

1981 November 4

[TRIANTAFYLIDES, P.]

“PHOENIX” GREEK GENERAL INSURANCE CO. S.A.,
Appellants—Applicants,

v.

AL KHALAF EXHIBITION,

Respondent.

(Application in Civil Appeal No. 6306).

5 *Civil Procedure—Stay of execution pending appeal—Principles applicable—Stay of execution by trial Court—Supreme Court possessing concurrent jurisdiction—Relevant order of trial Court not to be treated as challenged by way of appeal—Rules 18 and 19 of Order 35 of the Civil Procedure Rules.*

10 *Civil Procedure—Practice—Stay of execution on terms by trial Judge pending determination of appeal—Should not be treated as a refusal of stay of execution—Only a review thereof, by the Supreme Court, to be sought and not a fresh stay of execution Rules 18 and 19 of Order 35 of the Civil Procedure Rules.*

15 The appellants were adjudged to pay to the respondent the sum of C£10,492.682 mils. As against this judgment they filed an appeal and on the same day they applied to the trial Court for stay of execution pending the determination of their appeal. The trial Court made an order for stay of execution for ten days on terms*. By means of this application the appellants applied afresh for stay of execution to the Supreme Court which came before this Court under rule 18 of Order 35 of the Civil procedure Rules.

20 *Held*, that the appellants have wrongly treated the order made by the trial Court as a refusal of stay of execution; that the proper course was for the appellants to seek a review of the said order for stay of execution on terms and not to apply, as they have done, afresh for a stay of execution to the Supreme

* See the relevant terms at p. 675 *post*.

Court; and that for this reason alone this Court is not prepared to grant the present application.

Held, further, (on the assumption that applicant's application could be made under the said rule 18) that though under rule 18 of Order 35 this Court possesses a concurrent jurisdiction as regards stay of execution and the relevant order of the trial Court is not to be treated as being challenged by way of appeal, in the light of the principles governing grant of stay of execution pending appeal and of the circumstances of this case, this Court would not be inclined to grant the stay of execution sought by the applicants.

Application dismissed.

Cases referred to:

Merry v. Nickalls [1873] L.R. 8 Ch. App. 205;

Hansard v. Lethbridge, 8 T.L.R. 179;

Katarina Shipping Inc. v. The Cargo on Board the ship "Poly" (1978) 1 C.L.R. 355 at p. 360;

London and Overseas (Sugar) Co. v. Tempest Bay Shipping Co. Ltd. (1978) 1 C.L.R. 367 at p. 373;

Doyle v. White City Stadium Limited [1935] 1 K.B. 110 at p. 128.

Application.

Application by defendants for the stay of execution of the judgment in civil action No 1920/79 pending the final determination of their appeal against such judgment.

A. Pandelides, for the applicants.

R. Stavrakis, for the respondent.

Cur. adv. vult.

TRIANTAFYLIDIS P. read the following judgment. The applicants, as the defendants in civil action No. 1920/79 in the District Court of Nicosia, were adjudged to pay to the respondent, as the plaintiff in the said action, the sum of C£10,492.682 mils, with 4% per annum interest as from July 6, 1981, when the judgment of the District Court of Nicosia was delivered.

It appears that the liability in question of the applicants arose out of a contract of insurance entered into by them.

On September 5, 1981, they filed Civil Appeal No. 6306 against the aforementioned judgment of the District Court and on the same date they applied to the trial Court for stay of execution pending the determination of their appeal. The trial Court made the following order on October 8, 1981:-

“There will be a stay of execution of the judgment debt for ten days: if within this period the judgment creditor furnishes the judgment debtors with a bank guarantee from a commercial bank for the repayment of an amount up to the amount of the judgment debt in the event and according to the extent, if any, that the judgment debtors are successful on appeal, then the judgment debtors are to pay the amount of the judgment debt to the judgment creditor; but if the judgment creditor should fail to furnish to the judgment debtors such bank guarantee, the amount of the judgment debt is to be deposited with the Registrar, District Court Nicosia to abide the outcome of the appeal; in default, execution may be levied after the lapse of the said period of ten days. The costs of the action to be paid to the advocate of the judgment creditor upon the furnishing by such advocate of a personal undertaking to repay same in the event that such order for costs is reversed on appeal”.

In view of the provisions of rule 19 of Order 35 of the Civil Procedure Rules the applicants quite properly applied in the first instance to the trial Court for stay of execution.

The order which has been made, as above, by the trial Court is in effect a stay of execution on terms. This is quite clear from, *inter alia*, a comparison with the case of *Merry v. Nickalls*, [1873] L.R. 8 Ch. App. 205, the relevant part of the report of which reads as follows:-

“The Defendant in this case had been ordered to pay to the Plaintiff a sum of about £1100 and the costs of the suit; as reported.

Mr. Buchanan now moved that the proceedings under the order for payment might be stayed, pending the Defendant’s appeal to the House of Lords. The Defendant was willing to bring the money into Court.

Mr. Davey, for the Plaintiff, objected that his client would have to pay the money, and would then be out of pocket pending the appeal.

Their Lordships made an order to stay proceedings under the order for payment; the Defendant to pay the money to the Plaintiff, the Plaintiff giving security for repayment if the Defendant succeeded on the appeal; or the Defendant, if the Plaintiff preferred that course, to pay the money into Court. The costs of the suit, to be paid according to the decree, on the solicitor undertaking to repay if the Court should so direct". 5 10

It is useful to point out, too, that in the Supreme Court Practice, 1979, vol. 1, p. 910, para. 59/13/2, the case of *Merry, supra*, is referred to under the heading of "Terms on which a stay is ordered". 15

I am of the opinion that the proper course was for the applicants to seek a review of the aforementioned order for stay of execution on terms, which was made by the trial Court on October 8, 1981—(as, for example, in *Hansard v. Lethbridge*, 8 T.L.R. 179)—and not to apply, as they have done, afresh for stay of execution to the Supreme Court; and for this reason alone I would not be prepared to grant the application for stay of execution which is now before me. 20

The applicants, having treated, wrongly in my view, the order made as aforesaid by the trial Court as a refusal of stay of execution, have, consequently, made to this Court their present application which has come before me under rule 18 of Order 35 of the Civil Procedure Rules; and, subject to what I have already stated earlier in this judgment, I shall proceed to deal, too, with the applicants' application on the assumption that it could be made under the said rule 18. 25 30

It is well established that under such rule this Court possesses a concurrent jurisdiction as regards stay of execution and the relevant order of the trial Court is not to be treated as being challenged by way of appeal (see, *inter alia*, in this respect, the Supreme Court Practice, 1979, vol. 1, p. 910, para. 59/13/4). 35

The principles governing the grant of stay of execution pending appeal have been expounded in, *inter alia*, *Katarina Shipping*

Inc. v. The Cargo on Board the ship "Poly", (1978) 1 C.L.R. 355, 360, and *London and Overseas (Sugar) Co. v. Tempest Bay Shipping Co. Ltd.*, (1978) 1 C.L.R. 367, 373, and I need not repeat them now all over again.

5 Useful reference may be made, too, to the case of *Doyle v. White City Stadium Limited*, [1935] 1 K.B. 110, where (at p. 128) Lord Hanworth M.R. stated the following:-

10 "... although a plaintiff who is successful in the Court of first instance is entitled to stand upon that judgment on the presumption that it is right, yet the defendants are entitled to take their case to a higher Court,..."

As it appears from an affidavit sworn on October 13, 1981, and filed in support of their present application by the applicants, they are prepared not only to furnish a bank guarantee that
15 they will satisfy the judgment debt due to the respondent in case their appeal fails, but they are, also, prepared to undertake to pay, in such a case, to the respondent the difference between the legal interest which the judgment debt carries and the interest which the respondent would be receiving if the amount of the
20 judgment debt was to be deposited by the respondent in a bank in the meantime.

On the other hand, the respondent has complied with the order made as aforesaid by the trial Court on October 8, 1981, and has furnished a bank guarantee as directed in that order;
25 thus, the appellants will not irretrievably lose any funds in case they are successful in their appeal in whole or in part.

In the light of the relevant principles, and of the foregoing considerations, I would not be inclined to grant the stay of execution sought by the applicants.

30 In the result this application fails and is dismissed with costs.

Application dismissed with costs.