

(1915) 11 BOM CK 0007
In the Bombay High Court

The Textile Manufacturing Co. Ltd.

APPELLANT

Vs

Salomon Brothers

RESPONDENT

Date of Decision : 12-11-1915

Acts Referred:

Contract Act, 1872 — Section 56(2), 65(2)

Citation : AIR 1916 Bom 251 : (1916) ILR (Bom) 570

Hon'ble Judges : Macleod, J

Bench : Single Bench

Judgement

Macleod, J.—By a contract, dated the 18th of February 1914, the defendants agreed to purchase from the plaintiffs the total quantity of waste of the several descriptions specified in the contract produced in the plaintiffs' mills during the year ending the 31st December 1914 at the respective prices specified in the contract and to take delivery of whatever waste might be ready at least once monthly.

2. The defendants deposited with the plaintiffs 3 1/2 per cent. Government Promissory Notes of the face value of Rs. 2,200 to be retained, by the plaintiffs against the fulfillment of the contract.

3. The defendants are a German Joint-stock Company incorporated under the laws of Hanover, having a branch in Bombay, under the sole management of one Carl Beyer, a German subject.

4. On the 4th August 1914, war was declared between Great Britain and Germany.

5. On the 18th August, the plaintiffs wrote to the defendants calling upon them to take, delivery of waste under the contract.

6. Mr. Beyer replied on the 22nd August that on account of the present political position they were not allowed to do business in India and requested the plaintiffs to keep the delivery of waste standing over until business was allowed

to be resumed.

7. On the 11th November, plaintiffs again called upon the defendants to take delivery, of the waste under the contract.

8. Defendants replied on the 13th that they were unable to arrange for farther delivery until the declaration of peace.

9. On the 3rd December, plaintiffs called upon the defendants, to comply with their notice of the 11th November on or before the 8th December. The defendants replied through their solicitors on the 9th December and plaintiffs' solicitors by their letter of the 12th December extended the time for taking delivery until the 16th December. Defendants' solicitors replied on the 18th referring to the internment of the defendants' manager on the 5th September and claiming that u/s 56(2) of the Indian Contract Act the defendants were relieved from the performance of their part of the contract. On the 16th February 1915, the plaintiffs' solicitors informed the defendants that they had sold the waste of which the defendants had been under contract to take delivery at a loss of Rs. 4,270-13-0 and after deducting the value of the deposit demanded payment of Rs. 2,074-13-2.

10. The plaintiffs filed this suit on the 11th March. Three main contentions were raised by the defendants' written statement.

11. First, that on the outbreak of war, as the defendants were alien enemies, the contract was avoided and both parties were absolved from any performance under it.

12. Secondly, that the defendants were prohibited by reason of their status as alien enemies from engaging in or carrying on trade and that though the defendants applied to the Local Government for permission to carry on their local business it was not until the 8th February 1915 that they obtained a license limited to the winding-up and liquidation of the defendants' local business under Government supervision. Therefore, it became impossible for the defendants to perform their part of the contract.

13. Thirdly, that if there was a breach of the contract it was waived by the plaintiffs granting an extension of time for performance until the 16th December, and before that date the order of the 14th November made it impossible for the defendants to perform their contract.

14. This is not the case of a contract between a British subject and an alien enemy having a commercial domicile outside enemy territory. But even if it were I am not prepared to adhere to the hitherto accepted doctrine that domicile and not nationality is the test. That doctrine was established when wars were waged under very different conditions and it is certainly desirable that it should be reconsidered Note: Since the above judgment was delivered the important enactment Known as the Trading with the Enemy (Extension of Powers) Act, 1915 (5 mid 6 Geo. 5 Ch. 98) has come into force, and Macleod J.'s view, that

the doctrine that domicile and not nationality should no longer be the sole test, has been recognized, because the Act provides for the extension of the restrictions relating to trading with the enemy to persons to whom though not resident or carrying on business in enemy territory, it is by reason of their enemy nationality or enemy associations expedient to extend such restriction. [Ed.] The defendant company is registered in Germany and its business is managed and controlled from Germany. Mr. Beyer acted under instructions from headquarters and especially in the case of the contract in suit he sent samples of the waste to headquarters for approval since the waste was intended for export to Germany. Therefore, the defendants have a German residence and domicile: *De Beers Consolidated Mines Limited v. Howe* [1906] A.C. 455.

15. Nor does the question arise whether the contract is merely suspended during the duration of hostilities as the period of the contract expired before there was any likelihood of hostilities coming to an end.

16. The more modern view seems to be that all contracts with alien enemies become illegal on the outbreak of war: see per Lord Lindley in *Janson v. Driefontein Consolidated Mines, Limited* [1902] A.C. 484.

17. In *W. Wolf and Sons v. Carr Parker and Co. Limited* ILR [1915] 407 the defendants, a Manchester firm, were sued by the plaintiffs, a German firm, whose partners were resident and domiciled in Germany and had their principal place of business in Germany with branches in Manchester and other places for the recovery of £1,342-8-6 partly for goods sold and delivered and partly as damages for breach of contract. The plaintiffs relied on the sixth clause of the Proclamation of the 9th September 1914 but it was held by the Court of Appeal that there was nothing in that clause which enabled the plaintiffs to recover where otherwise as alien enemies they would not be entitled to do so. On the outbreak of war, the contracts between the plaintiffs and defendants became illegal contracts and were dissolved and there had been since then no transaction between the parties within the meaning of Clause 6. The plaintiffs' contention was that Clause 6 enabled an enemy to sue in respect of obligations entered into before the war, but as the plaintiffs were not suing in respect of any transaction authorized by or coming within Clause 6 it was held that, they were not entitled to maintain the action under its provisions.

18. This decision was followed by Bray J. in *Kreglinger and Co. v. Cohen* ILR [1915] 502 where the plaintiffs were a Belgian Company carrying on Business in Antwerp and London and the defendant was a German carrying on business in Hamburg, and the claim was for damages on a contract entered into before war broke out.

19. Another decision to the same effect has been reported in the newspapers though it has not yet appeared in any of the Law Reports. These decisions follow a simple principle consonant with common sense and capable of universal application, thereby avoiding the many troublesome questions which otherwise

must arise as to what should be done during the continuance of hostilities, and what should be the position of the parties when hostilities cease. There may be hardships in individual cases, but it is obvious that it is better to allow the parties if they so wish, to renew their contracts at the end of the war, rather than bind them to continue business under the prior contracts when it is almost certain that the surrounding circumstances, will be entirely altered.

20. I must decide, therefore, that the contract in suit became illegal and was dissolved on the 4th August.

21. But apart from that it is quite clear that owing to the outbreak of war subsequent events rendered it impossible for the defendants to perform their contract.

22. Mr. Beyer financed his local transactions by a credit opened at the instance of the defendants with the Chartered Bank and, on the 13th August, he received a notice from them that, he could, under the law, only draw on his account for current-expenses or wages. All further business dealings were prohibited until he got a permit to trade from Government. Then, on the 5th September, Mr. Beyer was interned and as his Power of Attorney did not give him power to delegate his authority he was unable to carry on the business.

23. He did give a Power of Attorney to Mr. Save but he clearly had no authority to do this, and this power was, therefore, valueless.

24. In addition to these facts the various Proclamations, Ordinances and Orders relating to trading with the enemy have been referred to and it may be as well to analyse these.

25. On the 7th August 1914, the Government of India published the Royal Proclamation of the 5th August.

26. After reciting that it is contrary to law for any person resident, carrying on business or being in Our Dominions, to trade or have any commercial intercourse with any person resident, carrying on business or being in the German Empire without Our permission, all persons resident, carrying on business or being in Our Dominions are warned inter alia not to supply to the German Empire any goods, wares or merchandise or to supply the same to any person resident, carrying on business or being therein nor to trade in or carry any goods, wares or merchandise destined for the German Empire or for any person resident, carrying on business or being therein.

27. But it is declared that where any person--and person includes any body of persons corporate or incorporate--has or had an interest in houses or branches of business in some other country as well as in Our Dominions or in the Dual Empire as the case may be this Proclamation shall not apply to the trading or commercial intercourse carried on by such person solely from or by such houses or branches of business in such other country.

28. This Proclamation was revoked by the Proclamation of the 9th September which was substituted therefor.

29. Therein the expression "enemy" was defined as meaning any person or body of persons of whatever nationality resident or carrying on business in the enemy country, but not including persons of enemy nationality neither resident in nor carrying on business in the enemy country.

30. All persons resident, carrying on business or being in Our Dominions are warned inter alia not directly or indirectly to supply to or for the use or benefit of an enemy country, or an enemy any goods, wares or merchandise, nor directly or indirectly to trade in or carry any goods, wares or merchandise destined for an enemy country or an enemy.

31. But under Clause 6 it is provided that where an enemy has a branch locally situated, in British, allied or neutral territory, not being neutral territory in Europe, transactions by or with such branch shall not be treated as transactions by or with an enemy.

32. Under Clause 8 nothing in the Proclamation shall be taken, to prohibit anything which shall be expressly permitted by Our license, or by the license given on Our behalf by a Secretary of State or the Board of Trade, whether such licenses shall be especially granted to individuals or be announced as applying to classes of persons.

33. By Clause 3 of a, Proclamation, dated the 8th October, the power to grant licenses on Our behalf vested in a Secretary of State by the above clause may be exercised in India by the Governor-General.

34. On the 14th October 1914, the Government of India passed an Ordinance to amend the Foreigners Ordinance (III of 1914) of the 20th August whereby Sub-clause (d) was added to Clause (2) of the prior Ordinance, giving the Governor-General in Council power by order to provide that foreigners residing or being in British India, shall be prohibited from carrying on trade or business or from dealing with any property moveable or immovable, or shall only carry on trade or business subject to such conditions and restrictions as the Governor-General in Council may impose or shall deal with any such property in such manner as the Governor-General in Council may direct.

35. In pursuance of such powers an order called the Hostile Foreigners Trading Order was issued on the 14th November.

36. Clause 4 directs that a hostile foreigner shall not, neither shall a hostile firm, carry on or engage in any trade or business in British India except under a license issued by or under the authority of the Governor-General in Council and to such extent and subject to such conditions, restrictions and supervision as the Governor-General in Council may direct.

37. Under Clause 6 a hostile foreigner who, or a hostile firm which, has been

refused a license or has failed within one month from the date of the Order to apply for a license shall (unless exempted by the terms of any general license issued under the Order) forthwith cease to carry on or engage in any trade or business in British India.

38. But although nothing appears in the Proclamations regarding the issue of licenses to trade to hostile foreigners before the 9th September, and nothing in the Ordinances or Orders of the Government of India before the Order of the 14th November, under the common law the King's subjects cannot trade with an alien enemy, i.e., a person owing allegiance to a Government at war with the King without the King's license. It would appear from other documents in the case that the defendants had applied soon after war broke out for a license to trade, and their application had been considered by the Local Government. On the 2nd September, the Secretary to Government forwarded to the defendants copies of three Press Notes, dated the 28th August on the subject.

39. In the first it is stated that in the case of firms which are wholly German or Austrian license under Royal authority is necessary to enable them to continue their trade.

40. The second refers to an official Notification of policy regarding trading with the enemy published by His Majesty's Government in which it is stated inter alia that no payments or other operations with firms in hostile territory are permissible during war under contracts made before the war except that there is no objection to payments for goods delivered or services rendered when the contract has been in other respects completed before war, and that the question whether contracts made before the war are suspended or terminated depends on circumstances. But trade with a branch in British or neutral territory of a firm having headquarters in hostile territory is permissible apart from prohibition in special cases as long as trade is bona fide with the branch and no transactions with head offices are involved.

41. The third note notifies certain Announcements pending final orders to be passed under the Trading License Ordinance, for the clearing of imported goods by hostile firms and the acceptance of delivery of goods by British subjects from hostile firms.

42. No trading License Ordinance appears in the Official Publication of Legislation and Orders relating to the War.

43. It is not to be wondered at, that confronted with this bewildering array of Proclamations, Ordinances, Orders and Official communications, abounding in conflicting provisions, the members of the mercantile community in Bombay, whether British subjects, foreigners or enemies, remained paralyzed--unable to form any opinion as to what they could do or what they could not do.

44. The plaintiffs themselves evidently realized this as, after their letter of the 18th August, they made no attempt to get the defendants to take delivery until

the 11th November.

45. In my opinion, therefore, it had become impossible owing to circumstances arising from the outbreak of war for the defendants to perform their part of the contract.

46. Even assuming that it only became so after the 14th November, the plaintiffs gave the defendants further time for taking delivery up to the 16th December, and so waived any breach committed before that date.

47. It is admitted that on these findings the defendants are entitled to a return of their deposit u/s 65(2) of the Indian Contract Act.

48. As this is a test case arising from the outbreak of war on which it was necessary to obtain the opinion of the Court there will be no order as to costs.