

1980 September 29

[MALACHTOS, DEMETRIADES AND SAVVIDES, JJ.]

JAMES O. HOLMES,

Appellant-Defendant,

v.

ANDREAS MAKRIS,

Respondent-Plaintiff.

(Civil Appeal No. 5843).

5 *Diplomatic missions—Diplomatic privileges—Members of the technical and administrative staff—Immunity from legal process—Necessary prerequisites—Section 17 of the Diplomatic Rights, Immunities and Privileges Law, 1965 (Law 60/65)—Vienna Convention on Diplomatic Relations.*

10 The appellant-defendant, a staff member of the Embassy of the United States of America, who was involved in a road accident, claimed immunity from the civil jurisdiction of the Courts of the Republic on the ground that he was protected by diplomatic immunity. The trial Judge, relying on section 17(2)* of the Diplomatic Rights, Immunities and Privileges Law, 1965 (Law 60/65), dismissed his application having held “that a person who enjoys diplomatic immunity loses it if what he did was outside his actual duties as provided by the Vienna Convention and in consequence by our law”; and that it was “very doubtful whether the issue in the present action is such that was done by the applicant defendant whilst he was exercising his duties which enjoy diplomatic immunity”.

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* Section 17(1) and (2) of the Law reads as follows:

“17(1) Any member of the technical and administrative staff of the diplomatic mission performing the duties of archivist or cypher officer together with members of his family forming part of his household shall, if they are not citizens of the Republic or permanent residents therein, subject to sub-sections (2) and (3) enjoy the privileges and immunities specified in sections 10, 11, 12, 13 and 14.

(2) Any person mentioned in sub-section (1) shall not enjoy immunity from any criminal or civil jurisdiction as provided in sub-section (1) of section 12, for any act or omission committed by him outside the course of his official duties.”

Upon appeal:

Held (1), that only diplomatic agents enjoy immunity from criminal and civil jurisdiction in the Republic (see s. 12(1) of Law 60/65); that members of the technical and administrative staff of a diplomatic mission performing the duties of archivist or cypher officer enjoy diplomatic immunity only for acts or omissions committed in the course of their official duties (see section 17(1) and (2) of Law 60/65); that there is no allegation that the appellant was an archivist or cypher officer; that even if it is assumed that he was at the time a member of the technical and administrative staff of the diplomatic mission of the United States of America, performing the duties of archivist or cypher officer, he could enjoy immunity if the act or omission committed by him had to be within the course of his official duties (see section 17(2) of Law 60/65); that it was on the appellant to satisfy the trial Court that he was an archivist or cypher officer and that the accident took place while he was performing his official duties; that he failed to discharge this burden; and that, accordingly, his appeal must fail.

Appeal dismissed. 20

Appeal.

Appeal by defendant against the judgment of the District Court of Nicosia (Ioannides, P.D.C.) dated the 15th May, 1978 (Action No. 111/78) whereby his application for an order of the Court to set aside the service of the writ of summons on him was dismissed. 25

X. Xenopoulos, for the appellant.

A. Poetis, for the respondent.

Cur. adv. vult.

MALACHTOS J. read the following judgment of the Court. 30
This is an appeal by the defendant in Action No. 111/78 of the District Court of Nicosia whereby his application for an Order of the Court to set aside the service of the writ of summons on him was dismissed.

The relevant facts are the following: 35

On the 11th January, 1978 the respondent in this appeal brought the aforementioned action against the appellant claiming £2,087.105 mils as damages for negligence and/or breach of statutory duty.

In the specially endorsed writ of summons it is stated that the damage caused to the plaintiff was the result of a collision that took place on 24/8/77 between the 8th and 9th milestones of the Nicosia-Limassol main road where motor car TGX606 belonging to him and motor car under Registration No. ZGK179 driven at the time by the defendant were involved.

The defendant after entering a conditional appearance filed an application on the 6th February, 1978, claiming, as stated therein, "an Order of the Honourable Court setting aside the service of the writ of summons effected upon the defendant on the 16th January, 1978".

In the short affidavit in support of his application, the defendant states the following:

1. I am a citizen of the United States of America and a Member of the United States of America Embassy in Cyprus.
2. To the best of my knowledge and belief and as I am advised by my counsel this action cannot proceed and the service of the writ of summons must be set aside as I am protected by diplomatic immunity.
3. I, therefore, apply for an Order as per my application."

On the 24th of February, 1978, the plaintiff filed an opposition to the application of the defendant and in the affidavit in support thereof it is stated that even if the facts alleged by the defendant are correct, which are denied, they do not in law justify the setting aside of the service of the writ in the action. It is also stated that according to information received from the American Embassy the defendant is merely a member of the armed forces of the United States of America and had no connection with the Embassy and so he was not entitled to diplomatic immunity.

At the hearing of the application no oral evidence was called by either side. Counsel for applicant, however, put in evidence a certificate signed by the First Secretary of the Embassy of the United States of America in Nicosia dated 22nd March, 1978, exhibit 1, where it is stated that Mr. James Holmes, the defendant, is a staff member of the American Embassy in Nicosia and that he enjoys the privileges of administrative and technical staff as provided by the Vienna Convention.

The trial Judge after hearing further arguments of counsel dismissed the application of the defendant. His short decision appears at pages 21 to 22 of the record and reads as follows:

“Court: I take into account the submissions made by both learned counsel, taking into consideration all that was mentioned regarding the conditional appearance, the Vienna Convention, Law 60 of 1965, etc. 5

I have to refer only to one issue. *Exhibit* No. 1 states clearly that the applicant defendant enjoys the privileges as provided by the Vienna Convention and, in other words, our Law 60/65. However, the point that I would like to lay stress on is paragraph 2 of s. 17, which clearly states that a person who enjoys diplomatic immunity loses it if what he did was outside his actual duties as provided by the Vienna Convention and in consequence by our Law. I find that it is very doubtful whether the issue in the present action is such that was done by the applicant defendant whilst he was exercising his duties which enjoy diplomatic immunity. 10 15

In view of the above I dismiss the application of the applicant defendant with costs. Costs to be assessed by the Registrar.” 20

Counsel for the appellant in arguing this appeal before us submitted that since the trial Judge admitted in evidence the certificate of the First Secretary of the Embassy of the United States of America in Nicosia, where it is stated that the appellant is enjoying diplomatic immunity, he could not proceed further at this stage of the proceedings in order to find out as to whether at the time of the accident the appellant was in the course of his official duties or not. 25 30

The law that makes provision for the rights, immunities and privileges of diplomatic missions and diplomatic agents accredited to the Republic of Cyprus and with certain other persons and for matters connected therewith, is the Diplomatic Rights, Immunities and Privileges Law, 1965 (Law 60/65). 35

Part IV of the said Law contains sections 10 to 16, inclusive, which deal with immunities and privileges of the diplomatic agents. A “diplomatic agent”, according to section 2 of the Law, the Interpretation section, is any High Commissioner,

Ambassador, Legate, Nuncio, Envoy, Internuncio, Minister, Charge d'Affaires, Deputy High Commissioner, Counsellor, Secretary of Embassy, or Attaché (whether diplomatic, commercial, military or otherwise).

5 In the present case we are concerned with section 12 of the Law which provides:

“12.(1) A diplomatic agent shall enjoy immunity from criminal and civil jurisdiction of the Republic, except in the case of—

10 (a) an action in respect of immovable property owned or occupied by him otherwise than on behalf of the sending State or for the purposes of the diplomatic mission;

15 (b) an action in respect of succession in which the diplomatic agent is involved as executor, administrator, heir or legatee, otherwise than in his official capacity;

(c) an action in respect of the exercise of any profession or the carrying on of any trade or business by the diplomatic agent in his private capacity.

20 (2) Save with the consent of the head of the diplomatic mission, a diplomatic agent shall not be required to give evidence in any civil or criminal proceedings.

(3) No execution shall be levied in respect of a diplomatic agent except in the case of paragraphs (a), (b) or (c) of sub-section (1):

25 Provided that in such a case execution may be levied without infringing the inviolability of the person or residence of the diplomatic agent.

30 (4) That immunity from civil and criminal jurisdiction of a diplomatic agent under this section may be waived by the head of the diplomatic mission:

Provided that in the case of execution of a judgment a specific waiver shall be required.”

35 It is clear from subsection 1 of the above section that only diplomatic agents enjoy immunity from criminal and civil jurisdiction of the Republic.

In the case in hand, even if we accept the contents of the affidavit in support of the application, as well as the contents of exhibit 1, the certificate of the First Secretary of the American Embassy, it is clear that the appellant is not a diplomatic agent but a member of the staff of the said Embassy as stated in the certificate. So, in his case, section 17 of the Law, which deals with privileges of the members of the technical and administrative staff, comes into play. This section reads as follows: 5

“17.(1) Any member of the technical and administrative staff of the diplomatic mission performing the duties of archivist or cypher officer together with members of his family forming part of his household shall, if they are not citizens of the Republic or permanent residents therein, subject to sub-sections (2) and (3) enjoy the privileges and immunities specified in articles 10, 11, 12, 13 and 14. 10 15

(2) Any person mentioned in sub-section (1) shall not enjoy immunity from any criminal or civil jurisdiction as provided in sub-section (1) of section 12, for any act or omission committed by him outside the course of his official duties.” 20

There is no allegation that the appellant is an archivist or cypher. But, even if we assume that the appellant was at the time a member of the technical staff and administrative staff of the diplomatic mission of the United States of America, performing the duties of archivist or cypher officer, it remains to examine under sub-section 2 of section 17 of the Law, whether the act or omission in question committed by him, was within or outside the course of his official duties. 25

It was on the appellant to satisfy the trial Court that he was an archivist or cypher and that the accident took place while he was performing his official duties. In our view he failed to discharge that burden. 30

For the above reasons we are of the view that the trial Judge was right in dismissing his application.

The appeal is, therefore, dismissed with costs. 35

Appeal dismissed with costs.