(10)

SAINT VINCENT

IN THE COURT OF APPEAL

MOTION NO. 9 of 1981

BETWEEN:

EMERY ROBERTSON - Plaintiff/Appellant

and

GRAFTON ISAACS - Defendant/Respondent

Before: The Hon. Sir Neville Peterkin - Chief Justice
The Honourable Mr. Justice Berridge
The Honourable Mr. Justice Robotham

Appearances: O.R. Sylvester for the Plaintiff/Appellant
H. Forde, Q.C., for the Defendant/Respondent
Mounsey with him.

1982; April 22
July 19.

JUDGMENT

PETERKIN, C.J.

This is an application made by the Defendant/Respondent for leave to appeal to Her Majesty in Council from a decision of this Court delivered on the 20th July, 1981. The application is made by way of motion in accordance with Rule 4 of the West Indies Associated States (Appeals to Privy Council) Order, 1967 (1967 No. 224).

The action in which the Defendant/Respondent wishes to appeal was one for, (a) specific performance of an oral agreement between the Plaintiff/Appellant and one Inez Boatswain for the sale by her to the Plaintiff/Appellant of 1¾ acres of land for the price of $7,000. (b) A declaration that Inez Boatswain and the Defendant/Respondent are trustees of the property for the Plaintiff/Appellant. And (c) An

/injunction.....

injunction to restrain the Defendant/Respondent from entering the property and from molesting the Plaintiff/Appellant in the use of the property.

An application was made by way of Summons for an interlocutory injunction. It was heard on 31st May, 1979, when an order was made granting it in the terms sought. The Defendant/Respondent ignored the Order of the Court, and continued to carry out construction work on the land. On July 31, 1979, the Plaintiff/Appellant brought the motion seeking to have the Defendant/Respondent committed. It was heard on August 21st and 22nd, and was resisted on two grounds namely, (i) that the motion was defective in that it did not state the grounds of the application, and (ii) that the granting of the interlocutory injunction on 31st May, 1979, was a nullity because no document had been filed for one year from the date of the last proceeding had on September 13, 1977, when the application for the interlocutory injunction was adjourned for a date to be fixed. It was argued that in the given circumstances, the Order itself being invalid, there was no obligation to obey it. In a written judgment delivered on 22nd November, 1979, the learned trial Judge upheld both submissions and dismissed the motion. From this decision the Plaintiff/Appellant appealed to this Court whose findings may be summarised as follows:-

> "(1) That the motion was not defective and was therefore properly before the Court.
>
> (2) That prior to the hearing of the interlocutory injunction on May 31, 1979, the last proceeding had in the matter was on September 13, 1977, when the application was adjourned for a date to be fixed.
>
> (3) That no proceedings having been taken or any document filed within one year

/from.....

from the latter date, the suit by virtue of Order 34 Rule 11(1)(a) became altogether abandoned and incapable of being revived with effect from September 14, 1978.

(4) That in the circumstances the interlocutory injunction on May 31, 1979 ought not to have been made, the suit being then abandoned.

(5) That despite this it was not open to the respondent to disregard and disobey the terms of the injunction, without taking steps to have it discharged by a Court of competent jurisdiction.

(6) That his wilful disregard of the order amounted to a breach of the terms of the injunction."

Accordingly, the Court allowed the appeal, granted the motion, and recorded a finding thereon that the Defendant/Respondent was in contempt of Court, and as such liable to be punished. The Court, however, on the basis of the authorities and in the peculiar circumstances of the case, refrained from imposing imprisonment or a fine, but ordered the Defendant/Respondent to pay to the Plaintiff/Appellant the costs of the appeal and also all costs arising from the breach, including his costs of the application for committal. It is from this order that the Defendant/Respondent seeks leave to appeal.

At the outset, learned Counsel for the Plaintiff/Appellant has taken a preliminary objection to the procedure adopted by the Defendant/Respondent in relation to Rule 4. He has argued that he should have been served with a copy of the notice of motion itself within 21 days, and contends that the notice which was served on him is the notice served when one is going directly to the Privy Council, and not applying to this Court for leave. In short, that the notice served on him was not sufficient and was not in compliance with Rule 4.

/In support.....

In support of his argument he has cited to this Court the cases of :-

(i) In re Blyth & Young 1880 C.A., 416.

(ii) Ex parte Saffery. In re Lambert, 1877 C.A. 365, and

(iii) In re West Jewell Tin Mining Co. Littles Case, 1878 C.A., 806.

Rule 4 reads as follows:-

> "Applications to the Court for leave to appeal shall be made by motion or petition within twenty-one days of the date of the decision to be appealed from, and the applicant shall give all other parties concerned notice of his intended application."

The judgment from which the Defendant/Respondent wishes to appeal was delivered on 20th July, 1981. The Record shows that the notice of motion was dated 6th August, 1981, and filed on 10th August, 1981. It is conceded that it was brought within 21 days. It was accompanied by an affidavit setting out the grounds etc. upon which the Defendant/Respondent seeks leave of the Court to appeal to Her Majesty in Council. In addition, the solicitor for the Defendant/Respondent prepared and signed the following notice:-

"SAINT VINCENT AND
THE GRENADINES

WEST INDIES ASSOCIATED STATES SUPREME COURT
IN THE COURT OF APPEAL

SAINT VINCENT

CIVIL APPEAL NO. 9 of 1979

BETWEEN:

EMERY ROBERTSON Plaintiff/Appellant
and
GRAFTON ISAACS Defendant/Respondent

T A K E N O T I C E that the above-named GRAFTON ISAACS intends to apply to the Court of Appeal for leave to appeal against the judgment of the Court of Appeal dated July 20, 1981 in the above-named Case.

Dated the 5th day of August, 1981

(Sgd). J.H. Bayliss Frederick
Solicitor for the said Grafton Isaacs"

This notice, he swore in an affidavit, was served by him on the solicitor for the Plaintiff/Appellant on 5th August, 1981. This has not been denied. He then sought to have the motion set down for hearing at the next sitting of the Court in December, 1981. When the Court visited in December the Defendant/Respondent was out of the State. He wrote to the Registrar requesting an adjournment, and his matter was accordingly not listed. When the Court next visited on 19th April, 1982, the matter was set down for hearing, and the notice of motion, along with a copy of the affidavit, was served on the solicitor for the Plaintiff/Appellant.

In the case of Blyth and Young mentioned above, the solicitor for the unsuccessful party had merely stated in a letter to the solicitors on the other side, "we have taken the initial steps for lodging an appeal". It was held to be an insufficient notice as it amounted only to a mere suggestion that there was an intention to appeal. In Little's case on the other hand the person against whom an order in a winding-up had been made for payment of money to the official liquidator served on him a notice which read:

> "Take notice that it is the intention of J.L. to prosecute an appeal from the order made in this matter etc.".

It was held that this notice was sufficient, and the appeal was ordered to be set down. James, L.J. in pointing out the difference in the two cases in his judgment in the case of Blyth and Young said in reference to Little's case:

> "But in that case the notice was intended as an actual notice of appeal, although it was informal".

In the instant matter the notice served was a formal notice, and, in my view, a clear and early indication to the other

/side.....

side of the Defendant/Respondent's intended application. I do not think that any prejudice could have resulted.

For the reasons mentioned I am of the opinion that there was a sufficient compliance with Rule 4, and that the preliminary objection should fail.

I turn to the substantive motion. What falls now to be considered is whether or not the matter is appealable.

The grant of leave by the Court appealed from is governed by the terms of the instrument regulating appeals from that Court, in this case The Saint Vincent Constitution Order, 1979. It is contended for on behalf of the Applicant (Defendant/Respondent) that the matters raised are of great general or public importance and fall within section 99(2) of the Constitution. It reads:

> "An appeal shall lie from decisions of the Court of Appeal to Her Majesty in Council with the leave of the Court of Appeal in the following cases -
>
> (a) decisions in any civil proceedings where in the opinion of the Court of Appeal the question involved in the appeal is one that, by reason of its great general or public importance or otherwise, ought to be submitted to Her Majesty in Council; and
>
> (b) such other cases as may be prescribed by Parliament."

Objection has been taken that the affidavit is not in accordance with Order 8, Rule 3(2) of the Rules of the Supreme Court, and is accordingly not a sufficient affidavit. Learned Counsel has cited in support of his objection the judgment of this Court in Metrocint General Insurance Co. Ltd v Lewis and Da Silva, (No. 3 of 1979). Let me say at the outset that I do not consider the cases to be on all fours. In the Metrocint matter the evidence showed that the amount

/involved.....

involved in the case of one applicant was $5, and in the case of the other the sum of $250. Further to this, the Court had gone on to state (Davis, C.J.):

> "In addition, I am of the opinion that no cogent arguments were advanced to convince me that the question involved in this matter was of any great general or public importance."

The affidavit in question may not be all that it should have been, but it does go on to set out certain areas in the judgment to which the Applicant (Defendant/Respondent) takes objection, and seeks leave to appeal. Based on this, Learned Counsel for the Applicant (Defendant/Respondent) has dealt in the course of his argument mainly with two issues, which, he submits, raise arguable points of general and public importance.

The first issue, he contends, raises the question of the liberty of the subject, and involves the audi alteram partem rule, and the standard of proof. He has cited to the Court the cases of Re Pollard, (1868) L.R. 2 P.C., and Maharaj v Attorney-General of Trinidad and Tobago, 1977, 1 A.E.R., 411. His submission here is that no percon can be punished for a contempt of Court unless the specific offence charged against him be distinctly stated, and an opportunity given him of answering.

The second issue, he contends, is whether the interlocutory Order made by Glasgow, J. when the action was abandoned was a nullity and void, or merely an irregularity and voidable. He argued here that it was open to the Applicant (Defendant/Respondent) to contend before the Judicial Committee that if it was void there was nothing to which he could be held to be in contempt. Two cases were

/cited....

cited to the Court in support of the argument. They were, (1) Macfoy v United Africa Co. Ltd., 1962 A.C. 152 at p.160, and

(2) Carden v Enswinger, 58 American Law Reports 1256.

Learned Counsel has submitted that both these issues raise arguable points of law which are of great general and public importance. I would agree.

Accordingly, I would grant to the Applicant (Defendant/Respondent) the leave sought, subject to the terms and conditions to be settled in accordance with Rule 5 of the W.I.A.S. (Appeals to Privy Council) Order 1967.

N.A. PETERKIN
Chief Justice

I agree.

N.A. BERRIDGE
Justice of Appeal

I also agree.

L.I. ROBOTHAM
Justice of Appeal.