ST.VINCENT AND THE GRENADINES

IN THE COURT OF APPEAL

CIVIL APPEAL NO.8 OF1995

BETWEEN

ST.VINCENT CO-OPERATIVE BANK LTD

Appellant

and

BONADIE LIMITED

Respondent

Before:
The Rt. Hon. Sir Vincent Floissac
The Hon. Mr. C.M. Dennis Byron
The Hon. Mr.Albert Matthew

Appearances:
Mr. A. Cummings for the Appellant
Mr. O. Sylvester, Q.C. and Ms. N. Sylvester for the Respondent

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1996: July 23;
September 16.

JUDGMENT

BYRON J.A.

This is an appeal against the decision of Joseph J. delivered on 16th March, 1995 in which she declared that the goods of Vernon Wilson, distrained in suit No. 74 of 1988 cannot be seized in execution of suit No. 208 of 1987 unless the judgment creditor pays the landlord the arrears of rent not exceeding one year's rent and consequently ordered the appellant to pay to the respondent the sum of $2400.00 being rental due for six months and costs incurred in removing the goods to the Court House together with the respondent's taxed costs of the proceedings in suit 74 of 1988 and in these proceedings.

THE APPEAL

The appellant contends that the order should be set aside because:

[a] the proceedings ought to have been deemed to have been abandoned under Order 34 rule 11 [l][a], and

[b] the judgment conflicts with a prior order for the sale of the same goods for the benefit of the appellant made in suit 237 of 1988 on 20th May, 1988.

BACKGROUND

The parties to this appeal have been seeking to determine the proper distribution of the proceeds of sale of the goods of Vernon Wilson which have been in the custody of the court since 24th February 1988. The matter has had a long history and four orders including the one under appeal have already been made.

On 17th July, 1987 the appellant issued a writ of fieri facias in suit 208 of 1987 to levy execution against the goods of Vernon Wilson pursuant to the unsatisfied judgment against him for the sum of $10,964,72 with interest.

On 24th February, 1988 pursuant to suit No.74 of 1988, the respondent distrained against the goods of the said Vernon Wilson for six months arrears of rent in the sum of $2400.00 and certain goods were taken into custody of the court. On 25th March 1988 Singh J. made an order for the sale of the said goods to satisfy the rent and taxed costs.

While the goods were in the custody of the Court the appellant instituted proceedings in suit 237 of 1988 supported by an affidavit which deposed inter alia;

"4 There appeared in the Vincentian newspaper on the 6th May, 1988, a Notice listing several chattels of the Defendant, Vernon Wilson for sale pursuant to a writ of Fieri Facias issued on the 25th March,1988 in suit 74 of 1988. The said notice is exhibited herewith and marked "C".

5. The said Writ of Fieri Facias issued in Suit 1987 No.20 being first in time should have been given precedence over the Writ of Fieri Facias in Suit 74 of 1988."

On 20th May, 1988, Singh J. made an ex parte order in suit 237 of 1988 that the proceeds of sale derived from the sale of

chattels owned by Vernon Wilson and seized by the Court be applied in liquidation of the judgment debt in suit 208 of 1987.

In suit No 280 of 1988 the respondent applied by Originating Summons for relief similar to the order now under appeal, but on 30th November, 1990 Matthew J. deemed the proceedings abandoned under order 34 rule 11[1][a].

The instant proceedings were commenced by originating summons with supporting affidavit on 5th February 1991. The appellants entered an appearance on 20th February 1991. The matter came on for hearing on 19th January 1995. The appellant submitted that the judgment of Matthew J. in 280 of 1988 should have been followed and the proceedings deemed abandoned.

ORDER 34

> Order 34 rule 11[1][a] provides:
> "A cause or matter shall be deemed altogether abandoned and incapable of being revived if prior to the request for hearing or consent to judgement or the obtaining of judgment -
>
> [a] any party has failed to take any proceedings or file any document therein for one year from the date of the last proceeding had or the filing of the last document therein,"

Counsel for the appellant contends that the cause or matter should be deemed altogether abandoned by virtue of this rule. Counsel for the respondent contends, in rebuttal, that Order 34 does not apply to originating summons procedure which is regulated by Order 28 of the Rules of the Supreme Court 1970.

Order 28 rule 2 deals with fixing the time for attendance of the parties before the court. In essence the appointment is obtained by either party at any time after an appearance has been entered; or by the plaintiff at anytime after the time limited for appearance has passed; or in the case of an ex parse originating summons, not requiring an appearance, at any time. The appointment may be obtained on an oral application.

The date of hearing is controlled by the exigencies of the court's calendar and not by the parties. Applications to obtain a date for hearing are the only proceedings that a party can take. Whether such applications were made, or made within a

reasonable time is a justiciable issue requiting proof. The requisite jurisdiction is conferred by Order 28 rule 10 which specially empowers the court, if it is satisfied that the plaintiff in a cause or matter conducted as an originating summons is not prosecuting the proceedings with due dispatch, to dismiss the case or make such other order as may be just. This rule confers a discretionary power to dismiss which contrasts with the non - discretionary obligation to determine proceedings prescribed by order 34 rule 11. One reason for this difference is that Order 28 is modeled on the English rules of civil procedure where, in general, the court exercises discretionary powers to strike out proceedings for inexcusable delays in prosecution, delibrate failure to comply with peremptory orders of the court or failure to comply with the requirements of certain rules of the court. Order 34 rule 11, on the other hand and contrary to the English rules of civil procedure, imposes the mandatory sanction of terminating the proceedings for specified delay.

This contrast was pointed out by Lord Steyn delivering the judgement of the Privy Council in the St. Vincent case of **Lewis v St. Hillaire and Baptiste** [1995] 48 WIR 134. After discussing the contextual scene of Order 34 rule 11[1][a] against the background of the rules he said at page 146:

> "But it is plain that the legislature considered that this battery of discretional powers was insufficient to combat the mischief of delays in civil litigation. That calculation is understandable since apart perhaps from striking out for deliberate disobedience of court orders, the need to prove prejudice has caused great practical difficulties in striking out cases for want of prosecution. The Legislature accordingly enacted the special provisions of Order 34 rule 11, which are not in anyway modeled on English rules."

The enactment of the special jurisdiction in Order 28 rule 10 would indicate that Order 34 was not intended to apply to the originating summons procedure. This view is supported by the terms of Order 34 itself. It is based on the concept that when a cause or matter becomes ripe for hearing, after the pleadings have been closed, it should be set down for hearing expeditiously. Delay is controlled by deeming the cause or matter abandoned for delay in taking proceedings or filing of documents before, or in filing a

request for hearing after, the pleadings are closed. The concept of being ripe for hearing, and the filing of documents such as pleadings and requests for hearing are completely inapplicable to originating summons procedure.

In my view the matter is settled by order 28 rule 11 which states:

> "Order 34, rule 12, shall apply in relation to an action begun by originating summons as it applies in relation to an action begun by writ."

It is a legimate aid to construction to conclude that if the rule making authority had intended to make the whole of order 34, and not just rule 12, apply to the originating summons process it would have clearly said so.

In my judgment the jurisdiction to deal with delay in prosecuting a cause or matter conducted under the originating summons procedure is that conferred by Order 28 rule 10 and the provisions of Order 34 are inapplicable to such proceedings.

THE INCONSISTENT ORDERS

Fieri facias in suit 207 of 87

Counsel for the appellant submitted that the issue of the writ of fieri facias in suit 207 of 1987 preceded the order for sale in suit No 74 of 1988 and therefore had priority over the said order.

Unfortunately I am unable to agree. The learning indicates that the issue of the writ of fieri facias does no more that give the Sheriff a legal right to seize the goods of the judgment debtor. The matter is explained in Halsbury's Laws of England, 4th edition Volume 17 at paragraph 468:

> **"How goods are "bound" by the writ.** The writ is said to "bind" the property in the goods of the judgment debtor in the bailiwick. When it is said that the goods or the property in them, are "bound", what is meant is that the sheriff acquires a legal right to seize the goods. Notwithstanding the binding effect of the writ, the ownership continues in the judgment debtor until sale, and he can legally, until seizure, deal with the goods himself or, until sale, pass the property to others. Any transfer or assignment of the goods after the date at which the binding power of the writ operates will [except in the cases of a purchaser in market overt or of a purchaser in good faith for value without notice] be subject to the sheriff's right to follow up and seize the goods under the writ."

Order of 25th March 1988 in suit 74 of 88

Suit 74 of 88 was issued and prosecuted under The Rent Recovery Act [Cap. 94]. Section 4[1] provides:

> "Any landlord to whom rent is due may proceed for recovery of the same by making an affidavit, in Form 1 in the First Schedule, before a judge, the registrar or a magistrate, as the case may be."

The seizure of the goods of Wilson and the order made on 25th March 1988 were effected under powers conferred by section 7 which provides:

> [1] At the time of making such service, the officer making the same shall, together with the landlord, make a true inventory in duplicate of all the goods liable to attachment for rent or of such part thereof as is sufficient to secure payment of the rent and costs. Such duplicate inventories shall be signed by the officer and one shall be kept and returned by him and the other shall be delivered to the landlord.
>
> [2] Such goods shall then and thereafter be considered as attached for rent, and shall be deemed to be in custody of the Court or magistrate, and the officer, or any person authorized by him, may remain in possession of such goods until an order be made by the Court or magistrate for their disposal. Such goods may be impounded and kept on any part of the demised premises or if necessary in any fit place as near thereto as can be procured for the purpose."

Suit 237 of 88 and order of 20th may1988.

The order made on 20th May 1988, in suit 237 of 1988 was inconsistent with the prior order made on 25th March, 1987. The later order sought to resolve the competing claims between judgment creditor and landlord in favour of the judgment creditor.

This solution, however, seems to be in conflict with The Rent Recovery Act, [Ch. 94] Section 18 which provides:

> "No goods liable to attachment for rent, shall be liable to be seized in execution, unless the plaintiff in such execution shall, before removal of the goods from the demised premises, pay to the landlord so much, not exceeding one year's rent, as is due to him for rent at the time of seizure of the goods, and if the rent so due shall exceed one year's rent, the plaintiff in execution, and the seizing officer may levy

> and pay-to the plaintiff in execution as well the money so paid for rent as the money or money's levyable under the executions."

Section 18 is of great antiquity as it was copied from the English Landlord and Tenant Act, 1709 section 1. This provision has been interpreted as having the effect of impounding the tenant's goods for the landlord's benefit to the extent that they could not be removed from the rented premises until he was paid the arrears of up to one year's rent. To this extent section 18 gives the landlord a right to have them preserved as a security for one years arrears of rent due to him. The effect of this is that the appellant could not have sold the goods without first paying the respondent the arrears of six months rent which was due to him This is well settled law and the practice which has been employed to give effect to the rights of the landlord is described in the case of **Re Mackenzie, ex parse Sheriff of Hertfordshire** [1899] 19 QBD 563 by Lindley M.R. at 575:

> "Hence it became the practice for the Sheriff to sell and pay the landlord; and it was held that, if the sheriff sold without paying the landlord, the landlord instead of bringing an action against the sheriff on the statute, might apply to the Court for and obtain a rule - that is, an order for payment out of the proceeds of sale: *Henchett v Kimpson and Arnitt v* Gameff. This mode of procedure became the common practice; and if the sheriff had notice of he landlords claim before the proceeds of sale were parted with, the landlord could, if in time, obtain payment out of the proceeds: *Yates v Rutledge;* and if too late, he could sue the sheriff for removing the goods without paying him: *Andrews v Dixon.* The right of the landlord to be paid out of the proceeds of the sale thus became recognized and established where no bankruptcy intervened."

This principle operates to the extent that even if the sheriff had levied execution before the landlord had distrained for the arrears of rent, if given notice thereof, he must pay the landlord the arrears before selling the goods. Halsbury's Laws of England, 4th edition Volume 13 at paragraph 326 explains:

> **"Goods not to be sold after notice, until rent paid.** Where notice has been given to the sheriff by the landlord that rent is due, the sheriff should call upon the execution creditor to pay it, and should refuse to sell any goods until it is paid; even if there are goods upon the demised premises of a

value many times exceeding the amount of rent due, his duty is the same, and he should refuse to sell the smallest part of the goods until the claim of the landlord is satisfied. The landlord's claim must be paid without any deduction for the Sheriffs fees. The Sheriff is not bound to advance the money to pay the rent out of his own pocket. If the execution creditor declines to advance it the sheriff may refuse to sell; but if the Sheriff is willing to do so, he may sell, pay the landlord's rent and apply the surplus, if any, in satisfaction of the debt, and if there is no surplus may return nulla bona. When the goods on the premises are not sufficient to satisfy the rent lawfully demanded the sheriff should withdraw. When he withdraws the landlord can distrain for the whole rent.

It would seem, therefore, that the order of 20th May, 1988 in suit 237 of 1988 ought not to have been made as it contravened the provisions of section 18 of the Rent Recovery Act. In my judgment the law requires that the goods of Vernon Wilson be security for the arrears of six months rent due to the respondent and related costs as initially ordered in suit 74 of 1988. The order appealed against gives effect to the well established practice described by Lindley M.R. and is in accord with the provisions of the Rent Recovery Act. In these circumstances I affirm the order of Joseph J. and dismiss the appeal with costs.

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C.M. DENNIS BYRON
Justice of Appeal

I Concur.

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SIR VINCENT FLOISSAC
Chief Justice

I Concur

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ALBERT MATTHEW
Justice of Appeal [Ag.]