Privy Council Appeal No. 69 of 1944

Muhammad Issa El Sheikh Ahmad and another - *Appellants*

v.

Ali and others - - - - - - - - - *Respondents*
(and cross-appeal consolidated)

FROM

THE SUPREME COURT OF PALESTINE

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 12TH JUNE, 1947

Present at the Hearing:

LORD UTHWATT
SIR MADHAVAN NAIR
SIR JOHN BEAUMONT

[*Delivered by* LORD UTHWATT]

These are appeals from the Judgment dated the 29th January, 1943, of the Supreme Court of Palestine sitting as a Court of Appeal, varying the judgment dated the 2nd October, 1942, of the District Court of Jerusalem. The action was an action for damages for breach of contract. The District Court awarded to the Plaintiffs the sum of LP.4997 by way of damages. The Supreme Court reduced the damages to LP.3193.670 mils. The questions at issue under the appeal and cross-appeal relate to the existence of liability under the contract in suit and the damages proper to be awarded. The plaintiffs seek to have the judgment of the District Court restored. The defendants deny liability and contend further that, if they are liable, both Palestinian Courts assessed damages on a wrong principle.

The quesions arise out of a contract for sale of land. The appellants (defendants in the action) were the purchasers under the contract and will be referred to as " the purchasers ". The respondents (plaintiffs in the action) are as to some of them the vendors under the contract and, as to the rest, heirs of deceased original vendors. Nothing turns on the succession of interest and the original vendors and the respondents will be referred to as " the vendors ".

The material facts are as follow:—

It appears that in 1933 the vendors agreed to sell certain land to one, Haski, who paid in LP.675 in part payment of the purchase price. By the contract they undertook to pay Haski LP.1000 by way of liquidated damages if they breached the agreement. In addition to paying the LP.675, Haski paid LP.75 in respect of taxes on the land and commission of LP.300 to one of the original vendors and Yousef, a son of an original vendor.

The land was not transferred to Haski and, on the 20th December, 1936, the vendors entered into the agreement to sell the same land to the purchasers.

The sale agreement (in which the purchasers are the party of the first part and the vendors are the party of the second part) first recites the area of the property (5,793 sq. pics 25c.), the transaction with Haski and an agreement to sell in consideration of 400 mils. per sq. pic, by the LP.675 paid to Haski.

It then recites as part of the consideration the following intended obligation of the purchasers:—

> " 2. To guarantee to Yacoub Haski or any person in his stead the liquidated damages, namely LP.1000 together with the sum of LP.675 paid by Yacoub to the second part out of the purchase price, which was accounted for the second part, and the sum of LP.75 which was paid by the said Yacoub for Werko on behalf of the second part, and LP.300 which was received by Mohd. Ali, one of the persons constituting the second part, and by Yousef Mohd., the son of Fatmeh, one of the persons constituting the second part, for their intervention in the sale of the same land to Yacoub Haski as aforementioned, in case Mr. Haski claimed the said sum from both of them and was legally proved, and to guarantee all the rights and damages which may be incurred by the second part in respect of the said agreement and what followed."

Clauses 1, 2, 3, 7 and 8 of the Agreement are as follow:—

> " 1. The second part undertakes to sell and transfer to the name of the first part at the Land Registry the above whole plot of land known as Kitat el Satel, provided that its area be not less than 5,793 square pics according to the plan which is at the Tabu, for the price of 400 mils each square pic and for the consideration mentioned in the preamble provided that the transfer takes place within a week after the removal of all the attachments and encumbrances existing on the land or which may arise or at any time the first part requires this after the removal of all the said encumbrances.
>
> 2. The first part undertakes to accept the transfer and to pay the second part immediately when the transfer of the land into his name is effected, the sum of LP.1642. 200 being the remainder of the purchase price of the whole plot of land taking into consideration the amount of LP.675 paid by Haski out of the purchase price and received by the second part and which sum the first part guaranteed unto him together with other guarantees imposed on him and referred to in the preamble.
>
> 3. In the event Yacoub Haski or his representative claims from the second part and from the said Yousef a son of one of them, the amount which they received as aforesaid and the said liquidated damages, the first part undertakes to guarantee and to pay all these amounts on behalf of the second part on condition that they will not exceed the amount of LP.2017 excepting the expenses, costs and advocate's fees and provided that the first part will have no right of recourse against the second part and Yousef the son of one of them for any part of the amounts as they form part of the consideration in accordance with their agreement from now.
>
> 7. The second part undertakes not to sign any papers or undertakings to Mr. Yacoub Haski or anyone else which may affect this plot and undertakes in the event of being sued as aforementioned to notify the first part of it and he is not entitled to appoint any advocate in the circumstances in which it is deemed necessary without the consent and will of the first part on condition that all expenses and fees and advocate's fees required to oppose the claim and action arising therefrom in case the action is brought before the Courts, must be paid by the first part.
>
> 8. In order to secure the enforcement of the conditions of this agreement the first part undertakes not to let anyone be acquainted with the conditions of the agreement, nor to assign it to any one, nor to give a copy of same especially to the persons having connection with the second part, in respect of the land."

Clause 11 contained a stipulation for the payment of LP.3000 by way of liquidated damages in the event of any breach by the purchasers of their obligations under the agreement.

Following on the Agreement a Petition signed by the vendors was presented by them to the Land Registry asking the consent of the Administration to the sale therein described.

The material clauses are as follow:—

> " The aforesaid (i.e. the vendors) have agreed to sell the said property for the sum of LP.3328 and 530 mils to Messrs. Mohamad Issa El Sheikh Ahmad and Stawri Slaheet, of Jerusalem, in equal shares.
>
> We hereby apply for the consent of the Administration to the sale and we request that the said property be registered in their names in accordance with a deed of sale to be executed by us.
>
> And the said purchasers have agreed to purchase the said property for the sum above-mentioned and we hereby request that the said property be registered in the names of Mohamad Issa El Sheikh Ahmad and Stawri Slaheet in equal shares.
>
> And we the signatories to this document declare that all the above statements are true, that the consideration is truly and fully stated, and that, except as disclosed above, we are acting for ourselves alone and for no other person."

On the 31st December, 1936, the land was transferred to the purchasers. The transfer deed witnesses that " in consideration of the sum of LP.3328.530 mils paid by " the purchasers, to the vendors " the receipt of which sum the said vendors on behalf of themselves and as agents hereby acknowledge " the vendors transfer the land to the purchasers. It concludes with the following declaration:—" And the said vendors and purchasers declare that the consideration money expressed to have been paid is the true and full consideration money paid in respect of the sale."

In January, 1937, Haski sued the vendor for damages for breach of the contract for sale with him. In accordance with clause 7 of the contract the vendors reported the matter to the purchasers who appointed lawyers for the defence. The fees of the advocates were paid by the purchaser. Haski obtained judgment for LP.830 (stated by the Judge to be the amount proved to have been paid by him in respect of the land) and LP.1000 liquidated damages. The judgment is dated the 28th March, 1938.

Following on the judgment Haski obtained an order for payment of the debt by instalments. One instalment only was paid. That amounted to LP.20 and was paid by the purchasers. Evidence given on behalf of plaintiffs was to the effect that they did not pay because that was the purchasers' affair and in any event they had no money with which to pay.

Haski then took steps to enforce his judgment against the vendors and, in due course, obtained an order for sale of land belonging to them. The land was sold in the execution proceedings and realized LP.3660. Out of the proceeds Haski's judgment debt and interest were satisfied. The land was sold after the commencement of these proceedings brought by the vendors against the purchasers but before the case was heard.

In March, 1941, the vendors instituted the proceedings with which Their Lordships are concerned. The vendors pleaded the contract, the failure to pay Haski and Haski's judgment, and alleged that, by reason of the execution proceedings taken by Haski damage was thereby being caused to them. Their claim for damages was quantified as follows:—

> (A) LP.1997 (i.e. LP.2017 less LP.20 paid to Haski under the judgment by the purchasers).
>
> (B) LP.3000 as agreed and liquidated damages.

The amount claimed was, therefore, LP.4997. The purchasers by their defence joined issue on the allegation contained in the Statement of Claim, and pleaded that they had paid full consideration for the land. The claim for LP.3000 they submitted was a penalty.

Their Lordships find it unnecessary to deal in detail with the proceedings at the trial. The purchasers set up a substantive case (which they had not pleaded) to the effect that there had been an oral variation of the contract under which an additional sum was agreed to be paid to the vendors in lieu of the indemnity against Haski's claims. That additional sum, according to the evidence, was paid, and the difference between the contract price and the money consideration mentioned in the Deed of Transfer was part of the total sum paid. That total sum, in the course of the evidence of Stawri Slaheet, one of the vendors, varied. From time to time different elements entered into its composition and occasionally the rules of arithmetic had to be neglected to produce the desired result. The Judge rightly refused to accept the story and faced with the purchasers' substantive case found as a fact that only LP.1642 was paid on the occasion of the sale.

The Judge further found that the value of the property of the vendors sold in execution for LP.3660 was LP.6543. He accepted the evidence that in a Court sale by public auction in execution proceedings the full value was very seldom realized. That was, he held, common knowledge. The purchasers doubtless were aware of this, for one of them in association with a third party thought the circumstance of a Court sale warranted his making an opening bid of LP.960. The loss, the Judge held, was a direct result of the breach of contract.

The Judge took the view that he was not precluded by the terms of the Deed of sale from deciding the case on the effect of the evidence. He further held that the sum of LP.3000 mentioned in Clause 11 of the Sale Contract was a penalty and no one doubts that he was right in so holding. He assessed damages as follows. He first awarded the vendors the maximum amount of the indemnity LP.1997 (i.e. LP.2017 less LP.20 paid by the purchasers to Haski). He then proceeded to assess the other damages as follows:—

Value of Property sold in execution			LP. 6,543
Deduct sum received on sale		LP. 3660	
Less amount paid to Haski ...	LP. 2279·642		
After subtracting amount of indemity otherwise awarded	2017		
	262·642	262·642	
		3497·358	3497·351
			3,145·64

Of this sum of LP.3145.64 the vendors waived LP.145.64 so as to reduce the damages under this head to the figure of LP.3000 mentioned in the Statement of Claim.

In the whole, therefore, the purchasers recovered LP.4997.

From this decision the purchasers appealed to the Supreme Court. The points argued appear to have been confined to the question whether oral evidence was admissible to rebut the admission contained in the Deed of Transfer and to the question of damages. The Court was of the opinion that the trial judge erred in admitting evidence to contradict the terms of the Deed of Transfer and that the vendors were estopped from denying that they had received LP.3328 in cash. The Court further held that the vendors were not estopped from suing on the indemnity clauses contained in the contract.

The Court, however, took the view that the vendors must be taken to have received on account of the indemnity the difference between LP.3228 and LP.1642 the contract price for the land. That difference amounted to LP.1686.30. They could therefore recover only LP.2017

(the amount of the indemnity) less the set off of LP.1686.30 and the L.P.20 paid by the purchasers. The result was that the purchasers on this head were awarded LP.310.620 in place of the LP.1997 awarded by the trial judge. In respect of the breach of the contract for indemnity the vendors were held to be entitled to damages assessed as follows:—

Value of property sold in execution	LP.6543
Less price obtained at sale	LP.3660
	LP.2883

The total sum awarded therefore amounted to LP.3193.

The appeals before Their Lordships were argued on lines which appear to be in some respects different from those pursued in the Courts below though addressed to the same end. The purchasers contend that the sale agreement cannot by reason of the admissions in the Sale Petition and the Deed of Transfer be proved. The vendors dispute the conclusive effect in law of those admissions and further contend that in light of the substantive case put forward at the hearing by the purchasers those admissions cannot be relied upon by the vendors. Second the purchasers contend that, assuming the agreement can be proved, no damages other than interest are recoverable and if they are wrong on that, that the damages claimed in respect of the loss on the execution sale are too remote. Both these contentions are disputed by the vendors. The vendors and purchasers are agreed on the point that the LP.3000 provided for in clause 11 of the Sale Agreement is a penalty and not recoverable.

Their Lordships now turn to consider the contentions put before them.

The first contention of the purchasers is based on Articles 79 and 1588 of the Mejelle. They contend that the Petition of Sale and the Deed of Transfer contain admissions which bind the vendors and negative a sale on terms which contradict the terms of sale as gathered from those documents. Proof of the contract containing the stipulation sued upon was therefore precluded. In Their Lordships' opinion the Petition for Sale and Deed of Transfer must be considered separately.

The Petition for Sale contains a statement that the vendors had agreed to sell the property for the sum of LP.3228.530 and a declaration made by all the signatories, who included both the vendors and purchasers, that the consideration was truly and fully stated. It may be that on its true construction the Petition for Sale, like the deed of transfer founded upon it, refers only to the cash consideration and not to the guarantees. But, however that may be, the Petition for Sale was neither pleaded nor relied on in the lower Courts as an admission by the vendors in favour of the purchasers, and their Lordships are not prepared to allow the point to be taken at this stage. The Petition may therefore be disregarded for all purposes.

As respects the Deed of Transfer the admission contained in it is that the land was conveyed in consideration of LP.3328.530 received by the vendors. This is followed by a statement that the "consideration money" expressed to be paid is the true and "full consideration money" paid in respect of the sale. Their Lordships are content to proceed on the footing that the vendors cannot deny that the sum specified in the receipt clause was received by them, but they do not read the conveyance as containing an admission that all the terms of the contract of sale had been satisfied. The transfer was complete undoubtedly; but the consideration received or receivable on the occasion of a transfer does not as a matter of law necessarily exhaust the whole consideration received or receivable in respect of the sale. In this case the guarantees were on foot from the moment of the making of the contract and did not arise by reason of the conveyance. The receipt clause relates on its face only to what payment was made in respect of the transfer, not to the complete consideration receivable or received under the contract. The last sentence of the Deed

makes it acidly clear that only the money consideration paid in respect of the sale is included in the sum of LP.3328.530. This admission therefore is impotent to put the contract out of consideration.

It is convenient here to consider the effect of the admission contained in the Deed.

The Supreme Court took the view that the vendors should be treated as having in their hands the difference between the sum of LP.3326.530 and LP.1642.200 and that this difference should be treated as available as a set off against the contingent liabilities of the purchasers under the contract. Their Lordships are, as they have already stated, prepared to assume—they do not decide the point—that the first proposition is correct but they do not accept the second proposition. An obligation to apply overpaid monies in a particular way can only arise from an agreement express or implied. Here the terms of the contract are clear that the vendors are not to concern themselves with Haski's claims, and there are no circumstances from which a variation of that bargain can be inferred. The difference between the two sums, on the assumption made, stands nakedly as excess purchase money and for that matter money admitted by the purchasers to be paid in consideration of the transfer.

Their Lordships would add that the logical consequences of the Supreme Court's view would be that the execution sale was just as much the result of the failure of the vendors to apply money in discharge of Haski's claim as of the failure of the purchasers so to do.

The contract therefore is admissible in evidence as showing the transaction between the parties. The transfer of the land was obviously not a complete performance of the contract. The breach is obvious and the only remaining question is as to damages.

At the outset Their Lordships would observe that the action is in truth only an action for unliquidated damages for breach of contract. The amount payable under the guarantee and the amount paid out of the vendor's assets to Haski is immaterial in assessing the damages. The limit of the guarantee is relevant only in considering whether or not there has been a breach by the purchasers of their obligations. The amount paid to Haski out of the vendors' assets would be properly considered as a separate item in an action for money paid to the use of another but in assessing damages for the breach of contract neither the upward limit of the guarantee nor the amount of the vendors' assets applied to the purchasers' purposes is relevant. The only question is: What damage —not being too remote—has been suffered by reason of the breach alleged and proved?

The first contention of the purchasers was that the damages should be assessed under Article 112 of the Ottoman Code of Civil Procedure.

That Article runs as follows:—

> "The damages awarded for failure to carry out the undertaking which amount to payment of money, is a judgment for the interest at the rate of 1 per cent. per month in respect of the capital amount. This interest is awarded without calling on the creditor to show that he suffered damage. If there is no agreement in the document (Sanad) regarding the interest and interest is claimed in respect of the debt in the notice, interest is calculated from the date of the notice. If there is no notice, interest is calculated from the date of the statement of claim."

This contention of the purchasers found no favour either with the trial judge or the Supreme Court. Their Lordships agree with the view expressed by the Courts below that the contract is in substance a contract to indemnify. That contract might well be performed by satisfaction of Haski otherwise than by payment of money, despite the dissent of the vendors from that method of performance. A contract to indemnify such as is here present which on breach gives rise to a claim for

unliquidated damages is not, in their Lordships' view, an undertaking which amounts to a payment of money within the meaning of Article 112. Their Lordships therefore find it unnecessary to express an opinion on the general question whether Article 112 applies only when the claim is a claim for damages arising from non-payment of a sum due as a debt.

The remaining question is whether the loss resulting from the execution sale is too remote to be taken into account in assessing the damages recoverable. Both the trial judge and the Supreme Court, taking the view that the contract was a contract of indemnity, held that the loss on the sale was a direct result of the failure to perform that contract. Their Lordships are in some doubt whether by the phrase " direct result " the Courts below meant to express the view that the loss was such as might reasonably be expected to be in the contemplation of the parties as likely to flow from breach of the obligation undertaken. But their Lordships considering the matter from this aspect have come to the conclusion that the damages claimed are not too remote. The terms of the contract and its implications have to be weighed. Litigation by Haski against the vendors arising out of failure to pay Haski's claim was contemplated by the contract. Specific provisions directed to that litigation and its consequences are contained in clause 7. The purchasers were to play a definite part in it. Advocates for the vendors were to be selected and paid by the purchasers, not merely to oppose the claim, but also in respect of " action arising thereupon ". The vendors' impecuniosity was not a separate and concurrent cause of the land being sold in execution, and the trial judge held, as has been stated, that it was common knowledge that on a forced sale full value was seldom realised. Whether the contract be read as a contract to indemnify the vendors at all stages or as a contract to indemnify the vendors against the amounts due to Haski with a right in the vendors to fight Haski to such extent as they chose, the result is, in their Lordships' opinion, the same. In any event the limit on the amount payable under the guarantee is irrelevant in measuring the damages for breach of it. On the first basis the damages claimed fall within the terms of the contract on its true construction and on the second they are damages which, on the facts found by the trial judge, might reasonably be expected to be in the contemplation of the parties.

Their Lordships quantify the damages as follows. The value of the land sold was LP.6543. Out of that sum the vendors have been paid, after meeting Haski's claims, the sum of LP.1065.869, and there remains in the execution office to their credit (subject to certain possible claims by Haski) LP.314.5. The loss they have suffered is therefore LP.5162.631.

The vendors' claim was, however, in the Statement of Claim limited to LP.4997.0 and that sum only can be recovered. Their Lordships would add that it was not contended by the purchasers that the damages recoverable were limited by the penalty clause and that the question of the interest, if any, carried by a judgment for unliquidated damages was not debated before their Lordships.

Their Lordships will therefore humbly advise His Majesty that the appeal be dismissed and the cross-appeal be allowed, and that judgment be entered for the vendors for LP.4997 together with interest at such rate from the date of the judgment of the trial judge as is allowed by the Law of Palestine in respect of a judgment for unliquidated damages for breach of a contract to indemnify, and that the appellants pay the costs of the procedings in the Supreme Court.

The appellants will pay the costs of the appeal and the cross-appeal.

(57840) Wt. 8013—5 100 6/47 D.L. G. 338

In the Privy Council

MUHAMMAD ISSA EI SHEIKH AHMAD AND ANOTHER

v.

ALI AND OTHERS (AND CROSS-APPEAL CONSOLIDATED)

DELIVERED BY LORD UTHWATT

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