

1984 June 28

[TRIANTAFYLIDES, P., A. LOIZOU, LORIS, STYLIANIDES, PIKIS, JJ.]

TOULLA G. MALACHTOU,

*Appellant-Defendant,*

v.

CHRISTODOULOS K. ARMEFTI AND ANOTHER

*Respondents-Plaintiffs.*

(Civil Appeal No. 6616).

---

*Civil Procedure—Practice—Preliminary point of law—Order 27, rule 1 of the Civil Procedure Rules—Only pure issues of law should be dealt with thereunder which if decided in one way are going to be decisive of litigation between the parties—And only when facts are settled, otherwise the best course is to proceed with the hearing of the whole action under Order 33—Treatment of this case as an exceptional one.* 5

At the opening of this appeal, which was directed against the decision of the Full District Court of Limassol on an application under Order 27, rule 1 the Civil Procedure Rules the Court of Appeal, acting ex proprio motu, raised the preliminary issue whether it could deal with the present appeal, in view of the fact that the trial Court gave their ruling on a point of law which savoured of a decision “in abstracto” taking into consideration that the factual substratum on which the said ruling\* was based was neither proved nor agreed to by the litigants but on the contrary it was still bitterly contested. 10 15

*Held*, that though only pure issues of law should be dealt with under Order 27, rule 1, which if decided in one way are going to be decisive of litigation between the parties and the factual substratum thereof must not be in dispute; that though the Court called upon to decide a preliminary point of law should first know the undisputed facts giving rise to the legal issues he is invited to resolve and if the facts are not settled the best 20

---

\* The relevant part of the ruling is quoted at p. 550 post.

course is to proceed under order 33 i.e. the hearing of the whole action; and that though decision under Order 27, rule 1 when the facts are not settled will inevitably lead to declarations in abstracto or will decide academic questions something impermissible and quite outside the task entrusted to the Courts, this Court has decided, very reluctantly, to treat this case as an exceptional one and proceed with the hearing of the main appeal trusting that costs will be thus saved.

*Order accordingly.*

10 *Per curiam*: We feel it our duty to state though that we must not be taken to lay down either a deviation from the general principle stated above nor that we consider cases of the same or similar nature with the present appeal as cases which can be treated as exceptional cases.

15 Cases referred to:

*Georgallides v. Constantinides*, 1961 C.L.R. 95 at p. 97,  
*Overseas Shipping & Forwarding Co. of Lebanon v. Kappa Shipping Co. Ltd. and Others* (1977) 1 C.L.R. 248;

20 *Heirs of Theodora Panayi v. Administrator of the Estate of the late Stylianos Mandriotis* (1963) 2 C.L.R. 167 at p. 170;

*Michaelides v. Diakou* (1968) 1 C.L.R. 392;

*Papamichael v. Chacholiades* (1970) 1 C.L.R. 305 at p. 309;

*Stephenson Blake & Co. v. Grant Legros & Co.*, 86 L.J. Ch. 439;

25 *Jupiter Electrical (Overseas) Ltd. and Another v. Christides* (1975) 1 C.L.R. 144;

*Carl-Zeiss-Stiftung v. Herbet Smith & Co. and Others* [1969] 1 Ch. 93 at p. 94.

### Appeal.

30 Appeal by defendant against the ruling of the District Court of Limassol (Chrysostomis, P.D.C. and Stavrinides, D.J.) dated the 26th September, 1983 (Action No. 3107/82) whereby it was ruled, that provided a paternal affiliation is established, a child born out of wedlock has the same right of succession in the estate of the father and of a member of his father's family  
35 as if it had been born in wedlock.

*A. Triantafyllides* with *R. Michaelides*, for the appellant.

*C. Melas*, for the respondents.

TRIANAFYLLIDES P.: Mr. Justice Loris will give the ruling of the Court on the preliminary issue.

LORIS J.: At the opening of the present appeal, which is an appeal from the decision of the Full District Court of Limassol on an application under Order 27, rule 1 of our Civil Procedure Rules in Limassol Action No. 3107/82, we have raised, acting *ex proprio motu*, the preliminary issue whether we can deal with the present appeal, in view of the fact that the trial Court gave their ruling on a point of law which savours of a decision “in abstracto” taking into consideration that the factual substratum on which the said ruling was based was neither proved nor agreed to by the litigants but on the contrary it is still bitterly contested. 5 10

The relevant part of the ruling of the trial Court as it appears in the drawn up Order of 26.9.1983 reads as follows: 15

“This Court DOTH HEREBY RULE, provided that a paternal affiliation is established, that a child born out of wedlock has the same right of succession in the estate of his father and of a member of his father’s family, as if it had been born in wedlock”. 20

Thus the ruling on the aforesaid point of Law was made subject to the establishment of a “paternal affiliation”, a fact which is hotly contested by the pleadings and eventual failure of proving same will definitely render the substance of the ruling a mere declaration in abstracto. 25

In *Charis E. Georghallides v. Andreas Constantinides*, 1961 C.L.R. 95 it was stated by the then High Court of Justice (at p. 97) that “it is not the practice of the Courts to decide academic questions or make declaratory orders unless they relate to rights of one or more parties.....” 30

In the case of *Overseas Shipping & Forwarding Co. of Lebanon v. Kappa Shipping Co. Ltd. and others* (1977) 1 C.L.R. 248 it was held by a Judge of this Court (on the issue of jurisdiction) that “it is true that such an order..... should be made only in respect of matters on which no further light would be thrown 35

at the trial (*Isaacs & Sons Ltd. v. Cook* [1925] 2 K.B. 391 applied in *Taverner v. Glamorgan County Council* [1941] 57 T.L.R. 243) nor should such an order be made where there are facts in dispute”.

- 5 This Court after repeatedly drawing the attention on the procedure to be followed in respect of points of law raised under Order 27, rule 1 (vide: *The heirs of the late Theodora Panayi v. The Administrator of Estate of the late Stylianos Mandriotis* (1963) 2 C.L.R. 167 at p. 170 and *Maroulla Athanassi Michaelides v. Pinelopi Hji Michael Diakou* (1968) 1 C.L.R. 392) laid down in the case of *Michael PapaMichael v. Klitos Chaholiades* (1970) 1 C.L.R. 305 that only pure points of law should be dealt with under the provisions of Order 27, rule 1 whilst cases of mixed law and fact or fact alone should be tried under Order 33.
- 15 This is the relevant extract from page 309 of the report:

“We must say that we find the procedure followed in this case rather unorthodox. If it was a preliminary point of law then the provisions of Order 27 should have been followed..... If it was a question of mixed law and fact, or a question of fact alone, the trial Judge should have followed the procedure laid down in Order 33 regarding the hearing of the action.....”.

20

Our Order 27, rule 1 is similar to Order 25, rule 2 of the Rules of the Supreme Court in England as they were in force before 25 1962. (Now the corresponding rule in England is rule 11 of Order 18 read together with rules 3 and 4(2) of Order 33).

In the *Annual Practice 1953 Vol. 1* at p. 418 we read the following in respect of the English Order 25, rules 2 and 3 under the heading Scope of Rules.

- 30 “The Court is not justified under the above Rules, even with the consent of the parties, in deciding abstract questions of law raised by the pleadings. Its function is ‘to decide questions of law when arising between the parties as the result of a certain state of facts’”. (*Stephenson, Blake & Co. v. Grant Legros & Co.* 86 L.J. Ch. 439—
- 35 *Glasgow Navigations Co. v. Iron Ore Co.* [1910] A.C. 293).

In the case of *Stephenson, Blake & Co., v. Grant Legros & Co.* (supra) upon appeal on a dismissal of an application for the determination of six points of law under Order XXV, rules 2 and 3, the Court of Appeal refused to decide the questions of the law as to copyright and designs raised as points of law, leaving the action to go to trial in the ordinary way; Warrington L.J. stated inter alia the following: 5

“...The function of the Court is not to decide abstract questions of law, but to decide questions of law when arising between the parties as the result of a certain state of facts...” (vide p. 440 of the report). 10

The establishment with certainty of the state of facts from which there emerges the necessity of a preliminary decision of a point of law under Order 27, rule 1, is invariably a “sine qua non” element in all Cyprus authorities and in the vast majority of English cases to which we have looked for guidance. 15  
The case of *Jupiter Electrical (Overseas) Ltd. and another v. Savvas Costa Christides* (1975) 1 C.L.R. 144 is not a deviation from the above principle bearing in mind always that the two issues of law which were raised in the aforesaid case were (a) 20  
the issue of jurisdiction of the trial Court which turned on the interpretation to be placed on s. 3 of the Civil Wrongs Law, Cap. 148, i.e. a purely legal issue and (b) what was the law applicable in the case (the Cyprus or Libyan law); in this latter respect it is well settled that the matter of the law to be applied 25  
can be treated as a preliminary issue to be dealt with before the trial.

It is true though, that we have come across English cases, mostly recent, in which there was slight deviation from the above principle, cases which were rather treated as exceptional ones owing to their specific facts. One of these cases is the case of *Carl-Zeiss-Stiftung v. Herbet Smith & Co. and others* [1969] 1 Ch. 93. The facts of this case in brief appear at p. 94 of the report: 30

“A plaintiff brought an action against solicitors for an account and payment of all moneys they had received and were to receive from defendants in respect of fees, costs and disbursements in defending a passing-off action still proceeding in which the plaintiff claimed, as the soli- 35

5       citors admittedly knew, that all the assets of the defendants  
were and always had been the plaintiff's property; considerable fees, costs and disbursements would be incurred in future in defending the passing-off action preceding and during trial to establish matters in issue between the plaintiff and the defendants. In the action against the solicitors the plaintiff averred matters which were in issue in the passing-off action, and the solicitors moved for an order for the trial as a preliminary issue of the question whether  
10       the solicitors would be accountable to the plaintiff, for the moneys admittedly received, if the plaintiff established the matters averred.

Pennycuick J. Dismissed the motion".

15       On appeal it was held that since a decision in favour of the solicitors on the issue would dispose of the claim against them irrespective of the passing-off action the trial of the preliminary issue should be ordered.

Lord Denning M.R. in delivering the unanimous judgment of the Court of Appeal stated *inter alia* the following:

20       ".....I quite agree that in many cases the facts and law are so mixed up that it is very undesirable to have a preliminary issue. I always like to know the facts before deciding the law. But this is an exceptional case. The solicitors have received in good faith moneys for the defence of this action.  
25       They ought to know at once whether they can safely go on receiving them. If the issue of law is decided in their favour, it will dispose of the claim against them irrespective of the main action. I would order a preliminary issue to be tried....." (vide [1969] 1 Ch. 93 at pp. 98-99).

30       Reverting now to the present preliminary issue; after hearing addresses of counsel on both sides, having given to this issue our best consideration, we have decided, although we must say very reluctantly, to treat this case as an exceptional one and proceed with the hearing of the main appeal trusting that  
35       costs will be thus saved.

We feel it our duty to state though that we must not be taken to lay down either a deviation from the general principle stated above nor that we consider cases of the same or similar nature

with the present appeal as cases which can be treated as exceptional cases.

Only pure issues of law should be dealt with under Order 27, rule 1, which if decided in one way are going to be decisive of litigation between the parties; and the factual substratum thereof must not be in dispute. The Court called upon to decide a preliminary point of law should first know the undisputed facts giving rise to the legal issues he is invited to resolve. If the facts are not settled the best course is to proceed under Order 33 i.e. the hearing of the whole action. A decision under Order 27, rule 1 when the facts are not settled will inevitably lead to declarations in abstracto or to use the wording in the case of *Georgallides* (supra) to decide academic questions something impermissible and quite outside the task entrusted to the Courts.

*Order accordingly.*