1945 *Present:* **Keuneman and Rose JJ.**

MOHAMED & SONS, Appellants, *and* ZAHIERE LYE & CO., Respondents.

96—D. C. Colombo, 14,011.

Trading with the enemy—Licences to import textiles whose country of origin was Japan—Transfer of licences to plaintiff—Entry of Japan into the War—Restrictions on importation of goods of Japanese origin—Plaintiff's right to use the licences—Claim for refund—Defence (Control of Imports) Regulations, s. 8a.

Plaintiff sued on a contract dated January 13, 1941, whereby defendant transferred to plaintiff certain licences P 2 to P 4 to import textiles whose country of origin was the Empire of Japan.

By clause 2 of the contract it was agreed as follows:—

"In the event of the above permit system being abolished by Government for reasons unforeseen or due to *Force Majeure*, if you are unable to use the above permits or any portion of same we bind ourselves to refund (at the same rate paid to us) such value of the licences as may remain unused on the date of such abolition."

On the entry of Japan into the War on December 7, 1941, the Trading with the Enemy Regulations came into force which forbade trading in any goods coming from enemy territory.

Under section 8A of the Defence (Control of Imports) Regulations, read with General Licence No. 4, goods of Japanese origin could be imported into Ceylon provided they were imported from any territory forming part of the British Empire. General licence No. 4 did not apply to Canada and Newfoundland and importation from Canada and Newfoundland of goods of Japanese origin was permissible only under special licence.

Held, that, in the absence of proof that P 2 to P 4 were not usable for the importation of Japanese goods from Canada and Newfoundland, plaintiff's claim for a refund was not sustainable.

Any direct legislative or administrative interference would come within the meaning of the phrase "*Force Majeure*".

APPEAL from a judgment of the District Judge of Colombo.

H. V. Perera, K.C. (with him *S. J. V. Chelvanayagam* and *Navaratnarajah*), for plaintiff, appellant.

N. Nadarajah, K.C. (with him *D. W. Fernando* and *G. T. Samarawickreme*), for defendant, respondent.

Cur. adv. vult.

February 16, 1945. KEUNEMAN J.—

Plaintiff sued on contract P 1 of January 13, 1941, whereby defendant transferred to plaintiff certain licences to import regulated textiles whose country of origin was the Empire of Japan. By clause 2 of P 1 the defendant undertook as follows:—"In the event of the above Permit System being abolished by the Government for reasons unforeseen, or due

to Force Majeure if you are unable to use the above permits or any portion of same, we bind ourselves to refund (at the same rate paid to us) such value of the licences as may remain unused on the date of such abolition.''.

Plaintiff maintained that certain licences P 1 to P 4 current from August 1, 1941, up to July 31, 1942, could not be used by him, and that he was entitled to claim a refund in respect of them from the defendant under clause 2.

It has been established in this case that shortly prior to August 1, 1941—viz., on July 27, 1941—the Finance Regulation called the '' Freezing Order '' was applied to the Empire of Japan. Financial transactions between Japan and Ceylon thereupon became impossible. The licence or permit system was however not abolished, and in fact the licences P 2 to P 4 were issued to have validity from August 1, 1941.

It was not in dispute in this appeal that from August 1, 1941, till the entry of Japan into the War on December 7, 1941, these licences had validity and were usable—though not for direct importation from Japan owing to the '' Freezing Order ''. It was, however, possible to obtain goods of Japanese origin from India and other countries, including the British Empire. The entry of Japan into the War as a belligerent created a new situation. The Trading with the Enemy Regulations then came into force, which forbade trading in any goods '' coming from '' enemy territory. To meet this situation the Defence (Control of Imports) Regulations had been amended on August 1, 1941, by the promulgation of section 8A, which stated—

> '' Where goods which are imported from any territory forming part of the British Empire are goods of enemy origin, such goods shall, for the purposes of these Regulations, be deemed to be grown, produced or manufactured in that territory notwithstanding that they are goods of enemy origin.
>
> In this regulation ' goods of enemy origin ' means goods grown, produced or manufactured in any territory which is enemy territory within the meaning of the Defence (Trading with the Enemy) Regulations, 1939.''

It is clear that under section 8A goods of Japanese origin could be imported into Ceylon provided they were imported from any territory forming part of the British Empire. The prohibition contained in the Trading with the Enemy Regulations did not apply in such cases.

Ordinarily such goods would be imported upon licence. But under Regulation 5A of the Defence (Control of Imports) Regulations, Open General Licence No. 4 was promulgated on August 1, 1941, whereby '' the importation to Ceylon by any person of such goods of any class or description specified in the Schedule hereto as have been grown, produced or manufactured in any territory forming part of the British Empire, except Canada and Newfoundland or any other territory which is enemy territory within the meaning of the Defence (Trading with the Enemy) Regulations 1939.'' Admittedly the Schedule of the Open General Licence No. 4 covers the class and description of goods mentioned in P 2 to P 4.

It is contended for the appellant that the Defence (Trading with the Enemy) Regulations prevented the importation of goods of Japanese origin from allied or neutral countries, and that the licences P 2 to P 4 were not usable for that purpose. It is also urged that under section 8A of the Defence (Control of Imports) Regulations goods of Japanese origin could be imported from the British Empire, but the promulgation of Open General Licence No. 4 made the licences P 2 to P 4 useless, because any person could now import such goods from the British Empire without the necessity of obtaining a licence. But on the other hand the Open General Licence No. 4 did not apply to Canada and Newfoundland which were parts of the British Empire, and importation from Canada and Newfoundland of goods of Japanese origin was permitted under licence, and it was necessary for the plaintiff to show that the licences P 2 to P 4 were not usable for that purpose. It was not sufficient for the plaintiff merely to show that the use of these licences was restricted.

I agree with the argument of Counsel for the respondent that the plaintiff has failed to prove that " the permit system was abolished by the Government ". The only question is whether the words in clause 2 of P 1, viz., " or due to Force Majeure if you are unable to use the above permits or any portion of same " are applicable to this case. As regards the meaning of " force majeure " see the judgment of McCardie J. in *Lebeaupin v. Crispin* [1].

" The phrase ' force majeure ' was not interchangeable with ' vis major ' or ' the act of God '. It goes beyond the latter phrases. Any direct legislative or administrative interference would of course come within the term; for example, an embargo."

On the face of them the licences P 2 to P 4 apply to certain textiles whose country of origin is the Empire of Japan. There is no restriction as to the country from which they can be imported, and Canada and Newfoundland are not excluded from countries from which they could be obtained. To import from Canada or Newfoundland a licence was necessary. There is nothing to show that these licences P 2 to P 4 were not available for the importation of goods of Japanese origin from Canada or Newfoundland. In this connection the questions put to the Controller of Imports, who was a witness, are relevant.

" Q. After the Japanese entered the War a person in Ceylon desiring to import goods from Canada and Newfoundland of Japanese origin required a licence? A.—Yes."

" Q.—On this licence with the conditions attached to it would it have authorised a holder to import goods of Japanese origin from any part of the Empire? No answer ".

This evidence shows at any rate that there is no proof of any administrative embargo which rendered these licences P 2 to P 4 unusable for import of goods of the character described from Canada or Newfoundland. The witness called by the plaintiff admittedly knew nothing about these permits, and there is no evidence that the plaintiff tried to use these permits and was prevented from doing so. There is some evidence in

[1] *L. R. (1920) 2 K. B. 714 at 719.*

the case that Canada and Newfoundland fall outside the sterling group but there is no evidence of any financial or other regulations which rendered trading by persons in Ceylon with Canada or Newfoundland impossible.

Counsel for the appellant seeks to get over this difficulty by relying on section 8A of the Defence (Control of Imports) Regulations. His argument is briefly this. Goods imported from Canada or Newfoundland although of enemy origin must be deemed to be grown, produced or manufactured in Canada or Newfoundland. There has been a change in the nature and the character of the goods, and the licence to import goods of Japanese origin would have no application to those goods and could not be used for the purpose of importing them.

I do not think this argument can be sustained. Section 8A must be restricted to the purposes of the Defence (Control of Imports) Regulations. Those Regulations deal *inter alia* with the prohibition of importation into Ceylon of specified goods by order of the Governor, or of importation of such goods without a licence from the Controller. Under section 8A when goods which were in fact " of enemy origin " are imported from any part of the British Empire they are to be deemed to be grown, produced or manufactured in the British Empire, and accordingly capable of being imported into Ceylon. But I do not think it is possible to apply section 8A to the interpretation of the licences P 2 to P 4. In those licences certain specific goods whose country of origin was in fact the Empire of Japan have been described and their import permitted. I do not think it will be open to the Controller to say (as has been suggested by the appellant) that goods originating from Japan in the licence must under the circumstances be regarded as having lost that character and become goods originating in the British Empire, and that the licences are no longer applicable.

I agree with the finding of the District Judge that plaintiff has failed to prove that " the effect of those Regulations and Orders was either directly or indirectly to abolish the permit system, or to turn P 2 to P 4 into mere pieces of waste paper ". As the District Judge points out, the evidence is more favourable to the view that the licences were available for use in a very restricted sense. The plaintiff's case accordingly fails, and this appeal must be dismissed with costs.

ROSE J.—I agree, and have nothing to add.

Appeal dismissed.