1986 June 17

[A. LOIZOU, DEMETRIADES, PIKIS, JJ.]

PANAYIOTIS MESOLONGITIS AND OTHERS,

Appellants-Defendants,

v.

LOIZOS KOUTAS,

Respondent-Plaintiff.

(Civil Appeal No. 6917).

Action—Reinstatement of action dismissed at the hearing for want of prosecution—Civil Procedure Rules 0.33, rr.4 and 5 (corresponding to the old pre 1962 English Rules, 0.36, rr. 32 and 33)—Jurisdiction to reinstate—Rests with the trial Court and whenever possible should preferably be dealt with by the Judge, who tried the case—Although an appeal against a judgment in default can be made, the matter of reinstatement should as a rule be raised in the first place before the trial Court.

On the 18.2.1986, when the action came up for hearing, counsel for the plaintiff applied for an adjournment of the hearing on the ground that the plaintiff, an official of the Ministry of Foreign Affairs, could not attend because of his duties. Counsel for defendant 1 did not object, but counsel for defendants 2 and 3 (the present appellants) objected. The trial Judge found the application to be unjustified and, as a result, refused the adjournment and dismissed the action for want of prosecution.

The plaintiff filed an application for reinstatement of the action. The application was based on 0.33 rr. 1-5 of the Civil Procedure Rules and was supported by an affidavit of counsel, who appeared for the plaintiff on the day, when the action was dismissed, and who took partly the blame upon himself for its dismissal. The

Judge granted the application and ordered the reinstatement of the action.

Hence the present appeal by defendants 2 and 3 on the ground that the Court below in reinstating the action acted as a Court of Appeal on its own judgment, whereas previously the adjournment was refused and the action dismissed.

Held, dismissing the appeal, that, in the light of the relevant Civil Procedure Rules (0.33, rr. 4 and 5, corresponding to the Old English pre 1962 0.36, rr. 32 and 33) and the authorities, it is abundantly clear that the jurisdiction to reinstate an action rests with the trial Court and should preferably and whenever possible be dealt with by the Judge, who tried the case. Although there can be an appeal against a judgment given in default, the matter of reinstatement should as a rule be raised in the first place before the trial Court.

Appeal dismissed with costs.

Cases referred to:

Vint v. *Hudspith,* 29 Ch. D. 322;

In Re Edward's Will Trusts [1981] 2 All E.R. 941.

Appeal.

Appeal by defendents 2 and 3 against the judgment of the District Court of Nicosia (Laoutas, S.D.J.) dated the 3rd April, 1985 (Action No. 1510/83) whereby the action which had previously been dismissed for want of prosecution was reinstated on the ground that it was equitable so to do in the circumstances of the case.

P. M. Petrakis, for the appellants.

N. Pelides with *M. Pelides,* for the respondent.

A. Loizou J. gave the following judgment of the Court. This is an appeal from the order of a Senior District Judge of the District Court of Nicosia by which an action that had previously been dismissed by him for want of prose-

cution, was reinstated on the ground that it was equitable so to do in the circumstances of the case.

The relevant facts as they appear in the affidavits filed and the ruling of the learned trial Judge are briefly these. On the 18th February, 1986, the action came up for hearing when counsel for the plaintiff applied that the hearing of the case be adjourned on the ground that his client who is an official at the Ministry of Foreign Affairs serving as Codes officer, could not attend because of his duties. Counsel for defendant 1 did not object to the adjournment but counsel for defendants 2 and 3, the present appellants did raise an objection and applied to the Court for the dismissal of the action for want of prosecution claiming also their costs.

In the affidavit filed in support of the application for reinstatement the affiant Mr. N. Pelides counsel who appeared for the plaintiff on the date the action was dismissed took partly upon himself the blame for its dismissal for the reason that there had been an arrangement between himself and counsel appearing for defendant 1, and he rang up his client who was on call, as his services are constantly required, not to attend the Court until he was notified by him. When, however, he was asked by the Court to have the case proceeded with, his client could not attend as he had been detailed to perform urgent duties.

When the application for adjournment was made the learned trial Judge in his ruling stressed that litigants should not appear at will; that the grounds upon which adjournments are granted are known and that he believed that the present instance was not one coming within their ambit. Having therefore found unjustified the application for adjournment he proceeded to dismiss the action for want of prosecution and adjudged costs in favour of defendants 2 and 3 only.

The application for reinstatement was based on Order 33 rules 1 to 5 of our Civil Procedure Rules. The circumstances as explained in the affidavit filed in support there-

of as to how the non-appearance of the plaintiff came about convinced the learned trial Judge that the plaintiff's absence was not deliberate but was forced on him by circumstances which were beyond his control. This shows that on hearing the full version of the plaintiff he realised that the plaintiff was not the kind of person that would appear to prosecute his case only at his own convenience.

On these facts the learned trial Judge ordered as we have already said the reinstatement of the action. The ground of appeal is that "the Court below erred in law in that the order which it made reinstating the action for which in the exercise of its discretion it had previously refused to adjourn and which it dismissed as a result, is tantamount to acting as a Court of Appeal against its own judgment and as such it has acted in excess of its Jurisdiction".

Order 33, rules 4 and 5 read as follows:

> "4. If on the day fixed for trial the defendant appears when the trial is called on but the plaintiff does not, then upon proof being given of the plaintiff having been given notice of such day, the defendant, if he has no counter-claim, shall be entitled to judgment dismissing the action, but if he has a counter-claim, then he may prove his counter-claim so far as the burden of proof lies upon him, and judgment may be given accordingly.
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> 5. Any judgment obtained where one party does not appear at the trial may in a proper case be set aside by the Court upon such terms as may seem fit, upon an application made within fifteen days after the trial."

They correspond to the Old English (pre 1962) Order 36 rules 32 and 33. In the commentary to rule 32 in the Annual Practice 1956 p. 613, under the heading "Action Restored" the following is stated:

> "Action Restored—Where, in consequence of the illness of the plaintiff's solicitor, the necessary arrangements for the hearing were not made and the

action was dismissed, it was allowed to be restored to the paper upon payment by the plaintiff of the costs of the day and of the application to restore *(Birch* v. *Williams,* 24 W.R., 700; and see *Farrell* v. *Wale,* 36 L. T. 95, cited under r. 30). Where a case came unexpectedly into the paper for trial and was struck out, plaintiff not being ready to proceed, the C. A. set aside an order of the Judge refusing to restore the case, upon payment by plaintiff of all costs thrown away and the costs of the application *(Breed* v. *Jackson,* 10 T.L.R. 142)."

And at p. 614 in respect of rule 33, it is said:

"The application should be made if possible to the Judge who tried the case *(Schafer* v. *Blyth,* [1920] 3 K. B. 141)."

And under the heading "Appeal from Judgment" the comment is:-

"The C. A. has power to entertain an appeal direct from a judgment by default *(Armour* v. *Bate* [1891] 2 Q.B. 323), but the proper is for the defaulting party to apply to the Judge who heard the case to set aside judgment and restore the action to the paper *(Vint* v. *Hudspith,* 29 Ch. D. 322)."

In *Vint* v. *Hudspith* (supra) Cotton L. J. had this to say at pp. 323 - 324:

"We are of opinion that the Plaintiff's proper course was to apply to the Judge to restore the cause on the ground that the Plaintiff was absent per in curiam. I am far from saying that this Court cannot entertain an appeal from a judgment made by default, but in a case like the present it is important to prevent the Court of Appeal from being flooded by having to hear cases in the first instance. It is therefore right that the Plaintiff should first apply to the Judge who gave the judgment to restore the action."

The appeal was then ordered to stand even for a fortnight in order to give time for the plaintiff to make "such application to the Judge as he may be advised".

Bowen L. J. agreed with the rule as stated by Cotton L. J. but said "he would be sorry to decide that the Court has not jurisdiction to entertain an appeal from a judgment given by default."

He stressed, however. that it is a bad practice to encourage parties to go to the Court of Appeal without having the case in the first instance tried by the Court below.

The rule expounded in *Vint's Case* to which we subscribe fully, was applied in *Re Edward's Will Trusts* [1981] 2 All E. R. p. 941.

It is abundantly clear from the exposition of the Law made above, that the jurisdiction to reinstate rests with the trial Court and should preferably and whenever possible be dealt with by the Judge who tried the case. Although there can be an appeal against a judgment given in default, the matter of reinstatement should as a rule be raised in the first place before the trial Court. That being so the case for the appellant collapses, for the sole issue raised on appeal is that the District Court had no jurisdiction to entertain the application for reinstatement and that by so doing the learned trial Judge acted as a Court of Appeal from his own judgment.

The learned trial Judge by his order for reinstatement did, in our view, justice in a case where he had apparently acted, when he dismissed the action for want of prosecution, without having had before him the full facts, although in all fairness to him we must say that by so dismissing it he was making the point and rightly so that cases cannot be adjourned at will by the consensus of counsel.

For all the above reasons the appeal is dismissed with costs.

Appeal dismissed with costs.