

ANTIGUA & BARBUDA

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 3 of 1991

BETWEEN: BARBUDA ENTERPRISES LIMITED - Appellant

and

THE ATTORNEY GENERAL OF ANTIGUA
& BARBUDA - Respondent

Before: The Honourable Sir Lascelles Robotham - Chief Justice
The Honourable Mr. Justice Moe
The Honourable Mr. Justice Byron

Appearances: Dr. F. Ramsahoye, S.C. and C. Derrick for the Appellant
L. Osborne for the Respondent

1991; June 17,
Nov. 25.

JUDGMENT

NOE, J.A.

This appeal is against a decision whereby a Judge of the High Court ordered to be struck out a notice for further directions filed by the appellant on the 8th June, 1989 in an action brought by the appellant against the respondent and four other defendants.

The respondent is the first-named of the five defendants against whom the appellant commenced action in Suit No. 353 of 1987. All defendants in the suit entered an appearance, but only the respondent filed a defence. A reply to that defence was filed on 19th January, 1988. A summons for directions in the action was issued on the 5th May, 1988 and on hearing of the application under that summons on the 27th May, 1988 it was ordered by consent:-

- (i) The appellant be at liberty to amend the Writ of Summons in the action as set out in the Order.
- (ii) The appellant be at liberty to enter Final Judgment against the Second, Third, Fourth and Fifth Defendants respectively for an injunction restraining them from entering or being upon the property subject to the lease granted on 24th February 1984 without consent of the appellant.
- (iii) The appellant be at liberty to enter Interlocutory Judgment against the Second, Third, Fourth and Fifth Defendants for:-

/ (a) Damages to.....

- (a) Damages to be assessed for trespass and/or mesne profits;
 - (b) Punitive and/or aggravated damages to be assessed;
 - (c) Interest to be assessed;
 - (d) Costs of the action to be taxed.
- (iv) The plaintiff and the defendants within 21 days to serve the defendants and plaintiff respectively with a list of documents in their possession.
 - (v) Inspection of documents to be within 14 days of date of service of list.

The appellant filed his list on 1st July, 1988 and served it on 4th July 1988. The respondent filed and served his on 5th August, 1988.

The appellant did not file a request for hearing of the action until the 30th March, 1989; then on the 8th June, 1989 he took out the Notice for further directions, subject-matter of this appeal and which sought the following orders, namely:-

- (1) That the plaintiff (appellant) have leave to serve on the first (respondent), Second, Third, Fourth and Fifth Defendants respectively the amended Writ of Summons in this action within fourteen days of the date of this Order.
- (11) Such further or other order as the justice of the case may require.

The learned Judge held that at the time the application for further directions was filed there was no pending action as far as the respondent was concerned. That the appellant's action against him was already deemed altogether abandoned and incapable of being revived, by virtue of the provisions of Order 34 of the Rules of the Supreme Court.

The first ground of appeal is that judgment in the action having been entered in interlocutory proceedings on the 27th May, 1989 against the Second, Third, Fourth and Fifth defendants the High Court erred in applying the provisions of Order 34 Rule 11 of the Rules of the Supreme Court to declare the action abandoned against the respondent.

/Order 34....

Order 34 Rule 11 provides:-

11. - (1) A cause or matter shall be deemed altogether abandoned and incapable of being revived if prior to the filing of a request for hearing or consent to judgment or the obtaining of judgment -

(a) any party has failed to take any proceeding or file any document therein for one year from the date of the last proceeding had or the filing of the last document therein; or

(b) no application for or consent to revivor has been filed within six months after the cause or matter has been deemed deserted; or

(c) if the cause or matter has not, on the request of any party been entered on the Hearing List within six months from the date of any order of revivor.

(2) The instituting of a cause or matter which has been deemed altogether abandoned shall be of no effect in interrupting any period of limitation.

Counsel's contention is that on entry of the judgment under the Order of the 27th May, 1988, Ord. 34 r. 11 no longer was applicable to the respondent. That in this case the rule applies to the defendants, i.e. to them jointly, or to none at all. He sought to buttress this contention by the further argument that the respondent's success on this motion would result in the judgment already entered against the other parties to the suit being knocked out. None of these contentions is acceptable.

Order 34 Rule 11 stipulates a particular status for a cause or matter if certain facts and circumstances pertain. The facts and circumstances relating to a particular defendant may differ from those of another or other defendants albeit they are all defendants in the same suit. Whether Order 34 Rule 11 can apply in relation to any defendant will depend on whether the facts and circumstances relating to that defendant are such as admit of its applicability.

In this case where there were five defendants, the respondent being the first-named, on the obtaining of judgment against the Second, Third, Fourth and Fifth defendants the circumstances relating to those defendants made Order 34 Rule 11 no longer of any relevance to them. But the obtaining of judgment against those defendants did not ipso facto keep alive the cause against the first-named defendant, the respondent.

/What the....

What the respondent says is that Order 34 Rule 11(1)(b) operates in his favour. What facts and circumstances does the respondent point to? There was the summons for directions issued on 5th May, 1988, the application under which was heard on 27th May, 1988 and an order made. By virtue of Order 34 Rule 3(2) "if there are any interlocutory proceedings pending, a cause or matter shall not become ripe for hearing until the determination of such proceedings unless the Court otherwise orders". Thus with no judgment obtained against the respondent, the matter became ripe for hearing in relation to him on the 27th May, 1988.

The appellant would be expected to comply with the Rules of the Supreme Court as regards the steps and proceedings to be taken in relation to the respondent. Order 34 Rule 1(1) provides:-

1. - (1) When a cause or matter has become ripe for hearing, it shall be the duty of the plaintiff or other party in the position of plaintiff to file, within six weeks thereafter, a request that it be set down for trial.

Consequently it was incumbent upon the appellant to file a request for hearing of the matter against the respondent by the 14th July, 1988.

Now Order 34 Rule 7 states:

7. - (1) A cause or matter shall be deemed deserted if no request for setting down is filed within six months after the expiration of the period fixed for the filing of such request.

(2) When an action has been deemed deserted, no further proceedings may be taken therein, unless and until an order for revivor has been made by the Court on the application of any party or a consent to revivor and a request for setting down signed by all the parties thereto have been filed.

(3) No order for or consent to revivor shall avail as an advantage to the plaintiff in respect of the period of limitation applicable to the cause of action.

I regard it to be settled law that by that provision an order for revivor is necessary where no proceeding has been taken for six months. Cases in which the rule has been so applied are:

Raghuveeran v The Country Authority of Unity etc.
(1954 B.G.L.R. 56
Daily Chronicle v Munroe (1960) L.R.B.C. 267

By the provisions of Order 34 Rule 7(1) the action against the respondent was rendered deserted on the 14th January, 1989. In the language of Fraser J. in Daily Chronicle Ltd. v Munroe (supra) the action against the respondent had now moved into the category of actions on the way to abandonment. Therefore any proceedings taken after the 14th January, 1989 would be a nullity unless an order for

/revivor was...

revivor was obtained or there was consent to revivor and a request for hearing by the parties filed.

No order for revivor was obtained nor was there any consent to revivor. It is evident therefore that the request for hearing by the appellant on the 30th March, 1989 was of no effect. Again the notice for further directions taken out on the 8th June, 1989 was also a nullity. After the action was rendered deserted on 14th January, 1989 then by the 14th July, 1989 when six months had elapsed without an order for revivor being made or consented to Order 34 Rule 11(1) (b) became operative and the action against the respondent had become abandoned and incapable of being revived.

There were two other grounds of appeal. The first was that if Order 34 Rule 11 was applicable to the case, the filing of a request for hearing out of time was an irregularity in process within Order 2 of the Rules of the Supreme Court which the respondent did not seek to set aside promptly or at all. The rules on which Counsel relied are as follows:-

Order 2 Rule 1:

"1. (1) Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of anything done or left undone, been a failure to comply with the requirements of these or any other rules of court, whether in respect of time, place, manner, form or content or in any other respect, the failure shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order therein.

(2) Subject to paragraph (3), the Court may, on the ground that there has been such a failure as is mentioned in paragraph (1), and on such terms as to costs or otherwise as it thinks just, set aside either wholly or in part the proceedings in which the failure occurred, any step taken in those proceedings or any document, judgment or order therein or exercise its powers under these Rules to allow such amendments (if any) to be made and to make such order (if any) dealing with the proceedings generally as it thinks fit.

Order 2 Rule 2:

"2. (1) An application to set aside for irregularity any proceedings, any step taken in any proceedings, or any document, judgment or order therein shall not be allowed unless it is made within a reasonable time and before the party applying has taken any fresh step after becoming aware of the irregularity.

It was contended that the High Court erred in holding that Order 2 was superseded by Order 34 Rules 7 and 11 and that the Court had no obligation or discretion to permit the proceedings to continue against /the respondent.....

the respondent. I think my finding above that any proceeding in respect of the respondent taken after the 14th January, 1989 without an order for revivor or consent to revivor was a nullity takes care of this ground of appeal. There was no irregularity which the Court could consider for setting aside or accommodating.

The other ground of appeal^{was} that the High Court erred in holding that Order 3 Rule 6 and Order 34 Rule 11 were not in conflict in so far as Order 34 Rule 11 is construed to mean that an action was necessarily defeated in the circumstances set out in Order 34 rule 11.

Order 3 Rule 6 states:

"6. Where a year or more has elapsed since the last proceeding in a cause or matter, the party who desires to proceed must give to every other party not less than one month's notice of his intention to proceed.

A summons on which no order was made is not a proceeding for the purpose of this rule."

Dr. Ramsahoye's contention is that Order 3 Rule 6 contemplates that an action is not to fail merely because nothing has happened for one year. That although Order 34 Rule 11 would appear to be a harsh rule it stands side by side with Order 3 Rule 6 and must be reconciled with it. Order 34 Rule 11 must be read in the light of Orders 2 and 3.

As I see it, Order 3 rule 6 places an obligation on a party to give notice to other parties of his intention to proceed after there has been a year's delay in a cause or matter. If he does, he may very well alert the other parties that there are circumstances relating to the matter which are in their favour. If he does not, he will have to abide by the consequences of failing to obey the stipulation set out in the rule. But in my view Order 3 Rule 6 does not apply in the circumstances of this case. The appellant was not seeking to proceed after a year or more had elapsed since the last proceeding in the matter. Abandonment arose in one of the ways provided under Order 34 Rule 11 and the action having been deemed abandoned cannot be saved by an application of rules not relevant to the circumstances of the case.

For the reasons stated, I would uphold the decision of the learned trial Judge and dismiss the appeal with costs to the respondent.

G.C.R. MOE,
Justice of Appeal

/L.L.....

L.L. ROBOTHAM

C.M.D. BYRON,
Justice of Appeal