

IN THE SUPREME COURT OF SEYCHELLES

Micheline Larue

Appellant

v.

Johnson Carolla

Respondent

Civil Appeal No. 25 of 1984

Mr. Esparon for the appellant
The respondent did not appear

JUDGMENT

The appellant filed a plaint in the Magistrates' Court claiming payment of the sum of R.9,000 and costs on August 9, 1983. The plaint was duly served on the respondent and the parties appeared before the Magistrates' Court on October 5, 1983 when the respondent was given 14 days in which to file his defence. The parties appeared again on October 19, 1983 when the respondent filed his defence and the hearing of the case was set down for November 23, 1983 at 8.30 a.m. when it was further adjourned to December 21, 1983 at 8.30 a.m. It would appear from the record that the defendant failed to appear on November 23, 1983 when the hearing was first due to be heard and a fresh summons ordered to be issued for the 21st December. It does not appear that a summons was in fact issued but be that as it may the respondent did not appear on the 21st December either when leave to proceed was granted ex parte and the hearing adjourned again to December 27, 1983 at 1.30 p.m. On that date judgment was given in the appellant's favour. On February 16, 1984 execution was issued and moveable property of the respondent seized by a process officer on April 17, 1984. On May 9, 1984 the respondent's lawyer served notice of a motion to set aside the ex parte judgment dated December 27, 1983 on the ground that the respondent had not been properly served and/or notified of the hearing date of the case.

After hearing argument of Counsel for both parties the learned Senior Magistrate (A. Amstell Esq.) set aside the judgment of the Magistrates' Court (V. Alleear Esq.) dated December 27, 1983 expressly in terms of rule 22 of the Magistrates' Court (Civil Procedure) Rules Cap. 43.

It is against this decision of the learned Senior Magistrate that the appellant now appeals to this Court.

The main limb of Mr. Esparon's submissions is that rule 22 of the Magistrates' Court (Civil Procedure) Rules Cap. 43 (hereinafter referred to as the "Rules") has no application to this case. He has cited in support of his argument the judgment of Sir Georges Souyave C.J. in the case of Biancardi

v. Electronic Alarm S A (1975) S L R 193. In the Biancardi case on a similar motion before the Supreme Court to set aside its judgment given ex parte Sir Georges Souyave C.J. held that s. 69 of the Seychelles Code of Civil Procedure Cap. 50 can only apply to cases where the party invoking it has not appeared on the day fixed in the summons for appearance before the court under s. 63. As the defendant had duly appeared before the court on that day s. 69 had no application and could not be relied upon by the defendant and the only procedure open to him, apart from appeal, was an application for a new trial under s. 193.

s. 63 is the same as r. 16 of the Rules, s. 69 is the same as r. 22 of the Rules and s. 193 is the same as r. 95 of the Rules.

R. 22 of the Rules reads as follows -

"If in any case where one party does not appear on the day fixed in the summons, judgment has been given by the court, the party against whom judgment has been given may apply to the court to set it aside by motion made within one month after the date of the judgment if the case has been dismissed or within one month after execution has been effected if judgment has been given against the defendant, and if he satisfies the court that the summons was not duly served or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the court shall set aside the judgment upon such terms as to costs, payment into court or otherwise as it thinks fit and shall order the suit to be restored to the list of cases for hearing. Notice of such motion shall be given to the other side."

In this case the defendant appeared on the day fixed in the summons and again two weeks later when he filed his defence. It was not until November 23, 1983 on the date fixed for the hearing that he failed to attend.

At page 202 of the Biancardi report the learned Chief Justice said -

"The final question is whether the defendant is entitled to invoke section 69 (or rule 22). Reading section 69 (or rule 22), it is clear that to satisfy its provisions one of the essential requirements is that the party invoking the same must not have appeared on the day fixed in the summons for appearance before the court. In other words section 69 (or rule 22) applies only in the case where the party, against whom judgment has been given ex parte, has not appeared on the day fixed in the summons for appearance under section 63 (or rule 16) ----- . This being an essential requirement of section 69 (or rule 22), it is obvious that this section can only be invoked in the case where the ex parte judgment has been given only under section 65 or 66 or 67 or 68 (or rules 18, 19, 20 or 21) and not where judgment has been given under section 128 (or rule 51) or even under section 133 (or rule 56), read in conjunction with section 64 or 65 or 67 (or rules 17,

18 or 20), if Mr. Walsh's submission is correct, since in either of the latter cases there has been no appearance of the defendant before the court on the day fixed in the summons under section 63 (or rule 16) I would like to observe that the words, "or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing" in section 69 (or rule 22) apply in the case where the court under section 65 (or rule 18) has adjourned the hearing of the suit ex parte and the defendant was prevented by any sufficient cause from appearing on that date to take advantage of the provisions of section 66 (or rule 19)."

As has been stated above the respondent claimed before the learned Senior Magistrate that he had not been properly served and/or notified of the hearing date of the case. There was no basis for thinking that the respondent had not been properly served as he appeared in answer to the plaint and subsequently filed his defence. There was also little of substance before the learned Senior Magistrate to suggest that the defendant was unaware of the hearing date of his case. He was informed of that in Court on October 18, 1983 that his case would be heard on November 23, 1983 when he failed to appear. Furthermore he has never shown "that he was prevented by any sufficient cause from appearing when the suit was called on for hearing." The learned Senior Magistrate furthermore in his ruling stated that "the letter written by the Court informing (respondent) of the date of the hearing was not written until 23.12.83 yet the hearing itself was due to have been on 21.12.83 i.e. 2 days earlier. It is hardly surprising therefore that (respondent) was unaware of proceedings." This statement is erroneous as the hearing ex parte was in fact set down for 27.12.83 which was 4 days later not 2 days earlier.

In any event for the reasons set out above and following the decision in Biancardi I would allow this appeal with costs, set aside the ruling of the learned Senior Magistrate dated May 23, 1984 and reinstate the judgment of the Court below dated December 27, 1983.

(F. Wood)

JUDGE

September 3, 1984.