Privy Council Appeal No. 11 of 1970

Bookers Stores Limited – – – – – – *Appellants*

v.

Mustapha Ally – – – – – – *Respondent*

FROM

THE COURT OF APPEAL OF THE SUPREME COURT OF JUDICATURE OF GUYANA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 18TH JULY 1972

Present at the Hearing:

LORD MORRIS OF BORTH-Y-GEST

LORD SALMON

SIR EDWARD MCTIERNAN

[*Delivered by* LORD MORRIS OF BORTH-Y-GEST]

By their judgment dated 16th June 1969 the Court of Appeal of Guyana allowed the appeal of the respondent, Mustapha Ally, from a judgment of the Supreme Court of British Guiana (Khan J.) whereby the action brought by the respondent against Bookers Stores Limited, the present appellants, was dismissed. In appealing from the judgment of the Court of Appeal the appellants contend that the case was one in which the learned judge after a lengthy hearing and after considering the testimony of many witnesses had reached certain conclusions of fact. The appellants contend that the Court of Appeal ought not to have reversed those findings. Furthermore the appellants contend that in reversing findings of fact of the learned judge the Court of Appeal acted as to some matters on a mistaken view of the evidence and as to others on erroneous views as to the probabilities. The respondent did not appear and was not represented at the hearing before their Lordships. The consequential anxiety to ensure that no relevant matters would be overlooked was much present both in their Lordships' minds and in the minds of Counsel for the appellants.

The case related to events which took place in the year 1961 and in the years following. The respondent acquired from the appellants a Rice Mill and also a Dryer. He alleged that certain representations were made to him and warranties given. He claimed damages because he alleged that the warranties were broken.

Much evidence was heard by the learned judge in relation to many issues as to the way in which and the terms upon which the respondent became possessed of the Mill and of the Dryer. Indeed the trial of the action in the Supreme Court of British Guiana took place on no fewer

than thirty-four days between 25th February 1965 and 12th November 1966. Over twenty witnesses gave evidence. There was a considerable conflict of testimony as to how the transactions began and how they developed and in particular as to what statements and representations were made. There were issues which had to be resolved by the learned judge which involved questions of credibility. If a learned judge has reached conclusions on such questions after seeing and hearing witnesses and forming his opinion in regard to them it is accepted and in well known authorities it has been laid down that only by reason of some very telling factors or compelling circumstances will an appellate Court differ from such conclusions.

Although there was much conflicting evidence as to the events leading to the acquisition of the Mill and of the Dryer by the respondent it was beyond doubt that the respondent entered into a contract dated 26th March 1962 whereby he hired a Mill from the appellants on hire-purchase terms. It was a Grantex Model 30/60E Detached Rice Mill C/W Electric Motors. This is made clear in the Statement of Claim of the respondent. On 30th May 1962 he entered into a second contract by which he hired a Dryer on hire-purchase terms. The terms of each contract were similar. One clause (Clause 11) was in the following terms: "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." Clause 9 of the contracts gave the respondent an option to purchase. He exercised his options to purchase in September 1963. Following upon that he began the present proceedings by Writ dated 29th October 1963. One of the main contentions of the respondent was that before any contract was entered into the appellants had made certain representations as to and had given a warranty as to the capacity of the Mill. At the trial the case for the respondent was that the Mill, though it worked well, was not of the capacity represented and warranted. His case was that the representations were made orally and were amplified and supported by the handing to the respondent of certain literature in the form of a pamphlet. The case for the appellants was that the alleged oral representations were not made and that the warranty was not given and furthermore that the literature (in the form of the pamphlet) was not given to the respondent by anyone on behalf of the appellants. Where then did the truth lie in regard to these issues—which were of central importance? In regard to the Dryer the main issue concerned its performance. It was agreed by the appellants that on their behalf there had been a representation concerning the quantity that the Dryer could dry: they said that the performance of the Dryer was as represented. On all these important issues there was extensive evidence.

The respondent, who at the date of the trial was thirty-three years of age, was a contractor with some ten or twelve years of experience in such mechanical machinery as tractors, trucks, drag-lines and motor cars. He had no previous experience of rice mills. His evidence was that early in 1961 certain representatives of the appellants (including Mr. Blair and Mr. Chung) went to his house at Albion, Corentyne, Berbice, to discuss with him the purchase of a "Grantex" Rice Mill and Dryer. Mr. Blair was the General Manager of the Agricultural and Machinery Department of the appellants at Georgetown. Mr. Chung was the Manager of the appellants' branch at New Amsterdam. The respondent's evidence was that after he had explained how much he desired to spend he was shown "literature of the Grantex Mills and Dryer". He

identified what he said was "the identical pamphlet" shown to him. This was a pamphlet relating to Grantex Rice Mills manufactured by Lewis C. Grant Ltd. of Dysart, Fife, Scotland. To avoid any confusion as to the lettering of that Exhibit their Lordships will refer to it as the Mill pamphlet. Shortly stated the evidence of the respondent was that both Mr. Chung and Mr. Blair drew his attention to an illustration of a multi-stage mill marked S-20/4 with some words at the side which read "No. 72 Self-Contained Mill (3 cones 1 polisher) with cylinders for Rice Grading". That illustration was of a one-ton mill but the respondent said that he was told that he could acquire a two-ton mill which though similarly built would have a higher capacity and that reference was made to another page of the pamphlet which under various numbers recorded the capacities and specifications of "Self-Contained" Rice Mills. Both orally and by reference to certain recorded figures in the pamphlet the respondent said that he was told that the two-ton mill which he could acquire would have a capacity of between 4,300 and 5,600 lbs. of paddy per hour. The respondent further said that he was told that the appellants had erected a one-ton mill at Dr. Fraser's place at East Lothian: he said that he was then taken by car to that place where he saw the mill though it was not in operation. He further said that on the same day there was a discussion in relation to a dryer and that he was shown a pamphlet relating to Grantex Grain Dryers and that reference was made to a page showing capacities of dryers of particular sizes. In reference to a size that was noted the pamphlet shows that when reducing moisture content by 6% using dry air at 150°F. the capacity would be four tons per hour. On the pamphlet it is noted that capacities are based on reducing moisture content from 22% to 16% under atmospheric conditions of 60°F. and with relative humidity of 70%: it was set out that capacities under other climatic conditions such as tropical or sub-tropical would be given on receipt of details of average temperature and humidity prevailing. The respondent said that the appellants' representatives spent some three or four hours with him that day and gave him an encouraging picture of his prospects of outstripping competitors if he acquired both Mill and Dryer. He said that about a month later he was taken by Mr. Blair and Mr. Chung to New Amsterdam where they also saw Mr. Esslemont and that there was a repetition of what he had previously been told and further that he was told that if he bought an electrically driven (as opposed to a belt driven) mill and dryer he would have a capacity greater by 50% more than had been stated. Questions as to price were then raised and, commencing on 25th April 1961, there resulted the considerable correspondence which is amply referred to in the judgment of the learned judge. The later history is recorded in the judgments now being considered and their Lordships do not find it necessary to recite the details of the evidence relating to later events. In November 1962 power was obtained so that the Mill and Dryer which had been erected could be tried out. There was an official opening in March 1963. After the respondent had made complaints and expressed dissatisfaction there were various tests made as to the performance of the Mill and Dryer. A great deal of evidence was given in regard to these tests. This evidence is referred to by the learned judge in his judgment and he records his conclusions.

From what their Lordships have stated it is apparent that it was an issue of central importance in the case whether the contract in regard to the Mill was entered into after and on the basis that a representation amounting to a warranty concerning capacity had been made. Within this issue were all the questions as to what was said and represented to

the respondent and the question whether as part of or as supporting a representation the Mill pamphlet was handed to the respondent.

The evidence of Mr. Blair and that of Mr. Chung differed in most important respects from that given by the respondent. Mr. Chung said that the first time he met the respondent was at Dr. Fraser's place at East Lothian. Mr. Chung had gone there for a discussion with Mr. West a contractor who was erecting Dr. Fraser's mill. Dr. Fraser's son introduced the respondent who said that he had been trying to contact Mr. Chung and had been told that he (Mr. Chung) was at Dr. Fraser's place. The respondent then explained that he had bought some land and was interested in purchasing a rice mill and wished to have an explanation of the working of Dr. Fraser's mill. By permission the mill, then in operation, was seen and its working explained. Mr. Chung then went to discuss with Mr. West about the erection of Dr. Fraser's dryer and later again saw the respondent. The respondent told him that he had visited other types of mills, that he favoured the Grantex Mill and asked for a quotation for a mill like Dr. Fraser's but of a two-ton capacity. Mr. West and Dr. Fraser's son gave evidence and much of what they said confirmed the evidence of Mr. Chung. Mr. Chung said that he would give a quotation if the respondent called at the store on the following day. The respondent did so and a discussion took place in the course of which Mr. Chung said that a mill could be supplied with a capacity of from 3,500 to 5,000 lbs. Mr. Chung said that he gave the respondent a document recording specifications and quotations with reference to a 30/60 Grantex Detached Type Rice Mill. It was such a Mill that the respondent, as was set out in his Statement of Claim, later hired and much later purchased. But Mr. Chung said that he never showed the respondent any pamphlet or brochure relating to the Mill, as the respondent had suggested, and never gave him any pamphlet relating to the Mill or any other mill: nor had he visited the respondent's home to persuade him to buy the Mill. The quotation that he had given had been in reference to a belt-driven mill but later the respondent said that he was considering an electrically-powered mill. As to the Dryer Mr. Chung said that he gave the respondent a leaflet in regard to it: he did not give it in order to persuade the respondent to purchase but only after the respondent had said that he was going to buy a dryer.

Mr. Blair's evidence was to the effect that the respondent called to see him in 1961 and said that, being interested in purchasing Grantex rice milling equipment, he had been in touch with Mr. Chung: he wanted a quotation for additional equipment consisting of a dryer and a boiler. Later he said that he would like an electrically driven mill and dryer. Mr. Blair said that prior to the time when the respondent gave his order he (Mr. Blair) had not gone to the respondent's house. He said that he did not at any time show the respondent any brochure relating to the Mill: nor had he seen any one showing any such brochures to the respondent. Furthermore he said that the pamphlet or brochure referred to by the respondent was not in use but was obsolete at the time mentioned. Though there were such brochures at the branch office in New Amsterdam they had been obsolete since 1956. The respondent had said that he wished to order a mill like Dr. Fraser's mill that he had seen but wished it to be of two-ton capacity. Mr. Blair said that he had never told the respondent that an electrically-driven mill would have a 50% or any greater capacity than a belt-driven mill: nor had he discussed capacity or production capacity per hour with the respondent: he said that he would have expected that a range of capacity of from 3,500 to 5,000 lbs. of paddy per hour would have been indicated to the

respondent. Mr. Blair said that the rice-mill hired to and bought by the respondent was a " detached " mill as was Dr. Fraser's. The mill shown on the pamphlet produced by the respondent and denoted as S-20/4 is a self-contained mill and the appellants had not sold a self-contained mill in Guyana.

Their Lordships do not think that any useful purpose would be served by summarising all the features of the considerable body of evidence which the learned judge heard and had to assess. They have already indicated the range of the issues as to which there was considerable conflict. In his judgment the learned judge referred to the claims made by the respondent. He said:

> " By paragraph 4 of the plaintiff's statement of claim he alleges that the defendants by their servants *orally* warranted that the mill would be capable of milling more than 5,000 lbs. of paddy per hour and that the Dryer would be capable of drying more than 4 tons of white rice paddy (or more than 2 tons of parboiled paddy) per hour. Plaintiff also alleges in paragraph 5 that defendants represented that the mill being electrically driven would have a greater capacity than a belt-driven mill. 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 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."

The learned judge then recorded that the impression he had formed of the respondent was that he was a keen if not shrewd businessman. Some complaint was made in the Court of Appeal in regard to a reference made by the learned judge to what the respondent had said concerning his business activities including his methods of dealing with tax affairs. In their Lordships' view the reference was only made as part of a consideration by the learned judge of the respondent's personality and capabilities. The learned judge continued—

> " He 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 wherever their evidence is in conflict or at variance with the plaintiff and/or his witnesses. The mill order was a ' detached ' mill and not a ' self-contained ' mill which carried iron platform. As I said before, the plaintiff is a young, intelligent and enterprising businessman. He stated that he began business at the age of 14. If an iron platform was part of the order the plaintiff would have included this in his complaints. His complaints were that the mill and dryer have not the capacity claimed by the defendants and also that the dryer was causing excessive broken grains. I am satisfied that the capacity represented was that stated by Mr. Blair, *i.e.*, the mill intake was 3,500 lbs. to 5,000 lbs. per hour and the dryer as that stated by Mr. Chung and Mr. Blair."

In the Court of Appeal criticism was made of the use by the learned judge more than once of general words expressing acceptance of the testimony of Mr. Chung and of Mr. Blair in preference to that of the respondent. Their Lordships agree that it is generally much more helpful to amplify reasons why a preference is expressed for the evidence of one witness rather than another but in cases where credibility is involved a finding is not to be rebutted merely because it is comprehensive as well as definite.

Their Lordships must proceed therefore to examine the main reasons which prompted the Court of Appeal to reverse the findings of fact of the learned judge. There was but one ground of appeal set out in the Notice of Appeal to the Supreme Court. It was that " The decision of the learned trial judge is unreasonable and cannot be supported having regard to the evidence." As has been pointed out there were issues as to whether certain representations (resulting in warranties) had or had not been made. It is difficult to see how a finding either way could be said to be unreasonable. As evidence was given which could have supported either conclusion the only way in which the conclusion in fact reached could be attacked would be to show that the learned judge must have been in error in believing the evidence which he accepted. The other issues in the case related to the actual capacities of the Mill and of the Dryer. Various tests were made. There was a mass of evidence concerning these tests and their results. A heavy onus lay on those who attacked the findings of fact of the learned judge.

One of the conclusions reached by the learned judges in the Court of Appeal involved a direct contradiction of the finding of fact of the learned judge. They held that the pamphlet or brochure in regard to the Mill had in fact been given to the respondent as he had asserted. If it had been given there would be strong support for the respondent's case that the Mill had been represented to him as capable of milling 4,300 to 5,600 lbs. of paddy per hour rather than the figures of 3,500 to 5,000 lbs. per hour. One reason advanced by Persaud J.A. for his conclusion was that it was difficult to accept Mr. Chung's evidence that he had not handed the brochure about the mill when he admitted having handed the brochure about the Dryer. Persaud J.A. said " It seems more probable than not that Mr. Chung did give the brochure to the appellant and if he did, surely it must be to represent to the appellant what was the milling capacity of the machinery in which the appellant was interested: and this notwithstanding the fact that the brochure related to a self-contained mill, whereas the appellant bought a detached mill."

The learned Judge of Appeal considered the evidence concerning the document (recording the specifications and quotations with reference to a 30/60 Grantex Detached Type Rice Mill) which Mr. Chung said he had given to the respondent. He came to the conclusion that Mr. Chung had not given it. So he said that it followed that the evidence of Mr. Chung and Mr. Blair was in that respect tainted, " and if it is, one ought to approach the rest of their evidence with caution, particularly with respect to the alleged representation. On the balance of probabilities, I would say that the representation as alleged by the appellant was made as regards the capacity of the Mill, which capacity the Mill has been unable to achieve ". With every respect their Lordships cannot accept that any of these reasons warranted a rejection of the evidence of Mr. Chung whose testimony had been accepted by the learned judge who saw him. Nor is the reasoning valid that because a brochure was given in regard to the Dryer one must have been given in regard to the Mill. The brochure concerning the Mill which the

respondent produced was one that was obsolete and not in use. Both Mr. Chung and Mr. Blair said that it had not been handed by them to the respondent. It is difficult to understand how an appellate court could hold that an acceptance of the evidence of Mr. Chung and Mr. Blair could be said to be "against the weight of the evidence." The learned Judge of Appeal said that Mr. Grant (who is the Chairman and Managing Director of Lewis G. Grant Ltd., the makers of Grantex Rice Mills and Dryers) had said that he would have expected the agents to distribute the brochure concerning the mill to prospective purchasers. But what Mr. Grant said was that he would expect the appellant to supply the respondent with a booklet such as Exhibit G. That did not relate to the mill: it consisted of instructions for operating Grantex Grain Dryers.

The learned Judge of Appeal (Crane J.A.) recognised the great importance in the case of the issue as to whether the Mill pamphlet was handed to the respondent: on it there hinged the question whether or not there was the likelihood that a representation as alleged by the respondent was made. He said that if the learned judge's finding could not be sustained "then in the face of the very positive denial of it by the respondents it appears to me only reasonable to conclude that the representations alleged by the appellant ought to prevail, for then it can be rightly presumed I think that the denial was prompted by the fact that the respondents well knew that the appellant had spoken the truth concerning it." He proceeded to express the view that the learned judge had failed to consider the probabilities and in particular the probabilities which resulted from the very fact of the possession by the respondent of the pamphlet which he produced: in effect he asked the question—how could the respondent have got the pamphlet unless he was given it by the appellants?

With every respect their Lordships do not think that it ought to be assumed or deduced that the learned judge at the trial had failed to give any consideration to the probabilities. At the trial the respondent produced a pamphlet and said that it had been handed to him by the agents of the appellants. In coming to a conclusion as to whether or not the respondent was supplied with the pamphlet by the appellants no one could for one moment be unmindful of the fact that the respondent produced a pamphlet which, even if obsolete, was a pamphlet relating to a mill comparable with that which the respondent hired and later bought. But it was not for the appellants to explain how it was or why it was that the respondent had in his possession the pamphlet which he produced. Their Lordships recognise that a reading of the evidence may lead a reader to ponder as to where, on various matters, the truth lay: those ponderings could only be resolved by seeing and hearing the witnesses. Many of the observations made by the learned judges in the Court of Appeal may suggest that there were respects in which the judgment of the learned judge might have been more ample or more explicit but their Lordships do not consider that it can be said that it was "evident that there was no judicial approach in balancing the respective probabilities and improbabilities in the cases urged on behalf of both sides."

It was further said that the learned judge had made no attempt "*to consider* and evaluate the truth of" the respondent's testimony, that it was after a discussion at his home with the appellants' agents that he was taken by them to Dr. Fraser's rice-mill to see the operation of the mill. But this was one of the matters about which there was a conflict of evidence. The learned judge had to decide whom he believed. It is

true that on occasions enquirers about a rice-mill were taken by Mr. Chung to Dr. Fraser's mill to see its working. But on this occasion according to Mr. Chung the respondent had himself gone to Dr. Fraser's place prior to seeing Mr. Chung. It was for the learned judge to decide whether Mr. Chung was telling the truth.

In considering the various issues in regard to tests that were made it is clear that it is important to have in mind what were the matters to be tested. In regard to the Mill it was its capacity that was being tested. The significance of any test must depend upon the question as to what was the capacity represented by the appellants. Did the appellants represent that the Mill would have a capacity of more than 5,000 lbs.: or a capacity within the range of 4,300 to 5,600 lbs.? The learned judge held not. If the representation was of an intake of between 3,500 lbs. and 5,000 lbs. per hour, as was held, then the issue was whether on the test the Mill was found to be capable of such an intake. The paddy for the test that took place in July was supplied by Dr. Fraser. It was said to be of poor quality. Mr. Blair said that the reason why Dr. Fraser was asked to supply paddy was that it was intended to compare the performance with that of Dr. Fraser's mill. It may well be unfortunate if poor quality paddy was used for a test. It was however for the respondent to prove any assertion that he made that there was a breach of a warranty (the result of a representation) given to him. That was an onus which it was for the respondent to discharge.

The conclusion of the learned judge at the trial was that in regard to the Mill the representation was that the intake was 3,500 lbs. to 5,000 lbs. per hour. The finding of the judge was that the July test showed that the Mill was capable of 3,500 lbs. and over: the later test showed that it was capable of over 4,000 lbs. per hour. Only if it were held that the representation (and warranty) was of a capacity of over 5,000 lbs. per hour or of a range of 4,300 to 5,600 lbs, per hour would a breach have been shown. The learned judge was satisfied that the performance of the Mill was as represented to the respondent. Likewise he held that there was no reliable evidence that the performance of the Dryer fell short of what had been represented. In regard to the tests it was an undoubted fact that the quantities of broken grains were not only disappointing but excessive. There was much evidence directed to the questions as to why this had been so. Expert witnesses were called who gave evidence in regard to the mechanical condition of the machinery. The learned judge had to decide which witnesses most impressed him. His general conclusion was that the excessive quantity of broken grain was to be attributed partly to the fact that poor quality paddy was used and partly to the fact that there was unskilful operation of the machinery.

If there had been an express collateral warranty which was broken the appellants did not contend that they would not have been liable.

Their Lordships fully recognise that the learned judges in the Court of Appeal devoted much care to a consideration of the appeal and that they formed the view that it was a case in which it could be said that the learned judge at the trial had not taken proper advantage of his having seen and heard the witnesses. In their Lordships' view this was not established. Their Lordships do not consider that there were adequate or sufficient reasons for reversing the clear and definite conclusions of fact of the learned judge who after a lengthy investigation had to decide which witnesses appeared to him to be dependable.

Their Lordships will humbly advise Her Majesty that the appeal should be allowed and the judgment of the learned judge restored. The respondent must pay the costs in the Court of Appeal and of the hearing before the Board.

3131997—1 Dd. 178191 7/72

In the Privy Council

BOOKERS STORES LIMITED

v.

MUSTAPHA ALLY

DELIVERED BY
LORD MORRIS OF BORTH-Y-GEST

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