1, 1957

No. 41 of 1955.

In the Privy Council.

ON APPEAL

FROM THE COURT OF APPEAL FOR EASTERN AFRICA.

BETWEEN

SHEIKH BROTHERS LIMITED . . . *Appellant*

AND

1. ARNOLD JULIUS OCHSNER
2. OCHSNER LIMITED . . . . . *Respondents.*

Case for the Appellant.

RECORD.

1. This is an appeal from a judgment of the Court of Appeal for Eastern Africa at Nairobi, dated the 22nd day of December, 1954, which dismissed the appeal of the Applicant, Sheikh Brothers Limited (hereinafter called " the Appellant "), and affirmed the judgment of the Supreme Court of Kenya, dated the 11th day of December, 1953, in favour of the Respondents, Arnold Julius Ochsner and Ochsner Limited (hereinafter called " the Respondents "). pp. 26–31.

2. By an Agreement dated the 9th day of December, 1950 (hereinafter called " the Licence "), made between the Appellant of the one part and the first Respondent of the other part, the Appellant granted, inter alia, to the said the first Respondent (the Licensee) full power, licence and authority to cut, decorticate, process and manufacture all sisal then or at any time thereafter growing upon certain lands comprising about 5,000 acres in the Coast District of the Colony of Kenya. pp. 7–14.

3. By Clause 3 (C) thereof the Licensee undertook that he would as from the 1st April, 1951, manufacture and deliver sisal fibre in average minimum quantities of 50 tons per month; by Clause 3 (B) thereof, that he would deliver all sisal fibre and tow produced by him on the said premises to the Appellant or such agents of the Appellant as the Appellant should from time to time direct for sale; and by Clause 3 (E) thereof that he would not cut any sisal other than mature sisal as therein defined. p. 8, l. 12.

4. The facts hereinafter set out in paragraphs 5–8 appear from the affidavit of Sheikh Mohamed Bashir sworn on behalf of the Appellant on the 11th November, 1953. p. 3.

5. In accordance with paragraph 3 (N) of the Licence the first Respondent assigned the Licence to the second Respondent.

6. The cutting and manufacture of sisal under the Licence was carried on by the Licensee or Ochsner Limited until the 31st January, 1952, when possession of the premises the subject of the Licence was resumed by the Appellant at the request of the second Respondent, without prejudice to the rights and remedies of the Appellant under the Licence.

p. 4. 7. By an Agreement of submission dated the 27th day of November, 1952, and made between the Appellant and the Respondents all questions, difficulties and disputes between the Appellant and the Respondents concerning the construction, meaning or effect of the Licence, or any clause or thing therein contained, or the rights or liabilities of the parties thereunder or otherwise in relation thereto were thereby referred to the determination of Colonel Frederick Stewart Modera, D.S.O., M.C., and James Henry Wilkinson (hereinafter called "the Arbitrators") in accordance with and subject to the provisions of the Arbitration Ordinance, Cap. 22 Laws of Kenya (Revised Edition).

p. 4. 8. The Respondents thereafter lodged with the Arbitrators a Statement of Claim dated the 27th November, 1952, of which paragraphs 2 and 3 are as follows :—

p. 15. "(2) The Licence was entered into under a mutual mistake as to a matter of fact essential to the agreement inasmuch as the Parties thereto believed that the leaf potential of the said sisal area would be sufficient to permit the manufacture and delivery of the said minimum quantities of mature sisal throughout the said term, whereas this belief was erroneous and consequently the Licence is void.

(3) In the alternative it was an implied condition of the undertaking referred to in paragraph 1 that the leaf potential of the said sisal area would be sufficient to permit the manufacture and delivery of the said minimum quantities of mature sisal throughout the said term, whereas, notwithstanding the exercise of reasonable diligence by the Licensee and unknown to the Lessor, the said potential was insufficient for the said purpose and consequently performance of the contract was impossible and the Licence is void."

9. Sections 20 and 56 of the Indian Contract Act (Act IX of 1872) are as follows :—

"20. Where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement the agreement is void.

Explanation—An erroneous opinion as to the value of the thing which forms the subject matter of the agreement is not to be deemed a mistake as to a matter of fact.

Illustrations—

* * * * *

56. An agreement to do an act impossible in itself is void.

A contract to do an act which after the contract is made, becomes impossible, or by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.

When one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee had not known to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise.

Illustrations—

* * * * * "

10. On the 9th January, 1953, the Arbitrators issued a preliminary award on the preliminary points whether the Licence was void upon either of the following grounds :— p. 15.

(A) Mutual mistake referred to in paragraph 2 of the Company's Statement of Claim, or

(B) Impossibility referred to in paragraph 3 thereof.

11. The Arbitrators held and found as to (A) that there was no mistake but only an error of judgment ; and that the error was not mutual : that as to (B) there was insufficient leaf to enable the Licensee to carry out his obligations under Clause 3 (C) of the Licence, particularly having regard to the provisions of Clause 3 (E) thereof and that there was therefore impossibility.

After referring to Section 56 of the Indian Contract Act they decided that—

" The Licensee had he exercised reasonable diligence before agreeing to the terms of the Licence might have known that it would not be possible to produce the minimum quantities stipulated for in the Licence, and that consequently he must make compensation as visualised in the provisions of the Section quoted." p. 16, l. 21.

12. On application by the Respondents to the Supreme Court to remit or set aside the said Award on the ground of alleged errors appearing on its face, de Lestang, J., held that the Arbitrators were in error in holding that the Licensee had made an error of judgment only and not a mistake of fact. His judgment included the following passage :— pp. 16–18.

" The subject matter of the belief, namely, the sisal tonnage which the estate would produce, is not a matter of opinion but clearly a matter of fact and the Arbitrators themselves acknowledge as much in their finding of fact that there was insufficient leaf to enable the Licensee to carry out his obligations and that the Applicant could, by the use of reasonable diligence, have ascertained that fact." p. 17.

p. 18. 13. The learned Judge thereupon, by Order dated the 23rd July, 1953, remitted the Award to the Arbitrators.

p. 18. 14. The Revised Award of the Arbitrators dated the 7th September, 1953, is as follows :—

" When we presented our preliminary Award we held the view that an error of judgment was the equivalent of an erroneous opinion, and that when considering Section 20 of the Indian Contract Act such an opinion as to the capacity of the sisal plantation which formed the subject matter of the agreement, could not be deemed a mistake as to a matter of fact. We also held the view that the Licensee had formed an opinion which caused him to undertake the obligation which obligation was readily accepted by the Lessor.

The learned Judge by whose decision we are bound, has ruled that there was in fact a mistake and he has expressed the view that it was a mistake as to a matter of fact within the meaning of Section 20 of the Indian Contract Act. We are accordingly obliged to adopt this view. We have reached the conclusion that the mistake was mutual and was on a matter of fact essential to the agreement. We therefore held that the Licensee succeeds in his contention that the Agreement was void.

We find no occasion to vary our original decision in regard to impossibility but in view of the fact that the contract is now held to be void our decision as to impossibility will not become operative.

The arbitration fees to date shall be payable in equal proportions by the Lessor and the Licensee.

F. STEWART MODERA
Arbitrator

J. H. WILKINSON
Arbitrator."

p. 19. 15. THE PRESENT SUIT was instituted on the 7th December, 1953, when the Appellant applied to Mr. Justice Nageon de Lestang for the revised Award to be remitted or set aside on the following grounds
p. 20. (which are set out in the decision of the learned Judge) :—

" (1) That the Arbitrators were wrong in law and fact in finding that the mistake was mutual :

(2) That they were wrong in holding that the mistake was ' on a matter of fact essential to the agreement ' :

(3) That they were wrong in holding that having regard to their finding on the question of mistake their original decision on the question of impossibility under Section 56 of the Indian Contract Act would not become operative :

(4) That the revised Award is ambiguous and uncertain."

16. After Counsel for the parties had addressed the Court the learned Judge, on the 11th December, 1953, rejected each of the above-mentioned grounds and dismissed the said Application with costs, and granted Leave to Appeal. p. 21

17. From the said decision the Appellant appealed to the Court of Appeal for Eastern Africa on the following grounds stated in their Memorandum of Appeal dated the 10th March, 1954 :— p 22.

"1. The Arbitrators having in their Preliminary Decision Revised Award (hereinafter called 'the Revised Award') of 7th September, 1953, held that they found no occasion to vary their original decision as to impossibility, the learned Judge erred in upholding the Arbitrators when they went on to hold in their said Revised Award that their original decision as to impossibility would not become operative.

2. The learned Judge erred in holding or impliedly holding that if an agreement is void for mistake under Section 20 it cannot be void under Section 56 of the said Act on the ground of (initial) impossibility, that is to say, he erred in holding or impliedly holding that the two sections are mutually exclusive.

3. As the first and third paragraphs of Section 56 of the said Act were applicable in terms as shown by the Revised Award the learned Judge and the Arbitrators erred in thinking that the rights and liabilities under the third paragraph of that Section were taken away by the applicability also of Section 20 of the said Act and in failing to appreciate that Section 20 was a wider section than Section 56 and that therefore the applicability of Section 20 did not render inapplicable the third paragraph of Section 56.

4. The learned Judge failed to appreciate that the Arbitrators in their Revised Award erred in law in thinking that the learned Judge had for the first time in his order of 23rd July 1953 held the agreement to be void whereas the Arbitrators had in their award—Preliminary Decision of the 9th January 1953 already held it to be void or such finding was implicit in their decision to apply Section 56 of the said Act.

5. The learned Judge failed to appreciate that while the agreement to manufacture and deliver fibre in average minimum quantities of 50 tons per month was void on the ground of mutual mistake as to a fact essential to the contract it was also an agreement to do an act impossible in itself.

Alternatively and without prejudice to the above the learned Judge erred in upholding the Arbitrators in their finding in the Revised Award that the mistake was mutual or on a matter of fact essential to the agreement.

6. The Arbitrators having in their Awards found all the ingredients required for the application of the third paragraph of Section 56 of the said Act fulfilled, the learned Judge erred in failing to remit the Revised Award back to the Arbitrators with directions to assess compensation under the said third paragraph."

pp. 26–28. p. 32. 18. After Counsel for the parties had addressed the Court, the Court of Appeal for Eastern Africa by Order dated the 22nd December, 1954, dismissed the said appeal.

pp. 27–31. 19. The following passages are extracted from the Judgments of the said Court :—

BRIGGS, J.A. :

p. 27. " . . . The licensees had for some time worked the estate in intended part performance of the agreement. They had manufactured and delivered some sisal fibre, though not enough. It was submitted for the Appellants that this made it clear that the mistake could not be on a matter essential to the agreement. I think this argument is completely fallacious. A licence of this nature might well be drawn in such terms that a deficiency of leaf production would not be a ' matter essential,' but merely one affecting quantum of profits. In this licence, however, the requirement of fifty tons average per month minimum was quite deliberately made a fundamental term of the contract. Failure to produce that minimum meant not merely that profits would be reduced, but that the contract could not be performed at all. A mistake as to fact which results in performance of the contract being impossible can hardly fail to be on a ' matter essential to the agreement.' I think the arbitrators were clearly right on this point " . . .

p. 28. " Mr. Nazareth for the Appellants opened his argument on this point by saying that this was a case of initial impossibility, not supervening impossibility. He contended that accordingly sections 20 and 56 had exactly the same effect in rendering the agreement void *ab initio*. They did not conflict and full effect should be given to the whole of both of them. I think the first part of this argument must be accepted." . . .

p. 29. " A contract avoided for mutual mistake lacks the necessary element of ' free consent.' See section 14. But this is perhaps not a very happy expression. The real ground for avoidance, as stated by Pollock & Mulla, 6th ed. 135, is ' that the true intention of the parties was to make their agreement conditional on the existence of some state of facts which turns out not to have existed at the date of the agreement.' The condition precedent to contractual obligation is not fulfilled. When the matter is put in this way it is apparent that there was never an effective agreement at all. Why then should compensation be payable if the intended agreement happened to be impossible or unlawful ?

The position in the present case is a little obscured because the same fact gave rise both to the mistake and the impossibility ; but I cannot see that this really affects the matter. Its effect must be considered separately on the two issues." . . .

" It is, however, as a matter of common sense and equity alike, necessary in such a case, that, had it not been for the unknown element of impossibility or illegality, the promisee would have been able to claim performance of a valid contract. If even apart from

that unknown element, his agreement was never an enforceable contract, but was void for some other reason, there is no logical or moral basis for compensation. This leads me to the view that the provision for compensation in section 56 can only be invoked by the promisee when the agreement is void only by reason of the impossibility or illegality and would otherwise have been a valid contract."

JENKINS, J.A.:

"I have had the advantage of reading the judgment by my learned brother Briggs, and find myself in general agreement with it." . . . p. 30.

"I can see no reason for not holding that the agreement, void under section 20, is also void under the first paragraph of section 56. Impossibility due to non-existence of the subject matter is a species of the genus mutual mistake, and Pollock and Mulla, 6th edition, at p. 328, in commenting on the provisions of section 56 expressly refer to the fact that they have already dealt with impossibility by reason of the non-existence of the subject matter under the head Mistake, section 20, and accordingly do not deal with it again. pp. 30–31.

But the third paragraph of section 56 introduces factors which are entirely foreign to the conception of mutual mistake. In the first place the promisor has promised to do something which he knew, but which the promisee did not know, to be impossible. That removes the agreement completely from the scope of section 20, which requires that both parties to the agreement shall be under the mistake of fact essential to the agreement. If the promisor knew of the impossibility and the promisee did not there obviously can be no mutual mistake. This seems to me to be the governing motif of the third paragraph of section 56, a set of circumstances in which the parties are not on equal terms as they are under section 20. Thus the words '*or with reasonable diligence might have known*' again imply a set of circumstances in which the promisor is in a different position from the promisee, for the latter is presumed not to know. There is no mutuality of mistake which is the essential element under section 20.

I am therefore of opinion that the arbitrators and the learned appellate judge were correct in their view that the third paragraph of section 56 does not apply where, as in the present case, the agreement is held to be void on the ground of mutual mistake of fact." . . .

NIHILL, President:

"I have come to the same conclusion as my learned brothers. In my opinion this was never an effective agreement to which the third paragraph of section 56 of the Indian Contract Act could be applied. This conclusion is certainly consistent with the equity of the matter and for the reasons already stated in the judgments delivered I believe it to be also in accordance with the statute." . . . p. 31.

p. 33. 20. On the 17th March, 1955, the Court of Appeal for Eastern Africa granted the Appellant conditional Leave to Appeal as a matter of right to Her Majesty in Council from the said Order and Judgment and on the 1st October, 1955, granted final Leave to Appeal as aforesaid.

21. The Appellant humbly submits that the judgment of the Court of Appeal for Eastern Africa at Nairobi, dated the 22nd December, 1954, which dismissed the Appeal from the judgment of Mr. Justice Nageon de Lestang dated the 11th December, 1953, is erroneous and should be reversed and this Appeal allowed by setting aside the revised Award of the Arbitrators dated the 7th September, 1953, or alternatively, by remitting the said Award to them for a fresh decision on the preliminary points for determination set out in the Award of the Arbitrators dated the 9th January, 1953, and that the Respondents be ordered to pay the costs of the Appellant for the following, among other,

REASONS

(1) BECAUSE the Licence was valid and was not rendered void by either Section 20 or Section 56 of the Indian Contract Act, 1872.

(2) BECAUSE, alternatively, by their revised Award dated the 7th September, 1953, the Arbitrators expressly or impliedly incorporated their finding in their preliminary Award, dated the 9th January, 1953, that " the Licensee had he exercised reasonable diligence before agreeing to the terms of the Licence might have known that it would not be possible to produce the minimum quantities stipulated for in the Licence " and consequently they were not entitled to declare that the mandatory provisions of the final paragraph of Section 56 of the said Act would not " become operative."

(3) BECAUSE, alternatively, if the said Licence was void it was void solely on account of the provisions of Section 56 of the Act and on the findings of the Arbitrators the Licensee was under a duty to pay compensation to the Appellant under the final paragraph of the said Section.

(4) BECAUSE, alternatively, if the said Licence was void for mutual mistake under Section 20 of the said Act the provisions of Section 56 of the said Act, and in particular the final paragraph thereof, operated cumulatively so that the said duty to pay compensation arose, and the final paragraph of the said Section 56 was not excluded by the application of the said Section 20.

(5) BECAUSE, alternatively, the said paragraph of Section 56 of the said Act was applicable to the facts found by the Arbitrators and the concurrent application of Section 20 could not affect the measure of compensation.

(6) BECAUSE, alternatively, the decisions of the Arbitrators on the questions of mistake and impossibility were inconsistent.

(7) BECAUSE the decision of the Court of Appeal for Eastern Africa was wrong and ought to be reversed.

DINGLE FOOT.

J. T. WOODHOUSE.

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