

[WILSON, P., ZEKIA, VASSILIADIS and JOSEPHIDIS, JJ.]

SOPHOCLES MAMAS & CO.,

Appellant (Plaintiff)

v.

CARL F. W. BORGWARD.

Defendant.

AND

THE CHARTERED BANK OF NICOSIA,

Respondent (ex parte-Respondent).

(Civil Appeal No 4373).

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June 7, 21.
July 10

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Civil Procedure—Interim injunction—Issue and discharge discretionary—Matters to be considered—Interim injunction affecting property not being the subject matter of the action cannot be made under section 4(1) of the Civil Procedure Law, Cap.6.

In an action for money had and received and for damages for breach of contract the plaintiff—appellant applied under section 4(1) of the Civil Procedure Law, Cap.6 and obtained an interim injunction restraining a Bank from remitting to Germany a sum of £1000. That sum was not the subject matter of the action.

Eventually that interim injunction was discharged and on appeal by the plaintiff against the order discharging it, the High Court upholding the judgment of the District Court and its reasons,—

Held : (1) Section 4(1) of the Civil Procedure Law, Cap.6 is not applicable in this case.

Cyprus Palestine Plantations v. Olivier and Co. 16 C.L.R 122, followed.

(2) Apart from that, an interim injunction under section 4(1) is a matter of discretion and in this case the trial court has properly exercised its discretion.

Appeal dismissed

Cases referred to :

Cyprus Palestine Plantations v. Olivier and Co., 16 C.L.R 122.

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Appeal.

Appeal against the order made by the District Court of Nicosia (L. Loizou and Chr. I. Ioannides, D.J.J.), dated the 4/4/62 (Action No. 3834/61) discharging an earlier interim order dated 19 December, 1961, in an action for money had and received and for damages for breach of contract.

G. Tornaritis for the appellant.

St. Pavlides for the defendant.

A. Papageorghiou for the *ex parte* respondent.

The judgment of the Court was read by :—

WILSON, P. : This is an appeal by the plaintiff from an order of the District Court of Nicosia made on April 4, 1962, discharging an earlier interim order of the same court but made by District Judge Hji Anastassiou on December 19, 1961. On May 16, 1962, the defendant, now in Bankruptcy in Germany entered a conditional appearance and was represented before us by counsel.

On September 27, 1961, the plaintiff brought an action claiming the equivalent of £445 had and received by the defendant for use of the plaintiff and damages for breach of contracts alleged to have been made between them, particularly one for the sale by the defendant to the plaintiff of 14 motor cars.

On September 27, 1961 the plaintiff obtained an *ex parte* order made by Judge Georghiou ordering the defendant, its agents etc. to be restrained from in any way disposing of 14 motor vehicles then in customs at Famagusta and the customs authorities were ordered to detain the vehicles until the hearing and final settlement of the action unless the defendant appear before the Court on December 21, 1961 at 8 a.m. and show cause why the order should not remain in force. The Court also ordered that the order and notice of writ of summons be served on the defendant. This order was effective from its date but was not drawn up until November 17, 1961. After this order was made in September the defendant became bankrupt.

The trustee in bankruptcy of the defendant in Germany and the plaintiff then negotiated a sale of the vehicles. On

December 19, 1961, plaintiff obtained an order from District Judge Hji Anastassiou restraining the Chartered Bank at Nicosia from remitting £1,000 part of the proceeds of sale, to Germany until the final hearing and settlement of the action unless the defendant appear before the Court on March 5, 1962, at 8 a.m. and show cause why the order should not remain in force. The Chartered Bank appeared and opposed the motion.

On March 5, 1962, the motion was adjourned to March 13, when it was finally heard by District Judges L. Loizou and Ch. Ioannides.

On April 4, 1962, they discharged the order of December 19 and from their order this appeal is taken. The Chartered Bank and the defendant, or its trustee in bankruptcy supported the discharge of the December order.

After carefully reading all the material filed in these proceedings we are of the opinion that the reasons given for the judgment of the district Court are sound and no good argument has been advanced against them.

However, we desire to add some further observations. First as to section 4(1) of the Civil Procedure Law (Cap.6). There was not a full argument before the District Court because the trustee in bankruptcy was not represented. We merely point out that an order made under that section is discretionary and that in this case not only has the discretion not been challenged but we are of the opinion it was properly exercised.

Secondly, the delay in serving the writ of summons was not properly accounted for and no steps were taken to amend the style of cause after the plaintiff became aware of the defendant's bankruptcy.

Thirdly, there was no good reason for the long delays in making the orders returnable before the District Court. One month in each case would have been ample.

For these reasons the appeal will be dismissed

Having regard to the conduct of the plaintiff in this case we award costs to the Chartered Bank here and in the District Court and to the defendant all its costs of conditional appearance and of appearing before us.

Appeal dismissed.

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The Judgment of the District Court of Nicosia (Loizou & Ioannides D. JJ.) dated the 4th April, 1962, was as follows:

“This is an application under sections 4(1) and 9 of the Civil Procedure Law, Cap.6.

“The applicant is plaintiff in the action No. 3834/61 and the defendants in the said action are Carl F.W. Borgward, a firm of motor car and spare parts manufacturers of Bremen, Germany.

“The plaintiffs’ claim in the action as set out in the endorsement of claim reads as follows :

“(a) 5000 Deutch Marks equivalent to £445, money payable by the defendant to the plaintiff for money received by the defendant for the use of the plaintiff ;

(b) Damages for breaches of contract entered into between the parties and contained in various letters and other documents.

(c) Particularly damages for breach of contract of sale of 14 ‘Isabella’ motor cars entered into between the parties in July, 1961 ;

(d) Legal interest and the costs of the action’.

“In the present application the Chartered Bank of Nicosia has been joined as an ex-parte respondent.

“The applicant-plaintiff applies for an order restraining the defendants and the ex-parte respondents the Chartered Bank, ‘from disposing or transferring to Germany of an amount of £1,000 out of an amount of £4,000 representing 47000 Deutch Marks paid to the said bank by the plaintiffs to the order and/or for the account of the defendants and representing the proceeds of sale of Isabella motor cars referred to in paragraph (c) of the claim in the writ of summons until the final determination of this action’.

“The interim order was given on an ex-parte application on the 19th December, 1961 and was made returnable on the 5th of March, 1962.

“On that date counsel appearing for the ex-parte respondents opposed the application and it was heard on the 13th March, 1962.

“There was no appearance on the part of the defendants

who have not yet been served either with notice of the writ of summons or notice of the interim order.

"Before dealing with the merits of the application it is in our view pertinent to give a short summary of the history of the proceedings as it appears from the file before us.

"This action was filed on the 27th September, 1961 and on that day leave to seal and serve out of the jurisdiction was given.

"On the same day on the ex-parte application of the plaintiff an interim order was granted restraining the defendants from disposing or re-exporting 14 Isabella motor cars imported in Cyprus and then lying in the Famagusta Customs and directing the Customs Authorities in Famagusta to detain the same until further order or direction of the Court. This interim order was made returnable on the 10.11.1961 but as on that date no service had been effected it was adjourned to the 21st December, 1961.

"On the 7th December, 1961 the plaintiffs' advocate wrote to the Registrar requesting him to take steps to postpone service as the action might be settled.

"It would appear from correspondence in this file that plaintiff's counsel took steps with the Ministry of Foreign Affairs and stopped service on the defendants.

"On the 19th December, 1961, i.e. twelve days after his letter to the Registrar not to serve and after the steps he took with the Ministry and while the first interim order was still in force the present interim order was obtained.

"As we stated before this interim order was made returnable on the 5th of March, 1962.

"In reply to a letter dated 11th January, 1962, sent by the Registrar District Court to plaintiffs' counsel enquiring what steps had been taken to have the order served on the defendants in Germany plaintiffs' counsel requested the Registrar by his letter dated 16th February, 1962, to take the necessary steps to have the documents served on the defendants in Germany.

In the circumstances it is not surprising that service has not yet been effected.

"On the 20th December, 1961, plaintiffs' counsel wrote

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to the Registrar District Court that he wishes to discontinue the first interim order and on the following day he appeared before the Court and on his application the first interim order was discharged.

"It appears from paragraphs 14 and 15 of the plaintiffs' affidavit in support of the present application that the sum of £1000 to which this interim order relates is part of a sum of 47000 Deutch Marks which represent the purchase price of 14 Isabella motor cars and which the plaintiffs have paid to the Chartered Bank, the ex-parte respondents, on the 19th December, 1961, so that they would get the necessary documents from the Bank with which they had opened a confirmed credit, to enable them to clear the said cars from the Customs.

"It is further stated in paragraph 14 that plaintiffs' claim under paragraph (c) of the indorsement of claim has been settled.

"On the hearing of the application on the 13.3.1962 the ex-parte respondents confined themselves to a statement through their counsel to the effect that the £1000 restrained by the interim order represented part of the proceeds of negotiable documents amounting in all to 47000 Deutch Marks covering the value of a number of cars shipped by the defendants to the plaintiffs. They received the documents through their Hamburg office on account of the Bremen Lauderbank of Bremen who are the principals of the Chartered Bank Hamburg.

"The ex-parte respondents are not in a position to know the exact nature of the claim of Bremen Bank on the proceeds of the documents.

"Counsel for the plaintiffs applicants submitted that the sum of £1000 now in the hands of the ex-parte respondents form part of the subject matter of the action and in particular of paragraph (c) of the indorsement of claim.

"It is quite clear to this Court from both the indorsement of claim and plaintiffs' affidavit that this is not so.

"It is equally clear from paragraph 18 of plaintiffs' affidavit that the purpose for which he seeks to restrain the respondents from disposing of or transferring to Germany this sum of money is to enable him to satisfy any judgment

that may be given in his favour. We are clearly of opinion that s.4(1) of the Civil Procedure Law (Cap.6) cannot be considered as providing for such a case ; whatever the meaning of the latter part of sub-section (1) of section 4 is it cannot in our opinion be construed to mean that the section may be invoked to enable a plaintiff to obtain satisfaction of the judgment of the Court if given in his favour.

"Such provision is made in s.5 of the same law with regard to immovable property and the language there used is clear.

"In any case there is clear authority to the effect that the Court has no power under s.4 of Cap.6 to make an order affecting property not itself the subject of the action. We refer to the decision of the Court of Appeal in the case of *Cyprus Palestine Plantations v. Olivier & Co.* C.L.R. Vol. 16 p.122.

"For the above reasons we are of the opinion that the interim order should be discharged, and it is hereby discharged.

"In conclusion we wish to state that in any case we would find it difficult not to discharge the interim order in view of the mode this case was handled with regard to service, even if the application fell within the scope of s.4 of Cap. 6."

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