C.App. 41/49

(C.A. 24/48)

SHIMSHON PALESTINE PORTLAND CEMENT FACTORY LTD.

v.

THE ATTORNEY-GENERAL

In the Supreme Court sitting as a Court of Civil Appeal
[April 12, 1950]
Before: Dunkelblum J., Assaf J., and Agranat J.

International Law - State Succession - Succession to obligations - Municipal Law - Former sovereign party to litigation pending on change of sovereignty - Position of new *sovereign - The Law of Israel.*

The applicant, a Company registered in Tel Aviv, formerly Palestine, now Israel, brought an action against the Government of Palestine for the return of the sum of 2539 Palestine Pounds customs drawback. On February 17, 1948, the Haifa District Court gave judgment in favour of the applicant On March 17, 1948, the Attorney-General of the Government of Palestine entered an appeal against that judgment. This appeal was not heard. On May 15, 1948, the Mandate for Palestine terminated and the State of Israel came into existence. The present application, before the Israel Supreme Court, was for an order that the appeal should proceed between the Attorney-General of the Government of Israel as appellant and the applicant as respondent. Counsel for the applicant argued that the liability to pay the judgment debt had now passed to the Government of Israel, which came into existence on the termination of the Mandatory regime and thus took the place of the Mandatory Government "which has ceased to exist in the territory of the State of Israel", that the powers and functions of the Attorney-General of the Government of Palestine had passed to the Attorney-General of the Government of Israel, and therefore that the Attorney-General of the Government of Israel must take the place of the Attorney-General of the Government of Palestine. Alternatively, the applicant moved the Court to order such person as it thought fit to be joined in the action and to summon him to appeal as appellant, or, in the alternative, to make an order in the appropriate way for substituted service, so as to enable the respondent to bring the case to a conclusion.

Held: that the action must fail. There was no substitution of the Government of Israel for the Government of Palestine. The action should be removed from the list of pending cases without prejudice and with liberty to apply.

English cases referred to:

(1) *Cook v. Sprigg (1899) A.C.* 572.

(2) *West Rand Central Gold Mining Co. v. The King (1905)*

(3) *Commercial and Estates Co. of Egypt v. The Board of Trade* (1995) 1 *K.B.* 271.

(4) *The Cristina* (1985) *A.C.* 485.

Decisions of International Tribunals referred to :-

(5) *Permanent Court of International Justice - Succession in Obligations (Fees paid in Error) Case A.D.* 1925-6, *Case No.* 50.

(6) *Affair of the Ottoman public Debt - I Reports of International Arbitral Awards,* p. 529; *A.D.* 1925-6, *case No. 57.*

Levitsky for the applicants.

Shimron, State Attorney, for the respondents.

DUNKELBLUM J after stating the facts as set forth above, continued. The first motion, for the submission of the -General of the Government of Israel for the attorney-General of the Government of Palestine, was based on the assumption, mentioned in the application, that the judgment debt due from the Government of Palestine had become the responsibility of the Government of Israel. Counsel for the Applicant based this argument on two main grounds :

(1) According to the Law and Administration Ordinance, 1948, the Government of Israel assumed responsibility for the payment of the debts of the Government of Palestine. In his view this is derived from section 15(a) of the said Ordinance according to which "whenever in any law the word 'Palestine' appears, the word 'Israel' shall be substituted", and from section 21, according to which the Government of Israel is entitled to collect taxes and other sums due to the Government of Palestine. If the Government collects taxes due to the Government of Palestine then it must also take upon itself its debts. By its behaviour, then, the Government of Israel is estopped from denying that it is the successor of the Government of Palestine and must therefore assume responsibility for the mischarge of that Government's obligations.

(2) According to international law the debts of the former Government have passed to the Government of Israel.

In my opinion there is no reason for giving to section 15(a) of the Law and Administration Ordinance the interpretation which has been suggested on behalf of the applicant. Section 15 speaks only about the interpretation of laces, and lays down that, whenever in any law the word 'Palestine' appears, the word 'Israel' is to be substituted. That section does not deal at all with the interpretation of judgments. Neither does section 21 of the said Ordinance assist the applicant in any way. That section does not deals with the collection of taxes and other sums due to the Government of Palestine, and not with the discharge of its debts. It is possible, indeed, to derive from this section precisely the opposite of what the applicant argues. Since the State of Israel is not the successor of the former Government, there was need for specific legislation to entitle the Government to collect taxes and other sums due to the Government of Palestine. Were the Government of Israel the successor of the former Government there would be no need for such legislation.

But it is enough if we say that so far-reaching an interpretation as that suggested by the applicant cannot be deduced by a mere process of interpreting the statute: it should be a specific provision of the statute. If the legislature had been desirous of imposing upon Israel responsibility for the debts of the Government of Palestine, it would have said this explicitly and unequivocally.

In the second place, the applicant relies upon international law. In this connection two questions arise. The first is : In the absence of recognition by the proper authorities of the State of given rules of international law, are the municipal courts of that State entitled to reach a decision on the basis of those rules ? The second is: Is there any rule of international law which entitles the applicant to demand from the State of Israel payment of the debt, the subject matter of the case before us?

Regarding the first question, the matter has been developed in a number of decisions rendered by the superior courts of England, and those decisions are a useful indication to us, having regard to Article 46 of the Palestine Order in Council of 1922 and section 11 of

the Law and Administration Ordinance, 1948. One of the first of these judgments was that given by the Privy Council in the case of *Cook v. Sprigg* (1). In that case it was held that a plaintiff in a municipal court cannot rely upon international law and that a municipal court does not exist to ensure observance of obligations imposed upon a sovereign government by the principles of international law. This rule was followed in one of the most important cases dealing with this question, though to a more limited extent: W*est Rand Central Gold Mining Co. o. The King* (2). The rule expressed in that case can be summarised as follows: whatever has received the common assent of our country, and that to which we have assented along with other nations in general, may properly be called international law, and as such will be acknowledged and applied by our municipal tribunals when legitimate occasions arise for those tribunals to decide questions to which doctrines of international law may be relevant.

It follows, then, that in order to prove a rule of international law, sufficient evidence must be brought to show that the State in question has recognised it and acts according to it, so that the character of the rule in question, or the fact that the rule is recognized by so many other States, leads to the conclusion that no civilized State can ignore it. As is said in the W*est Rand Central Gold Mining Co.* case (2) :

> "The mere opinions of jurists, however eminent or learned, that it ought to be so recognised, are not in themselves sufficient. They must have received the express sanction of international agreement, or gradually have grown to be part of international law by their frequent practical recognition in dealings between various nations." (at page 407.)

The principles and dicta from this case were quoted with approval by the Court of Appeal of England in *Commercial Estates Co. of Egypt v. Board of Trade* (3). The question to what extent municipal courts will adjudicate according to the rules of international law also arose in the case of *The Cristina* (4). There Lord MacKillan said: "It is manifestly of the highest importance that the Courts of this country before they give the force of law... to any doctrine of international law, should be satisfied that it has the hallmarks of general assent and reciprocity."

We shall now return to the second question that arises in this case, and that is whether there is a principle of international law agreed to and accepted by civilized peoples which accords a right to the applicant to claim payment of the debt which is the subject of this case from the State of Israel.

The applicant is a Company which was registered in Palestine and its registered office is at Tel Aviv. No evidence has been brought before us as to the composition of the company, that is to say, in regard to the question who are the owners of the shares in the company and who exercises control over the company. It seems to me, therefore, that in this case the essential elements which would justify the application of international law are lacking. If the Company is an Israeli Company, can its relations with the Government of Israel be regulated by the principles of international Law? Does international law really have to do with relations such as these ?

It is enough to say here that, with regard to this question, there are opinions to the effect that relations such as these are entirely outside the scope of international law. See as to this Kelsen's article, Theorie generale du droit international public, problemes choisis, in vol. 49 of the Recueil des Cours of the Hague Academy of International Law, p. 1.17, particularly from p. 312 onwards, where the following passages occur:

> "In so far as concerns debts due to individuals who become, as a result of territorial changes, citizens of the successor State, here there can arise no question of a legal succession based upon principles of general international law itself. The relations between the State and its citizens are in the exclusive jurisdiction of the State in question which can therefore, acting in full accord with international law, decide quite freely whether it will take upon itself debts such as these" (p. 329).

And again,

> "It can no longer be alleged from the point of view of general international law that the successor is under any obligation to pay to its

> own citizens contract debts originally created by its predecessor, because relations such as these between a State and its citizens are not a proper matter to be dealt with by international law" (p. 332).

Thus we see that there exists a doubt whether it is possible, in the case before us, to rely at all on international law in the absence of anything international (such as international agreements, foreign nationality, etc.) about the relations existing between the applicant and the State of Israel.

It is indeed true that there are writers who are inclined to deal with questions similar to that before us from the point of view of international law, but it is possible to point out that, even in their views, there exists no clear and generally accepted rule of law to support the applicant's allegation that the State of Israel is obliged to discharge the debt to the applicant from the Government of Palestine.

The above quoted judgment in the *West Rand* case (2), is important also with regard to the substance of the matter before us. In that case there arose a problem similar to that before us today, namely : was the Government of the United Kingdom responsible for the payment of the debts of the South African Republic which it had overcome by conquest? Counsel for the plaintiff in that case argued that all the contractual liabilities of the vanquished State which had been entered into before the outbreak of the war, passed after conquest to the victor State, regardless of the precise characteristics of the obligation or its origin.

The facts in that case may shortly be summarised as follows: A certain quantity of gold which had belonged to the plaintiff was taken by the authorities of the South African Republic for governmental purposes. According to the laws of the Republic, the Government was obliged to return the gold to its owners, or pay its value. Before the return of the gold or payment of its value, war broke out between Britain and the Republic, which terminated in the conquest of the Republic by the British Government. The company, relying upon the principle above referred to, claimed the value of the gold from the British Government.

The submission of the plaintiff company was not accepted, and the claim was dismissed. The grounds affecting the merits of the matter are of interest to us.

As appears from the judgment, counsel for the company was obliged to contend that the conquering government was liable for the payment of all the debts of the conquered government. Were that not so, the court would be obliged to examine the origin and nature of each debt, and the circumstances in which it was created. On the other hand, it was clear that the court was unable to examine the actions of the conquered government, and there was no possibility, according to the laws of evidence by which the courts were bound, of proving the facts necessary for such an examination which were of importance for the purpose of examining the origin of the obligations or the circumstances in which they were created. In order to escape these difficulties, so it was submitted by counsel for the company, the conquering government was liable for all the debts of the conquered government without exception, although one difficulty did arise : whether it was really just to demand of the conquering government that it pay all such debts? In the judgment cited various examples are quoted of obligations in respect of which it cannot be conceived that the conquering government would be liable for their discharge. The court finally held that there exists no principle in terms of which the conquering State is liable for the discharge of the debts of the conquered State.

It seems to me, in connection with the question before us, that the difficulties are greater than those with which the court was concerned in the case of *West Rand Central Gold Mining Company* (2).

Is the State of Israel responsible for the payment of all the debts of the former Mandatory Government, even those which had been incurred during its struggle against the aspirations of the Jewish people, aspirations which were to bring about the establishment of the State of Israel? Is the State of Israel responsible for the discharge of debts due to former residents of Palestine who are not today residents of Israel? The territory of the State of Israel does not coincide with all the territory under the former Mandate. What, then, should be the relative proportion of the obligations of the mandatory Government which fall upon the State of Israel? Clearly it is not the task, nor is it within the capabilities, of a court of law to give a reply to these questions.

In fact no authorities of international law were quoted in support of the applicant's argument that the Government of Israel is responsible for the former Mandatory Government's debt, the subject of this judgment. The text-books on international law distinguish between different classes of rights and liabilities and different rules apply to these different classes. But regarding the question before us there is no need to mention those rules which have no direct connection with the subject-matter of this judgment. We are concerned with a demand for the payment of a debt and it will be sufficient if I say that there does not exist in international law any generally accepted rule imposing liability on the State of Israel to discharge this debt. In support of this I will refer to several authorities to demonstrate the differences of opinion existing on this question, to make it clear that there is no justification for holding that the argument put forward on behalf of the applicant is an accepted principle of International law.

The territory of the State of Israel, as has already been mentioned, does not coincide with all the territory under the former Mandate. Consequently the problem before us is not dissimilar to the problem which a following the break-up of the Austro-Hungarian Empire after the First World War. This question is dealt with on p. 160 of vol. I of Oppenheim's International Law (7th Ed.). There it is stated that it would be only just in such circumstances if the successor had to take over a corresponding part of the debt of its predecessor, but no rule of international law concerning this point can be said to exist, although many treaties have stipulated a devolution of a part of the debt of the predecessor upon the successor.

After the dissolution of the Austro-Hungarian monarchy the question was discussed by several law courts in the successor States. Perusal of the volumes of the Annual Digest of Public International Law Cases for the years 1925-6, 1927-8 and 1929-30 shows that, on this question, the majority of the courts decided that there is no succession in regard to such debts except where the Peace Treaties provided otherwise. It is interesting to point out that in one case, the *Succession in Obligations (Fees Paid in Error)* case (5), the Supreme Administrative Court of Czechoslovakia gave judgment against the Republic of Czechoslovakia in a case about the payment of a debt due in circumstances similar to those before us. However, the Czechoslovak legislature found it necessary to change the situation

brought about by that judgment, and it cancelled the liability of the Czechoslovakian Government in such circumstances. See Annual Digest, 1927-1928, Case No. 58, and Notes thereto. See also Oppenheim, loc cit. p. 160, footnote 2.

Regarding the above question it is also valuable to recall the arbitral award rendered by Borel in the *Affair of the Ottoman Public Debt* (6). In that arbitration, to which the Government of Palestine was a party, it was argued that there exists no principle of international law requiring States, acquiring portions of territory from another State, to pay any relative proportion of the international debt of the former State. The arbitrator agreed with that contention. Kelsen also, in the above quoted article, after analysing various points of view, states :

> "Whatever the debt it should be observed that the rules of general international law regulating succession nowhere impose upon the successor State an obligation to pay creditors who are or became its nationals or who remain its nationals or who remain nationals of its predecessor. For the rest, it is not possible to affirm that, in so far as concerns the creditors who are nationals of third States, the successor State is in all circumstances under an international obligation towards such third States to pay those of its citizens who are creditors in respect of contract debts undertaken by its predecessor" (loc. cit. p. 348).

It is my opinion, therefore, that there is no justification for the view that there exists, in international law, any rule which commands general assent and which is thus part of the municipal law of the country, imposing upon the State of Israel responsibility for the discharge of the debt the subject matter of this judgment and I therefore hold that the application for the order that the appeal should proceed between the Attorney-General of the Government of Israel as appellant and the applicant as respondent is not well founded.

There is also no ground for the applicant's alternative request and there is no need to dwell upon it at length. It is inherently unsound. On the one hand the applicant argues that the Government of Palestine has ceased to exist, and on the other hand it moves this court to appoint a person to accept service in place of the former Government. In argument,

Counsel for the applicant mentioned the Crown Agents who, in his view, should take the place of the original appellant and who should therefore be summoned in the appeal, but no authority in support of this was cited, nor is there any evidence to show the existence of any connection between the Crown Agents and the Government of Palestine so as to enable the court to fix responsibility on the Crown Agents in regard to the claim. Had there been any substance in this argument, it would have been necessary to consider another question, namely : are the Crown Agents a department of the British Government so that this court cannot assume jurisdiction to deal with a claim against them, owing to the well-known rule of State immunity? However, having regard to what I have said above, there is no need to go into this question. Counsel for the applicant also asked for appropriate relief so as to bring the appeal to an end. This request can be well understood. The applicant obtained a judgment in his favour from a competent court. An appeal was submitted in the name of a Government which has since ceased to exist and there is, therefore, no possibility of hearing it. The Civil Procedure Rules do not contain any provision regarding the cancellation of an appeal or its striking from the list for want of prosecution. According to the Rules, there is no possibility of making an order against the appellant unless he is duly summoned to a judicial hearing. However, the circumstances of this appeal are unique and the legislator could not have foreseen them. In my opinion, therefore, it would be meet, even in the absence of an appropriate rule of procedure, to strike the appeal from the list of pending cases before this court without prejudice, so that this court shall have the right to return the appeal to the list if it should be so moved on the part of any person establishing his right to come in the place of the appellant.

ASSAF J. I concur.

AGRANAT J. I concur.

Appeal struck off the list without prejudice to the rights of all parties.

Judgment given on April 12, 1950.