APPEAL FROM ORIGINAL CIVIL.

Before Mr. Justice Shadi Lal and Mr. Justice Martineau.

1920

Feb. 25

HAJI ALI JAN, FIRM OF—(*Plaintiff*) *Appellant*,

versus

ABDUL JALIL KHAN AND OTHERS—(*Defendants*) *Respondents*.

Civil Appeal No 1135 of 1916.

Civil Procedure Code, Act V of 1908, section 83.—suit brought in British India by a firm, some of whose partners were residing and carrying on a business at Mecca while Turkey was at war with Great Britain—whether competent—"Alien enemy" defined.

THE plaintiff firm consisted of 6 partners, one of whom lived at Delhi and carried on the business of the firm there, the remaining five lived in the Turkish Vilayat of the Hedjaz where they carried on a branch firm belonging to the partners. The plaintiff firm brought the present suit in the Civil Court at Delhi in April 1915, while Great Britain was at war with Turkey. It was objected that they could not maintain a suit in the Courts of British India, the partners in Mecca being alien enemies.

Held, that a person who voluntarily resides in a hostile country for a substantial period of time acquires the disability attaching to an enemy during that period even if he is a British subject, unless such residence is with the consent of the Crown, and that consequently the 5 partners residing and carrying on business at Mecca must be treated as alien enemies.

McConnel v. *Hector* (1). per Lord Alvanley C. J., *Porter* v. *Freudenberg* (2), *Daimler Company, Limited*, v. *Continental Tyre and Rubber Company, Limited* (3), and *Janson* v. *Driefontein Consolidated Mines* (4), followed.

Held, also, that if one of the partners in a firm is an alien enemy as defined above neither he nor his partner, who does not bear an enemy character, can recover money owing to the firm in the Courts of British India, and that the plaintiffs were therefore rightly non-suited by the lower Court.

McConnell v. *Hector* (1), followed.

Rodriguez v. *Speyer Brothers* (5), distinguished.

(1) (1802) 6 R. R. 724.
(2) (1915) 1 K. B. 857.
(3) (1916) 2 Ap. C. 338.
(4) (1902) Ap. C. 505.
(5) (1919) Ap. C. 59.

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The facts of the case out of which the present appeal arose are as follows:—

The plaintiff firm known as Haji Ali Jan consisted of 6 partners, one of whom, namely, Haji Abdul Ghafur lived at Delhi and carried on the business of the firm there and all the remaining five lived at Mecca and carried on a branch firm there under the name of Abdul Sattar-Abdul Jabbar belonging to the partners. The plaintiff firm alleged in their suit that the father of the defendant desired them to complete a project for the repair of a Serai at Mecca and agreed to pay the cost at Delhi. The plaintiff firm completed the work through their Mecca Branch at a cost of Rs. 33,405, of which they had received Rs. 15,000, and they instituted the present suit for the balance of Rs. 18,405 at Delhi through Haji Abdul Ghafur.

A preliminary objection was taken under section 83, Civil Procedure Code, in the Court of the District Judge, Delhi, that the suit was not maintainable, being one by an alien enemy and an issue was struck on the point. The objection prevailed and the District Judge rejected the plaint under Order 7, rule 11, holding that the suit was barred by law. The plaintiff firm appealed to the High Court against the decision of the District Judge.

Dr. Muhammad Iqbal (for the appellant)—I rely mainly on a recent ruling of the House of Lords, *Rodriguez* v. *Speyer Brothers* (1). (*A*) Assuming that some of the plaintiffs are alien enemies the partnership is *ipso facto* dissolved under section 83 at the outbreak of the war. (*B*) The principle that an alien enemy cannot seek the assistance of British Courts does not apply to a case of partnership. (*C*) The rule about alien enemies is directed against alien enemies and not against British subjects. The present suit is brought in the name of the firm and the alien enemy members of the firm are joined as co-plaintiffs in the interests of the firm. They could have been made defendants and in that case the suit would proceed, since the general rule does not apply to a case where the alien enemy is a defendant. There are direct decisions to the effect that the rule has no

(1) (1919) Ap. C. 59.

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application where the outbreak of war results in the dissolution of the partnership and the name of the alien enemy ex-partner might be used as a co-plaintiff for the purpose of getting in assets. The various rulings on the point historically considered lead to this conclusion that the rule is not inflexible and is subject to change. (*D*) The case before the House of Lords which I cite in support of my contention is similar to the present case, the debt in the present case as in the case before the House of Lords had accrued long before the war. The amount of the alien enemy's shares in the debt sued for is not known in the present case, and therefore it cannot be said as to how much of the debt would go to him. Even if it were known it would not affect the situation. Moreover there are legal ways to stop the passage of the money to the alien enemy. Nor does the fact that in the case before the House of Lords five of the members of the firm were British subjects and one was an alien enemy, a position reverse to that of the present, affect the matter.

Counsel next contended that nationality was also a determining factor to ascertain whether a person was an alien enemy or not, *vide The Textile Manufacturing Co. Ltd.* v. *Solomon Brothers* (1), British Nationality Status of Alien Act (1914), Current Statutes by Somnath Sastri section 27, Halsbury's Laws of England, volume I, page 302, section 662. What is the meaning of residence is clear from *Misri* v. *Muhammad Khan* (2), *Gunda Mull* v. *Mulla Mull* (3), *Mubarik Shah* v. *Mussammat Wajeh-ul-Nissa* (4), *Fatima Begam* v. *Sakina Begam* (5), *Weber*, Exparte (6), *Winans* v. *Attorney* General (7). A surviving partner can recover, see *Mulk Raj* v. *George Knight* (8).

Their Lordships called upon Mr. Moti Sagar to reply only as regards the point whether the suit is maintainable or not, assuming some of the plaintiffs to be alien enemies.

Mr. Moti Sagar (for respondents)—The case cited by the other side *Rodriguez* v. *Speyer Brothers* (9) is distinguishable from the present case: (*a*) because the

(1) (1915) 18 Bom. L.R. 105 (112, 116).
(2) 63 P. R. 1887
(3) 17 P. R. 1871.
(4) 53 P. L. R. 1902.
(5) (1875) I. L. R. 1 All. 51 (53).
(6) (1916) Ap. C. Vol. I, 421 (424).
(7) (1904) Ap. C. 287 (288).
(8) 10 P. R. 1906.

majority of the plaintiffs in the present case are alien enemies while in the case cited the majority of the plaintiffs were British subjects, (*b*) the plaintiffs who did not bear the enemy character were given power by the deed of partnership to institute legal proceedings independently of the partners, (*c*) the interest of the enemy partner was almost infinitesimal.

It is immaterial that the alien enemy is suing jointly with others (*McConnell* v. *Hector*) (1), or that the ultimate result may not be actually to put money into his pocket, *Branden* v. *Nisbet* (2), and the disability extends to every action by or in favour of the alien enemy, *Briston* v. *Tomes* (3). The question is not one of public policy but of personal disability. An action by a firm some members of which are alien enemies is not maintainable, *Candiles and Sons* v. *Victor and Company* (4), *Actien Gesellchaft für Anilin-fabrikation* and *Mersey Chemical Works* v. *Levinstein* (5).

Miscellaneous first appeal from the order of C. L. Dundas, Esquire, District Judge, Delhi, dated the 19th January 1916, *rejecting the plaint.*

The judgment of the Court was delivered by—

Shadi Lal, J.—The action, which has led to this appeal, was brought by the firm of *Haji* Ali Jan against the defendant Abdul Shakur Khan, for the recovery of a sum of money due to the firm. The allegations in the plaint are that the predecessor of Abdul Shakur Khan had asked the firm to get his *serai* at Mecca repaired, and that the plaintiffs carried out the repairs and spent thereupon a large sum of money much in excess of the amount deposited with the plaintiffs for the purpose. The action is accordingly for the balance of the money due to the plaintiffs.

It is common ground that the plaintiff firm consists of six persons, one of whom lives at Delhi and carries on the business of the firm *Haji* Ali Jan, while the remaining five members reside at Mecca where the partners have got another firm called

(1) (1802) 6 R. R. 724.
(2) (1794) 3 R. R. 109.
(3) (1794) 6 T. R. 35.
(4) (1916) 33 T. L. R. 20.
(5) (1905) 21 T. L. R. 225.

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"Abdul Sattar-Abdul Jabbar." Now the city of Mecca is situate in the Turkish Vilayat of the Hedjaz, and a state of war was proclaimed in November 1914 between His Britannic Majesty and the Sultan of Turkey. The action, though relating to a transaction entered into and probably carried out before the declaration of the war, was brought during the war; and the crucial question for determination is whether such an action can be maintained in the Courts of British India.

Section 83, sub-section (2), Civil Procedure Code, makes it perfectly clear that an alien enemy residing in a foreign country cannot maintain a suit in any of such Courts. It is, however, contended that as the five partners residing in the hostile country are British subjects, they cannot be treated as alien enemies within the meaning of the aforesaid provision of the law. This contention is, in our opinion, wholly erroneous. It is true that the phrase "alien enemy" in its natural significance has reference to nationality, and indicates a subject of a State which is at war with the United Kingdom of Great Britain and Ireland and would not include a British subject or a neutral subject. But this is not the meaning of the expression when used in reference to Civil rights and liabilities. For this purpose the place of residence, or the place where the business is carried on, and not the nationality is the determining factor; and even a British subject will be treated as an alien enemy, if he voluntarily resides or carries on business in a hostile country. In other words, an enemy means a person, of whatever nationality, residing or carrying on business in the enemy country. The residence must of course be a voluntary one, because it is clear that an involuntary residence, *e.g.*, that of a prisoner of war or an internee, does not debar him, if otherwise qualified, from invoking the assistance of the British Courts.

That nationality is not the test for determining the status of a person for the purpose of Civil rights and liabilities is clear from the explanation appended to section 83, Civil Procedure Code, and the doctrine has been repeatedly affirmed in a series of judgments by the English Courts. It was enunciated during the

Napoleonic wars in the case of *McConnell* v. *Hector* (1), when two of the Judges laid down that a British subject resident and carrying on trade in an enemy's country is an alien enemy and is consequently incapable of suing in an English Court. The reason of the rule is " that the fruits of the action may not be remitted to a hostile country and so furnish resources against this country. For that purpose the case of an Englishman residing abroad does not differ from any other person."

There can, therefore, be no doubt that even if the five partners residing at Mecca are British subjects, a matter upon which no definite opinion can in the absence of evidence be pronounced, they must still be regarded as alien enemies, because they are residing in a hostile country. Their residence alone would be sufficient to bring them within the category of alien enemies. As pointed out by Lord Alvanley, C. J. in *McConnell* v. *Hector* (1), ' most certainly every natural born subject of England has a right to the King's protection so long as he entitles himself to it by his conduct, but *if he live in an enemy's country he forfeits that right.*"

This rule has since been affirmed in several cases vide, *inter ali, Porter* v. *Freudenberg* (2).

What residence in an enemy country will suffice to make a man an alien enemy is a question of degree. It is clear that the residence contemplated by the rule need not amount to what is called domicile, namely, permanent residence *sine animo revertendi*. A much less permanent residence is sufficient to constitute a man an alien enemy, provided that it is not of a temporary character. The correct proposition appears to be that if a person resides in a hostile country for a substantial period of time, he acquires the disability attaching to an enemy during that period, *vide Porter* v. *Freudenberg* (2) *and Daimler Company, Limited* v. *Continental Tyre and Rubber Company Limited* (3) unless such residence is with the consent of the Crown.

(1) (1802) 6 R. R. 724. (2) (1915) 1 K. B. 857.
(3) (1916) 2 Ap. C. 838.

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The residence, must, however, be of a voluntary character, for example a prisoner of war kept in the enemy country cannot be regarded as an alien enemy.

A person may not be resident in an enemy country, and yet he may acquire an enemy status if he carries on business in that country. As observed by Lord Lindley in *Janson* v. *Driefontein Consolidated Mines* (1) "When considering questions arising with an alien enemy, it is not the nationality of a person, but his place of business during war that is important. An Englishman carrying on business in an enemy's country is treated as an alien enemy in considering the validity or invalidity of his commercial contracts."

There can be little doubt that of the six members of the plaintiff firm five not only reside in a hostile country but also carry on business there, and they must, therefore, be treated as alien enemies, but the sixth is not an enemy. What then is the effect of this constitution of the firm upon the suit brought by it?

Now, it is beyond dispute that a partnership firm is not a juristic person like a limited Company, and has no existence in law apart from the members composing it. A firm is only a short expression for denoting the several persons who are members thereof. We must, therefore, take it that the present suit is brought by six persons, of whom one is a friend and five are enemies. Now, a series of cases decided by the English Courts beginning with the case of *McConnell* v. *Hector* (2) have laid down the rule that if one of the partners in the firm is an alien enemy as defined above, neither he nor his partner, who does not bear an enemy character, can recover money owing to the firm in the Englisn Courts. A discordant note, however, appears to have been struck in a recent judgment of the House of Lords in *Rodriguez* v. *Speyer Brothers* (3), and it is necessary to examine this case carefully in order to see what it did decide. The firm dealt with in that case carried on a banking business in London until the outbreak of war with Germany and consisted of six persons, only one of whom was an enemy having an interest to the extent of $\frac{1}{40}$th.

(1) (1902) Ap. C. 505. (2) (1802) 6 R. R. 724.

(3) (1919) Ap. C. 59.

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The partnership was *ipso facto* dissolved by reason of one partner having become an alien enemy, and in order to get in the assets and wind up the affairs of the firm an action was brought in 1916 by the firm for the recovery of a debt alleged to have accrued due before the commencement of the war. The question arose whether the action was maintainable. Of the five Law Lords, who decided the case, two were of the opinion that, as one of the plaintiffs was personally disqualified from seeking the aid of the British Courts, the suit could not be maintained. On the other hand, the remaining three members of the Bench, while recognizing the validity of the rule referred to above, considered that the rule was not a definite and inflexible one and should not be applied to cases where its application would be mischievous and contravene the principles of public policy which alone gave rise to the rule. They pointed out that the special circumstances of the case showed that the action was really for the benefit of the partners who were not enemies, and the enemy alien could not during the war reap any benefit from the action. It was accordingly held that to prevent an alien enemy, in these circumstances, from being a party to an action as plaintiff would do much more harm to British subjects or to friendly neutrals than to the enemy; and this was a consideration most material to be taken into account in determining whether a case falls within the true scope and extent of the rule. In view of these special circumstances the majority of the House of Lords allowed the case to proceed.

It is to be observed that in the cases of *McConnell* v. *Hector* (1) and *Candilis and Sons* v. *Victor and Co.* (2), the majority of the firm consisted of alien enemies, and in both the cases it was decided that the action brought by the firm could not be maintained. No dissent was expressed by the majority of the House of Lords from the rule laid down in these cases which were distinguished on the ground of the special circumstances in *Rodriguez* v. *Speyer Brothers* (3). In view of the constitution of the firm, with which

(1) (1802) 6 R. R. 724. (2) (1916) 32 T. L. R. 2..

(3) (1919) Ap. C. 59.

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we are dealing, there can be no manner of doubt that even the ground upon which the majority of the House of Lords took that particular case out of the purview of the rule, has no application to the case before us.

We are accordingly of opinion that the District Judge was right in non-suiting the plaintiffs. The appeal, therefore, fails and is dismissed with costs.

A. N. C. *Appeal dismissed.*

APPEAL FROM ORIGINAL CIVIL.

Before Mr. Justice Broadway and Mr. Justice Bevan-Petman.

1919

Nov. 12.

GHULAM MUHAMMAD, &c. (*Plaintiffs*) *Appellants*,

versus

Mussammat GAUHAR BIBI, &c. (*Defendants*) *Respondents*.

Civil Appeal No. 86 of 1914.

Custom (Succession)—daughter or near collaterals—Sipras of Miana Hazara, Tahsil Bhera, District Shahpur—entries in Wajib-ul-arz and Riwaj-i-am—value of—whether applicable to both self-acquired and ancestral property.

Mussammat G. B., the widow of plaintiff's uncle G. R., on 19th April 1913, made a gift of her husband's landed property in 3 villages in Tahsil Bhera, in favour of her daughter and her deceased daughter's son. The plaintiffs sue for a declaration that the gift shall not affect their reversionary right after the death or re-marriage of the widow. It was found by the High Court on appeal that some of the property was ancestral, and some was not. The entries in the *Wajib-ul-arz* of the villages concerned and in the *Riwaj-i-am* were against married daughters succeeding as heirs to their father's property.

Held, that the portions of a *Wajib-ul-arz* which refer to custom are not provisions intended to enure for the duration of the Settlement only, but are statements that a certain custom exists.

Rahiman v. *Bala* (1) and *Masta* v. *Pohlo* (2), followed.

Also that there is a certain presumption as to the correctness of such entries.

(1) 8 P. R. 1892. (2) 52 P. R 1896.