IN THE HIGH COURT OF JUSTICE
SAINT VINCENT AND THE GRENADINES
(CIVIL)
A.D. 1990

9/11/90

SUIT NO. 452 of 1990

BETWEEN

OTHNEIL R. SYLVESTER — PLAINTIFF

AND

SATROHAN SINGH — DEFENDANT

Dr. R. Gonsalves for Plaintiff
Hon. P. Campbell, Attorney General and Mr. O. Ramjeet, Solicitor General, Intervening.

1990 September 28;
October 30;
November 9.

JUDGMENT

MATTHEW J. (IN CHAMBERS).

On August 14, 1989 the Plaintiff filed a writ against the Defendant for damages for libel contained in a type-written letter dated 11th March, 1987 and signed by the Defendant and addressed to the Honourable Mr. L.L. Robotham. On September 19, 1990 the Plaintiff by exparte summons applied for leave to serve the notice of the writ out of the jurisdiction and for substituted service of the writ by newspaper in St. Christopher-Nevis under Order 11 Rules 1 and 5 and Order 50 Rule 4 of the Rules of the Supreme Court, 1970.

In support of the application were affidavits by the Plaintiff and Dennis London, a bailiff of the High Court of Justice in Saint Vincent. In his affidavit the Plaintiff stated that the Defendant is currently the resident High Court Judge in the State of St. Christopher-Nevis and can be found there for service of the notice of the writ. He also stated that such service can be properly effected through publication in the LABOUR SPOKESMAN, a newspaper widely read and circulated throughout the

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State of St. Christopher-Nevis, and if necessary, through THE VINCENTIAN, a newspaper published in St. Vincent and the Grenadines.

Dennis London stated in his affidavit that at noon on August 14, 1990, the Plaintiff's Solicitor, Dr. Ralph E. Gonsalves, gave to him for service the original and a copy of the writ in the action. London further swore to the following:

"From Tuesday August 14, 1990, until Thursday August 16, 1990, inclusive, I made persistent and strenuous efforts to serve the writ on the Defendant but was unsuccessful in my efforts. I visited his home at Cane Garden on several times to effect service but was prevented from doing so by policemen who were guarding the gate and premises of the Defendant's home. The gate was locked on each occasion and I was told repeatedly by the policemen that the Defendant had instructed them not to allow me or anyone on to the premises and not to accept any document from me for him.....

From noon on Tuesday August 14, 1990, until his departure from the State on Friday August 17, 1990 I never saw the Defendant at his work place at the High Court to inform him that I had a writ to serve on him."

London also referred to a letter dated August 15, 1990 written to the Registrar of the High Court by Dr. Gonsalves in respect of service of the writ and he exhibited a copy of the letter with his affidavit.

ATTORNEY GENERAL AS AMICUS CURIAE/INTERVENER

When the summons came up for hearing in Chambers the Attorney General appeared in person as amicus curiae and he stated that the Solicitor General Mr. O. Ramjeet was with him. Dr. Gonsalves applied for an adjournment till after the Criminal Assizes in which he was engaged. The Attorney General asked to address the Court as amicus curiae and was permitted so to do, The learned Attorney General submitted that the suit had been the subject of overwhelming publicity and he produced three issues of the local newspapers to illustrate that. He then requested that in view of that he was requesting the Court to exercise its jurisdiction pursuant to Order 32 Rule 10(1) and transfer the matter to open court. The learned Attorney General stated that the suit involves one of Her Majesty's Counsel, the only one in St. Vincent and the Grenadines suing the

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only Judge in St. Vincent and the Grenadines for libel and slander and this was unprecedented. He asked that the matter be adjourned to open court. The Attorney General also submitted that since there was one court stretching from Tortola in the North to St. Vincent in the South this was not a fit application for service out of the jurisdiction. He referred to Order 1 Rule 6 of the Rules of Court.

After reply from Dr. Gonsalves I intimated that if the matter had been subject to overwhelming publicity I did not see why we should give it more publicity. Order 32 Rule 10(1) is as follows:

> "The judge in Chambers may direct that any summons, application or appeal shall be heard in Court or shall be adjourned into Court to be so heard if he considers that by reason of its importance or for any other reason it should be so heard."

I ruled that the matter would not be adjourned to open Court and I also questioned the manner of substituted service which the Plaintiff was asking for in his affidavit. The matter was adjourned to October 19, 1990 but on that day the Attorney General was reported to be unwell and it was further adjourned to October 30, 1990.

At the resumed hearing the Attorney General stated that he was applying to the Court to be Intervener in the matter and he read a passage from the book "The Attorney General, Politics and the Public Interest" by J.W. Edwards 1984 pages 153-158 to illustrate the difference between his role as Amicus Curiae and Intervener. I think it would be useful to quote a portion of the book. At pages 153-154 the learned author states:-

> "The role of an amicus curiae or friend of the Court is by no means restricted to participation by the Law Officers of the Crown, it being open to the presiding Judge in any case to grant leave to a person, not necessarily a member of the Bar who is not engaged in the case being litigated, to assist the Court in the capacity of an adviser by drawing to its attention legal authorities that might otherwise be overlooked. By its very definition an amicus curiae is not an adversary in the proceedings. In sharp contrast, where

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> standing is granted to a person who is accepted as an intervener in the proceedings before the Court, the intervener becomes a party to these proceedings in the fullest sense of the word. When the Attorney General sees fit to intervene in his official capacity he is entitled to tender evidence, cross-examine witnesses, and appeal the findings in the same manner as if there were an original party to the suit."

Later in the text Sir Jocelyn Simon is quoted as saying: "In my view the Attorney General has a right of intervention in a private suit whenever it may affect the prerogatives of the Crown, including its relations with foreign states; and he certainly has in such circumstances a locus standi at the invitation of the Court or with the leave of the Court. I think the Attorney General also has the right of intervention at the invitation or permission of the Court where the suit raises any question of public policy on which the executive may have a view which it may desire to bring to the notice of the Court."

Learned Counsel for the Plaintiff submitted that his understanding of the law is that if the Attorney General is intervener he should file documents. The Attorney General replied that this would be the case if the matter proceeds after the day's hearing.

I stated that I would for the time put aside the question whether this was a suitable case for the intervention by the Attorney General in accordance with Sir Jocelyn Simon's view but would allow the Attorney General to intervene even at this stage to hear all that had to be said about the summons after which I would decide accordingly.

SUBMISSIONS OF COUNSEL FOR PLAINTIFF

Dr. Gonsalves at this stage abandoned the part of his application which requested service of notice of the writ out of the jurisdiction having regard to the earlier submission of the Attorney General. He submitted that the summons was a simple application for substituted service based on the affidavits of Sylvester and London. Dr. Gonsalves seems to have taken an earlier hint from the Court for he now submits that the method of substituted service need not be by publication in

newspapers but could be effected by a letter to the Registrar in St. Christopher-Nevis.

SUBMISSIONS OF ATTORNEY GENERAL

Mr. Campbell submitted that the Plaintiff had two fundamental hurdles. Firstly, he submitted, that to come within the ambit of Order 50 Rule 4 the Plaintiff must show it was impracticable to serve the Defendant where he currently resides and not only where he resided before. He submitted that judicial notice had to be taken that the Defendant is a High Court Judge and his residence was in St. Christopher-Nevis which is within the jurisdiction of the Court. As authority for judicial notice he cited - THE ENGLISH AND EMPIRE DIGEST (~~RULE~~ BAND) VOL. 22 PAGE 137 PARAGRAPH 1209 CRAVEN V. SMITH (1869) L.R. 4 EXCL. 146; AND PHIPSON ON EVIDENCE, 13TH EDITION, PARAGRAPH 2 - 14.

The Attorney General submitted that even if the Plaintiff is right that it was impracticable to serve the Defendant in St. Vincent and the Grenadines he has to show also that it is impracticable to serve him in St. Christopher-Nevis.

Secondly, he stated that his main submission is that the writ has not complied with the mandatory provisions of the Public Officers' Protection Act No. 4 of 1981 as amended by Act No. 1 of 1988. I shall here set out what section 3 of the Act states:

"No action shall be brought against any public officer for anything done or purporting to be done in the exercise of his office unless and until two calendar months after notice in writing shall have been delivered to him or left at his usual place of residence with some person there, by the party who intends to bring such action or his attorney or agent, and in every such notice shall be clearly and explicitly stated:

(a) the cause of action;

(b) the name and address of the person who is bringing the action; and

(c) the name and address of his attorney or agent, if any

and no evidence of the cause of such action shall be produced, except in so far as to cause of action has been spelt out in the notice."

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He submitted that it is clear that the Defendant is a Public Officer and was so on March 11, 1987. He stated further that judicial notice must also be taken of the fact that L.L. Robotham is the Chief Justice and in this respect he cited WATSON V. HAY (1847) 3 Kerr, 559 found at paragraph 696 of Page 138 of the said volume 22 of the English and Empire Digest referred to above.

He then submitted: "Since we have a communication from a Judge of the High Court to the Chief Justice the Court has no choice but to presume that a letter written by one public officer to his superior must fall within the ambit of the Public Officers' Protection Act." He also referred to sections 4, 5 and 11 of the Act. He further submitted that the Plaintiff did not put anything in the record to show that the communication in issue was a private matter and he fell into trouble by not putting the relevant portions of the letter in the writ that would put the case outside of the protection afforded by section 3. Counsel submitted finally that the Plaintiff could not rely on the self serving statement in the last paragraph of the letter by his Counsel to the Registrar which may very well be hear-say evidence.

REPLY BY COUNSEL FOR PLAINTIFF

Counsel observed that in respect of affidavits by virtue of Order 41 Rule 5(2), the hear-say rule is waived. He submitted further that a Plaintiff has not got to show that a person is consistently evading a writ before he applies for substituted service. He referred to Order 65 of the 1988 White Book, Page 1045 Paragraph 65/4/9 captioned: "Where person to be served is usually resident within the jurisdiction."

Counsel stated that as regards the Attorney General's main submission it is not every action done by a public officer that requires you to serve him with notice. Counsel submitted that the Attorney General had jumped the gun by assuming his complaint was a Section 3 action and he had to wait for the Statement of Claim to see if the action fell within the mandatory provisions of Section 3 of the Public Officers' Protection Act.

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CONCLUSIONS

I want first of all to deal with the Plaintiff's writ for there was a suggestion that it was defective. The Plaintiff's writ is generally indorsed and is as follows:

"The Plaintiff's claim is for damages for libel contained in a type written letter dated 11th March, 1987 and signed by the Defendant and addressed to the Honourable Mr. L.L. Robotham."

In "The Civil Court in Action" by David Barnard, Second Edition, Page 5 the learned author writes: "A writ is a formal document issued under the authority of the Lord Chancellor telling a defendant that a claim has been brought against him and that he must deliver an acknowledgement of service, i.e. place himself on the court record, or judgment will be given against him. Every writ must have written on the back, a statement, usually only in general terms, of the nature of the case against the defendant."

... Forms. Second Edition, Volume 1, 1984 issue at

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The learned Attorney General has submitted in fact that even if it is true the Plaintiff found it impracticable to serve the Defendant in St. Vincent and the Grenadines he must still attempt to serve him in St. Christopher-Nevis. I cannot entertain such a submission.

The main submission resting as it does on the Public Officers' Protection Act appears to be a matter of substance to be argued at the trial, i.e., whether the thing done or purporting to be done was in the exercise of the office of the Defendant.

In suit 211 of 1987 between Windward Properties Ltd. and Saint Vincent Horticulture Ltd. as Plaintiff and THE ATTORNEY GENERAL OF ST. VINCENT AND THE GRENADINES AND OTHERS as Defendants decided on October 19, 1987 at first instant, learned Queen's Counsel for the Defendants in making a submission on Section 3 of the Public Officers' Protection Act referred to the fact that the Plaintiff's writ was not generally indorsed and that they had set out their full claim in their writ. Counsel was in effect implying if the writ was generally indorsed the plaintiffs could yet in their Statement of Claim show the non-application of Section 3. The Attorney General cannot make a similar submission in this case for it is clear that the writ is generally indorsed. See pages 6, 13 and 14 of the judgment. The decision was affirmed by the Court of Appeal.

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But the force of the submission of the learned Attorney General is that there is a presumption that when a public officer is communicating to his superior the communication must fall within the ambit of the Public Officers' Protection Act. Phipson on the Law of Evidence, 13th Edition Pages 4-5 speak of presumptions of fact and presumptions of law. It cannot be doubted that the Attorney General must have been referring to a presumption of fact and not one of law. Phipson states:

"Presumptions of fact are inferences which the mind naturally and logically draws from given facts, irrespective of their legal effect. Not only are they always rebuttable, but the trier of fact may refuse to make the usual or natural inference notwithstanding that there is not rebutting evidence." I would hesitate to say that as soon as a Puisne Judge communicates to the Chief Justice it must naturally and logically be said to be a communication in the exercise of his office. But even if one could raise the communication to the level of a presumption it is a

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rebuttable presumption.

Exhibited with the affidavit of Dennis London is a letter written by Dr. Gonsalves to Mr. Oswald Jack, Registrar of the High Court of Justice of St. Vincent and the Grenadines. In that letter dated 15th August, 1990 Dr. Gonsalves was requesting the assistance of Mr. Jack in serving the writs against the Defendants. The letter speaks of writs for originally there was a writ for slander and one for libel. The former has since been withdrawn. The last paragraph of the letter is as follows:-

> "In all this please remember that you and Mr. Singh are officers of this Court. It is true that the writs involve private matters but each officer of the Court has an overriding obligation to ensure that the service of Court documents, including writs are facilitated."

The learned Attorney General has referred to this paragraph of the letter as self serving but the date of the letter is one day after the writ was filed and before the Attorney General made his first appearance in these proceedings on September 28, 1990.

In my view the affidavit of London with the exhibit comply with Order 41 Rules 5(2) and 11.

I reject the submission that the Plaintiff is required to show on his generally indorsed writ that the subject matter of the litigation falls outside the parameters of Section 3 of the Public Officers' Protection Act.

But I think there is a broader and more fundamental issue surfacing from these proceedings. I do not think a litigant should be lightly denied access to Her Majesty's Courts even though it may be thought that his complaint is unlikely to meet with the favour of the tribunal. He ought not to be shut out from approaching the judgement seat, but must have the opportunity to state his grievance and hear his complaint rejected.

I would just observe the passage by the illustrious Lord Denning in GOURIET V. UNION OF POST OFFICERS 1977 1QB 729, 761-762 and placed on the cover page of his latest book LANDMARKS IN THE LAW:-

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"To every subject in this land, no matter how powerful, I would use Thomas Fuller's words over 300 years ago: 'Be you never so high, the law is above you."

I grant the application and order that the Defendant be served by prepaid registered mail and that he make appearance to the writ within 28 days of service upon him.

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A.N.J. MATTHEW
PUISNE JUDGE