1976
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NASO ELIADOU
v.
NICOS
THEMISTOCLEOUS

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

NASO ELIADOU,

Appellant-Defendant,

v.

NICOS THEMISTOCLEOUS,

Respondent-Plaintiff.

(*Civil Appeal No.* 5506).

Civil Procedure—Appeal—Time within which to file appeal—Interlocutory order—Final judgment—Partly heard actions—Hearing in the absence of both appellant and her counsel after withdrawal of the latter when his application for adjournment was refused—Judgment given on the merits and not in default—Main complaints of appellant not related to merits of claim but to the manner in which proceedings against her continued in her absence and that of her counsel—Appeal treated as an appeal against the final judgment in the action and not as an appeal made solely against an interlocutory order, in which case it would have been out of time—Order 35 *rule* 2 *of the Civil Procedure Rules.*

The trial Court having, on the 4th June, 1975, rejected an application for adjournment by counsel for the appellant, counsel withdrew from the case with the leave of the Court, and the hearing continued in the absence of the appellant or her counsel.

The Court having looked at the evidence as a whole, gave judgment on the merits and not in default on September 10, 1975.

Prior to counsel's withdrawal the Court had, in the course of another hearing, heard plaintiff's case and that of defendant 2.

The main complaints of the appellant were not related to the merits of the claim of the respondent but to the manner in which the proceedings in the action against the appellant were continued and concluded in the absence of both the appellant and her counsel.

On a preliminary objection raised by the respondent that the appeal was out of time because it has, in effect, been made not

against the final judgment given on September 10, 1975 but only against an interlocutory ruling, given on June 4, 1975:

Held, (1) this is not, really, an appeal solely against the order of June 4, 1975, refusing an adjournment of the hearing, but it is, also an appeal in respect of the way in which the trial Court proceeded, *after* the refusal of the adjournment, to determine the action in the absence of the appellant and her counsel; it is quite clear that what is being complained of is that the proceedings were conducted in a manner which amounts to a violation of basic principles of justice.

(2) We are not prepared to look upon this appeal as being an appeal made solely against an interlocutory order, in which case it would have been out of time; we have to treat it as an appeal against the final judgment in the action, in the sense of it being an appeal against such judgment on the ground that it, allegedly, has brought a travesty of justice; and this being the essential nature of the present appeal, it can certainly not be regarded as being out of time.

Order accordingly.

Cases referred to:

Laird v. *Briggs* [1880-81] 16 Ch. D. 663;

Charalambous v. *Charalambous and Another* (1971) 1 C.L.R. 284.

Appeal.

Preliminary objection raised by respondent to the effect that this appeal, by defendant No. 1 against the judgment of the District Court of Nicosia (Stavrinakis, P.D.C. and Papadopoulos, S.D.J.) dated the 10th September, 1975, (Action No. 7521/71) whereby the sum of £1,200.- was awarded to plaintiff as damages for injuries suffered by her in a traffic accident due to the negligent driving of defendant No. 1, is out of time.

E. Efstathiou with *D. Koutras*, for appellant-defendant No. 1.

S. Erotokritou (*Mrs.*), for respondent-plaintiff.

G. I. Pelaghias, for defendant 2.

The decision of the Court was delivered by:-

TRIANTAFYLLIDES, P.: We will, at this stage, give our decision on a preliminary objection raised by the respondent (who was the plaintiff at the trial), namely that this appeal is out of time.

The judgment in the action between the parties was delivered by the trial Court on September 10, 1975, and this appeal was filed on October 21, 1975.

Counsel for the respondent contended that this appeal is out of time because it has, in effect, been made not against the final judgment given on September 10, 1975, but only against an interlocutory ruling, given on June 4, 1975; by means of such ruling the trial Court refused a request of counsel for the appellant (who was defendant 1 at the trial) for an adjournment of the hearing of the action; and, of course, if the respondent's contention is correct, then, under rule 2 of Order 35 of the Civil Procedure Rules, this appeal is out of time.

It is very helpful to refer to the history of the proceedings before the trial Court, which has been set out in its judgment as follows:-

> " By this Action the plaintiff claims against the defendants jointly and severally damages for personal injuries received in a road traffic accident allegedly due to the negligent driving of defendant No. 1, whilst in the course of his employment by defendant No. 2.
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> .....
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> The present Action was filed on the 30th December, 1971, whereby the plaintiff alleges that at the material time the vehicle was being driven by defendant No. 1, who, in her turn, alleges—in her Statement of Defence filed on the 14th May, 1973—that it was the plaintiff and not she who was driving the vehicle in question at the material time, charging him with negligence on his part.
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> On the 8th January, 1974, defendant No. 1 filed in the District Court of Nicosia Action No. 109/74, against the plaintiff and defendant No. 2, claiming damages for the personal injuries she received in the same accident, alleging that it was due to the negligent driving of the plaintiff.
>
> On the 16th March, 1974, when the present Action was mentioned before a different Full Court, counsel for defendant No. 1 informed the Court about the filing of Action No. 109/74 and applied that this Action be adjourned sine die till the closing of the pleadings in the subsequent Action and pending an application for consolidation. The case was accordingly adjourned by the Court sine die until

the 25th April, 1974, when the plaintiff applied for a short date of hearing, on the ground that he was suffering from kidney trouble and had to go abroad for treatment. The case was fixed for hearing on 25th May, 1974, and on that day, owing to the Nicosia Assizes, it was further adjourned to the 5th July, 1974.

On the 4th July, 1974, an application was made by defendant No. 1 (in her own Action) for the consolidation of the two Actions. The application was fixed for hearing on the 7th October, 1974 .....

.....

On the 7th October, 1974, when the hearing of the application for the consolidation came up, it was agreed by all parties concerned (same in both Actions but in different capacities), that as there could be no consolidation in the strict sense, the present Action, 7521/71, to be heard first and the final judgment regarding the common issue (as to who was the driver), to be binding on the parties in the other Action (109/74). Upon this, a new date for the hearing of the Action was given.

The testimony of the plaintiff was heard on the 21st October, 1974, and his case was closed on the 13th December, 1974, when defendant No. 2 called his only witness, Dr. Iacovides (D.W.1) and closed his case, subject to certain reservations. Although it was upon defendant No. 1 to begin first, yet this course was considered more appropriate, owing to the nature of the allegations of defendant No. 1 and because the evidence on behalf of defendant No. 2 was of medical nature, regarding the plaintiff's injuries and it followed, in sequence, the medical evidence adduced by the plaintiff. After that, it was the turn of defendant No. 1 to present her case and substantiate the allegations contained in the Statement of Defence.

There were repeated adjournments made on the application of counsel of defendant No. 2, on the ground that she was and still is abroad, undergoing treatment and, also, on the ground that in view of the seriousness of her condition, her counsel was unable to present her case and/or receive instructions from her. Despite the anxiety of the plaintiff for a speedy trial, the Court granted the adjournments and on the 21st April, 1975, when the Court

was dealing with such an application for an adjournment, it was pointed out to the parties that the case would be adjourned to the 4th June, 1975, and that no other adjournment would be granted on the same or similar grounds.

On the 4th June, 1975, counsel for defendant No. 1 applied afresh for another adjournment, on the same grounds as before. The application was objected to by counsel for the plaintiff, laying stress on the urgency of the case from his point of view. The Court rejected the application for another adjournment, upon which counsel for defendant No. 1 applied for leave to withdraw from the case for want of instructions and with the object of not prejudicing his client's case by his appearance in the proceedings. Leave was granted and the Court directed the continuation of the hearing. The remaining parties applied for some time to consider the situation that was created by the new development and, finally, the plaintiff and defendant No. 2 addressed the Court on the 27th June, 1975, in the absence of defendant No. 1.

The question that arises out of this situation, is whether the Court can make use of and/or act on the cross-examination of the witnesses by counsel appearing at the time for defendant No. 1, or whether, having later withdrawn, and the case being allowed to proceed in default, any previous, participation of the said party to the proceedings should be ignored as it never have occurred. This is a very crucial question, not so much for the purpose of these proceedings, but for the consequence it may later have in other proceedings."

After the above part of its judgment, the trial Court proceeded to deal with the question whether less injustice would be caused to the parties if judgment were to be given on the merits, than if it were to be given in default, and it went on to say the following:-

"This question is really rooted on considerations of fairness to both sides. What is fair in the present case for the plaintiff and defendant No. 2 is that there should be finality in litigation, even more so, for defendant No. 2 who may eventually be called upon to pay. Such finality can better be achieved with a judgment on the merits.

Generally speaking, a judgment on the merits may also

in some cases be fair for the defendant and we may give only as an example the hypothetical case of a defendant who manages to discredit the plaintiff's witnesses in spite of his subsequent failure to appear. In such a case, it must be to his disadvantage if his successful participation is ignored and judgment is issued on the bare evidence adduced by the plaintiff. If, however, the defaulting party's participation did not achieve the desired results, it does not mean, that the defendant is left without a remedy. In a proper case, he may appeal and if successful, have a rehearing of the case. If his grounds for appeal are weak, then he is to blame and not the other litigants because even an order for setting aside a judgment obtained in default is not granted as of right.

In the light of all the above, we are of the opinion that in giving judgment in this case, we must look at the evidence as a whole and determine the case on the merits, including all the disputed issues touched during the hearing of the case by all parties appearing at the various stages."

So, by a judgment on the merits, and not in default, given on September 10, 1975, the trial Court found that the appellant was, in fact, the driver of the vehicle in which the respondent was travelling at the time of the accident; and, as the appellant was at the material time acting in the course of the employment of defendant 2, judgment was given in favour of the respondent against both the appellant and defendant 2 for the amount of C£1,200, including general and special damages.

At the end of the Court's judgment there appears the following note:-

"Copies of this judgment to be delivered to the advocate last appearing for defendant No. 1 and, also, to be filed in Action No. 190/74".

After the present appeal was filed, the respondent filed, on November 7, 1975, a cross-appeal, alleging that the amount of damages is inadequate and gave notice, in this respect, to both defendants in the action.

The main complaints of the appellant, as they are to be gathered from her notice of appeal, are not related to the merits of the claim of the respondent—such as liability or quantum of damages—but to the manner in which the proceedings in

the action against the appellant were continued and concluded in the absence of both the appellant and her counsel.

Thus, in dealing with the preliminary objection of the respondent that this appeal is out of time, it is important to bear in mind that the refusal of an adjournment of the hearing of the action on June 4, 1975—which is the main source from which the appellant's complaints stem—is *not* an interlocutory order connected with the merits of the case; had it been an order of that kind then rule 16 of Order 35 of the Civil Procedure Rules would be applicable; it reads as follows:-

> "No interlocutory order from which there has been no appeal shall operate so as to bar or prejudice the Court of Appeal from giving such decision upon the appeal as may be just".

It might be observed, at this stage, that our rule 16, above, corresponds exactly to the old rule 14 of Order 58 in England; and a case illustrating the application of that rule is that of *Laird* v. *Briggs*, [1880-81] 16 Ch. D. 663, where the view appears to have been taken that the refusal of leave to amend the pleadings formed part of the judgment and need not have been appealed against separately; but, in the appeal now before us, the situation is quite different from that in the *Laird* case.

Nor is the position in the present case comparable to that in *Charalambous* v. *Charalambous and Another*, (1971) 1 C.L.R. 284, where the appellant was complaining that there had been refused an adjournment of the trial in order to enable a witness to be present but at the same time the appeal was about the merits of the case as well.

After carefully perusing the grounds in the notice of the present appeal we find ourselves inclined to the view that this is not, really, an appeal solely against the order of June 4, 1975, refusing an adjournment of the hearing, but that it is, also, as already mentioned, an appeal in respect of the way in which the trial Court proceeded, *after* the refusal of the adjournment, to determine the action in the absence of the appellant and her counsel; it is quite clear that what is being complained of is that the proceedings in the action were conducted in a manner which amounts to a violation of basic principles of justice.

We are not, therefore, prepared to look upon this appeal as

being an appeal made solely against an interlocutory order, in which case it would have been out of time; we have to treat it as an appeal against the final judgment in the action, in the sense of it being an appeal against such judgment on the ground that it, allegedly, has brought about a travesty of justice; and this being the essential nature of the present appeal, it can certainly not be regarded as being out of time.

Order accordingly.