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IN THE SEYCHELLES COURT OF APPEAL

EMERALD COVE LTD APPELLANT

VERSUS

INTOUR S. r. l.
(Rep. by its Director Paolo Chionni) RESPONDENT

Civil Appeal No: 9 of 2000

[Before: Ayoola, P., Silungwe & De Silva, JJ.A]

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Mrs. N. Tirant-Gherardi for the Appellant
Mr. P. Pardiwalla for the Respondent

JUDGMENT OF THE COURT

(Delivered by Ayoola, P.)

The proceedings from which this appeal from the decision of the Supreme Court arose came in the form of an application by Intour S.r.l. ("the respondent") for a Writ of Habere Facias Possessionem to issue against the Emerald Cove Ltd ("the appellant") ordering it and its agent and officers to leave and vacate the hotel known as Emerald Cove Hotel ("the hotel") situated at Anse La Farine, Praslin, Seychelles.

The respondent is the lessee of the hotel, it having taken a lease of it from its owners the L'Esperance Estate Company Ltd. By a management agreement executed on 18th April 1996 ("the Agreement") and made between the respondent and the appellant, the parties agreed that the appellant shall, subject to the other provision of the Agreement, "*be responsible for the Management and Commercialisation of the Hotel and its contents*" and that "*all the costs and expenses referring to the management of the hotel will be borne by the Operator.*" The appellant was "*the Operator.*" The agreement was to last for a period of 9 years from 1st May 1996.

Clause 5 of the Agreement provided for settlement of all disputes or differences which shall arise between the parties "*touching or concerning the Agreement or its construction or effect or as to the rights, duties and liabilities of the parties*" by an arbitral tribunal composed of 3 members and that arbitration shall be held in Bergamo, Italy and shall be governed by Italian Civil Law. Clause 6 provided for payment of management fees. Apart from setting out the amount of fees payable it was agreed, inter alia:-

> *(i) that the amounts payable "shall be paid by equal three monthly instalments, by the 10th of the month (expiry date); and*
>
> *(ii) that should the three monthly instalment be delayed by more than 60 days from the expiry date, the lessee shall be entitled to treat this Agreement as rescinded by operation of law.*

Alleging that by reason of the repeated failure of the appellant to pay the instalments of the management fee in the time and amount specified under Clause 6 of the Agreement, the respondent has treated the Agreement as rescinded and that it has given notice thereof to the appellant and required it to vacate the Hotel, the respondent made the application for the writ on the ground that the appellant had no legal right or cause to remain in occupation of the Hotel.

The appellant resisted the application. It raised a plea in limine litis challenging the jurisdiction of the Court on the strength of the arbitration clause which, as has been stated earlier, provided for settlement of differences and disputes by arbitration to be held in Italy and shall be governed by Italian law and on the ground that the appellant had by virtue of the Control of Rent and Tenancy Agreement Act become a statutory tenant. The trial judge having had no difficulty in over-ruling the plea, proceeded to consider the application on its merits. At the end of the day, after a careful consideration of the facts relied on by the respondent for rescinding the Agreement he found two instances of breach of the Agreement in regard to payment of management fees and held that the Agreement had been rightly rescinded. Having so found, he held that the appellant had "*failed to raise a serious and bona fide defence to the application for the issue of a writ habere facias possessionem.*"

In this appeal the issues that arise for determination on the grounds raised by the appellant's memorandum of appeal are:-

> *(1) Whether the learned judge was right in the procedure he adopted and his approach to determining such application as was before him.*
>
> *(2) Whether his opinions that contract between the parties had been rescinded by operation of law on the basis of the affidavit evidence alone was valid in law and in fact.*
>
> *(3) Whether his opinion that the arbitration clause did not oust the jurisdiction of the Court was not arrived at or based on a misdirection of law in regard to the applicable principles and non-direction on the relevant facts.*
>
> *(4) Whether the appellant was a statutory tenant.*

The nature of the remedy and the principles that guide the Court in the issue of a writ "*habere facias possessionem*" can be stated briefly. The remedy, which derived from the French Law, is a summary remedy open to owners of property to obtain possession of their property without undue delay. The first task of a party who approaches the Court for such remedy is to show a clear title of ownership. Article 544 of the Civil Code of Seychelles ("the Code") describes ownership as:-

> *"The wider right to enjoy and dispose freely of things to the exclusion of others provided that no use is made of them which is contrary to laws or regulations."*

Once a party has shown a clear title to ownership of property he is entitled to the "*widest right to enjoy it*" which includes possession of it, unless the person who seeks to restrict the incident of ownership, so widely described, can justify the restriction.

It follows that in an application for a writ "*habere facias possessionem*" the party from whom possession is sought may either:-

> *(i) challenge the title of ownership of the applicant or;*

(ii) *set up legal grounds for restricting the admitted owner's wide incidents of ownership to justify his possession of the property.*

He states by his affidavit the facts on which he bases his challenge or justification. It is then for the judge to determine whether such facts amount to a good or serious defence. It is evident that where a party seeks to defeat the application by a challenge to the applicant's title, mere denial of the appellant's title of ownership, without much more, cannot be said to indicate a serious defence. In the same vein, where reliance is placed on facts in defence, the facts relied on in the affidavit in opposition to the application by a party who claims to be in lawful possession of the property must be such that, if believed, will amount to such justification. If the facts, if believed, could amount to such justification and the issue is whether or not they should be believed, a Court hearing the application for a writ should not proceed to resolve the issue where the determination would depend on production of oral evidence or the need to resolve conflicts of evidence.

What have been said above are usually summed up in the statement that the respondent to an application for the writ must raise a serious and bona fide defence. The principle is stated quite succinctly in the case of **Gajadhun v Reunion Ltd & Anor** 1960 MR 199 cited to us by Mr. Pardiwalla. In that case the Mauritian Supreme Court said, per Osman, SPJ, at page 213:-

> *"The right of a party who has a clear title is not to be defeated by mere allegations which are unsupported by such facts and circumstances as are likely to help the Judge or the Court in assessing the seriousness of the defence."*

When after examining the materials placed before him in the form of affidavit of facts supported, where the circumstances so demand, by relevant and material documents the judge comes to a conclusion that there is a real defence, the application should be refused.

In this case there is no issue as to the title on which the respondent relied. The respondent's case was that the appellant held a management contract by

virtue of which the appellant came on the premises and that the appellant's retention of the property after the contract had been rescinded by operation of law was unlawful. The appellant denied that the contract had been rescinded. The learned judge held that the contract had been rescinded by operation of law.

Article 109-3 of the Commercial Code provides as follows:-

> *"When a breach of a commercial contract occurs, the party innocent of the breach shall be entitled to treat the contract as discharged by operation of law.*
>
> *The rules of Article 1184 of the Civil Code, insofar as they require that when a breach of contract occurs discharge thereof shall be obtained through proceedings, shall not apply to commercial transactions."*

Article 1184 of the Civil Code permits rescission by operation of law if the parties have inserted a term in the contract providing for rescission. It is manifest that article 109-3 of the Commercial Code and article 1184 of the Civil Code permit extra-judicial rescission of contracts in certain circumstances and such rescission is not subject to judicial intervention and discretion. Once the parties have clearly and expressly specified the circumstances in which termination of the contract will occur they are bound by what they have agreed to. Besides, where as in the case of a commercial contract, the law permits the "*party innocent of the breach*" to resort to extra-judicial rescission of the contract, the law must take effect. Another instance in which the law has dispensed with the need for recourse to the court for rescission of contract is prescribed in Article 1657 of the Civil Code.

It does seem from what have been said above, that where a contract is permitted to be rescinded without recourse to the Court, the act of rescission by the person who asserts that he is the innocent party is a form of self help and is effective to bring the contract to an end without an order of the Court. The consequence of this, we venture to think, is that the party who rescinds acts at his own risk, for, if it turned out that the rescission had been wrongful, he would be liable to the other party should the latter seek appropriate remedies for wrongful rescission of the contract. It is in this wise that for the purpose of the

application for a writ the statement made in **Gajadhun's case** (supra) at page 212 becomes relevant. There it was stated:-

> *"... the writ habere facias possessionem ... does not finally dispose of the case on the merits but grants a party who has a clear title the right to occupy his property without barring the defendant, if he so chooses, from having his right, if he claims to have any over the property, determined by the Court by way of a principal action."*

Mr. Pardiwalla, learned counsel for the respondent relied on the above passage and we think he was right in doing so in the circumstances of this case. The appellant which challenged the rescission may well do so by way of an action and claim whatever remedies are available to it should the rescission be found to be wrongful.

However, notwithstanding the above, the learned judge having correctly noted that judicial declaration of breach had been abolished, nevertheless took the precaution to enquire whether the failure to perform alleged as ground for the rescission had occurred. In this regard he held that such had occurred in two regards when he found that:-

> *"(i) there was no valid payment of the management fee within the 60 days limit from the expiry date provided under Clause 6 of the Agreement for the August-October 1997 term...*
>
> *(iii) the deduction of the accounts from the payments for the terms August-October 1997 and November-January 1998 to be in breach of the respondent's obligation to pay the management fee under Clause 6(b) of the Agreement whereby the applicant has treated the contract as discharged by operation of law."*

On this appeal it has not been seriously argued that the facts found by the learned judge were erroneous. What was strenuously contended by Mrs. Tirant-Gherardi, learned counsel for the appellant, is that notwithstanding those facts the learned judge should have adverted to the allegations of bad faith made in the affidavit in opposition to the application and hold that they constituted a

serious defence. The approach of the learned judge was guided by the view he held that:-

> *"... the Court when faced with such a clause (as in 6(b)) is not being called upon to determine whether the breach which has occurred is justified or not in the circumstances of the case. The express intention of the parties, by virtue of the 'clause resolutoire expresse' limits the intervention of the Court to the determination as to whether the breach envisaged by the provision of the contract has occurred."*

Discussing "*extra-judicial resolution*", Professor Barry Nicholas in The French Law of Contract, 2nd Edition, page 244, was of the view that even where the relevant clause of the contract is sufficiently explicit to exclude the need for recourse to the Court, in all cases the Courts require the creditor to act in good faith. It cannot be said that the questions whether the Court will refuse to recognise the fact of rescission that has occurred or whether the Court has power to exercise a judicial discretion to make an extra-judicial determination of a contract ineffective had at all been fully discussed by the learned author. It suffices that where the proceedings are by way of the summary procedure afforded by a writ, it is sufficient that an extra-judicial termination of the agreement has taken place and that the right of the debtor to challenge the right of the creditor to act as he has, may be left ultimately to be raised by the debtor in a separate action. Since the appellant may well wish to seek further remedies, we refrain from deciding whether or not the facts deposed to in the affidavit amounted to absence of good faith in the respondent or not.

On a careful consideration of the well-reasoned and lucidly written judgment of the learned judge, Juddoo, J., and in the light of the helpful submissions made to us by counsel for the parties on this appeal, we come to the conclusion that the first two questions for determination earlier set out in this judgment must be resolved against the appellant.

However, the question arose whether the learned judge had rightly rejected the plea in limine litis that the Seychelles Court had no jurisdiction to entertain the proceedings by virtue of the arbitration clause in the Agreement.

Distinguishing the present case from such cases as **Beitsma v Dingjam** [1973] SLR 307, learned counsel for the appellant submitted that the present case concerns a commercial transaction where the parties are obviously of Italian nationality and both have a physical presence in Italy. These considerations, though relevant to a question of choice of law, are however, irrelevant to the issue whether the jurisdiction of the Seychelles' Court is ousted by the arbitration clause.

The learned judge considered the guidelines stated in such cases as **Pillay v Pillay** [1973] SLR 307 and **Beitsma v Dingjam** (supra) and ruled that there had been no proof of the validity of the arbitration clause under Italian laws so as to declare the Supreme Court incompetent and that the respondent had failed to satisfy the Court that it was ready and willing to do everything for the conduct of the arbitration in order to stay the proceedings before the Court.

The decisions in **Pillay v Pillay** (supra) and **Beitsma v Dingjam** must now be read in the light of the Commercial Code of Seychelles ("the Commercial Code") article 110(1) of which provides that:-

> *"Any dispute which has arisen or may arise out of a specific legal relationship, and in respect of which it is permissible to resort to arbitration, may be the subject of an arbitration agreement subject to article 2044 to 2058 of the Civil Code relating to compromise."*

Article 113-1 of the same Code provides that:-

> *"The Court seized of a dispute which is the subject of an arbitration agreement shall, at the request of either party, declare that it has no jurisdiction, unless, insofar as the dispute is concerned, the agreement is not valid or has terminated."*

It is evident that, now, where an arbitration is valid, in terms of article 113-1, it is capable of ousting the jurisdiction of the Court. However, the validity of the arbitration agreement is determined by the proper law of the contract. In this case, it is Italian Law. Notwithstanding the wide import of article 113-1 a Seychelles Court should not decline jurisdiction and so shut its doors to a litigant

unless it is sure that the agreement to arbitrate is valid and subsisting. The burden is on the person who claims ouster of the jurisdiction of the Seychelles Court to show that under the foreign law which is the proper law of the agreement, the agreement to arbitrate is valid and subsisting. This he must do by evidence that satisfies the Court to that effect.

It is also because the Seychelles Court will not deny a litigant of the protection of law that it will insist that a party who asks it to decline jurisdiction in a matter, on the ground that there is a valid arbitration agreement must show readiness to submit the matter to arbitration. It must be emphasised that where there is an arbitration agreement, notwithstanding that the validity of the agreement is determined by the proper law of the contract which may be foreign law, whether the Seychelles Court will decline jurisdiction or not and the procedure for requesting the Court to decline jurisdiction is governed by Seychelles law. That procedure was stated in **Beitsma v Dingjam** (supra) and adverted to by the learned judge.

In this case, it is obvious that the appellant did not prove the validity of the arbitration agreement under Italian law and it asserted through its counsel that there was no dispute to submit to arbitration. Learned counsel for the appellant addressing the Supreme Court was recorded as saying:-

> *"... no authority exists to require the respondent (i.e. the present appellant) to take any action in any Court, he has paid he is in possession he is continuing his work and he has no cause to go before the Court whether in Seychelles or in Italy ..."*

Earlier, she submitted in the Supreme Court:-

> *"The question as to whether the parties should have begun proceedings or it is the duty of the respondent to begin proceedings in Italy so as to seek a stay of the action in Seychelles is ... inapplicable at this stage for the obvious reason that the respondent does not acknowledge that there has been a breach ... It is the applicant who believes that there has been a breach that it has been so fundamental that it allows the contract to be rescinded and that on the basis (of?) the rescinded contract ... is seeking leave of eviction of the respondent."*

These submissions, ran counter to the position of the respondent which was that the respondent having rescinded the contract by operation of law, it was up to the respondent to take the appropriate steps for a declaration by the court or by an arbitration tribunal. On the face of the positions taken by the parties, both asserting, for different reasons, that they were not prepared to initiate arbitration proceedings, it is not surprising that the learned judge did not accede to the request of the appellant.

It is to be observed in passing, although no argument has been pressed on us in that regard on this appeal, that summary procedure afforded by the writ for the eviction of a person, claimed by the owner of the property to be in wrongful occupation of his immovable property in Seychelles, could hardly be a subject of arbitration or a matter over which an arbitrator could exercise powers. We venture to suggest that where the party who claims to be the innocent party has rescinded the agreement by operation of law and relying on the rescission has taken steps to evict the other party by resort to the writ habere facias possessionem, it is for the aggrieved party to submit the question of the validity of the rescission to arbitration if there is an agreement to arbitrate disputes and differences arising from the contract. This he can still do notwithstanding his eviction from the property which he claims to hold by virtue of the contract.

Be that as it may, we hold that the learned judge came to a right conclusion when he rejected the plea of the appellant that he should decline jurisdiction.

The last question whether the judge was right in holding that the appellant was not a statutory tenant can be disposed of shortly. Fastening on the definition of "lessee" in section 2 of the Control of Rent and Tenancy Agreements Act (Cap 47) as including:-

> *"Any person enjoying the use and occupation of a dwelling house (and business premises) for which an indemnity is payable or not",*

learned counsel for the appellant argued that the appellant was a lessee under the statute and that, therefore, in terms of section 9 and 10 of the Act jurisdiction

for the ejectment of the appellant was in the Rent Board. In her address before us she referred to the English translation of a contract in Italian (Exh. 12A) in which it was stipulated and agreed, inter alia, that *"Intour S.r.L leases to 'Bassanini' the hotel premises."* And that 'Bassanini' *"intends to manage and market the hotel."*

However, it is clear that the agreement of the parties was for management of the hotel. No doubt, the appellant had "occupied" the hotel in order to manage it, but such occupation was just incidental to and part and parcel of the main purpose of the agreement. Once that main purpose is removed there was no independent occupation. Such situations as this are to be distinguished from a situation in which the occupier's occupation stands on its own, albeit as a collateral transaction, as when the lessor lets premises to his employee. Our decision in **Village Management (Pty) Ltd v Albert Geers & Or** CA42/1997 properly understood in that light is applicable to this case. We see no reason to distinguish that case from this one or to depart from it.

For the reasons which have been given, all the issues in this appeal must be resolved against the appellant. In the result, this appeal fails and it is dismissed accordingly. The respondent is entitled to costs of the appeal.

E. O AYOOLA	**A. M. SILUNGWE**	**G. P. S. DE SILVA**
PRESIDENT	**JUSTICE OF APPEAL**	**JUSTICE OF APPEAL**

Dated at Victoria, Mahe this 24th day of November 2000.

Read by M. Allecan C. Justice

M. Allecan
C. Justice
24.11.00.