1982 December 20

[TRIANTAFYLLIDES, P., MALACHTOS, SAVVIDES, JJ.]

AVGI SAVVA KYRIACOU,

Appellant-Plaintiff,

v.

KYRIACOU MATA,

Respondent-Defendant.

(*Civil Appeal No.* 6059).

Findings of fact made by trial Court—Appeal—Principles on which Court of Appeal acts.

Judgment—Reserved judgment—Promotion of one of the two Judges constituting the Court—Whether judgment can be pronounced by the other of the Judges.

The following two issues arose for consideration in this appeal:

(a) Whether the findings of the trial Court were warranted by the evidence as a whole;

(b) Whether the reserved judgment of the trial Court could be validly pronounced by one of the Judges constituting the Court.

Issue (b) was based on the fact that after the conclusion on 3rd June 1978, of the hearing of the action before the trial court, which was composed of the President of the District Court of Nicosia, Judge D. Demetriades, as he then was, and of a District Judge, Judge S. Nikitas, as he then was, Judge Demetriades became a member of the Supreme Court on 19th June 1978 and the reserved judgment of the trial court was delivered by Judge Nikitas on 5th February 1980.

Held, (1) (*after stating the principles on the strength of which an appellate Court may interfere with findings of fact made by a trial Court—vide* pp. 934–935 *post*), that having considered the evidence adduced by both sides, this Court has not been persuaded by the appellant—on whom the onus to do so rested—

that it would be justified in interfering with the findings of the trial court which were based on evidence of witnesses which the trial court, having seen and heard the witnesses, was in a better position to evaluate and draw conclusions therefrom (see, inter alia, *Demou* v. *Constantinou* (1979) 1 C.L.R. 21, 24 and *Salih* v. *Sofocleous* (1979) 1 C.L.R. 248, 252).

(2) That the appealed from judgment in the present case has to be treated as having been validly pronounced.

Appeal dismissed.

Cases referred to:

Kyriacou v. *A. Kortas & Sons Ltd.* (1981) 1 C.L.R. 551 at p. 553;

Demou v. *Constantinou* (1979) 1 C.L.R. 21 at p. 24;

Salih v. *Sofocleous* (1979) 1 C.L.R. 248 at p. 252;

Hallam v. *Hallam* (*Gould Intervening*) [1930–31] 47 T.L.R. 207;

Berandeo Bande v. *Debidatt Singh* [1930] I.L.R., 53 All 133.

Appeal.

Appeal by plaintiff against the judgment of the District Court of Nicosia (Demetriades, P.D.C. and Nikitas, D.J.) dated the 5th February, 1980 (Action No. 5536/76) whereby it was held that the defendant is the owner of a savings bond issued by the Central Bank of Cyprus (No. 49382 of the seventh series) and the person entitled to collect the amount of C£10,000.- which is the prize won in respect of the said bond.

M. Christofides, for the appellant.

St. Karydes with *A. Timothi* (*Mrs.*), for the respondent.

Cur. adv. vult.

TRIANTAFYLLIDES P. read the following judgment of the Court. In this case the appellant challenges the judgment of the District Court of Nicosia by means of which it was held that the respondent is the owner of a savings bond issued by the Central Bank of Cyprus (No. 49382 of the Seventh Series) and the person entitled to collect the amount of C£10,000 which is the prize won in respect of the said bond as a result of a draw on 6th April 1974.

At the proceedings before the trial court the respondent was the defendant and had been sued by the appellant who was seeking a declaration that the bond in question belonged to her;

and the respondent had, by means of a counterclaim, contended that she was entitled both to the bond and the aforementioned prize of C£10,000.

The trial court dismissed the claim of the appellant and gave judgment in favour of the respondent on her counterclaim.

The judgment of the trial court was based entirely on findings as regards the reliability of evidence adduced before it by the parties to the present proceedings.

The version of the appellant was that the bond in question belonged to her; that she had kept it in a wardrobe at her home at her village; and that she lost it due to the occupation of the village since the 14th August 1974 by Turkish military forces.

The version of the appellant, who has been residing in London, was that the said bond, which she had in her possession, had been sent to her from Cyprus by a friend as a present for hospitality which she had offered to him while he was in London.

The trial court rejected the evidence of the appellant as unsatisfactory and reached the conclusion that the respondent was telling the truth and was the owner of the bond.

There was submitted by counsel for the appellant that the findings of the trial court were not warranted by the evidence as a whole.

The principles on the strength of which an appellate court may interfere with findings of fact by a trial court have been expounded in, inter alia, *Kyriacou v. A. Kortas & Sons Ltd.*, (1981) 1 C.L.R. 551, 553 as follows:

> "It must be shown that the trial judge was wrong in evaluating the evidence and the onus is on the appellant to persuade the Court that that is so. Matters relating to credibility of witnesses fall within the province of the trial Judge who has the opportunity to see and hear the witnesses. If on the evidence before him it was reasonably open

to him to make the findings to which he arrived at, then this Court will not interfere unless the inferences drawn therefrom are not warranted by the findings whereupon this Court can draw its own conclusions".

In the present case, having considered the evidence adduced by both sides, we feel that we have not been persuaded by the appellant - on whom the onus to do so rested - that we would be justified in interfering with the findings of the trial court which were based on evidence of witnesses which the trial court, having seen and heard the witnesses, was in a better position to evaluate and draw conclusions therefrom (see, inter alia, *Demou v. Constantinou,* (1979) 1 C.L.R. 21, 24 and *Salih v. Sofocleous,* (1979) 1 C.L.R. 248, 252).

It has been, also, argued on behalf of the appellant that at the time of the delivery of its judgment the trial court was not properly constituted; and this argument was based on the fact that after the conclusion, on 3rd June 1978, of the hearing of the action before the trial court, which was composed of the President of the District Court of Nicosia, Judge D. Demetriades, as he then was, and of a District Judge, Judge S. Nikitas, as he then was, Judge Demetriades became a member of the Supreme Court on 19th June 1978 and the reserved judgment of the trial court was delivered by Judge Nikitas on 5th February 1980.

Counsel for the respondent submitted that the appealed from judgment was validly delivered and that, in any event, it has to be presumed that the deliberations of the Judges constituting the trial court were concluded, and that they had reached their verdict, before the appointment of Judge Demetriades as a member of the Supreme Court.

In relation to the issue in hand useful reference may be made to the cases of *Hallam v. Hallam (Gould Intervening),* [1930-31] 47 T.L.R. 207 and of *Berandeo Bande v. Debidatt Singh,* (1930) I.L.R., 53 All, 133.

In the case of *Hallam,* supra, the judge who had tried the case had reserved judgment and before its delivery he had retired

from the bench and his judgment was subsequently read by another judge.

In the case of *Bande,* supra, a judgment was written by the trial judge after his retirement and was pronounced by his successor; and it was deemed to have been validly delivered; on appeal there are stated, inter alia, the following (at pp. 135-136):

"Two other rulings may be referred to, one of which is *Lachman Prasad v. Ra, Kishan.* In this it was laid down that where a judgment is written by a Judge, who is transferred, then his successor has discretion under order XX, rule 2, either to pronounce the judgment or not to pronounce it and to come to a decision himself on appeal. Another case in point is *Satyendra Nath Ray v. Kastura Kumari,* which was a decision of a Bench of five judges. In this it was held that a judgment may be written by a Judge after he has been transferred or has gone on leave and may be pronounced by his successors. We note that in that case there was an interval of ten months after the Judge had gone on leave before he sent the judgment to his successor to pronounce, and it was held that the pronouncing of such a judgment was a correct procedure under section 199 of the former Code of Civil Procedure of 1882, which corresponds to order XX, rule 2.

Some attempt has been made to draw a distinction between a judgment written after a Judge had retired and a judgment written while a Judge is on leave. It is true that when a Judge is on leave he will, on return from leave, take over charge again of his judicial office, but during the period that he is on leave he does not possess any judicial powers or functions or jurisdiction. We can see no distinction drawn between the writing of a judgment while a Judge is on leave and the writing of a judgment by a Judge who has gone on retirement. In fact if the distinction which the learned counsel seeks to draw were drawn, then it would lead to an absurd conclusion. If it were to be held that a judgment written on retirement is invalid but a judgment written on leave is not invalid, then there might arise a case of a judgment written during leave which is held to be valid, but owing to the officer subsequently

going on retirement and his retirement dating back to the commencement of his leave, then the same judgment ought to be invalid."

In the light of the above case-law, and by analogy thereto, we are of the opinion that the appealed from judgment in the present case has to be treated as having been validly pronounced.

As a result this appeal is dismissed with costs in favour of the respondent.

Appeal dismissed with costs.