1938
Dec. 8.

MUSTAFA MEHMED ALI
v.
EMINE HASSAN.

As I read the Guardianship of Infants and Prodigals Law, 1935, it was enacted for the purpose of protecting the person and property of an infant or a prodigal in certain circumstances. But, it is clear to me, it was not intended by its enactment to interfere with the exclusive jurisdiction of the Divorce Court in relation to the custody of the children of a marriage.

And as there are no express words in this Law—32 of 1935—taking away the exclusive jurisdiction of the Sheri Court in divorce matters, I think the learned District Judge was right when he refused to hear this application for the custody of a child of the marriage which had been the subject of a divorce in accordance with Moslem Law.

FUAD, J.: I concur.

Appeal dismissed with costs.

1938
Dec. 8.

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

CONSTANTINOS ANTONI AND ANOTHER, *Respondents*,

v.

THE CYPRUS AND GENERAL ASBESTOS Co. LTD., *Appellants*.

(Civil Appeal No. 3624.)

APPLICATION MADE UNDER SECTION 94 OF THE COMPANIES (LIMITED LIABILITIES) LAW, 1922, TO COMMENCE AN ACTION AGAINST A COMPANY AFTER AN ORDER FOR WINDING UP THE COMPANY HAD BEEN MADE.

The Respondent applied ex parte *to the District Court of Limassol (in action No.* 358/38) *for an order granting leave to commence an action against the Appellants. The District Judge granted the leave asked for, and the Appellants appealed against this order mainly on the grounds that this order could not be made without notice to the liquidator, and that there were no special circumstances shewn to the Judge why leave should be given to institute the action.*

HELD: (1) *That, because the object of the winding up provisions of the Companies Law is to put all unsecured creditors upon an equal footing, to allow one unsecured creditor to bring an action against the liquidator without notice notice to him, is prejudicial to the other unsecured creditors ;*

(2) *That, as section* 128 *of the Companies Law in Cyprus includes a claim of debt such as the one claimed by the Respondents, they should have proved it in the winding up proceedings and not applied for leave to commence an action ;*

(3) *That applications of this nature should not be made* ex parte *and that they should be granted only under special circumstances ;*

(4) *That the application should not have been made after the action had both in law and in fact actually commenced ;*

(5) *that the affidavit made in support of the application did not comply with the requirements of Order XV, r.* 16 (ii) *and Order XX, r.* 1 *of the Rules of Court,* 1927.

Tornaritis with *Cleanthis* for Appellants.

Sir Panayiotis Cacoyannis with *Solomonides* for Respondents.

The facts of the case and arguments of counsel appear sufficiently in the judgments.

Judgment: CREAN, C.J.: An order was made by the District Judge at Limassol on the 27th April, 1938, granting to the Respondents leave to commence an action against the Appellants, the Cyprus and General Asbestos Company Limited.

This order was made under section 94 of the Companies (Limited Liability) Law, 1922. The application for the order was made *ex parte* and was grounded on an affidavit which contained only the bare statement that the Cyprus and General Asbestos Company Ltd. was wound up by the District Court of Limassol on the 8th January, 1938.

The Appellants appeal against this order on the grounds that the District Judge had no power to make the order without giving notice to the liquidator. Other grounds, set out in the notice of appeal, are, that there were no special circumstances shewn to the Court to induce it to make this order, and that as that part of the action which seeks an injunction cannot lie, as the Appellants have ceased to exist, the claim of the Respondents must be considered as one for damages. Being for damages, it was a provable debt when the winding up order was made. Therefore, no action could be proceeded with or commenced against the Company on foot of it.

The points emphasized by Mr. Tornaritis in support of the appeal were: firstly, that this order could not be made without notice to the liquidator, and secondly, that there were no special circumstances shewn to the Judge of the District Court why leave should be given to bring the action.

It was admitted by Sir Panayiotis Cacoyannis that the first point emphasized, did appear to be an insuperable barrier to his arguing in support of the order made; but, he asked this Court to have recourse to Order XXI, Rule 2, which gives power to waive defects or irregularities in the proceedings, if the irregularity or defect has not materially prejudiced the interests of any party to the action.

I take the view that the present case does not come within that rule, because, the object of the winding up provisions of the Companies Law, is to put all unsecured creditors upon an equal footing and pay them *pari passu*. And, to allow one unsecured creditor to bring an

1938
Dec. 8.

CONSTANTINOS ANTONI & ANOTHER v. THE CYPRUS & GENERAL ASBESTOS CO. LTD.

action against the liquidator without notice to him is, I think, prejudicial to the other unsecured creditors who are interested parties.

As regards the other submission made on behalf of the Appellants, that special circumstances must be shewn before such an order as this appealed from, can be granted. It is submitted by counsel for the Respondents, that as the liquidator has not the power to grant him the remedies he seeks, he must institute an action. In addition it is submitted by him that section 128 of the Company Law in Cyprus does not apply to the Respondents' claim.

I would say that this particular section is so very comprehensive that it includes a claim or debt such as the one which grounds this action. Therefore, the Respondents should have proved in the winding up like any other unsecured creditor and not applied for leave to commence this action.

It is admitted that special circumstances must be shewn before an order such as this can be granted: And, as the affidavit on which the leave was given shews no such circumstance, for that reason and the other reasons I have given, I think this appeal should be allowed with costs.

FUAD, J.: This is an appeal from an order of Themistos, D.J., granting leave to the Plaintiffs (Respondents) to commence an action against Defendant No. 1, the Cyprus General Asbestos Co. Ltd. (Appellants) after an order for winding up the Company had been made.

The application was made on the 27th April, 1938, in compliance with the provisions of section 94 of the Companies (Limited Liabilities) Law, 1922, which reads as follows: " When a winding up order has been " made no action or proceedings shall be proceeded with or commenced " against the Company except by leave of the Court and subject to " such terms as the Court may impose."

Every action commences by the issue of a writ of summons, and the writ of summons is deemed to be issued after it is numbered, dated and sealed by the proper officer of the Court. This application was made in an action and was numbered with the number of that action which clearly indicates that the commencement of that action preceded the making of the application. I do not see any object in making an application for leave to commence an action after the action had both in law and in fact actually commenced. Although the application was made *ex parte* and leave granted *ex parte*, once it was made in the action to which the Cyprus General Asbestos Co. were parties, the question as to whether they could appeal from an *ex parte* order or no does not arise.

Here the application was supported by an affidavit sworn to by one Genethlios Fasuliotis of Limassol to the effect that the Company in question was wound up by the District Court of Limassol on the 8th of January, 1938. Apart from the fact that this form of evidence was not the best evidence available for the purpose of proving the making of a winding up order, the affidavit did not comply (1) with the definite requirements of Order XV, r. 16 (ii) of the Rules of Court, 1927, because it did not state the trade or profession of the person making it, and (2) with Order XX, r. 1, of the said Rules, because it did not set out all the essential facts upon which the application was based. It also violated the well-known principle that a deponent should always give the source of his information to show that it is not based on idle rumour.

It would seem that this affidavit was filed simply as a matter of form to get over Order XX, r. 1, of the Rules of Court, 1927, which is imperative and demands that every application should be accompanied by an affidavit. The facts disclosed in the affidavit were not sufficient to satisfy a Court of law that a winding up order had been made and could not have been acted upon unless the Judge presumed to take judicial notice of the making of the order on the ground that it was issued out of the Court of which he happened to be a member. The Judge was also left, as stated by the learned counsel for the Respondents, to deduce from the body of a Writ of Summons ostensibly to be issued, all the important facts which were necessary to be placed before him and which should have been testified to on oath to enable him to decide whether to grant or refuse the application.

Section 94 of our Law mentioned above corresponds with section 87 of the Companies Act of 1862, and section 142 of the Companies Act of 1908 on which our Law was apparently modelled. In the Companies Act of 1929 similar provision appears in section 177 with the addition, after the words " when a winding up order has been made " of the words " or a provisional liquidator has been appointed " which is new.

It was decided as early as 1880 in England in *Western and Brazilian Telegraph Co. v. Bibby*, 42 L.T., 821, that applications of this nature should not be made *ex parte*, and many decided cases show that it should be granted only under special circumstances such as actions to enforce a security upon the company's property or where the company is a necessary party to an action in which others are involved or where an action would be the only or at least the most convenient mode of procedure. In the case before us the learned District Judge made the order granting leave to commence the action *ex parte* and did not have

1938
Dec. 8.

CONSTANTINOS ANTONI & ANOTHER v. THE CYPRUS & GENERAL ASBESTOS CO. LTD.

before him sufficient material to enable him to decide whether in accordance with the principles enunciated in the cases decided in England it was one of those applications which should be granted, and if any conditions or terms should be imposed.

Appeal will therefore be allowed and the order of the learned District Judge set aside with costs.

Appeal allowed and Order of the District Judge set aside.