1943 *Present* : **Moseley A.C.J. and Jayetilleke J.**

BOGSTRA, Appellant, *and* CO-OPERATIVE CONDENSED FABRIK, Respondent.

87—D. C. Colombo, 11,015.

Enemy property—Plaintiff company carrying on business in Holland—Occupation of Holland by the Enemy—Comppany under enemy control—Vesting of property in Custodian of Enemy Property—Defence (Enemy Property) Regulations of 1939, Regs. 7 (1) and 7 (1) (c).

The plaintiff, a company incorporated under the Laws of Netherlands, carrying on the business of manufacturing and selling condensed milk, instituted this action against the defendants to restrain them from importing or selling condensed milk bearing a certain mark and also from passing off the condensed milk imported by them as that of the plaintiff. After the defendant filed answer Holland was occupied by the enemy on May 9, 1940.

The Custodian of Enemy Property (the respondent) thereupon filed a petition and moved to be substituted in place of the plaintiff on the ground that all movable and immovable property belonging to the plaintiff vested in him.

The respondent also produced a letter dated June 26, 1940, written from London by the Acting Under Secretary for the Minister of Trade, Industry and Shipping, Netherlands, to the local agents informing them that the Royal Netherlands Government was unable to obtain information as regards the actual position of the plaintiff and that the latter does not figure among the firms which have, since the outbreak of the War, transferred their seats to territories of the Kingdom outside Europe.

Held, that the plaintiff was a body of persons over whom some degree of control was exercised by the Enemy within the meaning of Regulation 7 (1) (c) of the Defence (Enemy Property) Regulations of 1939.

Held, further, that the action instituted for the vindication of rights based upon a trade mark arises out of movable property within the meaning of Regulation 7 (1).

APPEAL from an order of the District Judge of Colombo.

H. V. Perera, K.C. (with him *E. F. N. Gratiaen*), for appellants.

N. Nadarajah, K.C. (with him *N. K. Choksy*), for 1st respondent.

Cur. adv. vult.

March 23, 1943. JAYETILEKE J.—

The plaintiff, a company incorporated under the laws of the Netherlands and carrying on the business of manufacturing and selling condensed milk at Leeuwarden, instituted this action against the defendants on October 25, 1939, to restrain them from importing or selling condensed milk bearing a certain mark and also from passing off the condensed milk imported by them as that marketed by the plaintiff. The plaintiff also claimed an account of the profits earned by the defendants or in the alternative Rs. 5,000 as damages.

On March 9, 1940, the defendants filed answer and on May 9, 1940, Holland was occupied by the enemy. On February 27, 1942, the respondent, who is the Custodian of Enemy Property in Ceylon, filed a petition and an affidavit and moved to be substituted in place of the plaintiff, or alternatively, to be added as a plaintiff, on the ground that under Regulation 7 (1) of the Defence (Enemy Property) Regulations of 1939 all movable and immovable property belonging to the plaintiff became vested in him.

The Regulation, omitting immaterial words, reads thus:

> "All movable or immovable property belonging to or held or managed for and on behalf of an enemy shall be and is hereby vested in the Custodian and shall be deemed for all purposes to have been so vested in him from the commencement of the War."

The motion was opposed on the ground that the plaintiff was not an "enemy" as defined in Regulation 49 of the Regulations. The learned District Judge held against the defendants on that point and made order adding the respondent as a plaintiff. The defendants appealed from that order.

On appeal a further point was raised, namely, that the subject-matter of the action is not movable or immovable property. Mr. Perera contended that all things are divided into corporeal and incorporeal and that only corporeal things are subdivided into movable and immovable.

This argument bears some similarity to that which was addressed to the Court in *Ex Parte Master of the Supreme Court*[1]. In discussing the Common Law meaning of the expression "immovable property" Innes C.J., said:—

> "The question may be regarded from two standpoints. You may look at it first in this way: that all things are divided into corporeal and incorporeal, and that corporeal things are subdivided into movable and immovable—leaving non-corporeal out altogether, and making 'movable' and 'immovable' simply subdivisions of corporeal things. That seems to be the view of Van der Keessel. He says (sec 178): 'By the law of Holland, as under the Roman Law, incorporeal things, where the law or the will of the owner has given no direction to the contrary, are not comprehended under movable or immovables, as in the case of legacies, agreements, and mortgages'. Voet (I. 8. sec. 18) looks at the matter from another standpoint: 'Incorporeal things are things which can neither be handled nor touched, and consist in a right, as inheritances, servitudes, debts, actions, and revenues. But

[1] *(1906) T. S. 563.*

as the greatest portion of the municipal laws ignores the division into corporeal and incorporeal and is content with a mere division into movables and immovables (*Mat., De Auct. 1, 3, 13, and De Crim. 48, 20, 4, 21*), it will be worth while to inquire under which class each incorporeal thing is to be accounted, whether movable or immovable. In his opinion incorporeal rights should wherever possible be divided into movable or immovable. It seems to me that the view expressed by *Voet* is the common sense and the preferable one. I think our law would favour the division of such rights into one or other of the above categories wherever possible."

I respectfully agree with this view. The incorporeal rights mentioned by *Voet* are not exhaustive. Rights to patents, designs, trade marks, copyrights, etc., have been treated by the law as incorporeal. (*Maasdorp's Institutes of South African Law, Vol. 2, page 1.*) Such rights from their very nature must be reckoned as rights to movables.

The expression "property" is defined in Regulation 49 as follows: "Property means movable or immovable property and includes any rights, whether legal or beneficial, in or arising out of property, movable or immovable".

This action was instituted by the plaintiff for the vindication of certain rights based upon the ownership of a trade mark. These rights arise out of movable property within the meaning of the definition of "property".

I now come to the only other argument that remains to be dealt with and that is based on the meaning of the expression "enemy" in Regulation 7 (1). The part of the definition which is relevant to this appeal is clause (*c*) which reads—

(*c*) "any body of persons (corporate or un-incorporate) carrying on business at any place, if and so long as the body is controlled by a person who is an enemy within the meaning of this definition".

The respondent produced a letter addressed by the manager of the plaintiff to the local agents and posted at Leeuwarden on May 3, 1940, giving them detailed instructions as to what they should do with monies due to the plaintiff in the event of Holland being occupied by the Germans. He also produced a letter dated June 26, 1940, written from London by the Acting Under Secretary for the Minister of Trade, Industry and Shipping, Netherlands, to the local agents informing them that the Royal Netherlands Government was unable to obtain any information as regards the actual position of the plaintiff and that the latter does not figure among the firms which have, since the outbreak of the War, transferred their seats to territories of the Kingdom outside Europe.

It was urged that this evidence did not prove that the plaintiff was carrying on business in Holland or that the plaintiff was controlled by an enemy on and after May 9, 1940. A similar point seems to have been taken in *Re an arbitration between N. V. Gebr. Van Udens Scheepvaart en Agentuur Maatschappij and Sovfracht*[1].

In that case the respondents, a company incorporated under the laws of the Netherlands and carrying on the business of shipowners at Rotterdam, chartered one of their vessels to the appellants, a Russian company.

[1] *(1941) 3 All Eng. Rep. p. 419.*

A clause in the charter-party provided for arbitration in London. Disputes having arisen between the parties in April, 1940, each party appointed an arbitrator but therefore the matter could proceed further the German invasion of the Netherland took place and the country was occupied by the enemy in May, 1940.

The appellants and their arbitrator subsequently refused to proceed with the arbitration on the ground that the respondents had become enemies. On June 24, 1941, the respondents took out a summons asking for the appointment of an umpire. It was contended for the appellants that the summons should be dismissed for three reasons, one of them being that the respondents had become enemies under the Trading with the Enemy Act of 1939.

That Act has a definition of "enemy" which is identical with ours but it does not have a provision which corresponds with Regulation 7 (1) of our Regulations.

The only evidence before the Court was that contained in an affidavit sworn and filed by the solicitor acting for the appellants which stated that they are a Dutch company, that is to say a company incorporated under the laws of the Netherlands, and have their principal place of business at Rotterdam. It was further stated that Holland was occupied by the Germans in the second week of May, 1940, the arbitration having been begun in the previous month.

In June, 1941, the Court was invited on this evidence to infer or to take judicial notice of the following facts:—(*a*) that the appellants continued to carry on business, (*b*) that the occupation of Holland by Germany continued and (c) that the appellants were controlled by the enemy.

Referring to (*a*) Goddard L.J., said:—"I think it is fair to draw the inference that the appellants are still trading, or endeavouring to do so, in Rotterdam, though it may be for the purpose only of winding up their business".

I presume that Goddard L.J. referred to the severe punishment that Rotterdam had received at the hands of the Germans when he used the words "or endeavouring to do so". Perhaps very few buildings remained undamaged after the bombing of Rotterdam and he was therefore of opinion that trading in Rotterdam under those circumstances really amounted to "an endeavour to trade".

Referring to (*b*) and (c) Du Parcq L.J., said:—"We were asked to take judicial notice of the fact that this occupation continues, and there is no dispute about this, or about the fact that some degree of control, which may well be severe, is exercised by the enemy over the inhabitants".

Section 57 of the Evidence Ordinance (Cap. 11) gives a list of the facts of which the Court shall take judicial notice. That list is not exhaustive and it is open to a court to take notice of facts other than those mentioned in the section.

In *The Englishman Limited v. Lajpat Rai*[1], the scope of section 57 of the Indian Evidence Act, No. 1 of 1872, which is almost indentical with

[1] *(1910) I. L. R. 37 Cal. p. 760.*

section 57 of our Evidence Ordinance was considered. In the words of Woodroffe J. :—

" . . . . Facts, however, of which judicial notice may be taken are not limited to those of the nature specifically mentioned in these clauses. These are mentioned because, as regards them, the Court is given no discretion. As to others the Court must determine in each case whether the fact is of such a well known and established character as to be the proper subject of judicial notice. A matter of public history may be such a fact. The tendency of modern practice is to enlarge the field of judicial notice. . . . . "

Woodroffe and Ameer Ali in their Commentary on the Law of Evidence applicable to British India say that the Courts may and will take judicial notice of, generally speaking, all those other facts, at least, of which English Courts take judicial notice. (*9th Edition, page 469.*)

The evidence in this case is much stronger than the evidence in the case of *Re an arbitration between N. V. Gebr. Van Udens Scheepvaart en Agentuur Maatschappij and Sovfracht* (*supra*), which in the opinion of Lord Greene, Master of the Rolls, was colourless.

I feel that, on the materials before me, I would be justified in drawing the inference that after the occupation of Holland by the enemy the plaintiff continued to carry on business in Leeuwarden at least, for the purpose of winding it up and that some degree of control is exercised by the enemy over the plaintiff. The plaintiff would thus be an enemy for the purposes of the Defence (Trading with the Enemy) Regulations of 1939.

The order of the learned District Judge is, in my opinion, correct, and I would accordingly dismiss the appeal with costs.

MOSELEY A.C.J.—I agree.

Appeal dismissed.