

9.1948

No. 80 of 1945.

In the Privy Council.

ON APPEAL

FROM THE SUPREME COURT OF PALESTINE SITTING
AS A COURT OF CIVIL APPEAL.

UNIVERSITY OF LONDON
W.C.1.
-3 OCT 1956
INSTITUTE OF ADVANCED
LEGAL STUDIES

CASE FOR THE APPELLANT.

11215

BETWEEN—

ISRAEL MARGOLIS

Appellant

DEFENDANT

— AND —

SARKIS IZMIRILIAN

Respondent

PLAINTIFF.

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CASE FOR THE APPELLANT.

RECORD.

1. This is an appeal from a Judgment and Decree of the Supreme Court of Palestine sitting as a Court of Civil Appeal dated 12th December, 1944, setting aside a Judgment and Decree of the District Court of Tel-Aviv Palestine dated 12th March, 1944 and entering judgment in favour of the Plaintiff-Respondent against the Defendant-Appellant for damages for breach of contract for the purchase of goods and for costs.

p. 15.

p. 11.

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2. The Respondent instituted this action on 2nd August, 1942, in the District Court of Tel-Aviv against the Appellant for the recovery of L.P. 4,526 claimed as damages for the alleged wrongful repudiation of a contract of sale of 1,000 tons of Sudanese cotton seed to be shipped from Port Sudan to Haifa and for non-acceptance of the goods sold.

3. The Respondent claimed as assignee of Charles Schlick of Alexandria under a written contract of sale dated 1st March 1942 the material terms whereof were as follows:—

p. 19.

Seller: Charles Schlick Alexandria or substitute people from Sudan.

p. 19.

Buyer: Israel Margolis . . . Tel-Aviv Palestine.

Quantity: 1,000 tons of 1,000 kilos each.

Goods: Sudanese cotton seeds, new and old crop.

Price etc. L.E. 12 per 1,000 kilos.

Shipment: By sea or rail at seller's option from Port Sudan to c.i.f. Palestinian ports or rail station.

Delivery: During March until 31st August 1942.

Payment: By opened confirmed letter credit through Barclays Bank.

Licences: Subject to seller's export licence and to buyer's import licence. 10

p. 20, l. 3.

The said contract was endorsed "Order M. Sarkis Izmirilian with recourse Khartoum Sudan" by Charles Schlick.

A copy of the contract appears at page 19 of the Record of Proceedings.

pp. 38-42.

4. By the Licensing of Imports Order 1939 made by the High Commissioner on 11th December 1939 and amended on 18th July 1940 it was provided (*inter alia*) that all goods were prohibited to be imported into Palestine except under the authority of a licence granted by the Director of Customs, Excise and Trade. 20

p. 10, l. 2.

The Controller of Foreign Exchange had forbidden all banks to open credits against imports unless properly licensed.

p. 25.

5. Accordingly on 6th March 1942 the Appellant applied to the Customs Department at Haifa for an import licence. He had previously informed Charles Schlick that he had not yet obtained any import licence. On 10th March 1942 Mr. Schlick who was anxious that the contract should proceed without hitch, wrote the Appellant a letter in which he said *inter alia*:—

p. 26.

p.27, l. 6.

"Now if you really had a refusal from your licence authorities in connection with your demand for 1,000 tons seeds, please send it to me, that letter to show it to my seller in Sudan, on which document only seller agrees to cancel the contract signed between us. Besides that, my seller, takes responsibility to obtain the above licence so you cannot have any arguments to refuse goods. Please hurry to open the credit." 30

p. 20.

In reply to this letter the Appellant informed Mr. Schlick by letter dated 15th March 1942 that he had already applied for the requisite licence and that on its receipt he would open any credits called for by the contract. He said he hoped to receive his licence by 5th/10th April. 40

p. 8, l. 38.

p. 20.

6. The Appellant received no reply to his application of 6th March and accordingly on the same day 15th March he again wrote

to the Import Licensing Section of the Customs at Haifa requesting that he might be granted the necessary authority to import.

On the 24th March 1942 the Customs wrote to the Appellant refusing him any licence and stating expressly that if the cotton seed in question arrived in Palestine it would be forfeited. p. 27.

7. On the 26th March 1942 the Appellant notified Mr. Schlick of what had happened. He enclosed a copy of the letter from the Customs after saying:— p. 28.

10 “all importers were advised by radio yesterday that no import licence will be issued until investigations will prove that the respective importer is relevant and authorised to do business in war time. Goods imported illegally . . . are forfeited and one may also be put in prison for such deed. I have informed you that I should not be waited for and that as soon as I should be permitted I would let you know. At present however I wish to be free as I am unaware whether I should be included in the list of importers at all.”

8. In reply Mr. Schlick on 3rd April 1942 informed the Appellant that the whole contract had been assigned to the Respondent Sarkis Izmirilian and that he was forwarding to him all documents and correspondence. p. 29.

The Appellant had never agreed to the assignment of the contract, but the Courts below have both held that the Respondent is a proper assignee as being “a substitute person from Sudan”. pp. 12-16.

9. The Respondent had an agent in Tel-Aviv called Yehiel Nahari Mindgeretsky. According to this agent, who gave evidence at the hearing in the District Court:— pp. 5-7.

“On 6th April 1942 I received a telegram and knew that Defendant (Appellant) did not want to receive the goods.” p. 7, l. 1.

30 On the 14th April Mindgeretsky saw a Mr. Arnott who was Assistant Food Controller Jerusalem. He further wrote two letters (copies of which the Respondent has not produced) to the Food Controller dated 14th and 17th April. In reply to these letters the Food Controller wrote on the 22nd April 1942 saying, that an import licence would be granted; suggesting that the cotton seed should be sold or offered to Messrs. Shemen or Messrs. Izhar; and finally asking to be advised in due course of the buyer's name “in order that the Import Licensing Authority can be requested to issue an import licence”. p. 6, ll. 1 & 25.

40 Mr. Mindgeretsky admitted in cross-examination that he “did not ask for a licence on behalf of the Defendant” (Appellant). p. 21.

10. Meanwhile on 15th April 1942 6,609 bags of cotton seed weighing about 800 tons were shipped for Haifa from Port Sudan p. 31.

on the s.s. "Fred". The bill of lading showed the Respondent as the shipper and was made out to "Order or Order or to his or their Assigns".

p. 32. On 25th April 1942 a further 2,503 bags weighing about 200 tons were shipped for Haifa from Port Sudan on the s.s. "Reedpool" under a bill of lading of like tenour and effect.

The bills of lading were forwarded through Barclays Bank Khartoum to their Haifa and Tel-Aviv Branches. The bills of lading were despatched from Khartoum on 1st May 1942. They were accompanied with a draft drawn on "Shemen" for L.E. 7,650 (L.P. 7,865·814). The documents, invoice, bills of lading and insurance policy, arrived on 11th May; Shemen were advised the same day; and they paid the amount of the draft on 14th May. 10

p. 37.

It would accordingly appear that on or before 1st May 1942 the cotton seed covered by the bills of lading aforesaid had been sold to Shemen; that the Respondent's agent had applied for, and presumably obtained an import licence for Shemen; and that the documents were forwarded through Barclay's Bank for tender to Shemen; and that the transaction was finally completed on 14th May 1942. 20

p. 25. The price to Shemen was apparently L.E. 8.50 per ton. It was not wholly secured by the draft, the balance being adjusted later.

p. 7. 11. On 27th April 1942 the s.s. "Fred" with about 800 tons of cotton seed on board arrived at Haifa. No shipping documents at all were to hand and the Respondent was not in a position to make any or any proper tender of documents under his contract with the Appellant (assuming that it was still valid and enforceable).

12. On 30th April 1942 a notice was published in the "Palestine Gazette" stating that certain scheduled commodities (including Sudanese cotton seed) "are being imported on Government account and that no import licences in respect of such commodities will be issued to private importers". 30

p. 22. 13. On 1st May 1942 the Respondent caused to be served on the Appellant a Notarial Notice:—

- (a) referring to the contract of 1st March 1942,
- (b) notifying the arrival of 800 tons per s.s. "Fred",
- (c) stating that a further 200 tons were expected per s.s. "Reedpool",
- (d) asserting that export and import licences for the import of the said goods had been obtained "in accordance with the 40

contract" and that "*the import licence is at your disposal*",
and

- (e) calling upon the Appellant to take delivery of the 800 tons per s.s. "Fred" within 24 hours and pay for the same, and to act similarly as to the "Reedpool" shipment on arrival.

This document was served upon the Appellant's wife on Friday 1st May 1942. The next day was the Sabbath and Barclays Bank was closed as usual. It would have been quite impossible for the Appellant to comply with the Notice. No import licence whether
10 in favour of the Appellant or of anyone else, has ever been produced :
it was alleged by the Respondent that an import licence was issued on 5th May 1942. No documents were available for the goods. And in fact they had already been shipped and consigned to Shemen. Mr. Mindgeretsky in evidence said that he did not deliver the documents to the Appellant because he had not paid and had no licence.

14. In reply to the Notarial Notice the Appellant by letter dated 4th April 1942 addressed to Schlick with a copy to the Respondent contended that any contract had become void on the
20 ground that his application for an import licence had been refused by the competent authority.

15. The cargo of the s.s. "Fred" was delivered to Shemen on 5th May 1942 against a guarantee to produce the bill of lading on arrival duly endorsed. On 14th May when the documents for both shipments had arrived, they were tendered by Barclay's Bank to Shemen for payment as set out in paragraph 10 hereof.

16. Shemen having bought at L.E. 8.50 only as against the contract price of L.E. 12 the Respondent brought this action claiming the difference as damages for non-acceptance of the goods or breach
30 of contract.

17. The Respondent's Statement of Claim was delivered on 2nd August 1942 and the Defence of the Appellant on 29th September 1942.

18. The action proceeded to trial on twelve issues which were framed on 15th February 1943. These issues in substance raised the following questions:—

- (i) whether the Respondent was entitled to sue,
(ii) whether either party was in breach in respect of the obtaining of the necessary import licence,
40 (iii) whether the contract was discharged upon the ground of illegality, or impossibility,

- (iv) whether the Respondent was entitled to serve and to rely upon the Notarial Notice,
- (v) whether the Appellant was released from further performance of the contract (if still subsisting) by reason of the Respondent's actions, and
- (vi) whether the measure of damages claimed was correct.

pp. 5-11. 19. The action was tried in the District Court of Tel-Aviv before their Honours Judge Israel Many and Judge P. Korngruen.

p. 11. On 12th March 1944 the Court gave judgment for the Defendant (Appellant) holding that:— 10

p. 13. (a) the Defendant was entitled to consider the contract as at an end when the competent authorities refused to grant him an import licence,

p. 13. (b) that after the said refusal the Defendant was not bound to make further efforts to obtain a licence in view of the fact that import of cotton seed had become a Government monopoly,

p. 14. (c) that the Plaintiff (Respondent) was not at any material 20 time in a position to carry out his contract as he had already sold the goods to Shemen,

p. 14. (d) that the Plaintiff did not, and could not, tender proper documents under the contract, and

p. 14. (e) that the Plaintiff having in fact sold the goods previously to Schlick for L.E. 9 per ton, his damages should be limited to L.E. 500.

A transcript of the judgment will be found in the Record of Proceedings at pages 11 to 14.

p. 14. 20. From this judgment the Respondent appealed to the 30 Supreme Court of Palestine sitting as a Court of Civil Appeal. His Notice of Appeal is dated 28th March 1944 and the grounds of the appeal are in substance that:—

- (a) the Appellant had wrongfully repudiated his contract,
- (b) that he should have waited until August 1942 (the end of the period for delivery) before he assumed that he could not and would not get an import licence,
- (c) that he, the Plaintiff, was not in any way in breach, and
- (d) that after the Defendant's conduct he was not obliged to tender the usual documents. 40

A copy of the Notice of Appeal will be found in the Record of Proceedings at page 14.

21. The appeal was heard by Mr. Justice Edwards and Mr. Justice Frumkin and on 12th December 1944 they allowed the appeal.

They held that the Defendant (Appellant) should have waited until 31st August 1942 before claiming cancellation and that he might in the interval have obtained an import licence. They thought that the cases of *Austin Baldwin & Co. v. Wilfrid Turner & Co. Ltd.* 36 T.L.R. 769 and *Andrew Millar & Co. Ltd. v. Taylor & Co. Ltd.* (1916) 1 K.B. 402, at 414, 416, were authorities in the Plaintiff's favour on this point. They further held that the contract in its terms provided that this should be so. They do not appear to have considered whether the Plaintiff was ever in a position to tender proper documents; presumably holding him excused by reason of what they considered a sufficient anticipatory breach by the Defendant. They considered that by his letter of 26th March 1942 (the material parts whereof are set out in paragraph 7 of this Case) the Appellant had already intimated his intention to repudiate the agreement; and that, if he considered the period of twenty-four hours allowed by the Notarial Notice insufficient, he should have asked for an extension of time.

A transcript of the judgment of the Supreme Court will be found at pages 15 to 17 of the Record of Proceedings.

22. The Appellant being aggrieved by the Judgment and Decree of the Supreme Court sought and obtained Final Leave to Appeal to His Majesty in Council. A copy of the Order of the Supreme Court, granting Final Leave to Appeal, will be found in the Record of Proceedings at page 18 and is dated 23rd March 1945.

23. Wherefore the Appellant humbly prays that the Judgment and Decree of the Supreme Court may be set aside and that in lieu thereof judgment may be entered for the Appellant (Defendant in the action) with costs for the following among other

REASONS.

- (1) BECAUSE the contract was subject to Buyer's import licence being obtained and the Appellant was unable to obtain such licence.
- (2) BECAUSE the Appellant used reasonable diligence to obtain such licence and failed.

- (3) BECAUSE there was not at any material time any prospect of the Appellant obtaining such a licence by the 31st August 1942 or within a reasonable time or at all.
- (4) BECAUSE in the premises the said contract became and was impossible of legal performance or was dissolved by frustration, before 4th May 1942.
- (5) BECAUSE the Respondent took the risk of any failure by the Appellant to obtain an import licence.
- (6) BECAUSE the Respondent never tendered, and could 10 not tender to the Appellant proper or sufficient shipping documents.
- (7) BECAUSE there was no, or no sufficient, act or default of the Appellant dispensing the Respondent from the necessity of making tender of such proper documents.
- (8) BECAUSE before 4th May 1942 the Respondent broke and repudiated the contract
- (a) by failing to tender documents in accordance with the contract, or
- (b) by selling or agreeing to sell to Shemen the goods 20 which were the subject matter of the contract, or
- (c) by seeking to impose on the Appellant the terms of the Notarial Notice,
- and the Appellant was thereby entitled to rescind, and did by his letter of 4th May 1942 (referred to in paragraph 17 of this Case) rescind, the contract.
- (9) BECAUSE the Appellant did not at any time break or repudiate the contract.
- (10) BECAUSE the cases of *Austin Baldwin & Co. v. Wilfrid Turner & Co. Ltd.* and *Andrew Millar & Co. Ltd. v. 30 Taylor & Co. Ltd.* which were relied upon by the Supreme Court, are distinguishable on the facts proved or admitted in the present case.
- (11) BECAUSE the Judgment of the Supreme Court of Palestine was wrong and ought to be reversed.
- (12) THE Appellant will further or in the alternative rely upon the Preliminary Points and alternative submissions set out in the Defence herein delivered 29th September 1942.

PATRICK DEVLIN.
A. J. HODGSON.

In the Privy Council.

ON APPEAL

FROM THE SUPREME COURT OF PALESTINE
SITTING AS A COURT OF CIVIL APPEAL.

BETWEEN—

ISRAEL MARGOLIS - *Appellant*
Defendant

— AND —

SARKIS IZMIRILIAN - *Respondent*
Plaintiff

CASE FOR THE APPELLANT.

WALTONS & Co.,
101, Leadenhall Street,
London, E.C.3,
Appellant's (Defendant's) Solicitors.