

PETITIONER:
SUNDERLAL & SON

Vs.

RESPONDENT:
BHARAT HANDICRAFTS (P.) LTD.

DATE OF JUDGMENT:
20/09/1967

BENCH:
SHAH, J.C.
BENCH:
SHAH, J.C.
SIKRI, S.M.
SHELAT, J.M.

CITATION:
1968 AIR 406 1968 SCR (1) 608
CITATOR INFO :
F 1972 SC 391 (2)

ACT:
Forward Contracts (Regulation) Act (74 of 1952), ss. 15(4),
and 20(2)-Validity of contract without consent or authority
of party who was not a member of recognised association.
Code of Civil Procedure (Act 5 of 1908), O. XLI, r. 27-
Additional evidence tendered in Appellate Court-Condition
for receiving.

HEADNOTE:

Under s. 15(1) of the Forward Contracts (Regulation) Act 1952, forward contracts for the sale or purchase of specified goods may be entered into only between members of a recognised association or with a member or through any member of such association otherwise, the contract will be invalid. By sub-s. (4), Parliament imposed a prohibition upon every member of a recognised association against entry into a contract on his own account. with a non-member, in respect of the specified goods: the prohibition is lifted when in the memorandum, agreement of sale or purchase, or in the bought and sold notes it is expressly disclosed that the contract is by the member on his own account and that he has secured the consent or authority of the other person who is a party to the contract, and. if such consent or authority be not in writing, the member has obtained a written confirmation by such person of such consent or authority within three days from the date of the contract.

A notification was issued by the Central Government declaring S. 15(1) to be applicable to forward contracts in jute goods, and the appellants, who were members of an Association recognised by the Act, entered into a contract with the respondents-who were not members of any such association-for buying jute bags on their own account. The appellants applied to the High Court. under s. 33 of the Arbitration Act. 1940, for an order declaring that there existed a valid arbitration agreement contained in the relevant bought and sold notes. No evidence was tendered in the High Court to show that the appellants had secured the written consent or authority of the respondents, to the contract, and it was not their case that they had secured

any written confirmation of an oral consent or authority by the respondents. within three days of the date of the contract. The High Court held that the requirements of s. 15(4) were not complied with. and that the contract was therefore invalid.

In appeal to this Court. the appellants contended (1) that s. 15(4) was complied with, because, the respondents did confirm the contract in the slip provided for such confirmation at the foot of the sold note, that the slip was detached from the sold note but was not tendered in evidence in the High Court as its importance was not realised, and that this Court should receive the document in evidence: and (2) that even if there was a breach of the prohibition in s. 15 (4) the contract was enforceable, and the breach would merely expose the appellants to a criminal prosecution under s. 20(2).

HELD: (1) The additional evidence could not be allowed to be brought on record. [613H]

609

The document was in the possession of the appellants and no rational explanation was furnished for not producing it before the High Court. Further, the document did not prove itself and did not establish that the respondents had consented in writing to the terms of the contract. This Court as the appellate court, did not require the additional evidence to enable it to pronounce judgment, nor was any substantial cause made out which would justify an order allowing additional evidence to be led in this Court, within the meaning of O. XLI, r. 27 of the Civil Procedure Code. [613C-D, G-H]

(2) The prohibition imposed by s. 15(4) is not imposed in the interest of revenue: the clause is conceived in the larger interest of the public to protect them against the malpractices indulged in by members of recognised associations in respect of transactions in which their duties as agents conflict with their personal interest. parliament has made a writing, evidencing or confirming the consent or authority of a non-member, as a condition of the contract, if the member has entered into a contract on his own account. So long as there is no such writing, as is contemplated by s. 15(4) or its proviso there is no enforceable contract. [615D-F]

The penal clause in s. 20(2) cannot be utilised to restrict the prohibition contained in s. 15(4). What is penalized under s. 20(2) is entry into a forward contract by a member on his own account without disclosing to the non-member contracting party that the contract is on the member's own account; and not, for failing to secure the consent or authority of the other party to the contract. [615G-H]

Shri Bajrang Jute Mills Ltd. v. Lalchand Dugar, (1963-64) 68 C.W.N. 749, overruled.

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 32 of 1965.

Appeal by special leave from the judgment and order dated May 13, 1963 of the Calcutta High Court in Award Case No. 119 of 1963.

Sachin Chowdhury, M. G. Poddar and D. N. Mukherjee, for the appellant.

Sardar Bahadur, for the respondent.

The Judgment of the Court was delivered by

Shah, J Messrs Sunder Lal & Son-hereinafter called 'the appellants's--are members of the East India Jute and Hessian

Exchange Ltd. an Association recognised under the provisions of the Forward Contracts (Regulation) Act, 1952. The appellants applied to the High Court of Judicature at Calcutta on its original side under s. 33 of the Indian Arbitration Act 10 of 1940 for an order, inter alia, declaring that "there exists a valid arbitration agreement contained in contract No. 750 dated September 16, 1960 between the petitioners" and the respondents. The appellants claimed that they entered into a contract with the respondents on September 16, 1960, for the purchase of 6,00,000 bags of B Twill at the rate of Rs. 132.50 nP per 100 bags, "on their own account" in Transferable Specific Delivery Form prescribed under the byelaws of the Association. and on terms and conditions set out therein The respondents denied the existence of the contract and also its validity. The High Court dismissed the application holding that

M/J(N)6SCI-13

610

the contract was invalid in that it did not comply with the requirements of s. 15 sub-s. (4) of the Forward Contracts (Regulation) Act, 1952. By special leave, the appellants have appealed to this Court.

The relevant recitals in the notes, which, it was claimed, constituted the contract between the parties may first be set out:

"7A, Clive Row,

Calcutta-1

Sunder Lal & Son.

Contract No. 750

Messrs. Bharat Handicrafts (Private) Ltd.

Dear Sirs,

We have, subject to the terms and conditions hereinafter referred to, this day sold to Messers., Sunderlal & Son by Your order, and on your account:

Yours faithfully,

Sunderlal & Sons.

"Calcutta,

16th September, 1960

Messrs. Sunderlal & Son

No. 750

Dear Sirs,

We have, subject to the terms and conditions hereinafter referred to this day bought from Bharat Handicrafts (Private) Ltd., by your order, and on your account:

Yours faithfully,

Sunderlal & Son.

Validity of the contract was challenged by the respondents on, two grounds-(1) that the appellants were not at the relevant time members of the Association; and (2) that the requirements of s. (4) of the Forward Contracts (Regulation) Act were not complied with and the contract was on that account invalid. The High Court decided both the grounds in favour of the respondents.

The appellants averred in their petition that they were at all material times members of the Association. Baburam Saraf principal officer of the. Company-in his affidavit in reply merely states

611

that he did not admit that averment. The learned Judge observed that he was "unable to hold that the appellants had proved that the appellants were members of the Association at the time of the formation of the contract". It is unfortunate that the attention of the learned Judge was not invited to the admission made by the respondents in

paragraph 6 of the plaint filed by them in the City Civil Court, Calcutta, for a declaration that there was in fact no contract between them and the appellants bearing No. 750 dated September 16, 1960, in which the respondents had averred that they had discovered that the appellants "at all material times were the members of the said East India Jute & Hessian Exchange Ltd". In view of this evidence, counsel for the respondents did not seek to support the decision of the High Court on the first ground, and nothing more need be said in that behalf.

In dealing with the second ground, it is necessary to summarise the relevant provisions of the Forward Contracts (Regulation) Act, 1952. The Act was enacted to provide for the regulation of certain matters relating to forward contracts, the prohibition of options in goods and for matters connected therewith. By Ch. II the Central Government is given authority to establish and constitute a Forward Markets Commission with certain functions and powers. By Ch. III provision is made for granting recognition to associations, withdrawal of recognition and other incidental matters. By s. 11 sub-s. (1) any recognised association may, subject to the previous approval of the Central Government, make bye-laws for the regulation and control of forward contracts. By sub-s. (2), it is provided that such bye-laws may provide inter alia for the terms, conditions and incidents of contracts, including the prescription of margin requirements, if any, and conditions relating thereto, and the forms of contracts in writing. Sub-sections (1), (2) and (4) of s. 15 in force at the date of the contract were these:

"(1) The Central Government may by notification in the Official Gazette, declare this section to apply to such goods or class of goods and in such areas as may be specified in the notification, and thereupon, subject to the provisions contained in section 18, every forward contract for the sale or purchase of any goods specified in the notification which is entered into in the area specified therein otherwise than between members of a recognised association or through or with any such member shall be illegal.

(2) Any forward contract in goods entered into in pursuance of sub-section (1) which is in contravention of any of the bye-laws specified in this behalf under clause

(a) of sub-section (3) of section 11 shall be void--

(i) as respects the rights of any member of the recognised association who has entered into such contract in contravention of any such bye-law, and also

612

(ii) as respects the rights of any other person who has knowingly participated in the transaction entailing such contravention.

(3)

(4) No member of a recognised association shall, in respect of any goods specified in the notification under sub-section (1), enter into any contract on his account with any person other than a member of the recognised 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

Section 20 prescribed, penalties for breach of the provisions of the Act. The relevant section at the date of the contract insofar as it relates to the penalty for infringement of s. 15(4) read as follows:

(2) any person who enters into any forward contract in contravention of the provisions contained in subsection (4) of section 15 shall on conviction be punishable with fine."

It is common ground that the Central Government has issued a notification declaring s. 15(1) of the Act as applicable to forward contracts in jute and jute goods. The appellants entered into the contract with the respondents-who are not members of the association-for buying jute bags on their own account. Sub-section (4) of s. 15 imposes a prohibition against the entry into a contract on his own account by a member of the association with any person who is not a member of that association, unless the member has secured the consent of such other 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. The prohibition is removed only if two conditions exist-(i) that the note must disclose that the purchase or sale is on the account of the member of the recognised association; and (ii) consent or authority of the other person has been secured independently of the disclosure in the note. Where the consent or authority of the other person is secured but not in writing, the member has to secure a written confirmation of such consent or authority within three days from the date of such contract.

613

The "bought" and "sold" notes which are set out earlier are in the form prescribed in the Appendix to the Bye-laws of the association. At the foot of the prescribed form of the note there is a slip in which normally the confirmation of the other party to the contract would be obtained. The confirmation slip was it appears detached from the "sold" note, but it was not produced before the High Court by the appellants. Counsel for the appellants says that the respondents did give a slip confirming the contract in the "sold" note, but it was unfortunately not tendered in evidence in the High Court, and he applies for leave to tender in evidence that confirmation slip in this Court. The confirmation slip sought to be produced in this Court purports to bear the confirmation by a person who has signed it as 'M.L. Bahati'. This document was admittedly in the possession of the appellants and could have been produced by them in the High Court. No rational explanation is furnished for not producing the document before the High Court. Again the document does not prove itself: to make out the case that the respondents had consented in writing to the terms of the contract, evidence that the signature "M. L. Bahati" was subscribed by the person bearing that name and that he was authorised to confirm the note on behalf of the respondents would be necessary. The "sold" note is addressed to the appellants: it purports to be made out in

the name of the respondents, and is signed by the appellants as "Member Licensed Broker of the Association" " It is claimed that the appellants subscribed their signature to the sold" note under the authority of the respondents. The authority of the appellants from the respondents to enter into the transaction does not appear from the terms of., the "sold" note. But it is urged on behalf of the appellants that the bye-laws framed by the association prescribe that this form of the note shall be adopted even in transactions in which a broker is entering into a contract on his own account, and if the contract is not in the form prescribed under the bye-laws the contract would be void. We need not dilate upon that question, for we' are only concerned to point out that there is no evidence on the record that the appellants had secured the written consent or authority of the respondents to the contract. Where the Appellate Court requires any document to be produced or witnesses to be examined to enable it to pronounce judgment, or for any other substantial cause, the Court may allow such document to be produced or witnesses to be examined. We do not, require additional evidence to be produced in this case to enable us to pronounce judgment, nor do we think that any substantial cause is made out which would justify an order allowing additional evidence to be led at this stage. The document relied upon was admittedly in the possession of the appellants, but they did not rely upon it before the High Court. It was said at the Bar that the importance of the document was not realized by those in charge of the case. We do not think that the plea would bring the case within the expression "other substantial cause" in O. 41 r. 27 of the Code of Civil Procedure. We therefore decline to allow this additional evidence to be brought on the record

614

There is accordingly no writing evidencing the consent or authority A to the appellants entering into a contract on their own account with the respondents in respect of jute goods, and it is 'not the case of the appellants that they had secured written confirmation of such consent or authority by the respondents within three days from the date of the contract.

Counsel for the appellants, however, contends that sub-s. (4) of s. 15 does not invalidate a contract merely because there is no writing evidencing or confirming the consent or authority of the non-member, even if the member has entered into a contract in respect of goods purchased or sold on his own account. Counsel says that the prohibition imposed by the Parliament against the entry into such a contract does not make it void: only by entering into the contract the appellants are rendered guilty of an offence under s. 20 sub-s. (2) of the Act. In support of that contention, counsel says, that since in ss. 15(1), 15(2), 17(2) and 19 the Parliament has expressly enacted that in certain eventualities forward contracts shall be illegal or void, but in s. 15(4) no such consequence is indicated, a contract even in breach of the prohibition is enforceable, though it may expose the appellants to a criminal prosecution. Reliance is placed in support of that plea upon *Shri Bajrang Jute Mills Ltd. v. Lalchand Dugar*(1), in which the Calcutta High Court observed in dealing with the validity of a contract entered into by a member of a recognised association on his own account with a non-member in respect of specified goods:

"..... We think that the first proviso to section 15(4) is directory in the sense that the securing of the written confirmation

of the contract is no more than a condition subsequent as to which the responsible members may be blamable or punishable if he does not secure it, but his failure to do so does not invalidate the contract.

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."

In our judgment that view cannot be accepted as correct. The Legislature has by the Act imposed diverse restrictions upon the liberty of contract in respect of forward transactions in commodities specified in a notification under s. 15(1). By the first sub-section of S. 15 it is provided that contracts in respect of the specified goods or classes of goods in certain areas not between persons who are members of a recognized association or through or with any such member shall be illegal. The effect of the sub-section is that a forward contract for the sale or purchase of specified goods may be entered into

(1) 68 Cal. W.N. 749.

615

only between members of a recognized association or with a member or through any member of such an association: otherwise the contract will be invalid. The Act then proceeds to enact in sub-s. (2) that a forward contract in goods entered into in pursuance of sub-s. (1) shall still be void if it is made in contravention of the bye-laws in that behalf under cl. (a) of sub-s. (3) of s. 11. By sub-s. (4) the Parliament has then imposed a prohibition upon every member of a recognized association against entry into a contract on his own account with a non-member in respect of specified goods: the prohibition is lifted when in the memorandum, agreement of sale or purchase or in the bought and sold notes it is expressly disclosed that the contract is by the member on his own account and that he has secured the consent or authority of the other person who is a party to the contract, and if such consent or authority be not in writing, the member has obtained a written confirmation by such person of such consent or authority within three days from the date of the contract. It is therefore contemplated that for an enforceable 'contract to arise there shall be a writing evidencing or confirming the consent or authority of such person. The prohibition imposed by cl. (4) is not imposed in the interest of revenue; the clause is apparently conceived in the larger interest of the public to protect them against the malpractices indulged in by members of recognized associations in respect of transactions in which their duties as agents conflict with their personal interest. The Parliament has clearly made a writing evidencing or confirming the consent or authority of a non-member as a condition of the contract, if the member has entered into a contract on his own account. So long as there is no writing as is contemplated by s. 15(4) or the proviso thereto, there is no enforceable contract: it is the consent or authority in writing or confirmation of such consent or authority which brings into existence an enforceable contract. Any other view would attribute to the Parliament an intention to impose a prohibition which would be rendered for all practical purposes futile.

Under s. 20 sub-s. (2) of the Act a penalty is imposed on any person who enters into a forward contract in contravention of the provisions contained in sub-s. (4) of

s. 5. The penal clause is not clearly expressed. A reasonable reading of that clause is that a person who enters into a contract without disclosing that he contracts on his own account is liable to be punished. It could obviously not have been intended by the Parliament to punish a person for failing to secure the consent or authority of the other party to the contract-an act which depends solely upon the volition of that other person. The apparent obscurity in the penal provision cannot however be utilized to restrict the prohibition contained in s. 15(4). What is penalised under s. 20(2) is entry into a forward contract by a member on his own account without disclosing to the non-member contracting party that the contract is on the member's own account. We therefore hold that

616

the High Court was right in holding that the contract did not comply with the requirements of sub-s. (4) of s. 15 and was on that account invalid.

The appeal therefore fails and is dismissed with costs.

V.P.S. Appeal dismissed.

617