IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

GEORGHIOS KYRIACOU AND OTHERS,

Applicants,

and

THE REPUBLIC OF CYPRUS, THROUGH THE COUNCIL OF MINISTERS,

Respondent.

(*Case No.* 134/69).

Immovable Property (Tenure, Registration and Valuation) Law, Cap. 224—Communal property—Declared that it should cease to be such property—Section 19 (c) of the Law—"Available" in the proviso to this section—Meaning of—Amount to be paid for the value of the communal property—Adequacy of, not a matter that can be determined in a proceeding such as the present recourse—Time and manner of disposal of the amount of money to the inhabitants—Court cannot substitute its discretion or choice in the place of that of the administration regarding the part of the communal property to be covered by the declaration.

Words and Phrases—"Available"—In the proviso to section 19 (c) of the Immovable Property (Tenure, Registration and Valuation) Law, Cap. 224.

Administrative Law—Discretionary powers—Part of communal property declared that it should cease being such property—Section 19 (c) of the Immovable Property (Tenure, Registration and Valuation) Law, Cap. 224—Court cannot substitute its own discretion or choice in the place of that of the administration regarding the part of the property to be covered by the declaration.

By a decision of the respondent Council, taken under section 19 of the Immovable Property (Tenure, Registration and Valuation) Law, Cap. 224, it was declared that 314 donums of the "communal property" of Koutsoventis village should cease to be property of such nature, because it was required for quarrying. The said section, so far as relevant, reads as follows:

"(c) where the communal property or any part thereof is required for any of the following purposes, that is to say -

(i) the formation of a village or quarter;

(ii) reclamation;

(iii) soil conservation;

(iv) mining;

(v) an undertaking of public utility, the Council of Ministers may, by notice in the Gazette, declare that such property or part thereof shall cease to be communal property:

Provided that in every such case property of the Republic of equal utility as the communal property shall, if available, be assigned in lieu thereof or, if property of the Republic is not available, a sum equal to the value of the communal property, as determined by the Director, shall be provided and disposed of for the benefit of such town, village or quarter;

..... ".

Counsel for the applicants has submitted:

(a) That the proviso to section 19 (c) has not been duly complied with, as both alternatives in such proviso had to be examined before the *sub judice* decision was reached and the first of them had to be adopted unless there was no property of the Republic available so as to make such a course possible; and that the term "available" in section 19 (c) should be construed as meaning "available in fact" and not "available in the light of policy considerations", which, in this case, influenced the respondent Council against the assignment of a forest area.

(b) That the amount of £3,600 paid under the said proviso to section 19 (c) to the inhabitants was inadequate and it was not put at the disposal of the applicants at the proper time.

(c) That the respondent was labouring under the misconception that quarrying operations and grazing of

animals could take place in neighbouring areas. In this respect, it was stressed that the dust from the quarrying operations would make grazing impossible.

(d) That a different part of the communal property, equally rich in quarry materials, ought to have been used for quarrying operations, instead of the 314 donums affected by the *sub judice* decision.

With regard to contention (c) above, Counsel for the respondent has stated that the said amount was paid to the District Officer of Kyrenia on the 24th December, 1970, for the benefit of the village of Koutsoventis and that the 314 donums concerned ceased to be communal property only after the payment of the money.

Held, (I). With regard to contention (a) above:

(1) The term "available" in section 19 (c) of Cap. 224 means available in fact and, also, capable of being used or being taken advantage of in the light of all relevant considerations. (See Words and Phrases Legally Defined, 2nd ed. vol. 1, p. 142).

(2) The consideration of public policy, which appears to have influenced the respondent Council against the assignment of a forest area, was that, once it was assigned to the villagers, the Government could not have any control over its use; and I do find such a consideration a very legitimate one, in view of the obviously special nature, and the need for protection, of forest areas.

Held, (II). With regard to contention (b) above:

(1) The issue whether the amount of £3,600 was equal to the value of the 314 donums of communal property, which ceased to be such property, is not one that can be determined in a proceeding such as the present recourse.

(2) There is nothing in section 19 (c) which rendered it necessary for the said amount to have been paid simultaneously with the publication of the *sub judice* decision; nor is it laid down by section 19 (c) that such amount ought to have been placed directly at the disposal of the applicants, as inhabitants of the village.

Held, (III). With regard to contention (c) above:

I am not satisfied that the applicants have substantiated their contention that there existed such a material misconception as would justify the annulment of the *sub judice* decision, because, from the material before me, it seems that, to a certain extent, grazing of animals and quarrying operations can co-exist.

Held, (IV). With regard to contention (d) above:

This Court cannot substitute its own discretion or choice in the place of that of the administration in a matter of this nature.

Application dismissed.

Cases referred to:

Kyriacou and Others v. *The Republic* (1971) 3 C.L.R. 73.

Recourse.

Recourse against the decision of the respondent Council of Ministers whereby part of the " communal property" of Koutsoventis village was declared that it should cease to be property of such nature.

L. Papaphilippou, for the applicants.

L. Loucaides, Senior Counsel of the Republic, for the respondent.

Cur. adv. vult.

The following judgment was delivered by:–

TRIANTAFYLLIDES, P.: By this recourse the applicants, who are all inhabitants of Koutsoventis village, seek a declaration that the decision of the respondent Council of Ministers, dated April 10, 1969 (and published in the Third Supplement to the Official Gazette under Not. 239) to the effect that part (314 donums) of the " communal property" of Koutsoventis village should cease to be property of such nature is *null* and *void* and of no effect whatsoever.

This decision was taken by the respondent on the basis of the provisions of section 19 of the Immovable Property (Tenure, Registration and Valuation) Law, Cap. 224, the material parts of which (as modified under Article 188 of the Constitution) read as follows:–

" 19. Where by law or custom any immovable property (in this section referred to as 'the communal property') is held or enjoyed communally by any town, village or quarter, that following provisions shall have effect, that is to say:-

(a) the inhabitants of such town, village or quarter shall have in common, to the exclusion of all persons not being inhabitants thereof, the right of holding or enjoying the communal property subject to any conditions under which the communal property is by law or custom held or enjoyed;

.....

(c) where the communal property or any part thereof is required for any of the following purposes, that is to say –

(i) the formation of a village or quarter;

(ii) reclamation;

(iii) soil conservation;

(iv) mining;

(v) an undertaking of public utility, the Council of Ministers may, by notice in the Gazette, declare that such property or part thereof shall cease to be communal property:

Provided that in every such case property of the Republic of equal utility as the communal property shall, if available, be assigned in lieu thereof or, if Property of the Republic is not available, a sum equal to the value of the communal property, as determined by the Director, shall be provided and disposed of for the benefit of such town, village or quarter;

..... "

The Director referred to in subsection (c) above is the Director of Lands and Surveys.

The respondent took the said decision because the area in question is to be used for quarrying operations.

In determining a preliminary issue in the present proceedings I have already held (see *Kyriacou and Others* v. *The Republic* (1971) 3 C.L.R. 73) that the term "mining" in section 19 (c) (iv) of Cap. 224 is wide enough to include "quarrying".

Counsel for the applicants has submitted that the proviso to section 19 (c), above, has not been duly complied with, as both alternatives in such proviso had to be examined before the *sub judice* decision was reached and the first of them had to be adopted unless there was no property of the Republic available so as to make such a course possible; he has referred, in this respect, to paragraph 5 of the relevant submission to the Council of Ministers (see *exhibit* 3) and he has contended that it is to be derived therefrom that the first alternative could be implemented, but such a course was not followed because an area which could have been assigned to Koutsoventis village in lieu of the aforementioned 314 donums of land was a forest area.

Counsel for the applicants has argued, in this connection, that the term "available" in section 19 (c) should be construed as meaning "available in fact" and not "available in the light of policy considerations".

Regarding the notion of availability it is perhaps useful to refer to Words and Phrases Legally Defined, 2nd ed., vol. 1, p. 142, where the following passages are to be found:-

> "*Australia*:- (Section 200 (1) of the Licensing Act 1932-1966, provides that no holder of a publican's licence shall, if there is accommodation 'available' in his house, refuse to receive any *bona fide* traveller.) 'The natural meaning of 'available' is 'capable of being used'. *Rowan* v. *McNally*, (1941) S.A.S.R. 200, per Napier, J., at p. 204.
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> *Canada*:- (A policy of insurance provided that at the end of the third or any subsequent year during which full premiums had been paid or within thirty days thereafter, the surrender value in cash should become 'available' to the assured.) ''Available' does not mean 'existing'. It means 'in such a condition as that it can be taken advantage of'. *Devitt* v. *Mutual Life Insurance Co. of Canada* (1915), 33 O.L.R. 473; C.A., per Riddell; J., at p. 478."

Similarly, in my opinion, the term "available" in section 19 (c) of Cap. 224 means available in fact and, *also*, capable of being used or being taken advantage of in the light of all relevant considerations, including public policy considerations. I, therefore, cannot accept as correct the interpretation placed on the proviso to section 19 (c) of Cap. 224 by counsel for the applicants.

In the present case, as it appears from *exhibit* 3, the first alternative was duly examined, first, but it was decided, eventually, that, for considerations of public policy, a forest area, which was otherwise available, should not be assigned to Koutsoventis village; in effect such area was not "available" in the sense of being, in the circumstances, capable of being used for the purpose of adopting the first alternative course under the said proviso. The consideration of public policy, which appears to have influenced the Council of Ministers against the assignment of a forest area, was that, once it was assigned to the villagers, the Government could not have any control over its use; and I do find such a consideration a very legitimate one, in view of the obviously special nature, and the need for protection, of forest areas.

It was decided by the respondent that there should be paid, under the proviso to section 19 (c), to the inhabitants of Koutsoventis, a sum of £3,600, and, also, that there should be created a grazing area for use by them.

Counsel for the applicants has submitted that the amount of £3,600 is inadequate, and, also, that it was not put at the disposal of the applicants, at the proper time, inasmuch as until the date of the hearing of the present case such amount had not yet been made available to them.

Counsel for the respondent has stated that on December 24, 1970, the said amount was paid to the District Officer of Kyrenia for the benefit of the village of Koutsoventis and that the 314 donums concerned ceased to be communal property only after the payment of the money on December 24, 1970.

There is nothing in section 19 (c) which rendered it necessary for the said amount to have been paid simultaneously with the publication of the *sub judice* decision; nor is it laid down by section 19 (c) that such amount ought to have been placed directly at the disposal of the applicants, as inhabitants of the

village. All that was required was for the money to "be provided and disposed of for the benefit of such... village..." and the process for doing so was, in my view, sufficiently set in motion by paying the amount in question to the District Officer under whom the village authority of Koutsoventis comes.

The issue whether the amount of £3,600 was equal to the value of the 314 donums of communal property, which ceased to be such property because of the *sub judice* decision of the respondent, is not one that can be determined in a proceeding such as the present recourse.

Counsel for the applicants has contended, too, that the respondent was labouring under the misconception that quarrying operations and grazing of animals could take place in neighbouring areas; he stressed, in this respect, that the dust from the quarrying operations would make grazing impossible.

I am not satisfied that the applicants have substantiated their contention that there existed such a material misconception as would justify the annulment of the *sub judice* decision; in this connection it must be duly borne in mind that in the course of the hearing it has been stated by counsel for the applicants that prior to the said decision the whole of the communal property in question was being used as a grazing area by the applicants and that, at the same time, there existed therein four lawfully operated quarries in respect of which the applicants received annual fees; so, it seems that, to a certain extent, grazing of animals and quarrying operations can co-exist.

Regarding, lastly, another argument of counsel for the applicants to the effect that a different part of the communal property, equally rich in quarry materials, ought to have been used for quarrying operations, instead of the 314 donums affected by the decision of the respondent, all that needs to be said is that this Court cannot substitute its own discretion or choice in the place of that of the administration in a matter of this nature.

For all the foregoing reasons this recourse fails and is dismissed accordingly; but, I am not prepared to make an order for costs against the applicants.

Application dismissed; no order as to costs.