

1983 February 10

[TRIANTAFYLIDIS, P., DEMETRIADES, SAVVIDES, JJ.]

KYRIACOS A. LAKATAMITIS,

Appellant-Defendant,

v.

GEORGHIOS THEODOROU,

Respondent-Plaintiff.

(Civil Appeal No. 6396).

Injunction—Interlocutory injunction—Possible to make under section 32 of the Courts of Justice Law, 1960 (Law 14/60) an order such as that envisaged by section 5 of the Civil Procedure Law Cap. 6—But in making such an order specific criteria laid down in section 5, in so far as they do not coincide with those in section 32 should, also, be taken into account—Trial Court granting interim order by examining only whether criteria laid down by section 32 were satisfied and not making any finding as regards a very important specific criterion in section 5—Discretionary power of trial Court exercised in a defective manner—Interim order set aside.

Upon filing an action against the appellant-defendant claiming damages caused due to negligence and breach of statutory duty, the respondent-plaintiff obtained ex parte an interim order restraining the appellant from selling, mortgaging or otherwise alienating his immovable property. This interim order was applied for under section 5* of the Civil Procedure Law, Cap. 6 and, also, under section 32** of the Courts of Justice Law, 1960 (Law 14/60); and it related to property which was not the subject-matter of the action in question. The trial Court made the interim order absolute and ordered that it should remain in force till the final determination of the action or until further order of the trial Court. In determining the issue of whether or not the interim order ought to be made absolute

* Section 5 is quoted at pp. 522-523 post.
 ** Section 32 is quoted at p. 523 post.

the trial Court applied only the criteria laid down in subsection (1) of section 32 of Law 14/60.

5 Upon appeal by defendant it was argued that an order such as the one involved in the present proceedings could not be made under section 32 of Law 14/60, but only under section 5 of Cap. 6.

10 *Held*, that though it is possible to make under section 32 of Law 14/60 an order such as that envisaged by section 5 of Cap. 6, in making such an order under section 32, the specific criteria laid down in section 5 should be, also, taken into account in so far as they do not coincide with the criteria set out in the said section 32; that since the trial Court proceeded to examine whether the criteria laid down by section 32 of Law 14/60 were satisfied, but it did not make any finding at all as regards a very important specific criterion in section 5, namely whether or not if the interim order was not made absolute it was probable that the respondent, as plaintiff, might be hindered in obtaining satisfaction of the judgment of the trial Court if given later in his favour, it follows that the discretionary powers of the trial Court were exercised in a defective manner, in that a most material consideration was not duly weighed; and that, therefore, the appealed from decision will be set aside and the question of whether the interim order which was made ex parte should remain in force until the determination of the action concerned has to be retried, necessarily by a differently constituted bench of the District Court of Nicosia.

Appeal allowed.

Cases referred to:

Constantinides v. Makriyiorghou (1978) 1 C.L.R. 585;
30 Papastratis v. Petrides (1979) 1 C.L.R. 231.

Appeal.

35 Appeal by defendants against the ruling of the District Court of Nicosia (Papadopoulos, P.D.C.) dated the 11th February, 1982 (Action No. 2305/81) whereby an interim order restraining the defendants from selling, mortgaging or otherwise alienating his immovable property was made absolute and ordered to remain in force until final determination of the above action.

G. Korfiotis, for the appellant.

P. Demetriou with *L. Georghiou*, for the respondent.

Cur. adv. vult.

TRIANTAFYLLOIDES P. read the following judgment of the Court. The appellant, who is the defendant in action No. 2305/81 in the District Court of Nicosia, has appealed against a decision by means of which there was made absolute and was ordered to remain in force till the final determination of the said action, or until further order of the trial Court, an interim order by which the appellant has been restrained from selling, mortgaging or otherwise alienating his immovable property in Nicosia (Pallouriotissa) and in the villages of Pano Lakatamia and Kato Lakatamia. 5 10

The said interim order was applied for by the respondent who is the plaintiff in the action and who is claiming from the appellant damages caused due to negligence of, and breach of statutory duty by, the appellant, or his servants or agents. 15

The interim order was initially obtained *ex parte* and then it was made returnable so as to afford to the appellant an opportunity to show cause why it should not remain in force; and after hearing counsel for the parties the trial Court decided that the order should remain in force as aforementioned; and as a result the present appeal was made. 20

As it appears from the record before us the interim order in question relates to immovable property which is not, in any way, the subject-matter of the action in question; and it was applied for under section 5 of the Civil Procedure Law, Cap. 6, and, also, under section 32 of the Courts of Justice Law, 1960 (Law 14/60). 25

The material, for the purposes of the present judgment, parts of the said section 5 are its subsections (1) and (2), which read as follows: 30

“(1) Any Court in which an action for debt or damages is pending, may, at any time after the institution of the action, by its order direct that the defendant be restrained from parting with so much of the immovable property standing registered in his name or of which he has by law a right to 35

be registered as the owner, as in the opinion of the Court shall be sufficient to satisfy the plaintiff's claim together with his costs of action.

5 (2) No such order shall be made unless it appears to the Court that the plaintiff has a good cause of action, and that by the sale or transfer of the property to any third person it is probable that the plaintiff may be hindered in obtaining satisfaction of the judgment of the Court if given in his favour."

10 Also, the material part of section 32 is its subsection (1), which reads as follows:

15 "(1) Subject to any Rules of Court every court, in the exercise of its civil jurisdiction, may, by order, grant an injunction (interlocutory, perpetual or mandatory) or appoint a receiver in all cases in which it appears to the court just or convenient so to do, notwithstanding that no compensation or other relief is claimed or granted together therewith:

20 Provided that an interlocutory injunction shall not be granted unless the court is satisfied that there is a serious question to be tried at the hearing, that there is a probability that the plaintiff is entitled to relief and that unless an interlocutory injunction is granted it shall be difficult or impossible to do complete justice at a later stage."

25 It is obvious from the reasoning to be found in the decision of the trial Court that in determining the issue of whether or not the interim order ought to be made absolute it applied only the criteria laid down in subsection (1) of section 32 of Law 14/60.

30 It has been argued by counsel for the appellant that an order such as the one involved in the present proceedings could not be made under section 32 of Law 14/60, but only under section 5 of Cap. 6.

35 We have not been referred to any case-law of this Court excluding from the ambit of section 32 of Law 14/60 an order that can, also, be made under section 5 of Cap. 6 and, on the contrary, when an order of such a nature was in fact made by the District Court of Nicosia and then it came before this Court on

appeal in *Constantinides v. Makriyiorghou*, (1978) 1 C.L.R. 585, it was not found that it could not have been made under section 32 of Law 14/60 because it was an order that could be made under section 5 of Cap. 6; it must be pointed out, however, that it does not appear from the judgment in the *Constantinides* case, supra, whether the particular issue of the jurisdiction to make an order of this kind under, also, section 32 of Law 14/60 was expressly raised in that case.

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Law 14/60 is a Law containing, inter alia, general provisions about the jurisdiction and powers of the Courts of the Republic and one of such powers is that granted by means of its section 32. On the other hand section 5 of Cap. 6 is a provision of a specific nature. We see no reason, as at present advised, why an order of the nature envisaged by section 5 of Cap. 6 cannot be made, also, under section 32 of Law 14/60, and, especially, simultaneously under both section 32 of Law 14/60 and section 5 of Cap. 6.

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In *Papastratis v. Petrides*, (1979) 1 C.L.R. 231, it was argued on appeal that an order for the preservation of the status quo or for preventing any loss or damage can be granted under section 4 of Cap. 6 independently of the provisions of section 32 of Law 14/60, and in rejecting such argument the following were stated by our Supreme Court (at p. 240):

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“We must say that we entirely disagree with this proposition of counsel. With the exception of cases where property is the subject matter of the action, in all other cases an application for an interlocutory order under section 4 of Cap. 6 cannot be considered independently of the provisions of section 32 of Law 14/60. Section 32 of Law 14/60 is of a wider application than section 4 of Cap. 6 and, consequently, when an application is considered under this section the provisions of section 4 of Cap. 6 are automatically taken into account.”

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Applying the above dictum, by analogy, to section 5 of Cap. 6 and section 32 of Law 14/60 we find confirmation for our already stated view that it is possible to make under section 32 of Law 14/60 an order such as that envisaged by section 5 of Cap. 6. But, in making such an order under section 32, the specific criteria laid down in section 5 should be, also, taken into account in so

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far as they do not coincide with the criteria set out in the said section 32.

5 In the present case the trial Court proceeded to examine whether the criteria laid down by section 32 of Law 14/60 were satisfied, but it did not make any finding at all as regards a very important specific criterion in section 5, namely whether or not if the interim order was not made absolute it was probable that the respondent, as plaintiff, might be hindered in obtaining satisfaction of the judgment of the trial Court if given later in his
10 favour.

15 It follows from the foregoing that the discretionary powers of the trial Court were exercised in a defective manner, in that a most material consideration was not duly weighed, and for this reason we have decided to set aside its appealed from decision and to order that the question of whether the interim order which was made ex parte should remain in force until the determination of the action concerned has to be retried, necessarily by a differently constituted bench of the District Court of Nicosia.

20 As a result this appeal is allowed with costs.

Appeal allowed with costs.