

Antonio Buttigieg Vs. Inez Faizon and Others

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Court : Privy Council

Decided On : Nov-15-1948

Reported in : AIR1949PC118

Judge : Lords Simonds, Uthwatt, Morton of Henryton & Reid

Appeal No. : Privy Council Appeal No. 71 of 1947 (From Malta)

Appellant : Antonio Buttigieg

Respondent : inez Faizon and Others

Advocate for Pet/Ap. : W.W.K. Page and C.J. Colombos, for Appellant; Frank Gahan, for Respondents. Solicitors for Appellant, Hy. S. L. Polak and Co.; Solicitors for Respondents, White and Leonard.

Judgement :

Lord Uthwatt:

This is an appeal from a judgment dated 3rd December 1916, of the Court of Appeal of Malta affirming the judgment of the Commercial Court of Malta dismissing the claim of the appellant for the rescission of a contract dated 16th January 1944, made between the appellant and the respondents.

[2] It appears that Carmelo Bonavia and Salvatore Quintano were partners in equal shares in a concern known as "Palais de Danses" carried on at lease-hold

premises No. 84, Strait Street, Valetta, and held in their joint names as one of the partnership assets a permit to hold public dances issued by the police on 29th September 1925. On the death of Quintano, the respondents became entitled to his moiety in the concern and on 18th January 1944, entered into an agreement with the appellant for the transfer of that moiety to the appellant.

[3] The agreement provides that by virtue of it the respondents transfer to the appellant for the sum of 700 a moiety of the concern, goodwill and all other rights, licences and permits relative and inherent to the concern subject to certain conditions. The first condition is to the effect that the conveyance is absolute and comprehensive. The second condition opens by stating that the sum of 700 has been paid to Mr. Bonello, Legal Procurator.

[4] It then proceeds as follows:

"Whereas, however, the parties hereto are subjecting this present conveyance to a resolute condition, as hereunder specified, appearers do hereby likewise stipulate that the price of seven hundred pounds, as hereby paid, shall not be shared between, and taken by each transferor until such time as the transfer of the permit to hold public Dances issued by the Police to Salvatore Quintano and Carmelo Bonavia on the Twenty-ninth day of September, in the year One Thousand Nine Hundred and Twenty-five and bearing number Eighty-three Thousand Three Hundred and Fifty-three (No. 83353) shall have been approved by the Police."

The third condition is in the following terms:

"Thirdly : The parties hereto do hereby expressly stipulate that this present conveyance is subject to the condition of the transfer of the aforementioned permit; and, accordingly, if the Police shall not approve the transfer of the said permit to Carmelo Bonavia and the acquiring firm, this present conveyance shall be rescinded and of no further effect, and the acquiring firm shall, in consequence, be there and then entitled to the restitution of the aforementioned sum of Seven hundred pounds (700). Contrarily, as soon as the Police shall have approved the transfer of the said permit to Carmelo Bonavia and the acquiring firm, this present

conveyance shall become absolute, complete and irrevocable."

[5] The submission of the appellant is that in the events which happened the Police did not approve "the transfer of the permit" in the sense in which that phrase is used in the third condition and that he is therefore entitled to restitution of the 700 paid under the contract.

[6] Before stating the facts bearing on the question of approval, it is convenient to refer to two Articles contained in the Police Laws of the Island and to the police practice in relation to dance permits. By Art. 106 no trade or calling which (inter alia) might cause annoyance to neighbours may be carried on without a licence from the police. A licence so granted is not to continue in force for more than a year and is not to be granted except when a Board composed of certain officials-not the Police-are satisfied that there is no danger of annoyance.

[7] By Art. 169 the giving of shows or balls either public or for money was prohibited without a permit from the police. The two Articles are distinct. The police act on their own authority under Art. 169, but can only act under Art, 106 after the Board has made a determination that there is no danger of annoyance.

[8] The Police Code contains no provision dealing with the transfer of a permit given under Art. 169. The evidence given in the case establishes that in practice the police, on receiving an application for transfer, consider the matter and either approve or disapprove of the transfer. Before giving approval the normal procedure- presumably dictated by the provisions of Art. 106 -was to require the consent of the neighbours to be produced. The approval, if given, was not intended by the police to operate as a transfer of the permit, and, in their Lordships' opinion, would not in law so operate. The procedure, adopted, in order to give effect to the transfer approved, was either to alter the old permit or to grant a new permit.

[9] Turning now to the particular facts of the case, the permit referred to in the agreement was apparently not produced in the Courts below and is not included in the Record. The case was dealt with in the Courts below and was argued before their Lordships on the footing that it was granted under Art. 169 and that it merely

authorised the two partners to hold public dances on the premises 34, Strait Street.

[10] As a result of curfew restrictions imposed in 1940 all dance permits- there were but four in Valetta-remained in abeyance. Moreover in 1941, the Premises No. 34, Strait Street, were partly destroyed by enemy action. Indeed on 25th November 1944, it was held in proceedings to which the appellant and respondents were parties that the result of their destruction was that the lease had under the laws of Malta come to an end. Formally, however, the permit was at the relevant date regarded by the police and the parties as remaining on foot.

[11] Following on the contract, the respondents and Bonavia on 4th February 1944, in agreement with the purchasers applied to the Superintendent of Police for the transfer of the permit to Mr. Arthur Buttigieg, a partner in the appellant firm. On 28th March 1944, the transfer was authorised by the Commissioner and the parties were in due course so informed by the police. This application was according to the uncontradicted evidence attended to and dealt with in the usual way subject to one exception. The police took no steps to ascertain the views of the neighbours, the reason being that, the premises having been demolished, the permit could not be used.

[12] Following on this approval, the purchase money was distributed among the respondents. After the approval of the transfer, protests were lodged and on 10th April 1944 the Commissioner of Police ordered that the neighbours' consent be produced. The case was referred to the Board under Art. 106 and the Board ruled that it could not take further cognizance of the matter until the premises were reconstructed. In the result the permit has not been altered and no new permit has been issued.

[13] Both the Courts below held as a fact that in this state of affairs the police did "approve the transfer of the permit" within the meaning of the third condition. This finding disposes of the appellant's case unless the third condition upon its true construction requires that an effective permit to use the premises should be given either by way of an alteration of the old permit or the grant of a new permit.

14In their Lordships' view, this is not the true construction of the condition. The critical fact is that on the evidence the giving or withholding of police approval of a transfer happens as a matter of practice and is distinct from the issue of a definitive document giving legal effect to that approval. The practice would in any event be one of the surrounding circumstances bearing on the construction of the condition. In the present case the matter goes further. The condition on its language appears to refer, and to refer only, to approval given in accordance with the practice.

[15] Nor are there any surrounding circumstances which suggest that a gloss should be put upon the condition. If the parties had intended that the finality of the transaction should depend upon the grant of a definitive permit to Bonavia and the appellant, it would have been easy to say so. But that is precisely what the parties did not do. They might well have reflected that police approval of Bonavia and the appellant as the prospective holders of a new permit was all that could at the time be rationally expected and would give the appellant the substance of what was wanted. Only an incurable optimist would expect that the grant of a permit to hold dances on premises not physically capable of use for that purpose would be granted at a time when curfew restrictions limited even if they did not preclude, the use of any premises for public dances. The condition construed literally, as their Lordships in agreement with the Courts below construe it, fits in with all the circumstances of the case.

16. It remains to add that subsequent refusal of the police to act upon their approval unless certain conditions were complied with cannot alter the fact that unconditional approval was, in fact given. The event in which the conveyance was to become irrevocable then happened.

[17] Other points depending on the dissolution of the lease as the result of war damage to the premises were taken unsuccessfully in the Courts below. These points were not debated before their Lordships and their Lordships express no opinion upon them.

[18] Their Lordships will humbly advise His Majesty that the appeal be dismissed. The appellant will pay the costs of the appeal.

Appeal dismissed.

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