

(1933) 10 PRI CK 0001

In the Privy Council

Case No : Privy Council Appeal No. 47 of 1932

Abdullah Bey Chedid and others

APPELLANT

Vs

Tenenhaum

RESPONDENT

Date of Decision : 09-10-1933

Acts Referred:

Citation : (1934) AIR(PC) 91

Hon'ble Judges : George Lowndes, Wright, Lords Tomlin, JJ.

Advocate : Pleineas Grass, Wilfred Greene, Wilfred Barton, Tomlin Thorpe, for the Appearing Parties.

Judgement

On 14th July 1925 C had entered into a contract with the plaintiff-respondent where he agreed to sell and the respondent agreed to purchase certain miri land situated at Haifa in Palestine. The purchase under the contract had not been completed at the death of C. The price fixed by the contract was ?E 260 per dunum. ?E.6,000 was paid on the signing of the contract, and the balance of the price ?E.28,000 was to be paid at the transfer into the name of the respondent. The contract contained also the following clause :

"5. If the first Party commits breach of any terms of this contract, he shall return to the second party the ?E.4,000 received by him and shall pay to him. ? E.10,000 as liquidated damages and penalty for the non carrying out of this contract, and if the second party commits breach of any terms of this contract, he shall pay to the first party ?E.10,000 as liquidated damages and penalty after deduction of the ?E. 4,000 paid."

The prescribed period for the transfer after the payment of the price was postponed with the consent of both parties to 30th November 1927 and the heirs of C, whereby the respondent as he did not have the sum owing to the then present conditions, asked the heirs of C to give a year's period to 30th November 1928, under the conditions therein contained.

The conditions in effect provided : (1) for the payment then made of an

additional deposit of ?E.5,000; (2) for the extension of the time for payment of the balance to 30th November 1928; and (3) for the reduction of the penalty under clause of original contract from ?E.10,000 to ?E.7,000. The plaintiff alleged that the vendor had not transferred the land to him by the agreed date, and therefore he claimed the refund of deposit and stipulated damages of ?E.7,000. The defendant put in a defence and counter-claim in which he alleged that he had offered to transfer the land by due date and that the plaintiff was in default in not accepting the same and that the real reason of the refusal of the respondent to accept the transfer was that he had no money to pay the balance of the purchase price and he was himself in default and accordingly the defendant counter-claimed to keep the deposit and to be paid a further sum of ?E.5,000 to make up damages or penalty of ?E.7,000. Their Lordships found that the defendant did not on the agreed date proffer a transfer which the plaintiff was bound to accept and to that extent the plaintiff had made good his case. Accordingly the plaintiff was held entitled to a refund of the deposit. But as the plaintiff was not in a position to perform his part of the contract (that is, to pay the remainder of the purchase price) he was not entitled to recover any damages for breach of contract.

Lord Tomlin.-

(After stating facts and concluding that appellant 1 did not on 30th November 1928 proffer a transfer which the respondent was bound to accept his Lordship proceeded). There remains the question as to the readiness and willingness of the respondent to perform his part of the contract. Their Lordships' attention has not been directed to any provision of the Turkish law or any local ordinance which deals with the question whether in an action to recover damages for breach of contract the plaintiff is bound to establish his readiness and willingness to perform his part. In the absence of any such provision their Lordships are of opinion that regard must be had to the English law applicable in the case of concurrent obligations.

Readiness and willingness to carry out his obligation has always been a condition precedent to the plaintiff's right to recover damages in respect of breach of one of two concurrent obligations. It is true that to-day in England it need not be expressly pleaded, but the onus of proving it is nevertheless on the plaintiff. That onus, in the absence of any evidence to the contrary adduced by the defendant, may be easily discharged, nor is a tender of money necessary in the case of an obligation to pay money. Evidence of inability to discharge the obligation adduced by the defendant may however render it necessary for the plaintiff to satisfy the Court that he was at the material moment in a position to discharge his obligation : see *Jefferson v. Paskell*, (1916) 1 KB 57=85 LJ KB 398=113 LT 1189=32 TLR 69, at p. 74, and *British and Bemingtons Ltd., v. North-Western Cachar Tea Co.*, (1923) AC 48=93 LJ KB 62=128 LT 422 =28 Com Cas 265.

The learned Judges of the Supreme Court were, in their Lordships' opinion, in error in regarding the issue of readiness and willingness as irrelevant. Here there

was, in their Lordships' judgment, no repudiation of the contract by appellant 1, and the respondent was insisting on the contract inasmuch as he was suing for the sum recoverable under Cl. 5. To recover under that clause it was, in their Lordships' judgment, necessary that he should establish his own readiness and willingness to perform his part of the concurrent obligations.

Throughout the litigation appellant 1 set up that the respondent was not in a position to pay and that he utilized the question of title to make for himself by means of damages a profit out of the transaction. To support this charge there was produced a certified copy of the execution minute in an action in the Haifa Court, in which a judgment for about £30 had been recovered in May 1928 by a creditor against the respondent. From the certified copy it appeared that on 12th July 1928 a petition was presented by the respondents' attorney, alleging that owing to hard times the respondent was prepared to pay off the debt and interest by monthly instalments of £2; that eventually the attorney agreed to pay £2 down and £5 per month, beginning on 15th September 1928, and that these instalments of £5 were either not paid in full or, at any rate, were still being paid as late as July 1929.

It was said on behalf of appellant 1 that this was some evidence which, if not displaced, pointed to the respondent's inability on 30th November 1928, to pay a sum exceeding £28,600. The point was taken in the pleadings, but the respondent did not himself give or adduce any evidence in respect of it, and their Lordships are satisfied that the proper conclusion is that the respondent has failed to discharge the onus of proving his readiness and willingness to perform his part of the concurrent obligations although he has established that appellant 1 failed to discharge his part.

The result must therefore be that the claim for damages on either side fails. So far however as the respondent is concerned he is entitled to recover the money paid as a deposit, as no title has been made to the land. The appeal must therefore be allowed so far as it concerns the damages or penalty for £700. The order of the Supreme Court will therefore stand in regard to the deposit and the counterclaim, but will be set aside in regard to the £7,000 claimed in the action, and in respect of that claim the action must be dismissed.

With regard to costs : (1) in the Court of first instance, the respondent should receive half his costs of the action and his costs of counterclaim and should pay appellant 1 half his costs of the action with an appropriate set off; (2) in the Supreme Court the respondent should receive half his costs of the appeal and his costs of the cross-appeal and should pay appellant 1 half his costs of the appeal with an appropriate set off; and (3) before their Lordships' Board the appellants should receive two-thirds of their costs and will pay the respondent one-third of his costs with an appropriate set off. Their Lordships will humbly advise His Majesty accordingly.