CALCUTTA HIGH COURT

Bhuwalka Brothers Ltd

Vs.

Dunichand Rateria

A.F.O.D. No. 124 of 1951

(Harries, C.J. G.N. Das and Banerjee, JJ.)

16.05.1952

JUDGMENT

Banerjee, J.

1. This is an appeal from a judgment of Bachawat, J., requiring our decision upon the effect and validity of an Ordinance made by the Governor of this Province.

2. The plaintiff is a merchant who has been carrying on business in Calcutta in jute goods for the last 30 or 35 years and during this time he entered into numerous transactions to the approximate value of rupees eighty to ninety crores. In the year 1949, the volume of his business exceeded Rs. 2 crores. Yet he never possessed a godown nor any place to store jute goods. He gives 'actual' delivery by means of delivery orders or mate's receipts. In his evidence he said :

> "The goods remain with the mills. We deal either in delivery orders or mate's receipts. Delivery order is in other words the goods. Whether you say delivery order or delivery of the goods, it is one and the same thing."

That is how he carries on business.

3. As to the defendant, the learned trial Judge has thus summarized its position :

> "A large part of the defendant's contracts is settled by paying the difference in price. In my judgment neither the making nor the settlement of a contract for purchase and sale of jute goods is a dealing in sale and purchase of goods involving actual delivery thereof. With regard to some of the contracts which are not settled, the defendant gives and takes delivery orders and receives and pays the price of jute goods against such delivery orders ..... Some of the defendant's contracts are however strictly performed by actual delivery of the goods alongside the steamer."

4. He has further held that

> "the defendant does give and receive shipping instructions and does also pay and receive the price of jute goods in exchange for mate's receipts. Such mate's receipts are obtained by the mills after the goods are delivered alongside the steamer."

The learned Judge continues :

> "The defendant is neither a mill nor a shipper. Frequently its contract of sale and purchase of jute goods is a link in a long chain of contracts starting with the Jute mills and ending with the shipper or exporter. The various links in the chain consist of middlemen who are both buyers and sellers in their turn. The shipping instruction is given by the shipper and similar shipping instructions are given by each middleman including the defendant all along the chain until it reaches the mills. The goods are delivered alongside the vessel by the mills against mate's receipt which is forwarded along the chain until it reaches the shipper."

5. This shortly according to the trial Judge is the position of the parties. These findings have not been challenged before us, and the respective contentions of counsel were made on the basis of these findings.

6. The plaintiff, who is the respondent before us, agreed to buy under three several contracts, the first two being dated 8th August 1949, and other dated 17th August 1949, made on the Indian Jute Mills Association printed Forms, and the defendant agreed to sell B-T will bags (jute goods), October-December 1949 delivery. On 28th September 1945, the plaintiff made three cross contracts (Settlement contracts as they are usually called) with the defendant to sell back the goods to the defendant, delivery October-December 1949, and agreed to pay the difference at certain rates on the due dates. The total difference was Rs. 1,15,650, for which the plaintiff duly submitted his bills, which the defendant refused to pay.

7. In the written statement the defendant pleads that the contracts of sale which it had made with the plaintiff became impossible of performance. But no point was made on this defense in the trial Court, and the case was fought on the only ground that the Settlement contracts were void being in contravention of the West Bengal Jute Goods Futures Ordinance, 1949. The only issue the parties by consent raised before the learned trill Judge was this : Are the three settlement contracts illegal in view of the ordinance? The other issue was the subsidiary issue : To what relief (if any) is the plaintiff entitled?

8. The Ordinance was promulgated by the Governor of West Bengal in exercise of the power conferred on him by Section 88, Government of India Act, 1935. This section empowers a Governor when the legislature of a province is not in session and the Governor is satisfied that circumstances exist which render it necessary for him to take immediate action, to promulgate such Ordinance as the circumstances appear to him to require.

9. The Ordinance in question came into force on 22nd September 1949, the date of its

publication in the official gazette.
10. Shortly before that date the Government of India had devalued its currency. The Pakistan Government did not. The result was a great disparity between the Indian currency and the Pakistan currency. So much so that 100 Pakistan Government rupees became equivalent to 140 rupees of the Indian Government. The effect of devaluation could not at that time be correctly ascertained and there was confusion in the minds of merchants and traders as to what the effect would be.

11. One of the principal trades in West Bengal is the jute trade. But all raw jute practically at that time came from East Bengal which was then and now is a part of East Pakistan. The mills are in Calcutta. But the mills cannot run without raw jute. Any one in India who wanted to buy one hundred rupees worth of raw jute in Pakistan had to pay Rs. 140 in Indian currency. The situation led to a lot of speculation in the jute market.

12. It should be observed that apart from contracts by way of wager, jute trade in Calcutta is mainly carried on by (1) delivery of goods against payment, and (2) forward contracts where under a contract, goods are deliverable on a future date. On the due date either the goods are taken delivery of, or the contracts are settled by settlement contracts, the difference being paid or received. There is no actual delivery of goods. In majority of cases, the contracts are settled. They are highly speculative in character.

13. The Government of West Bengal passed the Ordinance for the prevention of dealings in jute goods futures. In the Ordinance, unless there is anything repugnant in the subject or context, "contract relating to jute goods futures," means a contract relating to the sale or purchase of jute goods made on a forward basis - (a) providing for the payment or receipt, as the case may be, of margin in such manner and on such dates as may be specified in the contract, or (b) by or with any person not being a person who - (i) habitually deals in the sale or purchase of jute goods involving the actual delivery of possession thereof, or (ii) possesses, or has control over, a godown and other means and equipments necessary for the storage and supply of jute goods. Section 3 gives power to the Provincial Government to prohibit contracts relating to jute goods futures. That section provides that the Provincial Government may, from time to time, if it so thinks fit, by notification in the official gazette, prohibit the making of contracts relating to jute goods futures and may, by like notification, withdraw such prohibition. Sub-section (2) provides that when the making of contracts relating to jute goods futures is prohibited by a notification under Sub-section (1), - (a) no person shall make any such contract or pay or receive any margin except, in the case of any such contract made prior to the date of the notification, to the extent to which the payment or receipt, as the case may be, of margin is allowable on the basis of the last closing rate in the notified market. Clause (c) of sub-section (2) provides that notwithstanding anything contained in any other law for the time being in force, (i) every such contract made, and every claim in respect of margin, in contravention of the provisions of clause (a), shall be void and unenforceable, and (ii) every such contract made prior to the date of publication of the notification shall be varied and settled on the basis of the last closing rate in a notified market. That section also defines what a 'closing rate', and a 'notified market' is. Section 4 provides for penalty and Section 5 the procedure for the trial of a person who acts in contravention of the provisions of the Ordinance.

14. The defendant's case is that as the settlement contracts were made after the notification

referred to in Section 3 of the Ordinance, they are void and unenforceable, and that being the position the original contracts must be settled on the basis of the last 'closing rate' in a 'notified market'. The Provincial Government notified as to what that market was.

15. The contentions of the respective parties may be summarized thus : the plaintiff contends that he is entitled to the sum of Rs. 1,15,000 and odd as agreed between the parties. The defendant's contention, on the other hand, is that the plaintiff is entitled only to the difference between the contract rate and the last 'closing rate' in the notified market.

16. According to the defendant, notwithstanding any other law for the time being in force, the settlement contracts having been made after the promulgation of the Ordinance, are void and unenforceable : therefore, the plaintiff is only entitled to enforce the original contracts under that clause of the Ordinance which provides for settlement on the basis of the last 'closing rate' in the notified market.

17. It should be observed that if the defendant's contention is accepted, it will have to pay a very much less amount than the plaintiff claims - practically nothing.

18. The defendant in his written statement states what according to the Ordinance the notified markets are. They are : (a) East India Jute and Hessian Exchange Ltd., (b) Calcutta Wheat and Seeds Association, and (c) Indian Jute and Cotton Association Ltd. The East India Jute and Hessian Exchange Ltd. fixed Rs. 146-14-0 per 100 bags of B-Twill as the last closing rate in terms of the Ordinance and the rates fixed by the other two associations were near about the same. The rate at which the contracts were settled by agreement between the parties, was Rs. 161-8-0 per 100 bags, the difference being payable by the defendant to the plaintiff. According to the last closing rate in the notified market the rate was Rs. 146-14-0. According to this rate the plaintiff would be entitled to a very small difference.

19. The first question that was canvassed before us was as to whether the settlement contracts came within the purview of the Ordinance. Before us there is no dispute that neither party comes within Section 2 (1) (b) (ii) of the Ordinance. Neither the plaintiff nor the defendant possesses, or has control over, a godown and other means and equipments necessary for the storage and supply of jute goods. It is not in dispute that in this case the delivery was to be by means of delivery orders. But what has been canvassed before us on behalf of the respondent is that such delivery means 'actual delivery of possession' of the goods within the meaning of the ordinance. In other words it has been contended on behalf of the respondent that the parties come within the protection afforded by Section 2 (1) (b) (i). It is said that they are habitual dealers in the sale or purchase of jute goods involving the actual delivery of possession thereof, and it has been very strenuously contended by counsel for the respondent that delivery of the delivery order means actual delivery of possession of the goods, and reliance has been placed on various English cases in support of that contention. On the evidence the learned trial Judge has held on this point that in the Calcutta jute trade, pukka delivery orders are ordinarily issued by the mills against cash payment and pass from hand to hand by endorsement and are used in the ordinary course of business, authorizing the endorsee to receive the goods which they represent. They are dealt with in the market as representing the goods. The learned Judge refers to *Anglo-India Jute Mills Co. v. Omodemull*[1], He has further held that the holder of a delivery order is the person to whom the holder of the goods must deliver the goods though the transfer of the delivery order has not the

effect of delivery of the goods. The learned Judge points out that on this point there is a difference between bills of lading and other documents of title. After referring to the observation of Lord Parker in *Ramdas v. Amerchand and Co*[2]*.,* at p. 171, the learned Judge said :

> "the transfer of a bill of lading is equivalent to actual delivery of possession of the goods, but the transfer of other documents of title has no such effect."

20. The word 'actual' seems to be a slip, the word used by the Privy Council being 'constructive.' The passage to which the learned trial Judge makes reference is as follows :

> "The truth is that the only point in which a bill of lading differs from other 'documents of title' is that its assignment, whether upon a resale or by way of pledge, operates as a constructive delivery of the goods to which it refers."

21. That was a case in which their Lordships had to consider the meaning of the expression 'bill of lading or other instrument of title' in Section 103, Contract Act, 1872, in order to decide whether railway receipts were instruments of title within the meaning of that section.

22. The two cases which have been referred to by the learned trial Judge do not seem to support his reasoning. In Anglo-India Jute Mitts' case, 38 Cal 127 the nature of a pukka delivery order, its negotiability had to be considered, as appears from the following words of Jenkins, C.J., (at p. 137) :

> "This delivery order was indorsed to the plaintiffs by way of pledge on the 4th of March and this the plaintiffs maintain entitles them in the circumstances to the decree Fletcher, J., has passed in their favour. The defendant company on the other hand urge that the delivery order was not a document of title, that it was not negotiable, and that no goods passed. But to this the plaintiffs reply, (a) that this delivery order did pass by indorsement, (b) that the issue of the delivery order in the circumstances was a representation on which the plaintiff acted, that the cash payable in respect of the goods to which it referred had been paid, and (c) that it is not open to the defendants to contend that the property in the goods had not passed or to place reliance on their not having passed if that was the fact."

The court held that a delivery order was recognized as a document of title under Section 108, Contract Act and Section 137, T. P. Act, and under a delivery order the transferee acquired title to the goods to which it related. By the usage of the jute trade in Calcutta, pucca delivery orders are issued only on cash payment, are passed from hand to hand by endorsement, and are sold and dealt with in the market as absolutely representing the goods to which they relate.

[1]38 Cal 127
[2]43 Ind App 164 (PC)

23. It is clear that in that case what was considered was the negotiability of a pucca delivery order. The question was whether title passed by endorsement of delivery orders. In that case the question which we have to determine in this appeal, namely, whether the endorsement of

a delivery order amounts to 'actual delivery of possession of the goods,' did not fall to be considered. In that case the delivery order was held to be a document of title, which by endorsement passes the title in the goods it represents to the endorsee. But it still has to be considered whether such endorsement gives 'actual delivery of possession of the goods.'

24. It appears from the observation of Lord Parker in Ramdas's case, 43 Ind App 164 (PC) that the assignment of even a bill of lading operates only as a constructive delivery of the goods which it represents and not actual delivery of the goods.

25. In the Indian Sale of Goods Act, 'delivery order' is included among documents of title, 'mate's receipt' is not. In Mulla's Sale of Goods Act, the distinction between a bill of lading and the other documents (including a delivery order) is thus stated (at p. 14) :

> "Modification of the Common Law by the Act - At common law there was an important distinction between a bill of lading and those other documents which by the definition are documents of title. 'Those documents,' wrote Lord Blackburn, 'are generally written contracts, by which the holder of the endorsed document is rendered the person to whom the holder of the goods is to deliver them, and in so far they greatly resemble bills of lading; but they differ from them in this respect, that when goods are at sea the buyer who takes the bill of lading has done all that is possible in order to take possession of the goods, as there is a physical obstacle to his seeking out the master of the ship and requiring him to attorn his rights; but when the goods are on land, there is no reason why the person who receives a delivery order or dock warrant should not at once lodge it with the bailee, and so take actual or constructive possession of the goods. There is, therefore, a very sufficient reason why the custom of merchants should make the transfer of the bill of lading equivalent to an actual delivery of possession, and yet not give such an effect to the transfer of documents of title to goods on shore. As between seller and buyer, this is still the law, with the result that, while the transfer of the bill of lading by itself amounts to delivery of the goods by the seller to the buyer, so that the seller's lien is thereby destroyed, his handing to the buyer of other documents of title does not amount in itself to delivery, and before the buyer can be said to be in possession of the goods, the bailee must attorn to him. It is when, and only when, such documents come into the hands of a third party that the position as it was at common law is altered. The transferee of such a document is now, as against the seller, in the same position as the transferee of the bill of lading was at common law. "

26. In *Official Assignee of Madras v. Mercantile Bank of India, Ltd*[3]*.,* the Judicial Committee had to consider the difference between a bill of lading and other documents of title. In that case it has been held that a railway receipt, providing that delivery of the consigned goods is to be made upon the receipt being given up by the consignee, or by a

[3](1935) AC 53 (PC)

person whom he names by indorsement thereon, is a document of title within the meaning of the Indian Contract Act, 1872, Section 178 (for which a new section was substituted by the amending Act IV [4] of 1930), and a pledge of a railway receipt operated under the repealed

section as a pledge of the goods. The pledgee does not release the pledge by handing the receipt to the pledgor in order that he may collect the goods from the railway company and place them in a warehouse on behalf of the pledgee. Goods so pledged are not in the possession, order or disposition of the pledgor within the meaning of sub-section 2 (c) of Section 52, Presidency Towns Insolvency Act, 1909, even where the railway receipt has been handed to the pledgor for the purpose above stated. Lord Wright after referring to Ramdas's case (43 Ind App 164 PC) makes the following observation at pp. 58-59 :

> "The two questions which next arise on Section 178 are (1) whether the words 'a person who is in possession of any goods or of any bill of lading', etc., include the owner, and (2) whether a pledge of the documents is a pledge of the goods as distinct from the documents. The questions must be separately considered; both depend on the words of the section read in connection with the rest of the Act.

But the arguments advanced on behalf of the appellant have sought to treat the matter as concluded by the history and present state of the relevant law in England, which will now be briefly summarized. At the common law a pledge could not be created except by a delivery of possession of the thing pledged, either actual or constructive. It involved a bailment. If the pledgor lad the actual goods in his physical possession, he could effect the pledge by actual delivery; in other cases he could give possession by some symbolic act, such as handing over the key of the store in which they were. If, however, the goods were in the custody of a third person, who held for the bailor so that in law his possession was that of the bailor, the pledge could be effected by a change of the possession of the third party, that is by an order to him from the pledgor to hold for the pledgee, the change being perfected by the third party attorning to the pledgee, that is acknowledging that he thereupon held for him; there was thus a change of possession and a constructive delivery : the goods in the hands of the third party became by this process in the possession constructively of the pledgee. But where goods were represented by documents the transfer of the documents did not change the possession of the goods, save for one exception, unless the custodier (carrier, warehouseman or such) was notified of the transfer and agreed to hold in future as bailee for the pledgee. The one exception was the case of bills of lading, the transfer of which by the law merchant operated as a transfer of the possession of, as well as the property in, the goods. This exception has been explained on the ground that the goods being at sea the master could not be notified; the true explanation may be that it was a rule of the law merchant, developed in order to facilitate mercantile transactions, whereas the process of pledging goods on land was regulated by the narrower rule of the common law and the matter remained stereotyped in the form which it had taken before the importance of documents of title in mercantile transactions was realized."

The difference between actual delivery and constructive delivery is clearly explained.

27. In view of the Privy Council cases, which I have cited, it is not necessary for us to discuss the English cases on this point which were cited at the bar.

28. Section 33, Sale of Goods Act provides that delivery of goods sold may be made by doing anything which the parties agree shall be treated as delivery or which has the effect of putting the goods in the possession of the buyer or of any person authorised to hold them on his behalf.

(a) A sells certain specific goods to B which are locked up in a godown. The seller gives the key to the buyer so that he may get the goods.
(b) A sells goods to B in the possession of a warehouseman. Subsequently the three agree that the warehouseman would hold the goods for the buyer.

29. In each case there is a delivery. But there is this difference. In the first case the delivery of the key to the buyer gives him actual control of the place where the goods are and thereby of the goods themselves. This is symbolic delivery. The delivery of the key is a declaration of the seller's intention to transfer control of the goods. But delivery of a key does not operate as delivery of the goods under the lock if it does not in fact give complete access to the goods.

30. In the other case possession is transferred by agreement of the buyer, the seller and of the warehouseman who after the agreement holds the goods on behalf of the buyer. This is called constructive delivery, in which there is no change in the actual and visible custody of the goods. But from the moment of the agreement the warehouseman is bound to give actual delivery whenever he is called upon by the buyer to do so. The agreement which is called "agreement of attornment" has the effect of transferring legal possession of the goods to the buyer. But all the three parties must concur, otherwise there is no delivery. Mere handing of a delivery order or the like by the seller to the buyer is not sufficient. *McEwan v. Smith*[2], In the language of the English cases on the Statute of Frauds, taking and keeping a delivery order is evidence of acceptance, but not of receipt. Numerous examples can be given of constructive delivery.

31. Section 34 deals with effect of part delivery. Section 39 deals with delivery through carrier or wharfinger. It is settled law that if a tradesman order goods to be sent by a carrier, though he does not name any particular carrier, the moment the goods are delivered to the carrier it operates as a delivery to the buyer. The carrier is in such cases deemed to have been authorized to receive the goods on behalf of the buyer. Sometimes great difficulties arise in deciding questions of delivery.

32. The point we have to decide is what is the meaning of the expression 'actual delivery of possession.' Who are the persons who are outside the mischief of the Ordinance? What are the transactions which are within the mischief of the Ordinance?

33. It should be noted that if a contract is made by a person who habitually deals in the sale or purchase of jute goods involving the actual delivery of possession thereof with another person who does not habitually deal in such sale or purchase, the contract is within the mischief of the Ordinance. Likewise if a person who is not a habitual dealer within the meaning of Section 2 (b) (i) enters into a contract with a person who is such a dealer, the Ordinance hits the contract. It is only when both the buyer and the seller are habitual dealers in the sale or purchase of goods involving the actual delivery of

[3](1849) 2 HLC 309

possession, that the contract between them is not within the mischief of the Ordinance.
34. In this case, it is admitted, what happened was this. The mills who held the goods sold them to A, A to B, B to the defendant, defendant to the plaintiff, plaintiff to C and C to the shipper. This is what is known as a chain contract. It is admitted by the plaintiff, that the mills give the delivery order to A. A endorses it to B, B to the defendant, defendant to the plaintiff and so on.

35. None of them pays the actual price of the goods except the shipper who takes delivery of the goods from the mills against payment. From the mills' custody the goods go to the custody of the shipper, who puts them on the vessel and sends them away. The question is whether such a contract can be called a contract between the plaintiff and the defendant involving the actual delivery of possession of the goods.

36. A endorses the delivery order over to B and takes the difference, B in his turn to the defendant and takes the difference and so on. Sometimes in a chain contract, settlement is, made and nobody takes delivery of possession of the goods. Such a contract cannot be called a contract by way of wager as that is ordinarily understood. But there is no doubt that this is a highly speculative transaction. Nobody is concerned to pay the actual price or takes delivery of the goods except the shipper who takes the goods and pays the price to the mills. In such a case necessarily no large capital is needed. The intermediate buyer or seller need not possess a godown or any other place to store the goods or any equipment for their storage.

37. The learned Judge has said :

> "Now visualize the long chain of contracts in which the defendant's contract is one of the connecting links. The defendant buys from its immediate seller and sells to its immediate buyer. As seller it is liable to give and as buyer it is entitled to take delivery. As seller it receives and as buyer it gives shipping instructions. Similar shipping instruction is given by each link until it reaches the mills. The mills deliver the goods alongside the steamer. Such delivery is in implement of the contract between the mills and their immediate buyer. But eo instanti it is also in implement of each of the chain contracts including the contract between the defendant and its immediate buyer and the contract between the defendant and its immediate seller. Not only does the mill give and its immediate buyer take actual delivery but eo instanti each middleman gives and takes actual delivery. Simultaneously the defendant takes actual delivery of possession of the jute goods from its immediate seller and gives actual delivery of possession of jute goods to its immediate buyer. Prima facie at the moment of the delivery alongside the steamer there is appropriation and the passing of the property in the goods and the giving and taking of actual delivery of possession thereof all along the chain at the same moment."

38. The learned Judge then refers to an observation of Lord Wright in *Nippon Yusen v. Sam Jiban*[4], and adds :

> "The sale and purchases of the defendant where there is actual shipment and

[4]65 Ind App 263 (PC)

> delivery of possession of the goods alongside the vessel involves actual delivery of possession of the jute goods. The delivery of the goods alongside the vessel is physical delivery of the goods and necessarily changes the actual custody of the goods. It is said that there is no actual physical delivery of the goods by the defendant himself. The legislature, however, does not say that the dealer must himself give actual delivery of the goods. I cannot read in the statute words which are not there and say that the dealer must

himself give delivery of the goods in order to come within the definition in sub-e. 2 (1) (b)(i) of the Ordinance. The legislature simply insists that the sales and purchases of the dealers should involve actual delivery of possession of the jute goods. I do not see why the sales and purchases do not involve actual delivery, if such actual delivery is given not by the dealer but by a third party in performance of and in relation to the sales and purchases of the dealer. Even the buyer and the seller of jute goods over the counter rarely takes and gives manual delivery of the goods. Very often such manual delivery is given and taken not by the buyer and seller but by their respective servants and agents. I do not see why instead of the buyers' and sellers' employees and servants giving and taking delivery of the goods somebody else on their behalf gives and takes delivery such delivery is not actual delivery of possession of the goods."

39. I am unable to take the view of the law that the learned trial Judge has taken. The words in the Ordinance are 'actual delivery of possession.' What is actual delivery? A goes to a book-shop, pays the price, and takes the book. In this case there is actual delivery in its true sense. The word 'actual' means actual, not fictional or notional. Where you make over the key, it may be said that there is actual delivery, because the buyer can unlock the warehouse and get access to the goods and remove them. Like argument is possible also in constructive delivery. But where there is transfer of a mere delivery order, I cannot see how there is actual delivery of possession of goods. The learned Judge has said that when the mills deliver the goods to the shipper there is an eo instanti delivery between intermediate buyer and seller; But that is not actual delivery of goods. It may be delivery of goods by fiction.

40. I have already pointed out that taking and keeping a delivery order is no evidence of receipt of the goods except in one case where the delivery of a document of title effects transfer of the actual possession of goods. That is in the case of a bill of lading. Where the goods are in the hands of a carrier by sea, the lawful issue or transfer of the bill of lading to the buyer gives him actual possession of the goods. No attornment by the carrier is required to complete the delivery. This is not the case when the document of title is not a bill of lading but a delivery order or a dock warrant. The reason for the difference between a bill of lading and other documents of title has been explained by Lord Wright in the judgment I have already cited.

41. In this case the plaintiff said he had nothing to do with the goods. All that he was required to do by the contract was to take or give delivery of the delivery order or mate's receipt. According to him delivery order meant the goods. His intention was only to hand over the delivery order and pay or receive the difference. He never shipped any goods. He has never been in possession of any godown or any place to store the goods.
42. How can it be said that there was between the plaintiff and the defendant a contract which involved the actual delivery of possession of goods? What the contract did involve was the actual transfer of the delivery order, but not delivery of the goods.

43. Then again what was the Ordinance promulgated for ? Certainly not to avoid wagering contracts, which are already void under the ordinary law of the land. For that purpose no legislation was necessary. The mischief which the Ordinance was intended to redress was that created by these highly speculative transactions namely the chain contracts. I have already said

that a part of the jute trade in Calcutta is carried on by these chain contracts. They are highly speculative transactions and are carried on by means of forward contracts. Sometime delivery is taken. But in majority of cases, they are settled by cross contracts. Section 3 (1) gives power to the Provincial Government to prohibit the making of such contracts relating to jute goods.

44. The words of the Ordinance are 'by or with any person not being a person who habitually deals in the sale or purchase', which clearly refer to contracts which involve delivery between the intermediate buyer and seller and not to that kind of delivery which the learned Judge says takes place when the mills make over goods to the shipper.

45. The original contracts were made before the date of the notification, namely 22-9-1949 the settlement contracts after that date.

46. The practical effect of a settlement contract is to wipe out the original contract. There is no question of taking or giving delivery of goods any more. It is only payment or receipt of the difference. In this case the original contracts were settled by the settlement contracts, and the defendant agreed to pay to the plaintiff certain difference.

47. But in law the position is different. The original contracts and the settlement contracts remain outstanding till the due dates arrive. On that day the contracts are performed by payment of the difference. In other words there is set off as regards delivery under the original contract against delivery under the settlement contract and the difference is paid.
48. Rankin, J., in *Uttamchand v. Mamooji*[5], observes at p. 542 with reference to such contracts as follows :

> "When a settlement contract is made, reselling the goods back again from the original buyer, the intention, is not that after the settlement contract the first contract should be gone. The intention is that the two contracts should stand together. That being so there can be a set-off as regards delivery, and there can be a set-off as regards price for everything except the difference. It seems to me to be abusing Section 62, Contract Act to say that after a settlement contract the original contract is utterly discharged."

49. In this case, therefore, both the original contracts and the settlement contracts remained outstanding till the arrival of the due dates. But the settlement contracts having been made after the Ordinance had come into force are void and unenforceable by reason of clause 3 (2) (c) (i) of the Ordinance, and, therefore, it follows that the original contracts which remained outstanding on the due dates must be settled on the basis of the last

[5]46 Cal 534

closing rate in a notified market, (3 (2) (c) (ii)), and the plaintiff is entitled to this difference and nothing more. But then on behalf of the respondent it was very strenuously contended that the Ordinance was ultra vires and invalid and had no effect on the contracts, and, therefore, the plaintiff was entitled to damages at the current market rate. This point was not taken in the Court below, and the learned trial Judge had no opportunity to express his views on it.

50. The question is whether the Ordinance is ultra vires. The Ordinance was promulgated by the Governor by virtue of the power conferred on him by Section 88, Government of India Act.

51. In Schedule 7 of the Act there are three legislative lists. List I is the Federal Legislative List - list of subjects on which the Federal Legislature alone could make laws. List II is the Provincial Legislative List, which enumerates the subjects on which the Provincial Legislature could make laws, and List III is the Concurrent Legislative List, on which the Provincial Legislature could make laws with the assent of the Governor-General of India. In this case the Ordinance has not received the assent of the Governor-General. The question is whether the Ordinance comes within List II or within List III. If it comes within List III, then since the assent of the Governor-General has not been obtained, the Ordinance must be invalid. The Provincial Legislature without the assent of Governor-General had no legislative authority. and what the Provincial Legislature could not legislate, the Governor was incompetent to do by Ordinance.

52. On behalf of the respondent it was contended that the Ordinance came within head 10 of List III :

> "Contracts, including partnership, agency, contracts of carriage, and other special forms of contract, but not including contracts of agricultural land."

Counsel's argument was that the Ordinance aimed at contracts only and, therefore, it came within item 10.

53. On the other hand, on behalf of the appellant it was argued that the Ordinance came within head 27 of List II : "Trade and Commerce within the Province; markets and fair; money lending and money lenders."

54. If it comes within List II, it is quite clear that the Provincial Legislature was competent to legislate, and, therefore, when the legislature was not in session, the Governor could make the Ordinance by virtue of Section 88, Government of India Act.

55. In aid of his argument counsel for the respondent cited numerous cases decided by the Privy Council on Canadian Regulations. The first of the case cited is *Citizens Insurance Co. of Canada v. William Parsons*[6], The two appeals arose out of two actions brought by the same plaintiff (the respondent) upon contracts of insurance against fire of buildings situate in the province of Ontario, in the Dominion of Canada. The most important question in both appeals related to the distribution of legislative powers between the parliament of Canada and the Legislatures of the provinces, and the question was whether

[6](1881) 7 AC 96

the contracts of insurance came within the words "Property and civil rights" or "Regulation of Trade and Commerce". On the part of the respondent it was argued that the Ontario Act in question had relation to matters corning within the class of subjects described under the head "Property and Civil Rights in the Province." The appellants on the other hand, contended that civil rights meant only such rights as flowed from the law and gave as an instance the status of persons. According to them the contracts came within the words 'Regulation of trade and commerce."

56. Another point mooted in that case was as to whether the business of insuring building against

fire was a trade or not. Their Lordships observed at p. 111,

> "this business, when carried on for the sake of profit, may, no doubt, in some sense of the word, be called a trade. But contracts of indemnity made by insurers can scarcely be considered trading contracts, nor were insurers who made them held to be 'traders' under the English Bankruptcy Laws; they have been made subject to those laws by special description. Whether the business of fire insurance properly falls within the description of a 'trade' must, in their Lordships' view, depend upon the sense in which that word is used in the particular statute to be construed; but in the present case their Lordships do not find it necessary to rest their decision on the narrow ground that the business of insurance is not a trade."

57. Their Lordships abstained on that occasion from any attempt to define the limits of the authority of the Dominion Parliament. They said (p. 113) :

> "It is enough for the decision of the present case to say that, in their view, its authority to legislate for the regulation of trade and commerce does not comprehend the power to regulate by legislation the contracts of a particular business or trade such as the business of fire insurance in a single province and therefore that its legislative authority does not in the present case conflict or compete with the power over property and civil rights assigned to the Legislature of Ontario by No. 13 of Section 92."

58. The case before us is not exactly similar to the appeals before their Lordships of the Judicial Committee. Here we have to consider the reverse of what their Lordships had to consider in that case. Here the power to make laws relating to contracts is in the Concurrent List; that is to say, the Provincial Legislature as well as the Federal Legislature had the power to legislate on it; but the Provincial Legislature could do so only with the assent of the Governor-General.

59. In the Privy Council Appeals, the head 'Property and civil rights' came within the legislative competence of the Province, and 'Regulation of trade and commerce', of the Central Government. Here the Provincial Government has the exclusive power to legislate for trade and commerce, and co-ordinate jurisdiction to legislate for contracts.

60. Then again ours is not a case of a mere contract, like a contract of insurance, which was the subject-matter of the Privy Council decision.

61. The principle, I gather, from the decisions of the Privy Council is that the Court should give such a construction to the words as would produce harmony and reconcile the respective powers given to the Dominion and the Province :

> "In performing this difficult duty it will be a wise course for those on whom it is thrown, to decide each case which arises as best they can, without entering more largely upon an interpretation of the statute than is necessary for the decision of the particular question in hand."

62. The cases were cited at the bar were *Bank of Toronto v. Lambe etc*[7]*., John Deere Plow Co. Ltd. v. Theodore F. Wharion*[8]*,* In re, Board of Commerce Act, 1919 and Combines and Fair Prices Act, 1919, (1922) AC 191 (PC); *Attorney-General for Canada v. Attorney General for Ontario*[9]*, Shannon v. Lower Mainland Dairy Products Board*[10]*,* etc.

63. No useful purpose will be served by a discussion of these cases. They are decisions on regulations of Canada. The conflict was between the laws made by the Dominion Parliament and the Provincial Legislature.

64. The principle, I apprehend, is gathered from the passages I have already cited from *Citizens Insurance Co. of Canada v. William Parsons*[11]*,* and has been laid down in *Gallagher v. Lynn*[12]*,* At p. 869 Lord Atkin observes :

> "My Lords, the short answer to this is that this Milk Act is not a law 'in respect of trade; but is a law for the peace, order and good government of Northern Ireland 'in respect of precautions taken to secure the health of the inhabitants of Northern Ireland by protecting them from the dangers of an unregulated supply of milk.

These questions affecting limitation on the legislative powers of subordinate parliaments or the distribution of powers between parliaments in a federal system are now familiar, and I do not propose to cite the whole range of authority which has largely arisen in discussion of the powers of Canadian Parliament It is well established that you are to look at the 'true nature and character of the legislation' : *Russell v. The Queen*[13]*,* 'the pith and substance of the legislation'. If, on the view of the statute as a whole, yon find that the substance of the legislation is within the express powers, then it is not invalidated if incidentally it affects matters which are outside the authorised field. The legislation must not under the guise of dealing with one matter in fact encroach upon the forbidden field."

65. To the same effect is the observation of Lord Porter in *Attorney General for Canada v. Attorney General for the Province of Quebec*[14]*,* His Lordship said at p. 43 :

> "The whole scheme for distribution of powers must be looked at, as their Lordships pointed out in *Attorney General for Alberta v. Attorney General for Canada*[15]*,* Moreover, as their Lordships laid down in *Attorney*

[7](1887) 12 AC 575
[8](1915) AC 330 (PC)
[9](1937) AC 355 (PC)
[10](1938) AC 708 (PC)
[11](1881) 7 AC 96
[12](1937) AC 863
[13](1882-7 AC 829)
[14](1947) AC 33
[15](AIR 1943 PC 76)

> *General for Canada v. Attorney General for British Columbia*[16]*,* it
> is within the competence of the Dominion Parliament to provide for matters which, though otherwise within the competence of the Provincial Legislature, are necessarily incidental to effective legislation by the Parliament of the Dominion on a subject of legislation expressly enumerated in Section 91, 'Legislation', says Lord Maugham in

> delivering the judgment of the Board in *Attorney General for Alberta v. Attorney General for Canada*, 'coming in pith and substance within one of the classes specially enumerated in Section 91 is beyond the legislative competence of the Provincial Legislatures under Section 92.'"

66. On the principle thus enunciated we have to decide as best as we can on our regulations. We have to determine what is the scheme here for distribution of power between the Central and the Provincial Legislatures. We have to determine as to what the pith and substance of the Ordinance is; its true nature and character.

67. Trade and commerce is within the Provincial list; production supply and distribution of goods as well. What remains of trade and commerce, if these are left out ? Trade means buying and selling. In the vast majority of cases, there can be no buying and selling, unless there is a contract, either verbal or in writing. Here certain contracts have been declared to be void. Can it not be said that such declaration was incidental to making an effective legislation on trade ? Let us look at the Ordinance once more.

68. It is clear from the preamble that the Ordinance was passed to prevent dealings in jute goods futures and the Ordinance empowered the Provincial Government to prohibit the making of certain kinds of contracts which are usually made in the jute trade in Calcutta. The whole object of the Ordinance was that there should be no buying and selling of jute where delivery need not be given, where intermediate buyer and seller have not to pay the price of goods, but pay or receive only the difference, where the intermediate buyer and seller have not to keep a godown or any place for storage of goods. It was necessary to put a stop to this part of the jute trade, so that the price of jute might not go sky-high and create a deadlock in jute business. The Ordinance was really aimed at the jute trade, and to regulate the trade it was necessary to make certain contracts void. So it was provided that the contracts made before the Ordinance would not be void but would be settled at a particular rate. Only three markets were selected, called the 'notified market' at the last closing rate of which, contracts made previous to the Ordinance must be settled. It is quite clear therefore that the real character of the Ordinance was to regulate the jute trade within the province. This is the pith and substance of the Ordinance. It was necessary to pass the Ordinance to meet the situation brought about by devaluation. The provisions in the Ordinance relating to contracts are only incidental.

69. We are therefore of opinion that the Ordinance is intra vires and declare it to be such. The original contracts must be settled in terms of clause 3 (c) (ii). But no claim has been made on this basis either before us or the Court below.

70. The result therefore is that the appeal must be allowed. We set aside the decree of the learned trial Judge with costs here and below. Certified for two counsel.

[16](1930 AC 111)

Harries, C.J.

71. I agree.

Das, J.

72. I agree.

Appeal allowed.