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ARTEMIS N. VASSILIADES
v.
AFRODITI N. VASSILIADES.

[GRIFFITH WILLIAMS AND HALID, JJ.]

ARTEMIS N. VASSILIADES, *Appellant,*

v.

AFRODITI N. VASSILIADES, *Respondent.*

(Civil Appeal No. 3682.)

Execution—Civil Procedure Law, 1885—*Sections* 4 *and* 8 *(i) and (ii)*—*Ex parte Application—Rules of Court,* 1938, *Orders* 42 *and* 48, *rule* 8—*Security Bond—Recognizance.*

Action on a bond given by respondent to appellant in purported compliance with section 8 (2) of the Civil Procedure Law, 1885. The appellant having obtained judgment against one Haji Nicola Vassiliades, seized machinery in execution on a writ of movables. The debtor thereupon made application *ex parte* to the Court for cancellation of the writ of execution on the ground that the machinery was immovable property and for a stay of execution pending trial of the application. The District Court made an order *ex parte* under the Civil Procedure Law, 1885, sections 4 and 8, granting a stay of execution, and ordering the seizure to continue in force, and the debtor to furnish security in £200 for any damage and costs incurred in the making of the *ex parte* order. As security the respondent on behalf of the debtor executed a bond in favour of the appellant for the sum of £200. It is on this bond that the present action is founded. The *ex parte* order was made on 25th May, 1939, and the substantive application came on for hearing on 27th June, 1939, but was with the consent of the appellant adjourned. This action was dismissed by the District Court as premature.

Held : The Civil Procedure Law, section 4, provides for the protection of property during action pending, but does not apply after execution levied. Under section 8 (2) of that law the security to be given is a recognizance to be answerable in damages to the person against whom an *ex parte* order is sought. There is no authority for the giving either by the applicant or a 3rd party of a security bond to the execution creditor, and such bond is invalid and of no effect. When the liability to be answerable for damage caused by the making of an order *ex parte* has ceased, the security is no longer enforceable.

Appeal from a judgment of the District Court of Famagusta.

P. N. Paschalis for the appellant.

G. N. Rossides for the respondent.

The facts are set out in the judgment of the Court which was delivered by :—

GRIFFITH WILLIAMS, J. : The Court of Appeal having given an oral judgment dismissing this appeal on the 21st February, 1941, and now considering it advisable for the guidance of the Courts that the reasons for that judgment should more fully be set out, states its reasons accordingly.

This was an appeal from the judgment of the District Court, Famagusta, dismissing the appellant's action on a bond on the ground that the action was premature. The appellant appealed to this Court.

The appellant and respondent are brother and sister. In the year 1938 the appellant obtained judgment against his and the respondent's father Haji Nicola Vassiliades, in action D. C. Famagusta 244/35, and seized certain flour mill machinery belonging to the said Haji Nicola in execution on a writ of movables.

On 25th May, 1939, the said Haji Nicola made application to the Court for an order directing the cancellation of the said writ of movables on the ground that the machinery was not movable

property and should not be the subject of such writ, and for a stay of execution pending the final disposal of the application. The application seems to have been based, wrongly in our opinion, on part 5 of Law 10 of 1885 and on Orders 42 and 48 of the Rules of Court, 1938. Order 48 deals with *ex parte* applications, and rules 8 and 9 of that Order set out the orders and rules under which *ex parte* applications can be made. Order 42, which relates to execution on immovable property, is not one of those orders. Consequently no application under that order should have been applied for *ex parte*.

The application to stay execution was, however, made *ex parte*, and seems to have been decided by the Court making an interim order under sections 4 and 8 of Law 10 of 1885 in lieu of the authorities relied on in the application. Section 4 does not apply to property seized in execution, and no order under this section should have been made. The order is not however before us now, and, it never having been appealed against, we must treat it as if the Court had power to act under that section. Section 8 of the law gave the Court power to make a temporary order under section 4 *ex parte* on proof of urgency or other peculiar circumstances. But by sub-section (2) of that section the order could not be made without the applicant giving security by entering into a recognizance with or without a surety to be answerable in damages to the person against whom the order was sought. Rightly or wrongly then the Court on the 25th May, 1939, made an *ex parte* order under these sections staying execution under the writ of movables, ordering the seizure to continue in force ; and ordering the applicant to furnish security in £200 for any damages and costs. On 25th May, 1939, the security bond, the subject of the present action, was executed by respondent in favour of appellant. We are bound to hold that this bond, on the giving of which the *ex parte* order was issued, was an attempted compliance with the requirements of section 8 of Law 10 of 1885 in respect of the security therein required to be given.

In deciding whether or not the present action lies we are entitled, nay compelled, to look into circumstances in which this bond was given and so to find out what was the consideration, if any, for it. Clearly the supposed consideration was the making of a temporary *ex parte* order under section 8. That temporary order came to an end on, at latest, the 27th June, 1939, on which date the present appellant (judgment creditor in that action) appeared by his counsel, and consented to the substantive application being adjourned, until 28th November, 1939. By subsection (3) of section 8 of Law 10 of 1885 " No such order without notice shall remain in force for a longer period than is necessary for service of notice of it on all persons affected by it and enabling them to appear before the Court and object to it ". The mere fact that the hearing of the substantive application was adjourned to 28th November, 1939, did not keep alive the temporary *ex parte* order, which ceased to be *ex parte* on the appearance before the Court of all those affected. The consideration for the bond consequently thereupon ceased and the bond expired ; and failing proof of damage occasioned to appellant between 27th May and 27th June, 1939, through the making of the temporary order *ex parte*, we cannot see what damage he could claim. The fact that the appellant consented to the trial of the

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issue being adjourned to 28th November from 27th June in itself shows that the mere making of the order in the first instance *ex parte* did not occasion him any damage.

As soon as the parties are before the Court they come under section 4 and not section 8 of Law 10 of 1885, and the latter section ceases to be of effect. A recognizance bond under this section is much like a bail bond conditioned on the appearance of an accused person before the Court on a particular day. On his appearance before the Court the bond is discharged; and, in the event of the case being adjourned, if bail is extended without the consent of the bailor, he cannot be made liable in the event of the accused absconding. This follows the equitable principle that any alteration made in the position of a person who has undertaken a liability as surety, by in any wary altering the form or increasing the extent of his liability without his consent, discharges him.

Now on the bond she signed the respondent undertook to indemnify the appellant against any damage and costs occasioned him by the said order being made *ex parte*. The order was returnable on 27th June, 1939, and the respondent was entitled to consider that her liability would then cease. When the order came on for consideration on that date, the respondent was not present. She did not consent to any adjournment nor agree to have her liability on the bond extended; her liability must be held to have terminated.

There is, however, a more fundamental objection to the bond, and one which goes to the root of appellant's case. The bond ought never to have been given by respondent or allowed by the Court. Section 8, under which it was given, provides that the applicant shall enter into a recognizance with or without a surety or sureties. There is no power given to the Court to substitute another party for the applicant, and a bond for a recognizance. Hence there was no power to allow the respondent to become primarily liable or indeed directly liable at all to the appellant even as a surety—the liability under a recognizance being to the Crown. Hence the bond itself was void *ab initio*; and the liability of the respondent to appellant never arose.

We do not see how the bond sued on could ever have been considered a suitable substitute for a recognizance, because not only did it purport to make the respondent—who should have been a surety— primarily liable, but there was no privity of contract between the parties; the *ex parte* order was made by the Court in the absence of the appellant; and no consideration moved from the appellant promisee to the respondent. A recognizance is the most suitable form of security in an action, because to enforce payment under it there is no need of a fresh action; as is the case with a bond. This is no doubt why recognizance is specified in section 8 as the mode of security to be given instead of leaving it to the Court to decide what form it should take.

If this action were not for the foregoing reasons unmaintainable, we should agree with the lower Court that, it being at the time of action not only impossible to ascertain the amount of damage appellant might have suffered, but to decide whether or not he had suffered any damage at all, the action was premature.

Appeal dismissed with costs.