IN THE SEYCHELLES COURT OF APPEAL

Civil Appeal No.14 of 1991

Farm Agriculture Export (Pty) Ltd. APPELLANT

versus

Walter Larue RESPONDENT

Boule for appellant
Georges for respondent

Judgment of Mustafa P.

Farm Agriculture Export (Pty) Ltd (the appellant herein) had filed a suit against Walter Larue (the respondent herein) in or about 1986 claiming a sum of money as due and owing in respect of goods sold and delivered. Larue Glass Works Ltd of which company Walter Larue was either the sole or major shareholder, in return filed a claim against Farm Agriculture Export (Pty) Ltd for a refund of money for goods purchased from Farm Agriculture Export which Larue Glass Works alleged were unfit for use.

On 31st March 1987, by consent of both the appellant and the respondent, the case by Farm Agriculture Export against Walter Larue was fixed for hearing on 18th June, 1987. It was subsequently discovered that 18th June, 1987 was a dies non, a Public holiday. The case was called on 16th June 1987 before Ahmed J. The proceedings are recorded as follows:

" Miss Tirant for Plaintiff (absent)

Mr. Georges for defendant

Mr. Georges My Lord Miss Tirant used to appear holding Mr Boule's brief. I move that the matter be set aside.

Court Motion granted."

It would seem as a result of the judge's order the plaint by Farm Agriculture Export (Pty) Ltd, against Walter Larue was considered as " dismissed."

In or about February 1991, Farm Agriculture Export (Pty) Ltd, filed a notice of motion in the Supreme Court asking for an order that

> " ..... the above mentioned case, set aside on 16th June 1987 because of absence of Counsel for plaintiff, be restored to the cause list."

The matter came before Periera J who heard the application and dismissed it. From that dismissal the appellant appeals.

Pereira J found that there was no notification to Miss Tirant counsel for the appellant that the hearing date was changed to 16th June, 1987 from 18th June, 1987. He nevertheless said " However the

case has been on the cause list, and therefore the counsel should be presumed to have been aware of the date."

Pereira J then referred to section 65 and section 67 of the Code of Civil Procedure and stated " Although the words 'set aside' were used the effect was a dismissal of the plaint of Farm Agriculture Export (Pty) Ltd dated 23rd February, 1987 against Walter Larue for the recovery of a sum of Rs.20,577."

Mr. Boule appeared for the appellant. He submitted that 'set aside' is not a 'dismissal.' He contended that the reasons given by Pereira J to equate 'set aside' with "dismissal" were flawed. Section 65 and Section 67 of the Code of Civil Procedure both refer to a date fixed for summons. Here the 16th June, 1987 was not a date fixed. It was a date which must have arisen ad hoc, and one party was not even informed of the date. Miss Tirant's absence from the Court on 16th June was certainly due to no fault on her part.

I must confess that I find the terminology used by Mr. georges before Ahmed J somewhat confusing. Mr. Georges asked " the matter be set aside." And Ahmed J ordered "motion granted." If it was an application for dismissal of the plaint for non-appearance, it should have been an application for the plaint to be dismissed, in terms of Section 67.

Generally speaking, one 'sets aside' an order, a command to do something or refrain from doing something. One does not 'set aside' a plaint. Perhaps Pereira J was right in thinking that to Ahmed J the words 'set aside' and " dismiss" are synonymous.

However was Pereira J right in refusing to restore? I think his statement "the case has been on the cause list and therefore counsel should be presumed to have been aware of the date" is open to grave doubt. I do not think such a presumption can be drawn against the appellant. A party to a litigation is entitled to be properly notified of any change of date or venue, and a litigant's rights cannot be jeopardised by vague and dubious assumptions.

The trial judge referred to the three and a half years delay by the appellant in making the application to restore. However the right of action was still subsisting and the application was in time in terms of Section 189 of the Code of Civil Procedure as no motion for peremption by the other party had been made.

I would allow the appeal, set aside the order of Ahmed J and order that the case be restored for hearing in the Supreme Court. I would order that the costs of this appeal be in the cause.

A. Mustafa

A.Mustafa

President

Dated 31st this March day of 1993.

In Chambers

In the Seychelles Court of Appeal

Farm, Agriculture Exports (Pte) Ltd — Appellant

Walter Larue — Respondent

Boullé for Appellant

Georges for Respondent

Judgement of Goburdhun J A

Appellant claimed from respondent before the Supreme court the sum of R20,577. for foods sold and delivered. The case came for mention before Ahmed J on 31st March 1987. Miss Tirant appeared for appellant and Mr Georges for respondent. The pleadings being in order the judge fixed the case for hearing to the 18th June 1987. According to the record the case was called on 16th June before Ahmed J. The 18th June 1987 was a public holiday. There is nothing on record to show that the parties and their counsel was informed of the change of date of the hearing of the case.

Accordingly to the record of the proceedings both appellant and their counsel were absent. Mr Georges Counsel for respondent was present.

Mr Georges made the following observation to the court: My lord Miss Tirant used to appear holding Mr Boulle's brief. I move that the matter be set aside. Further the records reads: Court: motion granted.

Nothing was heard about the case till early February 1991 when appellant through Counsel moved the court to have the case reinstated in the cause list. The motion was heard by Pereira J. on 9th July 1991. The learned judge dismissed the motion. He was of the view that although the words "set aside" were used the effect was a dismissal of the plaint of appellant. He found nothing in the record to indicate that Miss Tirant counsel for appellant, was informed of the change of date, but he was of the view that the "case has been on the cause list and therefore counsel should be presumed to have been aware of the date. With respect I am unable to go along with the reasoning of the learned judge. In my view no such presumption can be held against Counsel. Further the date of trial of a case should not be changed and fixed arbitrarily. Counsel should not only be informed about any change of date but consulted as well and this not only out of courtesy to counsel but also in the interest of justice. I am not surprised that counsel was not present on 16th June. Miss Tirant could not be faulted for her absence. In my opinion the learned judge would have been in error had he dismissed the plaint. Counsel for respondent did not move for dismissal of the plaint but that the matter be set aside. The words "set aside" in the context cannot mean 'dismissed'. In my view the action still subsists and the motion for its reinstatement in the cause list should have been allowed.

I would accordingly allow the appeal and order that the case be reinstated in the cause list of the supreme court for hearing. The costs of the appeal to be in the cause.

H Goburdhun

Justice of Appeal

Dated ~~31st~~ this 31st day of March 1992.

Delivered in open Court in the presence of both counsel by Mr Justice V Ahnee.

IN THE COURT OF APPEAL

HOLDEN AT SEYCHELLES

ON ..... DAY OF 1992

BEFORE THEIR LORDSHIPS

ABDULLA MUSTAPHA	PRESIDENT
HURILAL GOBURDHUN	JUSTICE, COURT OF APPEAL
EMMANUEL O. AYOOLA	JUSTICE, COURT OF APPEAL

CIVIL APPEAL NO. 14/91

BETWEEN:

FARM AG EXPORTS ... . APPELLANT

V.

WALTER LARUE ... ... APPLICANT

This is an appeal from the ruling of the Supreme Court (Perera J) refusing to grant an application by the appellant for the restoration of a suit commenced by him to the cause list. The circumstances which led to this appeal are not disputed and they can be shortly stated.

The appellant, Farm Ag Export -Pty Ltd, an exporter of goods from South Africa commenced in January 1986 an action for balance due for the supply of goods against the respondent, Walter Larue, at the Supreme Court.

The fact was disclosed in the learned judge's ruling and it seems to be common ground on this appeal that 18th of June 1991 to which the case had been adjourned for hearing was a public holiday. It was further disclosed in the ruling that on having realised that that day was public holiday the case was called on Tuesday 16th June 1987 at 8.30 before Ahmed J. What transpired when the case came up on that day had been set out. Ahmed J "set aside" the matter. The argument which was pressed on Perera J by counsel for the appellant in support of his application was that the proper order which Ahmed J should have made in the circumstances of the case was to "dismiss the case" and not to "set aside the case," and that as no order of dismissal had been made, the court could order the restoration of the case to the cause list. Perera J was not persuaded by the argument and he gave his reasons which I now summarise as follows : First, although there was nothing in the record to indicate that Miss Tirant, counsel for the "plaintiff" (now appellant) was informed of the case on 16th June "to fix a fresh date of hearing" since the case had been on the cause list counsel should be presumed to have been aware of the date. Secondly, Ahmed J

should have considered the provisions of section 65 as well as section 67 of the Code of Civil Procedure (Cap 50) and made an order in terms of section 67 as the appellant had defaulted in appearance. Thirdly, although the words "set aside" were used, the effect was a dismissal of the plaint of the appellant and the effect of such dismissal would be the same as if the action had been dismissed on merits. Fourthly, although in view of section 69 the appellant within one month of the order could have moved the court to set aside the order of 16th June 1987 stating the reasons for its default, the motion before him had been fixed three and a half years after the said order and reasons have not been given for the delay. Consequently the Supreme Court was not inclined to grant the motion "after the lapse of such a long period of time." He therefore dismissed the motion.

The three main questions which arise on this appeal from the dismissal of the motion are:

(i) Whether the order made by Ahmed J setting aside the matter was tantamount to an order that the suit be dismissed pursuant to section 67 of the Code of Civil Procedure;

(ii) Whether in the circumstances of this case Ahmed J could have made an order of dismissal pursuant to section 67 as Perera J would seem to have held.

(iii) Whether lapse of time in bringing the application to restore the suit to the cause list is a discretionary bar to the granting of the application.

It is expedient to bear in mind at the threshold of a consideration of these questions that Perera J was not siting as an appellate court over the decision of Ahmed J nor were the proceedings one for a review of Ahmed J's order. It is manifest that Ahmed J. did not purport to have made the order he made pursuant to Section 65 or Section 67, that he did not should not have been a significant consideration in the proceedings before Perera J. nor should it be on this appeal. What is important is the order which Ahmed J. made in the form it was and whether flowing from that order liberty is afforded to the Appellant to seek to restore the case on the cause list.

On this appeal, Mr. Boule, Counsel for the Appellant argued that the circumstances were not such that Ahmed J. could have made an order under Section 67 nor even under Section 133 as the former dealt with appearance of the Plaintiff "on the day (so) fixed on the summons" and the latter with non appearances at adjourned hearing. It was argued that the suit was "set aside" neither on the day fixed on the summons nor

on an adjourned date. Mr. George for the Respondent was content to submit that he had "dismissal" in mind when he invited Ahmed J. to "set aside" the suit. Section 67 provides:

> "If on the day so fixed in the summons, when the case is called on, the defendant appears and the plaintiff does not appear or sufficiently excuse his absence, the plaintiff's suit shall be dismissed."

It cannot be disputed that Ahmed J. could very well have made an order under Section 67 even though the case was not one in which the Plaintiff had failed to appear on the day fixed on the summons. Section 133 empowers the court to dispose of the suit in one of the manners directed in that behalf by Section 64, 65 and 67 or make such orders as it thinks fit" if on the day to which the hearing of the suit has been adjourned by the court, the parties or any of them fail to appear." If Ahmed J, had dismissed the suit, the only question would have been whether or nor the circumstances had justified the dismissal. He did not dismiss the suit. He set it aside. There was no provision in the Code of Civil Procedure which empowers a court to set aside a suit for absence of the Plaintiff or any party. Usually, a step in a proceeding may be set aside by reason of irregularity. An order, judgment

or a decree may be set aside in certain circumstances. An order merely setting aside a judgment or another order or decree is not the same thing as an order of dismissal which puts an end to the cause or matter and extinguishes the right of action itself. It cannot on its own amount to an order of dismissal whether directly or in effect. When therefore Ahmed J. made an order setting aside the suit, it was an order not provided for by any provision of the Code and if the effect which had been attributed to it had been one removing the suit from the cause list, it should be within the right of the party aggrieved to have it restored. In my view, it was not open to Perera J. and it would not have been open to Ahmed J. on the Appellant's application to have the suit restored, to substitute an order which Ahmed J. could have made but did not make and proceed to consider the application on the basis of the substituted order. The order setting aside the matter could not be tantamount to an order dismissing the suit under Section 67 and Perera J. should have proceeded on that footing.

On the view I hold as above, the question whether Ahmed J. could have made an order of dismissal pursuant to Section 67 in the circumstances of the case tends to become hypothetical. The circumstances are that the

order made by him was made two days earlier than the adjourned date and there was nothing to show that a change of adjourned hearing date was communicated to the Appellant; and, the matter was dealt with not on a day to which hearing had been adjourned. The Learned Judge reasond that the appellant's Counsel (Miss Tirant) should be presumed to have been aware of the fresh date because the case had been in the cause list and thus imputed notice to the appellant. Section 16 of the Code of Civil Procedure provides for the preparation by the Registrar of the weekly cause list of all cases and matters set down for hearing in Court during the week and that such cause list shall be affixed in a conspicuous place at the entrance of the Supreme Court not later than 9 a.m. on Monday in the week during which such causes and matters are to be heard. The section did not stipulate, and no other provision of the Code stipulated, that the publication of the cause list amounted to constructive notice of an adjourned date. When hearing of a cause or matter has been adjourned to a date fixed in the presence of the parties or their Counsel, it stands to reason that actual notice of an alteration of the adjourned date should be given to the parties or their attorneys. In this case actual notice of the alteration in the adjourned date ought to have

been given to the appellant or its counsel. Furthermore, as revealed in Perera J's ruling, the suit came before the Supreme Court on "16th June to fix a fresh date of hearing." 16th June could therefore not have been "the day to which the hearing of the suit has been adjourned" within the intendment of Section 133. For these reasons, I feel no hesitation in concluding that in the circumstances of this case, Ahmed J, would not have been justified in making an order dismissing the Appellant's suit pursuant to Section 67.

The only question left is whether the lapse of time in bringing the application to restore the suit to the cause list is a bar at the discretion of the court, to the granting of the application. In my view, lapse of time in bringing the application in a case such as this not covered by Section 69, could be a relevant factor only if the circumstances are such that there could have been effective peremption of the suit. When no proceeding has been taken in the suit during three years, the cause or matter is extinguished (S.185). However, peremption to be effective must be decreed by the court upon a motion to that effect by one of the parties to the suit (S. 188). Peremption is in-operative if one of the parties in the suit has made any valid act of procedure in the suit although made after the

lapse of three years (S.189). All these provisions show the circumstances in which peremption of suits operates. None of these has happened in this case. To deny the relief sought by the Appellant by his motion on the ground of lapse of time will in my view be tantamount to creating in effect a new circumstance of peremption not provided for by the Code of Civil Procedure. In my judgment lapse of time per se should not have been used as a justification for refusing to restore the suit to the cause list.

For these reasons, I would allow the appeal and set aside the decision of Perera J. refusing to restore the suit to the cause list. I would order that the suit between the Appellant Farm Ag. Exports (Pty) Ltd. (as Plaintiff) and Walter Larue (as Defendant) which was "set aside" by Ahmed J. on 16th June 1987 be restored to the cause list and heard.

(E. O. AYOOLA)
Justice, Court of Appeal

Delivered in open Court in the presence of both counsel by Justice V Allen.

Judge.
31/3/93