

IN THE SEYCHELLES COURT OF APPEAL

[Coram: A.Fernando (J.A),M. Twomey (J.A),L. Tibatemwa-Ekirikubinza(J.A)]

Civil Appeal SCA 29/2017

(Appeal from Supreme Court DecisionCS 06/2012)

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| Emilie Adonis | 1 st Appellant |
| Antoine Adonis | 2 nd Appellant |
| Versus | |
| Daniel Port Louis | Respondent |

Heard: 05 December 2019
Counsel: Mr. J. Camille for the Appellants
Mr. F. Elizabeth for the Respondent
Delivered: 17 December 2019

JUDGMENT

A.Fernando (J.A)

The appeal:

1. The Appellants, who were the Defendants at the trial before the Supreme Court, have appealed against the whole of the decision of the Supreme Court wherein the learned Trial Judge had in conclusion said: “The plaint succeeds and the court gives judgment in favour of the plaintiff (Respondent herein) for the total amount of Rs 906,800.00 being claimed as the market value of the property and as regard moral damages I find that a sum of Rs 25,000.00 would be fair. The defendants to pay the costs in this matter. Coming to the counterclaim of Rs 1200,000.00 for costs of construction and Rs 50,000 as moral damages I do not find any cogent evidence to substantiate same before the court and the counterclaim should fail. It is therefore set aside.”

The case, in brief, as recorded at paragraph 1 in the judgment:

2. “The Respondent (Plaintiff before the Supreme Court), a building contractor, is claiming the sum of Rs 1,006,800.00 as damages for breach of contract. In their defence the defendants (Appellants herein) are denying in that they owe any money to the plaintiff or are liable for any breach of contract. They are in turn counterclaiming the sum of Rs 1,200,000.00 for costs and expenses for the construction and Rs 50,000.00 as damages for inconvenience and distress.”

Grounds of Appeal:

3. The Appellants have raised the following grounds of appeal:
 - i. “The Learned trial Judge erred in law in having failed to appreciate that the Respondent did not prove and/or substantiate, by way of evidence, his oral testimony before the Court, in regards to his claim as per plaint and in regards to the awards of damages awarded by the Court in the case, being Rs 906,800 and Rs 25,000 respectively.
 - ii. The learned trial judge erred in law in having failed to assess the evidence as deponed by the Respondent before the Court and of which his findings in regards to the award of damages ought to have been based.
 - iii. The learned trial erred in law in that his findings that the plaint of the Respondent should succeeds rest on no evidential basis and which finding could not have been made in law.
 - iv. The learned trial judge erred in law and on the facts in having failed to appreciate that Respondent’s claim as per pleadings had been for Rs 1,200,000 representing alleged sum of money invested to complete the house and the semidetached house, whereas the findings of the court was in the sum of Rs 906,800, based on the same plaint having succeeded before him.

- v. The learned Judge erred in law and on the facts in attaching insufficient weight and/or to address himself to the exhibits tendered by Appellants, relating to the claim of the Appellants in respect to their counter claim.
- vi. The learned Judge erred in law and on the facts in having set aside the counter claim of the Appellants and in finding in favour of the Respondent, with cost.

By way of relief the Appellants sought a dismissal of the Respondent's case and to find in favour of their counter claim." (verbatim)

The averments in the Complaint filed by the Respondent before the Supreme Court:

4. According to the Amended Complaint filed by the Respondent before the Supreme Court, the Appellants were the joint owners of land parcel No H4483 with an uncompleted house at Mont Signal, Mont-Buxton and the Respondent, a building contractor. By virtue of an oral agreement made on or about April 2009, the Respondent agreed to complete construction of the Appellants' house and the Appellants agreed to allow him to build a semi-detached house of his own on the said land. On 19th March 2009 the 1st Appellant expressed her desire to have the Respondent benefit from her estate after her death by instructing Mr. John Renaud, Notary Public to draw up her Will in which she appointed the Respondent as Testamentary Executor and bequeathed Parcel No. H4483 with house thereon to him and two other persons namely Paul Adonis and Excell Gerry Port-Louis. It was inter alia, term of the said agreement that the Respondent would not charge the Appellants for all construction works which he would carry out on the said uncompleted house. It was a further term of the said agreement that upon completion of all construction works on the Appellants' house; the Respondent will build an adjoining semi-detached two-bedroom house on Parcel H4483 for himself. In compliance with the said agreement, the Respondent had duly executed all construction works amounting to the sum of SCR 1,200,000.00 to complete the house of the Appellants. In further compliance with the said agreement, the Respondent duly started to build his own semi-detached two-bedroom house on Parcel H4483 belonging to the Appellants. The Respondent had averred in his complaint that the said semi-detached two-bedroom house had been completed. He had averred that the Appellants in breach of the said agreement, had failed, refused or neglected to honour their obligations under the said

agreement by allowing him possession and occupation of the said semi-detached house. He had averred in his plaint that he verily believes that the Appellants are in the process of renting or selling Parcel H4483 with the houses thereon, in further breach of the said agreement. The Respondent had averred that he had suffered some detriment without lawful cause and the Appellants have been correspondingly enriched without lawful cause as a result of the agreement and that he is entitled to recover what is due to him to the extent of the enrichment of the Appellants in law. Further and in the alternative, the Respondent had averred that the Appellants have preserved the structures and buildings which he had built on title No. H4483 at his own costs and that the Appellants must now reimburse him in a sum equal to the increase in the value of the property or equal to the cost of the materials and labour estimated at the date of such reimbursement. By reason of the matters aforesaid the Respondent in his plaint had claimed that he had suffered loss and damages which he had particularized as follows:

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| (a) Market Value of the building built by the | |
| Plaintiff on the Defendant's property | SCR 906,800.00 |
| (b) Moral Damages for inconvenience, anxiety and | |
| Distress | SCR 100,000.00 |
| <u>TOTAL</u> | <u>SCR 1,006,800.00</u> |

The averments in the Defence filed by the Appellants before the Supreme Court:

5. The Appellants in their Amended Defence had admitted that they are the joint-owners of land parcel No H4483 which had an uncompleted house. It has been their position that the agreement was for the Respondent to complete construction of their house from materials supplied by them and at their costs and the Respondent was to carry out the construction work gratuitously. They deny that they agreed to allow the Respondent to build a semi-detached house of his own on their land. The only agreement was for the Respondent to receive free accommodation in the Appellants' house pending the Respondent securing his own accommodation. The Appellants had denied that the Respondent's averments in relation to the Will and state that it was only a declaration of intention which has since then been

withdrawn. It had been the Appellants position that the Respondent did not complete the construction work on their house as agreed but constructed a small semi-detached house on their property for himself with their money and materials and without their consent. The Appellants had stated that there was never an agreement to build a semi-detached two-bedroom house for the Respondent on their property but always believed the adjoining house to be an extension to their incomplete house. The Appellants had denied a breach of an agreement and that they are in the process of selling parcel H4483. They have admitted that the property is being rented. The Appellants had denied that the Respondent had suffered any detriment and that they had been enriched. They had denied the Respondent's claim for damages. By way of a counterclaim the Appellants had claimed for "costs and expenses for the construction of the semi-detached house at Rs 1,200,00.00 and Rs 50,000.00 for inconvenience and distress. By way of relief the Appellants had in their Defence moved Court for a dismissal of the Plaint with costs and prayed for judgment on the Counterclaim.

6. At the very outset I wish to point out that the Appellants' counterclaim is baseless as they are claiming money for the construction of the semi-detached house which they claim belong to them and in their possession and which they have admitted they were renting. The counterclaim also shows that they are not sure of the position that they had taken up in their defence that there was no agreement to allow the Respondent to build a semi-detached house of his own on their land. The Appellants by counter claiming Rs 1,200,00.00 as costs and expenses for the construction of the semi-detached house, have accepted the market value of the building built by the Respondent and as claimed by him in his Plaint as Rs 1,006,800.00. Therefore, the need to prove the expenses incurred for the construction of the house was obviated.

Plaintiff's (Respondent herein) case before the Supreme Court:

7. The Respondent testifying before the Court had stated that the 1st Appellant is his aunty, his mother's sister. According to him the Appellants had approached his mother and requested of her to ask the Respondent to complete their house that had been left partly built by the earlier contractor. On the 19th of March 2009 the 1stAppellant had made her Last Will making the Respondent her Executor and giving him parcel No: H4483. The said Will had been

produced as Exhibit P5. The Respondent had stated that he did not charge the Appellants any money for the construction and as per the agreement he would build a semi-detached two bed room house on parcel H4483 for his own use. When he was nearing completion of the construction, the Appellants had threatened him and said that they did not want to continue with the agreement. He had received a letter from the Appellants' lawyer to vacate the site. He had therefore left the site. The Respondent had through his lawyer written to the Appellants requesting that he be re-instated in the house and that he had no objection from being removed from the Will. By that time the Respondent vacated the site, about 80% of work had been completed and he had spent his money, about one point two million on the construction of the building, which had three units, the basement for the occupation of the Appellants and the other two units on top for himself and his brother. The floor area of the building was 210 square meters. The Respondent could not occupy the semi-detached two bedroom apartment and had stated that it had been rented out to people. Several pictures had been produced to Court indicating the various stages of the construction work being carried out. The Respondent had stated that he had contracted the services of a Quantity Surveyor and Property Consultant to value the work. The Respondent had stated that the Appellants had benefitted from his work as averred in the Plaint by renting the house with people while he had to pay for the construction and continue to live in rented apartments. According to the report of the Quantity Surveyor, the construction work done has been quantified at RS 906.800.00. The Respondent had stated that inclusive of the moral damages, he is claiming a sum of Rs 1,006,800.00 with interest and costs from the Appellants. He had denied specifically the Appellants averment in their Defence that they provided him with the material. He had stated that the Appellants had not given him any money and that everything had been built by him and paid for by him.

8. Under cross-examination the Respondent had stated that he did not think it necessary to have a written agreement "because we are family". It had been suggested to the Respondent that the agreement was for him to complete the construction on the main house and in return to have free accommodation until such time the Respondent sorted out his own accommodation. On being questioned as to why the unit on top was completed before the basement that was to be occupied by the Appellants, Respondent had explained that it had to be done that way. The Respondent had specifically denied the allegation that no work had been done on the

basement and that the Respondent had used the materials and the money taken from the Appellants to complete the small house for his benefit contrary to the agreement. The Respondent had said that he got the money to do the construction of the house from the work he was doing at Ephelia hotel by breaking rocks. He used to earn 25,000 to 30,000 every two to three days. 67% of that money he had invested in the construction of the Appellants house. He has a group of workers, working for him. When challenged that the Respondent had not produced any receipts in respect of purchase of construction materials, his response had been that he is a contractor and was working in two to three projects at the same time and the receipts are in the name of his company and will not specify for which project they are. He had also said that he had no receipts for money he received from Ephelia for breaking rocks nor for the house he was constructing elsewhere. It is noted that normally it is the one who pays for work done that keeps receipts and not the one who receives payment.

9. N. Roucou, a Quantity Surveyor of 14 years' experience, testifying on behalf of the Respondent at the trial had produced his Report, exhibit P 12, providing a valuation of the works carried out on a double storey slit residential development with an attic floor. The valuation made reference to renovation to the existing house which he had estimated as 31% of work done and at a cost of SR 57,341.25; the new house extension which he had estimated as 80-85% of work done and at a cost of SR 812,430.00 and site preparation works and demolition and alteration work as 100 % of work done and at a cost of Rs 37,000.00 adding up to a total of SR 906,800.00. There had been no challenge to the percentages of work done or valuation amounts.

Defendants' (Appellants herein) case before the Supreme Court:

10. The 2nd Respondent testifying before the Trial Court had stated that he was not involved in any discussions regarding construction work at his property and that it was his wife, the 1st Respondent, "who did all the talking because this was a family affair. I was always working,...I was always on the sea and whenever I came back she told me to give her money to give Daniel (Respondent) to finish the work." There were no receipts produced to show that moneys were in fact given to the Respondent or that construction materials were purchased from the moneys that the 2nd Appellant claimed he had withdrawn. He had said

that the Respondent had not purchased any building materials and that he bought everything. He had also withdrawn moneys from his bank accounts at Barclays and Nouvobanq and given to the 1st Appellant to be given to the Respondent. The 2nd Appellant's evidence was not of much use in supporting the averments in the Defence as he claimed to be unaware of any agreement and claimed not to have had any dealings with the Respondent.

11. The 1st Appellant testifying before the Court had stated that the Respondent is her sister's son. She and the Respondent had reached an agreement in Mr. Renaud's office whereby the Respondent was to construct her house on the condition that she would have to supply the materials and also pay him. In return the 1st Appellant had agreed to give the Respondent "one room for three months as his house was being built". The 1st Appellant had in accordance with the agreement provided the Respondent with the materials and the money. She had said that her husband, the 2nd Appellant, had given her the money to be given to the Respondent and sometimes she herself had withdrawn from the bank. The 1st Appellant had said that she personally gave the money to the Respondent in his house. She had denied that the Respondent had spent Rs 1.2 million of his own money in constructing her house and that there was any agreement that he would be allowed to build a small house next to the main house which would belong to the 1st Appellant. She had also denied that she bequeathed her property to the Respondent by a Will.
12. Under cross-examination the 1st Appellant other than saying that they had already paid the Respondent was unable to say how much he had been paid. She had denied renting out her house but stated that some workers of her brother was staying in the house.
13. In answer to Court, Counsel for the Appellants at the trial below had admitted that the Appellants had not told Court how much they had paid for construction materials.

Documents produced by the Appellants before the Trial Court:

14. Documents produced by the Appellant's before the Trial Court pertaining to purchases of construction materials as correctly stated by the Learned Trial Judge in his judgment were of no help to their case as they date back to a period long before the agreement with the Respondent to construct the house was made. Further the receipts refers to quantities so

minimal and insignificant when compared with the construction work that had been carried out. As stated earlier there were no receipts produced by the Appellants to prove that the moneys were in fact paid to the Respondent. The bank documents produced date to a period long before the agreement with the Respondent had been reached or long after the Respondent had stopped work; and as correctly stated by the Learned Trial Judge “cannot be relied upon either as constituting payment or in any way as a sufficient sum for purchase of materials.”

Determinations made by the Trial Judge:

15. I am in agreement with the learned Trial Judge that it is difficult to believe that the Respondent would have worked gratuitously for the Appellants merely to have three months accommodation with the Appellants until the Respondent find a house for himself. There certainly had been an agreement between the Respondent and the Appellants for the construction of the Appellants house and the Will, which was later withdrawn, had constituted the leitmotiv. I agree with the learned Trial Judge that there was no evidence of any money paid to the Respondent and I agree that the construction materials had been purchased by the Respondent. Thus there had been no cogent evidence to substantiate the counterclaim of Rs 1200,000.00 for costs of construction and Rs 50,000.00 as moral damages. Since there had been no challenge to the percentages of work done or valuation amounts I agree with the learned Trial Judge that the Respondent’s plaint should have succeeded.

The issue before the Court:

16. This case depended entirely on which version was more probable, namely that of the Respondent that it was he who provided the building materials and carried out the construction work at his own cost or that of the Appellants who claimed that they provided the building materials and paid the costs of labour, bearing in mind that the burden was on the Respondent to prove his case. In this case the Trial Court had to make this determination mainly on the oral testimony of the Respondent and the Appellants. The receipts produced and the bank documents were not of much use save for the Report of the Quantity Surveyor. No objection had been raised to the maintenance of the action under article 1341 of the Civil

Code of Seychelles which states that oral evidence is not admissible to prove any matter the value of which exceeds 5000 rupees and requires a document drawn up by a notary or under private signature. This Court in the case of **Cooposamy V Duboil [2012] SLR 219** found that where there is no written agreement and evidence is brought regarding the existence of an oral agreement, the objection to the evidence in such cases ought to take place, before the material oral evidence on which the plaintiff is relying as proof of the obligation is adduced. In the case of **Corgat V Maree [1976] SLR 109, Sauzier J** said: *“The provisions contained in article 1341 are not absolute. They are subject to many exceptions one of which being that they do not apply where a party either expressly or impliedly waives them”*. Counsel for the Appellants at the hearing before us confirmed that he did not raise an objection under article 1341 in view of the accepted exceptions to article 1341, namely moral impossibility as a result of the relationship between the parties from family ties of aunt and nephew. In the case of **Michaud V Ciunfrini [2006-2007]** this court said: *“Moral impossibility may arise from a special relationship between the parties, resulting from family ties or parentage, ties of affection and ties based on trust”*.

17. That being the case the determination as to which party’s evidence was more probable was essentially a matter for the Trial Judge. An appellate court would be very slow to interfere with such a finding unless the version of the party whose evidence the Trial Judge had accepted is so improbable or where the inferences drawn by the Trial Judge from the facts as adduced by that party is wrong. The Appellants have not succeeded in convincing us on that matter. It is clear from the judgment that the learned Trial Judge had disbelieved the evidence of the Appellants. He had stated that the testimony of the 2nd Appellant “was designed to hide the truth”. He had gone on to state: “Defendant number 2 (2nd Appellant herein) appeared to be erratic and someone who had come to court with the intention of hiding the truth. His demeanour was that of a person who had come to court to tell lies and nothing else. Here is a person who does not know, or, as he said nothing to do with him, and giving the impression that the plaintiff (*Respondent herein*), was on his land carrying out the construction by himself. Yet the defendant says, he bought building materials for him.” As regards the Appellants version the learned Trial Judge had said: “It does not appear credible. For all the reasons set out above the defendants (Appellants herein) version cannot be believed.”

18. As stated at paragraph 15 above it is difficult to believe that the Respondent would have worked gratuitously for the Appellants merely to have three months' accommodation with the Appellants until the Respondent find a house for himself. Further as stated at paragraph 6 above, the Appellants by counter claiming Rs 1,200,00.00 as costs and expenses for the construction of the semi-detached house, have accepted the market value of the building built by the Respondent and as claimed by him in his Plaint as Rs 1,006,800.00. Therefore, the need to prove the expenses incurred for the construction of the house was obviated.

19. I therefore dismiss the appeal. I do not make any order for costs.

A.Fernando (J.A)

I concur:. M. Twomey (J.A)

I concur:. L. Tibatemwa-Ekirikubinza (J.A)

Signed, dated and delivered at Palais de Justice, Ile du Port on 17 December 2019