

1984 March 16

[L. LOIZOU, HADJIANASTASSIOU AND MALACHTOS, JJ.]

DIOMEDES GEORGHIADES,

*Appellant-Plaintiff,*

v.

VRYONIS ANTONIOU AND ANOTHER,

*Respondents-Defendants.*

(Civil Appeal No. 5024).

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*Civil Procedure—Evidence—Trial in civil cases—Claim under a bond—Burden of proof lies on the debtor and he should adduce his evidence first.*

5 *Findings of fact made by trial Court—Appeal turning thereon—Not a case in which Court of Appeal could interfere with such findings.*

This appeal, which arose out of the dismissal of appellant's claim for £38.- allegedly due to him by the respondents by virtue of a bond, turned on the following issues:

(a) The burden of proof

10 (b) The findings of fact made by the trial Court.

*Held*, (1) that the burden of proof was on the respondents and the Judge expressly said so in his judgment and ruled that they should adduce their evidence first which they did.

15 (2) That this is not a case in which this Court could interfere with the findings of the trial Court; accordingly the appeal must fail.

*Appeal dismissed.*

**Appeal.**

20 Appeal by plaintiff against the judgment of the District Court of Paphos (Pitsillides, S.D.J.) dated the 4th September, 1971 (Action No. 1329/70) whereby his action against the defendants for the sum of £38.- by virtue of a bond was dismissed.

*E. Komodromos*, for the appellant.

*J. Mavronicolas*, for the respondents.

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*Cur. adv. vult.*

L. LOIZOU J. read the following judgment of the Court. This is an appeal against the judgment of the District Court of Paphos whereby plaintiff's-appellant's action against the respondents-defendants was dismissed with costs. By his action the appellant claimed the sum of £38.- together with interest at 9% from 1st February, 1962, by virtue of a bond. The bond in question is exhibit 6. It is dated 13th November, 1961, and was payable on the 1st February, 1962. Respondent 2 is the wife of respondent 1 and she was a guarantor under the bond and was sued jointly and severally with respondent 1, her husband, in that capacity.

By their defence the respondents alleged that for the sum due under the bond in question as well as for other debts due to the appellant by them or either of them they had signed on the 29th March, 1963, a new bond for the sum of £72.750 mils payable in three instalments, the last of which was payable on the 30th November, 1965. It was signed by the two respondents and by the father of respondent 1, all three as principal debtors and that the said bond had been paid off and, therefore, the respondents were not indebted to the appellant.

It is not in dispute that on the 31st July, 1962, respondent 1 filed an application under the Agricultural Debtors Relief Law, 1962, and among his debts to his various creditors he included a debt due to the appellant by virtue of two bonds, one for the sum of £38.- and the other for the sum of £4.500 mils. The file of the said application which bears No. 88/1962 has been produced at the trial and it is exhibit 1. Appellant's counsel on the 25th January, 1963, filed an Opposition to the said application on behalf of the appellant and also made and swore an affidavit in support thereof. At paragraph 4 of the said affidavit counsel states that as far as he could affirm from the material which he possessed the exact amount of the debt of respondent 1 to the appellant was £44.500 mils by virtue of a bond dated 3rd January, 1962, and payable on 1st April, 1962, with interest at 9% from 1st April, 1962, until the 31st December, 1962 i.e. £47.515 mils and with 9% interest on this sum from the 31st December, 1962, till final payment. In the same paragraph counsel stated that respondent 1 owed to the creditor other debts by virtue of bonds which he did not include in his application.

At the commencement of the hearing of the action before the trial Court appellant's counsel stated that by inadvertence a sum of £10.- which the respondent 1 had paid against this bond to the appellant on 1st December, 1965, had not been  
5 deducted from the claim and he reduced his claim accordingly. The respondents denied the payment of this sum. The file, exhibit 1, was produced by the Acting Assistant Registrar of the District Court of Paphos who had in his custody the files of the Agricultural Debtors Relief Law. The witness stated,  
10 and so it appears from the file, that the debts which the respondent stated as owing to the appellant consisted of two bonds, one for £38.- with 9% interest made in 1961 and the other for £4.500 mils at 9% interest made on 28th December, 1961. According to a record made by the Judge in this file on the 8th  
15 April, 1963, counsel for the appellant appeared before the Court together with respondent 1 (who was the applicant in the application) and stated that the debts had been settled out of Court and the application was withdrawn.

According to the evidence of the respondent, given before  
20 the trial Court, the bond for £38.-, the subject-matter of these proceedings, was included in his application for relief under the Agricultural Debtors Relief Law and that on the date they appeared before the Agricultural Debtors Relief Court he agreed with Mr. Komodromos, who was counsel for the creditor,  
25 the appellant, to bring his father and his wife to sign a bond for all his debts to the appellant including that which was not included in the application for relief and that on the 29th March, 1963, he did so and after counsel calculated all the debts up to that date all three signed a bond for £72.750 mils as principal  
30 debtors. The bond in question is exhibit 2. The new bond, he stated, included the two bonds mentioned in his application for relief i.e. one for £38.- and one for £4.500 mils as well as a third bond for £44.500 mils together with the interest due up to that date and that on the date in question he paid against  
35 his debt to the appellant the sum of £20.- which was deducted from the total of his debts before exhibit 2 was made and signed. He further stated that he paid off this debt and that he does not owe anything to the appellant. It is, in fact, common ground that this bond, exhibit 2, has been paid off.

40 The appellant also gave evidence before the Court and

confirmed that the debts of the respondents to him were under three bonds as follows: One for £44,500 mils, one for £4,500 mils and a third for £38.-; that in his application for relief the respondent 1 included only two bonds totalling £42,500 mils but that the bond of £38.- was not included in the application, as he was informed by his counsel. Appellant further stated that his counsel had in his possession all the bonds due to him by the respondents but that he, himself, had no personal knowledge of what negotiations preceded the signing of the new bond, exhibit 2, nor was he present when the said bond was signed nor even when the application for relief was filed or settled, because at the time he was out of Cyprus and all he knew was what his counsel had told him. But he insisted that the respondent had paid him a sum of £10.- against the sub judice bond, exhibit 6, on 1st December 1965, i.e. long after the new bond, exhibit 2, was signed.

The learned trial Judge having heard the evidence adduced by the parties preferred the version of the respondent to that of the appellant which, in any case, was almost entirely based on hearsay evidence. He was satisfied that the bond for £38.-, exhibit 6, was included in the application for relief and was also taken into account and was part of the sum of £72,750 mils of the new bond exhibit 2. With regard to the allegation made by the appellant that the respondent paid him £10.- against this bond the trial Judge disbelieved the appellant and was satisfied that such allegation was not true but was aimed at supporting his case that the debt for the bond in question was not included either in the respondent's application for relief or in the new bond. Having come to this conclusion he dismissed the action with costs.

The grounds of appeal relate for the most part to the evaluation and the weight of evidence as well as its assessment by the trial Judge; that the trial Judge did not take into consideration the fact that the burden of proof was on the respondents and that his findings were arbitrary and wrong. With regard to the question on whom the burden of proof lay the learned trial Judge expressly says in his judgment that it lay on the respondents and, in fact, he ruled that they should adduce their evidence first, which they did. For the rest the arguments advanced before this Court were much the same as those

advanced at the trial and counsel invited this Court either to upset the findings of fact on the ground that the reasoning of the Judge was wrong or in the alternative to order a retrial.

5 Having carefully considered counsel's arguments we are satisfied that this is not a case in which this Court could interfere with the findings of fact and we are clearly of the view that there is no merit on any of the grounds relied upon or argued.

10 Appellant's claim was for £38.- plus interest by virtue of the bond exhibit 6. It is beyond any question that this bond together with another bond for £4,500 mils were included in the respondent's application for relief No. 88/1962 (exhibit 1). It is clearly so recorded in the application itself and also contained in the evidence of the Acting Assistant Registrar who produced the file. Furthermore it is equally clear that the application for relief was withdrawn as having been settled out of Court and that the settlement was reached by the execution of the bond for £72,750 mils, exhibit 2, which was signed by the 15 two respondents and also by the father of respondent 1 in consideration of such settlement, as expressly stated in the said bond. Lastly, it is not in dispute, and the trial Court so found, 20 that the bond in question was paid off by three instalments as provided therein.

In the light of the above it is quite clear to us that the bond, the subject matter of these proceedings, has been paid off and that, therefore, this appeal must fail. 25

In the result the appeal is dismissed with costs.

*Appeal dismissed with costs.*