1975
Oct. 31

GENERAL ENGINEERING CO. LTD.

v.

SEDDON ATKINSON VEHICLES LTD.

[TRIANTAFYLLIDES, P., STAVRINIDES, HADJIANASTASSIOU, JJ.]

GENERAL ENGINEERING CO. LTD.,

Appellants-Plaintiffs,

v

SEDDON ATKINSON VEHICLES LTD.,

Respondents-Defendants.

(Civil Appeal No. 5387).

Civil Procedure—Affidavit sworn in England—Properly accepted by trial Court—Rule 17 of Order 39 of the Civil Procedure Rules and rule 3 of the Rules of Court (Transitional Provisions) 1960.

Constitutional Law—Affidavit—Sworn in Great Britain, Ireland or the Channel Islands—Provisions of rule 17 (first part) of Order 39 of the Civil Procedure Rules to the effect that such an affidavit is receivable as valid not inconsistent with our Constitution, and, in particular, with the status of Cyprus as an independent State—Article 188 of the Constitution.

Civil Procedure—Writ of summons—Striking out of—Practice of fixing a time-limit within which to apply for—Objects of—Omission of a defendant to apply within the prescribed time raises only a presumption of waiver of the objection to the jurisdiction—Extension not being necessary for the purpose of filing an application to strike out the writ of summons—No irregularity in a matter of substance by granting such extension of time on ex parte *applications not supported by affidavit—In any event, an irregularity, in this respect, could be treated under Order 64 of the Civil Procedure Rules, as being of no real significance.*

By means of an application supported by affidavit, which was sworn in England, the respondents-defendants sought to set aside the writ of summons and all subsequent proceedings in the action on the ground of want of jurisdiction. The appellants-plaintiffs took objection on the ground that the affidavit in support of the application was invalid as it was not sworn in accordance

with rule 7 of Order 39 of our Civil Procedure Rules, which provides that an affidavit may be sworn before a judge or Registrar of any Court; "Court" being a Court in Cyprus.

Respondents' contention before the Court below was that the said affidavit was validly sworn before a Commissioner for Oaths in England in view of rule 17 of Order 39 of the Civil Procedure rules which so far as relevant reads as follows:

"Any affidavit may be sworn or taken in Great Britain before any Court, judge, notary public, or person lawfully authorised to administer oaths and the judges and other officers of the Cyprus Courts shall take judicial notice of the seal or signature as the case may be of any such Court, judge, notary public, person appended or subscribed to any such affidavit and shall allow the same as regards its form to be used in a Cyprus Court without further proof ".

The trial Court upheld the respondents' contention, and it did not accept a submission of counsel for the appellants that, in view of Article 188 of the Constitution, rule 17, above, ceased to be operative after Cyprus became an independent State on August 16, 1960.

Hence, the present appeal whereby the appellants complain further that respondents' said application was made out of time, in that an extension of time for the purposes was not duly obtained after the initially set, for this purpose, time-limit had expired.

The facts relevant to this latter complaint are as follows: The respondents applied on May 16, 1974, for an order enabling them to enter an appearance under protest; an order allowing them to do so was made on that same day, on condition that if an application to set aside the writ of summons was not filed within 40 days then the conditional appearance would be treated as unconditional.

On June 17, 1974, shortly before the expiration of the said 40 days' period, the respondents applied *ex*

parte for an extension of time up to July 25, 1974, and the trial Court granted their application. Subsequently, on November 2, 1974 the respondents applied for a further extension till November 6, 1974 and the extension having been granted, the application to set aside the writ of summons was filed.

It has been argued by the appellants in this respect that the extensions of time were granted *ex parte* irregularly, especially as they were not supported on each occasion by an affidavit, but the grounds on which they were made were stated in the applications themselves.

Relevant to the issue of the validity of the affidavit is rule 3 of the Rules of Court (Transitional Provisions) 1960, which were made on December 12, 1960. By means of this rule the Civil Procedure Rules were re-enacted, and thus continued to be in force, subject to their being interpreted and applied with such modifications as might be necessary in order to secure compliance with the provisions of the Constitution.

Held, 1. It is not inconsistent with our Constitution, and, in particular, with the status of Cyprus as an independent State, to continue to have in our Civil Procedure Rules a provision, such as that in the first part of rule 17, to the effect that an affidavit is receivable as valid if sworn in Great Britain, Ireland or the Channel Islands (in which, of course, is included England). This is nothing more than a provision affording litigation facilities as between two equal, sovereign and independent countries. (Cf. *Gohoho* v. *Guinea Press Limited and Another* [1962] 3 All E.R. 785).

2. In the light of the foregoing, we find, when we apply rule 17 of Order 39, in conjunction with the said rule 3 of the Rules of Court of 1960, that the said affidavit which was sworn in England has been properly accepted by the trial Court and should not have been struck out as contended by the appellants.

3. There has not actually occurred any irregularity in a matter of substance in relation to the filing of the application to set aside the writ of summons; and, in any event, an irregularity, in this respect, could be treated, under Order 64 of the Civil Procedure Rules,

as being of no real significance. The basic reason for reaching such a view is the fact that, strictly speaking, no extension was necessary for the purpose of filing the said application.

4. The practice of fixing a time-limit within which to apply for striking out the writ of summons is to prevent the hands of a Court from being tied up indefinitely by a formal protest in the form of a conditional appearance, and the omission of a defendant to apply within the prescribed time raises only a presumption of waiver of the objection to the jurisdiction. (Dicta of Fletcher Moulton L.J. in *Keymer* v. *Reddy* [1912] 1 K.B. 215 at p. 220 followed).

Appeal dismissed.

Cases referred to :

Gohoho v. *Guinea Press Limited and Another* [1962] 3 All E.R. 785;

Keymer v. *Reddy* [1912] 1 K.B. 215

Appeal.

Appeal by plaintiffs against the order of the District Court of Nicosia (Stavrinakis, P.D.C. and Papadopoulos, S.D.J.) dated the 4th February, 1975 (Action No. 2365/74) by virtue of which the Court refused to strike out an affidavit sworn in England before a Commissioner for Oaths and which was filed in support of an application by means of which the defendants were seeking to set aside the writ of summons and all subsequent proceedings in the action on the ground of want of jurisdiction of the Cyprus Courts to deal with it.

A. Triantafyllides, for the appellants.

R. Stavrakis, for the respondents.

Cur. adv vult

The judgment of the Court was delivered by :-

TRIANTAFYLLIDES, P. : The appellants, who are the plaintiffs in Action No. 2365/74 before the District Court of Nicosia, have appealed against the refusal of the said Court to strike out an affidavit dated October 17, 1974, which was sworn in England, by a certain Panayiotis

John Verdellis, before a Commissioner for Oaths, and which was filed in support of an application by means of which the respondents (the defendants in the said action) were seeking to set aside the writ of summons and all subsequent proceedings in the action, on the ground of want of jurisdiction of the Cyprus Courts to deal with it.

The appellants complain, further, that such application was wrongly treated by the trial Court as having been filed within the appropriate, for the purpose of taking such a step, time.

It is common ground that the said affidavit was not sworn in accordance with rule 7 of Order 39 of our Civil Procedure Rules, which provides that an affidavit may be sworn before a judge or registrar of any Court; "Court" being a Court in Cyprus.

It was contended before the Court below that the affidavit in question was validly sworn before a Commissioner for Oaths in England in view of rule 17 of Order 39 of the Civil Procedure Rules, which reads as follows :-

> "Any affidavit, declaration or affirmation may be sworn or taken in Great Britain, Ireland or the Channel Islands or in any British Colony, Possession, Protectorate or Mandated Territory or other place under the dominion of Her Majesty in foreign parts before any Court, judge, notary public, or person lawfully authorized to administer oaths in any such Colony, Possession, Protectorate, Mandated Territory or other place under the dominion of Her Majesty, or may be sworn or taken before any of Her Majesty's Consuls or Vice-Consuls in any foreign parts outside Her Majesty's Dominions, and the judges and other officers of the Cyprus Courts shall take judicial notice of the seal or signature as the case may be of any such Court, judge, notary public, person, Consul or Vice-Consul appended or subscribed to any such affidavit, declaration or affirmation or to any other document, and shall allow the same as regards its form to be used in a Cyprus Court without further proof but subject always as regards admissibility of its contents to the rules of evidence."

The trial Court upheld this contention, and it did not accept a submission of counsel for the appellants that, in view of Article 188 of the Constitution, rule 17, above, ceased to be operative after Cyprus became an independent State on August 16, 1960.

We shall deal, first, with this issue:

By means of rule 3 of the Rules of Court (Transitional Provisions) 1960, which were made on December 12, 1960, and were published on December 17, 1960 (see Official Gazette, Second Supplement, Not. 5) the Civil Procedure Rules were re-enacted, and thus continued to be in force, subject to their being interpreted and applied with such modifications as might be necessary in order to secure compliance with the provisions of the Constitution.

We can take judicial notice of the fact that since August 16, 1960, Cyprus became an independent State (see, *inter alia,* Article 1 of the Constitution); and that it is, also, a member of the British Commonwealth.

What we have been asked to determine in this appeal is whether the supervining of the independence of Cyprus is a development which entails the application of the aforesaid rule 17 in such a modified manner as to lead to a finding that the affidavit in question is invalid, because for the purposes of such rule the United Kingdom has to be regarded as a foreign country, notwithstanding the fact that it is, like Cyprus, a member of the British Commonwealth.

We do not agree with the trial Court that some help is to be derived from the fact that in Part II of Annex F to the Treaty of Establishment between the United Kingdom, Greece, Turkey and the Republic of Cyprus, of 1960, it is stated—(and repeated in Article 170.1 of the Constitution)—that the Republic of Cyprus shall, by agreement on appropriate terms, accord most-favoured-nation treatment to the United Kingdom, Greece and Turkey in connexion with all agreements whatever their nature. Such a consideration is not really relevant to the matter under examination by us in these proceedings; as it appears from Oppenheim's International Law, 8th ed., vol. 1, p. 971, paragraph 580, Schwarzenberger's

International Law and Order (1971) p. 129, and O'Connell's International Law, 2nd ed., vol. 1, p. 248, a most-favoured-nation clause is a feature of international law mainly in the commercial field; and, in any event, as no specifically relevant agreement was concluded, by virtue of the operation of the most-favoured-nation clause, we fail to see how the validity of the affidavit under scrutiny in this case could be treated as saved merely because of the existence of such a clause.

Also, the Convention Abolishing the Requirement for Legalization of Foreign Public Documents (Ratification) Law, 1972 (Law 50/72), as amended by the Convention Abolishing the Requirement for Legalization of Foreign Public Documents (Ratification) (Amendment) Law, 1972 (Law 91/72)—which was not cited before the Court below, but was referred to during the hearing of this appeal—does not provide the answer to the problem before us, because none of its provisions appears to be applicable to the affidavit concerned.

In England the Rules of the Supreme Court (see the Supreme Court Practice (1973) vol. 1, p. 609) have been appropriately amended so as to take into account the new realities created through the development of relations between the members of the British Commonwealth; thus, it is provided by rule 12 of Order 41 that "A document purporting to have affixed or impressed thereon or subscribed thereto the seal or signature of a Court, judge, notary public or person having authority to administer oaths in a part of the Commonwealth outside England and Wales in testimony of an affidavit being taken before it or him in that part shall be admitted in evidence without proof of the seal or signature being the seal or signature of that Court, judge, notary public or person".

In the absence of any comparable amendment of our own Civil Procedure Rules—(and, indeed, such an amendment does appear to be desirable)—we cannot treat the membership by Cyprus of the Commonwealth as *ipso facto* entitling the Cyprus Courts to apply in an accordingly modified form the Civil Procedure Rules (and in particular rule 17 of Order 39, with which we are concerned) because the membership by Cyprus of the Com-

monwealth is not an arrangement having constitutional force.

We revert now to the application, in the circumstances of the present case, of the said rule 17: It is to be noted that it relates, in effect, to three different categories of documents executed outside Cyprus; first, it renders receivable, as validly sworn, an affidavit, declaration or affirmation sworn or taken in Great Britain, Ireland or the Channel Islands; secondly, it makes similar provision in relation to an affidavit, declaration or affirmation in any British Colony, Possession, Protectorate or Mandated Territory or other place under the dominion of "Her Majesty in foreign parts", and it is only in relation to this second category of documents that it is mentioned that the oath is to be taken before a Court, judge, notary public, or otherwise lawfully authorised person; and, thirdly, it covers likewise affidavits, declarations or affirmations sworn in "any foreign parts" before a Consul or Vice-Consul.

We leave open the question as to what would have been the position now, when Cyprus is an independent State, if the affidavit before us had belonged to either of the latter two, out of the three aforementioned, categories of documents. We are only concerned with the first of such categories, to which this affidavit clearly belongs; and we find that it is not inconsistent with our Constitution, and, in particular, with the status of Cyprus as an independent State, to continue to have in our Civil Procedure Rules a provision, such as that in the first part of rule 17, to the effect that an affidavit is receivable as valid if sworn in Great Britain, Ireland or the Channel Islands (in which, of course, is included England). This is nothing more than a provision affording litigation facilities as between two equal, sovereign and independent countries. In this connection we might usefully refer, by way of analogy, to *Gohoho* v. *Guinea Press Limited and Another* [1962] 3 All E.R. 785, where it was held, because of the Ghana (Consequential Provision) Act, 1960, which was enacted in England, that Ghana, although being an independent Republic within the British Commonwealth, was to be treated as a "British Dominion" for the purposes of the service of a writ of summons.

In the light, therefore, of the foregoing, we find, when we apply in the present case rule 17 of Order 39, in conjunction with rule 3 of the already referred to Rules of Court of 1960, that the affidavit which was sworn in England by P. Verdellis has been properly accepted by the trial Court and should not have been struck out as contended by the appellants.

There remains to deal, next, with another argument advanced by counsel for the appellants, namely that the application by the respondents to strike out the writ of summons was made out of time, in that an extension of time for the purpose was not duly obtained after the initially set, for this purpose, time-limit had expired.

As it appears from the material before us, the respondents applied on May 16, 1974, for an order enabling them to enter an appearance under protest; on that same date an order was made allowing them to do so, on condition that if an application to set aside the writ of summons was not filed within 40 days then the conditional appearance would be treated as unconditional.

On June 17, 1974, shortly before the expiration of the said 40 days' period, the respondents applied *ex parte* for an extension of time up to July 25, 1974, and the trial Court granted their application. Subsequently, on November 2, 1974, the respondents applied for a further extension till November 6, 1974; the extension having been granted, the application to set aside the writ of summons was filed.

It has been argued that the extensions of time were granted *ex parte* irregularly, especially as they were not supported on each occasion by an affidavit, but the grounds on which they were made were stated in the applications themselves.

We do not think that there has actually occurred any irregularity in a matter of substance in relation to the filing of the application to set aside the writ of summons; and, in any event, an irregularity, in this respect, could be treated, under Order 64 of the Civil Procedure Rules, as being of no real significance. The basic reason for reaching such a view is the fact that, strictly speaking, no extension was necessary for the purpose of filing the

application to set aside the writ of summons. As it appears from *Keymer* v. *Reddy* [1912] 1 K.B. 215, the practice of fixing a time-limit within which to apply for striking out the writ of summons is to prevent the hands of a Court from being tied up indefinitely by a formal protest in the form of a conditional appearance, and the omission of a defendant to apply within the prescribed time raises only a presumption of waiver of the objection to the jurisdiction; Fletcher Moulton L.J. said the following (at p. 220):-

> "Now suppose a case in which an appearance is entered under protest. It is evident that such an appearance must be taken as an actual appearance unless the defendant with reasonable promptitude obtains an order setting aside the writs or it would be the means of imposing upon a plaintiff who has a good cause of action a great and unjustifiable delay in recovering his rights. Hence the practice has arisen that the Master indorses on the appearance a period of time during which the application to set aside the writ ought to be made. In my opinion that means that if the application is not made within that time it will be taken *prima facie* to be an abandonment of the conditional and limited character of the appearance so that the officials of the Court will be justified in treating it as an absolute appearance. Suppose the time is eight months and that this period has expired and a statement of claim has been delivered and the time has arrived at which in default of defence the plaintiff would have been entitled to sign judgment. Then in the ordinary course the officials of the Court will treat the appearance as if it was an unconditional appearance and the plaintiff will be entitled to sign judgment. Unless some limitation of that kind is put a mere conditional appearance would tie up their hands for ever. But that practice cannot limit the power of the Court to set aside the writ or the service, nor does it really limit the effect of the defendant's having entered an appearance under protest. Therefore if he has entered an appearance under protest, whether the time fixed by the Master for applying to set aside the writ has expired or not, and if he makes an

application to the Court to set aside the writ and the Court is of opinion that the delay in making that application does not shew an intention to abandon the protest, or an improper attempt to impede the administration of justice, it has the fullest power to give effect to that protest and to set aside the writ or the service."

In the present case it is quite obvious from the whole conduct of the respondents, including the aforesaid applications for extension of time and the reasons given for them, that they never waived their objection to the jurisdiction of the court below.

In the light of all the foregoing this appeal has, therefore, to be dismissed, with costs against the appellants.

Appeal dismissed with costs.