1975
June 23
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GEORGHIOS CHAR. FELLAS AND ANOTHER

v.

ELENITSA I. VOTSI AND ANOTHER

[TRIANTAFYLLIDES, P., STAVRINIDES, L. LOIZOU, JJ.]

GEORGHIOS CHAR. FELLAS AND ANOTHER,

Appellants-Plaintiffs,

v.

ELENITSA I. VOTSI AND ANOTHER,

Respondents-Defendants.

(Civil Appeal No. 5418).

Civil Procedure—Judgment in default of appearance—Setting aside of—Discretion of trial Court—Appeal—Principles on which Court of Appeal will interfere with such discretion—Claim for C£1100—Bank deposit of C£400 to the credit of defendant 1 standing attached by means of garnishee proceedings—Leave to defend upon payment into Court of C£200 by way of security—Trial Court's discretion wrongly exercised in relation to amount of the security—Said amount increased to C£400.

The Court below set aside a judgment for the payment to the appellants by the respondents of the sum of C£1100, as having been obtained in default of appearance and gave leave to the respondents to defend the action, on condition that within fourteen days respondent 1 would pay into Court the sum of C£200 by way of security.

At the material time there was deposited with the Bank of Cyprus, to the credit of respondent 1, the sum of C£400, which had been attached by means of garnishee proceedings, which were still pending before the trial Court.

The claim in the action was for a sum exceeding by far not only the said amount of the security, but that of C£400 as well.

Held, (1) Having in mind the principles govering interfering on appeal with the exercise of judicial discretion, we are not prepared, on the basis of the record before us, to interfere with the decision of the trial judge that the judgment obtained in default of appearance should be set aside and that leave should be given

to the respondents to defend the action (see *Evans* v. *Bartlam* [1937] 2 All E.R. 646 at p. 654 and *Ioannis Kotsapas & Sons Ltd.* v. *Titan Construction and Engineering Co.*, 1961 C.L.R. 317).

(2) The discretion of the judge was wrongly exercised in relation to the condition for the security to be given by respondent 1; the amount to be lodged in Court should not have been only C£200, but the full amount of C£400, which was the subject of the garnishee proceedings.

Appeal allowed.

Cases referred to:

Evans v. *Bartlam* [1937] 2 All E.R. 646 at p. 654;

Ioannis Kotsapas & Sons Ltd. v. *Titan Construction & Engineering Co.*, 1961 C.L.R. 317.

Appeal.

Appeal by plaintiffs against the order of the District Court of Nicosia (Kourris, S.D.J.) dated the 31st March, 1975 (Action No. 5174/74) whereby the judgment obtained in default of appearance on 28.1.75 was set aside and leave to file and deliver the statement of defence by 20.4.75 was granted on condition that within 14 days defendants 1 would pay into Court the sum of £200.- by way of security.

M. Vassiliou, for the appellants.

P. Maxioutis, for the respondents.

The judgment of the Court was delivered by:-

TRIANTAFYLLIDES, P.: In the present case the appellants (who are plaintiffs in the action before the trial Court) appeal against an order of such Court by virtue of which a judgment for the payment to the appellants by the respondents (who are the defendants in the said action) of the sum of C£1100 was set aside, as having been obtained in default of appearance, and leave was given to the respondents to defend the action, on condition that within fourteen days respondent 1 would pay into Court the sum of C£200 by way of security, in case the appellants obtain once again judgment against the respondents; the respondents were ordered, also, to

pay the costs of the application to set aside the judgment obtained in default of appearance.

A noteworthy feature of this case is that at the material time there was deposited with the Bank of Cyprus, to the credit of respondent 1, the sum of C£400, which had been attached by means of garnishee proceedings, which were still pending before the trial Court; and yet the trial Court directed that only C£200 should be paid into Court by way of security, even though, as it appears from the judgment obtained in default, the claim in the action was for a sum exceeding by far not only the amount of C£200, but that of C£400 as well.

Having in mind what has been stated about interfering on appeal with the exercise of judicial discretion in, *inter alia,* the case of *Evans* v. *Bartlam* [1937] 2 All E.R. 646, 654, as well as in our own case of *Ioannis Kotsapas & Sons Ltd.* v. *Titan Construction and Engineering Co.,* 1961 C.L.R. 317, we are not prepared, on the basis of the record before us, to interfere with the decision of the trial judge that the judgment obtained in default of appearance should be set aside and that leave should be given to the respondents to defend the action; but we do think that the discretion of the judge was wrongly exercised in relation to the condition for the security to be given by respondent 1; the amount to be lodged in Court should not have been only C£200, but the full amount of C£400, which was the subject of the garnishee proceedings, and which is still inadequate to meet the claim of the appellants, if they are successful in the action.

We have, therefore, decided to vary the order appealed from by directing that within two months from today the respondents, or either of them, should pay into Court in all C£400, by way of security, and that only upon this condition being satisfied the order setting aside the judgment obtained in default of appearance and giving leave to defend shall become operative; otherwise, the said judgment shall remain in force and in such case the C£200, which has already been lodged in Court, is to be paid to the appellants in part satisfaction of the judgment.

Regarding the costs of this appeal, we shall let each party bear its own costs, because of the special family relationship which exists between the parties to the action.

Appeal partly allowed. Each party to bear its own costs.

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