
(1916) 10 MAD CK 0023
In the Madras High Court

Soorthingjee Sakalchand

APPELLANT

Vs

Mahomed Nasurudeen and Another

RESPONDENT

Date of Decision : 13-10-1916

Acts Referred:

Contract Act, 1872 — Section 56

Citation : (1917) 32 MLJ 146

Judgement

1. This is an appeal from the judgment of Mr. Justice Bakewell dismissing the plaintiff's suit which was instituted with the object of recovering certain quantity of glass bangles from the defendants. The 1st defendant was an agent of an Austrian Firm and in his capacity as such agent entered into a contract with the plaintiff for the supply of glass bangles. The contract was entered into some time in April and May 1914 and the plaintiff accepted two drafts for the price of the goods on 22nd July of that year. War was declared with Austria on the 12th August and the steamer "Steinturm" in which the goods were shipped arrived in Ceylon on the 15th of August that is three days after the declaration of the war. It is sufficiently clear that the cargo which was at first detained by the Government was subsequently released and the formal order of release so far as these goods were concerned was passed on the 26th August 1916. The Bills of Lading were in the possession of the National Bank of India in Madras who acted as agents for the collection of the drafts and for the purpose of making over the documents relating to these goods as agents of the Austrian Firm. The Bills were payable on the 22nd of August; the goods have not yet been delivered to the plaintiff and the drafts have not been paid.

2. Mr. Justice Bakewell has held that since the contract became wholly void on account of the outbreak of the war with Austria and as by virtue of

Royal Proclamation issued on the 5th of August 1914 and 12th September 1914 it became unlawful to trade with the enemy, the suit of the plaintiff

for recovery of the goods could not be maintained. Section 56 of the Contract Act seems to me to be perfectly clear on the point. It declares 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.

3. It is argued by Mr. Ghamier on behalf of the appellant that we must treat this case as one of executed contract because the Austrian Firm, he

says, have done their part of the contract and all that remains is for the plaintiff to perform his part which he has been ready and willing to do. But

that is not the correct position. The Austrian Firm has yet to deliver the documents, which, as pointed out in a number of decisions are the symbol

for the goods, and the plaintiff has to pay the purchase money to the enemy firm. The agency of the National Bank must be taken to have been

terminated by the declaration of the war. They are no longer the agents of the Austrian Firm for the purpose either of delivering the documents or

of receiving the money due upon those documents. The mere fact that the goods have arrived and are now within the limits of British India can

make no difference in this respect as the further performance of the contract has now become impossible or unlawful. The proclamation of the 12th

of September says; "(2) Not to compromise or give security for the payment of any debt or other sum of money with or for the benefit of an

enemy. (3) Not to act on behalf of an enemy in drawing, accepting presenting for acceptance or payment, negotiating or otherwise dealing with any

negotiable instrument. (4) Not to accept, pay or otherwise deal with any negotiable instrument which is held by, or on behalf of the enemy.

4. The result of that Proclamation is clearly to make it unlawful on the part of the plaintiff to pay any money to the Austrian Firm or to receive any

goods from them in return for such payment. This is the effect of the decision in *Arnhold Karberg & Co. v. Blythe Green, Jourdain & Co.* (1915)

2 K.B. 379. But it is argued by Mr. Chamier that the property in the goods had passed, to the plaintiff before the declaration of the war, and this

he seeks to make out on the facts that the samples were shown to the plaintiff at the time he accepted the draft and the goods had been shipped

before war was declared. We do not think that this is a correct contention. The contract is what is known in commercial circles as a C.I.F.

contract the effect of which as held in a number of decisions of the English Courts and very fully discussed in the case which has been mentioned, is

that the buyer under such a contract is entitled to the documents of title on payment of the money due on those documents. Until then it cannot be

said that he has any right to the goods. It is stated by Justice Scrutton in the same, case at page 387 of the report, "I understand the effect of those

judgments to be that where the seller by taking the bills of, lading in his own name or to his own order has reserved the *jus disponendi* or power of

dealing with the goods, the property does not pass on shipment, but is vested in the vendor until he receives payment from the buyer in exchange

for the documents of title.

5. The documents in this case are made out to the order of the shippers and therefore it cannot be said that the plaintiff acquired any right to the

goods before he obtained the documents of title in exchange for payment.

6. It was strenuously argued by Mr. Chamier that this decision is based on the Sale of Goods Act in England and that the Indian Contract Act lays

down the law differently, and he referred us to Sections 78 and 83. The last clause of Section 78 says, "If the parties agree, expressly or by

implication that the payment, or delivery, or both, shall be postponed, the property passes as soon as the proposal for sale is accepted." But then

this is subject to any special contract which the parties may enter into and if the effect of a C.I.F. contract, be it as it is laid down in the English

cases, that cannot be said to be over-ridden by anything in Section 78. The parties to a contract like this must be taken to have accepted the

ordinary incidents which are attached to such contracts by mercantile usage, Section 83 does not seem to us to touch the point at all. It only says

that the goods which are not ascertained at the time of making the agreement for sale may be appropriated afterwards by the consent of the

parties. Of the two Indian decisions which have been referred to in the course of the argument, one is a decision of Mr. Justice Chowdhry of the

Calcutta High Court in *G.C. Sett v. Madhoram Hurdeodass* (1916) 33 I.C. 540.

Reliance was placed by the appellants on a statement at page

544 :- ""Such contracts even with an alien-enemy are merely suspended during the war as regards the right to performance and right of action, and

are avoided or dissolved only in certain circumstances, among them, if its performance necessitates intercourse with the enemy during the war.

7. This is laid down on the authority of *Esposito v. Bowden* (1857) 7 El. & Bl. 763: 119 E.R. 143. Now even if that dictum was applicable to the

case under our consideration it does not appear how it would help the plaintiff in any way. The suit will still be liable to be dismissed as it could not

be maintained during the continuance of the war. The decision of the Bombay High Court reported in 18 Bombay Law Reporter 531 was also

referred to. But that was a suit on a bill of exchange, the parties to which were both British subjects. That is sufficient to distinguish that case from

the present. I may here mention that Mr. Chamier contended that in this case not only was the Austrian Firm liable on the contract but also the first

defendant in his personal capacity and he asked us to permit him to amend the plaint so that he might obtain relief against the first defendant apart

from his capacity as agent of the. Austrian Firm. But this is inconsistent with the case sought to be made out in the plaint. The suit was brought

against the 1st defendant as agent of the Austrian Firm and this is made clear in para. 3 of the plaint. Mr. Chamier also put forward another

argument that since the Government had released the goods, that will have the effect of reviving the contract or renewing the validity of the contract

although it had become void before the order of release was passed. That, cannot be taken to be the effect of the order of release. Its only effect is

that the Government withdraws its hands so that any party entitled to the goods may establish his right to them. Mr. Chamier in the course of his*

argument, asked us what will become of the goods : to whom will they go? It is not necessary in this suit to answer that question. The plaintiffs

contract became void by reason of the outbreak of the war and he cannot recover the goods on the basis of such contract.

8. The appeal is dismissed with costs. There will be one set of costs. The costs of the interlocutory application will be included in the costs of this

appeal.