Privy Council Appeal No. 73 of 1938

The Ottoman Bank, Haifa - - - - - - *Appellant*

v.

Clement Menni - - - - - - - *Respondent*

The Ottoman Bank, Haifa - - - - - - *Appellant*

v.

Anis Mansour - - - - - - - *Respondent*

(*Consolidated Appeals*)

FROM

THE SUPREME COURT OF PALESTINE

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 21ST JULY, 1939.

Present at the Hearing:

LORD THANKERTON

LORD FAIRFIELD

SIR LANCELOT SANDERSON

[*Delivered by* LORD THANKERTON]

This consolidated appeal is taken from two judgments of the Supreme Court of Palestine, sitting as a Court of Appeal, both dated the 19th February, 1937, by which two judgments of the District Court of Haifa in favour of the appellant, dated the 5th February and the 16th April, 1936 respectively, were set aside, and judgment was given in favour of the respective respondents in the suit in which each was plaintiff.

The main question at issue in the appeal relates to the amount of the respondents' pensions and the measure of their salaries, on the basis of which such amount falls to be ascertained. This is the fourth occasion within ten years on which a similar question as to the pensions of the appellant's employees has come before this Board.

The appellant, originally established in 1863 as the Imperial Ottoman Bank, with its head office in Constantinople, now Istanbul, has many branches, most of which, including the Haifa branch, were formerly within the Turkish Empire. It had also branches outside the Empire, and the branch bank in Cyprus, which was formerly under lease to Great Britain, is carried on under the name of the Ottoman Bank of Nicosia.

The respondent Menni entered the service of the appellant in 1910 at Haifa, and he became a member of the permanent staff there on the 16th June, 1913, when he signed

a declaration of adherence to the pension regulations of the Bank, known as the " Caisse de Pensions et de Retraites ", the whole provision of which was to form an integral part of the conditions of his engagement and the application of which was to be obligatory for him. He retired from the service of the Bank on the 30th November, 1933, under notice of termination of his employment, when he admittedly became entitled to a pension.

The respondent Mansour entered the service of the Bank in June, 1912, at Haifa, and became a member of the permanent staff on the 12th December, 1912, when he signed a declaration of adherence to the pension regulations similar to that signed by the respondent Menni. He remained in the service of the Bank at Haifa until the 31st December, 1933, when he retired under notice from the Bank, and was placed on pension as from the 1st January, 1934.

The amount of pension is provided for by the following articles of the pension regulations,

> " Article 14.—The amount of the pension is calculated on the basis of the salary the employee was drawing on the 31st December of the year which preceded that in which he was put on pension.
>
> Article 15.—The amount of the pension will be calculated on the following basis:—
>
> 1. For ten completed years of service, 30 per cent. of the fixed annual salary.
>
> 2. 2 per cent. for each succeeding year.
>
> Article 16.—In no case must the pension exceed three-quarters of the fixed annual salary. In no cases shall the pension be less than Ltq. 45 per year in the case of the clerical staff, and Ltq. 25 per year in the case of the subordinate staff."

It may now be taken as beyond dispute that, like the salary, the pension falls to be calculated in Turkish pounds, and that the fixed annual salary on the material date alone forms the basis; a claim by the respondent Menni that certain additional allowances should also be taken into account in calculation of the pension was rejected by both Courts below, and he has accepted the decision. But both respondents claim that, on a proper construction of the contract, their salary was payable in gold Turkish pounds only, and that their pensions are to be calculated accordingly. This contention is the same as has been dealt with in the previous decisions of the Board.

But, in both cases, the appellant has maintained that the respondents are precluded by certain admissions from making the above contention, and, as their Lordships are of opinion that the respondent Menni is so precluded, they will first deal with the case of the respondent Mansour alone.

Until the British occupation of Palestine in the autumn of 1918, the law of Turkey was the governing law of Palestine. Haifa was occupied about the end of 1918. Up to that time, the salaries were paid in Turkish currency. From that time until 1927, Egyptian currency was mainly in use, but, in November, 1927, a new Palestinian currency was introduced, and the salaries were thereafter paid in

Palestinian currency. After the British occupation, the salaries of Turkish pounds, as shown in the pay-sheets, were converted at a fixed rate into the prevailing currency; up till May, 1933, the first column expressed the fixed salary in Turkish pounds, but in that month this column was omitted from the pay-sheets, though it still formed the basis of calculation of the salary. Certain of the employees protested against this change.

There is no doubt that the contract is to be construed according to the Turkish law, which, in the Courts of Palestine, is now a question of fact. In the present case evidence has been led on three points, which in substance is identical with the evidence led in the last case before this Board, vizt., *Ottoman Bank of Nicosia* v. *Chakarian,* [1938] A.C. 260, the decision of which by this Board was delivered on the 16th November, 1937, about nine months after the decision of the Supreme Court, which is now under appeal. Their Lordships have no doubt that if the Supreme Court had had the said decision of the Board before them, they would have found, in the evidence led in these cases, reasons for distinguishing them from the case of *Ottoman Bank of Nicosia* v. *Dascalopoulos,* [1934] A.C. 354. Manning J. states that it had been agreed by both parties that the proper law of the contract is the Ottoman law as it existed at the date when the contract was made.

The first of the three points established by the evidence is that, although the Turkish gold pound was current at the date of the contract, the proper construction of the contract, according to the Ottoman law, was that the pound Turkish referred to in the contract was a unit of account, and was not a contract to pay Turkish gold pounds, in the absence of an express provision to that effect; in other words, it was a contract to pay so many pounds Turkish in whatever might be legal tender in Turkey according to Turkish law at the material time.

The second point established by the evidence is that at all material times since the beginning of the war the paper pound Turkish has been legal tender, and that the Turkish gold pound gradually disappeared from circulation and ceased to be money, and became a mere commodity, with a price like any other merchandise.

The third point established by the evidence is that the practice—" régime usité "—of the Bank in converting the amount of pounds Turkish payable as salary to their employees in Palestine at a fixed rate of conversion, did not constitute any admission that the salary was only payable in Turkish gold pounds, as the fixed rate was not the equivalent in value of the bullion contents of the Turkish gold pound.

The first two points make clear that the basic salary of the respondent Mansour, which was Ltqs. 23 on the 31st December, 1933, as at which date his pension falls to be calculated, was payable by the Bank in pounds Turkish in the paper currency which was legal tender in Turkey at the time, and that the pension falls to be calculated on

that basis, subject to an observation, which may be best expressed by citation of a passage in the judgment of the Board in the last case (see [1938] A.C., at p. 272), vizt.,

> " So far this way of regarding the matter would appear to be conclusive against the respondent's contention and to dispose of the appeal in favour of the appellants. It is necessary, however, to examine with some care the practice of the appellants in paying their employees, and in particular the course which they adopted in Turkey in paying the respondent and other employees after the Turkish currency went off gold. Reliance is placed by the respondent on these facts as being, in a phrase which was used, exegetical of the contract, and something like the principle of contemporaneous exposition was invoked. It is obvious that if a contract is clear and unambiguous its true effect cannot be changed merely by the course of conduct adopted by the parties in acting under it. Such conduct, if it is clear and unambiguous, may in certain events raise the inference that the parties have agreed to modify their contract, but short of that such conduct cannot have the effect of changing the operation of an unambiguous agreement, though it might possibly in special cases support, along with other appropriate evidence, a claim for rectification. In addition, the practice seems to be only consistent, when properly understood, with the construction which their Lordships have just enunciated."

The third point established by the evidence in this case makes the last sentence of that passage directly applicable to the present case, and the first and second points here established bring the present case within the rest of the passage. There is nothing in the present case to suggest any ground for a claim of rectification.

The appeal by the Bank in the case of the respondent Mansour succeeds on the foregoing grounds, and it is unnecessary to consider the appellant's contention that this respondent is precluded by admissions from maintaining his contentions as to the construction of the contract.

In the case of the respondent Menni, it is necessary to consider whether he is precluded by his admissions from claiming that he is entitled to his emoluments on a gold basis. After certain documentary evidence had been produced, and oral evidence had been led as to the additional allowances, which are no longer in question, the District Court made a provisional ruling on the 22nd January, 1936, in the following terms:—

> " Now as regards the question of estoppel which has been raised here, after considering the documentary and oral admissions of both parties, and the Plaintiff relying upon the Law of Palestine which includes such provisions of the Mejelleh as have not yet been modified or repealed, and the Defendant's advocates neither raising any objection nor requesting leave to prove the contrary on the question of the Law applicable here, we have come to the conclusion that prima facie the Plaintiff is estopped in law from prosecuting any further the claim which is now before us. We think that the Mejelleh as before mentioned provides us with the law in regard to estoppel which is binding upon this Court and that no other law applies here. Having regard, however, to the provisions of the Law of Evidence Amendment Ordinance 1924 as amended and in particular to the interpretation which has been placed upon the meaning and intention of Section 12 in the Ordinance by the Court of Appeal, we consider that we are bound first to afford (if he so desires), the Plaintiff the opportunity of giving evidence himself and/or of calling the Defendant's representative as his witness to prove any fac

relevant to the issue of estoppel, subject of course to his right later on may be to recall either himself or the Defendant's representative to give further evidence which may be relevant generally to the issues herein if the Court shall finally have decided the issue of estoppel in the Plaintiff's favour."

In their judgment, delivered on the 5th February, 1936, the District Court decided that the respondent was precluded by his admissions, and they state that the respondent had decided not to avail himself of the opportunity of giving evidence, which had been afforded to him by the provisional ruling. This decision was reversed by the Supreme Court, and, though no further evidence had been led, they decided in the respondent's favour on his claim to a gold basis. There is no record of any agreement to treat the evidence in the Mansour case as evidence in this case, and if their Lordships agreed with the Supreme Court that the respondent was not precluded by his admissions, it would be necessary that the case should be sent back in order that the parties might have the opportunity of leading further evidence. Their Lordships, however, agree with the decision of the District Court on this matter.

The claim of the respondent, which is at issue in the appeal, is for payment on a gold basis (*a*) of his pension, calculation of which is based on his fixed salary as at the 31st December, 1932, and (*b*) of his salary from 29th May, 1933, to 30th November, 1933, when he retired.

Under Article 46 of the Palestine Order in Council of 10th August, 1922, the provisions of the Mejelleh are applicable in the Courts of Palestine, and the appellant founds on certain articles, the translation of which by Grigsby (1895) is as follows:—

"Article 79.—Each man is bound by his own admissions.

Article 1606.—An admission by writing is equivalent to an admission made by word of mouth.

Article 1609. An admission of a debt which a person has written with his own hand or by means of another person, and, having signed or sealed it, has given it to another person, is equivalent to his admission by word of mouth, if it is regularly drawn up, i.e., in the accustomed manner, and the accustomed forms of receipt have the same validity."

As regards the claim in respect of salary, the appellant further founds on the following articles:—

"Article 1536.—*Ibrai*, freeing one from an obligation, payment, abandonment, acquitment. These are of two kinds, of which the first is called *ibrai-iskat*, and the second *ibrai-istafa*. *Ibrai-iskat*, freeing, abandoning a debt, is where a person frees another from the obligation, abandoning the whole or part of his claim. This is the release (*ibrai*) of which mention will be made in this book. *Ibrai-istafa*, recovery, is where a person declares that he received his claim from another, thus, this is a kind of admission.

Article 1562.—If anyone release another from his claim his claim is extinguished, he can no longer renew it."

The Supreme Court rejected the appellant's contention mainly on their view of the proper inference to be drawn from the signed pay-sheets and receipts given by the respondent, and, apparently, it was for that reason that they

held that articles 1536 and 1562 were not relevant to the circumstances of the case. But their Lordships do not agree with the Supreme Court nor with their view that article 1655 has a bearing on the case, in view of the fact, already noted, that the respondent did not attempt to given evidence to qualify the clear meaning of his signature to the pay-sheets and the receipts given by him.

On the pay-sheet for the respondent's salary for December, 1932, the calculation of his salary is fully stated, and the respondent signed for receipt of the "net amount payable" as stated in the last column. The calculation is inconsistent with his present claim, and their Lordships are of opinion that this constitutes a clear admission by the respondent that the net amount is correctly calculated, and infers a release from the debt due to him by the Bank, it being the customary form of receipt taken by the Bank. It follows that the respondent is now bound by this admission as to the correct amount of his salary at the date material for the calculation of his pension. As regards his claim in respect of salary from May to November, 1933, the case is equally clear. In May, 1933, when the Bank dropped the first column from the pay-sheet, the respondent wrote a letter dated the 29th May in which he protested against the change, but he did not persist in his protest, but signed unconditional receipts during the succeeding months, which form Exhibit D/6, the last of which, dated the 21st December, 1933, is for "the sum of Palestine pounds twenty-five and 381 mils only—for balance of my salaries from February, 1933, until end of November, 1933". This is clearly a release, by which his claim was extinguished, and he can no longer renew it.

Their Lordships are therefore of opinion that the respondent Menni's claim also fails, and that the District Court were right in dismissing his suit. Their Lordships will, accordingly, humbly advise His Majesty that the judgment of the Supreme Court dated the 19th February, 1937, which related to both cases, should be set aside, and that the judgments of the District Court in Menni's case dated the 5th February, 1936, and in Mansour's case dated the 16th April, 1936, should be restored. The respondents will pay to the appellant the costs of this appeal, and will respectively pay to the appellant the latter's costs in their respective cases before the Supreme Court.

19040—3A) Wt. 8075—41 110 8/39 P. St. G. 338

In the Privy Council

THE OTTOMAN BANK, HAIFA

v.

CLEMENT MENNI

THE OTTOMAN BANK, HAIFA

v.

ANIS MANSOUR

(*Consolidated Appeals*)

DELIVERED BY LORD THANKERTON

Printed by HIS MAJESTY'S STATIONERY OFFICE PRESS,
POCOCK STREET, S.E.1.

1939