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36,1954

No. 38 of 1953.

In the Privy Council.

ON APPEAL

FROM THE WEST INDIAN COURT OF APPEAL.

38064

BETWEEN

JOHAN JOSEF FRANCOIS HUTT (Defendant) . *Appellant*

AND

BOOKER BROTHERS McCONNELL AND COMPANY LIMITED whose duly constituted attorney in the colony of British Guiana is HENRY GEORGE SEAFORD (First Plaintiff) . *First Respondent*

and

LEON SCHULER (Second Plaintiff) . . . *Second Respondent.*

UNIVERSITY OF LONDON
W.C.1.
23 MAR 1955
INSTITUTE OF ADVANCED
LEGAL STUDIES

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Case

ON BEHALF OF THE APPELLANT.

RECORD.

1. This is an appeal from a Judgment and Order dated the 26th February 1951 affirming the Judgment and Order dated the 22nd May 1950 entering judgment for the Respondents for the sum claimed by them against the Appellant on a special endorsed Writ.

20 2. The First Respondents are a limited liability company incorporated in England and carry on business in Georgetown, British Guiana. p. 5, l. 19.

The Second Respondent resides in Georgetown, British Guiana, and has the controlling interest in an hotel known as the Bel Air Hotel Limited, which will be referred to hereinafter as "the hotel." p. 9, l. 18.

The Appellant carries on the business of an hotel proprietor and owns the hotel known as the Hotel Eldorado with the land at Lots 9 and 10 Holmes Street, Georgetown, British Guiana. p. 24, l. 8.

30 3. The Appeal arises out of an action brought by the Respondents against the Appellant to enter judgment against the Appellant on a specially endorsed writ claiming from the Appellant a sum of \$18,038.63 being the agreed purchase price of 3,400 fully paid shares of \$5 each in the hotel with interest thereon.

The principal defence was that the property in the shares had not passed to the Appellant. Both the Courts below rejected this defence and gave the Respondents judgment as claimed in the specially endorsed Writ.

4. The sole question for determination in this appeal is whether the property in the shares had passed to the Appellant so as to entitle the Respondents to a claim for the purchase price on a specially endorsed Writ and this turns upon the proper construction of the terms of an Agreement entered into between the parties on the 12th February 1949.

p. 24. 5. On the 3rd January 1949 the Appellant entered into an Agreement to sell the Hotel Eldorado with the land to one, J. A. Sue-A-Quan for the 10 sum of \$120,000.

p. 9, l. 44. The purchaser paid to the Appellant the sum of \$6,000 as a deposit on the purchase price. It was arranged that after paying off the first, second, third and fourth mortgages existing on the property, the balance of \$64,000 was to be paid to the Appellant on the passing of the title to the land.

The purchase was to be completed on the 3rd July 1949. The purchaser failed to complete the purchase and the sale fell through.

p. 9. 6. On the 12th February 1949 the Appellant and the Second Respondent entered into an Agreement whereby the Second Respondent agreed to sell to the Appellant the shares owned by the Second Respondent 20 in the hotel in which he had a controlling interest. As the sole question for determination turns upon the construction of the terms of the Agreement it is stated in full :—

pp. 9, 10. AN AGREEMENT made the 12th day of February, 1949, Between :—BEL AIR HOTEL LIMITED, (hereinafter called “ the Debtor Company ”) of the first part, JOHAN JOSEF FRANCOIS HUTT, (hereinafter called “ the Purchaser ”) of the second part, LEON SCHULER, (hereinafter called “ the Vendor ”) of the third part, and BOOKER BROTHERS MCCONNELL AND COMPANY LIMITED, (hereinafter called “ the Creditor Company ”) of the fourth part. 30

WHEREAS the Debtor Company is indebted to the Creditor Company in the sum of approximately \$19,000 :—under a First Mortgage, and in the sum of approximately \$8,500 :—in respect of supplies, and is also indebted to the Vendor in the sum of \$17,000 :—

AND WHEREAS the Vendor, who has the controlling interest in the Debtor Company, has agreed to sell to the Purchaser his shares in the Debtor Company for the sum of \$17,000 :—

AND WHEREAS the Purchaser is the owner of the following 40 property, viz :—

“ Firstly,
the immovable property known as—“ E½ of lot A9 ; W½ of lot A9 and W½ of lot A10 ; SE part of lot A10 ; South Cummingsburg, Georgetown, with all the buildings and erections thereon ” ; as held under Transport No. 523 of 23rd day of April, 1946 ;

“ Secondly,
the goodwill of the hotel business (including all Licences) carried
on upon the property ;

“ Thirdly,
all the fixtures, fittings, furniture, trade utensils and other
chattels in or about the hotel premises and used in or in connection
with the said business and in and upon the property, save and
except such furniture, personal belongings and chattels of hotel
guests ; and

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“ Fourthly,
all stock-in-trade in and upon the property ” ;

but has agreed to sell and has delivered possession of the same
under an Agreement dated 3rd January, 1949, to J. A. Sue-A-Quan
for the sum of \$120,000 :—of which \$11,000 :—has been already,
or will shortly be, received by the Purchaser and \$45,000 :—is to
be paid to the Demerara Mutual Life Assurance Society, Limited,
in satisfaction of the First, Second, Third and Fourth Mortgages
on the said property, leaving a balance of \$64,000 :—to be paid
to the Purchaser on the passing of Transport :

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AND WHEREAS the Vendor has assigned to the Creditor
Company the sum of \$17,000 :—owing to him by the Debtor
Company and the sum of \$17,000 :—owing to him by the Purchaser
in respect of the sale of the said shares :

AND WHEREAS the Debtor Company has agreed to pass a
First and Second Mortgage on its property to the Creditor Company
as security for the payment of the said sum of \$17,000 :—
with interest at the rate of FIVE per cent. per annum from the
date hereof within six months from the 3rd day of January, 1949,
or the passing of the Mortgage and the Purchaser has agreed to
pass a Fifth Mortgage on the said property to the Creditor Company
as security for the payment of the said sum of \$17,000 :—
with interest at the rate of FIVE per cent. per annum from the
date hereof within six months from the 3rd day of January, 1949,
or the passing of the Mortgage as the case may be :

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NOW IT IS HEREBY AGREED as follows :—

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1. The Purchaser shall forthwith deposit with the Creditor
Company the Grosse Transport No. 523 of 23rd April, 1946, for
the said property and hereby assigns to the Creditor Company
the said balance of \$64,000 :—payable to him under the said
Agreement dated 3rd January, 1949, and the full benefit and
advantage thereof.

2. The Debtor Company and the Purchaser shall forthwith
advertise the aforesaid Mortgages to the Creditor Company, and
shall pass the same whenever requested by the Creditor Company.

3. On payment of the said sums of \$17,000 :—with interest
as aforesaid, or on the passing of the said Mortgages, whichever
shall first happen, the transfer of the said shares which has been
signed by the Vendor, shall be handed to the Purchaser.

4. On receipt of the said balance payable under the said Agreement dated 3rd January, 1949, the Creditor Company shall apply the same to the payment of—

(a) the capital and interest of the said First Mortgage of \$19,000 :— ;

(b) the said sum of \$8,500 :—in respect of supplies ; and

(c) the said sums of \$17,000 :—with interest as aforesaid.

5. All costs and expenses of and incidental to this agreement shall be paid by the Debtor Company.

p. 26. 7. In accordance with the said Agreement of the 12th February 1949 the Appellant executed a Supplemental Agreement of the same date assigning to the First Respondent the full benefit of the Principal Agreement dated the 3rd January 1949.

p. 23. In accordance with the said Agreement of the 12th February 1949 the Second Respondent signed the transfer of the shares and handed the blank transfer with the relevant share certificates to the solicitor acting jointly for the Respondents and the Appellant. The Agreement of the 12th February 1949 provided that the transfer was not to be handed to the Appellant until the happening of one or other of the two events stated in the Agreement. The Appellant has never signed or received any 20 transfer of the shares agreed to be sold.

p. 15. 8. On the 14th July 1949 the First Respondent called upon the Appellant to pay the sum of \$64,000 or to advertise and pass a fifth mortgage on the property mentioned in the Agreement of the 12th February 1949. On the 17th April 1950 the sale having fallen through, the First and Second Respondents called upon the Appellant for immediate payment of \$17,000 in pursuance of the Agreement of the 12th February 1949. The Appellant refused to pay.

p. 3. 9. Thereupon the First and Second Respondents instituted
THE PRESENT PROCEEDINGS 30
 on the 4th May 1950 by a specially endorsed writ of summons against the Appellant before the Supreme Court of British Guiana claiming from the Appellant the sum of \$18,038.63.

p. 4. 10. The Statement of Claim endorsed on the Writ rested the claim
 p. 4, l. 36. on the ground that the Appellant failed to advertise and pass the mortgage as provided in the Agreement of the 12th February 1949 and refused to do so or to pay for the shares although he had been given control of the hotel, and, that furthermore, the sale to Sue-A-Quan had fallen through.

p. 7. 11. On the 13th May 1950 the Appellant filed his Defence.
 The relevant clauses are :— 40

p. 8,
 ll. 7-24.

13. I have never signed or received or seen any transfer of the 3,400 shares or any of them by the plaintiff Schuler to me.

14. Moreover, J. A. Sue-A-Quan failed through no fault of mine, to carry out his agreement of the 3rd January, 1949, to purchase my other property as set out in the agreement of the 12th February, 1949.

15. His fulfilment of his said agreement was a basic condition of the agreement of the 12th February, 1949, and I am advised by my said counsel and believe that the non-fulfilment of this condition releases me from liability to make payment under the agreement of the 12th February, 1949.

10 16. I am also advised by my said counsel and believe that in any event, the plaintiff Schuler cannot be and is not entitled in law or equity to specific performance of an alleged agreement to purchase shares in a company, and that the plaintiff company as an assignee of Schuler, is also not entitled to recover from me the said sum of \$17,000 :—or any portion thereof or any interest thereon.

12. Four issues were raised at the trial. The only issue now relevant is No. 3 as follows :—

“ The Plaintiff cannot have specific performance if there is breach of contract. *Re Schwabacher*, 98 L.T. 127. Hutt did not sign the transfer in acceptance of assignment of shares—to enable the transfer to be registered by the Company.” p. 28, l. 19.

13. The Trial Court delivered its judgment on the 22nd May 1950 p. 31.
20 giving judgment against the Appellant for the full amount as claimed.

14. The Reasons for Decision were delivered on the 21st June 1950. The relevant passage is as follows :—

I may add that I saw no substance in another ground of defence set out in the defendant's affidavit, at paragraph 13 of his affidavit, namely that the defendant “ never signed or received or seen any transfer of the 3,400 shares.” This, too, involved no triable issue. The defendant cannot avail himself of his own failure to sign the transfer as a good defence to the claim for payment of the purchase price of the shares, although the transfer may not have been recognised by the Company as legally effectuated without the signature of the transferee. The transfer was signed by the transferor and was thereupon handed to the solicitor, Mr. J. E. de Freitas, who prepared the agreement for both parties and that is sufficient for the purposes of the claim. p. 30,
ll. 12-23.

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15. The Appellant appealed against that decision to the West Indian p. 32.
Court of Appeal.

16. The appeal was heard on the 19th, 20th and 21st February p. 34, l. 16.
1951 before the President (the Chief Justice of Trinidad and Tobago), the Chief Justice of British Guiana and the Chief Justice of the Windward
40 and Leeward Islands.

17. The Judgment of the Court of Appeal was delivered on the p. 34, l. 17.
26th February 1951 dismissing the appeal on the ground that the property in the shares passed to the Appellant on the execution of the agreement of the 12th February 1949 and the signing of the transfer form by the vendor, and that the sale of the shares was thereby effectuated.

p. 34, l. 36.

18. In giving his Reasons for Decision the learned President held that on a proper construction of the agreement of the 12th February 1949—in particular the second and fourth recitals and paragraph 3—that the intention of the Agreement was *inter alia* to evidence the sale of the shares by Schuler to the Appellant and the assignment of the agreed price therefor by Schuler to the Respondents. The learned President held that the effect of the provisions of paragraph 3 of the agreement of the 12th February 1949 was to make the sale of the shares a conditional rather than an absolute contract within the meaning of section 3 of the Sale of Goods Ordinance (Laws of British Guiana, Volume II, Chapter 65), 10 but that the fulfilment of the condition was wholly within the control of the Appellant and it is not open to the Appellant to repudiate the contract by reason of the non-fulfilment of a condition which was in his own power to fulfil.

p. 39.

19. Against the Decision and Judgment of the West Indian Court of Appeal dated the 26th February 1951 the Appellant obtained leave to appeal to His Majesty in Council on the 3rd April 1951.

20. The Appellant humbly submits that this appeal be allowed, and the Judgment and Decision of the West Indian Court of Appeal dated the 26th February 1951 be set aside and the Respondents' claim as framed in 20 the specially endorsed Writ be dismissed for the following among other *with costs throughout*

REASONS

- (1) BECAUSE upon the proper construction of the Agreement dated the 12th February 1949 the property in the shares did not pass to the Appellant upon the execution of the Agreement and the signing of the transfer form by the vendor.
- (2) BECAUSE the Courts below erred in law in holding that the Respondents' remedy was to sue for the price of the shares. 30
- (3) BECAUSE the non-fulfilment of the condition to pay the purchase price being due to the default of the buyer the Respondents' remedy in law is to bring an action for damages for breach of contract.

S. P. KHAMBATTA.

K. NARAYAN.

In the Privy Council.

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JOHAN JOSEF FRANCOIS
HUTT *Appellant*

AND

BOOKER BROTHERS
McCONNELL & COMPANY
LIMITED and Another . *Respondents.*

Case
ON BEHALF OF THE APPELLANT.

LUDLOW, HEAD & WALTER,
Broad Court Chambers,
Covent Garden, W.C.2,
Solicitors for the Appellant.