

(FISHER, C.J. AND STUART, J.)

SAFVET HANIM MAHMOUD EFFENDI AND ANOTHER
v.

RATIB EFFENDI IRIKZADE.

FISHER,
C.J.
&
STUART, J.
1923
June 20RIGHT TO APPEAL—C.C.J.O. 1882, CL. 31—VILLAGE JUDGE RULES, 1909, R. 68—
PRELIMINARY OBJECTION—LEAVE TO APPEAL—O. XXI. R. 1—LAND CODE—
ART. 41—PREFERENTIAL RIGHTS OF CO-POSSESSORS—FORCED SALE.

Clause 31 of the Cyprus Courts of Justice Order, 1882, gives an absolute right of appeal to the Supreme Court from all decisions by the District Courts in civil proceedings which do not come within the first sentence of the Clause. Rule 68 of the Village Judge Rules, 1909, must be treated as ultra vires in so far as it seeks to restrict this right.

The preferential rights given to co-possessors of Arazi-Mirié by Art. 41 of the Land Code do not extend to cases of sale in execution of a judgment under the Civil Procedure Law, 1885.

This was an appeal from a judgment of the District Court of Paphos upholding a decision of a Judge of the Court sitting as a Village Judge.

The Defendant at a sale by auction of the immoveable property of a judgment debtor bid for and was declared the purchaser of an undivided share of the judgment debtor in Arazi-Mirié, and it was registered in his name. The Plaintiffs were the persons entitled to the other undivided shares. They claimed to exercise their rights under Art. 41 of the Land Code against the Defendant. The Village Judge gave judgment supporting their claim and the District Court confirmed the judgment, in so far as it recognised their rights under Art. 41, but found that the amount ordered to be paid by the Plaintiffs was insufficient, and increased it. The Defendant asked for and obtained leave to appeal to the Supreme Court but did not file an office copy of the Order giving leave with the Registrar of the Supreme Court.

S. Pavlides for the Appellant.

Paschalis for Respondents.

Paschalis : There is a preliminary objection. Order 21, r. 1, has not been complied with, and the appeal must be dismissed in accordance with the decision in *Haji Zembili v. Louka*, C.L.R., VIII., 107.

Pavlides : Although leave to appeal was obtained it was unnecessary. This case falls within the last sentence of Clause 31 of the Cyprus Courts of Justice Order, 1882. It is a claim in respect of immoveable property and an appeal lies irrespective of the value of the land or the right (*Aggelidi v. Ginghiz*, C.L.R., IV., 3).

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The Court decided to reserve judgment on this point and to hear the appeal subject to the preliminary objection.

Pavrides: Art. 41 does not apply in cases of forced sale. There was no "transfer" by the co-possessor. What was done was not a voluntary act by him, nor with his consent. See Chiha's *de la Propriete Immobiliere en Droit Ottoman* pp. 234, 295. Such a right, being a fetter on dealing with property, must be strictly construed.

Paschalis: The Plaintiffs' right was admitted before the Village Judge. The Plaintiffs' right is exercisable after the sale (*Christofides v. Tofaridi*, C.L.R., I., 21).

Pavrides in reply: Case cited was not a case of forced sale. In this case the share was in effect offered to Plaintiffs, as sale was open and notice given.

Judgment: A preliminary objection was raised in this case namely that whereas leave to appeal was obtained from the District Court no office copy of the order giving leave was filed and that, therefore, the appeal must be dismissed in accordance with the decision of this Court in *Haji Zembili v. Louka*, C.L.R., VIII., 107. But it is contended that that decision does not apply here inasmuch as, although leave to appeal was in fact obtained, it was unnecessary as an appeal from the decision of the District Court lay as of right under the provisions of Clause 31 of the Cyprus Courts Justice Order, 1882.

The decision appealed from was a judgment dismissing (subject to an amendment as regards amount) an appeal from a Judge of the District Court sitting as a Village Judge. No question of the jurisdiction of the Village Judge is raised and the first thing to consider is the nature of the claim. It is a claim for the exercise of rights conferred on co-possessors of *Arazi-Mirié* by Art. 41 of the Land Code. It is, therefore, not such a right as would have been within the jurisdiction of a Village Judge prior to the Cyprus Courts of Justice Order, 1908.

Under the previous law, the former Clause 28 of the Cyprus Courts of Justice Order, 1882, the jurisdiction of Village Judges, with two exceptions, dealing with rights of common and partition, was confined to actions "in respect of any debt, damage, or demand where the amount "of such debt, damage, or demand is not more than £3" afterwards raised to £5, that is to say to money claims, with the two exceptions mentioned. All actions in respect of claims to immoveable property had to be tried in the District Court (*see Haji Petro v. Yannaki*, C.L.R., II., at p. 118). Therefore prior to the Cyprus Courts of Justice Order, 1908, practically all decisions of Districts Courts on appeals from Village

Judges came within the first portion of Clause 31 of the Cyprus Courts of Justice Order, 1882, as being based on demands "made in respect of money, goods, or other property (which in *Aggelidi v. Ginghiz*, C.L.R., IV., p. 3 was defined to mean moveable property) or for damages of the value to the amount of less than £20," and were only appealable with the leave of the District Court or the Supreme Court.

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Now the Cyprus Courts of Justice Order, 1908, as has been indicated, extended the jurisdiction of Village Judges so as to include many claims respecting land, which cannot be said to come within the first sentence of Clause 31 as construed in *Aggelidi v. Ginghiz*. That being so they come within the last sentence of that Clause, which provides that in all other civil proceedings "the decisions of a District Court shall be liable to appeal to the Supreme Court." The appeal in such cases, as was said by the Court in *Aggelidi v. Ginghiz* on p. 5, is "of right."

As against that there is another provision which must be considered. That is Rule 68 of the Village Judge Rules, 1909, which provides that "No appeal shall be brought from the District Court to the Supreme Court except by leave of the District Court." The Cyprus Courts of Justice Order, 1908, Clauses 2, 28 (6), provides that "Every judgment of a Village Judge shall be subject to appeal to the full District Court," re-enacting in the same words the last sentence of the former Clause 28, but that Order does nothing to alter expressly or by inference the provisions of Clauses 30 or 31. The Rule of Court therefore is not one which merely regulates "the course of procedure with a view to ensure due diligence in the process," (see *Joachim v. Haji Christofi*, C.L.R., V., at p. 76) it affects to cut down, so far as appeals in Village Judge cases are concerned, the absolute right of appeal given in the last sentence of Clause 31. In our opinion such a restriction is in direct variation with and contrary to the right referred to given by Clause 31. The right in the last sentence of Clause 31 is obviously a wider and more extensive right than that given by the first sentence. The Rule mentioned seeks to restrict both of them. In our opinion it is beyond the power of a Rule of Court to do this and therefore, the right of appeal being absolute, no leave to appeal was necessary and the preliminary objection fails.

We therefore come to consider the substance of the appeal.

Until the Law of 15 Sheval, 1288, there seems to have been no process under which Arazî-Mirié could be taken against the will of the possessor for payment of a judgment debt, and therefore at the date of the Land Code, 7 Ramazan, 1274, the transfer by a co-possessor con-

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templated by Art. 41, must have been a voluntary transfer by him. The legislation which made such property liable to be taken in execution made no provision for the saving of rights such as those given by Art. 41. They are exercisable within five years after the transfer and it is obvious that its effectiveness would have been seriously hampered had it done so.

Moreover the sale in question was not a secret transaction; the Law and Rules under which it was carried out provide for advertisement and the giving of notices so that it was open to those who wished, including the Plaintiffs, to go and bid at the auction. The transfer in this case was something outside the control of the co-owner and carried out in pursuance of a remedy given to judgment debtors by the Civil Procedure Law, 1885, and in our opinion Art. 41 cannot be applied.

Appeal allowed. Judgment to be entered for Defendant with costs here and in the District and Village Judge Courts.