

1984 October 4

[HADJIANASTASSIOU, DEMETRIADES, SAVVIDES, JJ.]

HERAKLIS PANAYIOTOU,

Appellant-Plaintiff.

v.

1. IOANNOU & PARASKEVAIDES (OVERSEAS) LTD.
2. THE NINE GROUP SUPPLIERS LTD.,

Respondents-Defendants.

(Civil Appeal No. 6365).

Civil Procedure—Trial in civil cases—Action based on negligence and breach of contract—Trial Judge failing to adjudicate on issue of breach of contract—And such failure prejudicial to plaintiff—Retrial ordered.

5 The appellant-plaintiff sued the respondents defendants
claiming (a) damages “for negligence and/or breach of the
defendants of their statutory duties and (b) damages for breach
of contract entered into between the plaintiff and defendants 2
as agents of defendants 1 of the 30th March, 1979”. The
10 particulars of claim (b) in the statement of claim were that
the defendants by virtue of the terms of a contract of employ-
ment, “undertook to cover the plaintiff against any loss from
any danger irrespective of any responsibility of the defendants
at the time of his employment”; and in the course of his evidence
15 the appellant produced the said contract of employment. The
trial Court considered the action as founded on the law of negli-
gence only and did not adjudicate on claim (b) having held
that it has been abandoned in that it was not seriously pursued
during the hearing.

20 *Upon appeal by plaintiff:*

Held, that this Court has not traced anywhere in the record
of the proceedings that at any stage of the proceedings the plain-
tiff or counsel on his behalf waived his alternative claim based
on breach of contract; that, therefore, the finding of the trial
25 Judge that the plaintiff’s claim in this respect had been abandoned

is not warranted by the material before this Court and the failure of the trial Judge to adjudicate on this issue has been prejudicial to the plaintiff; and that, accordingly, the case has to go back for retrial on both issues.

Appeal allowed. 5
Retrial ordered.

Appeal.

Appeal by plaintiff against the judgment of the District Court of Nicosia (Artemides, S.D.J.) dated the 13th November, 1981 (Action No. 1733/80) whereby his claim for damages in respect of injuries which he suffered in the course of his employment with the defendants, was dismissed. 10

G. Korfiotis, for the appellant.

Ch. Ierides with *Chr. Clerides*, for the respondent.

Cur. adv. vult. 15

HADJIANASTASSIOU, J.: The judgment of the Court will be delivered by Mr. Justice Savvides.

SAVVIDES J.: This is an appeal against the judgment of the District Court of Nicosia whereby appellant's claim for damages in respect of injuries which he suffered in the course of his employment with the respondents, was dismissed. 20

Appellant was employed by the respondents to work in Muscat, Oman, as a body car repairer. The accident in respect of which the claim arose, occurred in the course of his employment with the defendants in Muscat on 18.7.1979 as a result of which the plaintiff suffered the damages in respect of which he brought an action in the District Court of Nicosia. Appellant's claim was two-legged. The first leg concerned damages for injuries suffered by him as a result of the negligence of the defendants and/or for breach of statutory duty in securing a safe place of employment, the second leg being for damages for breach of contract entered between him and the defendants on the 30th March, 1979, whereby the defendants agreed and undertook as part of his terms of employment in Muscat, to have the plaintiff insured for any damage that might be caused to him in respect of a personal accident independently of any negligence on his part. 25
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The facts as appearing from the statement of claim are briefly as follows:

On or about the 30th March, 1975 the plaintiff entered into an agreement with the defendants for employment in Muscat in the Arab Bay for a period of one year as a car body repairer. In compliance with such contract the plaintiff entered employment in Muscat, Oman. It was a term of the contract of employment between the parties that the defendants would undertake to pay the premiums for an insurance for personal injuries in respect of industrial accidents, as well as for any personal injuries in respect of any accident anywhere in Oman. On or about the 18th July 1979 the plaintiff, whilst working in the garage of defendants 1 met with an accident alleged by him as having been caused due to the negligence of the defendants, particulars of which are set out in the statement of claim. As a result of such accident, he suffered injuries which resulted to personal damages for which he claims £740.250 mils, special damages, as well as general damages.

The learned trial Judge having heard a number of witnesses called by both sides, in dealing with the question of negligence came to the conclusion that the plaintiff failed to prove that the defendants have any blame for the accident. The learned trial Judge had this to say in his judgment:

“Before concluding, I must say that it was upon the plaintiff to prove on the preponderance of probabilities his case. I have tried to understand as far as I could the mechanical means of how a spring is functioning in the boot of a car. No drawing was produced to show me this functioning and what is more important the alleged tool which it is supposed to consist from an ordinary piece of iron, has not been shown to me. I have tried to make out how the accident has occurred from rather incoherent oral evidence emanating from the plaintiff himself coupled with hand gestures and signs. In the light of my above findings I have come to the conclusion that the plaintiff has failed to prove that for his accident the defendants have nothing to be blamed for”.

Nevertheless, in following the established practice, he proceeded to decide the question of damages to which the plaintiff

would have been entitled, had he been successful and found such amount at £605.--.

The learned trial Judge considered the case from the aspect of tortious liability, without examining the question of any liability arising out of any contractual relationship between the plaintiff and defendants 1 and in particular, the responsibility undertaken by the defendants, for the following reasons, as appearing in his judgment: 5

“In paragraph 10 of the statement of claim there is an allegation that the defendants had also contravened a term of the contract of employment in that they had failed to insure him against all risks during his work. This ground, however, of the plaintiff’s claim has in fact been abandoned in that it was not seriously pursued during the hearing. The claim as it is framed in the specially endorsed writ, refers to the contravention of the contract of employment as an additional ground of the claim. In the statement of claim, however, in paragraph 11 this ground has not been added. I considered the case, and that is how it was handled by counsel for the plaintiff, as founded on the law of negligence”. 10 15 20

The plaintiff appealed against the findings of the trial Judge, and the grounds of appeal, as appearing in the notice, are as follows:

(1) The trial Court failed to adjudicate and/or examine the claim of plaintiff for breach by the defendants of the contract of employment and in particular, with reference to the undertaking for insurance against industrial accidents, and general personal insurance against any accident. 25

(2) The trial Court wrongly applied and/or failed to apply the established principles concerning the employers’ liability emanating from the legislation and the jurisprudence of the Court. 30

(3) The trial Court made a wrong assessment of the evidence adduced and/or wrongly exercised its discretion contrary to the established principles and/or failed to give due reasoning. 35

(4) The assessment of general damages at £250.-- was

manifestly low, taking into consideration the injuries suffered by plaintiff.

5 Having heard carefully the arguments advanced by counsel appearing on both sides, and having considered the findings of the trial Court in the light of the pleadings and the evidence before it, we have come to the conclusion that the finding of the trial Court that the plaintiff's claim for breach of contract was in fact abandoned and that it was not seriously pursued at the trial and also that the statement of claim is based solely
10 on negligence and not on the contract of employment, are not supported by the material before the Court. In the endorsement on the writ of summons the plaintiff's claim is clearly made both in tort and in contract. Under paragraph (a) the plaintiff claims damages for negligence and/or breach of the defendants
15 of their statutory duties and under paragraph (b) damages for breach of contract entered into between the plaintiff and defendants 2 as agents of defendants 1 on the 30th March, 1979.

In the statement of claim to which reference is made by the trial Court, paragraphs 2, 3 and 4, read as follows:

20 “(2) On or about the 30th March, 1979 the plaintiff entered into a contract of employment with defendants 2 as authorised agents of defendant 1, as car body repairer for a period of one year in Muscat as from the 30th March, 1979.

25 (3) In compliance with the terms of the said contract the plaintiff on or about the 30th March, 1979 went to Muscat, Oman, where he entered the personnel of defendants 1 and started offering his services as agreed.

30 (4) Under paragraph 5 of Article 5 of the said contract, defendants 1 and 2 undertook the payment of any premiums for the insurance of the plaintiff against any industrial accidents, as well as for any personal accident of the plaintiff anywhere in Oman”.

Further, in paragraph 10, the following are alleged:

35 “10. Without prejudice to his above allegations the plaintiff will contend at the trial that the defendants by virtue of the terms of the said contract of employment, undertook to cover the plaintiff against any loss from any

danger irrespective of any responsibility of the defendants at the time of his employment”.

And the statement of claim concludes with the following prayer:

“Special and general damages for loss and/or personal injuries suffered by plaintiff on or about 18.7.1979 as a result of an industrial accident in Muscat at a time when he was in the employment of defendants 1 and 2 and as a result of the negligence and/or breach of statutory duties of the defendants and/or in breach of their contractual obligations”.

In the course of his evidence, plaintiff made reference to the written agreement between him and the defendants, copy of which was produced by consent and put in as exhibit 1. The said contract was before the Court and the terms embodied therein are clearly speaking of themselves. We have not traced anywhere in the record of the proceedings that at any stage of the proceedings the plaintiff or counsel on his behalf waived his alternative claim based on breach of contract. The finding, therefore, of the trial Judge that the plaintiff’s claim in this respect had been abandoned is not warranted by the material before us and the failure of the trial Judge to adjudicate on this issue has been prejudicial to the plaintiff.

In the result, we have come to the conclusion that the case has to go back for retrial on both issues and we give directions accordingly. Such trial to take place before another Judge.

Costs of this appeal in favour of the appellant payable after the determination of the new trial.

Appeal allowed. Retrial ordered.