1,1957

In the Privy Council.

No. 41 of 1955.

ON APPEAL

FROM THE COURT OF APPEAL FOR EASTERN AFRICA

BETWEEN

SHEIKH BROTHERS LIMITED ... ... APPELLANTS

AND

1. ARNOLD JULIUS OCHSNER
2. OCHSNER LIMITED ... ... RESPONDENTS.

CASE FOR THE RESPONDENTS

RECORD

1.—This is an Appeal from a judgment and order of the Court of Appeal for Eastern Africa (Nihill, P., Jenkins and Briggs, JJ.A.) dated the 22nd December, 1954, whereby the said Court of Appeal dismissed an appeal by the Appellant against an order of the Supreme Court of Kenya (de Lestang, J.) dated the 11th December, 1953, dismissing an application by the Appellant that the Revised Preliminary Award filed in Court by Colonel Frederick Stewart Modera and James Henry Wilkinson, the arbitrators in a certain arbitration between the Appellant and the Respondent, should be set aside or remitted to the said arbitrators. pp. 26–32 pp. 21–2

10 2.—The principal question for determination in this appeal is whether compensation is payable under Section 56 (3) of the Indian Contract Act, 1872, in a case where an agreement is void under Section 20 of the said Act by reason of mutual mistake as to a matter of fact essential to the agreement, but also the agreement is to do an act impossible in itself and therefore void in accordance with Section 56 (1) of the said Act.

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pp. 7–14

3.—The Appellant is owner of a sisal estate. By a Memorandum of Agreement dated the 9th December, 1950, the Appellant granted the first-named Respondent a licence to work the estate for a term of 5 years
p. 9, l. 30 from the 1st January, 1951. Under its terms the first-named Respondent was permitted to assign the licence to a private limited liability company of which he and members of his family were the only shareholders. On or
p. 3, l. 33 about the 1st May, 1951, the first-named Respondent assigned to the second-named Respondents his rights and obligations under the licence, with effect from the 1st January, 1951.

4.—Clause 3 of the said Memorandum of Agreement provided inter alia that the Licensee would :— 10

p. 8, l. 6 (A) continuously and in a proper and efficient manner cut decorticate process and manufacture all mature sisal then or thereafter growing on the Mature Sisal Area of the said Estate ;

p. 8, l. 9 (B) deliver all sisal fibre and tow produced by the Licensee on the said estate to the Appellant or its agents for sale ;

p. 8, l. 12 (C) as from the 1st April, 1951, manufacture and deliver sisal fibre in average minimum quantities of 50 tons a month ;

p. 8, l. 20 (D) use the Appellants' trade mark " Kedai " and stamp the same on all fibre and tow produced and delivered by the Licensee as aforesaid ; and 20

p. 8, l. 24 (E) not cut any sisal on the said estate other than mature sisal, as defined.

p. 11, l. 41 5.—Clause 6 of the said Memorandum of Agreement made provision for the Appellant to recoup itself out of the deposit paid by the Licensee, in the event of deliveries of fibre in any year ending the 31st December, falling below the aggregate of the average minimum monthly quantity
p. 12, l. 35 provided in Clause 3 (C). Clause 11 further provided for re-entry by the Appellant inter alia if the Licensee should fail for a period of three consecutive calender months to cut and deliver the average minimum 30 quantities of sisal provided for by Clause 3 (C) and by reason of such failure the Appellant should sustain a loss exceeding 100,000/–.

p. 3, l. 36–
p. 4, l. 2 6.—The Respondents cut and manufactured sisal under the said Licence until the 31st January, 1952, when possession of the estate was resumed by the Appellant at the request of the first-named Respondent, without prejudice to the Appellant's right and remedies.

p. 4, l. 4 7.—By an Agreement of Submission dated the 27th November, 1952, the Appellant and the Respondents referred to the determination of the arbitrators mentioned in paragraph 1 hereof, all questions, difficulties and

disputes between the Appellant of the one part and the first-named and/or second-named Respondents of the second part, 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 howsoever in relation thereto.

8.—By their Statement of Claim dated the 27th November, 1952, the second-named Respondents contended that the Licence was void because— p. 15

(A) it 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 sisal area would be sufficient to permit the manufacture and delivery of the prescribed minimum quantities throughout the term, whereas this belief was erroneous ; p. 15, *l.* 3

(B) alternatively notwithstanding the exercise of reasonable diligence by the Licensee and unknown to the Appellant, the leaf potential of the sisal area was insufficient to permit the manufacture and delivery of the prescribed minimum quantities throughout the term and consequently performance of the contract was impossible. p. 15, *l.* 9

9.—The arbitrators were asked to decide as preliminary points whether the Licence was void upon either of the above grounds of mutual mistake or impossibility. By their Award dated the 9th January, 1953, the arbitrators decided that :— p. 4, *l.* 27 p. 15, *l.* 19

(i) there was an error of judgment on the part of the Licensee only in his assessment of the sisal tonnage which the estate could produce, but an " error of judgment " was not the equivalent of " mistake," and accordingly there was no such mistake as would render the Licence void under Section 20 of the Indian Contract Act ; p. 15, *ll.* 25–38

(ii) there was insufficient leaf to enable the Licensee to carry out his obligations under Clause 3 (C) of the Licence, and to that extent there was impossibility ; p. 16, *l.* 9

(iii) the Licensee must make compensation in accordance with Section 56 (3) of the Indian Contract Act which provides :— p. 16, *ll.* 13–25

> " Where one person has promised to do something which " he knew, or, with reasonable diligence, might have known, " and which the promisee did not know 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,"

on the ground that the Licensee, had he exercised reasonable diligence before agreeing the terms of the Licence, might have known that it would not be possible to produce the minimum quantities stipulated for therein.

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pp. 16–18
p. 17, *l.* 38

10.—The Respondents subsequently applied to the Supreme Court of Kenya to remit or set aside the said Award on the ground of errors appearing on its face. By a judgment of the said Supreme Court (de Lestang, J.) dated the 23rd July, 1953, it was held that the said arbitrators had erred in holding that the Licensee's erroneous belief that the leaf potential of the estate would be sufficient to enable him to carry out his obligations under the Licence did not amount to a mistake of fact within the meaning of

p. 18, *ll.* 2–4

Section 20 of the Indian Contract Act. The said Supreme Court therefore ordered that the said Award should be remitted to the arbitrators.

11.—The arbitrators thereafter made a Revised Award dated the 7th September, 1953, in the following terms :—

p. 18, *l.* 20

" 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 hold that the " licensee succeds 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."

p. 2

12.—On the 16th November, 1953, the Appellant applied by Summons to the Supreme Court of Kenya for an order that the said Revised Award should be set aside or remitted to the arbitrators. This summons was

p. 19, *l.* 3
pp. 21–2

heard before de Lestang, J. on the 7th December, 1953, and on the 11th December, 1953, the learned Judge dismissed the Appellant's application with costs.

p. 20, *l.* 13
p. 21, *l.* 8

13.—In his Judgment, de Lestang, J. said that he could find no substance in the first two grounds on which the application was based, namely that the arbitrators were (1) wrong in law and fact in finding that the mistake was mutual, and (2) wrong in holding that the mistake was on a matter of fact essential to the agreement. With regard to the Appellant's argument that the arbitrators 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

p. 21, *l.* 11

not become operative, the learned Judge entirely agreed with the view of

p. 21, *ll.* 12–17

the arbitrators. He held that Section 56 (3) of the Indian Contract Act only applied where an agreement was declared void on the ground of impossibility or illegality, and did not apply where, as in the present case, the agreement was held to be void on the ground of mutual mistake of fact.

p. 21, *l.* 18

Finally, he could find nothing uncertain or ambiguous in the Revised Award.

14.—Against this decision the Appellant appealed to the Court of Appeal for Eastern Africa. The said appeal was heard by the said Court of Appeal (Nihill, P., Jenkins and Briggs, JJ.A.) on the 10th and 13th December, 1954. On the 22nd December, 1954, the said Court of Appeal dismissed the Appellant's appeal with costs. p. 32

15.—The leading judgment was delivered by Briggs, J.A. On the question whether the mistake was on a matter essential to the agreement, he thought that the arbitrators were clearly right. In his view, the requirement of 50 tons 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 a fact which resulted in the performance of the contract being impossible could hardly fail to be on a " matter essential to the agreement." p. 26, *l.* 17 p. 27, *l.* 33 p. 27, *l.* 28 p. 27, *l.* 29 p. 27, *l.* 31

16.—The learned Judge then proceeded to consider whether Section 56 (3) of the Indian Contract Act might be invoked where there was initial impossibility or illegality, but in addition the agreement was void *ab initio* on some other ground. He referred to various grounds on which an agreement might be void and observed that the different moral qualities affecting the grounds of avoidance led to different treatment. He thought that the argument of the Appellant to the effect that an agreement declared by law to be void for more than one reason was no more void that if avoided by impossibility alone, and that if void on the ground of impossibility compensation was payable even though the agreement also void for other reasons, failed. The argument, he thought, necessarily involved the proposition that, apart from the special grounds of avoidance which led to compensation, every ground of avoidance had, under the Indian Contract Act, the same legal consequences. He considered this to be unsound. He referred to agreements made by infants or persons lacking contractual capacity, agreements void for lack of consensus as to parties, and agreements avoided on grounds of public policy. He did not think that compensation would be payable in such cases if the agreements happened to be void also for impossibility. An agreement was avoided for mutual mistake, because the true intention of the parties was to make their agreement conditional on the existence of some state of facts which turned out not to have existed at the date of the agreement. In such circumstances, there was never any effective agreement. In his view the provision for compensation in Section 56 could only be invoked by the promisee when the agreement was void solely by reason of impossibility or illegality and would otherwise have been a valid contract. There was no logical or moral basis for compensation on the ground of an unknown element of impossibility or illegality if the contract was void for some other reason. p. 28, *l.* 21 p. 28, *ll.* 24–36 p. 28, *ll.* 46–51 p. 29, *l.* 1 p. 29, *ll.* 4–15 p. 29, *l.* 18 p. 29, *l.* 23 p. 29, *l.* 49. p. 29, *l.* 47

17.—Briggs, J.A., thought that his view was supported by another line of argument, namely, that in the circumstances of the case there was no " promise " within the meaning of Section 56 (3). He preferred, however,

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p. 30, l. 13 to express no final opinion on this argument. Finally, he referred to *The Salvator* (1909) 26 T.L.R. 149, which seemed to him to show that, on his view of Sections 20 and 56 of the Indian Contract Act, the law of Kenya
p. 30, l. 26 and the law of England on this point were the same. He concluded that the arbitrators and the Supreme Court of Kenya had arrived at a correct decision.

p. 30, l. 33 18.—Jenkins, J.A., found himself in general agreement with Briggs, J.A.
p. 30, l. 44 He could see no reason for not holding that the agreement, void under Section 20, was also void under the first paragraph of Section 56. However,
p. 31, l. 4 Section 56 (3) introduced factors which were entirely foreign to the conception of mutual mistake, implying a set of circumstances in which the parties were not on equal terms as they were under Section 20. He was
p. 31, l. 19 therefore of opinion that the arbitrators and the Supreme Court of Kenya were correct in their view that Section 56 (3) did not apply where as in the present case the agreement was held to be void on the ground of mutual mistake of fact.

p. 31, l. 27 19.—Nihill, P., also agreed. In his opinion this was never an effective agreement to which Section 56 (3) of the Indian Contract Act could be applied.

The Respondent submits that this appeal should be dismissed with costs for the following among other

REASONS

(1) BECAUSE no error appears on the face of the Revised Award dated the 7th September, 1953.

(2) BECAUSE the agreement dated the 9th December, 1950, was void under Section 20 of the Indian Contract Act, 1872, on the ground of mutual mistake of fact.

(3) BECAUSE Section 56 (3) of the said Act has no application where an agreement is void by reason of the provisions of Section 20 of the said Act.

(4) BECAUSE the order of the Supreme Court of Kenya was right.

(5) BECAUSE the order of the Court of Appeal for Eastern Africa was right.

H. J. PHILLIMORE.

R. I. THRELFALL.

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CASE FOR THE RESPONDENTS

FIELD ROSCOE & CO.,
52 Bedford Square,
London, W.C.1,
Respondents' Solicitors.

GEO. BARBER & SON LTD., Printers, Furnival Street, Holborn, E.C.4, and Cursitor Street, Chancery Lane.
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