ORIGINAL CIVIL.

Before Mr. Justice Beaman.

KARL ETTLINGER (PLAINTIFF) *v.* CHAGANDAS & Co. (DEFENDANTS).* 1915. *August* 6.

The Indian Contract Act (IX of 1872), section 56—Performance of contract becoming unlawful or impossible—Legal impossibility—Physical impossibility —Commercial impossibility—Force Majeure—*Notifications under the Sea Customs Act (VIII of 1878)—Construction of contract—Charterparty—Bill of lading.*

The plaintiffs, a firm of naturalised Germans, doing business in London made a contract on the 24th of July 1914 with the defendant-firm through their London agent, by which the defendants agreed to supply the plaintiff-firm with 1,000 tons freight at 11s. 6d. per ton, the material to be carried being manganese from the Port of Bombay for Antwerp, shipment in September. On the 4th of August 1914 war broke out between Great Britain and Germany. On the 7th of August 1914, the Government of India, by a Proclamation duly published in Bombay under the Sea Customs Act prohibited the export from India of ammunition and explosives and all materials used in the manufacture thereof. Under the Sea Customs Act, the Government of India is only empowered to prohibit the export of specified articles or things, and the specification must be exact and *nominatim*. Manganese not being expressly specified in the last mentioned notification the Government of India issued on the 17th of October 1914 a further notification in supercession of the notification of the 5th of August, by which manganese was amongst other articles specifically prohibited. On the 7th of September 1914 the defendants relying on the earlier notification telegraphed to the plaintiffs that owing to *force majeure* the contract was cancelled. The plaintiffs refused to accept the cancellation and insisted upon the performance of the contract. They subsequently sued the defendants in damages in the sum of £525 or Rs. 7,937. The defendants pleaded: (1) that the export of manganese from India was prohibited by the Government of India notification of the 5th of August 1914 published in Bomday on the 7th of August 1914; (2) that the performance of the contract became impossible as no freight was procurable during the month of September from Bombay to Antwerp; (3) that it was an implied condition, and of the essence of the contract, understood by both parties to be so, that there should be freight available from Bombay to Antwerp.

Held (1) that having regard to the form of the earlier notification dated 5th of August 1914, the plaintiffs were right in contending that the defendants

* O. C. J. Suit No. 1407 of 1914.

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might have performed their part of the contract on the 7th of August 1914 without contravening any law, or being able to avoid it under section 56 of the Indian Contract Act as having been made unlawful after they had entered upon it.

(2) The performance of the contract did not become impossible within the meaning of section 56 of the Indian Contract Act, merely because frieghts from Bombay to Antwerp were not procurable from a commercial point of view, when the defendants repudiated the contract.

(3) That no implied condition could be read into the contract that it was agreed by the parties that normal freight conditions should continue.

(4) That the defendants had committed a technical breach of contract, as the plaintiffs had not proved that they had any intention of shipping 1,000 tons of manganese to Antwerp in September, nor had they suffered any loss on account of non-shipment.

Before a contract can be broken on the ground that the acts to be done have become impossible the Courts must be very sure that they are physically impossible. Physical impossibility must go much further than mere difficulty or the need to pay exorbitant prices.

The latter part of section 56 deals with cases where the acts to be done were at the time the contract was made lawful but a legal prohibition has supervened after the making, but before the performance of the contract, and extends to such cases the general principle of law applicable to all contracts and expressed in section 23.

THIS was a suit to recover damages on a breach of contract. The material facts are fully set out in the judgment of the learned Judge.

Weldon with *Campbell*, for the plaintiffs.

Desai with *Jinnah*, for the defendants.

BEAMAN, J. :—The plaintiffs, Ettlinger & Co., a firm of naturalized Germans, doing business in London, made a contract on the 24th July 1914, with the defendant-firm, through their London agent, Smith, by which the defendants agreed to supply the plaintiff-firm with 1,000 tons freight at 11*s.* 6*d.* per ton, the material to be carried being manganese from the Port of Bombay for Antwerp, shipment in September. On the 7th of

September 1914, the defendants telegraphed to the plaintiffs that owing to *force majeure* the contract was cancelled. The plaintiffs refused to accept the cancellation and hold the defendants to account for damages.

It is contended on behalf of the defendants that they are absolved from performance of the contract on three grounds: (1) that the export of manganese from India was prohibited by the Government of India Notification of the 5th of August 1914, published in Bombay on the 7th of August 1914; (2) that the performance of the contract became impossible as no freight was procurable during the month of September from Bombay to Antwerp; (3) that it was an implied condition, and of the essence of the contract, understood by both parties to be so that there should be freight available from Bombay to Antwerp.

With the assistance of the learned counsel on both sides I have been able to take a fairly comprehensive survey of this field of law brought up-to-date in the recent work of Mr. Trotter. It is clear that the law of India is very different from what was the law of England on the point of impossibility of performance. How far the law of England has, in recent times, been modified and brought more closely into accord with the Indian law, as expressed in section 56 of the Indian Contract Act, would be a matter of long, difficult and delicate critical analysis. In this country, whatever may have been the law of England, and whatever may now be the opinion of eminent Judges and Jurists in that country, it cannot be denied that after the contract has been made to do a certain act or acts, and those acts become impossible, the contract is void. Section 56 deals with two grounds upon which executory contracts become absolutely void: the first of these is that which I have just stated, namely, that the act to be done

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should, after the contract has been made, become impossible. The second is that the acts necessary to be done in order to carry out the contract should, after the contract has been made, and through no fault in the parties to that contract, become unlawful. The latter part of the section deals with cases where the acts to be done were at the time the contract was made lawful but a legal prohibition has supervened after the making, but before the performance of the contract, and extends to such cases the general principle of law applicable to all contracts and expressed in section 23.

The question, then, which I have to answer is really a question of comparative simplicity, whether any act which the defendant firm undertook to do under the contract of the 24th July became impossible before the month of September, or, at any rate, before the repudiation of the contract by the defendants on the 7th September; and (2) whether any act which the defendants agreed to do under that contract became, without any fault on the defendants' part, unlawful, before the time of performance.

In dealing with the question of impossibility, it has been difficult to keep out of sight the many refined distinctions and definitions drawn by some of our greatest English Judges in decisions through which the law of England is slowly built up and developed. But what is interesting, and to be noted, as the great distinction originally existing between the English law and the Indian law laid down in the Contract Act is that in the former from the time of the case of *Paradine* v. *Jane*[1], decided in the year 1647, until modifications and enlargements began to be introduced in the second part of the 19th century, no attention whatever appears to have been paid by the English Courts to the

[1] (1647) Al. 26.

impossibility or otherwise of the performance of obligations voluntarily undertaken. The only distinction originally to be found is between obligations imposed on parties by law and obligations imposed upon them by their own voluntary acts. In the former case the obligation was dissolved if the performance of the acts became impossible, but in the latter case not so. Thus confined rigidly within very narrow limits and governed by a single strict principle, the English law appears to me to have been intelligible and consistent, whatever may be thought of its reasonableness, up to such time when certain wide extensions and developments were given to it by the introduction of the numerous considerations which, notwithstanding the ingenuity of the Courts in seeking to apply them, do not appear to me to have succeeded in establishing any clear-cut and definite principle distinct from that which had theretofore been the law of the country. Thus in the case of *Taylor* v. *Caldwell*[1] we first come in sight of what, no doubt, underlies section 56 of the Indian Contract Act. But the reasoning upon which that decision is based might, for all that I can see to the contrary, have been just as well and logically applied in all the earlier cases in which, as I have said, impossibility was never allowed as an excuse for non-performance of an absolute contract. The very much later and more subtle extensions given to the gradually developing doctrine in the group of cases called the Coronation cases still appear to me to require very critical examination, and to leave the law in England open, in large measure, to the application by Judges of what they may consider in the circumstances of each case to be its own justice. The principle indeed upon which *Krell* v. *Henry*[2] was decided may be thought to have been anticipated by Sir Charles

(1) (1863) 3 B & S. 826 : 11 W. R. 726. (2) [1903] 2 K. B. 740.

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Sargent in the case of *Goculdas Madhavji* v. *Narsu Yenkuji*[1], where the question was whether a contract ought to be enforced against a defendant who refused to perform it, because he had been unable to obtain a license authorising him to carry on operations, profit from which had constituted the main, if not the only, motive of his contract. Such a decision is clearly not referable to any ground of impossibility or unlawfulness, or to any principle up to that time recognized either in the English or the Indian Courts. The case of *Taylor* v. *Caldwell*[2] rests no doubt indirectly upon considerations of impossibility in this sense, that where the subject of a contract has been destroyed before the time of the fulfilment of the contract, the Courts held that the party injured could not recover.

But in dealing with a case of this kind, I prefer to keep, as closely as I can, to the language of the Statute law in the first place, and having exhausted its application, then and then only, if necessary, to turn to the consideration of other materials which might possibly be introduced, but in a different way, and for altogether different purposes, as a means of adjusting the rights of the parties in reference to particular contractual relations, rather than as an absolute ground of avoiding the whole contract.

Looking, then, to the terms of the contract with which I have to deal, I have first to observe that it appears to incorporate by reference in the original contract a bill of lading, which is Exhibit H in this case, on certain terms of which the plaintiffs rely. That bill of lading appears to be in common form and excepts the usual perils of the sea, pirates, robbers, restraint of princes and the like, and expressly contemplates the existence of a state of war. Now, on the happening of

(1) (1889) 13 Bom. 630. (2) (1863) 3 B. & S. 826 : 11 W. R. 726.

any of these contingencies after the goods had been accepted and the bill of lading signed, the master is thereupon authorised to abandon the destined port of disembarkation and deliver the goods at the nearest safe port. And the contention of the plaintiffs has been that the conditions laid down in this bill of lading must be extended to and made to cover the original contract, so that, should it have been found impossible to obtain freight from Bombay to Antwerp in the month of September, the defendants were still bound to obtain freight for the plaintiffs to the nearest safe port. I cannot accede to that interpretation of the contract and the annexed bill of lading. I think it could easily be pushed to absurdity. The contract is a contract for a thousand tons of freight from Bombay for Antwerp and supposing when the time of fulfilment had arrived every port in Europe had been blockaded, could it be seriously contended that the defendants were still under an obligation to obtain freight from Bombay to Suez, which would, then, I suppose, have been the nearest safe port? Would that have been of any advantage to the plaintiffs, and would they, on their part, have admitted that as a satisfactory discharge of the defendants' obligations incurred under the contract? The bill of lading has nothing to do with the events or conditions before the goods are received on board. What the defendants bound themselves to do was to find freight from Bombay to Antwerp. That being found, the master would have signed the bills of lading, certainly not primarily in the interest of the plaintiffs' firm, but to protect his own vessel from unnecessary risks. He would then have been authorised to substitute for Antwerp should it have become, owing to war conditions or the restraints of princes or other like circumstances, inaccessible, and to discharge his goods at the nearest safe port, and this is obviously

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necessary, lest he might, once having loaded his vessel and embarked on a voyage, find himself under the obligation of retaining the goods on board at his own risk and peril until the conditions which render the port of destination inaccessible had been removed. So that I do not think that the legal rights of the parties are in any way affected or modified by the addition of the bill of lading or its incorporation, if it has been incorporated, by reference in the original contract.

I am, then, to see whether this contract, when it was made, became unlawful through any fault of the plaintiffs or the defendants. The object of the contract, to use the language of section 23, was the shipment of 1,000 tons of manganese ore to Antwerp. On the 7th of August 1914, three days after war had broken out between His Britannic Majesty and the German Austrian Empire, the Government of India Proclamation was duly published in Bombay, under the Sea Customs Act, prohibiting the export from India of various articles. Amongst other things the export of ammunition and explosives, and all materials used in the manufacture thereof was prohibited. Now it cannot be denied that manganese is a substance which might be used in the manufacture of ammunition. It is true that no evidence has been led in this Court to prove that fact, and it is not a fact, I suppose, of which a Court can take judicial notice. But were that the only answer, I do not think that I should be disposed to give too much weight to the technicality. The plaintiffs have a better answer. Under the Sea Customs Act, the Government is only empowered to prohibit the export of specified articles or things, and I take that to mean that the specification must be exact and *nominatim*. It will not do to lump perhaps a thousand commodities *ejusdem generis* under a vague description. This difficulty was doubtless felt by the Government,

since a later Notification of the 17th of October was issued in supercession of the Notification of the 5th of August, and there we find the export of manganese specifically prohibited. It is also in evidence here that whether it was or was not the intention of Government to prohibit the export of manganese, that had not been actually done by the first Notification, for the official returns of the Chamber of Commerce show that considerable quantities of manganese were exported in August and September. Had the Notification of the 5th of August specifically mentioned manganese, and prohibited its export, then I should have entertained no doubt but that the contract between the plaintiffs and the defendants had become unlawful. It was contended on behalf of the plaintiffs that this would not necessarily follow inasmuch as all that the defendants contracted to do was to supply freight to the extent of a thousand tons for the plaintiffs, and that it made no difference to the defendants to what use that tonnage was put. But the terms of the contract are quite explicit. The object was to export 1,000 tons of manganese, and if that was unlawful, then I should not hesitate to hold that this contract being inseparable from, and ancillary to, that object, it would be tainted with the same illegality. But since the Notifications of August and October took the forms they did, I think that the plaintiffs are right in contending that at all times material to this contract the defendants might have performed their part of it without contravening any law, or being able to avoid it under section 56 of the Indian Contract Act as having been made unlawful after they had entered upon it.

The third ground I may dismiss in a few words. It does not appear to me that there is any recognized doctrine of law which goes the length the defendants would wish to press this contention. No doubt it

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would ordinarily be the understanding of parties, particularly those engaged in buying and selling freight, that ships should be available. But unless all the mercantile marine in the world had disappeared, we must suppose that ships were available, and what is really meant by the defendants is that it was impliedly agreed upon by the parties that normal freight conditions should continue. No Court has ever read such an implication as that, as far as I know, into any contract. It could not, I think, even be said that any Court has yet held contracts made in times of peace necessarily implied the continuance of peace, unless the outbreak of war and its attendant conditions made the performance of the contract impossible or destroyed the subject-matter of it. I have nothing of that kind to deal with here.

This brings me to the main ground of defence, the second, whether the fulfilment of this contract became impossible in the month of September. It appears to me that it hardly lies in the mouth of the defendants, who definitely repudiated the contract as early as the 7th of September, to contend that they were justified in doing so because they had certain information that it had then become finally impossible for them to fulfil it. It is to be remembered that the breaking of this contract was of the 7th of September when the defendants telegraphed to their agent in London that they had cancelled the contract. Doubtless they had made inquiries for freight from Bombay to Antwerp, and had received uniform replies that no freights were procurable. They say that they had even offered as high as 17*s.* 6*d.* per ton, still there were no takers. But before a contract can be broken on the ground that the acts to be done have become impossible, the Courts must be very sure that they are physically impossible. What was called "legal impossibility" really belongs to the

other part of section 56, and, I think, I have said enough upon that head. But physical impossibility must go much further than mere difficulty or the need to pay exorbitant prices. I suppose it can hardly be denied that ships might have been procured throughout the month of September to carry freight to Antwerp, if a sufficiently high price had been offered, or to put it at the highest, I suppose a ship could have been bought and despatched to Antwerp in the month of September. It should be borne in mind that no restraints of princes prevented sea communication with Antwerp throughout the month of September. Although war conditions prevailed on land and by sea, the commerce of the sea under the English flag had not then been, and never has since been, interrupted. No blockade of the port of Antwerp had then, or has ever since, unless now we can consider that it has been blockaded by the Allies, been established. But doubtless after the town had fallen into the hands of the Germans it would have been insanity to despatch British ships and British cargo to it. But who would have foreseen in the month of September that Antwerp was to be captured by the Germans on the 9th of October, and how can it be said that on the 7th of September it had become a physical impossibility to obtain freight, no matter what price was offered for it, from Bombay to Antwerp? What really happened was that freights rushed up, and that probably it would have been commercially impossible for the defendants to procure freight of a thousand tons of manganese from Bombay to Antwerp at any time during the month of September. Even in London, according to the correspondence in this case, the best the plaintiffs could do was to obtain indications that freights might be had for anything between 21 and 23 shillings per ton for very much larger consignments than 1,000 tons, and it is a fact beyond dispute that no steamer sailed

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from Bombay to Antwerp during the month of September. So that upon all grounds of common sense and reason the defendants might well be exonerated from having played the plaintiffs false or in any way treated them unfairly. It only needs to read the correspondence to understand the true nature of this litigation. The plaintiffs receiving the defendants' telegram on the 7th of September immediately consult their solicitors, and are told that from a legal point of view they are in a very strong position, and that having regard to the manner in which freights were going up everywhere they had only to insist upon the performance of the contract to obtain a very handsome sum from the defendants. I have not the least doubt that the plaintiffs had not the slightest intention or desire to ship this thousand tons of manganese to Antwerp in September, and I doubt very much, had the defendants been a little more discreet and held their hands, whether the plaintiffs themselves would not have been the first to suggest the cancellation of the contract. Notwithstanding what has been suggested here on their behalf, it appears to me that the whole suit has been a very clever dodge in order to bleed the detendants upon an inflated claim for damages, whereas in fact the plaintiffs probably, I speak merely upon the case as far as it has gone, have not suffered any damage whatever, and never thought, after the war broke out, of sending their manganese to Antwerp. Technically, however, such evidence as has been led before me shows that they had 17,000 tons of manganese in Bombay, and, therefore, had the defendants offered them a thousand tons freight to Antwerp in September they were in a position to load the stuff. I need only call attention to the terms of their letter of the 18th of September to support what I have said as to the real meaning of this litigation. If freights had gone down, as they had

suddenly gone up, we should certainly have heard nothing whatever of this grievance. It is not that the plaintiffs had really suffered any loss through manganese not being shipped to Antwerp, but that because there has been a technical breach of contract on the defendants' part they see their way, by claiming differences, to pocketing between £500 and £600 that this litigation has been pressed, still the law is the law, and I have little to do with the mere motives of those who are cunning enough and well advised enough to take advantage of it. I cannot doubt but that there has been a technical breach of contract in this case, and that the defendants are not justified by section 56 of the Indian Contract Act. Neither do I doubt that the plaintiffs had not really sustained any damages.

[His Lordship then proceeded with the trial further, and awarded to the plaintiffs one anna as damages. No order was made as to costs.]

Attorneys for the plaintiff: Messrs. *Crawford, Brown & Co.*

Attorneys for the defendants : Messrs. *Payne & Co.*

Suit decreed.

G. G. N.

APPELLATE CIVIL.

Before Mr. Justice Batchelor and Mr. Justice Hayward.

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October 11.

BHASKAR GOPAL AND ANOTHER (ORIGINAL DEFENDANTS), APPELLANTS *v.* PADMAN HIRA CHOWDHARI AND ANOTHER (HEIRS OF THE ORIGINAL PLAINTIFF), RESPONDENTS.*

Transfer of Property Act (IV of 1882), section 54—Sale deed of property in possession of tenants—Deed should be registered.

* Second Appeal No. 177 of 1914.