IN THE COURT OF APPEAL

SAINT VINCENT:

MAGISTERIAL CIVIL APPEAL NO. 7 of 1975

BETWEEN: CHARLES TIMOTHY - Appellant/Defendant

Vs.

PRINCESS GILBERT - Respondent/Plaintiff

Before: The Honourable the Chief Justice
The Honourable Mr. Justice St. Bernard
The Honourable Mr. Justice Peterkin

Appearances: E. Robertson for appellant
C. Douglas for Respondent

1975, September 17 and 18
1976,

J U D G M E N T

DAVIS C.J.:

On the 31st day of December, 1973 the respondent filed a suit No. 215/73, against the appellant claiming damages in the sum of $106.40, for trespass to his lands at Glenside Mesopotamia, in the State of Saint Vincent. The particulars of claim were, that on the 18th and 21st days of December, 1973, the defendant unlawfully entered the plaintiff's land at Glenside and pulled up her cultivation thereon. After a full hearing of the suit, including addresses by counsel on both sides, the learned magistrate reserved her judgment, and on the 6th June, 1974, non suited the plaintiff.

On the 20th day of May, 1974, the plaintiff issued another writ - No.56/74 - against the appellant, claiming damages for trespass, the particulars of which claim were the same as given in Suit No.215/73, and which are mentioned in the preceding paragraph. The same magistrate heard the suit and again reserved her judgment. It should be mentioned that on this occasion the appellant was not represented by counsel at the trial.

/On

On the 28th January, 1975, judgment was entered for the respondent in the sum of $53.16, with $10.08 costs. It is against this judgment that the appellant now appeals.

The grounds of appeal are as follows:-

(1) That the case has been already heard or tried and decided by the said magistrate,

(2) That the learned magistrate, having heard the case before ought not to have adjudicated upon the case again,

(3) That legal evidence has been rejected by the magistrate in that she failed to allow the defendant an opportunity to produce his title deed to the said land.

(4) That the learned magistrate erred in law when she decided the case on the footing that section 6 of the Small Debts Ordinance Chapter 16 as amended was applicable to the circumstances of this case.

At the outset of the hearing of this appeal, counsel for the appellant abandoned ground (4).

On ground (1) counsel submitted that the non suiting of the plaintiff, amounted to a decision or judgment in the matter and therefore the plea of "res judicata" would apply. In support of this argument he referred the Court to sections 21(1) and 25 of Cap. 16 of the laws of Saint Vincent, and the term "judgment" as defined in section 2 of the said Ordinance. He further submitted that the learned magistrate, having heard all the evidence and addresses of counsel, was wrong to enter a non suit without having heard counsel on the question, and that in the circumstances, she ought to have entered judgment for the defendant.

Counsel for the respondent submitted in reply, that a non suit is not a final judgment and that the magistrate had an unfetterd discretion to non suit the plaintiff at any time, and the legal result is that the respondent in this case had an opportunity to proceed against the appellant a second time for the same wrong. He referred to section 33 of Cap. 16 and cited

the case of Clack v. Arthurs Engineering Ltd. 1959 2 A.E.R. 503.

Had the appellant appealed against the order of non suit made in Suit No.215/73, I would have been prepared to hold that the learned magistrate did not exercise her discretion judicially when she proceeded to enter a non suit without having first heard counsel on the question, and would have ordered that judgment be entered for the defendant.

Although it is legally in order to enter a non suit at the conclusion of the whole case, it is, in my view, preferable to do so at the conclusion of the plaintiff's case. I agree with the submission of counsel for the respondent that the non suiting of the respondent was not a final judgment, and therefore the respondent could bring the action again.

The question which perplexes my mind is what should be the fate of Suit No. 56/74, which was pending between the same parties in the same cause or matter at the time the judgment in Suit No. 215/73 was given? In my view, it should share the same fate as befel the respondent in Suit No. 215/73. To hold otherwise would be to suggest that the respondent knew before-hand, what the judgment or order would be, and, to take this view, would be grossly unfair to the learned magistrate.

I have not been able to find any authority to support my view on this, and do not intend to rest my judgment solely on this point.

I pass now to consider ground (2). It is clearly wrong that a magistrate who heard the previous case and could not make up her mind one way or the other, should, just a few months later, adjudicate in the same case and order judgment to be entered for the plaintiff with costs. She ought to have declined to hear the case and let a fresh mind be brought to bear in the matter. It is a well known principle, that not only must justice be done but must manifestly be seen to be done. It could not be said that the appellant in this case could see that justice was done.

I do not think it necessary to consider ground (3)

/In

In the result I would allow the appeal and set aside the judgment of the learned magistrate.

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(MAURICE DAVIS)
CHIEF JUSTICE

I agree

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(E. L. ST.BERNARD)
JUSTICE OF APPEAL

I also agree.

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(N. A. PETERKIN)
JUSTICE OF APPEAL