

1965
May 14

[ZEKIA, P., TRIANTAFYLIDIS, MUNIR, JJ.]

DJEREDJIAN
(IMPORT—
EXPORT)
LTD., ETC.,
THROUGH
(a) CHR. P.
MITSIDES,
(b) NICOS
CHR. LACOUFIS,
v.
THE
CHARTERED
BANK

DJEREDJIAN (IMPORT-EXPORT) LTD. IN LIQUIDA-
TION UNDER SUPERVISION OF THE COURT)
THROUGH ITS LIQUIDATORS

(a) CHR. P. MITSIDES,

(b) NICOS CHR. LACOUFIS,

Appellants-Defendants,

v.

THE CHARTERED BANK,

Respondents-Plaintiffs.

(Civil Appeal No. 4521)

Practice—Filing of an appeal against issue of an Interim Order by ex parte proceedings under sections 4 and 9 of the Civil Procedure Law, Cap. 6 and section 32 of the Courts of Justice Law, 1960, before adjudication by the trial Court on its validity, not possible.

Practice—Jurisdiction—Appellate Jurisdiction—An Appellate Court would be usurping the functions of a Court of first instance and would not have been acting in its appellate jurisdiction if it proceeded to go into the facts and merits of a case and adjudicate on them before their adjudication by a lower Court.

The important point involved in this appeal is whether the defendant-respondent in an action where an interim order has been obtained by *ex parte* application under the Civil Procedure Law, section 9 (1), he can, on the day that the order was made returnable, have two courses: either to show cause and discharge the order, or instead take the matter direct to the Court of Appeal and keep proceedings before the trial Court in abeyance until the matter is determined by the Court of Appeal.

Held, (1) we have considered carefully this matter and it appears to us that if in all cases this Court had contemporaneous jurisdiction with the trial Court and was ready to substitute itself for that court it would amount to a usurpation of the functions of the trial Court and we shall be substituting and converting ourselves to a court of first instance, whereas matters should in the first instance be adjudicated by some other court before it comes before us and dealt by us in our appellate jurisdiction.

(2) There is no doubt that there might be instances that, without the hearing of an application of this kind by a trial Court, the matter may be taken before the Supreme Court but this is not so in the present case.

(3) It may, on the face of the record, appear that an interim order obtained by *ex parte* application be bad in law without going into the merits and facts of the case in order to discover its invalidity and then perhaps we may be entitled to entertain an appeal but when we are called upon to go into the facts and merits of the case and then adjudicate on a matter which has not already been adjudicated on its merits in a lower court then we are of the opinion that we are usurping the functions of the court of first instance and we are not acting in our capacity as an appellate Court.

(4) In the circumstances, we think that this appeal does not lie. We may give on a future occasion further and fuller reasons on this point as, we consider, the matter is of some importance.

(5) The appeal is dismissed with costs.

(6) The interim order will continue until such time as the trial Court will go into the merits of it and give its final decision on it.

*Appeal dismissed with costs.
Interim order to remain in
force until finally adjudicated
upon by the trial Court.*

Appeal.

Appeal against the interim order made by the District Court of Famagusta (Zihni, D.J.) on the 3rd April, 1965, (Action No. 560/65) whereby the defendants, their agents and/or servants were restrained from selling, mortgaging or in any way parting with certain textiles until the hearing and final determination of the action.

Chr. Mitsides, for the appellants.

M. Montanios, for the respondents.

The facts sufficiently appear in the judgment of the Court which was delivered by :

ZEKIA, P. : This is an appeal against the issue of an interim order by *ex parte* proceedings made on the 3rd April, 1965, by the District Court of Famagusta under

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sections 4 and 9 of the Civil Procedure Law, Cap. 6, and also under section 32 of the Courts of Justice Law, 1960. The order was made returnable on the 16th April, 1965. On that day, as it appears from the record now supplemented, the parties, including the present appellants, appeared through their counsel before the Court and by consent of the parties, though not expressly but by implication, the order was extended until final determination of the present appeal. The following is an extract of the Court record as to what transpired on the 16th April, 1965 :

“ *Mr. Mitsides* : We have appealed against the order on behalf of the respondents 1 (a) (b) and we are also informed that the file was sent to the Supreme Court. Therefore I apply for adjournment pending the final determination of the appeal.

Mr. Pavlides : I agree.

Court : Application is adjourned *sine die* until the final determination of the appeal when a new date will be fixed.”

From this record it appears that Mr. Mitsides informed the Court that he had filed an appeal to the Supreme Court and he further applied to the said Court for an adjournment pending final determination of the appeal.

We are faced with a singularly important point, that is to say, whether the defendant-respondent in an action where an interim order^f has been obtained by *ex parte* application under the Civil Procedure Law, section 9 (1), he can, on the day that the order was made returnable, have two courses : either to show cause and discharge the order, or instead take the matter direct to the Court of Appeal and keep proceedings before the trial Court in abeyance until the matter is determined by the Court of Appeal.

We have considered carefully this matter and it appears to us that if in all cases this Court had contemporaneous jurisdiction with the trial Court and was ready to substitute itself for that Court it would amount to a usurpation of the functions of the trial Court and we shall be substituting and converting ourselves to a Court of first instance, whereas matters should in the first instance be adjudicated by some other Court before it comes before us and dealt by us in our appellate jurisdiction. There is no doubt that there might be instances that, without

the hearing of an application of this kind by a trial Court, the matter may be taken before the Supreme Court but this is not so in the present case. It may, on the face of the record, appear that an interim order obtained by *ex parte* application be bad in law without going into the merits and facts of the case in order to discover its invalidity and then perhaps we may be entitled to entertain an appeal but when we are called upon to go into the facts and merits of the case and then adjudicate on a matter which has not already been adjudicated on its merits in a lower Court then we are of the opinion that we are usurping the functions of the Court of first instance and we are not acting in our capacity as an appellate Court.

In the circumstances, we think that this appeal does not lie. We may give on a future occasion further and fuller reasons on this point as, we consider, the matter is of some importance.

The appeal is dismissed with costs.

The interim order will continue until such time as the trial Court will go into the merits of it and give its final decision on it.

*Appeal dismissed with costs.
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