Privy Council Appeal No. 4 *of* 1957

Hassanali Kurji Kanji - - - - - - - - - *Appellant*

v.

Gailey and Roberts Limited - - - - - - *Respondents*

FROM

THE COURT OF APPEAL FOR EASTERN AFRICA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 20TH APRIL 1959

Present at the Hearing:

LORD RADCLIFFE
LORD KEITH OF AVONHOLM
MR. L. M. D. DE SILVA

[*Delivered by* LORD RADCLIFFE]

In this appeal the appellant challenges the decision of Her Majesty's Court of Appeal for Eastern Africa to the effect that he is liable to pay to the respondents a principal sum of Shs.206,429/09 representing monies outstanding on the trading account of two businesses, one entitled Hassan Trading Stores, of which the appellant was registered proprietor, and the other entitled Hassanali & Co., the registered proprietor of which was one H. K. Premji. It was not in dispute in the appeal that the appellant had in fact given the respondents an undertaking to pay these sums; what was argued on his behalf was that the evidence in the action did not support the view that any consideration had been afforded by the respondents in exchange for the undertaking and that therefore the undertaking itself was void in law under the provisions of section 25 of the Indian Contract Act, 1872, which rules in Tanganyika.

In their Lordships' opinion this argument cannot be supported. Since it turns wholly on the question what facts were proved at the trial of the case in the High Court of Tanganyika and on the further question what legitimate inferences could be drawn from those facts as to the true nature of the arrangement come to between the parties, it is more convenient to notice the course of the trial itself and the form which the evidence took than to attempt any independent narrative of the facts.

The respondents, it appears, carry on business in Tanganyika at Moshi and elsewhere. In February, 1954, they launched the present action against the appellant under the name of the Hassan Trading Stores, claiming a sum of Shs.97,936/54 in respect of goods supplied by them to the stores and a sum of Shs.121,462/07 in respect of the account of Hassanali & Co. for which, they said, the appellant had undertaken liability. In his defence the appellant denied that he ever undertook the liability of Hassanali & Co., a position which he maintained throughout the trial and tried to support by the evidence which he gave. His evidence on this point was not believed by the learned Judge (Cox, C.J.) who tried the case, and their Lordships are satisfied that there was ample material by way of subsequent conduct and admissions to justify the Judge in his finding that the appellant had in fact given the undertaking

alleged. This was conceded at the present hearing and the appellant's Case accepted the month of December, 1951, as the month in which the undertaking was given.

The material point is therefore to see how far the evidence established the circumstances attendant upon that undertaking. As to this, it appeared that there was at the material time a third customer of the respondents, one Mohamedali Jafferali, in their debt to the extent of Shs.109,345/70. He was the appellant's nephew and the son of Premji's brother in law. All three had the same postal address, P.O. Box 48 Moshi. According to the learned Chief Justice their business relationship and family relationship were such as to make their three concerns " almost integrated one with the other ". It was objected that there was no evidence to support this finding. Certainly no evidence is recorded to this effect; but a considerable part of the hearing is only covered by the Judge's Notes, which are not and are not intended to be exhaustive, and their Lordships do not think it likely that the trial Judge would have stated that he was satisfied as to certain incidental matters of fact if he had not had some material before him to support his conclusion.

The respondents' statement of the case was that the appellant's undertaking to cover the Hassanali account arose out of an arrangement by which the sums owing to them on the Jafferali account were transferred in part to the appellant's account and in part to the Hassanali account and Jafferali's account with the respondents was then closed. Paragraph 5 of their amended plaint runs as follows: " In or about December, 1951, it was agreed orally between Mr. F. A. Green the then Manager of the plaintiffs at Moshi and the defendant and H. K. Premji that Shs.100,000 should be transferred from the account of Mohamedali Jafferali to the account of Hassanali & Co. . . ., and it was agreed at the same time that the balance of the said account of Mohamedali Jafferali some Shs.9,334/70 should be transferred to the account of Hassan Trading Store . . ., and it was further agreed between the aforementioned parties that the defendant would undertake the responsibility for the payment of the account of Hassanali and Co., which at the time of the said undertaking included the amount transferred from the account of Mohamedali Jafferali ".

The evidence produced at the trial left no doubt that the Jafferali account had in fact been treated in the way alleged. It was clear from the account books kept by the respondents that this account was shown as closed by the 31st December, 1951, and that the Shs.109,345/70 owing on it were divided as stated as debits to the accounts of Hassan Trading Stores and Hassanali & Co., respectively. This is not now in dispute.

It would be difficult to say that the trial elicited any further facts than these relevant to the circumstances in which the appellant's undertaking was given. Mr. Green, the respondent's manager at Moshi in 1951/52, was called: but he had left that employment in 1953 and it is plain that by the time of the trial he had very little recollection of what arrangements he had made with the appellant, except so far as he had some contemporary record or document to act as the foundation for anything to which he testified. The most that he seems to have been able to contribute was that in December, 1951, Jafferali was not in a position to pay what he owed, that he (Green) had had a meeting in the same month with the proprietor of Hassanali & Co. " to get the money ", that the Shs.100,000 were transferred to the Company's account because they had agreed to take over that liability and that his impression was that the appellant himself had agreed in 1951 to undertake liability for the Hassanali account. He founded his impression principally on the fact that he had obtained and held a series of post-dated cheques drawn by the appellant to the precise amounts owing on that account. These cheques, which were never honoured, appear to have been made out in favour of Hassanali & Co., and endorsed by them to the respondents.

The respondents' two succeeding managers at Moshi were also called as witnesses, since they had taken over responsibility for the respondents' dealings with the appellant. While they could add nothing of their own

knowledge as to the circumstances in which the arrangement or arrangements of December, 1951, were come to, they did make it quite clear that between 1952 and 1954 the appellant had consistently treated himself as liable to the respondents for what was owing on the Hassanali account as well for what was owing from Hassan Trading Stores and had never, until the defence was filed in the action, disclaimed the liability.

Both he and Premji were called at the trial. Premji, while agreeing that he had arranged with Mr. Green to take over Shs.100,000 of Jafferali's debt, denied that, so far as he knew, there had been any suggestion of the appellant becoming responsible for the Hassanali account. The appellant, while agreeing that he had arranged with Mr. Green to take over Shs.9,000 of the Jafferali debt, denied that he had assumed responsibility for the Shs.100,000 or for the liability of Hassanali & Co. in any form. As has been said, the trial Judge stated that he rejected the story told by the witnesses for the defence where it was in conflict with that of the plaintiffs' witnesses. While this does not add any element of proof to the respondents' evidence that was not there before it does mean that the facts and circumstances which were established by their evidence stand without any acceptable explanation from the side of the appellant.

On this state of the record the appellant argues that he was entitled to succeed at the trial with regard to all that part of the claim that related to the Hassanali account because there was no consideration given by the respondents for the undertaking which he gave to them. This point as to lack of consideration was not raised by the defence nor, when the issues came to be settled, was any issue asked for with regard to it. It appears to have been raised by the appellant's counsel in his address to the Court at the close of the hearing. It is possible that, had it been brought forward earlier, the evidence adduced at the trial would have been more explicit in this connection; but, having regard to the general course that the evidence took and the vagueness of Mr. Green's personal recollection, the possibility is only a thin one and their Lordships do not give any weight to it in their appreciation of the evidence.

Consideration is defined by section 2 of the Indian Contract Act in the following terms:—" When at the desire of the promissor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing something, such act or abstinence or promise is called a consideration for the promise ". This definition does not offer any distinction that is material for the purposes of the present appeal between consideration as ruled by the Indian Contract Act and consideration in the law of England. Now it is true that there is no part of the evidence for the respondents which states with any clarity what was agreed between Mr. Green on their behalf and the appellant; nor is there in it any statement at all to the effect that any promise which the appellant gave to hold himself responsible for the Hassanali account was made at the same time as and in exchange for the respondents' closure of the Jafferali account. This is the point upon which the appellant's counsel stands. It is not impossible, as he says, that the undertaking to cover the Hassanali account was given independently of the arrangement to close the Jafferali account and divide the sums owing on it between Premji and himself. If so, the undertaking would stand as *nudum pactum*. At any rate, he says, it was never affirmatively proved that the undertaking and the arrangement were so much part of one transaction as to be, in effect, mutual promises; and, if so, then the respondents' case lacked an essential element of proof.

In their Lordships' view the question resolves itself into that of deciding how far it was open to the High Court to supply by inference from facts proved or admitted a material fact that was not so proved. In effect, did the circumstances known to the Court justify the inference that when the appellant gave the respondents his undertaking to be responsible for the Hassanali account he obtained consideration from them in return in the form of something that he wanted them to do or abstain from or to promise? There is no doubt that it is open to a Court to find a fact by inference in this way without having direct proof before it and the

giving of consideration is sometimes so found—see *Crears* v. *Hunter* 19 Q.B.D. 341. The test seems to be whether the inference drawn arises with reasonable cogency from the surrounding circumstances.

The learned trial Judge's treatment of the facts is expressed as follows: " In the middle of 1951 and before that Mohamedali Jafferali had incurred a considerable liability with the plaintiffs, and one of the local managers of the plaintiffs, being concerned about it and the fact that he himself would be pressed from his head office in connection with this outstanding account, acquiesced in a proposal by the defendant that the liability of this third concern to the plaintiffs should be divided between Hassan Trading Stores and Hassanali & Co., and at the request of the defendant Mohamedali Jafferali's account was closed . . ." Later, he states: " I am quite satisfied from the evidence that the defendant accepted liability for the whole of Mohamedali Jafferali's liability to the plaintiffs and that that liability was divided between Hassan Trading Stores and Hassanali & Co. as requested by the defendant, with effect from the 31st day of December, 1951.".

Plainly, with facts so found, the appellant obtained consideration from the respondents by their closure of the Jafferali account and all that was done and promised on both sides was part of one interconnected arrangement. Their Lordships do not think that this was an impermissible deduction from the known facts. It is common ground that both the appellant's undertaking, and the closure and transfer of the Jafferali account took place in the same month, December, 1951. If the Jafferali account was closed and its debits transferred in the way proved, it seems not only a possible but in fact the most reasonable inference that the respondents would not have so acted unless they were to get something in exchange for the release of their debtor. Since it is known that in the same month the appellant assumed liability for the Hassanali account as between himself and the respondents, thereby becoming its guarantor, it is similarly the reasonable inference that he took this responsibility upon himself in exchange for the Jafferali release, a release to which he had at any rate some reason for wishing to contribute. When the facts and inferences can be set out in this way, their Lordships are satisfied that it would be wrong for an appellate court to upset the judgment of the trial Judge on the ground that it was not open to him to arrive at the conclusions of fact which have been referred to above.

Their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellant must pay the respondents' costs.

(39739) Wt. 8021—25 100 5/59 D.L.

In the Privy Council

HASSANALI KURJI KANJI

v.

GAILEY AND ROBERTS LIMITED

DELIVERED BY LORD RADCLIFFE

Printed by HER MAJESTY'S STATIONERY OFFICE PRESS,
DRURY LANE, W.C.2.

1959