,13,000 by the appellant to the defendants which will have to be taken into account. The parties will bear their own costs.

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