PRIVY COUNCIL

Govindram Seksaria

Vs.

Edward Radbone

P.C.A.No.78 of 1946
(Lord Thankerton, CJ. Lord Du Parcq, Lord Oaksey Lord Morton of Henryton and Mr.M.R. Jayakar JJ.)

14.10.1947

JUDGMENT

LORD MORTON OF HENRYTON J.

1. This is an appeal from a decree of the High Court of Judicature at Bombay, dated 4.12.1944, made in its appellate jurisdiction, setting aside the decree of that Court dated 10.4.1944, made in its original jurisdiction, and giving judgment for the respondent for rs. 99,043. The history of the case begins with a contract made on 9.9.1938, between the first appellants of the one part and Francke Werke A.G. of Bremen, Germany, and Hansa (India) Trading Company Limited of Bombay {therein and hereinafter referred to as "the sellers") of the other part. By the contract the first appellants agreed to buy, and the Sellers agreed to sell, certain machinery with all the necessary accessories, as specified in sch. A to the contract, for a complete oil refining and hydrogenating plant.

2. The relevant terms of the contract may be summarised as follows:

> (i) By Clause 1 it was provided that the delivery by the sellers was to consist of the machinery, etc., specified in sch. A. The sellers were also to supply free of charge complete sets of drawings showing the arrangement in detail of the buildings and execution drawings of foundations.
> (ii) By clause 2 the total price for the plant as specified in sch. A was to be 177,500 Reichmarks, delivered c.i.f. Karachi Port. This price was to include all export, packing, forwarding and insurance charges. By subsequent written agreement between the parties, it was agreed that delivery should be c.i.f. Bombay.

(iii) Clause 3 contained the terms of payment which was to be made by instalments as follows:

(a) 25 per cent. of the total price (i. e. 44,375 Reichmarks) on the signing of the contract.

(b) 25 per cent. of the value of each consignment against shipping documents the total being 44,375 Reichmarks.

(c) 25 per cent. of the total value of the order after completion of the erection of the whole plant, on the plant being found mechanically satisfactory on trial.

(d) 25 per cent. of the total value of the order 4 months after the payment under (c). Payment was to be made in free Reichmarks and the rate of exchange was fixed at 12.40 Reichmarks to the pound sterling.

(iv) Clause 6 provided that the sellers should send a qualified erector for the erection of the plant.

Clause 7 provided that the sellers should despatch their Chief Chemist to start the plant, prove to the first appellants that the guarantees given by the sellers were satisfied, and train the staff in the handling of the plant. The first appellants were to pay, in respect of the services of the erector and of the Chief Chemist, agreed amounts over and above the price for the plant specified in Clause 2 of the contract.

(v) Clause 9 provided that the sellers were to be responsible for the due fulfilment of all the guarantees of the manufactured articles and the quality of the product as given in Schedule "b" to the contract.

(vi) Schedule A set out the specification of the plant. This specification, as subsequently revised by the parties, contained 64 items. Schedule "B" contained guarantees on three matters:

(a) That the plant would be supplied complete, except for certain items specified in Schedule C, which though agreed to be necessary to make the plant complete were not to be supplied by the sellers.

(b) That, the first appellants having guaranteed that their existing refinery produced 12 tons of refined oil per 24 hours, this refinery together with the plant supplied by the sellers would produce 25 tons of faultless hydrogenated product with an average melting point of 430C. within 24 hours. The raw materials to be used for this purpose were specified in the guarantee.

(c) That the hydrogenated product produced in this plant should be of prime white colour and completely tasteless and odourless and should not develop any smell whatsoever even after storing it in sealed containers for 6 months.

3. The contract was subsequently varied in certain other respects by correspondence

between the parties, but no one of such variations is relevant for the purposes of this appeal.

4. On 1.1.1939, the first appellants paid the first installment of the price, amounting to 44,375 Reichmarks which was equivalent to rs. 50,212. By an agreement dated 27.7.1939, the first appellants agreed to sell to the second appellants all the right, title and interest of the first appellants in the plant and accessories comprised in the contract.

5. At the end of July or the beginning of August, 1939, delivery was made in Bombay of the greater part of the machinery comprised in the contract. The invoice value of this delivery was 158,000 Reichmarks, which represents approximately nine - tenths of the total contract price. This consignment was accepted by the appellants without complaint and was taken by them to the place where the factory was to be erected. The second appellants, in accordance with clause 3 (b) of the contract set out above, paid to the sellers in respect of this delivery the sum of 39,500 Reichmarks, representing 25 per cent. of the 158,000 Reichmarks. 39,500 Reichmarks was the equivalent of Rs. 45,798. This payment and the payment made on 1st January together total 83,875 Reichmarks, or Rs. 96,010. Against this total payment the appellants had received goods of the value, as the respondent alleges, of 158,000 Reichmarks, the equivalent of Rs. 183,200. The appellants had thus, as the respondent submits, at this stage received under the contract an "advantage" to the value of Rs. 87,190 being the difference between the value of the goods received by them under the contract and the amount which had been paid by them to the sellers.

6. Two further small consignments of machinery were despatched by the sellers from Germany, but these consignments had not arrived in India on 3.9.1939, when war was declared between the United Kingdom and Germany. The ships carrying these consignments did not reach India and no further deliveries under the contract were made. Section 65, Contract Act, provides as follows:

> "When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it or to make compensation for it, to the person from whom he received it."

7. Their Lordships agree with the following comment of Stone C. J., upon this section:

> "Compensation for an advantage may appear to be a contradiction in terms, since compensation connotes a measure of loss or damage and not the value of

an advantage. It should be noted that in Section 56 the expression used is 'compensation for any loss' and that under Section 64 the party rescinding the contract is to restore any 'benefit.' Under Section 65 the alternatives are to restore any advantage 'or to make compensation for it to the person from whom he received it.' This must mean valuing or quantifying in money the advantage retained, if retained it be."

8. It is common ground between the parties that on the outbreak of war the contract in question "became void" within the meaning of Section 65. It is also common ground that by virtue of the Enemy Property (Custody and Registration Order), 1939, the property and assets of the sellers, both of whom were enemy firms within the definitions in Rule 103, Defence of India Rules, became vested in the respondent (hereafter called "the Custodian") as the Custodian of Enemy Property for British India.

9. On and after 14.9.1939, certain correspondence took place between the second appellants on the one hand and the custodian and certain other parties on the other hand. Reference must be made later to this correspondence. On 7.8.1942, the custodian made a formal claim against the first and second appellants for payment of the sum of Rs. 87,190 within eight days. No such payment was made, and the custodian began the action out of which this appeal arises by his plaint dated 29.8.1942. It is convenient to quote para 20 of the plaint:

"20. The plaintiff says that the defendants have admittedly received goods and machinery worth 1,58,000 Reichmarks equivalent to Rs. 1,83,200, which they have taken delivery of, and not only have they not offered at any time to return the same to the Sellers or to the plaintiff but they have actually used the same in erecting a plant and have been working the same. The plaintiff submits that the defendants are bound to pay to the plaintiff the value thereof less the said sum of Reichmarks 83,875 equivalent to Rs. 96,009 - 4 - 1 which they have already paid to the Sellers in terms of the contract as stated hereinabove. The plaintiff estimates the advantage received by the defendants under the circumstances aforesaid at Rs. 87,190 being the difference between the value of the machinery supplied to the defendants, viz. Reich - marks 1,58,000 equivalent to Rs. 183,200, less the said sum of Reichmarks 83,875 equivalent to Rs. 96,009 - 4 - 1 which the defendants have paid to the sellers in terms of the said contract. The plaintiff submits that the defendants have in the events that have happened become liable to pay to him the said amount, either as compensation for the said

advantage or otherwise and claims the same accordingly from the defendants."

The custodian claimed the sum of Rs. 87,190 with interest and costs.

10. By their written statement the first and second appellants contested this claim. They also put forward a counterclaim which was abandoned by them at the trial of the action. Paragraph 15 of the written statement is as follows:

> "15. With reference to para. 20 of the plaint the defendants deny that they have received goods and machinery worth Rs. 1,83,200. Such parts of the goods and machinery as were delivered were valueless except as scrap material without the parts which remained to be delivered. Further the price contracted for includes the services of an expert erector and of a chief chemist. In order to make use of the goods and machinery delivered the defendants were compelled to procure parts to substitute for the missing parts and were put to an expense of Rs. 1,27,746. Many of the said parts so procured were inferior and some second hand and the machinery and plant as ultimately installed is of less value to the extent of Rs. 40,000 than the plant to be supplied and erected under the contract. The defendants say that if they derived any advantage from the goods and machinery delivered beyond the scrap value which was Rs. 10,000 such advantage was not of greater value than Rs. 23,113 whereas they have paid Rs. 96,009 - 4 - 1. The plaintiff has consequently received an advantage to the extent of Rs. 72,896 - 4 - 1 particulars of which sum are hereto annexed and marked No. I."

11. Blagden J. dismissed the suit and the counter claim and the custodian appealed from the dismissal of his suit. The High Court, in its Appellate Jurisdiction (Stone C.J. and Kania J.) allowed the appeal and gave judgment for the custodian for the sum claimed with interest. From that decision the appellants appeal.

12. Apart from the terms of certain documents, which will be considered later, their Lordships feel no doubt that the decision of Blagden J., was correct. The result of Section 65 Contract Act, was that, as from 3.9.1939, each of the parties became bound to restore to the other any advantage which the restoring party had received under the contract of sale. In their Lordships' view, the custodian could not recover any sum in his action, as pleaded, unless he proved that the value of the "advantage" which the appellants had received under the contract, i. e., of the machinery which had been delivered to them, was greater than the sum of 83,375 Reichmarks, that sum being admittedly an "advantage" which the custodian had received under the contract. Moreover, in their Lordships' view, the value of the machinery which was delivered to

the appellants, for the purposes of Section 65 of the Act, must be taken to be the value of that machinery in India immediately after the contract had become void by reason of Section 65. In estimating that value, a Court would have to take into account the fact that the balance of the machinery contracted to be supplied could not be supplied from Germany, and the fact that the appellants could no longer have the services of a qualified erector sent from Germany and of the sellers' Chief Chemist. Further, the Court would have to consider the question whether or not the appellants were able to procure from other sources the balance of the machinery contracted to be sent from Germany, and, if so, at what price and within what period of time, and what quantity and quality of products could be produced by the plant so assembled.

13. In their Lordships' view the custodian failed to prove before Blagden J. that the machinery delivered was worth more than 83,375 Reichmarks. The only witness called on behalf of the custodian was plainly not qualified by his experience to give expert evidence on the relevant question, and the learned Judge appears to have attached no importance to his evidence.

14. The appellants also called one witness, who gave evidence to the effect that the appellants bought the missing parts of the machinery, and that their factory "was made to run continuously on 27.7.1941." He offered to produce a statement showing how the machinery worked in 1941 and 1942 but the Advocate - General, who appeared for the custodian, objected to the production of this statement and it was never in fact produced. At the conclusion of his judgment Blagden J. said :

> "The fact is that I have no satisfactory evidence in the present case that the defendants - purchasers or either of them have received an advantage under the contract which became void by the start of this war. They might have or might not. For the price they paid they got part of what they contracted for. Whether on the whole they put into their pockets more than they paid for I think it is impossible to say. But if it were necessary for me to do so on this evidence I should be inclined to think that they did not, but it is sufficient to say that on the evidence in this case it is not proved that they have."

Their Lordships read this passage as meaning that in the view of the trial Judge the custodian had failed to prove that the advantage which the appellants had received under the contract of sale was of a greater value than 83,875 Reichmarks. With this view they agree.

15. It remains, however, to consider the effect of certain documents to which the

appellate Court attached great importance. The first of them is a letter of 14.9.1939, from the second appellants to the Deputy Controller of Enemy Firms. In that letter the writers refer to the receipt of "machineries worth R. M. K.. 158,000" but in their Lordships' view this phrase was merely a reference to the invoice price of the machinery so far delivered under the contract. Having regard to the terms of this letter as a whole, no part of it can fairly be construed as an admission that the machinery delivered was actually worth that sum, in the hands of the appellants, after the contract had become void and delivery of the balance of the machinery from Germany had become impossible. On 8.11.1939, the second appellants wrote:

> "As you are aware there is a regular agreement between us by which you have first to fulfil certain guarantees before any further payments are made to you. These further payments have also been guaranteed by us through the Netherlands Trading Society and unless and until these guarantees are fulfilled by you, we do not see how you can make any claim on us for any further payments. Please also note that owing to the non - supply of machineries from your side and non - fulfilment of the terms of our agreement by you, we shall be put to great loss and damage for which our claim is outstanding against. The machineries already supplied to us are of no more use to us than scrap iron in the absence of the remaining machineries and of their erection and commercial working under your guarantees. Please, therefore, take immediate steps to supply us the remaining machineries and fulfil all the guarantees under the agreement dated 9.9.1938."

16. At this time neither party seems to have realised the effect of Section 65 Contract Act, but it is to be noted that even at this early stage the appellants were raising the vital point as to the value of the machinery on their hands "in the absence of the remaining machineries and of their erection and commercial working under your guarantees." The same point is raised, in more detail, in a letter of 6.4.1940 from the appellants to the custodian. A form subsequently filled up by the second appellants, which is relied upon by the appellate Court as an admission, was expressed to be

> "subject to the terms and conditions of agreement dated 9.9.1938, and to the details given and claims made by us in our letters 538 of 14.9.1939, and 321 of 6.4.1940, addressed by us to you and is without prejudice to our counter claims for loss and damage caused to us by non - fulfilment of the guarantees given by Hansa (India) Trading Co., Ltd., in the agreement dated 9 - 9 1938."

17. In these circumstances their Lordships can attach no importance to this form as an

admission, nor can they find any other document which constitutes an admission of the vital fact which had to be proved by the custodian in order to achieve success in his action against the appellants. As this fact was not established, either by the evidence or by admission, it follows that the decision of Blagden J. was right.

18. For these reasons, their Lordships will humbly advise His Majesty that this appeal should be allowed and the decree of Blagden J. should be restored. The custodian (respondent) must pay the appellants' costs here and in the Appellate Court.

Appeal allowed.