[HADJIANASTASSIOU, A. LOIZOU, MALACHTOS, JJ.]

ANDREAS CHRISTOU CHILIDES,

Appellant-Plaintiff,

v.

ELIAS DANOS,

Respondent-Defendant.

(*Civil Appeal No.* 5530).

Estoppel—Waiver—Consent judgment—As effective as an order of the Court made otherwise than by consent—Variation of consent judgment by mutual agreement of the parties as to the mode of payment of instalments due thereunder—Judgment creditor—Waived his rights to insist on original mode of payment—And is estopped from insisting on such mode of payment—Plea of res judicata of no avail.

Consent judgment—Effect.

On April 6, 1973, the appellant-plaintiff obtained judgment, by consent, against the respondent-defendant for the sum of £500. By means of this consent judgment the respondent was allowed to pay the judgment debt in five instalments and it was further provided that failure to pay any instalment "renders the whole amount or any balance payable forthwith".

The judgment debtor paid all instalments without any delay but the instalment due on September 1, 1973 reached the Advocate for the judgment creditor on September 5, 1973, instead of on September 1. Thereupon the judgment creditor issued a writ of movables for the recovery of the balance due under the said consent judgment and the judgment debtor applied for an order staying the execution and setting it aside on the ground that the judgment debt had been paid in full.

The trial Court found that the mode of payment had been changed by consent of the parties; and after the finding that the judgment creditor has waived his right to complain against the non strict adherence to the original mode of payment by the judgment debtor, it set aside the writ of execution.

The judgment creditor appealed contending that the trial

Judge was wrong in applying the doctrine of waiver with regard to the rights and obligations arising from the consent judgment and that the finding that the conditions of payment embodied in the consent judgment had been changed by consent was against the *res judicata* doctrine created by the consent judgment.

Held, dismissing the appeal, that an order by consent which has not been discharged by mutual agreement, and has remained unreduced, is as effective as an order of the Court made otherwise than by consent and not discharged on appeal; that once the order made by consent was varied by mutual agreement of the parties as to the mode of payment of the instalments due, the plea of *res judicata* is of no advantage to the appellant and the appeal will be dismissed. (Dictum of Lord Blanesburgh in *Kinch v. Walcott* [1929] A.C. 482 (H.L.) at p. 493 adopted and followed).

Appeal dismissed.

Cases referred to:

Birmingham and District Land Co. v. London and North Western Railway Co. [1888] 40 Ch. D. 268);

Kinch v. Walcott [1929] A.C. 482 (H.L.) at p. 493.

Appeal.

Appeal by plaintiff against the order of the District Court of Nicosia (Boyadjis, S.D.J.) dated the 6th December, 1975 (Action No. 525/72) whereby it was held that the writ of execution issued against the movable property of the defendant, for the balance of the judgment debt due to the plaintiff, was unjustifiably issued and was set aside.

M. Kyriakides, for the appellant.

D. Papachrysostomou, for the respondent.

Cur. adv. vult.

The judgment of the Court was delivered by:-

HADJIANASTASSIOU, J.: This is an appeal from the order of a Senior Judge of the District Court dated December 6, 1975, whereby the writ of execution issued against the movable property of the applicant for the balance of the judgment debt allegedly due to the respondent was unjustifiably issued and set aside by the learned trial Judge. The question raised in this appeal is whether the

consent order has been waived by the consent of the parties.

The appellant brought an action against the respondent on January 27, 1972 claiming (a) damages for the breach of a contract dated May 5, 1970 for the sale of a field and (b) the return of £400 which was paid to the defendant together with interest of 9 per cent.

On April 6, 1973, a settlement was reached between the parties and a consent order was issued in these terms:-

> "This Court does order and adjudge that the defendant do pay to the plaintiff the sum of £500.- with interest thereon at 4% per annum from April 6, 1973, to date of payment; provided that if the defendant pays the sum of (a) £150 on 25th May, 1973; (b) £50 on 1st July, 1973; (c) £50 on 1st August, 1973; (d) £50 on 1st September, 1973; and (e) £50 on 1st October, 1973, then the whole judgment debt will be considered fully satisfied".

Then it was made clear in that order that "failure to pay any instalment as above renders the whole amount of any balance payable forthwith".

In fact, after the consent order, the instalments of May 25, 1973, July 1, 1973, August 1, 1973 and October 1, 1973, were paid without any delay by the judgment debtor by cheque to the counsel of the plaintiff. With regard to the instalment due on September 1, 1973, again it was paid by cheque issued by the defendant on the same date, but because it was posted by the advocate of the defendant to plaintiff's advocate, there was a delay and it reached the latter on September 5, instead of September 1, 1973. The judgment creditor without any delay at all pursued his legal rights through the present advocate who issued a writ of movables for the recovery of the balance, under the aforesaid order. In fact, before the writ was executed, the judgment creditor left for England where he settled permanently. The judgment debtor, feeling aggrieved, made an application to the District Court praying for an order of the court staying the execution and setting it aside on the ground that the judgment debt had been paid in full.

On the other hand, counsel on behalf of the judgment

creditor opposed the application and in the affidavit filed it was alleged that the facts stated in the notice were true and correct and that the contents of the applicant's affidavit are denied.

The learned judge, having heard counsel on September 5, 1975, reserved his ruling. He delivered it on September 9, 1975, and said that:-

> "There is nothing in the advocate's affidavit which is objectionable in the sense that it is an allegation of any positive fact which the affiant is unable of his own knowledge to prove or is the result of mere information and belief of the affiant without reference to the sources and grounds thereof.
>
> For the above reasons I have arrived at the conclusion that respondent's opposition to the application is fairly in accordance with the provisions of 0.48, r. 4 and 0.39 r. 2 of the Civil Procedure Rules and the preliminary objection of counsel for the applicant is hereby overruled".

Having reached that conclusion, the application was adjourned and on October 18, 1975, the learned Judge heard the evidence of the applicant judgment debtor and the addresses of both counsel. The second ruling was delivered on December 6, 1975. The learned Judge, having accepted that the evidence of the judgment debtor was true and correct and that the mode of payment in the consent order had been changed by consent of the parties, dealt with the issue of estoppel or waiver. The trial Judge, having addressed his mind to the observations made in *Birmingham and District Land Co. v. London and North Western Railway Co.* [1888] 40 Ch. D. 268, regarding the doctrine of waiver, said in his ruling:-

> "In this case the obligations of the applicant was to pay £50.- on 1.8.73 and £50.- on 1.9.73 to Mr. Phivos Clerides against the judgment in favour of the respondent. The arrangement suggested by respondent and accepted by applicant on 3.8.73, although does not in itself directly postpone the time of payment of future instalments, yet the date of payment thereof was made impossible without the presence of

the respondent in applicant's office to accept payment.

By his failure to call at applicant's office on 1.9.73 to collect the instalment and/or by his failure to demand afresh, in time or at all, compliance with the original mode of payment, the respondent has waived his right to complain against the non strict adherence to the original mode of payment by the applicant. Respondent cannot benefit himself from a situation brought about by his own conduct, which induced applicant, to his detriment, not to send his cheque to Mr. Clerides in time on 1.9.73 as he had been doing in the past.

In conclusion, I wish to state that, since all other instalments had been paid in accordance with the consent judgment and the respondent has waived his right to complain about the mode and/or time of payment of the subject matter instalment originally due on 1.9.73, the applicant-debtor has paid in full the judgment debt; therefore, the writ of execution against the movable property of the applicant for any balance of the judgment debt allegedly due to the respondent was unjustifiably issued and is, hereby, set aside".

This, indeed, is a unique case, and regretfully the whole of the dispute and the long proceedings which have followed have arisen solely due to legalistic quibbles raised by counsel on behalf of the judgment creditor.

This appeal was argued by counsel on behalf of the appellant mainly on these three grounds: (1) that the trial Judge was wrong in law in applying the doctrine of waiver with regard to the rights and obligations arising from the consent judgment; and that he was wrong in law in deciding that the mode of payment embodied in the consent judgment had been changed by consent of the parties; (2) that the ruling of the trial Judge that the conditions of payment embodied in the consent judgment had been changed by consent is against the *res judicata* doctrine created by the consent judgment; and (3) that the trial Judge was wrong in law in as much as he failed to consider the consent judgment as the only *res judicata* binding on the parties.

Having considered the contentions of both counsel, we are inclined to the view without going into all these questions, that the contentions of counsel cannot succeed once the *res judicata* principle cannot be raised successfully in this appeal, because had he taken the trouble to have the text or the authority on which he relied he would have had no difficulty in realizing that his argument could not succeed.

In *Kinch v. Walcott,* [1929] A.C. 482 H.L. Blanesburgh, delivering the judgment of their Lordships said at p. 493:-

> "First of all their Lordships are clear that in relation to this plea of estoppel it is of no advantage to the appellant that the order in the libel action which is said to raise it was a consent order. For such a purpose an order by consent, not discharged by mutual agreement, and remaining unreduced, is as effective as an order of the Court made otherwise than by consent and not discharged on appeal. A party bound by a consent order, as was tersely observed by Byrne, J. in *Wilding v. Sanderson* [1897] 2 Ch. 534, 544, 'must, when once it has been completed, obey it, unless and until he can get it set aside in proceedings duly constituted for the purpose'. In other words. the only difference in this respect between an order made by consent and one not so made is that the first stands unless and until it is discharged by mutual agreement or is set aside by another order of the Court; the second stands unless and until it is discharged on appeal. And this simple consideration supplies at once the answer to this appeal".

Directing ourselves with this weighty judicial pronouncement, we would adopt and apply the *dictum* of Lord Blanesburgh, because once the order made by consent was varied by mutual agreement of the parties as to the mode of payment of the instalments due, the plea of *res judicata* is of no advantage to the appellant and we would, therefore, dismiss the appeal with costs.

Appeal dismissed with costs.