

The Kara Deniz

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Court : Mumbai

Decided On : Jul-05-1922

Reported in : (1923)25BOMLR116

Judge : Sumner, ;Parmoor, ;Wrenbury and ;Arthur Channell, JJ.

Appellant : The Kara Deniz

Disposition : Appeal dismissed

Judgement :

Sumner, J.

1. Although their Lordships do not find it necessary to call upon the Crown for any argument, they must not be understood to cast the smallest slight upon the argument which has been advanced to them on behalf of the appellant in so doing. Indeed, they wish to say that great assistance has been rendered to them by the brevity, the clearness and the good judgment which Mr. Mirza has displayed on behalf of his client; but their Lordships have come to the conclusion that there is no ground made out upon which they can interfere with the condemnation which was pronounced in the Court below.

2. The case is a claim in Prize for the condemnation of the Kara Deniz. It has been heard on two occasions, On the first the learned Chief Justice found that the formalities of the transfer to the claimant appeared to be complete, but he had

doubts, which the circumstances certainly seem to have warranted, whether the transaction might not have been a collusive one entered into for the purpose of assisting the Turkish Government, then an enemy of His Majesty, and accordingly the case was adjourned to give the claimant the opportunity of calling further evidence upon that point. Subsequently the case came on again, and a decree of condemnation was pronounced upon the ground that the claimant had, at the time of the capture and continuously thereafter, a commercial domicile in Constantinople, and that he had never formed any intention, or taken any steps, which had the effect of divesting him of that commercial domicile and adopting some other. If the decision that he had not done so, and had therefore retained his Turkish commercial domicile was correct, it is not contended before their Lordships that the condemnation was not properly pronounced.

3. The question is one of fact, and depended in the first instance upon the evidence given as to the acts and intentions of the claimant. He was by race a Greek. He was a member of the Orthodox Greek Church, but was born in Constantinople a Turkish subject. About three years before the war he had been naturalised as a Persian subject, but he continued to carry on his business in Constantinople as before. In partnership with a Turkish subject he traded as a manager of shipping, and, in co-ownership sometimes with Turks and sometimes with Germans, and in one or two cases without any co-owners, he was owner of a number of vessels trading principally in the Black Sea, where they carried the Russian mails, and through the Suez Canal and down the Red Sea, where they engaged in the pilgrim traffic to Mecca. This business he carried on up to the very eve of the outbreak of the war between Turkey and 'Great Britain. He happened then to be in the Piraeus in consequence of some trouble which one of his vessels, the Teheran, had got into. The imminence of war must have been obvious to him, as it was to everybody else, because his vessels had been employed in transporting troops for the Turkish Government, a service which they had rendered in time of peace for some years, but now were called on to render upon an exceptionally large scale.

4. In the autumn of 1914 mines had been laid in the Dardanelles, the traffic through the Straits was no longer conducted in the ordinary mode of times of

peace, and it could hardly have been a surprise to him when, at the Piraeus, he learned that war had formally begun. He took an early opportunity of removing from the immediate area of war his wife and children, and brought them to Piraeus. His Turkish partners he left in Constantinople. His material interests were there, because his ships, except the Teheran and the Kara Deniz, were in the hands of the Turkish Government, and his undertakings therefore continued as before in Constantinople, though they were seriously hampered, and perhaps brought to a standstill, by the war. He next devoted himself to the fortunes of the Kara Deniz, which he had bought in the previous August. It may be assumed for present purposes that everything connected with the purchase was done in good faith, but she was a vessel at that time on passage eastwards, and reached Bombay before he had been able to communicate with the captain for the purpose of taking the formal steps necessary to change her flag and to establish her as a Persian vessel. She reached Bombay flying the Turkish flag, under the command of a Turkish captain, with a Turkish crew; she had no register on board, but in other respects she was documented as a Turkish vessel. He accordingly went to Bombay himself for the purpose of trying to terminate her stay at Bombay, for the authorities insisted that before the change of ownership could be recognised the register must be produced and put into regular order. His intention was to forward the vessel to a destination, which he says had been pre-arranged, Busra.

5. Under these circumstances the burden of proof was upon him to satisfy the learned Chief Justice that the commercial Turkish domicile, which he had certainly retained up to the time when war broke out, had been altered. He might have stated that it was his intention definitely to give it up, and not to resume business in Constantinople at all. As to that he made statements in evidence before the learned Chief Justice which negatived any such intention, because he said in cross-examination, 'I shall go back as soon as the Dardanelles are open. It is immaterial to me whether war is going on or not. I want to go to look after my business. I was afraid of the safety of my wife and family, as they were Greeks.' It is true that in re-examination he said, 'I do not want to trade there while war continues. If I got to Constantinople I would try and get my ships to Piraeus,' and it is suggested that what he really meant was that he expected that very shortly, not only would Constantinople be in the hands of the British forces, but apparently

would have been annexed to the British Empire and have become a British possession. No grounds are shown for so far-reaching an anticipation as that, but at any rate he gave this evidence before the Chief Justice, who formed his own opinion as to it. Cogent grounds would be needed to alter the conclusion drawn by him from the oral evidence which the appellant gave, in spite of the fact that he spoke Greek, and that it seems doubtful whether the interpreter thoroughly understood Greek, while the Court did not at any rate profess to understand that language. Every act of Mr. Atychides at the time was consistent with the intention to retain his commercial domicile at Constantinople, and is inconsistent with any intention to divest himself of it. He did his best to continue the voyage of the Kara Denis to a Turkish port, although he was not able to show that there was any particularly pressing commercial object in pending her to Busra, where no cargo was engaged, where no agent had been appointed and where, so far as appears, there was no trade to be expected. He continued to act exactly as before, so far as their Lordships know. It may be said that there was very little that he could do with his business in Constantinople, he being in the Pirus and his ships being in the hands of the Turkish Government; but still the matter rested with him, and on appeal their Lordships think it is impossible to dissent from the conclusion which the learned Chief Justice arrived at in that state of the evidence, namely, that the claimant had not discharged the burden of proof which lay upon him of showing that he was no longer commercially domiciled in Turkey, as he had been before. That being so, it has not been argued before their Lordships that the condemnation should not stand.

6. There were other claims raised at the first trial, the nature of which appears to have been that it was contended that the ship had been detained by the Government at Bombay either without legal authority or in the unreasonable exercise of a legal authority, and under such circumstances as to warrant the claimant in the prize proceedings making a claim for damages for detention of the vessel. It may be that, if the ship had been released in the prize proceedings, he might have a claim for something of the kind, but what claim in prize he could have as an alternative to a claim for the release of the vessel and consistently with her condemnation does not appear.

7. On the first occasion, either by arrangement or in the discretion of the learned Chief Justice, those questions do not seem to have been tried; on the second occasion it was unnecessary to try them because the vessel was condemned, and there it was conceived the matter ended. It has been contended before their Lordships by counsel for the appellant, first of all that there is such grievance, and secondly that it is one upon which their Lordships ought to pass an opinion in the appellant's favour. It is quite clear that, sitting in appeal, their Lordships could not investigate this matter for the purpose of giving a decision themselves, if it was never passed upon at Bombay before a Court there and after proper examination of the facts in Court, and their Lordships are clearly of opinion that no ground whatever has been made out for giving the appellant any relief in that connection. If he has any such rights he should prosecute them in Bombay.

8. Their Lordships are very far from encouraging any supposition that he has such rights. Counsel frankly admitted that the case must be, not that there was illegal behaviour on the part of the port officials, but that they acted unreasonably in exercising legal rights for a long time instead of accepting the representation diplomatically made on behalf of the claimant, and it was contended that the object was the indirect one of getting an opportunity of condemning a Persian vessel as Turkish if war should break out between Great Britain and Turkey. A charge of bad faith like that, which has never been investigated, still less supported, is one as to which it is unnecessary to say anything further. Their Lordships, therefore, think that there is no ground whatever for interfering with the condemnation pronounced by the Chief Justice of Bombay, and they will humbly advise His Majesty that the appeal should be dismissed with costs.