1959
July 2,
Nov. 26

[ZEKIA, J., ZANNETIDES, J.]

KYRIACOS (ALIAS KOULLIS) PROTOPAPAS,
Appellant (Defendant),

v.

ELENI (ALIAS LELLA) SPYROU VASSILIOU,
Respondent (Plaintiff).

(Civil Appeal No. 4281).

Practice—Specially indorsed writ—Civil Procedure Rules, O.2, r. 6—Claim which could not be made the subject of a special indorsement thereunder—The writ is not a nullity—Defect amounting to a mere irregularity—That can be cured—Fresh steps taken—Waiver of the irregularity—Civil Procedure Rules, O.64, r. r. 1 and 2.

Appeals—Findings of fact—Depending wholly or partly on the credibility of witnesses—Principles upon which Appellate Courts would interfere with such findings.

The respondent-plaintiff instituted an action against the defendant by a specially indorsed writ raising claims which could not be specially indorsed under the Civil Procedure Rules, 0.2, r. 6. In due course she applied for summary judgment under Order 18, r. 1 (a), which application was opposed by the defendant (appellant). Eventually the application was by consent withdrawn and unconditional leave to defend was granted. The defendant-appellant did not apply to strike out the claim under Order 18, r. 1 (b). At the trial, however, he raised the preliminary objection that inasmuch as the writ was badly indorsed the proceedings amounted to a nullity and that he was, therefore, entitled to the dismissal of the action. The trial Court, treating the defect as a mere irregularity and considering that fresh steps had been taken by the appellant-defendant with knowledge of the irregularity, overruled the objection under Order 64, rule 2. The first point taken on appeal was whether the trial Court was right in overruling the objection.

The trial Court acting on the conflicting evidence of the two litigants and accepting only part of the evidence of the Respondent-plaintiff adjudged the appellant-defendant to pay the sum of £876. The point taken by the Appellant on appeal was that the trial Court could not reasonably have accepted the evidence of the respondent-plaintiff.

Held : affirming the judgment of the lower Court,—

(1) The Court below was right in treating the defect in question as a mere irregularity. By no means the defendant-appellant was prejudiced or embarassed in his defence after the application for summary judgment was dismissed by the Court. cfr. The Annual Practice 1959, (White Book) at p. 260 (*post*).

(2) In exercising our appellate jurisdiction in relation to findings of fact when such findings primarily depend on the credibility of a witness credited partly or entirely by a trial Court, we are guided by principles appearing in the following extracts from the judgments of Authoritative Courts: (see those cases *post*, in the judgment, and in the Annual Practice, 1959, (White Book) at p. 1653). We have not been persuaded that there are adequate reasons justifying this Court to interfere with the findings of fact of the lower Court.

Appeal dismissed.

Cases referred to:

Khoo Sit Hoh v. Lim Thean Tong (1912) A.C. 323, at p. 325, P.C.;

Yuill v. Yuill (1945) P. 15;

Watt v. Thomas (1947) A.C. 484.

S.S. Honterstroom v. S.S. Sagaporack (1927) A.C. 37, at p. 47.

Powell v. Streatham Manor Nursing Home, (1935) A.C. 243.

Appeal.

Appeal by the defendant against the judgment of the District Court of Limassol (Zenon, P.D.C. and Plumer, D.J.) dated December, 2, 1959 (Action No. 69/58) whereby he was adjudged to pay £1,376, including damages for breach of promise of marriage, plus costs.

P. Paschalis for the appellant.

Fivos Pitsillides for the respondent

Cur. adv. vult.

The facts sufficiently appear in the judgment of the Court, which was delivered by:

ZEKIA, J. : Two are the points which fall for decision in this case.

1. The effect of a special indorsement of a writ, made improperly, on the subsequent proceedings specially on the trial of the case after the withdrawal, which took place by consent, of an application to obtain a summary judgment under rule 1 of Order 18 of the Civil Procedure Rules.

2. Whether the points raised before this Court can justify the upsetting of the trial Court on findings of fact by holding that the evidence of the plaintiff-respondent as to the payments she allegedly made to the defendant-appellant—which evidence was partly relied upon by the Court — could not reasonably be accepted.

Plaintiff in this case served on the defendant a specially indorsed writ which obviously could not be done under Order 2. rule 6 of the Civil Procedure Rules. The plaintiff later applied for a summary judgment which was objected to by the defendant and later withdrawn by the former. Defen-

dant did not seek to strike out the claim under Order 18, rule 1 (b). The case was listed for hearing and at the inception of the trial the defendant raised a preliminary objection that inasmuch as the writ was badly indorsed the proceedings amounted to a nullity and the defendant was entitled to the dismissal of the action.

The trial Court ruled that although the writ was not capable of being specially indorsed, fresh steps taken in the proceedings amounted to a waiver and the Court having treated the defect as a mere irregularity overruled the objection under rule 2, Order 64 of the Civil Procedure Rules. Indeed if the default in question amounted to nullity the proceedings followed in the action are automatically nullified.

Notes in the Annual Practice on Order 14, rule 3 of the Rules of the Supreme Court which correspond to Order 18, rule 3 of the Civil Procedure Rules, show clearly that a bad indorsement of a writ does not by itself amount to nullity. We quote from page 260 of the Annual Practice 1959 under the heading "Show cause"—

> "that the plaintiff's claim is in substance of such a nature that it cannot be made the subject of a special indorsement under O.3 r. 6, *e.g.* that it involves a claim for damages for libel. In such a case the objection is fatal to the application under O.14, and the Master will exercise his discretion in the circumstances whether to dismiss it under r. 9(b), *infra*, or give unconditional leave to defend. No affidavit is required in support of a preliminary objection on either of the above grounds".

It appears that a Judge has a discretion in the matter and in a matter of nullity no such discretion is reserved to the Court. In this particular case unconditional leave to defend was given and there was nothing wrong with it.

We are of the opinion that the Court below was right in treating the defect in question as a mere irregularity. By no means the defendant was prejudiced or embarrassed in his defence after the application for summary judgment was dismissed by the Court.

Coming to the second point. Plaintiff-respondent in this case alleged to have paid to her former fiancé, the appellant, the sum of £1,560 in cash by instalments and on different dates. Appellant-defendant denied having received any sum from his former fiancée, the plaintiff. The evidence before the Court was conflicting. The trial Court had the advantage and indeed the task to observe the demeanour of both litigants when giving their evidence and also to consider such evidence in the surrounding circumstances of the case. The Court obviously believed that some amount of money was paid to the defendant but had the difficulty in getting to

the exact amount and was reluctant to accept the evidence of the plaintiff *in toto*. The Court took into account the aggregate sum actually collected by respondent from the sale of three building sites, and the sums deposited with her banks on the dates of the transfer of the said sites. She admittedly collected £1,650 from two purchasers and also deposited in her name £294 with the Bank of Greece and Athens, and £480 with the Bank of Cyprus Ltd. The balance of the purchase price of the three building sites after deducting the lodgments with the Banks amounts to £876 which amount the appellant-defendant was adjudged to pay. Nowhere in the judgment appears that the Court treated the balance remaining in the hands of the plaintiff as corroboration — in the legal sense of the word — for the payment of such balance to the defendant. The fact that there remained a balance in the hands of the plaintiff could indicate nothing more than that she had had the means of lending or gifting the sums mentioned to the defendant. The trial Court, apparently, felt safer to accept an amount as having been paid by the plaintiff not exceeding the balance of the purchase price retained by her and not deposited with the Banks.

In exercising our appellate jurisdiction in relation to findings of fact when such findings primarily depend on the credibility of a witness credited partly or entirely by a trial court, we are guided by principles appearing in the following extracts from the judgments of Authoritative Courts : *Khoo Sit Hoh v. Lim Thean Tong* (1912) A.C. 323, at p. 325, P.C.

> "Not to have seen the witnesses puts appellate Judges in a permanent position of disadvantage against the trial Judge, and unless it can be shown that he has failed to use or has palpably misused his advantage — for example has failed to observe inconsistencies or indisputable fact or material probabilities (*ibid.* and *Yuill v. Yuill*, (1945) P. 15 ; *Watt.* v. *Thomas*, (1947) A.C. 484) — the higher Court ought not to take the responsibility of reversing conclusions so arrived at merely as the result of their own comparisons and criticisms of the witnesses, and of their own view of the probabilities of the case (per Lord Summer in *S.S. Hontestroom* v. *S.S. Sagaporack*, (1927) A.C. 37, at p. 47). If his estimate of the man forms any substantial part of his reasons for his judgment the trial Judge's conclusions of fact should be let alone". (*ibid.* and see *Powell* v. *Streatham Manor Nursing Home* (1935) A.C. 243) See : p. 1653 of the Annual Practice, (1959).

We have not been persuaded that there are adequate reasons justifying this Court to interfere with the findings of the lower Court and in the circumstances we think that the appeal should be dismissed with costs.

Appeal dismissed with costs.