IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

SAID GALIP,

Applicant,

and

1. THE MINISTER OF INTERIOR,
2. THE DIRECTOR OF THE DEPARTMENT OF LANDS AND SURVEYS,

Respondents.

(*Case No.* 226/70).

Recourse under Article 146 *of the Constitution—" Act" or " decision" in the sense of Article* 146.1*—Which can be made the subject matter of a recourse under that Article—Sale of mortgaged property by public auction—Fixing a reserve price under the Immovable Property (Restriction of Sales) Law, Cap.* 223 *and the Immovable Property (Transfer and Mortgage) Law,* 1965 (*Law* 9/1965)*—An action aimed at serving a public purpose and, therefore, an " act" or " decision" in the realm of public law and within the ambit of the said Article* 146*—A recourse thereunder, therefore, lies against such decision—Cf. proviso to section* 42 (1) *of the said Law* 9/1965.

Sale of mortgaged property—Fixing a reserve price—A decision in the realm of public law and as such within the ambit of Article 146.1 *of the Constitution—See further* supra.

Immovable Property—Mortgaged property—Sale of, by public auction —Fixing reserve price—An action in the realm of public law— See further supra.

Mortgaged property—Sale of such property by public auction—Fixing a reserve price—Matter within the ambit of Article 146 *of the Constitution—And which can be challenged by a recourse under that Article—See further* supra.

Public law—Acts or decisions in the realm of public law—Which alone can be made the subject of a recourse under Article 146 *of the Constitution—See* supra.

By this recourse the applicant seeks to challenge the validity of the decision of the respondent Director of the Department of Lands and Surveys whereby the latter fixed a certain amount as the reserve price at the forced sale of mortgaged property of the applicant by public auction under the provisions of the relevant Laws (*supra*). On a preliminary point taken by counsel for the respondent that the fixing of such reserve price is a matter of civil law and, therefore, it cannot be challenged by a recourse under Article 146 of the Constitution, the Court held that the fixing of the reserve price is aiming at a public purpose and, consequently, it is within the ambit of Article 146.1 of the Constitution as being an action in the realm of public law.

Cases referred to:

Christodoulou v. *The Republic* (1970) 3 C.L.R. 377;

Cyprus Industrial and Mining Co. Ltd. (No. 1) v. *The Republic* (1966) 3 C.L.R. 467, at p. 472;

Valana and *The Republic*, 3 R.S.C.C. 91;

Charalambides and *The Republic*, 4 R.S.C.C. 24.

Recourse.

Recourse against the reserved price fixed by respondent No. 1 in relation to the sale, in default of payment, of mortgaged properties of applicant.

A. Emilianides, for the applicant.

L. Loucaides, Senior Counsel of the Republic, for the respondent.

K. Riza, for the Cyprus Turkish Teachers' Credit and Savings Bank Ltd., for the interested party.

Cur. adv. vult.

The following decision was delivered by:–

TRIANTAFYLLIDES, P.: By this recourse the applicant complains against the reserve price fixed by the respondent Director of the Department of Lands and Surveys—(who is subordinate to the respondent Minister of Interior)—in relation to the sale, in default of payment, of mortgaged properties of applicant.

It is sought, also, by this recourse, to prevent the said sale, which, however, does not appear, from the material before me, to have been fixed as yet.

The immovable properties concerned of the applicant are at Lefca and it is contended that the reserve price, as fixed, is too low; and that the sale cannot be proceeded with properly in view of the situation prevailing at present in the area of Lefca.

The properties are mortgaged to the interested party and the reserve price was fixed after the machinery for the sale was set in motion by steps taken by such party under the Immovable Property (Transfer and Mortgage) Law, 1965 (9/65).

Counsel for the respondents raised a preliminary objection to the effect that no recourse, under Article 146 of the Constitution, lies against the decision of respondent 2 regarding the fixing of the reserve price, because it is not a matter in the domain of public law, inasmuch as it relates only to civil law rights of the parties concerned; he cited in this connection the cases of *Valana* and *The Republic*, 3 R.S.C.C. 91, *Charalambides* and *The Republic*, 4 R.S.C.C. 24, and *Christodoulou* v. *The Republic* (1970) 3 C.L.R. 377.

Counsel for the interested party has adopted the above submission of counsel for the respondents.

Counsel for applicant has, on the other hand, contended that the said decision of respondent 2 is a matter in the domain of public law as it was taken under legislation aiming primarily at ensuring that mortgaged properties are to be sold under certain safeguards, in the public interest.

The legislation in question is Law 9/65 (see Part VI) and the Immovable Property (Restriction of Sales) Law, Cap. 223.

Some time ago, in the case of *Cyprus Industrial and Mining Co. Ltd. (No. 1)* v. *The Republic* (1966) 3 C.L.R. 467, at p. 472, this Court stated:-

> " It is, thus, necessary in the present Case, to decide whether the fixing of a reserve price, under sections 4 and 6 of Cap. 223, is action intended to serve primarily a public purpose, or action intended primarily to regulate civil law rights and to ensure the carrying out of the sale by auction

of the mortgaged property of applicants in a proper manner; only in the former case it would be an 'act' or 'decision' in the sense of paragraph 1 of Article 146 and against which this recourse would lie.

It is, first of all, necessary to bear in mind that once an act or decision emanates from an organ of administration then, as a rule, it is an 'act' or 'decision' within the ambit of a revisional jurisdiction such as the one laid down under Article 146 (vide Conclusions from the Jurisprudence of the Greek Council of State 1929–1959 p. 228).

As the fixing of the reserve price in the present Case has, no doubt, been made by an organ of administration, it follows that it should be looked upon, to begin with, as an 'act' or 'decision' within Article 146, unless it is established that it only amounts to action in the domain of private law, thus being outside the sphere of administration and consequently outside also the ambit of Article 146.

Looking at the provisions of Cap. 223 as a whole—and particularly at its long title which reads 'A law to restrict forced sales of immovable property in certain cases', and at the provisions of section 11 thereof, which renders the Law applicable to rural areas—it does appear that the fixing of a reserve price in cases of a public sale by auction of mortgaged property is intended to ensure that rural properties shall not be allowed to be so sold at prices below their proper values. It is thus a measure intended to protect the rural community of Cyprus, by way of public policy; it is noteworthy in this respect that under Cap. 223 (see sections 4 and 7 thereof) a reserve price may be fixed even where a sale of immovable property has been ordered by a Court and such Court has not proceeded to fix itself a reserve price (as under section 40 of the Civil Procedure Law, Cap. 6).

I am, thus, of the opinion that the fixing of a reserve price under Cap. 223 is action which is primarily intended to serve a public purpose and, therefore, an 'act' or 'decision' in the realm of public law, and within the ambit of Article 146 of the Constitution.

An analogous case which may be usefully referred to is the case of *Eraclidou* and *The Hellenic Mining Co. Ltd.*

(3 R.S.C.C. p. 153) where it was held that the decision of the Compensation Officer to allow or disallow a claim under the Pneumoconiosis (Compensation) Law (Law 11/60) is the decision of a person exercising administrative authority in the sense of paragraph 1 of Article 146, because he is a 'public officer whose functions have as their primary object the promotion of a public purpose' and not merely the regulation of private rights. It was so held in view of the fact that the scheme for compensation of the victims of pneumoconiosis is 'an expression of governmental action and policy in a matter of vital public importance'. I likewise regard the existence of provisions, such as the relevant provisions of Cap. 223, as an expression of governmental action and policy in a matter of vital public importance viz. the protection of rural debtors against possible exploitation by their creditors".

The mortgaged properties of the applicant, in the present case, are properties in a rural area; in other words, they are not in one of the urban areas to which, because of its section 11, Cap. 223 was inapplicable, except with the consent of the creditor concerned. I cannot agree with the view that the repeal of section 11 of Cap. 223, by section 8 of the Immovable Property (Restriction of Sales) (Amendment) Law, 1966 (60/66), with the consequence that the distinction—in applying Cap. 223—between properties in rural and properties in urban areas was abolished, has resulted in the fixing of a reserve price not being any longer action primarily intended to serve a public purpose; in my opinion the abolition of the said distinction extended the scope of serving such public purpose, by including therein properties in urban areas as well.

My view that the fixing of a reserve price primarily aims at serving a public purpose and, therefore, is administrative action in the realm of public law, is strengthened by the proviso to section 42 (1) of Law 9/65, which reads as follows:-

"Νοεῖται ὅτι ὁσάκις τὸ τοιοῦτο ἀκίνητον βαρύνεται διὰ τῆς πληρωμῆς οἱουδήποτε τέλους, φόρου ἢ δικαιώματος, ὅπερ δυνάμει τῶν διατάξεων οἱουδήποτε ἐκάστοτε ἐν ἰσχύϊ νόμου βαρύνει κατὰ πρῶτον λόγον τὸ τοιοῦτο ἀκίνητον ἱκανοποιούμενον κατὰ προτεραιότητα ἔναντι παντὸς ἑτέρου βάρους ἐπὶ τοῦ αὐτοῦ ἀκινήτου, ὁ Διευθυντὴς διατάσσει, τηρουμένων τῶν διατάξεων τοῦ περὶ 'Ακινήτου 'Ιδιοκτησίας (Περιορισμὸς Πωλήσεων) Νόμου, ὅπως μὴ διενεργηθῇ ἡ πώ-

λησις τοῦ ὡς εἴρηται ἀκινήτου ἐκτὸς ἐὰν τὸ προσφερόμενον διὰ τοῦτο ποσὸν μετὰ τὴν ἀφαίρεσιν τῶν δικαιωμάτων τοῦ δημοπράτου καὶ τῶν δαπανῶν τῆς πωλήσεως εἶναι οὐχὶ ἔλασσον ἐλαχίστης τιμῆς ἴσης πρὸς τὸ ποσὸν τοῦ τέλους, φόρου ἢ, ἀναλόγως τῆς περιπτώσεως, δικαιώματος, διὰ τῆς πληρωμῆς οὗτινος βαρύνεται τὸ τοιοῦτο ἀκίνητον".

("Provided that where such immovable property is charged with the payment of any fee, tax, rate or duty which, under the provisions of any law in force for the time being, is a first charge on such immovable property in priority to any other charge thereon, the Director shall, subject to the provisions of the Immovable Property (Restriction of Sales) Law, direct that the immovable property aforesaid shall not be sold unless the amount bid for it is, after deduction of the auctioneer's fee and of any charges or expenses of the sale, not less than a reserve price which shall be equal to the amount of the fee, tax, rate or duty, as the case may be, with the payment of which such immovable property is charged").

For the foregoing reasons I cannot accept as correct the preliminary objection of counsel for the respondents that this recourse could not be made, under Article 146, in respect of the decision of respondent 2, by means of which a reserve price, for the purposes of the sale by auction of the mortgaged properties of the applicant, was fixed.

Another preliminary objection which has been raised by counsel for the respondents, and adopted by counsel for the interested party, is that the applicant is not entitled to the reliefs claimed by this recourse because they cannot be granted under Article 146:

It is correct that in drafting the motion for relief in this recourse the relevant wording of Article 146 has not been used; but it is obvious that by paragraph (1) of the motion for relief the applicant seeks the annulment of the decision of respondent 2, by which the reserve price was fixed; and this is an order that can definitely be made under Article 146.

Paragraphs (2) and (4) in the motion for relief relate to the sale of the properties and what is sought thereby cannot, in any case, be dealt with in this recourse because there is nothing to show that before the filing of the recourse—or even up to

the hearing of the case in relation to the preliminary objections to which this Decision relates—any decision about fixing the sale, or proceeding with it, on a particular date had been taken by respondents.

Paragraph (3) in the motion for relief is nothing more than an argument in support of paragraph (1) and should be treated as such.

For all the reasons set out above this recourse will proceed to a hearing as regards the relief which is, in substance, sought by paragraph (1) in the motion for relief, namely the annulment of the decision regarding the reserve price.

Order accordingly.