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INSTITUTE OF ADVANCED
LEGAL STUDIES

IN THE PRIVY COUNCIL

No. 29 of 1959

50908

ON APPEAL
FROM HER MAJESTY'S COURT OF APPEAL FOR
EASTERN AFRICA

B E T W E E N

KHATIJIBAI JIWA HASHAM Appellant

— and —

ZENAB D/O CHANDU NANSI Widow and
Executrix of Harji Gulamhussein
10 Harji, deceased, as Legal Representative
... .. Respondent

CASE FOR APPELLANT

Record

- 1. THIS is an Appeal by leave of the Court of Appeal for Eastern Africa from the Judgment and Order of that Court dated the 15th March, 1957, affirming the Judgment of the Supreme Court of Kenya dated the 13th January, 1956, in an action in which the Appellant was Defendant and the Respondent's husband (since deceased and hereinafter called "the Deceased") was Plaintiff. pp.375 & 376
pp.343, 375
p.268
- 2. BY the Judgment of the Supreme Court it was ordered that the Appellant should specifically perform a contract in writing adjudged to have been made on the 19th February, 1954, between the Appellant and the deceased for the sale by the Appellant to the deceased of a plot of land in Nairobi, slightly more than two acres in extent, and that the Appellant should pay the deceased the sum of Shs 1,500 (£75) as damages for delay in completion of the Contract, and costs. p.268
p.378
- 3. ACCORDING to the terms of the said Contract of Sale as so adjudged to have been made, it was provided that the whole of the said plot of land should be sold by the Appellant to the deceased for the sum of Shs 100,000 (£5,000) and that completion of the sale should take place within 6 months from the date of the Contract, that is to say by the 19th August, 1954. The issues in this appeal are :- p.378

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- p.378 (a) Whether the transaction was affected by a
fundamental mistake as to whether the subject-
matter of the said Contract of Sale was the
whole of the said plot of land or only part
p.378 thereof, so as to make the said Contract
unenforceable on the ground of mistake or
as "non est factum".
- p.378 (b) Whether the action was premature; i.e.,
whether the deceased, who brought the suit
claiming specific performance at a time when 10
the date fixed by the Contract for
performance had not arrived, could in law at
one and the same time elect to treat a
refusal by the Appellant to go on with the
p.378 Contract as a repudiation bringing the
contract to an end and entitling them to sue
at once, on the principle of Hochster v. de
la Tour, (1853) 2 E.and B.678, and also keep
p.378 the Contract alive by suing for specific
performance, thus holding himself bound to 20
fulfil his part of the Contract which he had
elected to treat as at an end.
- (c) Whether in all the circumstances of the case,
including the fact that the deceased had
given deliberately untruthful evidence on an
important aspect of the case, it was a
proper exercise of the Court's discretion to
make an order for specific performance.
- p.343 line 31 4. THE facts of the case can be given most 30
to p.346 clearly by quoting from the judgment of
line 38. Sinclair, V.P., in the Court of Appeal for
Eastern Africa, as following:-
- p.378 "This is an appeal from a Judgment and
Decree of the Supreme Court of Kenya for
specific performance of a contract for the
sale by the Appellant to the Respondent of
Plot No.209/58/1 consisting of a house and
just over 2 acres of land situated next to
the Mayfair Hotel, Nairobi."
- The Supreme Court also awarded to the Respondent 40
Shs 1,500/- damages for delay and made other
consequential orders.
- "The Appellant is a Khoja Ismali woman
of about 58 years of age. She is not
literate in English, nor can she understand
it. The Respondent is a land and estate

10 agent residing and carrying on business at Nairobi. He, also, is a Khoja Ismaili. In 1948, the Appellant's husband and two others purchased the premises in question for Shs 152,000/-, each holding a one-third share. In 1950, the Appellant's husband died, leaving her his share. In June, 1953, the Appellant became the registered owner of half the property. Towards the end of 1953 she entered into an agreement to purchase the remaining half for Shs 55,000/-, subject to her taking over the entire responsibility for the mortgage to the Diamond Jubilee Investment Trust, Limited, on which there was at that time owing the sum of Shs 81,000/-.

20 By February, 1954, she had paid Shs 25,000/- of the Shs 55,000/-, so that she then owed the balance of Shs 30,000/- for the purchase of the other half of the property and Shs 81,000/- on the mortgage, a total of Shs 111,000/-.

"On the 18th February, 1954, the Appellant signed a document giving the Respondent an option to purchase the property for Shs 100,000/-. The option was written by the Respondent in English and was witnessed by a young Ismaili girl named Amina Hasham. It reads:-

p.377
i.e. the
deceased who
was
Respondent in
the Court of
Appeal

30 "Mr.Haji G. Harji
Nairobi.

p.377

"Dear Sir,

"Re: my house on Slater Road
adjoining Mayfair Hotel, Nairobi.

"In consideration of Sh 5/- five I hereby giving you option to purchase the above property for Sh 100,000/- net on hundred thousand.

40 "The above property is over 2 acres and subdivision is complited.

"The House of above property will be given in vacant Possition with all vacant land contain.

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"This Option is good up to 22nd February 1954 up to 1 p.m. to you or your nminis.

"Yours sincerely,

(Signature in Gujerati)"

"Witness: Amina V. Hasham."

"Later that day the Respondent agreed to sell the property to one Hasham Nanji, one of the proprietors of the Mayfair Hotel, for Shs 107,000/-. He had already obtained from the Appellant the key of the house, which was vacant. On the following day, the 19th February, the Respondent and Hasham Nanji went to Mr. Ishani, the Respondent's advocate. Mr. Ishani was also the advocate for the Diamond Jubilee Investment Trust Limited. The Respondent handed the Option to Mr. Ishani and instructed him to prepare two agreements of sale, one between the Appellant and himself and the other between himself and Hasham Nanji. The Respondent then went away and called the Appellant who arrived at Mr. Ishani's office with one Sultan Ali. Mr. Ishani was not acting as the Appellant's advocate in this transaction, though he was her nephew and had acted for her or her family on previous occasions. The agreement between the Appellant and the Respondent, which had been prepared by Mr. Ishani in duplicate, was signed by the Appellant, the original first and then the duplicate. It provided inter alia for payment of Shs 15,000/- against the purchase price of Shs 100,000/- on or before the execution of the agreement, for the sale to be completed within six months of the date of the agreement, and for payment of the balance of Shs 85,000/- on presentation of documents of transfer, either by the taking over of the mortgage for Shs 81,000/- and payment of Shs 4,000/- on completion of transfer, or, if so required, free from encumbrances. In the agreement the Appellant gave complete vacant possession and the Respondent acknowledged receipt thereof. Almost immediately after signing the duplicate of the agreement, the Appellant tore up the original agreement, stating that she intended to sell only a portion of the whole

10 plot. She thereby repudiated the Contract. She did not take the cheque for Shs 5,000/- deposit which the Respondent had signed. Later the same day the Respondent's advocate wrote to the Appellant insisting on the performance of the Contract, and the Appellant's advocate wrote to the Respondent confirming her repudiation of the Contract and alleging that the whole transaction was fraudulent. p.378 p.382 p.385 p.378

"The Plaintiff was filed in July, 1954, the Respondent claiming specific performance of the agreement of the 19th February, 1954, and damages for delay, or alternatively, rescission of the agreement and damages for breach of contract and loss of bargain. In her Defence the Appellant set up a number of alternative defences: p. 1

20 "(a) That the agreement of sale, by introducing new terms not contained in the option, was not an unqualified exercise thereof, but constituted a counter-offer which the Appellant at no time accepted, and that the Appellant at no time completed the signing and delivery of the agreement or acknowledged it as binding upon her as her act and deed: p.378

30 "(b) That the Appellant was induced to grant the option and make the agreement of sale by the fraud or misrepresentation of the Respondent: pp. 377 & 378

"(c) That the Appellant was induced to grant the option and make the agreement of sale by undue influence of the Respondent: pp. 377 & 378

40 "(d) That the agreement was entered into by mistake in that the terms thereof were drawn up so as to contravene the intention of the parties by purporting to refer to the whole of Plot No. 209/58/1, whereas it should have referred to a portion only: p. 378

"(e) That the Respondent dealt with the Appellant in an unfair and unjust manner

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and was thereby disentitled from having specific performance of the agreement:

"(f) That the Respondent and the Appellant verbally agreed at the office of Mr. Ishani on the 19th February, 1954, to rescind the option and agreement of sale."

pp.377 & 378

p.268 5. THE case was tried before Harley Ag.J. In his judgment given on the 13th February, 1956, he rejected the Appellant's evidence and the evidence given by the witnesses called on her behalf on all material issues; decided that the Appellant's allegations of Fraud and Misrepresentation and Undue Influence were not supported by the evidence, and that there was no agreement to cancel or rescind the said Contract of Sale; and ruled that the submission stated in Paragraph 3(b) hereof, that as a matter of law the action was premature, failed. Although the Learned Trial Judge considered that there might well have been a point at which the Appellant was entitled to reject the said Contract of Sale, as constituting a counter-offer, he said that the Appellant none the less had read the said Contract of Sale and had accepted it, albeit reluctantly. He further said that "the issue of mistake or of non est factum can carry no weight in view of the facts as found".

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p.378

p.284 line 36

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6. THE Learned Trial Judge accordingly gave judgment for the deceased, for specific performance of the contract, and for Shs 1,500 as damages, and a decree was passed accordingly.

p.287

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7. THE facts as found by the Learned Trial Judge, so far as they are material to this appeal, are that the option was read over to the Appellant at her Uncle's house on the morning of the 18th day of February, 1954; that on the 19th day of February, 1954 the said Ishani read out and explained the contents of the said Contract of Sale to the Appellant at his office, where the deceased and the said Sultan were also present; that, after the Appellant had there signed the original Contract of Sale and the duplicate, she asked to whom the land might have been re-sold; and that, on hearing the reference to the name of Hashanbhai, she became very angry, sprang from her chair, took the document, and tore it up, saying that she only intended to sell half an acre, and then left the office.

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8. BY Notice of Appeal dated the 13th January, 1956, the Appellant appealed from the said Judgment and Decree to the Court of Appeal for Eastern Africa. p.290
pp.268 & 287
9. THE Appeal was heard before Sinclair V.P., Briggs J.A., and Connell, J. who gave judgment on the 15th March, 1957. p.374
10. THE leading Judgment, with which the other two judges in substance agreed, was given by Sinclair V.P. After stating the facts as already quoted in Paragraph 4 above, the learned Vice President discussed at length the question as to whether the action, as an action for specific performance, was premature on the grounds set out in Paragraph 3(b) hereof and concluded (wrongly, as the Appellant submits) that this was not the case. p.343
- 20 On the issues of fact the learned Vice-President considered that the failure of the Learned Trial Judge to appreciate that the deceased had told a deliberate untruth on a fundamental question as to the reason why the Appellant tore up the Contract of Sale immediately after signing it, or to attach any importance to the point, "must detract from the favourable view which he took of the Respondent's credibility", and that "in those circumstances the issues of fact become at large for this Court and a fresh evaluation of the evidence is necessary". p.378
p.363 line 33
p.363 line 35
- 30 On a fresh evaluation of the evidence, the Learned Vice-President held that "if the case were to be decided on a mere balance of probabilities this would weigh very heavily against him "(the deceased). However, notwithstanding such ruling the Vice-President (wrongly, as the Appellant submits) decided that "the only substantial defence on the facts was fraud", and that the case was one..... of repudiation of liability under a Contract", and that on the evidence "no question of common mistake could arise". And, treating the case as exclusively a case of fraud or misrepresentation, he decided that "the allegations of fraud or misrepresentation, whether made in Defence or in the evidence, were not proved", and that the Appellant had failed to discharge p.367 line 33
p.367 line 26
P.369 line 33
p.366 line 33
p.366 line 12

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- p.367 line 36 "the very heavy burden as it always must be" of establishing an allegation of Fraud.
- p.355 line 3 The Learned Vice-President further ruled that as, "when the matter came on for trial, the Appellant was in default and all conditions precedent to relief then existed", and as "a Court of Equity would not permit an Appellant to avoid the Contract merely because the action was started prematurely", and "the Appellant had a complete cause of action when the suit was instituted", the action had not been instituted prematurely, notwithstanding that at the date when proceedings were instituted the time for performance of the Contract of Sale by completion had not yet arrived. 10
- p.355 line 9
- p.358 line 7
- p.378
- p.368 line 7 THE Learned Vice-President further held that "no sufficient grounds have been shewn for refusing specific performance." 20
- pp.369-373 11. Briggs, J.A., agreed with the Learned Vice-President, but discussed shortly the important question as to whether the action was premature, on which he arrived at the same conclusion as the Vice-President, for substantially similar reasons.
- p.374 line 43 12. Connell, J., who also agreed with the Vice-President, discussed shortly the question as to whether the evidence of the deceased could be accepted in spite of its obvious falsity on one vital point, saying:- 30
- p.374 "I do not think the falsehood can be said to be so glaring as utterly to destroy confidence in the witness altogether."
- p.375 13. AN Order was accordingly made dismissing the Appeal with costs.
- p.367 line 34 14. THE Appellant submits that there was no, or no sufficient, adjudication on the issue of mistake either in the Supreme Court of Kenya or in the Court of Appeal for Eastern Africa; that on the balance of probabilities the Court of Appeal ruled that "this would weigh very heavily against" the deceased; that as only a few months before she signed the said Contract of Sale the Appellant had agreed to purchase her co-owner's half share in the whole of the property for Shs 55,000 (£2,750) and at the same time assumed 40
- p.378

entire responsibility for the mortgage of Shs 81,000 (£4,050) which was then outstanding on the property; that, at the time when she was adjudged to have contracted to sell the whole of the property for Shs 100,000 (£5,000), the Appellant was thus responsible for the payment of the sum of Shs 111,000 (£5,550) as aforesaid; and that, having regard to the view of Sinclair V.P. that the Appellant "was an astute business woman whose advice was sought by her family in transactions relating to property", no reason exists and no probable reason has been suggested as to why in the aforesaid circumstances the Appellant should have sold the whole of the land at a loss. It is therefore submitted that on the balance of probabilities the issue of mistake - as distinct from Fraud - ought on a re-evaluation of the whole of the evidence to be resolved in favour of the Appellant.

p.364 line 11

15. THE laws of Kenya applicable to the issues of law arising in this case is as follows:-

(1) On questions of contract, the Indian Contract Act applies. Section 39 thereof runs as follows:-

"When a party to a Contract has refused to perform or disabled himself from performing his promise in its entirety, the promisee may put an end to the Contract unless he has signified by words or conduct his acquiescence in its continuance."

(2) On questions of specific performance, the law of England applies, and not the Indian Specific Relief Act.

(3) On questions of procedure, the Kenya Civil Procedure Rules apply. Order VII Rule 1(e) thereof runs as follows:-

"The Complaint shall contain the following particulars:-

"(e) the facts constituting the cause of action and when it arose."

On the said section 39 of the Indian Contract Act, the Courts both of India and Kenya are accustomed to refer to English authorities; and

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on the said Order VII Indian authorities on similar provisions in the Indian Code of Civil Procedure are commonly relied on in Kenya.

16. THE Appellant submits that the effect of Section 39 of the Indian Contract Act and of the English authorities is that, if a promisee elects not to treat an anticipatory breach of contract as a repudiation of the Contract entitling him to sue for damages, but to keep open and rely upon the Contract by instituting proceedings for specific performance, then the institution of proceedings before the date on which the Contract is to be performed is misconceived in law.

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17. THE Appellant further submits that support for her arguments is to be found also in Order VII, rule 1(e) of the Kenya Civil Procedure Rules already cited in Paragraph 15, above, which requires that the Plaintiff shall state the facts constituting the cause of action, and when it arose. Decisions on the interpretation of the same rule (Order VII, Rule 1(e) of the Indian Code of Civil Procedure 1908) such as Dinobundhoo v. Kristomunee I.L.R. 2 Cal.152 show that the Plaintiff should include in his Plaintiff all existing grounds on which the suit can be based, and that the Plaintiff shall only be entitled to succeed on the cause of action alleged by him in his Plaintiff. (See also Hammer v. Flight 24 W.R.346). Since at the time when the suit was instituted the time for performance had not arrived, the Appellant submits that, as a matter of procedure as well as of substantive law, the action was premature.

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18. THE Appellant submits that, in the event of it being adjudged that the action is otherwise maintainable, the Court of Appeal should have set aside the Decree granting specific performance, on the grounds that hardship and injustice arose by reason of the fact that the mistake already mentioned had been made, and should have awarded damages only, in accordance with the principles applied in Webster v. Cecil (1861), 30 Beavan 62; and further that it was a wrongful exercise of judicial discretion to grant equitable relief to the deceased who was found to "have told a deliberate untruth" because he thought that to do so would assist his case on the fundamental issue as to the

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p.287

p.363 line 31

explanation given by the Appellant at the time for tearing up the document.

19. THE Appellant humbly submits that the Judgment of the Court of Appeal for Eastern Africa dated the 15th March, 1957, affirming the Judgment and Decree of the Supreme Court of Kenya dated the 13th January, 1956, was wrong and ought to be set aside, for the following among other

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pp.268 & 287

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R E A S O N S

(1) That there was no sufficient adjudication on the issue of mistake or non est factum

(2) That upon a proper adjudication on the said issue it should be adjudged on the evidence that such mistake or absence of consent existed as to preclude the formation of any Contract.

(3) That the action was premature.

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(4) That the grant of equitable relief by way of specific performance was in all the circumstances of the case a wrongful exercise of judicial discretion.

(5) Because the judgments of the Supreme Court of Kenya and of the Court of Appeal for Eastern Africa were wrong.

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D. N. PRITT

ALAN CAMPBELL

No. 29 of 1957

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THEODORE GODDARD & CO.
5, New Court,
Lincoln's Inn,
W.C.2.