A

HASMAT BIBI

v.

ASGAR ALI

B [COURT OF APPEAL, 1968 (Hammett P., Gould J.A. Trainor J.A. 6th, 30th May]

Civil Jurisdiction

Trial—judgment—witnesses—credibility—necessity for finding on credibility of witnesses in judgment—appeal court not in position to determine whether witnesses to be believed or not—new trial.

C *Practice and procedure—new trial—no sufficient finding on credibility of witnesses in the court below.*

Appeal—insufficient findings by trial judge on credibility of witnesses—position of appeal court—new trial.

D The appellant's action in the Supreme Court for (*inter alia*) declarations that freehold land transferred by her to the respondent was held by him as a mortgagee or alternatively as a trustee for her, was dismissed on the ground that the appellant had not discharged the burden of proof. In his judgment the trial judge made no specific findings upon the essential issue of credibility, but considered that the appellant's evidence was not sufficiently clear and convincing and that in particular respects her case was inherently improbable.

E

Held : 1. There was no lack of clarity in the appellant's own evidence which was in a large measure corroborated by three independent witnesses.

2. There were inferences which ought to have been drawn from uncontradicted evidence that the stated purchase price for the transfer F was only about one half of the true value of the land at the material time.

3. It was a case in which it was essential that the trial judge should make a finding on the vital issue of the credibility of the appellant and her witnesses; this was not done.

G 4. It was not possible for the Court of Appeal, not having seen or heard the witnesses, to decide whether they should have been believed or not, and while an order for a new trial is to be made with reluctance, it was in this case appropriate and necessary.

H Cases refered to : *Rochefaucauld v. Boustead* [1897] 1 Ch. 196; 75 L.T. 502: *Yuill v. Yuill* [1945] P. 15; [1945] 1 All E.R. 183: *Fry v. Lane* (1889) 40 Ch. D. 312; [1886-90] All E.R. (Rep.) 1084: *Wood v. Abrey* (1818) 3 Madd. 417; 56 E.R. 558: *Khemaney v. Murlidhar* [1960] E.A. 1: *Brown v. Dean* [1910] A.C. 373; 102 L.T. 661.

Appeal from a judgment of the Supreme Court dismissing an action claiming declarations relative to title to land.

K. P. Mishra for the appellant. A

J. N. Falvey for the respondent.

The following judgments were read :

HAMMETT P.: [30th May, 1968]— B

This is an appeal from the decision of the Supreme Court of Fiji sitting at Lautoka.

The facts leading up to the action were as follows : -

In 1959 the plaintiff appellant was the registered proprietor of 3 acres of freehold land at Ba comprised in Certificate of Title No. 59/5871. Her C two sons Abdul Jalil and Abdul Lateef were the joint registered proprietors, as tenants in common, of the adjoining 3 acres of freehold land comprised in Certificate of Title No. 59/5872. The plaintiff appellant's husband was a storekeeper who also grew sugar-cane on this land owned by his wife and two sons. He fell into financial difficulties in 1958 and 1959 and borrowed a total of £1,850 from the defendant respondent who was at all material times a registered moneylender. Repayment D of this money was secured by a mortgage over the plaintiff appellant's 3 acres of land which was registered on 1st July 1959 and later by the further security of a collateral mortgage over the land owned by the two sons which was registered on 31st July, 1959.

Crop Liens were also given, in 1959, to the respondent over the proceeds of sugar-cane to be harvested on this land owned by the appel- E lant and her two sons respectively.

The financial position of the appellant's family steadily deteriorated. In 1961 Morris Hedstrom Ltd. at Ba threatened to exercise the powers of seizure and sale contained in a Bill of Sale over their residence and shop. This had been given to secure the repayment of a debt which by then amounted to some £1,200. In addition debts were due to other F creditors and there was the prospect of bankruptcy proceedings. In the event the appellant's husband was later made bankrupt and died, as such, before the hearing of these proceedings. The appellant's son Abdul Jalil was also adjudicated bankrupt and was still a bankrupt at the time of the trial of this action.

The appellant's husband and her sons discussed the matter with the G respondent in 1961 and he agred to give further financial help. As a result on 24th March, 1961 the appellant executed a transfer of her land in favour of the respondent for a stated consideration of £1,150.2.6. At the same time her sons executed a transfer of their 3 acres of land in favour of the respondent also for a stated considertion of £1,150.2.6. The total stated consideration for these two transfers was £2,300.5.0 which was the total then due to the respondent under his two mortgages H over the whole 6 acres of land. No cash was paid by the respondent but in return he discharged these mortgages and remitted all the interest due thereon. He then lent the appllant's husband the further sum of

£500 on the security of a second Bill of Sale over his house and shop. This £500 was paid to Morris Hedstrom Ltd. who as a result did not exercise the powers of seizure and sale under their Bill of Sale.

In her action in the Court below the appellant claimed, *inter alia* —

(1) A declaration that the transfer of Certificate of Title No. 59/5871 from the Plaintiff to the Defendant registered on 24th day of March, 1961 although in form an absolute conveyance is in fact a mortgage with right of redemption

and in the alternative

(2) A declaration that the Defendant holds the said property in trust for the Plaintiff subject to the repayment of the said loan.

The learned trial Judge in a brief judgment very rightly pointed out that in a case such as this the task facing the plaintiff of discharging the burden of proof in the teeth of the documentary evidence is always formidable.

Without reviewing the evidence in any great detail he concluded his judgment by holding that the appellant had not discharged the onus of proof that rested on her and dismissed the action.

It is against that dismissal that the plaintiff appellant now appeals on the following four grounds :-

"1. That the learned trial Judge failed to distinguish between the two separate issues involved in the case :

(a) whether or not the property concerned was transferred to the Respondent on trust,

(b) the manner of fulfilment of the said trust.

2. That the learned trial Judge over-emphasized the second issue whereby he failed to make a clear finding on the first issue, whether or not the property was transferred on trust.

3. That the learned trial Judge having believed Mr. Gurudayal Singh's evidence that the sale was a "family arrangement" ought to have adverted to the evidence of the other two independent witnesses, Venkat Subaiya and Mohan Singh, to arrive at a clear finding of the first issue, that is whether it was an out and out transfer or a transfer on trust.

4. It appears from the penultimate paragraph of the judgment that the learned trial Judge was deeply concerned with the second issue, that is, the manner of fulfilment of the trust than the trust itself which may have been decided on the balance of probability once a clear and separate finding of trust was made.

It is clear that the appellant has confined herself in this appeal to the single issue of whether or not the transfer of her 3 acres of freehold land to the respondent was by way of out and out sale to him or was on trust as alleged by her. She has not appealed against the decision of the Court below declining to grant a declaration that the transfer which appears to be an absolute coveyance was in fact a mortgage with a right of redemption.

It is the contention of the appellant that the learned trial Judge did not evaluate, or give sufficient weight to or reach and record specific findings of fact on the evidence given by the appellant and her witnesses in the Court below in support of her contention that the land was transferred to the respondent on trust and not absolutely.

The evidence for the appellant on this issue in the Court below fell under three distinct heads :

Firstly : There was the evidence of the appellant herself and her son Abdul Jalil of what was said and agreed to by the respondent shortly before the transfer was executed by the appellant. From this evidence it is claimed the respondent expressly agreed that if she transferred the land to him he would transfer the land back to her as soon as his debt was paid.

Secondly : There was the evidence of Gurudayal Singh, the solicitor who prepared the documents, of what the respondent said at the time of the execution of the transfer. There was also the evidence of Venkat Subaiya and Mohan Singh both of whom wanted later to buy the land themselves of what the respondent said to them sometime after the land had been transferred into the respondent's name. It is claimed that the evidence of these three witnesses corroborated and supported the appellant's evidence that the respondent agreed to accept the transfer of this land into his own name and to hold it in his own name only until the money due to him had been repaid. It is contended that the respondent's admissions to these witnesses is cogent evidence that at no time was it ever agreed by the parties or intended that the transfer of the land into the respondent's name should be an absolute transfer.

Thirdly : The evidence of the comparatively small consideration at which the transfer took place, which was less than half the market value of the property at the time, and also the evidence of the circumstances generally under which the transfer was made. It is submitted that this evidence tends to support and corroborate the claim of the appellant that this was not an absolute transfer and to negative the claim of the respondent to the contrary.

In support of each of these heads counsel for the appellant has drawn attention to the following instances of evidence on the record.

In her own evidence the appellant said that the respondent told her that if she transferred her land to him he would return it to her after the repayment to him of his money. He assured her that he would not cheat her and told her she should have faith in him. Her evidence in this respect was corroborated and supported by that of her son Abdul Jalil and her son-in-law Abdul Ghaffar.

In this respect counsel for the appellant relied on the decision of the Court of Appeal in *Rochefaucauld v. Boustead* [1897] 1 Ch. 196. In that well known case the Court of Appeal held that what on the face of it appeared to be an absolute transfer of property to the respondent was in fact, a transfer to him as trustee for the appellant. If the evidence of the appellant in this case as corroborated by that of her son and son-in-law had been accepted and believed, against the uncorroborated denials

by the respondent of any such arrangement and agreement, it was undoubtedly open to the learned trial Judge in the Court below to hold in favour of the appellant that the respondent held her land on trust.

In the course of the judgment in the Court below, however, no specific findings were made on the essential issue of credibility. The appellant's case as a whole was not accepted, according to the judgment, for two reasons :-

Firstly : That the appellant's evidence was not sufficiently clear and convincing, and

Secondly : That in particular respects her case was inherently improbable.

If the case for the appellant had depended only upon her own evidence as supported by that of two relatives, against that of the respondent, a specific finding by the Court below that he did not consider her or her relatives were witnesses of truth and he did not accept or believe their evidence alone in face of the respondent's denials on oath, might well have been conclusive. The learned trial Judge did not, however, make any such specific finding.

I do not find it easy to understand the criticism of the clarity of her case. After all she was an elderly Indian housewife. According to her she was, with reluctance, talked by her husband and her relatives and the respondent into agreeing to transfer her own property to the respondent at a time when her husband was in low financial straights. She said she did so in order that the respondent would render her husband further financial assistance on the respondent's assurance that once his money had been repaid he would transfer her land back to her. The details of how this was to be effected were matters of arrangement between her husband her relatives and the respondent. It seems to me that her own evidence on this point was quite clear and not open to any confusion. It either was to be believed or disbelieved.

On the question of whether it was convincing or not it seems to me that two questions arise. Her evidence could be convincing or not according to the manner in which she gave it or according to its contents and inherent probability.

The learned trial Judge did not say that he found her manner or that of her relatives as they gave evidence to be unconvincing, but that the subject matter of her case and her story was unconvincing in particular respects.

The instance of inherent improbability which was cited was the suggestion that the respondent, a registered moneylender, would be willing to transfer the land back to the appellant upon payment of his money, without charging an agreed rate of interest. I do not, however, feel able to agree that this of itself is inherently improbable.

I say this because whilst the respondent had the land in his own name he had the use of it. He did in fact use it and shared it on "share farming" arrangements with other persons who actually farmed it. The appellant and her family certainly gave up possession. The fruits or profits of the

use of the land would have been a very real return on the money loaned if this, as the appellant maintains, was the basis upon which the land was transferred to the respondent.

Taken on its own, I consider the appellant's evidence and that of her relatives was, if believed, of ample cogency to support the appellant's case. The absence of any specific finding that neither she nor her relatives were witnesses of truth or worthy of belief, apart from the question of the inherent probability or improbability of their story, appears to me to be a matter of considerable significane. This becomes of increasing importance when the evidence under the remaining heads is considered.

Three witnesses, all of them apparently independent, namely Mr. Gurdayal Singh, the solicitor, to whom the respondent went at the time of the preparation and execution of the transfers in 1961 and Mr. Venkat Subaiya and Mr. Mohan Singh, both of whom were prospective purchasers of the land in 1963 have given evidence.

Mr. Gurdayal Singh who said his main business is that of dealing in land and that he knew the value of land in Ba, said that in 1961 the value of this land was between £5,000 and £6,000. He said that he asked why the stated price at which the transfer was taking place, i.e. a little over £2,300, was, as he put it, "so low." He said the respondent then said "I'm not taking the land. Its just a family matter."

Mr. Venkat Subaiya said that in 1963 he told the respondent he wished to buy the land. The respondent told him that the land did not belong to him and that he would have no objection to the witness buying the land if a figure was agreed with the appellant's husband and sons.

Mr. Mohan Singh gave evidence that he also wanted to buy the land in 1963 and spoke about it to the respondent in whose name the land was registered. He said he was with Abdul Jalil, the appellant's son, at the time. He said the respondent told him that the land belonged to "Jalil and his family" and that he, the respondent, would have no objection to them selling the land if they wanted to do so.

The evidence of these three witnesses was not only consistent with the evidence of the appellant and her son and her son-in-law but also in large measure corroborative of their testimony. It was certainly completely inconsistent with and contradictory to the evidence of the respondent, who asserted in his evidence, that at no time had he ever agreed to transfer the land back to the appellant as soon as he had been repaid the money he had advanced. The respondent, in the course of his testimony, however, made no attempt to explain or deny the evidence of these three apparently independent witnesses. Under cross-examination when questioned about the low consideration given in the transfers, he himself replied "I don't know, I was concerned about my money. Not about purchasing."

Whilst the evidence of the appellant and her two relatives was open to the challenge that it should not be accepted alone as it was the evidence of witnesses who had an interest in the mater, the evidence of Messrs. Gurdayal Singh, Venkat Subaiya and Mohan Singh was not open to this criticism. Theirs was the testimony of persons who apparently fell within the classification of independent witnesses.

It was essential therefore that a finding should be made by the Court below on the vital issue of the credibility of these witnesses. If there was any valid reason why their testimony should not be accepted this was certainly not clear from the record itself. If their evidence was not rejected as unworthy of belief then the Court below was faced with the problem of making definitive findings of fact based on such testimony and also of stating what inferences and conclusions ought to be drawn from such findings.

Findings of fact were necessary on such questions as "Did the respondent in 1963 tell these two prospective purchasers that the land belonged to the appellant and her family or not?" If he did, what inferences ought to be drawn from such statements by the respondent in view of his present assertions to the contrary?

In these circumstances it is unfortunate that there were no findings on the issue of credibility by the Court below. In the absence of such findings it is not possible for this Court, not having seen or heard the witnesses, to decide whether they should have been believed or not. In the absence of findings of fact on the issues raised by these witnesses it is not possible for this Court merely from the material on the record of the trial to determine the essential issue raised in the case.

Finally, there are the inferences which ought to be drawn from the low price at which the transfer of the total of 6 acres was stated to have taken place, namely £2,300.5.0. For the appellant it is submitted that there was virtually no consideration for the transfer additional to the money that was already owed to the respondent and secured by mortgages over the land transferred. Mr. Gurdayal Singh a local solicitor gave evidence that the land was worth between £5,000 and £6,000 and that he remarked on this fact at the time the parties were with him. There was no evidence given for or on behalf of the defence in the Court below that challenged or contradicted the evidence of the value of this land at the material time given by Mr. Gurdayal Singh.

It is the appellant's contention that when all these factors are taken into account there was ample evidence in support of her case in the Court below and she was entitled to the declaration she sought, namely that the respondent held this property in trust for her and must transfer the land back to her upon payment to him of the money due to him.

This may well be so but in the absence of specific findings on the issue of credibility, we are unable to state whether or not the learned trial Judge who heard and saw these witnesses came to the conclusion that they were witnesses of truth or not. We are not in a position to rule on this vital issue of credibility as we have not heard or seen these witnesses.

A study of the record in this case indicates that the Judge in the Court below did not receive all the help that he may have expected and was entitled to from the parties' legal representatives. This was a civil action. It is always necessary for the trial Judge in a civil action to avoid a "descent into the arena" (see *Yuill v. Yuill* [1945] P.15) lest his vision be clouded by the dust of the conflict. The trial Judge may not, therefore, have felt himself free to put all the questions to the witnesses, especially

to the respondent, to test his veracity aganist that of the several witnesses for the appellant, that should really have been put by counsel. Without these questions having been put it was all the more difficult for the learned trial Judge to determine the vital issue of credibility in respect of each of these witnesses. This Court is, of course, even less able than the Court below to adjudicate on such matters.

A further matter of some difficulty arises out of the way in which this action was brought in the Court below. It was the case for the appellant that she transferred her 3 acres of freehold land to the respondent and her two sons, Abdul Jalil and Abdul Lateef, at the same time transferred their 3 acres of freehold land to the respondent upon trust, for the defendant to hold for them until the appellant's husband and their family had repaid to the respondent the loans he had made to the appellant's husband. These two different titles to land, one held by the appellant and the other by her two sons jointly, were the subject of this one alleged trust. In spite of this the appellant's sons Abdul Jalil and Abdul Lateef did not join with her as joint plaintiffs in bringing this action claiming, inter aila, this declartion of trust. Abdul Jalil gave evidence on behalf of the plaintiff, but appears to have been an undischarged bankrupt at the date of the action. In this event the Official Receiver would apparently have been interested in the plaintiff's cause of action. Abdul Lateef neither joined the appellant in bringing her action nor did he give evidence in the case.

It is clear that no decision in this case would be binding on Abdul Jalil or Abdul Lateef who were not parties to it. Some consideration should, therefore, in my view, have been given to the desirability of having them joined in the action possibly as co-plantiffs subject, of course, to the rights of the Official Receiver in bankruptcy. It is not easy or perhaps even possible on the evidence in the record to state how the interests of the plaintiff and her 3 acres of land and those of her sons and their 3 acres of land should be apportioned or treated having regard to the joint total sum of money originally due to the defendant, and whatever may now be due, even if the appellant were herself to succeed alone in a claim against the respondent.

I have taken into account the many other facets in this case, upon which counsel for the respondent relied in support of the decision of the Court below. It is submitted that the transfer by the appellant of her land to the respondent was an absolute transfer and was intended to be such. It is contended that the respondent is a moneylender who, taking advantage of the situation in 1961, when credit was tight and money was scarce, drove a hard but nevertheless quite legal bargain with the appellant at a time that her husband was in straightened financial circumstances.

In this situation this Court has three alternatives open to it:

Firstly: It could allow the appeal and enter judgment for the appellant. This is quite impossible in the absence of sufficient findings of fact by the Court below.

Secondly: It could dismiss the appeal and uphold the judgment in favour of the respondent. To do so would be to hold that questions of fact depending on credibility were resolved in the mind of

the learned trial Judge against the appellant. This again is not possible because the basic reason in the judgment of the Court finding in favour of the respondent is one with which I do not, with the greatest respect, agree.

Thirdly: It could order a new trial. Whilst reluctant to adopt this course, I do not see any alternative to it in order that the matters to which I have referred can be resolved. This course does have the added advantage of affording opportunity to correct the position as to parties. In my view the new trial should not proceed without full consideration being given to the necessity of the appellant's sons (in one case under the name of the Official Receiver if this should still be apposite) being added as plaintiffs or defendants as may be appropriate.

For these reasons I would allow the appeal and set aside the judgment of the Supreme Court and order that the case be remitted to the Court below for retrial.

I would award the appellant the taxed costs of the appeal and order that the costs of the original proceedings in the Supreme Court be reserved to the discretion of the trial Judge at the new trial.

GOULD J.A.:

I have had the advantage of reading the judgment of the learned President. I agree with it and with the orders he proposes.

I would add only a word on the question of the order for a new trial. It was said by the Privy Council in their judgment in *Khemaney v. Murlidhar* [1960] E.A. 1 that courts of appeal, in ordering a new trial should always bear in mind that a new trial provides a party with judicial advice on which he can remedy such defects as existed in his case when originally presented. They quoted the following remark by Lord Loreburn L.C. in *Brown v. Dean* [1910] A.C. 373 —

> "When a litigant has obtained a judgment in a Court of Justice whether it be a County Court or one of the High Courts he is by law entitled not to be deprived of that judgment without very solid grounds."

Bearing these considerations in mind I am nevertheless satisfied, that in the present case, the order for a new trial is appropriate and necessary, even though the conduct of the trial in the Supreme Court by counsel may have contributed to some extent to the lack of essential findings by the learned trial Judge. It is not a case in which this court can arrive at its own conclusion from the written record and for the reasons appearing in the judgment of the learned President I would consider it undesirable and unsafe merely to dismiss the appeal.

TRAINOR J.A.:

I have had the opportunity of reading the judgment of the learned President with which I concur and there is little that I could add; indeed, in the light of it, the less the better. Nevertheless I would like to comment on another aspect of the case which I consider was inadequately presented, though touched on, to the Court below.

There is no clear evidence, though the inference is to be drawn, as to whether or not the appellant received any independent professional advice, or indeed any advice other than that given her by her husband and son. Mr. Gurdayal Singh, who it would appear was acting for both parties, drafted the transfer and drew the attention of the appellant's husband to what he, Mr. Gurdayal Singh, considered inadequate consideration. Did he draw the appellant's attention to this or explain what, on the face of it, the transfer meant? A

These matters appear to me to be, indeed, relevant to the issue. Had they been ventilated the Court below might well have considered them in the light of *Fry v. Lane* (1889) 40 Ch. D. 312 and (1886-90) All E.R. (Rep.) 1084, and *Wood v. Abrey* (1818) 3 Madd. 417 irrespective of whether the respondent had given an undertaking to re-transfer or not. B

Appeal allowed.