

# CALCUTTA HIGH COURT

Sri Bajrang Jute Mills Ltd

Vs.

Lalchand Dugar

Appeal from Original Order No. 183 of 1962

(Bachawat and Arun K. Mukherjea, JJ.)

11.02.1964

## JUDGMENT

### **Bachawat, J.**

1. This is an appeal from an order refusing to set aside an award. The appellants contend that the transferable specific delivery contract for jute goods between the parties dated the 22nd September, 1961 including the arbitration-agreement contained therein is in contravention of section 15(4) of the Forward Contracts (Regulation) Act, 1952 and is therefore illegal and void. A. N. Ray, J. rejected this contention and dismissed the application for setting aside the award. The contract was made by bought and sold notes in writing in the prescribed form as required by paragraph (1) (b) of Chapter V and Appendix II of the bye-laws of the East India Jute and Hessian Exchange Ltd. for trading in transferable specific delivery contract in raw jute and jute goods. The bought and sold notes were signed by the respondent who is a member of the East India Jute & Hessian Exchange Ltd. The appellants are not members of the Association. The sold note issued to the appellants stated "We have, subject to the terms and conditions hereinafter referred to, this day sold to Messrs. Lalchand Dugar by your order and on your account". The bought note issued to the respondent stated "we have, subject to the terms and conditions hereinafter referred to, this day bought from Messrs. Shree Bajrang Jute Mills Ltd. by your order, and on your account."

2. Section 15(4) reads as follows:-

"No member of a recognized association shall, in respect of any goods specified in the notification under sub-section (1), enter into any contract on his own account with any person other than a member of the recognized association, unless he has secured the consent or authority of such person and discloses in the note, memorandum or agreement of sale or purchase that he has bought or sold the goods, as the case may be, on his own

account:

Provided that where the member has secured the consent or authority of such person otherwise than in writing he shall secure a Written confirmation by such person of such consent or authority within three days from the date of such contract.

Provided further that in respect of any outstanding contract entered into by a member with a person other than a member of a recognized association no consent or authority of such person shall be necessary for closing out in accordance with the bye-laws the outstanding contract, if the member discloses in the note, memorandum or agreement of sale or purchase in respect of such closing out that he has bought or sold the goods, as the case may be, on his own account."

3. Now it is common case that the second proviso does not apply to the contract and we have to consider only the effect on it of the main paragraph and the first proviso of section 15(4). The appellants contend that the respondent entered into the forward contract on his own account without disclosing in the bought and sold notes the fact that he has bought on his own account and without either obtaining the consent of the appellants or securing a written confirmation of such consent, that the making of such a contract was prohibited by section 15 (4) and was an offence punishable with imprisonment and fine, and that the prohibition under a penalty implies that the contract is illegal and void, and in this connection reliance is placed on the decisions in *Mellesh v. Sherley Local Board*<sup>1</sup>, and *Re Cork and Younghall Railway*<sup>2</sup> Now in agreement with the learned Judge we hold that the appellants orally gave consent to the respondent to enter into the contract on his own account. The first paragraph of section 15 (4) does not require that the consent must be in writing and we think that for the purposes of that paragraph oral consent is sufficient. We hold also that the bought and sold notes sufficiently disclosed that the respondent bought the goods on his own account. The bought and sold notes are in the prescribed form. The statement in the sold note that the respondent had sold to himself was a sufficient disclosure that he was buying on his own account. The statement in the bought note that the goods had been bought on his own account also sufficiently disclosed his purchase on his own account. Since the consent of the appellants to the purchase by the respondent on his own account was oral, it was the duty of the respondent to secure a written confirmation by the appellants of such consent within three days from the date of the contract, but no such written confirmation was secured. Now in these circumstances is the contract made illegal by section 15 (4) ? To get at the real intention of the legislature, we must read the entire Act, as also section 15(4) in all its parts including the provisos and ascertain whether the failure of the member to obtain a written confirmation of the oral consent implies a nullification of the contract. The contravention of sections 15(1), 15(3A), 15(4), 17 and 19 are all offences punishable under section 20, yet it is remarkable that section 15(4) unlike section 15(1), 15 (3A), 17 and 19 does not provide that a contract entered into in contravention of section 15 (4) is illegal. Section 15(4) prohibits a member of a recognized association from entering into a contract on his own account with a non-member unless two conditions are satisfied viz.: (a) he has secured the consent of the non-member and (b) he discloses in the note, memorandum or agreement of sale or purchase that he

has bought or sold on his own account. In the instant case both these conditions were satisfied. But as the consent was oral, the first proviso was attracted, and it cast upon the respondent the additional duty of obtaining the written confirmation of the consent within three days of the date of contract. But neither the form nor the substance of the first proviso indicates that the written confirmation of the consent is a condition precedent to the making or the validity of the contract. The first proviso is couched in the affirmative form. Unlike the

<sup>1</sup>(1885) 16 Q.B.D. 446

<sup>2</sup>(1864) L.R. 4 Ch. App. 748, 758

first paragraph it does not contain negative words. In substance the first proviso requires the member to perform a condition subsequent after the making of the contract. In the Justices of the Peace for *Middlesex v. The Queen*<sup>3</sup>, Lord Blackburn observed: "There are many cases-I was not aware that this point was to be raised, and I have not looked into them and I cannot refer to them, but there is a numerous class of cases in which it has been held that certain provisions in Acts of Parliament are directory in the sense that they were not meant to be a condition precedent to a grant or whatever it may be, but a condition subsequent; a condition as to which the responsible persons may be blame-able and punishable if they do not act upon it, but their not acting upon it shall not invalidate what they have done, third persons having nothing to do with that". Similarly we think that the first proviso to section 15(4) is directory in the sense that the securing of the written confirmation of the consent is no more than a condition subsequent as to which the responsible members may be blame-able or punishable if he does not secure it, but his failure to do so does not invalidate the contract. He has no control over the other party, and inspite of his best efforts he may be unable to obtain the written confirmation. We think that on a true construction of section 15 (4) the failure of the member to obtain the written confirmation of the oral consent or authority to enter into the forward Contract on his own account does not render the contract either illegal or void.

4. Our attention was drawn to be decision of A. N. Ray, J. in Award Case No. 119 of 1963 (In the matter of *Sunder Lal & Son v. Bharat Handicrafts Private Ltd.*) where His Lordship appears to have taken a view somewhat contrary to the opinion expressed by him in the judgment under appeal in this case. In so far as the decision in Award Case No. 119 of 1963 expressed a contrary opinion we are unable to agree with that decision.

5. We think that A. N. Ray, J. rightly refused to set aside the award. We pass the following order: The appeal be and is hereby dismissed with costs. Certified for two counsel.

**Arun K. Mukherjea, J.**

6. I agree.

Appeal dismissed.

<sup>3</sup>(1884) 9 A.C. 757 at 778