

1987 September 21

(TRIANAFYLIDES P LORIS SYLIANIDES JJ)

GRINDLAYS BANK LIMITED OF NICOSIA,

Appellants - Plaintiff

v

1 CHRISTODOULOS DEMETRIADES & CO LTD ,
2 CHRISTODOULOS DEMETRIADES,
3 ANDROULLA CHR DEMETRIADES,

Respondents-Defendants

(Civil Appeal No 6902)

Civil Procedure Preliminary point of law — Factual substratum in dispute The best course is to proceed with the hearing of the whole action

5 On the day fixed for hearing of the action counsel for the defendants invited the Court to rule on the point of Law raised in para 1 of the defence Counsel appearing for the plaintiffs, at least tacitly, accepted that the aforesaid course be followed

10 The preliminary legal issue, which was thus heard by the trial Court, is set out in the decision of the trial Court as follows

•The question which we are called to examine in the present case as a preliminary point of law is as to whether the facts of this case bring the defendants under the wings of Law 24/79 or not »

The facts of this case were never agreed between the litigants

15 The trial Court without hearing evidence concluded that the claim is protected by the provisions of Law 24/79, and that, therefore, such claim must be suspended

20 Held, allowing the appeal, that as stated in *Malachtou v Arnefti and Another* (1984) 1 C L R 548, if the facts are not settled, the best course is to proceed under Order 33, i e the hearing of the whole action

Appeal allowed
No order as to costs

Cases referred to

25 *Malachtou v Arnefti and Another* (1984) 1 C L R 548

Appeal.

Appeal by plaintiffs against the judgment of the District Court of Famagusta (Papadopoulos, P.D.C. and Eliades D.J.) dated 4th March, 1985 (Action No. 338/78) whereby it was decided that plaintiffs' claim for the sum of £2,000.= allegedly paid after 14.8.1974 is protected by the provisions of Law No. 24/79 and was suspended. 5

X. Clerides, for the appellants.

A. Boyiadjis, for the respondents.

Cur. adv. vult. 10

TRIANTAFYLLIDES P.: The judgment of this Court will be delivered by Loris, J.

LORIS J.: The present appeal is directed against the decision of the Full District Court of Lamaca on a point of law raised by way of preliminary issue by the defendants in their defence in Lamaca Action No. 338/78. 15

It is apparent from the record before us that the defendants-respondents never applied to the trial Court in writing under Order 27, rule 1, for the setting down for hearing before the trial Court of the point of law raised in their defence; simply, as far as the record goes, on the day fixed for hearing of the action learned counsel appearing for the defendants stood up and invited the Court to rule on the point of Law raised in para. 1 of the defence. It seems - and there is nothing on record to the contrary - that learned counsel appearing for the plaintiffs, at least tacitly, accepted that the aforesaid course be followed. 20 25

The preliminary legal issue which was thus heard by the trial Court is set out in the decision of the trial Court as follows:

«The question which we are called to examine in the present case as a preliminary point of law is as to whether the facts of this case bring the defendants under the wings of Law 24/79 or not». 30

The question posed by the learned trial Judges is correct but we must remind them, with respect, that «the facts of this case» were never agreed between the litigants. Almost every allegation of fact in the sixteen paragraphs of the statement of claim is being denied in the defence and we could not trace any statement by counsel to 35

the effect that at least crucial facts were agreed. On the contrary
inspite of the tacit consent of learned counsel appearing for the
plaintiffs-appellants at the hearing of the preliminary point, we see
from the record that he was insisting in addressing the trial Court,
5 on all the allegations of fact contained in the statement of claim
which as already stated were being denied by the defence.

We have noted that learned counsel appearing for the plaintiffs
strenuously argued before the trial Court - and this appears in the
sub-judice decision as well - that the plaintiffs were claiming the
10 amounts set out in the statement of claim, inter alia, by way of
damages suffered by them as a result of defendants' fraud and/or
misrepresentation (and particulars to that effect were set out in the
statement of claim).

The trial Court without hearing any evidence, and without
15 having before them settled facts rejected the allegations of the
plaintiffs on facts by saying «we cannot agree that Plaintiffs' claim
is for damages caused to them by the conduct of the defendants»
and proceeded to conclude «that the claim of the plaintiffs ... is
protected by the provisions of Law 24/79 and such claim must be
20 suspended.»

We had the opportunity in the recent decision of the Full Bench
in *Malachtou v. Armetti and Another* (1984) 1 C.L.R. 548 (pp.
550-552) - to deal at length with applications under Order 27, rule
1 of our Civil Procedure Rules; we may perhaps stress once more
25 that:

«the establishment with certainty of the state of facts from
which there emerges the necessity of a preliminary decision of
a point of law under Order 27 rule 1, is invariably a 'sine qua
non' element.»

30 And it is clear that in the sub-judice decision the state of facts was
never established; the factual substratum was in dispute; and as
stated in *Malachtou* case (supra) if the facts are not settled the best
course is to proceed under Order 33, i.e. the hearing of the whole
action.

In the result the present appeal is allowed; the preliminary issue
35 will be decided together with the merits of the case, by a Court of
different constitution; in view of the circumstances of this case we
have decided to make no order as to the costs of this appeal.

Appeal allowed.
No order as to costs.