

TSAMKOSHOGLOU TRADING CO.,  
*Appellants-Plaintiffs,*  
v.

TSAMKO-  
SHOGLU  
TRADING CO.  
v.  
CYTECHNO  
LIMITED AND  
ANOTHER

CYTECHNO LIMITED AND ANOTHER,  
*Respondents-Defendants.*

(Civil Appeal No. 4983).

---

*Practice—Evidence on commission—The Civil Procedure Rules, Order 36, rule 1—Matters which must first be established before an application is granted—Issue in respect of which evidence of witnesses abroad is required ceased to be a disputed issue between the parties—No good reason shown why the witnesses cannot be examined here—Appellants failed to establish that proposed evidence could not reasonably be obtained except by the method they proposed—Trial Court dealt with the application on the basis of the correct principles governing the matter and exercised its discretion in a manner presenting no cause for the Court of Appeal to interfere.*

*Evidence by commission—Principles upon which an application for the taking of such evidence should be granted—Trial Court properly exercised its discretion in the matter in dismissing the appellants' (plaintiffs') application for an order that evidence be obtained abroad on commission.*

This is an appeal from a ruling of the District Court of Nicosia dismissing an application whereby the plaintiffs (now appellants) were seeking an order for obtaining on commission the evidence of two witnesses in Belgium. The Supreme Court affirming the decision (ruling) appealed from, held that the District Court dealt with the application on the basis of the correct principles governing the matter and exercised its discretion in a manner presenting no cause for the Appellate Court to interfere. The facts sufficiently appear in the judgment of the Supreme Court.

Cases referred to :

*Power v. Beha*, 24 C.L.R. 254.

### **Appeal.**

Appeal by plaintiffs against the decision of the District Court of Nicosia (Stavrinakis and Stylianides, D.JJ.) dated

1971  
July 6  
—  
TSAM'KO-  
SHOGLU  
TRADING CO.  
v.  
CYTECHNO  
LIMITED AND  
ANOTHER

the 13th May, 1971, (Action No. 29/69) whereby an application by plaintiffs seeking an order for obtaining on commission the evidence of two witnesses in Belgium was dismissed.

*Chr. Mitsides*, for the appellants.

*G. J. Pelagias*, for the respondents.

The following judgment was delivered by:—

TRIANTAFYLIDIS, P. : This is an appeal from a decision dismissing an application by means of which the appellants-plaintiffs were seeking an order for obtaining on commission the evidence of two witnesses in Belgium, for the purposes of Civil Action No. 29/69 before the District Court of Nicosia ; the application was filed on the 9th March, 1971.

That was the second application filed, in practically identical terms, in the said action ; the earlier application having been withdrawn before it had been dealt with on its merits.

The affidavit in support of the new application states that the case “ involves a real issue between the parties to be tried the main issue being the agreement for commission payable ”—to the appellants—“ by defendant No. 1 Company and/or by defendant No. 2 personally who is the managing director of defendant No. 1 ”.

In the same affidavit it is averred that the said agreement as “ concluded or confirmed ” is “ contained in oral evidence and/or documentary evidence including correspondence exchanged between the proposed witnesses and the parties or either of them ”.

In the decision dismissing the application of the appellants it is stated—(without the correctness of such statement being disputed by the appellants)—that on the 14th April, 1971, twenty-three documents were produced which contained, *inter alia*, the terms of the agreement and that upon that counsel for the appellants had contended, before the Court below, “ that the agreement was really admitted by the defendants ” ; therefore, the issue in respect of which the evidence of the two witnesses, who are abroad, is allegedly required seems to have ceased to be a disputed issue between the parties and, consequently, the application was deprived of the purpose which it was intended to serve. This consideration alone was sufficient to justify the dismissal of the application.

Moreover, as it was rightly stressed in the case of *Power v. Beha*, 24 C.L.R. 254, there must exist "some good reason why the witnesses cannot be examined here". We are in agreement with the Court below that the appellants in the present case have not established such a reason ; and this was another ground justifying the dismissal of the relevant application of the appellants.

During the hearing of the application counsel for the appellants contended (though this had not been mentioned expressly in the affidavit in support of the application, as it should have been done) that there was a dispute as to whether the appellants had done what they had undertaken to do by means of the agreement between the parties and were entitled to be paid therefor ; and that the evidence of the witnesses who are abroad was necessary in order to establish the claim of the appellants.

The Court below proceeded, *ex abundanti cautela*, to deal with the application on the basis, also, of this belated contention and held that, in the circumstances, a trial Court "should not be deprived of the opportunity of watching the demeanour of these witnesses in giving evidence and assess the value of their evidence" ; so, on this ground, too, the application was refused. In the *Power* case (*supra*) it was pointed out that where it is obviously desirable that a witness should be seen in Court there must be shown—by the party applying that his evidence be obtained on commission—such a degree of difficulty in producing the witness as to amount to practical inability to do so. In the light of all the material before us we are of the view that, for this reason as well, the application of the appellants could not be granted ; the appellants had failed to establish that the proposed evidence could not reasonably be obtained except by the method they proposed.

In the result this appeal is dismissed with costs against the appellants ; the Court below dealt with the application of the appellants, for an order that evidence be obtained abroad on commission, on the basis of the correct principles governing the matter and exercised its discretion in a manner which presents no cause for us to interfere.

*Appeal dismissed with costs.*

1971  
July 6

—  
TSAMKO-  
SHOGLU  
TRADING CO.  
v.  
CYTECHNO  
LIMITED AND  
ANOTHER