

BOMBAY HIGH COURT

Union of India

Vs.

Chinubhai Jeshingbhai

O.C.J. Appeal No. 60 of 1951

(Chagla, C.J. and Tendolkar, J.)

02.04.1952

JUDGMENT

Chagla, C.J.

1. This appeal raises a very short question as to the liability of the Union of India to discharge a liability arising under a contract which was entered into prior to partition and in respect of goods which according to the Union of India belonged to Pakistan on the appointed day, viz. 15-8-1947. In March 1947 the Government of India had certain quantities of long cloth for sale as disposal of surplus stock, and these goods were lying at the Ordnance Parachute Factory in Lahore. These goods were purchased by the plaintiffs, who are residents of Baroda, by three sale notes executed on 10-3-1947. Under these sale notes the plaintiffs had to pay a sum of Rs. 34,758-15-5. The contract contained in these sale notes provided that the goods sold had to be stamped for which certain charges had to be paid by the purchaser and that the stock had to be removed within 21 days of the stamping of these goods. The evidence shows, and the finding of the learned Judge is also to the same effect which has not been challenged by the Attorney General in this appeal, that through no fault of the plaintiffs the goods could not be stamped at Lahore because of the serious communal situation that prevailed in Lahore in the month of August 1947. The evidence also shows that a representative of the plaintiffs and of the Textile Commissioner in Bombay did see the goods in Lahore on 10-8-1947, but on that day nothing could be done and the goods could not be stamped partly because of the communal troubles and also because no labor was available due to the serious situation prevailing in Lahore. Thereafter came partition on 15-8-1947, and ultimately the goods were never stamped and never delivered to the plaintiffs. The plaintiffs paid the full price 'in respect of these goods including the stamping charges to the Government of India prior to 15-8-1947.

2. On 26-9-1947, the plaintiffs wrote to the Textile Commissioner, Bombay, drawing his attention to the abnormal situation prevailing in Lahore and asking him to bring the stock lying at

Lahore to Bombay where delivery could be taken by them, or in the alternative to give them other materials in place of the materials purchased by them under the contract. Two reminders were sent by the plaintiffs to this letter and ultimately on 30-10-1947, the Textile Commissioner informed the plaintiffs that all outstanding actions on the contract for the sale of surplus would be performed by the Government of the Dominion in whose territory the stores were situated at the time of sale, viz. the Dominion of Pakistan. On 11-11-1947, the plaintiffs informed the Textile Commissioner that he should either make arrangements to bring the goods to Bombay or, if that was not possible, the contract might be treated as having terminated and the moneys paid by the plaintiffs should be returned to them. The Textile Commissioner replied to this letter on 28-11-1947, pointing out that the decision communicated by him on 30-10-1947, was arrived at a very high level by the parties constituting the then Government of India and it was not possible to do anything further in the matter. The plaintiffs thereupon approached the Government of Pakistan and on 5-11-1948, the Textile Commissioner for Pakistan informed the plaintiffs that the sale notes in question had been cancelled as the stores were not available. With regard to the refund of the money the plaintiffs were asked to refer to the Textile Commissioner, Government of India, Bombay. On 16-11-1948, the plaintiffs approached the Government of India pointing out that the refund of the moneys had long been delayed and asking them to expedite the matter. On 21-1-1949, the Deputy Assistant Director of the Government of India informed the plaintiffs that the question of the refund had been referred to the Ministry in New Delhi along with other similar cases, and unless and until a decision was arrived at by the Ministry no action could be taken. On 25-1-1949, the Deputy Assistant Director informed the plaintiffs that in accordance with the press note, a copy of which was annexed, the plaintiffs were asked to intimate to the Government of Pakistan immediately their option in terms of the press note, and the option which the plaintiffs had to exercise in terms of the press note was that the plaintiffs had either to take delivery of the stores lying in the Dominion of Pakistan before 28-2-1949, or ask for the cancellation of the sale. Acting in pursuance to this press note, the plaintiffs wrote to the Textile Commissioner of Pakistan on 7-2-1949, cancelling the sale notes and asking the Government of Pakistan to remit to them the amounts paid by them under the contract. As the plaintiff's did not hear anything from the Pakistan Textile Commissioner, they again approached the Textile Commissioner, Bombay, on 2-4-1949, asking him to do the needful in the matter and to get the refund of the amount expedited. On 6-8-1949, the plaintiffs again wrote to the Textile Commissioner, Government of Pakistan, referring to the telegram that they had received to the effect that they should submit the original documents in connection with the sale of the surplus goods by the Government of India to them, and that in answer to that telegram they were forwarding the original documents. On 18-8-1949, as they had received no redress from the Textile Commissioner Pakistan they wrote to the Textile Commissioner, Government of India, calling upon him to take immediate steps to either compel the Pakistan authorities to refund the amount or in the alternative to request him to refund the amount to them without any further delay. On 21-12-1949, the Assistant Secretary to the Government of India pointed out to the plaintiffs that under the Inter-Dominion Agreement it was the liability of the Government of Pakistan to refund the money to them and they should continue reminding the Government of

Pakistan to that effect. He further pointed out that the Government of India had already informed the Government of Pakistan that they should pay this amount, not only to the plaintiff's but to all other parties similarly situated, but nothing had so far been done and pending final settlement the Government of ?

India regretted that no action could be taken by that Government. As the plaintiffs neither received the amount which they had paid under the contract either from the Government of Pakistan or from the Government of India, they ultimately filed this suit on 4-5-1950.

3. The plaintiffs claimed the amount of Rs. 34,758-15-5 as damages suffered by them for breach of contract by the defendant, or in the alternative as moneys due by them on failure of consideration or in any event as moneys had and received by the defendant. At the trial before the learned Judge below various issues were raised. It was contended by the defendant that the plaintiffs were not ready and willing to perform their part of the contract, that the defendant had not committed any breach of the contract, and also that there was no failure of consideration as alleged by the plaintiffs. On all those issues the learned Judge found in favor of the plaintiffs. Various legal issues were also raised, as we shall presently point out, and on those issues also the learned judge held in favor of the plaintiffs. Ultimately, the learned Judge passed a decree in favor of the plaintiffs as prayed. It is from that decree that this appeal has been preferred, and before us the learned Attorney General has not contested the findings of the learned Judge on the issues of fact. Even on the questions of law it was urged before the learned Judge that the notice given by the plaintiffs under Section 80, Civil Procedure Code, was not a proper notice inasmuch as it did not comply with the mandatory provisions of the section. The learned Judge held that the notice substantially complied with the provisions of Section 80 and in any event the notice had been waived by the defendant. This contention also which was raised in the lower Court has not been persisted in by the Attorney General before us. The only point that has been urged by the Attorney General is that under the Indian Independence (Rights, Properties and Liabilities) Order of 1947, any liability arising under the contract in suit had to be discharged by the Government of Pakistan and that the Union of India was not liable in respect of any such liability, and therefore according to the Attorney General assuming all the facts in favor of the plaintiffs, even so in law the plaintiffs could not sue the Union of India and could not obtain any relief against the Union of India. Therefore, it is only this short contention of the Attorney General that remains to be considered in this appeal.

4. Now, in order to appreciate the point urged before us by the Attorney General, in the first instance we have got to look at the Independence Act. Section 9 of that Act provides that the Governor General shall by order make such provision as appears to him to be necessary or expedient, and we are here concerned with Sub-Clause (b) "for dividing between the new Dominions and between the new Provinces, to be constituted under this Act, the powers, rights, property, duties and liabilities of the Governor General in Council or, as the case may be, of the relevant Provinces which, under this Act, are to cease to exist." The object of enacting this section is clear. On 15th August 1947, undivided India was to be split up into two Dominions and

provision had to be made for dividing between the two Dominions the rights, property, assets and liabilities which belonged to united India and which had now to be shared and distributed between the two new Dominions which were being set up. It is significant to note that Section 9(b) refers not merely to powers, rights, property and duties of the Governor General in Council, but also his liabilities. Pursuant to this section an order was passed which is known as the Indian Independence (Rights, Property and Liabilities) Order, 1947, and it is this Order that falls to be interpreted at our hands. Article 3 of this Order provides that the provisions of this Order relate to the initial distribution of rights, property and liabilities consequential on the setting up of the Dominions of India and Pakistan and shall have effect subject to any agreement between the two Dominions or the provinces concerned and to any award that may be made by the Arbitral Tribunal. Therefore, it is clear that this Order provided for distribution of rights, property and liabilities subject to the provision being modified or altered by any subsequent agreement between the two Dominions and subject to any award that may be made by the Arbitral Tribunal which was to be set up in accordance with the Arbitral Tribunal Order of 1947. It is in this sense that the expression "initial" is used in Article 3. What was in contemplation was that although this Order would make arrangements for distribution of rights, property and liabilities which were necessary in view of the setting up of the Dominions of India and Pakistan, the arrangements made may not be final, they were only initial, and ultimately these arrangements might be modified or altered by any agreement between the two Dominions or any award to be made by the Arbitral Tribunal. Sub-clause (3) of Article 3 provided that the powers of control over property conferred upon each of the Dominions by this Order shall include all the powers of use, consumption, management and disposition incidental to ownership. Therefore, the control over property which was conferred upon the two Dominions by this Order was of such a nature as exercisable by the owner of a property. Article 4 dealt with land and it provided that all land which immediately before the appointed day is vested in His Majesty for the purposes of the Governor General in Council shall on that day - (a) in the case of land situated in India or in the tribal area on the borders of India, be under the control of the Dominion of India, (b) in the case of land situated in Pakistan or in the tribal areas on the borders of Pakistan, be under the control of the Dominion of Pakistan. Therefore, as far as land was concerned, the method adopted for division and distribution was clear and simple. Land which was in Pakistan went to that Dominion and land which was in the Dominion of India went to the Dominion of India. Then Article 6 applied the provisions of Article 4 and Article 5, which deals with the two provinces of East and West Bengal, to goods, coins, bank notes and currency notes, and it provided that these articles shall apply in relation to all goods, coins, bank notes and currency notes which immediately before the appointed day are vested in His Majesty for the purposes of the Governor-General in Council or of a province as they apply in relation to land so vested. Therefore, reading Articles 4 and 6 with which we are concerned, if goods, coins, bank notes and currency notes were situated in India or in the tribal areas on the borders of India, they were to fall under the control of the Dominion of India, and control meant by reason of Article 3(3) that the Dominion of India had all the powers with regard to those goods which go with ownership. Articles 4 and 6 having dealt with land and goods, Article 8 dealt with contracts, and Article 8(1)

provided :

"Any contract made on behalf of the Governor-General in Council before the appointed day shall, as from that day, -

(a) if the contract is for purposes which as from that day are exclusively purposes of the Dominion of Pakistan, be deemed to have been made on behalf of the Dominion of Pakistan instead of the Governor-General in Council ; and

(b) in any other case be deemed to have been made on behalf of the Dominion of India instead of the Governor-General in Council ;

and all rights and liabilities which have accrued or may accrue under any such contract shall, to the extent to which they would have been rights or liabilities of the Governor-General in Council, be rights or liabilities of the Dominion of Pakistan or the Dominion of India as the case may be." Therefore, Article 8(1) deals with contracts which were entered into on behalf of the Governor-General in Council before 15-8-1947, and the provision was that if the contract was exclusively for the purposes of the Dominion of Pakistan, then the contract was deemed to have been made on behalf of the Dominion of Pakistan. Therefore, it is clear that although in fact the Governor-General in Council might have entered into a contract with a citizen of India and although he may have undertaken liabilities under that contract and although certain rights might accrue to the citizen under that contract, if the contract was found to be on 15-8-1947, exclusively for the purposes of Pakistan, then the contract was deemed to be a contract made by the Dominion of Pakistan. Therefore, the actual making of the contract by the Governor-General in Council prior to 15-8-1947, was immaterial. What was material was whether on 15-8-1947, it could be considered that the contract was for the purposes of the Dominion of Pakistan. If it was for the purposes of the Dominion of Pakistan, then it became a contract made by the Dominion of Pakistan and all rights and liabilities which might have accrued or which may accrue in future in respect of such contract would accrue to the Dominion of Pakistan again notwithstanding the fact that the contract was originally entered into by the Governor-General in Council. Therefore, Article 8 provided for a method of dividing contractual rights and liabilities which were entered into on behalf of undivided India by the Governor-General in Council prior to 15-8-1947, and the line of demarcation which was indicated by Article 8 was to consider whether a particular contract was for the purposes of the new Dominion of Pakistan, in which case the rights and liabilities fell to the share of that Dominion, and in all other cases it fell to the share of the Dominion of India.

5. Now, the view has been taken by the learned Judge that under Article 8(1) the rights of third parties have not been affected or interfered with. The learned Judge takes the view that although this Order might determine the rights of the two Dominions inter se, it cannot affect the rights of third parties because according to him there is no express legislation affecting the rights of third parties. With very great respect to the learned Judge, it is difficult to understand how it is possible to take the view that this Order which deals with contractual rights and liabilities did not seek to

affect or modify the rights of third parties. In every case where the Governor-General in Council before partition had entered into a contract with an Indian subject, rights of third parties were bound to be involved; liabilities would accrue to the Government under the contract; rights would accrue to the subject under the contract; and it was in order to deal with these rights and these liabilities that provision was made by the Order which we are considering. If rights of third parties were not to be affected at all, then no question could have arisen of making any distribution or division with regard to contractual rights and liabilities. Sir Jamshedji also has suggested that there is an assignment of liability by one State in favour of the other without extinguishing the liability of the original contracting party, and Sir Jamshedji says that no novatio can be deemed to have been brought about by reason of this Order. Sir Jamshedji is perfectly right that if we were dealing with private parties negotiating with regard to their private rights, then no novatio can be brought about unless all the three parties to the novatio agree to the substitution of the new contract. But we are not dealing here with private parties or with private rights. We are dealing with legislation, and it cannot be disputed that a law can destroy private rights and can interfere with contractual rights also. It is true that the Court would be reluctant to assume that a Legislature would interfere with contractual rights or with private right. But if the language used by the Legislature is clear and explicit, there is no difficulty in giving effect to that language. In our opinion, it is impossible in this case to suggest that the effect of the Order we are considering was not to interfere with the rights of private parties. Sir Jamshedji says that his clients entered into a contract with undivided India and undivided India undertook the liability under the contract. According to him it is not open to the Dominion of India to say that although undivided India undertook the liability, only the Dominion of Pakistan should now discharge that liability. We have every sympathy for that contention, but the Indian Independence (Rights, Property and Liabilities) Order makes it perfectly clear that the liabilities which originally belonged to undivided India and which had to be discharged by the Governor-General in Council should no longer be discharged by undivided India because unfortunately undivided India ceased to exist. Therefore, argument had to be made as to how these liabilities had to be discharged between the two new Dominions which came into existence on 15th August 1947, and the arrangement was as laid down in the Indian Independence (Rights, Property and Liabilities) Order, 1947.

6. There is a further and very clear indication that the rights of third parties were intended to be affected, and that is to be found in Article 12 of the Order which provides :

"(1) When immediately before the appointed day the Governor-General in Council is a party to any legal proceedings with respect to any property, rights or liabilities transferred by this Order, the Dominion which succeeds to the property, rights or liabilities in accordance with the provisions of this Order shall be deemed to be substituted for the Governor-General in Council as a party to those proceedings, and the proceedings may continue accordingly."

Therefore, this article deals with a case where a suit has already been instituted against the Governor-General in Council who was liable before 15th August 1947, but on 15th August that liability either devolved upon one Dominion or the other, and that Dominion upon which the liability devolved in accordance with this Order had to be substituted for the Governor-General in Council and the proceedings had to continue against that particular Dominion. Therefore, Article 12 makes it abundantly clear that after 15th August 1947, the liability no longer was upon both the Dominions as representing undivided India of old, but the liability was upon one or the other Dominion, and that liability had to be gathered from the provisions of this Order. Therefore, it is clear that by the very enactment of Article 12 the rights of private parties were seriously affected because they could no longer hold the whole of undivided India liable. Their right was limited and restricted to looking to one or the other Dominion only.

7. But the more interesting and important question which has been debated at the bar is, what is the proper meaning to give to the expression "a contract for the exclusive purposes of the Dominion of Pakistan". It is conceded by the Attorney-General that it is only if this particular contract is held to be for the exclusive purpose of Pakistan that the Union of India can succeed in the contention it has put forward, viz. that under this Order the liability has devolved upon the Dominion of Pakistan and the Union of India is no longer liable. We have to construe the expression "a contract exclusively for the purposes of the Dominion of Pakistan" with reference to the facts in this particular case. The fact on which the Union of India relied in order to put forward this contention was that the goods covered by the contract were on 15-8-1947, lying at Lahore, and what has been pressed upon us by the Attorney-General is that if the goods were lying at Lahore on 15-8-1947, then the contract in respect of these goods must be a contract for the exclusive purposes of the Dominion of Pakistan. Let us examine this argument. If the goods were lying at Lahore on 15-8-1947, then undoubtedly by reason of Article 6 the goods would be under the control of the Dominion of Pakistan and the control contemplated by that article as already explained would be the control that an owner would have over goods belonging to him. Therefore, we have here, if the allegation of the Union of India is correct, a contract in respect of goods belonging to the Dominion of Pakistan. Can it be said that a contract in respect of goods belonging to the Dominion of Pakistan is a contract for the exclusive purposes of that Dominion? It is clear from the language used in Article 8 that the test to be applied with regard to this contract is not whether the contract was for the purposes of the Dominion of Pakistan at the date when it was made. Ex hypothesi that test is clearly inapplicable. All contracts contemplated by Article 8 must be contracts which when made were made by undivided India by the Governor-General in Council. The test that must be applied is an artificial test and the test may be either, if the contract had been entered into on 15-8-1947, whether it would have been a contract for the purposes of the Dominion of Pakistan, or, if the Dominion of Pakistan had been in existence when the contract was entered into, whether it would have been a contract for the purposes of Pakistan. It is difficult for us to understand how it is possible to argue that when a State or a Dominion enters into a contract in respect of property or goods belonging to it, it is not a contract for the purposes of that State or Dominion. Sir Jamshedji contends that "for the purposes" must

be construed to mean "a contract which enures for the benefit of a particular Dominion." In our opinion, that is not at all the proper test. Once it is conceded that property belongs to a particular State or Dominion and the State or the Dominion enters into a contract with a third party in respect of that property or goods, then the contract in its very nature is for the purposes of that State or Dominion. Article 8 introduces a legal fiction and converts by that legal fiction a contract which was originally entered into by the Governor-General in Council to a contract for the purposes of one Dominion or the other.

8. It is interesting to look at the Government of India Act which was undoubtedly before the draftsman of the Independence Act, and we have similar language used in Section 175 of that Act. The draftsman of the Government of India Act also had a similar problem to face as the draftsman of the Independence Act. As it is well known, the Government of India Act, 1935, sought to set up a Federation and various Provinces in India as constituent units, and the problem that the draftman of the Act of 1935 had to face and surmount was to divide property and assets which originally belonged to the Government of India as a unit between the Federation and the Provinces, and turning to Section 175 we find that it was provided that

"The executive authority of the Federation and of a Province shall extend to the grant, sale, disposition or mortgage of any property vested in His Majesty for the purposes of the Government of the Federation or of the Province, as the case may be, and to the purchase or acquisition of property on behalf of His Majesty for those purposes respectively, and to the making of contracts."

Therefore, there also the property which was originally vested in His Majesty had to be distributed between the Federation and the Provinces from the point of view of the purposes for which the property was meant, either for the purposes of the Federation or for the purposes of the Province. Similarly under the Independence Act all property, immovable or moveable, was distributed between the two Dominions and the contracts relating to these properties were also divided in a similar way, and therefore when Article 8 refers to "purposes of the Dominion," the expression is used in a very wide connotation and not in a narrow restricted sense as suggested by Sir Jamshedji.

9. Therefore, in our opinion, on a true construction both of the Independence Act and the Indian Independence (Rights, Property and Liabilities) Order, it is clear that when it is found that there were goods originally belonging to the Government of India lying at a place which formed part of the Dominion of Pakistan on 15-8-1947, those goods fell under the control of that Dominion and that Dominion was entitled to exercise rights of ownership with regard to those goods, and it is equally clear that when a contract had been entered into with respect to those goods prior to 15-8-1947, all liability in respect of that contract devolved upon the Dominion of Pakistan, and any rights that a citizen in India had in respect of that contract could only be asserted against the Dominion of Pakistan and not against the Union of India. If that be the true position, then in

respect of these goods which were the subject-matter of the contract, if they were lying in Lahore on 15-8-1947, then the rights of the plaintiffs under these contracts could only be litigated against the Dominion of Pakistan and not the Union of India. The claim of the plaintiffs is founded upon the contract, the claim that they make is under the contract, and the liability of the other contracting party is also under the contract. Before 15-8-1947, it would have been the Government of India as it was then constituted which would have been liable to make good to the plaintiffs the money which they had paid under the contract. After 15-8-1947, if the goods which the Government had to deliver to the plaintiffs were in Pakistan, then by the legal fiction evolved by Article 8(1)(a) of the Order it is the Dominion of Pakistan that has to discharge that liability.

10. Now, a difficulty has arisen in this case by reason of the fact that the true legal position was not properly appreciated in the Court below. As I have pointed out, there is a specific averment in the written statement of the Union that the goods covered by the contract were lying at Lahore on 15-8-1947. The importance of this averment will be realized in view of what we have just stated. The whole argument of the Attorney-General before us has proceeded on the assumption that because the goods were lying in Lahore on 15-8-1947, by reason of Article 4 they fell under the control of the Dominion of Pakistan, and by reason of Article 8 the Dominion of Pakistan became liable in respect of any amount due by the plaintiffs under that contract. Although this averment was made in the written statement, no issue was raised in the Court below. The only evidence on the record to which our attention has been drawn is an admission made by the Attorney General on which he relies and that is to be found in a letter written by the plaintiffs on 17-10-1947. In that letter the plaintiffs wrote to the Textile Commissioner of Bombay that

"as the goods of the above mentioned sale note are lying at Lahore where, on account of the circumstances prevailing at present delivery cannot be had requested you in our said previous communication kindly to bring the goods of the said sale note to Bombay where we have delivery thereof or in the alternative to grant us other goods instead."

The Attorney-General wants us to read this admission coupled with the oral evidence given in the Court below and that is that on 10-8-1947, a representative of the Textile Commissioner and the plaintiffs saw the goods in Lahore, and the Attorney General says that this clearly establishes that the goods which were in Lahore on 10-8-1947, and seen by both the representatives of the parties continued to remain there till 17-10-1947. Now, although the correspondence between the parties was put in, we do not find that the defendant placed any reliance upon this admission, and as I said before, really the attention of the parties was not focussed upon this aspect of the case at All I do-not think it would be fair to the plaintiffs to allow the defendant to make capital of this statement in the letter of 17-10-1947. After all, it is well known what troubles there were in the Punjab after 15-8-1947, and it is impossible to believe that when the plaintiffs wrote this letter on 17-10-1947, they could have had any personal knowledge of the fact that the goods were still lying in Lahore on that date. Sir Jamshedji says it might well be that the goods were destroyed in

the riots that were raging in Lahore, not only subsequent to 15-8-1947, but even before that date, and Sir Jamshedji says that on the record there is really no definite evidence as to whether the goods were lying in Lahore on 15-8-1947. I think there is force in Sir Jamshedji's contention, and we should remand this matter to the Court below for a proper and explicit finding on evidence properly led as to whether the goods were or were not lying in Pakistan on 15-8-1947. It would be open to the learned Judge below to find that the goods were lying in Lahore on 15-8-1947, or that they were destroyed prior to 15-8-1947, or that they had been transferred from Lahore to some other place which was in the Union of India. If the finding of the learned Judge is in favour of the plaintiffs, then the matter does not necessarily end there because the Attorney General reserves to himself the right of contending that even though the goods might not be in Pakistan on 15-8-1947, even though they may have been destroyed prior to 15-8-1947, and even though they might be in the Union of India prior to 15-8-1947, still under the Independence Act and under the Order made there is no liability devolving upon the Union of India. If, on the other hand, the learned Judge finds on the evidence that the goods were in Pakistan on 15-8-1947, then in the view that we have taken of the law the plaintiffs' suit must clearly fail and will have to be dismissed.

11. We would, therefore, send the matter down to the learned Judge and direct him to try the following issue:

"Whether the goods covered by the three sale notes were lying in the territory constituting the Dominion of Pakistan as constituted by the Independence Act on 15-8-1947?"

The Attorney-General gives up all the other issues. Costs reserved.
Order accordingly.