TORTOLA

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 2 OF 1998

[1] DANIEL MALONE
[2] NATHANIEL MALONE
[3] AMABELLE FRETT
[4] ESSIE STOUTT

Appellants

and

[1] LESLIE FRANKLYN MALONE
[2] GAD STANLEY MALONE
as administrators of the estate of
William Hamilton Malone,deceased

Respondents

Before:

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| The Hon. Mr. C.M.Dennis Byron | Chief Justice [Ag.] |
| The Hon. Mr. Satrohan Singh | Justice of Appeal |
| The Hon. Mr. Albert N.J. Matthew | Justice of Appeal [Ag.] |

Appearances:

Mr. J. Farara Q.C. and Miss A. Robinson
for the Appellants.
Mr. P. Webster for the Respondents

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1998: July 2;
September 14.

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JUDGMENT

MATTHEW J.A. [AG.]

This is an interlocutory appeal, with the leave of the judge, from a ruling of Moore J. on the admissibility of evidence during the hearing of two actions which were consolidated brought by the Respondents claiming a declaration that they are entitled to be

registered as joint proprietors with absolute title to two portions of land; to possession of the said lands; and asking for rectification of the land register.

The consolidated actions came up for trial on March 30, 1998 and after lengthy submissions on the first day Leslie Malone was called as the first witness for the Plaintiffs. During his examination in chief objection was taken by learned Counsel for the Defendants. After hearing lengthy submissions the learned Judge ruled in favour of learned Counsel for the Plaintiffs allowing him to lead the challenged evidence. Learned Counsel for the Defendants then intimated his instructions from his clients to appeal the negative ruling where upon the learned Judge then granted the required leave.

For the purpose of explaining the point in the appeal I think it is necessary to examine the pleadings to find out what were the issues between the parties.

First of all there were two actions, suit 79 of 1984 and suit 241 of 1992. They are identical and the issues are the same. The only reason for the two actions is because when the first action was filed service was effected only against the first Defendant. The other three Defendants were not served and it was necessary to institute a later but identical action against them. The defences, too, in both actions are the same.

In their statement of claim the Plaintiffs ask for a declaration that they are entitled to be registered as joint proprietors with absolute title to two parcels of land and to possession of the said parcels and for rectification of the register. They allege that in November of 1992 acting as administrators of their father's estate, they filed claim No. 126/3323 with the Land Adjudication Officer in respect of certain lands and that the said lands were also claimed

by Harold Smith as administrator of Charles Smith by way of claim No.137/3636 and by Daniel Malone by way of claim No. 32/846.

They allege also that the Land Adjudication Officer did not consider their claim but duly considered the other two claims and he made a decision in favour of Harold Smith and recorded the land as the property of Harold Smith and his brothers and sisters.

The Plaintiffs further allege that on February 16, 1973 they petitioned the Adjudication Officer under section 20 of the Land Adjudication Ordinance with regard to his failure or omission to consider their claim and as a result the Adjudication Officer as Dispute BVI/P/26/73 on February 23, 1973 made a decision which in effect cancelled the registration of the Smiths and had 4 acres of land adjudicated to the heirs of William Malone.

They allege that there was no appeal by Harold Smith or by any person against the decision of the Adjudication Officer but when in or about the month of November 1981 the Plaintiffs sought to partition and distribute the estate of William Hamilton Malone among his children they discovered that the entry in the registry of the said land shows the proprietor thereof as “The heirs of John Malone” and not as “The heirs of William Malone”.

It is on this basis that the Plaintiffs allege that the said entry had been made or obtained by fraud or mistake.

In their defences the Defendants say that the land comprising parcels 47 and 54 of Block 3139 B of the East Registration Section referred to in paragraph 1[a] of the statement of claim was claimed by Daniel Malone and in 1973 the said land was adjudicated to the heirs of John Malone deceased with absolute title.

They also say that the land comprising parcels 47 and 54 or any part thereof were never recorded in the name of Harold Smith and his brothers and sisters but have always been recorded in the name of the heirs of John Malone deceased. They further state that

neither the lands comprising parcels 47 and 54 nor any portion thereof were ever adjudicated to the heirs of William Malone.

Let me pause here for a while to assess the disparity in the pleadings of the parties. Both sides cannot be right and what could be necessary to determine the case is the facts to support the pleading, facts of registration which will speak for themselves.

In addition to the above the Defendants have pleaded the statute of limitations which in itself could be an answer to the Plaintiffs' action. The Defendants have also pleaded long possession and that is the aspect of the defence which has interfered with the progress of the trial.

The basis of the appeal is that the Respondents should not be allowed to lead evidence on the aspect of long possession, that is evidence that his father collected rents or doing anything in relation to the disputed land for that was not pleaded in their statement of claim or their reply in the later suit. Reliance is placed on Order 18 Rules 3 and 8; the Supreme Court Practice and DAVIES V NEW MERTON BOARD MILLS LTD 1956 1 AER 379. The Respondents concede that on the pleadings the Plaintiffs should not be allowed to lead evidence establishing a claim for possession but they submit that the ruling by the trial Judge went no further than is permitted by the rules of evidence and was within his discretion.

It is unnecessary to decide on the correctness of the Judge's ruling. What is before us for determination is a preliminary objection to the appeal which was taken by the Respondents.

In support of his preliminary objection learned Counsel for the Respondents submits that the Appellants do not have a right to appeal against the ruling of the Trial Judge. Counsel referred to section 30 of the West Indies Associated States [Supreme Court] Act Chapter 80 which states:

> "An appeal shall lie to the Court of Appeal, and the Court of Appeal shall have jurisdiction to hear and determine the appeal, from any judgment or order of the High Court in all civil proceedings."

Counsel's argument was that there is no appeal from a ruling.

Counsel referred also to ISAAC V NORMAN (1968) 8 WIR 324 at page 328 letter H to end of judgment.

Learned Counsel for the Appellants contended in reply that the Court does have jurisdiction and the circumstances of the case are exceptional. Counsel submitted that one of the effects of his appeal, if successful, is to shorten the proceedings in a trial which had just begun. Counsel referred to AMERICAN LIFE AND GENERAL INSURANCE CO. LTD V SUPER CHEM PRODUCTS LTD (1995) 51 WIR 298 and latter submitted under separate cover the English case FORSTER AND OTHERS V FRIEDLAND and Another Court of Appeal, November 10, 1992.

I think I can dispose of the objection to jurisdiction based on statute very quickly by reference to the interpretation section of the West Indies [Associated States Supreme Court Act] which states:

"Order" includes decision and rule.

The issue in Isaac v Norman was a motion to commit the appellant for contempt in disobeying the terms of an injunction. But the Court was experiencing some difficulty in proceeding because it was discovered that the whole of the original record of the proceedings had disappeared. Georges J. ordered a reconstruction of the record and the appellant appealed. The Court of Appeal in that case seems to have sanctioned the argument of Counsel for the Respondent that in a case where, during the hearing of proceedings, a judge gives a ruling on the admissibility of any matter tendered in evidence by a party it is manifestly not open to

the party who considers himself aggrieved by the judge's ruling to enter an appeal against it before judgment is given in the proceedings which are before the Court for adjudication.

But the crux of the decision in my view was that as the Order of the trial judge was in the nature of a Provisional Order and did not deprive either party of his right to contest at the hearing of the motion the admissibility of any document comprehended within the Order there was no right of appeal against it at that stage.

The circumstances of Forster resemble those in the present case for there on the second day of the trial the judge was asked to rule on whether certain tape recordings and the transcripts of them were admissible. The defendants contended that they were excluded by the "without prejudice" rule. The judge decided they did not come within the rule and were accordingly admissible. So he gave the necessary leave to appeal and pending the appeal the trial was adjourned. The Court of Appeal allowed the appeal. This case concerned a vendor's action to enforce an alleged oral statement of the sale of shares and it seems to me that without those tape recordings and transcripts the Plaintiffs would have been hard pressed to present a good case. It may well have been that the decision of the Court of Appeal was in effect to shorten the proceedings.

The most recent case of American Life is authority that the Court of Appeal has jurisdiction to hear interlocutory appeals in the course of a civil action, but the jurisdiction should only be exercised in exceptional circumstances. I am persuaded by that authority.

I have tried to indicate above the number of issues between the Parties in this case any one of which could be decisive one way or another and even on the question of long possession which gave rise to these proceedings one cannot say how the matter could be resolved.

I wish to restate the passage from Pleadings: Principles and Practice by Sir Jack Jacob and Iain Goldrem:

> "It is highly undesirable that there should be appeals to the Court of Appeal in the course of trials of actions. It is altogether better that matters of an interlocutory nature should work themselves out in the course of the trial without interlocutory recourse to the Court of Appeal before the facts have been completely determined and the trial has been concluded. The Civil Division of the Court of Appeal may hear appeals in the Course of the trial but only in exceptional circumstances. The reason is not just that it interrupts the trial, although that is usually a sufficient reason, but that if it became the practice to give leave to appeal in the course of a trial the Court of Appeal would soon be overwhelmed with appeals, many of which might prove academic: *E. McGarry (Electrical) v Burroughs Machines, 14th April 1986, CAT No 346"*

This matter may only be of academic interest if the Respondents are unsuccessful in the action. If they are successful, then the Appellants on appeal, may raise, the ruling of the Trial Judge as a ground of appeal to be heard and determined with the other grounds, if any, that may be filed. In my opinion there are no exceptional grounds that require the intervention of this Court at this time. I would therefore uphold the preliminary objection and dismiss the appeal with no order as to costs.

A.N.J. MATTHEW
Justice of Appeal [Ag.]

I Concur

C.M.D. BYRON
Chief Justice [Ag.]

I Concur

SATROHAN SINGH
Justice of Appeal