

IN THE COURT OF APPEAL OF SEYCHELLES

CIVIL APPEAL NO. 4 OF 1988

KRISHNA CHETTY. APPELLANT
versus
DOREEN LOUSTEAU LALANE. RESPONDENT

Lucas for appellant
Renaud for respondent.

JUDGMENT OF MUSTAFA, P.

The appellant Krishna Chetty was sued by Kitson Adeline who died during the pendency of the suit. Kitson's daughter Doreen was substituted as plaintiff in the action and is now the respondent.

In his plaint Kitson had alleged that he was the owner of a 40 H.P. Outboard motor engine which he bought for about Rs.15,000 and that it was stolen by one Nelson Payet during March, 1985, who then sold it to the appellant. In his defence the appellant denied the allegations and claimed that he had acted throughout in good faith.

At the trial P.W.6 Lepathy, an Assistant Registrar of the Supreme Court produced a court record which indicated that Nelson Payet had pleaded guilty to a charge of stealing Kitson Adeline's outboard engine and was convicted on his own plea.

The respondent had claimed from the appellant the sum of Rs.15,000 being the cost of the outboard engine, Rs.25,000 for loss of earnings as a transporter and Rs.15,000 as moral damages.

The appellant was not available to give evidence at the close of the respondent's case in the Supreme Court. Mr. Lucas who appeared for the appellant at the trial applied for an adjournment and Mr. Renaud for the respondent objected, and no adjournment was granted.

The Chief Justice in his judgment stated that the case had to be decided on the evidence called by the Plaintiff and the submissions of counsel. He held that the appellant had not acted in good faith when he acquired the engine in that he had either purchased it from P.W.3 Nelson Payet, the convicted thief or some other person who had acquired it from P.W.3 Payet. He found that the respondent had suffered Rs.25,000 pecuniary loss and Rs.10,000 as moral damages. He allowed the respondent damages in the sum of Rs.35,000 and costs.

From that judgment the appellant has appealed.

In the course of arguing his appeal Mr. Lucas applied for and was allowed to add an additional ground of appeal. It reads:

"The Chief Justice erred in relying on a sale between the appellant and a third party to ground his conclusion of mala fides - there being no evidence of sale on the record."

There was also, in the appeal itself, the following ground:

"There was no evidence that the defendant had acted mala fides and in all the circumstances of the case the learned Chief Justice misconstrued the provisions of Article 2279 and ought to have presumed in favour of the defendant....."

At the trial the evidence adduced for the respondent contained nothing to show that there was a sale to the appellant by the thief Nelson Payet or by any other vendor. Apart from an assertion in the plaint itself there was also no evidence adduced to show that the appellant had bought the outboard engine for Rs.4,000 or any sum. The only relevant evidence adduced was that the respondent had his ^{outboard} outdoor engine stolen and it was found by the Police in the appellant's shop some three months later. According to P.W.5 A.S.P. Savy when the said engine was so found it was

complete, although Kitson Adeline had stated that it was in a bad state of repair with spare parts missing. A.S.P. Savy also stated "During my investigation, as far as I remember, the defendant in this case said he bought the engine from the accused (i.e. Nelson Payet)". As this was a civil and not a criminal case, I do not think this could be considered a "verbal", and I also do not think that it could be accepted as an admission; in any event it was too vague and imprecise to have any probative value. As I stated earlier the appellant, on the insistence of Mr. Renaud who was appearing for the respondent, was denied the opportunity of testifying and the result was that there was no admissible evidence that the appellant had purchased the article from a convicted thief, or indeed from any one else.

There was also no evidence that the appellant had done anything to hide the outboard engine; it would seem it was kept in the open shop and he co-operated with the police when enquiries were being made. There was nothing clandestine in the appellant's conduct.

The Chief Justice in his judgment stated inter alia "There is a presumption of ownership in Article 2279 in favour of the possessor of a movable; it is not generally incumbent on him to prove how he got it. But this presumption does not apply when the movable is proved to have been stolen". And again "In this instant case I find on a balance of probabilities that the defendant either purchased it from Payet (P.W.3) or some person who acquired it from Payet".

The appellant's defence throughout was that he was in possession in good faith, and that he did not at any time have knowledge of the theft nor was he a party to it.

Article 2279 reads:

"With regard to movables possession in good faith establishes a presumption of ownership. Nevertheless a person who has lost something or whose goods were

stolen may vindicate these during a period of five years from the date of the loss or the theft against any person in whose hands the goods are found: but the latter shall have a remedy against the person from whom he obtained them".

This Article I understand is a literal translation of the same Article in the French Civil Code; and both Mr. Lucas and Mr. Renaud agree that "to vindicate" is equivalent to "le revendiquer" i.e. to recover.

In my view on the evidence adduced at the trial there was nothing to indicate that the appellant had acted mala fides. I think the Chief Justice had erred in finding that the appellant had not acted in good faith.

Since on the evidence the appellant had acted or must have acted in good faith, he cannot be liable for pecuniary loss or moral damages allegedly suffered by the respondent.

I would allow the appeal and set aside the order made by the learned Chief Justice. As the appellant has not insisted on costs being awarded to him, I would make no order as to the costs of this appeal.

Dated at Victoria this 14th day of March 1989.

A. Mustafa

President.

Read out in Court

P. J.

In the Court of Appeal of Seychelles

Krishna Chetty

Appellant

v

Doreen Lousteau Lalanne

Respondent

Judgment of Goburdhun J.A.

In a plaint entered before the Supreme Court the plaintiff averred that (1) he was the owner of a 40 H.P. Outboard engine make Yamaha which cost him R 15,000 (2) it was stolen by one Nelson Payet and sold to the defendant (now appellant) for R 4,000. He further alleged in his plaint that as a result he "had suffered loss, damage and inconvenience" and claimed R 55,000 as damages from the appellant.

The defendant (now appellant) denied all the allegations of the plaintiff. He also pleaded in the alternative "even if the engine was stolen he was not liable to the plaintiff as he was no party to any criminal offence and had always acted in good faith."

The learned Chief Justice who heard the case gave judgment in favour of the plaintiff in the sum of R 35,000 .

The relevant part of the judgment of the learned Chief Justice reads as follows:

"I find on a balance of probabilities that the defendant either purchased it from Payet (P.W.3) or some other person who acquired it from Payet. The defendant has had another engine at one time and he is therefore familiar with such movables. He must have known that if he purchased or otherwise acquired such property, unless the person who transfers it to him could account for it and produce a documentary title and/or receipt he was a malefactor engaged in a clandestine deal. I find that the defendant by his act caused the plaintiff to suffer R 25,000/- pecuniary loss and R 10,000/- moral damage. I do not find that the defendant acted in good faith when he acquired the engine. I therefore order that he pays to the plaintiff R 35,000 damages and costs."

The appellant is challenging the judgment on the following grounds inter alia:

- (1) The Chief Justice erred in relying on a sale between the appellant and a third party to ground his conclusion

(2) malefides - there being no evidence of sale on the record. There was no evidence that the defendant had acted malefides and in all the circumstances of the case the learned Chief Justice misconstrued the provisions of Article 2279 and ought to have presumed in favour of the defendant.

This is an action for damages and not "vindication" or recovery of a movable. In order to succeed the respondent must prove the bad faith of the appellant. There must be evidence to show that the appellant purchased the engine knowing that it was stolen property. Is there such evidence on record? There is evidence to the effect that the respondent was the owner of the engine which was stolen by one Nelson Payet. There is also evidence to show that the engine was found in the shop of the appellant. The Police Officer who enquired into the case of the theft of the engine - witness Savy said in court that "as far as he remembers the defendant told him that he bought the engine from the accused". On this evidence the learned Chief Justice had this to say: "I accept for what it is worth the evidence of A S P Savy that, as far as he would recall, after the 40 H.P. engine had been found at his place, the defendant said he had bought it from Payet but no record was made of the statement by A S P Savy and he may have been mistaken about a conversation that took place two and a half years previously".

With respect I agree with the learned Chief Justice. I find that there is no evidence to show there was any sale by Payet to the appellant as alleged in the plaint.

In my view, this being a claim for damages, it was incumbent on the respondent to prove that the appellant had committed a tortious act which would entitle him to claim damages. The mere fact that the engine was found in possession of the appellant is not sufficient to show that the appellant was of bad faith. Good faith is always presumed until the contrary is proved.

" La bonne foi doit être présumée chez le possesseur jusqu'à preuve contraire. "

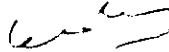
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The contrary has not been proved.

In the circumstances I am of the view that the respondent has failed to make out his case against the appellant and the appeal must succeed.

I therefore allow the appeal and set aside the order of the learned Chief Justice.

As agreed by the parties I make no order as to costs.



H Goburdhun
Justice of Appeal

Delivered at Victoria this 14th day of March 1989



IN THE SEYCHELLES COURT OF APPEAL

Between :

Krishna Chetty Appellant

v.

Doreen Loustau Lalanne Respondent

(Civil Appeal N° 4 of 1988)

Counsel for Appellant : Mr. Lucas
Counsel for Respondent : Mr. Renaud

Judgment of Mr. Justice d'Arifat

The Respondent is the daughter of Kitson Adeline now deceased. By consent of parties she was substituted in the rights of her deceased father for the purpose of this claim. The plaint alleged that the Respondent was the owner of a 40 H.P. outboard engine mark Yamaha Reg NO 301281 which was stolen during the night of the 15th - 16th March 1985 by one Nelson Payet who sold it to the Appellant for Rs 4.000.

In his Statement of Defence the Appellant had denied that the said engine had been stolen and that, even if it was, he, the Appellant is not liable to the Respondent as he was not a party to any criminal offence but has always acted in good faith.

The Appellant had also pleaded in limine that the plaint discloses no cause of action. This plea was overruled by the Learned Chief Justice. This ruling is appealed from in ground 1. In view of my decision on ground 2 I need not examine the arguments in support of ground 1.

The second ground of appeal reads as follows:-

"There was no evidence that the Defendant (Appellant) had acted mala fides and in all the circumstances of the case the Learned Chief Justice misconstrued the provisions of article 2279 and ought to have presumed in favour of the Defendant given the fact that value was paid for the merchandise".

...../.....

The Appellant must succeed on this ground of appeal except for that part of the ground which refers to the value which was paid for the merchandise.

The evidence adduced by the Respondent shows that the outboard engine which was on his boat was stolen by Nelson Payet and was subsequently found in possession of the Appellant, by the Police who secured it.

The plaint averred that Nelson Payet had sold the engine to Appellant for Rs 4.000. That fact, per se, would not have proved the bad faith of the Appellant. However this fact has not been proved in evidence. All there is on record is that speaking from memory P.W.5 A.S.P. James Savy stated : "During my investigation as far as I remember the defendant in this case said he bought the engine from the accused". I am not prepared to accept this statement as evidence of the purchase as it is evasive and hearsay.

Appellant's case was never opened as he was not in Seychelles on the date fixed for the continuation of the case and the Respondent objected to a postponement.

On this evidence the Respondent sought to obtain Rs 55.000 damages under the following headings:

- (i) Cost of outboard engine
- (ii) Loss of earnings because of loss of use
- (iii) Moral damage for anxiety and inconvenience.

Counsel for the Respondent relied on articles 1599 and 2279 of the Civil Code.

Article 1599 has no application because there is no evidence that the Appellant purchased the engine from Nelson Payet.

Article 2279 of the Seychelles Civil Code is a literal translation of article 2279 of the French Civil Code, except for the word "vindicate" which appears in the Seychelles text where the word "revendiquer" appears in the French text.

In Harrap's Shorter French and English Dictionary I read: "to vindicate one's rights, revendiquer ses droits". In my opinion the French and English words convey the same meaning. The person who has lost a moveable or from whom it has been stolen may ask the person in whose possession the moveable is found to return it to him. It is an action "en revendication".

.../...

This is not the claim of the Respondent who is asking for damages only. Had he entered an action "en revendication" he may have claimed damages also for loss of use. Such is not the case. The award of damages in the circumstances is not justified.

Vide Jurisclasseur Civil (Seychelles Library Edition)
Art. 2279 -

Notes 95. "Comme tout possesseur est réputé de bonne foi il appartient au revendiquant de renverser cette présomption". (La présomption de bonne foi du possesseur).

96. "C'est à bon droit également que les Juges du fond allouent des dommages-intérêts pour privation de jouissance au propriétaire qui agit en revendication d'un animal perdu dès lors qu'ils ont retenu la mauvaise foi du défendeur et sa persistance à conserver l'animal".

The Respondent has failed to prove that the Appellant was of bad faith. Therefore the Appellant must be presumed to have been of good faith. In these circumstances the Respondent was not entitled to receive damages from the Appellant who is presumed to have been of good faith.

For those reasons I allow the appeal and quash the judgment of the Learned Chief Justice.

In the circumstances I will make no order as to costs.

27th December 1988.

C. del. 5. 1988.

Read out in Court
this 14th day of March 1989.

P. J.