1981 June 5

[A. LOIZOU, MALACHTOS AND SAVVIDES, JJ.]

PANAYIOTIS KOURRIS,

Appellant–Plaintiff,

v.

1. ALPO LTD.,
2. ANTONAKIS MAKRI,
3. MARINOS SPYROS,

Respondents–Defendants.

(*Civil Appeal No.* 5613).

Contract—Bailment—Sub-bailment—Whether English Common Law principle of sub-bailment excluded by Contract Law, Cap. 149.

Retrial—Dismissal of action for damages to car, in the course of sub–bailment, due to absence of privity of contract between owner and sub–bailee—English Common Law principle of sub–bailment not excluded by Contract Law, Cap. 149*—Misdirection by trial Judge as to the law applicable—No necessary factual background for the determination of liability by Court of Appeal—Retrial ordered.*

On May 31, 1971, the appellant–plaintiff delivered to Autorex Ltd. his car for service and tekalemit. Autorex Ltd. entrusted the tekalemit of the car to respondents 1 and whilst it was driven by a servant of respondents 1 towards their petrol station it was damaged in an accident. The appellant sued respondent 1 and their servant as well as the driver of the car with whom his car came into collision for damages; and the trial Court dismissed the action having held that there did not exist between the appellant and respondents 1 any privity of contract and that they could not be considered as bailees of the car of the appellant because he did not entrust to them his car for service and tekalemit but to the Autorex Ltd.

Upon appeal by the plaintiff.

Held, that there is nothing in the relevant provisions of the Contract Law, Cap. 149, which govern the question of bailments,

to exclude the part of the English Common Law, relating to sub-bailment; that, therefore, the approach of the trial Judge that as there did not exist between the appellant and the respondents any privity of contract the latter could not be found to be bailees of the car in question amounts to a misdirection as to the Law applicable in this case; that the question, however, remains for determination whether on the facts as found by him and the conclusions drawn thereon there is the necessary factual background for the determination of the liability, if any, of the respondents in this case; that under the Law governing sub-bailment there are such matters to be examined as the existence or not of authorization or of consent by the bailor to the bailee for the assumption of the custody of the chattel entrusted to the bailee by a third party who is ultimately found to be a sub-bailee; that, also, the very delivery of possession to the alleged sub-bailee has to be examined; that as these matters, however, which should not be taken as exhaustive of the issues for determination, involve questions of credibility, in the circumstances of this case, this Court is not in a position to satisfactorily dispose of it by determining them itself; accordingly the appeal must be allowed, the judgment of the trial Court must be set aside and the case be sent back for retrial.

Appeal allowed.
Retrial ordered.

Cases referred to:

Morris v. *Martin & Sons Ltd.* [1965] 3 W.L.R. 276 at p. 285;

Gilchrist Watt and Sanderson Pty Ltd. v. *York Products Pty Ltd.* [1970] 3 All E.R. 825.

Appeal.

Appeal by plaintiff against the judgment of the District Court of Nicosia (Ioannides, D.J.) dated the 5th July, 1976, (Action No. 6282/71) whereby his claim for C£80.550 mils agreed damage to his motor-car was dismissed on the ground that defendants could not in law be found to be bailees.

G. Mitsides, for the appellant.

C. Myrianthis, for the respondents.

Cur. adv. vult.

A. Loizou J. read the following judgment of the Court. This is an appeal from the judgment of the District Court of Nicosia

by which the claim of the appellant-plaintiff for C£80.550 mils agreed damage to his motor car under registration No. EV.39, was dismissed with costs on the ground that the respondents-defendants 1 could not in law be found to be the bailees of the said car of the appellant.

The facts are as follows:

On the 31st May, 1971, the appellant delivered to Autorex Ltd., his car for service and tekalemit. The tekalemit of such cars was entrusted by Autorex Co. Ltd., to respondents as they did not themselves offer this kind of service to their clients. In accordance with their usual practice the car was driven by one of their directors to the Petrol Station of the respondents, where defendant 2, an employee of the latter, drove him back to their garage and left with the car for the Service Station.

Some time later the car was brought back for repairs as it had been damaged in an accident on the mudguard, bumper and headlamp. Its repair and painting caused the agreed amount claimed; for the period however, for which the car was under repair, Autorex Ltd., gave the appellant another car for the cost of which there was no claim in these proceedings.

Defendant 2 entered no appearance and defendant 3, with whom the car came into collision, entered an appearance and filed a defence but did not turn up at the hearing of the case and his advocate withdrew as he could not find him and receive instructions from him.

It was the case for the respondents that during the first months of the operation of their Petrol Station and Tekalemit Service, that is until March 1971, the vehicles brought for tekalemit were taken delivery of from the place of work of their clients or their clients would deliver them at the Station and they would be driven back to their place of work by employees of the respondents. In March 1971, however, because of the fact that defendant 2 was involved in an accident whilst delivering to a client his car, the Director of respondents gave specific instructions to Antonis Chrysospathis, the man in charge of the Station, as well as to defendant 2, prohibiting all employees from driving cars of clients outside the Station.

Chrysospathis stated in evidence that on the 31st May 1971, he saw one of the Directors of Autorex Ltd., drive a car to their Station, talked to defendant 2 and then saw the two of them leaving together in that car. Shortly afterwards he heard that that car was involved in an accident and reprimanded defendant 2. He further stated that after the prohibition of respondents to their employees to drive clients' cars outside the Station, Autorex Ltd., who were clients, did not happen to bring a vehicle so as to inform them that they would not drive such vehicles brought for tekalemit back to them.

As no evidence had been adduced regarding the circumstances of the accident, the learned trial Judge felt that he could make no finding with regard to negligent driving by either defendant 2 or 3, or both, and dismissed as against all defendants the claim of the appellant for negligence.

The learned trial Judge then examined the question of the liability of the respondents for the damage caused to the car of the appellant whilst bailees, as alleged in the pleadings, of the said car. After pointing out that the appellant had delivered his said car to Autorex Ltd., for service and tekalemit and not to the respondents he went on to say:

> "Consequently, from the evidence of the plaintiff, defendants 1 could not be considered as bailees of the car of the plaintiff because he did not entrust to defendants 1 his car for service and tekalemit but to the Autorex Ltd. There does not exist between the plaintiff and defendants 1 any privity of contract. That the plaintiff took to Autorex Ltd., his car for service and tekalemit, it is stated in the evidence by P.W.1., Andreas Myrianthopoulos, one of the Directors of the Autorex Ltd. Since on the evidence before me it has not been proved that the plaintiff entrusted or delivered his car to defendants 1 for tekalemit, defendants 1 cannot be found to be bailees and it is not therefore necessary to examine whether defendants 1 are lible in any way as bailees of the car of the plaintiff".

The grounds of appeal are the following:

(A) That the trial Court misdirected itself as to the burden of proof of negligence as in cases of bailment the proof

that the damage was not caused by negligence is on the bailee—in the present case on respondents 1.

(B) The defendants did not discharge the burden of proof placed on them that the damage on the car in question was not due to their negligence or they were not otherwise responsible for it.

(C) The trial Judge was wrong to consider that respondents 1 were not bailees of the said car.

We shall take first ground "C" hereof as it disposes of this appeal.

With regard to this ground, there does not appear to be any disagreement between learned counsel appearing on both sides. In fact, Mr. C. Myrianthis fairly conceded that regarding the question as to whether there could be any sub-bailment under the relevant provisions of our Contract Law, Cap. 149, there is nothing in these provisions excluding the application of the Common Law principles on the subject, and that in law there was no need to establish a privity of contract between the appellant and the respondents in order to give a right of action to the former against the latter.

Mr. Myrianthis, however, invited the Court to proceed and make the necessary findings and draw the conclusions from the evidence adduced that would enable it to decide in favour of the respondent.

Whilst on this point, we would like to say that we share this view of both counsel appearing before us. As stated in *Pollock & Mulla, Indian Contract and Specific Relief Acts* 9th Ed., at p. 650:

> " 'Bailment' is a technical term of the Common Law, though etymologically it might mean any kind of handing over.....
>
> Bailment is necessarily dealt with by the Contract Act only so far as it is a kind of contract. It is not to be assumed that without an enforceable contract there cannot in any case be a bailment.
>
> Bailment is a relationship sui generis and unless it is sought

to increase or diminish the burden imposed upon a bailee by the very fact of bailment, it is not necessary to incorporate it into the Law of Contract and to prove a consideration". (See *Pollock & Wright*, The Possession in the Common Law, p. 163, quoted also in the case of the *State of Gujarat* v. *Memon Mohammad* (1967) 3 S.C.R. 938).

At page 665 of the same textbook, under the sub-heading "Sub-bailee right of the owner, against", it is stated:

"A sub-bailee for reward owes to the owner all the duties of a bailee for reward. And the owner can sue the sub-bailee direct for loss of or damage to the goods unless the latter is protected by an exemption clause".

As authority for this proposition is given the English case of *Morris* v. *Martin & Sons Ltd.* [1965] 3 W.L.R., 276, 285.

In *Halsbury's Laws of England*, 4th Ed., Vol. 2, para. 1541, the position of the law with regard to sub-bailments is stated to be as follows:

"A third party who, with the bailor's consent, accepts the custody of chattels from a bailee thereby assumes the obligations of a bailee towards the bailor. The nature of these obligations will, as in the case of an ordinary bailment, vary according to the circumstances in which and the purposes for which the goods are delivered. Thus, if the sub-bailment is for reward, the sub-bailee will owe to the bailor all the duties of a bailee for reward. The sub-bailee also owes, concurrently, the same duties to the original bailee, whose obligations to the bailor are not extinguished by the sub-bailment.

The bailor has a right of action against the sub-bailee for any breach of his duties either if the bailor has the right to immediate possession of the chattels or if they are permanently injured or lost. The relationship between the bailor and the sub-bailee exists independently of any contract between them or of any attornment".

Among the authorities cited for the aforesaid propositions are the case of *Morris* (*supra*), and *Gilchrist Watt and Sanderson Pty Ltd.* v. *York Products Pty Ltd.* (1970) 3 All E.R. 825, and Pollock & Wright on Possession, p. 169.

In the *Gilchrist* case (*supra*) the Privy Council reviewed extensively the Common Law with regard to the liability owed by the first bailor to a person taking possession under a sub-bailment and reference is made therein again to *Pollock & Wright on Possession*, to the case of *Morris* (*supra*) and what was stated therein by Lord Denning, Diplock L.J. and Salmon L.J., and the position is summed up as follows at p. 831:-

> "Both on principle, and on old as well as recent authority it is clear that, although there was no contract or attornment between the plaintiffs and the defendants, the defendants by voluntarily taking possession of the plaintiffs' goods, in the circumstances assumed an obligation to take due care of them and are liable to the plaintiffs for their failure to do so (as found by the trial Judge). The obligation is at any rate the same as that of a bailee, whether or not it can with strict accuracy be described as being the obligation of a bailee. In a case such as this, the obligation is created by the delivery and assumption of possession under a sub-bailment. In the English Courts the word 'bailment' has acquired a meaning wide enough to include this case".

We have found nothing in the relevant provisions of our Contract Law, Cap. 149, governing the question of bailments to exclude this part of the English Common Law, namely the sub-bailment. We therefore find that the approach of the learned trial Judge that as there did not exist between the appellant and the respondents any privity of contract the latter could not be found to be bailees of the car in question amounts to a misdirection as to the Law applicable in this case. The question, however, remains for determination whether on the facts as found by him and the conclusions drawn thereon there is the necessary factual background for the determination of the liability, if any, of the respondents in this case. From the statement of the Law as hereinabove briefly set out it appears that there are such matters to be examined as the existence or not of authorization or of consent by the bailor to the bailee for the assumption of the custody of the chattel entrusted to the bailee by a third party who is ultimately found to be a sub-bailee. Also the very delivery of possession to the alleged sub-bailee.

As these matters, however, which should not be taken as exhaustive of the issues for determination, involve questions of credibility, we do not consider, in the circumstances of this case, that we are in a position to satisfactorily dispose of it by determining them ourselves.

We, therefore, allow this appeal, we set aside the judgment of the trial Court and send this case back for retrial.

Costs of this appeal in favour of the appellant.

Costs in the Court below to be costs in cause.

Appeal allowed. Retrial ordered. Order for costs as above.