Judgment Book

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JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 22 of 1982

BEFORE: THE HONOURABLE MR. JUSTICE KERR, J.A.
THE HONOURABLE MR. JUSTICE CAREY, J.A.
THE HONOURABLE MR. JUSTICE ROSS, J.A.

BETWEEN GEORGE ANTONIO SALMON PLAINTIFF/APPELLANT

AND AUBREY SIMPSON HINDS DEFENDANT/RESPONDENT

Mrs. P. Benka-Coker for Salmon.
Norman Wright for Hinds.

27th, 28th, 29th October; 19th November, 1982

CAREY, J.A.:

This appeal raises firstly as a preliminary issue, a matter of procedure whether an order dismissing a motion for judgment is within the ambit of the prohibition contained in sec. 11 (1)(b) of the Judicature (Appellate Jurisdiction) Act which provides as follows:

"11. - (1) No appeal shall lie -

(b) from an order of a Judge giving unconditional leave to defend an action;"

secondly, as a matter of substance whether in circumstances where the defence did not by their pleadings traverse allegations of fact in a statement of claim, the plaintiff was entitled to judgment on the pleadings and thirdly, as a side wind, so to speak, whether such an order as made by the learned judge below constituted an interlocutory order in respect of which leave was required.

With respect to the last point, this conditional restriction on appeals to this court from the Supreme Court was not raised by either of the parties, but by the court itself, regrettably at a late stage of the proceedings when the substantive appeal was well launched and to be precise, after the appellant's counsel had completed her arguments.

I entertain not the slightest doubt that this order is other than an interlocutory order. Whichever of the tests suggested in the cases, one cares to apply, the status of these parties, has not been finally determined. If the order is valid, the action to determine the parties' rights proceeds to finality. In Bozson v. Altrincham U.D.C. [1903] 1 K.B. 547 at p. 548, Lord Alverstone C.J. put forward a test. He said this:

> "Does the judgment or order, as made finally dispose of the rights of the parties? If it does, then I think it ought to be treated as a final order; but if it does not, it is then, in my opinion, an interlocutory order."

On the basis of this test, there can be little doubt but that the order dismissing the motion for judgment, far from finally disposing of the rights of the parties, achieved a result, which left the parties' rights unresolved and to be disposed of at another hearing.

Another test suggested for distinguishing between final and interlocutory orders is to be found in Salaman v. Warner & Ors. (1891) 1 Q.B. 734 viz. that an order is an interlocutory order unless it is made on an application of such a character that whatever order had been made thereon must finally have disposed of the matter in dispute. In this test, the focus is on the nature of the proceedings. But the weight of authority supports the test which regards the nature of the order rather than the nature of proceedings. As an example of final orders, an order on motion for judgment on admissions in pleadings was held to be a final order. See Attorney General v. G. E. Ry. Co. (1879) 48 L.J. Ch. 428. But I suggest that even on this latter test, such an order remains, a final order. A refusal of such an order on motion for judgment, even on that test remains, an interlocutory order for the reason that if it stands, it does not finally determine the matter in litigation. There is no doubt therefore that this order refusing the motion was an interlocutory order which required the leave of the judge to fix this court with jurisdiction.

It should be noted that the Court of Appeal in England has heard appeals without deciding whether the order appealed from fell into one or other of the categories of final or interlocutory. In Re Holland S.S. Co. & Bristol Steam Navigation Co. (1906) 95 L.T. 769, Collins M.R. said this:

> "I think, however, that in its present shape this is a final and not an interlocutory appeal; but it is not necessary to decide that point. No appeal lies and therefore the appeal must be dismissed."

Of significance, is the fact that the learned Master of the Rolls voiced his opinion that the order appealed from, was a final order. Neither of the other Lords Justices referred to this particular point in the note of their judgments as appears in the Law Times Reports and it may well be that they too considered the order final, and not interlocutory.

In Re Emmet's Estate, Emmet v. Emmet (1880) 13 Ch. D. 484, the appeal came on for hearing before the Court of Appeal among appeals from orders on interlocutory motion. It was plain that the appellant had misconceived the nature of the order. Jessel M.R. made a ruling on behalf of the court that "this is a final order, and the appeal ought not to have come "on among appeals from orders on interlocutory motions, but "as you are here, we will hear you." The orders in both these cases, it should be noted, were final orders in respect of which, no leave was required. Counsel was quite unable to point us to a case in which the court proceeded to hear the merits, where the order appealed from was interlocutory and consequently required leave to appeal. The result is that I derive no assistance from these cases.

Rule 22(4) of the Court of Appeal Rules provides as follows:

> "Wherever under the provisions of the law or of these Rules an application may be made either to the Court below or to the Court, it shall be made in the first instance to the Court below."

There is no power in these Rules to deal with non-compliance with the provisions of the Rules, similar to sec. 678 of the Judicature (Civil Procedure Code) Law, which enacts:

> "Non-compliance with any of the provisions of this Law shall not render the proceedings in any action void unless the Court shall so direct; but such proceedings may be set aside either wholly or in part, as irregular or amended or otherwise dealt with in such manner, and upon such terms as the Court shall think fit."

I am of opinion therefore that no leave having been obtained from the judge below, this court cannot now give such leave and there is no jurisdiction to entertain the appeal.

It is unnecessary to consider the preliminary point whether the effect of the order of Parnell J. was an unconditional leave to defend. I cannot help remarking upon the irony of the situation where the appellant's complaint is on a point of procedure and this appeal is arrested on another point of procedure. If there be a moral, it is that appellants must first put their tackle in order, before embarking upon the oft perilous appellate seas. But the appellant need entertain no sense of grievance because he will have his day in court below where the merits of the case will undoubtedly be carefully and throughly gone into. I would accordingly dismiss the appeal with costs.

ROSS, J.A.:

I agree.

KERR, J.A.:

I concur.