APPELLATE CRIMINAL.

Before Mr. Justice Mackney.

1940

Jan. 12.

MOHAMED ISMAIL AND OTHERS

v.

THE KING.*

Seamen's contract—Peace time agreement for a commercial voyage—Outbreak of War—Refusal to go to sea—Burma Merchant Shipping Act, s. 100, cl. ii—Risks of a commercial voyage—Risks of War—Implied promise under agreement—Basis of contract—Frustration—Contract Act, ss. 9, 56.

Where seamen have entered into an agreement with a Shipping Company in peace time to go to sea on commercial voyages within a specified area during a certain period and war breaks out over a portion of the area involving risk of life and liberty of the crew, they have reasonable cause to refuse to go on a voyage over that portion and are not thereby committing any offence under s. 100 (ii) of the Burma Merchant Shipping Act.

The natural risks of a commercial voyage do not include the risks which arise in a state of war. In embarking on a vessel upon a commercial voyage one does not include among the risks of the voyage capture or destruction of men and ships by the enemy or destruction by mines. The agreement is 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 when that state of things ceases to exist, the contract is deemed to be at an end.

F. A. Tamplin Steamship Co., Ltd. v. *Anglo-Mexican Petroleum Products Co., Ltd.*, (1916) 2 A.C. 397 ; *Hartley* v. *Ponsonby*, 26 L.J. 322 ; *Krell* v. *Henry*, (1903) 2 K.B.D. 740 ; *Liston* v. *Owners of Steamship Carpathian*, (1915) 2 K.B.D. 42 ; *Palace Shipping Co., Ltd.* v. *Caine*, (1907) A.C. 386 ; *Robson* v. *Sykes*, 54 T.L.R. 727, referred to.

The doctrine of frustration as applied in England is applicable in Burma under the Contract Act.

Goculdas v. *Narsu*, I.L.R. 13 Bom. 630 ; *Gouri Sankar* v. *Moitra*, 26 C.W.N. 573 ; *Panakkatan Sankaran* v. *The District Board of Malabar*, (1933) Mad. W.N. 1281, referred to.

Karl Ettlinger v. *Chagandas & Co.*, I.L.R. 40 Bom. 301, distinguished.

Rauf for the appellants.

Lambert (Government Advocate) for the Crown.

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* Criminal Appeal No. 1052 of 1939 from the order of the Western Subdivisional Magistrate of Rangoon in Summary Trial No. 738 of 1939.

MACKNEY, J.—The 47 appellants are seamen who on the 5th July 1939 entered into an agreement to sail on the M.V. " Staffordshire " for a period of twelve months on a voyage from Calcutta to any other ports or places within the limits of 60 degrees North and 50 degrees South Latitude trading to and fro as the nature of the service or employment may require, and finally to be discharged at Calcutta. It seems that the ship reached England thereafter and must have left England shortly before the outbreak of hostilities with Germany. The ship arrived at Rangoon on the 17th of October 1939. Six days later, the appellants and other members of the Indian crew of the ship interviewed the Master and demanded double pay and compensation for their families in case of their death on account of war injuries. The Master after consultation with the Shipping Master of the owners offered the following terms to the appellants :—their pay to be increased by 25 per cent from the 1st of October 1939 and compensation and widow pension and children's allowances to be paid in accordance with the British Board of Trade's circular dated the 7th of September 1939.

The first paragraph of this circular reads as follows :

"MERCHANT SHIPPING AND SEAMEN.

COMPENSATION IN RESPECT OF WAR INJURIES.

The Minister of Pensions has been empowered by the Pensions (Navy, Army, Air Force and Mercantile Marine) Act, 1939, which came into force on the 3rd September 1939, to consider :—(*a*) claims in respect of disablement or death directly attributable to war injuries sustained by officers and members of the crews of British ships including fishing boats or to detention caused by reason of such service in British ships, and (*b*) the payment of allowances to mariners so detained or to their dependants."

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The "Staffordshire" is a British ship. Its port of registry is Liverpool, England. The terms offered did not seem satisfactory to the appellants and they declined to go to sea on those terms. In consequence of this refusal to go to sea they were prosecuted before the Western Subdivisional Magistrate of Rangoon under section 100 clause ii of the Merchant Shipping Act.

The relevant portion of this section reads as follows :

> "If a seaman lawfully engaged commits any of the following offences he shall, notwithstanding anything in the Code of Criminal Procedure, 1898, be liable to be tried in a summary manner and to be punished as follows :
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> (ii) if he neglects or refuses without reasonable cause to join his ship or to proceed to sea in his ship, he shall, if the offence does not amount to desertion or is not treated as such by the master, be guilty of the offence of absence without leave and be liable to forfeit out of his wages a sum not exceeding two days' pay and in addition for every twenty-four hours of absence either a sum not exceeding six days' pay, or any expenses properly incurred in hiring a substitute, and also he shall be liable to imprisonment for a term which may extend to ten weeks."

The appellants stated to the Court that they wanted double pay and that in case of their death they wanted compensation for their families. They desired that an agreement in those terms should be signed by the Shipping Master and also by the Captain. They have not agreed to the terms which were offered to them.

The Magistrate held that although with the outbreak of war there was a change in the conditions of their service, it was not such a change as would take away the lawfulness of their employment for service on the ship. The terms given by the Captain appeared to the

Magistrate to be quite reasonable and in view of the concessions offered by the Captain, he did not think that the appellants had a reasonable cause to refuse to go to sea. The Magistrate thought that their case would have been different if they had refused to go to sea because they were afraid to enter the war zone. As this was a case in which the object of the accused was to fish in troubled waters and obtain higher wages for themselves he was of the opinion that they had infringed section 100 of the Act.

All the persons convicted have now appealed to this Court.

It is contended that the contract which the appellants had signed on the 5th of July 1939 was now no longer valid owing to the change in the conditions of their service and the risks to be undergone by the appellants owing to the declaration of war between Germany and His Majesty's Government. The appellants, it is urged, had signed articles for a commercial voyage and had undertaken only the natural risks of such a voyage. Under these articles they could not be asked to undertake a voyage the character of which had changed owing to the risks which had to be incurred by making the voyage.

Their conviction is supported by the learned Government Advocate on the ground that it was not by reason of the unforeseen risks to which they would be subjected that they had refused to undertake a further voyage but because they had seen the opportunity of extorting better terms for themselves from the Master of the ship.

It appears plain to me that if in fact the voyage which they were asked to undertake was not such a voyage as was contemplated by their agreement, they must be deemed to have had reasonable cause to refuse to proceed to sea.

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I think it may be stated that this is the view which has been taken by the English Courts in a long series of decisions.

The learned Government Advocate has observed that the men had already sailed during the period of war, although they had the chance of announcing their determination not to proceed further under the old conditions whenever they reached any one of the various ports at which the ship called in her voyage from England to India. It does not appear to me that this is a ground for holding that they had acquiesced in the new conditions. After all once they had left England every day took them nearer to their own homes: but it became a different matter when they were asked to return to the war zone.

In *Liston and others* v. *Owners of Steamship Carpathian* (1) the plaintiffs were engaged as seamen on a British ship on a commercial voyage from London to Port Arthur, Texas, and to a final port of destination in the United Kingdom. Upon arrival at Port Arthur she discharged her outward cargo and took on board a cargo of black oil. News having arrived that a state of war existed between Germany and England and that the *Karlsruhe*, a German cruiser, was in the vicinity of Port Arthur, the plaintiffs refused to proceed to sea and to complete the voyage, on account of the extra risk due to the outbreak of war which they would incur, unless they received extra remuneration. The master, in order to obtain their services, agreed to pay them extra. It was held that the risks of war not being contemplated by the seamen when they made the bargain for the commercial voyage, and the risk of capture and of danger from mines on the voyage home being risks which might reasonably be taken into

(1) (1915) 2 K.B.D. 42.

consideration, the plaintiffs were discharged from their obligation to proceed on the voyage, and the (new) contract was binding on the owners. Lord Coleridge observed :

"It is quite clear that it was not in the contemplation of the parties when they made this bargain that war would be declared between the country of the ship and another Power, both being maritime Powers and both having vessels of war which might or might not overrun the very portion of the sea through which this vessel was to pass. The test is whether there were war risks which in the reasonable contemplation of the parties might involve capture at sea. In embarking on a vessel upon a commercial voyage one does not include among the risks of the voyage capture by an enemy : the question is whether their conduct in seeking to be discharged from their contract was reasonable. I think they might reasonably take into consideration the risk of the ship being captured by the enemy. They also might reasonably consider the risks from mines run throughout the voyage, and moreover there would be the risks attached * * * * in the progress up the Channel of other units of the German Fleet."

Lord Coleridge was of the opinion that the crew were justified in remaining on shore at Texas and refusing to proceed on the voyage, and, that being so, they were discharged from their obligation to sail.

In *Palace Shipping Company, Limited* and *Caine and others* (1), it was held that the seamen having entered into an agreement for a peaceful commercial voyage, were justified in refusing to go to Japan. Lord Macnaghten observed :

"A voyage to Sasebo, a naval base belonging to one of the two belligerents, would necessarily involve risks to life and property different from and in excess of those incident to the employment of seamen engaged in peaceful commerce."

I think that in the present case one must be careful to avoid being influenced by the fact that it is common

(1) (1907) A.C. 386, 393.

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knowledge that the "Staffordshire" is a ship belonging to Messrs. Bibby Brothers & Company of Liverpool and that as a rule she regularly sails between England and Burma. No doubt the appellants when they signed the articles of agreement may have thought that the ship would sail as ordinarily ships of this line sail. That, however, does not alter the fact that if the owners of the ship had decided that the ship should sail to other ports in other parts of the world within the degrees of latitude specified in the agreement, the appellants would have been bound under the clauses of the agreement to sail with her. The owners need not order the ship to sail to England, and if they choose to do so knowing that such a voyage now entails risks which were not contemplated at the time the agreement was entered into and which are not contemplated in an ordinary commercial voyage, it appears to me that they cannot lawfully require the seamen to sail in the ship on such a voyage.

As is stated in the agreement the ship in which the men were to serve, was "trading to and fro." In order to carry out this purpose it was not necessary for the ship to go to any particular place. When it was decided that the ship should proceed to England after war had been declared with Germany—which at the time the appellants declined to sail with the ship had already shown herself to be an entirely ruthless enemy, sinking merchantmen without warning and without consideration for life—then the voyage became a somewhat hazardous enterprise partaking of the risks of war, and ceased to be an ordinary commercial voyage.

It may be that actually owing to the efficiency of His Majesty's Navy the actual risks are small. Nevertheless it cannot be denied that they exist—as is patent from the terms of the Board of Trade circular to which

I have already referred; for if the risks were not appreciable it is extremely unlikely that His Majesty's Government would offer such compensation as is here offered.

It has been suggested that in July 1939 when the articles of agreement were signed it must have been known that there was the risk of war breaking out between England and Germany. That may be so, but this is no proof that the men agreed to sail under the same conditions supposing war actually did break out. It appears to me that this agreement was entered into on the footing that a state of peace would continue to exist along the route which the ship should take in her voyages. As was observed by Earl Loreburn in *F. A. Tamplin Steamship Company, Limited* and *Anglo-Mexican Petroleum Products, Company, Limited* (3):

"When a lawful contract has been made and there is no default, a Court of law has no power to discharge either party from the performance of it unless either the rights of some one else or some Act of Parliament give the necessary jurisdiction. But a Court can and ought to examine the contract and the circumstances in which it was made, not of course to vary, but only to explain it, in order to see whether or not from the nature of it the parties must have made their bargain on the footing that a particular thing or state of things would continue to exist. And if they must have done so, then a term to that effect will be implied, though it be not expressed in the contract. In applying this rule it is manifest that such a term can rarely be implied except where the discontinuance is such as to upset altogether the purpose of the contract."

Where circumstances have altered materially it cannot be supposed that the parties as reasonable men intended the contract to be binding on them under such altered conditions.

In *Hartley* v. *Ponsonby* (2), a ship, being on a voyage from Liverpool to Australia and back, when in

(1) (1916) 2 A.C. 397, 403. (2) 26 L.J. 322, 325.

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port at Australia became so short-handed that it was dangerous to life to proceed with only the reduced crew; the captain promised the remaining seamen an additional sum if they would assist in taking the ship to her next port. It was held that the seamen were not bound to proceed on the voyage as it involved risk of life, and the promise was binding on the captain. Lord Campbell C.J. observed:

> "I consider that the ship was so short-handed at Port Phillip, that it would have been dangerous to life to proceed on the voyage to Bombay with such a crew; that is, so dangerous to life that the plaintiff and the other seamen were not bound to re-embark under their articles."

Of course, there is a question of degree and it has to be considered in each case whether the risk is so great as to render it unreasonable to require the seamen to proceed.

In the present case I consider that the fact that His Majesty's Government offers special compensation for war injuries sustained by seamen, is a sufficient indication that the degree of risk involved in sailing to England is sufficiently high to make it unreasonable to require the seamen to sail when they are under the terms of articles signed for commercial voyages to be carried out in times of peace.

It appears that the Shipping Master must have thought that the men were entitled to better terms on account of the risks, unforeseen at the time of the agreement, to which they would be subjected.

Robson and others v. *Sykes* (1) is a recent case under section 225 of the Merchant Shipping Act, 1894. Certain seamen were lawfully engaged under articles entered into in November, 1936, for a foreign-going voyage to any ports or places between latitude 75 degrees

(1) 54 T.L.R. 727.

North and latitude 60 degrees South. At that time civil war was in progress in Spain. After visiting several other ports the ship was ordered to proceed to Hopewell and load a cargo of nitrate for Seville, a naval base of the Spanish insurgents. The seamen in question refused to proceed, and were discharged at Boston. On summonses for combining to impede the navigation of the vessel, it was held, that seamen, *prima facie*, undertook to serve on an ordinary commercial voyage, and the question whether a particular voyage was within that description was one of fact. There were ample facts in the present case to justify the men's refusal. The Lord Chief Justice observed that it was true that the geographical limits mentioned in the articles included Spain, but in the conditions which then subsisted, when the crew were asked to take a cargo of nitrate to Spain, it was open to them to indicate that it was something outside the bargain into which they had entered.

It has been urged on behalf of the Crown that in Burma we are bound by the provisions of the Contract Act. This, no doubt, is true but the Contract Act also provides for "implied" promises. Section 9 for instance states:

> "In so far as the proposal or acceptance of any promise is made in words, the promise is said to be express. In so far as such proposal or acceptance is made otherwise than in words, the promise is said to be implied."

I take the view that in the agreement before us the promise, that the voyages contemplated would be ordinary commercial voyages over routes where peaceful conditions reign, is implied.

In *Goculdas Madhavji, Plaintiff* v. *Narsu Yenkuji, Defendant* (1), where the defendant agreed to pay the

(1) (1889) I.L.R. 13 Bom. 630.

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plaintiff " rent " for a piece of hilly ground at the rate of Rs. 329 per month for one year during which time the defendant was to be allowed to blast stones and carry on the work of quarrying, it was held that in the nature of the contract it must be taken to have been the intention of the parties that the monthly rent should only be payable so long as quarrying was permitted by the authorities, and that there was no unconditional contract to pay rent in all events.

In *Gouri Sankar Agarwalla, Plaintiff* v. *H. P. Moitra, Defendant* (1), the defendant contracted to supply plaintiffs with certain goods. The contract was made on 21st January 1914 and the goods were shipped in part in July 1914 in a German ship. This ship was captured by the British and condemned as prize. The cargo arrived in Calcutta in June 1916. The defendant did not inform the plaintiff of the arrival of the cases in June 1916 and he sold the goods to other dealers at a profit to himself. The plaintiff in July 1917 tendered the contract price to the defendant and brought the present suit for non-delivery of the goods. It was held, that having regard to the fact of the transhipment, the plaintiff was not entitled to the delivery of the goods on their arrival in June 1916 in the same manner as if there had been no interruption. It was pointed out that section 56 of the Contract Act only applies to physical impossibility and would not cover every case of frustration. The Chief Justice observed that section 9 of the Act, recognizes that promises may be implied, also that section 20 of the Act deals with the case of a common mistake at the time of the transaction " as to a matter of fact essential to the agreement." "Perhaps", it was observed, " a general principle of frustration depending on construc-

(1) 26 Cal.W.N. 573.

tion might be so stated as to cover that." It was not considered that the English cases had no bearing on this point.

In *Panakkatan Sankaran* v. *The District Board of Malabar and another* (1), it appears to have been thought that the doctrine of frustration as it applied in England was applicable also in India, although in the present case the defendant could not rely on it.

Of course, it was not impossible for the men to proceed in the ship to England but it was impossible for the voyage to be undertaken in those conditions in which ordinary commercial voyages are undertaken.

In *Krell* v. *Henry* (2), where the defendant agreed to hire from the plaintiff a flat for two days on which it had been announced that the coronation processions would take place and pass along the road in which the flat was, although the contract contained no express reference to the coronation processions, it was held, when the defendant declined to pay the balance of the agreed rent, as the processions did not take place on the days originally fixed, that the taking place of the processions on the days originally fixed along the proclaimed route was regarded by both contracting parties as the foundation of the contract; that the words imposing on the defendant the obligation to accept and pay for the use of the flat for the days named, though general and unconditional, were not used with reference to the possibility of the particular contingency which afterwards happened, and consequently that the plaintiff was not entitled to recover the balance of the rent fixed by the contract. Vaughan Williams L.J. observed :

"I think that you first have to ascertain, not necessarily from the terms of the contract, but, if required, from necessary

(1) (1933) Mad.W.N. 1281. (2) (1903) 2 K.B.D. 740.

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inferences, drawn from surrounding circumstances recognized by both contracting parties, what is the substance of the contract, and then to ask the question whether that substantial contract needs for its foundation the assumption of the existence of a particular state of things. If it does, this will limit the operation of the general words, and in such case, if the contract becomes impossible of performance by reason of the non-existence of the state of things assumed by both contracting parties as the foundation of the contract, there will be no breach of the contract thus limited."

In *Karl Ettlinger* (*Plaintiff*) v. *Chagandas & Co.* (*Defendants*) (1), section 56 of the Contract Act was applied with great strictness and it was held, that the performance of the contract did not become impossible within the meaning of section 56 of the Indian Contract Act, merely because freights from Bombay to Antwerp were not procurable from a commercial point of view, when the defendants repudiated the contract, and that no implied condition could be read into the contract that it was agreed by the parties that normal freight conditions should continue. Apparently in their case it was held that it was still possible to obtain freight although difficult. In our present case, however, we have to deal with an entirely different set of conditions.

I am of the opinion, therefore, that the appellants did not neglect or refuse without reasonable cause to join their ship or to proceed to sea in their ship and they should not have been convicted under section 100 clause ii of the Merchant Shipping Act.

This appeal is, therefore, allowed and the sentence of the Western Subdivisional Magistrate, Rangoon, is set aside and the appellants are acquitted.

(1) (1915) I.L.R. 40 Bom. 301.