[VASSILIADES, MUNIR, JOSEPHIDES, JJ.]

SOCRATIS THEODOROU,

Appellant-Plaintiff.

v.

THE ABBOT OF KYKKO MONASTERY,
MR. CHRYSOSTOMOS AND OTHERS,

Respondents-Defendants,

(*Civil Appeal No.* 4473)

Contract Law—Contract of sale of land—Notice of rescission through the post—Purchaser presumed to have received it in due course.

Evidence—Presumptions—Delivery of letter through the post—A letter shown to have been posted and not returned by the post office is prima facie *evidence of its delivery to the addressee—Onus on addressee to negative presumption.*

By a contract of sale signed on the 28th March, 1953, the respondents agreed to sell to the appellant and the latter agreed to buy a building-site at Ayios Dhometios village for the sum of £650.

The appellant (purchaser), paid the sum of £20 on the same day but although he had agreed to pay the balance of £630 regularly in 60 monthly instalments with interest at 5 per cent per annum, he paid nothing until the institution of the present action in March, 1961. Had he paid regularly his monthly instalments he would have paid the whole purchase price of £650 plus interest by the 31st March, 1958.

In January, 1961, the respondents leased the building-site in question to the ESSO oil company and, when the appellant noticed building operations for the construction of an oil-filling station on the site in question, he instructed his advocate who sent a letter to the respondent, on the 27th January, 1961, informing them that his client was ready to pay any balance due to them by virtue of the building-site in question.

On the 6th February, 1961, respondents' counsel replied by letter to appellant's counsel stating that they rescinded the contract of sale by two letters dated the 15th April, 1958 and the 22nd July, 1958.

The main question which falls for determination in this appeal is whether by the posting of a letter addressed to the purchaser (appellant) notice of rescission of a contract of sale of land could, in the circumstances of this case, be presumed to have been received by him in due course.

The respondents-defendants' case was that, as stated in their advocate's letter of the 6th February, 1961, they rescinded the contract of sale by two letters dated the 15th April, 1958, and the 22nd July, 1958.

The appellant denied ever receiving either of those letters. The Court of Appeal dismissed the appeal on 15.12.1964, and intimated that the reasons for the judgment were to be given later.

The Court of Appeal gave their reasons for judgment on 21.1.65 and—

Held, (*I*) *on the question whether the rescission came to the knowledge of the appellant :*

(*a*) There is a presumption that a letter shown to have been posted, and not returned by the post office, is *prima facie* evidence of its delivery to the person to whom it is addressed, a presumption which was, after consideration of the authorities, re-affirmed by Parker J., in the case of *Re Struve's Trusts* (1912) W.N. 149, 56 Sol. Jo. 551 ; see also *Gilbert* v. *Gilbert* (1948) 2 All E.R. 64.

(*b*) In this case we should not be taken as laying down any rule of law with regard to the delivery of notice of rescission of a contract beyond the above stated presumption as to delivery of notice by post. On the basis of this presumption of delivery the onus shifted to appellant and he failed to discharge the onus cast on him, that is, to prove the contrary. On the particular facts of this case and on the evidence before it, the trial court rightly (*a*) came to the conclusion that the two notices of rescission posted to the appellant in 1958 reached him : and (*b*) rejected his version that he did not receive any of these notices.

(*II*) on the merits :

(*a*) The appellant bought a building-site from the respondents in 1953 for £650, he paid £20 in advance and he undertook to pay the balance regularly in 60 monthly instalments with interest. It was expressly provided in the contract that the time of payment was of the essence of the contract and that breach of that condition rendered the whole amount due and payable and gave the right to the respondents to rescind the

contract, after a written notice to the appellant. If the appellant had paid regularly he would have paid off the whole amount by the end of March, 1958. In fact, he did not pay a single mil beyond the £20 paid in 1953. He never went to the office of the respondent nor did he write to them a single letter regarding his failure to pay the purchase price as agreed and he did nothing until January, 1961, that is to say, for nearly 8 years, when he saw a petrol-filling station being constructed on the site in question. It was only then that he decided to assert his rights, if any. And even then he did not go to pay or tender the balance but he simply wrote a letter through his advocate.

(*b*) In the circumstances of this case it was reasonable to infer that the notice of rescission was received by the appellant and the trial Court correctly decided that the appellant's claim must fail.

(*III*) *For these reasons we dismissed the appeal. The question of costs was not raised.*

Per VASSILIADES, J.: I have had the advantage of reading Mr. Justice Josephides' reasons for judgment, and I entirely concur. But I think I may add that as the fate of this appeal must turn on the question whether it was open to the trial Court to find on the evidence before them, that the notice of rescission has in fact reached the appellant (buyer) an affirmative answer to this question would, in my opinion, be sufficient to dispose of the appeal. There can be no doubt, I think, that the trial Court could draw the inference of fact which they have drawn on the point. And no sufficient reasons were advanced before us for disturbing their conclusion.

Cases referred to :

MacCann v. *Waterloo County Mutual Fire Insurance Co.* (1874), 34 U.C.R. 376 ;

Fraser v. *Harding* (1844), 2 Kerr, 375 :

Canadian Druggists v. *Thompson* (1911) 19/O.W.R. 401 ; 24 O.L.R. 401 ;

Reed v. *Harvey* (1880) 5 Q.B.D. 184 :

Warren v. *Warren* (1834) 1 Cr. M. & R. 250 ;

Re *Struve's Trusts* (1912) W.N. 149, 56 Sol. Jo. 551 ;

Gilbert v. *Gilbert* (1948) 2 All E.R. 64 :

1964
Dec. 15,
1965
Jan. 21
—
SOCRATIS THEODOROU
v.
THE ABBOT OF KYKKO MONASTERY
MR. CHRYSOSTOMOS AND OTHERS

Appeal.

Appeal against the judgment of the District Court of Nicosia (Loizou, P.D.C. and Ioannides, D.J.) dated the 23rd September, 1963, (Action No. 1256/61) whereby plaintiff's claim for specific performance of the terms of a contract of sale of a building site was dismissed.

G. Ladas with Ph. Clerides, for the appellant.

Ch. Ioannides, for the respondents.

Cur. adv. vult.

VASSILIADES, J. : The reasons for judgment will be delivered by Mr. Justice Josephides.

JOSEPHIDES, J. : This appeal was dismissed and we intimated that we would give our reasons later, which we now proceed to do.

The main question which falls for determination in this appeal is whether by the posting of a letter addressed to the purchaser (appellant) notice of rescission of a contract of sale of land could, in the circumstances of this case, be presumed to have been received by him in due course.

By a contract of sale signed on the 28th March, 1953, the respondents agreed to sell to the appellant and the latter agreed to buy a building-site at Ayios Dhometios village for the sum of £650. The following are the material terms of the contract :

" *Terms :* The purchaser to pay £20 in advance upon the signing of the agreement.

2. The balance to be paid regularly in 60 monthly instalments with interest at 5%.

3. Immovable property taxes will be the liability of the purchaser from the day of the execution of this agreement.

4. Transfer to be effected as soon as the purchase price is paid off.

The second clause is an essential one. Contravention of the said clause renders the whole amount due and payable. And in the event of non-compliance of the purchaser with this clause the vendor is entitled, after a written notice to the purchaser, to res-

cind this agreement and any payment already made will belong to the Kykko Monastery by way of damages or rent or otherwise."

The appellant (purchaser), who is a carpenter of Galata village, paid the sum of £20 on the same day but although he had agreed to pay the balance of £630 regularly in 60 monthly instalments with interest at 5 per cent per annum, he paid nothing until the institution of the present action in March, 1961. Had he paid regularly his monthly instalments he would have paid the whole purchase price of £650 plus interest by the 31st March, 1958.

In January 1961 the respondents leased the building-site in question to the ESSO oil company and, when the appellant noticed building operations for the construction of an oil-filling station on the site in question, he instructed his advocate who sent the following letter to the respondents on the 27th January, 1961 :

" I am instructed by Mr. Socratis Theodorou of Galata to bring to your knowledge that my said client is ready to pay any existing balance due to you by virtue of the sale of a building site No. 92 reg. No. 524.

You are therefore requested to reply within 4 days from today to my office and fix a date for my said client to come and pay any existing balance for the aforesaid building site, and register same in his name.

In case of no reply within the above time limit I will consider your stand as a negative one and legal proceedings will be instituted against you without further notice."

On the 6th February, 1961, respondents' counsel replied as follows :

" 1. The allegations of your client referred to in your said letter are utterly groundless and unacceptable. The agreement cited by your client was entered into in 1953 and he broke it, on the first month of its signing.

2. We refer you to a letter to your client on behalf of the Abbot dated 15.4.58 by which he was informed that if he did not settle his account within 10 days from the date of the said letter the agreement would be considered as rescinded.

3. We refer you to a written notice of mine, on behalf of my clients, to your client, dated 22.7.58, by virtue of which the contract of sale on which he

relies was rescinded. In view of the above my clients do not recognize any claim of your client."

Following the receipt of that letter the appellant instituted the present action on the 30th March, 1961, claiming specific performance of the contract of sale and damages. In the course of the hearing of this action before the District Court the appellant reduced his claim for damages, which was originally £9,350 plus £20 for consideration which had failed, to £5,000.

The respondents'-defendants' case was that, as stated in their advocate's letter of the 6th February, 1961, they rescinded the contract of sale by two letters dated the 15th April, 1958 and the 22nd July, 1958. There is no doubt that the contents of either of those letters constitute sufficient notice of rescission of the contract in accordance with its terms, as it is expressly provided that the provision regarding the regularity of payment is of the essence of the contract and that breach of such condition renders the whole amount due and payable and entitles the vendor (respondents) to rescind the agreement by giving written notice to the purchaser (appellant).

The appellant denied ever receiving either of those letters.

Now, what is the evidence on this point? The first witness for the defence, Panaretos Ieromonachos, stated in evidence that he signed and posted himself the letter dated the 15th April, 1958, rescinding the contract, addressed to the plaintiff at Galata. The postage on the letter had been prepaid and the letter was not returned undelivered. No reply was received and the respondents accordingly instructed their advocate Mr. Velaris, who, according to his evidence, prepared a letter dated the 22nd July, 1958, which he signed and posted personally having prepaid the prescribed postage. He addressed it to the respondent at his village Galata. The letter was posted at the Central Post Office, Nicosia, and it was not returned by the Post Office. Both letters were sent by ordinary post. As already stated, the appellant denied having ever received any of those letters.

In his final address to the trial Court appellant's counsel invited the attention of the Court to Notification No. 555 published in Supplement No. 3 to the *Gazette* of the 8th August, 1958. This Notification is an Order under the then Curfews laws, 1955 (now Cap. 156), by

virtue of which *the whole of Nicosia District* was put under curfew on the 22nd July, 1958, the day on which Mr. Velaris stated that he prepared the second of the two letters rescinding the agreement. The aforesaid curfew order was made and came into force on the 22nd July, 1958 and in the second schedule of that order the hours prescribed are " from 04.30 hours to 19.00 hours daily until further notice ". In Notification No. 567, in the same issue of the above quoted *Gazette*, it appears that the operation of the curfew order was not revoked until 7 p.m. of the following day, *i.e.* the 23rd July, 1958.

No evidence was adduced as to whether the curfew was actually in force for the whole of the 22nd July, and what is more significant, this matter was not put to the witness (Mr. Velaris) while he was giving his evidence, nor was he given an opportunity of explaining matters.

The trial Court were of the view that no special significance should be attached to the fact that in the second schedule to the curfew order the hours prescribed were " 04.30 hours to 19.00 hours ", having regard to the fact that the curfew was a continuous one and the draftsman of the order had to mention the hours that the curfew would be in force on the subsequent dates.

Mr. Ladas before us submitted that the statement of the hours of curfew (0430 hours to 1900 hours) in the curfew was conclusive and could not be challenged or doubted.

The prohibition laid down in the curfew order is, in fact, the law and cannot be challenged or doubted but what certainly can be doubted is whether the curfew in the whole of the Nicosia District was actually in operation or enforced by the security forces as from 4.30 hours in the morning onwards. This particular order, which was made on the 22nd July, was not published in the *Gazette* until the 8th August, and it does not purport to state as a fact that the curfew was *actually in operation* during all the hours from 4.30 a.m. to 7 p.m. on the 22nd July, and in the whole of Nicosia District. In this connection it should be borne in mind that there was provision in the Curfews Laws, 1955, for the temporary suspension of the operation of a curfew order in any specified area (see second proviso to section 2), and in fact the operation of curfew orders was suspended in certain areas during the emergency from 1955 to 1959.

Appellant's counsel invited the Court to draw the conclusion that because a curfew order in respect of the 22nd July, 1958, was published in the *Gazette* on the 8th August, 1958, it was impossible for Mr. Velaris to have posted his letter on that day. In the first place, what Mr. Velaris stated in his evidence is that he prepared the letter on the 22nd July, 1958, and that he posted the letter personally. He may have posted it on the following day. In fact, whether he posted the letter one or two days after the 22nd July, 1958, is not material for the purposes of this case. Appellant's counsel does not challenge the veracity of Mr. Velaris's evidence that he prepared the letter, that he signed it and that he posted it. His submission is that he may be making a mistake as to the date, *i.e.* the 22nd July, 1958. But, as already stated, even if there is a mistake of one or two days, the fact remains that Mr. Velaris's evidence on the posting of the letter dated the 22nd July 1958, was accepted by the trial Court and it has not been shown to our satisfaction that the court was wrong in doing so. The same applies to the evidence of Panaretos Ieromonachos, regarding the posting of the letter dated the 15th April, 1958, addressed to the appellant, which was also accepted by the trial Court.

The next question which arises for consideration is : Did the rescission come to the knowledge of the appellant? It is true that the onus is on the respondents but, this being a civil case, it will be sufficient if they discharge it on the balance of probabilities. What we have, therefore, to decide is whether, in the circumstances of this case, it would be reasonable to infer that the notice of rescission was received by the appellant.

Mr. Ladas for the appellant submitted that the mere posting of a notice of rescission is insufficient compliance with the condition for giving notice where proprietory rights of the addressee are affected by the notice, and that actual delivery must be proved, and it cannot be inferred from the mere posting of a letter.

In support of his submission Mr. Ladas cited two Canadian cases which are referred to in the English and Empire Digest, Replacement Volume 22, at page 364, paragraphs 1908 and 1907, namely, *MacCann* v. *Waterloo County Mutual Fire Insurance Co.* (1874), 34 U.C.R. 376 ; and *Fraser* v. *Harding* (1844), 2 Kerr, 375. In the first place the full report of these cases is not available in Cyprus but, in any event, it appears from the same volume

of the English and Empire Digest (at page 364, paragraph 1906) that it was subsequently decided in 1911 by the Canadian Courts that " the posting of a letter properly stamped is evidence of the fact of its having been received " : see *Canadian Druggists* v. *Thompson* (1911), 19/O.W.R.401 ; 24 O.L.R.401.

Mr. Ladas also relied on the English case of *Reed* v. *Harvey* (1880) 5 Q.B.D. 184, in which it was held that the mere posting of an application to the trustee in bankruptcy requiring him to decide whether he will disclaim or not is not sufficient under the 24th section of the Bankruptcy Act, 1869, but such application must be received in order that the time for disclaimer may be limited in accordance with the section. Under rule 28 of the Bankruptcy Rules, 1871, it was provided that when any property of a bankrupt acquired by a trustee in bankruptcy consisted of a leasehold interest the trustee should not execute a disclaimer without the leave of the Court. The Court in that case was of the view that it was not enough " merely to prove such posting, at all events, where the assertion of the trustee is that he never received the letter ". We think that that decision is not applicable to the present case. There, the Court had to consider in 1880 an express statutory provision, namely, section 24 of the Bankruptcy Act, 1869, which made provision for the giving of notice to the trustee in bankruptcy requiring him to exercise his rights as to disclaimer for the protection of the creditors ; and the Court held that the mere posting of an application to the trustee in bankruptcy was not sufficient compliance with the provisions of that section, where the trustee denied having received the letter. It is significant that neither *Phipson* on Evidence (10th edition) nor *Halsbury's* Laws (third edition), volume 15, refer to this case under any relevant heading relating to the presumption of delivery by post.

On the contrary both *Halsbury's Laws* and *Phipson* summarise the law of evidence on this point as follows : the doing of an act may sometimes be inferred from the existence of a general course of business according to which it would ordinarily be done, there being a probability that the general practice would be followed in the particular case. The most common illustration under this heading arises in the case of letters which, if proved to have been addressed properly and posted, and not returned, are presumed to have been received in due course (*Warren* v. *Warren* (1834), 1 Cr. M. & R. 250) : see 15

Halsbury's Laws, third edition, page 284 paragraph 515) ; and Phipson on Evidence, 10th edition, page 138, paragraph 297. This presumption applies also when a Law or public instrument authorizes or requires the service of any document by post unless the contrary intention appears : see our Interpretation Act, Cap. 1., section 2 ; and the English Interpretation Act, 1889, section 26. There is a presumption that a letter shown to have been posted, and not returned by the post office, is *prima facie* evidence of its delivery to the person to whom it is addressed, a presumption which was, after consideration of the authorities, re-affirmed by Parker J., in the case of *Re Struve's Trusts* (1912) W.N. 149, 56 Sol. Jo. 551 ; see also *Gilbert* v. *Gilbert* (1948) 2 All E.R. 64.

Finally, Mr. Ladas submitted that although this presumption may apply in the usual course of things, in the summer of 1958 we were not living in normal times in Cyprus, but we were in the height of an unprecedented emergency and, consequently, the presumption did not apply. Undoubtedly, those were abnormal times but no evidence has been adduced to show that the mail was not running to the appellant's village or that letters had not been delivered there.

In this case we should not be taken as laying down any rule of law with regard to the delivery of notice of rescission of a contract beyond the above stated presumption as to delivery of notice by post. On the basis of this presumption of delivery the onus shifted to appellant and he failed to discharge the onus cast on him, that is, to prove the contrary. On the particular facts of this case and on the evidence before it, the trial Court rightly (*a*) came to the conclusion that the two notices of rescission posted to the appellant in 1958 reached him ; and (*b*) rejected his version that he did not receive any of these notices.

The evidence has already been given at some length and we need only refer to the salient facts, that is to say, that the appellant bought a building site from the respondents in 1953 for £650, that he paid £20 in advance and he undertook to pay the balance regularly in 60 monthly instalments with interest. It was expressly provided in the contract that the time of payment was of the essence of the contract and that breach of that condition rendered the whole amount due and payable and gave the right to the respondent to rescind the contract, after a written notice to the appellant. If the appellant had paid regularly he would have paid off the whole amount by the

end of March, 1958. In fact, he did not pay a single mil beyond the £20 paid in 1953. He never went to the office of the respondent nor did he write to them a single letter regarding his failure to pay the purchase price as agreed and he did nothing until January, 1961, that is to say, for nearly 8 years, when he saw a petrol-filling station being constructed on the site in question. It was only then that he decided to assert his rights, if any. And even then he did not go to pay or tender the balance but he simply wrote a letter through his advocate.

In the circumstances of this case it was reasonable to infer that the notice of rescission was received by the appellant and the trial Court correctly decided that the appellant's claim must fail.

For these reasons we dismissed the appeal. The question of costs was not raised.

Appeal dismissed. No order as to costs.

VASSILIADES, J. : I have had the advantage of reading Mr. Justice Josephides' reasons for judgment, and I entirely concur. But I think I may add that as the fate of this appeal must turn on the question whether it was open to the trial Court to find on the evidence before them, that the notice of rescission has in fact reached the appellant-buyer, an affirmative answer to this question would, in my opinion, be sufficient to dispose of the appeal. There can be no doubt, I think, that the trial Court could draw the inference of fact which they have drawn on the point. And no sufficient reasons were advanced before us for disturbing their conclusion.

MUNIR, J. : I also had the advantage of reading the reasons delivered by Mr. Justice Josephides with which I concur.

VASSILIADES, J. : As to costs, it is already pointed out in the judgment that there was no claim for costs in the appeal ; and we make none as between party and party.

Appeal dismissed. Order for costs as aforesaid.