CASES

DECIDED BY

THE SUPREME COURT OF CYPRUS

IN ITS ORIGINAL JURISDICTION AND ON APPEAL FROM THE ASSIZE COURTS AND DISTRICT COURTS

[STRONGE, C.J., AND FUAD, J.]

1936.
April 3 & 7.

HATTIDJE MUSTAFA

v.

ALI MEHMED MUTAF.

(*Civil Appeal No.* 3526.)

HATTIDJE MUSTAFA
v.
ALI MEHMED MUTAF.

Enforcement of Sheri Court Ilam under section 95 *of Civil Procedure Law,* 1885 — *Examination of Debtor under both Parts* 8 *and* 9 *of that Law seeking Committal to Prison and Order for Payment by Instalments.*

The Sheri Court, Nicosia, ordered the defendant on the 11th September, 1925, to pay the plaintiff a daily sum of 1*s.* for her maintenance. Upon his failing to do so, the Ilam of the Sheri Court was made executable in the District Court of Nicosia by order dated 5th June, 1929. On the 15th June, 1935, an application was made to the District Court asking it to hold an investigation into the defendant's ability to pay with a view to ordering payment by instalments, and to commit him to prison on the ground that subsequent to the Sheri Court's decision he transferred four houses to his wife. The defendant was examined before the District Court, which ordered him to be committed to prison for three months in default of paying the maintenance amount regularly together with 10*s.* per mensem of the arrears. From this order the defendant appealed (Nicosia Application No. 96/29).

M. Michaelides for appellant (defendant):

The order for imprisonment and payment by instalments is not justified. The only evidence before the Court below was that of the appellant, and it was to the effect that he could only pay 5*s.* a month. He was there examined, and was also cross-examined by the respondent's counsel.

V. Markides for respondent (plaintiff):

The transfer of the houses occurred after the issue of the Sheri Court decision. That decision has to be vested with some formality by the District Court before it can be executed.

The judgment of the Supreme Court was delivered by the Chief Justice.

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STRONGE, C.J.: This is an appeal from an order of the Nicosia-Kyrenia District Court dated the 31st May, 1935, whereby upon hearing a motion consisting of applications under Part VIII and Part IX of the Civil Procedure Law, 1885, the appellant was ordered to be committed to prison for 3 months for gross contempt of Court, the said committal being directed to be suspended so long as £1. 10*s.* per month was paid together with 10*s.* a month of the arrears.

Part 8 of the Civil Procedure Law, 1885, empowers the Court to commit a judgment debtor to prison where upon investigation it appears that the creditor has been unable to realize the amount due under his judgment or order by sale of the debtor's property or by attachment of property in the hands of a third party and (*a*) that the debtor either has or has had since the date of the judgment or order means to pay the amount awarded or part thereof, or (*b*) has made a gift or transfer of or concealed any property and has thereby prevented the judgment creditor from obtaining payment.

Part 9 of the same Law empowers a Court to order that the judgment debtor pay the sum due under the judgment by instalments. This part of the Law provides by sections 86 & 87 that attendance of the debtor may be compelled and that he may be examined both by the creditor and the Court. There is a total absence of similar provisions in Part 8 of the Law, and it is consequently not unreasonable to infer that this omission by the legislature was intentional and is attributable to Part 8 being penal in its nature " exposing " as McCardie, J., has said in *Nelson* v. *Metcalfe* (1921, 1 K.B. at p. 407) " the debtor to imprisonment for non-payment of debt ", and also to the well-known maxim " *nemo tenetur prodere seipsum* ". In my opinion it follows that in Cyprus, as the law stands, the debtor is not a compellable witness under Part 8. In England he may, under the provisions of section 5 of the Debtors Act, 1869, be summoned and examined on oath. If, then, it is at all competent to a judgment creditor to join, as in the present case, in one motion an application for committal under Part 8 and an application for an instalment order under Part 9—a point upon which I express no opinion—the two applications should at all events be framed in the alternative and not conjunctively, and the Court in my opinion, when such a motion comes before it, ought to hear and decide one application before proceeding to deal with the other. Indeed I go so far as to say that it would be distinctly preferable that the application under Part 8 should be heard and determined before the application under Part 9. If, however, it so happens that the application under Part 9 is heard first, then, in view of the pending application

under Part 8, it is in my opinion incumbent on the Court to warn the debtor before he gives evidence on the hearing of the application under Part 9 that, having regard to the application to be subsequently heard, he is not bound to answer any questions which would tend to incriminate him in respect of that second application. I need hardly say that it is, of course, possible that a Court on hearing the application for payment by instalments may, on the ground that the debtor is not in a position to pay instalments, refuse that application, but may, nevertheless, on hearing the application under Part 8 find that the evidence establishes that the debtor has had means since the date of the judgment or order of paying the whole of the sum awarded or part of it, or that he has made a transfer of property which would otherwise have been available for the creditor. It follows that the course adopted by the District Court in the present case of dealing with the two applications simultaneously and making a conjoint order in respect of both was not a satisfactory mode of procedure. The committal order, moreover, does not indicate whether the decision to commit was based upon proof of the matters in (*a*) of section 81 or of those in (*n*) of that section.

The facts alleged in the affidavit filed in support of the application were that the debtor on the 26th Sept., 1925, 8th Feb., 1927, and 22nd Sept., 1930, respectively, transferred three houses into his wife's name, and that he stated in Court on a previous occasion that he had done so for the purpose of evading payment of the amount due to the creditor. The judgment debtor on the hearing of the application stated on cross-examination that he had disposed of the three houses to his wife's father prior to the case ever coming before the Sheri Court in 1925. The following are the real facts of the case: The L.R.O. certificate of search, which was an exhibit in certain proceedings in the case heard by Raif, D.J., on the 18th June, 1934, shows that on the 26th Sept., 1925, two houses, and on the 8th Feb., 1927, another house was transferred to the debtor's wife. The debtor in the proceedings before Raif, D.J., said that his object in transferring the house property to his wife was that she, and not his sisters, might get them in the event of his death. The transfer of the 22nd Sept., 1930, appears from the debtor's affidavit and from the title-deed not to have been a transfer from the debtor at all. It is clear, therefore, that the debtor subsequently to the order of the Sheri Court did transfer in 1925 and 1927 three houses to his wife, and his evidence, consequently, on cross-examination that he did not possess three houses in 1925 at the date of the Sheri Court judgment but had sold them before that date to his wife's father was untrue.

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The affidavit on the applicant's behalf deposing that the debtor had stated in Court that he had disposed of the property to evade payment of the amount due to applicant is likewise false. What the debtor did say in Court has been already stated.

Mr. Michaelides argued that inasmuch as the transfers were effected in the interim between the date of the judgment in the Mahkeme-i-Sheri and the date of the so called exequatur of the District Court in 1929, no order for committal could in any event be made in respect of these transfers, because until the exequatur was obtained, there was no judgment of a Court for non-compliance with which committal proceedings would lie. This contention is, I think, unsound for the following reasons:—

Section 95 of the Civil Procedure Law, 1885, says " For the purpose of executing the judgment of a judge of the Mahkeme-i-Sheri . . . . . a District Court may on the application of any person in whose favour the judgment is made issue the same writs and orders as though the judgment had actually been given by the District Court and may stay execution in the same manner as it may stay execution of its own judgments and shall have all such powers in relation to the judgment as are specified in Part 9 of this Law." This section may possibly have owed its existence to the fact that the Mahkeme-i-Sheri had no machinery, such as bailiffs, etc., for executing its judgments, and the civil Courts of the Colony had. The purport of the section is clear. A person who wants to obtain execution of a judgment of the Mahkeme-i-Sheri in any of the recognized modes specified in section 12 of the Civil Procedure Law, 1885, must apply to the District Court for the particular mode of execution desired, and must presumably satisfy that Court that the judgment of the Mahkeme-i-Sheri is in his favour and is still wholly or in part unsatisfied. Thereupon the District Court may issue the particular form of execution applied for if appropriate. I am satisfied that the customary form of order made by District Courts on applications under section 95 viz. " let it be executed accordingly " is one for which no support is forthcoming in the wording of the section. I may further observe that the Sheri Court judgment remains from first to last a judgment of that Court and no application to the District Court for execution thereunder has the effect, whether granted or not, of turning that judgment in a judgment of the District Court. Now one of the modes of execution which a District Court in a proper case can make use of to give effect to its own judgment, is by imprisoning the debtor under Part 8 of the Civil Procedure Law, 1885. It is clearly, therefore, open to a person who has obtained

a judgment of a Sheri Court to apply to a District Court to treat that judgment as if it had actually be obtained in the District Court by holding an investigation under Part 8 and by committing the debtor to prison upon proof of his wilful default in regard to that judgment. The onus of proof upon hearing such an application, it may not be amiss to observe, rests on the creditor.

Remains the question whether the transfers in this case were such as to come within section 81 (*b*). That the debtor has made a transfer is not, in my opinion, sufficient in itself to warrant a committal; the surrounding circumstances must be such as to lead to the conclusion that the debtor made it fraudulently, that is with the intention of defeating the creditor's remedy. That the transfer meant by the section is a transfer of this description and not one of an innocent nature is, I think, indicated by the occurrence in the section of the words " or concealed any property ". The allegation in para. 12 of the affidavit filed in support of the application, that the debtor admitted to the Court that his object in making the transfers was to evade his creditor is, as I have already said, proved to have been untrue. This affidavit was not brought to the notice of the debtor until after the motion had been disposed of, so that he had no opportunity of stating to the Court, as he had done before Raif, D.J., that his object in effecting the transfers was that his wife, and not his sisters, should succeed to the houses in the event of his death. The result was that the Court on the hearing of the motion was left under the impression that the debtor had previously admitted fraudulent intent, which was not the case, and was also deprived of the benefit of having the debtor's version of his motive presented to it. The debtor's version might or might not have been believed by the Court, but at any rate he should have had the opportunity of contradicting the affidavit and referring the Court to what he had actually said, and that opportunity was not afforded him.

Having regard to this latter fact and the unsatisfactory mode of procedure in the District Court to which I have alluded, I am of opinion that this appeal should be allowed and the order appealed from set aside. In view however, of the falsity in para. 12 of the affidavit filed on behalf of the creditor, and of appellant's evidence on cross-examination, I am of opinion that each party should bear his own costs both here and in the Court below.

Appeal allowed: Order of Court below set aside.