

1987 October 7

[SAVVIDES, J]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

PETER BROWN,

Applicant,

v

THE REPUBLIC OF CYPRUS, THROUGH
1 THE MINISTER OF INTERIOR,
2 THE DISTRICT LANDS OFFICER LIMASSOL,

Respondents

(Case No 150/86)

Immovable property — Aliens — Acquisition of immovable property by aliens — The Immovable Property Acquisition (Aliens) Law, Cap 109, as amended by Laws 52/69 and 55/72 — Section 4(2) — Deed of trust concerning land executed before the coming into operation of Law 55/72 — The beneficiary thereunder, an alien, complied with requirements of section, but his application for registration of the trust with the D L O was refused on ground that it amounted to an acquisition of immovable property by an alien prohibited by section 3 of the aforesaid laws — Refusal annulled

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The applicant is an alien within the definition of s 2 of Cap 109 as amended by section 2 of Law 52/69 and section 2 of Law 55/72

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The applicant is beneficiary under a deed of trust concerning a parcel of land situated at Yermasoyia village, Limassol The deed was executed before the coming into operation of Law 55/72 On 5 9 72 the deed was presented to the Ministry of Interior and was indorsed accordingly in accordance with section 4(2) of Law 55/72, which reads as follows

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«Nothing in this Law provided shall affect the rights of an alien subsisting at the date of the coming into operation of this Law under a trust for his benefit relating, in whole or in part, to immovable property, provided that the document creating the said trust shall be produced to the Minister of Interior within two months of the said date for noting thereon the date of its production, and such note of the date shall constitute undisputable evidence of the production of the document as aforesaid»

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On 8 2 85 the applicant filed an application to the District Lands Office of Limassol for the registration of the said trust in accordance with the provisions of section 65E of the Immovable Property (Tenure, Registration and Valuation) Law, Cap 224, as amended by Law 2/78

5 The District Officer refused registration of the trust, on the ground that it amounts to acquisition of immovable property by an alien, which is prohibited by section 3 of Cap 109, as amended

Hence this recourse

The Court, after citing the relevant provisions of the aforesaid law

10 Held *annulling the sub judice decision* (1) The contention of counsel for the respondent that the document in question was not a deed of trust, but a contract for sale, was not raised or examined by the respondent before reaching the sub judice decision

15 (2) In the light of the provisions of section 4(2) of Law 55/72 and once the prerequisites of such section had been complied with, the subject-matter trust deed did not fall within the restrictions of the law and was not affected thereby

(3) In the result respondent (2) by refusing to have the said deed registered for the reasons contained in his letter embodying the sub judice decision, operated under a misconception of law and his decision is in excess and/or abuse of his powers

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Sub judice decision annulled
Costs against respondent

Recourse.

25 Recourse against the refusal of the respondents to effect registration of a piece of land at Yermasoyia village on the applicant as a beneficiary under a deed of trust executed on 25.6.1972.

A. N. Lemis, for the applicant.

Gl Hadjipetrou, for the respondents.

30 *Cur. adv. vult.*

SAVIDES J. read the following judgment. The applicant is a citizen of the United Kingdom and resides permanently abroad. He is the beneficiary under a deed of trust executed on 25.6.1972 concerning a parcel of land situated at Yermasoyia village, 35 Limassol. Such deed was presented on the 5th September, 1972,

to the Ministry of Interior in accordance with the provisions of section 4(2) of the Immovable Property Acquisition (Aliens) (Amendment) Law of 1972 (Law 55 of 1972) and was indorsed accordingly.

On the 8th February, 1985, the applicant through his advocate, filed an application to the District Lands Office of Limassol for the registration of the said trust in accordance with the provisions of section 65E of the Immovable Property (Tenure, Registration and Valuation) Law, Cap. 224, as amended by Law No. 2/78. The District Lands Officer referred the matter to the office of the Attorney-General of the Republic on whose advice he refused to effect such registration and his refusal is contained in a letter dated 20th December, 1985, addressed to the applicant's counsel the contents of which read as follows:

«With reference to your application dated 8.2.1985 for the registration of a trust of the Company SAVESTATES LTD., of Limassol I wish to inform you that this cannot be registered as it amounts to acquisition of immovable property by an alien which is prohibited under s. 3 of the Immovable Property Acquisition (Aliens) Law, Cap. 109 and the amending Laws (Opinion of the Attorney-General No. 11(A)/44/11 dated 20/5/1985).»

As a result the applicant filed the present recourse challenging the above decision and praying for its annulment.

The following legal grounds were advanced in support of the prayer:

The respondents arbitrarily, wrongly and in violation of the provisions of the Law, Cap. 109, as amended by Law 55 of 1972 and in particular section 4(2) and/or in violation of Articles 146 and 82 of the Constitution and/or in excess and/or abuse of powers refused to register the said trust in favour of the applicant.

In arguing his case counsel for applicant submitted that the trust deed in question was executed by Savestates Co. Ltd., the owner of the land and subject-matter of the deed, in favour of the applicant, prior to the enactment of Law 55/72, under the provisions of which an alien is prohibited to acquire any interest in immovable property without a permit from the Council of Ministers. In any event, counsel contended, under the provisions of such law a trust deed executed prior to its enactment is

excluded, provided it is presented to the Ministry of Interior for inspection and indorsement within two months from the date of the coming into operation of the law. In the present case counsel argued the prohibition for the acquisition of property by aliens does not apply as the case of the applicant falls within the exceptions provided by the law. Therefore, the refusal of the District Lands Officer to accept the trust deed for registration is arbitrary, wrong and was taken in abuse and/or excess of powers.

Counsel for the respondents submitted that the District Lands Officer rightly refused to accept the said deed for registration as such deed, in the light of its contents, is in fact not a trust deed but a contract of sale by the owner of the land to the applicant, of the subject-matter property. Therefore, counsel added, the applicant being an alien was prohibited by law to acquire any immovable property without a permit from the Council of Ministers and in the present case no such permit had been obtained.

It is common ground that for the purposes of the present case the applicant is an alien within the definition of s. 2 of the Immovable Property Acquisition (Aliens) Law, Cap. 109 as amended by section 2 of Law 52 of 1969, and section 2 of Law 55/72.

Section 3 of the Law, Cap. 109 has been repealed and replaced by section 3 of the Immovable Property Acquisition (Aliens) (Amendment) Law of 1972 (Law 55/72) which provides as follows:

«3-(1) Απαγορεύεται η υπό αλλοδαπού κτήσις, άλλως ή αιτία θανάτου, ακινήτου ιδιοκτησίας άνευ προηγουμένης αδείας του Υπουργικού Συμβουλίου.»

The English translation reads.

«3-(1) No alien shall acquire, otherwise than mortis causa, any immovable property without the permit of the Council of Ministers first obtained.»

The word «acquisition of immovable property» as defined in sub-section 6 of section 3 includes inter alia:

«(γ) την δημιουργίαν καταπιστεύματος προς όφελος αλλοδαπού το οποίον αφορά, εν όλω ή εν μέρει, εις ακίνητον ιδιοκτησίαν, μίσθωσιν ακινήτου ιδιοκτησίας εμπύπτουσας εις τας διατάξεις της παραγράφου (α) ή μετοχήν εταιρείας της οποίας η κτήσις εμπύπτει εις τας διατάξεις της παραγράφου (β).» 5

The English translation reads.

«(c) the creation of a trust for the benefit of an alien relating, in whole or in part, to immovable property, to the lease of immovable property falling within the provisions of paragraph (a) or to a share in a company the acquisition of which falls within the provisions of paragraph (b).» 10

Furthermore under sub-section (4) of section 3 it is provided that:

«(4) Ουδέν των εν τω παρόντι Νόμω διαλαμβανόμενων επηρεάζει το δικαίωμα αλλοδαπού όπως προθή εις τας εν τω άρθρω 2 του περί Πωλήσεως Γαιών (Ειδική Εκτέλεσις) Νόμου αναφερομένας ενεργείας.» 15

The English translation reads. 20

«(4) Nothing in this law provided shall affect the right of an alien to do any act specified in section 2 of the Sale of Lands (Specific Performance) Law.»

And section 4(2) provides:

«(2) Ουδέν των εν τω παρόντι Νόμω διαλαμβανόμενων επηρεάζει τα κατά την ημερομηνίαν της ενάρξεως της ισχύος αυτού υφιστάμενα δικαιώματα αλλοδαπού δυνάμει καταπιστεύματος προς όφελος αυτού αφορώντος, εν όλω ή εν μέρει, εις ακίνητον ιδιοκτησίαν, νοουμένου ότι το έγγραφον της δημιουργησάσης το εν λόγω καταπίστευμα πράξεως θα προσαχθή εις τον Υπουργόν Εσωτερικών, εντός δύο μηνών από της ρηθείσης ημερομηνίας, ίνα σημειωθή επ' αυτού η ημερομηνία της προσαγωγής του, η δε τοιαύτη σημείωσις της ημερομηνίας θα συνιστά αναμφισβήτητον απόδειξιν της ως εν τοις ανωτέρω προσαγωγής του εγγράφου.» 25 30 35

The English translation reads.

5 «(2) Nothing in this Law provided shall affect the rights of an alien subsisting at the date of the coming into operation of this Law under a trust for his benefit relating, in whole or in part, to immovable property, provided that the document creating the said trust shall be produced to the Minister of Interior within two months of the said date for noting thereon the date of its production, and such note of the date shall constitute undisputable evidence of the production of the document as aforesaid.»)

10 Having dealt with the relevant legal provisions I am reverting now to the facts of the case.

The opinion of the office of the Attorney-General on which the District Lands Officer relied is contained in a letter dated 20th May, 1985, addressed to the Director of Lands and Surveys which reads as follows:-

«I refer to your letter No. 102/54 of the 10th May, 1985.

20 2. The creation of a trust amounts to acquisition of immovable property by an alien, which is prohibited by section 3 of the Immovable Property Acquisition (Aliens) Law.»

25 There is no doubt that the creation of a trust in favour of an alien amounts to acquisition of an interest in land in accordance with section 3(6)(c) of Law 55 of 1972 which under the provisions of section 3(1) of the Law, Cap. 109, as amended by Law 55/72, is prohibited save with the permission of the Council of Ministers.

30 Nothing is mentioned in the above opinion of the provisions of section 4(2) of Law 55/72 and whether under such provisions the trust deed in question was or was not exempted from the operation of the provisions of the law. Nor did the Director of Lands and Surveys enquire further whether the trust deed in question was so exempted or not, but he took it as granted that the creation of a trust was prohibited generally.

According to his written address counsel for the respondents contended that the trust deed in question is not in fact a trust deed but is an agreement for the sale of property.

Such matter was not raised by the District Lands Officer in his reply to the applicant in which the reason given for not accepting

registration of the trust is that a trust deed cannot be created in favour of an alien as it amounts to acquisition of immovable property by an alien. This leads to the inference that the application was considered all along on that basis only.

The situation in the present case is very simple. There is a trust deed which was in existence prior to the coming into operation of Law 55/72. Such trust deed was presented by the applicant to the Ministry of Interior within the period prescribed under section 4(2) of Law 55/72 and it was indorsed with the date of its production. 5

In the light of the provisions of section 4(2) of Law 55/72 and once the prerequisites of such section had been complied with the subject-matter trust deed did not fall within the restrictions of the law and was not affected thereby. 10

In the result respondent (2) by refusing to have the said deed registered for the reasons contained in his letter embodying the sub judice decision, operated under a misconception of law and his decision is in excess and/or abuse of his powers. 15

For the above reasons this recourse succeeds and the sub judice decision is hereby annulled with costs in favour of the applicant.

*Sub judice decision
annulled with costs in
favour of applicant.* 20