

1985 April 2

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

ACHILLEAS D. ACHILLEOS,

*Appellant-Plaintiff,*

v.

- 1. ANDREAS MAVROU,
- 2. GEORGHIOS MAVROU,

*Respondents-Defendants.*

*(Civil Appeal No. 6577).*

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*Civil Procedure—Trial in civil cases—Evidence adduced, without objection, at variance to as well as outside the pleadings—Trial Judge evaluating the evidence without reference to the pleadings—His omission to refer to the pleadings makes his findings vulnerable—Retrial ordered.*

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On the 15.1.1982 the parties to the above appeal entered into an agreement for the sale to the respondents of fifteen cows and one bull, at a price of £9,500. Following the agreement the respondents took possession of the animals. Part of the sale price—an amount of £5,000.—

was paid on the day of the conclusion of the transaction and the balance at a future date. As the payment of the balance became the subject of controversy and was never paid the appellant sought an order for the recovery of the animals and, in the alternative, judgment for £4,500 by way of damages for breach of contract. The trial Judge concluded that a sale took place and inasmuch as it was not followed by delivery of the certificates of ownership, as required by section 4 of the Animals Certificates Law, Cap. 29, the transaction was illegal as provided in section 7 of the Law and as such unenforceable. Hence the dismissal of the action. In the course of the trial evidence was adduced, without objection, at variance to as well as outside the pleadings, in relation to the nature of the agreement reached on 15.1.1982; and the Court evaluated such evidence without reference to the pleadings.

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Upon appeal by the plaintiff:

5           *Held*, that the omission of the trial Judge to refer to the pleadings in evaluating the evidence makes his findings vulnerable especially those findings affecting the version of the defendants, eventually accepted as to the conditions accompanying the sale; that the version accepted, establishing an outright sale, is contradicted by the version put forward in the defence; that this contradiction weakens the findings and makes them uncertain as a basis for the judgment of the Court; accordingly the appeal must be allowed and a retrial is directed before another Judge.

*Appeal allowed.*

*Retrial ordered.*

15 **Appeal.**

Appeal by plaintiff against the judgment of the District Court of Larnaca (Constantinides, S.D.J.) dated the 30th April, 1983 (Action No. 624/82) whereby his claim for £4,500.- as damages for breach of contract was dismissed.

20           *E. Efsthioiu with G. Constantinides and Z. Mylonas*, for the appellant.

*A. Andreou with K. Kourtis*, for the respondents.

*Cur. adv. vult.*

25           **TRIANTAFYLLIDES P.:** The judgment of the Court will be delivered by Pikiis, J.

30           **PIKIS J.:** It is common ground that on 15th January, 1982, the parties entered into an agreement for the sale by the appellant to the respondents of fifteen cows and one bull, at a price of £9,500.-. Following the agreement the respondents took possession of the animals. Part of the sale price —an amount of £5,000.- was paid on the day of the conclusion of the transaction, while the balance would be paid at a future date in circumstances that were a matter of dispute between the parties. The payment of the balance became the subject of heated controversy between the parties and was never paid in the end. Respondents claimed a right to return four of the animals bought, pursuant to

the terms of the agreement for the payment of the balance, that allegedly gave them a right to return cows that proved not to be pregnant. At the time of their sale it was a moot point whether the cows were pregnant. Some time had to elapse before definite signs of pregnancy could be detected. Appellant disputed the right of the respondents to return the four cows or possibly anyone of them. Matters came to a head when the respondents sold the animals to third parties, apparently unaware of the details of the transaction between the parties or the claims of the appellant to the animals. Certificates of ownership were issued on the application of the respondents that paved the way for the disposal of the animals to third parties.

Appellant sought, by the institution of the present proceedings, an order for the recovery of the animals and, in the alternative, judgment for £4,500.- by way of damages for breach of contract. The agreement provided, in his contention, that payment of the balance—payable in a matter of days—was a condition for the finalisation of the agreement, failing which plaintiff would be entitled to have the animals back. In evidence, appellant contended respondents assumed possession as bailees, subject to the finalisation of the agreement. Payment, it was explained, would be effected by the execution of bonds in favour of the appellant, whereupon he would relinquish ownership in the animals and complete the transaction by furnishing the respondents with the requisite certificates of ownership.

Respondents raised, by paragraph 1 of the defence, a preliminary objection to the validity of the claim of appellant, illegal in their contention, for breach of the provisions of the Animals Certificates Law—Cap. 29. The inevitable inference from the wording of para. 1 is that the plaintiff's claim as set out in the statement of claim, disclosed but an illegal agreement, that is, sale of animals unaccompanied by the requisite certificates of registration, as required by Cap. 29. Subject to this objection they put forward their own factual allegations relevant to the conditions of the agreement, constituting an alternative answer to the claim of the plaintiff as well as founding a counterclaim. The gist of their factual allegations is that the sale of the animals was subject to a "condition precedent"

that respondents would have a right to return as many of the cows as were not pregnant. In other words, they alleged, as the plaintiff did, that the transaction between the parties did not amount to an outright sale but a conditional one, albeit subject to conditions different from those averred by the appellant. And they expressed readiness to pay an amount of £2,100.-, balance of the money due, excluding the value of the four rejected cows. Building upon the premise of their case, adumbrated in the defence, they raised a counterclaim for an amount of £5.- per day, by way of damages, for the feed they provided for the four cows.

At the trial neither party confined his evidence to the allegations made in the pleadings and, in some respects, evidence was adduced in contradiction thereto. The learned trial Judge, in a careful judgment, examined the contentious evidence and concluded without, it must be said, direct regard to allegations made in the pleadings, that a sale took place and inasmuch as it was not followed by delivery of the certificates of ownership, as required by s. 4 of Cap. 29, the transaction was illegal, as provided in s. 7 of the Law and, as such, unenforceable. No claim could be fastened to it. Hence he dismissed both claim and counterclaim.

Appellant confined argument on appeal to one issue only: The nature and implications of the agreement of 15.1.82. In his submission, the circumstances of the transaction made it at best a conditional agreement within the meaning of s.24 of the Sale of Goods Act, that did not entail passing of property in the animals. The learned trial Judge accepted in his judgment that what is prohibited by the provisions of s. 7 of Cap. 29, is a sale without certificates of ownership, as defined by the Sale of Goods Act,<sup>1</sup> as opposed to an agreement to sell, that does not pass the property in the movables to the buyer. Although the Animals Certificates Law—Cap. 29, does not define “sale”, it is reasonable to presume, in view of the nature of the subject matter, that the legislature intended “sale” to have the meaning ascribed to it by commercial law; a meaning,

<sup>1</sup> Cap. 267.

it must be said, that tallies by and large with the ordinary usage of the word, as depicted in the Concise Oxford Dictionary.<sup>2</sup> Quite rightly then, the Court concerned itself to decide whether the transaction of 15.1.82 was a sale or an agreement to sell. Obviously, evidence was adduced without objection at the trial, at variance to as well as outside the pleadings, in relation to the nature of the agreement reached on 15.1.82. In the end, the Court evaluated such evidence without reference to the pleadings. This omission makes the findings vulnerable, especially those findings affecting the version of the defendants, eventually accepted as to the conditions accompanying the sale. The version accepted, establishing an outright sale, is contradicted by the version put forward in the defence. This contradiction weakens the findings and makes them uncertain as a basis for judgment of the Court. In view of this inherent weakness in the findings of the Court, it becomes unnecessary to debate whether it was at all possible for the Court, without amendment of the pleadings, to arrive at the findings it did and then give judgment unwarranted by the pleadings of the parties. For, in the contention of both appellant and respondents, the agreement of 15.1.82 was not a sale. It was merely an agreement to sell.

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We need not, in this case, because of our ruling on the unsafe nature of the findings, examine whether judgment can ever be found outside the scope of the pleadings and at variance to them.

In the result, the appeal is allowed with costs. The judgment of the trial Court is set aside. A retrial is directed before another Judge. Costs incurred before the trial Court

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<sup>2</sup> See, The Concise Oxford Dictionary, 8th edition, p. 996—The first meaning of the noun 'sale' is given as 'exchange of a commodity for money or other consideration, selling; ...'.

will be costs in the cause. Order accordingly.

*Appeal allowed with  
costs. Retrial ordered.*