APPELLATE CIVIL.

Before Sir John Wallis, Kt., Chief Justice, and Mr. Justice Oldfield.

BANGHY ABDUL RAZACK SAHIB OF MESSRS. KHAN SAHIB BANGHY ABDUL KHADAR SAHIB & CO. (PLAINTIFF), APPELLANT,

1917, March, 21 and 29.

v.

KHANDI ROW AND ANOTHER OF W. K. A. RANE & CO. (DEFENDANTS), RESPONDENTS. *

Contract, breach of—Suit for damages—Contract after outbreak of war to supply enemy goods out of stock in a particular ship—Royal Proclamation, prohibiting contract as illegal, effect of—Capture and condemnation of steamer and goods by Prize Court, effect of, on contract—Purchase of goods from Prize Court by defendant and bringing goods to place of performance by other steamers, effect of—Contract to supply goods of a certain description and quality—Supply of inferior goods, effect of.

A contract made on the 25th August 1914, after the outbreak of war with Germany on the 4th August 1914, to supply German dyes expected to arrive by certain steamers believed to have started on their voyage from Germany before the war, is unenforceable, if under the contract the defendant was not to be liable in case of non-arrival of the steamers at certain ports on account of the state of war and the ship and the dyes therein were as a fact seized during the voyage and condemned as prize by a Prize Court.

Held further,

(*a*) that the effect of the Royal Proclamation of 8th September 1914, prohibiting trading with the enemy and in enemy goods as illegal, was to render the further performance of the contract illegal and to put an end to the contract;

(*b*) that the condemnation of the goods by the Prize Court related back to the date of seizure and divested the owners of the goods as from the date of seizure;

(*c*) that the fact that the defendants for their own convenience bought the goods from the Prize Court and brought them to the place of performance is immaterial as the goods ceased to be goods consigned to the defendants; and

(*d*) that a contract to supply dyes of 40 per cent strength on arrival of certain steamers is not enforceable when the steamers arrive with dyes of inferior description and quality, viz., 16 per cent strength.

Hale v. *Rawson* (1858) 27 L.J., C.P., 189, distinguished.

Arnhold Karberg & Co. v. *Blythe Green Jourdain & Co.* (1916) 1 K.B., 495, *The Odessa* (1916) A.C., 153, and *The Zamora* (1916) 2 A.C., 77, followed.

* Original Side Appeal No. 22 of 1916.

ABDUL RAZACK v. KHANDI ROW.

APPEAL against the judgment of BAKEWELL, J., in Civil Suit No. 229 of 1915.

This is a suit for damages for breach of contract entered into between the plaintiffs who were merchants at Ambur and the defendants who were importers of German dyes on the 25th August 1914 after the outbreak of war with Germany. The contract was as follows:—

Madras, 25th August 1914.

"KHAN SAHIB

BANGHI ABDUL KADIR SAHIB,

AMBUR.

DEAR SIR,

We agree to deliver to you the following packages from the lot that is coming per S.S. *Steinturm*, 3 casks = 12 cwt. Alizarine per cent 4 cwt. at 501-4-0.

From Bombay lot—

5 kegs 1 cwt. each Alizarine 20 per cent at 55.

(initialled) .....

for W. K. A. RANE & Co.

N.B.—

2 casks each 4 cwt. 40 per cent.
2 „ „ „
2 „ „ „

To be delivered on arrival of other steamers, one lot of 2 casks to be delivered each time at the abovementioned rate, i.e., Rs. 501-4-0 per cwt. We are not responsible for the supply of goods if steamers do not come to Madras or Madura."

The Royal Proclamation prohibiting trading with the enemy and in enemy goods as illegal came into force on 9th September 1914. The steamer *Barenfels* and its cargo (the dyes in question) were captured in October 1914 as prize of war and taken into Alexandria for condemnation and were eventually condemned as prize of war in September 1915. In the meanwhile the defendants got the goods released on payment of double the invoice value agreeing to treat it as their sale price in case of their eventual condemnation and the ship and the goods in question arrived in Colombo in May 1915. In addition to claiming a right to delivery of the abovementioned goods the plaintiffs claimed that the defendants were bound to deliver them certain dyes which arrived by S.S. *Frimley* though they were not of 40 per cent strength but only 16 per cent. On defendant's failure to supply goods the plaintiffs sued for

damages for breach of contract. The defendants pleaded that they were not liable for the following reasons :—(1) the contract freed them from liability, as in the events that were contemplated and happened, the steamer *Barenfels* did not arrive, (2) that the contract was void, illegal and unenforceable, having been made after the outbreak of war, (3) that it was later on cancelled, (4) that no dyes of 40 per cent strength arrived by the other steamers named, and (5) that the seizure and condemnation of the goods relieved them of all liability though they bought the goods from the Prize Court for purposes of their own and brought them to India, as they ceased to be goods consigned to them. The following issues were framed :—

(1) Has the contract sued on become void and unforceable owing to the outbreak of war between England and Germany ?

(2) Are defendants liable in respect of the two casks that arrived by S.S. *Barenfels* ?

(3) Are the defendants absolved from liability owing to their not being able to obtain delivery of the two casks ?

(4) Is the contract in respect of the remaining casks premature owing to the non-arrival of the steamers ?

(5) To what damages is the plaintiff entitled ?

Mr. Justice BAKEWELL, who tried the suit, dismissed it by the following judgment :—

BAKEWELL, J.

JUDGMENT.—The plaintiffs are owners of a factory for dyeing yarn and have obtained their dyes for the last few years from the defendants who are importers. I hold that the plaintiffs were aware that the dyes which they obtained from the defendants were obtained by the latter from a German firm, and that on the 25th August 1914, the date of the contract in suit, the plaintiffs were aware that the defendants had consignments coming to Madras of dye which had been shipped before the 4th of August. War broke out between England and Germany on the 4th August 1914 and the contract in suit of the 25th of August, was evidently entered into in contemplation of the fact that the dyes coming from Germany would be difficult to obtain.

The contract is for the delivery of three casks of Alizarine dye ex S.S. *Steinturm* and five kegs from the Bombay consignment, and it contains the following postscript :—

"Six casks of 4 cwt. 40 per cent to be delivered on arrival of other steamers, one lot of two casks to be delivered each time at the abovementioned rate, i.e., Rs. 501-4-0 per cask ; we are not

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responsible for the supply of goods if the steamers do not come to Madras or Madura."

The quality of the goods S.S. *Steinturm* was to be 40 per cent and from Bombay lot 20 per cent. I think it is clear that the contract was for the supply of goods manufactured in Germany and purchased by the defendants from a German firm, which the parties contemplated would be shipped before the outbreak of the war but delivered subsequently. I have no doubt that both parties were aware of the outbreak of the war and of the Proclamation against dealing with enemy goods; but it is equally probable that they thought that goods shipped before the outbreak of war might be safely dealt with.

The plaint relates to goods shipped by S.S. *Barenfels* and *Frimley*? A claim was also made with regard to another ship *Waturm* but I do not think that any question arises as to this steamer which carried goods consigned to Bombay. The S.S. *Barenfels* carried goods consigned to Madras which would fall within the terms of the contract, but she was captured and the ship and the goods were condemned by the Prize Court at Alexandria. I think that it is clear from the finding of that Court that the goods were enemy goods and therefore that the contract between the parties related to enemy goods coming from the enemy country. If therefore the defendants had taken up these goods and paid for them, they would have been trading in goods coming from the German Empire and from a person carrying on business therein, and the contract to sell such goods to the plaintiff falls, I think, within the Proclamation and is illegal and void.

It has been argued that the defendants obtained part of the goods consigned to them from S.S. *Barenfels* but procured their transhipment to Bombay instead of to Madras, and that having thus diverted the goods from their proper port of delivery they are liable for this consignment; but the correspondence that has been put in shows, I think, that these goods were taken by the defendants provisionally and subject to a decision by the Prize Court at Alexandria, and having been subsequently condemned they became the property of the Crown, and the voyage of the captured ship came to an end. The result is, therefore, that the goods came to the defendants as purchasers from the Crown at Colombo and they were at perfect liberty to treat this purchase as one independent of their contract with the plaintiffs and to deal with the goods as a separate consignment.

It has also been argued that the consignment ex S.S. *Frimley* is included in the suit contract. The facts as to this shipment are not

at all clear It appears that the goods were shipped at Antwerp on the 7th June, 1914, for Masulipatam via Colombo and that they were transhipped at Colombo on the 5th January, 1915, but it does not appear that the property in these goods had not passed to the defendant before the outbreak of the war, and I do not think they have shown that this consignment consisted of goods coming from Germany. It would seem that they are foreign goods which have Germany as their country of origin; but goods of that kind would not come within the Proclamation, which covers 'goods coming from the German Empire' and not goods which may originally have come from Germany. The consignment was to Masulipatam and I do not think that the fact that the defendant diverted the consignment to Madras brings these particular goods within the contract. Moreover the goods ex S.S. *Frimley* do not come within the precise terms of the contract which relates only to goods of 40 per cent, the consignment ex S.S. *Frimley* being all kegs of 16 per cent only. I think the onus is on the plaintiffs to show that the goods of 16 per cent are substantially equivalent to those of 40 per cent. The evidence on the point is not very satisfactory. The point does not seem to have been clearly raised in the pleadings and the working partner of the plaintiffs' firm was not cross-examined on the point, but I think the onus was upon the plaintiffs to show that the two classes of goods are practically identical, and the fact that the contract itself draws a distinction between goods of 40 per cent and 20 per cent and expressly stipulates for those of 40 per cent shows that what the parties had in contemplation was a particular quality, and that prima facie the plaintiffs would have been entitled to reject the tender of goods of any other quality. I hold, therefore, that the plaintiffs have failed to prove that the defendants received any consignment in Madras or Madura of the particular goods stipulated in the contract. It has been argued on their behalf that the arrival of any steamer containing goods of a particular description, whether consigned to the defendants or not, would entitle the plaintiffs to claim delivery of the contract goods. Having regard to the knowledge of the plaintiffs of the course of business carried on by the defendants, I think that this exceedingly wide interpretation of the contract is not admissible. I think it is reasonably clear that the contract relates only to consignments which the parties knew were coming to the defendants in the ordinary course of business.

The result is that the plaintiffs' suit fails and is dismissed with costs.

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The plaintiffs preferred this appeal.

Hon'ble Mr. *S. Srinivasa Ayyangar*, the *Advocate-General*, and *M. D. Devados* for the appellants.

W. Barton and *V. L. Ethiraj* for the respondents.

WALLIS, C.J., AND OLDFIELD, J.

JUDGMENT.—This is a suit for breach of contract between the plaintiffs who are merchants at Ambur and the defendants who were importers of German dyes to Madras and Tuticorin, entered into on the 25th August 1914 after the outbreak of the war, by which the defendants undertook to deliver certain casks of dye from the lot to arrive per S.S. *Steinturm* and certain other casks from what is described as the "Bombay lot" meaning the lot imported by the defendants at Bombay. The contract went on to stipulate for three deliveries of two casks each of the weight and description mentioned,

"to be delivered on arrival of other steamers, one lot of two casks to be delivered each time at the abovementioned rate, i.e., Rs. 501-4-0 for each cask. We are not responsible for the supply of goods if steamers do not come to Madras or Madura".

The evidence shows that the defendants had arranged for consignments by successive steamers, and having regard to this we have no doubt that what the defendants undertook to deliver was two casks of the required description arriving in the ordinary course in successive steamers consigned to the defendants at Madras or Tuticorin, the port for Madura. In the case of Tuticorin the ship either touched at Tuticorin or landed the goods at Colombo for transhipment. One of the steamers, S.S. *Barenfels*, had left Hamburg and Antwerp before the outbreak of war and, according to the evidence, should have arrived in Madras about the 17th August, in the ordinary course. On the date of the contract she was overdue and the defendant says he did not know what had happened to her. She did arrive ultimately in May, 1915, and the first contention of the learned Advocate-General was that under the contract on the arrival of the S.S. *Barenfels* the defendants became bound to make delivery, even if the goods were not on board, citing *Hale* v. *Rawson*(1). In that case which was an action for failure to deliver tallow, the defendants had contracted to deliver tallow on the arrival of a certain steamship and it was held that they were not relieved

(1) (1858) 27 L.J., C.P., 189.

from their obligation, because it turned out the ship had no tallow on board. Here we think it is clear from the language of Exhibit A and having regard to the course of business and the stipulation as to the non-arrival of the steamers, that the defendants were only bound to make deliveries out of the lots consigned to the defendants in the ordinary course of business by the steamers referred to and arriving therein, and that they were not bound to make any such delivery on the arrival of the steamer without having on board any such goods consigned to the defendants.

This being the interpretation of the contract, as the goods had not arrived before the coming into force of the Proclamation of the 9th September, 1914, against trading with the enemy, the effect of that Proclamation was to render the further performance of the contract illegal, as it would admittedly have been impossible for the defendants to take up the goods and pay for them, and to put an end to the contract; *Arnhold Karberg & Co.* v. *Blythe Green, Jourdain & Co.*(1).

The case may also be disposed of on another ground. The S.S. *Barenfels* and her cargo were captured in October, 1914, as Prize of War and taken into Alexandria for condemnation, and they were subsequently condemned as Prize of War in September, 1915, a comdemnation which related back and divested the owners of the goods as from the date of seizure: *The Odessa*(2), *The Zamora*(3). Under the contract, as already stated, the defendants were not to be responsible for the supply of goods, if steamers did not come to Madras or Madura; and these steamers clearly were the "other steamers", already mentioned by which the three consignments were coming out. In these circumstances the capture of the S.S. *Barenfels* which must have been one of the possibilities contemplated, in our opinion, relieved the defendants of liability under this clause and put an end to the contract so far as this particular consignment was concerned. And it seems to us immaterial that some six months later the ship and cargo were sent out to Colombo, Madras and Calcutta by bailees from the Prize Court who landed the goods in question, which were consigned to Tuticorin, at Colombo and did not forward

(1) (1916) 1 K.B., 495.
(2) (1916) A.C., 153. (3) (1916) 2 A.C., 77.

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them by transhipment to the defendants, the consignees at Tuticorin. There was no certificate of release from the Prize Court in respect of these goods, which at the time were being proceeded against for condemnation; and the only terms on which the defendants were able to obtain delivery of them was by depositing a sum amounting to twice their invoice value, and by agreeing that, if the goods were condemned, as happened, this sum should be treated as the sale price paid to the Prize authorities as vendors. It cannot be said that the defendants were under any obligation to purchase these goods at a greatly enhanced price from the Prize authorities and make them over to the plaintiff, and we think the plaintiff's claim in respect of these casks fails.

The case as regards the plaintiff's other ground of claim on account of the consignment on the S.S. *Frimley* is even clearer. The evidence, for there is nothing explicit in the plaint, is that kegs of 16 per cent strength arrived by that ship. The contract being for delivery of kegs of 40 per cent strength it was for the plaintiff to show that the defendants were in a position to deliver dye such as that described in the contract. We think it is clear that the plaintiffs have not done so and that the description of the dye on the S.S. *Frimley* differs in toto from the description stipulated for. We may add that on the evidence the plaintiffs failed entirely to establish that the dye on the S.S. *Frimley* could be accepted as equivalent to that referred to in the contract, the only witness who had any practical knowledge of dyeing deposing that dye of 16 per cent strength would not produce the same quality of colour as that of 40 per cent strength after admixture.

In the result, the appeal fails and is dismissed with costs. (Two counsel.)

Solicitors for the appellants.—Messrs. *Grant* and *Greatorex*.

Solicitors for the respondents.—Messrs. *Short, Beves & Co.*

N.R.