[TRIANTAFYLLIDES, P., STAVRINIDES, L. LOIZOU, HADJIANASTASSIOU, A. LOIZOU, MALACHTOS, JJ.]

1975
Mar. 6

DEMETRAKIS MELETIOU AND ANOTHER,

Appellants,

v.

THE DISTRICT LABOUR OFFICER, NICOSIA,

Respondent.

DEMETRAKIS MELETIOU AND ANOTHER v. DISTRICT LABOUR OFFICER NICOSIA

(Criminal Appeals Nos. 3344, 3345).

Constitutional Law—Constitutionality of legislation—Section 24(1) of the National Guard Law, 1964 (Law 20 of 1964) as amended by Laws 5 of 1966 and 70 of 1967—Its provisions requiring an employer to pay his own *social insurance contributions while an employee of his is serving in the National Guard are not offending, beyond reasonable doubt, against the principle of equality enshrined in Article 28.1 of the Constitution—But its provisions requiring the employer to pay the contributions which would be payable by such employee if he was actually in his employer's service, create, beyond any doubt, an arbitrary and objectively unreasonable distinction as between employers—They are unconstitutional as being contrary to the doctrine of equality safeguarded by the said Article 28.1.*

Equality—Article 28.1 of the Constitution—Principle of equality of treatment—Violated if a distinction has no objective and reasonable justification—Test for determining reasonableness of a classification.

National Guard Law, 1964 (Law 20 of 1964 as amended by Laws 5 of 1966 and 70 of 1967)—Constitutionality of section 24(1) of the Law.

The issue involved in these appeals was the constitutionality of section 24(1) (quoted in full in the judgment at p. 24 *post)* of the National Guard Law, 1964 (Law 20 of 1964 as amended by Laws 5 of 1966 and 70 of 1967).

In support of their appeal counsel relied *inter alia*, on Article 28.1 of the Constitution which runs as follows:

> "All persons are equal before the law, the administration and justice and are entitled to equal protection thereof and treatment thereby"

The Court of Appeal, after reviewing the legal position relating to the doctrine of equality as applicable in India, U.S.A., Greece, Cyprus and in the Court of Human Rights of the Council of Europe (vide pp 25 - 29 of the judgment *post*) and after observing that the object of the said s. 24(1), "was not only to secure the payment of the relevant social insurance contributions by an employer even though his employee while serving in the National Guard was not rendering to him any services, but furthermore, to secure that the contributions otherwise payable by such employee himself were, during his period of service in the National Guard, to be paid by his employer"

Held, (1) The provision in section 24(1) requiring an employer to pay his own contributions while an employee of his is serving in the National Guard, has not been shown to our satisfaction to be a provision offending, beyond reasonable doubt, against the principle of equality enshrined in Article 28.1 of our Constitution, it may conceivably be said that, as during the period of such service the master and servant relationship is merely suspended, the employer affected can be reasonably differentiated from other employers whose employees are not serving in the National Guard

(2) Coming next to the further obligation of the employer to pay, so long as an employee of his is serving in the National Guard, the contributions which would be payable by such employee if he was actually in his employers' service, we are of the view, beyond any doubt, that in this respect an arbitrary and objectively unreasonable distinction has been made as between employers, because though employers whose employees are not in the National Guard and are actually working for them are not bound to pay such employees' contributions, those whose employees are in the National Guard and, therefore, are not rendering to them any

services, are put in a still more disadvantageous position by having to pay the contributions of their employees who are national guardsmen. (*Loizou* v. *Poullis* (1969) 1 C.L.R. 17, distinguished).

Appeals partly allowed.

Cases referred to :-

Arkansas Natural Gas Co. v. *Arkansas Railroad Commission*, 67 L. Ed. 705, at p. 710;

Frost v. *Corporation Commission of the State of Oklahoma*, 73 L. Ed. 483, at p. 488;

Bayside Fish Flour Company v. *Gentry*, 80 L. Ed. 772 at p. 777;

Republic v. *Arakian* (1972) 3 C.L.R. 294, at pp. 302-303;

Case *"Relating to certain aspects of the laws on the use of languages in education in Belgium"*, decided by the Court of Human Rights of the Council of Europe (see European Convention on Human Rights Yearbook No. 11, part 2, p. 832);

Fekkas v. *The Electricity Authority of Cyprus* (1968) 1 C.L.R. 173;

Loizou v. *Poullis* (1969) 1 C.L.R. 17.

Appeals against conviction and sentence.

Appeals against conviction and sentence by Demetrakis Meletiou and Another who were convicted on the 24th March, 1972 at the District Court of Nicosia (Criminal Cases Nos. 10513/71 and 8681/71) on various counts of the offence of failing to pay Social Insurance Contributions contrary to section 24 of the National Guard Laws, 1964 - 1967 and sections 5, 9(6)(e), 73(1)(2)(4) and 77 of the Social Insurance Laws, 1964 - 1970 and were sentenced by Colotas, D.J. to pay fines varying from £4.- — £15.- and they were further ordered to pay the outstanding contributions.

S. Erotokritou, (Mrs.), for the appellant in Appeal 3344.

K. Michaelides, for the appellant, in Appeal 3345.

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

Cur. adv. vult.

The judgment of the Court was delivered by :-

TRIANTAFYLLIDES, P : These two appeals were heard together as they involve a common basic issue, namely the constitutionality of section 24(1) of the National Guard Law, 1964 (Law 20/64), as amended by the National Guard (Amendment) Law, 1966 (Law 5/66) and the National Guard (Amendment) (No. 2) Law, 1967 (Law 70/67).

The said section reads as follows :-

«24(1) Ὁσάκις πρόσωπον κληθὲν δι' ὑπηρεσίαν ἐν ἐνεργῷ ὑπηρεσίᾳ τῆς Δυνάμεως δυνάμει τῶν διατάξεων τοῦ παρόντος Νόμου ἐργάζεται εἰς τακτικὴν ἀπασχόλησιν παρά τινι ἐργοδότῃ, ἡ ἀπασχόλησις αὐτοῦ οὐδόλως διακόπτεται ἀλλ' ἁπλῶς ἀναστέλλεται διαρκούσης τῆς περιόδου καθ' ἣν τὸ πρόσωπον τοῦτο τελεῖ ἐν τῇ ὑπηρεσίᾳ τῆς Δυνάμεως, ὁ ἐργοδότης ὅμως ὑποχρεοῦται ὅπως ἐξακολουθῇ νὰ καταβάλλῃ, διαρκούσης τῆς τοιαύτης ἀναστολῆς, τὴν ἑβδομαδιαίαν αὐτοῦ εἰσφορὰν συμφώνως πρὸς τὸ ἄρθρον 5 του περὶ Κοινωνικῶν Ἀσφαλίσεων Νόμου τοῦ 1964 καὶ ὅπως καταβάλλῃ περαιτέρω τὴν ὑπὸ τοῦ μισθωτοῦ πληρωτέαν εἰσφορὰν συμφώνως πρὸς τὸ ρηθὲν ἄρθρον ἀνεξαρτήτως τοῦ ὅτι ὁ μισθωτὸς οὐδεμίαν ὑπηρεσίαν παρέσχεν εἰς τὸν ἐργοδότην διαρκούσης τῆς περιόδου ταύτης.

Πᾶς ἐργοδότης ὅστις παραλείπει ἢ ἀμελεῖ νὰ καταβάλῃ τὴν ὑπὸ τοῦ παρόντος ἐδαφίου προνοουμένην εἰσφορὰν διαπράττει ἀδίκημα καὶ ὑπόκειται ἐν περιπτώσει καταδίκης του εἰς τὰς ὑπὸ τοῦ ἄρθρου 73 τοῦ περὶ Κοινωνικῶν Ἀσφαλίσεων Νόμου τοῦ 1964 προνοουμένας ποινὰς καὶ ὑπόκειται περιπλέον εἰς τὰς λοιπὰς διατάξεις τοῦ ἄρθρου τούτου».

("24(1) Where any person called out to active service in the Force under the provisions of this Law is regularly employed by an employer, his employment shall not be discontinued but merely suspended

for the duration of the period during which such person is in the service of the Force, and the employer is obliged to continue paying, pending such suspension, his weekly contribution in accordance with section 5 of the Social Insurance Law, 1964, and to pay further the contribution payable by the employee in accordance with the said section, irrespective of the fact that the employee has rendered no services to the employer during such period

Any employer who fails or neglects to pay a contribution provided under this section commits an offence and is liable in case of conviction to the punishments provided under section 73 of the Social Insurance Law, 1964 and is, further, subject to the rest of the provisions of such section")

Each of the two appellants was convicted of committing an offence contrary to section 24(1), by failing to pay social insurance contributions in respect of employees of theirs during the periods of service of such employees in the National Guard; they have both appealed to this Court on the ground that section 24(1) is unconstitutional

For the purposes of their appeals, they have relied, *inter alia,* on Article 28 of the Constitution, paragraph (1) of which reads as follows -

«1 Παντες εἰναι ισοι ενωπιον τοῦ νομου, τῆς διοικησεως και τῆς δικαιοσυνης και δικαιοῦνται νά τυχωσι ἴσης προστασιας και μεταχειρισεως»

("1 All persons are equal before the law, the administration and justice and are entitled to equal protection thereof and treatment thereby")

In India the corresponding provision is Article 14 of the Constitution which reads as follows -

'The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India' (See Basu's Commentary on the Constitution of India, 5th ed., vol I p 287)

The above provision is quite similar to the relevant part of section 1 of the 14th Amendment to the Con-

stitution of the United States (see Basu, *supra*, at pp. 440, 444).

It is pointed out by Basu, *supra*, (at p. 447) that—"Mere production of inequality is not enough to hold that equal protection has been denied. For, every selection of persons for regulation produces inequality, in some degree"; and the learned author adopts the view that "the inequality produced, in order to encounter the challenge of the Constitution, must be 'actually and palpably unreasonable and arbitrary'."

In this respect reference is made by Basu to the decision of the U.S.A. Supreme Court in *Arkansas Natural Gas Co.* v. *Arkansas Railroad Commission*, 67 L. Ed. 705, at p. 710, which has been followed in *Frost* v. *Corporation Commission of the State of Oklahoma*, 73 L. Ed. 483, at p. 488, and in *Bayside Fish Flour Company* v. *Gentry*, 80 L. Ed. 722, at p. 777).

In the *Bayside* case Mr. Justice Sutherland said (at p. 777) :-

> "It never has been found possible to lay down any infallible or all-inclusive test by the application of which it may be determined whether a given difference between the subjects of legislation is enough to justify the subjection of one and not the other to a particular form of disadvantage. A very large number of decisions have dealt with the matter; and the nearest approach to a definite rule which can be extracted from them is that, while the difference need not be great, the classification must not be arbitrary or capricious, but must bear some just and reasonable relation to the object of the legislation. A particular classification is not invalidated by the Fourteenth Amendment merely because inequality actually results. Every classification of persons or things for regulation by law produces inequality in some degree; but the law is not thereby rendered invalid (*Atchison, T. & S. F. R. Co.* v. *Matthews*, 43 L. Ed. 909), unless the inequality produced be actually and palpably unreasonable and arbitrary. *Arkansas Natural Gas Co.* v. *Arkansas R. Commission*, 67 L. Ed. 705, 710, and cases cited)."

In Basu, *supra*, (at p. 450) the following tests are laid down for determining the reasonableness of a classification :-

"I. When a law is challenged as violative of Article 14, it is necessary for the Court first to ascertain the *policy* underlying the statute and the *object* intended to be achieved by it.

II. The purpose or object of the Act is to be ascertained from an examination of its '*title, preamble* and *provision*'.

III. Having ascertained the policy and the object of the Act, the Court should apply the dual test in examining its validity :

(a) Is the classification rational and based on an intelligible differentia which distinguishes persons or things that are grouped together from others that are left out of the group?

(b) Has the basis of differentiation any rational nexus or relation with its avowed policy and object?

IV. If both the tests just mentioned are satisfied, the statute must be held to be valid.

In such a case, the consideration as to whether the same result could not have been better achieved by adopting a different classification would be foreign to the scope of the judicial inquiry.

V. If either of the two tests of intelligible differentia and nexus is not satisfied, the statute must be struck down as violative of Article 14.

VI. (a) The reasonableness of the classification is to be tested with reference to the circumstances existing at the time of enactment of the impugned law.

But —

In the case of pre-Constitution laws, the circumstances existing at the time of commencement of the Constitution become material.

(b) A law which was non-discriminatory at its inception may be rendered discriminatory by reason

of external circumstances which take away the reasonable basis of classification"

In Greece the doctrine of equality before the law has been incorporated in all Greek Constitutions from 1844 onwards

According to Sgouritsas on Constitutional Law—(Σγουριτσα Συνταγματικόν Δίκαιον)—Vol B, Part b, (1966 ed.) at p. 185, the following is the effect of the equal protection clause, as found in Article 3(1) of the 1952 Constitution

> « εχει δε υιοθετηθῆ παγίως ἀπο τοῦ 1947 υπο τῆς νομολογίας, τῶν δικαστηρίων δεχομένων ὁτι η διαταξις τοῦ αρθρ 3 τοῦ Συντάγματος επιβάλλει ισοτητα δικαίου, ἤτοι απαγορεύει ου μόνον τὴν ανισον εφαρμογην τῶν νόμων, αλλα καὶ τὴν ὑπο τοῦ νομοθέτου οὐσιαστικῶς ανισον ρύθμισιν τοῦ δικαίου Δὲν ἀποκλείονται καὶ κατα τὴν ἀποψιν ταύτην παρεκκλίσεις ἐκ τοῦ γενικοῦ κανονος, αλλ αὗται, αφ ενος μὲν δὲν εἶναι δυνατὸν νὰ υπερβαίνουν ὡρισμενα ἀκραία ὁρια εἰς εκάστην δεδομένην περίπτωσιν αφ ετέρου δὲ επιτρεπονται μονον εφ ὁσον συντρεχουν ἐπαρκεῖς λόγοι δικαιολογοῦντες αυτὰς ἐξ αντικειμένου»
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> (" has been adopted by case-law constantly since 1947, the Courts having accepted that 'the provision of Article 3 of the Constitution requires equality of the law, in other words it prohibits not only inequality in applying the laws, but also prohibits substantial inequality in the course of laying down the law' In accordance with this view, too, there are not excluded deviations from a general rule, but these cannot, on the one hand, exceed certain extreme limits in every particular case, and, on the other hand, are permitted only so long as they can be justified from the objective point of view on the basis of adequate grounds")

In Cyprus, it was held in the *Republic* v *Arakian*, (1972) 3 C L R 294, at pp 302 - 303, that it is up to "the persons complaining of unequal treatment (see, *inter alia*, *Lindsley*, 61 L Ed 369 and *Morey*, 1 L Ed 2d 1485), to show that the decision in question of the Mi-

nistry of Finance did not rest upon any reasonable basis and that it was essentially arbitrary". In that case this Court adopted the view of the Court of Human Rights, of the Council of Europe, in the case "*Relating to certain aspects of the laws on the use of languages in education* in *Belgium*" (European Convention on Human Rights Yearbook No. 11, part 2, p. 832) "that the principle of equality of treatment is violated if the distinction has no objective and reasonable justification" (see, too, *inter alia, Fekkas* v. *The Electricity Authority of Cyprus* (1968) 1 C.L.R. 173).

With the foregoing principles in mind we shall now proceed to examine the position in the present case :-

At all times material for the outcome of these appeals the material parts of section 5 of the Social Insurance Law, 1964 (Law 2/64)—which is referred to in section 24(1) of the National Guard legislation, *supra*, read as follows :-

«5.(1) Δι' έκαστην εβδομαδα εισφορῶν καθ' ἣν, ἡ διὰ μέρος τῆς ὁποίας μισθωτός τις ἀπησχολεῖτο εἰς ἐξηρτημένην ἐργασίαν καταβάλλονται ὑποχρεωτικῶς συμφώνως ταῖς διατάξεσι τοῦ παρόντος Νόμου τρεῖς ἴσαι εἰσφοραί, μία παρὰ τοῦ μισθωτοῦ, ἑτέρα παρὰ τοῦ ἐργοδότου καὶ τρίτη ἐκ τοῦ Παγίου Ταμείου τῆς Δημοκρατίας

Νοεῖται ὅτι

(α) οὐδεμία εισφορὰ καταβάλλεται ἀναφορικῶς πρὸς ἑβδομάδα καθ' ἣν ὁ μισθωτὸς οὐδεμίαν ὑπηρεσίαν παρέσχε καὶ οὕτω οὐδεμία ἀντιμισθία τῷ κατεβλήθη

(β)

(2)

(3) Ὁ ἐργοδότης ἐνέχεται κατ' ἀρχὴν εἰς τὴν καταβολὴν τόσον τῆς ὑπ' αὐτοῦ πληρωτέας εἰσφορᾶς ὅσον καὶ τῆς ὑπὸ τοῦ μισθωτοῦ πληρωτέας τοιαύτης· αὕτη καταβάλλεται διὰ λογαριασμὸν τοῦ μισθωτοῦ, τοῦ τελευταίου ἀπαλασσομένου οἱασδήποτε ἐνοχῆς πρὸς καταβολὴν τῆς εἰσφορᾶς· διὰ τοὺς σκοποὺς δὲ τοῦ παρόντος Νόμου εἰσφοραὶ καταβληθεῖσαι ὑπὸ τοῦ ἐργοδότου διὰ λογαριασμὸν τοῦ μισθω-

τοῦ λογίζονται εἰσφοραὶ καταβληθεῖσαι ὑπὸ τοῦ μισθωτοῦ».

("5.(1) For each contribution week during the whole or any part of which an employed person has been employed, three equal contributions shall be payable in accordance with the provisions of this Law, one by the employed person, one by his employer and one out of the general revenue of the Republic:

Provided that —

(a) where an employed person has rendered no services during any week and received no remuneration in respect of that week, no contribution shall be payable for that week;

(b)

(2)

(3) The employer shall, in the first instance, be liable to pay both the contribution payable by himself and also, on behalf of and to the exclusion of the employed person, the contribution payable by that person, and for the purposes of this Law contributions paid by an employer on behalf of an employed person shall be deemed to be contributions paid by the employed person.")

Also, section 10 of Law 2/64, as amended by the Social Insurance (Amendment) Law, 1968 (Law 28/68), reads as follows, in its material part:-

«10. Αἱ εἰσφοραὶ πιστοῦνται ὑπὲρ τοῦ ἡσφαλισμένου:

(ε) διὰ πᾶσαν ἑβδομάδα εἰσφορῶν καθ' ἑκάστην ἡμέραν τῆς ὁποίας οὗτος κληθεὶς δι' ὑπηρεσίαν ἐν τῇ Ἐθνικῇ Φρουρᾷ δυνάμει τῶν περὶ Ἐθνικῆς Φρουρᾶς Νόμων τοῦ 1964 ἕως 1967, διατελεῖ ἐν ἐνεργῷ ὑπηρεσίᾳ, ἐάν οὐδεὶς ἐργοδότης ἐνέχηται εἰς τὴν καταβολὴν εἰσφορῶν ὡς πρὸς αὐτὸν δυνάμει τοῦ ἐδαφίου (1) τοῦ ἄρθρου 24 τῶν προαναφερθέντων Νόμων».

("10. Contributions shall be credited to an insured person :

(e) for any contribution week for each day of which he, having been called for service in the National Guard according to the National Guard Laws of 1964 to 1967, continues in active service, if no employer is liable to pay contributions in respect of him in accordance with sub-section (1) of section 24 of the aforesaid Laws.")

It is abundantly clear that section 10 of Law 2/64 was amended by the introduction of paragraph (e)—by means of Law 28/68—because of the corresponding amendments of section 24(1) of Law 20/64 by means of Law 5/66 and Law 70/67.

It is to be noted, at this stage, that Law 2/64 has been repealed and replaced by the Social Insurance Law, 1972 (Law 106/72)—which is not applicable to the present appeals as it was enacted subsequently thereto—but section 10 of Law 106/72, which corresponds to section 10 of Law 2/64, has remained substantially the same in so far as the provisions applicable to persons serving in the National Guard are concerned.

From a study of the above-quoted legislative provisions it is clear that the object of section 24(1) of Law 2/64, as amended, was not only to secure the payment of the relevant social insurance contributions by an employer even though his employee while serving in the National Guard was not rendering to him any services, but, furthermore, to secure that the contributions otherwise payable by such employee himself were, during his period of service in the National Guard, to be paid by his employer.

In the light of the well-settled approach to the matter of the constitutionality of legislative provisions introducing differentiations as between categories of persons—(as such approach has been referred to earlier on in this judgment) —we have reached the conclusion that the provision in section 24(1) requiring an employer to pay his own contributions while an employee of his is serving in the

National Guard, has not been shown to our satisfaction to be a provision offending, beyond reasonable doubt, against the principle of equality enshrined in Article 28.1 of our Constitution, it may conceivably be said that, as during the period of such service the master and servant relationship is merely suspended, the employer affected can be reasonably differentiated from other employers, whose employees are not serving in the National Guard.

Coming next to the further obligation of the employer to pay, so long as an employee of his is serving in the National Guard, the contributions which would be payable by such employee if he was actually in his employers' service, we are of the view, beyond any doubt, that in this respect an arbitrary and objectively unreasonable distinction has been made as between employers, because though employers whose employees are not in the National Guard and are actually working for them are not bound to pay such employees' contributions, those whose employees are in the National Guard and, therefore, are not rendering to them any services, are put in a still more disadvantageous position by having to pay the contributions of their employees who are national guardsmen.

The case of *Loizou* v *Poullis* (1969) 1 C.L.R. 17, is in our view clearly distinguishable from the present one, the *Loizou* case relates to the provision in section 24(2) of Law 20/64 which imposes on an employer of a demobilized national guardsman the obligation to offer to him the same, or similar, employment as before his enlistment

It appears that the appellants were charged and convicted on the basis of counts concerning the failure to pay both their own contributions *and* those of their employees, during their service in the National Guard It follows that, as the convictions of the appellants were based only partly on the statutory provision which we have found to be unconstitutional—as being contrary to the doctrine of equality safeguarded by Article 28.1—their appeals have to be allowed only to that extent, therefore, their convictions stand with the particulars of the counts concerned being modified in the light of this

judgment. The sentences of fines which were imposed on the appellants as a result of their convictions need not be interfered with as in our view they could not be manifestly excessive even if the appellants had only failed to pay their own contributions as employers; but the amounts which the appellants were ordered to pay, by the trial Court, as outstanding contributions have to be adjusted according to the outcome of these appeals.

Appeals allowed in part.