

PETITIONER:
STATE OF GUJARAT

Vs.

RESPONDENT:
MANILAL JOITARAM & CO.

DATE OF JUDGMENT:
08/11/1967

BENCH:
HIDAYATULLAH, M.
BENCH:
HIDAYATULLAH, M.
BHARGAVA, VISHISHTHA
VAIDYIALINGAM, C.A.

CITATION:
1968 AIR 653 1968 SCR (2) 117

ACT:
Forward Contracts (Regulations) Act, 1952, ss. 18 and
20--Non-transferable specific delivery contracts --No
actual delivery-whether prohibited.

HEADNOTE:

The members of a Ghee and Tel Brokers Association, used to enter into contracts for the sale and purchase of groundnut oil. Week after week contracts were cancelled by cross-transactions and there was no delivery. Instead of payment of price losses resulting from the cross transactions were deposited by the operators in loss with the Association. On the due date also there was no delivery but adjustment of all contracts of sales against all contracts of purchase between the same parties and delivery was of the outstanding balance. Even this delivery was often avoided by entering into fresh contract at the rate prevailing on the due date, as part of the transactions in the next period. The Sessions Judge convicted the respondents--the Association's President, Secretary and Directors. holding that these were forward contracts prohibited under the Forward Contracts (Regulation) Act and the Association was not recognised. The High Court set aside the convictions. In appeal, this Court:

HELD: Section 18(1) of the Act speaks of true non-transferable 'specific delivery contracts but the proviso at the same time makes it illegal for an unrecognised association to so arrange matters that non-transferable specific delivery contracts will-be worked out without actual delivery. Such conduct is prohibited by the proviso and directly punishable under s. 20(1)(b). An offence under that clause of s. 20(1) and also under el. (c3 of that section read with s. 15 was made out. There was no question of considering the matter first under the main part of the first sub-section and then to put the proviso out of the way because the first sub-section did not apply. The Legislature contemplates that the first sub-section of s. 18 might be complied with in the documents evidencing the contract but in actuality the contract might be differently performed and has. therefore, provided for the identical situation which arose in this case. [182F-H, D]

JUDGMENT:

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 250 of 1964.

Appeal from the judgment, and order dated March 14, 1963 of the Gujarat High Court in Criminal Revision Application No. 124 of 1961.

R. Ganapathy Iyer and S.P. Nayar, for the appellant.

M.V. Goswami and C.C. Patel, for the respondent.

The Judgment of the Court was delivered by

Hidayatullah, J. In this appeal by certificate under Art. 134(1)(c) of the Constitution the State of Gujarat appeals against

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the judgment, March 14, 1963, of the High Court of the State acquitting the respondents of diverse offences under the Forward Contracts (Regulation) Act, 1952. Originally 31 persons were charged before the Judicial Magistrate, Ahmedabad, who acquitted 14 and convicted the rest. The present respondents, who are 11 in number (accused 1 to 9, 11 and 12), were convicted under s. 20(1)(c) of the Act and fined Rs. 51/- (15 days' S.I. in default). They were also convicted under s. 21(b) of the Act but no separate sentence was imposed. Nine of them (accused 1 to 9) were further convicted under s. 21(c) of the Act and fined Rs. 25/- (one week's S.I. in default). The remaining accused were convicted under s. 21(b). All appealed to the Court of Sessions Judge. The conviction of accused 1 to 9, 11 and 12 was maintained but conviction under s. 20(1)(b) was substituted for that under s. 20(1)(c). The other accused were convicted of all the charges. The High Court was then moved in revision. All the accused were acquitted of all the charges. The State Government now appeals.

All respondents are members of the Ghee and Tel Brokers Association Ltd., Ahmedabad. Nine of them are Directors and two of these are President and Secretary of the Association. The accused, who are not before us, were brokers and servants of the Association or of the brokers. The prosecution case is this: The Association has an office where the members and brokers used to enter into contracts for the sale and purchase of groundnut oil. These contracts were largely speculative. A large number of contracts used to be entered into but were not performed by actual delivery and payment of price. They were adjusted on a due date after the expiry of a fixed period. This period was generally from the 5th of one calendar month to the 25th of the following month and the latter was the due date. On each Saturday during the period the Association exhibited the prevailing rate and according to that rate cross transactions entered earlier were adjusted and the persons in loss deposited money representing their particular losses with the Association. On the due date all outstanding transactions were finally adjusted by cancelling sales against purchases and delivery used to be ordered in respect of the balance which had to be completed by the end of the month of the due date. During the stated period extensive trading through sales and purchases took place without any delivery. Each member could enter into as many transactions of either kind as he liked provided that each transaction was in multiple of 50 Bengali Maunds. Between March 5 and April 25, 1957 the total transactions put through totalled 4,33,600 Bengali Maunds but the actual delivery on the due date was about 5,500 Bengali Maunds

only, that is to say, just over 11/4 per cent. The share of the several operators in these deliveries was insignificant and the deals were really forward

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any such member, becomes illegal, and the contract itself becomes void, except in the case of a person who has no knowledge that the transaction is prohibited. We are not concerned with ss. 16 and 17 and may omit them from consideration. Then comes s. 18, sub-section (1) whereof provides:

"18. Special provisions respecting certain kinds of forward contracts.--

(1) Nothing contained in Chapter III or Chapter IV shall apply to non-transferable specific delivery contracts for the sale or purchase of any goods:

Provided that no person shall organise or assist in organising or be a member of any association in any area to which the provisions of section 15 have been made applicable (other than a recognised association) which provides facilities for the performance of any non-transferable specific delivery contracts by any party thereto without having to make or to receive actual delivery to or from the other party to the contract or to or from any other party named in the contract."

This sub-section read with ss. 20 and 21 is at the foundation of the charge and as s. 19 is irrelevant here, we may proceed to read them at once. We are concerned only with cls. (b) and (c) of sub-s. (1) of s. 20 and (b) and (c) of s. 21 and will, therefore, omit the other clauses:

"20. Penalty for contravention of certain provisions of Chapter IV.--

(1) Any person who---

(a)

(b) organises, or assists in organising, or is a member of, any association in contravention of the provisions contained in the proviso to sub-section (1) of section 18; or

(c) enters into any forward contract or any option in goods in contravention of any of the provisions contained in sub-section (1) of section 15, section 17 or section 19, shall, on conviction, be punishable with imprisonment for a term which may extend to one year, or with fine, or with both.

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transactions in which there was no intention to take or give delivery. The prosecution, therefore, submitted that these were forward contracts prohibited under the Act and as the Association was not recognised the offences charged were committed. The High Court having acquitted all the accused the State contends now that the acquittal recorded by the High Court is wrong and proceeds on a misapprehension of the provisions of the Act and of the facts on which the charges rested.

To consider the submissions of the parties the relevant provisions of the Act, which has been passed, among other things, to regulate forward contracts, will have to be seen. Before we do so we may first glance at some definitions

leaving out those attributes of the terms defined in which we are not interested. "Forward contract" under the Act means a contract which is not a ready delivery contract but a contract for future delivery (s. 2(c)). A "ready delivery contract" is one in which there is delivery and payment of price either immediately or within a period which is not to exceed 11 days even by consent of parties or otherwise (s. 2(1)). The expressions "transferable specific delivery contract" and "non-transferable specific delivery contract" are defined' with reference to the latter expression which means a specific delivery contract, the rights or liabilities under which are not transferable (s. 2 (f)) and "specific delivery contract' means a forward delivery contract which provides for actual delivery of specific qualities or types of goods either immediately or during a period not exceeding 11 days at a price fixed thereby or to be fixed in the manner thereby agreed and in which the names of both the buyers 'and sellers are mentioned (s. 2(m)).

The effect of these definitions is clearly to distinguish, firstly, forward contracts from ready delivery contracts by limiting the time in which ready delivery contracts must be completed by delivery and payment of price; secondly, to distinguish between transferable and non-transferable specific delivery contracts; and finally to distinguish forward contracts in which there is either no provision for actual delivery or the parties are not named, from a specific delivery contract.

The Act then proceeds to lay down in Chapter III the conditions of recognition of Associations. Since this Association was admittedly not recognised it is unnecessary to review the provisions of that Chapter. Chapter IV then makes certain provisions regarding forward contracts and option in goods. Chapter V then provides for penalties. The relevant provisions of these two Chapters need to be carefully considered. Section 15(1) declares illegal forward contracts in notified goods and on the notification so issuing every forward contract in notified goods otherwise than between members of a recognised association or through or with

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"21. Penalty for owning or keeping place used for entering into forward contracts in goods.---Any person who--

(b) without the permission of the Central Government, organises, or assists in organising, or becomes a member of, any association, other than a recognised association, for the purpose of assisting in, entering into or making or performing, whether wholly or in part, any forward contracts in contravention of any of the provisions of this Act, or

(c) manages, controls or assists in keeping any place other than that of a recognised association, which is used for the purpose of entering into or making or performing, whether wholly or in part, any forward contracts in contravention of any of the provisions of this Act or at which such forward contracts are recorded or adjusted, or rights or liabilities arising out of such forward' contracts are adjusted, regulated or enforced in any manner whatsoever, or shall, on contravention, be punishable with

imprisonment which may extend to two years, with fine, or with both."

The respondents were charged under ss. 20 (1) (b)., 20 (1) (c) and 21(a), (b), (c) and (f). As the State does not press its case under s. 21 (a) and (f) they have been left out. Before we analyse the penalty sections it is necessary to see whether the case fails within s. 18 (1) of the Act. It is established in the case that the Association was unregistered. It is also clear that the contracts, although they appeared to be non-transferable specific delivery contracts were not intended to be completed by delivery immediately or within a period of 11 days from the date of the contract. In fact week after week contracts were cancelled by cross-transactions and there was no delivery. Instead of payment of price losses resulting from the cross-transactions were deposited by the operators in loss with the Association. Further, on the due date also, there was no delivery but adjustment of all contracts of sales against all contracts of purchase between the same parties and delivery was of the outstanding balance. Even this delivery was often avoided by entering into fresh contract at the

rate prevailing on the due date, as part of the transactions in the next period. There is evidence also to establish this. In other words, the transactions on paper did seem to comply with the regulations but in point of fact they did not and the Association arranged for settlement of the entire transactions (barring an insignificant portion if at all) without delivery.

Turning now to the provisions of sub-s. (1) of the 18th section it is clear that the provisions of Chapters III and IV would not have applied to the respondents if their transactions were true non-transferable specific delivery contracts. They would have been so if the nature of the transaction, not on paper, but in actuality was such as the Act contemplates. This is why the proviso to s. 18 has been added to prohibit certain things. The proviso enacts that no person shall organise or assist in organising or be a member of an association (except a recognised association) which provides facilities for the performance of any specific delivery contract without having to make or to receive actual delivery. The Legislature contemplates that the first sub-section of s. 18 might be complied with in the documents evidencing the contract but in actuality the contract might be differently performed and has, therefore, provided for 'the identical situation which, arises in this case.

Now the difference between the Magistrate and the Sessions Judge arose on the application of the first sub-section of s. 18 with its proviso. The Magistrate felt that the transactions were not non-transferable specific delivery contracts and the matter fell within the proviso. Having found this, it is not a little surprising that he did not apply s. 20(1)(b), which was clearly attracted. His reasoning on this point is difficult to appreciate. He seems to think that as the first sub-section of the eighteenth section dealt with non-transferable specific delivery contracts, it had no application here. Therefore, the charge of being members of an association in contravention of the proviso thereto did not survive and hence no offence under s. 20(1)(b) was disclosed. In this the Magistrate was clearly in error. Section 18(1) speaks of true non-transferable specific delivery contracts but the proviso at the same time makes it illegal for an unrecognised association to so arrange matters that non-

transferable specific delivery contracts will be worked out without actual delivery. The Magistrate should have seen that the conduct of the members of this unrecognised association was precisely this and was, therefore, prohibited by the proviso and directly punishable under s. 20(1)(b). An offence under that clause of s. 20(1) and also under cl. (c) of that section read with s. 15 was made out. There was no question of considering the matter first under the main part of the first subsection and 'then to put the proviso out of the way because the first sub-section did not apply. The Magistrate, however, con-

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victed the members under s. 21 (b) for organising an unrecognised association for the purpose of assisting in or entering into or making or performing, whether wholly or in part, any forward contracts in contravention of the provisions of the Act and further under s. 21 (c) for managing, controlling or assisting in keeping a place other than that of a recognised association where forward contracts in contravention of the Act or at which forward contracts are recorded or adjusted or rights or liabilities arising out of such forward contracts are adjusted, regulated or enforced in any manner whatsoever.

When the respondents appealed to the Sessions Judge, the conviction under s. 21 (b) and (c) was confirmed and the other conviction was altered from s. 20(1)(c) to s. 20(1)(b). The Sessions Judge rightly pointed out that the so-called non-transferable specific delivery contracts were so arranged that they could be resolved after the period of eleven days and without actual delivery. The Sessions Judge was of the opinion that the respondents had acted in breach of the proviso to s. 18 (1) and were clearly guilty of the offence. In a precise and clear judgment the Additional Sessions Judge explained the pertinent sections and rightly held the proviso to s. 18(1) and s. 20(1)(b) applicable.

The High Court then in revision held that it was not open to the Sessions Judge to alter the conviction from s. 20(1)(c) to s. 20(1)(b) as the acquittal under the latter section by the Magistrate was not appealed against and in an appeal from a conviction there could be no change of finding to convert an acquittal into conviction. The High Court also held that no offence under s. 21 (b) or (c) was made out. In a fairly long judgment the High Court pointed out that the decision of this Court in *The State of Andhra Pradesh v. Thadi Narayana*(1) prohibited the alteration of the finding. The High Court then went further to hold that there could not be a conviction under s. 20(1)(c) as the Sessions Judge had acquitted the appellants and there was again no appeal against that acquittal. The High Court also set aside the conviction under s. 21 (b) and (c). The High Court reached its conclusion on the basis of the finding of the Sessions Judge that the contracts entered into were non-transferable specific delivery contracts and the appellants were, therefore, not guilty of the offence under s. 20(1)(c) of the Act. The High Court then proceeded to reason that as no part of the Act prohibited performance of non-transferable specific delivery contracts otherwise than by making or receiving actual delivery, the acts of the appellants were not offences under the Act. The learned Judge while dealing with s. 18 (1) proviso observed:

(1) [1962] 2 S.C.R. 933334.

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"The performance of a non-transferable specific delivery contract by a mode other

than giving and taking of actual delivery would be contrary to law only if there is some provision of law which prohibits it. But unfortunately for the prosecution, the Legislature has not chosen to enact any such provision. The only nearest approximation I could find was the proviso to sub-section(1) of section 18 but that proviso does not prescribe that a non-transferable specific delivery contract shall be performed by making and receiving actual delivery and that the parties to such a contract shall not perform it otherwise than 'by making and receiving actual delivery. All that it enacts is that no person shall organise or assist in organising or be a member of any association in any area to which the provisions of section 15 have been made applicable (other than a recognised association) which provides facilities for the performance of any non-transferable specific delivery contract by any party thereto without having to make or receive actual delivery to or from the other party to the contract or to or from any other party named in the contract. What this proviso seeks to achieve is to secure that no Association other than a recognized Association shall provide facilities for performance of a non-transferable specific delivery contract by the parties thereto without having to make or receive actual delivery. But it is a long step in the argument to conclude from the proviso that performance of a non-transferable specific delivery contract otherwise than by making and receiving actual delivery is prohibited. The language of the proviso cannot bear any such extended artificial construction..... "

The learned Judge was clearly in error and misunderstood the connection between the first sub-section and its proviso. Distinction is made in the proviso between recognised and unrecognised associations. Persons can organise and assist in organising or be member of an association which is recognised even if the association provides for performance of non-transferable specific delivery contracts without actual delivery. The prohibition is against persons arranging for avoidance of delivery through an unrecognised association and read with the penalty sections, it is clear that such acts are rendered illegal. If the acts are illegal then non-transferable specific delivery contracts by members of unrecognised associations become illegal also. They are forward contracts and being entered into otherwise than between members of a recognised association or through or with any such member are rendered illegal by s. 15.

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Thus there is no doubt whatever in the case that offences under s. 21(b) and (c) were committed. It is enough to read these clauses to see that they fit the acts of nine respondents (accused 1-9) and their position vis-a-vis the unrecognised association of which they were directors makes them liable to penalty under s. 21 ('b) and (c) but the remaining two respondents (accused 11 and 12) being only members are liable to penalty under s. 21 (b) only. As regards the other offences under s. 20(1)(b) and

(c) we are clear that these offences were also committed. But as the Sessions Judge acquitted them under cl. (c) and there was no appeal to the High Court we say nothing about it. As regards the offence under s. 20(1)(b) the Magistrate did not clearly record a finding of acquittal. However, his reasoning seems to be in favour of holding that the clause did not cover the case as the contracts were not non-transferable specific delivery contracts. His finding was the reverse of the finding of the Sessions Judge. The question thus remains whether the Sessions Judge could alter the finding in an appeal from a conviction (and the High Court too if it so chose) when it was a question of choosing between two clauses of a penalty section depending on whether the true nature of the contracts was as held by the Magistrate. The ruling of this Court cited earlier was invoked to suggest that such a course was not possible for the Sessions Judge or the High Court. We do not pause to consider whether the ruling prohibits such a course and if it does whether it does not seek to go beyond the words and intendment of s. 423(1)(b) of the Code of Criminal Procedure. This is hardly a case in which to consider such an important point. We, therefore, express no opinion upon it. It is sufficient to express our dissent from the High Court on the interpretation of the Act and hold the respondents guilty of infractions where the ruling does not stand in the way.

We accordingly set aside the acquittal of the respondent under cls. (b) and (c) of s. 21 and restore their conviction under those clauses as confirmed by the Sessions Judge. We sentence all the respondents to a fine of Rs. 25 (or one week's simple imprisonment in default) under s. 21(b). No separate sentence under s. 21 (c) is imposed on the respondents who were original accused Nos. 1-9. The appeal shall be allowed to the extent indicated. in this paragraph.
Y.P. Appeal allowed in part.

L10SupCl:67- 13

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