1966
March 17
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SOFOCLIS MAMAS
v.
THE FIRM
"ARMA" TYRES

[VASSILIADIS, MUNIR, JOSEPHIDES, JJ.)

SOFOCLIS MAMAS,

Appellant-Defendant,

v.

THE FIRM "ARMA" TYRES,

Respondents-Plaintiffs.

(*Civil Appeal No.* 4560).

Civil Procedure--Appeal - Findings of fact by trial Court—Findings resting on credibility of witnesses--Circumstances under which the Court of Appeal will disturb such findings—Restatement of legal position---Statutory ground on which matter must be considered set by section 25 *of the Courts of Justice Law*, 1960 (*Law* 14 1960).

Findings of fact—Findings resting on credibility of witnesses, justified on "the demeanour of witnesses in Court"— Set aside as not warranted by the evidence considered as a whole.

The main issues on which the appeal was fought were issues of fact and credibility. The findings of the trial Judge were challenged by the appellant on the ground that they were based on wrong evaluation of the credibility of witnesses and were against the weight of the evidence taken as a whole. The subject matter of the appeal was a claim for £7.500 mils being value of two motor car tyres alleged to have been sold and delivered to appellant by respondents ; appellant's defence was that he never bought the tyres in question or any tyres from respondents. No invoices or other documentary evidence was produced apart from a ledger where the appellant was shown to owe the respondents the aforesaid amount ; but the respondent called two of their employees to prove the sale. In allowing the appeal the Court :

Held, (1) There is no dispute as to the legal position, which is now clearly settled in our law. Section 25 of the Courts of Justice Law, 1960 (Law of the Republic No. 14 of 1960) sets the statutory ground on which the matter has to be considered. And a number of cases where the effect of the section in question was discussed, and its provisions were acted upon by this Court, make the position fairly clear.

(2) (a) The onus lies plainly on the sellers-respondents to prove their case On the other hand this appeal turns on issues of fact and matters of credibility. On the face of it, the appellant in such a case, has a rather difficult task.

(b) The sellers-respondents relied, almost exclusively, on the credibility of their two employees; and on an entry made later in a ledger.

(c) But, considered against the form of the claim in respondents', pleadings; the absence of the invoice or any counterpart thereof; the absence of any debit-note to the alleged buyer (the appellant) within a reasonable time, or at all, the absence of any correspondence in connection thereto; the failure to make any claim, or demand for payment, or mention whatsoever about it for over eighteen months after the alleged sale, notwithstanding the business connections between the parties, the alleged throwing away of the signed slips which until half-way through the trial were supposed to be in the possession of the respondent, the complete absence of any evidence of delivery or transport of the two tyres in question out of respondents' premises, the absence of any attempt to trace such tyres in the possession or use of the alleged buyer, all these matters constitute reasons which must take away a great deal of the value of the naked oral evidence of two interested witnesses

(d) And to this extent, the reasoning under which the demeanour of these witnesses in Court" was considered sufficient to outweigh all that material, and to discharge the onus of proof in a case of sale and delivery of the two tyres in question, in the circumstances of this case, is, in our unanimous opinion, unsatisfactory; and the findings of the trial Court, based on such reasoning, must be set aside as not warranted by the evidence considered as a whole.

Appeal allowed. Judgment of the District Court set aside. Substituted by a judgment dismissing plaintiff's action with costs here and in the District Court.

Cases referred to

Thomaides & Co. Ltd. v. *Lefkaritis Brothers* (1965) 1 C.L.R. p. 20.

Patsalides v *Afsharian* (1965) 1 C.L.R. p. 134

Philippos Charalambous v *Soteris Demetriou* 1961 C.L.R. 14, at p. 19

Appeal.

Appeal against the judgment of the District Court of Nicosia (Demetriades, D.J.) dated the 13th November, 1965 (Action No. 1214/65) whereby the defendant was adjudged to pay to the plaintiff the sum of £7.500 mils being the value of two motor car tyres alleged to have been sold and delivered to the defendant.

L. Clerides with *Chr. Ioannou*, for the appellant.

A. Hji Ioannou, for the respondents.

The facts of the case sufficiently appear in the judgment of the Court delivered by

VASSILIADES, J. This appeal turns on issues of fact and matters of credibility. The appellant challenges the findings of the trial Judge on the ground that they rest on wrong evaluation of the credibility of witnesses, and are against the weight of the evidence taken as a whole. On the face of it, the appellant in such a case, has a rather difficult task.

There is no dispute as to the legal position, which I think, is now clearly settled in our law. Section 25 of the Courts of Justice Law, 1960 (No. 14/1960) sets the statutory ground on which the matter has to be considered. And a number of cases where the effect of the section in question was discussed, and its provisions were acted upon by this Court, make the position fairly clear.

Counsel for the appellant referred to *Thomaides & Co. Ltd.* v *Lefkaritis Brothers* ((1965) 1 C.L.R. 20). That case was subsequently considered together with other earlier cases on the point, in *Patsalides* v *Afsharian* ((1965) 1 C.L.R. 134) where the legal position was re-stated. The findings of the trial Court will not be disturbed on appeal, unless the appellant can satisfy this Court that the reasoning behind such findings is unsatisfactory, or that they are not warranted by the evidence when considered as a whole. There is no dispute in the present case, about the legal position.

As regards findings made on the credibility of witnesses, Zekia, J., as he then was, stated the position very cautiously, if I may say so with respect, as early as February, 1961, in

Philippos Charalambous v. *Sotiris Demetriou* (1961, C.L.R. p. 14 at p. 19), where, taking the view that the appeal should be dismissed, he said :

> " While I am far from being satisfied of the way some judgments are given by trial Courts where without stating adequate reasons dispose of an issue in the case by merely saying 'I believe or disbelieve so and so', I will hesitate a lot on the other hand to introduce a principle the application of which might have the effect of amending the Evidence Law which would constitute a transgression on our part of the rights of the legislature ".

That was a case heard and decided in the District Court on the law as it stood before the enactment of the Courts of Justice Law, 1960 ; but decided in the Court of Appeal after the statute containing section 25 came into force

Ever since, findings of trial Courts, whether resting on credibility or otherwise, have been considered on appeal upon these principles, in a great number of cases ; and have been successfully or unsuccessfully attacked, depending on their particular merit in each case. In *Patsalides* v. *Afsharian* (*supra*) for instance, same as in many other cases, civil as well as criminal, findings of the trial Court resting partly or entirely on the credibility of witnesses, were set aside on appeal. And inferences and conclusions drawn by trial Courts were reconsidered in the light of criticism based upon the record.

Coming now to the case in hand, and taking the position from the judgment of the trial Court, we have before us a claim for £7 500 mils, value of two motor car tyres, alleged to have been sold and delivered to the appellant (defendant in the action) by the respondents ; defended on the allegation that the appellant never bought these, or any tyres, from the respondents.

The onus lies plainly on the seller-respondents to prove their case. They called two of their employees for the purpose But as pointed out during the hearing of the appeal, although the claim was made " on an invoice and/or statement of account " (vide statement of claim at p. 4 of the record) no such invoice or statement was produced. The evidence was that the " original " of the invoice was prepared and handed to the buyer ; but no copy was produced ; nor was any block which such an invoice could have come from.

And there was no suggestion that any statement of account was ever sent to the buyer ; or any debit-note was forwarded to the buyer ; or any correspondence in connection thereto ; or demand for payment ever made before action, which was actually filed more than eighteen months after the alleged sale; and only after the appellant had commenced other proceedings against the respondents for the value of goods delivered before the alleged sale of the tyres in question.

The employees called by the respondents in support of the claim, stated that the appellant signed at their request, two identification slips taken from the tyres, which were in respondents' possession ; and the trial Court granted an adjournment to enable them to produce the slips. But no such slips were traced or produced, one of the witnesses stating on the adjourned hearing, that he " was informed that they were thrown away after the defendant was debited " in their books.

A ledger was produced, admitted as exhibit 1, where the appellant was shown to owe the respondents £7.500 " under credit invoice No. 4104 dated 24/9/63 ". But as pointed out during the argument, the evidential value of such " hearsay " records, depending on the circumstances in which they are being made and kept, is, as a rule, rather questionable.

As to delivery, which in such claims is a very important matter, one of the employees stated that he delivered two tyres to the other employee (p. 7B of the record). The latter stated that the former took the tyres from the shelf and left them by his desk ; and that the appellant took delivery in his presence (p. 8C). But he did not say how the buyer took delivery of two tyres in such circumstances ; nor could he say who carried them out of the office (p. 8D). Nor was there any attempt to trace such tyres on any vehicle connected with the appellant.

Learned counsel for the respondents stated that this was a friendly transaction between persons well knowing one another, and was, therefore, made so informally. The trial Judge, counsel contended, having the advantage of seeing and hearing the witnesses could better assess the value of their evidence ; and make a safer choice between the conflicting versions of the two sides.

This is undoubtedly so. But one cannot lose sight of the fact that the seller had the onus cast upon him to prove the

claim, before he could succeed. And this he tried to do by relying, almost exclusively, on the credibility of his two employees ; and on an entry made later in a ledger.

Considered against the form of the claim in respondents' pleading , the absence of the invoice or any counterpart thereof , the absence of any debit-note to the alleged buyer within a reasonable time, or at all , the absence of any correspondence in connection thereto , the failure to make any claim, or demand for payment, or mention whatsoever about it for over eighteen months after the alleged sale, notwithstanding the business connections between the parties , the alleged throwing away of the signed slips which until half-way through the trial were supposed to be in the possession of the respondents , the complete absence of any evidence of delivery or transport of the two tyres in question out of respondents' premises , the absence of any attempt to trace such tyres in the possession or use of the alleged buyer, all these matters constitute reasons which must take away a great deal of the value of the naked oral evidence of two interested witnesses And to this extent, the reasoning under which " the demeanour of these witnesses in Court " was considered sufficient to outweigh all that material, and to discharge the onus of proof in a case of sale and delivery of the two tyres in question, in the circumstances of this case, is, in our unanimous opinion, unsatisfactory ; and the findings of the trial Court, based on such reasoning, must be set aside as not warranted by the evidence considered as a whole

The appellant having thus successfully attacked the findings of the trial Court on which the judgment against him rests, is entitled to succeed in his appeal. The judgment of the District Court will be set aside, and will be substituted by a judgment dismissing plaintiff's action with costs here and in the District Court, on the appropriate scale

Appeal allowed. Judgment of the District Court set aside. Substituted by a judgment dismissing plaintiff's action with costs here and in the District Court.