Privy Council Appeal No. 5 of 1949

Credit Foncier D'Algerie et de Tunisie - - - - - *Appellants*

v.

Jerome Linares - - - - - - - - - - - *Respondent*

FROM

THE SUPREME COURT OF GIBRALTAR

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 29TH JANUARY, 1951

Present at the Hearing :

LORD PORTER
LORD REID
LORD RADCLIFFE
LORD TUCKER
SIR JOHN BEAUMONT

[*Delivered by* LORD RADCLIFFE]

The appellants in this case were sued by the respondent in the Supreme Court of Gibraltar. His complaint was that he had suffered damage at their hands by reason of their fraud or negligence. The trial took place before the Chief Justice of Gibraltar, sitting with a special jury, and on the 18th November, 1948, judgment was entered for the respondent in the sum of £2,200 by way of damages, the jury having found the appellants guilty both of fraud and of the negligence charged. Their Lordships have come to the conclusion that this judgment cannot stand, since there was no evidence upon which the jury were entitled to arrive at these findings.

The respondent instituted his action in February, 1947, but the matters of which he complained took place as long ago as the year 1936. For a number of years before that he had been a customer of the Gibraltar branch of the appellants' bank and they had kept with him a current account in pesetas. The peseta, although it was not at any material time legal currency in Gibraltar, circulates freely in the Colony, and the records of the respondent's account, which were put in evidence at the trial, showed that there were frequent payments into and drawings out of that account. On the 24th November, 1936, the account showed the respondent in credit to the extent of pesetas 112,887. Upon that date, according to him, certain fraudulent misrepresentations were made to him on behalf of the appellants the ultimate consequence of which was to be that 110,000 out of his 112,887 pesetas became worthless and indeed were lost.

The respondent's Statement of Claim left no doubt as to what were the alleged fraudulent representations upon which his case was to depend. Nor was there any lack of explicitness in the formulation of the alternative claim in negligence, which was based upon the appellants' failure during the weeks succeeding the 24th November, 1936, to achieve what the respondent maintained that they ought to have achieved on his behalf. But before going further it is necessary to notice what were the events affecting the currency of Spain which led to the action taken by the parties on that 24th November.

On 16th March, 1936, a decree was made by the Government of Spain instituting a system of export permits to regulate the export of Bank of Spain notes. These permits, which were known as "guias", were

required to frank the removal from the country of Bank of Spain notes, which were themselves part of the legal currency of the country: the scheme was that these guias were to be delivered to the foreign banks or other recipients when the notes were negotiated abroad and then returned to Spain with notes to the equivalent value. Notes imported into Spain without covering guias were not to be accepted by Spanish or foreign banks operating in Spain as founding a credit in favour of a foreigner. Guias were not attached to any particular notes; but in substance the scheme meant that notes outside Spain were barred from re-entry unless accompanied by guias to the same amount. To banks operating in Gibraltar, where pesetas circulated freely, such a scheme must have presented no little inconvenience. At any rate the appellants had succeeded, shortly before the decree of the 16th March became law, in making a special arrangement with the Bank of Spain in its capacity as the Official Centre for Currency Transactions, under which they were entitled, without the production of guias, to open and maintain peseta accounts with banks in Spain by importing to them Bank of Spain notes on a mere certificate that they entered Spain from the territory of Gibraltar. It was part of this arrangement that they were to be able to draw on these accounts for the purpose of taking bank notes back to Gibraltar but not for other purposes of export. In the evidence given at the trial there was some dispute as to whether this special arrangement, which the Bank of Spain had confirmed on the 6th March, 1936, was preserved by or revoked by the decree of the 16th March, which certainly contained in its preamble a saving clause for existing agreements as to the crediting of accounts. But what was not in dispute was that in the months that followed the decree until the 18th July, 1936, the appellants did on many occasions send large quantities of pesetas to the credit of their Spanish account without accompanying guias and that the Bank of Spain in fact acted as if the arrangement of the 6th March was still effective. Thus the appellants were for the time being in a position to offer exceptional service to a customer in Gibraltar such as the respondent who maintained a peseta account with them but continued to feed it with bank notes uncovered by guias. Indeed his credit on current account which stood at 11,828 pesetas at the close of business on the 12th March, 1936, had risen to 112,887 pesetas by the 24th November.

On the 18th July, 1936, General Franco's rising began, and on the 12th November, 1936, there issued from his Headquarters a currency decree the terms of which were responsible for the action subsequently taken by the parties in this case. That part of the decree that bore particularly upon their position was that which required the stamping of all Bank of Spain notes, wherever situate, that were in circulation before the 18th July. For this purpose notes outside Spain had to be sent in to receiving offices of the Bank of Spain, to be established at certain named ports and frontier towns, accompanied by their relative guias, and this had to be done within a period of days fixed by the decree. Notes thus received were to be transmitted to the Burgos branch of the Bank of Spain (which was there under the revolutionary authority), to be examined and to have the validity of their guias checked: if they were passed by an Examining Committee, but not otherwise, they were to be stamped and retransmitted to the senders. Notes which did not obtain stamping under this process were banned from circulation by the decree. Moreover Bank of Spain notes which had been put into circulation after the 18th July were declared to be invalid.

This decree created an obvious problem for the appellants who held among their resources Bank of Spain notes uncovered by guias. The Franco Government was still only an insurrectionary movement by international law, and any action taken in compliance with its decree might compromise the validity of the notes in the eyes of the established Government as well as prejudice the maintenance of the March agreement with the Bank of Spain. And, in any event, if the Franco Government was not prepared to recognise that agreement or to condone action taken under it, it was difficult to see how the uncovered notes could be

got into Spain without the guias or, if allowed entry, could expect to receive the necessary approval at Burgos. On the other hand those in Gibraltar could hardly ignore the formidable prospect that the insurrectionary movement would triumph. Southern Spain had very soon passed under the control of its leaders and the towns of Algeciras and Lá Linea, both within the immediate vicinity of Gibraltar, were in their hands. According to the evidence, the commercial community had more confidence in General Franco and his currency than in the Government in Madrid. Such then was the nature of the problem that confronted the appellants when the Franco decree became known. But it would be a serious misunderstanding to suppose that this problem was solely or even primarily the concern of the appellants. Primarily it was the concern of those of their customers who maintained with them at that date current accounts in pesetas. For the appellants could, if necessity allowed no alternative, close these accounts and pay off the account-holders with unstamped Bank of Spain notes without guias; and, if they chose to do this, the problem of taking steps to secure the value of the notes passed from their shoulders to those of their customers.

The evidence given at the trial described the action which the appellants took at this juncture. Mr. Noguera, the then manager of their Gibraltar branch, discussed their position with Mr. Raida, their manager at Tangier, under whose general instructions the Gibraltar branch was conducted. Mr. Noguera was already in touch with legal counsel at Gibraltar, and when Mr. Raida came from Tangier to join him they both resorted to this gentleman for advice as to how they stood under the law of Gibraltar. Two interviews took place on the 20th and 21st November respectively before Mr. Raida returned to Tangier. The substance of the advice that they got from their counsel appears to have been that they should take no action to get Bank of Spain notes stamped by the Franco authorities except so far as they might be expressly requested so to do by their customers. If so requested they were to accept the mandate and do what they could to carry it out. Mr. Raida appears to have settled with Mr. Noguera and their counsel a form of request to be signed by customers for this purpose and this form undoubtedly envisaged that the person signing would be the actual owner of specific and identifiable notes, not a mere creditor for a sum of money on account. But his general instructions to Mr. Noguera were "to do everything through our lawyer so that all should be regularly and legally done": and it is convenient at this stage, in view of a line of argument that was taken before their Lordships on the appeal, to record that there was no evidence at all to support the suggestion that Mr. Raida was the real author of the alleged fraud, and that he had left behind him orders to Mr. Noguera designed to entrap the respondent and other customers similarly situated into taking over these notes from the appellants in order to save the Bank from an actual or possible loss.

If fraudulent misrepresentations were made on behalf of the appellants, it is by Mr. Noguera that they must have been made, nor does the very full summing up of the learned Chief Justice suggest that the case was put to the jury on the basis that Mr. Raida was using him as a mere instrument of his own plans. It is quite impossible to put forward Mr. Noguera as the innocent mouthpiece of a dishonest superior, for there was no material matter known to Mr. Raida that was not also known to Mr. Noguera. Indeed it was he, as the manager on the spot, who had learnt from the Spanish Customs authorities at La Linea, after the making of the decree of 12th November, 1936, that the Bank would not be allowed to bring Bank of Spain notes into Spain without guias. But before considering how the case stands against Mr. Noguera it is necessary to complete the story as to what passed between him and the respondent on the 24th November and the subsequent history of the peseta notes. Fortunately there was no real dispute between the witnesses as to what took place.

On that day Mr. Noguera got into touch with the respondent. Both of them knew of the Franco decree: "I knew as much as he did about

it ", said the respondent. Mr. Noguera had already had prepared a list of peseta notes, identified by numbers, which were to be allotted to the respondent out of the appellants' holding if he requested them to take action on his behalf to get notes stamped in Burgos. The respondent went to see Mr. Noguera. The interview can be described in his own words:—" He told me that in order to comply with the Decree of Burgos it was necessary for me to sign a letter drafted by defendants and a few sheets of lists of pesetas etc., in order to take those pesetas to La Linea for stamping. He said everything would be all right: I should get my money back, legalised. I asked him whether any of the notes had been put into circulation after 18th July, 1936. He said: 'No'. I was satisfied." The respondent did not in fact sign any documents at that interview, but later in the day his brother Bernard, who was an employee at the Bank, called to see him with a set of documents. These consisted of a cheque to bearer for 110,000 pesetas drawn by the respondent on the appellants; a letter addressed to the appellants recording the deposit with them of the same sum in notes without guias as identified on an accompanying list and requesting the appellants to "forward the said notes to Spain with a view to having the same stamped in accordance with the decree issued at Salamanca on the 12th November, 1936"; and a paying-in slip and copy covering this deposit. The respondent asked his brother if he thought everything was in order and, on being told "Yes", signed the documents tendered to him. No suggestion appears to have been made that Bernard Linares was a party to practising any deception upon his brother.

The notes were to remain in the possession of the appellants at Gibraltar for two years more. During that time they were employed in trying to find some effective way of getting such notes as the respondent's into Spain without guias to cover them. The line that they followed was on three several occasions to petition General Queipo de Llano, the Commander-in-Chief of General Franco's Southern Army, asking that the appellants' special arrangement of the 6th March, 1936, which had been made with the Bank of Spain, might be recognised by the Franco authorities and that the Gibraltar branch might be allowed accordingly to introduce notes into Spain for stamping without the cover of guias. Unfortunately this line of approach, though it produced some correspondence, produced no favourable reply. Mr. Noguera also took advantage of the presence in Gibraltar of a Delegate of General Queipo de Llano to have an interview with him and his legal assessor, at which he put his case. Finally a Mr. Ramon Marquez, a brother of the legal assessor, was retained some time in March, 1937, to go to Burgos on the appellants' behalf and to place their request before the Minister of Finance there. But none of this in fact produced any positive result, and in December, 1938, the respondent withdrew his 110,000 peseta notes from the custody of the Bank. His purpose in doing so was to take advantage of a new decree dated 27th August, 1938, which he hoped might operate to improve his chance of getting these notes recognised as valid. Certainly he succeeded in depositing them, without guias, at the receiving office at La Linea; but as they were never returned to him stamped or unstamped, nor did he ever receive any value in exchange, it cannot be said that the respondent achieved anything but the final loss of his notes by so doing.

On the 4th February, 1947, the respondent issued the writ in this action. The Statement of Claim, which asked for £3,000 by way of damages, made it clear that he was charging the appellants with fraud and negligence in respect of their conduct in 1936: and the fraud charged rested on what Mr. Noguera was alleged to have said to the respondent in order to induce him to carry out the transactions of the 24th November which are recited above. Paragraph 4 of the Statement of Claim specified these statements:—" The said representations were to the following effect, viz.: that in order to comply with the Decree of the Government of Burgos in Spain dated the 12th day of November, 1936, it was necessary for the defendants to forward to the Bank of Spain at Burgos their customers' Bank of Spain notes for stamping, that the list of Bank of Spain notes delivered to the plaintiff did not contain any Bank of Spain notes placed in circulation after the 18th day of July, 1936, and that upon the plaintiff

admitting these notes to be held by the defendants for his account such notes would be stamped and the said decree complied with ". These representations amounted to three separate statements: all, the respondent said, were false and known to the appellants to be false. Nothing in the Statement of Claim, or indeed in the evidence given at the trial, disclosed what persons representing the appellants were charged as having been in possession of the guilty knowledge at the material date. Presumably, since it was Mr. Noguera who was alleged to have made the impugned representations, it was Mr. Noguera who was pointed to as the possessor of that knowledge. But vagueness upon such a vital point is not a good foundation for a charge of fraud.

The trial took place before the Chief Justice and a special jury of seven. It lasted seven days. During the course of it oral evidence was called on both sides, the respondent's witnesses being Mr. Noguera, Mr. Bernard Linares, a lawyer named Manzuco and the respondent himself. The appellants' witnesses were Mr. Raida, a Mr. Sené, who had been secretary of their Gibraltar branch in 1936, and two lawyers. On the 18th November, 1948, the learned Chief Justice summed up, and at the conclusion of his summing up he left to the jury a series of questions, the form of which he had previously settled in Chambers with the concurrence of counsel for the parties. These questions, with the answers which the jury returned to them, were as follows :—

" 1. Did the defendants make to the plaintiff the representations mentioned in paragraph 4 of the Statement of Claim, or any of them? (Answer) Yes.

2. If so, was (or were) any such representation (or representations) false? (Answer) Yes.

3. If so, was the plaintiff thereby induced to alter his position in the manner mentioned in paragraph 8 of the Statement of Claim? (Answer) Yes.

4. If so, did the defendants make such representation (or representations) fraudulently, in the sense that they knew it (or them) to be false? (Answer) Yes.

5. Alternatively to Question 4, did the defendants make such representation (or representations) fraudulently in the sense that they made them recklessly without caring whether it (or they) were true or false? (Answer) No answer.

6. Were the defendants negligent as regards taking steps between the 24th November, 1936, and the 14th December, 1936, to have the Bank of Spain notes mentioned in (the deposit letter of the 24th November, 1936), stamped? (Answer) Yes.

7. Damages (if this question arises)? (Answer) £2,200."

Upon these answers judgment was entered for the respondent in the sum of £2,200, with costs. On this appeal the appellants have argued that there was no evidence which would admit of the jury finding the facts as they did. That is the question upon which their Lordships must now give their decision.

The question falls into two parts. Firstly, was there any evidence which allowed the jury to find that all or any of the representations complained of were untrue in fact? Secondly, if any one of these representations was untrue, was there any evidence which allowed the jury to find that that representation was made by some person, acting on behalf of the appellants, who was at the time of making it aware of its untruth?

As to the first, it became quite clear in the course of the trial that Mr. Noguera had told the respondent on the occasion of the interview on 24th November that the list of notes which was put forward for him to sign contained no notes that had been put into circulation after the 18th July, 1936 : and that it did in fact contain the identifying numbers of such notes to the value of 3,325 pesetas. To that extent the representation was untrue. Of the other representations attributed to Mr. Noguera, it is difficult to say that there was anything that showed them to have been untrue. The witnesses were speaking of an oral exchange that had taken place some twelve years previously to their giving evidence, and it would

be quite unreal to parse too closely the record of what they said in their evidence as it is set out in the Chief Justice's notes taken at the trial. In one sense what Mr. Noguera said may be regarded as unexceptionable: in another sense it might have conveyed a misleading impression. Everything depended on the circumstances of the interview and the context in which the statements were made. It is improbable that the respondent was under much, if any, misapprehension in the matter, since one of his answers under cross-examination stated:—" I could not have got my guia-less pesetas stamped, I admit. I was requiring the defendants to do something for me that I could not do." But it is not upon any question as to the sufficiency or insufficiency of the evidence of the falsity of the representations that their Lordships think that this appeal must succeed.

What was lacking from the evidence was anything which could warrant the jury's finding that the appellants made these representations or one or more of them with knowledge of their falsity, assuming for this purpose that falsity was present. Indeed the respondent's proof on this issue took a singular course. Everything turned, as their Lordships have pointed out, upon the state of mind and intentions of Mr. Noguera. He and the respondent were the only persons present at the interview of 24th November when the representations were made. Yet Mr. Noguera's evidence was called by the respondent, not by the appellants, and his evidence in chief thus became part of the respondent's case. Not unnaturally, perhaps, Mr. Noguera said nothing in chief to suggest that he had acted otherwise than honestly in the matter and he explained his mistake about the notes that had been put into circulation after the 18th July, 1936, by saying that he had given instructions to the clerks in the bank to check the notes specified in the respondent's list against a list of the proscribed notes which was then in the bank's possession. Whether that list was sufficiently exhaustive to allow a complete check to be made does not appear clearly from the evidence. Mr. Noguera did not do the checking himself and presumably relied upon his clerks to do all that they could. There is nothing to suggest that he knew that his answer to the respondent was incorrect and his answer in cross-examination was to the effect:—" I was not telling plaintiff anything false to my knowledge about the validity of the individual notes allocated to him." On the general question of the nature of his statements his answer in cross-examination was:—" I can't say we defrauded plaintiff. All I said to plaintiff was true according to my instructions. I believed everything I said was true. I said nothing which I knew to be untrue."

The respondent was the last of the witnesses to be called on his side. Under cross-examination he gave the following answer:—" The 'fraudulent misrepresentations' made by Noguera to me were (1) that all notes in my list had been in circulation before 18th July, 1936, (2) that if I signed the various documents my notes would be stamped—all would be in order—owing to defendants' exemption from need to produce guias. I do not think that he said those things dishonestly, without believing them to be true. I do not believe so."

At the conclusion of the respondent's case counsel for the appellants submitted that there was no case to go to the jury, directing special attention to what had been said by Mr. Noguera, the respondent's own witness. Counsel for the respondent submitted that there was a case, arguing that the " action is against defendants, not against Noguera personally." The learned Chief Justice ruled (wrongly, as their Lordships think) that the case should go to the jury and the action then proceeded without respondent's counsel, so far as appears, disclosing at any stage what person if not Mr. Noguera or other than Mr. Noguera he was accusing as having acted with fradulent intent on behalf of the appellants. Nor does the summing up of the Chief Justice, in many respects a very full and careful review of the case, afford to the jury any guidance upon this important point that, if the appellants were to be found guilty of fraud in their dealings with the respondent, that fraud could not have been committed by the appellants as a collective generalisation but must be proved by evidence to have been committed on their behalf by this or that named person or two or more such named persons acting together.

In view of the Chief Justice's ruling the appellants' witnesses were called: but their Lordships have found nothing in the evidence of these witnesses, whether under examination or cross-examination, that supports the respondent's case: for it is not enough to point out that Mr. Raida's answers often lacked clarity and were described by the Chief Justice as tangled.

In the result their Lordships hold that the jury's finding in answer to Question 4 cannot stand and if that finding goes there goes with it, subject to what is said below as to recklessness, the respondent's right to damages for fraudulent misrepresentation. Paragraph 4 of the Statement of claim was amended at the close of the respondent's case, apparently at the instance of the Court, so as to include an alternative allegation that the appellants had made the representations complained of "recklessly, not caring whether they were true or false." The jury did not answer Question 5, which dealt with this issue, since it was, correctly, put to them as an alternative, arising only if they made a negative answer to Question 4. But the evidence on this issue is no more than the evidence on the issue of deliberate deception, though, since it was not actually pleaded as an issue at the time when the respondent's witnesses were giving evidence, there were no formal questions and answers directed to this point. But had the jury returned an affirmative answer to Question 5 on the strength of the evidence called at the trial their Lordships would have been bound to upset the finding for the same reasons as have led them to upset the jury's answer to Question 4: and in these circumstances it would be wrong to direct a new trial on this issue.

There remains the respondent's claim in negligence. Paragraph 21 of the Statement of Claim gave the necessary particulars under this head. It runs:—"The plaintiff has suffered damage through the negligence of the defendants in that they failed in their duty to the plaintiff as their customer in not taking steps within the period prescribed in the Decree of the 12th day of November, 1936, to have the said Bank of Spain notes legalised, stamped and exchanged for currency notes." The period of time within which the appellants are said to have been negligently inactive is therefore a limited one, and the evidence established that it could be treated as expiring on the 14th December, 1936. Their Lordships have already set out in brief the various attempts that the appellants made both before and after that date to get the notes into Spain. They are quite at a loss to understand what more the appellants could usefully have essayed in the hope of procuring what at no time had they the power either to require or to compel. It was suggested in argument that they ought at least to have made a formal tender of the respondent's notes at the Customs House at La Linea and that by not doing this they might somehow have compromised the chances of their petition to General Queipo de Llano being granted. But this seems to be no more than a speculation and it is not even a likely one. Mr. Noguera, Mr. Raida and Mr. Sené were all at one in saying that they realized after the decree of the 12th November they could not get guia-less notes to Burgos under the previous procedure, and Mr. Noguera had already been informed by the Custom House authorities that they would not accept such notes. To continue to make formal tenders of all these notes would have been an aimless course of action, and there is no reason to think that the appellants' line of seeking to get the Franco authorities to recognise the special arrangement with the Bank of Spain, which was the real occasion of the Gibraltar branch being in possession of these holdings of notes without guias, was anything but the line most likely to serve the interests of their customers. Nor was it any fault of theirs that it did not succeed. In those circumstances the jury's affirmative answer to Question 6 can only have been arrived at by some inadvertence and it cannot be allowed to stand in the face of a total lack of any evidence to support it.

Their Lordships will humbly advise His Majesty that the Judgment of the Supreme Court of Gibraltar dated the 18th November, 1948, which awarded to the respondent the sum of £2,200 by way of damages and his taxed costs (including the costs of the Special Jury) ought to be set aside and that in lieu thereof judgment in the action ought to be entered for the appellants, the respondent to pay their taxed costs (including the costs of the Special Jury). The respondent must also pay the costs of the hearing before the Board.

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In the Privy Council

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