

PETITIONER:
UNION OF INDIA

Vs.

RESPONDENT:
CHAMAN LAL LOONA

DATE OF JUDGMENT:
30/04/1957

BENCH:
DAS, S.K.
BENCH:
DAS, S.K.
DAS, SUDHI RANJAN (CJ)
IMAM, SYED JAFFER
MENON, P. GOVINDA
SARKAR, A.K.

CITATION:
1957 AIR 652 1957 SCR 1039

ACT:

Partition of India-Distribution of rights and liabilities-Contract by Governor-General in Council, if and when for the Purposes of Pakistan -Test-Such Purpose, if can be modified by Powers of control vested in Joint Defence Council-Adjudication of rights and liabilities under such contract-Indian Independence (Rights, Property and Liabilities) Order, 1947, Arts. 8(1), 3(2)--joint Defence Council Order, 1947, Art. 8(c).

HEADNOTE:

The correct test to determine whether a contract made before the partition of India on behalf of the Governor-General in Council comes within the purview of cl. (a) of Art. 8(1) of the Indian Independence (Rights, Property and Liabilities) Order, 1947, so as to be deemed to have been made on behalf of the Dominion of Pakistan, is-either (1) if the contract was made on August 15, 1947, it would have been a contract for the purposes of the Dominion of Pakistan ; or (2) if Pakistan had existed on the day the contract was made, it would be a contract for the purposes of Pakistan.

Union of India v. Chinu Bhai jeshing bhai, I.L.R. 1953 Bom. 117, approved.

The purpose of a contract is not to be confused with the ultimate disposal of the goods supplied thereunder since such disposal can in no way determine or modify it. Nor do the powers of control over military stores vested in the joint Defence Council by Art. 8(c) of the joint Defence Council Order, 1947, and saved by Art. 3(2) of the Indian Independence (Rights, Property and Liabilities) Order, 1947, whereby the goods might be transferred anywhere in India, make any difference and the rights and liabilities accruing from such contracts fall entirely to be adjudged by the provisions of the Indian Independence Order and not by the joint Defence Council Order.

The concluding part of Art. 8(1) makes it quite clear that the Article makes no distinction between contracts where the

consideration is either executed or executory in nature and applies equally to both.

Elahi Bux v. Union of India, A.I.R. 952 Cal. 471 and Krishna Ranjait v. Union of India, A.I.R. 1954 Cal. 623, approved. Union of India v. Loke Nath, A.I.R. 1952 Cal. 140, disapproved.

Consequently, in a case where the Union of India was sought to be made liable on the basis of a contract entered into on behalf of the Governor-General of India in Council for the supply of fodder to the Manager, Military Farms, Lahore Cantonment, which was in Pakistan on August 15, 1947, and the trial Court found for the Union of India but the High Court, taking the view that the fodder constituted military stores under the exclusive control of the joint Defence Council on August 15, 1947, liable to be transferred anywhere in 'India, reversed that finding, the contract, even assuming that view to be correct, must be held to be one exclusively for the purposes of Pakistan as from the date and the Union of India could not be made liable thereunder.

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 24 of 1954.

Appeal under Article 132 read with Article 147 and Article 133(1)(c) of the Constitution of India from the judgment and order dated July 17, 1952, of the Punjab High Court in First Appeal from Order No. 9 of 1949 against the judgment and decree of the Sub-Judge 1st

104

Class, Ferozepur dated February 9, 1949, in Civil Sui No. 134 of 1949.

Porus A. Mehta, R. Gopalakrishnan and R.H. Dhebar, for the appellant.

Hardayal Hardy, for the respondents.

1957. April 30. The Judgment of the Court was, delivered by

S. K. DAS J.-This is an appeal on the strength of a certificate granted by the High Court of Punjab at Simla. The appellant is the Union of India and the respondent Messrs. Chaman Lal Loona and Company military contractors at Muktsar in the district of Ferozepur, now in the Indian State of Punjab.

The relevant facts are these. In the Court of the senior Subordinate Judge at Ferozepur, in August, 1948, the respondent Company made an application, purporting to be an application under s. 8(2) and s. 20 of the Arbitration Act, 10 of 1940, wherein the respondent alleged that in 1945 the respondent had entered into a contract for the supply of "bhoosa" (fodder) to the military department of the then undivided India through the Manager, Military Farms, Lahore Cantonment. The contract, it was alleged, was signed by the Assistant Director, Military Farms, on behalf of the then Government of India. The agreement between the parties was that the said Manager would also supply, on payment of price, wire coils in connection with the supply of bhoosa presumably for the purpose of tying the bundles of fodder, and on the supply being made and on return of the wire coils, the military department would give credit for the price of the coils already paid by the respondent. In November, 1945, the respondent supplied fodder and returned 152 bundles of wire coils. The Manager, Military Farms, Lahore, informed the respondent, however, that out of 152 bundles of wire coils, said to have been sent, 24 bundles had not been received, though no note of such non-delivery

was made at the time the consignment was received. The respondent had also deposited Rs. 11,026 by way of security with the military department in connection with the contract. The agreement contained an

134

1042

arbitration clause to the effect that if a dispute arose between the parties, it should be decided by the arbitrator named therein, viz., the District Commander concerned. The respondent said that he had a claim against the appellant for Rs. 720, the price of 24 bundles of wire coils at Rs. 30 per bundle, and for refund of Rs. 11,026, and prayed in terms of s. 20 of the Arbitration Act that the appellant be directed to 'ale the agreement and other relevant documents, and that the Court do refer the dispute to the arbitrator named for the purpose of filing an award.

As required by sub-s. (2) of s. 20 of the Arbitration Act, the application was registered as a suit, and a notice was issued to the appellant to show cause. The appellant showed cause by a written statement filed on November 4, 1948, in which the two substantial pleas taken were-(1) that by reason of the provisions of the Indian Independence (Rights, Property and Liabilities) Order, 1947, hereinafter referred to as the Independence Order, 1947, the Dominion of India, and later the Union of India, had no liability in respect of the contract in question, the purposes of which contract as from August 15, 1947, were purposes exclusively for the Dominion of Pakistan; and (2) the Court at Ferozepore had no jurisdiction to try the suit, as the cause of action did not arise within its territorial jurisdiction.

The two issues which were tried by the learned Subordinate Judge were the aforesaid issues of liability and jurisdiction. On jurisdiction, he found in favour of the respondent, on the ground that the respondent was a displaced person' living in Muktsar which is in Ferozepore and therefore the Court at Ferozepore had jurisdiction to try the suit. The High Court affirmed this finding, and as nothing now turns upon this issue, we are not called upon to make any pronouncement thereon. The issue as to the liability of the appellant on the basis of the contract in question is, however, very much a live issue. The learned Subordinate Judge found in favour of the appellant on this issue, and dismissed the application. The High Court reversed that finding, and allowed the appeal. In reversing the finding of the learned Subordinate Judge, the High

1043

Court relied on the provisions of the Joint Defence Council Order, 1947, to be referred to hereinafter as the Defence Order, 1947. The precise ground on which the High Court proceeded may best be put in the words of Khosla J. who gave the leading judgment. Khosla J. said:

" In the present case the Lahore Military farm is situated at Lahore and whether the fodder was supplied in 1945 or after the 15th of August 1947, the purpose will be deemed. to be a purpose of the Dominion of Pakistan on account of the territorial situation of Lahore. But in the present case, the fodder was to be supplied to a Military Farm and the fodder, therefore, constituted Military stores. Military Stores were kept joint and under the exclusive control of the Joint Defence Council who had the power of allocating these stores among the two Dominions and for transferring them from one place to another. Therefore, fodder lying in the Military Farm, Lahore, was not, on 15th August 1947, the exclusive property of the Dominion of Pakistan but was under the exclusive control of the Joint

Defence Council. This fodder could be transferred to a farm in India and thus could become the property of the Dominion of India. In the circumstances, it cannot be said that the contract for supply of fodder to the Military Farm, Lahore, was a contract exclusively for the purposes of the Dominion of Pakistan if the contract were viewed on the 15th of August 1947, and, that being so, it must be held that the contract was not a contract exclusively for the purposes of the Dominion of Pakistan. The decision of the learned trial Judge on this point must, therefore, be set aside."

The principal question in this appeal is whether the High Court is right in its view as to the true scope and effect of the relevant provisions of the Independence Order, 1947, and the Defence Order, 1947. Learned counsel for the appellant has challenged the correctness of that view, and has submitted-(1) that on a true construction of Art. 8 of the Independence Order, 1947, the contract under consideration in this case was as from the appointed day (i.e., August 15, 1947), a contract exclusively for the purposes of the Dominion of

1044
Pakistan and shall be deemed to have been made on behalf of that Dominion, and all rights and liabilities which have accrued or may accrue under such contract shall be the rights and liabilities of the Dominion of Pakistan; (2) that the Defence Order, 1947, which set up a Joint Defence Council and provides for the exercise of certain powers of control by the said Council under Art. 8 of that Order did not in any way affect the rights and liabilities arising out of the contract, which rights and liabilities were governed by the relevant provisions of the Independence Order, 1947; and (3) that, in any view, the claim in the present case did not relate to military stores as the High Court wrongly assumed, and the Defence Order, 1947, had no application at all to the facts of this case.

On behalf of the respondent, the correctness of each of the above submissions has been seriously contested, and learned counsel for the respondent has strongly contended that the view of the High Court as to the relevant articles of the Independence Order, 1947, and the Defence Order, 1947, is correct. Learned counsel also raised a preliminary point of objection to the effect that on an application under s. 20, Arbitration Act, the only point for decision was if there was an arbitration agreement and the question of liability was one for the arbitrator and not for the Court to decide. Ordinarily, that would be so. When, however, we pointed out to learned counsel that the Union of India as such was admittedly not a party to the arbitration agreement and could not be dragged, therefore, to an arbitration proceeding on the strength of an agreement to which it was not a party unless by operation of law it was deemed to be a party to the agreement, learned counsel gave up his preliminary objection and conceded that the question of liability must be decided in this case with reference to the provisions of the Independence Order, 1947, and the Defence Order, 1947.

It is convenient at this stage to set out the relevant provisions of the two Orders. The Defence Order, 1947, was made in exercise of the powers conferred by.. sub-s. (1) of s. 9 and in pursuance of sub-s. (1) of s. II of the Indian Independence Act, 1947, and was published

1045
on August 11, 1947. The Independence Order, 1947, was made in exercise of the powers conferred by s. 9 of the Indian Independence Act, 1947, and was published on August 14,

1947. Both came into force at once. Article 3 of the Defence Order, 1947, states:

" (1) As from the 15th day of August, 1947, there shall be set up a Council to be known as the Joint Defence Council for India and Pakistan.

(2) The said Council, hereinafter referred to as the Joint Defence Council, shall consist of-

(i) the Governor-General of India, (ii) the Defence Minister of India, (iii) the Defence Minister of Pakistan, and (iv) the Supreme Commander of His Majesty's forces in India and Pakistan (hereinafter referred to as the Supreme Commander). "

Article 8, so far as it is relevant, is in these terms:

" The Joint Defence Council shall be in exclusive control of-

(a) the division of the Indian forces between the Dominions and their reconstitution as two separate Dominion forces

(b) the allocation, transfer and movement of officers and men belonging to the Indian forces for the purposes of such reconstitution;

(c) the allocation, transfer and movement for the purposes of such reconstitution of plant, machinery equipment and stores held by the Governor-General in Council immediately before the 15th day of August, 1947, for the purposes of the Indian forces etc."

The Independence Order, 1947, states in Art. 2 that the 'appointed day' means the fifteenth August, 1947. Article 3 so far as it is relevant for our purpose, states:

" (1) 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.

(2) Nothing in this Order affects the powers of control over military plant, machinery, equipment

1046

and stores conferred on the Joint Defence Council by the Joint Defence Council Order, 1947.

Article 8(1), which is very important for our purpose, is in these terms:

" (1) 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. "

The first question is, what is the true scope and effect of Art. 8(1) of the Independence Order, 1947? Does it apply to the contract in question, and, if so, does the contract fall within the purview of cl. (a) or cl. (b)? At one stage of the argument, learned counsel for the respondent contended that Art. 8(1) did not apply to what is sometimes described as executed contracts; this point was also urged before Kapur J. of the Punjab High Court (as he then was) and one of the reasons given by him for a reference of the case to a larger bench was the difficulty he felt if the contract in

question which has been performed and executed long before August 15, 1947, so far as the respondent was concerned, attracted the operation of cl. (a) of Art. 8(1). It is necessary to appreciate clearly the distinction between the two classes of contracts where the consideration is either executed or executory. " An executed consideration consists of an act for a promise. It is the act which forms the consideration..... No contract is formed unless and until the act

1047

is performed, e.g., the payment for a railway ticket, but the act stipulated for exhausts the consideration, so that any subsequent promise, without further consideration, is merely a nudum pactum. In an executed consideration the liability is outstanding on one side only; it is a present as opposed to a future consideration. In an executory consideration the liability is outstanding on both sides. It is in fact a promise for a promise; one promise is bought by the other. The contract is concluded as soon as the promises are exchanged. In mercantile contracts this is by far the most common variety. In other words, a contract becomes binding on the exchange of valid promises, one being the consideration for the other. It is clear, therefore, that there is nothing to prevent one of the parties from carrying out his promise at once, i.e., performing his part of the contract; whereas the other party who provides the consideration for the act of or detriment to the first may not carry out his part of the bargain simultaneously with the first party. " (Chitty on Contracts, Vol. I, 21st Edn. pp. 43-44). On a plain reading of Art. 8(1) of the Independence Order, 1947, it is clear that it applies to both classes of cases; it says, in its concluding part, that " all rights and liabilities which have accrued or may accrue under any such contract, shall be rights or liabilities of the Dominion of Pakistan or the Dominion of India, as the case may be." If the contract has been fully and completely performed on both sides, no question of any further rights and liabilities under the contract is likely to arise. If, however, the contract is one in which the consideration is executed on one side, there will be a right on one side and an outstanding liability on the other. If the consideration is executory on both sides, there will be outstanding rights and liabilities on both sides. In talking of " all rights and liabilities which have accrued or may accrue" under the contract, the Article clearly contemplates both classes of cases. On this question, we approve of the view taken in *Elahi Bux v. Union of India* (1) and *Krishna Ranjan v.*

(1) A.I.R. 1952 Cal. 471.

1048

Union of India (1) and disapprove of the view expressed by *Roxburgh J.* in *Union of India v. Loke Nath* (2).

It is further clear that the first part of Art. 8(1) creates a legal fiction. The contract is actually made before August 15, 1947, (the appointed day); but as from that date, the contract shall be deemed to have been made on behalf of the Dominion of Pakistan, if the contract is for purposes which as from that day are exclusively purposes of the Dominion of Pakistan, and in any other case it shall be deemed to have been made on behalf of the Dominion of India. What is the proper meaning of the expression " a contract for the exclusive purposes of the Dominion of Pakistan"? We assent to the view expressed by *Chagla C.J.* in *Union of India v. Chinu Bhai Jeshingbhai* (3). Said the learned Chief Justice-

" It is clear from the language used in art. 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 art. 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 August 15, 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."

This, we think, is the correct test to apply for determining the true scope and effect of Art. 8(1) of the Independence Order, 1947, and applying this test, there is no doubt that the contract in question comes under cl. (a) of the said Article. The purpose of the contract was to supply fodder to the Manager, Military Farms, Lahore Cantonment, which farms were in Pakistan on the appointed day. The contract was, therefore

(1) A.T.R. 1954 Cal. 623.

(2) A.I.R. 1952 Cal. 140.

(3) I.L.R. 1953 Bom. 117, 130.

1049

exclusively for the purposes of the Dominion of Pakistan as from the appointed day.

The second question is-do the provisions of the Defence Order, 1947, make any difference in the legal position? The High Court thought, erroneously in our opinion, that they did. It is true that cl. (2) of Art. 3 of the Independence Order, 1947, says that nothing in that Order affects the powers of control over military plant, machinery, equipment and stores conferred on the Joint Defence Council by the Defence Order, 1947. Clause (3) of Art. 3 of the Independence Order, 1947, states that the powers of control over property conferred upon each Dominion by the Order shall include all powers of use, consumption, management etc. This, however, is subject to such powers of control as are given to the Joint Defence Council. Those powers of control are laid down in Art. 8 of the Defence Order, 1947, cl. (c) of which relates to "the allocation, transfer and movement for the purposes of such reconstitution of plant, machinery, equipment and stores held by the Governor-General in Council immediately before the 15th day of August, 1947, for the purposes of the Indian forces." The point which is to be emphasised is that what is saved by cl. (2) of Art. 3 of the Independence Order, 1947, is 'Powers of control' of the Joint Defence Council with regard to certain essential military equipment etc. including stores. There is no provision in the Defence Order, 1947, which affects the rights and liabilities of any of the two Dominions arising out of a contract, and those rights and liabilities are dealt with by the Independence Order, 1947. The learned Judges of the High Court thought that the Defence Order, 1947, made a difference in the legal position in so far as the purpose of the contract was concerned. They realised and said that ordinarily the purpose of supplying fodder to the Military Farms at Lahore was a purpose exclusively for the Dominion of Pakistan; but they thought that on the assumption that 'bhoosa' was military store, the Joint Defence Council had powers of control over it and could send it wherever they wanted it to be sent; therefore, they

1050

said that the purpose of the contract was not a purpose exclusively for the Dominion of Pakistan.

We say this with great respect, but this line of reasoning appears to us to be due to a lack of proper appreciation of the distinction between the "purpose of the contract" and the "ultimate disposal of the goods" supplied under the contract. The purpose of the contract is not determined nor modified by the ultimate disposal of the goods supplied under the contract, nor even by the powers of control exercised over the goods after the contract had been performed by the respondent. Wherever the goods might be ultimately sent, the purpose of the contract remained what it was, that is, to supply fodder to the Manager, Military Farms, Lahore, which, on the test laid down by us, was clearly a purpose exclusively for the Dominion of Pakistan. The Independence Order, 1947, determines the respective rights and liabilities under contracts. If, under the Defence Order, 1947, some goods the liability for the price of which under the Independence Order, 1947, falls on, say, India, are allotted to Pakistan, then the value thereof will have to be adjusted in accounts. Such allotment does not alter the rights or liabilities determined under the Independence Order, 1947. We are, therefore, of the view that the High Court of Punjab was in error in inferring that on the strength of certain provisions of the Defence Order, 1947, the contract in question came within cl. (b) of Art. 8(1), and not cl. (a). We think that the learned Subordinate Judge correctly held that cl. (a) applied and the Union of India had no liability under the contract.

Only a few words are necessary to dispose of the third contention urged before us. The claim in the present case was a claim for a refund of the price paid for 24 bundles of wire coils and of the security deposit. Such a claim did not relate to military stores, and the Defence Order, 1947, had no direct application to such a claim. It was only for examining the purpose of the contract that the question of 'bhoosa' being military store arose. The High Court assumed that 'bhoosa' was military store. Without deciding whether 'bhoosa' is military store or not, we have also proceeded on the

1051

same assumption; but even on that assumption, there is no difference in the legal position. The purpose of the contract was still a purpose which, as from the appointed day, was a purpose exclusively for the Dominion of Pakistan. It is worthy of note that cl. (c) of Art. 8 of the Defence Order, 1947, relates inter alia to stores held by the Governor-General in Council immediately before August 15, 1947, for the purposes of the Indian forces. There was nothing in the record to show that the 'bhoosa' supplied by the respondent in 1945 was held by the Governor-General in Council immediately before August 15, 1947, so as to vest the power of control in the Joint Defence Council and thereby affect the purpose of the contract, assuming, though we do not so decide, that such power of control can affect the purpose of the contract.

The original contract was not produced in this case, as it was not available in the appropriate office in India. The respondent did not even produce a copy thereof, but gave oral evidence as to the purpose of the contract. The Courts below proceeded on that oral evidence, and the appeal was argued before us on that footing. We have determined the purpose of the contract as on August 15, 1947, on the basis of that evidence, without deciding the further question if

oral evidence was admissible in this case as to the purpose of the contract.

For the reasons given above, we allow this appeal, set aside the judgment and decree of the High Court, and restore those of the learned Subordinate Judge. The appellant will get costs throughout.

Appeal allowed.

1052

JUDIS