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Judgment 18, 1966

IN THE PRIVY COUNCIL No.2 of 1966

ON APPEAL

FROM THE BRITISH CARIBBEAN COURT OF APPEAL

(APPELLATE JURISDICTION)

CHINTAMANIE AJIT

v.

JOSEPH MOOTOO SAMMY

CASE FOR THE APPELLANT

HATCHETT JONES & CO.,
90, Fenchurch Street,
LONDON, E.C.3.

IN THE PRIVY COUNCIL No.2 of 1966

ON APPEAL

FROM THE BRITISH CARIBBEAN COURT OF APPEAL

(APPELLATE JURISDICTION)

B E T W E E N :

CHINTAMANIE AJIT — Appellant (Plaintiff)

- and -

JOSEPH MOOTOO SAMMY — Respondent (Defendant)

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CASE FOR THE APPELLANT

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1. This is an appeal from a judgment of the British Caribbean Court of Appeal (Archer, Wylie and Jackson FJJ) dated the 22nd day of March 1962 which dismissed an appeal from a judgment of the Supreme Court of British Guiana (Luckhoo CJ) dated the 16th day of February 1961. p.35 pp 20-24

2. The principal questions raised on this appeal are whether the Courts below were correct in law in disallowing the opposition of the Appellant to an agreement between the Respondent and a third party to lease certain land which comprised part of the land previously agreed by the Respondent to be sold to the Appellant and, if so, whether the Courts were correct in ordering the Appellant to forfeit the deposit which he had paid to the Respondent.

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3. By his Statement of Claim dated the 10th day of December 1959 the Appellant recited (inter alia) that the official Gazette for British Guiana for the 28th day of November 1959 had contained a Notice of a lease for 999 years pp.4-7

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between the Respondent and a third party. As a result of the description of the property the
p.4 Appellant entered a Notice on the 5th day of December 1959 in the Deeds Registry objecting to the passing of the said lease on the ground that the property described was part of the property contained in an agreement for sale dated the
pp.24-25 31st day of July 1958 and made between the Appellant and the Respondent. The Appellant contended (inter alia) that the Respondent had failed to complete the transfer of the whole property and it was not competent for the Respondent in these circumstances to lease a part of it.

p.5 4. The Appellant therefore claimed :-

(a) an order of the Court restraining the passing of the lease

(b) Specific performance of the contract of sale

(c) Alternatively, damages of nine thousand dollars.

pp.7-8 5. The Appellant filed an affidavit with his Statement of Claim in which he alleged (inter alia) that while the transfer of sale had been advertised in the Gazette, it had been necessary to readvertise and this had not been done by the Respondent with the result that the Appellant who was willing to complete the purchase, was not able to obtain title.

pp.9-10 6. Upon the 17th day of December 1959 the Respondent filed an affidavit of Defence in which he admitted (inter alia) the agreement of sale, the original advertisement and the need to re-advertise as a result of further information being required in his affidavit about certain buildings on the property. He alleged that he had attended Court on the 24th day of November 1958 in order to complete the matter but the Appellant was not present. The Respondent therefore went to the Appellant's

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home where the Appellant said that he was in difficulties in finding the balance of the purchase price. The Respondent then agreed to increase the amount which he was prepared to have on mortgage from ten thousand to twelve thousand dollars. The Respondent further alleged that the failure to complete was due to the default of the Appellant in attending court to do so. A letter from the Respondent's Solicitors was exhibited to the said affidavit which was stated to be dated the 3rd day of February 1959. This letter called upon the Appellant to attend Court the following Monday to accept the transfer, pass the mortgage and pay the balance of the purchase price. It also stated that should the Appellant fail to attend, he would forfeit the deposit and become liable for any loss or damage suffered by the Respondent.

7. At the trial of the action the Appellant appeared in person while the Respondent was represented by Counsel. The Appellant gave evidence on oath and after referring to the agreement and the filing of documents with the Registrar of Deeds, stated that when publication did not take place in the Official Gazette he saw the Deeds Registry Officer and either on the same day or the following day he saw the Respondent who promised to put matters right with regard to his affidavit. The Appellant expected that publication would take place the following week but this did not occur. The Respondent met the Appellant some two to three days later and asked him to make out an affidavit stating how he (the Respondent) had acquired the houses about which queries had been made at the Registry. The Appellant told the Respondent he was unable to do this and advised him to consult a lawyer. The Appellant then kept looking in Gazette for about six weeks but nothing appeared and then the Respondent called at the Appellant's office and asked the typist to type something. He assured the Appellant that everything was fixed about the advertisements which would come out very soon as the necessary

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pp.11-14

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affidavit had been filed

8. The Appellant further testified that he fell ill in the early part of December 1958 and it was at this time that he was told by his secretary that she had seen the advertisements relating to the purchase and the mortgage in the Official Gazette. During that month the Respondent visited the Appellant who asked for the matter to wait until he got better. The Appellant made two proposals. First, if the Respondent wanted the matter to be completed forthwith, that he should agree to raise the mortgage to 14,000 dollars as the Appellant only had 2,000 dollars in the house (the purchase price was 17,000 dollars of which the Appellant had deposited 1,000 dollars). Secondly, that if the Respondent was prepared to wait until the Appellant was better, the Appellant would take the property free from any mortgage. The Respondent then made a compromise proposal by offering to raise the amount of the mortgage to 12,000 dollars. The Appellant repeated that he had only 2,000 dollars in the house and would try and raise the balance of 2,000 dollars from a friend. If the loan was not forthcoming the Appellant stated he would complete in six weeks. The Appellant was not successful in obtaining the loan and a further meeting between the parties took place about the beginning of February 1959. The Appellant asked to have the six weeks for which he had previously asked but the Respondent refused and stated he would be consulting a lawyer.

9. The Appellant then received a letter dated 3rd day of February 1959 from the Respondent's solicitors which is reproduced as Annexure "A" hereto but whose main provision was to declare
p.22 that time was the essence of the contract and called upon the Appellant to complete upon the 9th day of February 1959. Before the latter date the Respondent again called on the Appellant and asked whether he was going to attend court to complete the transaction. The Appellant stated it was doubtful if he would

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be well enough but if he failed to attend he asked the Respondent to readvertise the transfer. This the Respondent agreed to do at the Appellant's expense and without any mortgage to which the Appellant agreed. The Appellant did not attend Court upon the 9th day of February and during that day the Respondent again came to see the Appellant and gave him a further chance to raise the money and also stated that if the Appellant was not successful he would get his deposit back. The Appellant said he would be responsible for the re-advertising and accordingly on the 26th day of February 1959 he paid the fee to the Deeds Registry and obtained an official receipt which was produced. The advertisement, however, did not appear and when the Appellant enquired at the Registrar's office he was informed that the Respondent together with his solicitor had attended at the Registry and obtained the transfer. On the following day the Appellant met the Respondent at his house who told him that he had decided not to sell as a property agent had informed him that he could make 12,000 dollars if the site was sold in portions. The Appellant was also told that he would forfeit his deposit. The Appellant informed the Respondent that he could not take this attitude and the transfer must be given to him.

10. The Appellant also stated in his evidence in chief that the parties had met again on Thursday the 26th November 1959 when the Appellant informed the Respondent that he was ready to take the transfer of the property. On the following Saturday the lease to a third party was advertised in the Gazette to which the Appellant entered opposition on the 5th day of December 1959.

11. In cross-examination the Appellant stated that he had been a real estate agent since 1939 and an auctioneer, valuer and stockbroker since 1944. He had not prepared transfer papers before this occasion when he had agreed to pay the expenses and the agreement between the parties was prepared by a barrister. The

pp.14-17

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Appellant also said that while he had enough money in banks to complete, he did not have enough liquid cash. He was also in difficulties because he wanted to re-sell the property in portions in order to make a profit. He was depending on purchasers from him to pay deposits from which the Respondent could be paid but owing to his illness the Appellant was not able to see the prospective purchasers.

pp.17-18 12. The acting assistant Conveyancing Officer in the Deeds Registry (Mr.Rockliffe) gave evidence for the Appellant and after reciting the history of the filing of various documents, referred to a note on the file that on the 26th
p.26 day of February 1959 the Appellant paid the fee for re-advertisement. There was also a receipt signed by the Respondent and dated the 27th day of February 1959 for the document of transfer (known in British Guiana as "transport") together with a note "Title to be laid over". The witness explained that it was not within the duty of the clerk delivering the transport to the Respondent to inform him that a re-advertisement fee had been paid, he only had to be satisfied as to identity but as a matter of practice the witness would probably have told the Respondent about the re-advertisement fee having been paid.

p.19 13. Upon being put to her election, Counsel for the Respondent made the following submissions :-

1. The Appellant was the party in default.

2. Time was of the essence

   (a) because of the requirement that advertisement would take place during September

   (b) in any event by the letter of 3rd February 1959.

3. The Appellant was never in a financial position to take up the transfer.

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4. Any arrangements made subsequent to the completion date of 9th February 1959 were not in writing and were therefore unenforceable.

5. The Appellant could not base his action upon a representation made by the Respondent upon which the Appellant acted to his detriment.

6. After the breach of contract by the Appellant the Respondent was entitled to rescind.

14. In reply, the Appellant (inter alia) submitted that time was not of the essence of the contract having regard to the conduct of the parties and that the letter of the 3rd day of February 1959 became of no effect as a result of what the Respondent had said prior to the 9th February 1959. pp.19-20

15. In a reserved judgment dated the 16th day of February 1961 the learned Chief Justice after reciting the Appellant's claim, referred to the agreement between the parties by which the Appellant undertook to be responsible for the preparation of the affidavits of the parties and give instructions to the Registrar of Deeds to advertise. The Respondent swore his affidavit on the 27th day of September and the Appellant on the 30th day of September. The learned Chief Justice held that even if they had been correctly prepared pp.20-24

> "it would not have been possible for the Registrar to check the documents and the advertisement of transport to be made during the month of September as is provided for in the agreement. The failure to observe this term of the agreement was that of the Plaintiff" (Appellant) p.21 ll. 36

16. The Appellant respectfully submits that the above finding against him ought not to have been

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made as there was no evidence before the Court regarding the circumstances and the dates of the filing of the affidavits but there was evidence that the Respondent's affidavit was insufficient and had to be re-sworn. It was never put to the Appellant in cross-examination that the insufficiency of the Respondent's affidavit was the Appellant's fault.

17. The learned Chief Justice then proceeded to outline the sequence of events up to the letter of 3rd day of February 1959. He referred to the offer by the Respondent to increase the mortgage and made the following finding : -

p.22 ll.12-15

> "The evidence of the Plaintiff under cross-examination makes it clear that the Plaintiff was financially incapable of taking up the transport and mortgages."

18. The Appellant further submits that the above finding is not justified by the evidence. The learned Chief Justice in reciting the events appears to have accepted the evidence of the Appellant that he was ill in December 1958 and that he had the sum of 2,000 dollars in his house when the Respondent came to see him. No reference was made to that part of the Appellant's evidence in which he referred to bank accounts in which he said he had money but he did not have at the time enough liquid cash. It is respectfully submitted that this evidence ought to have been referred to and accepted.

p.15 ll.21-45

19. The learned Chief Justice further held that the time fixed in the letter of the 3rd day of February 1959 was in the circumstances reasonable. The Appellant respectfully contends that it was not open to the Respondent to make time of the essence of the contract unilaterally by letter and in any event that the time limit of six days from the date of the letter was manifestly unreasonable in particular having regard to the fact as was mentioned in another passage in the judgment that the transport Court was held every Monday.

p.22 ll.45-46

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20. The learned Chief Justice then proceeded to recite the subsequent events according to the Appellant's evidence. Whilst making no specific finding one way or the other, the learned Chief Justice appears to have accepted what the Appellant had said. The learned Chief Justice then continued :-

> "On the 26th February 1959 the Plaintiff paid a re-advertisement fee to have the transport re-advertised on the next day the Defendant uplifted his transport from the Deeds Registry. There is no evidence as to whether the Defendant was aware at the time of uplifting his transport that the Plaintiff had paid a re-advertisement fee. There is also no evidence that the Plaintiff had altered his position by acting upon any oral representation made by the Defendant." p.21 ll.21-30

The Appellant respectfully submits that the first and last sentences of this passage are contradictory and that the learned Chief Justice should have held that it was because of the oral representations made by the Respondent that the Appellant paid the fee to have the transport re-advertised.

21. The learned Chief Justice concluded his judgment with the following passage :-

> "It is clear that time was made of the essence of the contract by the letter of the 3rd February 1959. Any subsequent oral arrangement between the parties can only amount to either a variation by parol evidence of a term of a contract required by law to be in writing or to a mere forbearance on the part of the defendant to insist on the performance of the contract on the date fixed for completion. If the former, then parol evidence is inadmissible to vary the original written agreement; if the latter, the plaintiff cannot now claim any right to have the original contract specifically enforced. The defendant has p.23 l.53 - p.24 l.13

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never been in breach of the contract and therefore the plaintiff's claim for damages must also fail. The opposition is declared to be not just, legal nor well-founded."

It is further submitted that upon the evidence and in particular the matters referred to in the proceeding paragraph, that such conclusion was wrong in law. Before uplifting his transport the Respondent was not entitled to assume that the Appellant had not acted upon the Respondent's representations. The Respondent having made the representations was under a duty to enquire at the Registry when he sought to uplift his transport whether the Appellant had acted upon them. If he had so enquired he would have been informed of the payment of the re-advertisement fee and been estopped in law from uplifting the transport.

pp.1-3 22. The Appellant filed a Notice of Appeal in the Federal Supreme Court dated the 27th day of March 1961 which set out a number of grounds, the principal are being stated as follows :-

p.2 ll.34-39 "The learned Chief Justice erred in law when he found that the plaintiff- appeallant was not actually in the act of performance of the contract and/or that the defendant-respondent was not bound by such performance by plaintiff - appellant."

23. The Appeal was dismissed for the reasons given in a Judgment dated the 22nd day of March 1962 which is annexed hereto in "Annexure B". It is respectfully submitted that the Court erred in only considering the position as set out in the letter dated 3rd February 1959 upon which they came to the wrong conclusion and not referring to subsequent events from which it appears that the stipulation contained in the said letter was varied by the parties. Further, that these events were investigated by the learned Chief Justice who in his Judgment appears to have accepted that they took place.

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24. The Appellant obtained conditional leave to appeal to Her Majesty's Privy Council upon the 21st day of February 1962 and final leave upon the 26th day of February 1963. pp.36-38 p.38

25. The Appellant respectfully submits that this Appeal should be allowed and that he should obtain the relief set out in his Statement of Claim for the following (amongst other)

R E A S O N S

(1) BECAUSE the learned Chief Justice made findings against the Appellant that were not open to him upon the evidence.

(2) BECAUSE the Federal Supreme Court failed to consider the evidence relating to events subsequent to a letter dated the 3rd day of February 1959 the legal effect of which in any event was wrongly interpreted by the Courts below.

(3) BECAUSE the Appellant had acted upon representations made by the Respondent and the Respondent ought not in law be allowed to act so as to nullify these representations.

(4) BECAUSE the Appellant was upon the evidence entitled to the relief set out in his Statement of Claim.

E.F.N. GRATIAEN

JOHN A. BAKER

ANNEXURE A

3rd February 1959

Dear Sir,

We have been consulted by Mr. Joseph Mootoo Sammy with reference to his agreement of sale with you dated 31st, July 1958 in respect of lot 113, Duke Street, Kingston. We are instructed that although the transport and mortgage were advertised on 8th, November last you have failed to accept and pass same although repeated demands have been made and our client even agreed to increase the amount of the mortgage from $10,000:- to $12,000:-. We are therefore instructed to inform you that time is of the essence of the contract and that unless you attend transport Count on Monday next the 9th, Inst. at 2 p.m. and accept transport, pass the mortgage and pay the balance of purchase price viz:- $4000:- our client will have no alternative but to cancel the sale and forfeit the deposit and furthermore will hold you responsible for any loss or damages that he may incur in this matter.

Yours Faithfully,
Sgd: CAMERON & SHEPHERD.

ANNEXURE B

REASONS FOR JUDGEMENT.

On the hearing of this appeal, the appellant appeared in person and made submissions generally following the grounds of appeal set out in his Notice of appeal. The Court dismissed the appeal with costs to the respondent, who was not called upon. The Court was in agreement with the decision of the learned Chief Justice that time had been made of the essence of the contract by the action of the respondent's legal advisers in sending to the appellant the letter of 3rd, February 1959 and that the time fixed in that letter was in the circumstances reasonable. See Stickney v Keeble 1915 A.C. 386. This Court was also in agreement that the appellant had not established that the respondent was in breach of his agreement at all. It was also considered that the failure to perform the contract according to its terms and within the time stipulated was solely the fault of the appellant. Accordingly, the Court was of opinion that the judgement of the learned Chief Justice that the appellant was not now entitled either to specific performance of the contract or to damages was correct. It followed that his opposition to the passing of transport was not well founded, as was held by the Chief Justice. This Court therefore dismissed this appeal, with costs to the respondent.

Dated this 22nd, day of March 1962.

C.V.H. Archer, Federal Justice — C. Wylie Federal Justice — Donald Jackson Federal Justice

UPON READING the notice of motion on behalf of the above-named (plaintiff) appellant dated the 27th day of March 1961, and the judgement hereinafter mentioned; AND UPON reading the judge's notes herein; And upon hearing the (plaintiff) appellant in person; and the court indicating that it does not wish to hear Mr.Ali Khan, Counsel for the (defendant) respondent; It is Ordered that the judgement of the Honourable the Chief Justice dated the 16th, day of February 1961 be affirmed and this appeal be dismissed with costs to be taxed and paid by the said plaintiff - appellant to the said (defendant) respondent.

BY THE COURT
A. Chung, Deputy Registrar.
FEDERAL SUPREME COURT.

IN THE PRIVY COUNCIL No.2 of 1966

ON APPEAL

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