Judgment 14 of 1972

No. 11 of 1970.

IN THE PRIVY COUNCIL

ON APPEAL

FROM THE COURT OF APPEAL OF GUYANA

BETWEEN

BOOKERS STORES LIMITED — Appellants

AND

MUSTAPHA ALLY — Respondent

CASE FOR THE APPELLANTS

RECORD

1. This is an appeal from a judgment of the Court of Appeal of Guyana (Persaud, J.A., Cummings, J.A., Crane, J.A.) dated 16th June, 1969 which allowed with costs the Respondent's appeal from a judgment of the Supreme Court of British Guiana (Khan, J.) whereby the Respondent's action was dismissed and judgment was entered for the Appellants with costs. pp.281-330 p.246-277

2. The Respondent in his Statement of Claim dated the 12th March, 1964, claimed damages for breach of warranty and or condition and or for misrepresentation arising out of a contract of hire purchase dated the 26th March 1962 and the subsequent purchase thereunder of 1 Grantex Model "30/60"E, detached Rice Mill C/W Electric Motors and 1 Grantex Electrical Paddy Dryer, Model "08". The Respondent relied upon an express oral warranty alleged to have been given to him by the Appellants' servants as to the capacity of the mill and the dryer, a representation by literature alleged to have been issued by the Appellants as to the capacity of the mill and the dryer and an implied term as to the fitness of the mill and dryer for their purpose. The pp.3-8

matters relied upon as amounting to breach of contract were that the mill and dryer failed to attain the respective capacities alleged to have been represented and that an excessive percentage of broken grains of rice were produced. The amended Defence admitted the contract and purchase thereunder but denied
p.9-10 that any implied term as alleged formed part of the contract and denied that any warranty or representation had been given as alleged or at all. Further the Defence alleged that it had been an express term of the agreement dated 26th March, 1962 that the Appellants did not supply the mill subject to any condition as to quality, description, suitability, fitness or otherwise. The agreement provided as follows:-

> By Clause 9: The Hirer(s) may at any time during the hiring become the purchaser of the hired property by paying to the Owners such sum as will with the sums previously paid under Clause 2 equal the said Purchase Price and thereupon the hiring shall come to an end and the hired property shall become the property of the Hirer(s) and the Owners will assign and make over all their rights and interest in the same to the Hirer(s):
>
> PROVIDED ALWAYS that -
>
> (a) the option hereby granted shall not prejudice any right of action or other remedy of the Owners in respect of any liability incurred by the Hirer(s) under this Agreement or of any breach of the terms thereof: and
>
> (b) if the Hirer(s) shall exercise the option hereby granted, the Owners will return to the Hirer(s) such part of the said Purchase Price (if any) as represents the proportion of interest or collection charge for the unexpired period of the hiring.
>
> By Clause 11: The Owners do not supply the hired property subject to any condition or warranty express or implied

as to quality, description, suitability, fitness or otherwise but if the manufacturers of the hired property give any warranty in respect thereof the Owners will take such steps as they can to enforce the same.

By Clause 13: The Hirer(s) acknowledge that before the signing of this Agreement the Hirer(s) examined the hired property and agree(s) that the delivery of the hired property shall be conclusive evidence that it is equipped and in good condition

3. The trial of the action in the Supreme Court of British Guyana lasted for thirty-four days between the 25th February, 1965 and the 12th November, 1966. Over twenty witnesses gave evidence including the Respondent and an expert who gave evidence of tests carried out on the mill and the dryer. pp.12-33

The Respondent gave evidence and dealt with the literature relating to the Mill (exhibit C) and to the dryer (exhibit B). He said that both documents had been shown him at the start of negotiations, when the Appellants' servants, Esselment, Blair and Chung had visited him at his house in 1961. His mill was not in fact shown on exhibit C but he said that he was told that Mill No. 72, which was shown, was the same except that it was a 1 ton mill, whereas his would be a 2 ton mill. Exhibit "B" relating to the dryer, in fact described the dryer he bought. The Respondent denied in cross-examination that he had got exhibit C from Mr. Blair or Mr. Chung after the action was filed. p.45-87 p.45-50 pp. 45-47 p.73. 20

4. The Appellants called Mr. Blair who said that he had not been to the Respondent's house before the Respondent gave his order and he denied that he had at any time ever showed the Respondent exhibit C and further stated that he had never seen anyone showing the Respondent any brochure at all. He said that he never discussed anything about capacity or production capacity per hour with the Plaintiff. Further he said that he did not give the p.172 p.175 p.175. 29

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Respondent any guarantee about the dryer and stated that the Respondent had ordered a dryer similar to Dr. Fraser's and that is exactly
p.178 what he supplied, and that the only difference had been that Dr. Fraser's was belt driven and the Respondent's was electrically driven.

pp.183-195 Mr. Blair was cross-examined and said that he would expect that the capacity of the mill was indicated to the Plaintiff to be in the range of 3500 to 5000 lbs. of paddy per hour. This was described in local terms as a two ton mill and that that would indicate an intake of 4,480 lbs.
p.184 per hour. He further stated that the pamphlet exhibit C was not in use at the time as it was obsolete but that it was on the premises in the Appellants' store in Water Street. Mr. Blair added that the reference 74 on Exhibit C did not apply to the Respondent's mill. The mill 74 was similar to the Respondent's in that it was a triple cone mill with one polisher. Further
p.184 Mr. Blair stated that he was certain that the interview alleged with him prior to the order
p.194 never took place and that the old pamphlets were kept in a cabinet at the Appellants' department and were not exposed to the public
p.195. 32 in Georgetown so far as he knew.

5. The Appellants' servant, Mr. Chung, also
p.199 gave evidence and said that he had never
p.199. 23 visited the Respondent at his home to persuade him to buy the mill before the purchase. He said that he never showed or gave the Respondent any advertising pamphlets about any of the Appellants' mills and never showed the Respondent
p.201. 10 exhibit C or any similar brochure. The Appellants had pamphlets like exhibit C in a bin behind his desk on the ground floor, that a number of pamphlets were kept like that in an open bin. Further Mr. Chung stated that he never gave the Respondent the exhibit B leaflet to persuade him to buy the dryer, but that he
p.203. 4 gave it to the Respondent after he had been told by him that he was going to buy the dryer. He said that the Respondent came one day and asked if there were any leaflets on the dryer and was then given exhibit B. In cross-examination
p.215. 12 Mr. Chung stated that he could not remember if exhibit B was given before or after the order was placed.

6. The other exhibits in the case included a letter written by Mr. Blair (exhibit K.1) dated the 25th April 1961 to the Respondent in which Mr. Blair referred to a "quotation handed to you by our Mr. Chung" and exhibit V which is a specification of the mill and quotation.

7. Judgment was given by Khan, J., on the 12th November 1966 when he dismissed the Respondent's claim with costs. After having dealt with the evidence which had been before him Khan, J., made the following findings of fact in relation to the conflict of evidence regarding the alleged representations :- p.246 p.272

> "The only evidence adduced by the Plaintiff as to these oral representations was the Plaintiff himself. The Defendants denied the allegations through their servants Messrs. Chung and Blair. The pamphlets tendered as exhibits by the Plaintiff did not relate to the mill ordered. In fact the Defendants stated through their witnesses that no pamphlets were issued in relation to the mill purchased by the Plaintiff. I have considered the evidence adduced in this respect and I am satisfied that the Plaintiff decided to purchase both the mill and the dryer after investigating and witnessing the operation of Dr. Fraser's mill. Although Dr. Fraser's dryer was not yet in operation the Plaintiff decided to purchase a similar dryer."

After considering some further evidence the learned Judge then stated the following view in relation to the witnesses:-

> "He (the Plaintiff) is not the ordinary man to believe that the capacity of a mill or dryer would be increased if electrically driven. I find that no such representation was made to him. I believe and accept the evidence of Mr. Chung and Mr. Blair whenever their evidence is in conflict or at variation with the Plaintiff and/or his witnesses.... p.273

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I am satisfied that the capacity represented was that stated by Mr. Blair i.e. the mill intake was 3500 lbs. per hour and the dryer as that stated by Mr. Chung and Mr. Blair."

p.276. 34.

7. As to the nature of the contract between the parties the learned Judge held:-

"The facts show that the transaction between the Plaintiff and the Defendants is a Hire Purchase contract simpliciter. The Plaintiff exercised his option under Clause 9 of Exhibit "K12 and 14" and completed the sale and affirmed the contract after working both the mill and the dryer from December 1962 to September 1963. He had adequate time for testing the machinery before he decided to affirm the contract and pay off the defendants for both mill and dryer. The Plaintiff described the dryer to Mr. Chung several months before affirming the contract as a 'white elephant'. He was under no obligation to exercise the option to purchase a 'white elephant'. He knew what the machinery was capable of producing and decided to exercise the option notwithstanding his complaints."

The learned Judge accordingly dismissed the Plaintiff's action with costs.

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8. The Respondent appealed to the Court of Appeal of Guyana against the learned Judge's decision on the ground that the decision was unreasonable and could not be supported having regard to the evidence.

pp.281-330

9. The appeal was heard by Persaud, J.A., Cummings, J.A. and Crane, J.A., on February 19th and 20th, 1969 and judgment was given on the 16th June, 1969 allowing the appeal and ordering that the case be remitted to the learned trial judge for damages to be assessed.

10. Persaud, J.A., held that the learned trial judge's finding that exhibit C was not given to

the Respondent 'was against the weight of the evidence'. He gave two reasons for this finding; first that 'it was difficult to accept that Mr. Chung would not have given the Respondent exhibit C when he admitted giving him exhibit B and secondly that Mr. Grant (the Chairman and Managing Director of the manufacturing company) would have expected agents to give exhibit C to prospective purchasers'. p.291. p.291. 40

The learned judge went on to express the view that exhibit V was not given to the Plaintiff, 'in which case it would follow that the evidence of Messrs. Chung and Blair is tainted in this respect.' p.293. 20

Persaud, J.A., held that the brochure exhibit C was given to the Respondent and then went on to consider the effect of the representation and of Clause 11 of the Hire Purchase contract. He held that the representation as to the capacity of the rice mill amounted to a warranty and that on the principle enunciated by Lord Green in Webster v. Higgin (1948) 2 All E.R. 127 Clause 11 did not exclude the warranty, for it had been given prior to the signing of the agreement. The learned judge applied the same reasoning to reach his conclusion in relation to the dryer. p.297-299 p.298 p.303

11. Crane, J.A., in his judgment dealt with the principles applicable where an appellate court reverse a Court of first instant on an issue of fact and having dealt with the learned trial judge's findings went on to state that the Appellants' account of how the Respondent came to place the order 'teemed with improbabilities'. He criticised the learned trial judge for attaching weight to the Respondent's evidence that he neither kept books nor made income tax returns. He went on to say that the Appellant's story was that 'the Respondent agreed to purchase both mill and dryer on one and the same occasion, that is, when he saw their agents at Dr. Fraser's.' He again stated that this was the p.305 p.312. 21 p.313

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Appellants' case later on in his Judgment and criticised it as being a very improbable story. The learned judge then went on to make a finding that Exhibit C was issued to the Respondent and to criticise at length the evidence of Mr. Blair and Mr. Chung about the test they made in July 1963. The learned Judge held that Clause 11 did not exclude the warranty already in existence at the time of the hire purchase agreement, and that the exercise of the option to purchase did not exonerate the Appellants from the performance of their

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obligations under the hire purchase agreement. Accordingly Crane, J.A., allowed the appeal with costs and remitted the case for the assessment of damages.

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12. Cummings J.A., agreed with the judgments of the other two learned Judges.

13. The Appellants respectfully submit that this appeal ought to be allowed and that the judgment of Khan, J., was correct and ought not to have been reversed by the Court of Appeal. The case turned upon the credibility of witnesses and the learned trial judge's preference for the Appellants' witnesses should not have been overruled unless it could have been shown that he had misunderstood or misapplied the evidence. In attempting to show that this was the case the Court of Appeal made serious errors, and it is respectfully submitted that the reasoning of Persuad, J.A., and Crane, J.A., in relation to the crucial findings of fact made by them was based on a mistaken view of the evidence and an erroneous view as to the probabilities.

Persaud, J.A., held that exhibit C had been given to the Respondent for two reasons. The first reason given entirely ignored the fact that exhibit B was a current document, describing the dryer the Respondent bought, whereas exhibit C was obsolete and did not describe the mill which had been bought. The second reason was a mistake, for Mr. Grant had not said that he would have expected agents to give purchasers exhibit C, but exhibit G. a booklet of instructions for the

use of the mill. It is respectfully submitted that Crane, J.A.'s criticism of Khan, J., stemmed from a misapprehension of the purpose for which the evidence as to the books and income tax matters was quoted. Khan J., quoted the evidence for the purpose of showing that the Respondent was an energetic business man but not meticulously careful, who might have decided to buy the mill and the dryer simply as a result of seeing Dr. Fraser's mill. Further Crane, J.A., in basing his criticism of the Appellants' case on a finding that the Respondent agreed to purchase both the mill and the dryer on the same occasion, at Dr. Fraser's, misunderstood the Appellants' account which was that the Respondent decided to buy the mill on the occasion of the visit to Dr. Fraser's, but said nothing about buying the dryer until he went to see Mr. Blair a little time later. Again in the lengthy criticism he made of the evidence of Mr. Chung and Mr. Blair about the test in July 1963 the learned judge based his reasoning on mistaken views as to the evidence given. p.273

14. In relation to Clause 11 it is respectfully submitted that on a proper construction of the said clause the Court of Appeal were wrong in holding that the Appellants' liability for breach of the alleged warranty was not excluded. Alternatively it is respectfully submitted that the Court of Appeal were wrong in that on a proper interpretation of the contractual relationship between the parties they should have held that the Respondent's exercise of the option to purchase operated so as to terminate the Appellants' liabilities under the hire purchase agreement.

15. The Appellants respectfully submit that the Judgment of the Court of Appeal was wrong and ought to be reversed, and the Judgment of the Supreme Court of Guyana ought to be restored, and this appeal ought to be allowed with costs, for the following, (among other)

R E A S O N S

1. BECAUSE the Court of Appeal ought not to have reversed the findings of fact made by Khan, J.:

2. BECAUSE the Court of Appeal reversed the learned Judge's findings on a mistaken view of the evidence and erroneous views as to the probabilities:

3. BECAUSE on a proper construction of Clause 11 the Appellants' liability was in the circumstances excluded:

4. BECAUSE the Respondent's exercise of his option to purchase operated to determine the Appellants' liability.

J. G. LE QUESNE

GERALD DAVIES.

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