

1962
Oct. 10
1963
Jan. 17

RASHID ADEM,
v.
LUTFIYE MEVLID,
Appellant-Plaintiff,
Respondent-Defendant.

RASHID ADEM
v.
LUTFIYE
MEVLID

(Civil Appeal No. 4357)

Practice—Appeals—Appeal against findings of fact by trial Courts—The Courts of Justice Law, 1960, section 25(3)—The High Court will not disturb such findings unless it is satisfied that the reasoning behind a finding is unsatisfactory or that the finding is not warranted by the evidence considered as a whole.—The onus rests with the appellant both in civil and criminal cases—Primary facts and conclusions drawn from these facts—Distinction.

The appellant-plaintiff's version was that the respondent-defendant orally agreed to sell to him her house for the sum of £1,800 and that the appellant-plaintiff paid there and then the sum of £1,500 in cash and undertook to pay the balance of £300 within a year. No receipt for the payment of £1,500 was given nor was any written agreement signed by the parties. The respondent-defendant denied both the payment of the sum of £1,500 and the agreement.

The District Court after hearing the evidence adduced on both sides preferred the respondent's version and gave judgment for the respondent-defendant.

The appellant-plaintiff appealed against this judgment and the High Court in dismissing the appeal :

Held, (1) per VASSILIADES, J.: (1) There is no doubt that section 25 (3), providing that this Court, in its appellate jurisdiction, "shall not be bound by any determinations on questions of fact made by the trial Court", gives to this Court powers, *inter alia*, to investigate into the correctness of trial-Court findings ; and to set them aside where the investigation leads to that result.

(2) But the exercise of such power has been considered in several appeals, both civil and criminal, since the enactment of the section, in December, 1960. And the reason why we reserved giving the grounds for dismissing this appeal, was to make reference to those cases, which, so far, must be taken as governing the position.

1962
Oct. 10
1963
Jan. 17

—
RASHID ADEM

v.
LUTFIYE
MEVLID

(3) Unless the appellant be able to show from the record, error or other adequate cause for setting aside the findings of fact, made by the trial court, the appeal must be determined upon such findings.

(4) In this case the appellant failed to show sufficient cause for disturbing the findings made by the District Court, and his appeal was therefore dismissed.

(II) *Per* JOSEPHIDES, J.:

(1) A distinction should, however, be made between the findings of primary facts and the conclusions drawn from those facts by the trial Court. The Court of Appeal is prepared to form an independent opinion upon the proper conclusion of fact to be drawn from a finding of primary facts.

(2) In this case there was conflict between the version of the appellant (plaintiff) and that of the respondent (defendant). The appellant's version was that the respondent orally agreed to sell to him her house for the sum of £1,800 and that the appellant there and then paid to the respondent the sum of £1,500 in cash and undertook to pay the balance of £300 within a year. No receipt for the payment of the sum of £1,500 was given, nor was any written agreement whatsoever signed by the parties. The respondent denied both the agreement and the payment of the sum of £1,500.

(3) The Full District Court, after hearing the evidence adduced on both sides, preferred the respondent's version and gave reasons for doing so. It is, therefore, apparent that the findings of the trial Court were based on their estimation of the witnesses.

(4) After listening to the able address of counsel for the appellant and reading the evidence adduced in this case, I was not satisfied that this would be a proper case in which to reject the findings of the trial Court on the primary facts deposed to by the witnesses, especially when the findings, as in this case, are based on the credibility of witnesses. Indeed, I would go further and say that, on the evidence before the trial Court and having regard to the circumstances of this case, especially to the absence of any receipt for the alleged payment of £1,500 or any other memorandum or acknowledgment in writing, any other finding would have been unreasonable.

Appeal dismissed.

Cases referred to :

- Philippos Charalambous v. Sotiris Demetriou* 1961 C.L.R. 14 ;
Stelios Simadhiakos v. The Police 1961 C.L.R. 64 ;
Christofis Tofas v. The Republic 1961 C.L.R. 99 ;
Nicos HJAntoni v. Afroditi Vassiliadou 1961 C.L.R. 103 ;
Enver Mulla Feyzi v. The Republic (Cr. Appeal No. 2332
decided on 31.5.61, unreported) ;
Kufi Mehmed Emin v. The Republic (Cr. Appeal No. 2333
decided on 31.5.61, unreported) ;
Economides v. Zodhiatis 1961 C.L.R. 306 ;
Arif Portokallis v. Hji Theodosi 1962 C.L.R. 1.

1962
Oct. 10
1963
Jan. 17
—
RASHID ADEM
v.
LUTFIYE
MEVLID

All the above cases followed.

Appeal.

Appeal against the judgment of the District Court of Nicosia (Avni and Izzet D. JJ.) dated the 16.10.61 (Action No. 3257/59) dismissing plaintiff's action for damages for breach of a contract for the sale of a house and for the repayment of a sum of £1,500 paid to the respondent against the price.

Cur. adv. vult

St. Pavlides for the appellant.

R. R. Denktash for the respondent.

The facts sufficiently appear in the judgments delivered by VASSILIADES and JOSEPHIDES, JJ.

WILSON, P. : Mr. Justice Vassiliades and Mr. Justice Josephides will give the reasons for judgment in this case. I agree with them.

ZEKIA, J. : I also agree.

VASSILIADES, J. : This is an appeal against the judgment of the District Court of Nicosia, dismissing appellant's action for damages for breach of an alleged contract for the sale of immovable property ; and for the recovery of a sum of £1,500 alleged to have been paid to the respondent against the price, under the contract.

After hearing the evidence of both parties, and that of their witnesses, the District Court found for the defendant. In a considered judgment, the Court gave their reasons for rejecting the evidence of the appellant, and accepting

1962
Oct. 10
1963
Jan. 17

RASHID ADEM
v.

LUTFIYE
MEVLID

Vassiliades, J.

that of the respondent and her witnesses, upon which they made their findings. The claim was, thereupon, dismissed ; with an order for part of defendant's costs.

The appeal is mainly directed against the trial-Court's findings. Learned counsel for the appellant, challenging, upon the evidence on record, the correctness of the reasoning behind such findings, submitted that this Court, making use of its powers under section 25 (3) of the Courts of Justice Law, 1960, can review the whole evidence, and drawing its own conclusions thereon, may set aside the findings of the District Court, and determine the case accordingly.

There is no doubt that section 25 (3), providing that this Court, in its appellate jurisdiction, "shall not be bound by any determinations on questions of fact made by the trial Court", gives to this Court powers, inter alia, to investigate into the correctness of trial-Court findings ; and to set them aside where the investigation leads to that result. But the exercise of such power has been considered in several appeals, both civil and criminal, since the enactment of the section, in December 1960. And the reason why we reserved giving the grounds for dismissing this appeal, was to make reference to those cases, which, so far, must be taken as governing the position.

The matter was first considered in *Philippos Charalambous v. Sotiris Demetriou*, 1961 C.L.R.14. That was a case of damages for assault during a quarrel in a crowded village cinema where the defendant denied that he had assaulted the plaintiff, stating that he was nowhere near him at the material time. The trial-Judge disbelieved the two witnesses called by the plaintiff ; but accepted the latter's evidence in preference to that of the defendant, and his witnesses. And gave judgment for the plaintiff.

On appeal by the defendant, this Court was asked to set aside the trial-Judge's findings ; and reconsidering the whole case upon the record, to find for the defendant.

The powers of the Court in this connection, were carefully considered in the four separate judgments delivered in that case, where each of the members of the High Court made his own approach to the question. The appeal was decided by majority, against the appellant.

The same question arose again, about two months later, in a criminal appeal : *Stelios Simadhiakos v. The Police*, 1961 C.L.R.64. Here the appel-

lant, a policeman, was convicted for inciting a soldier to steal firearms and ammunition ; and was sentenced to eighteen months imprisonment. On appeal, the trial Judge's findings supporting the conviction, were strongly attacked ; and this Court was invited to set them aside, making use of the powers conferred by section 25 (3) of the Courts of Justice Law, 1960.

1962
Oct. 10
1963
Jan. 17
—
RASHID' ADEM
v.
LUTFIYE
MEVLID
—
Vassiliades, J.

In the light of elaborate argument on both sides, the Court again considered the effect of this new section, on the law regarding trial-Court findings, in Cyprus at present. The position was reviewed in three long judgments mainly dealing with the effect and application of section 25 (3). The conviction was unanimously sustained ; and the appeal dismissed.

In Christofis Tofas v. The Republic, 1961 C.L.R. 99 the provisions of section 25 (3) were again invoked on behalf of the appellant, against a conviction for robbery with violence, where the case turned on the evidence of the complainant, an aged woman, regarding the identification of the prisoner ; evidence accepted by the trial-Court, and vigorously challenged on appeal.

The Court unanimously upholding the conviction resting on the findings of the trial-court, adopted the view expressed in Simadhiakos' case that such findings :—

“ continue to be the valuable conclusions reached by one or more trial-Judges, subject only to unfettered investigation and criticism on appeal ”

One of the main and important functions of a trial-court is to watch and weigh the evidence adduced in the case, in order to make its judicial findings thereon, regarding facts in dispute, upon which the parties' rights shall then be determined according to law.

“ Before such findings are disturbed (it was said in Simadhiakos' case, and was repeated in Tofas' case at p. 3 of the Court's judgment) the Appellate Court must be satisfied to the extent of reaching a decision (unanimous or by majority) that the reasoning behind a finding is unsatisfactory ; or that the finding is not warranted by the evidence considered as a whole. And the onus must rest on the appellant, both in civil and in criminal appeals, to bring this Court to such a decision ; or else, the trial Court findings remain undisturbed. ”

1962
Oct. 10
1963
Jan. 17
—
RASHID ADEM
v.
LUTFIYE
MEVLID
—
Vassiliades, J.

In Nicos HjAntoni v. Afroditi Vassiliadou, 1961 C.L.R. 103 President O'Briain delivering the unanimous judgment of the Court, cited parts from the judgments in Simadhiakos' case adopting the position stated therein.

And a few days later, in his judgment in the appeals of *Enver Mulla Feyzi and Kufi Mehmed Emin v. The Republic* (Cr. Appeals 2332 and 2333. Decided on 31.5.61) against their conviction for attempted murder, President O'Briain referred again to Simadhiakos' case, and restating the position said at p. 4 of the judgment :

“ The High Court of Justice is an Appellate Court with extensive powers in connection with the reviewing of decisions of all lower courts in the Republic. But, it must once again be emphasized that in dealing with appeals it is not a trial-Court..... it was for that Court, and not for this Court, to determine all relevant issues of fact, and in case of conflict between witnesses to decide where truth lay ”.

Every member of this Court agreed with that judgment.

In *Economides v. Zodhiatis*, 1961 C.L.R. 306 the main complaint of the appellant was that the trial Judge said boldly that he believed the plaintiff and his witnesses, without giving any reason for doing so. Notwithstanding some apparent contradictions in the evidence of the respondent-plaintiff and his witnesses, this Court was unanimous in sustaining the findings of the trial-Judge, and dismissing the appeal.

Delivering the judgment of the Court, Mr. Justice Josephides referred to the power of a court of appeal to set aside the findings of the lower court and to the relative provisions in section 25 (3), and added :—

“ But this provision has to be applied in the light of the general principle that a court of appeal ought not to take the responsibility of reversing the findings of fact by the trial-Court merely on the result of their own comparisons and criticism of the witnesses, and of their own view of the probabilities of the case.”

In *Arif Portokallis v. HjTheodosi*, 1962 C.L.R. 1 on the other hand, the findings of the trial Court in a running down case of damages for negligence, were partly sustained and partly upset on the issue of negligence, with the result that by a majority decision, the appeal was allowed and judgment was entered for the defendant-appellant with costs.

In a number of other cases which followed, and to which I do not think that specific reference is necessary, this Court, where the appellant failed to show upon the record, sufficient reasons for disturbing the findings of the trial Court, determined the appeal upon such findings.

Unless the appellant be able to show from the record, error or other adequate cause for setting aside the findings of fact, made by the trial Court, the appeal must be determined upon such findings.

In this case the appellant failed to show sufficient cause for disturbing the findings made by the District Court, and his appeal was therefore dismissed.

JOSEPHIDES, J. : In this appeal counsel for the appellant, after referring to the provisions of section 25 (3) of the Courts of Justice Law, 1960, to the effect that this Court is not bound by any determinations on questions of fact made by the trial Court, submitted that this is a proper case in which to exercise such power of re-opening the facts and making new findings.

What was said by this Court in the case of *Economides v. Zodhiatis (supra)*, is, I think, to the point :

“ Undoubtedly a Court of Appeal has the power to set aside the findings of fact of a trial Court where the trial Judge has failed to take into account circumstances material to an estimate of the evidence, or where he has believed testimony which is inconsistent with itself, or with indisputable fact. And since the enactment of the Courts of Justice Law, 1960, under section 25 (3) this Court is not bound by any determinations on questions of fact made by the trial Court and has power to re-hear any witness already heard by the trial Court, if the circumstances of the case justify such a course. But this provision has to be applied in the light of the general principle that a Court of Appeal ought not to take the responsibility of reversing the findings of fact by the trial Court merely on the result of their own comparisons and criticism of the witness, and of their own view of the probabilities of the case.”

A distinction should, however, be made between the findings of primary facts and the conclusions drawn from those facts by the trial Court. The Court of Appeal is

1962
Oct. 10
1963
Jan. 17
—
RASHID ADEM
v.
LUTFIYE
MEVLID
—
Vassiliades, J.

1962
Oct. 10
1963
Jan. 17

—
RASHID ADEM
v.
LUTFIYE
MEVLID
—
Josephides, J.

prepared to form an independent opinion upon the proper conclusion of fact to be drawn from a finding of primary facts.

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The Full District Court, after hearing the evidence adduced on both sides, preferred the respondent's version and gave reasons for doing so. It is, therefore, apparent that the findings of the trial Court were based on their estimation of the witnesses.

After listening to the able address of counsel for the appellant and reading the evidence adduced in this case, I was not satisfied that this would be a proper case in which to reject the findings of the trial Court on the primary facts deposed to by the witnesses, especially when the findings, as in this case, are based on the credibility of witnesses. Indeed, I would go further and say that, on the evidence before the trial Court and having regard to the circumstances of this case, especially to the absence of any receipt for the alleged payment of £1,500 or any other memorandum or acknowledgment in writing, any other finding would have been unreasonable.

For these reasons the appeal was dismissed.

Appeal dismissed.