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IN THE SEYCHELLES COURT OF APPEAL

VISTA DO MAR LTD APPELLANT

versus

FRANCES CURTIS BENNETT RESPONDENT

Civil Appeal No: 32 of 1998

[Before: Goburdhun, P, Ayoola & Venchard, JJ.A]

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Mr. P. Pardiwalla for the appellant
Mr. K. Shah for the respondent

JUDGMENT OF THE COURT

(Delivered by Ayoola J.A)

The simple question that has arisen on this appeal from the decision of the Supreme Court is whether the plaintiff's witness who has given his evidence in chief and has been partially cross-examined not having been produced by the plaintiff for his cross-examination to continue and be concluded, the plaintiff's claim had been rightly dismissed for want of diligent prosecution.

The short facts are that trial of the suit began with the evidence of the plaintiff's witness Mr. Etzin, who appeared to have been representing the company. He gave evidence in chief and was being cross-examined by counsel for the defendant when in the course of cross-examination the case was adjourned to enable counsel for the plaintiff to study certain letters which the defendant had just introduced in evidence. It transpired that Mr. Etzin returned to England where he took ill and on the advice of his doctor who certified to that effect, it became unsafe for him to undertake a journey to Seychelles. He therefore failed to turn up for his cross-examination to continue and be concluded.

After several adjournments had been granted to the plaintiff for his counsel to decide what to do in the circumstances, and the plaintiff's counsel being apparently unable to come to any concrete decision as to how he wished to proceed, the Supreme Court on an oral application of counsel for the defendant dismissed the action for want of diligent prosecution.

In the course of his ruling the learned Chief Justice made copious reference to English decisions in which suits have been dismissed for want of prosecution by reason of delay in taking steps in the proceedings. We think the present case can be distinguished from those cases since the trial had commenced and there was evidence tendered for the plaintiff. We feel empathy with the learned Chief Justice's anxiety to avoid delay in the further trial of the case and to avoid possible injustice that delay may occasion the other party. However, we think it is expedient to set out the procedure that should be followed when situations such as in this case arise. This is why although the parties have on this appeal consented to an order that the case be remitted to the Supreme Court to be properly concluded, it is essential to state for general guidance why we think that that is the desirable course in the circumstances.

Section 134 of the Seychelles Code of Civil Procedure ("the Code") provides:

> "If any party to a suit to whom time has been granted fails to produce his evidence or to cause the attendance of his witness or to perform any other act necessary to the further progress of the suit, for which time has been allowed, the court may, notwithstanding such default, proceed to decide the suit forthwith."

The plaintiff in this case could not be said to have failed to "produce his evidence" but it may be said to have failed "to cause the attendance of his witness;" or "to perform any other act necessary to further progress of the suit." The ambit of the last situation is wide and may include failure to make arrangements for a witness's cross examination to be concluded or for any other witness to be called as in this case.

The question that needs to be addressed on the footing that Section 134 of the Code applies, is what the Supreme Court should have done pursuant to the power it has to "proceed to decide the suit forthwith." Where the plaintiff had not produced any evidence at all, decision of the suit forthwith may reasonably lead to a dismissal of the suit without much ado. Where, however, the plaintiff has produced some evidence, decision of the suit would involve deciding the case on such evidence as the plaintiff has produced, should the defence elect not to call evidence; or, it may involve deciding the case on the totality of the evidence where the defence has elected to call and has called evidence. Where the party in default is the defendant, the case may be decided on the plaintiff's evidence alone unless the defence has led some evidence in which case the suit should be decided on the totality of such evidence as the parties may have led.

In the present case the plaintiff has produced some evidence. In the event of it not being able to present its witness for cross-examination to be concluded or not calling further evidence, the court should have deemed the plaintiff's case closed and left it to the defence to exercise an option of resting her case on the plaintiff's case or leading evidence in defence. It is after this has been done that the suit should have been decided. The fact that the witness for the plaintiff had not been produced for his cross-examination to be concluded was a factor which would have been relevant to the weight to be ascribed to the evidence of that witness.

It is to be observed that peremption of suits for want of prosecution is provided for in Section 186 of the Code and takes place when no proceeding has been taken therein during three years. That does not apply in this case.

Nothing that has been said in this judgment should be understood as affecting or whittling down the inherent jurisdiction of the Supreme Court to dismiss suits for want of diligent prosecution in appropriate cases. The authorities referred to by the Chief Justice afford useful guidance as to when the exercise of such jurisdiction may be appropriate. We do not think that it is appropriate in the circumstances of this case.

For these reasons we are of the view that the appellant's appeal should be allowed. The order dismissing the suit is set aide. The suit is remitted to the Chief Justice to proceed with it forthwith as he may deem appropriate. The discretion of the Chief Justice to proceed pursuant to Section 134 of the Code along the lines stated in this judgment is unimpaired by this judgment, nor is his discretion to grant any application as may be appropriately made to enable the plaintiff to take any steps necessary to the further progress of the suit within a reasonable time, circumscribed by this judgment.

Each party should bear its or his own costs of the appeal.

Dated this 4th day of ***December*** 1998.

H. GOBURDHUN	E. O AYOOLA	L.E. VENCHARD
PRESIDENT	***JUSTICE OF APPEAL***	***JUSTICE OF APPEAL***