

to establish a proper system of conservancy, sanitation and watch and ward at the fair, (3) that when issuing a permit the District Magistrate can impose such terms and conditions as he may deem fit. The net effect of these rules is merely to establish a system of *ad hoc* control by the District Magistrate through the issue of a permit and by the vesting of other powers in him under the rules. These cannot be said to be rules which in themselves constitute a system of conservancy, sanitation and watch and ward. Thus the result that is brought about is not within the intendment of the section which authorises the making of the rules. A system of *ad hoc* control of responsible officers may, possibly be one method of regulating the sanitary and other arrangements at such large gatherings. But if it is intended to constitute a system of *ad hoc* control with reasonable safeguards, the power to make rules in that behalf must be granted to the rule-making authority by the legislative organ in appropriate language.

The impugned order of the District Magistrate being bad on both the above grounds, this is enough to dispose of the appeal and it is not necessary to express any opinion as to whether the impugned order infringes also the appellant's fundamental rights under article 19. The appeal must accordingly be allowed.

*Appeal allowed.*

DUNI CHAND RATARIA

*v.*

BHUWALKA BROTHERS LTD.

[MEHR CHAND MAHAJAN C.], BHAGWATI, JAGANNADHADAS and VENKATARAMA AYYAR JJ.]

*West Bengal Jute Goods Future Ordinance, 1949, s. 2(1) (b) (i) —Actual delivery of possession—Whether includes symbolical as well as constructive delivery of possession—Indian Sale of Goods Act, 1930 (III of 1930), s. 2(2)—Delivery—Meaning of.*

Delivery has been defined in s. 2(2) of Indian Sale of Goods Act, 1930, as meaning voluntary transfer of possession from one per-

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son to another and it includes not only actual delivery but also symbolical or constructive delivery within the meaning of the term.

The expression "actual delivery of possession" in s. 2(1)(b)(i) of the West Bengal Jute Goods Future Ordinance, 1949 means actual delivery as contrasted with mere dealings in differences within the intendment of the Ordinance and such actual delivery of possession included within its scope symbolical as well as constructive delivery of possession.

The word "involving" in the expression "involving the actual delivery of possession thereof" in s. 2(1) (b)(i) of the Ordinance means in the context resulting in and this condition would be satisfied if the chain contracts in the present case, as entered into in the market resulted in actual delivery of possession of goods in the ultimate analysis.

The Ordinance came within Head 27 of List 2 of the Seventh Schedule of the Government of India Act, 1935:—"Trade and commerce within the Province; markets and fair; money lending and money lenders" and the Provincial Legislature was competent to legislate on that topic.

*Nippon Yusen Kaisha v. Ramjiban* ([1938] L.R. 65 I.A. 263), referred to.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 61 of 1953.

Appeal from the Judgment and Decree dated the 16th day of May, 1952 of the High Court of Judicature at Calcutta in Appeal from Original Decree No. 124 of 1951 arising out of the decree dated the 25th day of May, 1951 of the High Court of Calcutta in its Ordinary Original Civil Jurisdiction in Suit No. 3614 of 1950.

*M. C. Setalvad*, Attorney-General for India, (*P. Mandal* and *S. P. Varma*, with him), for the appellant.

*N. C. Chatterjee* (*A. N. Sinha* and *P. C. Dutta*, with him), for the respondent.

1954. December 3. The Judgment of the Court was delivered by

BHAGWATI J.—This appeal with certificate from the High Court of Judicature at Calcutta arises out of the suit filed on the original side of the High Court by the appellant against the respondent to recover a sum of Rs. 1,25,962-2-0 with interest and costs.

The appellant entered into three contracts, two dated the 8th August 1949 and the third dated the 17th August 1949 with the respondent agreeing to purchase 1,80,000 bags of 'B' twills at the price of Rs. 134/4/- per 100 bags, 1,80,000 bags at the rate of Rs. 135/4/- per 100 bags and 90,000 bags at the rate of Rs. 138/- per 100 bags respectively for October, November and December 1949 deliveries in equal monthly instalments on terms and conditions contained in the relative contract forms of the Indian Jute Mills Association. In September 1949 the respondent expressed its inability to deliver the goods under the said contracts and requested the appellant to settle the same by selling back the goods under the said contracts to the respondent at the price of Rs. 161-8-0 per 100 bags. Three settlement contracts were accordingly entered into between the parties on the 28th September 1949 whereby the appellant agreed to sell the goods under the original contracts to the respondent at the rate of Rs. 161-8-0 per 100 bags on the terms and conditions contained in the relative contract forms of the Indian Jute Mills Association. The appellant duly submitted to the respondent his bills for the amounts due at the foot of the said contracts aggregating to Rs. 1,15,650 which the respondent accepted but failed and neglected to pay in spite of repeated demands of the appellant. The appellant therefore filed the suit for recovery of the said sum with interest and costs. The respondent filed its written statement contesting the appellant's claim on the main ground that the three settlement contracts above-mentioned were illegal and prohibited by the West Bengal Jute Goods Future Ordinance, 1949. The respondent contended that it never dealt in the sale and/or purchase of jute goods involving actual delivery of possession thereof, nor did it possess or have control over any godown and other means or equipments necessary for the storage and supply of jute goods and that therefore the said settlement contracts were void and not binding upon it and that the appellant was not entitled to any relief as prayed. The Trial Court negatived the contention of the respon-

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dent and decreed the appellant's claim. The learned Judges of the Appeal Court however came to the conclusion that the said settlement contracts were contracts relating to the purchase of jute goods made on a forward basis by the respondent not being a person who habitually dealt in the sale or purchase of jute goods involving the actual delivery of possession thereof and were therefore void and unenforceable. The only right which the appellant had against the respondent was to have the said original contracts settled on the basis of the last closing rate in a notified market which was Rs. 146/14/- per 100 bags. No such claim was however made by the appellant. A further contention which was raised by the respondent, viz. that the Ordinance was *ultra vires* was negatived by the Court. But in view of its finding on the main issue the Appeal Court dismissed the appellant's suit with costs.

The relevant provisions of the West Bengal Jute Good Future Ordinance, 1949 were as under :—

Section 2. In this Ordinance, unless there is anything repugnant in the subject or context :—

(1) 'Contract relating to jute goods futures' means a contract relating to the sale or purchase of jute goods made on a forward basis—

(a) providing for the payment or receipt, as the case may be, of margin in such manner and on such dates as may be specified in the contract, or

(b) by or with any person not being a person who,

(i) habitually deals in the sale or purchase of jute goods involving the actual delivery of possession thereof, or

(ii) possesses, or has control over, a godown and other means and equipments necessary for the storage and supply of jute goods : .....

3. (1) The Provincial Government may, from time to time, if it so thinks fit, by notification in the Official Gazette prohibit the making of contracts, relating to jute goods futures and may, by like notification, withdraw such prohibition.....

(2) When the making of contracts relating to jute goods futures is prohibited by a notification under sub-section (1),—

(a) no person shall make any such contract or pay or receive any margin except, in the case of any such contract made prior to the date of the notification, to the extent to which the payment or receipt, as the case may be, of margin is allowable on the basis of the last closing rate in a notified market :.....

(c) notwithstanding anything contained in any other law for the time being in force,—

(i) every such contract made, and every claim in respect of margin, in contravention of the provisions of clause (a), shall be void and unenforceable, and

(ii) every such contract made prior to the date of publication of the notification shall be varied and settled on the basis of the last closing rate in a notified market.

Explanation—In this sub-section,—

(a) “last closing rate” means the rate fixed by the Directors of a notified market to be the closing rate of such market immediately preceding the date of publication of the notification under sub-section (1) prohibiting the making of contracts relating to jute goods futures: and

(b) “notified market” means a jute goods futures market recognised by the Provincial Government by notification in the Official Gazette.

The Ordinance came into force on the 22nd September 1949. In pursuance of the power conferred under section 3(1) of the Ordinance the Government of West Bengal issued a notification, being notification No. 4665 Com. dated the 23rd September 1949 prohibiting the making of contracts relating to jute goods futures on and from the date of publication of the notification in the Official Gazette and by another notification No. 4666 Com. of the same date recognised certain jute goods futures markets for the purpose of Para. (b) of the Explanation to section 3(2) as notified markets. These notifications were published in the

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Calcutta Gazette on the same day, the 23rd September 1949.

The relevant terms and conditions of the standard form of the Indian Jute Mills Association contracts may be conveniently set out here :—

(1) Buyers to give 7 Clear Working day's notice to place goods alongside.....

(3) Payment to be made in cash in exchange for Delivery Orders on Sellers, or for Railway Receipts, or for Dock's Receipts or for Mate's Receipts (which Dock's Receipt or Mate's Receipts are to be handed by a Ship's or Dock's officers to the Sellers' representatives).

(4) The Buyers hereby acknowledge, that so long as such Railway Receipts or Mate's or Dock's Receipts (whether in Sellers' or Buyers' names) are in the possession of the Sellers, the lien of the sellers, as unpaid vendors, subsists both on such Railway Receipts Dock's or Mate's Receipts and the goods they represent until payment is made in full.

There were other terms and conditions appertaining to the delivery of goods under the contracts including inspection by the buyers, insurance, tender, etc. The settlement contracts were also practically in the same form except that in the body of the contracts it was mentioned that the particular contract represented settlement of an original contract which had been already entered into between the parties and that the buyers in the settlement contract would pay to the sellers the difference at the particular rate on due date.

In respect of the goods deliverable under the contracts the mills would, in the case of goods sent by them alongside the vessel in accordance with the shippers' instructions in that behalf, obtain the mate's receipts in respect of the same and such mate's receipts would be delivered by the mills to their immediate buyers who in their turn would pass them on to their respective buyers in the chain of contracts resting with the ultimate shipper. If the mills held the goods in their godown they would issue

delivery orders on the due date, which delivery orders would be dealt with in the same manner as the mate's receipts aforesaid. Both these sets of documents would represent the goods and would be passed on from seller to buyer against payment of cash. As a matter of fact on the evidence the learned Trial Judge held that in the Calcutta jute trade mills' delivery orders are ordinarily issued by the mills against cash payment and pass from hand to hand by endorsement and are used in the ordinary course of business authorising the endorsee to receive the goods which they represent and that they are dealt with in the market as representing the goods.

The Appeal Court accepted this position and further found that in the instant case "the mills who held the goods sold them to A, A to B, B to the defendant, defendant to the plaintiff, plaintiff to C and C to the shipper. This is what is known as a chain contract. It is admitted by the plaintiff, that the mills give the delivery order to A. A endorses it to B, B to the defendant, defendant to the plaintiff and so on".

The question that falls to be determined on these facts and circumstances is whether the settlement contracts mentioned above could be called contracts between the appellant and the respondent involving the actual delivery of possession of the goods. It was common ground that the contracts did not provide for the payment or receipt of margin. It was also common ground that the respondent did not possess or have control over a godown and other means and equipments necessary for the storage and supply of jute goods. The only point at issue was whether the respondent was a person who habitually dealt in the sale or purchase of jute goods involving the actual delivery of possession thereof and the contention which was vehemently urged on behalf of the respondent in the Courts below was that the transactions were purely speculative, that mere delivery orders passed between the parties, which delivery orders did not represent the goods and the transfer thereof did not involve as between the intermediate parties actual delivery of possession of the goods but

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differences in rates were only paid or received by the parties.

The appellant on the other hand contended that the delivery orders represented the goods, that each successive buyer paid to his immediate seller the full price of the goods represented by the delivery order in cash before the relative delivery order was endorsed in his favour and thus obtained not only the title to the goods but actual delivery of possession thereof and that in any event when the goods were delivered alongside the vessel or actual delivery was taken by the ultimate buyer there was the giving and taking of actual delivery of possession of the goods all along the chain at the same moment.

The Trial Court accepted the contention of the appellant that the delivery orders are dealt with in the market as representing the goods and that they pass from hand to hand by endorsement being received by the successive buyers against cash payment and are used in the ordinary course of business authorising the endorsee to receive the goods which they represent. The learned Trial Judge further observed :—

“Now visualize the long chain of contracts in which the defendant's contract is one of the connecting links. The defendant buys from its immediate seller and sells to its immediate buyer. As seller it is liable to give and as buyer it is entitled to take delivery. As seller it receives and as buyer it gives shipping instructions. Similar shipping instruction is given by each link until it reaches the mills. The mills deliver the goods alongside the steamer. Such delivery is in implement of the contract between the mills and their immediate buyer. But *eo instanti* it is also in implement of each of the chain contracts including the contract between the defendant and its immediate buyer and the contract between the defendant and its immediate seller. Not only does the mill give and its immediate buyer take actual delivery but *eo instanti* each middleman gives and takes actual delivery. Simultaneously the defendant takes actual delivery of possession of the jute goods from its immediate seller and gives actual delivery of possession



of jute goods to its immediate buyer. *Prima facie* at the moment of the delivery alongside the steamer there is appropriation and the passing of the property in the goods and the giving and taking of actual delivery of possession thereof all along the chain at the same moment".

The learned Trial Judge then referred to the following observations of Lord Wright, in *Nippon Yusen Kaisha v. Ramjiban*<sup>(1)</sup> in regard to the standard form of the Indian Jute Mills Association contract :—

"This is a form under which the entire export business in gunnies in Calcutta is conducted.....In the present case the sale being free alongside, the property *prima facie* passes when the goods are appropriated by delivery alongside in implement of the contracts," and added :—

"The sale and purchases of the defendant where there is actual shipment and delivery of possession of the goods alongside the vessel involves actual delivery of possession of the jute goods. The delivery of the goods alongside the vessel is physical delivery of the goods and necessarily changes the actual custody of the goods. It is said that there is no actual physical delivery of the goods by the defendant himself. The Legislature, however, does not say that the dealer must himself give actual delivery of the goods. I cannot read in the statute words which are not there and say that the dealer must himself give delivery of the goods in order to come within the definition in sub-section 2(1) (b) (i) of the Ordinance. The Legislature simply insists that the sales and purchases of the dealer involve actual delivery of possession of the jute goods. I do not see why the sales and purchases do not involve actual delivery if such actual delivery is given not by the dealer but by a third party in performance of and in relation to the sales and purchases of the dealer. Even the buyer and the seller of jute goods over the counter rarely takes and gives manual delivery of the goods. Very often such manual delivery is given and taken not by the buyer and

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seller but by their respective servants and agents. I do not see why instead of the buyers' and sellers' employees and servants giving and taking delivery of the goods somebody else on their behalf gives and takes delivery; such delivery is not actual delivery of possession of the goods".

The learned Judges of the Appeal Court however did not accept this view and misdirected themselves both in regard to the facts and the position in law. They took it that none of the parties in the chain contracts paid the actual price of the goods except the shipper who took delivery of the goods from the mills against payment. They wrongly assumed that A endorsed the delivery order over to B and took the difference, B in his turn endorsed the delivery order to the defendant and took the difference and so on and concluded that nobody was concerned to pay the actual price or take delivery of the goods except the shipper who took the goods and paid the price to the mills. This assumption was absolutely unwarranted, the evidence on record being that each of the successive buyers paid to his immediate seller the full price of the goods represented by the delivery order in cash against the endorsement of the relative delivery order in his favour by the seller.

The learned Judges of the Appeal Court also laid unwarranted emphasis on the words "actual delivery of possession" and contrasted actual delivery with symbolical or constructive delivery and held that only actual delivery of possession meaning thereby physical or manual delivery was within the intentment of the Ordinance. Delivery has been defined in section 2(2) of the Indian Sale of Goods Act as meaning voluntary transfer of possession from one person to another and if nothing more was said delivery would not only include actual delivery but also symbolic or constructive delivery within the meaning of the term. The use of the word "actual" in section 2(1) (b) (i) of the Ordinance was considered by the Appeal Court as indicative of the intention of the Government to include within the scope of the exemption only cases of actual delivery of possession as

contrasted with symbolical or constructive delivery. This construction in our opinion is too narrow. Even if regard be had to the mischief which was sought to be averted by the promulgation of the Ordinance, the Government intended to prevent persons who dealt in differences only and never intended to take delivery under any circumstances, from entering into the market. Provided a person habitually dealt in the sale or purchase of jute goods involving delivery of the goods, he was not to be included in the ban. This could be the only intendment of the Ordinance, because otherwise having regard to the ordinary course of business, business in jute goods would become absolutely impossible. The manufacturer of jute goods does not come normally into direct contact with the shipper. It is only through a chain of contracting parties that the shipper obtains the goods from the manufacturer and if only actual delivery of possession as contrasted with symbolical or constructive delivery were contemplated it would be impossible to carry on the business. If the narrow construction which was put by the Appeal Court on the expression "actual delivery of possession" was accepted it would involve each one of the intermediate parties actually taking physical or manual delivery of the goods from their sellers and again in their turn giving physical or manual delivery of the goods which they had thus obtained to their immediate buyers. Such an eventuality could never have been contemplated by the Government and the only reasonable interpretation of the expression "actual delivery of possession" can be that actual delivery as contrasted with mere dealings in differences was within the intendment of the Ordinance and such actual delivery of possession included within its scope symbolical as well as constructive delivery of possession.

Once this conclusion is reached it is easy to visualise the course of events. The mate's receipts or the delivery orders as the case may be, represented the goods. The sellers handed over these documents to the buyers against cash payment, and the buyers obtained these documents in token of delivery of

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possession of the goods. They in turn passed these documents from hand to hand until they rested with the ultimate buyer who took physical or manual delivery of possession of those goods. The constructive delivery of possession which was obtained by the intermediate parties was thus translated into a physical or manual delivery of possession in the ultimate analysis eliminating the unnecessary process of each of the intermediate parties taking and in his turn giving actual delivery of possession of the goods in the narrow sense of physical or manual delivery thereof.

It is necessary to remember in this connection that the words used in section 2(1) (b) (i) are "involving the actual delivery of possession thereof". The word "involving" in the context means resulting in and this condition would be satisfied if the chain contracts as entered into in the market resulted in actual delivery of possession of goods in the ultimate analysis. The Appeal Court was therefore clearly in error when it put a narrow construction on the expression "actual delivery of possession" and held that the transactions were purely speculative and the parties in no event contemplated actual delivery of possession of the goods. The learned Trial Judge was in our opinion correct in his appreciation of the whole position on facts as well as in law and in negating the contention of the respondent.

In view of this conclusion it is unnecessary to consider the argument which was submitted before us based upon the definition of "documents of title" in section 2(4) and the provisions of section 30, proviso to section 36(3) and the proviso to section 53(1) of the Indian Sale of Goods Act that all the documents of title enumerated in section 2(4) were assimilated to a bill of lading and a mere transfer of the documents of title in favour of a buyer was tantamount to a transfer of possession of the goods represented thereby.

The contention that the Ordinance was *ultra vires* was not seriously pressed before us. We may however add that the Appeal Court rightly held that the

Ordinance came within Head 27 of List 2 of the Seventh Schedule of the Government of India Act:—"Trade and commerce within the Province; markets and fair; money lending and money lenders", and that the Provincial Legislature was competent to legislate on that topic.

The result therefore is that the appeal will be allowed, the decision of the Appeal Court will be reversed and the decree passed by the Trial Court in favour of the Appellant will be restored with costs throughout.

*Appeal allowed.*

## PANDURANG, TUKIA AND BHILLIA

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## THE STATE OF HYDERABAD.

[MUKHERJEA, S. R. DAS and VIVIAN BOSE JJ.]

*Indian Penal Code (Act XLV of 1860), s. 34—Prior concert—Common intention—Same or similar intention—Distinction between.*

It is well-settled that common intention in s. 34 of the Indian Penal Code presupposes prior concert. It requires a pre-arranged plan because before a man can be vicariously convicted for the criminal act of another, the act must have been done in furtherance of the common intention of them all. Accordingly there must have been a prior meeting of minds. Several persons can simultaneously attack a man and each can have the same intention, namely the intention to kill, and each can individually inflict a separate fatal blow and yet none would have the common intention required by the section because there was no prior meeting of minds to form a pre-arranged plan. In a case like that, each would be individually liable for whatever injury he caused but none could be vicariously convicted for the act of any of the others; and if the prosecution cannot prove that his separate blow was a fatal one he cannot be convicted of the murder however clearly an intention to kill could be proved in his case.

Care must be taken not to confuse same or similar intention with common intention; the partition which divides their bounds is often very thin, nevertheless the distinction is real and substantial, and if overlooked will result in miscarriage of justice.

The plan need not be elaborate, nor is a long interval of time required. It could arise and be formed suddenly. But there must

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