1987 December 23

[A LOIZOU DEMETRIADES SAVVIDES JJ ]

N P. LANITIS CO LTD ,

*Appellants - Defendants 3,*

v

MICHAEL PAVLOU,

*Respondent-Plaintiff*

*(Civil Appeal No 7102)*

*Injunction — Interlocutory injunction — Balance of convenience*

*Evidence — Finding of fact by a Judge of the Supreme Court in a recourse under Art 146 1 of the Constitution — Judgment reversed on appeal on different ground — Whether in considering an application for an interlocutory injunction in a civil action trial Judge could rely on such a finding — As plaintiff's (applicant's) allegation as to the existence of such a fact was hotly contested by one of the defendants (respondents in the application), i e the present appellants, the trial Judge could not rely on such a fact*

Defendants 5 in the action granted a first mortgage on a plot of land in Nicosia in favour of Kykko Monastery for £27,000 plus interest at 9% and a second mortgage in favour of appellants for £41,537 050 mils plus interest thereon at 9%

As Defendants 5 failed to honour their obligations under the mortgage, appellants brought action 1823/72 and obtained judgment for the debt and order for the sale of the mortgage property In addition to their mortgage, appellants filed, also, a memorandum, and then applied to the D L O for the sale of the aforesaid property The D L O , acting presumably under the Immovable Property (Restriction of Sales) (Amendment) Law 1966 (Law 60/66) finally fixed the reserved price at £162,000

Defendants 5 challenged the decision by a recourse under Art 146 of the Constitution Malachtos, J annulled the decision on the ground that the local inquiry, which was made before the sub judice decision, had not been carried out in the presence of the local authority The decision of Malachtos, J was reversed on appeal on the ground that the impugned decision was in the domain of private law

Since then, on several occasions the D L O fixed a day for the sale of the property in question, but, on each occasion, the sale was postponed by reason of Court proceedings taken by defendant 5

Finally the sale was refixed on 1 9 85 On 12 8 85 the respondent in this appeal who is one of the judgment creditors of defendants 5 brought Action 7465/85 in D C Nicosia praying inter alia for a declaration that the reserve price fixed by the Land Registry Office at £162 000 - is substantially low On the same day he applied ex-parte for an interim order postponing the sale and directing the stay of same till the final determination of the action Such application was granted and the application was fixed for hearing on 27 8 85

*After a hotly contested hearing the Court made a final order in the terms of* the application restraining appellants from enforcing the compulsory sale *and postponing the sale till the final determination of the action Hence the* present appeal

In reaching the decision appealed from the trial Court relied on two grounds i e that the local inquiry which preceded the decision whereby the reserve price was fixed had not been properly carried out and that the balance of convenience militated in favour of granting the interlocutory injunction

Held *allowing the appeal* (1) The allegation that the local inquiry was carried out in the absence of the local authorities was hotly contested by appellants In examining this issue the trial Judge did not deal with the conflicting allegations of the parties before him but relied on the finding of the first instance said Judgment of Malachtos J This Court reached the conclusion that something which was said in a judgment the effect of which was nullified by the Full Bench on appeal without any evidence on this conflicting issue could not by itself be sufficient ground for granting the interim order The trial Judge did not view the facts in this respect in their proper perspective

(2) In reaching his conclusion on the balance of convenience it appears that the trial Judge failed to take into consideration and weigh properly in his mind the following facts which were before him

(a) The fact that the interest on the capital of the mortgages in favour of the Holy Monastery of Kykko first mortgagee and the appellants second mortgagees had since a long time accumulated as to double the amount of the capital and that, ever since, no interest can be charged

(b) The fact that there had been long and abortive proceedings since 1973 by respondent 5 either alone or together with other creditors of his and on one occasion by the present respondent, always taken on the eve of the date of the sale fixed by the D L O in an effort to have such sale called off

(c) That the respondent as one of the judgment creditors of defendant 5, never raised any objection to the reserve price and waited till all efforts of defendant 5 failed and a few days before the sale fixed by the D L O instituted the present proceedings

(d) The question whether the proceedings so far taken in respect of the sale of the property might have savoured of an abuse of the process of the Court directed towards the further postponement of the sale.

*Appeal allowed with costs.*

**Appeal.**

Appeal by defendants No. 3 against the order of the District Court of Nicosia (Nikitas, P.D.C.) dated the 15th January, 1986 (Action No. 7465/85) whereby they were (a) restrained from enforcing an order of the District Court of Nicosia for the sale of a building site mortgaged by its owners in their favour and (b) an order staying the sale by public auction of the said property and postponing it from 1.9.85 when it was to take place until the final determination of the action.

*A. P. Anastassiades*, for the appellant.

*A. Markides*, for the respondent.

*Cur. adv. vult.*

A. LOIZOU J.: The judgment of the Court will be delivered by Mr. Justice Savvides.

SAVVIDES J.: This is an appeal from an order of the District Court of Nicosia (S. Nikitas, P.D.C.) in Action No. 7465/85 whereby-

(a) appellants (defendants 3 in the Court below) were restrained from enforcing an order of the District Court of Nicosia, dated 24th October, 1972, in Action No. 1823/72 for the compulsory sale of a building site mortgaged by its owners in favour of appellants.

(b) An order was made staying the sale by public auction of the said property and postponing it from 1.9.1985 when it was fixed to take place till the final determination of the action.

Action No. 7465/85 was brought by respondent in the present appeal against the following persons as defendants:-

1. The Attorney-General of the Republic,
2. The District Land's Officer,
3. N. P. Lanitis Co. Ltd.,
4. The Director of Lands and Surveys Department,
5. M.D.M. Estate Developments Ltd.,
6. Kyriacos Kyriacides, of Nicosia.

The appeal was filed only by defendants 3. Notice of the appeal was served on all defendants as interested parties but none of them participated at the hearing of the appeal. Counsel for appellants in fact made a statement on behalf of defendents 1, 2, 4 and 6 that they agree with the arguments put forward by him in the Court below and for the grounds which he raised on appeal but they did not wish to participate in the proceedings. Also, counsel who appeared on behalf of defendant 5, after informing the Court that his client is in agreement with the position of respondent-plaintiff, applied for leave to withdraw.

The factual background in so far as relevant to the present appeal and with which we shall have to deal at some length due to the nature of the case, is as follows: -

Defendant 5, a development company, began the building of a block of flats on a plot in Prodromos quarter, Ayii Omologhitae, Nicosia, but as it ran into debt and was unable to complete it, it granted a first mortgage in favour of the Kykko monastery, in the sum of the £27,000.- with interest at 9 per cent and a second mortgage in favour of N. P. Lanitis Co. Ltd., appellants, in the sum of £41,537.050 mils, plus interest at 9 per cent. Appellants brought Action No. 1823/72 in the District Court of Nicosia against defendant 5 on 27th March, 1972 for the recovery of the above sum and also for the foreclosure of the mortgage due to them, and on the 23rd October, 1972 they obtained judgment by consent as per claim and costs. Upon obtaining such judgment, appellants filed also a memorandum in addition to the mortgage already existing in their favour. Thereafter appellants applied to the District Land's Office of Nicosia, briefly to be referred to as the D.L.O., for the sale of the property in question, in satisfaction of the judgment - debt. The D.L.O. carried out a local inquiry and presumably acting under section 4 of the Immovable Property (Restriction of Sales) Law, Cap. 223, as amended by the Immovable Property (Restriction of Sales) (Amendment) Law, 1966, (Law 60/66) fixed the reserve price of the building site in question at £1,500.- and by letter dated 14.2.1974, notified all parties concerned. By letter dated 5.3.1974, the respondent applied to the District Lands Officer for a review of the reserve price. In the said letter, the respondent informed the District Lands Officer that on the said building site there were under construction, and almost at the completion stage, 27 flats. As a result, a reassessment of the reseve price was made by the D.L.O.

and it was fixed at £136,000. By letter dated 18.4.1975 the D.L.O. informed all parties concerned, such parties, under section 5(1), being the debtor and every creditor, that the sale of the property in question was fixed for 15.6.1975 and about the reserve price fixed in respect of such property.

The respondent in this appeal was one of the creditors who presumably has been notified by the Director, as he had a judgment in his favour against defendant 5 secured by memorandum 278/73 already charged on the said property.

Upon representations made by defendant 5, the Director of Lands and Surveys, instructed the District Lands Officer of Nicosia, to call off the sale of the property and to carry out a new local inquiry as soon as possible, in order to reassess the reserve price. The D.L.O. in compliance with the above instructions, called off the sale and after carrying out a new local inquiry, fixed the reserve price at £162,000.- and by letter dated 9.10.1975 notified all interested parties accordingly. In the meantime, defendant 5 filed an application on 10.5.1975, in the District Court of Nicosia, under the Debtors Relief (Temporary Provisions) Law of 1975, for an order of the Court to stay the sale which was about to take place on 15.6.1975. On 13.2.1976, when that application came on for hearing before the District Court, an order was made staying the sale of the said property till 31.10.1976. The sale was subsequently fixed on 12.6.1977 and a notice dated 20.5.1977 was sent to all interested parties by the D.L.O. informing them accordingly. On 3.6.1977, defendant 5, through its advocate, addressed a letter to the District Lands Officer, asking for the fixing of a new reserve price and/or to review the already fixed reserve price, for the reasons stated therein. The sale was called off and on 27.6.1977 a new local inquiry was carried out and the reserve price of the property in question was fixed at £162,000. - and by letter dated 16.7.1977 the District Lands Officer informed all the interested parties accordingly. Defendant No. 5 having felt aggrieved by such price, filed Recourse No. 212/77, in the Supreme Court, challenging such decision.

An objection as to the jurisdiction of the Court on the ground that the sub judice decision was not in the field of public law, was raised which, however, was decided in favour of defendant 5. The learned trial Judge proceeded and annulled the sub judice decision on the assumption that the local inquiry was not properly carried out (*MDM. Estate Developments Ltd. v. The Republic*

(1980) 3 C.L.R. 54. The decision in the above the recourse was reversed on appeal and applicant's recourse was dismissed on the ground that as the fixing of the reserve price under Cap. 223 was a matter of private law, the jurisdiction of the Court under Article 146 could not be invoked. (See *The Republic v. MDM Estate Developments Ltd. (1982) 3 C.L.R. 642).* Subsequently, the D.L.O. fixed the sale of the properly on 16.1.1983 and informed all interested parties accordingly. Defendant No. 5, on 29.12.1982, filed an application before the District Court of Nicosia, under the Debtors Relief Law, for the stay of the sale, on the ground that defendant 5 was a stricken debtor. An interim order was granted, directing the calling off of such sale and its stay. As a result of such interim order the sale was called off.

The application came up for hearing before the Court on 12.2.1983 and a settlement was reached in the presence of the authorized agent of defendant 5, whereby stay of execution was agreed till after the 15th of July, 1983 and if defendant 5 paid on or before such date £20,000.- against interest already accrued, then there would be a further stay of execution till 30.10.1983. As a result, an order was made for the compulsory sale of the property subject to the terms agreed. Defendant 5 failed to pay the agreed sum of £20,000.-, and the D.L.O. proceeded and fixed the date for the sale of the property on 31.7.1983. Shortly before such date and in fact on the 26th July, 1983, defendant 5 together with one Nicos Serettis, alleged creditor of defendant 5, brought an action against defendant 3 and the Republic (Action No. 4325/83 in the District Court of Nicosia), claiming to set aside the settlement reached on 12.2.1983. An interim order was sought together with such application, which was granted on 28.7.1983, returnable on 6.8.1983 and calling off the sale of the property which was to take place on 31.7.1983.

After a hotly contested hearing, the Court discharged the interim order on the ground that the Court could not see that the plaintiffs could possibly have any «visible chance of success in the action». Thereafter, the D.L.D. proceeded and fixed the sale of the property on the 17th June, 1984, with a reserve price fixed at £162,000.- and as on all previous occasions, informed all interested parties accordingly. Four days before the date of the sale and in fact on the 13th June, 1984, the respondent in this appeal, apparently being a creditor who had obtained judgment against defendant 5 and had already lodged a memo in 1973, filed

an appeal to the District Court, against the reserve price fixed by the D.L.O. Upon filing his appeal, he applied and obtained an interim order prohibiting the sale by public auction of the subject property. Due to the urgency of the matter, the Court dealt with the application on the 16th June, 1984 and gave its decision dismissing the application, on the ground that the applicant had not satisfied the Court that his appeal had a visible chance of success.

In view of the pendency of the above proceedings, the D.L.O. postponed the sale and refixed it on the 1st September, 1985. On 12.8.1985, the respondent in this appeal, brought Action No. 7465/85 in the District Court of Nicosia, praying, inter alia, for a declaration that the reserve price fixed by the Land Registry Office at £162,000.- is substantially low. On the same day, he applied ex-parte for an interim order postponing the sale and directing the stay of same till the final determination of the action. Such application was granted and the application was fixed for hearing on 27.8.85.

After a hotly contested hearing, the Court made a final order in the terms of the application, restraining appellants from enforcing the compulsory sale and postponing the sale till the final determination of the action. Hence, the present appeal.

The learned trial Judge in his decision summarized the arguments advanced by counsel on both sides and proceeded to examine whether, in the circumstances of the case and bearing in mind the approach of the courts, as expounded in a line of cases decided by this Court, the interim order should be granted.

In reaching his decision he relied mainly on two grounds which he considered as justifying the granting of the interim order.

The first ground was the question as to whether the local inquiry was carried out in the presence of the local authority as prescribed by the law. On this issue, he had before him the affidavit of the respondent in support of his application for the interim order in which under paragraph 19 he alleged that the local inquiry was carried out by the Lands Office in the absence of the village authority. Such allegation was hotly contested by appellants and in fact in the affidavit of one of their managers under paragraph 20 such allegation is specifically denied and is further contended that the respondent had no right at such late stage to raise such matter

and that he was estopped from relying on such allegation. The learned President in examining this matter did not deal with the conflicting allegations of the parties but relied on the judgment of the first instance Judge in Recourse 212/77 that something might have gone wrong in this connection. In fact, he had this to say in this respect:-

«Counsel for defendant 3 submits that the judgment of Malachtos J., cited supra, having been overruled on appeal for lack of jurisdiction, does not produce any effect whether as a res judicata or for any other purpose. And counsel supported this proposition by a number of passages from Halsbury. The conclusion of the learned justice in regard to the local inquiry carried out by the L.R.O., so the argument runs, must therefore, be totally ignored for present purposes; and since no fresh evidence has been adduced the plaintiff's allegations on the matter ought to be disregarded.

Undoubtedly the principle invoked is correct, but the Court can always look at the judgment to see what was in issue between the parties. Besides jurisdiction the case turned on the issue of the presence of the local authority and its role at the local inquiry as prescribed by section 6(3) of Cap. 223 and the finding of the Court is, to my mind, an indication that something may have gone wrong in this connection. In my judgment there is here a serious question to be tried, namely, one for which there is some supporting material, as to the validity of the local inquiry that preceded the fixing of the reserve price.»

We find that the learned trial Judge in reaching his conclusion on this issue and relying on something which was said in a judgment, the effect of which was nullified by the Full Bench on appeal, without any evidence on this conflicting issue, could not by itself be sufficient ground for granting the interim order. The learned President did not view the facts in this respect in their proper perspective.

The second ground on which he relied was the balance of convenience which, in the circumstances, he found to weigh in favour of the respondent. He had this to say in this respect:-

Looking at the whole of the circumstances in the present case I think that the balance of convenience and justice

requires that I should make an interlocutory injunction The grounds advanced for refusing the remedy appear to me to be somewhat vague and general. There is no valid reason to suppose that defendants would suffer greater hardship by an injunction should they ultimately succeed in the action. I should perhaps add that I am conscious of the fact that the matter has been pending in the Courts for quite a considerable time. But I do not consider that a sufficient reason for depriving a citizen of the means of having his rights properly determined by the Court».

In reaching his conclusion on this ground the learned trial Judge dealt with an argument advanced by counsel for defendant 6 who was also opposing the application for an interim order and who had also applied to the D.L.O. as a judgment creditor of defendant 5 for the sale of the property in question, to the effect that there is great depreciation of the value of the money of his client with the passage of time and, also, depreciation of the buildings standing on the subject property. In reaching his conclusion on the balance of convenience, it appears that the learned trial Judge failed to take into consideration and weigh properly in his mind the following facts which were before him:-

(a) The fact that the interest on the capital of the mortgages in favour of the Holy Monastery of Kykko, first mortgagee, and the appellants, second mortgagees, which were contracted in 1971, had since a long time accumulated as to double the amount of the capital which was £68,000.- and that ever since, no interest can be charged, with the result that the two mortgagees were losing over £6,000 a year of interest on their capital, plus any interest which they could have recovered if the accrued interest had been paid.

(b) The fact that there had been long and abortive proceedings since 1973 by respondent 5 either alone or together with other creditors of his, and on one occasion by the present respondent, always taken on the eve of the date of the sale fixed by the D.L.O. in an efford to have such sale called off to institute the present proceedings and take steps for the calling off of such sale.

(c) That the respondent as one of the judgment-creditors of defendant 5, though duly notified by the D.L.O. on each time that a sale was fixed with a reserve price originally of £1,500.- then increased to £136,000.- and then to £162,000.- he never raised any objection to such reserve price and waited till all efforts of

defendant 5 failed and a few days before the sale fixed by the D.L.O. to institute the present proceedings and take steps for the calling off of such sale.

(d) Another factor which should have been considered by the trial Judge in view of the allegation of the appellants in their affidavit that the respondent had no right at this late stage to raise such matter, was whether the proceedings so far taken in respect of the sale of this property might have savoured of an abuse of the process of the Court directed towards the further postponement of the sale.

In the present case having carefully considered all the material circumstances as appearing in the various exhibits and the history of these proceedings as related earlier, we have reached the conclusion that the interim order was granted on insufficient grounds and, therefore, we allow the appeal and discharge the interim order.

We take this opportunity to stress the desirability of speedy trials in cases of this nature. In the light of our findings as above and our observations, we remit the case back to the District Court to be tried on its substance and bearing in mind its nature, this case should be afforded the opportunity of an early trial.

Costs of this appeal in favour of the appellants, defendants 3.

*Appeal allowed with costs in favour of appellants - defendants 3.*