

1978 March 31

(TRIANTAFYLIDIS, P., A. LOIZOU, MALACHTOS, JJ.)

NICOLAOS PETROU,

Appellant—Defendant,

v.

PHILIPPOS PETROU,

Respondent—Plaintiff.

(Civil Appeal No. 5067).

5 *Limitation of Action—Cause of action—Contracts—Accrual of cause of action—Oral agreement for redistribution of fields—Appellant transferring fields to other persons—Cause of action accrued as from time of transfer and not as from conclusion of agreement or after expiration of reasonable time thereafter—Section 5 of the Limitation of Actions Law, Cap. 15.*

Credibility of witnesses—Findings of trial Court as to credibility—Appeal turning on such findings—Approach of Court of Appeal.

10 *Contract—Uncertainty—Oral contract for redistribution of immovable property—Certainty as regards its parties, its subject matter and all its material constituent parts—Not void—Section 29 of the Contract Law, Cap. 149.*

15 *Contract—Illegality—Contract for redistribution of immovable property—Parties all along intended that property would be registered as redistributed—Contract not void for illegality in that it was intended to evade or defeat the application of the provisions of section 4 (as in force at the material time) and section 40 (1) of the Immovable Property (Tenure, Registration and Valuation) Law, Cap. 224.*

20 *Damages—Breach of contract—Erroneous computation inconsistent with evidence.*

Civil Procedure—Appeal—Issue of law pleaded but neither pursued at the trial nor raised in the notice of appeal—Whether it can be argued on appeal.

25 By an oral agreement reached in 1947 or 1948 the parties to

this appeal, who are brothers, agreed to redistribute afresh certain properties, which had been given to them by their parents as dowry. As a result of this agreement three fields at Kokkino-trimithia, the subject matter of these proceedings, were given by the appellant—defendant to the respondent—plaintiff. Though the respondent entered into possession of the said fields no registration thereof in his name was effected; and when in 1966 or 1967 the appellant transferred two of the said fields to other persons, the respondent by an action, filed in 1967, claimed, *inter alia*, damages for breach of contract.

The trial Court, after accepting the version of the respondent, found* that an agreement for the redistribution of the properties concerned was concluded in 1947 or 1948 and awarded to him the amount of C£1,300.— by way of damages for breach of contract.

The defendant appealed.

Counsel for the appellant contended:

- (a) That the action was statute-barred because it was filed more than six years after the alleged agreement of 1947 or 1948. It has been argued in this connection that as the appellant was bound to register the fields in question in the name of the respondent either upon the conclusion of the agreement or within reasonable time afterwards—that is approximately within a year—the period of limitation of six years, provided for by section 5** of the Limitation of Actions Law, Cap. 15, began to run ever since the time when the appellant failed to register the fields in the name of the respondent.
- (b) That the trial Court erred in finding, by accepting the version of the respondent, that an agreement for the redistribution of the properties concerned was concluded.
- (c) That the said agreement was so uncertain as to be void, in view of the provisions of section 29*** of the Contract Law, Cap. 149.

* See the relevant findings of the trial Court at p. 262 *post*.

** See p. 263 *post*.

*** See p. 267 *post*.

- 5 (d) That the said agreement was void for illegality, as being contrary to section 4* (as in force at the material time) and section 40 (1) of the Immovable Property (Tenure, Registration and Valuation) Law, Cap. 224.
- (e) That the amount of damages was excessive.

10 The assessment of damages was based on evidence adduced by the respondent which was to the effect that one of the three fields was worth C£800.- in 1967. Evidence given by a Land Clerk, however, was to the effect that this property was sold for only C£500.- in 1967.

15 *Held*, (1) that normally a cause of action accrues when there is in existence a person who can sue and another who can be sued and when all the facts have happened which are material to be proved to entitle the plaintiff to succeed; that in relation to contracts the cause of action accrues when the breach of contract takes place; and that the action was not statute-barred, because the time began to run as from when the appellant transferred two of the fields concerned to other persons in 1966 or 1967, and it did not begin to run as from when the agreement, by virtue of which the respondent became entitled to such fields, was concluded in 1947 or 1948, or after the expiration of reasonable time thereafter (pp. 263-66 *post*).

25 (2) That this being a matter involving the view taken by the trial Court of the credibility of witnesses the onus lay on the appellant to satisfy this Court that this is an instance in which, in accordance with the well settled principles applicable to such a matter, it could intervene in order to upset the Court's finding; and that the appellant has not discharged this onus (see, *inter alia*, *Charalambides v. HjiSoteriou & Son and Others*, (1976) 4 J.S.C. 625 at pp. 633, 634, regarding the said principles).

35 (3) That in relation to the agreement involved in these proceedings there exists certainty as regards the parties to it, its subject matter and in general all its material constituent parts; and that, accordingly, it cannot be treated as void by virtue of the operation of the provisions of section 29 of Cap. 149 (see,

* Both sections are quoted at p. 268 *post*.

also, Pollock and Mulla on the Indian Contract and Specific Relief Acts, 9th ed. p. 303).

(4) That it was all along intended by the parties that the said three fields would, in due course, be registered by the appellant in the name of the respondent; that it was never the intention of the parties to act in an unlawful manner when they concluded the agreement in question; and that, accordingly, the proposition that the agreement is void for illegality, in that it was intended to evade or defeat the application of the provisions of sections 4 and 40 (1) of Cap. 224, cannot be accepted as correct. (See, also, *The Estate of the Deceased Osman Ahmed Pasha v. Mehmed Kadir Osman Pasha*, 19 C.L.R. 226 at pp. 230, 231).

Per curiam: That as the issue of illegality of the agreement in question was raised by the statement of defence but it was neither pursued at the trial nor raised in the notice of appeal, this Court has been faced with the situation that the appellant has attempted to argue an issue of law when all the relevant to it facts are not either admitted or proved beyond controversy after full investigation; and this reason alone would be sufficient to justify a refusal to deal in this appeal with this issue.

(5) That it was erroneous for the trial Court to assess the damages in respect of one of the plots at an amount higher than the price stated by the Land Clerk, as there was not the slightest evidence that the price disclosed for the purposes of the sale of such plot was not the real one; and that, accordingly, the total amount of damages will be reduced by the difference regarding the value of such plot, from C£1,300.- to C£1,000.

Appeal partly allowed.

Cases referred to:

- Coburn v. Colledge* [1897] 1 Q.B. 702 at pp. 706, 707;
- Central Electricity Board v. Halifax Corporation* [1963] A.C. 785 at p. 806;
- Zographakis v. Agathocleous*, 20 C.L.R. Part I p. 31 at p. 35;
- Lakshmijit v. Sherani* [1973] 3 All E.R. 737;
- Charalambides v. HjiSoteriou & Son and Others* (1976) 4 J.S.C. 625 at pp. 633, 634 (to be reported in (1975) 1 C.L.R.);
- Nissis (No. 2) v. The Republic* (1967) 3 C.L.R. 671 at p. 675;

The Estate of the Deceased Osman Ahmed Pasha v. Mehmed Osman Pasha, 19 C.L.R. 226 at pp. 230, 231.

Appeal.

5 Appeal by defendant against the judgment of the District Court of Nicosia (Demetriades, Ag. P.D.C. and Papadopoulos, D.J.) dated the 29th February, 1972, (Action No. 3903/67) whereby he was ordered to pay to plaintiff the sum of C£1,300.— by way of damages for breach of contract.

C. Myrianthis, for the appellant.

10 *C. Velaris*, for the respondent.

Cur. adv. vult.

The judgment of the Court was delivered by:

15 TRIANTAFYLIDIS P.: The appellant, who was the defendant before the trial Court, has appealed against a judgment by virtue of which he was ordered to pay to the respondent, as plaintiff at the trial, the sum of C£1,300, by way of damages for breach of contract. The respondent and the appellant are brothers and they have another brother and a sister. Their parents were the owners of immovable property situated at various localities in the vicinity of the villages of Kokkinotrimithia, Mammari, Denia, Paleometochos and Ayios Vassilios.

20 When the respondent, the appellant and their brother and sister got married their parents gave to each one of them a number of fields as dowry; the appellant was married in 1923, the respondent in 1925, their brother in 1934 and their sister in 1938.

30 The respondent has alleged at the trial that in 1947 or 1948, he, the appellant, and their brother and sister, agreed to divide afresh the properties given to them as aforesaid by their parents, and that, as a result, three fields at Kokkinotrimithia, which are the subject matter of the present proceedings, were given by the appellant to the respondent.

The said agreement was an oral one and has been denied by the appellant.

35 The trial Court made the following finding concerning the existence of this agreement:—

“ Having carefully considered the evidence before us and

having seen the demeanour of the plaintiff and his witnesses on the one hand and that of the defendant on the other, and having in mind that the evidence of the defendant is not supported in any way or corroborated by any evidence whilst that of the plaintiff is corroborated by the evidence of the witnesses he called as well as by all surrounding circumstances, *i.e.*, that he was in possession of the properties the subject of the action from at least 1948 to 1966, we have come to the conclusion that the version of the plaintiff is the correct one and that in fact an agreement was reached in 1947 or 1948 for the re-distribution of the properties amongst the parties to this action and their brother and sister and in particular the plaintiff agreed to exchange and in fact did exchange properties belonging to him with the properties the subject of this action.”

In 1966 or 1967 the appellant transferred two out of the aforementioned three fields, one to third persons and the other to his daughter, and on September 30, 1967, the respondent filed against the appellant the action from which this appeal has arisen.

The trial Court found that the only remedy to which the respondent was entitled was damages for breach of contract and, as a result, it awarded the aforesaid amount of C£1,300 to him.

It was submitted, at the trial, on behalf of the appellant, and it has, also, been argued before us, that the action of the respondent was, in any event, statutebarred, because it was filed more than six years after the alleged agreement of 1947 or 1948; in this respect it is common ground that the three fields concerned were not registered in the name of the respondent by the appellant, and counsel for the appellant has contended that, as his client was bound to register them in the name of the respondent either upon the conclusion of the agreement or within reasonable time afterwards—that is approximately within a year—the period of limitation of six years began to run ever since the time when the appellant failed to register the fields in the name of the respondent.

The relevant provision of the Limitation of Actions Law, Cap. 15, is section 5, which reads as follows:-

“ 5. No action shall be brought upon, for, or in respect of, any cause of action not expressly provided for in this Law, or expressly exempted from the operation of this Law, after the expiration of six years from the date when
5 such cause of action accrued”.

The trial Court has held that the action was not statute-barred because the relevant limitation period of six years began to run only as from 1966 or 1967, when the appellant broke his aforesaid agreement with the respondent by transferring
10 two fields to other persons.

The basic factor in relation to the question of whether or not the action of the respondent against the appellant is statute-barred is the date when the cause of action accrued.

Normally a cause of action accrues when there is in existence
15 a person who can sue and another who can be sued and when all the facts have happened which are material to be proved to entitle the plaintiff to succeed (see Halsbury's Laws of England, 3rd ed., vol. 24, pp. 193, 194, para. 347).

In this respect in *Coburn v. Colledge*, [1897] 1 Q.B. 702,
20 Lord Esher M.R. stated the following (at pp. 706, 707):-

“ The definition of ‘cause of action’ which I gave in *Read v. Brown** has been cited. I there said that it is ‘every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court.’ The language I used obviously means this:
25 the plaintiff in order to make out a cause of action must assert certain facts which, if traversed, he would be put to prove. It is well known, of course, that any of those facts which is not traversed is taken to be admitted. The
30 words ‘if traversed’ were inserted to make it clear that the facts spoken of were those which the plaintiff must allege in his statement of claim as it is now called, or his declaration as it used to be called. In former times, if he failed to assert any of those facts, his declaration was demurrable as shewing no cause of action. If he asserted those
35 facts, and they were traversed, it lay upon him to prove

* 22 Q.B.D. 128.

them. If any of them were not traversed, he need not of course prove them. I adhere to the definition of 'cause of action' which I then gave, and which was assented to by Fry and Lopes L.JJ. It has been suggested that it is inconsistent with the effect of what was said by Lindley L.J., in *Reeves v. Butcher*.^{*} But I do not think there is really any such inconsistency as was suggested. If the plaintiff alleges the facts which, if not traversed, would *prima facie* entitle him to recover, then I think he makes out a cause of action." 5 10

The above approach of Lord Esher was approved by the House of Lords in England in *Central Electricity Board v. Halifax Corporation*, [1963] A.C. 785, in which Lord Guest said (at p. 806):-

"The date when a cause of action accrues may be said to be the date on which the plaintiff would be able to issue a statement of claim capable of stating every existing fact which, if traversed, it would be necessary for the plaintiff to prove in order to support his right to judgment. This, I take it, is the effect of the judgment of Lord Esher M.R. in *Coburn v. Colledge*.^{***}" 15 20

In Cheshire and Fifoot's Law of Contract, 9th ed., p. 619, it is stated that:-

"The expression 'cause of action' means the factual situation stated by the plaintiff which, if substantiated, entitles him to a remedy against the defendant.^{***}" 25

It is well settled that in relation to contracts the cause of action accrues when the breach of contract takes place (see *Zographakis v. Agathocleous*, 20 C.L.R., Part I, pp. 31, 35, Cheshire, *supra*, p. 619, Chitty on Contracts, 24th ed., vol. 1, p. 809, para. 1702, and Halsbury's *supra*, p. 213, para. 386). 30

It is useful to refer, also, in this connection, to the case of *Lakshmijit v. Sherani*, [1973] 3 All E.R. 737, which was decided

* [1891] 2 Q.B. 509.

** [1897] 1 Q.B. 702.

*** *Letang v. Cooper*, [1965] 1 Q.B. 232.

by the Privy Council in England; the headnote of the report of that case reads as follows:—

“ By an agreement made on 16th February 1948 the vendor agreed to sell to the purchaser certain land in Fiji. Possession of the property was deemed to have been given to the purchaser as from 1st February 1948. After payment of the deposit it was provided that the balance of the purchase price should be paid by quarterly instalments, the first instalment falling due on 1st August 1948. Clause 2 provided that if the purchaser made default in payment of any instalment and the default continued for seven days the vendor should be entitled to charge interest on the balance of the purchase price remaining unpaid. Clause 20 provided that should at any time two quarterly instalments be in arrear and unpaid for seven days the vendor, without prejudice to any other rights and remedies under the agreement, might exercise either of the following remedies: (a) enforce the contract, in which case the whole of the purchase money and interest then unpaid would become due and at once payable, or (b) rescind the contract, whereupon all moneys paid would be forfeited and the vendor would be entitled to re-enter and take possession of the land and at his option resell it. In fact the purchaser never made regular quarterly payments under the agreement. The vendor died in May 1964. On 2nd March 1967 the vendor’s administrator addressed a notice to the purchaser demanding payment of the moneys due under the agreement with interest and on the same day his solicitors gave notice that unless the arrears were paid within 30 days the agreement would be rescinded and the purchaser required to quit and give up possession of the land. The purchaser neither paid the moneys claimed nor gave up possession of the land. In October 1967 the administrator commenced an action claiming possession. The purchaser contended that the action was barred by s. 1 of the Real Property Limitation Act 1874 (applicable in Fiji), since the vendor’s right of entry had first accrued more than 12 years before the action had been brought, in that it had accrued as soon as the vendor was at liberty to exercise his right to rescind under cl 20 of the agreement.

Held (Viscount Dilhorne dissenting)—The remedies provided for by cl 20 of the agreement were inconsistent with each other and with the rights under cl 2 to charge interest on overdue instalments. If one remedy were exercised the purchaser's right to possession would come to an end whereas if the other were exercised his right to possession would continue. If the vendor exercised his option to rescind the agreement he would be bound to communicate that fact to the purchaser if he were to acquire a right to possession of the land. The vendor did not acquire a right of entry on breach of condition by the purchaser but only when he exercised his right of rescission. That right was not exercised until the vendor's administrator sent the letter of 2nd March 1967. It followed that the vendor's right of entry only accrued on that date and his action was not therefore statute-barred".

In the light of all the foregoing we are in agreement with the trial Court that, in the present instance, the action of the respondent was not statute-barred, because the time began to run as from when the appellant transferred two of the fields concerned to other persons in 1966 or 1967, and it did not begin to run as from when the agreement, by virtue of which the respondent became entitled to such fields, was concluded in 1947 or 1948, or after the expiration of reasonable time thereafter; we are of the opinion that in view of the nature of such agreement there was no obligation undertaken by the appellant to register the said three fields in the name of the respondent immediately upon the conclusion of the agreement or within reasonable time thereafter, but he only undertook to do so when requested by the respondent, and, in the meantime, the respondent took up possession of the fields as from the time of the conclusion of the agreement.

We shall deal, next, with issues related to the substance of this case:

It has been argued that the trial Court erred in finding, by accepting the version of the respondent, that an agreement for the re-distribution of the properties concerned was concluded.

This is a matter involving the view taken by the trial Court of the credibility of witnesses, and having heard what counsel

for the appellant had to say in relation to this aspect of the present appeal we did not call upon counsel for the respondent to reply, because we have not been satisfied by counsel for the appellant, on whom the relevant onus lay, that this is an instance in which, in accordance with the well settled principles applicable to such a matter, we can intervene in order to upset the Court's finding (regarding the said principles see, *inter alia*, *Charalambides v. HjiSoteriou & Son and others*, (1976) 4 J.S.C. 625, 633, 634)*.

10 It has, also, been contended by counsel for the appellant that the said agreement is so uncertain as to be void, in view of the provisions of section 29 of the Contract Law, Cap. 149, which reads as follows:-

15 "29. Agreements, the meaning of which is not certain, or capable of being made certain, are void."

The above section 29 is the same as section 29 of the Indian Contract Act, 1872; in relation to the application of such section the following are stated in Pollock and Mulla on the Indian Contract and Specific Relief Acts, 9th ed., p. 303:-

20 "A contract of which there can be more than one meaning or which when construed can produce in its application more than one result is not void for uncertainty. So long as the language applied by the parties is -

25 'not so obscure and so incapable of any definite or precise meaning that the Court is unable to attribute to the parties any particular contractual intention'

the contract is not void or uncertain or meaningless."

30 In our view, in relation to the agreement involved in the present proceedings, there exists certainty as regards the parties to it, its subject matter and in general all its material constituent parts, and, therefore, we cannot accept that it should be treated as void by virtue of the operation of the provisions of section 29 of Cap. 149.

35 We need not deal with the contention of counsel for the appellant that such agreement is void for lack of consideration because this contention was abandoned during the hearing of

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the appeal; we might state only that, in our opinion, there did exist proper consideration for the agreement and that there was no uncertainty at all as regards this aspect.

Another submission of counsel for the appellant has been that if we were to find that it was not of the essence of the agreement in question that the three fields concerned should be registered by the appellant in the name of the respondent when the agreement was concluded, or within reasonable time thereafter, then such agreement was void for illegality, as being contrary to sections 4 and 40 (1) of the Immovable Property (Tenure, Registration and Valuation) Law, Cap. 224; section 4 of Cap. 224, as it was in force at the time when the relevant agreement was concluded, read as follows:—

“4. Notwithstanding anything in paragraph (c) of subsection (1) of section 33 of the Courts of Justice Law contained and subject to the law relating to trusts, the law relating to vakfs and the provisions of any other Law in force for the time being, no estate, interest, right, privilege, liberty, easement or any other advantage whatsoever in, on or over any immovable property shall subsist or shall be created, acquired or transferred except under the provisions of this Law.”

This section was repealed and replaced by a new section 4, enacted by the Immovable Property (Tenure, Registration and Valuation) (Amendment) Law, 1960 (Law 3/60), but the provisions of the new section are not material for the outcome of the present appeal.

Section 40 (1) of Cap. 224 reads as follows:—

“40. (1) No transfer of, or charge on, any immovable property shall be valid unless registered or recorded in the District Lands Office.”

The issue of illegality of the agreement in question was raised by the statement of defence filed by the appellant in the action before the trial Court, but was not argued at the trial, nor was it raised in any way in the grounds in the notice of appeal; moreover, as a result of the fact that it was not pursued at the trial, we have been faced in this appeal with the situation that the appellant has attempted to argue an issue of law when all

the relevant to it facts are not either admitted or proved beyond controversy after full investigation; and this reason alone would be sufficient to justify our refusal to deal in this appeal with such issue (see *Nissis (No. 2) v. The Republic*, (1967) 3 C.L.R. 5 671, 675).

Anyhow, as already indicated earlier on in this judgment, we are of the view that it was all along intended by the parties that the aforementioned three fields would, in due course, be registered by the appellant in the name of the respondent and we, therefore, cannot accept as correct the proposition that the 10 agreement concluded between the parties in 1947 or 1948, is void for illegality, in that it was intended to evade or defeat the application of the provisions of sections 4 and 40 (1) of Cap. 224.

15 In this connection it is pertinent to note that in *The Estate of the Deceased Osman Ahmed Pasha v. Mehmed Kadir Osman Pasha*, 19 C.L.R. 226, it was observed (at pp. 230, 231) that "a transaction ought to be presumed lawful unless the contrary is shown and the fact that registration was not effected is but 20 slight evidence as to what the parties intended at the date of the transaction whose legality is in question".

In the present case, as already stated, we are of the opinion that it was never the intention of the parties to act in an unlawful manner when they concluded the agreement on which 25 the claim of the respondent against the appellant in the present proceedings has been based.

Lastly, we shall deal with the amount of damages, C£1,300, which have been awarded by the trial Court to the respondent for the breach by the appellant of the agreement:

30 Counsel for the appellant has submitted that the said amount is excessive.

The trial Court based its assessment of damages on the evidence of the respondent and of his brother Christophis; such evidence was to the effect that one of the three fields concerned, plot 107, was worth C£800 in 1967. It appears, however, 35 from the evidence given by a Land Clerk, Nicos Tsikkos, that this property was sold in 1967 for only C£500.

In the light of the above evidence regarding the price to which plot 107 was actually sold, we think that it was erroneous for the trial Court to assess the damages in respect of it at an amount higher than the said price, as there is not the slightest evidence that the price disclosed for the purposes of the sale of such plot was not the real one. 5

Regarding the amounts of damages awarded in respect of the other two fields, plots 113 and 73, C£200 and C£300, respectively, we see no reason to disturb the findings of the trial Court and, therefore, we only reduce the total amount of damages, because of the difference regarding the value of plot 107, from C£1300 to C£1000. 10

This appeal is, therefore, allowed in part and dismissed as regards the rest of it; and we have decided, in the circumstances of this case, not to make any order as to its costs. 15

*Appeal partly allowed.
No order as to costs.*