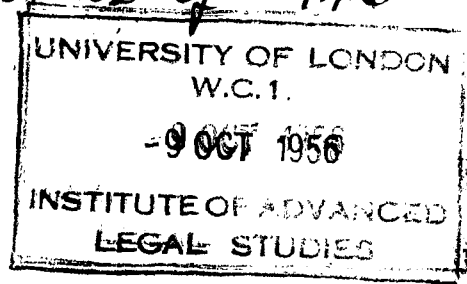


22, 1946

No. 23 of 1946



In the Privy Council.

ON APPEAL

44461

FROM THE SUPREME COURT OF PALESTINE.

BETWEEN—

JOSEPH KLEIN, ABRAHAM KLEIN, ISRAEL
 ASHER SHAFIR - *Appellants*

— AND —

ELIAHU (LEO) HEIMAN, ABRAHAM HEIMAN,
 BAROUCH HEIMAN, ISRAEL HEIMAN, SAMUEL
 HEIMAN, RACHEL HEIMAN *Respondents.*

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CASE FOR THE APPELLANTS.

RECORD

1. This is an appeal from the judgment of the Supreme Court of Palestine dated the 17th November, 1944, allowing the appeal of the Respondents (the Plaintiffs in the action) against the judgment of the District Court of Tel Aviv dated 31st October, 1943, in favour of the Appellants (the Defendants in the action) on their counterclaim brought in the action.

p. 21

2. The questions raised on the appeal are

(a) Whether there was any ground for holding that the discretion of the District Court had been erroneously exercised and for holding that it was inappropriate to order the relief claimed by the Appellants by way of declaration on a Counterclaim.

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AND SUBJECT THERETO

(b) Whether the judgment of the District Court contained sufficient findings of fact to support the decision in favour of the Appellants on the counterclaim.

CASE FOR THE APPELLANTS.

p. 27 3. The Respondents, as purchasers from the Appellants of certain land and shops in Tel Aviv under contracts in identical form dated the 3rd October, 1937, brought an action against the Appellants in the District Court Tel Aviv on the 17th August, 1942, alleging that disputes had arisen as to the balance of purchase money due from themselves to the Appellants and claiming that an account should be taken of the amount due which amount they declared their readiness to pay.

33 4. The Appellants contended that the contracts were rescinded and the action was baseless as the Respondents well knowing how much purchase money was outstanding and due, and although having been given, and for a long time remained in, possession of the property, had made default in due payment of the purchase money as stipulated, and were then unready to pay the amount due under the Contracts, whereupon the sale had been rescinded by the Appellants by notice given on 20th January, 1942, pursuant to a provision in the contracts (Clause 22) entitling the Appellants to cancel the sale in the event of such default. The Appellants accordingly counterclaimed for a declaration that the contracts were cancelled. 20

1-7 5. The Appellants are humbly of the opinion that it is unnecessary here to recite the pleadings in any detail and that it suffices to say that by order of the District Court dated 6th January, 8 1943, issues were settled which so far as concerns the counterclaim were:—

Issue No. 6.

“Whether the contracts were broken by the “Plaintiffs” (the present Respondents) “and what are the legal “effects of such breach; especially, whether the Defendants” (the present Appellants) “are entitled to cancel the said 30 “contracts; whether they were cancelled, and whether they “notified Plaintiffs thereof.”

9 and Issue No. 9.

“Whether Defendants are entitled to file a counterclaim “and claim cancellation of the contracts made between the “parties and upon what grounds.”

21 6. The District Court on the 31st October, 1943, gave judgment dismissing the Respondents' action. The Court held that no dispute at all was revealed in respect of the accounts and that the Respon- 40 dents in breach of the Contracts had not been prepared to fulfil the terms of payment and that in the seven days subsequent to the

notice in writing dated 20th January, 1942, given on behalf of the Appellants pursuant to Clause 22 of the Contracts the Respondents did not pay the amounts then due from them and that the notice dated 20th January, 1942, was effective as a cancellation of the Contracts. Accordingly the Court declared in favour of the Appellants on their Counterclaim that the Contracts between the parties were rescinded. p. 38

7. The Respondents on 29th November, 1943, served notice of appeal to the Supreme Court against the judgment on the Counterclaim only. On the 17th November, 1944, the Supreme Court gave judgment allowing the appeal. The Court stated that "in the peculiar circumstances of this case, it was not appropriate to order rescission of the contracts the subject matter of this dispute by way of declaration in a counterclaim to an action for accounts." The judgment proceeds: "We are not, of course, laying down any rule of law or of practice." There is no indication in the judgment as to what circumstances the Court had in mind as to any respect or respects in which procedure by way of counterclaim was not appropriate. p. 19
p. 21

8. The Court further held that there was "a stronger reason why the judgment of the District Court cannot stand and that is that the judgment does not, in our view, contain sufficient findings of fact to support a finding that the contracts had been rescinded or should be rescinded". There is no indication as to the respect or respects in which the findings were not sufficient. 20

9. The material provisions affecting counterclaims are as follows:—Civil Procedure Rules of Palestine, 1938,

Rule 52 (4).

"No action shall fail on the ground that the relief claimed is declaratory only"

30 and Rule 85. •

"A defendant in an action may set off or set up, by way of counterclaim against the claims of the Plaintiff, any right or claim, whether such set-off or counterclaim is for damages or not, and such set-off or counterclaim shall have the same effect as a cross action, so as to enable the Court to pronounce a final judgment in the same action, both on the original claim and on the counterclaim".

10. With regard to the view of the Supreme Court that the judgment of the District Court did not contain sufficient findings of fact to support a finding that the contracts had been rescinded or 40

should be rescinded, the findings of the District Court all of which were supported by evidence were as follows:—

(a) By virtue of contracts dated 3rd October, 1937, the Appellants agreed to sell to the Respondents certain land and shops situated in Tel Aviv. The price agreed upon for the sale of the said shops was to be LP. 16,463.984. The Respondents were to pay on completion of the buildings one-fourth of the price and the balance was to be paid within 10 years of the date of the agreement in monthly instalments with 8 per centum interest as from the date of the delivery of the shops.

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(b) By Clause 13 of the Contracts the Respondents undertook to take transfer of the land in the Land Registry (sometimes referred to in the proceedings as the "Tabo" which is the Turkish name for the Land Registry) whenever called upon by the Appellants and to execute a mortgage in favour of the Appellants to secure the balance of the purchase price as provided in Clause 23 of the Contracts.

(c) The shops were duly completed and in August, 1938, the Respondents took possession but paid on account of the advance purchase money the sum of LP. 3110 only instead of 20 LP. 4115.996 as provided by the Contracts so that the Respondents were still indebted on account of the advance purchase money in the sum of LP. 1000 as per Promissory Notes deposited with the Ashrai Bank, Tel Aviv.

(d) In accordance with an account made between the parties at the time of the delivery of the shops the Respondents delivered to the Ashrai Bank Promissory Notes for the balance of the price and for 10 years' interest.

(e) The Respondents delayed payments and many Promissory Notes, about 50 in number, were not paid.

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(f) On the 6th October, 1940, the Appellants served a notice on the Respondents requesting them to receive the transfer of the land at the "Tabo". The Respondents in breach of Clause 13 of the Contracts failed to attend for the reason that they were not able to make the necessary payments.

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(g) On the 20th January, 1942, the Appellants sent to the Respondents a seven days' notice in a registered letter as was provided for in Clause 22 of the Contracts whereby they rescinded the Contracts.

(h) The Respondents on the 17th August, 1942, commenced proceedings in the District Court of Tel Aviv in an action for accounts. The Appellants counterclaimed for a declaration that the Contracts were rescinded by virtue of the Respondents' breach thereof.

(i) Judgment was given on the 31st October, 1943 dismissing the action for accounts and allowing the Counterclaim. p. 16

11. The Respondents appealed against that part of the judgment of the District Court which declared the Contracts to be rescinded. p. 21
10 The Supreme Court allowed the appeal as above stated.

12. The Appellants applied to the Supreme Court for conditional leave to appeal to His Majesty in Council against the judgment of the Supreme Court. Leave to appeal was refused on the ground that the Supreme Court was not satisfied that "the subject matter of the appeal could be assessed on the value of the immediate issue 'in dispute'".

13. On the 31st July, 1945, the Appellants petitioned His Majesty in Council for leave to appeal from the decision of the Supreme Court.

20 14. On the 14th August, 1945, His Majesty in Council granted leave to the Appellants to appeal. p. 23

15. The Appellants have appealed to His Majesty in Council against the said decision of the Supreme Court of Palestine and it is respectfully submitted on their behalf that their appeal should be allowed and the order of the Supreme Court set aside for the following among other

REASONS.

- 30 (1) BECAUSE the Claim of the Appellants for a judgment declaring the Contracts to be cancelled in itself involved the determination of the very matters raised in the action by the Respondents and was in all respects appropriately and conveniently dealt with in the same litigation.
- (2) BECAUSE the judicial discretion of the District Court in admitting the Counterclaim and in ordering the relief claimed was properly exercised.
- (3) BECAUSE the findings of fact in the judgment of the District Court justified and necessarily involved the decision that the Appellants had lawfully rescinded the Contracts.

CONSTANTINE GALLOP.

(Sgd.) CHARLES LAWSON.

In the Privy Council.

ON APPEAL

FROM THE SUPREME COURT OF PALESTINE.

KLEIN & OTHERS - (*Appellants*)

v.

HEIMAN & OTHERS - (*Respondents*).

CASE
FOR THE APPELLANTS.

KAUFMAN & Co.,

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