

IN THE SUPREME COURT OF SEYCHELLES

Reportable
[2023] SCSC 654
MA162/2023
(CM58/2022)

In the matter between:

SEYCHELLES COMMERCIAL BANK LIMITED
(rep. by Olivier Chang-Leng)

PETITIONER

and

THE ESTATE OF LATE PACKIRISAMY PILLAY
(unrepresented)

RESPONDENT

Neutral Citation: *Seychelles Commercial Bank Ltd vs. Estate of late Packirisamy Pillay*
(MA162/2023) [2023] SCSC 654.

Before: Dodin J.
Heard: 06 April 2023
Delivered: 21 June 2023

RULING

DODIN J.

- [1] The Petitioner, Seychelles Commercial Bank Limited, hereinafter referred as “the Bank”, filed a Commandment pursuant to section 2 of the Immoveable Property (Judicial Sales) Act against estate of the late Pakirisamy Krishnamurthy Pillay in respect of loans granted to Krishnamart & Company (Proprietary) Limited and Maxicorp (Proprietary) Limited, which loan facilities were secured by charges against the Properties V1281 and V3146 in the sum of SCR 12,700,000/- and SCR 15,300,000. The appointed executor Palani Batcha Sathsivan of Les Mamelles, Mahe, Seychelles.

- [2] The commandment was to be served on the the Executor but according to the process servers of the court they were unable to effect service because the Executor was not in the country. The Applicant later became aware that the Executor was overseas namely in India on medical leave and is unaware when he would return. There is no indication whether the Petitioner has information on the overseas address of the Executor for the Respondent.
- [3] The Petitioner now applies to the Court for an order for substituted service on the Respondent at the Executor's address at Les Mamelles, Mahe, Seychelles.
- [4] Learned counsel for the Applicant submitted correctly that under section 2 of the Immoveable Property (Judicial Sales) Act every seizure of immoveable property shall be preceded by a commandment to be served upon the debtor in person. However, learned counsel submitted that the Act is silent as to what occurs if service cannot be effected on the debtor in person. Learned counsel recognised that it could mean that service on the person is mandatory. However learned counsel argued that that cannot be the case for the following reasons: Firstly, it would mean that a debtor could avoid the judicial sale process by simply avoiding service; and secondly, it would unduly limit the powers of the Supreme Court. Learned counsel submitted that it would be unjust if the entire process is stopped before it can commence simply because service on a debtor cannot be effected personally especially when the law otherwise provides in general terms, alternative means for service of court proceedings.
- [5] Learned counsel submitted that considering the Seychelles Code of Civil Procedure ("SCCP"), it is apparent that there is an entire part dedicated to service of proceedings. Substituted service falls under section 42 states as follows:

"If the defendant cannot be found and there is no agent empowered to accept service on his behalf, nor any other person on whom service can be made, or if the defendant is keeping out of the way for the purpose of avoiding service, it shall be sufficient service to affix the summons on the outer door of the house or place of business of such defendant and a copy thereof in some conspicuous part of the Court House".

[6] Learned counsel argued that under the SCCP, the Court has the power to dispense with personal service where the circumstances deem it appropriate. However, learned counsel further recognised that the SCCP refers mostly to ‘suits’ or ‘actions’, which refers to a civil proceeding commenced by plaintiff. If that is the case, it would not be applicable to a judicial sale which has its own procedure under the Immovable Property (Judicial Sales) Act. As a result, there is a gap in the law regarding service of proceedings in a judicial sale. In view of this gap in procedure and learned counsel submitted that this gap must be dealt with by turning to the law of procedure of England.

[7] Learned counsel submitted that section 17 of the Courts Act states that:

“In civil matters whenever the laws and rules of procedure applicable to the Supreme Court are silent, the procedure, rules, and practice of the High Court of Justice in England shall be followed as far as practicable”.

Learned counsel submitted that the present motion is one which would fall squarely within the ambit of section 17. The Immovable Property (Judicial Sales) Act is silent on the procedure to be followed if service cannot be effected personally on the debtor. As a result, the Court must consider English procedure as at 1976 refer to the Rules of the Supreme Court of England (1970 ed.), colloquially known as the “White book, for guidance. Learned counsel referred the Court to the case of Finesse v Banane [1981] SLR 103.

[8] Learned counsel referred the Court to Order 65, rule 4 of the White Book which provides that:

“(1) if, in the case of any document which by virtue of any provision of these rules is required to be served personally on any person, it appears to the Court that it is impracticable for any reason to serve that document personally on that person, the Court may make an order for substituted service of that document.

(2) An application for an order for substituted service may be made by an affidavit stating the facts on which the application is founded

(3) Substituted service of a document, in relation to which an order is made under this rule, is effected by taking such steps as the court may direct to bring the document to the notice of the person to be served'

Learned counsel submitted that in the explanatory notes which follows, the White Book states that substituted service may take the form of service by letter, advertisement or otherwise, as may seem just, and provide authorities for the same.

- [9] Learned counsel further submitted that O.65 r.4/6 of the White Book states that with regards to substituted service within the jurisdiction, the essential consideration of the court in ordering substituted service, is the impracticality for the plaintiff to effect personal service.
- [10] Learned counsel submitted that the Applicant has deponed to and provided evidence of the difficulty which the process server had in serving the commandement on the Executor due to him being out of the jurisdiction. The Applicant has further explained that there is no concrete indication as to when the Executor is to return. In view that the Applicant has a legitimate claim and there is a significant debt which remains unpaid, substituted service of the commandement is the only method by which the Applicant can exercise its right as a creditor. That it would have to wait for the possibility that the Executor will return (and it is unaware when that will be) would be an affront to justice.
- [11] Learned counsel submitted that in the case of Government of Seychelles & A.G v Poole & Ors [2016] SCCA 30, the Court of Appeal was tasked with determining an appeal where the issue of service had been raised. Whilst the facts differ to the present motion, the same issue arose – how should service be effected. At paragraph 23 of judgment, Twomey JA stated the following:

"Neither the Companies Act nor the Seychelles Code of Civil Procedure specifically provide for service on companies. In the absence of such

provisions, Mr. Hoareau has relied on the Rules of the Supreme Court of England (White Book) as is directed by section 17 of the Courts Act. He states that Order 65 Rule 3 of the White Book (1970 edn) provides that every company having a registered office may be served with any document by leaving it at or sending it by post to the registered office of the company”.

[12] Learned counsel recognised that the above case concerned service on a company and not substituted service. However, it is submitted that it is the principle espoused which the Applicant relies on, namely, where the law on procedure for service is silent, we may turn to the White Book. Ultimately, the Court of Appeal did not require the authority of the White Book because they relied on the Interpretation and General Provisions Act (the IIPA”) which has specific provisions for service on corporate bodies. However, the principle remains.

[13] Learned counsel concluded that the Act is silent on what occurs when service cannot be effected in accordance with section 2 thereof. In view that neither SCCP nor the IIPA is of help, we must turn to the laws of procedure of England vis a vis is the White Book. Order 65, rule 4 of the White Book permits the court to order substituted service in such manner it deems just, provided that it is satisfied that personal service could not be effected and/or is impractical. The Applicant has proven, by way of its affidavit and supporting evidence, that the Executor could not be served at his address and accordingly prays for an order of substituted service.

[14] Section 2 of the Immovable Property (Judicial Sales) Act provides:

“Every seizure of immovable property shall be preceded by a commandement to be served upon the debtor in person. The creditor shall, in the commandement elect a domicile at the office of the attorney at law retained by him for the purpose of such proceedings, at which domicile all acts relative to or in connection with the proceedings, or the claims to be enforced thereunder, shall be served upon him. He shall thereby notify to his debtor that, if he fail to pay the amount claimed, a seizure will be effected of his immovable property.” [Emphasis added].

The operating words relevant to this application are that “*every seizure of immovable property shall be preceded by a commandement to be served upon the debtor in person*”. The wording apparently leaves no room for discretion by the Court, the Petitioner or the process servers.

- [15] Learned counsel recognised the rigidity of the provision but argues that this is a gap in the law. It can be deduced from the argument of learned counsel for the Petitioner that this was an oversight of the the legislators and not their real intention. Hence to fill that lapse, the Court should make use of the provisions of the Rules of the Supreme Court of England, 1970 Ed. Whilst reference tfor guidance to the Rules of the Supreme Court of England pursuant to section 17 of the Courts Act is a well-established principle and legal authority enshrined in the law of Seychelles, it is in my view not always the solution for every process that a litigant wishes to pursue to by-pass actual provisions enacted by the legislature.

- [16] Section 17 of the Courts Act has the following provision referred to by learned counsel:

“In civil matters whenever the laws and rules of procedure applicable to the Supreme Court are silent, the procedure, rules, and practice of the High Court of Justice in England shall be followed as far as practicable.”

It must be noted that this section provides for “*where rules and procedure applicable to the Supreme Court are silent*”, then the procedure, rules and practice of the High Court of Justice in England shall be followed as far as practicable. This section cannot be taken to mean that where a law provides for a specific procedure that must be followed a litigant who is unable to follow that procedure can import an alternative procedure to defeat the strice adherence to the strict requirement of the existing law.

- [17] In my view, section 17 of the Courts Act becomes employable, when it is obvious that a law cannot be enforced or applied or a lawful objective cannot be attained or fulfilled without going through procedures that are lacking in the legislation or other laws. One must also keep in mind that it was more likely than not that the legislators did not want a liberal process in the seizure and disposal of an alleged debtor’s property, hence the strict

adherence to personal service on the debtor. I have not been convinced by the Petitioner that strict adherence to personal service could not have been the intention of the legislators.

[18] Secondly, at this stage the procedure does not involve a judge of the Court. The Judge becomes involved only after the commandement has been served and the Memorandum of Charges is filed for reading. It appears to me that the legislators were logical in their approach not to provide for alternative means of service at this stage because the same could not be made even under the Seychelles Code of Civil Procedures without an order of the Court. Hence since the law does not provide for the Court to seize itself of the matter, such motion cannot be entertained by the Court at this stage.

[19] Finally, there are means to proceed against a property of a person who has disappeared or cannot be found or is dead. Any person having sufficient interest in the property may apply for the replacement of the Executor who is not performing or is unable to perform by having become incapacitated. On the other hand, substituted service on a person whom the Petitioner knows is undergoing medical treatment overseas would cause a greater injustice to the Respondent than the law intended or our conscience would allow.

[20] Consequently, this Application made by the Petitioner is denied.

[21] I make no order for cost.

Signed, dated and delivered at Ile du Port, Victoria on 21 day of June 2023.

G. Dodin

Judge