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ORIGINAL CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Hayward.

VALLI MAHOMED ABU (APPELLANT AND DEFENDANT) v. BERTHOLD REIF AND ANOTHER (RESPONDENTS AND PLAINTIFFS).^o

1919.

May 27.

Debtor and creditor—Creditor, an alien enemy firm—Interest on debt—Debtor not entitled to claim suspension of interest from the date of outbreak of war to the date when the enemy firm obtains a license to trade.

Where a person indebted to an alien enemy had paid interest in respect of a transaction entered into before the outbreak of hostilities and sought a refund of the amount paid for the period between the outbreak of hostilities and the date of a license to trade obtained by the enemy firm,

Held, following the opinion expressed in *Hugh Stevenson and Sons v. Aktiengesellschaft Fur Cartonmagen-Industrie*⁽¹⁾, that he was not entitled to such refund, as there was no suspension of interest in respect of such transactions during that period.

SUIT on promissory notes.

The plaintiffs were a firm doing business in Hamburg and Bombay in the name of Buive and Reif of whom the former was an Austrian and the latter, a naturalised Englishman. The defendant was a trader in Bombay who used to indent piece-goods from Bradford and other cities through the plaintiffs' firm in Bombay.

^o O. C. J. Suit No. 703 of 1916 : Appeal No. 17 of 1918.

⁽¹⁾ [1918] A. C. 239.

1919.

VALLI
MAHOMED
v.
BERTHOLD
REIF.

The partnership between the plaintiffs was dissolved on the 10th of August 1914 by the outbreak of war between Great Britain and Austria ; but the plaintiff Reif being a naturalised British subject his representative in Bombay was granted a license on the 9th February 1915 to conclude the firm's indent transactions.

On the 1st of December 1916 the plaintiff's firm filed two suits through their Official Liquidator against the defendant in the Court of Small Causes, Bombay, on two promissory notes passed by the defendant for the balance of the amount of invoice value of the goods supplied to the defendant. Both the suits were transferred to the High Court for trial.

The defendant in his written statement contended *inter alia* that the said promissory notes were not passed for moneys lent and advanced to him by the plaintiffs but were signed in favour of the plaintiffs by way of collateral security in pursuance of the practice prevailing in the course of dealings with the plaintiffs through whom he used to indent for goods from time to time : that the defendant had not kept separate accounts of the indents but had kept one general account of the dealings with the plaintiffs ; that the account in respect of the said dealings had not been made up since 1909 and that if a proper account was taken a large sum would be found due to the defendant by the plaintiffs.

By consent of parties, both the suits were referred to the commissioner for taking accounts from 1909 up to the date of the decretal order of reference. The commissioner certified and reported that there was due from the defendant to the plaintiffs the sum of Rs. 1,983-14-3 for principal and interest up to the 30th of October 1917, the date of the consent decretal order of reference. The defendant took exceptions to the commissioner's report, contending *inter alia* that so much

of the interest as related to the period between the date of the declaration of war and 27th February 1916, the date of the letter from the Controller of the plaintiffs' firm to the defendant demanding payment was not chargeable to the defendant.

1919.

VALLI
MAHOMED
v.
BERTHOLD
REIF.

His Lordship, Beaman J., held that the defendant was entitled in the account to deduct any interest paid to the plaintiffs between the 10th of August 1914 and the 9th of February 1915, the date on which the representative of the enemy firm, the plaintiffs, first obtained a license to trade.

The defendant appealed and the plaintiffs filed in cross-objections.

Taraporevala with *Desai*, for the appellant.

Coltman with *R. D. N. Wadia*, for the respondents.

The following authorities were referred to in argument:—*Padgett v. Jamshetji Hormusji*⁽¹⁾; *Du-Belloix v. Lord Waterpark*⁽²⁾; *Hoare v. Allen*⁽³⁾; *Foxcraft v. Nagle*⁽⁴⁾; *Brown v. Hiatts*⁽⁵⁾; *Hugh Stevenson and Sons v. Aktiengesellschaft Fur Cartonnagen-Industrie*⁽⁶⁾; *United States v. Grossmayer*⁽⁷⁾; *Ward v. Smith*⁽⁸⁾; *Wolff v. Oxholm*⁽⁹⁾ and *Distington Hematite Iron Company, Limited v. Posschl & Co.*⁽¹⁰⁾

SCOTT, C. J.:—The only question to be decided on the cross-objection is whether the learned Judge in the lower Court was right in holding that the defendant was entitled in the account between the parties to a refund of any interest paid between the 10th of August 1914 and the 9th February 1915. The former date is

(1) (1916) 41 Bom. 390.

(2) (1822) 1 D. & R. 16.

(3) (1789) 2 Dallas 102.

(4) (1791) 2 Dallas 132.

(5) (1872) 15 Wall. 177 at p. 185.

(6) [1918] A. C. 239 at p. 245.

(7) (1869) 9 Wall. 72.

(8) (1868) 7 Wall. 447 at p. 452.

(9) (1817) 6 M. & S. 92.

(10) [1916] 1 K. B. 811.

1919.

VALLI
MAHOMED
v.
BERTHOLD
REIF.

taken as the date of the outbreak of war between England and Austria and the latter is the date when the first license was granted to the plaintiffs' representative in Bombay to conclude their indent transactions. These transactions were—so far as is indicated by the specimen indent put in—indents sent from Bombay to Bradford for goods from the plaintiffs' firm at that place. One of the plaintiffs, Reif, was a naturalised British subject. The partnership of the plaintiffs being between an Austrian and a naturalised Englishman was dissolved by the outbreak of war but the plaintiff Reif was granted a license under the proclamation of the 9th September 1914 in England.

Whether any of the contracts to which the accounts between the parties relate were illegal having regard to the terms of this Proclamation has not been established and the only question for consideration is, as above stated, whether the obligation to pay interest was between certain dates suspended.

The learned Judge followed to a limited extent a previous judgment of Macleod J., who thought the plaintiffs' Bombay firm was a branch of their Hamburg firm, and held there was a suspension of the obligation to pay interest; he was of opinion that if the defendant had paid money due to the firm in Bombay he would not have been doing anything which involved a penalty but was entitled to withhold it until satisfied that it would be retained in safe custody till the suspension of hostilities. In so holding he applied certain American cases of which *Brown v. Hiatts*⁽¹⁾, a decision of the Supreme Court of United States, is the weightiest. These decisions have, however, been questioned in *Hugh Stevenson and Sons v. Aktiengesellschaft Fur Carton-nagen-Industrie*⁽²⁾ by several of the Law Lords: see pp. 255, 259.

(1) (1872) 15 Wall. 177.

(2) [1918] A. C. 239 at p. 245r

1919.

 VALLI
 MAHOMED
 v.
 BERTHOLD
 REIF.

Moreover, in the Supreme Court of the United States it has been held that where the debtor resides in the same country as the creditor or his duly authorised agent, provided such agent was appointed before the war, interest on a debt is not suspended by the war: see *United States v. Grossmayer*⁽¹⁾ and *Ward v. Smith*⁽²⁾. In the present case the branch firm of the plaintiffs to whose representative the defendant paid interest was established long before the war.

We think the safest course is in the circumstances to give effect to the opinion indicated by the Lord-Chancellor in *Hugh Stevenson and Sons' case*⁽³⁾, that it is difficult to see on what principle interest (particularly where, as here, it is stipulated for by the contract) is to be forfeited if private property is to be respected.

In the present case it may be that even according to the proposition laid down by Macleod J. the money paid was not wrongly paid and therefore could not be recovered back.

We allow the cross-objection and delete the clause of the decree which varies the commissioner's report.

The result is that the appeal is dismissed with costs, and the cross-objection is allowed with costs.

Solicitor for appellants: Mr. M. B. Chothia.

Solicitors for respondents: Messrs. Little & Co.

Appeal dismissed and cross-objection allowed.

G. G. N.

(1) (1869) 9 Wall. 72.

(2) (1868) 7 Wall. 447 at p. 452.

(3) [1918] A.C. 239 at p. 245.