[VASSILIADES, P., TRIANTAFYLLIDES, L. LOIZOU, JJ.]

CHRISTAKIS VASSILIADES,
Appellant-Defendant,

v.

FRIXOS CONSTANTINOU,
Respondent-Plaintiff.

(*Civil Appeal No.* 4812).

Appeal—Findings of fact—Findings resting on credibility of witnesses—Set aside on appeal as not supported by the evidence considered as a whole and because the reasons given for such findings are not correct—Cf. infra.

Findings of fact made by trial Courts—Findings resting on credibility of witnesses—Circumstances under which the Court of Appeal will disturb such findings—Principles applicable laid down in a number of cases, restated—Cf. also supra.

This is an appeal by the defendant against the judgment of the District Court of Nicosia whereby he was adjudged to pay to the plaintiff (now respondent) the sum of £588 and costs by way of contribution for loss which resulted from trading in potatoes carried out as a joint adventure by the parties. The appeal was argued mainly on the ground that the findings made by the trial Court—some of them resting on credibility of witnesses -are not warranted by the evidence as a whole and that the reasons given for such findings are not correct.

The Supreme Court, after reviewing the facts, found that the complaints of the appellant (defendant) against the trial Court's findings were justified, and allowing the appeal and reversing the judgment appealed from :—

Held, (1) (*a*). The principles upon which the Court of Appeal acts where findings of fact and inferences therefrom are concerned, are now well settled. Apart from the two cases cited by counsel (*viz. Mamas* v. '*Arma*' *Tyres* (1966) 1 C.L.R. 158 and *Dafnis Thomaides and Co. Ltd.* v. *Lefkaritis Brothers* (1965) 1 C.L.R. 20), we might refer to the case *Kyriacou* v. *Aristotelous* (1970) 1 C.L.R. 172, in which reference is made to a number of other cases on the point.

(*b*) Put briefly, an Appellate Court will not disturb the findings of the trial Court unless satisfied that the reasoning behind such findings, is unsatisfactory, or that they are not warranted by the evidence considered as a whole.

(2) With the above principles in mind, we are satisfied, in the light of the arguments advanced, that the evidence considered as a whole shows that the complaints of the appellant against the trial Court's findings (*supra*) are justified and that such findings should be set aside.

(3) In the result this appeal is allowed and the judgment of the trial Court reversed. There will be judgment dismissing the action with costs. The respondent will also pay the costs in the appeal.

Appeal allowed with costs here and in the Court below against the respondent.

Cases referred to :

Mamas v. '*Arma*' *Tyres* (1966) 1 C.L.R. 158 ;

Dafnis Thomaides and Co. Ltd. v. *Lefkaritis Brothers* (1965) 1 C.L.R. 20 ;

Kyriacou v. *Aristotelous* (1970) 1 C.L.R. 172 (in which reference is made to a number of other cases on the point).

Appeal.

Appeal by defendant against the judgment of the District Court of Nicosia (A. Loizou, P.D.C. and Stavrinakis, D.J.) dated the 29th March, 1969, (Action No. 1906/67) whereby the defendant was adjudged to pay to the plaintiff the sum of £588.255 mils by way of contribution for loss which resulted from trading in potatoes.

A. Triantafyllides with *E. Odysseos*, for the appellant.

G. Tornaritis, for the respondent.

Cur. adv. vult.

The reasons for judgment were delivered by :—

L. LOIZOU, J. : On the 31st March, 1971, we allowed the defendant's appeal and reversed the trial Court's judgment in the following terms :

" This is an appeal by the defendant against the judgment of the District Court of Nicosia in Action No.

1906/67 whereby he was adjudged to pay to the plaintiff-respondent in the appeal—the sum of £588.255 mils and costs by way of contribution for loss which resulted from trading in potatoes.

The appeal was argued mainly on the ground that the findings of the Court are not supported by the evidence and that the reasons for such findings are not correct.

We have considered this case very carefully and we are unanimously of opinion that the evidence considered as a whole shows that the complaints of the appellant against the trial Court's findings are justified ; and that such findings should be set aside.

In the result this appeal will be allowed and the judgment of the trial Court reversed. There will be judgment dismissing the action with costs. The respondent will also pay the costs in the appeal.

The reasons which led the Court to this decision will be given later."

We now proceed to give the reasons for our judgment.

By this action which was instituted by the respondent on the 15th May, 1967, he claimed £892 against the appellant by way of contribution for loss which resulted from trading in potatoes alleged by the respondent to have been carried out as a joint adventure by the parties on the basis of an oral agreement.

The appellant by his defence denied absolutely the existence of any agreement in relation to trading in potatoes and alleged that the agreement between the parties was with regard to the packing of potatoes on a partnership basis. He further alleged that in any case their original agreement was substituted by a new one expressed in writing on the 3rd May, 1963.

The version of the respondent, as set out in the trial Court's judgment, is briefly as follows : That on or about the 21st April, 1963, he went to Potamos-tou-Kampou in order to buy the potato crop of the village which was offered for sale by a committee appointed for this purpose. There he met the appellant who was there for the same purpose and as there were no other prospective purchasers they agreed, on the proposal of the appellant, to buy the potatoes together at 35 mils per oke. The Committee

considered their offer low and told them that they would consult with the producers and let them know their decision later. On the following day four members of the committee went to the office of the appellant at Morphou and telephoned to the respondent to go there as well. The members of the committee explained to the litigants that they had gone to Famagusta in order to try and sell the potatoes to merchants there, but as they could not find any higher offer they were prepared to sell to the litigants at 35 mils per oke. The agreement was concluded and on the following day the vendors started delivering potatoes at appellant's warehouse. The potatoes were packed there and the appellant was keeping the accounts whilst respondent was making the payments. No plans were made as to the disposal of the potatoes at the time but later there was an offer from Michalakis Drakos Co. Ltd. to the respondent for the export of potatoes to the U.K. on a partnership basis. This the respondent conveyed to the appellant who also agreed and potatoes packed in cases were exported to the U.K. on a joint venture with Michalakis Drakos on the one side and the litigants on the other. Packed potatoes were also sold to Thomaides Bros. (Cyprus) Ltd., but according to the respondent there is no dispute in respect of those as the litigants settled their accounts on the 3rd May, 1963, by signing a new agreement.

The sale of the potatoes exported to the U.K. in partnership with Drakos Co. Ltd. resulted in a loss and respondent's claim is for contribution by the appellant as it was the respondent who was making the payments and actually suffered the loss.

The version of the appellant on the other hand was that the arrangement between him and the respondent at Potamostou-Kampou was for each of them to tender the same price for half the quantity of the potatoes available for sale so that they would purchase half the quantity each. That he, himself was acting on behalf of some merchants of Famagusta and made it clear to the vendors that his offer was good for that day only. The committee informed the litigants that they could not reply to them before they made inquiries at Famagusta regarding the prices of potatoes. That after the offers were made the respondent proposed to him to pack all the potatoes to be purchased by both of them at appellant's warehouse on a partnership basis, charge the merchants 275 mils per case and share any profits or losses. That one or two days later the respondent purchased the potatoes himself and asked the appellant if he

was still willing to do the packing at his (appellant's) warehouse on a partnership basis to which he agreed and as from the following day the delivery and packing of the potatoes commenced.

The trial Court heard in all eleven witnesses, including the parties, five for the plaintiff-respondent and six for the appellant-defendant. After dealing with the evidence in their judgment the Court say that they prefer the version of the plaintiff, *inter alia*, because it " makes better sense than that of the defendant ". In this respect the judgment reads :

> " As regards the nature of the joint venture, the defendant's version makes, as we have already stated, no sense and we are not satisfied as to why the plaintiff made such an offer to the defendant. The plaintiff had his own warehouse and packing machinery and it is in evidence that if it was full at the time, he could improvise an extension for the packing of potatoes and in fact such a shed was constructed later on by D.W. 5. This last-mentioned witness stated that the plaintiff's warehouse is bigger than that of the defendant.
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> We find also that it is more probable that the parties agreed to dispose of packed potatoes than just share the profits or losses out of the packing. They were buying the potatoes and it is not denied by the defendant, that this joint venture, as he alleges to be, was extended to and included potatoes bought by himself as well."

And the Court make, also, this finding :

> " We find as a fact, that the joint venture was for the disposal of packed potatoes and not just for the packing, as the defendant alleges and that the defendant knew and or consented and or agreed to the export of potatoes jointly with Drakos. It is not disputed that the plaintiff agreed to make the payments and the defendant to keep the accounts of the joint venture—and the detailed accounts so kept by the defendant is an indication that his interest in the joint venture went far beyond the mere packing."

As a result there was judgment in favour of the plaintiff for the sum of £588.255 mils and costs from which the defendant now appeals.

The main ground upon which the appeal was argued was that the findings of the Court are not supported by the evidence and that the reasons for such findings are not correct.

Learned counsel for the appellant has referred this Court to a number of points which, he submitted, would justify interference with the judgment of the trial Court. We consider it necessary to touch only some of the points raised.

It is an undisputed fact that on the 3rd May, 1963, the parties signed the agreement contained in *exhibit* 9 in substitution for their original agreement. This agreement reads as follows :

> «Διὰ τῆς παρούσης μας συνεφωνήσαμεν ὅπως ὅλη ἡ ἐργασία ἡ ὁποία διεξάγεται εἰς τὴν Ἀποθήκην τοῦ κ. Χρ. Βασιλειάδη εἶναι διὰ λογαριασμὸν τοῦ κ. Φρίξου Κωνσταντίνου.
>
> Ἐπίσης ὅλα τὰ ὑλικά, ἐργατικὰ καὶ ὅτι ἄλλα ἔξοδα σχετίζονται μὲ τὴν ἐργασίαν τῆς συσκευασίας τῶν πατατῶν εὐθύνεται ὁ Φρῖξος Κωνσταντίνου. Ὡς ἀμοιβὴν γιὰ τὸ ἐνοίκιον τῆς ἀποθήκης ἀναλαμβάνει ὁ κ. Φρῖξος Κωνσταντίνου νὰ πληρώνῃ στὸν κ. Χρ. Βασιλειάδην πρὸς 20 (εἴκοσι) μίλς τὸ κιβώτιον ἢ 10/- (δέκα σελίνια) τὸν τόνον σὲ σάκκους ὅσες γίνουν. Ἂν ὁ κ. Χρ. Βασιλειάδης θελήσῃ νὰ χρησιμοποιήσῃ μέρος τῆς Ἀποθήκης του θὰ δικαιοῦται*.»

It is the case for the appellant that the trial Court did not appreciate the effect of *exhibit* 9. It was submitted that this agreement was applicable with effect from the beginning of their co-operation *i.e.* the 20th April, 1963, to the end of the season and not as from the 3rd May. We are in full agreement with learned counsel's for the appellant submission. In our view the very wording of this document indicates that the intention was that it should apply as from the beginning of the co-operation between the parties. This view is supported by certain other facts. For instance on the 18th May, 1963, the respondent paid to the appellant the sum of £277, being expenses incurred by the appellant himself for the purchase of packing materials prior to the signing of *exhibit* 9, and at a time when it was clear that the potatoes exported in partnership with Drakos would result in a loss. Such payment was in our view obviously made to put matters right under the terms of the parties' agreement as expressed in *exhibit* 9. Another fact which supports this view is that although between the 23rd April

* An English translation of this text is to be found at p. 359 post.

and the 3rd May there was a sale of 3027 cases of potatoes to Thomaides Bros. (Cyprus) Ltd. which the Court finds produced a profit and which the respondent alleged were included in the joint venture of trading in potatoes, there is not the slightest evidence that part of this profit was either paid to the appellant or that he was credited as against the loss which resulted from the sale of potatoes exported jointly with Drakos and Co. Ltd.

Furthermore on the 23rd September, 1963, the appellant instituted action No. 3779/63 against the respondent claiming damages for breach of the agreement of the 3rd May, 1963. The damages claimed were calculated at the rates set out in the said agreement and covered the period 20th April to 14th June, 1963. The respondent (defendant in the action) by his defence alleged as per his present action and counter-claimed. On the 22nd September, 1967, when the action came up for hearing the respondent submitted to judgment for the sum of £590 and £90 costs reserving his rights in the present action.

It was also pointed out by counsel for the appellant, when dealing with the issue of credibility, that while the trial Court accepted respondent's version on the question of the nature of the joint venture, it rejected his evidence both on the question of the amount of damages and on the question of the cost of packing and accepted appellant's version ; that the respondent falsely tried to include 2534 cases in the number of cases shipped from Famagusta before the 3rd May, 1963, and that the trial Court rejecting his evidence on this point accepted the contention of the appellant and found that the said cases were actually exported on the 7th May, 1963.

One of the reasons why the trial Court preferred the version of the plaintiff to that of the defendant with regard to the nature of the joint venture *i.e.* that the agreement was in connection with the sale of potatoes and not merely for the packing, was the fact that the defendant kept detailed accounts which were not confined merely to the packing of potatoes and this they thought " is an indication that his interest in the joint venture went far beyond the mere packing ". This, counsel for the appellant submitted, rightly in our view, was not a safe or reasonable conclusion because a glance at *exhibit* 11 will show that the defendant continued to keep exactly the same accounts after the 3rd May when admittedly the new agreement came into force.

In support of his case counsel for the appellant cited the case of *Sophocles Mamas* v. *'Arma' Tyres* (1966) 1 C.L.R. p. 158.

Counsel for the respondent in a short address dealt specifically with only two of the points raised by counsel for the appellant *i.e.* the question of the 2534 cases of potatoes with regard to the time of the shipment of which the trial Court believed the contention of the appellant that they were shipped on the 7th May, 1963, and disbelieved respondent's evidence who insisted that they were shipped prior to the 3rd May, and also with the question of the construction of *exhibit* 9.

With regard to the first of these points he said that the respondent was not quite sure when these potatoes were sent to Famagusta for shipment and he was making a mistake when he said in evidence that they were shipped prior to the 3rd May. With regard to the second point he argued that the trial Court say in their judgment that the new agreement (*exhibit* 9) relates to the period after the 3rd May, 1963, and does not throw any light on the nature of the co-operation between the parties prior to that date ; and that there is no justification for interfering with such finding. All other points raised, counsel said, mostly go to credibility and the arguments advanced on the part of the appellant do not justify interference with the findings of the trial Court. In support of his argument counsel cited the case of *Dafnis Thomaides & Co. Ltd.* v. *Lefkaritis Brothers* (1965) 1 C.L.R., p. 20.

The principles upon which the Court of Appeal acts where findings of fact and inferences drawn therefrom are concerned, are now well settled and have been repeated in a great number of cases. Apart from the two cases cited by counsel we might, perhaps, refer to the case of *Kyriacou* v. *Aristotelous* (1970) I C.L.R. 172 in which reference is made to a number of other cases on the point.

Put briefly, an Appellate Court will not disturb the findings of the trial Court unless satisfied that the reasoning behind such findings, is unsatisfactory, or that they are not warranted by the evidence, considered as a whole.

Having given this case our best consideration and with the above principles in mind, we are satisfied, in the light of the arguments advanced, as we have already stated in the opening paragraph, that the evidence considered as a

whole shows that the complaints of the appellant against the trial Court's findings are justified and that such findings should be set aside.

For the above reasons we have given judgment in this case in the terms stated.

Appeal allowed with costs.

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*This is an English translation of the Greek text, appearing at p. 356 *ante*, as prepared by the Registry.

"We have hereby agreed that all the work which is being carried out in the warehouse of Mr. Chr. Vassiliades is being carried out for the account of Mr. Frixos Constantinou.

Also Mr. Frixos Constantinou is liable for all materials, labour expenses and for all other expenses incidental to the work of packing of potatoes. As remuneration for the rent of the warehouse Mr. Frixos Constantinou undertakes to pay Mr. Chr. Vassiliades at 20 (twenty) mils per case or 10/- (ten shillings) per ton in sacks, whatever will be the amount. If Mr. Chr. Vassiliades wishes to use part of his warehouse he will be entitled to do so."