1969
Sept. 23

NICOS S. COLOCASSIDES
v.
THE NICOSIA WATER BOARD

[TRIANTAFYLLIDES, LOIZOU AND HADJIANASTASSIOU, JJ.]

NICOS S. COLOCASSIDES,

Appellant-Plaintiff,

v.

THE NICOSIA WATER BOARD,

Respondents-Defendants.

(*Civil Appeal No.* 4727).

Trial in Civil Cases—Unsatisfactory verdict of the trial Court—Case not tried on the basis of the main claim but on a too narrow basis viz. on a subsidiary part of the plaintiff's (appellant's) claim—Erroneous evaluation of facts—Retrial ordered.

Retrial—Retrial Ordered by the Court of Appeal—See above.

Declaratory judgment—Claim for—Onus of proof possibly shifting more than once during the trial.

Water meter—Alleged defective or faulty mechanism thereof.

Under paragraph 12(A) of the statement of claim it appears that the main issue before the trial Court was whether the appellant had been rightly debited in respect of the consumption of 707 tons of water for the relevant period as shown by the water-meter readings from July 1, 1963 to September 20, 1963. But the trial Court, in determining this case, treated as the main issue before it an only subsidiary part of the appellant's claim (under paragraph 12(C) of the Statement of Claim for the return of £12 paid on December 21, 1963, to the respondents on account and under protest and pending a solution being found to the dispute which had arisen as a result of the aforesaid admittedly extraordinarily high consumption of water. As a result the trial Judge treated the matter before him as a claim for "money had and received" and, consequently took the view that the burden of proof lay upon the appellant.

After reviewing the facts, allowing the appeal and directing a new trial before another Judge, the Court:

Held, (1). The verdict under appeal was reached, first, through trying the case on too narrow a basis, viz. as a claim

for "money had and received" and not on its true broad basis as an action for a declaratory judgment (with the burden of proof on any particular issue possibly shifting more than once during the trial and not always remaining cast on the appellant, as it was treated to be by the trial Judge) and, further, through totally omitting from consideration a relevant possibility viz. air in the pipe of the water meter etc. etc.

(2) In the circumstances, the verdict of the trial Judge is unsatisfactory; and as the case has not been tried on the basis of the main claim of the appellant, which is that for a declaratory judgment under paragraph 12(A) of the statement of claim (*supra*) we have decided that it is preferable to order a retrial rather than try to determine the matter finally in this appeal.

Appeal allowed. Retrial ordered.

Appeal.

Appeal by plaintiff against the judgment of the District Court of Nicosia (Hadji Tsangaris Ag. D.J.) dated the 12th day of June, 1968 (Action No. 4394/68) dismissing his action for an order, *inter alia*, that his debiting by the defendants in respect of a consumption of 707 tons of water was void.

C. S. Colocassides, for the appellant.

A. Triantafyllides, for the respondents.

Cur. adv. vult.

The following judgment was delivered by:

TRIANTAFYLLIDES, J.: This is an appeal by the appellant-plaintiff against the judgment of the District Court of Nicosia dismissing his civil action No. 4394/66, against the respondents-defendants.

The main issue before the trial Court was whether or not the appellant had been rightly debited in respect of the consumption of 707 tons of water; and this issue was clearly raised by paragraph 12(A) of the statement of claim.

According to water-meter readings the said quantity of water was consumed between the 1st July and the 20th September, 1963, by a family of three persons while occupying a flat of the appellant as his tenants; the appellant being liable to pay for the water consumed by the tenants.

It is not disputed that such quantity of water is so extremely large that it could not be reasonably treated, in the particular circumstances of this case, as having been consumed by the appellant's tenants, in the usual course of things, over the aforesaid period of approximately two and a half months; in the past the average consumption being about 18 tons per month.

The trial Court, in determining this case, treated as the main issue before it an only subsidiary part of the claim of the appellant, which is set out in paragraph 12(C) of the statement of claim, viz. a claim for the return of £12 paid on the 21st December, 1963, to the respondents by the appellant, on account, under protest and pending a solution being found to the dispute which had arisen as a result of the aforesaid extraordinarily high consumption of water.

As a result the learned trial judge treated the whole matter before him as a claim for "money had and received" and he, consequently, took the view that the burden of proof lay upon the appellant.

In doing so, the trial Court seems to have expected of the appellant to establish that the mechanism of the water-meter was faulty, in order to discharge the onus of proof cast upon him; and once this was not proved to be so the Court concluded that the appellant could not possibly succeed in his action.

There appears to have been excluded completely from consideration the possibility that, even though the mechanism of the water-meter was not faulty, nevertheless an incorrect quantity of water could have been recorded as having been consumed because of air having got into the pipe (on which the water-meter was installed) due to a temporary interruption of the water-supply; this possibility was testified to by evidence before the trial Court, and such evidence was not challenged.

The trial Court was, on the other hand, very much influenced by the view that it could attribute the high consumption of water to a leaking pipe of the appellant, connecting the water-meter with his water-tank; and in this respect there was treated as "perfect evidence of such leakage" the existence of stagnant water in an adjoining building-site.

But, the only witness called by the respondents as an expert witness said in evidence that it was *not* possible to account for the whole consumption of 707 tons of water by means of

the leakage in the said pipe; so, he tried to attribute the large consumption of water both to the leakage in that pipe and to other leakages in pipes under the building; yet, the possibility of the existence of such other leakages, under the building, seems, on the present state of the record before us, to be excluded, because when that one pipe, which was found to be, in fact, leaking, was replaced, matters appear to have reverted back to normal. Thus, the leakage actually found might only have been regarded as one of the possible causes contributing to the abnormally high consumption of water, during the period in question, and the existence, and contribution to such consumption, of other causes, such as, possibly, air in the pipe of the water-meter, had to be considered, too.

It follows from the foregoing that the verdict under appeal was reached, first, through trying the case on too narrow a basis, viz. as a claim for "money had and received", and not on its true broad basis as an action for a declaratory judgment (with the burden of proof on any particular issue possibly shifting more than once during the trial and not remaining cast on appellant, as it was treated to be by the trial Court) and, further, through totally omitting from consideration a relevant possibility, viz. air in the pipe of the water-meter, and through giving unduly decisive weight to another possibility, viz. the leakage in the pipe leading to the water-tank.

In the circumstances, we find ourselves faced with an unsatisfactory verdict of the trial Court; as the case has not yet been fully tried on the basis of the main claim of the appellant, which is that for a declaratory judgment (in paragraph 12(A) of the statement of claim) we have decided that it is preferable to order a retrial rather than try to determine the matter finally in this appeal.

In the meantime, the amount of £60 which has been deposited by appellant during the course of this appeal is to be refunded to counsel for the appellant, minus the amount of the costs for the adjournment of the 13th June, 1969, which have been awarded, already, to respondents, in any event.

In the result, the judgment appealed against is set aside and we make an order for retrial before another judge; the costs for the first trial plus the costs of this appeal (other than those already adjudged as aforesaid) to be costs in the cause.

Appeal allowed; retrial ordered; order for costs as aforesaid.