

1987 August 31

[A LOIZOU, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

YIANNOULLA P. PANTZARI,

Applicant,

v.

THE WATER BOARD OF NICOSIA,

Respondent.

(Case No. 284/86).

Executory act — Informatory act — Condition in a permit to divide land as regards fees payable for water supply — Renewal of permit on 5.4.85 — Publication on 24.5.85 of new regulations concerning amount payable for water supply — Letter in response to applicant's inquiry informing applicant that the fees payable would be those currently payable — In the circumstances the act is of an informatory character. 5

Streets and Buildings — The Streets and Buildings Regulation Law, Cap. 96, section 5 — Any permit issued under the said law is issued for one year, but if the work or other matter is not completed, it shall be renewed, if not conflicting with any regulations in force at the time of such renewal. 10

Streets and Buildings — Division of land into building sites — Condition relating to water supply and the amount payable in respect thereof — Neither the work was carried out nor the amount paid, but permit renewed repeatedly (last renewal 5.4.85) — New regulations concerning water supply and amounts payable in respect thereof published on 24.5.85 with effect as from 1.1.85 — Decision to apply them in respect of the permit granted on 5.4.85 — In the light of section 5 of Cap. 96 (The Streets and Buildings Regulation Law) it cannot be said that the new regulations were applied retroactively — It is the applicant's delay which brought her within the ambit of such new regulations. 15
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Constitutional Law — Taxation — Constitution, Art. 24 — The Water Supply of Nicosia Regulations, 1985, Reg. 5 — The amount payable thereunder is not a tax — Article 24 is not applicable — In any event such amount is not arbitrary or of a destructive nature.

Taxation — What constitutes a tax — Test applicable

Water supply — *The Water Supply (Municipal and Other Areas) Law, Cap 350 — The Water Supply of Nicosia Regulations, 1985 — Regulation 5 — It is not ultra vires sections 13(c) and 30(1) of the said law*

5 On 6 5 82 the applicant was granted by the Improvement Board of Eylenja a permit for the division of her land into 28 building-sites, on condition, inter alia, that «In each plot there will be an installation of adequate water supply from the Water Supply Scheme of Greater Nicosia» The condition provided further that the amount of £5,575 which represents the costs of distribution of

10 water to the plots will be paid to the Director of the Water Board of Nicosia

The said division permit was renewed on several occasions and finally on 3 4 85

On 24 5 85 there were published the Water Supply of Nicosia Regulations with effect as from 1 1 85

15 By letter dated 5 2 86 the applicant's advocate wrote to the respondent Board that the imposition of the new rates for water supply in respect of permits issued before the date of the publication of the new regulations (24 5 85) in respect of division permits issued prior to the 24 5 85 is illegal and, in view of the fact that the permit was soon due to be renewed, asked to

20 be informed what rates the Board will impose on the applicant

By letter dated 22 2 86 the Board replied that the applicant had failed to apply to it for the work to be done or to pay the fees and the fees payable would in the circumstances be those currently payable

Hence this recourse

25 Held, *dismissing the recourse* (1) The sub judice act is not of an executory, but of an informatory nature The act simply states the legal situation and is not capable of producing legal results Indeed, there has been no decision as to what fees are to be paid and the appropriate authority for altering the conditions of the permit is the Municipality of Eylenja, which succeeded the

30 Improvement Board, which granted the permit

(2) Assuming that the sub judice act is of an executory nature (a) The decision does not, as submitted by applicant, tend to give retroactive effect to the Regulations of 24 5 85, beyond the 1 1 85 It was applicant's own delay to effect the division and pay the fees prescribed in the relevant condition that brought her within the ambit of the new regulations Moreover, and according to section 5 of Cap 96 the validity of any permit is for a period of one year, provided that if the work is not completed within a year, the permit shall be renewable if not conflicting with any regulations in force at the time of such

35 renewal In this case the permit was renewed on 3 4 85 and it is in respect of

40 this permit that the new regulations were considered as applicable

(b) Applicant's submission that the new regulations are void, because, contrary to Law 51/85, were never placed before the House of Representatives cannot be accepted, because Law 51/85 was published on 31.5.85 and, therefore, it was not in force at the time when the regulations were published (24.5.85). 5

(c) The submission that regulation 5 of the new regulations is ultra vires sections 13(c) and 30(1) of the enabling law cannot be accepted. Regulation 5 does not attempt to impose the rates and charges for any other purpose than as provided by the said law.

Recourse dismissed. 10

No order as to costs.

Cases referred to:

Constantinides v. E.A.C. (1982) 3 C.L.R. 798.

Recourse.

Recourse against the decision of the respondent that the fees payable by the applicant in respect of the supply of water to her property would be in accordance with the Water Supply of Nicosia Regulations, 1985. 15

Ph. Clerides, for the applicant.

G. Triantafyllides, for the respondent. 20

Cur. adv. vult.

A. LOIZOU J. read the following judgment. By the present recourse the applicant seeks a declaration of the Court that the fees payable by the applicant in respect of the supply of water to her property would be in accordance with the Water Supply of Nicosia, Regulations, 1985, is null and void and of no legal effect whatsoever. 25

On the 29th March, 1980, the applicant applied to the Improvement Board of Eylendjia for a permit to divide her property into twenty-eight building plots. She was granted the relevant permit on the 6th May, 1982, subject to certain conditions. 30

Condition 8 thereof provided that «In each plot there will be an installation of adequate water supply from the Water Supply Scheme of Greater Nicosia. For this purpose the amount of £5575.- which represents the cost of the distribution of water to the plots will be paid to the Director of the Water Board of Nicosia». 35

An estimate of the costs of the respondent Board was also sent to the applicant, that the amount payable to it for material, labour 40

and general expenses for the installation of the required water supply would be £5575.-

Furthermore, Clause 2(a) of the said permit was that no final approval certificate will be issued unless in each plot there is an
5 installation of sufficient and suitable water supply to the satisfaction of the appropriate authority.

The said division permit was renewed on several occasions and finally on the 3rd April 1985.

On the 24th May, 1985, the Water Supply of Nicosia,
10 Regulations 1985 were published under Not. 165 in Part III of the official Gazette of the Republic with effect as from 1st January 1985, imposing inter alia new rates and fees payable to the respondent Board in respect of water supply.

On the 17th July 1985, the applicant entered into an agreement
15 with a private company for the construction of roads, the laying of pipes for the water installation etc.

Subsequently, on the 5th February 1986, the applicant by letter of her lawyer wrote to the respondent Board to the effect that the
20 imposition of the new rates for water supply as provided by Not. 165 would be illegal in respect of division permits issued prior to 24th May 1985, and asked to be informed in view of the fact that the division permit was expiring soon and was thus due to be renewed, what rates the Board was to impose on his client.

The respondent Board replied on the 22nd February 1986, to
25 the effect that the applicant had failed to apply to it for the work to be done or to pay the fees due and that the fees payable would in the circumstances be the ones currently payable.

As against this decision the present recourse was filed.

A preliminary objection was put forward by the respondent to
30 the effect that the aforesaid letter was not an executory act capable of being challenged by a recourse, but of an informatory nature, informing the applicant what regulations were applicable.

It is necessary therefore before going into the merits of this case to deal with this matter first.

35 In my view the sub judice letter of the respondent Board is of an informatory nature. Primarily it is a reply to the applicant's letter by which the legal situation is stated and is not, in my opinion,

capable of producing legal results. No decision is reached therein as to what fees are to be paid, which have neither been specified or as it appears, been decided upon. Secondly the appropriate Authority for imposing or altering the conditions of the permit concerning the division of the applicant's property is not the respondent Water Board, but the Municipality of Eylendjia which replaced the Improvement Board of Eylendjia by virtue of Not. 66, published in the official Gazette of the Republic of the 21st March, 1986 under section 4 of the Municipalities Law 1985 (Law No. 111 of 1985).

Consequently I consider that the sub judice letter since it lacks the necessary executory character cannot be challenged by means of the present recourse and same fails and is dismissed accordingly.

Nevertheless if it were to be found that the said letter is an executory decision, I shall proceed to deal with the grounds of law put forward by the applicant.

It was argued on behalf of the applicant that the decision is wrong as it tends to give to the new Regulations a retroactive force beyond the 1st January 1985, which is contrary to the express provisions of the Law.

What was given in term 8 of the building permit was an estimate of the cost of the water supply as at that time on the basis of the unit prices costs and the regulations in general in force then. This appears in detail in Exhibit 1, attached to the opposition. The applicant never paid or deposited with the respondent Board this sum or any other sum and she never applied for the carrying out of the work before 1986. Instead she had the building permit renewed by the appropriate Authority from year to year and it was only after the enactment of the new regulations prescribing new fees that she merely inquired with the Director of the respondent Board regarding the amount of money which she had to pay for the carrying out of the work of supplying water to the building-sites for which the division permit was issued.

It was her own delay to effect the division of her property and to pay for the costs of the laying out of the pipes and the other fees that brought herself within the ambit of the new regulations. Had she taken with the respondent Board the proper steps in time, certainly the new regulation would not have been applicable in her case but the old ones that were in force at the time she would have taken the necessary steps for that purpose.

Furthermore the decision of the respondent Board does not attempt to give to the said regulations retroactive force at all for another reason. The validity of any permit issued under the Streets and Buildings Regulation Law, Cap. 96 is according to section 5 thereof for one year from the date of its issue and in the proviso to it, it is provided that if the work or other matter is not completed within that period, the permit shall be renewable at any subsequent time if not conflicting with any regulations in force at the time of such renewal. In our case the last permit was renewed on the 3rd April 1985, and it was in respect of this permit that the 1985 Regulations were considered as applicable. That does not amount to an attempt to give to such regulations retroactive effect.

The next ground is that the Regulations published under Notification 165/85, are invalid contrary to the provisions of the Law (Laying before the House of Representatives) Law 1985, (Law No. 51 of 1985), as they were never placed before the House of Representatives for approval, after having been approved by the Council of Ministers.

The said Regulations were published in the official Gazette of the Republic on the 24th May, 1985, one week prior to the publication of Law 51 of 1985 on the 31st May, 1985, and came into force as from 1st January 1985. So in effect when Law 51 of 1985 was published on the 31st May, 1985, the Regulations were already in force. Nothing is provided therein that regulations which were published during the period of 1st May 1985 and 31st May, 1985 and had already come into force, would be considered invalid unless placed before the House of Representatives for approval. Consequently I consider that the Regulations in question are valid as having been issued and published in compliance and in accordance with the Law in force at the time of their publication.

Finally it was argued that regulation 5 of the 1985 Regulations is ultra vires sections 13(c) and 30(1) of the Water Supply (Municipal and Other Areas) Law, Cap. 350 according to which the respondent Board may impose charges for any services rendered as there is no co-relation between the value of such services and the amount of such charges.

Moreover it was contended that the imposition of the charges under Regulation 5 is arbitrary and without objective criteria and therefore unconstitutional. Furthermore it was contended that the

amount of the charges which amount to taxation is so high that it is of a destructive or prohibitive nature and thus contrary to Article 24.4 of the Constitution. Moreover it is not imposed according to the means of the owner of the property.

After careful scrutiny of the regulation and sections 13(c) and 30(1) I have come to the conclusion that Regulation 5 does not attempt to impose the rates and charges for any other purpose than as provided by the enabling law. Both sections 13(c) and 30(1) provide for the imposition of water rates and charges for the supply of water. There is no provision therein as to the manner such charges are to be calculated, save that in section 30(1) it is provided that:

«30. (1) All rates or charges made by the Board for the supply of water and for any services rendered by the Board, in connection therewith, shall be fixed at such rate and on such scale that the revenue derived therefrom by the Board in any year, together with their revenue (if any) in such year from other sources, will be sufficient and only sufficient, as nearly as might be, to pay all expenses and meet all obligations of the Board properly chargeable to income in that year (including the payments falling to be made in such year by the Board in respect of the interest on, or repayment of, the principal of any money borrowed by the Board and provision for the redemption of securities issued by the Board under this Law) and such sums as the Board may think proper to set aside in that year for reserve fund, extensions, renewals, depreciation, loans and other like purposes.

(2) The rates or charges under this section may, if the Board thinks fit, be fixed at different rates and scales for different localities or for different purposes, but so that no undue preference shall be given to any locality.»

Consequently Regulation 5 cannot be said to be ultra vires the aforesaid sections of Cap. 350.

As regards the remaining arguments in the first place the amount payable under Regulation 5 is not tax as alleged. As stated in the case of *Constantinides v. E.A.C.* (1982) 3 C.L.R. 798 at 806:

«The test can be discerned from these books and caselaw is that an imposition is a tax if it is found to fulfil certain characteristics, namely, (a) it is compulsory and not optional,

(b) it is imposed or executed by the competent authority, (c) it must be enforceable by law, (d) it is imposed for the public benefit and for public purposes, and (e) it must not be for a service for specific individuals but for a service to the public as a whole, a service in the public interest.*

Clearly the charges in question do not fulfil such characteristics and thus do not fall within the above definition, and therefore Article 24 of the Constitution can have no application. In any case, the amount payable which according to Regulation 5 is to be specified each time and it therefore cannot be said to be arbitrary, cannot in my view be considered as so high as to be onerous or destructive, given the present day values of land. Furthermore it is a charge on land and the means of the owner of such land are of no consequence. Therefore these arguments fail also.

Before concluding I should point out that similar provisions exist in other instances such as the supply of electricity.

For the reasons stated above this recourse fails and is hereby dismissed with no order as to costs.

*Recourse dismissed.
No order as to costs.*