Privy Council Appeal No. 56 of 1945

Paul Couvreur and another - - - - - - *Appellants*

v.

M. G. Shapiro - - - - - - - - *Respondent*

AND

M. G. Shapiro - - - - - - - - *Appellant*

v.

Paul Couvreur and another - - - - - - *Respondents*
(*consolidated Appeals*)

FROM

THE SUPREME COURT OF PALESTINE

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 24TH JULY, 1947

Present at the Hearing:

LORD ROCHE
LORD NORMAND
MR. JAMES STRATFORD

[*Delivered by* LORD NORMAND]

This is an appeal from a judgment of the Supreme Court of Palestine allowing an appeal from a judgment of the District Court of Jerusalem and *inter alia* decreeing for payment of £3,100 against the appellants. There is also a cross appeal by the respondent, the purpose of which is to enable him to claim a larger sum than that awarded by the Supreme Court.

By an agreement dated 22nd December, 1934, as modified by subsequent letters of 12th and 24th January, 1935, the appellant Father Couvreur (hereinafter called the appellant) on behalf of the second appellant agreed to sell to a nominee of the respondents certain land at Latrum in two parcels, one of 863 dunams or thereby at a price of £P.13,823 or thereby, and the other of 148 dunams or thereby at a price of £P.2,371 or thereby. A deposit of £2,000 was paid by the respondent, and the appellant agreed to accept the balance as follows:—£P.5,000 on 1st June, 1935, and £P.1,000 monthly thereafter. The respondent was not able to fulfil his undertakings under the agreement and various concessions were made to him by subsequent agreements. Finally on 12th January, 1938, by which time the respondent had paid in all £P.9,500 and had received a transfer of 148 dunams, a new agreement was made. It cancelled the contract of 22nd December, 1934, and all its supplements. It declared that 148 dunams had already been transferred to the respondent and by Clause 3 the appellant undertook, when requested by the respondent, to transfer to the respondent 100 dunams, adjacent to the 148 dunams already delivered, as paid for and without further consideration. By Clause 4 the respondent agreed to pay £3,100 by 12th January, 1941. By Clause 5 the appellant agreed to transfer the remaining 763 dunams on payment of the £3,100. By Clause 6 the respondent undertook to prepare the transaction of transfer at the Land Registry at his own expense and to call upon the appellant to appear at the Land Registry and effect the transfer. He also undertook to pay the fees of transfer. Clause 7

provided that the respondent might call on the appellant to transfer the 763 dunams in lots of not less than 50 dunams each. It also provided that the transaction for sale and transfer should be prepared and followed up by the respondent at his expense in all respects. No part of this agreement was ever carried out by the respondent: he paid no more money: he did not request the appellant to transfer the 100 dunams: he did not call upon the appellant to attend at Land Registry, nor did he take any step towards preparing the transaction of sale and transfer during the three years ending 12th January, 1941.

On 28th February, 1940, the Palestinian Land Transfers Regulations, 1940, were published. Regulation 2 divided Palestine into two zones, A and B. The lands with which this appeal is concerned are in Zone A Regulation 3 *inter alia* provided,

> " The transfer of land situated within Zone A save to a Palestinian Arab shall be prohibited:
>
> Provided that the High Commissioner may, if he considers it desirable so to do—
>
> (*a*) permit of the mortgage of such land to such companies or societies as he may approve;
>
> (*b*) permit the transfer of such land by Palestinian Arabs to religious or charitable institutions;
>
> (*c*) permit the transfer of such land to persons not being Palestinian Arabs if in his opinion such transfer is necessary for the purpose of consolidating existing holdings, or of effecting the parcellation of village musha' within the meaning of the Land (Settlement of Title) Ordinance;
>
> (*d*) in the case of land within the said Zone owned by persons not being Palestinian Arabs, by general or special order, permit the transfer of such land to persons not being Palestinian Arabs."

The appellant took no step at any time to obtain a permit from the High Commissioner, but the respondent made an application for a permit on 17th March, 1941, and it was granted on 17th October, 1941.

The appellant regarded the contract as at an end, so far as the 763 dunams were concerned, on 12th January, 1941, but he remained ready and willing, as he still is, to transfer the 100 dunams as soon as the respondent made a request for transfer. The respondent on the other hand attempted to negotiate for a reduction of the price of the 763 dunams, but nothing came of this negotiation and in September, 1941, the appellant finally decided that he would make no new agreement for the sale of the 763 dunams on any terms. On 13th August, 1942, the respondent served on the appellant a Notarial Notice calling on him to sign an application to the Land Register and to appear at the Land Registry to receive the price due under the contract of 12th January, 1938, and to effect a transfer of the 863 dunams to the respondent. The appellant did not comply with this notice.

In January, 1943, the respondent commenced this action. It was as originally framed an action for damages for breach of contract, the breach being the appellant's failure to transfer the lands when he was asked to transfer them. But subsequently the claim was amended and two new grounds of action were tabled:—(1) that performance of the contract was prohibited by the Land Transfers Regulations and, (2) alternatively, that the parties by mutual consent had enlarged the time for carrying out the agreement of 12th January, 1938, until the consent of the High Commissioner could be obtained to the transfer of the land. The case thus became in effect an alternative case: an action for the return of money paid for a consideration which had failed, or an action of damages for breach of contract because the appellant had refused to transfer the lands when he was asked to do so after the High Commissioner had granted a permit to the respondent. Issues were agreed for the trial of the case in the District Court. The learned judge after hearing evidence found that the respondent, on whose veracity and conduct he made severe criticisms, was at no time willing and able to carry out his part of

the contract, whereas the appellant was during the three years of its currency always willing to carry out his obligations under it. He also found that time was of the essence and that there was no extension of time by agreement of parties. He held therefore, as regards the 763 dunams, that the appellant was not in breach of his contract, but that the respondent was not willing to carry out his part during its currency and therefore could not recover damages; nor could he recover money paid in respect of a consideration which had failed since he had in fact paid nothing for the 763 dunams. As regards the 100 dunams he held that the appellant had always been and was still willing to execute a transfer and had never been in breach of his contract and that there had been no failure of consideration in respect of the price paid for these lands.

The Supreme Court, reversing this decision on appeal, appears to have based its judgment on the proposition of law that the Palestine Land Transfers Regulations had operated a frustration of the contract, and on the supposition that the respondent had paid £P.3,100 under the contract of 12th January, 1938, and on this basis the Court ordered the appellant to repay £P.3,100 to the respondent. The respondent's counsel, however, admitted that he was unable to support the judgment, and it is clear that the Palestine Land Transfers Regulations did not have the effect of frustrating the contract (*Leavey & Co. Ltd.* v. *George H. Hirst & Co. Ltd.*, [1944] 1 K.B. 24, 60 T.L.R. 72). The respondent's counsel had also to admit that the Supreme Court had fallen into error in supposing that any sum had been paid under the contract. The judgment of the Supreme Court therefore needs no further consideration, but it is important to notice that the findings of fact by the learned judge of the District Court which have been noticed above were accepted by the Supreme Court.

Counsel for the respondent in the present appeal put forward an argument which turned on the two contentions:—(1) that the appellant, and not the respondent, had the duty arising out of the Land Transfers Regulations to apply to the High Commissioner for a permit to transfer the lands; (2) that in any event the respondent was entitled to a reasonable extension of time to allow the permit to be obtained from the High Commissioner and that the permit was in fact obtained before the expiry of such reasonable extension. These contentions are inconsistent with the respondent's amended pleadings and with the agreed issues, in which the respondent's position was that the Land Transfers Regulations prohibited performance of the contract, or alternatively, that the time for performance was enlarged by mutual consent. The respondent cannot be heard to advance an argument which is irreconcilable with the case put forward in his pleadings and which has consequently not been adjudicated upon by the Courts below. But it is also manifest that neither of the contentions now put forward can be made good by the respondent. The sixth and seventh clauses of the contract expressly lay on the respondent the duty of preparing and following up in all respects the transaction for sale and transfer of the lands, and this stipulation is the inevitable sequel of the earlier provisions of the contract by which it falls to the respondent to request the appellant to transfer the 100 dunams of land, to make payment of the £P.3,100 and to call upon the appellant to transfer the 763 dunams in lots of 50 dunams each. It is clear, therefore, that under the contract the duty of taking all steps necessary for effecting a transfer in his favour rested on the respondent. The wording of the stipulation is wide enough to cover a step not foreseen to be necessary at the time when the parties entered into the contract, such as obtaining a permit required by supervening regulations. Counsel for the respondent relied on *Tayler* v. *Landauer* (1940), 57 T.L.R. 47, in which it was held that the seller under a C.I.F. contract had a duty to apply for a permit for the sale of butter beans under the Cereal Products Order, 1939. That is a decision which was inevitable having regard to the incidents of a C.I.F. contract, but the contract in the present case has no resemblance to a

C.I.F. contract for the sale of goods. Counsel also cited *Mitchell Cotts & Co. (Middle East) Ltd.* v. *Hairco Ltd.* (1943) 60 T.L.R. 31, which decided that when the importation of goods is prohibited except under licence, it is the duty of the owner of the goods to obtain the licence. That also was a decision which was inevitable having regard to the nature of the contract and the prohibition, but it has no application to the present contract. The proposition that a reasonable time must be allowed to see whether the prohibition against transfer would be maintained or a permit to transfer would be granted has been applied to contracts which fall to be carried out in a reasonable time, and *Andrew Millar & Co. Ltd.* v. *Taylor & Co. Ltd.* [1916] 1 K.B. 402, and *Austin Baldwin & Co.* v. *Turner & Co.*, 36 T.L.R. 769, are cases dealing with such contracts, but here the contract fell to be completed within a fixed period and it has been conclusively found that time was of the essence. To require of the vendor that he should allow reasonable time beyond the fixed period to enable the purchaser to do what he was required to do by the terms of the contract, would amount to making a new contract for the parties.

On all these grounds, therefore, their Lordships are of opinion that the appeal should be allowed and the cross appeal refused; that the judgment of the Supreme Court should be set aside and the judgment of the District Court restored. Their Lordships will humbly so advise His Majesty.

The respondent will pay the appellant's costs of the appeal and the cross appeal and in the Courts below.

(58339) Wt. 8013—20 90 8/47 D.L. G. 338

In the Privy Council

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