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ZENON ACHILLIDES
v.
VYRON MICHAELIDES

[HADJIANASTASSIOU, A. LOIZOU, MALACHTOS JJ.]

ZENON ACHILLIDES,

Appellant-Plaintiff,

v.

VYRON MICHAELIDES,

Respondent-Defendant.

(*Civil Appeal No.* 5032).

Credibility of witnesses—Findings of fact made by trial Court depending on credibility of witnesses—Appeal turning on such findings—Approach of Court of Appeal—Claim for declaratory judgment regarding balance of mortgage debt and for cancellation of mortgage—Two conflicting versions—Respondent's version preferred by trial Court which gave good reasons for doing so—Appellant failed to discharge onus resting on him to persuade Court of Appeal that the reasoning behind the findings of the trial Court was unsatisfactory or that such findings were not warranted by the evidence—On the contrary Court of Appeal satisfied from the evidence adduced, that the trial Court was justified in arriving at the conclusions it did.

The appellant-plaintiff appealed against the dismissal of his claim for a declaratory judgment concerning the balance due under a mortgage and for a cancellation of a mortgage. The trial Court having considered and weighed the whole evidence, including the documents and the accounts produced by the parties, decided not to accept the evidence of the plaintiff as regards the items in dispute but on the contrary it accepted as true the evidence of the defendant, which evidence as stated in its judgment, impressed the Court favourably and gave good reasons for doing so. The appeal therefore turned solely on the issue of credibility of witnesses.

Held, (after stating the principles on which an Appellate Court will interfere with findings of fact made by the trial Court which depend on credibility of witness—vide pp.179-180 *post*) that the appellant did not discharge the onus which rested on him to persuade this Court that the reasoning behind the findings of the trial Court was unsatisfactory or that such findings were not warranted by the evidence; and that on the contrary, this court is satisfied that from the evidence adduced

the trial Court was justified in arriving at the conclusions it did.

Appeal dismissed.

Cases referred to:

Charalambous v. Demetriou, 1961 C.L.R. 14 at p. 19;

Mamas v. The Firm "Arma" Tyres (1966) 1 C.L.R. 158 at p. 160;

Thomaides & Co. Ltd. v. Lefkaritis Bros (1965) 1 C.L.R. 20;

Patsalides v. Afsharian (1965) 1 C.L.R. 134;

Clarke v. Edinbourgh Tramways Co. [1919]S.C. (.H.L.) 35 at p. 36;

Watt or Thomas v. Thomas [1947] A.C. 484.

Appeal.

Appeal by plaintiff against the judgment of the District Court of Limassol (Loris, Ag.P.D.C. and Hadjitsangaris, D.J.) dated the 29th November, 1971, (Action No. 3170/69) dismissing his claim for, *inter alia,* a declaratory judgment to the effect that the amount due by him to the defendant under a mortgage was £1,067.-

St. McBride, for the appellant.

P. L. Cacoyiannis, for the respondent.

Cur. adv. vult.

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

MALACHTOS, J.: This is an appeal by the plaintiff from the judgment of the Full District Court of Limassol in Action No. 3170/69 dismissing his claim for -

(a) A declaratory judgment to the effect that the balance due on 13.11.69 by the plaintiff to the defendant under Mortgage No. H109760/66 is £1,067.-;

(b) An Order of the court directing the cancellation of mortgage registered with the D.L.O. of Limassol under No. H109760/66 which expires on 27.11.69 on payment or tender by the plaintiff to the defendant of £1,067.- together with

interest thereon at 7% per annum from 14th November, 1969.

The relevant facts are as follows:-

On 28.11.63 the plaintiff who is a dealer in land, and who is also running a petrol station in Limassol, mortgaged to the defendant certain properties in order to secure a loan and the relevant registration of the said mortgage was made at the D.L.O. Limassol and Certificate No. H96271/63 was issued. The aforesaid mortgage debt was for £25,000.- plus £6,000.- interest, which was interest at 6% per annum on the capital for four years up to 27.11.67, the period at the end of which the debt was becoming due and payable.

On 20.3.64, in consideration of the release by the defendant from the aforesaid mortgage of two plots of mortgaged property, the plaintiff executed in favour of the defendant a bond in customary form for the sum of £1,400.- payable on 31.12.65 with interest thereon at the rate of 6% per annum from the day of execution.

On 25.1.65 the parties entered into an agreement in writing by virtue of which the defendant had undertaken, *inter alia,* to extend the time of repayment of the aforesaid mortgage registered under H96271/63 for another two years after its original expiration, on 27.11.67.

The mortgaged property consisted of 53 building sites and by Term 4 of the agreement between the litigants dated 25.1.65, it was agreed that for each one of the first 13 building sites the plaintiff would sell, he would have been paying to the defendant the sum of £400.- and for each one of the subsequent 40 building sites the sum of £650.-, the defendant having undertaken to credit the account of the mortgage of the plaintiff with the relevant amounts and also to release each one of the building sites for each respective payment that would have been made.

On the same day, *i.e.* 25.1.65, the plaintiff executed a bond in customary form in favour of the defendant for the sum of £3,000.- payable on 27.11.67 with interest thereon of 7% per annum, from the day when same was becoming payable.

It is common ground that the consideration for this bond was the interest for two years, which accrued under the mortgage debt. This bond of 25.1.65 for £3,000.- formed later the subject matter of Action No. 120/68 of the District Court of Limassol which resulted in a settlement, the appellant being adjudged to pay to the respondent the sum of £1,070.020 mils.

On 2.2.65 Mortgage No. H96271/63 was cancelled and substituted by another mortgage which was registered in the D.L.O. books under No. H101706/65. The capital of this mortgage is mentioned in the mortgage bond as £25,000.- There is also interest of £6,000.- for the period 28.11.65 up to 27.11.69 when this mortgage was made due and payable. The capital of this second mortgage, as referred in the mortgage bond, is £23,600.- due under the old mortgage H96271/63 plus £1,400.- cash. This sum is admittedly not paid by the respondent to the appellant but it was inserted there in order to facilitate the appellant in paying less mortgage fees to the D.L.O. Under this arrangement the appellant paid £15.200 mils mortgage fees because the amount of the second mortgage was identical with that of the first mortgage, whereas had it not been so, the mortgage fees would have been £236.100 mils.

It should be noted here that this item of £1,400.- the subject matter of this transaction, was the one of the two items in dispute between the litigants.

The version of the respondent on this item is that there was an agreement with the appellant to deduct the sum of £1,400.- from the mortgage, and for this reason he made an endorsement at the back of the certificate of mortgage that he had received on the same day the sum of £1,400.-

The appellant's allegation is that the endorsement was made because on that very same day, that is 2.2.65, he had paid in cash to the respondent this sum of £1,400.-

The mortgage H101706/65, which was to expire on 27.11.69, was substituted on 29.11.66 by another mortgage registered with the D.L.O. Limassol under certificate of mortgage No. H109760/66. The capital of this mortgage was again £25,000.- and there was interest thereon at

6% per annum from 28.11.65 to 27.11.69 amounting £6,000.- On the mortgage bond of this mortgage, an endorsement appears signed by the defendant to the effect that he received on 29.11.66 against the said mortgage the sum of £1,200.- The respondent did not deny having signed this endorsement but his allegation was that he signed it on 1.12.66 and not on 29.11.66 in order to cover the building sites which were excluded from this mortgage, which building sites were, in fact, two and not three. At the time of so signing he alleged that he did not have with him his own mortgage certificate and he was labouring under a mistake that the building sites released from the mortgage were three and that is why he signed the endorsement for £1,200.- He also alleged that he discovered his mistake two to three days later and thereupon accompanied by a certain Kyriacos Lofitis and his father-in-law, who gave evidence as D.W.3 and D.W.4, respectively, went to the petrol station of the plaintiff and protested to him that actually two building sites were released by the payment by the appellant of the sum of £800.- But the plaintiff would not listen and his reply was that "What is written is written". This sum of £1,200.- was the second item in dispute between the litigants.

In support of his case the appellant gave evidence before the trial court and called no other witnesses. His version was all along, as already stated earlier in this judgment, that the amounts of £1,400.- and £1,200.- which are the only amounts in dispute between the litigants, and which are endorsed on the relevant mortgage deeds, were paid by him to the respondent in cash. On the other hand, the version of the respondent, which was supported on material points by the evidence of his father-in-law and the D.L.O. clerk D.W.2, was that as regards the amount of £1,400.-, which was neither paid by him to the appellant nor was it paid in cash by the appellant to him on 2.2.65, when Mortgage No. H101706/65 was registered in the D.L.O. books, was deducted at the request of the appellant from the claim of the respondent in Action No. 120/68 instead from the mortgage debt as originally agreed.

As to the amount of £1,200.- the respondent admitted that on 29.11.66 he received the sum of £400.- and released from the mortgage the building site under Registration No. 19607 and on 30.11.66 the sum of £400.- and

released from the mortgage the building site under Registration No. 19591. Some time later acting under the erroneous belief, as at the time he was not holding the certificate of mortgage to check that the number of the building sites released on 29th and 30th November, 1966 were three instead of two, made a note that on 29.11.66 he received towards the mortgage debt £1,200.- For the sum of £800.-, which he received on 29th and 30th November, 1966, the respondent stated that the appellant appears in his accounts as already credited.

The trial court in dealing with the first item of £1,400.- in its carefully considered judgment said that one would not expect a man who was mortgaging properties with a view to obtaining credit for £25,000.- plus £6,000.- interest, to pay back on the same day the sum of £1,400.- Further the court added that it could not lose sight of the fact that as late as in 1968, when the parties came before the court in Action No. 120/68 the appellant had mentioned in his defence and counter claim raised in the aforesaid action, payment of £1,663.- and payment of other minor sums totalling £118.359 mils complaining to the court that none of these amounts were deducted from the mortgage of 1963 or from the mortgage of 1965. The court further added that the appellant never mentioned that he paid on 2nd February, 1965, the sum of £1,400.- in cash against the mortgage of 1965 and although in Action No. 120/68 the parties had settled their accounts no mention was ever made anywhere that the sum of £1,400.- was paid in cash. The court then came to the conclusion that it was obvious that the appellant was trying to take advantage of the endorsements signed at the back of the mortgage deeds. The court further stated that the defendant gave an explanation for these endorsements and having gone through the whole of the evidence and having examined thoroughly all the documents produced before it, it was satisfied that the respondent in this appeal was telling the truth and dismissed the action with no order as to costs.

In arguing this appeal before us counsel for the appellant confined himself on the following two grounds:-

(a) that the trial court was wrong in finding that the sum of £1,200.- was not actually paid; and

(b) as regards the sum of £1,400.-, whichever version is believed, he was nevertheless entitled to a declaration that this sum should be deducted from the mortgage.

On this second ground counsel for the appellant argued that since the parties had agreed that the amount of £1,400.- was to be deducted from the mortgage and in fact the mortgage debt was reduced, this amount could not be brought back from an unsecured debt to a secured one.

He referred to section 21 of the Immovable Property (Transfer and Mortgage) Law, 1965, which deals with declarations of mortgagor and mortgagee and documents to be produced at the D.L.O. when a mortgage is to be registered and said that he could find no provision in that section allowing such a course. The short answer to this submission is that there is no provision in this section either, prohibiting such a course if it is done with the consent of the parties concerned.

Counsel for the appellant also submitted that whether the sum of £1,400.- was paid in cash as the plaintiff alleged at the trial or whether it was not paid in cash but was so recorded to facilitate the plaintiff to pay lesser D.L.O. fees, it had to be deducted from the sum of £25,000.- so as to reduce the mortgage debt to the amount of £23,600.- which was the amount admitted by the defendant as actually due.

This allegation of counsel would have certainly been correct had the matter remained at that. The defendant, however, gave an explanation that by agreement of the parties this amount of £1,400.- was deducted from the debt due on the bond of £3,000.-, which was the subject matter of Action No. 120/68 and this explanation was accepted by the trial court.

So, this appeal turns really on the issue of credibility of witnesses. The trial court having considered and weighed the whole evidence, including the documents and the accounts produced by the parties, decided not to accept the evidence of the plaintiff as regards the two items in dispute, but on the contrary accepted as true the evidence of the defendant, which evidence, as stated in its judgment, impressed the court favourably and gave good reasons for doing so.

The principles on which an Appellate Court can interfere with findings of fact made by the trial court which depend on credibility of witnesses, are well known and have been stated in a line of cases both here and in England. In the case of *Philippos Charalambous v. Sotiris Demetriou,* 1961 C.L.R. 14, Zekia J., as he then was, said at page 19:

> "While I am far from being satisfied of the way some judgments are given by trial courts where without stating adequate reasons dispose of an issue in the case by merely saying 'I believe or disbelieve so and so', I will hesitate a lot on the other hand to introduce a principle the application of which might have the effect of amending the Evidence Law which would constitute a transgression on our part of the rights of the legislature".

The special interest of this case lies in the fact that it closes the cycle of judicial pronouncements in Cyprus under the law as it stood prior to the enactment of the Courts of Justice Law, 1960, on the powers of a Court of Appeal in reviewing findings of fact of trial courts based on the credibility of witnesses.

In *Sofocles Mamas v. The Firm "Arma" Tyres* (1966) 1 C.L.R. 158 at page 160, Vassiliades J., as he then was, referred to the case of *Thomaides & Co. Ltd. v. Lefkaritis Bros* (1965) 1 C.L.R. 20 and to the subsequent case of *Patsalides v. Afsharian* (1965) 1 C.L.R. 134 and said:

> "The findings of the trial court will not be disturbed on appeal, unless the appellant can satisfy this court that the reasoning behind such findings is unsatisfactory, or that they are not warranted by the evidence when considered as a whole".

In *Clarke v. Edinbourgh Tramways Co.* [1919] S.C. (H.L.)35, at page 36, Lord Shaw had this to say:

> "When a judge hears and sees witnesses and makes a conclusion or inference with regard to what is the weight on balance of their evidence that judgment is entitled to great respect, and that quite irrespective of whether the Judge makes any observation with regard to credibility or not".

In *Watt or Thomas v. Thomas* [1947] A.C. 484, a House of Lords case, it was decided that:

> "When a question of fact has been tried by a judge without a jury and it is not suggested that he has misdirected himself in law, an appellate court in reviewing the record of the evidence should attach the greatest weight to his opinion, because he saw and heard the witnesses, and should not disturb his judgment unless it is plainly unsound. The appellate court is, however, free to reverse his conclusions if the grounds given by him therefor are unsatisfactory by reason of material inconsistencies or inaccuracies or if it appears unmistakably from the evidence that in reaching them he has not taken proper advantage of having seen and heard the witnesses or has failed to appreciate the weight and bearing of circumstances admitted or proved".

In this appeal we are of the view that the appellant did not discharge the onus which rests on him to persuade us that the reasoning behind the finding of the trial court was unsatisfactory or that such findings are not warranted by the evidence. On the contrary, we are satisfied that from the evidence adduced, the trial court was justified in arriving at the conclusions it did.

For the reasons stated above this appeal is dismissed, with costs.

Appeal dismissed with costs.