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Judgment
39/1964

IN THE PRIVY COUNCIL No. 28 of 1963

ON APPEAL FROM THE FEDERAL SUPREME COURT OF NIGERIA

B E T W E E N :

EMMANUEL AYODEJI AJAYI, trading under the name and style of the Colony Carrier Company,

Appellant

- and -

R.T. BRISCOE (NIGERIA), LIMITED

Respondents

CASE FOR THE APPELLANT

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1. This is an appeal from an order of the Federal Supreme Court of Nigeria (Brett, Taylor and Bairamian, F.JJ.) dated the 21st December, 1962, dismissing the Appellant's appeal from a judgment of the High Court of Lagos (Onyeama, J.) dated the 23rd January, 1961, whereby the Respondents were awarded £11,304.16. 0. as sums due under two agreements, held by the learned Judge to be hire purchase agreements, between themselves and the Appellant. p.47 pp.33-34

2. The Respondents issued a civil summons in the High Court of Lagos on the 2nd November, 1959 claiming the hire of goods sold and delivered 'on hire purchase basis'. By their Statement of Claim, dated the 28th December, 1959, they alleged that they had entered into two hire purchase agreements with the Appellant: under the agreements, dated the 1st June, 1956 and the 31st July, 1957 respectively, eleven Seddon Tipper lorries, valued at £24,511. 6. 8, had been delivered to the Appellant on hire: the Appellant had paid deposits of £1,071. 2. 6 and £3,000 under the respective agreements and had agreed to pay the balance of £20,440. 4. 2. by stated instalments on stated dates between the p.1 pp.3-7

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1st July, 1956 and the 30th January, 1957 in accordance with the agreements; he had, the Respondents alleged, failed to pay the instalments in accordance with the agreements, and there was still unpaid the sum of £11,304.16.0.

pp.7-12

3. In his Defence and Counterclaim, the Appellant pleaded that he had been induced to enter into the agreements by fraudulent misrepresentations about facilities to be provided by the Respondents for repairing the lorries and supplying spare parts. The lorries had soon begun to give trouble. He had told the Respondents of this, and they had asked the Appellant, by a letter dated the 22nd July, 1957, to withhold the instalments due on the lorries so long as they were withdrawn from the road. The Appellant counterclaimed repayment of the £16,000 paid under the agreements, on the ground that the consideration had wholly failed.

pp.12-13

4. The Respondents delivered a Defence to Counterclaim, dated the 19th April, 1960. In it they denied the allegations made in the Defence and Counterclaim, and alleged that the contract between them and the Appellant was valid and not liable to be rescinded.

5. The action came on for trial before Onyeama, J. on the 25th, 26th and 27th October, 1960.

pp.52-62
pp.52, ll.27-38
p.53, ll.25-34
p.62, ll.14-22
p.53, l.35- p.54, l.5
p.54, ll.29-42

6. The two agreements were put in evidence at the trial. The first, dated the 1st June, 1956 (Ex.2), provided that, in consideration of £1072.2.6. paid on the signing thereof 'for the option of purchase hereinafter contained', and in consideration of the rent reserved, the Respondents would let two Seddon Tipper lorries to the Appellant from the 1st June, 1956. The balance of the price was to be paid by stated instalments on the first day of each month from July to December, 1956. If the Appellant were to observe the agreement and pay all sums due under it, 'the hiring shall determine and the said Motor Vehicle shall thereupon become the sole property of the (Appellant)'. The Appellant was to be entitled to terminate the hiring at any time by delivering the lorries to the Respondents,

but in such event was to pay 'the balance of the aggregated hire rent' less the amount of a valuation of the lorries. If the Appellant were to fail to pay the instalments punctually, or to observe any of the provisions of the agreement, the hiring was to determine immediately without any notice or other act on the part of the Respondents. p.57, ll 17-33 p.57, l 34- p.58, l 14

7. The second agreement, dated the 31st July 1956 (ex.3), related to nine Seddon Tipper lorries. The sum paid on the signing was £3,000, and the balance of the price was to be paid by stated instalments on the 31st August, 1956 and the 30th day of each month from September, 1956 to January, 1957. With these exceptions, the terms of Ex.3 were identical with those of Ex.2. pp.63-74

8. Correspondence between the parties was also put in evidence, relating to complaints by the Appellant that the lorries were breaking down and he could not get spare parts or technical assistance from the Respondents. In a letter of the 12th July, 1957 (Ex.12), the Appellant wrote that he had been compelled to withdraw the lorries completely from service. The Respondents answered this letter on the 22nd July, 1957 (Ex.9). They wrote that they were very sorry to hear of the troubles with the lorries, and regretted the inconvenience and loss to the Appellant. They agreed to his 'withholding instalments due on the Seddon Tippers as long as they are withdrawn from active service'. The Appellant acknowledged this letter on the 29th July, 1957 (Ex.6). pp.76-87 p.82, ll 31-34 pp.84-85 p.85, ll. 14-17 pp.85-86

9. The Respondents called their chief accountant, Mr. Gram-Hanssen. He said there was an unpaid balance of £11,304.16.0. due from the Appellant under the agreements. The whole amount should have been paid by the 30th January 1957; the Respondents had demanded payment several times. About July, 1957 complaints had been made by the Appellant about the lorries. Eight of the lorries had been sent in for repair, and the Respondents had repaired them. They had then (the witness said) asked the Appellant to remove them, but he had failed to do so. The pp.15-17 p.15, l. 40- p.16, l. 11.

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Respondents had sold the lorries to cover the cost of the repairs. In cross-examination, the witness said four of the lorries were still running and two had been sold as spare parts. The Respondents, he said, had told the Appellant they were selling the lorries. They had got about £3600 on the sale.

p.17, ll 15-20

pp.18-20

10. The Appellant gave evidence. He said that he had been induced to enter into the agreements by the representations of Mr. D.L. Payne, the Respondents' agent. The lorries had started giving trouble after less than two months, which had caused him difficulties with his own customers. He had complained orally, and then, because he considered the Respondents' agents were out to deceive him, in writing. After complaints, when the lorries were immobilised, he had driven eight lorries to the Respondents' garage because they were not roadworthy; of the three remaining lorries, two had broken engines. The Respondents had never told him that they had repaired the lorries, nor had they asked him to come and take them away; if the lorries had been repaired, he would have been glad to take them back.

p.19, ll 12-25

p.19, l 43- p.20, l 17

pp.22-24

11. Onyeama, J. delivered a reserved judgment on the 18th November, 1960. He referred to the agreements and the evidence, and held that there had been no misrepresentation, certainly none that had any bearing on the agreements. He then said there was no ground for the counterclaim, which was dismissed. Turning to the claim, the learned Judge observed that there was evidence that some of the lorries had been sold by the Respondents. The claim appeared to be based on the assumption that the lorries had been sold to the Appellant, not hired out to him. His liability was to pay the rent up to the day the lorries were returned to the Respondents, and the price realised on the sale should have been credited to the unpaid periodical sums. The Respondents were not entitled to sell the lorries and also recover the full purchase price from the Appellant. As it was not clear from the evidence what sum had been realised on the sale, the

p.24, ll 10-32

learned Judge directed an account as to the rents due on the date of the sale and an inquiry as to the amount realised on the sale.

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12. By agreement of the parties, Mr. J.B. Shogbola, an accountant, was appointed to take the account and make the inquiry. He found that the amount of rent due on the return of the eight lorries had been £11,304.16.0. and the amount realised on the sale had been £4005.11.11. After taking into account a number of small items, and the sum of £6763.9.3. which he found to be the difference between the value of the eight lorries at the time of the sale and the amount realised, he reported that the balance of rent due on the final adjustment of account between the parties was £789.9.6.

p.24 ll 37-38
p.30 l 22-p.31 l 36

13. Onyeama, J. gave a further judgment on the 23rd January, 1961, after receiving the report of the accountant. The learned Judge set out some of the figures found by the accountant, and went on:

pp.33-34

> "In my view the transaction between the parties was a hire-purchase agreement. The defendant was liable to pay the rents due on the tippers in accordance with the agreement. As the transaction was not one of outright sale of goods it is unnecessary to consider the question of the ultimate sale of some of the vehicles by the owners - the Plaintiffs".

p.34 ll 5-12

Since the parties agreed that the rents due and owing at 'the resumption of ownership by the (Respondents) and, therefore, the termination of the hiring' were £11,304.16.0., there would be judgment for the Respondents for that amount, with costs.

p.34, ll 13-20

14. The Appellant appealed to the Federal Supreme Court, against this judgment. The appeal was heard by Brett, Taylor and Bairamian, F.JJ. on the 4th December, 1962, and judgment was given on the 21st December, 1962.

pp.34-37
pp.37-40

15. Taylor, F.J. set out the contentions of the parties and the findings of Onyeama, J.

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p.42 l. 38-
p.43 l. 7

Counsel for the Appellant had not challenged the findings of absence of fraud and misrepresentation, and had conceded that there had not been total failure of consideration. On the main

p.43
ll 11-22

appeal the point raised was that there had been a waiver or estoppel which defeated the Respondents' claim, based on the principle of Central London Properties, Ltd. v. High Trees House Ltd. (1947), K.B. 130. This point was based on Ex.9, the Respondents' letter of the 22nd July,

p.43, l.23 -
p.44, l.23

1957. The learned Judge read the letter and said that the argument put forward on behalf of the Appellant had to go so far as to say that, although the amount claimed had been due on the 30th January, 1957, yet so long as the lorries were off the road, that amount need not be paid, and further that, since the lorries had been sold by the Respondents, the Appellant

p.44, l.24 -
p.45, l.44

could never be held responsible for it. The learned Judge referred to the facts and reasoning in the High Trees House Case. He said that in that case there had been not only a promise, but a promise intended to be acted upon, which had in fact been acted upon. The person acting upon it had altered his position

p.45, l.44 -
p.46, l.26

on the strength of the promise. In the present case, it was true a promise had been made, that as long as the lorries were off the road the Appellant could withhold the payments due; but, the learned Judge said, it had not been, and could not be, contended that this promise operated, in view of the subsequent sale of the lorries, as a complete waiver of payment of the debit. Finally, Taylor, F.J. said he could not see in what way the Appellant had altered his position, or could be said to have acted on the promise. There was nothing in the evidence, he said, to show that the Appellant had acted on the promise, and thereby altered his position so as to make it unjust for the Respondents to sue for the balance on the hire purchase agreement

p.46,
ll. 27-32

two years later. The principle in the High Trees House Case did not, in the learned Judge's view, apply to the facts of the present case, and the appeal should be dismissed with costs.

p.46

16. Brett and Bairamian, F.JJ. concurred in this judgment.

17. The Appellant respectfully submits that the learned Judges of the Federal Supreme Court were wrong in holding that the principle of the High Trees House Case was inapplicable. It was admitted that Ex.9 constituted a promise by the Respondents. The Appellant acted upon that promise by delivering the eight lorries to the Respondents for repair and withholding the instalments due, in the expectation that he would subsequently be entitled to pay those instalments and so complete his title to the lorries.

18. The conduct of the parties shews, in the respectful submission of the Appellants, that the agreements recorded in Exx.2 and 3 were varied, so as to allow the Appellant to complete the payment of the instalments, and so perfect his title to the lorries, after the expiry of the periods fixed for payment by Exx.2 and 3. The effect of Exx. 9 and 6 was further to vary the agreements, so that the unpaid instalments ceased to be due so long as the lorries were withdrawn from active service. Alternatively, the Respondents, having told the Appellant by Ex.9 that they would not enforce their rights under the agreements while the lorries were withdrawn from active service, were not entitled to enforce those rights until either the lorries were put back into service (which they never were), or the Respondents gave notice to the Appellant terminating the suspension of the enforcement (which they never did).

19. Since the eight lorries were delivered to the Respondents only for repair, and remained subject to the Appellant's rights under Exx. 2 and 3 varied as set out above, the Appellant respectfully submits that the Respondents were not entitled to sell them. Alternatively, the Respondents were not entitled to sell the lorries without prior notice to the Appellant of their intention to do so, and neither Onyeama, J. nor the the Federal Supreme Court found that such notice had been given. (There was no finding that the Respondents ever told the Appellant even that repairs had been completed.) The act of the Respondents in selling the lorries was therefore wrongful, and by this wrongful act they made it impossible for the lorries ever to be put back into the Appellant's service. The Respondents

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are, therefore, not entitled to any part of the sum claimed in these proceedings.

20. The Appellant respectfully submits that if (contrary to his contention) the Respondents are entitled to any part of the sum claimed by them, he ought to receive credit for the value of the lorries sold by the Respondents. The effect of the judgments of the Courts below is that the Respondents, having deprived the Appellant of eight of the lorries, nevertheless receive the full purchase price for all eleven. If any sum is due to the Respondents, it is that calculated by Mr. Shogbola in his report to the High Court.

21. The Appellant respectfully submits that the order of the Federal Supreme Court of Nigeria is wrong and ought to be reversed, and this appeal ought to be allowed with costs throughout, for the following (among other)

R E A S O N S

1. BECAUSE the Respondents were not entitled to the sum claimed before the lorries were put back into the Appellant's service:

2. BECAUSE the lorries never were put back into the Appellant's service:

3. BECAUSE the wrongful act of the Respondents in selling eight of the lorries made it impossible for them to be put back into the Appellant's service:

4. BECAUSE, if any sum is due to the Respondents, the sum awarded by the High Court of Lagos and the Federal Supreme Court is wrongly calculated and excessive.

J.G. LE QUESNE

MERVYN HEALD

No. 28 of 1963

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