

IN THE SEYCHELLES COURT OF APPEAL

Marie-May Philoe

APPELLANT

VS

Pamela Philo

RESPONDENT

Before Macgregor, Hodoul, Fernando and Twomey JJA

Mr. C. Lucas for the Appellant

Ms. L. Pool for the Respondent

Date of Hearing: 21st April 2011

Date of Delivery of Judgment: 29th April 2011

SCA No. 26/2009

JUDGMENT

A.F.T.FERNANDO. JA

1. The Respondent in this appeal before us, who is the daughter and the Executrix of the estate of the late Lawson Philo (Hereinafter referred to as the Deceased), had brought

this action before the Supreme Court as Plaintiff; against her aunt Marie-May Philoe, the Appellant in this case; who is the sister of the Deceased, and the Defendant before the Supreme Court.

2. It has been the position of the Respondent that the Deceased in August 2005 received a cheque in the sum of SR 87,507.36 from the Government of Seychelles as benefits arising out of his past employment with the Government. According to paragraph 4 of the Amended Plaint at the time of the receipt of the moneys the Deceased was in hospital and had directed the Appellant and had given her authority to deposit the said money in Barclays Bank account no. 4509428, which was in the joint names of the Appellant and the Deceased. According to the Respondent's testimony, this was a Savings account. On the 30th of August the Appellant had deposited the said amount in account no. 4509428. The said facts were admitted by the Appellant. The account at Barclays Bank, according to the evidence before the court had been opened for the deposit of the moneys that the Deceased would get from the Government.
3. The Respondent, in the Plaint filed before the Supreme Court, had claimed that the Appellant in the month of September 2005 had fraudulently withdrawn SR 39,500 from the said account on two occasions, Rs 37,500 on the first occasion and Rs 2000 on the second occasion; without the knowledge, permission and authority of the Deceased. The Respondent had claimed that Deceased had repeatedly requested the Appellant to refund the said amount but the Appellant had refused to do so. Lawson Philo, the Deceased died on the 27th of November 2005. The Respondent had claimed as a result, the Deceased had suffered loss and damage in a sum of SR 39,500 and SR 10,000 by way of moral damages, and claimed that the Appellant was liable to pay to the Respondent that amount as she was the Executrix of the estate.
4. The Appellant had taken up the position that the Deceased who was an alcoholic lived with her during the 4 years prior to his admission in hospital and that she cared for him and maintained him independently of any assistance from the Respondent or other relatives.
5. It is she, according to the Appellant, who took the initiative and all the necessary steps to have the application for benefits arising out of his past employment with the Government processed and get the payment approved, a process which took 3 years to conclude. She had borne all expenses in relation to it and all that the Deceased had to do was to place his signature in the relevant documents.

6. It is clear from the Respondent's evidence that she did not know anything about the Deceased's past employment with the Government or his entitlement to benefits arising out of his past employment. As per the Plaintiff she became aware of it only after the moneys had been disbursed to the Deceased. According to her evidence before the trial court she was not aware how the deceased made application to obtain his benefits for past services with the Government nor about the opening of the joint account at Barclays in the names of the Appellant and the Deceased to deposit the moneys, the Deceased was to receive from the Government. The Respondent was not even aware of anything pertaining to the receipt of the cheque or how it came to be deposited in the joint account. It is clear from the evidence of the Appellant that it was she who collected the cheque that was due to the Deceased from National House and the Deceased had to go to the Treasury to have it released.
7. It had been the position of the Appellant that there was an agreement between her and the Deceased that the proceeds received would be shared equally between them and her half share would be considered as the Deceased's contribution for his stay and upkeep at her premises. She had denied that the withdrawal of moneys were without the Deceased's authority.
8. When the Respondent had been questioned in her examination-in-chief; as to whether she knew about the agreement which the Appellant had claimed, existed between her and the Deceased to share the compensation money "half/half", her answer had been in the negative. The relevant part of the proceedings states thus:

"Q. Do you know about that agreement.

A. No.

And again

Q. Did he tell you that he had arrangement with your aunty to pay her half of the proceeds to compensate her for all the things she had done for him?

A. I never knew there was any agreement."

The Respondent's deliberate silence when further questioned about the agreement is noteworthy.

"Q. Did you understand that there was an arrangement between your aunty and your father that he would give her half the money? And in fact she was the person who initiated the process of getting that money?"

A.

Q. Do you now understand why your aunty had half because there was an arrangement between herself and your father?

A.”

The Respondent’s lack of knowledge as to the agreement between the Appellant and the Deceased or her silence when questioned about it cannot be taken as a denial of the Appellant’s claim as to the existence of the agreement between her and the Deceased. It is true that one cannot deny, what one does not know, but the resultant position is that the Appellant’s evidence in this regard had remained uncontroverted. The blood relationship between the Appellant and the deceased is an exception, as the learned trial Judge had correctly stated, to the requirements under article 1341 of the Civil Code of Seychelles. Further the existence of the joint account amounts to proof of the agreement, in view of the provisions of article 1347 of the Civil Code of Seychelles and is a basis for the non application of article 1341.

9. The Respondent had pleaded in her Pleint that despite the repeated request by the Deceased to the Appellant to refund her the moneys withdrawn by the Appellant, more specifically by notice dated 28th October 2005 (P2) the Appellant had refused to do so. In P2 it is alleged that the Appellant had withdrawn SR 39,500 from the joint account without the consent or authority of the Deceased and had thereby noticed the Appellant to refund the said amount within 7 days to the Attorney for the Respondent, under threat of legal action. This letter was written by the Attorney for the Deceased when the Deceased was in hospital.
10. The response by the Appellant to P2 by her letter dated 10th November 2005 had been produced through the Respondent as P4. In P4 the Appellant had stated: “Please note that the money I retained was the money owed to me by Lawson for the 48 months that he stayed with me when none of his children was caring for him. During the time he stayed with me I cared, fed, clothed and housed him and he agreed to pay me when he received his gratuity. I was the one, who acting on his behalf, did all the transactions to get his gratuity. Upon receiving the gratuity, as agreed, I deducted part of the money he owed me and gave him back the balance.” (Underlining and highlighting by us).
11. It had come out in cross-examination that the Respondent had started querying about the money only when she came to know that the Deceased had received it and after she had sought legal counsel. It had been the position of the Appellant that the letters of demand sent through the lawyer was a sham to get hold of all the moneys that the

Deceased got from the Government for his past services and that they never conveyed the true intentions of the Deceased.

12. All that was before the trial court to ascertain the intentions of the Deceased were P 2, 3, 7 and 8, namely, the letters of demand sent by counsel for the Respondent to the Appellant acting on behalf of the Deceased and the testimony of the Respondent, her sister and the Appellant before the trial court. None of the letters bear a signature or a thumb impression of the Deceased. The testimony of the Respondent and her sister as regards the non existence of an agreement are hearsay. As stated at paragraph 8 above there is no specific denial by the Respondent of the agreement which the Appellant had claimed had existed between her and the Deceased. It was on the basis of this material that the learned trial court had to make a determination in this case.

13. The Learned Trial Judge had come to the conclusion that there was no agreement between the Deceased and the Appellant to share equally or otherwise the moneys the Deceased received from the Government and that the withdrawal of moneys by the Appellant from the Joint account was without the knowledge and authority of the Deceased and was fraudulent, for the following reasons:

- (i) The Appellant had not appealed to him as a credible witness when she testified that there was an agreement for sharing the gratuity amount equally between the parties.
- (ii) The fact that the Appellant had incurred some expenses when she looked after the Deceased for a couple of years cannot create any legal obligation save a moral one on the part of the Deceased to compensate the Appellant.
- (iii) The Appellant had not adduced any concrete evidence with specificity as to when, where and how that the alleged agreement was concluded and what specific terms were agreed upon.
- (iv) If there was an agreement for equal sharing of the money the Deceased received from the Government, why didn't the Appellant withdraw the exact half share when she withdrew a relatively large amount from the bank in the first instance?
- (v) Why didn't the Appellant meet the Deceased at the hospital, and question him about the letter of demand issued on his behalf by his lawyer.
- (vi) What prevented the Appellant from disclosing about the agreement in Exhibit P4 when she had an opportunity to refute the allegation of fraudulent withdrawals?

(vii) The Appellant's withdrawal of Rs 37,500 from the account, the very next day following the deposit of the moneys received by the Deceased from the Government, for which no reason was adduced before the court shows a fraudulent intent on the part of the Appellant.

14. We do not wish to comment on the learned trial Judge's observations as regards the credibility of the testimony of the Appellant as that is a matter he was in a position to observe and which we are not. But we have the right to interfere with the inferences drawn by the learned trial Judge from the testimony of the Appellant or any other witnesses or from other matters when they are erroneous and this we have no hesitation in doing. An inference if to be acted upon to the advantage or detriment of a party to a case should be the only inference that could be drawn from the material before the court.
15. It is clear to us that the learned trial Judge got his burden of proof mixed up and failed to appreciate that the burden was on the Respondent who brought this action to establish on a balance of probabilities that the withdrawals of the moneys from the Joint account were without the knowledge, permission and authority of the deceased and fraudulent as claimed by the Respondent in the plaint. These were issues that were essential to the case and had to be proved by the Respondent if she was to succeed in the action. The general rule, in civil cases, is that he who asserts must prove. A party cannot escape a legal burden borne by him on a particular issue essential to his case by the simple device of drafting the claim, in relation to that issue, by way of negative allegation. The learned trial Judge had failed to appreciate and comment on the Respondent's inability to specifically deny that the Deceased had entered into an agreement with the Appellant to share the money he was going to get from the Government for his past services. The Respondent who claimed that the withdrawals of money were without the knowledge, permission and authority of the Deceased had not questioned the Appellant as to when, where and how the alleged agreement was concluded and what specific terms were agreed upon. Thus the Appellant was right to rest satisfied with her evidence that there was in fact an agreement between her and the Deceased. Therefore the learned trial Judge was in error when he held against the Appellant for not adducing any concrete evidence with specificity as to when, where and how the alleged agreement was concluded and what specific terms were agreed upon.
16. Another factor which the learned trial Judge had ignored and which goes to the very crux of this case is that Barclays Bank account no. 4509428, was a joint account in the

names of the Appellant and the Deceased, and obviously with the right of either party to withdraw moneys, without the others authority or approval. It is because of this that the Appellant had withdrawn moneys from this account on the 1st and 26th of September 2005 as borne out by P5 without the signature of the Deceased. This clearly shows the understanding that had existed between the Deceased and the Appellant at the time of the opening of the account as regards dealing with the moneys that were put into the joint account. This evidence taken together with the uncontested evidence of the Appellant that it was she who was responsible in obtaining these moneys for the Deceased and that there was an agreement between the Deceased and herself for the sharing of the money, cannot be displaced by a letter of demand dated the 31st of August 2005 written probably after the deposit of the moneys in the joint account and received by the Appellant likely after the first withdrawal was made on the 1st of September.

17. The learned trial Judge's contention that if there had been an agreement for equal sharing of the money the Deceased received from the Government, why didn't the Appellant withdraw the exact half share when she withdrew a relatively large amount from the bank and in the very next day following the deposit, does not convince us. One may as well ask if there was fraud on the part of the Appellant why didn't she withdraw the total amount, which she was perfectly entitled to do being a joint account holder with the right to withdraw moneys without authority from the Deceased.
18. The learned trial Judge had erred when he concluded that the Appellant had not disclosed about the agreement in Exhibit P4. The contents of Exhibit P4 as set out at paragraph 10 above clearly show that the Appellant had in fact disclosed the agreement. The contents of P4 had not been denied by the Respondent until the filing of the plaint in this case in February 2006.
19. The learned trial Judge's pronouncement that the fact that the Appellant had incurred some expenses when she looked after the Deceased for a couple of years cannot create any legal obligation save a moral one on the part of the Deceased to compensate the Appellant; is erroneous; for it certainly can and did create one, in view of the agreement reached between the Deceased and the appellant to share the moneys that the Deceased received from the Government.
20. We are of the view that the Respondent had failed to discharge the burden of proving that the Appellant had withdrawn moneys from the Barclays Bank joint savings account without the knowledge, permission and authority of the Deceased and fraudulently, in

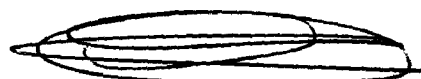
view of the fact that it was a joint account with the right of either party to withdraw without the authority of the other.

21. We therefore allow the appeal granting the relief as prayed for in the Notice of Appeal.



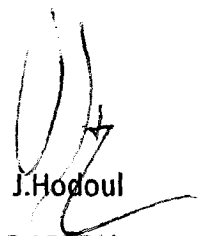
A.F.T.FERNANDO
JUSTICE OF APPEAL

I concur:



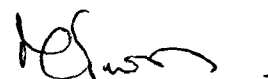
F.MACGREGOR
PRESIDENT OF THE COURT APPEAL

I concur:



J.Hodoul
JUSTICE OF APPEAL

I concur:



M. TWOMEY
JUSTICE OF APPEAL

Dated this 25th day of April 2011, Victoria, Seychelles