TYSER, C.J. & BERTRAM, J. 1908

May 19

[TYSER, C.J. AND BERTRAM, J.]

HASSAN KARABARDAK, *Plaintiff,*

v.

DERVISH EFFENDI TUJARBASHIZADE, *Defendant.*

IMMOVABLE PROPERTY—AGREEMENT FOR SALE—DELAY IN PAYMENT OF INSTALMENT BY PURCHASER—VENDOR'S RIGHT OF RESCISSION—MEJELLE, ARTS. 313 AND 314—SALE TO THIRD PARTY IN BREACH OF AGREEMENT—MEASURE OF DAMAGES—INTENTION TO REGISTER.

A. agreed to sell a café to B. for 150 Napoleons. The price was to be paid in instalments and B. made default in payment of one of the instalments. Thereupon A. declared the contract rescinded, and sold the café to C. for £150.

B. sued A. for breach of the agreement. It was not proved that in the agreement between A. and B. it was expressly provided that the transfer should be registered, but it was not alleged at the settlement of the issues that the parties intended to evade the registration laws.

HELD: (1) That the default of B. in the payment of the instalment did not justify A. in rescinding the contract.

Where one party to a contract has acted in such a manner as to show that he abandons the contract, *e.g.*, by absolutely refusing to perform his part of it, or by incapacitating himself for its performance, the other party may treat it as rescinded—but mere delay in the performance of a contract does not justify rescission, unless the contract so expressly stipulates.

(2) That inasmuch as the Defendant possessed a good title to the property and refused to convey it, the Plaintiff was entitled to damages for the loss of his bargain, and that the District Court was justified in assessing the damages at the difference between the prices of the two sales.

The measure of damages might be otherwise, where the failure of the vendor to transfer the property is due to his having no title.

(3) That in order to entitle a person to recover damages for the breach of a contract for the sale of immovable property, it is not necessary to show that the parties expressly agreed that the sale should be registered.

This was an appeal from the judgment of the District Court of Nicosia.

The Plaintiff's claim, so far as is material to this report was for damages for the breach of an agreement for the sale of a café.

It appeared that by a verbal agreement the Defendant agreed to sell the café to the Plaintiff for 150 Napoleons (£118 15*s.*) payable in instalments. There was some dispute as the dates on which these instalments were payable, but it appeared that the Plaintiff was in arrear as to one of these instalments. The Defendant, being dissatisfied with this position, thereupon rescinded the contract and sold the café to a third party for £150. It was alleged by the Defendant but disputed by the Plaintiff, that the Plaintiff consented to the rescission of the agreement. Afterwards the Defendant returned to the Plaintiff the money paid under the agreement, and the Plaintiff received it under protest.

The Plaintiff claimed damages for the breach of the agreement assessing the damages at the difference between the original contract price and the price at which the café was subsequently sold by the Defendant, *i.e.*, the difference between 150 Napoleons and £150 or £16 5*s.* There was also a further claim for interest on an unpaid instalment, which it is not necessary to consider.

At the settlement of the issues it was not alleged by the Defendant that the parties to the first agreement had any intention of not registering the transfer.—No issue was framed and no evidence was given on the point, but one of the witnesses of the Plaintiff stated that the registration was to take place after the payment of the final instalment.

The District Court gave judgment in favour of the Plaintiff for £16 5*s*.

The Defendant appealed.

Theodotou for the Appellant.

The Defendant was entitled to rescind.

In any case no action lies for breach of a contract for the sale of immovable property unless it is expressly stipulated at the time of the agreement that the transfer shall be registered. In *Chacalli* v. *Kallourena* (1895) 3 C.L.R., 246, there was such an express stipulation.

Chacalli for the Respondent was not called on.

The Court dismissed the appeal.

Judgment. CHIEF JUSTICE: This seems a very clear case. The agreement between the parties was for the sale of a coffee house. It is not very clear what the terms of payment were, but there is no dispute as to the amount, and no dispute that the payment was to be made by instalments. There may be some doubt as to the dates when these instalments were payable but this is a question which it is not necessary to decide for the purposes of the present judgment.

It is quite clear, at any rate, that there was a delay in the payment of one of these instalments, and the Defendant says that because there was this delay he was entitled to rescind the contract. That is not good law. There may be circumstances in which the neglect of one party to perform his obligation under a contract may justify the other party in treating the contract as at an end, for example where the one party has absolutely refused to perform or has incapacitated himself from performing his side of the contract, such refusal or incapacitation being in effect an abandonment of the contract. Mere delay, however, in carrying out the terms of a contract is not a good ground for rescission, unless the contract so expressly stipulates (Mejellé, Arts. 313 and 314). Thus, to take a case referred to in the principal English authority on the subject (Smith's Leading Cases, Vol. I, *Cutter* v. *Powell*) where the contract was for the delivery of a number of loads of straw, the price of each load being payable on delivery, and the purchaser afterwards declared that he would not pay on delivery, this absolute refusal was held to justify the vendor in rescinding the contract. But it was said in that case that if the purchaser had merely failed to pay for one load on delivery, this might not in itself have entitled the vendor to refuse to deliver more straw. (*Withers* v. *Reynolds*, 2 B and Ad., 882.)

Here there was no such unqualified refusal. It is true that there was evidence of delay. But that delay did not in itself

TYSER, C.J. & BERTRAM, J.

HASSAN KARA-BARDAK v. DERVISH EFFENDI TUJAR-BASHIZADE

constitute an abandonment of the contract. It may be that the delay would have been a ground for damages. It was not a ground for rescission.

So much for the alleged breach. But it is further said that there was a mutual rescission. This point was raised at the settlement of the issues, but no issue was settled to try it. Either the Court below had this issue of fact before them, or they had not. If they had not, it cannot be raised for the first time here. If they had, they considered all the facts, and decided against the Plaintiff. It is clear that there was evidence to justify that finding. At any rate no sufficient reason has been given why we should reverse it.

As to the question of the alleged illegality of the contract that is purely a question of fact. Was it part of the agreement that there should be no registration? This is an issue of fact that should have been raised below. It was not raised and no evidence was taken on it, though one witness does say that the registration was to take place on the payment of the balance. So far as the evidence goes therefore there was no such intention to evade the law as has been suggested.

As to the measure of damages, it is quite clear that damages may be recovered for failure to perform an agreement for the sale of immovable property, if damage has been suffered. The amount must depend on circumstances. Sometimes the failure to carry out the contract may be due to the fact that it is discovered that the vendor had no legal title to the property which he had agreed to transfer. In such a case the measure of damage would not be the same as in this case. In this case the vendor had a good title, but refused to convey.

There is no reason why the general rule as to damages should not apply. That general rule, as it has been laid down in America, is this—that "where the vendor has the title, and for any reason refuses to convey it, he shall respond in law for the damages, in which he shall make good to the Plaintiff what he has not lost of his bargain not being lived up to. This gives the vendee the difference between the contract price and the value at the time of the breach as profits or advantages which are the direct and immediate fruit of the contract." (Sedgwick, "Measure of Damages," 6th Edition, p. 213.) In determining the damage which the purchaser had suffered by the loss of his bargain, I think the District Court were justified in taking into account the difference between the contract price and the price at which the property was subsequently sold, and in awarding this difference to the Plaintiff as damages.

The appeal must be dismissed with costs.

BERTRAM, J.: I concur. In asserting that there was a mutual rescission of the contract, the Defendant seems to have been under a misapprehension of fact. In contending that the delay of the Plaintiff in itself justified the rescission, he was under a misapprehension of law. (Mejellé, Arts. 313 and 314.)

I only want to add a word on the point of law raised by Mr. Theodotou. He has argued that damage cannot be recovered for the breach of such contracts unless the parties have expressly stipulated for registration.

The principles on which the Courts have dealt with this matter have been recently considered and explained in the case of *Haji Pascali* v. *Haji Toghli* (1907) 7 C.L.R., 76. Where it appears to the Court from the circumstances of the case that the intention of the parties was to evade the provisions of the law requiring registration, as for example from the fact that the purchaser has been put into possession and allowed to remain in possession without registration, the Court will not entertain any claim for damages by the breach of the contract, either by the vendor or the purchaser. On the other hand where the contract has been for the transfer and registration of the property in the regular manner, damages may be recovered for failure to carry out the agreement. I see no reason why the undertaking to register should appear expressly. It is not to be assumed that all parties to such contracts have an illegal intention to evade the registration laws. They must be presumed to intend to carry out the law, unless the contrary is shown. It is for those who allege the existence of such an illegal intention, to plead it at the settlement of the issues and to prove their plea at the hearing.

I concur in what the Chief Justice has said as to the measure of damages.

Appeal dismissed.

[TYSER, C.J. AND BERTRAM, J.]

GEORGE TH. ROSSIDES, *Plaintiff*,

v.

EMETULLAH HAJI TOSSOUN AND ANOTHER, *Defendants*,

MULLAH HUSSEIN ABDULLAH, *Respondent.*

ATTACHMENT OF DEBTS—CIVIL PROCEDURE LAW, 1885, SECS. 21, 72, 80—DISPUTED DEBT—JURISDICTION OF SINGLE JUDGE—CYPRUS COURTS OF JUSTICE ORDER IN COUNCIL, 1882, ART. 207—FRAUD—ORDER XXI, RULE 21A.

The procedure for the attachment of debts under Part VII of the Civil Procedure Law, 1885, is not confined to cases where the debt is undisputed.

The powers of the Court under such procedure may be exercised by a single judge.

A judge exercising the powers of the Court, where the debt is disputed, may either try the dispute himself, or frame an issue for trial by the full Court.

Where the dispute involves an issue of fraud, it is desirable that it should be referred to the full Court.

The Plaintiff, having recovered judgment against the Defendant, issued a writ of attachment against the Respondent, and at the hearing alleged that the Respondent was indebted to the judgment debtor, asserting that the indebtedness arose out of a fraudulent arrangement entered into between the Respondent and the judgment debtor with a view to deprive the Plaintiff of the fruits of his judgment. The Respondent disputed the indebtedness. Oiconomides, J., sitting as a single judge of the District Court, tried the question, and having decided that the Respondent was indebted to the judgment debtor as alleged, ordered him to pay the amount of the debt to the Plaintiff.

HELD: That the judge had jurisdiction to try the question of the alleged indebtedness, but that, inasmuch as the issue was one involving a charge of fraud, he ought to have framed an issue and sent the case for trial to the full Court.