IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT
ACCRA, A.D.2011

CORAM: WOOD (MRS), CJ (PRESIDING)
ADINYIRA (MRS), JSC
DOTSE, JSC
YEBOAH, JSC
ARYEETEY, JSC

CIVIL APPEAL
NO: J4/6/2011
23RD JUNE, 2011

IN THE CONSOLIDATED SUITS OF

THE MANAGING DIRECTOR)
MESSRS AFRICAN DISTRIBUTORS)
COMPANY LTD.) .... PLAINTIFF/APPELLANT/APPELLANT

VRS

THE COMMISSIONER CUSTOMS)
EXCISE AND PREVENTIVE SERVICE)
(CEPS)) .... DEFENDANT/RESPONDENT/RESONDENT

AND

THE MANAGING DIRECTOR)
MESSRS AFRICAN DISTRIBUTORS)
COMPANY LTD.) .... PLAINTIFF/APPELLANT/ APPELLANT

VRS

THE COMMISSIONER CUSTOMS)
EXCISE AND PREVENTIVE SERVICE)
(CEPS))..... DEFENDANT/RESPONDENT/RESONDENT

J U D G M E N T

WOOD (MRS), CJ:

On the 19th of February, 1999, the High Court gave judgment in favour of the defendant /respondents in respect of two consolidated suits numbered 1609/91 and 1720/92 respectively. These decisions were, on appeal, affirmed by the Court of Appeal.

Dissatisfied, the plaintiff appellant has appealed to this court on the grounds that:

i. The Court of Appeal erred where it held that the Learned trial Court Judge was right in failing to adequately consider and give due weight to the fact that the goods the Plaintiff/Appellant was accused of failing to account for and pay duty in respect of remained at all material times in the custody and physical control of the Defendant/Respondent.

ii. The Court of Appeal, like the trial Judge erred in failing to adequately consider and give due weight to the legal effect of loss of the missing goods which in the Customs bonded warehouse controlled by men and the Defendant/Respondent estimated from Plaintiff/Appellant by the Defendant/Respondent.

iii. The Court of Appeal erred in fact and in law in upholding the holding of the learned trial Court that there was nothing from the facts and circumstance on record to show that the Plaintiff/Appellant signed the said agreement under coercion or under influence. The judgment was against the weight of the evidence on record.

iv. The Court of Appeal erred in dismissing the appeals in both consolidated cases.

v. Further grounds will be filed upon receipt of a copy of the judgment of the Court of Appeal.

Before tackling the substantive grounds of appeal I would like to make this observation. Although the appellant filed two separate claims, which were consolidated, the trial court gave two separate decisions. The court of appeal affirmed the two decisions. One would have thought the notice of appeal should have set out clearly and distinctly, the grounds of appeal in relation to each decision. Lumping the grounds of appeal together and requesting

that the decisions of the two lower courts be set aside and "judgment entered for the plaintiff/appellant in respect of its claims in both consolidated suits", does not meet the justice of this case. It is regrettable that the notice of appeal fails to disclose in clear terms which grounds relate to which decision. We are thus left to undertake this exercise ourselves, a task which must be based on the strict wording of the appeal grounds and nothing more, given that under rules 6 sub rules (4-8) of the Supreme Court, Rules, CI 16., separate and distinct grounds of appeal are to be filed.

In this regard, I have examined the grounds of appeal thoroughly and find that they all relate to the judgment of the suit numbered 1609/91. In the event, I do find myself utterly unable to impugn the decision in case suit number 1720/92.

The facts are that in March 1984, Umarco Ltd. who are agents of the appellants took delivery of 2470 cartons of wine for onward transmission to the respondent's bonded warehouse. Subsequently, the appellants collected 48 cartons of the wine for personal use and paid duty thereon to the respondents who declared 43 cartons broken and consequently delivered only 2,035 cartons of the consignment to the appellants, implying a short landing of 344 cartons which were never handed over to the appellants. The appellants allege that not only did the respondents wrongfully demand duty on the three hundred and forty-four (344) cartons which were never delivered, but also wrongfully seized 400 cartons in lieu of the duty on the 344 cartons; hence their claim in suit number 1609/91 for:

i. The sum of $ 26,784.00 (Twenty-six Thousand seven Hundred and eighty-four US Dollars) or its equivalent in Cedis being the value of seven hundred and forty-four (744) cartons of Birgi Wine which the Plaintiff imported and four hundred cartons (400) of which the Defendant seized on the pretext that duty had not been paid on Three Hundred and Forty-Four (344) which Plaintiff did not receive but which the Defendant received into their bonded warehouse.

ii. Interest on the said amount from the date of Writ to date of payment.

iii. General damages for Loss of Business"

The respondents' main defence to the action is that in view of an agreement voluntarily reached by the parties, the appellants were estopped from laying any claim against the respondents. Additionally, they allege that it was the appellant who voluntarily agreed, per the written agreement Exhibit.C, to deposit the 400 cartons of wine in lieu of the duty due on the 314 cartons, and were compelled to exercise their statutory right of sale of the goods when the appellants failed to pay the duty as stipulated under the said agreement.

The separate action numbered 1720/92, which is founded in negligence, arose when in the course of time, the appellants decided to re-transport a large quantity of wine which they had imported into Ghana to Cotonou for resale. The respondents intercepted the two truckloads of wine and detained them at the Airport Police Station for three (3) weeks on the grounds that they were being exported without the relevant customs documentation. Claiming that about six hundred and fifty-six cartons of wine were destroyed by the rain, for which reason the wines had to be sold at a much lower price, the appellant who alleges negligence on the part of the respondent's.

"The sum of $15,744.00 (fifteen thousand, seven hundred and forty-four) dollars being losses incurred by them as a result of the negligent handling of 656 cartons of wine…

The sum of 1.5 million Cedis being fees charged by the two(2) drivers responsible for carting the wine for being delayed for a period of three(3) weeks when the Defendant detained the trucks that were carrying 656 cartons of wine.

Interest on the amounts claimed

Damages for loss of use

Ground iii

"The Court of Appeal erred in fact and in law in upholding the holding of the learned trial Court that there was nothing from the facts and circumstances on record to show that the plaintiff/Appellant signed the said agreement under coercion or undue influence. The judgment was against the weight of the evidence on record."

In respect of this ground, counsel urged that we ought to take judicial notice of the circumstances in which the appellant found himself when his goods were under seizure. Counsel argues that the mere fact that the vehicle was detained for close to five weeks, with the appellants being under obligation to pay the drivers and mates, was enough to compel any reasonable person to sign the agreement against his will.

I think appellant counsel failed to recognise the burden he had to discharge at law having regard to his allegation of coercion or better still, duress as it is known in contract law. True the wider doctrine of undue influence is also recognised under equity. But this latter doctrine is applied to cases in which some form of fiduciary relationship existed between the parties, which from the evidence is not the appellant's assertion.

Duress in law is not grounded on the absence of consent. It is widely accepted as a fact of life, that to quote the learned author of Chitty on Contracts, the 25th edition, under the rubric "pressure and threats" at paragraph 483, "in ordinary commercial activity, pressure and even threats are both commonplace and often perfectly proper. Indeed, in one sense,

all contracts are made under pressure: every offeror threatens that unless the offeree accepts the terms offered he will not get the benefit of whatever goods and services are on offer."

From the case of Universe Tankships of Monrovia v, Inc. v ITF, [1982] 2WLR 803, at 813, 820 and 820, it is the nature of the pressure or the threats, which is paramount. The force or weight of the pressure is not even considered as the decisive factor, for the reason articulated by Lord Wilberforce in Barton v Armstrong [1976] AC 104 at 121, namely, "…in life, including the life of commerce and finance, many acts are done under pressure, sometimes overwhelming pressure, so that one can say that the actor has no choice but to act."

The principle is that actual violence to the person or threats of such violence, including imprisonment, are all illegitimate forms of pressure. The law thus allows a party to avoid any promise extracted from him or her by terror or violence, whether to the party or his agent. None of these recognised indices of duress was pleaded nor proven.

In view of the pleadings and evidence adduced by the appellant, both the trial and appellate courts, rightly in my view, concluded that the primary issue for determination was whether the parties, particularly, the appellant, voluntarily entered into the agreement on which the respondents raise the plea of estoppel. The court of appeal affirmed the learned trial judge's approach and I adopt the reasons articulated in support of the position of the two lower courts.

"During the trial much time was spent on how much wine was landed whether there was short landing, who controlled bonded warehouses, under whose control the goods were when about 300 or so cartons got missing, the genuineness or authenticity of certain documents containing information on quantity of wine received at a certain point; and so on.

But in my opinion what must be considered first is the agreement on which the Defendants have based their defence of estoppel. If this defence succeeds it will not be necessary to consider the matters I have mentioned in the last preceding paragraph."

The justice of the case required a determination of the critical issue, whether or not the agreement of the 14th of September, 1987, on which the defence of estoppel was grounded, was extorted under duress or undue influence.

On this issue, their Lordships of the court of appeal concluded:

"In the face of the evidence as to the said agreement and the pleadings contained in paragraphs 4 and 5 of the plaintiff's defence to suit no. 1609/91 and the fact that the plaintiff raised no issues thereon by way of fraud, duress and or any other vitiating factor,

the learned trial judge did what any reasonable judge would have done in view of the provisions of sections 24, 25 and 26 of the Evidence Decree, NRCD 323 herein before alluded to in this judgment, I think that the plaintiff was on the pleading and the admitted evidence bound by the contents of the said agreement and consequence of which created a conclusive presumption.

See (1) Baache & Co., (London) Ltd. vrs: Banque Verves et Commerciale de Paris SA (1973) 117. Sol. Jo. 483. I think that the said agreement had the effect of the Defendant satisfying his burden of providing evidence as to the presumed fact and therefore the learned trial judge was right in not considering any other evidence to the contrary. In fact, I venture to say that in the instant case no other evidence to the contrary was introduced by the plaintiff in the court below but who now seeks to introduce arguments on matters by way of conjecture and I think that he must fail on this ground."

I have no legal basis for disturbing this finding which is clearly supported by the evidence on the record and the law.

The respondent pleaded in some great detail, per paragraph 4-7 of their statement of defence, the following material facts.

4. "Paragraph 4 of the Statement of Claim is vehemently denied and the plaintiff will be put to stringent proof of the averment therein. The Defendant says in further answer that by an Agreement signed by both the Plaintiff and the Defendant in the presence of witnesses, the Plaintiff agreed to deposit 400 cartons of the wine with the Defendant in lieu of the duties due on the 313 cartons amounting to ₵2,093,566.16.

5.The said agreement provided that the Plaintiff was to settle the duty on the 313 cartons of the red and white wine within 14 days effective from 14th September 1987.

6. The Defendant says that the Plaintiff failed to honour the Agreement aforesaid. The Defendant further says that after the expiration of the said period of 14 days, they had the statutory power to dispose of the wine since they were perishable.

7. It will be contended that by the said Agreement the Plaintiff is estopped from making any claim against the Defendant."

The appropriate process by which to raise the material averment of duress or undue influence is a reply, but none was filed. Even so, in his evidence in chief, the closest evidence suggestive of duress is their evidence in chief as reproduced hereunder:

"I was compelled to enter into an agreement to pay duty on 313 cartons which according to customs had not been accounted for by my company…"

To be compelled to do something is not always conclusive of terror or force-duress-that which in law can entitle the appellant to avoid the contract. It does equally mean to make something necessary; which does not in any way imply the use of violence or threats of violence. The evidence we have on the record is the bare allegation of being "compelled to enter into the agreement". No evidence was led by the appellant who bore the burden of persuasion, in proof of the form in which the alleged compulsion took. The evidence is totally insufficient to support a finding of duress in his favour.

I fully endorse the findings and conclusion of the court of appeal as articulated by their Lordships and I adopt same as very sound reasons for dismissing this appeal. Their lordships said:

"I think the learned trial judge made the said observation in relation to the sections 24, 25 and 26 of the Evidence Decree on conclusive presumptions in view of the fact that there was no denial by the parties of an agreement entered into between them in relation to the shortages which were detected in the quantity of wine imported into the country by the plaintiff which agreement is referred to in extenso at bags (sic) 132 of the record. In my view, since there was no dispute bearing on the said agreement which was in writing, the learned trial judge was right in expressing himself in the manner which he did and I think that the onslaught on his delivery is wholly devoid of any substance whatsoever, since the said agreement raised issues which are in their nature conclusive presumption as provided for in sections 24, 25 and 26 of the evidence Decree, NRCD 323."

In order to appreciate the view, I have taken of this ground of appeal, I shall quote in extenso, the said provisions.

Section 24: "where the basic facts that give rise to a conclusive presumption are found or otherwise established the action (sic), no evidence to the contrary may be considered by the tribunal of fact".

The question which then arises for consideration is did the said agreement come within any of the conclusive presumptions provided in the law? Yes, by virtue of sections 25(1) and 26 which also provides thus:

25(1) "Except as otherwise provided by law, including a rule of equity the facts recited in a written document are conclusively presumed to be true as between the parties to the instrument or their successors in interest".

26. "Except as otherwise provided by law, including a rule of equity, when a party has by his own statement, act or omission, intentionally or deliberately caused or permitted another person to believe a thing to be true and to act upon such belief, the truth of that thing shall be conclusively presumed against that party or his successors in interest and such relying person or his successors in interest".

As rightly found by the two lower courts, the appellants are bound by the contents of the agreement, which raises a conclusive presumption against them. Consequently, their claim as endorsed is unsustainable. Their appeal based on ground iii thus fails and so does the appeal based on the other grounds, which are in reality closely intertwined with the ground iii and its failure or success automatically disposes of the other grounds of appeal.

As already noted, none of the grounds of appeal relate to the action based on the detention of the goods while being exported out of the country, as alleged by the respondents, illegally, that is, without the relevant custom documents. Even so, a most benevolent conclusion that all or even some of the appeal grounds relate to Suit No. 1720/92, would not alter the appellant's fortunes as far as the appeal to this court is concerned. The findings and conclusions of the two lower courts are so plainly supported by the law and evidence that the judgment ought not to be disturbed. The two lower courts both found as a fact that the appellant was in the process of removing the goods out of the jurisdiction when the goods were impounded by the respondents in the lawful discharge of their statutory duties. As rightly found by the appellate court, this was a crime and a clear illegality from which the appellants should not be allowed to profit, particularly, when as rightly, in my view, concluded by the learned trial judge,:

"*Under Section 334 0f the Customs, Excise and Preventive (sic) (Management) Law, 1993 (PNDCL 330) the Defendants are not liable for any loss or damage sustained by the Plaintiff's goods during or as a result of the impounding exercise unless willful act or negligence can be proved."*

Neither willful act nor negligence was proven and the claim must fail in its entirety. Accordingly this appeal fails and the same is dismissed.

(SGD) G. T. WOOD (MRS)
CHIEF JUSTICE

(SGD) S. O. A. ADINYIRA (MRS)
JUSTICE OF THE SUPREME COURT

(SGD) J. V. M. DOTSE
JUSTICE OF THE SUPREME COURT

(SGD) ANIN YEBOAH
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