

[CREAN, C.J., AND GRIFFITH WILLIAMS, J.]

POLYXENI CHRISTODOULOU,

Plaintiff-Appellant,

v.

LEFThERI ANDREOU,

*Defendant-Respondent.**(Civil Appeal No. 3635.)*1939
Dec. 9.
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CHRISTO-
DOULOU
v.
LEFThERI
ANDREOU.

APPLICATION FOR THE ISSUE AND LEVY OF EXECUTION AT A TIME WHEN AN INSTALMENT ORDER EXISTS—PART IX OF THE CIVIL PROCEDURE LAW, 1885.

The appellant brought an action in the District Court of Nicosia and obtained a judgment against the respondent (her husband) for £20 and in addition 15s. a month for her maintenance. The whole debt not having been collected by execution levied on the moveable properties of the respondent, and the respondent having also failed to pay 15s. a month for his wife's maintenance, the appellant filed an application praying the Court to inquire into the ability of the respondent to pay the balance of the judgment debt. Upon this application coming before the Court the respondent was, by consent, ordered to pay 15s. a month. Some time later the appellant made another application in which she asked for an order directing the sale of the respondent's immoveable properties in satisfaction of her judgment. The Court decided that so long as the order to pay by instalments was being complied with no order for the sale of the respondent's properties could be made. From this decision the appellant appealed to this Court.

HELD: That a judgment creditor cannot pursue two remedies at the one time; hence when an order for payment of a judgment debt by instalments is in force and is being complied with no application for the issue and levy of execution should be made.

Paschalis N. Paschalis for the appellant.

G. Chrysafinis for the respondent.

The facts of the case appear in the judgment.

Judgment of the Court was delivered by the Chief Justice.

CREAN, C.J.: This is an appeal from an order of the District Court dismissing an application for an order directing the sale of the immoveable property of the respondent.

The facts are, that the appellant brought an action against the respondent on the 2nd July, 1935, for £45 maintenance and in addition for an order directing the respondent to pay 25s. a month for the appellant's maintenance as a lawful wife. In this action judgment was given for the appellant for £20 and an order was made directing the respondent to pay 15s. a month for the appellant's maintenance as from the 15th March, 1937.

On March, 1938, an application was made to inquire into the ability of the respondent to pay the amount of the judgment debt and for an order for instalments. The matter came before the Court on the 30th April, 1938, and by consent an order was made by which the respondent was to pay 15s. a month from the 15th May, 1938.

This instalment was not paid on 15th May, 1938, and an application was filed by the appellant on the 1st June, 1938, for an order for the sale of the respondent's immoveable property.

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If the instalment of 15s. had been paid on the 15th May, 1938, doubtless this last application would not have been made to the Court. The reason for non-payment of it has been explained by the respondent and it is admitted by the appellant that the money was sent by registered post but the letter was lost on the streets and found by one Stavrinides who cashed the Postal Order for 15s. He was prosecuted and convicted therefor. This sum of 15s. was ultimately paid to the appellant in October, 1938.

On the 1st June, 1938, as the May instalment of 15s. had not been paid the appellant filed an application for the sale of respondent's immoveable property in satisfaction of the judgment.

This application came before District Judge Raif, and as he was of the opinion that appellant could not sell the property of the respondent so long as the instalments were being paid, dismissed the application.

The order for instalments was by consent, therefore it is not for us to consider whether it was a reasonable order or not. The effect of the order of 15s. a month was that the amount of £20 under the judgment would never have been paid off so long as that order was in force. But if the order had been for 16s. a month it could have been, but would have taken a very long time to pay off the original amount of £20.

The substantial reason for the order of the District Judge seems to be that as an instalment order was made and being complied with by the debtor; and there being no evidence before him that the original instalment was not being paid, there was no power to make an order for the sale of the respondent's immoveable property. At the same time it is possible that the learned judge came to the conclusion that the respondent could not continue to pay the 15s. a month if his immoveable property were sold.

It is argued by counsel for the appellant that there was a liability on the respondent to pay 15s. a month on the order of the 30th April, 1938, and in addition the 15s. a month ordered by the judgment of the 3rd March, 1937. With this contention however we are unable to agree as we must take it that the whole facts of the case were before the judge and that in making the order he was satisfied that was the limit of the respondent's financial ability. As to this part of counsel's argument it is very appositely pointed out by the counsel for the respondent that if the amount of the instalments had been 16s. then it is bound to be considered as being in reduction of the whole judgment for £20 and 15s. a month.

The main argument however for the appellant is that the existence of an instalment order does not take away the right to levy execution, and in respect of this counsel for the appellant refers us to Part 9 of

Civil Procedure Law of 1885, and particularly section 90 thereof. This part of the Civil Procedure Law prescribes what procedure is to be followed when it is sought to have a judgment debtor brought before the Court and examined respecting his ability to pay the amount of the judgment debt and for the discovery of property applicable to the payment. By virtue of section 90 the Court may if it thinks fit direct that the sum due under the judgment shall be paid by instalments at such times and in such amounts as it thinks fit.

It is clear from Part 9 of this Law that payment of a judgment debt by instalments is contemplated because the procedure therefor is prescribed; and the question now for consideration is can the judgment creditor in addition to that ask the Court to issue or levy execution. It is submitted by counsel for the appellant that the Court has that power and his authority for that submission is the case of "In re Ives" *ex parte* Addington" which was heard by Cave, J., and reported in Law Reports Q.B.D. 1886.

On our reading of this decision we cannot say it is an authority which enables a judgment creditor to get an instalment order for the payment of his judgment debt and at the same time to apply for the issue or levying of execution. It is true there are words in the judgment if taken by themselves and separated from the context may appear to support counsel's argument. But the general tenor of the decision is, that a judgment creditor cannot pursue two remedies at the one time. If he has obtained an order for payment of the judgment debt by instalments then as indicated by Cave, J., that order should be cancelled before the judgment creditor can apply for issue and levy of execution.

So far as we are aware there is no specific rule in the law of Cyprus forbidding the issue or levying of execution after an order for payment by instalments has been made. Nevertheless as a practice no application for the issue or levying of execution should be made while an order for payment of the judgment debt by instalments is in force and is being complied with.

As there was no evidence before the District Judge that the judgment debtor in this case was not complying with the order for payment by instalments of the judgment debt, we think he was right in refusing the application for an order to sell the respondent's immoveable property, and so we dismiss the appeal with costs.

Appeal dismissed with costs.

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