1987 January 27

[TRIANTAFYLLIDES P A LOIZOU SAVVIDES PIKIS KOURRIS JJ]

DESPINA HADJILOIZOU AND OTHERS,
Appellants-Applicants,

v

IMPROVEMENT BOARD, OF AYIOS DHOMETIOS
Respondent
(Revisional Jurisdiction Appeal No 370)

Compulsory acquisition—Acquisition of immovable property in 1954 by local Authority in virtue of section 36 of the Villages (Administration and Improvement) Law Cap 243—Abandonment of purpose of acquisition after the expiration of 10 years as from the date of the acquisition—Claim by former owners that property should have been offered back to them—Law applicable—It is the law obtaining at the time the rights of the parties were crystallised—It is, therefore section 38 of Cap 243 and not section 13 of the Land Acquisition Law, Cap 226 or Article 23 5 of the Constitution or the Compulsory Acquisition of Property Law 15/62—Ambit of section 38 of Cap 243

Construction of statutes—Provisos——Principles governing their construction—The Villages (Administration and Improvement) Law, Cap 243—The proviso to section 38—It is not a mere proviso, but a provision extending and supplementing the main part of the section

Construction of statutes—Repeal by necessary implication—Principles applicable

Recourse for annulment—Practice—Several issues raised touching the validity of the sub judice act or several objections in the opposition—Course to be followed

Executory act—Meaning of—Refusal to perform a duty—Whether productive of legal consequences

Early in 1954 the respondent compulsorily acquired in virtue of its powers under section 36 of the Villages (Administration and Improvement) Law, Cap 243 appellant's immovable property at Ayios Dhometios, being part of Plot 49 of Block «N», for the purpose of erecting a public market

The compensation was paid and the property vested in the respondent Board Until today the market has not been erected

In 1966 the appellants started claiming the offer to them of the land in question on the ground that the undertaking in connection with which the land had been acquired was abandoned

Finally on the 13th April 1982 the Chairman of the Improvement Board sent to appellants advocate a letter to the effect that the purpose for which the property was compulsorily acquired was never abandoned and that the relevant plans existed but they were not executed because of financial reasons on account of the Turkish insurgence of 1963 and the occupation by the Turks of a great part of the area of the Improvement Board

As a result of the said letter the appellants filed a recourse to this Court claiming a declaration that the decision communicated by the letter of 13 4 82 whereby the respondent refused to offer back to them their said land is null and void

The trial Judge directed that certain points be determined as preliminary points of law These points were

(1) Law applicable to the present case

(2) Has the Board a discretion or an obligation to offer back the land?

(3) In view of the lapse of more than ten years from the date of acquisition till the date of the alleged abandonment what are the rights of the applicants under s 13 of the Land Acquisition Law Cap 226? And

(4) Is the act challenged an executory administrative act or a confirmatory one and therefore the recourse is out of time?

The trial Judge held that (a) The law applicable to the present case is neither Art 23 5 of the Constitution nor the Land Acquisition Law Cap 226 nor the Compulsory Acquisition Law 15/62, but the law obtaining at the time of the crystallisation of the rights of the parties on 22 7 1954 (when the sanction of the Governor was published), i e section 37 (now 38) of Cap 243 (b) Under section 38 of Cap 243 the respondent Board has a discretion, but not an obligation to sell, (c) On the assumption of the applicability of the Land Acquisition Law, Cap 226, the applicants are, in virtue of section 13(2)(d)(ii) precluded by lapse of time to any right on the subject property

In the light of the above conclusions the trial Judge thought it unnecessary to deal with the fourth question and dismissed the recourse Hence the present appeal

Held, *dismissing the appeal (A) Per A Loizou, J Triantafyllides, P and Kourris J , concurring*

(1) In holding as he did in respect of the first preliminary point of law the trial Judge relied on the judgment of the Full Bench of this Court in *Pikis v The Republic* (1968) 3 C L R 303 The relevant passage is at page 307 In the light of the statement of the law in *Pikis case, supra* the decision that the law applicable is the Law obtaining at the time of the crystallisation of the rights of the parties cannot be faulted

(2) As regards the second preliminary point of law the appellants submitted

that section 38 of Cap 243 has no application in this case where the whole property has not been used for the purpose it had been acquired

Had it not been for the proviso to section 38 and in the light of the phrase in the enacting part of the section «in excess of the extent actually required for the purposes in respect of which it has been required», the appellants' contention would have been valid

However, applying the principles expounded in *PASYDY and Others v The Municipality of Nicosia* (1978) 3 C L R 117 and in *Georghiades v The Republic* (1969) 3 C L R 396 as regards the construction of provisos to the construction of section 38, the conclusion is that the proviso in question «is not in substance a mere proviso but it is a provision extending and supplementing the main part of section 38

Having regard to the wording of the proviso and in particular to the words «or if only a portion of such immovable property is in excess of such requirement», the conclusion is that section 38 also covers cases where the whole of the property has not been used

(B) *Per Savvides, J* (1) The reasons given by the learned trial Judge in his judgment which led him to his decision that appellants' recourse should be dismissed are very sound and no ground has been shown that his reasoning is wrong in any respect

(2) The approach of the trial Judge to dispose of the first three points of law and, then, not to embark on the fourth, was correct and consonant with the normal practice of this Court

By dealing with the substance of the case and adjudicating on it, the learned trial Judge has rendered useful guidance in the handling of other similar cases already pending before this Court and waiting the result of this appeal

(C) *Per Pikis, J* (1) The first question that ought to be answered was the fourth which affects the justiciability of the sub judice act The jurisdiction under Art 146 is confined to the review of executory administrative acts An act is executory only if it is determinative of rights and obligations under the law In order for an act of the administration to have such attribute the law must put it in the hands of the administration to issue a decision definitive of the rights and obligations affected thereby Refusal to perform a duty is not of itself productive of legal consequences In such a case the omission continues and is justiciable as a continuing omission

Neither s 38 of Cap 243 or s 13 of Cap 226 of their own or read in conjunction with Art 23 5 of the Constitution make the return of land unused for the purposes of acquisition a matter of decision for the Acquiring Authority Under s 13, Cap 226, if abandonment, objectively noticeable, occurs, a corresponding duty arises to return it

What we are asked to examine is consequently not a reviewable act under Art 146 1 and the recourse must therefore be dismissed

(2) Section 38 of Cap 243 deals specifically with the fate of property acquired by local authorities It can co-exist with section 13 of Cap 226 In the absence of specific language to that end one cannot presume that s 13 repealed by necessary implication s 38

In view of the above the appellants had no right to the re acquisition of the property as s 38 gave none nor were the respondents under any corresponding obligation The rights of the parties with regard to the property crystallized before independence and therefore were not affected by the Constitution

Appeal dismissed
No order as to costs

Cases referred to

Kaniklides v The Republic 2 R S C C 49

Pikis v The Republic (1965) 3 C L R 131

Pikis v the Republic (1967) 3 C L R 562

Ramadan v E A C 1 R S C C 49

Pikis v The Republic (1968) 3 C L R 303

Anastassiades and Others v Municipal Commission of Nicosia 3 R S C C 111

PASYDY and Others v The Municipality of Nicosia (1978) 3 C L R 117

Georghiades v The Republic (1969) 3 C L R 396

HjiLoizou and Others v The Republic (1984) 3 C L R 70

Stavrou and Others v The Republic (1986) 3 C L R 361

Vassiliko Cement Works Ltd v Violans (1975) 1 C L R 256

Moustafa v The Republic, 1 R S C C 44

Appeal.

Appeal against the judgment of a Judge of the Supreme Court of Cyprus, (Stylianides, J) given on the 25th February, 1984 (Revisional Jurisdiction Case No 264/82)* whereby appellants' recourse against the refusal of the respondents to offer back to

* *Reported in (1984) 3 C L R 70*

them property compulsorily acquired in 1954 was dismissed.

Chr. Chrysanthou with A. Dikigoropoullos, for the appellants.

A. Liatsos for K. Michaelides, for the respondent.

Cur. adv. vult.

TRIANTAFYLLIDES P.: Mr. Justice A. Loizou will deliver the first judgment.

A. LOIZOU J.: This is an appeal against the judgment of a Judge of this Court by means of which there was dismissed the recourse of the appellants against the refusal of the respondents to offer back to them their property which was compulsorily acquired in 1954.

The facts which gave rise to the appeal before us as very lucidly stated in the judgment of the learned trial Judge are these. Early in 1954 the Improvement Board of Ayios Dhometios decided to erect a public market and selected for the purpose an immovable property owned by the applicants situated at Ayios Dhometios, being part of Plot 49, Block «N», comprising two donums, two evleks and 240 sq. ft. or thereabout, as delineated in red on the Government survey plan signed by the Chairman of Ayios Dhometios Improvement Board dated 21st April, 1954. Thereupon, as it could not be acquired by agreement, it was compulsorily acquired in virtue of the specific provisions of section 36 of the Villages (Administration and Improvement) Law, Cap. 243.

On the 4th May, 1954, a notice of acquisition under subsection 2 of the said section 36 was published in the official Gazette under Notification No.324 and the Governor approved the plan submitted and sanctioned the acquisition of such immovable property on 14th July 1954 - (see No. 459 under subsection 4 of the said section 36, published in supplement No.3 to the Cyprus Gazette of the 22nd July 1954). As no agreement was reached between the acquiring Improvement Board and the owners of the land on the compensation, Application No. 85/54 was filed on behalf ot the Improvement Board whereby it prayed for reference by the Court to an arbitrator for the determination of the amount of the compensation.

The application was based on the Villages (Administration and Improvement) Laws 1950-53 and the Acquisitions of Land Law, Cap.233, and Law No.26 of 1952 as section 36(4) of the Villages (Administration and Improvement) Law provided that «if the

owner of the immovable property does not agree with the Board as to the sum to be paid as compensation for it, the sum shall be determined in accordance with the provisions of any law in force for the time being, providing for the acquisition of immovable property for public purposes»

The compensation was paid and the property vested in the Board Until today the public market has not been erected

In 1966 the owners started claiming the offer to them of the land in question on the ground that the undertaking in connection with which the land had been acquired was abandoned

By letters dated the 19th August 1966 and 19th of October 1966 the Chairman of the Board informed the applicants' advocate that the undertaking had not been abandoned Drawings were prepared by architects and tenders were invited in 1967

In 1968 the Board decided to make certain modifications to the drawings Due to financial difficulties and other reasons the project has not as yet been implemented The applicants persistently as from 1973 demanded unsuccessfully the offer to them of the land

On the 13th April 1982 the Chairman of the Improvement Board sent to applicants' advocate a letter to the effect that the purpose for which the property was compulsorily acquired was never abandoned and that the relevant plans existed but they were not executed because of financial reasons on account of the Turkish insurgence of 1963 and the occupation by the Turks of a great part of the area of the Improvement Board

As a result of the above letter the appellants filed a recourse, which is the subject matter of these proceedings, whereby they sought a «declaration that the act/or decisions of the respondents communicated to them through their advocate under cover of letter dated 13th April 1982, whereby respondents refused to offer back to the applicants the property compulsorily acquired in 1954 under Notification No 459 in the official Gazette No 3771 dated 22nd July 1954 is null and void and of no effect whatsoever having been made and/or taken contrary to the provisions of the Law and/or the Constitution/or in excess and/or abuse of their powers if any»

The respondents in their opposition raised a number of points of law At the commencement of the hearing on the application of both counsel the learned trial Judge directed that the said points of

law be determined preliminary to the hearing of the substance of the case. The points of law raised were:

(1) Law applicable to the present case;

(2) Has the Board a discretion or an obligation to offer back the land?

(3) In view of the lapse of more than ten years from the date of acquisition till the date of the alleged abandonment, what are the rights of the applicants under s.13 of the Land Acquisition Law, Cap. 226? And,

(4) Is the act challenged an executory administrative act or a confirmatory one, and therefore, the recourse is out of time?

Regarding point (1) above, namely the law applicable to the present one, the learned trial Judge after referring to the cases of *Kaniklides v. The Republic*, 2 R.S.C.C.49 at p.57, *Pikis v. The Republic* (1965) 3 C.L.R. 131 at p 140; *Pikis v. The Republic* (1967) 3 C.L.R. 562 at p.572; *Ramadan v. Electricity Authority of Cyprus*, 1 R.S.C.C. 49 at p. 57; *Pikis v. The Republic* (1968) 3 C.L.R. 303 at p.307; *Anastassiades and Others v. Municipal Commission of Nicosia*, 3 R.S.C.C. 111, and to Article 23 paragraphs 3 and 5 of the Constitution, as well as to sections 15, 23 (2) of the Compulsory Acquisition of Property Law, 1962 (Law No. 15 of 1962) held that «the Law applicable to the present case is neither Article 23.5 of the Constitution nor the Compulsory Acquisition Law, Cap. 226, nor Law No. 15/62. The Law applicable is the Law obtaining at the time of the crystallization of the rights of the parties, on 22nd July, 1954, i.e. section 37 of Law No. 12/50, now section 38 of the Villages (Administration and Improvement) Law, Cap. 243, under which the land was acquired by the respondent Board».

In concluding as above the learned trial Judge relied mainly on the judgment of the Full Bench in the case of *Pikis v. The Republic* (1968) 3 C.L.R. 303 and the relevant passage of his judgment reads:

«The rights of the parties in the present case crystallized on the date of the publication of the notification on 22nd July 1954 - (See Exhibit No.5). The constitutional provisions of Article 23 do not apply, firstly because the acquisition took place long

before the coming into operation of the Constitution and, secondly, because the rights of the parties crystallized on the date of the acquisition and it was not the intention of the drafters of the Constitution to bestow rights on persons who had none on the coming into operation of the Constitution. The Constitution is perspective and not retrospective.»

Regarding point (2) hereinabove mentioned, namely whether the Board has a discretion or an obligation to offer back the land, the learned Judge after construing the relevant section - section 38 of Cap. 243 - held that thereunder the respondent Board has a discretion but no obligation to sell. He said:

«In s.38 'may' is clearly permissive. It gives a permissive power to the Board, subject to the consent of the Administrative Secretary (now the Minister of the Interior - Article 188.3(c) of the Constitution), to deal with the question of compulsorily acquired immovable property in excess of the extent actually required for the purposes in respect of which it had been acquired in three different ways: either to sell, lease or exchange. 'May' cannot be interpreted as mandatory in the context of this section. It does not impose an obligation on the Board. If an imperative meaning is attributed to 'may', then what would be expected from the Board to do as the three powers are completely different in nature. The proviso is only applicable when the Board exercises its power to sell. If they decide to sell, then the owners have a right of pre-emption. The property has to be offered to them at the price at which it was acquired from them, give them the right of first refusal and then sell to somebody else. If the Board does not decide to sell, then the proviso is inapplicable. The word 'may' is distinctly a word of permission only; it is an enabling and empowering word. The Board has a discretion but no obligation to sell.»

Regarding point (3) hereinabove - lapse of more than ten years from the date of acquisition till the date of the alleged abandonment and the right of the appellants under section 13 of the Land Acquisition Law Cap. 226 - the learned trial Judge held

that the time of abandonment being long after the ten years period prescribed by section 13(2) (d) (ii) of the Land Acquisition Law, Cap 226, the applicants are «precluded by lapse of time to any right on the subject property» The relevant passage of the judgment reads

«If the provisions of s 13 of the general law - Land Acquisition Law - were the law applicable again the applicants are faced with an unsurmountable obstacle The acquisition took place in July, 1954 Definitely, in 1967 the purpose for which the property had been acquired was not abandoned as the respondent Board had prepared plans and invited tenders for the erection of the public market Mr Dikigoropoulos submitted that in 1981 the object was abandoned

Section 13(2) (a) of the Land Acquisition Law Cap 226, reads -

'13 (1)

(2) (a) Before any sale as in subsection (1), the land shall, unless-

(i) it has, in the meantime, been built upon or used for building purposes, or

(ii) the abandonment, as in the said subsection provided takes place more than ten years after the date of the acquisition,

be offered for sale, as in paragraph (b) of this subsection provided, to the person from whom the land has been acquired who shall signify his desire to purchase the land within six weeks from the date when the offer was made, otherwise he shall be deemed to have refused the offer'

This creates a right of re-emption for the owner if the abandonment takes place before the expiration of 10 years from the date of acquisition

In this case the respondent does not admit that the object has been abandoned The applicants' contention is that abandonment took place The time of abandonment, however, is long long after the ten years' period prescribed by s 13(2) (a) (ii) Therefore, even if this section were applicable,

the applicants are precluded by lapse of time to any right o the subject-property »

Having arrived at the conclusions aforesaid on the first three points of law the learned trial Judge deemed it «unnecessary to embark on the fourth question, i e whether the contents of the letter of 13th April 1982 amount to an administrative executory act or a confirmatory one»

As against the judgment of the learned trial Judge the applicants in the recourse took the present appeal which was based on the following grounds

«1 His Honour the Trial Judge misdirected himself as to the true facts and circumstances of the case before him and reached the wrong conclusion upon a misreading and/or misconstruction of the *ratio decidendi of Kaniklides v The Republic*, 2 R S C C 49, *Pikis v Republic* (1967) 3 C L R 562, and *Pikis v Republic* (1968) 3 C L R 303 and the other cases cited by him

2 The trial Judge misdirected himself as to the weight and effect of the evidence before him and/or failed to appreciate and evaluate such evidence properly, drawing unwarranted inferences and conclusions therefrom

3 His Honour's conclusion is based upon a misreading of the irrelevant provisions of section 38 of the Villages (Administration and Improvement) Law Cap 243, which provides for the rights of the Acquiring Authority in respect of land in excess of the extent actually required and has no application whatsoever in the present case where the whole property has not been used for the purpose it had been abandoned

4 His Honour's decision and/or Judgment is contrary to the basic notions of justice and is tantamount to an authorisation and/or blessing of self-admitted and confessed mal-administration.

5. His Honour's construction of Article 23(5) of the Constitution and Section 23(2) of Law No.15 of 1962 is based upon the arbitrary limitation of the aforesaid Constitutional and legal provisions to the period after 16.8.1960 and is, as such, untenable and wrong.»

Taking now ground 1 of the grounds of appeal, as already stated, the learned trial Judge in holding as he did relied mainly on the judgment of the Full Bench of the Court of Appeal in *Pikis v. The Republic* (1968) 3 C.L.R. 303 and need, therefore, arises to refer to the relevant passage at p.307 of the report in the *Pikis case:*

«The claim is based, as already stated, on the provisions of section 13 of the Land Acquisition Law (now Cap. 226, in the 1959 - Edition - of the Cyprus Statutes) as it stood at the time of the claim in April 1961. The provisions in this section were first introduced in the Land Acquisition Law on the 7th November, 1952, as an amendment by Law No.26 of 1952. It is common ground that, but for this amendment, such a claim could not be made; and no such right could be said to exist.

It is the case for the Appellant that the effect of the amendment in question, was to create the right claimed, by virtue of which, the Appellant seeks the relief pursued by this recourse. Learned counsel on his behalf based his client's claim on the wording of the section, particularly the words '... the land had been acquired' in line 8; and submitted that the Appellant was entitled to claim that property which 'had been acquired' under the Land Acquisition Law, and was not actually used for the purposes of the original public utility project, be offered bact to him as the expropriate owner, as provided in section 13 after the amendment in November 1952.

I am clearly of opinion that it was neither the intention of the legislator in enacting the amendment introduced by Law 26 of 1952, nor is it the effect of the amendment to create such a right in connection with expropriations effected prior to the amendment. Had the legislator intended such a result, he would have used language to that effect. In my opinion the rights of the parties herein crystallized at the time of the

expropriation on May 7, 1952, when Notification 188 was published in the Official Gazette This, I think, is quite sufficient to dispose of the application on its merits And I therefore, find it unnecessary to enter into the other matters raised in this appeal and for that matter into the other reasons on which the trial Judge founded his decision So long as I hold the view that no such a right existed in November 1952 when Law 26 of 1952 introduced section 13 in its present form and no such a right was created by the section in respect of earlier expropriations, I am of the opinion that the recourse must fail »

In the light of the statement of the law in the *Pikis case* (supra), the conclusion of the learned trial Judge that the «right of the parties crystallized on the date of the publication on 22nd July 1954» and that the Law applicable is the Law obtaining at the time of the crystallization of the rights of the parties on 22nd July 1954, i e section 38 of Cap 243, cannot be faulted and, therefore, the ground of appeal - ground 1 - that the trial Judge misread the relevant case-law cannot be sustained

Coming now to ground 2, we are of opinion that the inferences and conclusions which the learned trial Judge drew from the evidence were clearly open to him on the evidence before him and therefore this ground fails

Ground 3, relating as it does to the construction of section 38 of the Law, Cap 243, need arises to quote here section 38, it reads

«38. Any Board may, with the consent of the Administrative Secretary, sell, lease or exchange any immovable property compulsorily acquired under the provisions of this Law in excess of the extent actually required for the purposes in respect of which it has been acquired

Provided that the person from whom the immovable property was acquired shall have the right to preemption at the price at which it was acquired from him by the Board or, if only a portion of such immovable property is in excess of

requirements, at a price proportionate to that at which the whole was acquired from him.»

It is clear from a mere reading of the enacting part of section 38 that it refers to sale, lease or exchange of property compulsorily acquired «in excess of the extent actually required for the purposes in respect of which it has been acquired». And such being the wording of the enacting part ground 3 would have been valid but for the proviso; And having regard to the wording of the proviso. particularly «or, if only a portion of such immovable property is in excess of such requirement», I hold that it, also, covers cases where the whole of the property has not been used as is the case here. Need, therefore, arises to consider the effect of the proviso and at that the principles governing the construction of provisos.

In *PASYDY and Others v. The Municipality of Nicosia* (1978) 3 C L.R. 117 Triantafyllides P., said at pp. 138-139:

«Another argument which has been advanced by counsel for the applicants is that the at present in force paragraph (c) of the proviso to subsection (1) of section 157 constitutes a 'repugnant proviso' because though - allegedly - the public officers are not working for profit it is expressly provided in the relevant legislation, particularly in section 156, that the professional tax is imposed in relation to the carrying on practice or exercise of any business, trade, calling or profession 'for profit'».

In Halsbury's Laws of England, 3rd ed., vol. 36, p.400, para 604, it is stated that it is the substance, and not the form, of a legislative enactment that must be looked at, and that which is in form a proviso may be in substance a fresh enactment, adding to. and not merely qualifying, that which goes before it, and reference is made, in this respect, to *Rhondda Urban Council v. Taff Vale Rail Co.*, [1909] A.C. 253, 258, which has been followed in *Commissioner of Stamp Duties v. Atwill and others*, [1973] 1 All E.R. 576, 581.

I am of the view that in the present case, when the aforementioned paragraph (c) is looked at against the background of the legislation concerned, it is proper to conclude that it is not

in substance a mere proviso, but that it is a provision extending and supplementing the main part of section 157 of Cap. 240 in which it is to be found. But, even if it were to be held that it is a mere proviso, I would not treat it as a 'repugnant proviso', because I am of the view that public officers do, indeed, work for profit in the sense of section 156 above.».

Further in *Georghiades v. Republic* (1969) 3 C.L.R. 396 Triantafyllides, J., as he then was, said the following at pp. 406-407:

«In construing a proviso it must be borne in mind that it prima facie exempts out of the previous enacting part of a statute something which but for the proviso would have been within the enacting part (see, inter alia, the judgments of Lush, J. in *Mullins v. The Treasurer of the County of Surrey* [1880] 5 Q.B.D. 170, at p.173, of Kekewich, J., in *Duncan v. Dixon* [1890] 44 Ch.D. 211, at p. 215, of Lord Macnaghten in *Local Government Board v. South Stoneham Union* [1909] A.C.57, at pp. 62-63, and of Lord Macmillan in *Corporation of the City of Toronto v. Attorney-General for Canada* [1964] A.C. 32, at p. 37); furthermore, it is a basic cannon of construction of statutes applicable in cases of provisos, too, that a statute must, so far as possible, be construed as a whole in such a way as to give effect to all its parts (see, inter alia, the judgments of Lord Russel of Killowen and Lord Wright in *Jennings v. Kelly* [1940] A.C. 206 at pp. 220 and 227)».

Applying the above principles to the construction of section 38 and its proviso I hold that the proviso in question «is not in substance a mere proviso but that it is a provision extending and supplementing the main part of section 38». In view of this conclusion and the aforesaid construction I have given to the proviso, namely that it covers instances where the whole of the property required was not used, I hold that ground 3 is devoid of any merit whatsoever.

Regarding ground 5 - same as in ground 1, the learned trial Judge drew his conclusion by relying mainly on the judgment of the Full Bench in the *Pikis case* (supra) and having regard to the statement of the Law in the *Pikis case* I cannot but hold that the

conclusions of the learned trial Judge regarding this ground 5, are valid

Lastly coming to ground 4, once we have held that the trial Judge has neither misread the relevant case-law-ground 1 -nor has he misread section 38 of Cap 243-ground 3-or Article 23(5) of the Constitution and section 23(2) of Law 15/62 we are entitled to hold that the ground of appeal -4- to the effect that the judgment appealed against is «contrary to the basic notions of justice » remains without any legal foundation whatsoever and it must fail

In the result I would dismiss the appeal but in the circumstances there would be no order as to costs

TRIANTAFYLLIDES P I agree with the judgment just delivered by my brother Judge Mr Justice A Loizou and I do not wish to add anything

SAVVIDES J This is an appeal against the judgment of a Judge of this Court exercising revisional jurisdiction in the first instance by means of which he dismissed the recourse of the appellants against the refusal of the respondents to offer back to them their property which was compulsorily acquired in 1954

The facts of the case have already been lucidly narrated by my brother Judge A. Loizou in the judgment just delivered and I find it unnecessary to repeat them once again

The main issue which the learned trial Judge had to decide was whether the refusal of the respondents to offer back to the appellants for purchase property acquired from them in 1954 is illegal in view of the obligations cast on the Acquiring Authority by section 13 of Cap 226 and section 23(2) of the Compulsory Acquisition Law 15/62

The attention of the trial Judge was focussed to the following four points of law which were raised before him

(1) the law applicable to the case,

(2) whether the respondent Board had a discretion and/or an obligation to offer back the land to its owners,

(3) what were the rights of the appellants under section 13 of the Land Acquisition Law, Cap. 226 in view of the lapse of more than ten years from the date of the acquisition till the date of the alleged abandonment, and

(4) whether the act challenged was an executory administrative act.

The learned trial Judge after an elaborate exposition on the law relevant to the case, disposed of the four questions before him as follows (see *HjiLoizou and Others v. Republic* (1984) 3 C.L.R. 70 at p.83):

On question 1 he concluded that «the Law applicable to the present case is neither Article 23.5 of the Constitution nor the *Compulsory Acquisition Law, Cap. 226, nor Law No 15/62. The* Law applicable is the Law obtaining at the time of the crystallization of the rights of the parties, on 22.7.1954 i.e. s.37 of Law No. 12/50, now s. 38 of the Villages (Administration and Improvement) Law, Cap. 243, under which the land was acquired by the respondent Board.»

In dealing with question 2 he proceeded first to examine and construe the proviso to section 38 of Cap. 243 which reads as follows:

Provided that -

«The person from whom the immovable property was acquired shall have the right to pre-emption at the price at which it was acquired from him by the Board or, if only a portion of such immovable property is in excess of requirements, at a price proportionate to that at which the whole was acquired from him.»

The learned trial Judge in dealing with the arguments of counsel of the parties before him on the construction of such proviso, concluded as follows, at p.85:

«In s. 38 'may' is clearly permissive. It gives a permissive power to the Board, subject to the consent of the Administrative Secretary (now the Minister of the Interior - Article 188.3(c) of the Constitution), to deal with the question of compulsorily acquired immovable property in excess of the

extent actually required for the purposes in respect of which it had been acquired in three different ways either to sell, lease or exchange 'May' cannot be interpreted as mandatory in the context of this section It does not impose any obligation on the Board If an imperative meaning is attributed to 'may' then what would be expected from the Board to do as the three powers are completely different in nature The proviso is only applicable when the Board exercises its power to sell If they decide to sell, then the owners have a right of pre-emption The property has to be offered to them at the price at which it was acquired from them, give them the right of first refusal and then sell to somebody else If the Board does not decide to sell, then the proviso is inapplicable The word 'may' is distinctly a word of permission only, it is an enabling and empowering word The Board has a discretion but no obligation to sell »

The learned trial Judge then dealt with the third question He considered the provisions of section 13(2)(a) of the Land Acquisition Law, Cap 226 and in particular part (ii) of paragraph (a) of sub-section (2) which imposes a time limit of 10 years for the exercise of the right of pre-emption and concluded that from the date of abandonment the right of pre-emption of the owner can only be exercised if abandonment takes place before the expiration of 10 years from the date of the acquisition He said the following in this respect (p 86)

«In this case the respondent does not admit that the object has been abandoned The applicant's contention is that abandonment took place The time of abandonment, however, is long after the 10 years' period prescribed by section 13(2)(a)(ii) Therefore, even if this section were applicable, the applicants are precluded by lapse of time to any right on the subject property»

Having dealt with the first three points of law that posed before him, the adjudication on which in the opinion of the learned trial Judge disposed of the subject matter of the recourse, he found it unnecessary to embark on the 4th point of law as to whether the letter of the respondent dated the 13th April, 1982, which was sent by the Chairman of the respondent to the appellant's advocate to

the effect that the purpose for which the property was compulsorily acquired was never abandoned, was an executory administrative act or not.

I agree with the judgment of my brother Judge A. Loizou in this appeal, that all grounds of appeal advanced by appellants should fail and that this appeal should be dismissed.

The reasons given by the learned trial Judge in his judgment which led him to his decision that appellants' recourse should be dismissed are very sound and no ground has been shown that his reasoning is wrong in any respect.

I also agree with the approach of the learned trial Judge as to the order in which he dealt with the points of law presented before him. Very correctly, in my view, once by disposing the first three points of law, the substance of the case was disposed of, he did not proceed to deal with the last point of law, which if counsel wished and had requested the Court accordingly, it could be taken as a preliminary point of law. It has been normal practice in this Court when several issues are raised touching the validity of administrative act or a number of objections are raised in opposition in support of the act or decision, if the Court after having dealt with one or more of such issues comes to the conclusion as to the fate of the recourse, it does not proceed to deal with all remaining issues, the determination of which will not add anything to the outcome of the recourse.

By dealing with the substance of the case and adjudicating on it, the learned trial Judge has rendered useful guidance in the handling of other similar cases already pending before this Court and waiting the result of this appeal.

The appeal is dismissed accordingly.

PIKIS J.: The appellants were the owners of a plot of approximately 2 1/2 donums at Ayios Dhometios. The land was compulsorily acquired in 1954 by the Improvement Board of the area for the purpose of providing facilities for the establishment of a market. It was contemplated that premises would be built to

accommodate a number of shops within the same complex in order to provide a service needed in the locality The land was expropriated in exercise of the powers vested in the Improvement Board by the Villages (Administration and Improvement) Law* empowering them, inter alia, to build public buildings for the provision of necessary amenities Failing agreement with the owners on the compensation payable, the matter was referred to the Compensation Assessment Tribunal, pursuant to the provisions of the Land Acquisition Law, Cap 226 The land vested and became eversince the property of the respondents

The purpose for which the land was acquired was not implemented and the site remains vacant till to-day For the past 21 or more years the appellants have been pressing for the return of the site on the ground that the purpose for which the property was acquired was abandoned They claimed a right to purchase back the land founded on the provisions of s 13 of Cap 226 read with the modifications necessary to bring it into conformity with Art 23 5 of the Constitution (see Art 188 1 of the Constitution) Their request was refused in 1966 on the ground that the project for which the land was acquired was not abandoned, informing appellants it would be duly implemented when financial circumstances permitted So far as may be gathered from subsequent events, minutes of the proceedings of the Board and correspondence on the subject with departments of central government, the establishment of a market on the site was still being studied Conflicting views were expressed on the need for additional market facilities in the area Applicants renewed their request for the return of the property The response of the Improvement Board was negative again In April 1982 they refused the request informing the owners anew that plans for building the market had not been abandoned, explaining the delay was due to lack of financial resources The review of this decision is the subject-matter of the proceedings The refusal of the respondents to offer the property back to the applicants for purchase is questioned as illegal in view of the obligations cast on the Acquiring Authority by s 13, Cap 226 and those of s.23(2) of the Compulsory Acquisition Law (15/62)

* *Incorporated as Cap 243 in the 1959 Edition of the Cyprus Statute Law*

Before holding an inquiry on the merits of the complaint the learned trial Judge set down for preliminary determination the following four legal questions. Evidently he took the view they affected the foundation of the proceedings and were a proper subject of preliminary examination. The four questions as listed by the trial Court were the following:

«(1) Law applicable to the present case;

(2) Has the Board a discretion or an obligation to offer back the land?

(3) In view of the lapse of more than 10 years from the date of acquisition till the date of the alleged abandonment, what are the rights of the applicants under s.13 of the Land Acquisition Law, Cap. 226? And,

(4) Is the act challenged an executory administrative act or a confirmatory one, and, therefore, the recourse is out of time?»

The questions were answered in the order in which they had been posed. The Court found that the law defining the duties of an Improvement Board with regard to the use and disposition of property unused for the purpose for which it was acquired, was s.38 of the Villages (Administration and Improvement) Law, Cap. 243. No obligation is imposed on the local authority to dispose of unused property or offer it back for purchase to the owner. They may, at their discretion, sell, lease or exchange the property with the approval of the Minister of Finance. Only in the event of sale is a right of pre-emption conferred to the previous owner. Otherwise the Acquiring Authority is under no duty whatever to the former owners. The trial Court rejected the suggestion that s.38 was impliedly repealed as an implication arising from the enactment of s.13, Cap. 226. Supposing s.13 did have the effect attributed to it by the appellants, it would carry their case no further as the abandonment, if any, of the purpose for which the acquisition was effected took place more than 10 years after the date of the acquisition, a fact making inapplicable the provisions of s. 13(2), Cap. 226. And, the Court concluded that neither law gave the appellants a leg to stand on and for that reason the proceeding was ill-founded. Before us it was argued that the law regulating the obligations of the respondents is s.13, Cap. 226. As the project was neither implemented nor abandoned before Independence and the question of abandonment arose thereafter, s.13 had to be

applied subject to the provisions of Art. 23.5 imposing a positive duty upon an Acquiring Authority to return property within three years if the purpose for which it was acquired has not been attained; whereas the validity of the provisions of Cap. 226 was specifically saved by s.23(2) of the Compulsory Acquisition Law, 1962 with regard to acquisition made under that law.

In my judgment the first question that ought to be answered is that listed under (4) in the questionnaire raised for preliminary adjudication. The question raised affects the justiciability of the subject-matter of the recourse. The revisional jurisdiction of the Supreme Court under Art. 146 is confined to the review of executory only if it is determinative of rights and obligations under administrative action independently of its character. An act is executory only if it is determinative of rights and obligaitions under the law. It must of itself be genetic of rights or authority for the imposition of obligations. In order for an act of the administration to have those attributes the law must put it in the hands of the administration to issue a decision definitive of the rights and obligations of those affected thereby. Refusal, on the other hand, to perform a duty is not of itself productive of legal consequences. The omission continues for as long as the administrative authority fails to carry out its duties under the law. And this is of itself justiciable as a continuing omission

Neither s.38 of Cap. 243 or s.13 of Cap. 226 of their own or read in conjunction with Art. 23.5 of the Constitution make the return of land unused for the purposes of acquisition a matter of decision for the Acquiring Authority. Under s.13, Cap. 226, if abandonment, objectively noticeable, occurs a corresponding duty arises to return it.

What we are asked to examine is consequently not a reviewable act under Art. 146.1. and the recourse must, therefore, be dismissed. Theoretically that does not prevent the appellants from launching a new recourse assuming their complaint is one of continuing omission to return abandoned property in accordance with s.13, Cap. 226 read subject to Art. 23.5 of the Constitution. Judicial circumspection ordinarily restrains judges from exploring

matters not directly in issue. However, where the matter is proximate to the cause under review and the facts relevant to it are before the Court, it is not injudicial to venture an opinion especially if the matter is essentially one of law. As these prerequisites are present in this case, I shall record my opinion on the law applicable and contemplate the implications upon the facts of the case.

The law regulating rights and obligations of the acquiring authority and the owner, after acquisition, in respect of land acquired pursuant to the provisions of The Villages (Administration and Improvement) Law, Cap. 243, is s.38. It deals specifically with the fate of property acquired by local authorities; as such it can be reconciled with s.13 of the Land Acquisition Law, Cap. 226, and the two may co-exist within the same legislative framework. In the absence of specific language to that end, we cannot presume that the legislature intended to repeal s.38, Cap. 243, by the enactment of s.13, Cap. 226. Repeal by necessary implication is an exceptional course not to be countenanced unless the two enactments are irreconcilable (see, inter alia, *Stavrou and Others v. Republic)**. There is still less room for inferring an implied repeal where the ambit of the first law is confined to a special area of the general subject dealt with by the alleged repealing legislation *(Vassiliko Cement Works Ltd. v. Ioannis Lambrou Violaris)***.

In view of the above the appellants had no right to the re-acquisition of the property as s.38 gave none; nor were the respondents under any corresponding obligation. The rights of the parties with regard to the property crystallized before Independence; as such they remained wholly unaffected by the Constitution. Only unfledged rights in the process of creation were liable to be affected by constitutional provisions***. Equally unreviewable under Art. 146 is administrative action finalized before the Constitution came into force****.

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* *(1986) 3 C.L.R. 361 (F.B.)*
** *(1975) 1 C.L.R. 256*
*** *Iason Kaniklides v. Republic, 2 R.S.C.C. 49*
**** *Hasan Moustafa v. Republic, 1 R.S.C.C. 44*

For the reasons above indicated, the appeal fails.

KOURRIS J.: I agree with the result of this appeal for the reasons which have been set out in the judgment of my brother Judge Mr. Justice Loizou.

TRIANTAFYLLIDES P.: In the result this appeal is dismissed unanimously but with no order as to its costs. 5

Appeal dismissed.
No order as to costs.