CALCUTTA HIGH COURT

Clive Mills Ltd

Vs.

Swalal Jain

Special Suit No. 2 of 1956

(P.B. Mukharji, J.)

03.07.1957

JUDGMENT

P.B. Mukharji, J.

1. The Arbitrators of the Bengal Chamber of Commerce have stated a special case for the opinion of this Court under Section 13 (b) of the Arbitration Act, 1940. This was *between Clive Mills Co. Ltd. v. Swalal Jain before the Arbitrators*[5]. The dispute between them arose under a jute contract dated the 7th July 1954, whereby the buyer Clive Mills Co. Ltd., agreed to purchase from sellers Swalal Jain, 20,000 maunds of Mymensingh and/or Couripur and/or Bhairab (Pakistan) bottom jute at the rate of Rs. 24 per maund on the terms and conditions stated in the usual form of bought note in the Indian Jute Mills Association, a copy of which has been annexed with the Arbitrators' statement of the case. The major part of the contract has been performed by delivery of 19,004 maunds of jute. The dispute that went before the Arbitrators relates to the small balance of 598 maunds. The buyers claimed Rs. 11,324 in respect of this balance of jute and submitted their claim before the Arbitrators.

2. The Arbitrators say that the seller had requested them to state a special case to the Court on the point whether the said contract had been frustrated. But the Arbitrators in stating the questions of law for the opinion of the Court have not confined themselves to that particular point but have stated four questions on which Court's opinion is sought.
The questions asked by the Arbitrators are :-

> 1. Whether the Forward Contracts (Regulation) Act, 1952, is an Act dealing with 'Trade and Commerce' and, if so, had Parliament any power to legislate in respect of the trade and commerce or to pass the said Act?
> 2. Whether the said Act imposes reasonable restriction on trade and commerce or whether such restriction is unreasonable and as such repugnant to Article 19 (1) (g) of the Constitution?
> 3. Whether in order that the contract can be described as a non-transferable specific delivery contract within the meaning of the said Act it is necessary that -

(a) the rights and liabilities under the contract as also the delivery order and documents of title in respect of the goods covered by the contract should all be

[5] Case No. 859 of 1955

non-transferable, or

(b) whether if either the rights or the liabilities under the said contract or the delivery order or the documents of title under the contract are non-transferable, then the entire contract would be deemed to be non-transferable within the meaning of the said Act

4. Whether or not in the facts and circumstances as found by the Arbitrators as hereinbefore stated, the said contract in respect of the undelivered jute was frustrated?

3. From a perusal and analysis of the special case stated for the opinion of the Court, it appears that the following facts have been found by the Arbitrators :-

(i) The Arbitrators found that the contract was a forward contract for the sale and purchase of raw jute.

(ii) That it was a specific delivery contract.

(iii) That the goods were to be delivered at the Mill of the buyer.

(iv) That the goods had to be cleared through the Indian Customs Authorities against a license taken out in the name of the buyer.

(v) That the liabilities under the said contract were not transferable.

(vi) That the jute under the said contract was to be delivered from Pakistan.

(vii) That the trade license of the Pakistan constituent of the seller was cancelled, but such license was cancelled due to the default of the seller's Pakistan constituent.

(viii) That there was no agreement between the parties that the jute was to be delivered only by or through the said Pakistan constituent of the seller.

(ix) That there was no general or universal prohibition on the export of jute from Pakistan and that jute was being exported from Pakistan during the period within which jute was to be delivered under the said contract.

(x) After the seller by a letter dated 20th November 1954, informed the buyer that the trade license of his Pakistan constituent had been cancelled, the buyer agreed to the extension of time of delivery till the 31st December 1954, and the seller accepted such extension of time. The seller again asked for extension of time for delivery till the 31st January 1955, and such extension of time was also granted by the buyer. The seller did not ask for any further extension of time for delivery of the undelivered jute.

4. Upon those facts, the Arbitrators have asked the four questions I have set out above.

5. Undoubtedly, the Arbitrators under Section 13 (b) of the Arbitration Act, 1940, 'have power, unless a different intention is expressed in the agreement, to state a special case for the opinion of the Court on any question of law involved or state the award, wholly or in part, in the form of a special case of such question for the opinion of the Court'. In exercising that power which the Statute gives them they are not in the least compelled to accept the suggestions of the parties appearing before the Arbitrators nor are they confined to the suggestions made by the parties. In

stating a case for the opinion of the Court, the power is of the Arbitrators and they must take the responsibility to exercise their own judgment in using that power. In stating the case for the opinion of the Court the material facts necessary for the opinion on the question of law raised must be found by the Arbitrators and clearly set forth in the statement of case. In this procedure the Court will not find facts or make an enquiry to find facts. The well-known authority on the necessity of setting forth the material facts in a statement of a case is the observation of Lord Halsbury, L. C., in *N. and S. W. Junction Rly. Co. v. Assessment Committee of Brentford Union1,* It is relevant here to emphasize this point because on the 3rd question of law stated by the Arbitrators the fact of the terms and conditions of the licence nor the copies of the licence under which the contract for jute can be executed and which are material for determining the question of transferability of the contract have neither been fully recorded nor annexed to the Arbitrators' statement of case.

6. In this case the opinion is sought before the award. It is not a case where the Arbitrators have stated the award in the form of a special case on any question of law involved.

7. On the language of Section 13 (b) of the Arbitration Act, it is clear that –

> "the Arbitrators, unless a different intention is expressed in the agreement, have power to state a special case for the opinion of the Court on any question of law involved."

Therefore, by agreement of parties in the Arbitration agreement, this statutory power of the Arbitrators can be taken away. This conclusion follows from the use of the words, 'unless a different intention is expressed in the agreement'. Secondly, the question of law on which the Arbitrators can state a special case for the opinion of the Court is not any and every general question of law, but it must be a question of law that is 'involved'. These, therefore, are the two obvious limitations on the Arbitrators' powers to state a special case for the opinion of the Court. The first limitation is that it must not be prohibited by the arbitration agreement between the parties. This prohibition may be either express or implied because the statutory expression is, 'unless a different intention is expressed in the agreement'. On a construction of the present arbitration agreement I am of the opinion that there is no such express or implied prohibition preventing the Arbitrators from stating a case. The second limitation is that the special case must be on a point of law 'involved'.

8. The next section provides the duty of the Court when such a special case is stated by the Arbitrators for the opinion of the Court. Section 14 (3) of the Arbitration Act, 1940, says that –

> "where the Arbitrators or Umpires state a special case in clause (b) of Section 13, the Court, after giving notice to the parties and hearing them, shall pronounce its opinion thereon and such opinion shall be added to, and shall form part of the award."

Where a special case, therefore, is stated for the opinion of the Court it is mandatory for the Court to pronounce its opinion thereon. Then again such opinion of the Court shall be added to and form part of the award itself which the Arbitrators will make. The basic idea of this significant provision is that the opinion of the Court is sought only with the view to help the Arbitrators to make their award and not to defeat their jurisdiction to make the award. This

conclusion imports the third limitation on the power of the Arbitrators to

[1] (1888) 13 AC 592

state a case for the opinion of the Court on a question of law involved. That limitation is that the question of law involved must not be such that an opinion thereon does not help the Arbitrators to make the award but defeats their jurisdiction to make any award.

9. Reading Section 13 (b) and Section 14 (3) of the Arbitration Act together, it appears that when the Arbitrators state a special case for the opinion of the Court on a question of law involved, the question of law must not only be one which is involved in the dispute but also must not be one the opinion whereupon may oust the very jurisdiction of the Arbitrators themselves. For in that case the provisions of Section 14 (3) of the Arbitration Act in so far as they require that the Court's opinion shall be added to and form part of the award cannot be given effect to. If the opinion of the Court on the question of law asked by the Arbitrator is that there is no arbitration agreement at all then thereafter no award can be made by the Arbitrators, and the Arbitrators cannot function. Therefore, that opinion of the Court, in such an event, cannot be added to and form part of any possible award by the Arbitrators as required by Section 14 (3) of the Arbitration Act. In other words, the effect of Section 14 (3) of the Arbitration Act, 1940, read with Section 13 (b) of the Act is that the Court's opinion can be sought by the Arbitrators on a question of law involved where the Arbitrators find difficulty to decide it for themselves and which decision when given in the opinion of the Court will help and assist them in making the award and not defeat their very jurisdiction to make the award. If the Arbitrators ask a question of law in the form of a special case stated before the Court and on which the opinion of the Court may possibly be such that the very jurisdiction of the Arbitrators to arbitrate is denied as a result thereof, then the Court will no longer be bound to pronounce its opinion on such a special case stated by Arbitrators. The reason is clear. If the effect of the determination of the question of law asked shows that the Arbitrators are not really Arbitrators at all because the arbitration agreement is void, then the Arbitrators are no longer Arbitrators in law and therefore have no right to state a special case for the opinion of a Court nor will the Court then have any more jurisdiction to give an opinion on such a case. Court's statutory obligation to render its opinion is owed only to the lawful Arbitrators and not to pretended Arbitrators.

10. Therefore questions of law which go to the very root of the jurisdiction of the Arbitrators themselves to sit as Arbitrators, to conduct the arbitration proceedings and to make the award as Arbitrators cannot, in my opinion, be asked by the Arbitrators by the procedure of a statement of case under Section 13 (b) read with Section 14 (3) of the Arbitration Act, 1940. The true interpretation, then, of the word 'involved' in Section 13 (b) of the Arbitration Act is that the questions of law must be immanent in the dispute in the sense that their decision will help the Arbitrators in making a true and just award and not transcendent. Transcendental questions of law which transcend and override the jurisdiction of the Arbitrators to make the award do not, in my opinion, come within the true interpretation of the word 'involved' in Section 13 (b) read with Section 14 (3) of the Arbitration Act.

11. There is little authority on this point. The interpretation, however, appears to me to be supported by the commonsense view and by the construction of Section 13 (b) read with Section 14 (3) of the Arbitration Act, 1940, which I have endeavoured to explain above. There is, however, an observation of Delvin, J., in the recent case of *Windsor Rural*

District Council v. Otterway and Try[2], at p. 1497, where the learned Judge says :-

> "That is not a question which really goes to his jurisdiction; if it did, of course, it could not be determined by way of a case stated; because if he had no jurisdiction to determine the dispute he would have no jurisdiction to state a case about it"

12. Applying these tests to the questions of law stated in the special case before me, I come to the conclusion that all the questions asked, except the one on frustration, are questions which, if answered in one way, will defeat the very jurisdiction of the Arbitrators to state the special case for the opinion of the Court. The first question asked is about the validity of the Forward Contracts (Regulation) Act, 1952, and the second question asked is whether the restriction imposed by that Act on trade and commerce is repugnant to the Constitution. Both these questions raise high constitutional questions which no doubt are questions of law. But I do not consider that they are questions of law 'involved' in the dispute on which the Arbitrators can state a special case for the opinion of the Court. If the Forward Contracts Regulation Act, 1952, is a constitutionally valid Act and if the restriction imposed thereby on trade and commerce is constitutionally reasonable and if the contract in case is hit by the Act on the ground of being a transferable specific delivery contract, then the effect of the Statute is that it renders the whole contract illegal and void. Section 15 of the Forward Contract Regulation Act, 1952, makes such contracts illegal and void. Now if the contract is void and illegal, then the arbitration agreement is void and illegal. *Viscount Simon, L. C., in Heyman v. Darwins Ltd*[3]*.,* at p. 366, in his speech, observes :-

> "Similarly, if one party to the alleged contract is contending that it is void ab initio (because, for example, the making of such a contract is illegal), then the arbitration clause cannot operate, for on this view the clause itself also is void."

13. I am therefore of the opinion and I hold accordingly the first three questions stated in the special case by the Arbitrators for the opinion of this Court cannot and should not be answered by this Court.

14. The interpretation of Section 13 (b) and Section 14 (3) of the Arbitration Act, 1940, to mean that the question of law should not be such whose answer might lead to the ouster of the jurisdiction itself of the Arbitrators works no hardship in law. Section 33 of the Arbitration Act provides an ample remedy in such cases. That section says that any party to an arbitration agreement or any person claiming under him desiring to challenge the existence or validity of an arbitration agreement or an award or to have the effect of either determined, shall apply to the Court and the Court shall decide the question on affidavits provided that where the Court deems it just and convenient it may set down the application for hearing on other evidence also, and it may pass such orders for discovery of particulars as it may do in the suit. It would appear from this provision that this very question for determining the existence or validity or effect of an arbitration agreement or award shall be raised and decided in a particular way. That way is provided by making it an obligation upon a party to apply to the Court. The procedure prescribed by Statute for this purpose is an exclusive procedure and not by way of a statement of case by the

[2](1954) 1 WLR 1494
[3]1942 AC 356

Arbitrators. Therefore, the Arbitrators' inability to state a question of law under Section 13 (b) read with Section 14 (3) of the Arbitration Act, 1940 to raise a question, the opinion on which may oust their own jurisdiction does not prejudice any party who can always apply under Section 33 to have such questions determined by the Court.

15. Much of the confusion in this respect arises from a neglect to see the difference between the English law and the Indian law on this point. Section 21 of the English Arbitration Act of 1950 does not use the word 'involved'. Under the English law the Arbitrator may and shall, if so directed by the High Court, state 'any question of law arising in the course of the reference'. Even then Delvin, J., in the case of 1954-1 WLR 1494, at p. 1497, which I have already quoted on another point, warns the Arbitrators in clear terms when His Lordship says –

> "It is not a mere matter of words. The Court is not at the beck and call of the Arbitrator to answer whatever questions the Arbitrator may want to put to it and it is not here to indulge in legal exercises. It is here only to answer questions which it is satisfied do arise in the course of reference and are material to be determined."

I respectfully associate myself with that view and say that in India the Arbitrator has to be made careful in stating the case because the word of the Indian Statute by using the expression 'involved' emphasizes it all the more. The statutory ancestor of Section 13 (b) of the Arbitration Act of 1940 in this respect is Section 10 (b) of the Indian Arbitration Act, 1899, which used the word 'involved'. There is no comparable provision in the English law of arbitration as Section 33 of the Arbitration Act, 1940, in India. It is unwise in this respect to draw any analogy from the English law. The differences are far too great for such an analogy to be at all useful and may be misleading. In English law of arbitration the Arbitrator's freedom in staling a case on any question of law arising in course of the reference is wider. He can even be compelled by the High Court to state a case which cannot be done in India. Then again in England no agreement to take away the Arbitrator's power to state a case to the High Court for opinion is permissible, whereas it is expressly recognized in Section 13 (b) of the Arbitration Act, 1940, in India. In *Czarnikow v. Roth, Schmdt and Co*[4]*.,* such an agreement was held in England to be contrary to public policy and invalid because it involved an ouster of the statutory jurisdiction of the Courts under the English Arbitration Act. Lastly Section 21 of the English Arbitration Act, 1950, does not use the words that the opinion of the court 'shall be added to and form part of the award' as in Section 14 (3) of our Arbitration Act, 1940.

16. Now the last question on frustration asked by the Arbitrators requires special treatment. The effects of frustration on an arbitration agreement have been the familiar subject of big controversy in the judicial world from time to time. It will be unnecessary to trace the history of the whole case law on the point. I shall be content for the purposes of this application to refer to the last pronouncement of the House of Lords in *Heyman v. Darwins Ltd.*, where Lord Chancellor Viscount Simon at p. 367 of his Lordship's speech in the same report said :-

> "I do not agree that an arbitration clause expressed in such terms as above ceases

[4](1922) 2 KB 478

> to have any possible application merely because the contract has come to an end."

17. Thereafter the learned Lord Chancellor at p. 368 comes to the conclusion in the following terms :-

> "It is, in my opinion, fallacious to say that because the contract has 'come to an end' before performance begins, the situation, so far as the arbitration clause is concerned, is the same as though the contract had never been made. In such cases, a binding contract was entered into, with a valid submission to arbitration contained in its arbitration clause, and, unless the language of the arbitration clause is such as to exclude its application until performance has begun, there seems no reason why the Arbitrator's jurisdiction should not cover the one case as much as the other."

18. Now the arbitration clause in this case is contained in clause 14 of the Bought and Sold Notes and is in these terms :-

> "All matters, questions of disputes, differences and/or claims arising out of and/or concerned and/or in connection with and/or in consequence of or relating to this contract including matters relating to insurance and demurrage, whether or not the obligations of either or both parties under this contract be subsisting at the time of such dispute and whether or not this contract has been terminated or purported to be terminated or completed shall be referred to the arbitration of the Bengal Chamber of Commerce and Industry under the rules of its Tribunal of Arbitration for the time being in force and according to such rules the arbitration shall be conducted and any award made by the said Tribunal under this clause shall be final, binding and conclusive on the parties."

On a construction of this arbitration clause in the light of the observations of Lord Chancellor Viscount Simon, which I have just quoted, I am of the opinion that the question whether the contract in this case has been frustrated or not is not such a question that the opinion of this Court thereupon one way or the other will oust the very jurisdiction of the Arbitrators to arbitrate the present dispute. It is in my view also a question which in the present arbitration clause before me the Arbitrators have the jurisdiction to decide and ask for this Court's opinion to help them and frustration is a question of law 'involved' in the present dispute. In fact, this was the only point on which the seller sought a reference to the Court by the Arbitrators. Therefore I am of the view that the opinion of this Court can be given on this question of frustration.

19. On the following facts found by the Arbitrators on this point, namely, -

> 1. that the jute under the contract was to be delivered from Pakistan.
> 2. that the trade licence of the Pakistan constituent of the seller was cancelled, but such licence was cancelled due to the default of the seller's Pakistan constituent,
> 3. that there was no agreement between the parties that the jute was to be delivered only by or through the said Pakistan constituent of the seller,
> 4. that there was general or universal prohibition on the export of jute from Pakistan and

that jute was being exported from Pakistan during the period within which jute was to be delivered under the said contract, and

5. that after the seller by a letter dated the 20th November 1954, informed the buyer that the trade licence of his Pakistan constituent had been cancelled, the buyer, agreed to the extension of time for delivery till the 31st December 1954, and the seller accepted such extension of time and thereafter the seller having again asked for extension of lime for delivery till the 31st January 1955, such extension of time was also granted and accepted by the buyer.

I answer the fourth question asked by the Arbitrators in the negative and I hold and express the opinion that the said contract in respect of the undelivered jute was not frustrated

20. I therefore dispose of the Arbitrators' statement of the case by not expressing any opinion on the first three questions on the ground that such questions cannot be asked by the Arbitrators by way of a statement of case for the opinion of the Court and by answering the fourth question of the Arbitrators in the negative.

21. There will be no order as to costs of this proceeding.
Order accordingly.