ORIGINAL CIVIL

Before U Bo Gyi, J.

RANGOON TELEPHONE COMPANY, LIMITED (PLAINTIFF)

H.C. 1948 June 4.

v.

THE UNION OF BURMA (DEFENDANT).*

Constitution Act, s. 225 (3)—Claim against Government for value of plaintiffs' properties—Licence gives the option to purchase by Government—Charge taken of properties since 1st January 1946—Frustration of contract by war—Contract Act, s. 56—Sale of Goods Act, ss. 7 and 8—Principles embodied in Contract Act, s. 70—Applicable—Analogy from conversion—Arbitration clause in contract, if applicable.

The Rangoon Telephone Company, Limited, was operating telephone and telegraph undertakings in Rangoon and Moulmein before war under a licence. Under clause 8 of the licence Government could buy the Company out, if the right was exercised at the end of 40th year, and by a letter dated 4th March 1940 Government exercised the option to purchase as on 31st March 1943. War broke out and part of the property was demolished under the denial scheme. The remaining properties were taken over on 1st January 1946. The Company claimed Rs. 24,93,490-2-6 as the value under the contract or as damages. Government contended that they were liable only for what was over.

Held: That frustration is the premature determination of an agreement lawfully entered into between parties owing to circumstances so fundamental as to be regarded by the law both as striking at the root of the agreement and as entirely beyond what was contemplated by the parties when they entered into the agreement. This principle is embodied in s. 56 of Contract Act. The contract of purchase in this case was frustrated on account of the war.

Cricklewood Property and Investment Trust, Limited v. *Leighton's Investment Trust, Limited*, (1945) A.C. 221 at p. 228; *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barbour, Limited*, (1943) A.C. 32 at p. 40; *Hirji Mulji and others* v. *Cheong Yue Steamship Company, Limited*, (1926) A.C. 497; *Metropolitan Water Board* v. *Dick, Kerr & Co.*, (1918) A.C. 119; *The Pelepah* case, (1944) 170 L.T. 338; *Baily* v. *de Crespigny*, L.R. 4 Q.B. 180; *Mohamed Ismail and others* v. *The King*, (1946) R.L.R. 468, applied and followed.

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* Civil Regular Suit No. 73 of 1947 of the High Court, Rangoon; judgment dated the 4th June 1948.

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Held further : Under the Sale of Goods Act, ss. 7 and 8, if the goods after agreement become damaged, the agreement is avoided.

Barrow, Lane, and Ballard, Limited v. *Phillip Phillips & Co.*, L.R. (1929) 1 K.B. 574, applied.

The contract is indivisible and when the properties were damaged through the fault of neither party, the contract could not be enforced. There was no absolute implied promise to pay full value as on 31st March 1943.

Held further : The principles of *quantum meruit* embodied in s. 70 of the Contract Act come into play.

Secretary of State v. *G. T. Sarin & Co.*, 11 Lah. 375 ; *Zulaing* v. *Yamèthin District Council*, I.L.R. 10 Ran. 522.

If the suit were in tort the measure of damages would ordinarily be the value of the undertakings at the date of conversion. The Company is entitled to be paid the value of the assets in fact taken over on 1st January 1946. The principle of such valuation had been mentioned in the Third Schedule to the licence which was almost precisely the same as paragraph 1152 sub-paragraph 2, of Halsbury's Laws of England, 2nd Edn., Vol. XII.

Held further : As the contract was brought to an end by frustration, the clause relating to arbitration also came to an end.

Hirji Mulji's case, (1926) A.C. 497, referred to.

Horrocks for the plaintiff.

Chan Tun Aung for the defendant.

U BO GYI, J.—The Rangoon Telephone Company, Limited, which is the successor of the Oriental Telephone and Electric Company, Limited, and was operating telephone and telegraph undertakings in Rangoon and Moulmein prior to the 7th March, 1942, under licences granted by His Excellency the Governor of Burma, has sued the Government of Burma now replaced under sub-section (*3*) of section 225 of the Constitution by the Union Government, to recover Rs. 24,93,490-2-6 said to be the value of the plaintiff Company's undertakings agreed to be transferred to the Government of Burma, praying in the alternative that the sum may be awarded by way of damages. It is common ground that under clause 8 of the licences admittedly granted to the plaintiff for a term of 60 years, Government reserved the right to buy the

Company out at certain periodical intervals one of which fell on the 31st day of March, 1943, and under the terms of the licences if the right of purchase was exercised at the end of the fortieth year from the 1st day of April, 1903, the date of issue of the licences, the price to be paid would be the then value of the property as defined in the Third Schedule annexed to the licences, without any allowance for past or future profits, or goodwill. Now, Government by a letter dated the 4th day of March, 1940, communicated to the plaintiff its election to purchase the said undertakings on the 31st March, 1943. In pursuance of that election Mr. Daniel McGee, a director of the plaintiff Company, interviewed Mr. Nesbitt-Hawes, then Director-General, Posts and Telegraphs, Burma, who, it is said, agreed to take over the undertakings on the book value basis and without having any inventory made of the assets. Mr. McGee, however, to the question put by the Court frankly admits that he had no knowledge that Mr. Nesbitt-Hawes had been authorized by Government to make such an agreement; and during the argument the plaintiff's learned counsel states that the discussions at the interview took no definite shape. Thereafter, in February and March, 1942, when Burma was about to be invaded by the Japanese, Government, it is alleged, applied a scheme of denial to the enemy, pursuant to which Government caused to be demolished certain property and plant of the plaintiff Company being part of the said undertakings. The plaintiff Company and Government evacuated to India. There the Company demanded of Government payment of the money due under the contract and there was correspondence between the parties, the Company on the one hand demanding the price of the undertakings as they stood at 31st March, 1943, and Government on the other hand maintaining

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that it was entitled to take possession of whatever was found intact of the undertakings on its contemplated re-occupation of Burma and to pay for such remnants at the price ruling on the 31st March, 1943. Burma was re-occupied by the Allied forces in May, 1945, and the Company's undertakings were taken over by the British Military authorities who on or about the 1st January, 1946, made them over to Government. On the 21st September, 1946, Government wrote to the Company that pursuant to its electing to purchase the surviving assets of the Company it had taken over possession of them from the Military authorities on and from the 1st January, 1946. In the above circumstances the Company claims the sum of Rs. 24,93,490-2-6 on three grounds, first, under the terms of purchase contained in the said licences; secondly, by virtue of the contract to be implied by reason of its demand of the price of the undertakings on the basis of their value as at the 31st March, 1943, and Government's entering into occupation on or about 1st January, 1946; and, finally, by way of damages for breach of contract and/or as the current market value of the undertakings actually taken over by Government on the 1st January, 1946, together with the value at the time of demolition of the Company's property and plant which was denied before evacuation. Government while admitting the licences and the contract has held its ground and maintains that it is only liable for whatever remnants of the plaintiff's undertakings were taken over on 1st January, 1946, at the fair market value which prevailed on 31st March, 1943. Government also denies the correctness of the value of the Company's undertakings as assessed. The question of notice under section 80 of the Civil Procedure Code has not been pressed to an issue and is considered as waived.

On the pleadings, the following issues have been framed at the instance and by consent of the learned counsel for the parties :

1. Was the contract of purchase of plaintiff's assets frustrated by reason of the war ?

2. If it was frustrated, was there an implied contract to pay for the assets as they stood on the 31st March, 1943, and also for the assets denied on the basis of their value as on the 31st March, 1943

Or

Is plaintiff entitled to be paid the value of the assets in fact taken over on the 1st January, 1946, at their then value ?

3. Upon what basis should payment be made to the plaintiff ?

Under section 56 of the Contract Act a contract to do an act which becomes impossible after it is made becomes void. The doctrine of impossibility of performance which is enshrined in section 56 of the Contract Act is the basis of, or perhaps rather another name for, the doctrine of frustration which came into prominence about the middle of the First World War. The doctrine is not new to Burma and in *Mohamed Ismail and others* v. *The King* (1) where certain seamen who in times of peace had signed on for commercial voyages within a specified area and demanded new terms when war broke out over a portion of the area involving risk of life and liberty, it was held that the contract of service had been made under an implied promise that a state of peace would continue to exist along the routes which the ships would take in their commercial voyages and that when such state of things ceased to exist the contracts were deemed to be at an end. It was also held that the doctrine of frustration

(1) (1940) R.L.R. 468.

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as applied in England was applicable in Burma under the Contract Act. The best definition yet of the doctrine is by Viscount Simon, Lord Chancellor of England, who in *Cricklewood Property and Investment Trust, Limited* v. *Leighton's Investment Trust, Limited* (1) said,

" . . . . . Frustration may be defined as the premature determination of an agreement between parties, lawfully entered into and in course of operation at the time of its premature determination, owing to the occurrence of an intervening event or change of circumstances so fundamental as to be regarded by the law both as striking at the root of the agreement, and as entirely beyond what was contemplated by the parties when they entered into the agreement."

The principle underlying the doctrine has been described by his Lordship in *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barbour, Limited* (2) as "that where supervening events, not due to the default of either party, render the performance of a contract indefinitely impossible, and there is no undertaking to be bound in any event, frustration ensues, even though the parties may have expressly provided for the case of a limited interruption." The end of a war, as observed in that case, cannot reasonably be predicted. There shortly before war broke out between Germany and Poland an English Company agreed to sell machinery, delivery at Gdynia in Poland. Thereafter, on September 1, 1939, war broke out between Germany and Poland and on and after September 23, Gdynia was occupied by the Germans. Seven eminent Law Lords including the Lord Chancellor unanimously held that the contract was dissolved. As to the legal effect of the frustration of a contract, their Lordships of the

(1) (1945) A.C. 221 at p. 228. (2) (1943) A.C. 32 at p. 40.

Privy Council have held in *Hirji Mulji and others* v. *Cheong Yue Steamship Company, Limited* (1) that such effect does not depend upon the intention of the parties, or their opinions or even knowledge, as to the event which has brought about the frustration, but upon its occurrence in such circumstances as to show it to be inconsistent with the further prosecution of the adventure. To mention but one more out of the several authorities on the doctrine in support of the view that in circumstances such as those obtaining in the present case the contract is avoided, in *Metropolitan Water Board* v. *Dick, Kerr & Co.* (2), where the defendants had contracted to construct for the plaintiffs certain reservoirs within a specified time but after a substantial portion of the work had been done were ordered by the Minister of Munitions to cease work, it was held by the House of Lords that the contract was frustrated, the period of abeyance being so long and the changes in prices and conditions of labour so great that performance of the contract would be substantially different from what had been originally undertaken. On the other hand, the learned Assistant Attorney-General relies upon the *Cricklewood Property and Investment Trust, Limited* case (3), and *The Pelepah* case (4) in support of his contention that the contract in question has not been frustrated. But these cases relate to long leases and the abeyance period in each was but a small portion of the life of the lease. In the former case the House was divided on the question whether the doctrine of frustration could apply to a lease at all, and the decision in both the cases was that in the particular circumstances obtaining therein the leases had not been determined by the

(1) (1926) A.C. 497.
(2) (1918) A.C. 119.
(3) (1945) A.C. 221 at p. 228.
(4) (1944) 170 L.T. 338.

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doctrine of frustration. Furthermore, certain observations in the former case show that in any event covenants in a lease may become impossible of performance. Lord Russell of Killowen after observing that a lease is much more than a contract because it creates a vested interest in the land continues: "The contractual obligations thereunder of each party are merely obligations which are incidental to the relationship of landlord and tenant created by the demise, and which necessarily vary with the character and duration of the particular lease. It may well be that circumstances may arise during the currency of the term which render it difficult, or even impossible, for one party or the other to carry out some of its obligations as landlord or tenant, circumstances which might afford a defence to a claim for damages for their breach, but the lease would remain. The estate in the land would still be vested in the tenant." Lord Wright observes that covenants in a lease may be suspended or terminated by operation of law and cites the case of *Baily v. de Crespigny* (1) where a lessor had entered into a covenant with his lessee not to permit building on a paddock facing the demised premises but was held discharged from the covenant when the paddock was compulsorily taken by a railway company which erected buildings on it, including a urinal, thus impairing the amenities of the dwelling. Lord Porter says, "Some terms of the tenancy may be impossible of performance at least for the time being but the tenancy itself is not thereby necessarily determined." Lord Goddard makes similar observations. There is a considerable body of eminent judicial authority, therefore, that covenants in a lease may become impossible of performance whether or not the doctrine

(1) L.R. 4 Q.B. 180.

of frustration applies to leases; and in answer to the first issue I hold that the contract of purchase of the Company's assets was frustrated by reason of the War. In their report (1) made in 1918, relating to impossibility and frustration, Buckmaster Committee submitted a statement of the law which *inter alia* was as follows: "Finally, the court can only declare the contract dissolved or not dissolved. If it is not dissolved it remains effective according to all its term in their full force. The court cannot in any way alter its terms, or modify them, or in any way vary or adjust the rights and obligations of both parties. And if it is not dissolved, and there is a breach, the court cannot mitigate or lessen the full measure of damages to which the other party is legally entitled by such breach."

The question may also be viewed in another, though similar, aspect. The undertakings consist of both moveables and immovables. Under section 8 of the Sale of Goods Act, "where there is an agreement to sell specific goods, and subsequently the goods without any fault on the part of the seller or buyer perish or become so damaged as no longer to answer to their description in the agreement before the risk passes to the buyer, the agreement is thereby avoided." Section 7 of the Act relates to legal consequences arising from goods perishing or becoming damaged before making of contract and sections 7 and 8 of the Act are on much the same lines as sections 6 and 7 respectively of the Sale of Goods Act, 1893. In *Barrow, Lane, and Ballard, Limited* v. *Phillip Phillips & Co.* (2) where there was a contract for sale and delivery of 700 bags of groundnuts and unknown

(1) "The Effect of War on Contracts" by Webber, 2nd Edn., pp. 418 and 419

(2) L.R. (1929) 1 K.B. 574.

to the parties 109 bags of groundnuts had been lost before the date of the contract so that when the time for delivery arrived there remained only 591 bags for delivery, it was observed, "a contract for a parcel of 700 bags is something different from a contract for 591 bags and the position appears to me to be in no way different from what it would have been if the whole 700 bags had ceased to exist. The result is that the parties were contracting about something which at the date of the contract without the knowledge or fault of either party, did not exist. To compel the buyer in those circumstances, to take 591 bags would be to compel him to take something which he had not contracted to take, and would in my judgment be unjust." Wright J., as he then was, held that the contract was indivisible and that section 6 of the Sale of Goods Act, 1893, applied where part only of the goods had perished at the time when the contract was made. In this case also the undertakings are indivisible and consequently the same principle applies to the facts of the present case also.

Now, the position taken up by Government seems untenable in law. No doubt under section 13 of the Specific Relief Act a contract is not wholly impossible of performance because of the subsequent destruction of a portion of its subject-matter. But Government, presumably under legal advice, has not thought fit to file a suit for specific performance of the contract. Even if it should do so, it would be bound by sections 14 and 15 of the Specific Relief Act, the former relating to specific performace of part of a contract where the part unperformed is small and the latter to cases where the part unperformed is proportionately large. In either case, however, the party insisting upon performance is bound to pay

the price originally agreed upon before he gets his relief, though in the former case he may claim compensation in respect of part of the contract which cannot be performed. Now the Specific Relief Act is founded on the highest principles of justice and equity and in taking the stand it does on the contract Government is trying to get the plaintiff to perform a substantially new contract by way of defence, while if it had taken the initiative it would, under the Specific Relief Act, have been called upon to pay the full stipulated price.

The second issue may be disposed of briefly. *The Carbolic Smoke Ball* case relied upon by the plaintiff does not help it because Government has at all material times maintained that it could and would enter into possession of whatever remained of the undertakings on payment therefor at the price ruling on the 31st March 1943. Under section 7 of the Contract Act acceptance must be absolute and unqualified. The first part of the second issue is accordingly answered in the negative.

I now come to the second part of the second issue, which is whether the Company is entitled to be paid the value of the assets in fact taken over on the 1st January, 1946, at their then value. The contract, as I have held, has been dissolved and no new contract has been formed, and at the same time Government appears willing to take over the undertakings. In these circumstances the principles of *quantum meruit* embodied in section 70 of the Contract Act come into play. In *Secretary of State* v. *G. T. Sarin & Co.* (1) which arose out of a contract for supply of fodder the learned Judges ruled "as to the amount of compensation, it is obvious that it must be assessed at the market rates prevailing on the dates on which

(1) 11 Lah. 375.

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these supplies were made." This case has been followed in *Zulaing* v. *Yamèthin District Council* (1). I am of opinion that the principle adopted in the Lahore case is correct inasmuch as ordinarily the cause of action would have arisen on the respective dates on which the supplies were made. Here in this case also the cause of action apparently arose against Government on the 1st January, 1946, when it took over the undertakings. If the suit were in tort the measure of damages would ordinarily be the value of the undertakings at the date of the conversion. In answer to the second part of this issue, therefore, I hold that the Company is entitled to be paid the value of the assets in fact taken over on the 1st January, 1946, at their then value.

Coming to the third issue, the principle of valuation agreed upon by the parties and set forth in the Third Schedule to the licences appears to have been looked upon by the contracting parties as being just and equitable. The terms are almost precisely the same as those in paragraph 1152, sub-paragraph 2, of Halsbury's Laws of England, 2nd Edition, Vol. XII, and appear to have been borrowed therefrom. This principle of valuation has been adopted in acquisitions of electric supply undertakings by local authorities. To quote from the Third Schedule to the licences, "the value of such lands, buildings, works, materials and plant shall be deemed to be their fair market value at the time of purchase, due regard being had to the nature and condition for the time being of such lands, buildings, works, materials and plant, and to the state of repair thereof, and to the circumstance that they are in such a position as to be ready for immediate working, and to the suitability of the same for the

(1) I.L.R. 10 Ran. 522.

purposes of the undertaking, and where a part only of the undertaking is purchased to any loss occasioned by severance, but without any addition in respect of compulsory purchase or of goodwill or of any profits which may be or might have been made from the undertaking, or of any similar considerations." In answer to the third issue I hold the above to be the basis upon which payment should be made to the plaintiff, *i.e.* that payment should be made for the assets actually taken over on the 1st January, 1946, at their then value on the lines indicated above.

The last question is whether the arbitration clause in the licence bars the suit. The terms of the licences as I understand them are that arbitrators should only be appointed when there is a valid contract and the parties do not agree upon the price to be paid in pursuance of the contract. In *Hirji Mulji*'s case (1), it was held that a frustration brought to an end the whole contract including the submission to arbitration.

Under the reference rules in Chapter 9 of the Rules and Orders of the High Court, I refer the following issues to the Official Referee who will transmit his report with his findings thereon and reasons therefor in due course :

(1) What were the assets of the Rangoon Telephone Company, Limited, taken over by the Government of Burma on or about the 1st January, 1946? The assets which may have been put in by the British Military Administration will be separately inventoried and valued.

(2) What was the value of the Company's assets so taken over on or about the 1st January 1946 ?

[*4th June 1948*. When the judgment is delivered, Mr. Horrocks for the plaintiff and the learned

(1) (1926) A.C. 497.

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Attorney-General for the defendant state that since the assets put in by the Military Administration will belong to the Government it will not be necessary to value such assets separately. This will be noted by the learned Official Referee.]