Privy Council Appeal No. 28 of 1944

Beninson and others - - - - - - - - *Appellants*

v.

Shiber - - - - - - - - - - - *Respondent*

FROM

THE SUPREME COURT OF PALESTINE AT JERUSALEM

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 2ND MAY, 1946

Present at the Hearing:

LORD PORTER
LORD DU PARCQ
SIR JOHN BEAUMONT

[*Delivered by* LORD DU PARCQ]

The appellants are the three daughters and sole heiresses of the late Mrs. Menucha Valero, widow of Jacob Valero. Mrs. Valero died on the 5th March, 1933. At the end of the year 1928 she had entered into an agreement with the respondent, under which he was to build an apartment house for her, and to provide the necessary money to pay for its erection. The obligation which she then incurred had been met only in part at the time of her death and, during her lifetime, the original building contract was followed by a series of complicated transactions culminating in an agreement which purported to settle accounts finally between Mrs. Valero and the respondent. In the result it is admitted by the appellants that there is due to the respondent the sum of LP1298.416. The respondent claims a much larger sum, but in the District Court did not succeed in recovering more than the amount which was admittedly due. He appealed to the Supreme Court, where it was held that he was entitled to a total amount of LP4560.150, of which LP4500 was to carry interest at 9 per cent. from the 7th June, 1934. The appeal to His Majesty in Council is against this decision of the Supreme Court and the appellants ask that the judgment of the District Court be restored.

The appellants were sued both in their personal capacity and as heiresses of their deceased parents, " representing the estate of their said parents ". In both Courts they were adjudged to be liable only in this latter capacity, and it is not now suggested that they are personally liable. Nor does any question now arise as to their indebtedness in the sum of LP60.150 which formed part of the sum awarded in each Court.

The respondent founded his claim on the final agreement made with Mrs. Valero, the date of which was the 5th October, 1932. Mrs. Valero purported to make that agreement both in her personal capacity and as representative of the first-named appellant, " as per general power of attorney executed by her in Jerusalem on the 14th March, 1930 ", and also of the other two appellants. Nothing now turns on the question whether the appellants are to be regarded as parties to the agreement, and this is fortunate, since their Lordships have not before them either the original

agreement or a complete copy of it. The exhibit with which their Lordships have been supplied is itself an incomplete copy, omitting the names of the parties who set their hands and seals to it as well as those of the witnesses who attested it. These are by no means immaterial omissions, and indeed the respondent made a point of the fact that Mr. Rubin, an architect engaged by Mrs. Valero, was one of the witnesses. There would have been nothing in the Record to establish this fact, or to call their Lordships' attention to it, had not one of the judges of the Supreme Court mentioned it in his judgment. Their Lordships have thought it right to refer to this matter in order to emphasize the importance of putting their Lordships' Board in possession of all relevant documents.

Although the action was brought on the agreement of the 5th October, 1932, it is necessary to narrate the earlier history of transactions between the respondent and Mrs. Valero in order that the point on which the Supreme Court differed from the District Court may be appreciated. The story begins on the 28th December, 1928, when the agreement in writing to which reference has already been made was entered into between Mrs. Valero, purporting to act " on behalf of herself and on behalf of the heirs of the late Mr. J. H. A. Valero ", (her deceased husband), and the respondent, described therein as " the architect contractor ". The agreement recited that Mrs. Valero was desirous of erecting a five story building on plot No. 12 situated on King George Avenue in Jerusalem in accordance with plans prepared by the respondent, and that the respondent had agreed to execute the work at a named price per square metre. It was agreed that certain further sums were to be paid for the respondent's work as architect and for some extras which had already been agreed by way of departure from the original specification. The building was to be " completed and fit for habitation three months after Moharrem 1st, 1348 ", that is to say by a date in June, 1929. Any variations were to be " discussed with and approved by the proprietor or her representative " and such approval was to be given in writing, " or failing which shall be stated in the presence of two witnesses ". A further provision which assumed some importance in the course of the hearing was that the majority of artisans and workmen engaged on the building by the architect contractor should be Arabs. Most important, however, for the purposes of the present dispute, were the provisions as to payment, which it seems desirable to set out fully. They are as follows:—

" 3. The architect contractor shall find the money for the building and charge the proprietor for same at the legal rate of 9 per cent. per annum on the total amount discounted in advance.

4. The interest on the total amount shall begin to function 7½ months preceding Moharrem 1st, 1348, or 1929, i.e. from October 23rd, 1928.

6. If the proprietor cannot pay all interests in advance, she shall give instead bills of exchange, the discount on which shall be charged to the proprietor. Bank discount rate shall be taken as a basis.

7. The plot No. 12 situated on King George Avenue on which the proposed five story building is to be erected and belonging to the said proprietor shall be mortgaged in whole with the architect contractor for a period not exceeding 5 years beginning from the date of this present contract with all and every structure erected on it in the future. No other mortgage shall be made on the said plot of land and buildings while the present mortgage holds good.

8. The said land and buildings shall be mortgaged with the architect contractor for a sum of LP10000.000 (ten thousand pounds) bearing yearly interest as stated above.

9. The balance left over after deducting the mortgage amount shall be given in bills payable within one year from October 23rd, 1928, and the interest charged as mentioned in clause 6.

10. Should the proprietor fail to pay the first yearly interest on the amounts due, this shall *ipso facto* constitute a breach and cause the whole mortgage amounts to fall due.

15. The proprietor shall be at liberty to release the property from mortgage at any time during the five years and the architect contractor shall accept and effect such release immediately provided all amounts and interests whether covered by the mortgage, bills of exchange or any other outstanding accounts have been fully paid up.

20. All accounts shall be made out and bills signed together with the signing of this agreement.

21. The interest on any amounts paid up before maturity shall be refunded ".

The work was begun, and when the ground floor had been partly built Mrs. Valero called in Mr. Rubin to act for her as " supervising architect ". He gave evidence at the hearing in the District Court. The learned judge thought him an honest witness, and had " no hesitation in accepting his evidence ". He said that the house was completed about the end of July, 1929. On the 7th June, 1929, a mortgage was executed in fulfilment of clause 8 of the agreement of the 28th December, 1928. The consideration was expressed to be the sum of LP10.000 paid by the respondent to Mrs. Valero. On the same day a statement of account was drawn up after a discussion between the respondent and Mr. Rubin. The accounts were agreed between them and the document was typed in the respondent's office. It was produced at the trial. It shows a net sum of LP12664.000 to be due to the respondent for his work under the contract. From this the " mortgage amount " is deducted, leaving LP2,644.000. Particulars of four bills of exchange received from Mrs. Valero are then set out. One of them is stated to be for a total sum of LP2934.790, made up of " LP2664.000 plus 9 per cent. discount plus Bank's commission " and to be due on the 23rd October, 1929. Of the other three, one is stated to be in respect of permit fees and, by the addition of " 9 per cent. discount plus Bank's commission ", amounts to LP154.612; the next is for the " cost of white stones " which, with a like addition, amounts to LP35.138, and the last (due on the 7th December, 1929) is described as being

Interest 9 per cent. discounted on LP10,000 for period October 23rd, 1928, to June 7th, 1929 (mortgage date)	=LP596.000
The interest on and including LP596.000 from June 7th, 1929, to December 7th, 1929...	=LP624.080
Bank's commission ¼ per cent.	= LP1.560
	LP625.640

It is important to observe that, except for the reference to " cost of white stones ", which was never very satisfactorily explained, there is nothing in this account to suggest that payment was due from Mrs. Valero for any extras, although a deduction is made in calculating the cost of the work for " allowance agreed upon for omission on terrace ".

During the years 1928-1931 Mrs. Valero made payments to the respondent which amounted, as the learned judge found, accepting the evidence of Mr. Rubin, to at least LP2560.393, in which sum is included the purchase price of another plot (No. 1) in King George Avenue which the respondent bought from Mrs. Valero on the 22nd October, 1931, on the terms that the price should be set off against her debt.

On the date of this purchase, the 22nd October, 1931, the respondent prepared a statement of interest alleged to be due to him which, although it has at its foot the words " The foregoing amounts have been checked, found correct and approved ", was disavowed by the respondent's counsel at the trial and was not alleged to have been the subject of any agreement. Its importance is that it shows that the respondent's method of

computing interest at 9 per cent. was to charge nine pounds as interest in respect of each ninety-one pounds lent, an arithmetical inexactitude much in his own favour, and also that he was (as is now admitted) charging compound interest on bills of exchange given him by Mrs. Valero.

Their Lordships will not attempt the task, which on the materials available would be impossible of fulfilment, of setting out the details of the transactions between the parties. The number and amount of the bills of exchange given by Mrs. Valero cannot be stated with precision, and the payments in respect of those known to have been given cannot in every case be ascertained. It is not surprising in the circumstances that the parties, or at any rate the respondent, thought it desirable to arrive at a final accounting. The agreement of the 5th October, 1932, on which the respondent founded his action, was the result of this desire. How far it satisfactorily served its ostensible purpose is one of the questions in this case.

It recited (inter alia) that the respondent had " invested " in the erection of an apartment house on King George Avenue " a sum amounting to LP12,700 more or less, as a loan to the estate " and that the estate had failed to pay " the interest " due to the respondent " on said loan ", so that the amount presently due to him was " over LP17,000 ". The trial judge thought that the figure " LP12,700 more or less ", might be taken as the equivalent of the LP12,664 which had been agreed on the 7th June, 1929, and their Lordships are not disposed to differ from this view. The agreement further recited the execution of the mortgage for LP10,000 " bearing legal interest as security on the money advanced by him " (the respondent) for the erection of the house, and the fact that the respondent was now claiming " about LP7,500 over and above the LP10,000 ", and finally, that the parties had " now met and reached a final accounting amongst themselves ". The terms of the agreement which followed these recitals provided for the sale by Mrs. Valero to the respondent of the house which he had built for her at the purchase price of LP13,000. This sum was not to be paid over, but to be deducted from the total amount due to the respondent. Mrs. Valero was given an option to repurchase the house which was to hold good " until the end of the year 1351 A.H.", that is, until a date in 1933. The effect of these provisions, according to the law of Palestine, was to create a mortgage in the form of a conditional sale, with the result that Mrs. Valero would not lose her right to redeem when the prescribed date was reached. After the LP13,000 had been applied to the purchase of the house it was agreed that the total sum due to the respondent " inclusive of interest up to the 17th day of June, 1934 ", was LP4,500 and no more. To secure this sum Mrs. Valero undertook to execute a mortgage on certain lands near Romema, in Jerusalem, in favour of the respondent. The interest charged on the LP4,500 was to be 9 per cent. but the respondent (in the words of the agreement) thereby declared that the interest had already been included in the mortgage and reckoned with as paid up to the 7th day of June, 1934. It was incumbent on Mrs. Valero to register this mortgage (an obligation which she failed to fulfil), and the respondent was to advance her the sum of LP90 necessary for that purpose. The agreement conferred two benefits upon her, first, that she was to be entitled to collect the rent of the apartment house up to April, 1933, and secondly, that a number of specified promissory notes made by her, as well as other unspecified notes which she had made, should be redeemed by the respondent and returned to her. The value of the latter benefit is questionable. The largest of the specified notes, one for LP2,700 due on the 1st September, 1932, had (as was admitted by counsel for the respondent) already been fully satisfied and should have been delivered up at an earlier date. Of the remaining terms it will suffice to mention one, by which Mrs. Valero was to pay LP3,000 " as liquidated damages " in the event of any breach by her of any term in the contract. It will be convenient to say at once that both Courts in Palestine have held that this sum was in truth a penalty, and that the respondent made no claim to it before their Lordships' Board.

After Mrs. Valero's death the appellants made no payments to the respondent but it was not until the 18th August, 1941, that he instituted proceedings against them. It is not for their Lordships to speculate as to the motives which may have prompted this delay. It is legitimate to observe, however, that if, as was alleged, the long lapse of time from the date of the agreement sued on made it difficult for the respondent to preserve or to procure evidence, he had only himself to blame for this misfortune.

By his Statement of Claim the respondent claimed (in addition to the sum of LP60.150 admittedly due and the sum which is now admitted to be a penalty) the capital sum of LP4,500 with interest thereon. By their Defence the appellants alleged that the sum of LP4,500 consisted " entirely of excessive and compound interest " and so was " not recoverable in law ". They pleaded the agreement of the 28th December, 1928, and, after setting out the payments said to have been made by Mrs. Valero and the set off of LP13,000, alleged that on the 5th October, 1932, the sum of LP1238.266 was all that remained due to the respondent and that this sum consisted wholly of interest, so that " no further interest could have accrued thereon ". Finally, they prayed that the whole transaction might be re-opened and an account taken between the respondent and the appellants.

The appellants were thus invoking the Ottoman Law of Interest, which fixes 9 per cent. per annum as the maximum rate of interest " for all ordinary and commercial debts ". It further provides that if a higher rate be agreed the rate shall be reduced to 9 per cent. and so prevents parties from " contracting out " of the terms of the enactment. An article which might have been of importance if the respondent's delay had been further prolonged forbids the recovery of interest exceeding the total capital amount of the debt. There is also an article (numbered 5) which (with an exception not material in this case) forbids the charging of compound interest, but this is subject to the proviso that " if the debtor has paid nothing on account for three years or if the creditor and debtor have agreed that the accumulated interest for three years shall be added to the capital, compound interest for three years, but not more, shall be added to the capital." Article 6 is of particular importance in this case. It was before their Lordships in two differing translations. That which was adopted both by the trial judge and by the Supreme Court, and was preferred by the respondent, was made by two highly qualified persons, as appears from the judgment in *Azem* v. *Rayis* (1940) P.L.R. 199, at pp. 203-4, and for the purposes of this appeal their Lordships readily accept it. It is as follows:—

> " During the continuation of the transaction of lending and borrowing between the creditor and the debtor, whether the account was transferred or the deed of debt was renewed or changed, or not, claims for the reduction of usurious interest to its legal rate are hearable. But if the debt was paid in full and the relation between the creditor and the debtor was cut, then claims for the recovery of usurious interest are not hearable."

It must be added that the Usurious Loans (Evidence) Ordinance in force at all material times, an enactment passed in view of the Ottoman law of evidence, made it plain that the Court, when reviewing a money-lending transaction, was entitled to receive and act upon any evidence, oral or in writing, notwithstanding objections which, but for this Ordinance, might have been taken to it.

The learned Relieving President, who tried the case with conspicuous care and patience, accepted the appellants' figures, held that the transaction between the parties was " a continuing transaction of lending and borrowing ", and gave judgment for LP1298.416, made up of LP1238.266 and the further sum of LP60.150 admittedly due. The Supreme Court (Gordon-Smith, C.J., and Rose, J.), reversed this decision and gave judgment for the full amount of LP4,500 with interest as well as for the sum of LP60.150. They based their decision on two grounds, (1) that

article 6 was inapplicable to the transactions in question, which they held not to be transactions of " lending and borrowing ", (2) that the 1932 agreement constituted a settled account which could not be re-opened. With one exception, to which it will be necessary to refer later, neither of the learned judges dealt with any of the other questions which had been considered at the trial.

The reasons which the learned judges of the Supreme Court gave for their decision do not commend themselves to their Lordships. As to the first, it is, of course, true that where a building contract is concerned one does not normally expect the relationship of lender and borrower to exist between builder and building owner. It is, however, not less true that the parties to such a contract may so frame it as to create that relationship. In the present case the respondent agreed to " find the money for the building " and Mrs. Valero was to pay him interest on the money so found. If a man finds money for another and expends it on that other's behalf and in accordance with his request, he is lending it although he never physically transfers it to the borrower. This may be true even where, as here, some of the money is due to the lender himself for his services. It is not necessary in such a case, in order to constitute a loan, that money should be handed over by the lender to the borrower and by him returned to the lender as the reward for his services. The same result is arrived at if the parties, by the terms of their contract and by their course of dealing, have shown an intention that the moneys payable by the debtor should be provided or " found " by the creditor and treated as having been advanced by him. In their Lordships' opinion the whole course of dealing here is consistent with the relationship of lender and borrower having been established, and it is to be observed that the recitals of the 1932 agreement, which have already been quoted, refer to the respondent's " loan to the estate " and to " the money advanced by him " for the erection of the house, and that the respondent in his evidence spoke of the transaction in terms appropriate to a loan. Their Lordships are therefore of opinion that article 6 is applicable to the transactions in question. It thus becomes unnecessary to express any opinion on the submission made on the appellants' behalf that, even if article 6 were not applicable, articles 1, 3 and 5 would afford them a defence to the respondent's claim.

As to the second ground of the Supreme Court's decision, their Lordships can find no good reason for thinking that by purporting to settle final accounts parties can evade the imperative provisions of the law. Whatever form an agreement between lender and borrower may take, if it is once suggested that excessive interest is being charged, and if the account is still open to review in accordance with article 6, the Court is entitled and indeed bound to investigate the transaction which the agreement purports to regulate or to close, and, if it be found that the performance of the agreement will result in excessive interest being paid, it is the duty of the Court to reduce the interest to the legal rate.

For these reasons their Lordships, with all respect to the judges of the Supreme Court, cannot agree with their reasons for setting aside the judgment of the trial judge. It remains to be considered whether that judgment can properly be attacked on other grounds. The Supreme Court did not think it necessary to deal with those points which would arise only if a view differing from their own were taken on appeal to His Majesty in Council, and their Lordships regret that they have not the advantage of knowing the views of the learned judges of that Court upon them. Their Lordships have had the benefit, however, of a full argument on all relevant matters from counsel for both parties.

It was submitted by counsel for the respondent that, assuming the learned judge to have been right in re-opening the transaction, he had erred in many particulars. One only of these was animadverted upon in the Supreme Court, and that only in the judgment of Rose, J. The trial judge was naturally much impressed by the fact that, in the agreement sued on, no credit whatever was given for the payments which had been

made by Mrs. Valero. The respondent, whom the learned judge regarded as an unsatisfactory and untrustworthy witness, explained this by saying that there were set off against these payments the cost of a number of "extras" which also were not referred to in the agreement, and also the increased cost of employing Jewish, instead of Arab, labour at Mrs. Valero's request. The judge did not believe the respondent's evidence on this point. Rose, J., thought that a letter written by Mrs. Valero, which was put in evidence by the respondent, showed that the judge was wrong in taking the view that Mrs. Valero was not shown to have been under a liability for extras. Their Lordships have considered what weight should be attached to this letter which, though dated the 5th February, 1929, refers, curiously enough, to a plan dated the 5th March, 1929. It asks that variations marked on the plan should be carried out, and states that the difference in cost "shall constitute an extra". Having carefully read the respondent's evidence, their Lordships are satisfied that, notwithstanding this letter, the judge was amply justified in finding that the respondent had no claim for extras. There was no satisfactory evidence to prove that the instructions contained in the letter had been carried out. The plan was not produced, and there was nothing to show the nature or extent of the alleged variations. Mr. Rubin said that no claim in respect of extras was put forward when the 1932 agreement was made, and the fact that Mr. Rubin witnessed that agreement, to which great weight was attached by Rose, J., does not in their Lordships' opinion impair the value of his testimony. Mr. Rubin is an architect, not a lawyer or an accountant. The agreement was evidently drawn by a skilled hand, which was not Mr. Rubin's, and there is no evidence to suggest that at the time when it was executed Mrs. Valero had the benefit of any legal advice. As to the alleged charge for Jewish labour, there is nothing in the terms of the original agreement to justify such a charge, and the respondent failed to satisfy the judge that he was ever authorised to make it. Moreover, the fact that the account prepared in June, 1929, when the building was almost completed, does not include the charges for extras and in respect of Jewish labour which it is now sought to maintain, seems to their Lordships strongly to support the view of the trial judge. Their Lordships accordingly accept his finding that, apart from any question of interest, LP2560.393 fell to be deducted from the capital sum claimed by the respondent.

A further complaint made on behalf of the respondent was that the account put forward by the appellants and accepted by the judge appropriated Mrs. Valero's payments, not to interest, but to capital. In the absence of any appropriation by the debtor at the time of payment, it is no doubt true as a general rule that payments should be attributed in the first instance to interest. The present case, however, has some exceptional features. In their Defence the appellants pleaded that the payments amounting to LP2560.393 and the sum of LP13,000 "were appropriated and are hereby appropriated by the defendants towards payment first of the principal and the balance towards payment of interest." When the parties agreed upon the issues to be submitted to the Court no issue dealing with this plea was framed. At the trial the appellants' counsel relied on Article 1775 of the Mejelle which, he suggested, on its true interpretation allowed a debtor, even ex post facto, to appropriate payments to interest. This seems to their Lordships to be a questionable proposition, but they do not find it necessary to express any opinion upon it. It appears from the judgment of the learned judge that the respondent's counsel did not attack it in argument before him, and having regard to this fact and to the omission to frame any issue on the point, their Lordships think that it would be wrong to allow it to affect their decision now. Their Lordships are fortified in this view by the fact that the 1932 agreement recites that "the estate has failed to pay *the interest* due", and by the further fact that a number of the payments made on account are shown by the receipts exhibited to have been paid in respect of bills of exchange—all but one having been paid in respect of the bill for LP2934.790.

Reviewing the transaction as a whole, their Lordships have no doubt that both excessive and compound interest were charged. It was submitted on behalf of the respondent that an addition of compound interest for three

years to the capital sum advanced could be justified under article 5 of the Law of Interest. This submission was founded on the 1932 contract, which was said to include, by necessary inference from its express terms, an agreement that accumulated interest for three years should be added to the capital. Their Lordships cannot accept this submission. What article 5 requires is an express agreement for the addition of accumulated interest, stated in language which leaves no doubt as to a debtor's intention to accept an onerous, and prima facie unlawful, liability. Their Lordships are not satisfied that the 1932 contract expresses such an intention, and think that the judge rightly rejected the respondent's claim to compound interest.

Their Lordships do not think it necessary to deal with the remaining, and comparatively minor, criticisms to which the judgment was subjected. It may well be that if a further inquiry were ordered some slight adjustment of the figures would be made, not always necessarily in favour of the respondent. It would be of no profit to either party to order such an inquiry, and their Lordships are satisfied that no injustice will be done by restoring the judgment of the District Court, without modification.

For the reasons given their Lordships will humbly advise His Majesty that the appeal should be allowed, the judgment of the Supreme Court set aside, and the judgment of the District Court restored. The respondent must pay the appellants' costs of this appeal, and in the Supreme Court.

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In the Privy Council

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SHIBER

DELIVERED BY LORD DU PARCQ

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