1968
Feb. 1
Mar. 5, 19

ELENI ANDREA AVGOUSTI
v.
NIOVI PAPADAMOU AND ANOTHER

[TRIANTAFYLLIDES, STAVRINIDES, LOIZOU, JJ.]

ELENI ANDREA AVGOUSTI

Appellant-Plaintiff,

v.

NIOVI PAPADAMOU AND ANOTHER,

Respondents-Defendants.

(Civil Appeal No. 4647).

Specific Performance—Contract—Contract for the sale of immovable property—Breach—Action for specific performance—Instituted after the lapse of two months "from the date when the contract was made"—Rightly dismissed in view of the time-limit of two months as aforesaid provided in section 2(d) of the Sale of Land (Specific Performance) Law, Cap. 232—And notwithstanding that the action was instituted less than two months after the cause of action arose—The aforesaid time-limit provided in section 2(d) of Cap. 232 is not a "period of limitation" within section 2 of the Limitation of Actions (Suspension) Law, 1964 (Law No. 57 of 1964)—Therefore, it is not suspended by operation of section 3 of the same Law No. 57 of 1964—On the other hand the provisions in section 76(1) of the Contract Law, Cap. 149, in view of sub-section (2) thereof, are not applicable to specific performance of contracts for the sale of immovable property—See, also, herebelow.

Contract—Specific performance—The Contract Law, Cap. 149 section 76(1) and (2)—Provisions of section 76(1) of the Law not applicable to specific performance of contracts for the sale of immovable property—Specific performance of such contracts continues to be governed by the Sale of Land (Specific Performance) Law, Cap. 232.

Contract—Specific Performance—Contract for the sale of immovable property—Specific performance of such contracts still governed by the Sale of Land (Specific Performance) Law, Cap. 232, to the exclusion of section 76(1) of the Contract Law, Cap. 149—See, also, above and herebelow.

Specific Performance—Contracts for the sale of immovable property—The Sale of Land (Specific Performance) Law, Cap. 232, sections 2(d), 3 and 7—See above.

Sale of land—Contract for—Specific performance—See above.

Immovable Property—Sale of land—Specific performance—See above.

Limitation of actions—Time-limit in section 2(d) of the Sale of Land (Specific Performance) Law, Cap. 232 not a "period of limitation" within sections 2 and 3 of the Limitation of Actions (Suspension) Law, 1964 (No. 57 of 1964)—See also above.

Words and Phases—"From the date when the contract was made" in section 2(d) of the Sale of Land (Specific Performance) Law, Cap. 232—"Period of limitation" in sections 2 and 3 of the Limitation of Actions (Suspension) Law, 1964 (Law No. 57 of 1964)—"Affect" in section 76(2) of the Contract Law, Cap. 149.

Period of Limitation—See above.

Suspension of the period of limitation—See above.

Practice—Appeal—Point not put forward before the trial Court—Whether and in what circumstances it can be argued on appeal—See White Book for 1962 at p. 1675 under "Allowing a case to be made though not raised in the Court below".

This is an appeal by the plaintiff against that part of the Judgment of the District Court of Nicosia, given in Civil Action No. 3300/66 on June 15, 1967, whereby she was refused an order for specific performance of an agreement in writing dated the 15th September, 1965, under which the respondents-defendants undertook to sell to her certain immovable properties at Kato Lakatamia; the breach of the said agreement by respondents not being in dispute, the trial Court awarded the appellant £2,760 damages for breach of contract and costs.

The principal ground on which the trial Court has refused specific performance was that the action had not been instituted within two months from the date the relevant contract was made, as expressly provided under section 2(d) of the Sale of Land (Specific Performance) Law, Cap. 232.

It was argued by counsel for the appellant that the expression "from the date when the contract was made" in the aforesaid section 2(d) should be construed as meaning, in effect, from the date when the cause of action under such contract arose; actually, in the present case, in view of the terms of the contract between the parties,

such cause of action did not arise until about *one year* after the contract was entered into, namely in September, 1966. Section 2(*d*) (*supra*) provides that no specific performance of a contract for the sale of land shall be ordered unless the action shall be instituted within two months "from the date when the contract was made".

It was further argued by counsel for the appellant that the period of two months provided in section 2*(d)* (*supra*) is a period of limitation within the ambit of the Limitation of Actions (Suspension) Law, 1964 (Law No. 57 of 1964), and that, therefore, at the material time, it stood suspended in view of section 3 of such Law suspending the limitation of actions as from 21st December, 1964 onwards till order to the contrary by the Council of Ministers.

The last submission of counsel for the appellant was that section 76 of the Contract Law, Cap. 149, which provides about specific performance of contracts in general is applicable, also, to cases of contracts for the sale of immovable property, such as the present one, notwithstanding the existence of the express provisions, governing specific performance of such contracts in Cap. 232 (*supra*).

Section 76 of the Contract Law, Cap. 149 reads as follows:

"(1) A contract shall be capable of being specifically enforced by the Court if–

(*a*) it is not a void contract under this or any other Law; and

(*b*) it is expressed in writing; and

(*c*) it is signed at the end thereof by the party to be charged therewith; and

(*d*) the Court considers, having regard to all the circumstances, that the enforcement of specific performance of the contract would not be unreasonable or otherwise inequitable or impracticable.

(2) Nothing herein contained shall affect the specific performance of contracts for the sale of immovable property under the provisions of the Sale of Land (Specific Performance) Law, or any amendment thereof".

In dismissing the appeal, the Court (Stavrinides J. partly *dissenting)* :-

Held, (1) In the face of the express wording of section 2(*d*) of Cap. 232 (*supra*), we are unable to accept the submission of counsel for the appellant. It seems, in the last analysis, that the provisions of section 2 of Cap. 232 are designed to make possible specific performance in cases in which the right to sue does arise within the period of two months after the making of the contract for the sale of immovable property, as, for instance, when the stipulated time for performance expires, or there is an anticipatory breach of contract, within such period.

(2) As to the submission regarding the Limitation of Actions (Suspension) Law, 1964 (Law No. 57 of 1964):

(*a*) By section 2 of the said Law No. 57 of 1964 a "period of limitation" is defined as "any period prescribed by any provision of a legislative nature in force at the time of the coming into operation of this Law within which any action to which such provision relates is required to be brought"; it is only such a period which, by virtue of section 3 of the same Law, has been suspended as from the 21st December, 1963 and until such date as the Council of Ministers may in future appoint.

(*b*) Bearing in mind the object of the said Law No. 57 of 1964, as well as the wording of its relevant provisions, and particularly the definition of "period of limitation", we are of the opinion that the time-limit (two months) specified in section 2(*d*) of Cap. 232 (*supra*) is not a "period of limitation" in the sense of Law No. 57 of 1964; more than two months after the date of the contract for the sale of immovable property an action may still be brought, in case of breach thereof (as it was done in this case), for the purpose of redressing such breach; what is excluded, therefore, by means of the said time-limit, is not a right of action but a special remedy to be claimed by means of such action namely an order for specific performance.

(*c*) It is, further, worth noting, in this respect, that in section 3 of Cap. 232 (*supra*), the time-limit of two months set down by section 2(*d*) of that Law is referred to as a "formality".

(3) (Stavrinides, J. *dissenting*): *Regarding the argument based on section 76 of the Contract Law, Cap. 149*:

(*a*) In spite of the not very happy manner in which sub-section (2) of section 76 of Cap. 149 (*supra*) has been phrased, we have really no doubt in our minds that what was indended to be conveyed thereby is that the provisions of sub-section (1) of section 76 (*supra*), regarding specific performance of contracts in general, shall not "affect", in other words, shall not be applicable to specific performance of contracts for the sale of immovable property, and that this matter should continue to be governed, as before, solely by the provisions of Cap. 232 (*supra*).

(*b*) We cannot see any valid reason for which Cap. 232 (*supra*) should have been allowed to remain on the statute-book when section 76 of the Contract Law, Cap. 149 was enacted, if it was intended to put contracts for the sale of immovable property on the same footing as all other contracts, in so far as specific performance thereof was concerned; we do think that it was not so intended, because of the special considerations which apply to the specific performance of contracts for the sale of immovable property in the context of the land registration system in force in Cyprus, and to which system the provisions of Cap. 232 (*supra*) are correlated in express terms.

(*c*) We know of no case in which the view that section 76 of the Contract Law, Cap. 149 does not apply to a case of specific performance of a contract for the sale of immovable property was ever doubted; on the contrary, in 1959 the then Supreme Court of Cyprus adopted, without question, such view in *Iordanou* v. *Anyftos* 24 C.L.R. 97.

(4) The appeal, therefore, must be dismissed.

Held: per Stavrinides J.:

(1) I agree as to the result. Further, I agree that under section 2(*d*) of Cap. 232 (*supra*) the time within which proceedings for specific performance must be brought, runs from the making of the contract, not from its breach,

and that Law No. 57 of 1964 (*supra*) does not apply to that limitation.

(2) With regard to section 76(1) of the Contract Law, Cap. 149, however, I take the view that it applies to contracts for the sale of immovable property as well as to contracts for the sale of movables. There is no decision on this last point, although there is a dictum, clearly obiter, in the case of *Iordanou* v. *Anyftos* 24 C.L.R. 97, at p. 103.

(3) It is a cardinal rule of judicial interpretation that:

"If there is nothing to modify, nothing to alter, nothing to qualify the language which the statute contains, the words and sentences must be construed in their ordinary and natural meaning". (Halsbury's Laws of England, 3rd edn., Vol. 36, title Statutes, p. 371, para. 585).

Now it seems clear to me that the ordinary and natural meaning of section 76(2) of Cap. 249 (*supra*) is that the general provision for specific performance made by the sub-section preceding it is, so far as immovable property is concerned, in addition to, and not in derogation of, the provision made by section 2 of Cap. 232 (*supra*). And there is nothing in Cap. 149 or any other Law to "modify, alter, or qualify" the words and sentences of section 76(2) of the Contract Law, Cap. 149 (*supra*).

(4) On the other hand my view of section 76 of Cap. 149 is strengthened by the following considerations:-

(*a*) A contract for the sale of immovable property may provide for the payment of the purchase money over a period far exceeding two months;

(*b*) or the property the subject of the sale may not be registered at the time of the contract. In that case section 2 of Cap. 232 (*supra*) is inapplicable for the proviso to section 3 of that Law makes it a condition of specific performance under the preceding section that the property:

"Shall at the time of the deposit of the copy of the contract at the District Lands Office have stood registered in the name of the vendor".

(*c*) It follows that the scope of section 2 of Cap. 232

(enacted in 1885) is a narrow one, the explanation probably lying in the fact that the deposit of the contract "at the District Lands Office" produces certain consequences affecting persons to whom, subsequently to the deposit, the property is transferred "whether by way of gift, sale, inheritance, mortgage, or otherwise" (see section 7 of Cap. 232).

(5) That being so it seems to me only reasonable that a statute such as Cap. 149, passed in 1930, should extend the remedy of specific performance of contracts for the sale of immovable property to contracts not deposited at a District Lands Office, so long as it does not clothe such contracts with such effect as against third parties as does section 7 *(supra)*.

(6) I am unable to see that specific performance under section 76(1) of the Contract Law, Cap. 149, of contracts for the sale of immovable property is incompatible with, or would in any way affect, our system of land registration (Cfr. the remarks of the Supreme Court in *Chacalli* v. *Kallourena* 3 C.L.R. 246, at p. 255, paragraphs 4 and 5).

(7) Furthermore, if it had been intended to exclude contracts for the sale of immovable property from the scope of the remedy provided by section 76(1) that could have been done quite simply in either of two widely used methods *viz.* either by omitting sub-section (2) (*supra*) and confining what now is sub-section (1) expressly to "a contract for the sale of goods" or "movable property" or, alternatively, by enacting a different sub-section (2) reading something like this:-

"Nothing in the preceding subsection contained shall apply to contracts for the sale of immovable property".

(8) However, this is not the end of the matter. The point about the applicability of section 76(1) to contracts for the sale of immovable property is one that was not put forward at the trial. On consideration of this aspect in the light of the cases cited at p. 1675 of the Annual Practice for 1962 under "Allowing a case to be made though not raised in the Court below", I have come to the conclusion that my view of section 76 of the Contract Law, Cap. 149 cannot avail the appellant, because subsection (1) thereof lays down conditions which are not to be found in Cap.

232, so, that, had the applicability of section 76(1) been an issue at the trial, evidence might have been adduced which might have resulted in the Court concluding that this was not a proper case for specific performance under it.

Appeal dismissed.
No order as to costs in appeal.

Cases referred to:

Iordanou v. *Anyftos* 24 C.L.R. 97, at p. 103 *followed;*

Chacalli v. *Kallourena* 3 C.L.R. 246, at p. 255.

Appeal.

Appeal by plaintiff against that part of the judgment of the District Court of Nicosia (Mavrommatis & Vakis D.JJ.) dated the 15th June, 1967 (Action No. 3300/66) by virtue of which she was refused an order for specific performance of an agreement dated the 25th September, 1965, concerning sale of immovable property.

L. Clerides, for the appellant.

E. Tavernaris with *X. Clerides*, for the respondents.

Cur. adv. vult.

The following judgments were read:

TRIANTAFYLLIDES, J.: In this judgment there are set out the views of my brother LOIZOU, J. and of myself regarding the issues argued before this Court in this case; my brother STAVRINIDES, J. will be delivering a separate judgment.*

The appellant-plaintiff appeals against that part of the judgment of the District Court of Nicosia, given in civil action 3300/66 on the 15th June, 1967, by virtue of which she was refused an order for specific performance of an agreement dated the 15th September, 1965, by means of which the respondents-defendants undertook to sell to her certain immovable properties at Kato Lakatamia; the breach of the said agreement by respondents not being in dispute, the trial Court awarded the appellant £2,760.— damages and costs.

The principal ground on which the trial Court has refused

Note: Judgment of STAVRINIDES, J. is published post, at p. 76.

specific performance was that the action had not been instituted within two months from the date when the relevant contract was made, as expressly provided for under section 2(d) of the Sale of Land (Specific Performance) Law, Cap. 232.

It has been argued by learned counsel for the appellant that the expression "from the date when the contract was made", in the aforesaid section 2(d), should be interpreted as meaning, in effect, from the date when the cause of action under such contract arose; actually, in the present case, in view of the terms of the contract between the parties, such cause of action did not arise until about one year after the contract was entered into, namely, in September, 1966.

We are unable, in the face of the express wording of section 2(d) of Cap. 232, to accept the submission of counsel for the appellant. It seems, in the last analysis, that the provisions of section 2 of Cap. 232 are designed to make possible specific performance in cases in which the right to sue does arise within a period of two months after the making of a contract for the sale of immovable property, as, for instance, when the stipulated time for performance expires, or there is an anticipatory breach of contract, within such period.

In order to avoid the time obstacle set by section 2(d), counsel for the appellant has argued that the period of two months provided therein is a period of limitation within the ambit of the Limitation of Actions (Suspension) Law 1964 (Law 57/64), and that, therefore, at the material time, it stood suspended, in view of section 3 of such Law, and could not prevent the appellant from being granted specific performance of his contract with the respondents.

By section 2 of Law 57/64 a "period of limitation" is defined as "any period prescribed by any provision of a legislative nature in force at the time of the coming into operation of this Law within which any action to which such provision relates is required to be brought"; it is only such a period which, by virtue of section 3 of the same Law, has been suspended as from the 21st December, 1963, and until such date as the Council of Ministers may in future appoint.

Bearing in mind the object of Law 57/64, as well as the wording of its relevant provisions, and particularly the definition of "period of limitation", we are of the opinion that

the time-limit specified in section 2(d) of Cap. 232 is not a "period of limitation" in the sense of Law 57/64; more than two months after the date of a contract for the sale of immovable property an action may still be brought, in case of breach thereof (as it was done in this case), for the purpose of redressing such breach; what is excluded, therefore, by means of the said time-limit, is not a right of action but a special remedy to be claimed by means of such action, namely, an order for specific performance.

It is, further, worth noting, in this respect, that in section 3 of Cap. 232, the time-limit set down by means of section 2(d) of such Law is referred to as a "formality".

The last submission of counsel for the appellant has been that section 76 of the Contract Law, Cap. 149, which provides about specific performance of contracts in general, is applicable to cases of contracts for the sale of immovable property, such as the present one, notwithstanding the existence of the express provisions, governing specific performance of such contracts, in Cap. 232; counsel has submitted in this connection that the trial Court failed to consider the possibility of granting specific performance under section 76 of Cap. 149, and that whatever has been stated in its judgment to the effect that this is a case in which, in any event, damages and not specific performance would be the appropriate remedy, has not been stated by reference to section 76, but by reference to section 8 of Cap. 232, only.

Sub-section (2) of section 76 of Cap. 149 reads as follows:—

> "Nothing herein contained shall affect the specific performance of contracts for the sale of immovable property under the provisions of the Sale of Land (Specific Performance) Law, or any amendment thereof".

In spite of the not very happy manner in which sub-section (2) of section 76 of Cap. 149 has been phrased, we have really no doubt in our minds that what was intended to be conveyed thereby is that the provisions of sub-section (1) of section 76, regarding specific performance of contracts in general, shall not "affect", in other words, shall not be applicable to specific performance of contracts for the sale of immovable property, and that this matter should continue to be governed, as before, solely by the provisions of Cap. 232.

We cannot see any valid reason for which Cap. 232 should

have been allowed to remain on the statute-book when section 76 of Cap. 149 was enacted, if it was intended to put contracts for the sale of immovable property on the same footing as all other contracts, in so far as specific performance thereof was concerned; we do think that it was not so intended, because of the special considerations which apply to the specific performance of contracts for the sale of immovable property in the context of the land registration system in force in Cyprus, and to which system the provisions of Cap. 232 are correlated in express terms.

As at present advised we know of no case in which the view that section 76 of Cap. 149 does not apply to a case of specific performance of a contract for the sale of immovable property was ever doubted, and, on the contrary, in 1959 the then Supreme Court of Cyprus adopted, without question, such view in *Iordanou* v. *Anyftos* (24 C.L.R., p. 97).

For all the foregoing reasons, we find that the specific performance of the contract between the parties has been rightly refused by the trial Court and that, therefore, this appeal fails and has to be dismissed accordingly.

Bearing in mind, however, the conduct of respondents, in unjustifiably going back on their word and breaking their written undertaking towards the appellant, we have decided to make no order as to costs in this appeal.

STAVRINIDES, J.: I agree as to the result. Further, I agree that under s.2(d) of Cap.232 the time within which proceedings for specific performance must be brought runs from the making of the contract, not from its breach, and that Law 57 of 1964 does not apply to that limitation. With regard to s.76(1) of Cap. 149, however, I take the view that it applies to contracts for the sale of immovable property as well as to contracts for the sale of movables.

There is no decision on this last point, although there is a dictum, clearly obiter, in the case of *Iordanou* v. *Anyftos*, 24 C.L.R. 97, at p. 103.

It is a cardinal rule of judicial interpretation that

> "If there is nothing to modify, nothing to alter, nothing to qualify the language which the statute contains, the words and sentences must be construed in their ordinary and natural meaning": Halsbury's Laws of England,

Vol. 36, title Statutes, p. 371, para. 585.

Now it seems clear to me that the ordinary and natural meaning of s.76(2) of Cap. 149 is that the general provision for specific performance made by the subsection preceding it is, so far as immovable property is concerned, in addition to, and not derogation of, the provision made by s.2 of Cap. 232. The question then is whether there is anything "to modify, alter, or qualify" the words and sentences of s. 76(2). The answer is that there is nothing in Cap.149 or any other Law that could be said to have that effect. On the other hand my view of s.76 is strengthened by the following considerations.

A contract for the sale of immovable property may provide for payment of the purchase price over a period far exceeding two months; or the property the subject of the sale may not be registered at the time of the contract, although, as is often the case with building plots laid out by developers, registration of the particular plot concerned may be a mere formality, the land out of which it has been carved being already registered in the vendor's name. In the latter case s.2 of Cap.232 is inapplicable, for the proviso to s.3 of that Law makes it a condition of specific performance under the preceding section that the property

> "shall at the time of the deposit of the copy of the contract at the District Lands Office have stood registered in the name of the vendor under the contract";

and in the former case it is hardly of any use, for the institution of proceedings within two months presupposes either the extremely unlikely event of a vendor having undertaken to effect the transfer within that time while part of the purchase money, probably the bulk of it, remains unpaid, or an anticipatory breach by the vendor. It follows that the scope of Cap.232, which was enacted in 1885, is a narrow one, the explanation probably lying in the fact that the deposit of the contract "at the District Lands Office" produces certain consequences affecting persons to whom, subsequently to the deposit, the property is transferred

> "whether by way of gift, sale, inheritance, mortgage, or otherwise" (s.7).

That being so it seems to me only reasonable that a statute such as Cap.149, passed in 1930, should extend the remedy of specific performance of contracts for the sale of immovable

property to contracts not deposited at a District Lands Office, so long as it does not clothe such contracts with such effect as against third parties as does s.7 of Cap.232. True, in the absence of a requirement as to deposit, the property may be sold by the vendor a second time to an innocent purchaser for value or be mortgaged to a *bona fide* lender without notice. But that need cause no difficulty, because in the absence of any statutory protection to a purchaser claiming specific performance under the earlier contract it would clearly be "inequitable" within s.76(1) of Cap.149 to grant specific performance to him.

Nor am I able to see that specific performance under that provision is incompatible with, or would in any way affect, our system of land registration. (Cp. the remarks of the Supreme Court in *Chacalli* v. *Kallourena*, 3 C.L.R. 246, at p.255, paras. 4 and 5).

Furthermore, if it had been intended to exclude contracts for the sale of immovable property from the scope of the remedy provided by s.76(1) that could have been done quite simply in either of two widely used methods, viz. either by omitting what has been enacted as sub-s. (2) and confining what now is sub-s.(1) expressly to "a contract for the sale of goods" (or "movable property") or, alternatively, by enacting a different sub-s.(2) reading something like this:

> "Nothing in the preceding subsection contained shall apply to contracts for the sale of immovable property".

However, this is not the end of the matter. The point about the applicability of s.76(1) to contracts for the sale of immovable property is one that was not put forward at the trial; and we allowed counsel for the appellant to raise it for the first time at the hearing of the appeal partly because counsel on the other side did not object to this course and partly because it appears to be covered by ground (c) of the notice of appeal. The fact still remains, however, that it represents a completely new case—one not set up at the trial —and that in allowing it to be argued before us we did not bind ourselves to give it effect regardless of whether, in the light of the established principles regulating an appellant's position, this is a proper case for doing so.

On consideration of this aspect in the light of the cases cited at p. 1675 of the Annual Practice for 1962 under "Allow-

ing a case to be made though not raised in the court below", I have come to the conclusion that my view of s. 76 cannot avail the appellant, because sub-s.(1) thereof lays down conditions which are not to be found in Cap.232, so that, had the applicability of s. 76(1) been an issue at the trial, evidence might have been adduced which might have resulted in the court concluding that this was not a proper case for specific performance under it.

1968
Feb. 1
Mar. 5, 19

ELENI ANDREA AVGOUSTI
v.
NIOVI PAPADAMOU AND ANOTHER

Stavrinides, J.

Appeal dismissed.
No order as to costs in the Appeal.