Privy Council Appeal No. 4 of 1925.

Hirji Mulji and others - - - - - - *Appellants*

v.

The Cheong Yue Steamship Company, Limited - - - *Respondents*

FROM

THE SUPREME COURT OF HONG KONG.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 25TH FEBRUARY, 1926.

Present at the Hearing:

LORD DUNEDIN.
LORD SUMNER.
LORD WRENBURY.

[*Delivered by* LORD SUMNER.]

In this case the respondents, owners of the s.s. "Singaporean," sued in the Supreme Court of Hong Kong on an award made there in their favour by a single arbitrator. Notice had been given to the charterers, the present appellants, that the respondents claimed arbitration upon a dispute alleged to arise under a time charter made between them on the 17th November, 1916, and had named their arbitrator. This notice they disregarded, and, no second nomination having been made, the respondents proceeded before their own arbitrator, who made this award on the information which they laid before him. It was not contended before their Lordships that this procedure was not regular and in accordance with the local ordinances dealing with the subject.

The charter-party provided that the "Singaporean" should be placed at the appellants' disposal on the 1st March, 1917, at Singapore, and should be employed by them for ten months in sundry specified trades. It contained the usual terms, including a cancelling clause, an arbitration clause, and a clause providing that the charter should be construed and governed by "British" law.

Shortly before the time at which the ship was to have entered upon the performance of the charter, she was requisitioned on behalf of His Majesty's Government. For some reason the shipowners thought that after a few months she would be again placed at their disposal and on the 5th April, 1917, they wrote to the charterers to ask whether they would be prepared to take up the charter after the release of the vessel. The charterers, whether on independent information of their own or on these expressed anticipations of the owners, replied on the 12th May that they would require the steamer when released. Some correspondence passed in the autumn, which showed that the charterers then desired to know when the ship would be free, and that the shipowners were unable to find this out. Then there followed a long silence. From the 11th October, 1917, to March, 1919, no communication passed between the parties.

The "Singaporean" continued in Government service until late in February, 1919. On the 2nd March, 1919, the shipowners' agents informed the charterers of her release and asked who would take delivery of the ship on their behalf at Singapore. The charterers replied on the 4th March that it was now useless to offer delivery, giving as their reason that the charter had long expired. To this contention they adhered until and at the trial, when it was decided against them by the Chief Justice, who gave judgment for the plaintiffs in the action.

By the charter the ten months for which it was to be in force did not run from any specified date, but from the time at which the ship was placed at the disposal of the charterers. It was clearly a misapprehension on the charterers' part to say simply that the charter had expired by effluxion of time. The Trial Judge, on the other hand, says that an admission was made before him that the correspondence amounted to an exercise of the cancelling option in favour of maintaining the charter. This must be a mistake, for the only option mentioned is an option to cancel, and a decision to maintain the charter would not be an exercise of any opinion under this clause. Nevertheless he made use of this to support his view, repeated by him on the appeal but with some hesitation, that, by affirmatively electing not to cancel the charter, when the 1st March, 1917, passed without the ship being placed at their disposal, the charterers, who had full knowledge of the fact of the requisition, so conducted themselves as to oust the doctrine of frustration. He thought that they must be deemed to have relied on arrangements of their own to provide for such a case, so that no implication could arise. The charterers had agreed to take the ship, and therefore were ready to protect themselves.

This view may be shortly disposed of. Their Lordships think that on the facts it was untenable, and in argument before them it was not supported. The cancelling clause clearly was never put into operation by the charterers, and the term of the charter

therefore remained unaffected by it. Counsel admitted before the Board, and rightly on the materials, that the communications which passed on the 5th April and the 12th May, 1917, did not amount to a new contract or in any way vary the contract contained in the charter-party. No new promise was made nor, if there had been any new promise in form, was there any consideration to support it. The parties were over-sanguine. If they thought that the delay would not frustrate the charter, events showed that they were wrong and their error left their position unaffected.

On appeal to the Full Court there was a considerable divergence of opinion among the Judges (see 19 Hong Kong L.R. p. 12), the appeal being eventually dismissed by a majority (the Chief Justice and Gompertz, J., Sir Skinner Turner dissenting).

The case made by the appellant charterers was throughout that the arbitrator had no jurisdiction. The claim made against them, with which he had purported to deal, could not be said to be a dispute "arising under this charter" in the words of the clause, seeing that, before it was made or any question arose, the whole charter had come to an end by frustration of its objects in consequence of the requisitioning of the ship. The shipowners supported the view above set out, and, further said (in addition to points arising out of the state of the pleadings, which are not now material), that there had been no frustration, and that, even if this were not so, the clause continued to apply and was a submission effective to give the arbitrator jurisdiction. On this point, on which he had expressed no opinion at the trial, the Chief Justice agreed with Gompertz, J., on the appeal. Their conclusion, as expressed in the judgment of the latter learned Judge may be thus summarised. Frustration of a contract depends upon the express and implied terms of the contract itself. Such a question is therefore within a clause which refers "any dispute under the contract" to arbitration. Here the decision is not on a point collateral to the merits—the finding is on the merits—and on the very matters as to which the parties have agreed that the award should be final. Many authorities were cited, and much reliance was placed on *Scott* v. *Del Sel* (1923, S.C. (H.L.) 38), of which, unfortunately, the Court had only a brief note and not the full report before them. Sir Skinner Turner held that the contract having been still executory when the requisition occurred, the effect on the contract was that its object was frustrated by the delay caused thereby, and consequently the whole charter, including the arbitration clause, had come to an end before the shipowners raised their claim that it was still in force.

Upon the question of frustration the case is a typical one, and is governed both in its facts and its law by the *Bank Line* v. *Capel* (1919, A.C. 435). A great many charter-parties have been dealt with during the last few years on indistinguishably similar facts and have been held to have been frustrated by reason of the requisi-

tion. The facts of the present case are *a fortiori* to those in the case of the *Bank Line*, and no Court of law could have held upon them that the charter had not been frustrated at latest when, in the latter part of 1917, it had become plain that the first expectations of a speedy release of the ship were unfounded.

The arbitrator thought otherwise. His award is not clearly expressed, no doubt owing to the fact that only one party appeared before him, but their Lordships do not think that any objection can be reasonably taken to its form. It means that the charter-party had not been frustrated at all. So regarded, it was wrong in law and fact.

As the arbitrator was the judge, if at all, both of law and fact, the sole question is whether he had any jurisdiction to decide, as he purported to do, between the parties. This depends on the question whether or not there was any submission, and that again on the question whether, at the time when it purported to be submitted to him, there was a dispute, subsisting between the parties, " under this contract," that is, a contract then subsisting.

That a person before whom a complaint is brought cannot invest himself with arbitral jurisdiction to decide it is plain. His authority depends on the existence of some submission to him by the parties of the subject-matter of the complaint. For this purpose a contract that has determined is in the same position as one that has never been concluded at all. It founds no jurisdiction.

Lord Parker of Waddington sums up this subject in *The Produce Brokers'* case (1916, 1 A.C. at p. 327) in the following words :— " The arbitrator cannot make his award binding by holding, contrary to the true facts, that the question, which he affects to determine, is within the submission. . . Where the submission is contained in the contract, it may be a question of construction, whether such expressions as ' all disputes arising under this contract ' include questions as to the ambit of the submission itself. *Prima facie*, I do not think they would." " A Court," says Lord Loreburn in the same case (p. 322), " will decide for itself whether an inferior Court has clothed itself with jurisdiction by an erroneous finding on something vital to the jurisdiction " (see, too, *A.G. for Manitoba* v. *Kelly* (1922, 1 A.C. at p. 276). Accordingly, if it be the law that when a contract is frustrated it is brought forthwith to an end as regards matters thereafter arising, and if it was the fact that the contract had so come to an end before 1919, when for the first time an offer of the ship for service was effectively made, then the arbitrator could not clothe himself with jurisdiction by finding that there had been no frustration at all.

With regard to the reasoning of the majority in the Court below, their Lordships must observe, with very great respect, that they hardly appreciated the difference, which is made by holding that the entire charter had come to an end. An arbitrator under an ordinary arbitration clause may have jurisdiction to construe the

contract, which contains the submission, and to find for or against trade customs said to be incorporated with it (*Produce Brokers'* case; 1916, 1 A.C. 314), or to adjudicate upon breaches of a contract, partly or wholly performed, but still in existence, for the purpose of awarding damages for such breaches already committed, even though it is determined as regards future performance by repudiation on one side and acceptance on the other (*Sanderson* v. *Armour*, 1922, S.C. (H.L.) 117; *Champsey & Co.* v. *Jivray & Co.*, 1923, A.C. 480). This proposition is quite different from saying that a dispute, which might have arisen under the contract containing the submission, if it had not come to an end without fault on either side, is a dispute submitted thereunder, when the contract itself no longer exists (*May v. Mills*, 20 T.L.R. 287), though alluded to, was disposed of by assuming that it only excluded from the submission matters collateral to the main issue. Their Lordships venture to think that the question whether there is jurisdiction is not collateral; it is essential and fundamental, though, if the point is once got over, the merits may bulk so large as to make it seem a minor matter.

The respondents raised before their Lordships two somewhat refined arguments, to which their Lordships trust no real injustice is done by the following summary. The doctrine of frustration rests upon a term or a condition implied in the contract. In contemplation of law the parties, if they had anticipated and had taken into consideration the events which ultimately frustrated the object of their adventure, would have made provision for it, and, again in contemplation of law, the legal operation of those events upon the contract is the very thing for which that term would have provided. Hence, in implying that term to give a founation for a legal conclusion, the law is only doing what the parties really (though subconsciously) meant to do themselves. Accordingly, the respondents asked why must one mode of dealing with an unanticipated event be adopted rather than another? At any rate, why should not an arbitrator, in passing upon the questions raised by the implication, adopt a conclusion not in all respects identical with the decision in the *Bank Line* v. *Capel?* If, for example, he thought that the parties would have said (had they thought of it) that the contract should continue after the happening of the event, at least so far as to submit to his arbitration the question whether or not there had really been any frustration at all, would he not have been competent to do so? Or, putting it in another way, if the term which he thought fit to imply had been that in the event of frustration the contract as a whole should not be void, but that the parties should merely be relieved from further performance of acts, which under the charter they severally undertake to do, if so, must the Court not intend that his award was based on this kind of view and accordingly support it *ut res magis valent quam pereat?*

The alternative argument was that, even if frustration occurred and so brought the contract to an end, the arbitration clause is not one of those matters, which are affected by the event or are frustrated. On the contrary, it is precisely such an event that requires the continuance of the agreement to refer, so that, in case of difference as to the character of the event or the date from which frustration must be deemed to have arisen, the conventional tribunal, originally provided, may be available for its solution. Though further performance is excused, how is this contract discharged, unlimited as it is in time ?

All these arguments, it will be seen, resolve themselves, on examination, into the fundamental inquiry, whether in law and fact frustration had been brought about before any dispute arose with regard to frustration or its cause or its consequences. The arbitration clause is but part of the contract and, unless it is couched in such terms as will except it out of the results, which follow from frustration, generally, it will come to an end too. This must be so, if the law is, that the legal effect of frustration is the immediate termination of the contract as to all matters and disputes which have not already arisen.

Throughout the line of cases, now a long one, in which it has been held that certain events frustrate the commercial adventure, contemplated by the parties when they made the contract, there runs an almost continuous series of expressions to the effect, that such a frustration brings the contract to an end forthwith, without more and automatically. They are too numerous to be cited exhaustively, but there are few expressions to the contrary and none in recent cases. By way of illustration, reference may be made only to the following.

In *Jackson* v. *The Union Marine* (L.R. 10 C.P. at p. 145), at one end of the series, Bramwell, B., delivering the judgment of the majority in the Exchequer Chamber, describes the result of what happened by the words " the contract is at an end." In *Tamplin's* case, at the other, Lord Loreburn says that, if the parties had considered the matter when making the contract, " they would have said ' if that happens, it is all over between us.' Accordingly, the implied term as to frustration may be expressed in these words " (1916, 2 A.C. at p. 404). " The contract," says Lord Haldane (at pp. 406, 410 and 412) " must be looked upon as being wholly dissolved and the Courts cannot take any course which would in reality impose new and different terms on the parties. . . . The Court of Appeal below gave judgment to the effect that the contract remained in existence, and that the ' restraint of princes ' clause kept the contract alive. . . . I think that the entire contract was avoided. . . . The contract is gone and the clause with it." A statement of the general principle by Lord Parker of Waddington is expressed in the same case as follows (p. 424):—" The principle which really underlies all cases, in which a contract has been held to determine upon the happening of an

event which frustrates the object which the parties have in view, . . . applies also to charter-parties, where some commercial adventure contemplated by the parties . . . is brought to an end. . . . It was easy to imply a condition that, if the voyage became impossible of completion within that season, the contract should be at an end." Finally, in *Bank Line* v. *Capel* (1919, A.C. at p. 441), Lord Finlay sums up the law in these words :—" The doctrine that a contract may be put an end to by a vital change of circumstances has been repeatedly discussed. The law of the subject is well settled . . . the doctrine of frustration of the adventure as terminating the contract. . . . Neither of these clauses (26 and 31) can have the effect of preventing the termination of the charter-party by the requisition."

That requisition, or at any rate requisition for so long as showed that it was to endure for a considerable though indefinite time (whichever be regarded, in fact, as the event defeating the adventure), of itself terminates the charter and all its parts, as soon as it happened, is a conclusion, which though warranted and binding in view of these and other passages, does not depend merely on the language, which a long sequence of the highest authorities have happened to use. It rests on principle, and is the only way of reconciling the special rule as to frustration with the general rules as to the obligation of contracts.

An event occurs, not contemplated by the parties and therefore not expressly dealt with in their contract, which, when it happens, frustrates their object. Evidently it is their common object that has to be frustrated, not merely the individual advantage, which one party or the other might have gained from the contract. If so, what the law provides must be a common relief from this common disappointment and an immediate termination of the obligations as regards future performance. This is necessary, because otherwise the parties would be bound to a contract, which is one that they did not really make. If it were not so, a doctrine designed to avert unintended burdens would operate to enable one party to profit by the event and to hold the other, if he so chose, to a new obligation. Lord Blackburn (*Dahl* v. *Nelson*, 6 A.C. at p. 53) summarises the effect of *Jackson's* case in these words : " A delay in carrying out a charter-party, caused by something for which neither party was responsible, if so great and long as to make it unreasonable to require the parties to go on with the adventure, entitled either of them, at least while the contract was executory, to consider it at an end." It should be noted that, although at first sight this right to consider the contract as " at an end " might seem, from this language, to be in the option of either party but not to arise till that option is exercised, this is not really the gist of the opinion. The passage gives the effect of two cases, *Geipel* v. *Smith* (L.R. 7 Q.B. 404) and *Jackson* v. *The Union Marine*. In both cases there had been an actual refusal to perform after the event in question happened,

in the former by the shipowner and in the latter by the charterer, and in each case the formal question was whether the refusal could be justified, but there is nothing in Lord Blackburn's language to support the view that the contract does not terminate till a party to it says so. Lord Blackburn himself had said when a party to the judgment in *Geipel* v. *Smith* (p. 414), "It is possible that the blockade might be raised within a reasonable time. . . . If the defendants chose to run the risk and, in the event, turn out right, they are in the same position as if they had waited the reasonable time and had then sailed away," a passage which strongly supports the principle, that it is the event that frustrates, though time may be required in order to appreciate its effect on the contract, the event in such a case as the present being requisition for a time inconsistent with the objects of the adventure. Brett, J., puts the principle thus in *Jackson's* case in the Common Pleas (L.R. 8 C.P. at p. 581): "Where a contract is made with reference to certain anticipated circumstances, and where, without any default of either party, it becomes wholly inapplicable or impossible of application to any such circumstances, it ceases to have *any* application. It cannot be applied to other circumstances, which could not have been in the contemplation of the parties when the contract was made." When this was affirmed in the Exchequer Chamber (L.R. 10 C.P. at p. 144), Bramwell, B., speaking of the exception of "perils of the seas," says: "The words are there—what is their effect? I think this: they excuse the shipowner but give him no right. The charterer has no cause of action but is released from the charter. When I say *he* is, I think *both* are." Again, in *Bensaude* v. *Thames and Mersey Marine Insurance Co.* (1897, A.C. 609), Lord Watson's extempore phrase, "Such delay in the prosecution of her voyage as entitled the charterer to determine the adventure" is explained, partly by the fact that the charterer had done so, and partly by comparing with it Lord Halsbury's language, on p. 611, "It underlies the whole judgment of Collins, J., that the right to insist upon payment of the insurance money, as upon a total loss of the freight, was consummate at the moment the main shaft broke. Now, there is a fallacy underlying that form of argument, namely, that there must be a sufficiently ascertained form of damage to show at once that the loss must have accrued because the damage was of such a character that it could not be repaired in time. The facts here have been ascertained, and we know why the freight was lost. Why was it? Not *simpliciter*, but because the main shaft was broken under special circumstances—that is, at a distance from any place where it could be repaired within such a time as would have enabled the vessel to prosecute her voyage."

Evidently, therefore, whatever the consequences of the frustration may be upon the conduct of the parties, its legal effect does not depend on their intention, or their opinions or even knowledge, as to the event, which has brought this about, but on its occur-

rence under such circumstances as show it to be inconsistent with further prosecution of the adventure. Sometimes the event is such as to speak for itself, like the outbreak of war on the 4th August, 1914, in *Horlock* v. *Beal* (per Lord Wrenbury, 1916, 1 A.C. at p. 528). Sometimes the frustration is evident, when the gravity and the circumstances of the breakdown can be known, as in *Bensaude's* case ; sometimes, as in the case of requisition, when it can be known that in all reasonable probability the delay will be prolonged and *a fortiori* when it has continued so long as to defeat the adventure. Frustration is then complete. It operates automatically (*Larrinaga's* case, 27 Com. Cas. 160). What the parties say and do is only evidence, and not necessarily weighty evidence, of the view to be taken of the event by informed and experienced minds.

Language is occasionally used in the cases which seems to show that frustration is assimilated in the speaker's mind to repudiation or rescission of contracts. The analogy is a false one. Rescission (except by mutual consent or by a competent Court) is the right of one party, arising upon conduct by the other, by which he intimates his intention to abide by the contract no longer. It is a right to treat the contract as at an end, if he chooses, and to claim damages for its total breach, but it is a right in his option and does not depend in theory on any implied term providing for its exercise, but is given by the law in vindication of a breach. Frustration, on the other hand, is explained in theory as a condition or term of the contract, implied by the law *ab initio*, in order to supply what the parties would have inserted had the matter occurred to them, on the basis of what is fair and reasonable, having regard to the mutual interests concerned and of the main objects of the contract (see per Lord Watson in *Dahl* v. *Nelson* (6 A.C. at p. 59). It is irrespective of the individuals concerned, their temperaments and failings, their interests and circumstances. It is really a device, by which the rules as to absolute contracts are reconciled with a special exception which justice demands.

There is, however, this point of contact between the two cases. Though a party may exercise his right to treat the contract as at an end, as regards obligations *de futuro*, it remains alive for the purpose of vindicating rights already acquired under it on either side. So with frustration. Though the contract comes to an end on the happening of the event, rights and wrongs, which have already come into existence remain, and the contract remains too, for the purpose of giving effect to them.

No question of this sort, however, arises here. The contract was wholly executory. The ship was requisitioned before she was placed at the charterers' disposal ; the performance of the charter never began, and the failure to begin it by tendering the ship at Singapore was excused in the owners' favour by the excepted Restraints of Princes. Under these circumstances, by the year

1919, when a dispute first arose, " this charter " no longer existed. The dispute was not one, of which it could be predicated that it was one arising under " this charter," since that had terminated by frustration a year before. An arbitration clause is not a phœnix, that can be raised again by one of the parties from the dead ashes of its former self. By its very terms, as well as by the fact that it was only one part of the indivisible charter, it had come to an end also, and it is unnecessary to consider in what terms, if any, a clause might have been framed which would have saved the clause alive in the event of the frustration of the adventure and the charter. It may be noted that in practically all the numerous cases of frustration of charters by requisitioning during recent years, the charter must have contained an arbitration clause, yet no point of this kind has apparently been raised on any ordinary form of charter. The cases in general afford little support to the idea that any form of clause would survive the contract as a whole (see *Grey* v. *Tolme*, 31 T.L.R. at p. 138, and *In re Hohenzollern Co.*, 54. L.T.R. at p. 597, and conversely *Kennedy* v. *Barrow* in C.A. reported in Hudson on Building Contracts (ii. 415).

Sundry special authorities were cited in this connection, but they do not carry matters any further. They are either cases of repudiation and rescission, or of approbation and reprobation, or of continuing obligations under a contract still in being. In the *Johannesburg* case, it was admitted on the pleadings that the contract had been repudiated and the matters in dispute arose out of this, but at 1909, Sess. Cas. H.L. p. 53, the Lord Chancellor is reported as saying : " If the cause of action be that there has been a repudiation or breaking of the contract, in the sense that the contract has been frustrated by the breach, then it would not be within the arbitration clause." Whatever exactly this sentence means, at any rate it does not help the appellants now. Conversely in *Sanderson* v. *Armour* (1922, Sess. Cas. H.L. 117), though repudiation of the contract by the defenders was pleaded by the pursuers and the case had, of course, to be dealt with on the footing that this would be duly proved it was denied, and the defenders relied on the arbitration clause and were held entitled to it. A mere allegation that they had thrown the contract up could not deprive them of the right to have the dispute dealt with by the tribunal constituted by it. In *Scott* v. *Del Sel* (1923, Sess. Cas. H.L. 38) Lord Cave, L.C., expressly laid aside the question of frustration, since by virtue of its terms the contract continued in existence even in the events which had happened. As for the case of *Jureidini* (1915, A.C. p. 499), insurers pleaded the absence of an award as to quantum only as a fatal non-fulfilment of a condition to the right to sue on a policy. As they had themselves repudiated the claim *in toto*, it was held that they could not insist on the absence of an award. It is a case of approbation and reprobation (see *Macaura's* case, 1925, A.C. at p. 631).

Their Lordships' conclusion is that the arbitrator acted without jurisdiction and that the action on his award ought to have failed, and they will humbly advise His Majesty that the two judgments below should be set aside and that judgment in the action should be entered for the appellants, with costs here and below.

In the Privy Council.

HIRJI MULJI AND OTHERS

v.

THE CHEONG YUE STEAMSHIP COMPANY, LIMITED.

DELIVERED BY LORD SUMNER.

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