BOMBAY HIGH COURT

Wolf and Sons

Vs

Dadiba Khimji

(Heaton, C.J. Marten, J.)

31.07.1919

JUDGMENT

Marten, J.

1. This is an appeal from the judgment of Mr. Justice Macleod of the 12th December 1918 dismissing the plaintiffs' claim in this suit and allowing the defendants' counter-claim. On the figures since agreed, the amount of the claim is Rs. 69,467-9-0 representing the nett proceeds of sale of certain cotton blankets. The amount of the counterclaim is Rs. 58,440-9-0 representing part of the nett proceeds of sale of certain cotton bales. The aggregate amount in dispute is therefore Rs. 1,27,908. This sum represents the amount alleged to have been owing to the defendants on the security of the blankets and bales, which were pledged to them for differences on certain cotton contracts. The plaintiffs say these pledges and contracts became or were illegal and void, having regard to the outbreak of war at 11 P.M. on 4th August 1914, and that they are entitled to recover the sale proceeds of the blankets which were sold by the defendants in and prior to 1915, and to retain the sale proceeds of the bales which were by arrangement sold by the then Liquidator of the plaintiffs in the same year. Counsel for the appellants stated that apart from the sums in dispute, the realised Indian assets of the plaintiff's are insufficient to meet their Indian liabilities, but there is no evidence before us to that effect.

2. It is common ground that both the cotton blankets and the cotton bales were, prior to the war, the property of the plaintiffs, Wolf & Sons, a German firm with its head office in Germany and a branch office at Bombay, which was managed by a German named P. Zoller, who was interned on the 5th September 1914. Para 2 of the plaint describes the plaintiff-firm as being "incorporated"; but there is no evidence of this, and they have been treated in these proceedings as an ordinary partnership firm. From the report in *Wolf & Sons v, Carr, Parker & Co*[1]. this appears to be their correct status. The plaintiff firm now sues by Mr. P. S. Mellor, the present Controller of Hostile Trading Concerns, Bombay, who was appointed Liquidator of this hostile firm by the Bombay Government Order of the 20th September 1916, Exh A to the plaint. The

defendants Dadiba Khimji & Co. are an Indian firm carrying on business in Bombay, and were the guaranteed brokers and Muccadums of the plaintiffs prior to the war.

3. It is also common ground that between the 4th August and the 3rd September 1914 (inclusive) the blankets and bales were handed over to the defendants by Zoller on behalf of the plaintiffs as security for (a) the cotton differences, and (b) Rs. 10,000, the balance of a deposit of Rs. 50,000 by the defendants. No dispute arises about the Rs. 10,000. That is admitted to have been since repaid, and properly repaid, to the defendants out of the proceeds of sale of the blankets. But a dispute does arise about the cotton differences. These arose out of certain pre-war cotton contracts between the plaintiffs and the defendants for January to March 1915 delivery, which were closed or purported to be closed by Zoller on behalf of the plaintiffs on the 3rd September 1914, and shewed a heavy balance payable to the defendants on the due dates. To secure the sum ultimately payable by the plaintiffs on these pre-war contracts, Zoller pledged the cotton blankets on the 4th or 5th August 1914, and by way of further security the cotton bales on or about the 26th or 27th August. There is no evidence of any further express pledge on the 3rd September.

4. What happened to the business after Zoller was interned was this. One Tombroff was appointed Liquidator by Government, and, in the course of his duties, he appears to have taken directions from time to time from Mr. G. S. Hardy, I. C. S., the then Controller of Hostile Trading Concerns. At the trial, the order appointing Tombroff was called for by the defendants. It was not produced, but counsel for the plaintiffs stated : "We don't dispute that he" (Tombroff) "had power to deal with the assets of Wolf & Co.". The trial accordingly proceeded on that footing.

5. In the course of managing or winding up the business in 1915, Tombroff had to deal with the cotton blankets and bales and also with the pledges which the defendants claimed thereon for the amount of the cotton differences. Having regard to the approaching monsoon, Tombroff thought it desirable, if not imperative, to sell these goods, and he accordingly approached the Controller and the defendants on the subject. As regards the blankets we have a correspondence which is very material. Writing to the Controller on the 5th June 1915, the Liquidator says :

I have the honour to inform you that there are now the following stocks left with me which I would propose selling by auction in small lots...799 balea of cotton blankets in the godown of Dadiba Khimji & Co. The blankets are in possession of Dadiba Khimji & Co. as security against differences due to them on cotton, but I trust there would be no objection on their part to have these goods sold. Their claims have been duly taken note of....As for the blankets it is imperative they should be sold now.To this proposal for sale, the Controller agreed in a letter of the 11th June 1915.

6. Then the Liquidator after taking the advice of his solicitors wrote to the Controller on the 1st

July as follows :-

Re: 797 bales of cotton blankets.I have the honour to acknowledge receipt of your letter of 11th instant referring among other lots to the 797 bales mentioned above.These bales were given in charge of Dadiba Khimji & Co,, Muccadums of this firm under an agreement dated 5th August 1914, and with the view of obtaining possession of the same I consulted Messrs. Payne & Co. for opinion, and received their reply as per their letter enclosed. Under the circumstances, I shall arrange with Dadiba Khimji & Co. for selling these goods by public auction and the proceeds realised to be retained by Dadiba Khimji & Co. against their claim on this firm.It will be noted that this letter to the Controller tells him that the agreement relied on by the defendants is dated the 5th August 1914 which is after the outbreak of war.

7. The enclosed opinion of the solicitors Messrs. Payne & Co., which is dated 16th June 1915, was as follows :Dadiba Khimji & Co and Wolf & Sons.Referring to your letter of date Dadiba Khimji & (Jo. have got the blankets in question as security for payment of the moneys due to them, and you are therefore not entitled to claim delivery of the blankets without paying the moneys due to them. You may therefore allow Dadiba Khimji & Co. to sell the blankets after consultation with you as to the price for which they are to be sold. We return the papers sent to us herewith.The letter of instructions to the solicitors which they refer to is not in evidence: nor are we told what were the papers they returned.

8. On the 2nd July the Controller acknowledged the receipt of the Liquidator's letter of the 1st July and its enclosure. Thereupon the Liquidator appears to have carried out the arrangement contemplated, that is to say, he agreed with the defendants that they should sell the blankets and apply the sale proceeds in or towards payment of their debt for the cotton differences.

9. The defendants accordingly proceeded to sell the blankets by auction, but as appears from their letter of the 7th of October 1915 to the Liquidator, only 180 bales were sold. This letter is material and I may quote portions of it.

Re: Blankets accounts. W. Wolf & Sons.We have to bring to your notice the following and shall thank you to let us know your decision after due consideration.Out of 737 bales of blankets which are mortgaged to us by W. Wolf & Sons we have sold so far with your consent by auction the following quantities at the rates mentioned below :180 bales fetched Rs 17,695.Out of the amount we have paid Rs. 442-8-0 as to Messrs. Menessee & Co. auctioneers their commission at 2 1/2 per cent.We have to say that the way these blankets are sold by auction, they are not fetching their real value because people will not pay their prices in auction and as this is prejudicial both to W. Wolf & Sons' interest and to ours, we would propose to allot the balance of about 500 bales to us against our outstanding claim with W. Wolf & Sons, and we are prepared to

pay Rs. 10 per bale more than the average price obtained in the three auction sales...The assuring is of course not possible for you to do because you have to sell quickly and close the liquidation. Please remember that the running expenses per month are about Rs. 750; we have to pay Rs. 450 in shape of godown rent and there is insurance and shop rent and wages etc. which expenses will be saved to you, besides the auctioneers' commission at 2 1/2 per cent, if the goods are sold by auction.

10. The Liquidator consulted the Controller on this proposal and wrote to him on the 22nd October 1915 as follows:With reference to the interview I had with you this afternoon in connection with the sale of blankets of this firm mortgaged to Dadiba Khimji & Co.. I have the honor to inform you that I have duly intimated to them that their offer is accepted at the prices realised in the auction sale held on the 18th instant. There are some bales absolutely damaged which 1 believe can be only sold by auction, and in the interest of the firm I would suggest this procedure.It appears from a note on this letter that a verbal reply was given by the Controller on 23rd October 1915,

11. Then on 28th October Tombroff wrote to the defendants as follows :With reference to my letter dated 8th instant I have referred to the Controller ...your offer for purchase of sound hales out of the lot of the blankets morgaged to you by this firm.Please note that the Controller has accepted your offer to buy at the prices realised in the auction sale of Messrs. Crawford & Co held on the 18th instant. As there is very short time for the termination of the liquidation, i should ask you to submit to this office a complete statement of account of all bales so far sold including those purchased by you with amounts realised and your bills for godown rent and insurance charges etc....

The defendants acknowledged this letter on the 29th October and agreed to pay a certain sum for some scales and tarpaulins mentioned in the Liquidator's letter of 28th October.

12. On the 12th February 1916 the defendants sent to the then Liquidators, Fergusson & Co., their statement of account for the blankets, scales and tarpaulins, and on the 10th March 1916 their final account showing a balance of Rs. 47,104 still due to them and which according to them had been agreed by Tombroff to be paid out of the sale proceeds of the cotton bales in his hands.

13. Now as regards the cotton bales we have no correspondence as to the arrangement arrived at. There was however no cross-examination of the defendants' witnesses on the point: nor have the plaintiffs put in any defense to the defendants' counter-claim or denied in any pleading the agreement set up in para 13 of the written statement, or called Tombroff or Mr. Hardy as witnesses. I am, accordingly, satisfied that the agreement was made between Tombroff and the

defendants, and that in effect it was as follows :Tombroff was to sell the cotton and the defendants were to give delivery to Tombroff's purchasers and allow Tombroff to receive the purchase money, but on this express condition that the balance of the defendants' claim remaining after the realisation of the blankets was to be paid out of the proceeds of sale of the cotton. I think one may also infer that Tombroff acted here with the approval of the Controller, as he ' undoubtedly did as regards the blankets.

14. The precise date of this agreement about the sale of the cotton bales does not appear, but I think it clear that the sales took place somewhere in 1915. The reason no doubt why the evidence is rather meagre is that at the trial there was really no dispute as to the facts. The only witness called by the plaintiffs was Zoller, and he could not depose to the arrangement with the Liquidator, for he was interned at the time, and it does not appear that he was consulted in any way. Counsel tells us too that he could not be questioned much, owing to his strange manner in the witness box, and that he committed suicide the same evening.

15. It is common ground however that the arrangement in question was carried out so far as the defendants were concerned. They gave delivery to Tombroff's purchasers and allowed him to get possession of the sale proceeds. The plaintiffs however now repudiate the condition on which these bales were given up by the defendants, and the sale proceeds obtained by Tombroff, and claim that they are under no obligation to pay what was agreed to be paid to the defendants.

16. As I have already said, the defendants' final accounts were sent to the then Liquidators on the 12th February and 10th March 1916 and it was not till the 12th April 1916 that the defendants had any intimation that the plaintiffs repudiated the transaction. This letter of the 12th April 1916 which was written to the defendants by the attorneys of the then Liquidators alleged that the original pledge of the blankets on the 5th August 1914 was illegal and void : that the Liquidators were entitled to the sale proceeds in the hands of the defendants as pledgees : that the Liquidators would however give credit for the Rs. 10,000 deposit but demanded payment of the balance of the sale proceeds of the blankets within twenty-four hours, in default of which they would without further intimation or delay file a suit to recover the sale proceeds. The demand for payment within twenty-four hours was utterly unreasonable, if not silly, but it is almost a common form among Bombay solicitors and will probably take time to eradicate It is quite in keeping with this sort of demand that no proceedings to enforce it were taken for over one year and one quarter, viz. till the present suit was instituted on the 6th August 1917: and that after a further thirteen months the plaint was amended materially.

17. To complete the main facts, I should state that on the 13th November 1915 Tombroff wrote to the Controller drawing his attention to a decree of Macleod J. of the previous day in *Textile Manufacturing Go. Ltd. v. Salomon Brothers*[2] (since reported) whereby according to Tombroff "

all contracts entered into with alien firms are held as cancelled by virtue of the Royal Proclamation." The writer proceeded: " I have also to point out that this firm held a stock of blankets which the Manager had handed over to Dadiba Khimji & Co. as security against their claim for differences on cotton contracts, and after consulting my solicitors I shall have to claim (since the question of contracts is settled as above) to obtain possession of whatever stock there may be still unsold in the hands of Dadiba Khimji & Co. to be included in the liquidation." It does not however appear that the controller took any steps on this letter or made any communication to the defendants. The first hostile communication to them was the solicitors' letter of the 12th April 1916. The appellants rely on this letter of the 13th November 1915 as establishing the date when they first discovered the pre-war contracts to be illegal and void.

18. The arguments presented to us on this appeal were centred round two main points, viz., (1) the effect of the war on the transactions in question and on the legal position of the Bombay branch of the enemy firm, and (2) the provisions of the Indian Contract Act with reference to the recovery of money.

19. On the first branch of the case, it was urged by the appellants that the pre-war contracts of 16th to 23rd July 1914 and the pre-war pledge (if any) of 4th August 1914 became ipso facto void on the outbreak of war: that the further pledges given on the 5th August and on the 26th or 27th August were similarly void: and that the cross contracts of the 3rd of September were so tainted with the illegality of the pre-war contracts as to be themselves void, or alternatively only amounted to the settlement of a nullity. It was further urged by the appellants that Zoller's agency terminated ipso facto on the outbreak of war, and that therefore he had no power to enter into any of the subsequent transactions.

20. In the view I take of this case, it is not necessary for me to decide whether these propositions are well founded. I think that for the purposes of this case one may assume in favour of the appellants but without deciding the point., that all their contentions on this head are correct. But while making this assumption, I am of opinion that at any rate up to November 1915 the legal position of an Indian branch of an enemy firm was sufficiently doubtful as to afford some justification for the view that the transactions in question were valid. For that purpose and that purpose only I will refer to certain Proclamations and Orders then in force in India.

21. The Royal Proclamation No. 1 of the 5th August 1914 (see English Manual of Emergency Legislation, 1914, p. 875) has a somewhat obscure clause at the end, which probably standing by itself would not validate trade with a branch like that we have to deal with. But the official announcement of the 22nd August 1914 issued by the Treasury in explanation of the Proclamation No. 1 (see English Manual, p. 377) stated in para 3 :If a firm with headquarters in hostile territory has a branch in neutral or British territory, trade with the branch is (apart from

prohibitions in special cases) permissible, as long us the trade is bona fide with the branch, and no transaction with the head office is involved.And paragraph 4 stated:Commercial contracts entered into before war broke out with firms established in hostile territory cannot be performed during the war, and payments under them ought not to be made to such firms during the war. Where, however, nothing remains to be done save to pay for goods already delivered, or for services already rendered, there is no objection to making the payment.

22. This WHS followed by the Royal Proclamation No. 2 of the 9th September 1914 (see Indian Manual of Legislation and Orders relating to the War, 6th Ed., 1918, p. 77). This declared that as from the date thereof, Proclamation No. 1 together with any public announcement officially issued in explanation thereof was revoked and the present Proclamation substituted therefor. This obviously referred to the announcement of the 22nd of August, and to that extent recognised its former validity. Then in para 3 it defined "enemy". This definition would clearly include the plaintiffs' head office in Germany, but perhaps not Zoller himself, as ho was neither "resident nor carrying on business in Germany". Para G dealt with branches as follows:Provided always that where an enemy has a branch locally situated in British, allied, or neutral territory, not being neutral territory in Europe, transactions by or with such branch shall not be treated as transactions by or with an enemy.Then in para 7 :Nothing in this Proclamation shall be deemed to prohibit payments by or on account of enemies to persons resident carrying on business or being in Our Dominions, if such payments arise out of transactions entered into before the outbreak of war or otherwise permitted.

23. In addition to these Proclamations, there was in India on the 8th August 1914 a Notification (see Indian Manual, p. 184) putting in force the Foreigners Act III of 1864. By virtue of Section 9 of that Act no foreigner was to travel in or pass through any part of British India without a license. This was followed on the 20th of August by a Foreigners Ordinance No. III of 1914 (see Indian Manual, p. 47) giving powers to the Governor-General in Council by order to restrict the egress of foreigners and to prohibit or restrict their trade or business. Then on the 22nd August there was a Notification (see Indian Manual, p. 368) prohibiting foreigners from leaving the country. On the 28th August two Press Notes were issued in Bombay by the Political Department, the one on the lines of the Treasury Explanation of 22nd August, and the other stating certain arrangements permitting the clearance and disposal by German subjects of imported and other goods, and permitting the delivery to British subjects of goods, from German firms, and to "have commercial dealings with them in respect of existing stocks only". These Press Notes are referred to in Textile Manufacturing Go. Ltd. v. Salomon Brothers (1915) I.L.R. 40 Bom. 570, 586; 18 Bom. L.R. 105 and are set out in full in Campbell's "Trading with the Enemy" at pp. 408-409. On the 14th November 1914 the Hostile Foreigners (Trading) Order (see Indian Manual, p. 373) was passed rendering it necessary for all hostile firms to obtain within

one month licenses to trade. This provided in para 5 (2) that "An application on behalf of a hostile foreigner or hostile firm not resident or located in British India shall be signed by a Manager or other agent resident in British India."

24. As regards the plaintiffs themselves, it appears that by a Notification of the 4th March 1915 (see Indian Manual, p. 379) their licenses to trade were to "remain in force" until the 14th of August 1915; and it appears that by a subsequent Notification this period was extended to 14th November 1915. (See Note (2) on p. 380 of the Indian Manual). As the Notification of the 4th March says that the licenses are " to remain in force", I should infer that Wolf & Sons had previously-obtained the necessary license to trade.

25. Now if one looks at the Proclamations and in particular at paras 6 and 7 of the Proclamation No. 2, I think a business manor for the matter of that a lawyermight not unnaturally infer that you could deal with what I will call an enemy branch in India provided such dealing involved no intercourse with the head office in Germany (see *W. L. Ingle Limited v. Mannheim Insurance Company*[3]). And further that where, as here, the transaction merely involved payment by the enemy branch, namely, in respect of the cotton differences, one might fairly urge that it was an authorised payment within para 7 as being a payment to a British subject arising out of a transaction entered into before the outbreak of war. (See same case p. 232 and *Halsey v. Lowenfeld*[4]). And that if such a payment was authorised, it was also legitimate to do something short of payment, viz., to give security to a British subject for such payment.

26. Or, again, if one looked at Hall's International Law, 6th Edn., p. 388, which was cited with approval by Mr. Justice Sargant in Princess Thurn and *Taxis v. Moffitt*[5] it might be said that at any rate until his internment Zoller was not disabled by the war from entering into the transactions in question. The' passage I refer to is as follows:When persons are allowed to remain, either for a, specified time after the commencement of war, or during good behaviour, they are exonerated from the disabilities of enemies for such time an they in fact stay, and they are placed in the same position as other foreigners, except that they cannot carry on a direct trade in their own or other enemy vessels with the enemy country.Now, here, Zoller was prohibited by the Notification of the 8th, or, at any rate, of the 22nd August from leaving the countrya fact which was relied on by Mr. Justice Sargant. The actual decision in that case, viz., that the Princess, though of enemy nationality, was entitled to sue in the English Courts for an injunction to restrain the publication of libels on her, was approved by the Court of Appeal in *Porter v. Freuden-berg*[6] *and in Schaffenius v. Goldberg*[7] the latter of which cases decides that the right to sue is not lost by internment.

27. Further, if it be urged that the transactions in question must be judged in the light of the Proclamations actually in force at the date of the transactions and that the official explanation of

the 22nd August and the two Press Notes of 28th August had no legal authority, it may be urged in answer that this is taking a somewhat narrow view of the subject, and that it would not be unreasonable for the Controller or the Liquidator acting under his directions to abide by the spirit of the later Proclamation, viz., No. 2 of the 9th September 1914 and which remained in force during 1915.

28. As was said by Mr. Justice Macleod in *Textile Manufacturing Co. Ltd. v. Salomon Brothers*[8], speaking of affairs in Bombay during the latter half of 1914:It is not to be wondered at, that confronted with this bewildering array of Proclamations, Ordinances, Orders and Official communications, abounding in conflicting provisions, the members of the mercantile community in Bombay, whether British subjects, foreigners or enemies, remained paralysedunable to form any opinion as to what they could do or what they could not do.

29. In the present case, however, we have to deal with the Controller, a Government Official, who presumably had special facilities for ascertaining the policy and intentions of Government, and if necessary of obtaining the highest legal advice.Further, in the present case, Mr. Justice Macleod while holding that the pre-war contracts became invalid and that the pledges were invalid, thought that the September settlement by cross contracts was in itself valid, as was also the contract of 26th August (apart from the actual pledge) and that Zoller's agency was not terminated by the war. The learned Judge left open the question whether the defendants could in any event claim to rank as unsecured creditors.

30. I think, I have now stated enough to show, that in 1914-15, the true legal position was open to doubt, at any rate in some particulars. As 1 have already said, I need not and I do not decide what that position was. I merely assume for the purposes of this case that the appellants are correct on this first branch of the case.

31. I come accordingly to the second branch which appears to me to be the crux of the case, viz., on what legal grounds can the plaintiffs claim to recover the sale proceeds of the blankets. One may clear the ground by saying that their claim is based solely on Section 72, or alternatively, on Section 65, of the Indian Contract Act. They admitted that no claim based on the English law apart from that Act could succeed. The relief given in *Gulabchand v. Fulbai*[9] (where the illegal purpose had not been carried out) was therefore inapplicable. In view of such cases as *Kearley v. Thomson*[10] this admission was, I think, properly made, having regard to the appellants' contentions that all the transactions were illegal Nor need I consider whether if this Court was administering some fund, the mistake could be rectified (see In re *Robinson (1911) 1 Ch. 502 and In re Ainsworth) (1915) 2 Ch. 96(SUPRA):* nor whether if the payment had been made to its own officer by a mistake of law, the payment would be refunded (see Ex parte Simmonds; (1885) 16 Q.B.D. 308 In re Opera Limited[1891] 2 Ch. 154; 3 Ch. 260).

32. Before us, Section 72 was relied on first in argument. It was said that this was a case of " money paid by mistake " viz., a mistake of law, all parties thinking the contracts and pledges were valid and the debt due. When asked whether the appellants relied on any mistake of the then Liquidator, counsel at first said No, but at a later stage withdrew that answer and said Yes. I am not surprized at counsel's first answer. There is not a word in the pleadings about the Liquidator or Controller being under any mistake: no issue was raised about it: and neither of them went into the witness box to say he had made any mistake. The amended plaint is, I think, based on a different section altogether, viz., Section 65, as will be seen from looking at paras. 9, 9A and 14 and in particular to the allegation in para 9 as to the agreement being "discovered to be void".We were referred by the appellants to para 4 of the defendants' supplemental written statement of 12th October 1918, but this only dealt with the cross contracts of 3rd September 1914 and was in answer to the amended paras 9 A and 10 of the plaint. So, too, issues Nos. 5 and 5 A refer to a mistake at the time of the settlement mentioned in issue 4, viz., the settlement by cross contracts on 3rd September 1914. It has nothing to do with any subsequent mistake by the Liquidator.

33. It seems to me, therefore, that on the pleadings, this point under Section 72 is not open to the appellants and that in any event there is not sufficient evidence of any payment " by mistake." In the view I take, therefore, it is really unnecessary to consider whether Section 72 applies to a mistake of law. But as the learned trial Judge did deal with this point, and as it may be urged that an implied amendment of the pleadings was thereby made, and the case argued on the assumption that there was some evidence of a mistake in law, I will deal with the matter on this footing.

34. The next difficulty in the way of applying Section 72 is Section 21 which says that "A contract is not voidable because it was caused by a mistake as to any law in force in British India". Consequently, if Section 72 applies to mistakes of law, a man might recover payments under Section 72, although he could not avoid the contract under Section 21. I am thinking of course of a case where the same mistake is made at the inception of the contract as on the payment thereunder. Counsel for the appellants admitted that in such a case Section 72 would not apply. The payment in such a case he said would be made under the contract (which ex hypothesi could not be rescinded under Section 21), and consequently the payment would not be by mistake.

35. The appellants contended however that Section 21 did not apply here because there was no "contract" as defined by Section 2 (h), viz., "an agreement enforceable by law." There was at most an "agreement not enforceable by law' and therefore void under Section 2 (g). This contention is, I think, erroneous on the facts. In my judgment the Liquidator entered into binding agreements with the defendants for the sale of the blankets and bales and for the application of

the proceeds in discharge of the defendants' debt. The disabilities attaching to Zoller did not apply to the Liquidator or the Controller. He, as counsel admitted at the trial, had power to deal with the assets.

36. Further, the Enemy Trading Act No. X of 1916 (Indian Manual, p. 15), which was not cited to us, provides in Section 18 that Any act done after the 3rd day of August, 1914, by, or under the orders of, any officer of Government in respect of the property, moveable or immoveable, of any hostile foreigner or hostile firm which, if this Act had been in force, could have been validly done in the exercise of the powers conferred thereby, or which could have been conferred thereunder, is hereby validated.Sections 4 and 5 give wide powers for winding up enemy businesses and dealing with their assets in accordance with rules to be made by the Governor-General in Council. This provides in effect that such a winding up order is to have the same effect as if made by the Court under the Indian Companies Act, 1913, subject to modifications to be specified.

37. Now one of the ordinary duties of a Liquidator confronted with a person claiming to be a secured creditor is to decide whether he will admit the claim or fight it, and if necessary he will obtain the directions of the Court. And subject to the control of the Court he can pay creditors or make any compromise or arrangement with creditors or persons claiming to be creditors (see Indian Companies Act, Section 234). But under Section 3 of the Enemy Trading (Winding up) Order, 1916 (see Indian Manual, p. 284) Government takes the place of the "Court" in applying the Companies Act to this winding up; and as appears by the Notification, Ex. A to plaint, the present Controller can exercise all the powers conferred on Official Liquidators by Section 179 of the Indian Companies Act without the sanction or intervention of Government, and I think that the powers under Section 234 could also have been conferred on him.

38. I am, therefore, of opinion that, apart from all other grounds, the acts of Tombroff and Mr. Hardy are validated by Section 13 of the Enemy Trading Act, 1916, as being acts which could have been validly done in exercise of powers which could have been conferred under that Act. AH I have already pointed out the law at the time was not clear, and I do not think that either of these gentlemen can be blamed for preferring a settlement to a law suit, particularly when they were told by their legal advisers that the defendants were right.

39. It is not suggested that the wide powers given by Section 6 of the Enemy Trading Act, 1916, to the Governor-General in Council of cancelling contracts injurious to the public interest or revesting property transferred under them have ever been or could be exercised in the present case.

40. I am, therefore, of opinion that the agreements entered into by the Liquidator with the

defendants were "contracts" within the meaning of the Indian Contract Act and could not be avoided under Section 21 as being made under any mistake of law That being so, I am further of opinion that the payments made to the defendants were payments under this binding contract, and could not be recovered under Section 72.

41. In this view of the case, I need not decide whether Section 72 can ever apply to a mistake of law, but as at present advised, the passage referred to by the learned trial Judge in Pollock and Mulla (3rd Edn.) at p. 308 seems to me good sense : and good sense is generally good law. The passage in question runs ;The man who has chosen to judge his own cause upon all the facts, and has decided against himself, cannot appeal to the Court against his own judgment, whether it was well informed or not.I may also refer to the judgment of the Court of Appeal in *Rogers v. Ingham*[11] as showing the evils which would result from allowing parties to re-open transactions on the ground of some mistake of law having been made by them or their legal advisers.

I may also refer to the Holsworthy Urban Council v. Holsworthy Rural Council (1907) 2 Ch. 62 where Warrington J. held that a local authority was bound to continue payments under a compromise founded on an erroneous view of the law, notwithstanding that apart from such compromise the payments would be ultra vires. So too payments made under compulsion of legal process whether in a home or foreign Court of Law cannot be recovered (see *Clydesdale Bank, Limited v. Schroder & Co.*[12]*)* These four English cases illustrate the general principles adopted in England, and I only cite them by way of analogy.

42. I should perhaps have added that before us the appellants admitted that the arrangement with Tombroff as to the application of the sale proceeds of the blankets amounted to a payment. Under these circumstances, I think no real distinction arises between the few blankets Bold before June 1915 and those sold afterwards.

I may also add that the defendants, in the alternative, contended that the Liquidator's agreements were a compromise and in any event valid, and they relied on *Calliaher v. Bischoffsheim*[13] and *Miles v. New Zealand Alford Estate Co*[14].. In the view I take however it is unnecessary to decide this point.One other point may be noted, viz., that there is a clerical slip in the printed judgment on p. 91 as to the answer of the learned trial Judge to the important issue No. 7. This should clearly be in the negative and not in the affirmative as printed.

43. The alternative claim of the plaintiffs is based on Section 65 which runs :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 be received it.Now I have already held that the agreements with the Liquidator were valid. Consequently, in my opinion, Section 65 does not apply to the payments

in question as they were made to the defendants under valid agreements and not under void ones.

44. But supposing for the sake of argument that the payments were made under the contracts and pledges ending 3rd September 1914, and that the Liquidator's agreements were mere machinery for carrying out these contracts and pledges, the appellants have still other difficulties to contend with The first arises from the words " agreement discovered to be void." I agree with the learned trial Judge that the word "agreement" as used in that section does not apply to the pre-war contracts, for they were "contracts" within the meaning of the Indian Contract Act and not "agreements". As regards the subsequent agreements, the parties knew all the material facts and I doubt whether the words "discovered to be void" are really applicable to those agreements (see Gulabchand v. Fulbai (1909) I.L.R. 33 Bom. 411, 417; 11 Bom. I.R. 649)(Supra), The decision in *Jijibhai v. Nagji*[15] can be supported as being based on the validity of a collateral agreement for a refund, quite apart from Section 65 (see p, 698).

45. Next, if the other branch of the section is relied on no "advantage" under the pre-war contracts had been received by the defendants when ex hypothesi they became void on the outbreak of war. The plaintiffs' case is that there was no pledge till the 5th August. It hardly, therefore, lies in their mouths to contend there was a pre-war pledge and therefore an antecedent advantage for which compensation must now be given. In any event the advantage which the plaintiffs are trying to recover is the payment made to the defendants in 1915 and not the pledge in 1914. The appellants argued that under Section 65 the advantage need not be received before the contract becomes void or the agreement is discovered to be void. This is not, I think, the true construction of Section 65. I think the line is drawn at the time the agreement is discovered to be void or when the contract becomes void.

46. In the result, therefore, I respectfully agree with the learned trial Judge that the payments in question cannot be recovered by the plaintiffs under either Section 72 or 65 of the Indian Contract Act and that accordingly their claim fails.

47. As regards the counter-claim, the position at first sight seems somewhat different, for here it is the defendants who are claiming moneys in the hands of the Liquidator, viz., the part proceeds of the cotton bales. This claim is based solely on the agreement with Tombroff. They say that by virtue of that agreement the Liquidator holds those moneys as earmarked or upon trust for them: that he can only discharge that obligation or trust by paying them the moneys: that they will then hold those moneys just as if the sale proceeds had been paid to them in the first instance : and that their ultimate right to retain them will depend on the decision of this Court on the claim.

48. On this point also I agree with the decision of the learned trial Judge. The defendants have changed their position on the faith of a promise which in my opinion was validly made to them

by the former Liquidator, and I think that promise is binding on the present Liquidator.

49. It was next contended by the appellants that the promise only applied to the defendants' "claim" generally and did not admit any specific sum to be due, and that accordingly the whole claim could be repudiated. This, I think, is not the true view. The defendants' account might no doubt be vouched, and details such as godown rent challenged; but no repudiation of the mortgage itself was intended by the parties. That as the correspondence shows was regarded as valid at any rate with respect to the blankets. Nor in the view 1 take is this a case where the assistance of equity is asked towards carrying out an illegal agreement as in *Mohori Bibee v. Dhurmodas Ghose* [16]In substance, therefore, it seems to me, that the defendants' case on the cotton bales stands or falls with their case on the cotton blankets. They have succeeded on the claim. I think they also succeed on the counter-claim.

50. The appeal, therefore, of the plaintiffs should in my judgment be dismissed with costs. It will not however be necessary to proceed with the account directed by the decree, as the parties have since agreed on the figures. But this need not, I think, be mentioned in the order we make.

Heaton, J.

51. I agree that the Liquidator entered into valid agreements with the defendants regarding the sale of the blankets and of the cotton bales and for the disposal of the proceeds. And I think so for the reasons stated by my learned brother. That being so, the plaintiffs' claim must fail, for neither Section 72 nor Section 65 of the Indian Contract Act can possibly apply to what in this case happened, in fulfilment of those valid agreements.

52. I, therefore, agree that the appeal must be dismissed with costs.

Cases Referred.

1(1915) W.N. 195
2(1915) I.L.R 40 Bom. 570; 18 Bom. L.R 105
3(1915) 1 K.B. 227, 231
4(1916) 2 K.B. 707, 712, 717
5(1915) 1 Ch. 58, 61
6(19l5) 1 K.B. 857, 874
7(1916) 1 K.B. 284, 299
8(1915) I.L.R. 40 Bom. 570, 587; 18 Bom. L.R. 105
9(1909) I.L.R. 33 Bom. 411; 11 Bom. L.R. 649
10(1890) 24 Q.B.D. 742
11(1876) 3 Ch.D. 351, 356-57
12(1913) 2 K.B. 1
13(1870) L.R. 5 Q.B. 449
14(1886) 32 Ch.D. 266, 291
15(1909) 11 Bom. L.R. 693, 698
16(1903) L.R. 30 I.A. 114, 126: 5 Bom. L.R. 421