

CIVIL REFERENCE.

Before U Thein Maung, Chief Justice and U San Maung, J.

H.C.
1948

A. M. H. YEZDI AND ONE (CLAIMANTS)

v.

July, 26.

THE UNION OF BURMA (RESPONDENT).*

Requisitioning (Claims and Compensation) Order, 1947, Clause 13—Whether defective or ultra vires—Loss of profits—Whether a part of loss under Rule 96 (1), Defence of Burma Rules.

A restaurant business and the premises were requisitioned. The owner claimed that conditions or facts beyond those referred to in Rules 7, 8 and 9 made under the requisitioning (Claims and Compensation) Order, 1947 should be taken into consideration and in the alternative that the said Rules are *ultra vires* as they restricted the right to compensation.

Held: That the maxim *expressio unius est exclusio alterius* is applicable to the interpretation of the said Clauses and regard shall be had only to the conditions prescribed.

Held further: That the Claimants are entitled only to such compensation as may be fixed under the Rules and Orders and it must be regarded as fair. Loss of profits is only notional loss and the Claimants were not entitled to it.

In re An Arbitration between the London, Tilbury and Southern Railway Co. and The Trustees of the Gower's Walk Schools, (1890) L.R. 24 Q.B.D. 326; *Newcastle Breweries, Ltd. v. The King*, (1920) L.R. I.K.B. 854, distinguished.

In re An Arbitration between the Mersey Docks and Harbour Board and The Lords Commissioners of the Admiralty, (1920), L.R. 3 K.B. 223; *The Marpessa* (1906) Pro. 14, 33, affirmed in *ibid* 95, applied.

E. C. V. Foucar for the claimants.

Chan Tun Aung (Assistant Attorney-General) for the respondent.

U THEIN MAUNG, C.J.—The following questions have been referred to us under Clause 13 of the Requisitioning (Claims and Compensation) Order, 1947:

1. Where a requisition of a restaurant business together with its premises has been made, is a notional loss of profits resulting from such requisition a part of the "loss" contemplated by Rule 96 (1) of the Defence of Burma Rules?

* Civil Reference No. 4 of 1948 made by the Chief Judge of Rangoon City Civil Court under Clause 13 of the Requisitioning (Claims and Compensation) Order, 1947.

2. Is the Requisitioning (Claims and Compensation) Order, 1947, defective or *ultra vires* for the reasons given in the abovementioned statement of the case?

The claimants' case is that hotel and restaurant business was being actively conducted by them in the building known as No. 384, Dalhousie Street, Rangoon, when the said building was requisitioned together with all fixtures, fittings, furniture and other things therein under Rule 76 of the Defence of Burma Rules and that the closure of their business resulting from the requisition and their consequent failure to earn any profits are essentially a part of the loss sustained by them.

The respondents contend that the claimants had closed down the business before the building was requisitioned, that there accordingly was no loss of business and that in any case the claimants are not entitled to compensation for notional loss of profits.

However, for the purpose of this reference it has been agreed between the claimants and the respondents that it may be assumed that the claimants were carrying on the business there at the time of the requisition.

Now compensation must be assessed and paid in accordance with Rule 96 of the Defence of Burma Rules which reads :

96. (1) Whenever in pursuance of any of Rules 49, 66, 72, 76, 78, 79, 80 and 89A, any property is removed, destroyed, rendered useless, used, requisitioned or acquired by, or otherwise placed at the disposal or under the control of the Governor, and the circumstances are not such as to render the provisions of section 17 of the act applicable, the owner of such property shall be paid such compensation for any loss he may have sustained as a result of such removal, destruction, rendering useless, use requisitioning, acquisition, disposal or control, as may be fixed in accordance with the provisions of this rule.

(2) In default of agreement between Government and the owner of the property, the Governor shall by general or special order specify the authority or person through which or whom any

H.C.
1948

A. M. H.
YEZDI AND
ONE

v.
THE UNION
OF BURMA.

U THEIN
MAUNG, C.J.

H.C.
1948

A.M.H.
YEZDI AND
ONE
v.
THE UNION
OF BURMA.
U THEIN
MAUNG, C.J.

claim for compensation under sub-rule (1) shall be submitted and the authority or person by which or whom any such claim shall be adjudged and awarded.

(3) The Governor may further by general or special order prescribe the conditions to which the authority or person responsible for adjudging or awarding claims for compensation shall have regard when determining the amount of compensation payable, and may give such supplementary orders as to the assessment and payment of compensation as may appear to him to be necessary or expedient.

According to sub-rule (1) the claimants are entitled only to "such compensation for any loss" they may have sustained as a result of the requisitioning "as may be fixed in accordance with this Rule", *i.e.* as may be fixed in accordance with sub-rule (2) and the Governor's orders under sub-rule (3); and the Requisitioning (Claims and Compensation) Order, 1947, is an order made by the Governor in exercise of the powers conferred by Rule 96. So they are entitled only to such compensation as may be fixed in accordance with the said Order.

The following are the provisions of the said Order which are relevant to the questions under reference :

"7. In determining the amount of compensation payable as a result of the operation of an order made under Rules 49, 66, 76, 78, 79 and 80 of the rules, as the case may be, regard shall be had to any expenses incurred, or services rendered, by such owner in complying with such order."

"8. In determining the amount of compensation, regard shall also be had—

(1) in the case of immovable property;

(a) to the monthly rent which but for any appreciation of value due to any emergency might reasonably be expected to be payable by a tenant in occupation of the property during the period of requisition under a lease granted immediately before the beginning of the period whereby the tenant undertook to bear any rates, taxes or cess

payable in respect of the property and the cost of repairs and other expenses, if any, necessary to maintain the property in the state to command such rent and which, in the absence of other indications, may be deemed to be the 1941 assessment for rates."

"9. In determining the compensation payable in respect of any movable property, regard shall also be had—

- (a) to the sum which but for any appreciation of value due to any emergency might reasonably be expected to be payable for the hire of the property during the period of requisition under a contract entered into immediately before the beginning of the period of requisition for the use of the property in the same manner and subject to the same conditions as it is used " ;

The learned Advocate for the claimants has contended that the said provisions do not preclude other conditions or facts being taken into consideration by the authority or person responsible for adjudging or awarding claims for compensation and in the alternative that they must be *ultra vires* if they do so inasmuch as they restrict the right to compensation which is given by sub-rule (1) of Rule 96.

With reference to the first contention he relies on the phrase "regard shall also be had" which appears in both Clause 8 and Clause 9 of the Order. However, we are of the opinion that the word "also" has been inserted in the said clauses as they are to be read together with Clause 7, *i.e.* as they prescribe further conditions to which regard shall be had in connection with the respective cases. Besides, the Order has been made by the Governor in exercise of his power under sub-rule (3) to prescribe conditions to which regard shall be had; and prescription of such conditions will be meaningless if in spite thereof the authority or person responsible for adjudging or awarding claims for compensation can or must have regard to other

H.C.
1948

A. M. H.
YEZDI AND
ONE

v.
THE UNION
OF BURMA.

U THEIN
MAUNG, C.J.

H.C.
1948

A. M. H.
YEZDI AND
ONE
*
THE UNION
OF BURMA.

U THEIN
MAUNG, C.J.

conditions as well. So we are of the opinion that the maxim *expressio unius est exclusio alterius* is applicable to the interpretation of the said clauses.

With reference to his contention in the alterantive he has invited our attention to *In re An Arbitration between the London, Tilbury and Southern Railway Co. and The Trustees of the Gower's Walk Schools* (1). However, that was a case under section 16 of the Railway Clauses Act, 1845, which provided "the company shall make *full* satisfaction to all parties interested for *all* damage"; and Lord Esher M.R. observed in the course of his judgment therein (at p. 331).

"The ratio decidendi is this—if you can bring the case within the statute, then the words 'full satisfaction for all damages,' are to give not only that which would be legal damage in an action but compensation for all the damages which the property has in fact suffered."

He has invited our attention to *Newcastle Breweries Ltd. v. The King* (2) also. However, that is a case in which a part of Pegulation 2B of the Defence of the Realm Regulations made under section 1 of the Defence of the Realm Consolidation Act, 1914, is held to be *ultra vires* as "it deprives the owner of his *statutory* right to the fair market value" of the goods acquired. (See p. 865 of the ruling.) In the present case the claimants are entitled only to such compensation as may be fixed under the Rule; the Order, which has been made under the Rule by the same authority, must be deemed to be a part of the Rule; and the Order provides for payment of what may be regarded as fair rent.

The learned Advocate for the claimants has not been able to cite any ruling to show that compensation for notional loss of profit has ever been awarded. On

(1) (1890) L.R. 24 Q.B.D. 326.

(2) (1920) L.R. I.K.B. 854.

the other hand there is the ruling *In re An Arbitration between the Mersey Docks and Harbour Board and the Lords Commissioners of the Admiralty* (1). In that case a barge, which was being constructed for the Board, was requisitioned by the Admiralty when it was nearing completion; and it was found as a matter of fact that it could not be replaced in less than three years. And yet it was held—

H.C.
1948
—
A. M. H.
YEZDI AND
ONE
v.
THE UNION
OF BURMA.
—
U THEIN
MAUNG, C.J.

“that the Board were not entitled to any compensation for the loss of the services of the barge during the above-mentioned period of three years, the damage thereby caused being too remote.”

Moreover, The Earl of Reading C.J. observed in the course of his judgment therein—

“I think however that the principle applicable to cases of this kind is well settled, and I am satisfied that it would exclude compensation for loss of the services of the barge. In none of the numerous cases in which the Court has had to assess the compensation to be paid to a person who has been deprived of his property by a Government requisition has it ever been held that such damages could be recovered as are mentioned in the third question put to us by the arbitrator.”

Avory J. agreed and only added a quotation from *The Marpessa* (2), which reads :

“This tribunal, in assessing . . . damages, may say as a jury would do, ‘We must act with some reasonable certainty, and you, the plaintiffs are reasonably compensated by being awarded a sum which we are fairly satisfied you may have lost, but we cannot follow you into mere speculation’.”

Both of the questions under reference are answered in the negative. The claimants must bear the costs of this reference. Advocate’s fee ten gold mohurs.

U SAN MAUNG, J.—I agree.

(1) (1920) L.R. 3 K.B. 223. (2) (1906) L.R. P. 14, 33, affirmed in *ibid.* 95.