Privy Council Appeal No. 1 of 1935.

Sheikh Suleiman Taji Faruqi - - - - - - - *Appellant*

v.

Michel Habib Aiyub and others - - - - - - *Respondents*

FROM

THE SUPREME COURT OF PALESTINE.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 11TH OCTOBER, 1935.

Present at the Hearing:

LORD ATKIN.

LORD ALNESS.

LORD MAUGHAM.

[*Delivered by* LORD ATKIN.]

In this case, which is an appeal from the Court of Appeal of Palestine, the respondents and appellants had entered into a contract of sale in November, 1929, of certain land in the sub-district of Jaffa and that agreement provided for the sale of the land at a fixed price in accordance with the particular category in which the various portions of land would be placed after survey, there being a different price per dunam in each category. Then it provided for payment of £P.200 in cash on the signature of the contract, which has been paid; it then provided for payment of £P.50 one month before effecting the transfer; it provided that the date of completion which would be the transfer was to be twelve months from the date of the agreement and that the vendors were to place the land in such a position as to be ready for transfer. There seems to be some question as to whether or not they were at that time, or indeed at any time, in fact registered; but their Lordships have not to deal with that now. Then there was a clause to the effect that the vendors should pay jointly and severally to the second party £P.2,500 by way of agreed and liquidated damages without the necessity of notice if they committed a breach of all or part of their undertaking under clause 2 or of any clause in the contract. Then by clause 8 it was provided that " The second party "—that is the purchaser—" shall pay to the first party £P.2,500 as agreed and liquidated damages without the necessity of notice if he commits a breach of all or

part of his undertaking under this agreement." That agreement having been signed, apparently the purchaser went immediately into possession; but nothing further seems to have been done as far as the evidence before their Lordships is concerned by either side until in August, 1930, before the actual original date of completion had arrived, the parties agreed that the period of transfer at the date of completion should be extended to 13th February, 1932, provided that the purchaser paid the sum of £P.400 on account of the price by the end of February, 1931, and then on transfer he was to pay the balance of the purchase price in some modified form. That variation, which was effected by an exchange of letters, proceeded on the terms "that the remaining stipulations of the agreement remain in force as they are." The purchaser did not pay the sum of £P.400 on account of the price in February, 1931, or at all, though he had been given notice to pay. The question of notice is not being dealt with now. The extended time for completion, the 13th February, 1932, arrived, but nothing seems to have been done by anybody until in July, 1932, this action was commenced by the vendors against the purchaser to recover the sum of £P.2,500, alleging two breaches, (1) that he had not paid certain taxes that he ought to have paid under the agreement, and (2) that he had not paid this sum of £P.400. The points that were raised on the pleadings involved a suggestion that the plaintiffs were in default, because they had not taken steps at the material time to complete their contract, and it also plainly raised the point that the amount was not due under the Ottoman Code of Civil Procedure, because it was only a question of delaying the payment of a sum of money and that in that respect interest alone should be paid. When the case came on for trial, the learned Trial Judge, the District Judge, found first of all that there was no breach by the purchaser in respect of the payment of taxes. As regards the breach, the non-payment of the £P.400, he came to the conclusion that the clauses about paying £P.2,500 for the breach of any stipulation did not apply to the new term in the new agreement for the payment of £P.400 and, therefore, this amount was not due. Then there was an appeal by the vendors to the Court of Appeal, and the question about the effect of the Code of Civil Procedure appears to their Lordships to have been clearly raised before the Court of Appeal. They decided the case solely upon the point taken by the learned District Judge that the provision about the payment of £P.2,500 did not apply to the varied contract. They were clearly of opinion that that was wrong, and they say in their judgment: "It seems to us clear that the words of that letter 'with the understanding that the remaining stipulations of the agreement remain in force' mean that failure to fulfil his obligations under the letter is to render the respondent liable to payment of the penalty prescribed by clause 8 of the original agreement." Upon that it appears

to their Lordships that they were perfectly right, and there is no more to be said about that matter. It appears to their Lordships that the provision in the varied contract is quite plain. Unfortunately the Court of Appeal did not deal with the point that was raised in respect of the article in the Ottoman Code of Civil Procedure. Upon that two questions arise and, it appears to their Lordships, are still open; the first is as to article 112, which provides that, if the contract be for the payment of a certain sum of money and there be delay in making such payment, damages may be awarded at the rate of 9 per cent. per annum. It is suggested by the appellant, the purchaser, that that clause provides the only remedy when there has been delay in payment of a sum of money and that in consequence it is not possible to sue for what may be called, without intending to indicate any view about it, the penalty of £P.2,500. Article 111 says: "If the contract contain a clause binding either party in case of non-performance to pay a definite sum to the other party by way of damages, such sum may be awarded as damages, but neither more or less than such sum". Article 112 it is said deals exclusively with the remedy for delay in payment. Their Lordships content themselves with saying that there is a good deal in the contention of the appellant to be considered; but they have not the benefit of any opinion of either of the Courts on that matter. Moreover, there is a special difficulty in connection with it, namely that there is apparently a real dispute as to what the actual provision of the Ottoman Code of Civil Procedure is. The translation that is before their Lordships is the translation of Mr. Hooper, who has made a most valuable translation of the Code, but it is said that it is not in all respects accurate; it is said that the actual Code in Turkish reproduces accurately article 1153 of the French Civil Code, and, if it did, article 112 would apparently provide that the remedy by way of interest is the only remedy for default or delay in payment of a sum of money; but the translation does not appear to make it clear, at any rate, that the original provision in Turkish does say that that is the only remedy. It is quite impossible for their Lordships to resolve this question, because they would require to be advised on a matter of that kind and on the construction of the original Turkish by the Courts who do in fact administer that particular law, and, therefore, it is essential before their Lordships can determine that question, if they ever have to determine it, that it should be considered by the Courts in Palestine and that judgment should be given by the Courts in accordance with the Code, stating their reasons and explaining what the true position as to that particular article is.

Then there is a further point that is taken, which is again a question of construction of the Code, that article 111 only applies to a case where the non-performance is non-performance of the whole contract or substantially the whole

contract; in other words, is a breach which goes to the root of the contract, to use the English expression. Those two points must be determined, and, therefore, the case must be remitted to the Court of the District Judge in order to enable those points to be decided.

There are one or two other things it is necessary to say in respect of this matter. First of all, it does not appear to their Lordships that it ought at the further hearing to be open to the purchaser to raise the point that there was some default on the part of the vendor which excused him from making the payment of £P.400 on the date on which it was due under the revised contract. That point was raised, but there was no evidence given to support it at the hearing and it does not appear to their Lordships that it would now be fair to allow the point to be raised afresh. On the other hand, it is said apparently that this particular piece of litigation does not go very far towards determining the rights of the parties, because the purchaser appears to be in possession; he appears at the present moment to have no legal title as far as registration is concerned and there are outstanding questions as to whether or not the purchaser on his part or the vendors on their part have not committed a breach or breaches of the agreement between them. In the view of their Lordships nothing ought to prejudice the rights of either party to take such further proceedings as they may be advised if they wish the Courts to determine the differences which apparently must exist between them, and the Courts will exercise their jurisdiction in respect of any such further proceedings if they are brought before them. All that it is necessary to say about that is that in exercising any such jurisdiction and in dealing indeed with the present case no doubt the Courts will bear in mind the powers which are vested in them under article 46, subject to the provision of the Ottoman law and the Order in Council and the Ordinances in force, to exercise their jurisdiction " in conformity with the substance of the common law, and the doctrines of equity in force in England, and with the powers vested in and according to the procedure and practice observed by or before Courts of Justice and Justices of the Peace of England ". There is the necessary proviso, of course, " that the said common law and doctrines of equity shall be in force in Palestine so far only as the circumstances of Palestine and its inhabitants and the limits of His Majesty's jurisdiction permit, and subject to such qualification as local circumstances render necessary ". All that, of course, has to be very carefully considered; but, subject to all those observations, their Lordships think there can be no doubt that the provisions of the Order in Council do enrich the jurisdiction of the Courts in Palestine with all the forms and procedure and all the different remedies that are granted in England in common law and equity and also enrich their

jurisdiction with the principles of equity, among other things the well-established distinction between a penalty and liquidated damages. All that their Lordships say is that no doubt the Courts in Palestine when dealing with this question and any other question that arises will bear in mind the provisions of article 46 of the Order in Council.

There then remains the question as to the costs of this appeal. In respect of the actual decision, the grounds of the decision were, in their Lordships' opinion, quite accurately given; but it is unfortunate that the Court did not consider the whole of the case, and it may be, indeed it is to be hoped it will be, that this case will not come before their Lordships again. In their Lordships' opinion, the right order as to costs will be that the costs of the former trial, the costs of the appeal to the Court of Appeal and the costs of the appeal to His Majesty in Council should abide the event of the new trial which will now be given, and, if there should be any difficulty in respect of that or there should be no event upon which the costs should eventually be required to be paid, their Lordships will give liberty to apply to them, and they will humbly advise His Majesty accordingly.

In the Privy Council.

SHEIKH SULEIMAN TAJI FARUQI

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MICHEL HABIB AIYUB AND OTHERS.

DELIVERED BY LORD ATKIN.

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