

In the matter of part cargo of Steamship "Carolina."

Sture Bojsen - - - - - *Appellant*

v.

His Majesty's Procurator-General - - - - - *Respondent*

FROM

THE HIGH COURT OF JUSTICE (ENGLAND), PROBATE, DIVORCE AND
ADMIRALTY DIVISION (IN PRIZE).

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 23RD JULY, 1920.

Present at the Hearing :

LORD SUMNER.

LORD PARMOOR.

SIR ARTHUR CHANNELL.

[*Delivered by* LORD PARMOOR.]

The appellant, a Swedish subject, appeals from a decree and judgment of the late President which disallowed the appellant's claim, and condemned certain goods, part cargo of the steamship "Carolina." The goods in question were 200 cases of white orange Californian honey, 120 casks of borax powder, and 94 cases of desiccated whole egg, and 71 bags of carnauba wax. The goods were shipped on the 3rd and 4th December, 1915, at New York by the firm of Habicht, Braun and Company, who carry on business in the United States of America, and were consigned to the appellant at Malmö in the Kingdom of Sweden.

At the end of December, 1915, the steamship "Carolina" was sent in charge of a Prize Crew into the Port of Lerwick, and the goods were formally seized on the 29th of December. The case of the appellant is, that at all material times the property in the goods was vested in him, and that they had neither an enemy origin, nor an enemy destination, and that they were being carried on a neutral steamer from one neutral port to another neutral port, and intended exclusively for consumption in neutral territory.

The respondent's case is that the appellant had not proved that the property of goods had passed to him before shipment, or before seizure, and that the goods in question were enemy goods with an enemy destination, being either contraband or infected with contraband character.

The learned President for the purposes of the case assumed that the goods were shipped by a neutral firm in the United States to a neutral consignee in Sweden; and their Lordships in considering the case have adopted the same assumption.

The first matter which arises for consideration is whether the appellant was owner of the goods at the time of the seizure. If he was not the owner, he had no status to enable him to make his claim in a Prize Court, or to be heard on the appeal. The learned President found that it had not been proved to his satisfaction, either that the goods had passed before or on shipment to the appellant, or that the property had passed to him before the seizure. Their Lordships propose to consider in the first instance whether any reasons have been brought forward by the appellant sufficient to make them come to a different conclusion, on this issue from that of the President.

The goods were shipped at New York by the firm of Habicht, Braun and Company. The partners in this firm are F. E. Habicht and H. W. Braun, both of German birth but naturalised in the U.S.A. They used to have a branch at Hamburg. They are correspondents of Hugo Rohde and Siegmund Robinow, both of Hamburg. No evidence has been produced from this firm as to the conditions under which the shipments were made or as to the date at which payment was made to them by the appellant. Such evidence might have been produced without difficulty and there is no doubt of its importance. The non-production of such evidence is a serious consideration and necessarily throws doubt on the case of the appellant. The goods moreover are said to have been purchased through the agency of the Aktiebolaget C. V. Svensson, a duly registered Swedish company. No evidence is forthcoming as to the terms of this agency and the sale is said to have been settled verbally. In the earlier affidavit the appellant does not disclose any special connection between himself and C. V. Svensson and Company. It appears, however, that C. V. Svensson is the father of the appellant and that the appellant is jointly interested with his father in the firm. The firm was founded in 1912 with a capital of 5,000 kroner.

Svensson and his son, the appellant, work from the same office, and in addition Svensson acts as agent for Hermann Lindberg, of Malmo, who is described as a notorious enemy trader and as correspondent intermediary for Volkner Siegmund Lasch, of Halberstadt, in Saxony. In September, 1916, Svensson was concerned in the shipment of rice and beans per the steamship "Ada." The "Ada" was a blockade runner belonging to the Interchange, Limited, of Copenhagen, which was proclaimed an enemy firm on the 10th November, 1916, under the Trading with the

Enemy (Extension of Powers) Act, 1915. Finally, on the 1st August, 1916, the firm of Svensson and Company was itself proclaimed an enemy firm under the same Act. The appellant was himself proclaimed an enemy person under the same Act on the same date. Having regard to the position of the three principal actors in the transaction and to the nature of the business in which Svensson and Company have been engaged, there is no doubt that the burden lies upon the appellant to prove both that he was the owner of the goods at the date of the seizure, and that the goods had not an enemy destination.

The terms of the sale of the goods in question are said to be contained in four separate agent's sale notes which were produced at the hearing.

The purchases, so alleged to have been made, were all made between the 15th and 30th October, 1915, and the sale notes are all in similar form. Each note was addressed to the appellant at Malmo, signed by or on behalf of C. V. Svensson and Company. The shipment of goods was to be made from New York to Gothenburg and payment with reimbursement in New York. These sale notes are in form accurate, but, as in other cases, where the conditions are suspicious, owing to the conduct and transactions of the parties concerned, they cannot in themselves be accepted as deciding the case in favour of the appellant, and as stated above, there is no corroborative evidence either from the firm of Habicht, Braun and Company or from Svensson and Company. The appellant, however, further claims to have proved that, in accordance with the terms of the sale notes, he arranged, on the 20th October, 1915, and on the 17th November, 1915, through the Malmo Folksbank, for the necessary credit to be opened at the National City Bank at New York in order that payment should be made and that accordingly such payment was, in fact, made in America before shipment. The bills of lading are dated the 3rd and 4th of December, 1915, and contain the usual provision that the consignees shall be under an obligation to furnish to the shipping company at Gothenburg promptly and on demand a written declaration that the goods covered by the bills of lading are for consumption in the country of destination shown on the bill of lading and will not be exported. This declaration was made by the appellant, but there is no evidence to show to whom the bills of lading were sent or what became of them. Here again there should have been no difficulty in producing evidence from Habicht, Braun and Company or by Svensson and Company, but no proof has been given. The goods were all invoiced by Habicht, Braun and Company to the appellant by invoices dated the 8th December. In each of the invoices there is the term "Payment against Sight Draft opened through Malmo Folksbank through the National City Bank of New York."

Evidence was further produced that during October and November, 1915, the appellant re-sold certain of the goods to purchasers in Sweden and that the contracts of sub-sale provided for payment

in net cash and a declaration that the goods so purchased were intended exclusively for consumption in Sweden.

The learned President has dealt at length with the character of these sub-purchases and the position held by the sub-purchasers. It is not necessary in the view of their Lordships to enter in any detail into this portion of the case, if the appellant is not able to establish his ownership of the goods at the material dates. It must not be understood that they in any way differ from the conclusions at which the learned President arrived.

Attention must be called to an intercepted wireless message exhibited on behalf of the Crown and dated the 11th November, 1915. In this message, which is dated three weeks after the alleged sale of the borax powder to the appellant, Svensson and Company, who are said to have acted throughout as sale agents for Habicht, Braun and Company, say: "Bojsen accept forty tons borax powder casks twenty-one half five tons carnauba wax sixty-six two hundred cases honey as offered twenty-three without discount steamer 'Oesterland' credit opened." There is no explanation of the reference to the steamer "Oesterland," but the message evidently refers to the goods in question in the appeal and cannot be reconciled with the terms of the alleged sale notes.

The only remaining matter to consider is whether the appellant has succeeded in proving that he made payment for the goods before shipment or before the seizure. The evidence produced by the appellant as documentary proof of payment by him of the price for the goods before or on shipment or before the date of seizure is, in the opinion of their Lordships, not sufficient to discharge the burden of proof which the circumstances to which reference has been made unquestionably place upon him. It is unnecessary for their Lordships to call attention to the passages in previous judgments which indicate the necessity that claimants should make a full disclosure, and especially that all really essential documents should be produced unless some valid reason is given which makes their production, in any particular case, not possible. The documents on which the appellant relies may be examined in the order in which they occur in the record. These documents are in ordinary commercial form. They show no doubt, if they are accepted as genuine, that arrangements were made which might have allowed payment to be made by the appellant, but they do not show that payment was in fact made. Direct evidence on this point might have been given either by the National Bank of New York or by Habicht, Braun and Company, but no such evidence has been produced. It is the non-production of such evidence which makes it impossible to say that the appellant has discharged the burden of proof.

The first documents in the record on which the appellant relies and which relate directly to payment, are the two invoices of the 8th December, 1915. These invoices show that the terms of purchase included "Payment against sight draft drawn against letters of credit No. 1125 and No. 1064 by Malmo Folksbank through National City Bank of New York." This would no doubt

indicate spot payment in New York, but a further step is necessary to complete the proof, *viz.*, that these terms were in fact carried out by spot payment at the date mentioned, and as already has been pointed out there is no proof that this further step ever was taken. The next two documents are the bank credit note of the 30th December, 1915, and the bank debit note of the 5th January, 1916. Both of these documents indicate an arrangement for payment by telegraphic remittance to Habicht, Braun and Company. In this respect they differ from the statement in the invoices as to letters of credit opened by Malmo Folksbank through the National Bank of New York. This discrepancy is not, however, in itself of great importance. The material consideration is that these bank credit and debit notes, although no doubt of value to show whence the funds might have been derived, if there had been any direct evidence of payment, do not in themselves show that payment was in fact made at the date and by the method alleged by the appellant. The same criticism applies to the documents, extract from cash book, and statement as to extract from cash book. They are, on the face of them, consistent with the allegation which the appellant brings forward, but they are not sufficient to satisfy the burden of proof, which rests on the appellant. There is an omission of any direct proof of payment for the goods either at the date of shipment or before the date of seizure, an omission capable of being supplied by evidence either from the National Bank of New York or by Habicht, Braun and Company. Under these circumstances their Lordships have come to the same conclusion as the learned President.

It has not been proved to their satisfaction that the property in the goods had passed before or on shipment to the appellant or that the property had passed to him before the seizure. This disposes of the claim of the appellant, and it is unnecessary to consider whether there was an enemy destination of the goods. As stated above, it must not, however, be assumed that their Lordships under this head in any way differ from the learned President.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed with costs.

In the Privy Council.

In the matter of part cargo ex Steamship "Carolina."

STURE BOJSEN

v.

HIS MAJESTY'S PROCURATOR-GENERAL.

DELIVERED BY LORD PARMOOR.

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