

1987 May 14

[SAWIDES J]

ANASTASSIA C HAMBOU,

Respondent-Plaintiff,

v

ANDREAS THOMA

Applicant-Defendant

(Application No 57/87)

Civil Procedure — Preliminary point of law — Order 27, r 1 of the Civil Procedure Rules — Importance of rule — Application thereunder should be made on the Summons for Directions or at the close of the pleadings or very shortly thereafter — Need of Judicial control of the exercise of the right under said rule — Matter of granting or refusing an application thereunder left to discretion of the Court — An application under the rule was filed by the defendant on 4 3 87 and heard on 11 4 87, whilst the case had already been fixed for hearing on 14 4 87 — Decision that preliminary point be dealt together with the substance of the case — Discretion correctly exercised 5

Prerogative Orders — Prohibition — Leave to apply for — Principles applicable — Discretion of the Court 10

The applicant is the defendant in an action before the District Court of Lamaca for the recovery of possession of certain immovable property and for damages by way of rent and/or mesne profits until delivery of the premises

On 19 7 86 the applicant applied for leave to amend his defence in the action by the addition thereto of a preliminary objection that the Court had no jurisdiction to try the case On 21 11 86 the application was granted 15

The action was eventually fixed for hearing on 14 4 87 On 4 3 87 the defendant applied for hearing of the preliminary point of law that in virtue of Law 79/86 the premises became rent controlled and, therefore, subject to the Jurisdiction of the Rent Control Court 20

The application, which was opposed by the plaintiff, was eventually fixed for hearing on 11 4 87 After hearing counsel on the issue, the President of the District Court decided that the aforesaid point should be dealt with the substance of the case 25

As a result the defendant filed this application for leave to apply for an order of prohibition

Held *refusing leave to apply for an order of prohibition*

5 (1) The importance of Order 27 rule 1 of the Civil Procedure Rules has been stressed in a number of cases. The advantage under Order 27 should be taken either on the summons for directions or at the close of the pleadings or very shortly thereafter. Counsel should not wait till the case is fixed for trial and shortly before the date of hearing avail themselves of the procedure and thus secure an adjournment of the hearing which otherwise might not be granted. 10 If the right under the Order is left to be exercised without any judicial control then there may be an abuse of it and a party who wishes to protract the proceedings may use it to adjourn the hearing. This is why it is left within the discretion of the Court to decide whether to grant or not an application under the order.

15 (2) The granting of leave to issue a prerogative order is a matter of discretion which should be sparingly exercised, bearing in mind that the applicant should make out a *prima facie* case.

(3) The applicant in this case failed to make out a *prima facie* case. The trial Judge rightly exercised his discretion.

20 *Application dismissed. No order as to costs.*

Cases referred to

Christofi and Others v Iacovidou (1986) 1 C L R 236

Michaelides v Diakou (1968) 1 C L R 392,

25 *Paschalis v Ship «TANIA MARIA»* (1977) 1 C L R 53,

Overseas Shipping and Forwarding Co v Kappa Shipping Co Ltd and Others (1977) 1 C L R 248,

Michael v United Sea Transport Co Ltd (1981) 1 C L R 322,

Everett v Ribbands [1952] 2 Q B 198

30 Application.

Application for leave to apply for an order of prohibition prohibiting the District Court of Lamaca from further proceeding with the hearing of Civil Action No 643/84

E Karaviotis, for the applicant

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Cur adv vult

SAVIDES J. read the following judgment. This is an application for leave to apply for an order of prohibition prohibiting the District Court of Lamaca from further proceeding with the hearing of civil action No. 643/84 fixed for hearing before it.

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The facts of the case as emanating from the affidavit before me and the written address of counsel for applicant, are briefly as follows:

An action was instituted against the defendant-applicant for recovery of possession of certain property and for damages by way of rent and/or mesne profits until delivery of the premises. An appearance was entered by the applicant-defendant and his defence was filed in the proceedings. In fact the case was ready to be fixed for hearing and was in fact fixed for mention on 6.6.1986 and was adjourned for hearing. Prior to the hearing the Rent Control Law was amended to include certain additional areas within the definition of a controlled area. As a result, counsel for the defendant on the 19th July, 1986 applied for an amendment of the pleadings by the addition thereto of a new paragraph (paragraph 12) raising a preliminary objection that the Court had no jurisdiction to try the case and that the matter was within the jurisdiction of the Rent Control Court. Such application was granted on 21.11.1986. No summons for directions was applied for by counsel for applicant praying, inter alia, for the fixing of any preliminary point of law prior to the hearing and the action was eventually fixed for hearing on the 14th April, 1987, after the lapse of nearly three years from its institution. On the 4th March, 1987, applicant's counsel submitted an application to the Court for the hearing of the preliminary point of law that the premises in question under the enactment of Law 79/86 became rent controlled premises and, therefore, subject to the jurisdiction of the Rent Control Court. The application was eventually fixed for hearing on the 11th April, 1987 and the President of the District Court of Lamaca after hearing counsel on the issue, which was strongly opposed by counsel for plaintiff, decided that the preliminary question of law should be dealt with together with the substance of the action which had already been fixed for hearing on the 14th April, 1987.

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Though the record before me is not complete, it may be assumed that the learned President decided so in view of the fact that the action had already been fixed for hearing and was to be heard three days after the date when the application came up for hearing before him.

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As a result, the applicant filed the present application praying for leave to issue an order of prohibition prohibiting the District Court of Lamaca from further proceeding with the hearing of the case before it dealt with the preliminary point of law raised. It should be observed that no appeal was filed against the ruling of the learned trial Judge.

I need not repeat the principles governing the granting or refusing of an application for leave to apply for an order of certiorari or mandamus or prohibition as they have explicitly been stated in a number of cases of this Court (see, inter alia, the recent case of the Full Bench *Christofi and Others v. Iacovidou* (1986) 1 C.L.R. 236 in which reference is made to a series of cases decided by our Supreme Court and also by the English Courts).

It is well settled by our case law, following in this respect, the English case law which is based on the corresponding English Rules (Order 25 of the Rules of the Supreme Court in England of 1958, the old rules applicable in Cyprus) that the object of this rule is to save time and expenses in cases where the determination of a point of law preliminary to the hearing of the case may dispose of the substance of the case or dispose of a material issue and thus save the need for hearing evidence on any factual issues.

The importance of this provision has been stressed in a number of decided cases by this Court, both in the exercise of original jurisdiction in admiralty actions in considering the matter under the Admiralty Rules of our Supreme Court and in particular Rule 86 which corresponds to Order 27(1), of the Civil Procedure Rules and also in civil appeals (see, inter alia, *Michaelides v. Diakou* (1968) 1 C.L.R. 392, *Paschalis v. Ship «TANIA MARIA»* (1977) 1 C.L.R. 53; *Overseas Shipping & Forwarding Co. v. Kappa Shipping Co. Ltd. & Others* (1977) 1 C.L.R. 248; *Michael v. United Sea Transport Co. Ltd.* (1981) 1 C.L.R. 322).

Useful reference in this respect may be made to the observations of Josephides, J., in the case of *Michaelides v. Diakou* (supra) at page 395, which reads as follows:

«Before concluding our judgment, we would like to refer to the procedure followed in this case of setting down a point of law for hearing at the stage when it was set down for such hearing. In the past we had occasion to refer to the correct procedure to be followed. We did so on more than one

occasion We need only refer to the case of *The heirs of the late Theodora Panayi v The Administrators of the Estate of the late Stylianos Mandriotis* (1963) 2 C L R 167 This is what we said in that case (at page 170)

'We would like to add that in cases where an objection is taken in the defence the interested party must apply to the Court to have a particular point of law under Order 27 formulated and set down for hearing before the date of trial, and he should not wait until the day of trial when all the parties and their witnesses are before the Court, when considerable costs may be incurred An application under Order 27 should normally be made on the summons for directions'

We do hope that in future this practice will be followed both by counsel and the courts who have to deal with such matters »

It should be observed, however, and this view is supported by the dicta in the above cases that the advantage under Order 27 should be taken either on the summons for directions or at the close of the pleadings or very shortly thereafter (See, also, in this respect, *Everett v Ribbands* [1952] 2 Q B 198 at p 206) Counsel should not wait till the case is fixed for trial and shortly before the date of hearing avail themselves of the procedure under Order 27 and thus secure an adjournment of the hearing of the case which otherwise might not have been granted If this right is left to be exercised without any judicial control then there may be an abuse of it and parties who wish to have the proceedings protracted, may wait till the eve of the hearing to file an application and thus secure an adjournment of the case It is for this reason that the matter is left within the discretion of the Judge to decide whether in the circumstances of a particular case it is in the interest of justice to grant such application and have the points of law set down for hearing prior to the hearing of the action

In the present case the learned trial Judge after hearing arguments by both counsel and bearing in mind the fact that the action had already been fixed for hearing, decided that the application for hearing of the preliminary points which was made at such late stage and whilst the action was about to be heard, three days after the hearing of the application, decided to hear such point together with the substance of the case

The question which I have to decide at this stage is not as to whether the order applied for should be issued, but whether, on the material before me a prima facie case has been made out

sufficiently to justify the granting of leave to the applicant to move this court to issue an order of prohibition.

5 As I said earlier, the granting of leave to issue a prerogative order is a matter of discretion of this Court. Such discretion, however, should be sparingly exercised and bearing in mind always the principle that a prima facie case should be made out justifying the granting of such leave.

10 In the circumstances of the present case I find that a prima facie case justifying the granting of the order applied for has not been made out, that the Judge rightly exercised his discretion and, therefore, the granting of leave to issue an order of prohibition is not justified.

15 It should be noted that the applicant is not deprived of his right to argue the question of the jurisdiction of the Court at the hearing of the action at which counsel should have the opportunity of advancing his arguments.

In the result the application is hereby dismissed with no order for costs.

*Application dismissed.
No order as to costs.*

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