remaining appeals and passed appropriate orders therein; but this is unnecessary as my brethren take a different view in the two main appeals.

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R. Vishwanathan v. Rukn-ul-mulk Syed Abdul Wajid

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BY COURT: In view of the majority Judgment, there will be decree in terms as stated in the Judgment of the majority.

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May 4.

v.

RAYMON & CO. (INDIA) PRIVATE LTD.

(B. P. SINHA, C. J., K. SUBBA RAO, N. RAJAGOPALA AYYANGAR, J.R. MUDHOLKAR and T. L. VENKATARAMA AIYAR, JJ.)

Forward Contract—Contract for sale of goods—Government notification forbidding forward contracts other than non-transferable specific delivery contracts—Validity of the contract—Clause providing for arbitration—Clause, if valid even if contract were invalid—Parties appearing before arbitrator—Estoppel—Forward Contracts (Regulation) Act, 1952 (74 of 1952), ss. 2 (c) (f) (i) (m) (n), 15(1), 17, 18(1).

On September 7, 1955, the appellant company entered into a contract with the respondents for the purchase of certain bales of jute cuttings to be delivered by the respondents in equal instalments every month in October, November and December, 1955. Under cl. 3 of the agreement the sellers were entitled to receive the price only on their delivering to the buyers the full set of shipping documents. Clause 8 conferred on the sellers certain rights against the buyers such as the right to resell if the latter refused to accept the documents. Clause 14 provided that all disputes arising out of or concerning the contract should be referred to the arbitration of the Bengal Chamber of Commerce. As the respondents failed to deliver the goods as agreed the appellants applied to to the Bengal Chamber of Commerce for arbitration. The respondents appeared before the arbitrators and contested the claim, but an award was made in favour of the appellant. Thereupon the respondents filed an application in the High Court of Calcutta under s. 33 of the Arbitration Act, 1940,

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challenging the validity of the award on the ground that the contract dated September 7, 1955, was illegal as it was in contravention of the notification of the Central Government dated October 29, 1953, issued under s. 17 of the Forward Contracts (Regulation) Act, 1952, which declared that no person "shall enter into any forward contract other than a non-transferable specific delivery contract for the sale or purchase of raw jute in any form.....". The appellant pleaded (1) that on the terms of the arbitration clause the question whether the contract dated September 7, 1955, was illegal was one for the arbitrator to decide and that it was not open to the respondents to raise the same in proceedings under s. 33 of the Arbitration Act; (2) that the respondents were estopped from questioning the validity of the award by reason of their having submitted to the jurisdiction of the arbitrators; and (3) that, in any case, the contract was a non-transferable specific delivery contract within s. 2(f) of the Forward Contracts (Regulation) Act and was not hit by the notification dated October 29, 1953.

Held, that: (1) the dispute as to the validity of the contract dated September 7, 1955, was not one which the arbitrators were competent to decide under cl. 14 and that in consequence the respondents were entitled to maintain the application under s. 33 of the Arbitration Act.

When an agreement is invalid every part of it including the clause as to arbitration contained therein must also be invalid.

Leyman v. *Darwins Ltd.*, [1942] A. C. 356, *Union of India* v. *Kishorilal Gupta and Brothers*, [1960] 1 S. C. R. 493, *Tolaram* v. *Birla Jute Manufacturing Company Ltd.*, I. L. R. [1948] 2 Cal. 17, relied on.

(2) the respondents were not estopped by their conduct from questioning the validity of the award.

Ex parte Wyld, (1851) 30 Law J. Rep. (N. S.) Bank. 10, explained.

(3) on the true construction of the contract dated September 7, 1955, read with the terms of the import licence in favour of the appellant, the agreement between the parties was that the contract was not to be transferred.

In construing a contract it would be legitimate to take into account surrounding circumstances and, therefore, on the question whether there was an agreement between the parties

that the contract was to be non-transferable, the absence of a specific clause forbidding transfer was not conclusive.

Virjee Daya & Co. v. *Ramakrishna Rice & Oil Mills*, A. I. R. 1956 Mad.110, approved.

British Waggon Co. v. *Lea*, (1880) 5 Q. B. D. 149, distinguished.

Accordingly, the contract in question was not hit by the notification dated October 29, 1953.

CIVIL APPELLATE JURISDICTION : Civil Appeals Nos. 98 and 99 of 1960.

Appeal from the judgment and order dated April 16, 1958, and April 11, 1958, of the Calcutta High Court in Appeal from Original Order and decree Nos. 173 and 154 of 1957, respectively.

H. N. Sanyal, Additional Solicitor-General of Indin, M. G. Poddar and *D. N. Mukherjee*, for the appellant.

C. B. Aggarwala and *S. N. Mukherjee*, for the resopondent.

1962. May 4. The Judgment of the Court was delivered by

VENKATARAMA AIYAR, J.—These are appeals against the judgment of the High Court of Calcutta, setting aside an award of the arbitrators, which directed the respondent to pay to the appellants Rs. 41,250 as compensation for breach of contract, on the ground that the said contract was in contravention of a notification of the Central Government dated October 29, 1953, and was in consequence illegal and void. The facts are that the appellants own a Jute Mill at Calcutta and carry on the business of manufacture and sale of Jute. On September 7, 1955, they entered into a contract with the respondents who are doing business as

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dealers in jute, for the purchase of 750 bales of Jute cutting (raw) of Pakistan at Rs. 80 per bale of 400 lbs. to be delivered in October, November and December at the rate of 250 bales every month. Clause 14 of the agreement provides that all disputes arising out of or concerning the contract should be referred to the arbitration of the Bengal Chamber of Commerce. The respondents failed to deliver the goods as agreed whereupon the appellants applied to the Bengal Chamber of Commerce for arbitration in accordance with cl. 14 of the agreement. The respondents appeared before the arbitrators, and contested the claim on the merits. The arbitrators made an award in favour of the appellants for Rs. 41,250 with interest, and that was filed under s. 14(2) of the Indian Arbitration Act in the High Court of Calcutta in its original side and notice was issued to the respondents. Thereupon the respondents filed an application in the High Court, presumably under s. 33 of the arbitration Act, wherein they prayed for a declaration that the contract dated September 7, 1955, was illegal, as it was in contravention of the notification of the Central Government dated October 29, 1953, and that in consequence proceedings taken thereunder before the Chamber of Commerce and the award in which they resulted were all void. The learned Judge on the original side before whom the application came up for hearing dismissed it, and passed a decree in terms of the award. Against both the judgment and order, the respondents preferred appeals to a Division Bench of the High Court, Appeals Nos. 154 and 173 of 1957. They were heard by Chakravartti, C. J., and Lahari, J., who held that the contract dated September 7, 1955, was illegal as it fell within the prohibition of the notification aforesaid and accordingly allowed the appeal and set aside the award. The appellants

then applied for a certificate under Art, 133 (1) of the Constitution and the same was granted. This is how the appeals come before us.

The learned Additional Solicitor-General who appeared for the appellants urged the following contentions :—

(1) On the terms of the arbitration clause the question whether the contract dated September 7, 1955, is illegal is one for the arbitrator to decide and that it was not open to the respondents to raise the same in the present proceedings under s. 33 of the Arbitration Act,

(2) The respondents are estopped from questioning the validity of the award by reason of their having submitted to the jurisdiction of the arbitrators,

(3) The agreement dated September 7, 1955, is a non-transferable specific delivery contract within s. 2(f) of the Act and it is not hit by the notification dated October 29, 1953.

We now proceed to discuss these questions seriatim :

(1) Taking up the first questions, cl, 14 of the agreement which provides for arbitration is as follows :—

> "All the matters, questions, disputes, differences and/ or claims arising out of and/ or concerning and/ or in connection with and/ or in consequence of or relating to this contract including matters relating to insurance and demurrage whether or not the obligations of either or both parties under this contract be subsisting at the time of such dispute and whether or not this contract has been terminated or purported to be terminated or com-

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pleted shall be referred to the arbitration of the Bengal Chamber of Commerce and Industry under the rules of its Tribunal of Arbitration for the time being in force and according to such rules the arbitration shall be conducted and any Award made by the said Tribunal under the clause shall be final, binding and conclusive on the parties."

Now the contention of the appellants is that the clause is general in its terms and is wide enough to include dispute as to the validity of the contract that in consequence the only right of the respondents is to agitate this question before the arbitrators and if the award goes against them to move the Court either to modify it under s. 15 of the Arbitration Act or to remit it under s. 16 or to set it aside under s. 30 on the grounds mentioned therein and that the present application for a declaration that the contract is illegal, and that the arbitration proceedings are without jurisdiction is therefore incompetent and misconceived.

It cannot be disputed that the expression "arising out of" or "concerning" or "in connection with" or "in consequence of" or "relating to this contract" occurring in cl. 14 are of sufficient amplitude to take in a dispute as to the validity of the agreement dated September 7, 1955 Vide *Ruby General Insurance Co. Ltd.* v. *Pearey Lal Kumar* (1). But the question is not whether cl. 14 is all comprehensive but whether it could be enforced when the argeement of which it forms an integral part is held to be illegal. Logically speaking, it is difficult to conceive how when an agreement found to be bad, any portion of it can held to be good. When the whole perishes, its parts also must perish. '*Ex nihilo nil fit*'. On principle therefore it must be held that when an

(1) (1952) S.C.R. 501.

argeement is invalid every part of it including the clause as to arbitration contained therein must also be invalid.

That indeed is what has been laid down in the decisions which have been cited before us. The leading case on the subject is the decision of the House of Lords in *Heyman* v. *Dacwins Ltd*(1). There the question was whether repudiation of a contract by a party thereto had the effect of annulling the arbitration clause contained therein. It was held that it had not. It was in this context that the law as to the circumstances under which an arbitration clause in an agreement would become unenforceable came in for elaborate discussion. Summing up the law on the subject Viscount Simon, L. C. observed: "If the dispute is whether the contract which contains the clause has ever been entered into at all, that issue cannot go to aribitration under the clause, for the party who denies that he has ever entered into the contract is thereby denying that he has ever joined in the submission. Similarly, if one party to the alleged contract is contending that it is void ab initio (because, for example, the making of such a contract is illegal), the arbitration clause cannot operate, for on this view the clause itself also is void. But, in a situation where the parties are at one in asserting that they entered into a binding contract, but a difference has arisen between them whether there has been breach by one side or the other, or whether circumstances have arisen which have discharged one or both parties from further performance, such differences should be regarded as differences which have arisen "in respect of" or "with regard to" or "under" the contract, and an arbitration clause which uses these, or similar, expressions should be construed accordingly."

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Lord Macmillan with whom Lord Russel agreed observed: "If it appears that the dispute is whether there has ever been a binding contract between the parties, such a dispute cannot be covered by an arbitration clause in the challenged contract. If there has never been a contract at all, there has never been as part of it an agreement to arbitrate. The greater includes the less. Further, a claim to set aside a contract on such grounds as fraud, duress or essential error cannot be the subject matter of a reference under an arbitration clause in the contract sought to be set aside."

In the speech of Lord Wright there are the following observations on which the appellants rely: "Hence, if the question is whether the alleged contract was void for illegality or being voidable was avoided because induced by fraud or misrepresentation, or on the ground of mistake, it depends on the terms of the submission whether the dispute falls within the arbitrator's jurisdiction." The argument is that if the arbitration clause is general and unqualified it will include a question as to the legality of a contract also. The above observation does lend support to the view that if it was a term of the contract that a dispute as to its legality could be referred to arbitration, then it is valid. If that is what was meant by Lord Wright it may be difficult to reconcile it with the view expressed in the passages already cited. But it is to be noted that the noble Lord wound up with the following observation "Finally, I agree with the general conclusions on the matter summarised by the Lord Chancellor in the closing paragraphs of his opinion".

The appellants also rely on the following observations in the speech of Lord Porter: "If two parties purports to enter into a contract and a dispute arises whether they have done so or not,

or whether the alleged contract is binding on them. I see no reason why they should not submit that dispute to arbitration. Equally I see no reason why, if at the time when they purport to make the contract they foresee the possibility of such a dispute arising, they should not provide in the contract itself for the submission to arbitration of a dispute whether the contract ever bound them or continues to do so.....It may require very clear language to effect this result, and it may be true to say that such a contract is really collateral to the agreement supposed to have been made, but I do not see why it should not be done".

But these dicta must be read with the following observations in the same speech: "Where the contract itself is repudiated in the sense that the original existence or its binding force is challenged, e. g., where it is said that the parties never were ad idem, or where it is said that the contract is voidable ab initio (e. g., in cases of fraud, misrepresentation or mistake) and that it has been avoided, the parties are not bound by any contract and escape the obligation to perform any of its terms including the arbitration clause unless the provisions of that clause are wide enough to include the question of jurisdiction."

According to Lord Porter, then; there can be an agreement to refer a dispute as to the validity of a contract to arbitration, that where such an agreement is part of the contract which is impugned as invalid, then it can have no existence apart from it and there can be no reference based thereon, but where such an agreement is distinct and separate from the impugned contract, a reference pursuant thereto will be valid and it is possible that both these agreements might be contained in one document.

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The law is thus summarised in Halsburys Laws of England, Third Edition, Vol. 2, p. 24, para 56: The matter in question in the legal proceedings which it is sought to stay must be within the scope of the arbitration agreement.....If, however, the point in dispute is whether the contract containing the clause was ever entered into at all, or was void ab initio, illegal, or obtained (for example) by fraud, duress or undue influence, the clause does not apply and a stay will be refused."

This question arose incidentally for discussion in the *Union of India* v. *Kishorilal Gupta and Brothers*(1) where on an examination of the authorities, including *Heyman* v. *Darwins Ltd.* (2) this Court held that an arbitration clause embodied in an agreement is an integral part thereof and that if that agreement is *non est* either because it was never legally in existence or because it was void *ab initio*, then the arbitration clause would also perish with it. Similar decisions had been given in *Tolaram Nathmull* v. *Birla Jute Mfg. Company Ltd.*(3) and *Hussain Kasam Dada* v. *Vijayanagaram Commercial Association* (4).

Reference might in this connection be made to s. 33 of the Arbitration Act which enacts that a party to an arbitration agreement who desires to challenge the existence or validity of an arbitration agreement should apply to the Court for determination of the question. This section represents the law on the subject as understood in England at the time of that legislation and as declared later by the House of Lords in *Heyman* v. *Darwins Ltd.* (2). The scope of s. 33 came up for consideration before this Court in *Shiva Jute Baling Ltd.* v. *Hindley & Co. Ltd.* (5). There a petition had been filed under that section praying *inter alia* for a declaration that the contract between the parties containing an

(1) [1960] 1 S.C.R. 493.
(2) I.L.R. [1948] 2 Cal. 171.
(3) A.I.R. 1945 Mad. 528. 531.
(4) [1960] 1 S.C.R. 569.
(5) (1961) 30 Law. J. Rep. (N.S.) Bankr. 10.

arbitration clause, was void *ab initio* on the ground of uncertainty and that there was in fact no contract owing to mutual mistake and it was held that these were questions for decision by Courts and not by arbitrators. We are accordingly of the opinion that the dispute that the contract dated September 7, 1955, is illegal and void is not one which the arbitrators are competent to decide under cl. 14 and that in consequence the respondents are entitled to maintain the present application under s. 33 of the Arbitration Act.

(2) It is next contended for the appellants that even if cl. 14 should be held to be inoperative by reason of the fact that the dispute is one relating to the validity of the contract, the respondents are estopped from now challenging the award on that ground, because they appeared before the arbitrators and took part in the proceedings before them. The decision in *Ex p. Wyld* (1) is relied on in support of this contention. In that case a dispute between an assignee in bankruptcy and a creditor, Mr. Wyld, was referred to arbitration on the basis of an agreement in writing between them. An award having been pronounced against Mr. Wyld, he disputed its validity on the ground that the assignee had not obtained the leave of the Court for entering into the arbitration. In rejecting this contention the Court observed that under the law the agreement was binding on Mr. Wyld even though the leave of the Court was not obtained and that therefore he was not entitled to take this objection based on the informality of the submission as he had himself acted on it. This decision is clearly of no assistance to the appellants because there was a valid and subsisting submission on which the jurisdiction of the arbitrators to hear the dispute was complete, and that was not affected by the failure of the assignee to obtain the requisite

(1) (1861) 30 Law J. (N.S.) Bankr. 10.

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leave because that was a matter between him and the Court. But here if the agreement dated September 7, 1955, is void then there was no submission which was alive on which the arbitrators could act and the proceedings before them would be wholly without jurisdiction. If there had been another arbitration agreement apart from and independent of cl. 14 of the contract dated September 7, 1955, it might have been possible to sustain the proceedings before the arbitrators as referable to that agreement. But none such has been set up or proved in the present case. All that is alleged is that the respondents acquiesced in the proceedings. But what confers jurisdiction on the arbitrators to hear and decide a dispute is an arbitration agreement as defined in s. 2(a) of the Arbitration Act, and where there is no such agreement, there is an initial want of jurisdiction which cannot be cured by acquiescence. It may also be mentioned that the decision in *Ex. p. Wyld* (1) has been understood as an authority for the position that when one of the parties to the submission is under a disability that will not be a ground on which the other party can dispute the award if he was aware of it. Vide Russel on Arbitration, 16th Edn, p. 320. We are therefore unable to accept the contention of Mr. Sanyal, that the respondents are estopped by their conduct from questioning the validity of the award.

(3) We may now proceed to consider the question whether the contract dated September 7, 1955, is illegal as falling within the prohibition enacted in the notification of the Central Government dated October 29, 1953. It will be convenient to set out the relevant statutory provisions bearing on this question. Section 2(i) of the Forward Contracts (Regulation) Act, 1952, (Act 74 of 1952) hereinafter referred to as 'the Act'

(1) (1861) 30 Law J. Rcf. (N.S.) Bankr. 10 .

defines 'ready delivery contract' as meaning "a contract which provides for the delivery of goods and the payment of a price therefor, either immediately or within such period not exceeding eleven days after the date of the contract". 'Forward contract' is defined in s. 2(c) as meaning "a contract for the delivery of goods at a future date and which is not a ready delivery contract". Section 2(m) defines 'specific delivery contract' as meaning "a forward contract which provides for the actual delivery of specific qualities or types of goods during a specified future period at a price fixed thereby or to be fixed in the manner thereby agreed and in which the names of both the buyer and the seller are mentioned". Section 2(f) defines 'non-transferable specific delivery contract' as meaning "a specific delivery contract the rights or liabilities under which or under any delivery order, railway receipt, bill of lading, warehouse receipt or any other document of title relating thereto are not transferable" and finally s. 2(n) defines 'transferable specific delivery contract' as meaning "a specific delivery contract which is not a non-transferable specific delivery contract".

Chapter IV of the Act contains provisions conferring authority on the Central Government to prohibit certain classes of forward contracts. Section 15(1) of the Act enacts:

> "15(1) The Central Government may by notification in the Official Gazette, declare this section to apply to such goods or class of goods and in such areas as may be specified in the notification, and thereupon, subject to the provisions contained in section 18, every forward contract for the sale or purchase of any goods specified in the notification which is entered into in the area specified

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therein otherwise than between members of a recognised association or through or with any such member shall be illegal."

Where a notification has been issued under s. 15(1) it is provided in s. 16 that all forward contracts falling within the notification shall be deemed to be closed out and that "the seller shall not be bound to give and the buyer shall not be bound to take delivery of the goods".

Then comes s. 17 which is as follows:—

"17(1). The Central Government may, by notification in the Official Gazette, declare that no person shall, save with the permission of the Central Government, enter into any forward contract for the sale or purchase of any goods or class of goods specified in the notification and to which the provisions of section 15 have not been made applicable, except to the extent and in the manner, if any, as may be specified in the notification.

(2) All forward contracts in contravention of the provisions of sub-section (1) entered into after the date of publication of the notification thereunder shall be illegal.

(3) Where a notification has been issued under sub-section (1), the provisions of section 16 shall, in the absence of anything to the contrary in the notification, apply to all forward contracts for the sale or purchase of any goods specified in the notification entered into on or before the date of the notification and remaining to be performed after the said date as they apply to all forward contracts for the sale or purchase of any goods specified in the notification under section 15."

Section 18(1) provides that these provisions shall not apply to non-transferable specific delivery contracts for the sale or purchase of any goods.

To analyse the scheme of the Act; it divides contracts of sale of goods into two categories, 'ready delivery contracts, and 'Forward Contracts'. Forward Contracts are classified into those which are 'specific delivery contracts' and those which are not. Then again 'specific delivery contracts' are divided into 'transferable specific delivery contracts' and 'non-transferable specific delivery contracts.' Section 18(1) exempts from the operation of the Act 'non-transferable specific delivery contracts'. The net result of these provisions is that all forward contracts except those which are non-transferable specific delivery contracts can be declared illegal by notification issued under the Act.

Such a notification was issued by the Central Government in exercise of the powers conferred by s. 17 of the Act, on October 29, 1953. It is as follows :—

> "No. 2(24) Jute/53—In exercise of the powers conferred by section 17 of the Forward Contracts (Regulation) Act, 1952 (LXXIV of 1952), the Central Government hereby declares that no person shall enter into any forward contract other than a non-transferable specific delivery contract for the sale or purchase of raw jute in any form, except to the extent and in the manner specified below, that is to say:
>
> (1) all forward contracts, other than non-transferable specific delivery contracts for the sale or purchase of raw jute entered into before the date of this notification and remaining to be performed after the said date

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shall be deemed to be closed out at the rate prevailing at the time at which the Forward Market closed on the said date:

(2) all differences arising out of any contracts so deemed to be closed out shall be payable on the basis of the rate specified in clause (1) of this notification and the seller shall not be bound to give and the buyer shall not be bound to take delivery of raw jute."

The contract with which we are concerned in these appeals was entered into on September 7, 1955, when the notification aforesaid was in force, and so it would be hit by it, unless it is a non-transferable specific delivery contract and the point for decision is whether it is that. There is no dispute between the parties that it is a specific delivery contract. It is between named buyers and sellers the goods are specified, as also the period during which they have to be actually delivered and their price is fixed. What is in controversy is whether it is transferable or non-transferable. There was considerable argument before us on the question as to assignability of a contract. The law of the subject is well settled and might be stated in simple terms. An assignment of a contract might result by transfer either of the rights or of the obligations thereunder. But there is a well-recognised distinction between these two classes of assignments. As a rule obligations under a contract cannot be assigned except with the consent of the promisee, and when such consent is given, it is really a novation resulting in substitution of liabilities. On the other hand rights under a contract are assignable unless the contract is personal in its nature the rights are incapable of assignment either under the law or under an agreement between the parties.

In the light of the principles stated above, we shall now consider whether the contract dated September, 7, 1955, is or is not transferable. As it is only a benefit under a contract that can be assigned, the discussion really centres round two questions, are the buyers entitled to assign their right to get the goods on payment of price ? And are the sellers entitled to assign their right to receive the price on delivery of the goods ? On the question as to the rights of the buyers to assign their right to the goods, the matter is clear beyond all doubts. The licence which authorises the appellants to import the goods from East Pakistan also prohibits them expressly from assigning the same. In this connection it should be noted that, owing to the exigencies of Foreign Exchange, there have been in force, at all material times, restrictions on import of goods. The nature of these restrictions and the policy behind them were examined by this Court quite recently in *Daya* v. *Joint Controller of Imports and Exports* (1) and it is unnecessary to repeat them. It is sufficient for the present purpose to state that the issue of import licences by the Government was restricted to persons who had been engaged in the business of import during a specified period and there were also limitations on the extent to which they could import.

Manufacture of jute occupies the pride of place among the industries of West Bengal. Raw jute required for the business is largely imported from East Pakistan, and for that purpose import licences were being granted from time to time, to manufactures of jute. During the period of the contract with which we are concerned the appellants held two import licences from the Government of India (1) No. A 062290/52 and (2) A 063733/52. The licence No. A 062290/52 which is in the standard

(1) (1963) 2 S.C.R. 73.

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form is, so far as it is material for the present discussion, as follows :—

"Import Trade Control.
Office of the Joint Chief Controller of Imports, Calcutta.
Licence No. A 062290/52/A.U./C.C.I/C.
For Exchange Control purposes only.

Class of Importer.
Actual User or Contract.

(Valid at any Indian Port).

(Not transferable except under a letter of authority from the authority who issued the licences or from any Import Trade Controller). Messrs. Khardah Co. Ltd. of 7, Wellesley Place, Calcutta are hereby authorised to import the goods of which particulars are given below :—

1.	Country from which consigned	... Pakistan
2.	Country of origin	... ,,
3.	Description of goods	... Raw Jute
4.	Serial No. and part of the I.T.C. Schedule	... 174-IV
5.	Quantity	... 50,000 Mds. (Fifty thousant maunds only).

This licence is issued subject to the condition that the goods will be utilised only for consumption as raw material or accessories in the licence holder's factory and that no portion thereof will be sold to any party."

It will be noticed that the licence is non-transferable and that further the goods to be imported are not to be sold to any party but to be utilised for manufacture in the factory of the licencee. In view of the terms of the licence there can be no question of assignment of the contract by the buyers. That is not disputed.

Turning next to the sellers, can they assign their right to the price on delivery of the goods ? The learned Judges in the Court below held that they could, because, there was noting personal in the contract, and nothing in its terms which barred the right to assign a benefit which a party had under the general law. The appellants assail the correctness of this decision. They contend the terms of the contract must be construed in the light of the surrounding circumstances, and especially of the import licence, and that if that is done, the proper conclusion to come to is that the agreement is not transferable. This contention must now be examined.

The appellants sought, in the first instance, to establish on the basis of clauses 12 and 14 that the agreement is personal in its character, and is therefore not assignable. Now the contract in question is one for the sale of goods, and ordinary there can be nothing personal about it. It is of no consequence to the buyer as to who delivers the goods. What matters to him is that the goods delivered should be in accordance with the specifications. But it is argued that the status of the parties was a determinative factor in the making of the agreement, and that is sought to be deduced from cl. 12 of the contract. That clause provides that if either or both the parties to the contract are members of the Indian Jute Mills Association and if either of them is placed in the disapproved list of Association then the contract shall be deemed to

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have been broken by that party. That shows, it is said, that the contract was entered into on the faith of the status of the parties as members of the Jute Mills Association. But it is clear from the wording of the clause that the parties to the contract need not necessarily be members of the Association and that being so, the element of status does not enter into it. Clause 14, which is the arbitration clause, is also relied on as an indication that the contract is personal in its character and incapable of assignment on that ground. But it is settled law that an arbitration clause does not take away the right of a party to a contract to assign it if it is otherwise assignable. Vide *Shayler* v. *Woolf* (1) and Russel on Arbitation, 16th Edition, p. 65.

It is also argued that the rights conferred on the sellers under cl. 8 are incapable of assignment in law, and that is an indication that the rights under the agreement are not transferable. Clause 8 confers on the sellers certain rights against buyers, such as the rights to resell and so forth, when the latter refuse to accept the documents. What is said is that these rights cannot be assigned in law as they are really claims founded on breach of contract by the buyers. That undoubtedly is so, but that does not conclude the question. There is in law a clear distinction between assignment of rights under a contract by a party who has performed his obligations thereunder, and assignment of a claim for compensation which one party has against the other for breach of contract. The letter is a mere claim for damages which cannot be assigned in law, the former is a benefit under an agreement, which is capable of assignment. The fact therefore that the rights under cl. 8 are incapable of assignment does not stand in the way of the respondents assigning their rights to receive the price after they had performed their obligations.

(1) [1946] 2 All. E. R. 54.

That brings us on to cl. 3 on which the appellants mainly. Under that clause the sellers are entitled to receive the price only on their delivering to the buyers the full set of shipping documents. Now the argument is that as the delivery of documents and payment of cash are to be simultaneous, it is a case of benefit under a contract being burdened with a liability, and that such a benefit is incapable of assignment under the law. The learned Judges in the Court below took the view that there was nothing in this clause which prevented the seller from transferring the documents to a third party authorising him to deliver them to the buyers, and then to receive the price from them, and they further observed. "Although in presenting the shipping documents the transferee from the seller may act as his agent, he will not be an agent in receiving payment from the buyer, because the right to receive the payment has been transferred to him and has become his own right".

The respondents maintain that that is the correct view to take of the rights of the parties under this clause and rely on the statements of law in Halsbury's Laws of England, and the decision *British Waggon Co.* v. *Lea* (1). In Halsbury's Laws of England, 3rd Edn., Vol. 8, p. 258, para 451, the law is thus stated : "There is, however, no objection to the substituted performance by a third person of the duties of a party to the contract where the duties are disconnected from the skill, character, or other personal qualifications of the party to the contract. In such a circumstance, however, the liability of the original contracting party is not discharged, and the only effect is that the other party may be able to look to the third party for the performance of the contractual obligations in addition to the original contracting party". In *British Waggon Co.* v. *Leg*(1), the facts

(1) (1880) 5 Q.B.D. 149, 154.

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were that a company called the Parkgate Waggon Company had hired waggons to the defendant on the terms that he should pay rent for their use, and that the Company should execute the necessary repairs for them. The company then assigned its rights under the contract to another company called the British Company, subject to the obligation to execute the repairs. In accordance with this agreement the assignee did execute the repairs. Thereafter Parkgate Waggon Co, demanded rent from the defendant, who resisted the claim on the ground that the Company had disabled itself from performing the contract, by reason of assignment to which he had not consented. In overruling this contention the Court observed that as the work to be done under the contract did not require personal skill or confidence, the Parkgate Waggon Company could get it done by any person, and that would be sufficient performance. This decision would be in point if the respondents had arranged to deliver the jute to the appellants through another person, and then claimed the price, and that claim was disputed. But it is not an authority on the question which we have to decide, whether the assignment of the benefit under the contract burdened as it is with an obligation would itself be valid. It is true that the Court observed in passing "That a debt accruing due under a contract can, since the passing of the Judicature Acts, be assigned at law as well as equity, cannot since the decision in *Brice* v. *Bannister*(1) be disputed". But it should be noted that both the companies figured as plaintiffs, and therefore it is not possible to read those observation as a decision that an assignment of a benefit burdened with an obligation is valid.

It was argued for the respondents that it would have been open to them to first obtain the requisite certificate from the Bank in East Pakistan

(1) (1878) 3 Q.B.D. 569.

then deliver it to the appellants, and then assign their right to the price. But the question is not what could have been done by a seller in a forward contract generally, but what was in fact contemplated by the parties to this contract under cl. 3. The provisions that the shipping documents in Pakistan should be taken in the name of the buyer that the sellers should deliver them to the buyers and receive the price, and that the goods should be delivered at the Mills of the buyers, strongly suggest that the intention of the parties was, that neither of them should assign the contract.

Whatever doubts one might have as to the true import of cl. 3—it may be conceded, that it lends itself to the construction put on it by the learned Judges in the Court below, the position becomes unmistakably clear when it is construed in the light of the import licence in favour of the appellants. It has been already mentioned that it is this which authorises the appellants to import raw jute from East Pakistan. It is statedly not transferable, and further the goods imported thereunder are to be used only for consumption in the Mills of the appellants. It is contended for the respondents that they are not parties to this licence and that their rights under the general law to assign benefits under the contract remain unaffected by it. This is to take too narrow a view of the true position. Far from being strangers to the licence, the evidence clearly establishes that they are very intimately associated with it. On September 26, 1955, acting under licence No. A 062290/52 the appellants wrote to the Joint Chief Controller of Imports and Exports, Government of India, to "issue a letter of authority in favour of sellers Messrs. Raymon & Company (India) Ltd., for 2,500 maunds jute cuttings to be imported from Narayanganj, (East Pakistan), against the above (licence)."

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The letter of authority was received by the appellants on September 29, 1956, and they sent it on to the respondents with the following letter :—

"Dear Sirs,

Contract No. 2306

We are sending here with the Exchange Control Copy of Letter of Authority for 1250 Mds. Jute cuttings against the above."

Contract No. 2306 referred to in this letter is the contract dated September 7, 1955, involved in this dispute. It is on the strength of this letter of authority that the respondents opened a letter of credit with a Bank in East Pakistan and the goods were imported. We have not overlooked the fact that while the contract is dated September 7, 1955, the licence is dated September 22, 1955, and the letter of authority to the respondents is even later, and it might strike one as an anachronism to read the licence and the letter of authority into the contract. But it should be remembered that the licences are in standard form and are renewed from time to time except as to details concerning the imports, and the course of business followed in the jute market was throughout in conformity with the conditions laid down in the licence and was of the same pattern. Now the agreement provides that the shipping documents in Pakistan are to be taken in the name of the buyers that the sellers are "to open letter of credit" and that the goods are to be delivered "at the buyer's Mill siding". We have no doubt that these terms have been inserted with a view to give effect to the conditions on which licences are granted and that it was the understanding of both the sellers and buyers that the rights under the contract were not to be transferred.

But it is argued for the respondents that unless there is in the contract itself a specific clause prohibiting transfer, the plea that it is not transferable is not open to the appellants and that evidence aliunde is not admissible to establish it and the decision in *Seetharamaswami* v. *Bhagwathi Oil Company*(1), *Hanumanthiah* v. *Thimanthiah*(2) and *Hussain Kasam Dada* v. *Vijayanagaram Comm. Asson.* (3) are relied on in support of this position. We agree that when a contract has been reduced to writing we must look only to that writing for ascertaining the terms of the agreement between the parties but it does not follow from this that it is only what is set out expressly and in so many words in the document that can constitute a term of the contract between the parties. If on a reading of the document as a whole, it can fairly be deduced from the words actually used therein that the parties had agreed on a particular term, there is nothing in law which prevents them from setting up that term. The terms of a contract can be expressed or implied from what has been expressed. It is in the ultimate analysis a question of construction of the contract. And again it is well established that in construing a contract it would be legitimate to take into account surrounding circumstances. Therefore on the question whether there was an agreement between the parties that the contract was to be non-transferable, the absence of a specific clause forbidding transfer is not conclusive. What has to be seen is whether it could be held on a reasonable interpretation of the contract, aided by such considerations as can legitimately be taken into account that the agreement of the parties was that it was not to be transferred. When once a conclusion is reached that such was the understanding of the parties, there is nothing in law which prevents effect from being given to it. That was the view

(1) [1951] I M.L.J. 147. (2) A.I.R. 1954 Med. 87.
(3) A.I.R. 1958 Med. 528, 531.

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taken in *Virjee Daya & Co.* v. *Ramakrishna Rice & Oil Mills*(1), and that in our opinion is correct.

It remains to deal with one other question on which the parties have been at issue. It turns on a consideration of s. 2(f) of the Act. A non-transferable specific delivery contract is defined in s. 2(f), omitting what is not material, as a specific delivery contract the rights *or* liabilities under which are not transferable. Now the contention of the appellants is that as admittedly the liabilities under the contract are not transferable it is a non-transferable contract within s. 2(f). But the respondents argue that on that construction no forward contract will be hit by the notification because liabilities under the contract can never be transferred and so the notification would become futile. They accordingly contend that word 'or' should be read as 'and' and that on that construction unless both the rights and liabilities under the contract are non-transferable it is not a non-transferable contract as defined in s. 2(f). The appellants urge that on this construction no contract would be non-transferable as rights under a contract can always be transferred unless it is personal in its character and the section would become practically useless. The intention of the legislature as expressed in the section is, it must be admitted, clouded in obscurity and uncertainty. But in the view we have taken, that the contract is on its terms properly construed, non-transferable, it becomes unnecessary to decide between the arrival contentions as to the true import of s. 2(f).

In the result the appeals are allowed with costs one set throughout and one hearing fee.

Appeals allowed.

(1) A.I.R. 1956 Mad. 110.