Privy Council Appeal No. 66 of 1937

Richard Gillie - - - - - - - - - - *Appellant*

v.

Posho Limited (in liquidation) - - - - - - *Respondent*

FROM

THE COURT OF APPEAL FOR EASTERN AFRICA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 3RD FEBRUARY, 1939

Present at the Hearing:

LORD THANKERTON
LORD ROMER
LORD PORTER

[*Delivered by* LORD PORTER]

This is an appeal *in forma pauperis* by special leave from a decree of the Court of Appeal for Eastern Africa pronounced on the 31st December, 1932, dismissing the appellant's appeal from a decree of the Supreme Court of Kenya dated the 16th July, 1932.

The facts giving rise to the dispute between the parties were as follows:—

The appellant arrived in Kenya towards the end of the year 1926 and was anxious to find a farm on which he could grow wheat. For that purpose he was sent to the office of the firm of W. C. Hunter & Co., a firm of land agents of whom Wilfred Clare Hunter was the senior partner. He had been told to see and did see and negotiate with Mr. Hunter personally some time towards the end of December, 1926.

In addition to being a member of the firm of land agents Mr. Hunter was also liquidator of the respondent firm Posho, Limited, and agent for sale of some nine farms belonging to that company. After the purchase of certain other farms had been discussed and rejected on the ground that they were unsuitable in price or otherwise, Mr. Hunter suggested that the appellant should consider the suitability of one of the farms belonging to the company.

Negotiations appear to have begun in December, 1926, and the appellant ultimately acquired one of the nine, but the date on which the appellant decided to purchase is in dispute.

The appellant's story is that the farms were brought to his notice by Mr. Hunter, that he said that he did not want a farm which had not been proved for wheat, and that Mr. Hunter assured him that the land in question had been proved for wheat and sent him to see one McAntee who was working a neighbouring farm.

The appellant paid a visit to Mr. McAntee who admittedly had an optimistic view of the wheat-growing possibilities of the land, and, after seeing him, agreed to buy. But he avers that before he did so he was shown an advertisement in the offices of Messrs. Hunter in the following terms:—

> " LAND FOR SALE.
>
> " Nine undeveloped farms the property of Posho Limited, In Liquidation, varying in extent from 500 to 1,000 acres approximately, at prices varying from £2 to £3 per acre, suitable for maize and wheat and in parts coffee—very little clearing required. Maize and wheat proved on property. Railway adjoining. Apply to W. C. Hunter & Co."

This advertisement appeared in the edition of the " East African Standard " published on the 29th January, 1927, but the appellant alleges he saw it at the offices of Mr. Hunter at least some days before that date and possibly even as much as three weeks earlier. It is not definitely stated in the record by whom it was brought to his attention, but Mr. Nicholson, a partner in the firm of W. C. Hunter & Co., is said to have told him of it. The agreement for purchase was dated the 3rd February, 1927, and is to be found at p. 5 of the record. It is made between W. C. Hunter as liquidator and the appellant, the price was £2 10s. an acre payable by instalments. The purchaser was entitled to possession as from the 3rd February, 1927, and to a legal assignment of the property as soon as he had paid all the instalments subject only to the apportioned rent payable to the Government, whatever that rent might be. Clause 7 provided:—

> " In the event of any instalment of the purchase price or any part thereof or any interest thereon being in arrear for fourteen days after the date on which the same should be paid the Liquidator shall be entitled to rescind the sale without legal process on giving fifteen days notice in writing to the purchaser to pay the same or leaving such notice at the said premises and in default of payment before the expiration of such notice all payments made by the purchaser shall be absolutely forfeited. This clause shall be without prejudice to the right of the Liquidator to sue the purchaser for the purchase money or any part thereof remaining unpaid or to any other remedies allowed by law."

The appellant's case is that he relied upon the assurance of Mr. Hunter and on the statement in the advertisement that the land was proved for wheat, that unless he had had that assurance he would never have purchased, that in fact the land had not been proved for wheat and was useless for wheat growing, and that Mr. Hunter either knew that the land had not been proved for wheat or at any rate did not know whether it had or not, that he had been induced by

this false assurance and statement to make the purchase and that he was entitled to damages for the loss he had sustained thereby.

So far as is material the subsequent history of the appellant's efforts is that he tried to grow wheat on the farm until 1930, but had ascertained by that time that the land was not suitable for wheat.

Meanwhile he had fallen into arrears with his payments and a number of letters passed between him and Mr. Hunter with reference to the payment or non-payment of instalments and rent. Eventually the appellant accused Mr. Hunter of deceiving him in the sale of the property by representing that it was proved wheat land and Mr. Hunter denied that any representation had been made. The company thereupon brought action by plaint dated the 17th November, 1930, for past instalments amounting to 11950.00 shillings plus interest at 8 per cent. until payment and for past apportioned rent of 82.32 shillings and for acceptance of an assignment of the premises or alternatively under clause 7 that the agreement be rescinded and possession delivered to the plaintiffs and that the moneys already paid by the appellant in respect of the purchase money be forfeited.

By a written statement of defence dated the 19th December, 1930, the appellant alleged that he was induced to enter into the agreement for purchase by Mr. Hunter, who had fraudulently represented to him that the land was more suitable for growing wheat than another farm which he had contemplated purchasing and that wheat had been proved on the property. He further stated in paragraph 4:—

> "4. In addition to the direct representations made to the defendant as set out in paragraph 3 hereof, the said Wilfred Clare Hunter published a series of advertisements in the press advertising the said property for sale and stating that the same had been proved for wheat such advertisements being brought to the notice of the defendant at the time he was contemplating entering into the said agreement and finally caused him to make up his mind to purchase the said farm."

In addition the appellant alleged in paragraph 5 that Mr. Hunter knew that the appellant was relying upon his advice and assurance in purchasing the farm and also knew that the land was unsuitable for wheat growing.

After an abortive trial before Dickinson J. the case was tried in the Supreme Court of Kenya before Barth C.J. In that action Mr. Hunter denied, as he had denied in his letter, that he had made any representations to the appellant. The appellant, he asserted, had never asked him for any assurance as to the land's capabilities, and he was not aware that the appellant was relying on him for a choice or recommendation as to the farm.

As to the advertisement he said that it first appeared on the 29th January, 1927, that he came to England in February of that year, that he did not see the advertisement until the following October or thereabouts, that he then complained of it to his staff, and that if it had been submitted to him, it would not have been inserted. Indeed

he did not try to justify the statement that the land was proved for wheat, but he said that by the 23rd December, 1926, long before the appearance of the advertisement, the appellant had already agreed to buy the land and it followed, therefore, that even if he was shown the advertisement it could not have influenced his mind.

In support of Mr. Hunter's allegation that the appellant had agreed to make the purchase in December, 1926, a letter dated the 23rd December, 1926, from him to a firm of solicitors acting for the company was produced—the appellant was cross-examined on it and it was tendered and accepted in evidence.

Barth C.J., by his judgment dated the 16th July, 1932, found that the defendant had failed to substantiate his allegations of misrepresentation and said as to the letter of the 23rd December, 1926:—

> "The letter of the 23rd December, 1926 (Exhibit 1) in my opinion amply supports Mr. Hunter's assertion that the negotiations were concluded with the defendant before that date and that the advertisement of the 29th January, 1927, which did not come to Mr. Hunter's notice until much later had no influence on the defendant's determination to buy the land."

He accordingly ordered that the agreement be rescinded, that possession of the premises be delivered to the plaintiff and that the moneys already paid by the defendant in respect of the purchase price be forfeited.

The appellant thereupon appealed to the Court of Appeal for Eastern Africa. On that appeal the judgment of the Court of first instance was upheld. The Judges of the Court of Appeal held that the question was one of fact on which Barth C.J. was right. They agreed with the learned Chief Justice's finding that the advertisement had no influence on the appellant's mind.

> "This finding" (they said) "is supported by the evidence and to our minds particularly by the date of the agreement; the agreement was executed on the 3rd February, 1927, and the terms of it must have been settled prior to the 29th January. . . .
>
> "The question before the Court was one of fact and the Judgment of the Court below in our opinion was correct."

It is true that the question was one of fact to be determined by the Court trying the case, after seeing the respective parties in the box and hearing their evidence and any other admissible evidence which should be adduced.

If in the present case the decision had been confined to the question whether Mr. Hunter had made oral representations to the appellant, their Lordships do not consider that they would have been entitled to interfere with the finding of the Court below that the making of such oral representations had not been established, unless indeed that finding was or might have been influenced by evidence which ought not to have been admitted. So much the appellant's representative conceded.

But the decision was not so confined. The appellant complained that he had been induced to make the purchase

not only by the oral representations but also the advertisement which he said had been shown to him and had formed at any rate a substantial part of the material which influenced him in making up his mind.

The appellant stated in evidence that he was shown the advertisement in Mr. Hunter's office some time before the completion of the agreement on the 3rd February. Neither Court has cast doubt on this allegation, but as is shown by the passages quoted above, the Court below directly, and the Court of Appeal inferentially, relied upon the letter of the 23rd December, 1926, and its contents to show that the appellant could not have been influenced by the terms of the advertisement.

In their Lordships' view this letter was plainly inadmissible either in examination in chief or in cross-examination. It is no part of the *res gestae*. At most it is a statement made by Mr. Hunter to a third party of which the appellant had no knowledge, and the truth of which he never directly or indirectly admitted.

In certain cases as, e.g., in the cases of sexual offences against women, statements made to third parties are in some circumstances admissible. But the careful limits placed upon the admissibility of such statements is evidence of the jealousy with which their admission is regarded. They must be complaints, made voluntarily and at the earliest convenient moment, and even then they are received not as evidence or corroboration of the facts complained of, but as evidence of the credibility of the complainant's testimony to the facts alleged, and, where consent is a defence, to negative consent. They are inadmissible in any other class of case. See *R.* v. *Osborne,* [1905] 1 K.B. 551.

In *Jones* v. *S.E. & Chatham Ry. Co.'s Managing Committee,* (1918) 87 L.J. (K.B.) 775, an attempt was made to enlarge the classes of case in which such evidence is admissible. In that case the plaintiff who had met with an accident as she alleged in the course of her employment was cross-examined as to statements made to third parties as to the cause of her injury. When she in turn was called as a witness, evidence was sought to be given as to statements made by her in her own favour to third parties, but was rejected. On appeal to the Court of Appeal, Swinfen Eady L.J., at p. 777, said:—

> " It was argued that there is in certain cases a rule under which a witness may be asked to give particulars of what a person has said shortly after an occurrence and a complaint that such a person may have made shortly after an occurrence not as being evidence of the facts complained of but as being evidence of the consistency of the story of the complainant from beginning to end, and it is said that such a question ought to have been admitted in the present case on that principle. The answer is two-fold. First, that the principle has no application to a case of this kind. No doubt in cases especially of violence on women and girls the rule is established under which a question of that kind is allowed to be put. . . . That is a special class of case. Secondly, this statement was made two days after the alleged accident and not

> shortly after. If a statement of that kind were admitted, it would be easy to manufacture evidence by telling your various friends and then calling them as witnesses to prove what you told them."

In the same case Neville J. set out the general rule applicable to that, and as their Lordships think, to this case, as follows:—

> "We have simply to apply the general rule of evidence that statements may be used against a witness as admissions, but you are not entitled to give evidence of statements on other occasions by the witness in confirmation of her testimony."

In their Lordships' view these observations correctly set out the rule of evidence applicable to this case, and the letter is inadmissible on both the grounds referred to above. No evidence has been given to show whether the statements in the letter were made with reference to some event which had only just happened, but quite apart from the time that elapsed between the happening of the event and the recording of the statement, the letter is in their Lordships' view, inadmissible upon the other ground given by Swinfen Eady L.J.

The letter was tendered and received by the Court that its contents might be used in evidence to prove that the appellant had made up his mind to purchase the farm before he saw the advertisement, and the Courts relied upon it at least as corroboration of that fact. For this purpose it was wholly inadmissible and in these circumstances the case must go back to be tried by a Court of first instance upon evidence which the Court can properly receive and upon such evidence only.

Their Lordships would desire to add that in their opinion it is not legitimate to draw the inference that the agreement of the 3rd February, 1927, would require more time for preparation than the time between the 29th January and the 3rd February, even if the appellant did not see the advertisement until that date. No evidence to that effect was given and as the document is neither long nor difficult, four or five days seem ample time in which to draft it.

But it will be for that Court, after having heard the respective parties, the appellant and Mr. Hunter and such other evidence and circumstances as may be legitimately put before the Court, to decide who is in the right. In so deciding, it should not admit or pay any regard to the contents of the letter of the 23rd December, 1926, either as evidence of the truth of its contents or as evidence of the consistency of Mr. Hunter's story.

Their Lordships will humbly so advise His Majesty.

The appellant, who has been successful before their Lordships' Board, will receive the costs of the appeal to the Court of Appeal for Eastern Africa, and the costs of this appeal, the latter on the pauper scale. The costs in the Court below should abide the result of the new trial.

(15213—3A) Wt. 8168—30 110 2/39 P. St. G. 338

In the Privy Council

RICHARD GILLIE

v.

POSHO LIMITED (IN LIQUIDATION)

DELIVERED BY LORD PORTER

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

1939