

IN THE COURT OF APPEAL OF SEYCHELLES
COURT OF CIVIL APPEAL

SCA No: 4 of 2006

CHRISTOPHER GILL

Appellant

VS

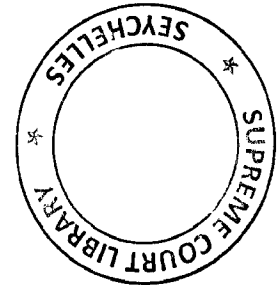
**WILFRED FREMINOT
EDWINA FREMINOT
(Executors of Mr & Mrs
Charlemagne Grandcourt)**

Respondents

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Before: Hodoul, Domah, Renaud, JJA
Counsel: Ms. Pool for the Appellant
Mr. Rouillon for the Respondents

Date of Hearing: 17 November 2006
Date of Judgment: 29 November 2006



JUDGMENT OF THE COURT

Domah, JA

[1] This is an appeal against the decision of the Supreme Court whereby the learned Chief Justice ordered a new trial and a stay of execution of a "consent judgment" entered into between the parties following a case for the specific performance of a contract of sale of an immovable property. In sum, the appellant offered to buy and Mr Grand Court accepted to sell a parcel of land, T639, for the amount of Rs 500, 000 on terms whereby the final payment was to be made by December 1993. However, there was still a balance of Rs 130, 000 outstanding by that time. Mr

Grandcourt must have then unilaterally decided to treat the contract as repudiated and proceeded to sub-divide the parcel and registered the sub-divided plots, thus fore-stalling the move of the appellant to complete his long overdue payment and have the property transferred in his name. There was no hearing of the case. Instead, parties decided to enter into an agreement which was dictated to the court and the so-to-say "consent-judgment" was entered into on the day of trial. We are using the term "consent-judgment" between quotes advisedly inasmuch as the very basis of it in the circumstances is seriously questionable in law.

[2] Be that as it may, soon after the "consent-judgment," Mr Grandcourt passed away. The heirs, on knowing of the transfer, then, decided to challenge the order made. They sought a new trial which was declined by Karunakaran J. The heirs appealed to the Supreme Court and the Chief Justice decided "in the best interest of justice that the matter be fully exhausted before the Supreme Court." He, accordingly, ordered a new trial and also ordered a stay of the "consent-judgment." The decision of the Chief Justice is being challenged on six grounds which are:

- (a) he erred in holding that it was in the best interest of justice that the matter be fully exhausted before the Supreme Court;
- (b) he was wrong to hold that the second petitioner/respondent was unable to testify and as a result could not put forward their case fully and was denied a fair trial;

- (c) he was wrong to reject the Learned Judges's finding that the Supreme Court had no jurisdiction to declare its own judgment improper;
- (d) he failed to consider section 203 of the Seychelles Code of Procedure which provides that there should be no new trial of a new trial;
- (e) he failed to give due consideration to the finding of the learned Judge that there was no evidence before him to disprove the fact that the heirs might have given consent to their father Mr Grandcourt to enter judgment;
- (f) he further failed to take into consideration the principle of res judicata raised by the appellant.

[3] On ground (a), the appellant urged that the plaintiffs/respondents had already exhausted all their remedies before the Supreme Court first in CS No 174/95 which resulted in a judgment by consent and secondly in CS 154/2000 which was dismissed by the Supreme Court so that the Chief Justice erred in holding that it was in the best interest of justice that the matter be fully exhausted before the Supreme Court.

[4] To assess whether the parties had actually exhausted all their remedies we need to know what cases CS 174/95 and CS 154/2000 were all about. The first was an action lodged by the appellant for specific performance of a contract where he had himself delayed final payment by a number of months. The second was an application by the respondents in this case wherein they have made a number of averments. One of them

was that the respondent had not completed the payments in time. This matter was itself challenged by the respondent who had averred in a connected case (CS 174/1995) that the sums had been paid. The other averment had been that even after so many years since the contractual date of December 1993 and ~~the consent-judgment, no payments had been forth-coming.~~ The heirs had not given their consent or authorization either for the sale or the consent-judgment. Mr Grandcourt was not present in court when the consent-judgment had been given. He was sick in bed and his consent was obtained through phone-calls. On account of the breaches of the conditions of sale and the consent-judgment, the co-heirs are unwilling to proceed with the completion of the sale of the property to the appellants.

- [5]** As may be seen the respondents had bona fide and serious issues to be tried. All these matters, however, were dismissed by the learned Judge who, procedure-sensitive, took the view that the law in Seychelles is silent on the procedure for challenging a consent judgment. Indeed, the learned Judge stated:

"a new right and remedy of setting aside a consent-judgment, in my view, cannot be granted by this Court to the plaintiff in the absence of the necessary statutory provisions and amendments to the Seychelles Code of Civil Procedure."

- [6]** That to us sets the legal proposition regarding rights and remedies of citizens a little too high. Rights and remedies may be created by legislations and codes. But statutes and codes are

not the only source of rights and remedies. The Constitution is the supreme source of the rights and remedies of the citizens. Even then, the Constitution does not create those rights and remedies. It only recognizes the continuing existence of a number of rights and remedies of citizens. Where rights exist, ~~they are but paper aspirations without the actual remedies that~~ need must go with them; otherwise they constitute denials.

- [7] The existence of a procedure for entering a consent-judgment in Seychelles law is provided for in section 131 of the Code of Civil Procedure (Cap 50). It provides:

"The parties may at any stage of the suit before judgment, appear in court and file a judgment by consent signed by both parties, stating the terms and conditions agreed upon between them in settlement of the suit and the amount, if any, to be paid by either party to the other, and the court, unless it sees cause not to do so, shall give judgment in accordance with such settlement."

- [8] The section, we understand, is used in practice fairly frequently and has been the subject-matter of judicial decisions: see **Padiwala v Padiwala 1993 Supreme Court Judgment No 15 (unreported)**, where Perera J., recognized not only the existence of a judgment by consent but also the legal effect that flows from such a judgment.
- [9] To that extent, if the law of Seychelles allows for a consent judgment to be entered, it is our view that it should also allow an avenue for challenge not necessarily by way of appeal which

in the majority of cases may be foreclosed because of an absence of determination by the court either on the facts of the case or the law applicable in the case. In such circumstances, the only avenue left to the parties would be to go to the Supreme Court by way of motion for the purposes of setting it aside. If an applicant can demonstrate that there are good grounds for setting aside the order made, it may do so and order that the case where the consent judgment was given proceeds for hearing in the normal course of things.

[10] In this particular case, the application was made before the Judge who set it aside. It was open to him to check the law and see that section 131 of the Courts Act had not been complied with and there was no judgment entered so that the decision maker was not yet functus officio. Another avenue open to the judge was to invoke his equitable jurisdiction and dynamize the little used section 6 of the Courts Act (Cap 52) which provides that no aggrieved person shall be left without a remedy notwithstanding that "no sufficient remedy is provided by the law of Seychelles." It is when the respondent was shut out that he applied for a new trial under sections 95-105 of the Courts Act. The Chief Justice who decided, after hearing the parties and giving his reasons, that there should be a new trial. Even if the reasons he gave are different, we find that his decision cannot be impugned for the very simple reason that the very validity of the consent-judgment is in issue. We take the view that there was neither any consent nor any judgment as required by the section 131 of the Code of Civil Procedure, to which two questions we now turn.

[11] On the first issue of consent, the facts suggest that one of the parties was not present that day at all in court. That he was represented by his attorney before court is neither here nor there. Parties have to be present in court, the more so when the order that the court is to make is not based on law but on the consent of parties. Mr Grandcourt, in this case, was not. It is said he was sick in bed. The Attorney appearing for him could have moved for a postponement on that ground. Parties preferred to dispose of the matter expeditiously, to their credit. Unfortunately, they took a risk which turned out to be a reality in that such a procedure was always open to challenge. And it was. It was a typical situation of more haste less speed. The grounds for challenge must have been obvious to the parties in that consent of this absent defendant could not have been effectively obtained - (a) at arm's length; (b) when he was lying on a sick bed; (c) through a telephone; (d) by unconfirmed proxy of the alleged heirs present and (d) without ensuring that there was clear evidence of such consent from the proper parties to the case.

[12] Parties in a civil suit should always be encouraged to settle their disputes between themselves and invite the court to give a judgment on the terms agreed upon. In many advanced jurisdictions, there is a law which imposes parties to a civil suit to consider a settlement first before engaging in full-blooded battle in court. However, it is a rule of best practice that the actual provisions of section 131 of the Code of Civil Procedure (Cap 50) be followed which imposes obligations upon both the

parties and the court. The reason is obvious. A judgment is not any decision. It is a title from which a number of rights follow. That is why a consent-judgment should be procedure perfect. With respect to the parties, they shall –

- (a) *appear in court; and*
- (b) *file a judgment by consent*

a. *signed by both parties*

b. *stating the terms and conditions agreed upon between them in settlement of the suit and the amount, if any, to be paid by either party to the other.*

[13] With respect to the court, there is an obligation to ensure that there is no impediment before it may enter judgment in accordance with the settlement reached. If there is no impediment, the court may enter judgment accordingly.

[14] The court may find that an agreement filed by the parties present certain impediments to enter judgment as per the terms agreed upon between the parties. For example, the terms may exceed the competence or the jurisdiction of the court. The agreement may relate to matters on which issues may not have been joined. In such cases, the Court may decline to give a judgment, leaving the agreement to have the force of a judicial contract between the parties. Or it may give judgment limited to what is within its powers to order, leaving the rest to have the force of a judicial contract between the parties. However it is, it is the duty of counsel and court to ensure that the agreement

and the judgment pronounced on it is free from further controversy.


- [15] In this case, it is seriously arguable that the consent of the defendant in point of fact had been obtained let alone his ~~consent as required by law.~~
- [16] We may now move to the second issue: namely, whether there has been any judgment at all. It is worth noting that neither party to the case moved that judgment be entered as per the agreement reached between the parties. Section 131 encapsulates another rule of best practice that after an agreement has been entered into, parties - who should be present and file the signed agreement - should then move to enter judgement in the terms set out. In this case, aside the fact that there was no motion, there was no formal judgment entered as such. True it is that the court made certain orders following the agreement. But those orders are bereft of any legal basis and are void by reason of non-compliance with section 131. To that extent, therefore, there has been no judgment as such.
- [17] In the light of the above, there is no need for us to decide the other issues raised under grounds (b), (c), (d), (e) and (f) above.
- [18] With respect to the law on consent-judgment, just as in some other obvious cases under the Seychelles Civil Code, one would need to resist the temptation of following the practice obtaining in common law jurisdictions. The civil law of the Republic,

inspired as it is from the continental law even if written in English and customized to the nation, starts off by placing the written word as a basic construct of its legal system. On the other hand, the common law system starts off by placing the spoken word as its basic construct. Thus, in the system we have ~~in this country inherited, it is unsurprising to see that in certain~~ cases:


"La conviction du juge importe peu, l'automatisme de la preuve est précisément l'effet recherché." **Encycl. Dalloz., Civ. Vol. VI, Vo Preuve, § 16. J. Normand, Le Juge et le Litige, 1965.**

[19] It is that "*automatisme de la preuve*" which is envisaged in section 131 of the Courts Act of Seychelles.


[20] For the reasons given above, the appeal is dismissed, with a direction that the parties to the case where the purported "consent judgment" was given are put back to the position of status quo ante to the purported decision. In other words, the case should proceed as though there has been no consent-judgment as yet given. With costs.


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J. M. HODOUL
JUSTICE OF APPEAL

I concur:


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S. B. DOMAH
JUSTICE OF APPEAL

I concur:


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B. RENAUD
JUSTICE OF APPEAL

Dated this 29 November 2006, Victoria, Seychelles