

D. N. Tadros : - - - - - *Appellant*

v.

Hashem Abu Khadra - - - - - *Respondent*

FROM

THE SUPREME COURT OF PALESTINE

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL, DELIVERED THE 26TH APRIL, 1937.

Present at the Hearing :

LORD ATKIN.

LORD THANKERTON.

LORD ROCHE.

[*Delivered by* LORD THANKERTON.]

This is an appeal from a judgment of the Supreme Court of Palestine, sitting as a Court of Appeal, dated the 16th April, 1934, which confirmed a judgment of the District Court of Jaffa, dated the 20th December, 1932, whereby the appellant, as defender of the suit, was held liable to the respondent as plaintiff in the sum of £P.2,000 in respect of an undertaking given by the appellant to the respondent by a letter dated the 14th April, 1930.

The claim arises out of a series of transactions in which the appellant on the one side and the respondent, his mother and his seven brothers on the other side, were concerned. On the 5th November, 1929, the appellant obtained judgment against the respondent, his mother and his seven brothers, as the heirs of Ramadan Abu Khadra, for the sum of £P.15,000. The parties negotiated as to some settlement of this debt, and an arrangement was come to between all these parties, which was embodied in a notarial declaration dated the 14th April, 1930, which is in the following terms:—

“ As we are indebted to Mr. Dimitri Tadros for the sum of fifteen thousand Palestine Pounds by virtue of a deed of sale signed by one of us Hashem on behalf of himself and on behalf of the rest of us for the orange grove called “ Rafoulieh ” for the above mentioned sum and this sale has not been duly registered to him and he has made legal proceedings against us in the District Court of Jaffa demanding the return of the above-mentioned debt and the fulfilment of the conditions contained in the deed and there was a judgment in his favour against the majority of us in our presence and Hashem and Fouzi by default on the 5/11/1929 Register 395/1929 and 450/1929 for the refund to him of the said debt of 15,000 Palestine Pounds with interest from the date of the said deed dated 14/4/1929 up to the full payment of the said debt with costs and we have submitted to this Judgment and now we have come to an agreement with Mr. D. N. Tadros to accept

from us £P.11,000—as a compromise for the said amount of 15,000 pounds and interest and cost and we undertake to give him as security for this amount a mortgage on all our shares as herein mentioned.

“ We the undersigned Hanon the daughter of Suleiman Aboukhadra the widow of Ramadan Aboukhadra and her children Hachem, Fouzi, Musbah, Husni, Zakieh, Husson, Ra'aisseh, and Akfeh children of Ramadan Aboukhadra Landed Proprietors and residents of Jaffa have appointed on our behalf Mr. Benjamin John Maxwell Nimmo, British Subject and Abdelatif the son of Ibrahim Aboukhadra both residents of Jaffa, jointly and singly to admit on our behalf before the Land Registrar of Gaza and all official, Civil and Judicial Departments that we have mortgaged to Mr. Dimitri Tadros all our shares in all the lands of the village of Barka in the District of Gaza which we inherited from Ramadan Aboukhadra for one year from the date of the transfer in the Registry Office for the amount of 12,000 pounds of which £11,000 agreed upon as a compromise and one thousand pounds to be paid to us and then added to the mortgage to enable us to pay any accumulated taxes for tithes Werko and any expenses on making the necessary formalities. Should the period elapse and we do not repay him the twelve thousand pounds he is entitled to put up the shares in the above-mentioned land and sell it by auction and if the proceeds do not realise the amount due he has the right to demand any balance from our other properties without procuring a Judgment from a Court and the interest to be accounted for on the amount due or on what remains from the date of its due until full payment, without making any objection for the sale of our other properties in the event of our not paying and we have given them power to sign on our behalf all necessary documents and receipts for the completion of all formalities for the registry of the mortgage and to admit in the Registry Office on our behalf that we have received the above amount and to register in the name of our creditor Mr. D. N. Tadros or in the name of whoever Mr. D. N. Tadros wishes to either individuals or Companies and it will not be lawful for us to dismiss both our attorneys or one of them before the full payment of the debt of 12,000 pounds during the time specified below and we hereby guarantee to remove at our expense all seizures mortgages and any obstacles made by a third party which may hinder registration and we give permission to Mr. D. N. Tadros to pay on our behalf the sum of 1,000 pounds above mentioned in different payments for registrations, etc., according to need to Abdelatif or Mahmoud Aboukhadra as if it was paid to us. We bind ourselves to prepare all formalities to be ready to be registered in the Land Registry within three months maximum from this date and if this period elapses without the mortgage being registered we undertake to refund him the said 12,000 pounds and to pay over and above 3,000 Palestine pounds as an indemnity agreed upon between us from now without necessity for Notarial notice and we have given permission to any of the two attorneys to give power of attorney to a third party for the fulfilment of the aforesaid formalities or part of them.”

On the same day, the 14th April, 1930, the appellant gave to the respondent alone a letter in the following terms:—

“ As you are indebted to the Banco di Roma for an amount over £P.4,000 under my guarantee and the guarantee of Mr. Alfred Rock and Mohamed Abdel Rahim, and there was a judgment against you for this amount and a judgment against Mr. Alfred Rock your guarantor for the sum of £P.2,000 due to Joseph Abdelnour, and as you, your mother, and your brothers are indebted to me for £P.15,000 with interest and expenses, and there was a judgment against you to me for this amount, and as we have compromised on the said £P.15,000 and interest and the expenses for the amount of £P.11,000 against which you have guaranteed to

mortgage to me the lands of Barqua as security and I have agreed to pay you £P.1,000 over and above according to a Notarial Agreement dated 14th April, 1930, therefore I have accepted that the amount which I paid to the Banco di Roma for you and the amount of Abdelnour that they be included in this compromise, so that you will be freed from any liability in respect of the amount of £P.4,000 odd owing to the Banco di Roma and from the £P.2,000 due to Yuseph Abdelnour in consideration of the compromise which has been effected between us in accordance with the terms and conditions of the above mentioned Notarial Declaration.

“ Yours faithfully,

“ (Signed) D. N. TADROS.

“ P.S.—The said compromise will include all debts to me besides these debts which may appear before the date of this letter, excepting the £P.11,000 above mentioned.”

The claim in the present suit is based on the undertaking given in that letter.

Prior to the date of these documents, the Banco di Roma had recovered judgment on the 5th December, 1929, for £P.4,723 against the respondent and his three guarantors, the appellant, Alfred Rock and Abdel Rahim, and on the 1st February, 1930, the appellant had paid £P.2,000 under the judgment to the Bank and had obtained release as a guarantor. Abdel Rahim had also obtained judgment for £P.2,000 against the respondent and Rock as his guarantor.

It is clear from the terms of the letter of the 14th April, 1930, that, in any question between the appellant and the respondent, it formed part of the settlement contained in the notarial declaration and falls to be read along with it. The appellant duly provided the £P.1,000 referred to in the declaration, but before the other parties had executed the mortgage for £P.12,000 and before the expiry of the three months limited for its execution, the respondent was declared bankrupt on the 15th June, 1930.

On the 18th June, 1930, Barclays Bank intimated that they had a seizure on all the Aboukadra lands for £P.5,000. On the 14th July, 1930, the appellant filed with the Syndic of the respondent's bankruptcy a claim for the recovery of the £P.2,000 paid by him to the Banco di Roma.

It appears that the New York Achooza Aleph Incorporated of New York, a foreign company registered in Palestine, were prospective purchasers of the Barka lands, which were to have been the subject of the mortgage under the notarial declaration, and that negotiations took place between the appellant, the Khadra family other than the respondent and the New York company, who were ready to purchase the interests of the Khadra family other than the respondent in the Barka lands, the price to be used in the first place for discharge of the claim of Barclays Bank. In result, an agreement was made on the 4th August, 1930, between these parties; the respondent was not a party thereto nor was the Syndic of his bankruptcy a party thereto. The material provisions of this agreement are as follows:—

“ THIS AGREEMENT is made the fourth day of August 1930
BETWEEN Hanon daughter of Sulciman Aboukhadra, widow of

Ramadan Aboukhadra and her children Fouzi, Musbah, Husni, Zakieh, Husson, Ra'aisseh and Akfeh children of Ramadan Aboukhadra, Landed Proprietors and residents of Jaffa (hereinafter called the Vendors which expression shall include their heirs and assigns) of the one part Dimitri Nicolas Tadros, Landed Proprietor of Jaffa (hereinafter called the Mortgagee) of the second part and New York Achooza Aleph Incorporated of New York a foreign Company registered in Palestine vide Official Gazette No. 56 dated 1st December 1921 (hereinafter called the Purchasers) of the third part.

" WHEREAS by a written declaration dated the fourteenth day of April 1930 made before the Notary Public of Jaffa the Vendors together with one Haschem Aboukhadra declared that they were indebted to the Mortgagee in the sum of fifteen thousand pounds Palestine (£P.15,000) plus interest and costs as therein stated.

" AND WHEREAS the said Hashem Eff. Aboukhadra (signatory of the said declaration) has now become bankrupt and the Mortgagee has agreed to release him from his liability thereunder subject to the joint and several guarantee of the remainder of the signatories of the said declaration that a minimum quantity of four thousand six hundred (4,600) dunams of land at least shall be made available for the security and the sale hereinafter mentioned.

" AND WHEREAS the Mortgagee has agreed to reduce the said total debt to the sum of twelve thousand pounds Palestine (£P.12,000) on condition that the Vendors, as security for the said reduced sum, should execute in favour of the Mortgagee a mortgage upon all their respective shares 'musha' in all the lands of and about the village of Barka in the district of Gaza as more particularly described in the Schedule hereto annexed (and hereinafter referred to as the Property) believed to contain four thousand six hundred (4,600) dunams more or less the actual area whereof is to be determined on survey.

" AND WHEREAS the Vendors have undertaken within two months from the date hereof to execute the aforesaid mortgage free from incumbrances in favour of the Mortgagee in consideration of the reduction of the debt before referred to.

" AND WHEREAS the Purchasers are desirous of purchasing (immediately after execution of the said mortgage and subject thereto) all the said property of the Vendors as aforesaid on the terms hereinafter contained.

" NOW THEREFORE IT IS AGREED between the parties as follows:—

" (1) The Vendors shall at their own cost within two months from the date hereof mortgage the property free from incumbrances to the Mortgagee in form approved by him for the sum of twelve thousand pounds Palestine (£P.12,000) at 7% (seven per centum) per annum. The said interest shall commence to run from the date of the said mortgage. In the event of any failure whatsoever on the part of the Vendors or any of them (no matter from what cause or excuse) to complete the said mortgage within the said period of two months the Vendors shall be jointly and severally liable to pay to the Mortgagee on demand as liquidated damages the sum of £P.3,000 (three thousand pounds Palestine) in addition to the sum of £P.12,000 (twelve thousand pounds Palestine) before mentioned.

" (2) The Vendors undertake to sell and the Purchasers to buy the aforesaid property (subject to the said mortgage) as determined by the survey for the price of three pounds Palestine five hundred mils (£P.3,500 mils) per metric dunam mafrous payable as follows:—

" (a) On signature of these presents two thousand pounds Palestine (£P.2,000) shall be paid by the Purchasers

on deposit to Barclays Bank (Dominion Colonial and Overseas) Jaffa and two thousand pounds Palestine (£P.2,000) in bills payable: One bill for £P.1,000 (One thousand pounds Palestine) payable six months from date of this contract and another for a similar sum payable in one year from date of this contract, and the said cash and bills shall be held by the Bank until the transfer (musha) in the Land Registry to the Purchasers upon which event the said sum and bills shall become the property of the said Bank to be applied by it in reduction of certain indebtedness existing as a result of a judgment obtained by the said Bank against the Vendors and deposited in the Execution office at Jaffa between the Bank and the Vendors and the said Hashem Abukhadra. The said transfer shall be executed simultaneously with (but subject to) the said mortgage.

“(b) The balance in equal instalments shall be paid to the Mortgagee within thirty (30) months of the date of the transfer ‘Musha’ to the Purchasers and shall be applied in discharge of the mortgage, the first of which instalments shall become payable upon completion of the legal partition (mafrous) of the Property and the balance at three months intervals thereafter. In the event of any dispute at any time arising as to whether in fact the legal partition of the Property as contemplated in this contract by the Vendors has been effected or not or as to upon what date such partition was effected the same shall be submitted to and finally determined by Mr. C. F. Reading or if he is unable to act by some person appointed by him.

“(c) In the event of the actual purchase price (as and when ascertained by measurement of the property) being less than sufficient (after deduction of the £P.4,000 (four thousand pounds Palestine) paid to the said Bank) to satisfy the principal sum of twelve thousand pounds Palestine (£P.12,000) due to the Mortgagee under the said mortgage then the Vendors shall be jointly and severally liable to repay forthwith such balance remaining unsecured and due to the Mortgagee thereunder. Once the mafrous of the property has been completed as contemplated by sub-clause (b) above no claim on the part of the Purchasers against the Vendors or otherwise shall effect the right of the Mortgagee to receive from them punctual payment of the balance of the purchase price.

“(3) The Mortgagee undertakes to consent to the said sale (subject to his mortgage) and agrees likewise to give his consent to any retransfer of the property to the Vendors (subject to the said mortgage) in the event of the exercise of the option mentioned in Clause 8 below provided always that the Purchasers shall remain liable on the said mortgage (as they hereby agree to do) until the actual re-transfer is effected in the Land Registry whereupon the mortgage shall immediately become payable in full by the Vendors notwithstanding anything to the contrary herein contained.

“(4) The Purchasers agree after purchase by them ‘Musha’ as aforesaid to pay the interest at seven per centum (7%) on the said mortgage annually in arrear with effect from the date of the said mortgage and punctually to pay the Mortgagee all interests and instalments becoming payable in respect thereof.

“(5) Notwithstanding anything to the contrary herein contained in the event of the Purchasers failing to pay to the Mortgagee any interest or any instalments on due date the mortgage shall become immediately due and the Mortgagee shall have full right after giving sixty days notice by registered letter to the Purchaser to exercise all legal rights and remedies of a Mortgagee whose mortgage debt has become due.

" (6) The area shall be determined forthwith by a duly licensed Surveyor appointed and paid by the Vendors.

" (7) The property is at present musha with the exception of an area believed to be about one thousand (1,000) metric dunams (more or less) within the blocks at present known as Wadie el Assal and Tel el Ramal which is ' mafrous Khasousi ' as this area shall be included within the total area of four thousand six hundred (4,600) dunams as roughly delineated for identification on the plan attached which shall be so partitioned as to constitute a single block of four thousand six hundred (4,600) dunams. The Purchasers shall be at liberty to enter upon the Mafrous Khasousi parcel at any time after the ' musha ' transfer in the Land Registry and shall be entitled to sink a well, cultivate and plant thereon. Any such well and trees planted and any constructions thereon shall form part of the security of the Mortgagee.

" (8) The transfer of the Vendors shares in the property shall be effected ' musha ' (subject to the said mortgage) within two calendar months from the date of this Contract and the legal partition ' mafrous ' shall be fully completed by the Vendors at their own expense within one year from the date of transfer ' Musha ' and in the event of the Vendors failing so to partition within the said period the Purchasers shall have the option to be exercised by registered letters addressed to the Vendors with copy to the Mortgagee (such option only to be exercised not later than the fifteenth month after the said transfer ' Musha ') requiring a refund from the Vendors of all sums paid to them in respect of the purchase price with interest at 7% plus a sum of three thousand pounds Palestine (£P.3,000) as agreed and liquidated damages and upon payment thereof the Vendors may require all the property to be re-transferred back to them subject to the said mortgage and the Vendors shall in such event be liable to refund to the Purchasers any money expended by the latter according to their official books upon improvements to the land.

" (9) The fact that the area of the property is found to be in excess or less than the 4,600 dunams shall not affect this contract except so far as it operates to vary the purchase price. In the event of the purchase price exceeding the sum required to pay the bank plus the mortgage and costs, the balance shall be paid to the Vendors.

" (10) Transfer fees in respect of the said transfer to the Purchasers in the Land Registry shall be paid by the Purchasers but all other expenses and taxes shall be paid by the Vendors, who shall deliver the property, except for the mortgage aforesaid free of all charges and claims whatsoever including claims (if any) for compensation of cultivators.

" (11) The Vendors undertake to keep open the present direct road leading from the property to the main road known as Jaffa-Gaza Road.

" (12) The Mortgagee shall discharge from time to time such portion of the land comprised in his mortgage as he (after consultation with Purchasers) shall deem fit having regard to the repayments made to him by the Purchasers and the preservation of his security.

" (13) The commission of any breach hereof by or any failure on the part of any party hereto shall itself be deemed notice thereof as contemplated by Article 107 of the Code of Civil Procedure and no Notarial Notice shall be deemed necessary upon any matter arising out of this contract. Any notice required to be given shall be by ordinary registered letter to the following address which shall also be the address for service respectively in the event of any litigation and proof of posting of such registered letter or delivery of any process at such address shall be deemed sufficient proof of service.

“(14) Until after the execution of the mortgage before referred to nothing contained in this agreement shall prejudice the rights and remedies of the Mortgagee existing or arising by virtue of the before recited declaration of 14th April 1930.”

The vendors failed to execute the mortgage before the expiry of the two months prescribed on the 4th October, 1930, and the appellant gave them notarial notice and obtained provisional seizure. On the 9th February, 1931, the vendors executed the mortgage in the appellant's favour of their shares in the Barka lands and executed a transfer of these shares to the New York company, who paid off Barclays Bank.

On the 24th June, 1931, the respondent's bankruptcy was rescinded, and on the 20th September, 1931, the respondent, though not asked to do so by the appellant, made a transfer of his share of the Barka lands to the New York company. Even with this addition, the area of these lands ultimately proved to be short of the 4,600 dunams guaranteed in the agreement of 4th August, 1930, and, on the 23rd November, 1933, the appellant obtained judgment against the Khadra family other than the respondent for the resulting deficit of £P.2,085.703 mils on the amount due under the mortgage of 9th February, 1931.

After a notarial notice given on the 24th January, 1932, the respondent brought the present suit against the appellant, claiming the sum of £P.6,000 to be due to him upon the undertaking in the appellant's letter of the 14th April, 1930, to free him of liability in respect of £P.4,000 due to the Banco di Roma and £P.2,000 due to Abdel Nur. The claim was reduced to £P.2,000 on the appellant objecting that the former debt had been discharged.

The District Court gave judgment in the respondent's favour for £P.2,000, holding that the appellant's letter of the 14th April, 1930, was a part of, and had effect together with, the second agreement of the 4th August, 1930. They stated in their judgment:—

“The defendant got the security, though not quite the same, which he would have got under the first agreement. It was the best which he could get under the existing circumstances. We must remember that when the plaintiff's bankruptcy was annulled, he himself threw his share into the mortgage, though not asked to do so, thereby increasing the defendant's security.”

This judgment was affirmed on appeal by the Supreme Court, on the ground that the second agreement of the 4th August, 1930, was a mere modification of the first agreement of the 14th April, 1930, rendered necessary, as its second recital indicates, by the respondent's bankruptcy, and that, this being so, the second agreement did not annul the letter of the 14th April, 1930, which must in consequence be read in conjunction with the second agreement.

Their Lordships regret that they are unable to agree with these grounds of judgment, as, in their opinion, the terms of the obligation by the respondent and the other Khadra heirs in the notarial declaration of the 14th April, 1930, to execute and register the mortgage over the Barka

lands within the period and under the indemnity specified make clear that time was of the essence of the contract, and that, on the expiry of the three months on the 14th July, 1930, without the execution of any mortgage, the respondent and the other heirs became liable in an unsecured debt to the appellant of £P.12,000 and £P.3,000 of indemnity, making £P.15,000 in all. The other provisions of the agreement disappeared. In the second place, in their Lordships' opinion, the terms of the letter of the 14th April, 1930, make clear that the obligations undertaken by the appellant were conditional on the execution of the mortgage in terms of the agreement of even date, and, in consequence, the failure to execute the mortgage within the time prescribed, rendered these obligations by the appellant nugatory. This was the position rightly taken up by the appellant in his reply, dated the 30th January, 1932, to the respondent's notary notice of the 24th January, 1932.

Their Lordships are also of opinion that the second agreement of the 4th August, 1930, was not a modification of the earlier agreement, but was a new agreement with different parties and under different conditions. As already stated, the first agreement had disappeared, leaving the Khadra heirs liable for an unsecured debt of £P.15,000. Obviously the appellant was anxious to get payment or security; it was useless to approach the respondent, in view of his bankruptcy, and accordingly negotiations were confined to the other debtors.

Accordingly, their Lordships are of opinion that the respondent has no ground of action against the appellant, and they will humbly advise His Majesty that the appeal should be allowed, that the judgments of the District Court and of the Supreme Court should be set aside and that the suit should be dismissed. The appellant will have his costs in the appeal and in the Courts below.



In the Privy Council.

D. N. TADROS

v.

HASHEM ABU KHADRA

DELIVERED BY LORD THANKERTON

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