SUPREME COURT.

† S.C. 1948

Aug. 27.

CHAS. R. COWIE & CO. (APPLICANTS)

v.

THE GOVERNMENT OF THE UNION OF BURMA (RESPONDENTS).*

Direction in the nature of Mandamus—*When granted—Another effective remedy available—Right of a party to War Risk Insurance under the War Risk Insurance Rules made under Defence of Burma Act—Whether right under contract or statutory right—Effective remedy of the applicant by suit.*

Held : It is settled law that if a specific remedy exists at law and remedy is not less convenient, beneficial or effective, the writ of *mandamus* or direction in the nature of the writ of *mandamus*, which cannot be claimed by applicants *ex debito* justice, will not be granted.

The Queen v. *Commissioner of Inland Revenue*, L.R. (1884) 12 Q.B.D. 461 ; *The Queen* v. *Charity Commissioners of England & Wales*, L.R. (1897) 1 Q.B.D. 407 ; *Rex* v. *Dymock*, L.R. (1915) 1 K.B. 147, followed.

Manik Chand Mahata v. *The Corporation of Calcutta*, I.L.R. 48 Cal. 916 at p. 924, dissented from.

The nature of the writ of *mandamus* is explained in *Murray* v. *Wellington*. (1938) Ran. L.R. 83.

Whether the right of the applicant for compensation under War Risk Insurance Rules made under the Defence of Burma Act, arises *ex contractu* or by operation of the Statutory Rules, the principle to be applied is the same that a person shall not take advantage of his own failure or own wrong.

Rainey v. *The Burma Fire & Marine Insurance Co., Ltd.*, I.L.R. 3 Ran. 383, referred to.

Raymond v. *Minton*, L.R. (1866) 1 Exch. 244, followed.

As the applicant claims that the Board of War Risk Insurance is still in existence he has an effective remedy by way of a suit for compensation and therefore issue of direction in the nature of *mandamus* cannot be ordered.

Kyaw Din for the applicants.

Chan Htoon (Attorney-General) for the respondents.

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* Civil Misc. Application No. 37 of 1948.

† *Present :* SIR BA U, Chief Justice of the Union of Burma, E MAUNG, J., and KYAW MYINT, J., of the Supreme Court.

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The judgment of the Court was delivered by

E MAUNG, J.—The applicants seek to have directions in the nature of *mandamus* issued to the respondents "to carry out the provisions of the law as contained in Rule 24 of the War Risks (Goods) Insurance Rules, 1941, by constituting a Board of Management of the War Risks (Goods) Insurance Scheme.

The War Risks (Goods) Insurance Rules, 1941, were promulgated on the 20th December 1941, by the Governor of Burma exercising powers vested in him by section 2 of the Defence of Burma Act, 1940. Under these Rules it was made compulsory for certain persons to insure their goods with the Board of Management of the War Risks (Goods) Insurance Scheme, and by Rule 24 (1) was constituted the Board of Management "which shall under that name be a corporation sole with perpetual succession and a common seal and which may sue and be sued under that name."

Under Rule 24 (2) the Governor was empowered to appoint from time to time a Chairman and such number of other members not exceeding seven in the exercise of his individual judgment, and in exercise of that power and by Notification No. 306 of the 20th December 1941 the Governor appointed the first Chairman and six other members to the Board.

For the purposes of this application it may be assumed that the applicants, who had been carrying on business at Rangoon, in pursuance of the Rules became participants in the Insurance Scheme and paid all the premiums due under the said Scheme up to the end of March 1942.

On the 20th February 1942, when Rangoon was threatened with enemy occupation, the applicants evacuated from Rangoon and later, on the re-occupation

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of Burma by the lawful Government, they gave notice in writing to the Board of loss of or damage to goods insured by them under the Scheme and made a claim for payment of compensation. It is averred on behalf of the applicants—and for the purposes of this application, may be assumed—that the claim in writing was made on the 27th May 1947. It may also be assumed that the claim was duly registered by the Board which afterwards examined on the 5th July 1947 a witness called by the applicants in support of their claim. The enquiry was then adjourned, and it may again be assumed for the purposes of the present application that on the 24th September 1947 the applicants were told on behalf of the Board that under orders from the Government the meetings of the Board had been temporarily suspended and that the hearing of the claims for which notice had already been issued would not therefore take place on the dates intimated but that revised dates of hearing would be communicated to the applicants by the Board on receipt of further orders from the Government.

On the 5th May 1948 a notice was issued under the authority of the Ministry of Finance and Revenue in the following terms:

> "The public is hereby informed that with the expiry of the Defence of Burma Act, 1940, the Board of Management of the War Risks (Goods) Insurance Scheme, constituted under Rule 24 of the War Risks (Goods) Insurance Rules, 1941, has ceased to exist with effect from the 31st July 1947, the date on which the said Act expired."

It is in these circumstances that the applicants sought the assistance of this Court by way of directions in the nature of *mandamus* to be issued to the respondents.

The nature of the prerogative writ of *mandamus* has been considered in some detail in *Murray* v. *Wellington* (1). Accordingly all that need be said here is that it is a writ whereby the Court empowered to issue it, directs the person to whom it is addressed to perform some public or quasi-public legal duty which he has refused to perform and the performance of which cannot be enforced by any other adequate legal remedy. It is settled and not open to dispute that if specific remedy exists at law and that remedy is not less convenient, beneficial or effective the writ of *mandamus* or directions in the nature of *mandamus*, which cannot be claimed by the applicants *ex debito justice*, will not be granted.

In *Manick Chand Mahata* v. *The Corporation of Calcutta and one* (2) a single Judge of the Calcutta High Court, it is true, said that " specific and adequate remedy " refers not to a general right of suit which must, unless expressly barred, always exist, but to some specific remedy expressly given by a particular Act. For this proposition the learned Judge gives no authority whatsoever, and so far as the learned Judge may be taken to have said that the existence of the right of suit would not bar the remedy by way of *mandamus* there is a long line of authorities consistently against him.

In *Queen* v. *The Commissioners of Inland Revenue* (3), Brett M.R. said : " " Where there is no specific remedy by which justice can be done, the Court will grant a *mandamus*, but where there is a specific remedy by which the subject will get justice by a judicial decision of the Courts, then it is within the reason of the rule that if there is such a remedy a *mandamus* ought not to issue." The learned Master of the Rolls made it clear

(1) (1938) Ran. 83. (2) I.L.R. 48 Cal. 916 at p. 924.
(3) L.R. (1884) 12 Q.B.D. 614.

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that for a remedy to be specific within the meaning of that rule it would be enough if the remedy was a remedy in law which the petitioner is entitled to claim as of right. Bowen L.J. agreed with Brett M.R. that a petition of right is such a remedy that the possibility of it would exclude *mandamus*.

In *Queen* v. *Charity Commissioners for England & Wales* (1) Wright and Bruce J.J. taking the view that the applicant could have sought his remedy within the ordinary jurisdiction of the Courts, either by way of an action for an injunction or by way of an application for a declaration of a right which could be claimed, refused to grant the writ of *mandamus*.

In *Rex* v. *Dymook* (2) Darling J. said: "There is another ground on which the application fails, namely that *mandamus* is not the only remedy open to the applicant. If he is entitled to the office of sexton as a freehold for life he can bring an action to recover the fees."

It has been strenuously claimed on behalf of the applicants that section 4 of the Defence of Burma (Repealing) Act, 1947, operates to keep alive, in spite of the expiry of the Defence of Burma Act, 1940, the Rules relating to the War Risks (Goods) Insurance Scheme and that consequently the claim made by the Ministry of Finance and Revenue that the Board has ceased to exist with effect from the 31st July 1947 is in law incorrect. It has also been claimed on behalf of the applicants that the power under Rule 24 (2) to appoint a Chairman and members to the Board from time to time imposes a duty and that this duty can and should be enforced by directions in the nature of *mandamus*.

It must then be first considered in this case whether there is available to the applicants an alternative specific remedy such as would exclude the issue of directions in

(1) L.R. (1897) 1 Q.B. 407. (2) (1915) 1 K.B. 147.

the nature of *mandamus*. In considering this point it must be borne in mind that at the root of the applicants' case lies the claim that the Board of Management of the War Risks (Goods) Insurance Scheme has not, as claimed on behalf of the Government of the Union of Burma, ceased to exist with effect from the 31st July 1947 and that the body corporate under that name and title continues its existence to this day.

It is clear therefore that, assuming the applicants' contention that the Rules persist and the Board remains in existence to this day to be correct in law, the discretionary remedy by way of directions in the nature of *mandamus* will have to be withheld if the applicants can have an effective alternative remedy at law.

On behalf of the applicants it is then said that the right to compensation for loss or damage to goods insured under the Scheme cannot arise out of contractual relations between the Board and the applicants but that the right accrued under and was treaceable exclusively to the statutory Rules made under section 2 of the Defence of Burma Act, 1940. It may be so, but the truth of the status theory of the origin of the right of compensation of the insurer under the Scheme is not so obvious. A contract has been defined in section 2, clause (*h*) of the Contract Act as an agreement enforceable by law, and in clauses (*a*), (*b*) and (*g*) of the same section are defined "proposal", "promise" and "agreement". Is it possible to say that the relationship, arising out of the acceptance of the obligation for insurance under Rule 17 (1) of the War Risks (Goods) Insurance Rules, 1941, is not a contract? Moreover the operation of sections 14 and 25 (*2*) of the Contract Act cannot be ignored in this connection. However, for reasons which will become apparent later, this point does not need to be further considered.

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The right to compensation whether *ex contractu* or as the creation of the Rules is admittedly dependent on the conditions precedent specified in Rule 19 (1) being complied with. It is said on behalf of the applicants, and may be assumed for the purposes of this application, that these conditions precedent have all been complied with.

It is next said on behalf of the applicants that there is another condition precedent in Rule 19 (2) (*d*) on the fulfilment of which their right of suit to enforce their claim to compensation is dependant. It was said that this condition precedent requires for its fulfilment an Act on the part of the Board and that the act was one which the Board was under a duty to perform and that the Board could not perform that act except through the human agencies of a Chairman and such number of members as the President of the Union is empowered and under a duty to appoint.

It would appear as if this part of the case would make it necessary for the Court to adjudicate on the question whether the Rules persist and the Board remains in existence, as claimed by the applicants, or not. A little reflection, however, would show that this necessity does not arise. It is not clear that Rule 19 (2) (*d*) enunciates a condition precedent to the accrual of a right of suit. A similar provision appearing in policies of insurance had formed the subject of consideration in *Rainey* v. *The Burma Fire and Marine Insurance Co., Ltd.* (1) where it has been said that the provision merely provides for the barring of a right which has already accrued. However, it is not necessary to pursue this matter further.

It is immaterial whether Rule 19 (2) (*d*) enunciates a condition precedent or not; neither is it material whether the condition precedent, if it is one, arises

(1) 3 Ran. 383.

ex contractu or by the operation of the statutory Rules. Assuming everything in favour of the applicants, it must be remembered that the principle which finds form in sections 53 and 67 of the Contract Act is one of universal application and is in substance true not only of the Common law but of natural justice and therefore of all civilized law.

As applied to contractual relations, the promisee who neglects or refuses to afford the promisor reasonable facilities for the performance of his promise thereby excuses the non-performance by the promisor, and the promisor who is prevented from performing his promise is, in spite of his non-performance, entitled to compensation from the promisee for the loss sustained in consequence of the non-performance of the contract.

In relations other than *ex contractu* the principle is clear that a man shall not take advantage of his own wrong. No man can complain of an impossibility for which he and he alone has been responsible ; *Nullus commodum capere potest de injuria sua propria*. As Pollock C.B. with robust commonsense said in *Raymond* v. *Minton* (1), " It is evident that the master cannot be liable for not teaching the apprentice if the apprentice will not be taught." No man can be called upon to perform an impossibility and if the impossibility arises out of the defendant's own act the non-performance of the conditions thus brought about clearly cannot be taken advantage of by the defendant.

It follows therefore that if, as claimed on behalf of the applicants, the Rules persist and the Board remains in existence, they would have a complete and effectual remedy at law by way of a suit for compensation in the appropriate Court. On the other hand if, as claimed on behalf of the respondents, the Rules are no longer in

(1) (1866) L.R. 1 Exch. 244.

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force and the Board has ceased to exist, the applicants clearly cannot seek to have the Chairman and other members appointed to a defunct Board. In either contingency the applicants have not established a case for the issue by this Court of directions in the nature of *mandamus*.

The application will therefore stand dismissed with costs. Advocate's fees ten gold mohurs.