[O' Briain, P., Zekia, Vassiliades and Josephides, JJ.]

1961
Oct. 17,
Dec. 5

IOANNIS KOTSAPAS
& SONS LTD.
v.
TITAN
CONSTRUCTION
& ENGINEERING
COMPANY

IOANNIS KOTSAPAS AND SONS LTD.,
Appellants (Plaintiffs),

v.

TITAN CONSTRUCTION AND ENGINEERING COMPANY,
Respondents (Defendants)

(Civil Appeal No. 4334).

Practice—Judgment—Obtained in default of pleading—Setting aside of—The Civil Procedure Rules, 0.26, *r.* 14*—Discretion of the judge—Appeal—Onus on the appellant to show that discretion was wrongly exercised—Primary consideration is whether the party applying for the judgment to be set aside has merits to which the Court should pay heed.*

The appellants-plaintiffs obtained judgment in default of pleading. The respondents-defendants applied to have the judgment set aside under the Civil Procedure Rules, 0.26, r. 14. The lower court granted the application and set aside the judgment on terms. On appeal by the appellants-plaintiffs against that order:

Held:- affirming the order of the lower court:

(1) Order 26, r. 14 of the Civil Procedure Rules is substantially the same as the corresponding Order 27, r. 15 of the English Rules of the Supreme Court.

(2) The question of setting aside a judgment is a matter of discretion and the appellant must satisfy the onus of showing that the judge was wrong in the exercise of that discretion.

(3) The primary consideration for a judge in exercising his discretion is whether the defendant has merits to which the Court should pay heed.

Principles laid down in *Evans v. Bartlam* (1937) A.C. 473 at pp. 479 and 481 per Lord Atkin, at p. 482, per Lord Russell of Killowen, and on pp. 486 and 489, per Lord Wright, *applied.*

Appeal dismissed.

Cases referred to:

Evans v. Bartlam (1937) A.C. 473.

Appeal.

Appeal against the order of the District Court of Limassol (Stavrinides, P D C.) dated the 25th February, 1961, (Action No. 183/60) whereby the Court set aside a judgment obtained by plaintiff in default of pleading in an action for £203 958 mils being balance of interest due.

Sir Panayiotis Cacoyannis for the appellants.

Chrysses Demetriades for the respondents

Cur. adv. vult

The facts sufficiently appear in the judgment of the Court, read by:

JOSEPHIDES, J This is an appeal against the order of the President, District Court of Limassol, allowing on terms an application to set aside a judgment given in default of defence. The order was made in the following terms:

> "If the applicants within fourteen days bring into Court the whole amount due under the judgment against them (including interest to date and costs) and also pay the costs of this application, which I hereby fix at £15, that judgment shall be automatically set aside, in which case the applicants shall be at liberty to file and deliver a defence by March 15th next".

The plaintiffs' claim was for £203.958 mils balance of interest due. The defendants admitted liability to pay interest up to the 30th June, 1957, but disclaimed any liability to pay interest after that date.

The writ of summons, which was specially indorsed, was taken out on the 22nd January, 1960, and it was served on the defendants on the 26th January, 1960 The defendants entered an appearance on the 4th February, and as they failed to file their defence, the plaintiffs on the 9th April, 1960, filed an application for judgment in default of defence.

On the 11th April counsel for both sides appeared before the Court, and defendants' counsel undertook to file and deliver a defence within 10 days, and thereupon by consent no order was made on the plaintiffs' application

As the defendants failed to file their defence by the 26th

April, 1960, the plaintiffs filed a new application for judgment in default of defence. This was an ex-parte application which was dealt with by the Court on the 29th April, 1960, and judgment for plaintiffs with costs was given on that day.

On the 6th June, 1960, the defendants filed their application to set aside the judgment obtained by the plaintiffs in default of pleading on the 29th April. The application is based on Order 26, rule 14, of the Civil Procedure Rules, and it is supported by an affidavit sworn by defendants' counsel, who explained that the failure to file the defence was mainly due to an oversight on his part. Counsel further stated in his affidavit that the defendants had a good defence on the merits in that they disputed the plaintiffs' claim, both on facts and in law, relying on the correspondence and conversation exchanged between the parties.

On the 7th June, 1960, the plaintiffs filed a notice of intention to oppose defendants' application supported by an affidavit sworn by their counsel to which there were exhibited 20 letters and statements of account exchanged between the parties. On the 16th September, 1960, defendants' counsel swore a further affidavit giving full particulars of the defence which his clients proposed setting up against the plaintiffs' claim. Two exhibits were annexed to that affidavit on the 20th September the plaintiffs filed a fresh affidavit together with 9 exhibits consisting of letters and statements of account; and, finally, on the 22nd September, 1960, notice was given by plaintiffs of a letter to which they intended referring at the hearing, in addition to the other letters filed on behalf of the plaintiffs in opposition.

To sum up, on the date of the hearing of this application there was the following documentary evidence before the Court, two affidavits on behalf of the defendants and two affidavits on behalf of the plaintiffs; and to these affidavits there were 32 exhibits annexed consisting of correspondence and statements of account exchanged between the parties.

The judge, after hearing counsel for the parties, exercised his discretion in defendants' favour and set aside the judgment on the terms stated above.

As already stated, the application is based on Order 26, rule 14, which corresponds to Order 27, rule 15, of the English Rules of the Supreme Court, with only one difference; that is to say, that the words "in a proper case" which appear in

our rule, are missing from the English text of the equivalent rule. The Cyprus rule (Order 26, rule 14) reads as follows:-

> "Any judgment by default, whether under this Order or under any other of these rules, may in a proper case be set aside by the Court upon such terms as to costs or otherwise as the Court may think fit".

The English rule 15 of Order 27 reads as follows:-

> "Any judgment by default, whether under this Order or under any other of these Rules, may be set aside by the Court or a Judge, upon such terms as to costs or otherwise as such Court or Judge may think fit".

It was argued by Sir Panayiotis Cacoyannis, on behalf of the appellants (plaintiffs) that the Cyprus rule differs from the English rule in substance. But on reading the judgments in the case of *Evans v. Bartlam* (1937) A.C. 473, which was decided by the House of Lords, it becomes apparent that the English rule has been interpreted in such a way as though the words "in a proper case" were actually in the text of the rule. Consequently, we propose dealing with this matter on the footing that the Cyprus rule is substantially the same as the English rule.

The leading case on this point is that of *Evans v. Bartlam* (cited above), from which I propose quoting extensively. Lord Atkin, at page 479, said:-

> "I agree that both rules, Order XIII, r. 10, and Order XXVII, r. 15, give a discretionary power to the judge in Chambers to set aside a default judgment. The discretion is in terms unconditional. The Courts, however, have laid down for themselves rules to guide them in the normal exercise of their discretion. One is that where the judgment was obtained regularly there must be an affidavit of merits, meaning that the applicant must produce to the Court evidence that he has a *prima facie* defence. It was suggested in argument that there is another rule that the applicant must satisfy the Court that there is a reasonable explanation why judgment was allowed to go by default, such as mistake, accident, fraud or the like. I do not think that any such rule exists, though obviously the reason, if any, for allowing judgment and thereafter applying to set it aside is one of the matters to which the Court will have regard in

exercising its discretion. If there were a rigid rule that no one could have a default judgment set aside who knew at the time and intended that there should be a judgment signed, the two rules would be deprived of most of their efficacy. The principle obviously is that unless and until the Court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure".

And at page 481, he said:-

"........while the appellate Court in the exercise of its appellate power is no doubt entirely justified in saying that normally it will not interfere with the exercise of the judge's discretion except on grounds of law, yet if it sees that on other grounds the decision will result in injustice being done it has both the power and the duty to remedy it".

Lord Russell of Killowen, at page 482, said:-

"Unless an appellate Court is satisfied that the discretion has been wrongly exercised and should have been exercised in the contrary way, the judge's order should be affirmed".

Lord Wright, at page 486, said:-

"It is clear that the Court of Appeal should not interfere with the discretion of a judge acting within his jurisdiction unless the Court is clearly satisfied that he was wrong. But the Court is not entitled simply to say that if the judge had jurisdiction and had all the facts before him, the Court of Appeal cannot review his order unless he is shown to have applied a wrong principle. The Court must, if necessary, examine anew the relevant facts and circumstances in order to exercise a discretion by way of review which may reverse or vary the order. Otherwise in interlocutory matters the judge might be regarded as independent of supervision".

And Lord Wright indicated that the onus of showing that the exercise of a discretion by the judge was not justified on the facts, was on the appellant.

Finally Lord Wright laid down these rules at page 489:-

"In a case like the present there is a judgment, which, though by default, is a regular judgment, and the appli-

cant must show grounds why the discretion to set it aside should be exercised in his favour. The primary consideration is whether he has merits to which the Court should pay heed; if merits are shown the Court will not *prima facie* desire to let a judgment pass on which there has been no proper adjudication. This point was emphasized in *Watt v. Barnett* 3 Q.B.D. 363. Here the appellant shows merits, in that the debt was primarily a gaming debt; he denies that he made any new contract within *Hyams v. Stuart King* (1908) 2 K.B. 696, an authority which has not yet been considered by this House. He clearly shows an issue which the Court should try. He has been guilty of no laches in making the application to set aside the default judgment, though as *Atwood v. Chichester* 3 Q.B.D. 722 and other cases show, the Court, while considering delay, have been lenient in excluding applicants on that ground. The Court might also have regard to the applicant's explanation why he neglected to appear after being served, though as a rule his fault (if any) in that respect can be sufficiently punished by the terms as to costs or otherwise which the Court in its discretion is empowered by the rule to impose. The appellant here has an explanation, the truth of which is indeed denied by the respondent, but at this stage I see no reason why he should be disbelieved on what appears to me to be a mere conflict on affidavits".

To sum up, the question of setting aside a judgment is a matter of discretion, and the appellants must satisfy the onus of showing that the judge was wrong in the exercise of that discretion; and, unless this Court is satisfied that the discretion has been wrongly exercised and should have been exercised in the contrary way, the judge's order should be affirmed.

According to Lord Wright, the primary consideration is whether the defendant has merits to which the Court should pay heed. Looking at the evidence, letters and statements of account in this case, it is apparent that the real dispute between the parties is whether any interest is payable by the defendants on their account after the 30th June, 1957. The accounts of 1956 show that interest at 7 1/2 per cent was charged on the defendants' account, though the interest now claimed by the plaintiffs is at 8 per cent per annum (see paragraphs 3 and 4 of the Statement of Claim). Moreover by his letter dated 11th July, 1957, in reply to the plaintiffs'

letter of the 2nd July, 1957, and the statement of account attached, the Director of the defendant company acknowledged the obligation to pay interest up to the 30th June, 1957. But by their letters dated 19th March, 1958, the 22nd March, 1958 and the 4th December, 1959, the defendant company disputed the obligation to pay any interest; while by their letter of the 18th December, 1959, they stated that they were prepared to honour their director's undertaking contained in his letter dated 11th July, 1957, *i.e.* to pay interest up to the 30th June, 1957, only. Here the defendants show merits in that there is correspondence in evidence which goes to show that they denied the obligation to pay any interest after the 30th June, 1957. The defendants show an issue which the Court should try.

The judge also considered the explanation given by the defendants' counsel for failing to file the defence in time and he was satisfied with the explanation given.

The question before us is whether any reason exists for holding that the judge exercised his discretion otherwise than rightly. Having read and considered the evidence and correspondence in the case, we find that no ground is shown to justify interference with the judge's discretion, and we think that the appeal should be dismissed with costs. Time for filing defence extended to 20th December, 1961.

Appeal dismissed.