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DOUDOU MOUSTAFA MATSOURI v. DURIYE AHMET RUSTEM

[TRIANTAFYLLIDES, P., A. LOIZOU, MALACHTOS, JJ.]

DOUDOU MUSTAFA MATSOURI,

Applicant,

v.

DURIYE AHMET RUSTEM,

Respondent.

(*Application in Civil Appeal No.* 4965).

Judgment by consent (on appeal)—Application for an order to vary such consent judgment—Circumstances under which the Court may interfere—The Court could not do so after completion or perfection of the judgment in question viz. *after same has been delivered, signed and filed, except to the extent of the "slip" rule—Consent judgment in the instant case perfected before the application to vary was filed—Application refused on this ground—Application also bound to fail even if the consent judgment had not been perfected, in which case the Court could use its relevant discretionary powers—Because the circumstances of the case are such that the Court in the exercise of its said discretion would not interfere.*

Judgment—Consent judgment—Perfection or completion—When effected—Discretionary powers of the Court in relation to judgments not yet completed or perfected—See also supra.

The Supreme Court refused this application to vary its consent judgment, given in a civil appeal, on the ground that the application was filed after the said judgment had been perfected or completed. The Court went on to state that, in view of the circumstances of the case (*infra*), even if the consent judgment in question had not been perfected, when it could exercise in relation thereto its relevant discretionary powers, then again in the exercise of such powers the Court would not have used those powers to vary the said judgment. The facts of the case are briefly as follows :—

This is an application made by the applicant herein (referred to hereafter as "Matsouri") whereby she seeks an order "varying or modifying or changing" the terms on which this Court gave judgment by consent on May 19, 1972, disposing of the Civil Appeal No. 4965, in which appellant was the respondent in the present proceedings (to be referred

hereinafter as " Rustem "), " Matsouri " (the present applicant being the respondent in that appeal. The consent judgment in question may be summarised as follows :

Judgment for £2,000 in favour of " Rustem " against " Matsouri ", provided that execution will be stayed so long as (*a*) " Rustem " is allowed by " Matsouri " to enjoy the properties under registrations No. 5849 and No. 5860 at the village of Galatia, and (*b*) " Matsouri " pays " Rustem " £17.500 mils per month as maintenance as from July 1, 1972 ; provided also that if " Matsouri " acts as per (*a*) and (*b*) above, until the death of " Rustem " the said judgment for £2,000 will be deemed to have been fully satisfied and, thus, no right in respect thereof will devolve upon the heirs of " Rustem ".

On June 2, 1972—after judgment had been given by consent, as aforesaid—" Matsouri " filed the present application seeking in effect that the terms of the judgment by consent be varied as follows :

(*a*) That the monthly maintenance (*supra*) be reduced from £17.500 mils to £5 monthly, and

(*b*) that the property under Registration No. 5849 (*supra*) be returned to " Matsouri " " for her absolute enjoyment ".

It was made abundantly clear by counsel for " Matsouri " that she is not seeking to set aside the judgment for £2,000 given against her in favour of " Rustem " (*supra*).

In support of the application two affidavits have been sworn, the one by " Matsouri " herself, the other by her counsel Mr. Mehmed to the effect that no instructions or authority were ever given to Mr. Mehmed, either expressly or impliedly, " to make any arrangement or enter into any settlement ".

Dismissing the application, the Court refused to vary the consent judgment in question and :—

Held, (1). The question of the power of a Court to set aside an order made by it on the basis of a compromise has been examined in the past on a number of occasions ; and we shall refer to some of the relevant case-law. (*Note :* The

Court referred to the following cases : *Dietz* v. *Lennig Chemicals Ltd.* [1966] 2 All E.R. 962 C.A. ; upheld by the House of Lords : [1967] 2 All E.R. 282 ; *Mardsen* v. *Mardsen* [1972] 2 All E.R. 1162 ; *Orphanides* v. *Michaelides* (1968) 1 C.L.R. 295). And we think that it is well settled law that the Court will not interfere at a time after perfection of the judgment.

(2) On the other hand a judgment in Cyprus is completed and perfected when it is delivered, signed and filed ; and whatever there remains to be done by way of formally entering it, *on the application of a party*, is not necessary for its completion or perfection, but it may well be a formality necessary for other purposes (*Orphanides* v. *Michaelides* (1968) 1 C.L.R. 295 *followed*).

(3) In the present case the judgment given by consent in the appeal on May 19, 1972 (*supra*), has not been drawn up, because neither side applied for this to be done, but the relevant record of the Court, embodying such judgment, had been typed, signed and filed before June 2, 1972, when there was filed in relation to it the application with which we are now dealing.

(4) It is to be observed that though the present application is based on the contention that counsel for the applicant (Matsouri) had no authority at all to reach any compromise in the appeal (*supra*), it has none the less been made abundantly clear by her counsel that it is not now sought to set aside the consent judgment for £2,000, but only to vary the agreed terms regarding the stay of execution of that judgment. In other words the applicant (Matsouri) is seeking to improve in her favour the terms of a bargain on the basis of which she retained ownership of disputed gifts of immovable property. In view of the above, and bearing in mind that, as agreed, if " Matsouri " (the applicant) complies with the said terms of the compromise of May 19, 1972, until the death of " Rustem " (who is over seventy years old) then the consent judgment for £2,000 against her (" Matsouri ") will be deemed to have been fully satisfied and shall be discharged, we do not feel at all satisfied that—even if the consent judgment had not been perfected and we could exercise in relation thereto our relevant discretionary powers—this is a case clearly calling for interference by us with the said judgment, in the course of a proper exercise of our said powers.

(5) In the result the application fails and is dismissed ; but in view of the novelty of the issue raised there will be no order as to costs.

Application dismissed. No order as to costs.

Cases referred to :

Orphanides v. *Michaelides* (1968) 1 C.L.R. 295 ;

Dietz v. *Lennig Chemicals Ltd.* [1966] 2 All E.R. 962, at p. 964, per Lord Denning M.R. ;

The Dietz' case (*supra*) was upheld by the House of Lords : See [1967] 2 All E.R. 282 ;

Marsden v. *Marsden* [1972] 2 All E.R. 1162, at pp. 1165, 1166, 1167 ;

Re Barrell Enterprises [1972] 3 All E.R. 631, at p. 636 per Russell, L.J.

Application.

Application for an order varying and/or modifying and/or changing the terms on which the Supreme Court gave, by consent, judgment on the 19th May, 1972, in Civil Appeal No. 4965.

A.M. Berberoglu, for the applicant.

A. Dana with *S. Hilmi* (*Miss*), for the respondent.

Cur. adv. vult.

The judgment of the Court was delivered by :—

TRIANTAFYLLIDES, P.: The applicant (to be referred to hereinafter as " Matsouri "), who was the respondent in civil appeal No. 4965, seeks an order " varying and/or modifying and/or changing " the terms on which this Court gave judgment, by consent, on the 19th May, 1972, disposing of the said appeal, in which appellant was the respondent in the present proceedings (to be referred to hereinafter as " Rustem ").

The relevant record reads as follows :—

" Duriye Ahmet Rustem, of Galatia,
Appellant-Plaintiff,

v.

Doudou Mustafa Matsouri, of Galatia,
Respondent-Defendant.

19*th May*, 1972.

For appellant : *Mr. A. Dana* with *Miss S. Hilmi.*

For respondent : *Mr. A. Berberoglu* with *Mr. O. Mehmed.*

At this stage counsel for both parties declare that they have agreed that there should be judgment for £2,000 in favour of the appellant and against the respondent,

provided that the execution of such judgment is to be stayed so long as (*a*) the appellant is allowed by the respondent to enjoy undisturbed possession of the properties under registrations No. 5849 and No. 5860 at the village of Galatia and (*b*) the respondent pays the appellant £17.500 mils per month as maintenance, as from 1st July, 1972, with one month's grace ; and

provided that if the respondent acts as per (*a*) and (*b*), above, until the death of the appellant the said judgment for £2,000 will be deemed to have been fully satisfied and, thus, no right in respect thereof will devolve upon the heirs of the appellant.

Counsel state further that, by way of security for the implementation of this agreement, the appellant will be entitled to register with the Famagusta Lands Office the judgment for £2,000 in respect of the two already mentioned properties and of the property under Registration No. 1623 in the village of Galatia ; and that respondent will consent to such registration being renewed by the appellant from year to year until the death of the appellant (but at appellant's expense).

It has been agreed that there will be no order as to costs in this case, either for the trial or for the appeal and that, therefore, the order for costs made by the Court below will be discharged.

COURT : In view of the agreement just declared by counsel the judgment of the trial Court is set aside by consent and judgment is entered for the appellant for the sum of £2,000 subject to the terms agreed upon. There will be no order as to the costs of the appeal and the order for costs made by the Court below is discharged."

The civil appeal in question was made against the judgment of the District Court of Famagusta in action No. 1134/69, by means of which the plaintiff in that action, Rustem, had sought to set aside the transfers of twenty-six immovable properties, which were effected by way of gift from her to the defendant in the action, Matsouri, on the ground that the gift was induced by undue influence ; by the said judgment of the District Court the action was dismissed ; and then the appeal was filed.

On the 2nd June, 1972—after judgment had been given by consent in the appeal, as aforesaid—Mr. Berberoglu, who appeared for Matsouri in the appeal, but not also in the action, filed the present application seeking, in effect, that the terms of the judgment by consent be varied as follows :—

(*a*) That the monthly maintenance to be paid by Matsouri to Rustem be reduced from £17.500 mils to £5, and

(*b*) that the immovable property under registration No. 5849, possession of which is to be enjoyed by Rustem, be returned to Matsouri, " for her absolute enjoyment ".

During the hearing of the present application it was made abundantly clear by counsel for Matsouri that it is not sought to set aside the judgment for £2,000, which was given in the appeal by consent in favour of Rustem and against Matsouri, but only to vary, as stated, the terms on the basis of which execution of such judgment is to be stayed.

The application is supported by an affidavit sworn by Matsouri and by an affidavit sworn by advocate O. Mehmed, who appeared for Matsouri both in the action and in the appeal.

In her affidavit Matsouri states that the instructions given to Mr. Mehmed " were for the sole purpose of fighting " the appeal and that she " did not give any authority expressly or impliedly to make any arrangement or enter into any settlement " in her absence ; also, that she was prevented by illness from being present at the hearing of the appeal on the 19th May, 1972. She further states that the terms of the arrangement, on the basis of which judgment by consent was given in the appeal, are against her interests and beyond her financial means.

Mr. Mehmed in his affidavit confirms that he was never " authorized or empowered to make any sort of settlement " in the appeal, but that at the hearing of the appeal, when a suggestion was made for an arrangement providing for the maintenance of Rustem, he was overpowered by humanitarian feelings and accepted such arrangement ; later on, when he informed about it his client, Matsouri, she stated to him that she would never accept it ; he adds that he discovered that the financial position of Matsouri is very bad and that he was not aware of this matter.

Mr. Mehmed states, also, in his affidavit that he had been requested by Matsouri to appear for her at the appeal with another advocate and so Mr. Berberoglu appeared for Matsouri at the appeal together with him.

The application has been opposed on the ground that counsel for Matsouri never disclosed, during the discussions which led to the arrangement reached in the appeal proceedings, that they had no instructions to agree to a settlement ; and that during the said discussions Mr. Mehmed " made a statement showing that he had knowledge of the financial position of his client and the income " of the properties concerned.

The question of the power of a Court to set aside an order made by it on the basis of a compromise has been examined in the past on a number of occasions ; and we shall refer to some of the relevant case-law : In the case of *Dietz* v. *Lennig Chemicals, Ltd.* [1966] 2 All E.R. p. 962, Lord Denning, M.R., in delivering his judgment in the Court of Appeal, said (at p. 964) :—

> " The law is settled by a series of cases, particularly *Holt* v. *Jesse*, [1876] 3 Ch. D. 177, and *Harvey* v. *Croydon Union Rural Sanitary Authority*, [1884] 26 Ch. D. 249. They show that if, before a consent order is drawn up, it appears that the consent was

given under a misapprehension, or from a misstatement or want of materials, then the party can come to the Court and ask that it be not drawn up. Of course, he cannot come without good reason. If he seeks arbitrarily to get out of it, the Court will not listen to him ; but, if he has any good reason, then he can come and ask that it should not be made an order of the Court, and that it be set aside."

The decision of the Court of Appeal in the *Dietz* case (*supra*)—which upheld the setting aside of the consent order involved in that case—was approved by the House of Lords ([1967] 2 All E.R. 282).

In the case of *Marsden* v. *Marsden* [1972] 2 All E.R. 1162, Watkins J. said in his judgment (at p. 1165) :—

> " With regard to the circumstances in which the Court should interfere to set aside an order based on a compromise, I have been referred to a number of authorities. They all show that the Court should view such applications as this with extreme caution and that a Court will not grant such an application except in a case which calls clearly for interference with the order made. It is a discretionary remedy to be exercised with care and with regard to the injustice or otherwise of allowing an order to stand."

Also, later on in his judgment (at p. 1167) he adopted, as representing " the state of the present law ", the following passage from Halsbury's Laws of England, 3rd ed., vol.3, paragraph 74, p. 51 :—

> " The position is more uncertain where the authority of counsel is limited, but the limitation is unknown to the other side, who enter into the compromise believing that the opponent's counsel has the ordinary unlimited authority. In some cases, where the matter is within the ordinary authority of counsel, the Courts have refused to inquire whether there was any such limitation, when it was not communicated to the other side, and have refused to set aside a compromise entered into by counsel. But the true rule seems to be that in such case the Court has power to interfere ; that it is not prevented by the agreement of counsel from setting aside or refusing to enforce a compromise ; that it is a matter for the discretion of the Court ; and that when, in the particular circumstances of the case, grave injustice would be done by allowing the compromise to stand, the compromise may be set

aside, even although the limitation of counsel's authority was unknown to the other side."

Earlier on (at p. 1166) in his judgment, Watkins J., had stated :—

"I think it is well settled law that the Court will not interfere at a time after perfection of the order."

In opposing the present application counsel for Rustem argued that we have no power to grant it because the compromise reached at the hearing of the appeal has been embodied in a Court Order which was perfected before the application was made ; and he relied in this respect on the case of *Orphanides* v. *Michaelides* (1968) 1 C.L.R. 295. In that case it was held that a reserved judgment of the Supreme Court could not be varied or be set aside after it had been perfected and that it was to be treated as perfected when delivered in a printed form, signed and filed, without a formal order having to be drawn up on the basis thereof before its perfection would be completed. It was stated as follows (at pp. 302–303) :—

"In each case where judgment has been reserved in Cyprus, such judgment is prepared and printed finally, and, as soon as it has been read in open Court, it is signed by the Judges who have delivered it, and the original thereof is filed as a matter of record in the official Court file (as it has been done in this case on the 15th December, 1967) ; and copies are given out at once, there and then, to the parties in the appeal, as, again, it has been done in the present case.

We are of the view, therefore, that looking at the essence of things, and not losing sight of it through procedural technicalities, the position in Cyprus, in relation to a reserved judgment is that such judgment is completed and perfected (just as it happens in England when an orally pronounced judgment is drawn up and entered) when it is delivered, signed and filed, and whatever there remains to be done by way of formally entering it, *on the application of a party*, is not necessary for its completion or perfection, but it may well be a formality necessary for other purposes.

Therefore, once, in Cyprus, a judgment has been delivered, signed and filed, there can be no possibility for the Court which has delivered it to rehear argument and to change it, or set it aside, except, of course, to the extent to which it has, always, been possible to correct an error in a judgment under the provisions

of Order 25, rule 6 (which is known as the 'slip' rule and corresponds to Order 20 rule 11 of the Rules of the Supreme Court in England), and under the inherent jurisdiction of the Court."

In delivering his judgment in *Re Barrell Enterprises* [1972] 3 All E.R. 631 (at p. 636), Russell, L.J., expressed the view that even:

> "When oral judgments have been given, either in a Court of first instance or on appeal, the successful party ought save in most exceptional circumstances to be able to assume that the judgment is a valid and effective one."

In the present instance the order made, by consent, in the appeal, on the 19th May, 1972, has not been drawn up, because neither side has applied for this to be done, but the relevant record of the Court, embodying such order, had been typed, signed and filed before the 2nd of June, when there was filed in relation to it the application with which we are now dealing.

It has not been contended by counsel for the applicant, Matsouri, that the approach adopted by the Court in the *Orphanides* case (*supra*), regarding the perfection of a reserved judgment delivered in an appeal, does not apply to the present case, where we were concerned with a judgment given by consent in an appeal; so we are inclined to treat the said consent judgment as having been perfected before the present application was made; and this is, in the light of the already referred to case-law, a sufficient ground for dismissing this application.

It is to be observed that though the present application is based on the contention that counsel for the applicant, Matsouri, had no authority at all to reach any compromise in the appeal, it has none the less been made abundantly clear by her counsel that it is not sought now to set aside the consent judgment for £2000, but only to vary the terms agreed to between the parties regarding the stay of execution of such judgment. In the affidavit of Matsouri it is stated that the present market value of the properties which, in return of the consent judgment against her for £2000, will remain registered in her name, as a gift from Rustem, is about £2500. What she complains of is that the terms for the stay of execution of the judgment are onerous. We do think that in this case the applicant, Matsouri, is seeking to improve in her favour the terms of a bargain on the basis of which she retained ownership of disputed gifts of

immovable property. In view of the above, and bearing also in mind that, as agreed, if Matsouri complies with the said terms until the death of Rustem, who is over seventy years old, then the consent judgment for £2000 will be deemed to have been fully satisfied and no right in respect thereof will devolve upon the heirs of Rustem, we do not feel at all satisfied that—even if the consent judgment had not been perfected and we could exercise in relation thereto our relevant discretionary powers—this is a case clearly calling for interference by us with the said judgment, in the course of a proper exercise of our said powers.

In the result this application fails and is dismissed ; but in view of the novelty of the issue raised we are not prepared to make any order as to the costs of the present proceedings.

Application dismissed ;
no order as to costs.