Privy Council Appeal No. 80 of 1945

Israel Margolis - - - - - - - - - *Appellant*

v.

Sarkis Izmirilian - - - - - - - - - *Respondent*

FROM

THE SUPREME COURT OF PALESTINE

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 10TH FEBRUARY, 1948

Present at the Hearing:

LORD OAKSEY
LORD MACDERMOTT
SIR JOHN BEAUMONT

[*Delivered by* LORD MACDERMOTT]

This appeal is from a judgment dated the 12th December, 1944, of the Supreme Court of Palestine, sitting as a Court of Civil Appeal (Edwards and Frumkin, JJ.), setting aside a judgment of the District Court of Tel-Aviv dated the 12th March, 1944, and awarding the respondent and plaintiff (as seller) damages against the appellant and defendant (as buyer) for the latter's breach of a contract in writing for the sale of cotton seed, dated the 1st March, 1942.

In the Palestinian courts numerous issues, technical and otherwise, were raised between the parties. Those requiring determination by the Board are, however, comparatively few and the narrative of events may be curtailed accordingly.

The contract was in the following terms:—

" Alexandria, 1st March, 1942.

Seller.—Charles Schlick, Alexandria, or substitute people from Sudan.

Buyer.—Israel Margolis, 11, Yehuda Halevy Street, Tel-Aviv, Palestine.

Quantity.—1,000 (thousand) tons of 1,000 Kos. each.

Goods.—Sudanese cotton seeds, new and old crop.

Packing.—In old bags, suitable for export.

Price.—L.E.12 (twelve Egyptian pounds) per 1,000 Kos., netto/brutto, on basis origin weight, by public Sudanese weigher.

Insurance.—Covered and included in Seller's price, to final destination.

Destination.—To Haifa or any Palestinian port.

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, from Port Sudan, in one or four lots shipment.

Payment.—By opened confirmed letter credit through the Barclays Bank, or by remitting the money by telegraph to the same bank, when seller advises having any chance for place on ship to load goods.

Licences.—Subject to seller's export licence, and to buyer's import licence.

We herewith undersigned confirm the overmentioned contract and conditions, agreed by both parties."

This document was subsequently endorsed by Schlick in favour of the respondent pursuant to the provision " or substitute people from Sudan ". The efficacy of this endorsement to establish privity between the parties to the litigation was challenged unsuccessfully by the appellant in the proceedings in Palestine and the point was abandoned before the Board.

Throughout and prior to the relevant contractual period certain restrictions on the free movement of various commodities, including cotton seed, were imposed by the competent authorities in consequence of the state of war then prevailing. A licence was required to export the goods in question from the Sudan. This was duly obtained by the seller. A licence to import the goods into Palestine was also necessary under an Order made by the High Commissioner in 1939 and amended on the 10th July, 1940. With one exception not now material, this Order—the Licensing of Imports Order, 1939—as so amended, prohibited the import of any goods save under the authority of a licence granted by the Director of Customs, Excise and Trade, and goods imported in contravention of its provisions were subject to forfeiture. On the 6th March, 1942, the appellant wrote to the Director enclosing a copy of the contract and asking that the necessary import licence should be granted as soon as possible. On the 15th March the appellant, not having got a reply, renewed his application. The Director's response to this was dated the 24th March. It reads thus:

" SIR,

With reference to your application dated 15th March, 1942, for a licence to import cotton seeds from Sudan, I regret to inform you that the licence for which you ask cannot be granted.

I have the honour to be, Sir,

Your obedient servant,

(Sgd.) ?

Director.

Note.—If the goods referred to above arrive in Palestine they will be forfeited."

On the 25th March an Order was promulgated in Palestine requiring importers of food stuffs to register, and it would appear that on the same day an announcement was broadcast to the effect that import licences would not be granted to such importers if unregistered. On the following day, the 26th March, the appellant sent Schlick a cable and a registered letter. The cable said:

" Yesterday Government advised by radio all importers no import licence till registration cancelling order cotton seed writing.—Margolis."

The letter enclosed a copy of this message and after a reference to it proceeded:

" I have called several times at Jerusalem and Haifa concerning the import licence and their reply was: we shall see, we cannot tell you yes or not. As to your telegrams stating that there is a possibility for shipment because a steamer is available. I have called at Jerusalem once again, and finally 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 (as per your telegram) 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."

In a post-script the appellant added:

> " I have just now received the refusal from the Import Licensing Section, copy of which is enclosed herewith."

This was the Director's letter of the 24th March. On the 3rd April Schlick replied to these communications and another letter from the appellant dated 30th March, which was not in evidence, stating that he found the contents " not very convincing nor interesting " and informing the appellant that he had transferred the contract to the respondent and had remitted the papers to Khartoum. On the 9th April the appellant replied to Schlick again stressing that there was no permission to import and saying:

> " And generally, why are you in such a hurry? Our understanding is up to the 31st August, and now the Palestine Government the decisive factor in our contract, does not consent to the transaction, about which I have already informed you in my letter of 26th March, 1942."

This letter of the 9th April was forwarded to the respondent's agent in Palestine, one Miedzyrzecki, who, after the receipt of an urgent cable dated the 13th April from his principal, applied to the Food Controller with a view to having some licence issued. The precise nature of the agent's request to this official is not clear as his letters of application were not produced, but in the course of his cross-examination he admitted that he did not ask for a licence on behalf of the appellant; that he did not apply to the Customs department; and that he was unaware that that department could refuse a recommendation by the Controller for the grant of an import licence. On the 22nd April the Food Controller wrote from Jerusalem to the agent as follows:

> " In reply to your letters of the 14th and 17th April re import licence for 1,000 tons cotton seed now en route to Palestine from the Sudan, I have to inform you that an import licence will be granted to the buyer of this consignment. I suggest the consignment is offered to Messrs. Shemen or Messrs. Izhar, Ltd.
>
> 2. Please advise me in due course of the buyer's name in order that the Import Licensing Authority can be requested to issue an import licence."

Meantime, on or about the 15th April, the respondent had shipped from Port Sudan in the *Fred* some 800 tons of the contract goods. This consignment reached Haifa on the 27th April. Another ship left Port Sudan with the balance of 200 tons about the 25th April and arrived at Haifa early in May.

In the *Palestine Gazette* of the 30th April the Government published an important notice to importers announcing: " that the commodities set out in the First Schedule hereto are being imported on Government account and that no import licences in respect of such commodities will be issued to private importers ". This undoubtedly applied to cotton seed from the Sudan. A distinct paragraph of the notice referred to a Second Schedule and made provision for the issue of licences in exceptional circumstances in respect of the commodities listed therein. The Supreme Court appears to have thought that this exceptional procedure might be availed of in relation to cotton seed from the Sudan, though that commodity is not mentioned in the Second Schedule. As there was no indication that the appellant was in a position to claim a special concession this view cannot be regarded as in any way conclusive. Apart from that, however, their Lordships cannot accept it as the meaning of the notice. In their opinion that notice amounted to an authoritative and unequivocal intimation of policy to the effect that import licences in respect of certain commodities (including the contract goods) would not be issued to private importers.

On the 1st May the respondent served upon the appellant a notarial notice reciting the contract and calling upon the appellant to clear the 800 tons then arrived at Haifa per the *Fred* within 24 hours and to act similarly on receipt of a notice regarding the balance of 200 tons then expected at the same port within the next few days. Failure to comply, the notice proceeded, would render the appellant liable in damages and costs to the respondent who, in that event, reserved the right to resell. On the 4th May the appellant's advocate wrote a letter in reply to this notice in the course of which he said:

> " It was clearly stipulated in the said contract that the purchase of the goods is ' subject to buyer's Import Licence '. Such Licence was refused to my client by the competent authorities in their letter dated 24th March, 1942 (copy of which is attached hereto). The contract is therefore to be regarded as cancelled as from the 26th of March, 1942."

The respondent resold the goods to a company carrying on business at Haifa called Shemen Ltd. This company took the goods and it may be assumed that it got the necessary import licence. There was nothing in the evidence to show when or how this licence was obtained. The document was not produced and its date must remain a matter of speculation. Nor is it clear when exactly the sale to Shemen Ltd. took place. There is some documentary indication that this company had gained an interest in the goods by the 1st May, but whatever the truth as to this may be, it is beyond dispute that by the 5th May, at latest, the respondent had sold the goods, and arranged for their delivery, to Shemen Ltd. and regarded himself as no longer bound by his contract with the appellant. On the view which their Lordships have formed it becomes unnecessary to fix the time of resale more closely than this.

The principal ground on which the District Court dismissed the respondent's action for damages was that the appellant was entitled to repudiate the contract when the Director of Customs refused his application for a licence on the 24th March, 1942. In the opinion of that Court the Director's letter of that date contained " a final refusal to grant defendant an import licence and a threat to confiscate the goods if the goods were brought without an appropriate licence ". The Supreme Court was of a different opinion. It took the view, based apparently on the decision of the Court of Appeal in *Millar & Co. Ltd.* v. *Taylor & Co. Ltd.* (1916) 1 K.B. 402, that the appellant should have waited a reasonable period for the purpose of seeing if it were possible to fulfil the contract. The judgment then proceeded:

> " In our view, the parties before us expressly provided for such a period in the contract itself. We therefore consider that the respondent should have waited till the 30th August, 1942, and we accordingly hold that the respondent was not justified in breaking the contract."

The decision of the District Court was therefore set aside and judgment was entered for the plaintiff for damages, the amount of which is not now in dispute.

In the course of the hearing before the Board it was agreed, and properly in their Lordships' opinion, that a stipulation binding each party to use reasonable diligence to obtain the licence requisite for the fulfilment of his part of the bargain should be implied. But the true construction of the expression " Subject to seller's export licence, and to buyer's import licence " raised considerable controversy. For the appellant it was said that the words " Subject to " meant " The above obligations are subject to ", so that, until the necessary licences had been obtained, the sale stipulations of the contract remained inoperative. For the respondent, on the other hand, it was contended that the whole contract came into force immediately, the effect of the licence clause being to make it subject to defeasance if, despite all due diligence, either seller or buyer was unable to get the appropriate licence.

Had their Lordships to choose between these views they would, as at present advised, favour that advanced on behalf of the appellant as according better with the natural meaning of the language used, as well as with the reasonable business requirements of merchants trading in the difficult and exceptional circumstances which prevailed at that time. Their Lordships find it unnecessary, however, to express any final conclusion on this matter as, on either view, the first question to be determined—and on the facts of this case it is the crucial question—is the same, namely, did the appellant use reasonable diligence to obtain an import licence? If he did, the action must fail (whether it be regarded as based on a breach of the implied term or of an operative contract of sale) for it is clear that he never got a licence. If he did not, he is liable in damages unless excused by certain special defences not yet mentioned as, for example, that the contract was a c.i.f. contract and the respondent did not tender the requisite documents.

Before dealing with this question of reasonable diligence it is necessary to enquire whether the appellant had repudiated the contract prior to the service of the notarial notice on the 1st May, 1942. In the opinion of the Board the appellant's cable and letter of the 26th March amounted, when read together, to a repudiation. By itself the letter might perhaps be regarded as equivocal; but the cable which was referred to in the letter without any attempt to modify the plain meaning of its message—" cancelling order cotton seed "—puts the matter, in the view of their Lordships, beyond any reasonable doubt.

If the case ended there it would be necessary to consider whether repudiation was *then* justified and to examine certain arguments addressed to the Board, and founded upon a series of decisions in frustration cases, as to whether it was the duty of the appellant (as was held of the plaintiffs in *Millar & Co. Ltd.* v. *Taylor & Co. Ltd.*) to wait a reasonable time after the interrupting event—the refusal of the 24th March—in the hope that it would subsequently prove possible to import the goods within the contract period; or whether, as the appellant contended, the appropriate test was to ask (using the words of Scrutton J., as he then was, in *Embiricos* v. *Reid & Co.* (1914) 3 K.B. 45 at p. 54) if, at the date of the repudiation, the " reasonable commercial probabilities " were that the necessary licence would not be granted.

But the case does not end with the appellant's repudiation for it is plain that it was not accepted. The terms of the notarial notice of the 1st May are eloquent as to that. The contract therefore remained in existence until that date, and by then the position had altered materially and in a manner which, for reasons to be mentioned later, left no room for the " wait and see " submissions of the respondent. Their Lordships do not, therefore, think it necessary to review the authorities cited in the course of the arguments to which reference has just been made. Lest any misunderstanding should arise from that reference, however, they wish to add that they are not to be taken as thinking that, had the repudiation of the 26th March been accepted, the question of reasonable diligence in the present case would have necessitated, for its determination, adherence to one line of authority or the other or a choice between rules of law. That question is essentially one of fact and the approach to it must take due cognizance of all relevant considerations, including the nature of the interrupting event, the extent of the contractual period and the conduct of the parties.

Turning to the position as it existed at the beginning of May, 1942, after the service of the notarial notice, it is important to observe that the respondent had then appropriated the goods to the contract and, by so doing and shipping when he did, had reduced the full span of the contractual period. So far as the appellant was concerned he could not, on any view, have been expected to wait for a licence after the 5th May when the goods had passed to Shemen Ltd. The finding of the Supreme Court that he should have waited till the 30th August, 1942, ignores the action taken by the respondent and is, in the opinion of the Board, clearly wrong.

Could the appellant then, by the exercise of reasonable diligence, have obtained a licence between the 26th March, when he received the Director's refusal, and the 5th May? For the respondent it was said that the fact that Shemen Ltd. got a licence indicated that renewed efforts on the part of the appellant might have succeeded, and that had he registered as a foodstuffs importer he would have enhanced his chances. Their Lordships are unable to place much weight on these considerations which are both highly speculative. The lack of definite evidence regarding the grant of a licence to Shemen Ltd. has already been remarked. For all that is known this licence may have been issued on grounds which were not available to the appellant or for reasons which enabled it to be said that Shemen Ltd. did not rank as private importers. The point relating to the appellant's registration does not appear to have been put to him in cross-examination and there is nothing in the record to show whether he was registered or whether registration would have modified the attitude of the licensing authority as expressed before registration became obligatory. Taken as a whole the evidence cannot be said to indicate any easing of the licensing situation, either for the appellant or generally, during the crucial period now under discussion. On the contrary, the provision made for registration and the official notice of the 30th April show, in the opinion of the Board, that the general trend was definitely the other way. It must be remembered, moreover, that the Licensing of Imports Order, 1939, was an emergency measure taken to meet a state of war and that the licences issued thereunder were personal to the licensees and could be refused on other than economic grounds. Whatever the reasons of the Director of Customs for refusing on the 24th March to license the appellant may have been, his decision was reached with a full knowledge of the contract and was communicated in terms which were plain and blunt to the point of discouraging an early renewal of the application in the absence of some material change of circumstance.

With these considerations in mind, and after a careful survey of all the available evidence their Lordships are of opinion and hold that the appellant did not fail at any material time in his duty to use reasonable diligence to obtain an import licence.

As this view suffices to dispose of the case it becomes unnecessary to consider the further pleas advanced on the appellant's behalf. Their Lordships will therefore humbly advise His Majesty that the appeal be allowed, the judgment of the Supreme Court set aside and the judgment of the District Court restored. The respondent must pay the costs of this appeal and of the appeal from the District Court to the Supreme Court.

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In the Privy Council

ISRAEL MARGOLIS

v.

SARKIS IZMIRILIAN

DELIVERED BY LORD MACDERMOTT

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