1982 December 2

[DEMETRIADES, LORIS, PIKIS, JJ.]

COSTAS EVAGOROU,

Appellant–Plaintiff.

v.

KOKOS CHRISTODOULOU AND ANOTHER,

Respondents–Defendants.

(Civil Appeal No. 6308).

Civil Procedure—Practice—Dismissal of action for want of prosecution —Order 17, *rule* 14(2) *of the Civil Procedure Rules—Discretion of the Court to set aside dismissal upon appropriate terms, in the absence of a direction at the time of dismissal that proceedings void—Order for reinstatement not a void order and the Court had no jurisdiction to set it aside and act upon the assumption that it was void—Rule* 14 *of Order* 26 *and rule* 1 *of Order* 64 *of the Civil Procedure Rules.*

Following the dismissal of appellant–plaintiff's action, in exercise of the Court's powers under Order 17, rule 14(2) of the Civil Procedure Rules, the appellant applied to have the action reinstated. The trial Judge granted the application; but when the appellant moved the Court for judgment in default of appearance of the respondents the trial Judge took the view that the order for reinstatement of the action was a nullity being an order which the Court had no power to make and acting on his own motion he set it aside.

Upon appeal by the plaintiff:

Held, that any judgment by default whether given under Order 26 of the Civil Procedure Rules or under any other Order may be set aside (see r.14 of Order 26) and that therefore the Court had discretion upon appropriate terms to set aside the dismissal of the action by default in the absence of a direction by the Court at the time of its dismissal; that the proceedings should be regarded as void (see, also, Order 64, r.1 of the Civil Procedure Rules); that the order for reinstatement was one perfectly open

to the Court excusing prior irregularities, it was not a void order and the Court had no jurisdiction to set it aside and act upon the assumption that it was void; accordingly the appeal must be allowed.

Appeal allowed.

Cases referred to:

Evans v. Bartlam [1937] A.C. 473;

Craig v. Kanseen [1943] 1 All E.R. 108;

Re Pritchard (deceased) [1963] 1 All E.R. 873;

Lysandrou v. Schiza and Another (1979) 1 C.L.R. 267.

Appeal.

Appeal by plaintiff against the order of the District Court of Nicosia (Artemides, S.D.J.) dated the 11th September, 1981, (Action No. 4574/78) setting aside the order of the 19.11.1980 whereby the above action had been reinstated.

Ph. Valiantis, for the appellant.

No appearance for the respondent.

Cur. adv. vult.

DEMETRIADES J.: The judgment of the Court will be given by Mr. Justice Pikis.

PIKIS J.: By a generally endorsed writ of summons dated 14th November, 1978, the appellant instituted an action for damages arising from a road accident. The defendants though apparently served failed to appear and contest the claim. After a long pause the appellant filed on 22nd November, 1980, the statement of claim setting out his cause and detailing the damage suffered as a result of the breach of duty, on the part of the deceased represented by the defendants, his personal representatives. How and in what circumstances the statement was allowed to be filed we know not for at the time of its filing the action had already been dismissed in exercise of the powers vested in the Court under Ord. 17, r. 14(2) of the Civil Procedure Rules. Dismissal was preceded by a notice addressed by the Registrar, Nicosia District Court, to the appellant under Ord. 17, r.14(1), notifying the appellant that the action would be dismissed unless steps were taken to drive the case to conclusion by moving the Court for judgment in default. To this there was no response or compliance. After the lapse of the time specified in the notice the action stood dismissed by operation

of the provisions of Ord. 17, r. 14(2), a fact certified by a Judge of the Court with an appropriate note.

Following the dismissal of the action the appellant applied on 19th November, 1980, to have the action reinstated. Artemides, S.D.J., as he then was, granted the application. Thereafter the appellant moved the Court for judgment in default of appearance of the respondents. The learned Judge took the view that the order made for reinstatement of the action was a nullity being an order the Court had no power to make and acting on his own motion he set it aside. The action ought not to have been revived. He debated at length the inherent powers of the Court to revoke null orders ex debito justitiae and felt dutybound to revoke his order of reinstatement notwithstanding the absence of a motion to that end.

This appeal raises two questions of law. The first is whether the order for reinstatement was ill-founded in the sense of nullity which, in turn would depend on the existence of a discretionary power to reinstate and, secondly, whether the Court had an inherent power to revoke a null order in the circumstances that jurisdiction was so assumed. Sustaining the appeal on the first ground will, naturally, obviate the need to discuss the second part of the appeal, therefore, we shall decide first whether power vests in the Court to reinstate an action dismissed under the provisions of Ord. 17, r.14 of the Civil Procedure Rules.

The trial Judge took the view that an action dismissed under Ord. 17, r.14, cannot be revived on a consideration of the provisions of Ord. 17, r.14(2) particularly that part laying down that dismissal shall not prejudice the right to the institution of a fresh action. With respect, this provision does not render the action dismissed void ab initio. All it suggests is that dismissal shall be no bar to the institution of fresh proceedings based upon the same facts. In other words it reiterates the well-established rule that dismissal of an action not emanating from an evaluation of the merits of the case does not make the matter res judicata.

The attention of the learned trial Judge was not drawn, it seems, either to the provisions of Ord. 26, r.14 or those of Ord. 64, r.2 of the Civil Procedure Rules. Ord. 26, r.14, expres-

sly provides that any judgment by default whether given under Ord. 26 or under any other order of the Civil Procedure Rules may be set aside. Judgment is any order finally disposing of the matter whether on the merits or on any other ground. So, in virtue of the plain provisions of this rule the order for the dismissal of the action by default could be set aside on appropriate terms. Ord. 26, r.14, derives its origin from R.S.C. Ord. 27, r.15 (old English Rules). Therefore, a study of its interpretation and application in England throws light on the ambit and scope of Ord. 26, r.14. (See the Annual Practice 1958, p. 615). In *Evans* v. *Bartlam* [1937] A.C. 473 it was pointed out that the discretion of the Court to set aside a judgment by default is not subject to any limitations other than those that may be imposed by the Court in the exercise of its discretion. There is jurisdiction to set aside any judgment not founded on an appraisal of the merits of the case and revoke the prior exercise of the coersive power of the Court. This statement of the law is adopted in the White Book as accurately reflecting the practice of English Courts as respects applications for setting aside a judgment given by default. Reinstatement may be ordered upon such terms as the Court deems appropriate. (See Annual Practice (supra), p. 617). The power to reinstate may be invoked in every kind of action (Annual Practice (supra) p. 618).

A judgment given by default may be set aside not only under Ord. 25, r.14, but under Ord. 64, r.1, as well. Ord. 64, r.1, categorically lays down that non-compliance, in the prosecution of an action, with the provisions of one or more of the Civil Procedure Rules does not render the proceedings void, *unless the Court so directs* and that any irregularity in the process arising from non-compliance with the rules may be excused upon terms appropriate on the occasion. Ord. 64, r.1, is modelled on the provisions of R.S.C. Order 70, r.1 (old English Rules) the application and effect of which is discussed at length in the *Annual Practice of* 1958 at p. 1896 et seq. As it is made clear in a note explanatory to the rule it is not intended to confer power on the Court to save void proceedings. Only proceedings irregular because of non-compliance with the Civil Procedure Rules are covered by R.S.C. Ord. 70, r.1. Therefore, a distinction is drawn between void and irregular

proceedings. An example given in the Annual Practice of an order that it is a nullity relates to a judgment obtained before the time limited for appearance. The distinction between void and irregular proceedings is discussed in *Craig* v. *Kanseen* [1943] 1 All E.R. 108, cited by the learned trial Judge but more extensively in the case of *Re Pritchard* (deceased) [1963] 1 All E.R. 873 (C.A.). In the latter case it was held that an originating summons not issued out of the central office, a mandatory step for the valid initiation of the proceedings, rendered the summons a nullity. Nullity arises whenever the defect is fundamental and goes to the root of the proceedings. Up-John, L.J. in *Re Pritchard* (supra) listed, on a review of the authorities, at least three classes of proceedings that are a nullity: (1) Proceedings that ought to be served but never came to the notice of the defendant (excluding cases of substituted service or cases where service was dispensed with under the law. (2) Proceedings that never properly came to being because of a fundamental defect in their issuing and (3) proceedings apparently duly issued but nevertheless failed to comply with the statutory requirement.

An example of a fundamental defect that cannot be waived or excused is furnished by the provisions of Ord. 25, r.2, laying down that an order for amendment of pleadings not effected within the time specified by the Court or within 15 days, in the absence of such indication, becomes ipso facto void. (See, *Lysandrou* v. *Schiza and Another* (1979) 1 C.L.R. 267). Another instance of a void step in litigation is provided by Ord. 2, r.13 of the Civil Procedure Rules requiring the accompaniment of the writ of summons in a probate action by an appropriate affidavit as the condition for its validity. In Action 34/79 of the District Court of Larnaca I had occasion to discuss the implications of Ord. 2, r.13 and pronounce a writ of summons unaccompanied by the affidavit envisaged by the rules as a nullity.

In the present case the Court had discretion upon appropriate terms to set aside the dismissal of the action in the absence of a direction by the Court at the time of its dismissal that the proceedings should be regarded as void. The power vested in the Court to decree proceedings fraught with irregularity as void is a drastic one and should be exercised with the greatest

circumspection. Its invocation might be justified only where the irregularity of the defaulting party is such that it would make it unjust to allow the other party to run the risk of reinstatement. However, we need not discuss the matter further for in the present case reinstatement was ordered in the first place without any direction that the proceedings should be treated as void ab initio.

In the light of all that is stated hereinabove it emerges that the order for reinstatement was one perfectly open to the Court excusing prior irregularities. It was certainly not a void order, therefore, the Court had no jurisdiction to set it aside and act upon the assumption that it was void. Inevitably the appeal succeeds. This being the result we need not discuss the inherent powers of the Court to set aside a void order and the circumstances pertaining to their exercise.

The appeal is allowed. There will be no order as to costs.

Appeal allowed with no order as to costs.