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[TRIANTAFYLLOIDES, J]

I W S NOMINEE
CO LTD
v
REPUBLIC
(REGISTRAR OF
TRADE MARKS)

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION
I W S NOMINEE CO LTD,

Applicant

and

THE REPUBLIC OF CYPRUS, THROUGH
THE REGISTRAR OF TRADE MARKS,

Respondent

(Case No 62/66)

Trade Marks—Registration—Jurisdiction—Public and Private Law—Article 146 1 of the Constitution—Trade Marks Law, Cap 268—Registration of a trade mark—A matter within the domain of public law and, therefore, within the ambit of Article 146—Because its primary and predominant purpose is a public purpose, namely, to protect the public against deception—It follows that this Court has jurisdiction to deal on a recourse under Article 146 of the Constitution with the sub judice decision i.e. the refusal of the Respondent Registrar of Trade Marks to accept for registration the trade marks mentioned in the motion for relief of the Application in these proceedings—And consequently, section 19 of the Trade Marks Law Cap 268, providing for an appeal in this matter must be deemed to be no longer in force to the extent to which it is inconsistent with a recourse under Article 146 of the Constitution—Article 188 of the Constitution—See also herebelow

Constitutional and Administrative Law—Recourse under Article 146 of the Constitution—Jurisdiction of this Court on a recourse thereunder—It is not sufficient that the act is done or the decision is taken by an organ or authority exercising executive or administrative function for such an act or decision to fall within the ambit of Article 146—It is further necessary that such act or decision can be said to be an act or decision in the field of public law, and not in the field of private law—In the present case the decision complained of is one within the domain of public law—Therefore a recourse under Article 146 would lie against it—Public law and private law—Distinction—Test of such distinction—See, also above, under Trade Marks

Constitutional Law—Constitutionality of statutes—Statutes in force on the date of the coming into operation of the Constitution

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(16th August, 1960)—Section 19 of the Trade Marks Law, Cap. 268 to the extent to which it is inconsistent with a recourse under Article 146 of the Constitution must be deemed to be no longer in force—Article 188 of the Constitution—Cfr. above under Trade Marks.

Recourse under Article 146 of the Constitution—When it would lie—Jurisdiction of the Court on such recourse—Public law and private law—Distinction—Test—See above under Trade Marks ; Constitutional and Administrative Law.

Jurisdiction—Jurisdiction of this Court on a recourse under Article 146 of the Constitution—See above.

Public Law—Private Law—Distinction—Test to be applied—See above under Trade Marks ; Constitutional and Administrative Law.

Private Law—Public Law—Distinction—Test—See above under Trade Marks ; Constitutional and Administrative Law.

Statutes—Constitutionality—See above under Constitutional Law.

By this recourse under Article 146 of the Constitution the Applicant challenges the decision of the Respondent Registrar of Trade Marks whereby in the exercise of his relevant powers under the Trade Marks Law, Cap. 268, refused to accept for registration the trade marks specified in the motion for relief of the Application in these proceedings.

When this Case came up for hearing, counsel for the Respondent raised the preliminary issue that this Court has no competence to deal with the *sub judice* matter on a recourse under Article 146 of the Constitution ; he argued that the said matter falls within the domain of private law and is, therefore, outside the ambit of Article 146 ; he has submitted that the proper remedy open to the Applicant was by way of an appeal under section 19 of the said Law, Cap. 268. It has not been disputed that the Respondent Registrar is an organ of Government. What has been contested by counsel for the Respondent, on the basis of past jurisprudence, is that the *sub judice* decision of the Respondent was not taken in the exercise of executive or administrative authority in the sense of paragraph 1 of Article 146, because it was not a decision in the field of public law, but a decision in the field of private law in relation to the protection of private rights.

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In overruling the objection raised by counsel for the Respondent as aforesaid, the Court :

Held, (1). The jurisprudence in the matter has been reviewed in a decision given in the case of *The Cyprus Industrial and Mining Co. Ltd. and The Republic* (1966) 3 C.L.R. 467 and need not be gone into once again *in extenso* in the present decision. It is to be derived from such jurisprudence that the test to be applied, in deciding whether the subject-matter of this recourse falls within the ambit of Article 146, is to examine whether the relevant powers of the Respondent Registrar of Trade Marks are exercised in order to serve, primarily, a public purpose, or whether they are in fact to be exercised in order to regulate, primarily, civil law rights ; only in the former case the *sub judice* decision would fall within the ambit of Article 146.1 of the Constitution and a recourse, such as the present one, would lie against it.

(2) It is quite correct that the registration of trade marks is intended, *inter alia*, to protect civil law rights therein. But it has also a public purpose to serve, namely, to protect the public against deception in relation to goods being offered for sale to the public.

(3) After weighing the relative importance of the said two purposes, in the light of the present day realities—to the extent to which they could be judicially noticed—including the fact that, for certain purposes, notices in relation to trade marks are published in the Official Gazette of the Republic, for general information, I have reached the conclusion that the primary and predominant purpose of the registration of a trade-mark is its public one and that a decision such as the *sub-judice* one is, therefore, one in the domain of public law, and not of private law. See the decisions of the Greek Council of State No. 517/1958 (Vol. 1958 A p. 655, at p. 656) ; and No. 660/1931 (Vol. 1931 B p. 281).

(4) In the light of the foregoing I find that the *sub judice* matter falls within the ambit of Article 146 and this Court has competence to deal with it ; furthermore, in view of Article 188 of the Constitution and past relevant jurisprudence (such as *Mikrommatis and The Republic*, 2 R.S.C.C. 125), section 19 of Cap. 268 (*supra*) to the extent to which it is inconsistent with a recourse under Article 146 of the Constitution must be deemed to be no longer in force.

Order in terms.

Cases referred to :

The Cyprus Industrial and Mining Co. Ltd. and The Republic
(1966) 3 C.L.R. 467;

Mikrommatis and The Republic, 2 R.S.C.C. 125 ;

Decisions of the Greek Council of State :

No. 517/1958 (Vol. 1958 A p. 655, at p. 656) ;

No. 660/1931 (Vol. 1931 B. p. 281).

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Ruling.

Ruling on the issue of jurisdiction of the Court to entertain a recourse against the decision of the Respondent, in the exercise of his powers under the Trade Marks Law, Cap. 268. refusing to accept for registration the trade marks specified in the motion for relief in these proceedings.

D. Themistocleous with A. Triantafyllides, for the Applicant.

M. Spanos, Counsel of the Republic, for the Respondent.

Cur. adv. vult.

The following Decision was delivered by:

TRIANAFYLLIDES, J.: When this Case came up for hearing, counsel for Respondent raised the preliminary issue that this Court had no competence to deal with the *sub judice* matter on a recourse under Article 146 of the Constitution; he argued that the said matter falls within the domain of private law and is, therefore, outside the ambit of Article 146; he has submitted that the proper remedy open to the Applicant was by way of an appeal under section 19 of the Trade Marks Law (Cap. 268).

In view of there being in issue a question of jurisdiction, the decision thereon has been reserved for some time so as to enable the Court to consider it as fully as possible.

The subject-matter of the recourse is a decision of the Respondent Registrar of Trade Marks communicated to the Applicant by means of a letter of the 18th January, 1966, (see *exhibit 1*); by virtue of such decision the Registrar, in the exercise of his relevant powers under Cap. 268, refused to accept for registration the trade marks specified in the motion for relief of the Applicant in these proceedings.

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It has not been disputed that the Respondent Registrar is an organ of Government. What has been contested by counsel for the Respondent, on the basis of past jurisprudence, is that the *sub judice* decision of the Respondent was not an exercise of executive or administrative authority in the sense of Article 146, because it was not a decision in the field of public law, but a decision in the field of private law in relation to the protection of private rights.

The said past jurisprudence has been reviewed in a Decision given in the case of *The Cyprus Industrial and Mining Co. Ltd.* and *The Republic* ((1966) 3 C.L.R. 467) and it need not be gone into once again *in extenso* in the present Decision. It is to be derived from such jurisprudence that the test to be applied, in deciding whether the subject-matter of this recourse falls within the ambit of Article 146, is to examine whether the relevant powers of the Respondent Registrar were exercised in order to serve, primarily, a public purpose, or whether they were in fact exercised in order to regulate, primarily, civil law rights; only in the former case the *sub judice* decision would fall within the ambit of Article 146 and a recourse, such as the present one, would lie against it.

It is quite correct that the registration of trade marks is intended, *inter alia*, to protect civil law rights therein. But it has also a *public purpose to serve*, namely, to *protect the public* against deception in relation to goods being offered for sale.

In Kerly on Trade Marks and Trade Names (9th ed., p. 1), we read that:— “The foundation upon which the law relating to trade marks and trade names developed is that the deception of the public by the offer for sale of goods as possessing some connection with a particular trader, which they do not in fact possess, is a wrong in respect of which the trader has a cause of action . . .”; one sees therein a clear indication of the two concurrent purposes of the registration of trade marks, the public one and the private one.

After weighing the relative importance of the two said purposes, in the light of present day realities—to the extent to which they could be judicially noticed—including the fact that, for certain purposes, notices in relation to trade marks are published in the official Gazette of the Republic, for general information, I have reached the conclusion that the primary and predominant purpose of the registration of a trade mark is its public one

and that a decision such as the *sub judice* one is, therefore, one in the domain of public law, and not of private law.

The Greek Council of State had occasion to express such a view in its Decision in case 517/1958 (vol. 1958 A. p. 655 at p. 656), wherein it is stated «...αί διατάξεις τῆς νομοθεσίας περί σημάτων εἶναι δημοσίας τάξεως, ἀποβλέπουσαι εἰς τὴν προστασίαν οὐ μόνον τοῦ προκαταθέσαντος, ἀλλὰ καὶ τοῦ καταναλωτικοῦ κοινοῦ ἀπὸ ἐνδεχομένων ἐξαπατήσεων».

(. . . the legislative provisions concerning trade marks are matters of public order, aiming at the protection not only of the person who has deposited a trade mark first, but also at the protection of the consumers against possible deceptions).

Actually in Greece decisions relating to registration of trade marks have always been treated as being matters within the ambit of the revisional jurisdiction vested in the Council of State, which is of the same nature as the one possessed by this Court under Article 146; see, *inter alia*, the decision of the Greek Council of State in case 660/1931 (vol. 1931 B p. 281).

At first, recourses in relation to matters pertaining to the registration of trade marks were made directly to the Greek Council of State; later on, however, special administrative courts were set up in Greece, by legislation, in order to deal, in the first instance, with such matters, and from their decisions an appeal lies to the Greek Council of State, as an appellate administrative court.

In the light of all the foregoing I find that the *sub judice* matter falls within the ambit of Article 146 and this Court has competence to deal with it; furthermore, in view of Article 188 of the Constitution and past relevant jurisprudence (such as *Mikrómattis* and *The Republic*, 2 R.S.C.C. p. 125), section 19 of Cap. 268 to the extent to which it is inconsistent with a recourse under Article 146 must be deemed to be no longer in force.

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