

1944

Present: Moseley S.P.J. and Wijeyewardene J.

ESMALJEE *et al.*, Appellants, and MUTTUPALANIAPPA
CHETTIAR, Respondent.

12—D. C. (Inty.) Colombo, 14,567.

Evidence on commission—Action on contract—Contract governed by restrictions and regulations made in India re export of goods—Application to examine Controller of Exports in India.

Where the plaintiffs sued the defendants on a contract the performance of which was subject to restrictions and regulations that may be made in India governing the export of goods,—

Held, that the defendant's application to examine in India on commission the Export Trade Controller, Madras, should be allowed.

A PPEAL from an order of the District Judge of Colombo.

H. V. Perera, K.C. (with him *T. K. Curtis* and *V. K. Kandasamy*), for defendants, appellants.

N. Nadarajah, K.C. (with him *H. W. Thambiah*), for plaintiffs, respondents.

Cur. adv. vult.

May 31, 1944. WIJEYWARDENE J.—

This is an appeal from an order of the District Judge of Colombo refusing an application by the defendants for the issue of a commission to examine certain witnesses resident in India.

The plaintiffs and defendants are two firms carrying on business in Colombo. These two firms entered into a written contract for the sale and delivery by the defendants to the plaintiffs of 500 bags of Indian Kurakkan. One of the clauses of the contract stipulated that the defendants would not hold themselves "responsible for any consequences due to local or foreign government regulations, restrictions and/or impositions"

The plaintiffs sued the defendants in this case for the recovery of Rs. 6,500 as damages sustained by them by reason of the defendants' failure to supply in or about August, 1942, the goods contracted for.

The defendants filed answer pleading that the non-delivery of the goods was due to the action of the Government of India in prohibiting the export of Indian Kurakkan during the relevant period.

The defendants moved before trial for a commission to examine in India the Export Trade Controller, Customs House, Madras, and one A. Janikeram Chettiar of Tuticorin with whom the defendants were alleged to have indented for 1,000 bags of Indian Kurakkan in July, 1942. The defendants supported their application with an affidavit from the Manager of their firm which referred, *inter alia*, to the letter X 1 sent by the defendants' Proctor to Janikeram Chettiar on August 23, 1943, and the reply X 2 sent by him on August 31, 1943.

The District Judge refused the application, and the main reasons given by him are—

- (1) "That there has been dilatoriness on the part of the defendants in preparing for the defence" as shown by the attitude of the defendants with regard to the service of the summons on them and their failure to make an application for the commission until twelve days before the date of trial;
- (2) That "no tender of money was apparently made" to Janikeram Chettiar who was merely informed in X 1 that the defendants were prepared to pay his expenses; and that the statement in Janikeram Chettiar's letter X 2 that he was too ill to travel to Colombo was not supported by a medical certificate;
- (3) That there was no material placed before him to show that the Export Trade Controller had refused to attend;
- (4) That the evidence of the Export Trade Controller would not be necessary, as the defendants could prove the relevant facts by the production of documents under sections 78 (6) and 81 of the Evidence Ordinance.

Before proceeding to examine the reasons given by the learned Judge, it is necessary to make a brief statement of the various steps taken in the action. The plaint was filed on January 18, 1943. Summons was taken out only on February 20 and served on the defendant firm on February 26, at 10.30 A.M., requiring the defendants to appear and answer on that day at 10.45 A.M. The summons was accompanied with a copy of the plaint translated into Tamil which was not the language of the defendants. The defendant firm wrote a letter to the District Judge on the same day pleading that the time given to them was insufficient for them to make an appearance in Court and that the copy of the plaint served on

them was not in their language. The Judge made a journal entry "File proper papers and move". It is not clear whether this endorsement was communicated to the defendants.

Without any further inquiry the District Judge fixed the case for *ex parte* trial on April 9, 1943, on the application of the plaintiffs. On that day the defendants, appearing through their lawyers, submitted to Court that the summons had not been served properly on them. The Judge held an inquiry on May 25, set aside the order for *ex parte* trial, and directed the plaintiffs to serve the defendants with a copy of the plaint in English. When this was done the defendants filed answer on June 11, and the case was fixed for trial on September 23. On September 12, the defendants applied to Court for the commission and that matter came up for inquiry on September 17; on that day, the learned Judge thought that it was "the most practical suggestion to take up the inquiry into the issue of the commission on September 23", the date of trial and postponed the inquiry accordingly. On September 23, the Judge, after hearing argument, refused to issue a commission. The defendants' Counsel informed the Court at this stage that his clients intended appealing against that order, but the Judge thought that the case should proceed up to "the point of closing the plaintiff's case" and directed the parties to suggest issues. After several issues had been suggested and framed the District Judge postponed the case as the plaintiffs' counsel said he "would rather have the case postponed without his case being disclosed". The resultant effect of these various orders is that, as yet, the trial has not proceeded beyond the initial stage of the framing of issues.

I think the District Judge should not have allowed himself to be influenced by the failure of the defendants to file answer till June, 1942, when he was considering the argument that the defendants had been dilatory in preparing the defence. That failure was brought about by the omission of the plaintiffs to comply with the requirements of the Civil Procedure Code and the objection raised by the defendants to the service of the summons has been found by the District Judge himself to be a sound one. The letters X 1 and X 2 show that the defendants had taken action in August, 1943, for securing the attendance of Janikeram Chettiar to give evidence in Court. The delay, therefore, for which the defendants are responsible covers a period of about two months—from June to August. The plaintiffs-respondents relied on *Steuart v. Gladstone*¹ in support of the contention that the application should be refused, as the defendants had been guilty of laches in making it. There is very slight similarity between the relevant facts in the two cases. In *Steuart v. Gladstone* (*supra*) issue was joined on June 11, 1877, and the case was set down for trial on November 13. On November 13, the Judge ordered the trial to be postponed for a month on the application of the plaintiff. On December 13, the plaintiff gave notice of a motion for the appointment of a commission to take the evidence of himself and a witness, who were in India, and for the postponement of the trial until the return of the writ of commission. At the hearing of the motion on December 17 the defendants offered to agree

¹ (1877) 7 Chancery Division 394.

to a postponement of the trial till February 15, 1878. The plaintiffs did not accept that offer, though the Judge suggested more than once that it should be accepted. The Judge held that the plaintiff should have preferred his motion shortly after June 11, and said—

“ When a plaintiff comes to ask that the hearing of his cause may be postponed he must show due diligence on his own part in making the application Feeling as I do that the defendants have done everything reasonable and that what the plaintiff is asking for is unreasonable, I must refuse this application with costs. ”

I do not think that *Steuart v. Gladstone* (*supra*) is an authority for refusing the defendant's application in this case on the ground of delay.

With regard to the second reason given by the District Judge the learned Counsel for the respondents did not attempt to support the view that Janikeram Chettiar was unwilling to come to Ceylon because he was not satisfied with the mere offer of the defendants promising to pay his expenses and that he would have changed his mind if the money was actually tendered to him. The production of a medical certificate would, no doubt, have helped the Court to form an opinion as to the nature of the illness of Janikeram Chettiar. The defendants, however, are asking for a commission to take his evidence on the ground of his unwillingness to come to Court and have produced his letter X 2 for that purpose. In a post-script to that letter Janikeram Chettiar has added by way of an explanatory note that his illness and the business engagements of his Head Clerk prevented him from acceding to the defendants' request to attend Court and give evidence. If Janikeram Chettiar's illness, is in fact, less serious than he makes it out to be, that would merely show that he is giving a false excuse for not agreeing to attend Court but will not negative his unwillingness to do so. It should be remembered in this connection that the defendant cannot compel the attendance of Janikeram Chettiar who is a resident of India.

The Manager says in his affidavit that “ the attendance of the Export Trade Controller or his representative cannot be procured ”. That statement stands uncontradicted. Moreover, it appears to me highly probable that an official of that position entrusted with the administration of defence regulations would have refused to leave his station and come to Ceylon.

The fourth reason given by the District Judge suggests a way of avoiding the necessity for a commission. It will be seen that the evidence is required with reference to some defence regulations and some orders made under those regulations. At this stage of the case it is difficult to state whether any oral evidence will not have to be led through the two witnesses to explain the connection between these orders and the contract so as to present the case for the defence in an intelligible form to the Court. Section 81 of the Evidence Ordinance referred to by the District Judge gives rise only to a presumption in favour of the documents mentioned therein and it is open to the plaintiff to rebut such presumptions. The position of the defendants will be an extremely difficult one, if the defendants rely merely on the presumption and the plaintiffs succeed in placing some evidence tending to rebut the presumption.

I may add that in *Marsden v. Habibhoy*¹ this Court affirmed the order of the District Judge allowing the issue of a commission to the Superintendent of Stamps of Bombay regarding certain entries made in Bombay Government records.

The plaintiffs filed this action in Colombo in respect of a contract the performance of which was made subject to regulations and restrictions that may be made in India governing the exportation of goods. I think that the defendants' application should be allowed in these circumstances and in view of the nature of the evidence that is sought to be obtained on commission.

I would set aside the order of the District Judge and send the case back with a direction to him to issue a commission at the defendants' expense to such Court or person as may appear fit to the District Judge. The defendants will bear the costs of the commission, whatever be the result of the case.

The defendants will be entitled to the costs of appeal and of the relative proceedings in the District Court.

MOSELEY S.P.J.—I agree.

Appeal allowed.

