

PARBHUBHAI v. SHYAMRUP B. PRASAD

[COURT OF APPEAL AT SUVA (Lowe, C.J., President, Sir George Finlay and Sir Joseph Stanton, JJ/A), January 6, 1959]

CIVIL APPEAL NO. 18 OF 1958

(Appeal from H.M. Supreme Court of Fiji—Hammett, J.)

Fraudulent misrepresentation—sale of business—whether any representation made—if made, what it was—whether material and induced the appellant to purchase—whether any representation made was false and, if so, whether made fraudulently—consideration as to earnings of business subsequent to sale.

Held : 1. The onus rested on the appellant to prove:

- (a) That the alleged representation consisted of something said which amounted in law to a representation.
- (b) That the representation was made by the respondent to the appellant.
- (c) That the representation was material and induced the appellant to enter into the contract.
- (d) That the representation was false.
- (e) That the representation was made by the appellant fraudulently.
- (f) That by reason of acting upon the representations the appellant suffered damage.

2. Certain matters not determined at the trial were not within the competence of the Appellate Court to decide.

Judgment vacated and case remitted to the Supreme Court for rehearing.

K. C. Ramrakha for the appellant.

M. V. Pillai for the respondent.

(The following is the judgment of Sir GEORGE FINLAY, J/A. Similar judgments were given by the other members of the Court.)

This appeal is against a judgment of the Supreme Court of Fiji in a suit concerning the sale of a business. The proceedings were initiated by the respondent who, as vendor, sought (*inter alia*) judgment for the unpaid balance of the price at which the business was sold. Alleging fraudulent misrepresentation inducing the purchase, by the respondent, the appellant sought rescission of the contract for sale and purchase. He also sought restitution of the moneys paid on the purchase and damages.

For reasons given by him, the learned Judge rejected the claim of the appellant and gave judgment for the respondent for the unpaid balance of the purchase price. The appeal is a challenge to the validity and sufficiency of the judgment and the reasons given for it.

Disregarding such of the representations as were promissory and so incapable of being the basis of an action for fraudulent misrepresentation, the crucial questions for determination and relation to representations alleged to have been made concerning the nett earnings or the income—possibly the gross income—of the business in the years preceding the date of the contract for sale and purchase. The use of the elliptical phrase "nett earnings or the income" is enforced at this point by the evidence. The contract was in writing and bears date the 8th December, 1956. The major alleged representation and certainly the one which was the subject of most attention had relation to the nett earnings or gross income of the business in the year 1955. To which it related was an issue calling for decision.

The appellant's case was framed and presented as one of fraudulent misrepresentation, and nothing else. So framed (damages having been sought), the appellant assumed the onus of proving:—

- (1) That the alleged representation consisted of something said which amounted in law to a representation.
- (2) That the representation was made by the respondent to the appellant.
- (3) That the representation was material and induced the appellant to enter into the contract.
- (4) That the representation was false.
- (5) That the representation was made by the appellant fraudulently.
- (6) That by reason of acting upon the representations the appellant suffered damage.

The respondent admitted making a representation as to his profits or, alternatively, as to his gross takings for the year 1955. Perhaps due to the difficulties of interpretation, perhaps to the incomprehension of the respondent from time to time or perhaps to equivocation the admissions sometimes relate to nett profits, sometimes to gross income. For instance, at p. 18 of the Record, in answer to the question "What did you tell them your nett profit was each year?" he answered "I told them that in 1955 my profit was £1,500." Then, in answer to the immediate further question "Your nett profit?" he said "Not nett—the nett income of commissions received." Just what that phrase means it is difficult to say, but it certainly had a tendency to mislead when addressed to an illiterate man and a boy.

Then his Income Tax Returns were produced to him. They showed a gross income of £1,276 14s. 2d. for the period from 1st October, 1954 to the 31st December, 1955, that is, for 15 months. Respondent then at first claimed to have given the figure of £1,500 as a mere approximation. Later, when again asked whether if, when negotiating with the appellant, he did not tell the latter that his nett income for 1955 was £1,500, he answered that he did not—that he showed the appellant his Income Tax Returns. This seems a denial of the previously admitted verbal representation: it is a denial in fact of any verbal representation.

The nett income shown in the Returns for the 15 months was £785 10s. 1d. Later again, respondent denied that he had told appellant that he had made £1,500 profit in 1955. In fact, having earlier admitted having told appellant he had made a nett profit of £1,500 in 1955, he later justified the admission by saying he had given that as a merely approximate figure: then later again he denied having given an approximate figure and said he gave the appellant his Tax Returns which, as I have said, was a denial of any verbal representation. Incidentally, the Balance Sheet for the year ending 30th September, 1955 contained a misleading item "Nett income for the year 1955—£586 5s. 6d." Though erroneous, this might in some circumstances be helpful to the respondent.

From this mosaic of contradictions and inconsistencies, taking the evidence of the respondent alone, it would be difficult for the Judge to say just precisely what the respondent admitted was the representation he had made—if he admitted any. One can only assume the learned Judge must have regarded the respondent as a very unsatisfactory witness.