

1962
Apr. 26

POLYXENI
DEMOU
KYRIACOU
v.
COSTAS
KEPERTIS

[WILSON, P., ZEKIA, VASSILIADES and JOSEPHIDES, JJ.]

POLYXENI DEMOU KYRIACOU,

Appellant-Applicant,

v.

COSTAS KEPERTIS,

Respondent.

(Civil Appeal No. 4354)

Immovable property—Mortgage—Sale of property under mortgage—Order for such sale by the Director of Land Registration under the Sale of Mortgaged Property Law, Cap. 233—Staying the sale by order of the Court—The Debtors (Postponement and Restriction of Sales of Immovable Property) Law, 1960 (Law of the Republic No. 2/60), section 4(3)—Second application for a new stay—Whether the order given in the first application operates as res judicata—In any event no new facts alleged—Therefore the second application fails.

Constitutional law—Whether the provisions of Cap.233 (supra) giving power to the Director of Land Registration to order in the first instance the sale of mortgaged property is contrary to article 30.1 of the Constitution—The point is not material in these proceedings—Therefore no question of reference to the Supreme Constitutional Court arises under article 144. 1 of the Constitution—Even if it were necessary to decide the point, the High Court as well as any subordinate court have the duty to apply Cap. 233, being a law in force on the date of the coming into operation of the Constitution, with such modifications as may be necessary to bring it into accord with the Constitution—Article 188. 4 of the Constitution.

The appellant-applicant applied to the District Court of Famagusta under section 4(3) of Law 2/60 (*supra*) to stay an order made by the Director (*supra*) for the sale of the farmer's mortgaged property under Cap. 233 (*supra*). Stay was granted. He applied for a second time asking for further stay. The District Court dismissed the second application holding that there are no new facts or material justifying a further postponement. The District Court overruled also the applicant's submission for a reference under article 144.1 of the Constitution to the Supreme Constitutional Court on the question of the unconstitutionality of Cap. 233 (*supra*) on the ground that the matter had been adjudicated upon in the previous application.

The applicant's argument as regards the unconstitutionality of Cap. 233 was that the provisions of that statute giving power to the Director of Land Registration to order the sale of mortgaged property are contrary to article 30.1 of the Constitution, which provides.

"No person shall be denied access to the court assigned to him by or under this Constitution. The establishment of judicial committees or exceptional courts under any name whatsoever is prohibited".

Held : (1) On the question of the unconstitutionality of the Sale of Mortgaged Property Law, Cap. 233, i.e. that it is contrary to the provisions of paragraph 1 of article 30 of the Constitution for the Director of Land Registration to order the sale of immovable property instead of the Court : It was the Court which was actually dealing with the matter and not the Director of Land Registration, as an application was originally made to the District Court for a postponement of sale and the consent order issued out of the Court in the first instance.

(2) Consequently, the question of unconstitutionality does not arise at all and in any event is not material for the determination of any matter in issue in these proceedings.

(3) Therefore it need not be referred to the Supreme Constitutional Court under article 144. 1 of the Constitution.

(4) Even if it were necessary to apply the provisions of Cap. 233, a law in force at date of the coming into operation of the Constitution, it would be incumbent under the provisions of paragraph 4 of article 188 of the Constitution, on this Court as well as on the subordinate courts, to apply it with such modifications as may be necessary to bring it into conformity with the Constitution.

(5) Without deciding the point whether the first order of the District Court constitutes or not *res Judicata*, there being no new material before the trial Court, a further postponement of the sale would not be justified.

Appeal dismissed.

Appeal.

Appeal against the judgment of the District Court of

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Famagusta (Loizou, D.J.) dated the 28/9/61 (Application No. 35/61) dismissing an application for stay of a writ of sale and for reference to the Supreme Constitutional Court under art. 144 of the Constitution.

Fronis Saveriades for the appellant.

Sozos Marathovouniotis for the respondent.

The judgment of the Court was delivered by :

JOSEPHIDES, J. : This is an appeal from the judgment of the District Court of Famagusta dismissing the appellant's application for an order staying the sale of her mortgaged property under S.M.P. No. 32/60. The application was based on the Debtors (Postponement and Restriction of Sales of Immovable Property) Law, 1960, (Law 2 of 1960).

The sale was fixed by the District Lands Office, Famagusta, for the 16th July, 1961, and the application for stay was filed with the District Court on the 13th July, 1961. On the filing of the application the sale of appellant's property was, under the provisions of section 4(3) of the aforesaid Law 2 of 1960, postponed pending the determination of the proceedings. The application was supported by an affidavit sworn by the appellant in which the history of the debt was given, and in paragraph 5 it was stated that although she expected to pay off her mortgage debt in 1961, due to "the bad conditions and the prevailing crisis" she was unable to settle it, and if her property were sold then, grave injustice would be done to her.

In paragraph 7 of the affidavit, the question of the unconstitutionality of the Sale of Mortgaged Property Law, Cap. 233, was raised in a general way.

In the affidavit of the respondent, filed in opposition to the application, the question of *res judicata* was raised, which was one of the points argued before the trial judge.

The trial judge, after hearing argument, ruled that the matter had been finally adjudicated upon by the Court in a previous application No. 250/60, based on the same Law 2 of 1960. In that application the appellant applied for a postponement of sale and the Court made a consent order postponing the sale for five months, as from the 20th January, 1961.

As already stated, the only facts put forward by the appellant with regard to her present application for postponement of sale were those stated in paragraph 5 of her affidavit. These are not new facts, and there being no new material before the trial Court we think that, even if the matter is not *res judicata* — upon which it is not necessary for us to rule in the present case — there are no facts justifying a further postponement of sale.

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As regards the second point taken by the appellant to-day, *i.e.* the unconstitutionality of the Sale of Mortgaged Property Law, Cap. 233, to the effect that it would be contrary to the provisions of paragraph 1 of article 30 of the Constitution for the Director of Land Registration to order the sale of immovable property instead of the Court, we are of the opinion that in this case the Court is actually dealing with the matter, and not the Director of Land Registration, as an application was made originally to the District Court for a postponement of sale and a consent order was made by the Court in the first instance.

A subsequent application for a further stay of sale was made to the Court, which was refused, and is the subject of this appeal.

Consequently, the question of the unconstitutionality of Cap. 233 does not arise at all and, in any event, it is not material for the determination of any matter in issue in these proceedings, and it need not be referred to the Supreme Constitutional Court under article 144 of the Constitution, as submitted by appellant's counsel. Even if it were necessary to apply the provisions of Cap. 233, which is a law which was in force on the date of the coming into operation of the Constitution, under the provisions of paragraph 4 of article 188 of the Constitution it would be incumbent on this Court, as well as on all Subordinate Courts, to apply it with such modification as may be necessary to bring it into conformity with the Constitution. But, as already stated, the provisions of Cap. 233 are not applicable to the present proceedings.

In the result the appeal fails and is dismissed with costs.

Appeal dismissed.