Privy Council Appeal No. 62 of 1946

Mary Khayat - - - - - - - - - *Appellant*

v.

Nasrallah Salim Khoury and another - - - *Respondents*

FROM

THE SUPREME COURT OF PALESTINE

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 15TH APRIL, 1948

Present at the Hearing:

LORD SIMONDS
LORD MORTON OF HENRYTON
SIR MADHAVAN NAIR

[*Delivered by* LORD SIMONDS]

This appeal is brought from a judgment of the Supreme Court of Palestine of the 14th February, 1945, affirming the judgment of the District Court, Haifa, of the 7th March, 1944, whereby that Court had dismissed a claim made against the respondents by the appellant.

The short question in the appeal is whether the appellant is entitled to recover interest from the respondents on three promissory notes, all signed by the respondent Nasrallah Salim Khoury on the 11th October, 1929, of which the particulars are as follows:

(i) for 2,000 Turkish gold pounds maturing on the 23rd May, 1930.
(ii) for 300 Turkish gold pounds maturing on the 23rd May, 1930.
(iii) for 47 Turkish gold pounds maturing on the 21st October, 1929.

The respondent N. S. Khoury and his late brother Youssif formerly carried on business in partnership as merchants at Haifa under the name of " S. N. Khoury " and in that name were adjudicated bankrupt on the 27th October, 1930.

It is necessary in order to understand some of the contentions that have been raised in this appeal to refer to earlier proceedings in which the promissory notes now in question have been the subject of litigation.

It is common ground between the parties that the three notes were dishonoured on maturity and that they were not protested. But in the bankruptcy of the firm a dispute arose between the appellant and the Syndic in the bankruptcy first upon the question whether the notes were promissory notes and secondly as to the date at which the rate of exchange should be fixed for the conversion of Turkish into Palestinian pounds and thirdly in regard to interest upon the notes.

After some delay the appellant sued the Syndic and also the respondent Khoury personally in Civil Case No. 183/37 before the District Court at Haifa alleging that after giving credit for various payments made on account there was due to her the principal sum of L.P. 1,722.55 and claiming

payment of that sum " with legal interest from the respective dates of maturity of the promissory notes." From this suit the respondent was soon and rightly dismissed, but the Syndic defended it on various grounds, pleading (inter alia) that the notes were not promissory notes, that the wrong rate of conversion had been adopted and that no interest was in any event payable. In the light of subsequent events it is noteworthy that he did not plead that, even if the notes were promissory notes, yet liability had not arisen because they had not been protested.

The respondent having been dismissed from these proceedings, issues were settled as between the appellant and the Syndic, the fourth of which was: " Is plaintiff entitled to any interest and if so at what rate and from what date or dates? " In regard to this issue it was submitted by the Syndic that no interest was payable for two reasons, the first of which need not be stated, but the second of which was as follows: " (*b*) in any event the claim is admittedly made against a bankrupt estate, date of adjudication being 27,10.30, so that in accordance with Article 155 of the Ottoman Commercial Code interest in any event does not run from the date of adjudication. There is no suggestion that this is a privileged debt."

While the rights of the appellant in respect of the promissory notes were still undetermined, it appeared that the estate of the bankrupt was likely more than to satisfy the claims of all creditors and leave a substantial balance and on the 19th July, 1940, it was ordered by the District Court that upon payment into Court of a sum of L.P.5244.082 and subject to certain other conditions a declaration should issue that the assets and property of the bankrupt be released from the bankruptcy and that the Syndic and officers supervising him or acting under him should cease to function and the state of bankruptcy be terminated. This order was subsequently confirmed.

In the meantime the first stage had been reached in the proceedings which eventually came before their Lordships. For on the 17th January, 1940, the District Court of Haifa delivered judgment. That Court, having decided that the notes were promissory notes, then dealt with the question of interest, and held that the notes carried interest at 9 per cent. p.a. from the date of maturity by virtue of Sections 3 and 4 of the Bills of Exchange (Protest) Ordinance, 1924, but only until the date of adjudication in bankruptcy. Of this Article 155 of the Ottoman Commercial Code was decisive. The Court added: " This however is without prejudice to any claim which may be brought in the future for interest under Article 305 of the Code."

It is convenient at this stage to set out Article 155 of the Code, which so far as material is as follows:

" The order of adjudication stops only so far as the estate of the bankrupt is concerned the running of interest on all claims which are not privileged or secured by a pledge or mortgage." The terms of this Article make it clear (1) that interest is not payable in the bankruptcy except in the excepted cases after the date of adjudication but (2) that outside the bankruptcy and subject to any provisions of the bankruptcy law a claim for interest may still be pursued.

The District Court also dealt with the question of the rate of exchange which is not now relevant.

Appeal was preferred from the District Court to the Supreme Court which affirmed the judgment and thence to the Privy Council, and it is necessary to refer to certain passages in their Lordships' judgment, the report of which will be found in 1943 A.C. 507.

Their Lordships, having affirmed the view that the notes were promissory notes, then dealt with the question of interest in these few words: " Their Lordships think that the appeal fails on this issue [i.e. the issue whether the notes were promissory notes] and the respondent is therefore entitled

to interest from the date of maturity though the interest will not run beyond the date of adjudication." And finally, after dealing with the question of rate of exchange, their Lordships humbly advised His Majesty that the appellant should have judgment for L.P.2052.375 with interest at 9 per cent p.a. from the date of maturity of the notes to the date of adjudication less a certain sum paid on account, and added that that judgment should be without prejudice to any claim for interest under Article 305 of the Code. Throughout the proceedings there was no suggestion that either principal or interest up to the date of adjudication was not payable by reason of the fact that the notes had not been protested.

Pursuant to the order which as above mentioned was made on the 19th July, 1940, the bankruptcy proceedings had been in the meantime terminated and the bankrupt was reinstated in the possession and management of his property. There was in fact a very substantial surplus after making provision for all debts payable in the bankruptcy.

On the 6th August, 1943, the appellant commenced the proceedings, in which the present appeal is brought, claiming against the respondents, who were expressed to be the respondent N. S. Khoury and the same person on behalf of the heirs of his late brother Youssif, interest from the date of adjudication upon the principal sums from time to time due on the promissory notes.

To this claim the respondents put in various defences, that which has been most seriously debated (though it does not clearly appear in the defence) being that, as the notes had not been protested, no interest was payable. It was also pleaded and argued before their Lordships, that the matter was res judicata in the proceedings to which reference has been made and that the only right that remained to the appellant to claim interest was in the event of the respondent seeking rehabilitation under Act 305 of the Code. These pleas must now be considered.

First it is convenient to refer to certain provisions of the Ottoman Commercial Code.

By Article 119 of that Code it is provided that where payment of a bill of exchange is refused at maturity such refusal shall be recorded the day following the maturity by means of a document called "protest": if that day be a legal holiday, the protest shall be made on the following day and by Article 141 that the interest payable on a bill of exchange dishonoured by non-payment is calculated from the date of protest. Article 155 has already been set out in this judgment.

Two other Articles Nos. 91 and 92 which are in the Appendix to the Code must also be mentioned because, though in their Lordships' opinion they are not relevant, they have largely influenced the decision of the Supreme Court.

Article 91 provides that no damages in respect of the breach or delay in the performance of a contract or engagement to give or do a thing shall be recoverable from the promisor unless he has been officially notified in writing to carry out his engagement with a proviso and further stipulation which need not be stated. Article 92 provides that the notification to the promisor shall be effected by serving on him a notice or protest or other similar official document.

Their Lordships have been informed that the Code contains no other relevant provision in regard to interest and will assume that to be the case. If so, and if the Code had been unaltered at the date which is relevant to the present claim, a nice question might have arisen whether in the absence of protest any interest would run upon a bill of exchange, which for this purpose includes a promissory note. But the law did not remain unaltered. For by the Ordinance No. 31 of 1924, being the Bills of Exchange (Protest) Ordinance 1924, it was provided by Section 2 that a bill of exchange should be protested as therein mentioned and by Section 3 it was provided as follows:

"Notwithstanding the provisions of Article 112 of the Code of Civil Procedure and of Article 141 of the Commercial Code, the interest payable on a bill of exchange dishonoured by non-payment shall be calculated from the date of maturity of the bill."

Upon this Ordinance two comments may be made. In the first place it is noteworthy that it contains no reference to Articles 91 and 92 of the Code. This confirms the impression which a first reading of those Articles would create that being in general terms they do not qualify the special provision which the Code contains in regard to bills of exchange. In the second place the provision that interest on a dishonoured bill shall run from the date of its maturity is unequivocal. And inasmuch as between the acceptor of a bill or the maker of a note and the holder protest can generally have no significance, there is no reason to imply the necessity of protest in order that as between them interest may run.

In the District Court and the Supreme Court it has been assumed that the Code and the Ordinance of 1924, being the law in force at the time of the making of the notes, alone had to be considered. Following a previous judgment of the Supreme Court (reported in 9 P.L.R. 365) those Courts disregarded the Bills of Exchange Ordinance No. 47 of 1929 notwithstanding that that Ordinance came into force before the notes for 2,000 and 300 Turkish gold pounds respectively matured. Upon this assumption the District Court dismissed the appellant's claim, holding, as has already been indicated, that under the Ottoman Law as it stood before 1924 protest of a bill was a condition precedent to interest running and that the Ordinance of that year did not dispense with the necessity of protest. The Supreme Court on the other hand thought that all reference to Article 141 of the Code and to the Ordinance of 1924 was irrelevant because those statutory provisions applied only where there had been a protest and that the only relevant provisions of law were Articles 91 and 92 of the Appendix, the conditions of which had not been satisfied.

Their Lordships will, before turning to the Ordinance of 1929, deal with the matter upon the footing that the earlier law alone is relevant. This would in any view appear to be so in regard to the note for the small sum of 47 Turkish gold pounds which was not only made but matured before the 1929 Ordinance came into force.

Upon this footing their Lordships are of opinion that the judgments of the Courts of Palestine cannot be sustained. First in regard to the judgment of the Supreme Court, they see no sufficient reason for thinking that provisions of a general character couched in language which is at least not apt to the subject matter of bills of exchange, can have been intended to qualify the specific provisions in regard to those instruments, and in this view they find support not only in the Ordinance of 1924 but, as will presently appear, in the Ordinance of 1929 also. Secondly in regard to the judgment of the District Court they have already intimated their opinion. It would appear that in Ottoman as in English law interest is regarded as damages recoverable for non-payment of a debt at its due date. If then as between the maker of a note and the holder, protest was necessary in order to render the maker liable for payment, it would be consistent and logical to make protest a condition also of interest running. But throughout these proceedings it has not been suggested that the respondent was not liable because the notes had not been protested. On the contrary his liability has been established not only for principal but also for interest up to the date of adjudication in the proceedings which reached this Board. In these circumstances their Lordships are constrained to give the language of the 1924 Ordinance its plain meaning and to hold that interest ran on the notes from the date of maturity.

So far it has been assumed that the Ordinance of 1929 has no application to the notes in question. That Ordinance as originally enacted contained section 96 which must be referred to. For by it the Ordinance of 1924 was expressly repealed and so were Articles 70 to 146 of the Code and Articles 84 to 90 of the Appendix to the Code. It is to be observed that Articles 91 and 92 of the Appendix were not repealed. Thus the view already expressed that those Articles do not touch bills of exchange is confirmed, for, if they did, they could not operate consistently with the

Ordinance of 1929 and must have been repealed. The repealing Section 96 however contains a proviso that " nothing herein shall attach anything done or suffered or any right title or interest acquired or accrued before the commencement of the Ordinance or any legal proceedings or remedies in respect of any such thing right title or interest." The question then might arise whether the proviso has the effect in regard to the two notes which did not mature until 1930 of leaving the parties subject to the law as it stood before the 1929 Ordinance. This would become an important question, if their Lordships had taken a different view of the earlier law. For there seems no justification for the contention that in regard to bills to which the 1929 Ordinance applies there is any need for protest in order that interest may run as between the maker and the holder of a note. On the contrary it is provided by Section 58 that interest runs from presentment if a note is payable on demand and in any other case from the date of maturity, and it is clear from the terms of Section 50 and Section 88 (1) that as between the maker and the holder of a note protest is irrelevant. The result being that, whether the 1929 Ordinance applies to the two larger notes or not, in the judgment of their Lordships interest runs from the date of maturity, it becomes unnecessary to determine what is the effect of the proviso to Section 96 upon notes made before the coming into force of the 1929 Ordinance but maturing after it, and their Lordships think it proper in view of the decisions of the Palestine Court to reserve their opinion upon the point until the occasion arises when it is material.

It remains only to deal with the plea that the question of interest is *res judicata*. This plea appears to have no foundation. Throughout the earlier proceedings, after at an early stage the present respondent had been dismissed from the suit, the only question in regard to interest was whether it was payable by the Syndic in the bankruptcy. The question whether it was payable by the bankrupt personally was at no time an issue. It is true that in the course of the judgments both of the Courts of Palestine and of the Privy Council reference was made to Article 305 of the Code and the judgment was expressed to be without prejudice to the appellant's rights under that Article. But this can by no means be construed as an adjudication of another right of the appellant which was neither expressly nor impliedly in issue.

The only pleas which the respondent has sustained before their Lordships having failed, they are of opinion that the appeal must be allowed, and the judgments of the District Court and Supreme Court set aside and that the respondent must pay to the appellant interest at the rate of 9 per cent. per annum upon the principal outstanding upon the notes from time to time after the date of adjudication and they will humbly advise His Majesty accordingly. The respondent must pay the appellant's costs of this appeal and of the proceedings in the District Court and Supreme Court.

(59861) Wt. 8062—31 90 4/48 D.L. G 338

In the Privy Council

MARY KHAYAT

v.

NASRALLAH SALIM KHOURY
AND ANOTHER

DELIVERED BY LORD SIMONDS

Printed by His Majesty's Stationery Office Press,
Drury Lane, W.C.2.

1948