1986 May 27

[A. LOIZOU, PIKIS, KOURRIS, JJ.]

COSTAS KADES,

Appellant-Defendant,

v.

CHRISTAKIS NICOLAOU AND ANOTHER,

Respondents-Plaintiffs.

(Civil Appeal No. 6798).

Judgments—Pillars upon which judgment must be fastened—Distinction between findings of fact and the evidential burden of proof—Burden of proof and its discharge have nothing to do with credibility of witnesses—Action for repayment of loan—Finding of fact that relevant sum given by cheque had not been given as a loan—Once such a finding was made, the action ought to have been dismissed. 5

On 8.6.81 respondents issued in favour of the appellant a cheque for £200, that was cashed by him. Respondents (Plaintiffs at the trial) alleged that it represented a temporary loan to the appellant. The appellant contended that it represented the equivalent of cash given to the respondents by him for the purpose of saving them a visit to the Bank on the date of the issue of the cheque. 10

The trial Court rejected that the sum of £200 had been advanced to the appellant as a loan. Nevertheless, for reasons not stated in the judgment, judgment was given for the respondents. 15

Hence the present appeal:

Held, allowing the appeal: (1) The aforesaid finding ought to have sealed the fate of the action. Conceivably the trial Court laboured under misapprehension as to the burden of proof, treating the issue of the cheque as supporting by itself a claim for a loan. Certainly this is not 20

a fact that may be presumed in face of allegations, as those made in this case.

5 (2) It is worth reminding of the three pillars upon which judgment must be fastened. There must be comprehensive analysis of the evidence by reference to the pleadings, accompanied by a clear statement of the findings of the Court rounded by a succinct declaration of the outcome of the case (*Pioneer Candy Ltd.* v. *Tryfon and Sons* (1981) 1 C.L.R. 540 and *Neophytou* v. *Police* (1981) 2 C.L.R 10 195). A distinction that must always be kept in mind is that between findings of fact and the application of the rules relevant to the discharge of the evidential burden of proof. Ponderation of the discharge of the burden of proof cast on a party can only be made by reference to evidence 15 accepted by the Court as credible. The rules relating to the burden of proof and its discharge have nothing to do with the credibility of witnesses.

Appeal allowed with costs, here and in the Court below.

20 Cases referred to:

Pioneer Candy Ltd. v. *Tryfon and Sons* (1981) 1 C.L.R 540;

Neophytou v. *The Police* (1981) 2 C.L.R 195.

Appeal.

25 Appeal by defendant against the judgment of the District Court of Nicosia (Michaelides, D. J.) dated the 26th June, 1984 (Action No. 1519/83) whereby the defendant was ordered to pay to the plaintiffs the sum of £200.- money given to the defendant as a loan.

30 *P. Frakalas*, for the appellant.

Y. Erorocritou, for the respondents.

A. LOIZOU J.: The judgment of the Court will be given by Pikis J.

PIKIS J.: The respondents are building contractors 35 working in partnership. The appellant is a civil engineer.

The two sides co-operated in the building of a factory; respondents as building contractors and appellant as the nominated civil engineer charged to oversee the structure that was being erected. Respondents issued on 8th June, 1981, a cheque in favour of the appellant for £200.- (Two Hundred Cyprus Pounds) that was duly cashed by him. As much is admitted. What is disputed, is the purpose for which the money was given, about which the parties joined issue before the District Court. Respondents alleged it represented a temporary loan advanced to enable appellant cope with current financial difficulties, to be refunded within two to three months. Appellant, on the other hand. contended the cheque had been issued for a wholly different purpose; it represented the equivalent of cash given to the respondents to save them a visit to the bank on the date of the issue of the cheque. In that way the parties were able to continue their discussion on matters connected with the building of the factory. The action for the recovery of the money was raised nearly two years after the money was given. It more or less coincided with the termination by the owners of the factory of their contract with the respondents on account of alleged delays on their part in the performance of obligations undertaken thereunder.

The evidence before the trial Court was confined to the testimony of the parties. The trial Judge noticed many loopholes in their evidence and found their testimony unsatisfactory. The witnesses left the Court with a poor impression and attempted, as noted in its judgment, to hide the truth from the Court. The Court found the witnesses lied to the Court in many parts of their evidence.

Any doubt as to the rejection of the case of the respondents (plaintiffs at the trial), is dispelled by the debate in the penultimate paragraph of the judgment, a debate it must be said, containing a degree of speculation. According to the judgment, what probably happened is that the cheque was given by the respondents to the appellant in order to induce the latter to justify delays on their part in the performance of their contractual obligations. One is left to infer from the tenor of the judgment that the parties entered into a kind of collusive agreement. A

claim for the recovery of the money was asserted only after the owners terminated their contract with the respondents, a termination for which respondents probably regarded the appellant as responsible. The state of the evidence before the Court on this matter was not certain to the degree of making it possible for the Court to make any positive findings of fact, as noted by the trial Judge.

Examined from whatever angle, the findings of the Court entailed the rejection of the case for the respondents. The Court rejected that the sum of £200.- had been advanced to the appellant as a loan. This finding ought to have sealed the fate of their action resulting in its dismissal. Nevertheless, for reasons not stated in the decision of the Court, judgment was given for the respondents. Conceivably, the Court laboured under a misapprehension as to the burden of proof, treating the issue of the cheque as of itself supporting a claim for a loan. This is not so. As counsel for the appellant pointed out by reference to the caselaw summarised in *Bullen & Leake*,[1] the advance of money, in cash or by cheque, is not of itself proof of a loan. Certainly this is not a fact that may be presumed in face of allegations, as those made in this case, that the money was given for a purpose inconsistent with the existence of a loan. Once the Court rejected the case for the respondents that the money had been given as a loan to the appellant, there was only one alternative open to the Court, to give judgment for the appellant.

It is worth reminding of the three pillars upon which judgment must be fastened, enumerated in *Pioneer Candy Ltd.*, v. *Tryfon & Sons*[2] and further emphasized in *Neophytou* v. *Police*.[3] There must be comprehensive analysis of the evidence by reference to the pleadings, accompanied by a clear statement of the findings of the Court rounded by a succinct declaration of the outcome of the case. One other distinction trial courts must always keep in mind it that between findings of fact and the application of the rules relevant to the dis-

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[1] Precedents of Pleadings, 25th ed., p. 675; see, also, Chitty on Contract, 22nd ed., p. 413.

[2] (1981) 1 C.L.R. 540

[3] (1981) 2 C.L.R. 195.

charge of the evidential burden of proof. Ponderation of the discharge of the burden of proof cast on a party, can only be made by reference to evidence accepted by the Court as credible. Adjudication on the credibility of witnesses is a matter wholly separate and distinct from the balancing of the evidence in order to ascertain on which side it preponderates. If the evidence of a witness is rejected as unworthy of credit, there is nothing to weigh thereafter. The rules defining the burden of proof and the circumstances of its discharge, have nothing to do with the credibility of witnesses. A witness may either be believed or disbelieved (wholly or in part) according to the view taken of his credibility by the Court. A question of discharge of the burden of proof can only arise if there is credible evidence to way on the two sides. If there is no credible evidence to support the case of the party upon whom the burden of proof lies, as in this case, there is nothing to weigh thereafter. The case collapses, as indeed the case for the respondents collapsed with the rejection of their testimony and allegations that the sum of £200.- had been lent to the appellant.

The appeal is allowed with costs here and in the Court below. The judgment of the trial Court is set aside and varied in accordance with this judgment.

Appeal allowed with costs.