Privy Council Appeal No. 32 of 1942

Vassiliades – – – – – – – – – – *Appellant*

v.

Vassiliades and another – – – – – *Respondents*

FROM

THE SUPREME COURT OF CYPRUS

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 6TH MARCH, 1944

Present at the Hearing:

LORD MACMILLAN
LORD WRIGHT
LORD CLAUSON

[*Delivered by* LORD WRIGHT]

The two main issues in the appeal are (1) whether the District Court and the Supreme Court were right in upholding the present respondents' claim that certain transfers and mortgages should be set aside (2) whether there were circumstances in the conduct of the trial before the District Court which entitle the appellant to object that the case had not been fairly tried. If the appellant were to succeed in whole or in part on the former issue, she would be entitled to judgment to that extent on the application. If she were to succeed on the latter issue, she would be entitled to an order for a new trial.

The transfers and mortgages in question were granted to the appellant by her father Hadji Nicolas Vassiliades, who was adjudicated bankrupt on a petition filed by the appellant in September, 1939. His trustee in bankruptcy was substituted for him in the proceedings, and is now the second respondent. The first respondent, Artemis N. Vassiliades, a son of the bankrupt and a brother of the appellant, had obtained two judgments against his father, one dated the 10th June 1937 for £200 with interest and costs on two bonds, in an action commenced on the 7th November 1935, the other dated the 25th June 1938 for £428 10s. with interest and costs in an action commenced by him on the 12th November 1935. It is this latter action and judgment out of which these proceedings arise. The respondent having failed to obtain satisfaction for his judgment, on the 24th April 1939 took out a summons claiming that the transfers and mortgages set out in Schedules A, B, C and D all of which were executed in favour of the appellant, should be set aside " as effected with intent to hinder or delay " his father's creditors and in particular the first respondent. The appellant intervened in the summons as *ex parte* respondent. The respondent filed an affidavit setting out the grounds of his application, which was based on Law 7 of 1886 sections 2 and 3, as amended by section 2 of Law 10 of 1927. The sections in their amended form, are as follows:—

> " 2.—(1) Every gift, sale, pledge, mortgage or other transfer or disposal of any movable or immovable property made by any person with intent to hinder or delay his creditors or any of them in recovering from him, his or their debts shall be deemed to be fraudulent, and shall be invalid as against such creditor or creditors; and, notwithstanding any

such gift, sale, pledge, mortgage or other transfer or disposal, the property purported to be transferred or otherwise dealt with may be seized and sold in satisfaction of any judgment debt due from the person making such gift, sale, pledge, mortgage or other transfer or disposal.

" (2) In any application under the provisions of this Law to set aside a transfer or assignment of any property made to any parent, spouse, child, brother, or sister of the transferor or assignor otherwise than in exchange for money or for other property of equivalent value or for good consideration the onus of proving that such transfer or assignment was *bona fide* and not made with intent to hinder or delay his creditors shall rest upon the transferor or assignor and upon the person to whom such transfer or assignment has been made.

" (3) No sale, mortgage, transfer or assignment made in exchange for money or other property of equivalent value shall be voidable, under the provisions of the Law, unless the purchaser, mortgagee, transferee, or assignee shall be shown to have accepted it with knowledge that such sale, mortgage, transfer, or assignment was made by the vendor, mortgagor, transferor, or assignor with intent to delay or defraud his creditors."

" 3. Any gift, sale, pledge, mortgage or other transfer or disposal of any movable or immovable property deemed to be fraudulent under the provisions of section 2 of this Law whether made before or after the commencement of an action or other proceeding wherein the right to recover the debt has been established may be set aside by an order of the Court, to be obtained on the application of any judgment creditor made in such action or other proceeding, and to the Court before which such action or other proceeding has been heard or is pending."

The appellant opposed the application. But both before the District Court and the Supreme Court her opposition has been overruled and the transfers and mortgages have been set aside.

In 1936 between the 23rd May 1936 and the 26th June 1936 while the first respondent's two actions were pending against Hadji N. Vassiliades hereinafter called Vassiliades, Vassiliades executed eight transfers, all but one of immoveable property and all in favour of the appellant. On the 25th June 1936 one Hortovadji commenced an action against Vassiliades and another, and on the same day an interim order was made restraining Vassiliades from alienating his immoveable property. Thereafter on the 30th June 1936 Vassiliades made in favour of the appellant a bond for £86 payable on the 1st August 1936 and on the 23rd July, 1936, purported by contract to sell to the appellant moveable properties for £792 and about the same period transferred to the appellant two mortgage bonds for £50 each. Thus in the period between the 23rd May 1936 and the 22nd June 1936, Vassiliades transferred to the appellant, partly before and partly after the commencement of Hortovadji's action and while the first respondent's two actions were pending, properties of a total value, even if the assessed values were taken, of over £2,000. In addition to this extraordinary sequence of events, there was also evidence before the Courts which they accepted that the business of Vassiliades did not go well after 1920 and that his financial position at all times since 1920 had been serious and critical. There was other evidence to the same effect.

The law of Cyprus as stated in the sections cited above makes the intent of the transferor the crucial test for deciding whether the transfer or disposal is to be deemed to be " fraudulent." The fraud contemplated is not what has been called " moral " fraud; but consists in the intention of the transferor to " hinder " or " delay " (that is something less than " prevent ") his creditors. Whether or not that intention exists, must be decided as an inference of fact from considering all the circumstances of the case. Here the embarrassed position of Vassiliades over a period of years, the actions against him and the judgments recovered and unsatisfied and in addition the most remarkable sequence of substantial conveyances within so short a period of time constitute very strong evidence. Vassiliades gave evidence but the Judge refused to credit anything he said. The appellant herself gave no evidence at all, in the witness box at the trial. Statements she made in an affidavit to show that the unsigned transactions were *bona fide* and for consideration were referred to, but

rejected by the Courts. There was in their Lordships' judgment ample evidence for the conclusion of both Courts below that the transactions were not *bona fide*. It is true that under section 2 (1) of the Act the onus is on the party seeking to set aside the transfers to prove his case, but the Courts below have considered the case on the footing that the onus so lay. Their Lordships also here proceed on the same view and arrive at the same conclusion as the Courts below. A question was raised as to the exact effect of the words " good consideration " in section 2 (2) which deals with transfers as between certain members of a family, otherwise than in exchange for money or other property of equivalent value or for good consideration. Good consideration in this statute, it was conceded, means something more than natural love and affection. It was said that even if it was accepted in respect of the two bonds included in Schedule D that there was no valuable consideration, there was " good " consideration because the transfer was by way of dowry, which it was said was good consideration like marriage consideration. The Courts below held this suggestion irrelevant because the appellant was neither married nor on the point of being married. There could thus be no question of applying in the appellant's favour section 2 (2) which shifts the burden of proof and places the onus of proving *bona fides* on the transferor and transferee because the conditions of subsection 2 had not been fulfilled. But the Courts below have dealt with all the transfers on the footing that the first respondent had to prove that the conditions of section 2 (2) and (3) were established, and that the onus throughout was on him. The decision that the first respondent had satisfied this onus, which was arrived at by the Courts in Cyprus, the Judges of which have a knowledge of local conditions and habits which their Lordships do not pretend to possess, is not one which they would lightly interfere with. But they feel satisfied on a consideration of all the evidence and documents that it is a right conclusion, and that the judgment should be affirmed.

But it is still necessary to consider the application of the appellant for a new trial on the various grounds suggested. These can best be considered separately.

The first objection is that the judgment appealed from is a nullity on the ground that the acting President of the District Court was not competent to sit but was disqualified because he had been Official Receiver when the petition against Vassiliades was filed and had expressed an opinion adverse to the appellant in another case. This objection alleges bias and want of impartiality on the part of the Judge. It is a most serious objection, the effect of which, if it is sustained, is that the trial must be held to have been *coram non judice* and the judgment a nullity. The simplest type of bias is where the Judge is shown to have any pecuniary interest in the result of the proceedings: in that case it will be held at once that he is disqualified, however small the interest and however clear it may be that his mind could not have been affected. A striking illustration of this type is afforded by *Dimes* v. *Grand Junction Canal Coy.* 3 H.L.C. 759, where that fact that the Lord Chancellor who presided at the hearing in the House of Lords had inadvertently failed to disclose a small interest he had in the respondent Company was held to vitiate the judgment of the House. But there are other circumstances which may be relied upon as justifying an objection that a Judge is disqualified for bias. It is then a question of substance and fact whether the objection is good. In *Allison* v. *General Medical Council* [1894] 1 Q.B. 750, Lord Esher at p. 759 explained the criterion for rejecting the objection to be " not that any perversely minded person cannot suspect him but that he must bear such a relation to the matter that he cannot reasonably be suspected of being biassed." That was a case in which bias was alleged on the ground that the person adjudicating had actively co-operated in bringing the charges which were being investigated, but the Court held that as he had taken no part in the prosecution, the objection of bias failed. In the present case the acting President of the District Court had taken no part in or in regard to the proceedings to set aside the transfers, either when he was Official Receiver or in any other capacity. Nothing is alleged or suggested to show that he was not capable of bringing an entirely impartial mind to the hearing of the particular application. No reasonable person could think that he

was biassed or " in substance and in fact " liable to be even suspected of bias merely because in the past in an official position he had dealt with matters in which the appellant was concerned. Their Lordships agree with the Supreme Court in rejecting this objection. It might perhaps have been better if the hearing had been adjourned until the Governor had dealt with the application to him to nominate another judge. It is always highly desirable that any proceeding should be dealt with by persons who are above any suspicion, however unreasonable, of being biassed. But as the proceedings have been in fact held, they cannot be set aside except on legal proof of bias, of which there is none.

The other matters of objection are fully dealt with and rejected by the Supreme Court, who have thus summed up their conclusion:—" On the whole we cannot think the proceedings were satisfactory, but all the difficulties appear to have arisen from the peculiar conduct of the appellant and her different advocates. And if she feels aggrieved it appears to us the fault was hers and that of her brother and lawyer Afxentis Vassiliades, that the case did not move on more smoothly. And as grounds of appeal we do not think we can consider them as such, considering the whole behaviour of her and her legal advisers."

Broadly, their Lordships take the same view. It is a matter of public policy that justice should not merely be done but should appear to be done. Judges, however, are only human, and their patience is sometimes sorely tried by Counsel and litigants. It is always to be regretted if their patience even appears to give way. But the administration of justice depends on the co-operation of the judges and the parties. Parties cannot complain whose improper or unreasonable conduct has led to a departure from the more regular course of procedure, so long as no substantial injustice is done.

Their Lordships do not think it necessary to examine in detail all the complaints made on behalf of the appellant. It may be enough to say that, after carefully examining into them, their Lordships are satisfied that there has been no substantial miscarriage of justice. Only if they had been so satisfied could a new trial be ordered.

One objection taken was that the District Court stopped the cross-examination of a witness by the appellant's brother, a barrister who at one stage appeared on her behalf. After it had lasted three hours, (it is true through the medium of an interpreter), the Court stopped it as irrelevant. Now cross-examination is one of the most important processes for the elucidation of the facts of a case and all reasonable latitude should be allowed, but the Judge has always a discretion as to how far it may go or how long it may continue. A fair and reasonable exercise of his discretion by the Judge will not generally be questioned by an Appellate Court. As Lord Sankey L.C. said in the *Mechanical and General Inventions* case [1935], A.C. 346, at p. 360, " A protracted and irrelevant cross-examination not only adds to the cost of litigation, but is a waste of public time." The Lord Chancellor went on to say that such a cross-examination may become indefensible. Before their Lordships the appellant's Counsel did not suggest that any material cross-examination had been prevented. This ground of objection is, in their Lordships' opinion, ill-founded.

It is not easy to follow all the peculiar features of the conduct of the appellant in Court or of her Counsel, who changed from time to time. For instance, there appears to have been no sufficient reason why her brother Afxentis, who had appeared as her Counsel and then gave evidence as her witness, refused at the outset of his cross-examination to answer a relevant question on the pretext that he had not finished his examination in chief. He was then committed for contempt and ordered to pay a trifling fine, with the alternative of a month's imprisonment. His tone is reported to have been angry and his demeanour disrespectful. Another of the appellant's Counsel had already withdrawn. The appellant was asked if she desired to call witnesses or address the Court, but she did not, because she said she had no advocate. She did not even herself give evidence.

Objections were taken to the form of the judgments in the lower Court. It was said that the judgment of the District Court did not sufficiently deal with all the various points which had been taken. The judgment is certainly brief and would have been more helpful to the Appellate Court if it had been fuller. It is desirable that a trial Court should deal with reasonable fulness with the facts as it finds them. But the judgment of the District Court deals clearly and precisely with the essential points. The judgment of the Supreme Court is careful, full and accurate. It is, however, objected that the final words of the judgment show that the Court did not do its duty, because an appeal like the present is an appeal by way of rehearing in Cyprus as it is in England under the rules of both Courts. The words of the judgment of the Supreme Court on which the objection is based are: " We do not think the conclusion come to by the Court [sc. the District Court] was unreasonable or such as ordinary jurors could not have come to, therefore we think the appeal should be dismissed with costs."

Their Lordships, however, do not understand these words, which are not indeed very accurately expressed, as meaning that the duty of an Appellate Court sitting on appeal from a Judge is the same as that of an Appellate Court sitting on appeal from the verdict of a jury. In the former case the appeal is made by the rules a rehearing; the appellate judges are judges of fact. In the latter case the appellate judges are not judges of fact. As Lord Atkin said in the *Mechanical and General Inventions* case (*supra*), at p. 369, speaking of a case where there is a jury, " that tribunal and that tribunal alone is the judge of fact, and no Appellate Court can substitute its own findings for those of the lawful tribunal." The contrasted case of an appeal by way of rehearing is examined in *Powell* v. *Streatham Manor Nursing Home* [1935], A.C. 243. Their Lordships see no reason to think that the Supreme Court neglected its duty to rehear the case, but they have thought it better to say what they have in order to avoid any misunderstanding of what is the true rule in such appeals.

Their Lordships wish finally to mention two separate matters. (1) They rejected an application on behalf of the appellant to introduce fresh evidence contained in an affidavit. It is a sufficient reason for their doing so that no explanation was given why it was not tendered in the District Court, and no proof was given that it was impossible to do so. Moreover, Counsel for the appellant was unable to say that if the fresh evidence were admitted it would materially affect the result of the case. (2) It is said that the value of the property in question is considerably in excess of the debt to the first respondent. That matter must be dealt with by the Court in Cyprus, to whom their Lordships refer it, to do what is just in the circumstances.

On the whole case their Lordships are of opinion that the appeal fails and should be dismissed with costs.

They will humbly so advise His Majesty.

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