

Joseph Klein and others - - - - - *Appellants*

v.

Eliahu (Leo) Heiman and others - - - - - *Respondents*

FROM

THE SUPREME COURT OF PALESTINE

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL, DELIVERED THE 8TH MARCH, 1948

Present at the Hearing :

LORD SIMONDS

LORD MORTON OF HENRYTON

SIR MADHAVAN NAIR

[Delivered by LORD SIMONDS]

This appeal, which is brought from the judgment of the Supreme Court of Palestine reversing the judgment of the District Court of Tel Aviv, raises a number of questions, upon only one of which their Lordships think it necessary to express an opinion. They desire at the outset to emphasise this point in order to preclude the possibility of a plea of *res judicata* being raised by reason of their decision in respect of any other matter which may be in dispute between the parties.

The single question upon which their Lordships propose to express their views is whether the learned Judges of the Supreme Court were right in deciding that the case was not one in which a declaratory order should have been made by the District Court.

For the purpose of determining this question they can state the relevant facts very shortly. The appellants as vendors and the respondents as purchasers on the 3rd October, 1937, entered into one or more contracts for the sale and purchase of certain land at Tel Aviv, upon which shops were to be erected by the appellants. Each contract contained a number of elaborate provisions which it is unnecessary to state and in particular by clause 22 provided that in a certain event the appellants (the vendors) should be entitled to cancel the contracts by a preliminary notice of seven days and that the purchasers should pay the damages stipulated and that they should likewise immediately vacate the shop and deliver it back to the vendors in the same good condition as they received it.

The appellants, claiming that in the events that had happened they were entitled to avail themselves of the provisions of clause 22, purported on the 20th January, 1942, to serve upon the respondents a notice under that clause. No steps appear to have been taken to pursue whatever rights the notice gave to the appellants: by the respondents it was disregarded. But on the 17th August, 1942, the respondents commenced a suit in the District Court of Tel Aviv against the appellants alleging that they were entitled and were ready and willing to pay the balances due under the contracts but professing that they did not know how much was due from them and claim-

ing that an account should be taken. The appellants not only defended this suit but put in the counterclaims which have given rise to this appeal. It is perhaps desirable to quote one of them in full. It ran thus:

“ By way of counterclaim Defendant alleges:—

“ 6. The plaintiffs committed a breach of the contracts between the parties and in accordance with what has been stipulated in the contracts defendants are entitled to cancel the contracts and this they did.

“ 7. Defendant by way of counterclaim prays that judgment be given against plaintiffs (A) declaring that the contracts made between the parties are cancelled (B) ordering payment of costs and advocates fees.”

To this counterclaim the respondents put in their defence, pleading (*inter alia*) that the counterclaim did not reveal the nature of the breach and alternatively that no breach of the contracts had been committed by them.

Upon these pleadings, inadequate as they appear, the parties proceeded to trial and certain issues were framed. It is unnecessary to say more than that the learned Judges of the District Court dismissed the action holding that “ it had no legal or factual basis at all.” For the purpose of disposing of the action it was therefore not necessary for them to consider whether, as the appellants contended, the contracts had been rescinded by the notice already mentioned. But they proceeded to consider the counterclaim and upon it made a declaration that the contracts between the parties had been rescinded.

The respondents did not appeal from the order so far as it dismissed their suit, but they did appeal to the Supreme Court from the order made on the counterclaim. The Supreme Court allowed the appeal. The learned Judges of that Court thought it sufficient to say that, while an appellate Court is always reluctant to interfere with the discretion of a Court of first instance, they thought that in the peculiar circumstances of that case it was not appropriate to order rescission of the contracts by way of declaration in a counterclaim to an action for accounts. And they found a stronger reason why the judgment of the District Court could not stand in the fact that, in their view, the judgment did not contain sufficient findings of fact to support a conclusion that the contracts had been rescinded or should be rescinded.

The judgment of the Supreme Court is not expansive, and intentionally so, for the valid reason that the Court was unwilling to express any views upon questions which might properly be the subject matter of other proceedings. Their Lordships propose to take the same course. They recall that by Rule 52 of the Civil Procedure Rules, 1938, it is provided (1) every action shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action but a plaintiff may relinquish any portion of the claim in order to bring the action within the jurisdiction of any Court, and (4) no action shall fail on the ground that the relief claimed is declaratory only. In such a case as this, in which the appellants gain nothing by a declaration unless they proceed to take the necessary action for recovery of possession of the land, of which the respondents are by themselves or their tenants in possession, it appears to their Lordships to be singularly inappropriate to accede to a claim for declaratory relief only. They share the reluctance of the Supreme Court to interfere with the exercise by the lower Court of its discretion, but they cannot think that that Court gave proper weight to considerations which should be decisive in determining whether or not to grant declaratory relief. There is in fact in its judgment no indication that the propriety of granting it was considered. In these circumstances their Lordships while emphasising that they express no opinion upon any of the matters in question between the parties, and in particular what are their respective rights under the contracts and in what jurisdiction it is open to them to enforce those rights, are clearly of opinion that the Supreme Court took a correct view in regard to the discretionary power of granting declaratory relief and that for this reason the present appeal must be dismissed with costs. They will humbly advise His Majesty accordingly.



In the Privy Council

JOSEPH KLEIN AND OTHERS

21.

ELIAHU (LEO) HEIMAN AND OTHERS

DELIVERED BY LORD SIMONDS