



No. 23 of 1946.

44462

In the Privy Council.

ON APPEAL

FROM THE SUPREME COURT SITTING AS A COURT OF
APPEAL JERUSALEM.

BETWEEN—

- 1. JOSEPH KLEIN
- 2. ABRAHAM KLEIN
- 3. ISRAEL ASHER SHAFIR *Appellants*

— AND —

- 1. ELIAHU (LEO) HEIMAN
- 2. ABRAHAM HEIMAN
- 3. BARUCH HEIMAN
- 4. ISRAEL HEIMAN
- 5. SHMUEL HEIMAN
- 6. RACHEL HEIMAN *Respondents.*

10.

CASE FOR THE RESPONDENTS.

RECORD.

20 1. This is an appeal by Special Leave from the judgment of the Supreme Court sitting as a Court of Appeal, Jerusalem dated the 17th November, 1944, setting aside that part of the judgment of the District Court, Tel-Aviv dated the 31st October, 1943 that had declared that certain contracts between the parties for the sale of divers shop properties by the Appellants to the Respondents were discharged and rescinded.

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p. 16

2. The contracts out of which this Appeal arises appear to be dated the 3rd October, 1937 though various dates were given by the parties to them in the pleadings. The actual number of contracts involved and the various parties thereto are not clear, and, though

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p. 18, l. 24 nothing much may turn on this, it is respectfully submitted that before a Court grants a Declaration as did the District Court, whose judgment it is sought by the Appellants to restore, "that the contracts between the parties are rescinded" much greater care should be taken to identify the particular contracts involved.

p. 27 3. The contract (Exhibit D/4) made between the Appellants and the Respondents Eliahu, Abraham and Israel is the only one of the contracts included in the Record and the only original contract formally exhibited in the proceedings. It can, however, be taken as typical of the divers contracts that were concluded between the Appellants and the different Respondents. 10

4. The contracts in suit provided for the sale by the Appellants of certain parcels of land with the shop properties to be erected thereon by the Appellants situate on the Petach-Tikvah Road, Tel-Aviv.

p. 27 5. The following provisions of D/4 are particularly material:—

9. Upon completion of the shop hereby sold—(a certificate signed by the Vendors' architect, Mr. Gepstein, or any other architect appointed in his stead and by the purchaser, or a certificate given in the form prescribed in clause 29 hereinafter, 20 testifying that the shop is finished, shall be considered as sufficient proof of the termination of the construction)—and should the purchaser by then have complied with all his undertakings under the present contract, the Vendors shall notify the purchaser within seven days—by registered letter—that the shop is ready and calling upon him to come and take delivery thereof by accepting the key, and the purchaser shall then come and receive the key of the shop within seven days of the despatch of the letter as aforesaid . . .

10. The Vendors undertake to complete the building of 30 the shop and deliver it to the purchaser within one year of the date of the signature of the present contract. Should the completion of the buildings be delayed because of various hindrances then the Vendors shall have a delay of six additional months to complete all the works; and no further delay shall be given them for any reason whatsoever.

11. Upon delivery of the shop to Purchaser and the compliance of the latter with all his undertakings under the present contract, the vendors undertake to transfer to the Purchaser in the Land Registry the ownership of the shop and cellar and 40 plot of land upon which the shop and cellar stand and the plot of the courtyard and pavement and other properties, jointly held by all shop owners in the Block, within six months. Should,

however, the work be delayed because of obstacles in Government and Municipal Departments, then completion of the transfer shall be delayed until removal of the obstacles. At the time of transfer in the Land Registry the Vendors shall produce a certificate of completion of the building from the Municipality of Tel-Aviv.

10 Should the transfer be not effected till the expiry of one year from the delivery of the shop to the Purchaser, then the Purchaser shall be entitled to stop making payments on account of the purchase price until the transfer, on which date the purchaser shall pay to the vendors all the amounts the payment of which was stopped as aforesaid, without interest. The vendors undertake to deal with the preparation in the Land Registry of the file for the transfer, as aforesaid.

20 13. The Purchaser undertakes to appear personally in the Land Registry or through his representative at any time as he shall be called upon to do so by the vendors in writing, or by a preliminary notice of 7 days in a registered letter in order to accept the transfer and sign all documents in connection with the said transfer and the mortgage or mortgages required as provided for in clause 23 hereunder on the day on which the vendors shall summon him.

All Government taxes and Municipal dues payable upon the said property until the completion of the building and delivery of the shop to the purchaser, shall be borne by the vendors; and from that day onwards, they shall be borne by the purchaser.

30 17. On account of the said purchase price, the purchaser has deposited with the Ashrai Bank Ltd. Tel-Aviv, to the credit of the Vendors, all the moneys and promissory notes set out in the list attached hereto, and such monies together with the amounts of the promissory notes, shall be termed hereinafter "earnest money." That list shall form an inseparable part of the present contract.

The purchaser undertakes to honour the aforesaid promissory notes on their respective dates of maturity.

18. The earnest-money shall be paid by the Bank to the vendors in three equal instalments, as follows

40 The Purchaser hereby instructs the Ashrai Bank Ltd. Tel Aviv, to pay unto the vendors the said instalments in accordance with the provisions with this clause

20. On completion of the building of the shop as per clause 9, the purchaser shall be bound to pay unto the vendors, in cash,

to the extent of completion of one-fourth of the price of the shop. Should the purchaser fail to pay what is due from him under this clause within seven days of the despatch of a notice in writing by registered letter by the vendors to the effect that the shop is ready in accordance with clause 9 herein, he shall be considered as a defaulter and the vendors shall be entitled to sell the shop to others and the Purchaser shall be liable to pay the damages provided for in this contract.

21. The balance of the purchase price . . . shall be paid by the purchaser to the vendors within ten years of the date of the signature of this contract by equal monthly instalments . . . to be reckoned from date of delivery of the key, but payments shall commence from date of delivery of the shop, i.e. first payments shall fall due on the expiry of one month of delivery. 10

In order to ease the said payments, the purchaser gives promissory notes to the order of the vendor, and the purchaser undertakes to deposit the said promissory notes with Ashrai Bank Ltd., Tel Aviv, within 72 hours of today with instructions to hand to the vendors promissory notes covering one year only from the date of delivery of the shop, and the remaining promissory notes on transfer in the Land Registry. 20

22. In the event of three promissory notes due under the present contract remaining unpaid after receiving into his possession of the shop prior to the transfer into the Land Registry and making of the mortgage he shall be considered as having committed a breach of the contract, and the Vendors shall be entitled to cancel the contract by a preliminary notice of seven days by registered letter, and the purchaser shall pay the damages stipulated in the contract. The purchaser shall likewise immediately vacate the shop and deliver it back to the vendors in the same good condition as he received it without any necessity for service of a notarial or other notice. 30

23. At the time of transfer of the property to the purchaser in the Land Registry, the purchaser shall record a first mortgage of the property transferred in favour of the vendors . . .

25. In the event of breach of the present contract or any one of its conditions, then the party committing the breach shall pay to the other party the sum of LP.500 as liquidated damages in respect of every shop . . . 40

6. On the making of the contract the Respondents duly deposited with the Ashrai Bank Ltd. the monies and promissory notes as by the said contracts required. In or about the year 1938 the shops

were built, and in or about August 1938 the Respondents went into possession thereof and from time to time thereafter let them. In the case of some of the shops there were sublettings. Various payments were made by the Respondents to the Appellants in respect of the monies due from them under the said contracts. In the course of these proceedings the Appellants have stated that the total amount so paid by the Respondents was about LP.7,000, and the Respondents are willing to accept this figure as correct.

p. 9, l. 41
p. 10, l. 21
p. 12, l. 31

p. 13, l. 16

7. By Clause 10 of the contract the buildings had to be completed and handed over to the Respondents by the 3rd October, 1938, or if there were hindrances (and none were ever proved) at latest by the 3rd April, 1939. Clause 11 provided that the properties were to be transferred to the Respondents in the Land Registry within six months of completion, that is, by the 2nd April, 1939, or if there were hindrances, by the 3rd October, 1939. The latest date envisaged by the contract for the undertaking referred to in Clause 13 was accordingly the 3rd October, 1939. The situation in Palestine was very disturbed during the years 1936 to 1939 and it was accordingly not uncommon for vendors and purchasers during these years to agree to the postponement of transfer of property in the Land Registry. According to the evidence in the present proceedings of the Respondent Baruch, the Appellants agreed to postpone the date of transfer as owing to the situation the Respondents did not have ready the money due on completion; the Appellant Shafir, who was the only one of the Appellants who gave evidence denied that he had ever made any agreement to this effect. There has been no finding of fact on this point in these proceedings.

p. 11, l. 31

p. 13, l. 22

8. On the 6th October, 1940, a letter was sent on behalf of the Appellants to the Respondents (D/2) inviting them to appear in the Land Registry of Tel-Aviv on the 15th October, 1940, to accept a transfer of the properties in question. The Respondents submit that the Appellants were correct in wording D/2 as an "invitation" and not as a peremptory call under Clause 13 that had to be obeyed. In their submission once the contract time for the transfer had expired, as it had by some time during the year 1939, the Appellants were not entitled arbitrarily to fix the date for completion themselves. In any event, it is submitted, failure to complete when called upon to do so at a time stated would not entitle the Appellants to have the contract cancelled on that ground.

p. 34

9. The Respondents did not appear in the Land Registry on the 15th October, 1940 as by D/2 they were invited to do. As already stated, in the Respondents' submission their failure so to appear was not a breach of contract, still less was it a breach going to the root of the contract.

p. 35

10. On the 20th January, 1942, the Appellants' lawyer sent a letter (Exhibit D/3) to the Respondent Eliahu alleging that "more than three instalments of promissory notes due from you and your associates . . . have not been paid", and purporting by reason of such alleged default to rescind the contract in suit under Clause 22 thereof. It is this document on which the Appellants mainly relied in the Courts below as justifying their submission that they could treat the contract as rescinded and entitling them to the declaration claimed. The Respondents have throughout submitted that this notice was as nugatory as was the invitation to appear in the Land Registry on the 5th October, 1940. The District Court has held that as within seven days of the receipt of the notice the Respondents did not pay the amount that was then due from them the Appellants were entitled to rescind. What the amount was that the District Court had in mind as the amount that should have been so paid was not stated in its judgment; nor could it have been as the Court never found nor knew what amount, if any, was then due and payable by the Respondents. Moreover, the District Court disregarded the Respondents' submissions as to the form of the notice. 10

p. 18, l. 20

11. Faced with the fact that following the sending of D/3 the Appellants refused to accept further monies from the Respondents and insisted that the contracts in suit were at an end, the Respondents to clarify the position commenced on the 17th August, 1942 20

THE PRESENT SUIT

p. 1

pointing out by their Statement of Claim that under clause 27 of the said contracts the Respondents were entitled to pay at any time the balance of the purchase price and stating that they were ready and willing to pay such balance, but that the Appellants refused to accept such balance, or to say what was due, and claiming accounts and other relief. 30

pp. 3, 7

12. Separate Defences were delivered by the third Appellant and by the first and second Appellants. As, when the case reached the Supreme Court, the questions arising on the Claim ceased to have any importance, it is not necessary to deal at length with the points taken in the two Defences. The third Appellant did, however, contend that the Respondents "although they signed promissory notes, failed to pay the amount that became due, and, for that matter, were not ready not only to pay the whole amount that was due from them, but were even unable and unwilling to pay those partial sums which had become payable." He did not state what was the amount that was due or what were the "partial sums" which he was alleging had become payable. 40

p. 3, l. 38

Both Defences concluded with Counter-claims. These were couched in somewhat similar terms and alleged that the Respondents were in breach and that the Appellants were accordingly entitled to and had cancelled the contracts. The Counter-claim of the first and second Appellants did mention by implication their reliance on D/3. Otherwise, apart from the paragraph in the third Appellant's Defence above referred to, neither Pleading gave any particulars of the matters on which the Appellants relied in support of the prayer with which each concluded, namely, for a Declaration that the contracts between the parties were cancelled. No other relief—apart from costs—was claimed though, it is obvious that the granting of the Declaration claimed would not have satisfied the Appellants, but that they would have used it as the basis of other claims against the Respondents and probably against the other parties who had been let into possession of the properties by or through the Respondents. The granting of a Declaration would inevitably affect the position of these other parties, parties who were not before the Court. It is the Respondents' submission—and this view commended itself to the Supreme Court—that if the Appellants wish to pursue their allegations that the Respondents were in default under the said contracts and that by reason thereof the Appellants were entitled to rescind the said contract, that is, matters that involved questions as to the title and possession of the properties in question the proper way of raising these matters was not in a counter-claim that merely asked for a Declaration, but in proceedings properly framed that asked for all the relief to which the Appellants would be entitled were their complaints justified. A grave question in any event arises as to whether the only Court that would have jurisdiction to decide the questions involved would not be the Land Court. Further references to these questions will be made subsequently in this Case.

p. 7, l. 42

p. 4, l. 1;

p. 7, l. 39

13. Issues were settled in the action on the 6th January, 1943. The only ones that are material to this appeal are the following:—

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1. Whether on 15th August, 1938, or thereabouts, contracts were made between Plaintiffs and Defendants whereby Plaintiffs purchased certain shops as described in the contracts.

6. Whether the contracts mentioned in (1) were broken by the Plaintiffs and what are the legal effects of such breach; especially, whether Defendants are entitled to cancel the said contracts; whether they were cancelled, and whether they notified Plaintiffs thereof.

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9. Whether Defendants are entitled to file a counterclaim and claim cancellation of the contracts made between the parties and upon what grounds.

pp. 9-15

14. The action was heard in the District Court (Judges Many and Krongrun) on the 12th July, 1943, and the 12th and 24th October, 1943. The only oral evidence led by the parties was that of the Respondent Baruch for the Respondents and the Appellant Shafir and a clerk in the Ashrai Bank for the Appellants. On the matters material to this appeal Baruch gave the evidence referred to in paragraph 7 above, and admitted that the promissory notes payable at sight had not been paid. When the Appellants' Counsel addressed the Court he stated that he did not find the Counterclaim on the non-payment of these notes. What was complained of was the non-payment of certain other notes. What these latter notes were did not appear. It is clear that if there were any such notes none of them was produced in Court. It is the Respondents' submission that without the production of such notes there was no material before the Court on which it could find that there had been any default by the Respondents. Furthermore, by Section 88 (1) of the Bills of Exchange Ordinance certain promissory notes have to be presented for payment; without seeing the notes on which it was alleged the Respondents had defaulted, the Court was not in a position to say whether they fell within the class requiring presentment for payment, and, as no presentment for payment was alleged, the Court was not in a position to say whether or not the Respondents had defaulted on them. At no time did the Appellants attempt to identify the notes (if there were any such) referred to in D/3 in the phrase "more than three instalments of promissory notes . . . have not been paid", which alleged default the Appellants relied on as justifying the application of Clause 22.

p. 11, l. 31
p. 11, l. 17

p. 13, l. 44

p. 35, l. 18

p. 16

15. A reserved judgment was delivered on the 31st October, 1943, dismissing the Respondents' claim and finding for the Appellants on their counterclaim. No question arises as to the decision on the claim. The reasons given by the Court for finding for the Appellants on the counterclaim are as follows:—

p. 17, l. 45

"As regards the Counterclaim there is no denial by the purchasers of their delaying payments; but they contend that they were not bound to pay notes which were not presented to them as required by law. The Court finds that in the present case the notes were given only in order to facilitate payments and they were deposited by the purchasers with the Ashrai Bank. They therefore knew that the vendors could not transfer the notes to other hands and they always knew that they had to come every month to the Ashrai Bank to pay the payments agreed upon in the contract. Moreover, Section 88 of the Commercial law (*sic*) applies only and solely to those notes which are payable at a particular place. There is no proof that the said notes contain such a condition. The purchasers have further contended that the seven days' notice

“provided for in Clause 22 of the contract and which was sent
 “to them on 20.1.42 did not afford them the last opportunity of
 “complying with the contract as is the usage in the case of such
 “admissions. The Court is of the opinion that the notice Ex.
 “D/3 contains an indication that it was sent in accordance with
 “Clause 22 of the contract and there is no need for further
 “particulars.

10 “From all the above the Court comes to the conclusion that
 “the purchasers Baruch Heiman and the others were not pre-
 “pared to fulfil their undertaking in accordance with the
 “contracts and that they have committed a breach thereof on
 “two occasions: (A) on 15.10.1940 they failed to appear at the
 “Tabu in order to receive transfer to their name of the shops
 “in question, a thing which is contrary to Clause 13 of the
 “contract; (B) within the seven days starting on 20.10.1942 they
 “did not pay the amounts which were then due from them.
 “On the ground of these breaches the Defendants were entitled
 “to rescind the contract.

20 “We therefore decide to dismiss the action of the Plaintiffs
 “and to declare that the contracts between the parties are
 “rescinded.”

16. The Respondents submit that the judgment of the District Court is manifestly unsatisfactory. There is no indication in the judgment that the Court appreciated the effect of its decision or considered the principles on which a declaratory judgment should be given. There was not, it is submitted, sufficient material before the Court justifying the making of the declaration. It is further submitted that the Court did not pay sufficient regard to Rule 205 of the Civil Procedure Rules which reads as follows:—

30 “Judgment in defended actions shall contain a concise
 “statement of the case, the Court’s findings on material facts,
 “the points for determination, the decision thereon and the
 “reasons for such decision.”

In view of the course taken by the Supreme Court when the case came before it on appeal, it will suffice to make the following further comments on this judgment. The Court would not appear to have had in mind that it is not every breach of a contract that justifies a claim for rescission. No complaint was made by the Appellants in their pleadings as to the failure by the Respondents
 40 to appear at the Land Registry in response to the invitation D/2, and the Respondents’ other submissions on this document—as also those on D/3—are ignored in the judgment. The Court appears to

have overlooked the fact that the Appellants themselves did not at the time or indeed at any time either avoid the contract or take steps to avoid it because of failure by the Respondents to comply with D/2: the terms of D/3 make it clear that in January, 1942, the Appellants still regarded the contract as subsisting.

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p. 21

17. The Respondents appealed against the judgment of the District Court on the counterclaim. The appeal was heard by Mr. Justice Edwards and Mr. A/Justice Plunkett. Judgment was delivered on the 17th November, 1944, when the appeal was allowed and the judgment of the District Court on the counterclaim set aside. 10
The grounds for the decision appear from the following passages of the Judgment:—

p. 21, l. 35

“We do not rule that a defendant to an action for accounts
“can never by way of counterclaim ask for a declaration that
“a contract for sale is or has been rescinded. The matter in
“Palestine is governed by rule 85, Civil Procedure Rules, 1938,
“read together with rule 52 (4).

“In the course of the argument, Mr. Goitein, for the
“appellants, referred to the case in *Re Staples* (1916) 1 Chancery
“Division 322 and to *Austen v. Collins*, Vol. 54 Law Times 20
“Reports, p. 903.

“Because of the view which we take of this matter it is, for
“obvious reasons, undesirable that we should deal at length
“with the judgment of the Court below or with the lengthy
“arguments advanced before us by the several advocates who
“have appeared on behalf of the various parties. Suffice it to
“say that, while an appellate Court is always reluctant to
“interfere with the discretion of a Court of first instance we
“think that, in the peculiar circumstances of this case, it was
“not appropriate to order rescission of the contracts—the 30
“subject matter of this dispute—by way of declaration in a
“counter-claim to an action for accounts. We are not, of course,
“laying down any rule of law or of practice. There is, however,
“a stronger reason why the judgment of the District Court
“cannot stand and that is that the judgment does not, in our
“view, contain sufficient findings of fact to support a finding
“that the contracts had been rescinded or should be rescinded.

“We accordingly allow the appeal and set aside that part
“of the judgment of the District Court which allowed the
“Counterclaim.” 40

18. Rule 85 of the Civil Procedure Rules, 1938, reads as follows:—

“A defendant in an action may set-off or set up by way of counter-claim against the claims of the Plaintiff, any right or claim, whether such set-off or counter-claim is for damages or not, and such set-off or counter-claim shall have the same effect as a cross-action, so as to enable the Court to pronounce a final judgment in the same action, both on the original claim and on the counter-claim.”

Rules 52 (1) and (4) of the same Rules read as follows:—

10 “(1) Every action shall include the whole of the claim which the Plaintiff is entitled to make in respect of the cause of action; but a Plaintiff may relinquish any portion of the claim in order to bring the action within the jurisdiction of any Court.

“(4) No action shall fail on the grounds that the relief claimed is declaratory only.”

20 Subject to the Respondents' contention already mentioned and referred to again at the end of this paragraph, that the only Court that could properly entertain the Appellants' complaints, if any, on the matters raised in their counter-claim was the Land Court, it is the Respondents' submission that the law in regard to the granting of declaratory relief is substantially the same in Palestine as it is in England, and that where the only relief claimed is a declaration the jurisdiction should be exercised with great caution and a declaration ought not to be made when it is plain that substantive relief will be claimed in another action. It is respectfully submitted that the Supreme Court applied the correct principles, when in its judgment in this case it came to the conclusion that the Appellants ought not to be granted the relief claimed.

30 As to the Respondents' submission that if the Appellants were entitled to any relief that relief could be given to them only by the Land Court, the Respondents would point out that the effect of the District Court judgment is that the right of the Respondents to the land in question or to registration thereof in the Land Registry has gone. In Palestine, it is submitted, that it is only the Land Court that can make a declaration the inevitable result of which is to give the Appellants both the legal and equitable right in the land in question and take away from the Respondents rights in the land given to them under the contracts in question. A Court ought not, it is submitted, to grant a declaration where such consequential
40 relief as would naturally follow from the right sought to be declared lies within the exclusive jurisdiction of another Court.

19. The Respondents submit that the judgment of the Supreme Court is right and ought to be affirmed for the following among other

REASONS.

1. BECAUSE this was not an appropriate case for the granting of declaratory relief.
2. BECAUSE there was no or no sufficient material before the District Court to justify the granting of such relief.
3. BECAUSE the Appellants had failed to prove that the Respondents had committed breaches of the contract in suit or that, if they had committed such breaches, 10 such breaches went to the root of the contracts.
4. BECAUSE time was not of the essence of the contracts in suit.
5. BECAUSE the Respondents were not in default under the contracts in suit.
6. BECAUSE if the Respondents were in default they should have been given by the Court time to make good their default.
7. BECAUSE the granting of a declaration as claimed would affect the position of parties who were not before 20 the Court.
8. BECAUSE the counter-claims raised matters that were within the exclusive jurisdiction of the Land Court.
9. BECAUSE the judgment under appeal is having regard to the facts and to the law applicable right and ought to be affirmed.

PHINEAS QUASS.

In the Privy Council.

ON APPEAL

FROM THE SUPREME COURT SITTING AS A
COURT OF APPEAL JERUSALEM.

BETWEEN:—

JOSEPH KLEIN and Others

Appellants

— AND —

ELIAHU (LEO) HEIMAN and Others

Respondents

CASE FOR THE RESPONDENTS

HERBERT OPPENHEIMER, NATHAN & VANDYK,
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