Privy Council Appeal No. 91 *of* 1945

Wolf Niwes and another - - - - - - - *Appellants*

v.

Chaim Leib Rosenstrauch - - - - - - - *Respondent*

FROM

THE SUPREME COURT OF PALESTINE

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 14TH JULY, 1947.

Present at the Hearing:

LORD DU PARCQ
LORD MORTON OF HENRYTON
SIR JOHN BEAUMONT

[*Delivered by* LORD MORTON OF HENRYTON]

This is an appeal from a judgment, dated the 22nd February, 1945, of the Supreme Court of Palestine sitting as a Court of Civil Appeal, allowing the respondent's appeal from a judgment of the District Court of Haifa in an action in which the respondent was plaintiff and the appellants were defendants. The appellants are husband and wife.

By paragraph 5 (F) of his Statement of Claim the respondent claimed judgment against the appellants, jointly and severally, for £P.1,000 and interest. At the trial before the President of the District Court, the respondent gave evidence to the effect that in April, 1937, when he and the appellants were living in Vienna, he handed over 41,000 schillings to his cousin the first appellant for safe custody; that a few days later it was agreed that 28,000 schillings part of this sum should be lent by the respondent to the first appellant; that the loan should bear interest and should be secured by a mortgage of a house at Haifa; and that £P.1,000 should be paid five years later in discharge of the principal sum lent. The respondent also stated that the terms of the loan were set out in a "Deed of Loan" drawn up by himself and signed by both appellants; that the balance of 13,000 schillings was repaid to him in October, 1937; that the first appellant paid him interest monthly from August, 1937, to February, 1938, when these payments ceased; that both appellants left Vienna shortly before Hitler entered Austria; and that the respondent destroyed the Deed of Loan, on the advice of his brother-in-law Armon Kruppik, after Hitler entered Austria, because it showed that the respondent had property and would have led to his being put in a concentration camp.

After hearing this evidence the learned President made the following note "Defendant objects to any witness other than the parties. I hold that as the plaintiff has established the fact that the document was destroyed, oral evidence of witnesses in addition to that of the parties is admissible to prove the contract." In view of subsequent events their Lordships cannot construe this note as a finding that the document existed and had been destroyed. In their opinion the President was merely expressing the view

that as evidence had been given of the destruction of the document, oral evidence was admissible to prove its contents. Armon Kruppik gave evidence that he had seen and read the Deed of Loan, and confirmed the evidence of the respondent as to its contents and as to the occasion on which, and the reason for which the document was destroyed. He said: " I saw the document destroyed—burned in my own house—with my own eyes." A. Scheg, who had interviewed the first appellant in Palestine after the respondent had come to Palestine, said " I was requested by the parties (i.e., by the respondent and the first appellant) to negotiate in their dispute but nothing came of my intervention. In the course thereof defendant told me he had paid interest on the loan in Vienna. He told me he had paid the interest every month . . . . I think he said 1,000 Austrian schillings . . . . this interest was in respect of the money he had taken from plaintiff. Defendant admitted the loan of 28,000 schillings and said he wanted to repay them." Y. Hoffmann said " I know defendant. He told me he owes money £P.1,000 to plaintiff and he is going to settle it amicably . . . . On another occasion when plaintiff was also present plaintiff said to the defendant ' When will you give me a mortgage of £P.1,000 on your house?' and defendant replied ' If you speak of pounds I do not want to speak at all. I want to settle with you but if you speak about pounds there is nothing doing.' "

At the conclusion of the evidence for the plaintiff, Counsel for the appellants stated that the first appellant was " too ill to come " and that he wanted to have the evidence of the second appellant, who was in New York, taken on commission. The first appellant never at any time gave evidence, although it appears that later he sufficiently recovered from his illness to travel to the United States of America. The second appellant gave evidence in New York, on commission, in the form of answers given on oath to certain questions drafted by the advisers of the respondent and appellants respectively and sent from Haifa by air mail. By her answers she said that the respondent voluntarily gave about 41,000 Austrian schillings to her husband in Vienna, that it was not a loan, that neither she nor her husband paid any interest to the respondent, that about 13,000 schillings were returned to the respondent by her husband and by the witness, and that " the balance remained in Vienna because the Nazis took control of everything when they took over Austria." This last piece of evidence would appear to be hearsay if, as the respondent had said, the witness and her husband left Vienna shortly before Hitler entered Austria. To the questions " Has the witness alone or together with the first defendant received a loan of Austrian schillings from the plaintiff?" and " Has the witness alone or together with the first defendant made and signed a deed of loan or promissory note to the plaintiff? " the witness replied " No."

In giving judgment the learned President said " Now the first issue to be decided by me is whether I am satisfied by plaintiff's evidence regarding the destruction and alleged contents of the said document." He then proceeded to summarise the evidence of the respondent and of Kruppik and gave his reasons for thinking that the story told by them as to the existence of this document and its destruction was an unlikely one. The President then referred to the evidence of the second appellant, taken on commission, and referred without comment to the fact that two other witnesses were called who gave evidence to the effect that the first appellant had admitted the loan. He then said " As I have already stated, the onus is upon the plaintiff, and, as I think I have already clearly indicated, I am by no means satisfied with the truth of his story. In fact, from the evidence generally I have obtained the impression that the money was merely deposited with defendant—probably for transfer by the latter if possible to Palestine—and that the real trouble between the parties is over the question of the amount to be repaid, the plaintiff demanding sterling and the defendant insisting on repayment at a very different rate of exchange. This action was not for the return of money deposited for safe keeping and, therefore, I can enter no judgment in respect thereof as clearly a different defence would arise." For these reasons he dismissed the action The respondent appealed to the Supreme Court of Palestine. The appeal was allowed, the judgment of the District Court set aside, and judgment

entered for the respondent against the appellants jointly and severally for £P.1,000 with interest from the date of action at the rate of 6 per cent. and costs in that Court and below. The Court accepted the fact that the deed of loan never existed. Frumkin J. (with whose judgment Shaw J. agreed) said in regard to this point " Although we do not necessarily agree with his reasoning (i.e., the reasoning of the President) we are not inclined to interfere with his discretion arrived at after hearing and weighing the evidence . . . . But that is not the end of the matter." After making certain observations as to the onus of proof, Frumkin J. referred to the evidence of Scheg and Hoffmann and concluded " Even if we take it that there is no document drawn between the parties there was independent evidence to prove that the money received and kept was in the nature of a loan and not a deposit." Judgment was accordingly given for £P.1,000 and interest against both defendants in the action.

Their Lordships agree with the decision given by the Supreme Court against the first appellant. They think that this is a case in which an Appellate Court was justified in coming to a different conclusion, on a question of fact, from that reached by the trial judge. In the present case the trial judge has given his reasons for declining to accept the evidence of the respondent and Kruppik, and their Lordships do not find these reasons at all convincing. They are prepared, however, to decide this appeal on the footing that the existence of the document in question was not satisfactorily established. Even on this footing, however, there remains the clear evidence of Scheg and Hoffmann as to the admissions of the first appellant. There is nothing to show that these two men were not independent witnesses, and the trial judge has made no adverse comment upon the manner in which they gave their evidence. This latter fact does not, of course, establish that he believed them, but the trial judge seems to have left out of account altogether the very significant fact that the first appellant never gave evidence contradicting the evidence of Scheg and Hoffmann, although he must have been able to give evidence, since he recovered his health sufficiently to travel to the United States. No explanation was given as to why he did not do so, and their Lordships think it is incredible that the first appellant should have refrained from giving evidence, had the evidence of Scheg and Hoffmann been untrue. Having regard to the facts:—

(1) that their Lordships find unconvincing the reasons of the trial judge for disbelieving the evidence of the respondent and Kruppik;

(2) that the trial judge did not see any witness for the appellants in the witness box, and was not, therefore, in a position to weigh the truthfulness of one set of witnesses against the other;

(3) that the trial judge appears to have disregarded the failure of the first appellant to give evidence and

(4) (a circumstance of less weight) that the trial judge made no adverse comment on the demeanour of any of the witnesses for the respondent,

their Lordships think that the Supreme Court was justified in differing from the President on the question whether there was a loan from the respondent to the first appellant. Their Lordships cannot agree with the views expressed by the Supreme Court as to the onus of proof; in their view, as the 28,000 schillings were admittedly deposited for safe keeping in the first instance, the onus was upon the respondent to prove that the transaction was changed into one of loan. For the reasons already stated, however, their Lordships think that onus was discharged.

Counsel for the appellant attacked the reasoning by which the Supreme Court arrived at the conclusion that the sum payable to the respondent was £P.1,000. Their Lordships are not in agreement with this reasoning, but they think that the sum awarded was the right sum, because it was a term of the loan that the sum to be repaid should be £P.1,000 although the sum lent was in Austrian schillings.

On one point, however, their Lordships find themselves in agreement with the argument of Counsel for the appellants. He submitted that, if the evidence of the respondent and Kruppik as to the existence of the deed of loan was rejected, there was no evidence to show that any sum was lent to the second appellant. Their Lordships think that this contention is well founded. The only evidence which tended to establish any liability on the part of the second appellant was the evidence that she, as well as her husband, signed the document in question. All the rest of the evidence establishes only a loan from the respondent to the first appellant.

Their Lordships will humbly advise His Majesty that the appeal of the first appellant should be dismissed; that the appeal of the second appellant should be allowed and that the judgment entered against the second appellant in the Supreme Court should be set aside. The first appellant must pay to the respondent such costs as can be awarded to a respondent appearing *in forma pauperis*. No order is made as to the costs of the second appellant, here or in the courts in Palestine.

(58342) Wt. 8013—20 90 7/47 D.L. G. 338

In the Privy Council

WOLF NIWES AND ANOTHER

v.

CHAIM LEIB ROSENSTRAUCH

DELIVERED BY LORD MORTON OF HENRYTON

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