

**IN THE HIGH COURT AT CALCUTTA
ORDINARY ORIGINAL CIVIL JURISDICTION
ORIGINAL SIDE
COMMERCIAL DIVISION**

Present:

The Hon'ble Justice Sugato Majumdar

CS/634/2001

PRAKASH KUMAR THAKER
VS

THE JHARKHAND STATE CO-OPERATIVE LAC MARKETING AND
PROCUREMENT FEDERATION LIMITED

For the Plaintiff : Mr. Subhasis Sengupta, Adv.
Mr. Avijit Dey, Adv.

For the Defendant : Mr. Sakya Sen, Adv.
Mr. Chanchal Kumar Dutta, Adv.
Ms. Krishna Mullick, Adv.

Hearing concluded on : 30.11.2023

Judgment on : 11.12.2023

Sugato Majumdar, J.:

The instant suit is filed by the Plaintiff praying for a decree of Rs. 14,23,920/-, interest along with other prayers.

The Plaintiff carries on business of export and trading of shellac. The Defendant is a co-operative society having its office at Ranchi, Jharkhand. The plaint

case in nutshell is that pursuant to negotiation between the parties, the Plaintiff agreed to purchase and the Defendant agreed to sell, confirmed by the later in terms of a letter dated 15/04/2000, to sell 24 metric ton shellac. In terms of the agreement, the Plaintiff deposited 10 per cent of the contract value as the earnest money by a demand draft dated 17/04/2000, drawn on Indian Overseas Bank, amounting to Rs.2,73,600/-. The said demand draft was duly received by the Defendant at its office at Ranchi. Acknowledgement was made on 18/04/2000. In terms of the letter dated 17/04/2000 the Plaintiff inquired into when the Defendant would be ready to deliver the first lot of 12 metric ton shellac so that the Plaintiff's representative may collect the same and deposit the balance consideration money. The Plaintiff's object to purchase shellac was to supply and sell the same to an Egyptian buyer. The Defendant had contractual obligation to deliver the entire quantity of machine-made T.N shellac within 20/05/2000. Since the stipulated supply was not made till mid-May, 2000, the Plaintiff asked the Defendant to supply shellac.

By a letter dated 26/07/2000, the Defendant wrongfully terminated the contract. On pretext of labor problem, the Defendant expressed inability to supply the said shellac. The Defendant also returned the earnest money, previously deposited by the Plaintiff. It is contention of the Plaintiff that in spite of extension of delivery period till 01/09/2000, the Defendant neglected, failed and refused to deliver any part of shellac as agreed upon. The Plaintiff made it known to the Defendant that the former is an exporter and goods are required for sale to his foreign customers. Since the Defendant failed to supply shellac in breach of agreement, the Plaintiff had to purchase shellac from market at enhanced rate to discharge contractual obligation to overseas party. Since the Plaintiff had to purchase shellac at enhanced rate, he suffered business loss and loss of profit to the tune of

Rs.14,23,920/- being the difference between market price and contractual price as on 01/09/2000. The Plaintiff filed the instant suit praying for recovery of the said damages along with interest and to pass decree for such amount as may be found payable by the Defendant.

During pendency of the suit, because of bifurcation of the State of Bihar and creation of the State of Jharkhand w.e.f. 27/08/2001 and subsequent amendments in relevant bye-laws, the present Defendant succeeded the original Defendant.

The Defendant contested the suit by filing written statement. The Defendant is a society registered under Jharkhand Co-operative Societies Act 1935. Functioning of the society is governed by the registered bye-laws of the society.

Contention of the Defendant is that no written agreement was ever executed between the parties for purchase and sale of shellac, as alleged. No contract came into existence between the parties, as alleged. The Plaintiff merely gave proposal to purchase T.N. Shellac from the Defendant which was accepted by the Defendant on the basis of decision taken by the Business Committee of the Defendant. The said decision was communicated to the Plaintiff by a letter dated 15/04/2000. The Plaintiff deposited the earnest money in compliance with the requirement as contemplated in the said letter. It is further contended that the proposal of the Plaintiff was provisionally accepted. In view of such factors namely labour trouble, and defect of chimney beyond control, the Defendant expressed its inability to give effect to the Plaintiff's proposal. The Defendant referred to *force majeure* clause of the agreement. The Defendant denied all other contents and specifically stated that this Court has no territorial jurisdiction to entertain the suit. According to the Defendant, the suit is liable to be dismissed with costs.

On the basis of rival pleadings, the following issues were framed:

- 1) Is the suit barred under the provision of section 57 read with bye-law of Jharkhand Co-operative Societies Act 1935 and therefore, not maintainable?
- 2) Did the Plaintiff and the Defendant entered into any agreement on 15th April, 2000?
- 3) Did the Defendant commit any breach of agreement for sale with regard to claim a sum of Rs.14,23,920/-?
- 4) Is the Plaintiff entitled to claim a sum of Rs.14,23,920/- ?
- 5) Has the Plaintiff suffered any loss or damage?
- 6) To what further or other relief is the Plaintiff entitled?

Parties adduced oral as well as documentary evidences.

The Defendant raised a plea that the suit is barred under section 57 of the Jharkhand Co-operative Societies Act, 1935. Section 57 of the Act states:

“57. Bar of jurisdiction of Court. - (1) Save in so far as expressly provided in this Act, no Civil or Revenue Court shall have any jurisdiction in respect of any matter concerned with the winding up or dissolution of the registered society or suspension of the Managing Committee of a registered society under its act, or of any dispute required by section 48 or any other section of

this Act to be referred to the Registrar, Tribunal, Forum, as the case may be, or of any proceedings, under Chapter VIIA.

(2) While a society is in liquidation, no suit or other legal proceeding shall be proceeded with or instituted against the liquidator as such or against the society or any member thereof on any matter touching the affairs of the society, except by leave of the Registrar and subject to such terms as he may impose.

(3) No order of the State Government, District Judge, Registrar, a person appointed to assist the Registrar, liquidator, State Tribunal or Forum or an arbitrator or arbitrators purporting to be one, which under any provision of this Act is declared to be final shall be liable to be challenged, set aside, modified, revised, or declared void in any Court upon merits or upon any ground whatsoever except want of jurisdiction.”

Section 48 refers to disputes related to business of the co-operative societies as detailed therein. There is no bar in the Act to institute a suit in a civil court to enforce a contract entered into by a co-operative society with a third party in relation to any business activity. The underlying principle and scope of section 48 and section 57 of the Act came up for consideration before a five Judges’ Bench of the Supreme Court of India. The Supreme Court of India considered the case in respect of Section 48(1) read with Section 57 of the Bihar and Orissa Cooperative Societies Act, 1935, the precursor of the present Act. It was explained:

“9. From the provisions of the Act, set out above, it is manifest that the Act created a special tribunal, namely, the Registrar of Cooperative Societies, to deal with certain disputes specified in Section 48(1) (a) to (e). This special tribunal was created with a view to shortening litigation and providing speedy relief to registered societies and their members in their disputes inter se in respect of the business of the society. Before the amendments introduced by the Act of 1948, the disputes which could be entertained by the Registrar were disputes amongst members, past members or their heirs or their sureties, or between a society and its officers, agents or servants, or between a society and other registered societies (without meaning to exhaust all the categories.) But, before the amendments, one who was not a member of a society or was not claiming through a member or a past member or a deceased member, or was not a surety of a member or a deceased member, was not subject to the jurisdiction of the Registrar under Section 48. That is to say, any dispute between a society or its members, past members or deceased members or sureties of such members on the one hand and non-members on the other, was not within the purview of the section, so that the appellant Company, which is not a registered society or a member of a registered society, could not have its claim, or a claim against it by a registered society, referred to the Registrar for decision, under this section. Such a dispute by a society or its members against a non-

member had to be taken to the ordinary courts for decision.”

(Sugauli Sugar Works (P) Ltd. v. Asst. Registrar, Co-op. Societies, AIR 1962 SC 1367).

In a subsequent case **Bihta Co-op. Development Cane Marketing Union Ltd. v. Bank of Bihar, (AIR 1967 SC 389)** a three Judges’ Bench of the Supreme Court of India reiterated the same:

“The scheme of sub-section (1) of Section 48 seems to be that certain disputes touching the business of a registered society should not be taken to Civil Courts and made the subject-matter of prolonged litigation. The legislature took pains to specify the persons whose disputes, were to be subject-matter of reference to the Registrar. Non-members did not come into the picture at all.”

In the present case, the Plaintiff is neither an agent or servant of the cooperative society nor is a member, past member, heir of deceased member of the Defendant cooperative society within the meaning of the aforesaid Act of 1935. Disputes of the present suit do not come within purview of section 48 or section 57 of the Jharkhand Co-operative Societies Act, 1935. Therefore, the suit is maintainable.

Issue No.1 is decided in favour of the Plaintiff.

The Issue No.2 is whether the Plaintiff and the Defendant entered into any agreement. It is one of the pleas in the written statement and also argued by the Learned Counsel for the Defendant that there was no binding agreement between the parties. The Learned Counsel for the Defendant argued, on the other hand, that

material evidences clearly establish that there was a concluded contract between the parties.

Although averred in the written statement that there was no agreement between the parties, written statement states in Para.5:

“The plaintiff merely gave a proposal to purchase T.N. Shellac from the defendant which proposal was accepted by the defendant on the basis of the decision taken by the Business Sub-committee of the defendant. The said decision was communicated to the plaintiff by letter dated 15th April, 2000 relied upon by the plaintiff. Issuance of the said letter dated 15th April, 2000 does not result in a contract coming into existence by and between the plaintiff and the defendant for purchase/sale of T.N. Shellac.”

This is an admission that a proposal was made by the Plaintiff to the Defendant for purchase of T.N. Shellac and the same was accepted by the Defendant. It is also admitted that acceptance was communicated to the Plaintiff in terms of the letter dated 15/04/2000. The said letter was marked as Ext. “E”. In the said letter offer of the Plaintiff was accepted subject to condition that the Plaintiff shall deposit 10% of the earnest money. It is also admitted in the written statement that the Plaintiff deposited the earnest money with the Defendant. In the conspectus of facts it is evident that offer of the Plaintiff was accepted and a concluded contract came into being.

Issue No.2 is decided in favour of the Plaintiff.

Issue No.3 is whether the Defendant committed any breach of agreement or not.

It is argued by the Learned Counsel for the Plaintiff that the Defendant delayed delivery of the goods. On 23rd June, 2000 the Defendant purportedly raised two grounds of lack of productivity and rise in price by the Board. Ultimately, in terms of the letter dated 26th July, 2000 (Ext.-K), the Defendant terminated the agreement on plea of labour problem and strike. According to the Learned Counsel for the Plaintiff, this is breach of agreement.

Per contra the Learned Counsel for the Defendant argued that delivery of the goods could not be made for reasons beyond control. It is a case of failure to perform contractual obligation because of supervening events beyond control resulting in frustration of contract. The Learned Counsel relied upon the principle of law laid down in **Satyabrata Ghosh vs Mugneeram Bangur & Co. and Ors. (AIR 1954 SC 44)**.

There was a time when contractual duties were regarded as absolute. There was no excuse for any supervening event which made contractual performance impossible. In **Paradine vs Jane [(1647) Aleyn 26]**, this principle was expounded by a British Court. It was decided that when a party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have been provided against it by his contract. The doctrine of absolute contract probably never applied where a contract called for personal performance by a party who died or was permanently incapacitated. Another early exception to it was recognised in cases of supervening illegality. In **Taylor vs Caldwell [(1863) 3 B. & S. 826]** Blackburn,

J, relied on the first exception as bases for formulating the general rule of discharge which became known as the doctrine of frustration. Owing its genesis in Taylor vs Caldwell, this doctrine of frustration entered into its growth in subsequent period. In **Krell vs Henry [(1903) 2 K.B 740]** the doctrine was further expounded and applied to cases where the event which renders the contract incapable of performance is the cessation or non-existence of an express condition or state of things, going to the root of the contract and essential to its performance.

In India, the doctrine of frustration is embodied in section 56 of the Indian Contract Act, 1872. The section states:

“56. Agreement to do impossible act. -An agreement to do an act impossible in itself is void.

Contract to do an act afterwards becoming impossible or unlawful.—A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.¹

Compensation for loss through non-performance of act known to be impossible or unlawful.—Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know, to be impossible or unlawful, such promisor must make compensation to such promisee for any

loss which such promisee sustains through the non-performance of the promise.”

In **Satyabrata Ghose v. Mugneeram Bangur & Co.,[(1953) 2 SCC 437]**, B.K. Mukherjee, J, speaking for three Judges’ Bench, explained that the first paragraph of the section lays down the law in the same way as in England. It speaks of something which is impossible inherently or by its very nature, and no one can obviously be directed to perform such an act. The second paragraph enunciates the law relating to discharge of contract by reason of supervening impossibility or illegality of the act agreed to be done. The wording of this paragraph is quite general, and though the illustrations attached to it are not at all happy, they cannot derogate from the general words used in the enactment. This much is clear that the word “impossible” has not been used here in the sense of physical or literal impossibility. The performance of an act may not be literally impossible but it may be impracticable and useless from the point of view of the object and purpose which the parties had in view; and if an untoward event or change of circumstances totally upsets the very foundation upon which the parties rested their bargain, it can very well be said that the promisor finds it impossible to do the act which he promised to do. It is further explained as follow:

“17. In the large majority of cases however the doctrine of frustration is applied not on the ground that the parties themselves agreed to an implied term which operated to release them from the performance of the contract. The relief is given by the court on the ground of subsequent impossibility when it finds that the whole purpose or basis of a contract was

frustrated by the intrusion or occurrence of an unexpected event or change of circumstances which was beyond what was contemplated by the parties at the time when they entered into the agreement. Here there is no question of finding out an implied term agreed to by the parties embodying a provision for discharge, because the parties did not think about the matter at all nor could possibly have any intention regarding it. When such an event or change of circumstance occurs which is so fundamental as to be regarded by law as striking at the root of the contract as a whole, it is the court which can pronounce the contract to be frustrated and at an end. The court undoubtedly has to examine the contract and the circumstances under which it was made. The belief, knowledge and intention of the parties are evidence, but evidence only on which the court has to form its own conclusion whether the changed circumstances destroyed altogether the basis of the adventure and its underlying object [*Morgan v. Manser*, (1948) 1 KB 184] . This may be called a rule of construction by English Judges but it is certainly not a principle of giving effect to the intention of the parties which underlies all rules of construction. This is really a rule of positive law and as such comes within the purview of Section 56 of the Contract Act.”

It was also explained that if the parties do contemplate the possibility of an intervening circumstance which might affect the performance of the contract, but expressly stipulate that the contract would stand despite such circumstance, there can

be no case of frustration because the basis of the contract being to demand performance despite the happening of a particular event, it cannot disappear when that event happens.

In Naihati Jute Mills Ltd. v. Khyaliram Jagannath (AIR 1968 SC 522) the doctrine was again considered by the three Judges' Bench of the Supreme Court of India. In the language of the Court:

“5. Section 56 of the Contract Act inter alia provides that a contract to do an act which, after the contract is made becomes impossible, or by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful. It also provides that where one person has promised to do something which he knew, or, with reasonable diligence might have known, and which the promisee did not know to be impossible or unlawful, such a promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance. As envisaged by Section 56, impossibility of performance would be inferred by the courts from the nature of the contract and the surrounding circumstances in which it was made that the parties must have made their bargain upon the basis that a particular thing or state of things would continue to exist and because of the altered circumstances the bargain should no longer be held binding. The courts would also infer that the foundation of the contract had disappeared

either by the destruction of the subject-matter or by reason of such long interruption or delay that the performance would really in effect be that of a different contract for which the parties had not agreed. Impossibility of performance may also arise where without any default of either party the contractual obligation had become incapable of being performed because the circumstances in which performance was called for was radically different from that undertaken by the contract.”

Coming to the case in hand, the letter dated 26th July, 2000 (Ext.-K), the Defendant terminated the agreement on plea of labour problem and strike. In the written statement plea was taken that chimney of the Defendant's factory was damaged and some labour trouble also cropped up. On account of these intervening events beyond control of the Defendant stipulated T.N. Shellac could not be supplied and the Defendant expressed inability to give effect to the proposal of the Plaintiff. The Defendant adduced evidence to show that chimney and boiler of the factory broken down disabling them to supply. It is not the Plaintiff's case that these incidents were forceable and existed at the time of making of the contract or acceptance of the proposal. It is in the evidence of D.W.1 that because of breakdown of chimney and boiler in the factory, production became standstill, consequently stipulated supply of T.N. Shellac could not be made. Evidence shows that running and working of chimney and boiler are so essential for production that break-down of the same disabled the Defendant to perform its part of contract.

In **Dhanrajamal Gobindram v. Shamji Kalidas & Co., (AIR 1961 SC 1285)** the Supreme Court of India considered the issue of *force majeure*. It was explained:

“17. McCardie, J. in *Lebeaupin v. Crispin* [(1920) 2 KB 714] has given an account of what is meant by “force majeure”, with reference to its history. The expression “force majeure” is not a mere French version of the Latin expression “vis major”. It is undoubtedly a term of wider import. Difficulties have arisen in the past as to what could legitimately be included in “force majeure”. Judges have agreed that strikes, breakdown of machinery, which, though normally not included in “vis major” are included in “force majeure”. An analysis of rulings on the subject into which it is not necessary in this case to go, shows that where reference is made to “force majeure”, the intention is to save the performing party from the consequences of anything over which he has no control. This is the widest meaning that can be given to “force majeure”, and even if this be the meaning, it is obvious that the condition about “force majeure” in the agreement was not vague. The use of the word “usual” makes all the difference, and the meaning of the condition may be made certain by evidence about a force majeure clause, which was in contemplation of parties.”

Break down of machineries are included in *force majeure*, as observed above. It is neither alleged nor in evidence that break down of machineries was a ploy of

the Defendant to avoid contractual obligation. Therefore, from the facts and circumstances of the case and material evidences, it is clear that the Defendants were prevented from supplying stipulated T.N. Shellac by supervening circumstances beyond control. This is a case of frustration of contract, as contemplated in section 56 of the Indian Contract Act, 1872 and not a case of breach of contract.

Issue No.3 is decided in favour of the Defendant.

Issue No.4, 5 and 6 are taken up together. As discussed and concluded above, this is a case of frustration of contract and the contract is void. Under section 65 of the Act, when an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it to the person from whom he received it. In **Kuju Collieries Ltd. v. Jharkhand Mines Ltd., [(1974) 2 SCC 533]** it was explained that the second part of the section refers to a contract becoming void. That refers to a case where an agreement which was originally enforceable and was, therefore, a contract, becomes void due to subsequent happenings. In both these cases any person who has received any advantage under such agreement or contract is bound to restore such advantage, or to make compensation for it to the person from whom he received it. In **South East Asia Marine Engg. & Constructions Ltd. (SEAMEC LTD.) v. Oil India Ltd., (2020) 5 SCC 164**, it has been succinctly elucidated by three Judges Bench of the Supreme Court of India that when the parties have not provided for what would take place when an event which renders the performance of the contract impossible, then Section 56 of the Contract Act applies. When the act contracted for becomes

impossible, then under Section 56, the parties are exempted from further performance and the contract becomes void. With reference to section 65 of the Indian Contract Act, 1872, it was observed:

“**23.** In India, the Contract Act, 1872 had already recognised the harsh consequences of such frustration to some extent and had provided for a limited mechanism to ameliorate the same under Section 65 of the Contract Act, 1872. Section 65 provides as under:

“65. Obligation of person who has received advantage under void agreement, or contract that becomes void.—When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it.”

The aforesaid clause provides the basis of restitution for “failure of basis”. We are cognizant that the aforesaid provision addresses limited circumstances wherein an agreement is *void ab initio* or the contract becomes subsequently void.”

In the case in hand, earnest money deposited by the Plaintiff was returned forthwith to him by the Defendant. This is in evidence and admitted fact. Advantage derived under the contract was returned to the Plaintiff. Therefore, the Defendant is not liable to pay any compensation. The Plaintiff is also not entitled to any relief prayed for reasons stated above.

Issue No.4, 5 and 6 are, therefore, decided against the Plaintiff.

On hearing rival submissions and appreciation of material evidences and for reasons discussed above this Court is of opinion that the instant suit of the Plaintiff fails on merit and is liable to be dismissed.

Hence, it is ordered that the instant suit is dismissed on merit without cost on merit.

The instant suit is disposed of along with pending applications.

(Sugato Majumdar, J.)