SHANKARBHAI NAGJIBHAI PATEL AND ANOTHER

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v.

FANIEL SHARAN AND OTHERS

[COURT OF APPEAL, 1962 (Hammett P., Marsack J. A., Trainor J. A.), 13th, 23rd February]

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Civil Jurisdiction

Contract—construction—supply of films—agreement to come into operation only if existing agreements successfully terminated—meaning of "successfully terminated".

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The respondents, who comprise two firms, had agreements and arrangements with G.B. Hari & Co. Ltd. in respect of the supply of cinema films. On the 23rd May, 1958, the respondents signed an agreement with the appellants for the supply of films, which, in clause 4, contained provision that it would only come into operation if the existing agreements and arrangements with G. B. Hari & Co. Ltd., "have been successfully terminated by the 31st August, 1958". Both respondent firms sent to G.B. Hari & Co. Ltd. formal notice of termination of the existing agreements, but that company claimed the notices to be ineffective and threatened (and in one case commenced) legal proceedings. The respondents intimated to the appellants that they had been unable successfully to terminate the existing arrangements with G.B. Hari & Co. Ltd., whereupon the appellants commenced proceedings for specific performance of the agreement of the 23rd May, 1958.

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Held: 1. The word "successful" in the context of clause 4 of the agreement of the 23rd May, 1958, was not synonymous with "legally effective".

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2. The intent of the parties as expressed in clause 4 was that the agreement of the 23rd May, 1958, should come into force only if the previous agreements with G.B. Hari & Co. Ltd. had been brought to an end in such a manner that the position was accepted by that company with no indication that any trouble arising out of the termination would occur in the future.

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Per Hammett P.: The intention of clause 4 was that existing arrangements should be terminated in such a way as to be "satisfactory to all parties hereto".

Case referred to: *Anglo-Cyprian Trade Agencies, Ltd. v. Paphos Wine Industries, Ltd.* [1951] 1 All E.R. 873; 95 Sol. Jo. 336.

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Appeal from a judgment of the Supreme Court refusing specific performance of an agreement. The facts sufficiently appear from the judgment of Marsack J.A. The judgments of Hammett P. and

Marsack J. A. appear below, and the President is recorded as saying that he had been asked by Trainor J.A. to say that he concurred with both.

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K. C. Ramrakha for the appellants.

D. M. N. MacFarlane for the first respondent firm.

H. M. Scott for the second respondent firm.

B The following judgments were delivered: [23 February 1962]—

MARSACK J. A.:

These are appeals against a judgment of the Supreme Court refusing a decree of specific performance of an agreement dated 23rd May, 1958, and rejecting a claim for damages in respect of C an alleged breach of agreement.

The facts are not in dispute. The firms of Sharan Bros. and Pala Bros. had agreements or arrangements with G.B. Hari & Co. Ltd. in respect of the supply of cinema films. Negotiations took place between the appellants and the respondents with a view to terminating their dealings with G.B. Hari & Co. Ltd. and entering D into fresh arrangements for the supply of films from the appellants to each of the respondent firms. It was in pursuance of these negotiations that the agreement of the 23rd May, 1958, was signed by the parties. The material clause in this agreement, which was the basis of the judgment in the Court below and towards which the main argument before us was directed, is Clause 4 which reads as follows:

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> "4. This agreement shall only come into operation if the existing agreements and arrangements between the parties and G.B. Hari & Co. Ltd. (Film Division) have been successfully terminated by the 31st August, 1958."

Both respondents took steps to terminate their arrangements with G.B. Hari & Co. Ltd. by sending formal notices to that company F of the termination of the existing agreement. The directors of the company reacted immediately and strongly, informing the respondents that, in their opinion, the notices of cancellation given by the respondents were ineffective, and that if the respondents persisted legal action would follow. In fact legal proceedings were commenced by G.B. Hari & Co. Ltd. against one of the respondents, Pala Bros., G following this threat. The respondents thereupon decided to pursue the matter no further, but to indicate to the appellants that they had been unable successfully to terminate existing agreements and arrangements with G.B. Hari & Co. Ltd. The learned Judge in the Court below held that the efforts at termination made by the respondents were genuine efforts, and I think this finding was justified on the evidence.

H The point in issue is thus a very simple one: what is the precise meaning to be attached to the phrase "successfully terminated"?

It is contended for the appellants that this construction is purely a legal question, and that the word "successfully" is there equivalent to "effectively". In fact Counsel takes the matter further and contends that the word "successfully" is really superfluous; that all that had to be decided by the Court was whether the previous agreements had been legally terminated. In Counsel's submission the notices given were effective to terminate the previous agreements, and accordingly the provisions of Clause 4 had been carried out to the extent that the agreement of the 23rd May, 1958, thereupon became of full force and effect.

The submission that "successfully" is a superfluous word, or, at the most, equivalent to the word "effectively", is not, in my opinion, well founded. The agreement was carefully drawn under legal advice and it must be assumed that all words in it were intended to mean someting. It is, I think, significant that the basis of the agreement of 23rd May, 1958, is a short summary of terms of agreement signed by the parties the previous day in which the following phrase is used:

> "8. Agreement effective from 1st September, 1958, provided the present verbal arrangement is all clear from G.B. Hari & Co. Ltd. and Pala Bros. from all sides."

This obviously contemplates that G. B. Hari & Co. Ltd., being included in the term "all sides", would have to have no further interest in the matter before the agreement became effective. It is however, with the agreement of 23rd May and with the wording of that agreement, that the Court is concerned.

Counsel for the first respondent contends that the whole object of the agreement of 23rd May, 1958, was to get rid of the monopoly held by G.B. Hari & Co. Ltd. It was a preliminary arrangement to come into force only if efforts were made to terminate the agreement with G.B. Hari & Co. Ltd. and these efforts proved successful. The word "successfully" was, in Counsel's submission, used deliberately. In any event, the word was used; and the Court must assume that it was used for a purpose. There is, as far as I know, no specific or technical meaning assigned to the word "successfully" by law, though there is some authority against the appellants' contention that in this context "successful" and "legally effective" are synonymous in *Anglo-Cyprian Trade Agencies, Ltd.* v. *Paphos Wine Industries Ltd.* [1951] 1 All E.R. 873, where it was held that a plaintiff in whose favour judgment had been given for nominal damages could not be regarded as a successful plaintiff. At p. 874 Devlin J. says:

> "It is necessary to decide whether the plaintiff really has been successful, and I do not think that a plaintiff who recovers nominal damages ought necessarily to be regarded in the ordinary sense of the word as a 'successful' plaintiff."

Turning now to dictionary definitions of the word "successful", Webster defines "success" as "favourable or satisfactory outcome or result"; and "'successful" as "coming out to be as hoped for".

The Oxford English Dictionary defines "success" as "the prosperous achievement of something attempted; the attainment of the object according to one's desire".

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If the dictionary definitions are adopted, it is perfectly clear that the agreements with G.B. Hari & Co. Ltd. were not successfully terminated. After what, I agree with the learned trial Judge, was a genuine effort to terminate the agreements the respondents found themselves with the great probability, and in one case the certainty, of litigation on their hands if they persisted in their efforts to terminate these agreements. Even if the Court accepts the contention of Counsel for the appellants that the notices given by respondents were legally effective to terminate the agreements, so that there was a reasonable possibility of their succeeding in the actions brought by G. B. Hari & Co. Ltd., there is no doubt that these actions would have given them a great deal of concern and, whatever the result, have caused them considerable expense.

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Holding as I do that the successful termination of the prior arrangements with G.B. Hari & Co. Ltd. was a condition precedent to the coming into operation of the new agreements between the appellants and the respondents, and that it was the successful termination and not the legally effective termination of those agreements which was to be the determining factor, I think it is the duty of this Court to decide the precise meaning to be given to the word "successfully" in Clause 4 and to decide whether or not the steps which were taken resulted in a successful termination of the business relationship with G.B. Hari & Co. Ltd. Adopting the dictionary definitions of the term "successful", I am satisfied that the evidence does not disclose a successful termination of the arrangements previously existing. Efforts to bring those previous business relationships to an end cannot, in my opinion, be described as successful when the immediate result of those efforts is to bring in their train, in one case threats, and in the other case the certainty, of litigation. I think that what the parties had in contemplation and what they actually expressed in Clause 4 of the document in question was that the agreement of 23rd May, 1958, should come into force only if the previous agreements of G. B. Hari & Co. Ltd. had been brought to an end in such a manner that the position was accepted by that company with no indication that any trouble arising out of the termination would occur in the future.

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Counsel for the appellant further contended that as a new agreement had been entered into by one of the respondents with G.B. Hari & Co. Ltd. in September, 1958, whereby the basis of payment for hire of the films was shifted from a rental to what is referred to in the evidence as a "fifty-fifty basis", this had the effect of bringing the previous agreement successfully to an end, in that it had been replaced by a new agreement. The crucial date, however, in the interpretation of Clause 4 of the agreement of 23rd May was the 31st August. No dealings with G.B. Hari & Co. Ltd. subsequent to 31st August, 1958, could have any effect in bringing the

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May agreement into operation. In any event, the evidence does not disclose on what date in September, or in what manner, the alteration in the basis of payment was agreed upon.

Accordingly, I am of opinion that the agreements and arrangements between the respondents and G.B. Hari & Co. Ltd. existing at the 23rd May, 1958, were not successfully terminated by the 31st August, 1958, and that the agreement did not, therefore, come into operation. A

For these reasons I am of opinion that the judgment of the learned trial Judge in the Court below was right and I would dismiss the appeal. B

HAMMETT P.:

I have had the advantage of reading the judgment of my learned brother which has just been read and with which I do with respect concur. All I have to add is that in my opinion the intention of the parties to the agreement dated 25th May, 1958, can be ascertained from the document itself. C

Clause 4 reads:

> "This agreement shall only come into operation if the existing agreements and arrangements between the parties and G.B. Hari & Co. Ltd. (Film Division) have been successfully terminated by the 31st August, 1958."

Clause 6 reads: D

> "If arrangements satisfactory to all parties hereto are reached with G.B. Hari & Co. Ltd. on or before the 31st day of August, 1958, the parties agree to allocate to the said G.B. Hari & Co. Ltd. a period of 17 weeks in the circuit, G.B. Hari & Co. Ltd. paying rent for the Lilac Theatre at the rate of £55 per week and in other centres the nett profit shall be divided on a 50/50 profit basis. The allocation of screenings is as follows: E
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> (i) 9 weeks Sharan Brothers
> (ii) 9 weeks Chimanbhai & Co.
> (iii) 17 weeks Pala Brothers
> (iv) 17 weeks G.B. Hari & Co. Ltd."

It appears to me to be clear from the opening words of Clause 6 that when the parties used the words "successfully terminated" in Clause 4 their intention was that the existing arrangements should not merely be legally terminated as has been submitted by Counsel for the Appellant but terminated in such a way as to be "satisfactory to all parties hereto". F

I certainly do not accept the contention of Counsel for the Apellant that the intention of the parties was that a termination of the existing agreements with G.B. Hari & Co. Ltd. was to be considered "successful" if it was a legal termination that resulted in legal proceedings or the threats of legal proceedings between G.B. Hari & Co. Ltd. and those who sought to terminate the existing arrangements with them, as happened in this case. G

I would dismiss the appeal with costs. H

Appeal dismissed.