1983 September 5

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

LIMASSOL LICENSED PORTERS ASSOCIATION,
Appellants-Defendants,

v.

STATE MACHINERY IMPORT CO.,
Respondents-Plaintiffs.

(*Civil Appeal No.* 5825).

Civil Procedure—Appeal—Security of costs—Special circumstances—Order 35, *rule* 2 *of the Civil Procedure Rules—Principles applicable.*

The trial Court, on the application of the respondents-plaintiffs, made an order for the addition of certain persons as co-defendants. The defendants appealed against this order and the respondents-plaintiffs applied* for security of costs of the appeal. The respondents-plaintiffs contended that since the appellants-defendants admitted that they do not possess a legal entity, and yet they have fought the case step by step, if their appeal fails, they will not be able to recover their costs though they themselves deposited in cash C£300.- as security for costs.

Held, that the facts relied upon do not constitute special circumstances because prima facie there has not been established a case of abuse or threatened abuse by the appellant of the process of the Court and no question of insolvency or poverty arises; accordingly the application must fail.

Application dismissed.

Cases referred to:

Dence v. Mason [1879] W.N. 177 C.A.;

Weldon v. Maples, Teesdale & Co. [1887] 20 Q.B. 331;

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* The application was made under Order 35, rule 2, of the Civil Procedure Rules which, so far as relevant, provides as follows:

"... such deposit or other security for costs to be occasioned by any appeal shall be made or given as may be directed, under special circumstances by the Court of Appeal."

Everett v. Islington Guardians [1923] W.N. 72;

Sir Lindsay Parkinson Co. Ltd. v. Triplan Ltd. [1973] 2 All E.R. 273 at p. 275;

Naamlooze-Vennootschop Beleggins Compagnie "Uranus" v. Bank of England & Others [1948] 1 All E.R. 465;

Visco v. Minter [1969] 3 W.L.R. 70;

In re B. (Infants) [1965] 1 W.L.R. 146;

Willmott v. Freehold House Property Co. [1885] W.N. 65;

Baird v. Hecquard [1889] 5 T.L.R. 576.

Application.

Application by the respondents for an order of the Court directing the appellants to give security for respondents' costs in the sum of £250.-.

G. Mitsides, for the applicants.

G. Cacoyannis, for the respondents.

Cur. adv. vult.

TRIANTAFYLLIDES P.: The judgment of the Court will be delivered by H.H. A. Loizou.

A. LOIZOU J.: By the present application the applicants seek an order that the respondents give security for their costs in the sum of C£250. The application is based on the Civil Procedure Rules, Order 35, rule 2, which provides that, "such deposit or other security for costs to be occasioned by any appeal shall be made or given as may be directed, under special circumstances by the Court of Appeal."

The applicants are a State company of Iraq, engaged in the import to that country of vehicles and machinery. On the 5th July, 1977, they instituted in the District Court of Limassol against the respondents Action No. 1748/77. The latter entered an unconditional appearance on the 20th July, 1977, and on the same day they applied for security for costs. On the 24th August, 1977, an order was made to that effect for the amount of C£300.- which was deposited with the Court on the 19th September, 1977.

On the 21st September, 1977, the Statement of Claim was filed. On the 11th October, 1977, an application for judgment against the respondents in default of filing their Defence was

withdrawn with costs against the respondents, who were ordered to file their Defence within one month.

On the 16th July, 1977, an application for an interim order to observe the status quo of the machinery, subject-matter of the action, was filed, which was granted on certain conditions the 29th October, 1977. The respondents appealed against that order by Civil Appeal No. 5759 which was withdrawn and dismissed on the 2nd December, 1977. During the hearing of the application for the said interlocutory order a certain Andreas Avraam gave evidence on behalf of the respondents and in the course of his cross-examination he disclosed that the respondents were not registered though he was acting as the treasurer of the Association. After that evidence and after the conclusion of the said appeal on the 10th January, 1978, an application was made by the plaintiffs-applicants to join as co-defendants all the persons who were the members of the respondent Association. That application was determined and a ruling was given on the 11th March, 1978, granting the said amendment which was appealed from by Civil Appeal No. 5825 which is now pending and in which the present application for security for costs has been made. In order to complete the picture the proceedings in Action No. 1748/77 were stayed by virtue of an order of the Court pending the determination of this Civil Appeal. That order was appealed and upheld by this Court by its judgment delivered on the 21st November, 1978, in Civil Appeal No. 5834 which appeal was dismissed with costs.

The opposition filed by the respondents to the application of the applicants to join as co-defendants all the persons who were the members of the said Association, was based on the allegation that such amendment could not be made inasmuch as the Limassol Licensed Porters Association, the original defendant 2 in the action, "has no legal entity and/or that they do not exist as a legal entity". In fact, the grounds of appeal turned mainly on the same issue, namely, that the trial Court had no power to make the order appealed from as the whole proceedings were a nullity ab initio since there was no defendant or proper defendant in the action.

It has been all along the case for the applicants that as the respondents admit that they do not possess a legal entity, yet they have fought the case step by step, and if that is so and if

their appeal fails, the applicants shall not be able to recover their own costs though they themselves deposited in cash C£300.- as security for costs.

It has been submitted that these facts constitute special circumstances satisfying the requirement of Order 35, rule 2, for the making by this Court of an order as applied by the plaintiffs-applicants for security for costs.

In support of their application counsel for the applicants has referred us to the cases of *Dence v. Mason* (1879) W.N. 177 C.A., which supports the proposition that such an order may be made against the appellant whether he is plaintiff or defendant in the Court below. Also to the case of *Weldon v. Maples, Teesdale & Co.* [1887] 20 Q.B. 331, to the effect that the Court of Appeal will order, that security be given for the costs of an appeal upon facts which establish a prima facie case of an abuse or a threatened abuse by the appellant of the process of the Court. We were also referred to the case of *Everett v. Islington Guardians* (1923) W.N. p. 72 where it was held that the mere fact that there was a novel or important point of Law which was reasonably fit for argument was not a sufficient ground for dispensing with security for costs even where there was such a point of Law the practice of the Court was to have regard to all the circumstances of the case.

Security for costs may be also ordered in a case where the defendant is appealing as it makes no difference from that of an appeal by a plaintiff who had brought the defendant into Court.

Counsel for the respondents in answer to the argument advanced on behalf of the applicants that the principles governing the exercise of the Court's discretion in cases of insolvency or poverty apply also to cases as the present one, has argued that insolvency or poverty of a plaintiff is no ground for requiring him to give security for costs. He based this argument on the provisions of Order 60 of our Civil Procedure Rules which corresponds to Order 65, rules 6(A), 6(B) and 7 of the old English Rules (see Annual Practice 1958 pages 1884 et seq.). He also referred as to the case of *Sir Lindsay Parkinson Co. Ltd. v. Triplan Ltd.* [1973] 2 All E.R., p. 273 at p. 275, in support of the proposition that in exercising its discretion the Court will

have regard to all the circumstances of the case that security cannot now be ordered as of course from a foreign plaintiff but only if the Court thinks it just to order such security in the circumstances of the case and as to the circumstances which the Court might take into account whether to order security for costs, as expounded by Lord Denning in the said judgment.

It may be pointed out here, however, that this case turned on the interpretation of Order 23, rule 1, of the new English Rules (See Annual Practice 1982, p. 420) which is different than the previous one; the main and most important change effected by this order concerns the nature of the discretion of the Court on whether to order security for costs or not. He also referred us to the case of *Naamlooze Vennootschop Beleggins Compagnie "Uranus" v. Bank of England & Others* [1948] 1 All E.R. p. 465, where it was held that the defendants were exercising their right to defend themselves against attack and their right to obtain security for costs from foreign plaintiffs and they ought not to be prevented from doing so or hampered by being themselves ordered to give security for costs. It should be noted that in that case one of the defendants was in effect agent for a Dutchman and a Dutch Charity, both resident out of the jurisdiction and on the plaintiff's volition these parties were joined as defendants; the two new defendants applied for security for costs which was ordered by the Master and thereupon the plaintiffs asked that the new defendants should also give security for costs.

He also referred us to the case of *Visco v. Minter* [1969] 3 W.L.R. p. 70, which again turns on the interpretation of the new Order 23, rule 1 and to the effect that the Court must look at the proceeding in question but assuming that that proceeding turns on a preliminary issue, regard must also be had to the substance of the matter which meant that the position of the parties in the substantive proceedings ought not to be ignored. Also reference was made to the case of *In re B. (Infants)* ([1965] 1 W.R.L. 146) which supports the same propostion; and to the case of *Willmott* v. *Freehold House Property Co.* (1885) W.N. 65, on the proposition that where the appeal relates merely to a point of procedure the Court is disinclined to order security.

We must, however, say that there are certain exceptions to the rule that insolvency or poverty is no ground for requiring security for costs. As an example for this proposition we have the case of an appellant who may be ordered to give security for costs on such ground under Order 59, rule 10(5) which corresponds to the old Order 58, rule 9 (see the Annual Practice 1982, pages 434 and 435) and also the Annual Practice 1958, Order 58, rule 9, at page 1684, where it is clearly stated that it is the settled practice to require security for costs to be given by an appellant who would be unable through poverty to pay the costs of an appeal, if unsuccessful, without proof of any other special circumstances. Needless to say that Order 58, rule 5, para. 5, is more or less in the same terms as the relevant part of Order 35, rule 2. The said paragraph reads:

> "The Court of Appeal may make such order as to the whole or any part of the costs of an appeal as may be just and may, in special circumstances, order that such security shall be given for the costs of an appeal as may be just."

The issue, therefore, for determination is whether this Court should exercise its discretion in ordering the defendants to give security for costs on the basis that the facts as outlined and relied upon by the applicants constitute special circumstances. We are afraid we cannot subscribe to that view as the totality of them do not constitute special circumstances and we cannot say that prima facie there has been established a case of abuse or threatened abuse, by the appellant, of the process of the Court. No question of insolvency or poverty arises in this case and by no stretch of imagination we should apply the same principles on the facts of the present case as they apply regarding cases of insolvency or poverty of an appellant. The choice of defendants 2 under the present title which they sought to amend by adding 69 other persons as defendants should not be used as a means for the applicants to benefit if they made a mistake in chosing the wrong name or a non-existing legally, as alleged, defendant. They have themselves to blame for that though we must stress that by saying this we are in no way committing ourselves either way on the merits of the appeal which is pending against the order of amendment made by the District Court of Limassol.

Moreover, this is indeed a procedural appeal and in line with

existing authority, (see *Willmott* (supra) and *Baird v. Hecquard* [1889] 5 T.L.R. 576), we are disinclined to order security for costs.

For all the above reasons we dismiss this application with costs.

Application dismissed with costs.