IN THE SUPREME COURT OF SEYCHELLES

CIVIL APPEAL 17/87

CHEZ DEENU — APPELLANT

v.

PHILIBERT LOIZEAU — RESPONDENT

Draft Judgment of Mr. C. d'ARIFAT.

The parties to this Appeal have quite rightly accepted that we make an order for a new trial and we have ordered accordingly.

Indeed it had become all too clear that there had been irregularities which have led the Judge and the parties to be drowned into the furious seas of the personal answers and of the decisive oath.

Further there is a cardinal rule of pleading that has also been disregarded. If the parties had correctly set out their respective case they might have seen the light of day before they reached the Court of Appeal.

The parties to a civil action have a right to know the legal pretentions of their opponents and more specially the averments on which they rely to prove their case.

In the present case, the Plaintiff says that he had sold and delivered goods (which he detailed) to the Defendant. His claim was for the unpaid purchase price. During the trial the Defendant whilst in the witness box contradicted his plea by stating that whatever goods he had purchased from Plaintiff he had paid for them. Even before the Court of Appeal Counsel for Respondent did not seem to appreciate the difference between the two defences and their ultimate legal and procedural difficulties.

Indeed if we go by the pleadings the Plaintiff had the burden of proving the contract of sale, the delivery of the goods and the failure of the Defendant to pay the agreed price. If on the other hand we go by the statement of the Defendant in Court the Plaintiff has nothing to prove and it is for the Defendant to prove the payment he alleges he made. We shall not for the purpose of this judgment analyse the situation which would arise if Defendant were to say his admission is a qualified one which the Plaintiff must take in toto or reject in toto.

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Be that as it may the two important questions for the parties and for the Court were to ascertain on whom the burden of proof lied and to prove what facts.

Indeed before analysing the mechanics of
(1) the "procedure relating to examination, personal answers"
(2) the decisive oath, it is necessary to ascertain on whom the burden of proof lies. The reason therefore is simple. The mechanics of those two procedures have been devised to come to the rescue of a party who is required by law to prove a given fact by producing a writing - which in this particular case is not available. As indicated previously it may be the Plaintiff or the Defendant. But it cannot be both at the same time.

We are, at this stage, very much alive that this case will be heard anew and we shall refrain from saying anything which may be regarded as tracing the procedure to be followed in the retrial.

We shall therefore feel content to answer the points which were raised in the grounds of appeal.

Ground I - According to the justice of the case the learned Chief Justice should have allowed the Defendant (now Respondent) who was present in Court at the hearing of the case to be examined on his personal answers.

Section 161 of the Seychelles Code of Civil Procedure reproduces articles 324 of the French Code of Civil Procedure except that the French Code adds that the personal answers should not delay the "instruction" or the judgment.

It is accepted in France that a motion to hear the adverse party on his personal answers may be made at any time during the course of the trial. Dalloz Répertoire Pratique 1915 ed. Vol VII V° Interrogatoire sur Faits et Articles note 63.

However in order to grant the motion the learned Judge may require to be in presence of the circumstances justifying the motion. In the present case if the Appellant's Counsel had called the Appellant and endeavoured to prove the contract by oral evidence but did not succeed because of the objection by Defendant's Counsel, the need to resort to personal answers would have become evident.

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Ground III - refers to the procedure of the decisive oath. This matter is governed by Article 1358 and fol. of the Civil Code.

It is an oath which one of the parties invites the other one to take as the former cannot prove his claim otherwise. This initiative must come from one of the parties and not from the Court. Its purpose is to put an end to the claim.

We agree with the procedure as explained by André Sauzier in his Introduction to the Law of Evidence in Seychelles. He has in fact translated therein Dalloz Encyclopédie de Droit Civil V° PREUVE Vol. 6. Note 1349 and following.

Both parties and the Court having misdirected themselves on procedural matters this Court has in the interest of justice ordered a new trial. No order as to costs.

1. del. 5 Aug.

Address in Open Court

Goodall

J.

22.7.88

IN THE SEYCHELLES COURT OF APPEAL

Chez Deenu (Pty) Limited — Appellant

v/s

Philibert Loizeau — Respondent

Civil Appeal No. 17 of 19

Judgment of Goburdhun J.A

The appellant (plaintiff in the court below) claimed before the Supreme Court from the respondent (defendant in the Court below) the sum of R17,449.13 c for goods sold and delivered to him. In his plea the respondent denied that he was indebted to the appellant in the sum claimed or at all".

The learned Chief Justice who heard the case found that the respondent paid for whatever goods he purchased from the plaintiff (now appellant) and dismissed the claim.

The appellant challenged the judgment of the learned trial Judge on, inter alia, the following grounds:

(a) According to the justice of the case, the learned Chief Justice should have allowed the defendant (now respondent) to be examined on his personal answers and

(b) the learned Chief Justice misapplied the law relating to the tendering of the decisive oath.

After hearing counsel of both parties this Court agreed that there were irregularities in the proceedings and the interest of justice demanded that there should be a new trial. It accordingly allowed the appeal and ordered a new trial.

I now wish to add a few observations on the points raised by counsel in this appeal.

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At the very beginning of the hearing appellant's counsel moved to hear the respondent on his personal answers. Counsel for the respondent, very surprisingly in face of his plea, objected to the motion on the astounding ground that the plaintiff (now appellant) should first make out a prima facia case of his claim before he can call his client on his personal answers. The Court upheld the objection of counsel and refused the motion.

With great respect I disagree with the ruling.

The right of a party to examine his opponent on his personal answers should not be taken away from the party except on strong grounds. Counsel for the appellant in support of his motion said that he wanted to call defendant (now respondent) on his personal answers because of "his flat denial of all the allegations in his plaint". Though counsel did not state it in so many words it seems to me that the appellant wanted to try to obtain a beginning of proof in writing which would have enabled him to prove his case by oral evidence.

The purpose of calling a defendant on his personal answers is to obtain admissions from him or evidence which would destroy his case or strengthen that of the party calling him. Of course if a motion to call a party on his personal answers is unreasonable the Court has a discretion to disallow it.

In the present case the appellant had ample reasons to call his opponent on his personal answers.

As regards ground (b) mentioned above the relevant parts of the judgment of the trial court reads as follows :

A :"In the present case the plaintiff conceded his inability to prove that the defendant was a non-trader. However, he relied on the provisions relating to oaths and he requested the Court to allow Mr. Siva Pillay, managing director of the plaintiff, to be tendered a decisive oath in accordance with Articles 1358 and 1359 of the Civil Code. Despite the objections of the defendant, I allowed the decisive oath to be given to Mr Pillay who thereafter swore that the goods had been supplied to the defendant on credit in July 1982 to 23rd May 1983."

B : "The defendant was also tendered a decisive oath and he denied that he had any indebtedness to the plaintiff."

A decisive oath is meant to put an end to a litigation. A party cannot "invite himself" to give evidence for his own benefit. If a plaintiff has no evidence to prove his allegations he may invite his opponent to take the decisive oath. If the opponent takes the oath that would be an end of the whole matter and plaintiff's case would be dismissed. But if he refuses to take the oath then the party inviting him to take it would win his case.

It is obvious that both counsel misdirected themselves on the effects of a decisory oath and the procedure that should be followed in that connection in Court and misled (unwittingly I concede) the Court.

Both parties are to be blamed for the irregularities.

H Goburdhun
Justice of Appeal

Supreme Court
Victoria

June 1988

Delivered in Open Court

22.7.1988

IN THE COURT OF APPEAL OF SEYCHELLES

CIVIL APPEAL NO. 17 OF 1987

CHEZ DENIS (Pty) LIMITED ... APPELLANT

versus

PHILIBERT LOIZEAU... ... ... RESPONDENT

Nathan for Appellant

Renaud for Respondent.

REASONS FOR JUDGMENT

MUSTAFA, P.

The appellant plaintiff had filed an action in the Supreme Court against the respondent defendant for recovery of the sum of Rs.17,449.13 in respect of goods sold and supplied to the respondent. The respondent in his defence denied that he was indebted to the appellant in the sum claimed or at all.

After a trial, the Supreme Court (Seaton, C.J.) dismissed the appellant's claim. The appellant's appeal to this Court was heard on 30.3.88, and in the course of the hearing, the parties, through their advocates, by consent agreed to the appeal being allowed, and also agreed to the case being sent back to the Supreme Court for a re-trial on the pleadings as filed. They also agreed that costs incurred todate would abide the result of the re-trial. This Court accordingly set aside the judgment and order of the learned Chief Justice and remitted the case to the Supreme Court for re-trial. We said we would give our reasons and I do so now.

Mr. Nathan, in his appeal before us, had applied for a re-trial on inter alia, the following two grounds:

(1) The Chief Justice had erred in disallowing the respondent to be examined on his personal answers.

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(2) The Chief Justice misapplied the law concerning decisive oaths.

At the commencement of the trial in the Supreme Court, Mr. Nathan for the appellant applied to call the respondent to be examined on his personal answers. Mr. Renaud for the respondent objected. In the course of his application Mr. Nathan stated that the respondent's defence was a total denial of indebtedness and would indicate ~~and~~ that there were no transactions between the appellant and the respondent and implied that they did not know each other. It was obvious that the appellant was attempting to open a door to let in proof. The learned Chief Justice rejected Mr. Nathan's submission and held that the appellant must first adduce some prima facie evidence before he could call on the respondent for his personal answers.

Before us Mr. Nathan referred to a Mauritius case, re Kassamally Esmael reported in Mauritius Reports 1941 where at p.20 it is stated:

> "The right to examine a party on personal answers is a legal right granted to the opponent, of which he should not be deprived except on very strong grounds, inter alia, if physical attendance is impossible or dangerous to life, or if it is proved that the person to be examined is in no way concerned with the issue....."

And at p.19

> "It is the usual practice for the examination to be held at the commencement of the hearing of the case ....."

I think that the above passages correctly reflect the position as regards the personal answer issue and it seems to me that the learned Chief Justice was wrong in his ruling.

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I turn now to the question of decisive oaths. At the trial Mr. Nathan had admitted that since the respondent was a non-trader, the appellant's books of account could not be produced in evidence. He sought permission for the managing director of the appellant, Mr. Pillay, to take a decisive oath. Mr. Pillay was allowed to take the oath and did so. Then the Chief Justice allowed the respondent to take a decisive oath as well. And then the Chief Justice heard other witnesses giving evidence.

With respect I think that the learned Chief Justice had erred. I would refer to the Articles concerning decisive oaths in the Civil Code of Seychelles and in particular to Articles 1361 to 1363:

"1361 - The person to whom the oath is tendered and who refuses to take it, or who does not consent to passing it on to his opponent, or the opponent to whom it is passed and who refuses to take it, shall fail in his claim or in his defence

1362 - The oath shall not be passed on when the act envisaged is not that of the two parties but an act purely personal of the party to whom the oath was tendered.

1363 - When the oath tendered or passed or has been taken, the other party shall not be allowed to prove its falsity."

From the above Articles it seems to me that if a plaintiff is unable, for whatever reason, to prove his claim, then he can call on the defendant to take a decisive oath denying it. A plaintiff cannot offer to take such an oath himself. If the defendant refuses to take the oath, then the plaintiff succeeds, if he does, the

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defendant wins. A defendant may in certain circumstances pass the oath to the plaintiff, and depending on whether the plaintiff takes the oath or not, he wins or loses. Only one person takes the decisive oath, and no witnesses can be called after such an oath. The case is decided purely on the oath taken.

It is clear that the course followed by the learned Chief Justice was irregular, and it could be said that no decisive oath was in fact taken in terms of Article 1358. It was very probable that the Chief Justice was misled by counsel appearing before him.

For these reasons this Court remitted the case to the Supreme Court for re-trial.

Dated_____this_____day of_____1988.

A. Mustapha
President.

Delivered in Open Court.

Registrar
22.7.1988

Appeal is allowed and the case remitted for a retrial by the Supreme Court.

Registrar
22.7.1988