IN THE SEYCHELLES COURT OF APPEAL

Expedit Abel — APPELLANT

v/s

H. Echtler — RESPOONDENT

Civil Appeal No. 14 of 1988

JUDGMENT OF THE COURT

In his plaint in this action the plaintiff described himself as a prospector of the Olivier le Vasseur Treasure at Bel Ombre, Mahe. The defendant, he alleged was also a prospector of the same treasure who, had, on November 16, 1984 entered into an agreement with the Government of Seychelles. The nature and terms of the agreement are not specified in the plaint, save that the plaintiff alleged that Clause 23 of that agreement provided that the defendant could enter into a partnership with the plaintiff with regard to prospecting of the said treasure.

It was further alleged that on November 30, 1984 the defendant and the plaintiff entered into a partnership agreement under which the plaintiff was to provide -

"personal knowledge and documents in connection with the said treasure and the Defendant was to finance the recovery of the said treasure."

Under the agreement the defendant agreed not to disclose any information in connection with the prospecting of the said treasure to any other person.

Paragraphs 5 and 6 of the plaint read -

"5. In breach of the said Agreement the Defendant has:

(i) failed to provide the necessary finance in order that the prospecting would have continued;

(ii) divulge (sic.) information obtained from the Plaintiff.

6. By reason of the mat ters aforesaid, the Plaintiff has suffered loss and damages which he estimates at R.600,000/-."

The defendant who is a German national resident in Germany was duly served with the plaint. He replied excusing his absence on the ground of illness which made air travel in the foreseeable future inadvisable and set out his version of events in the course of ~~re~~hunting for the treasure with documents in support.

The case came on for hearing in the defendant's absence. Counsel appearing for the plaintiff agreed to treat the defendant's letter and its enclosures as the defence in the action. He made it clear, however, that this in no way implied that he was accepting the truth of any facts stated therein - a reservation which is completely understandable.

In the letter which was accepted as the defence the defendant admitted the agreements pleaded. He alleged that the hunt had begun on August 6,1986. On August 9 the plaintiff had shown him the exact site where the plaintiff thought the entrance to the treasure would be found, and on August 15 digging works began. The digging revealed a layer of dirt which the plaintiff asserted was man-made. The defendant alleged that he had this layer examined by two geologists who were of the contrary opinion. The letter continued -

> "The 18th August I decided to stop work as because of false data given by the plaintiff the hunt was a lost cause as well, because the plaintiff could not name another site in the closer surroundings ...."

The defendant in his letter denied having divulged information given him by the plaintiff and asserted that he had at all times provided the necessary costs for "all the things important to the treasure hunt."

Since the defendant did not appear and was not represented no evidence was led on his behalf. The plaintiff and his witnesses gave evidence.

In a reserved judgment the Chief Justice dismissed the action.

In his first 4 grounds of appeal the plaintiff contended, to put the matter succinctly, that the Chief

Justice had treated the pleadings as evidence. The submission seems correct.

In his judgment the Chief Justice quotes from a letter dated August 19, 1986 - which he describes as "the day after the examination of the coral reefs by the experts (geologists)." The letter was written by the defendant to the Ag. Chief Lands Officer and gave the notice required under the defendant's contract with the Government that he would be ceasing excavation works.

Except for statements contained in the letter which was treated as the defence there was no mention in the proceedings of geologists having examined the site. The plaintiff gave no such evidence. There was not even a copy of the geologists' reports attached to the letter which was treated as the defence. The only information as to its contents was the statement in the letter of defence. Nonetheless the Chief Justice stated in his judgment -

> "In other words the defendant's renunciation of the agreement was based on the fact that he could not get workers and, the most important of all on the fact that the agreement had become impossible to perform since the layers, under which the plaintiff alleged was the treasure, had turned out to be dead corals one on top of the other and which had not been made by man. The plaintiff disagreed with the findings of the experts. He merely disputed those findings but did not adduce evidence from other experts (other geologists) to counteract the effect or to challenge the said findings.
> The plaintiff is not a geologist, and in my view, his mere denial was not sufficient in the circumstances."

On these findings of fact the Chief Justice concluded -

> "The unanticipated circumstances made performance of the undertaking different from what was reasonably within the contemplation of the parties when they entered into those agreements. In other words, the two agreements were frustrated by later events.

> Thus, the discharge of the two agreements occurred automatically upon the discovery that there was no man made layer of corals at the spot or within the area of concession. The discharge in this case, on grounds of frustration, did not depend upon any repudiation, renunciat ion or act of any of the parties."

This approach, with respect, seems misconceived. There was no evidence on record as to examination by geologists or as to the opinions they had given. There was nothing for the plaintiff to rebut on that issue. There were merely statements in a defence in support of which no evidence had been led.

Frustration was not an issue raised on the pleadings, such as they were. Two breaches of contract had been alleged - failure to provide necessary funds and wrongful divulgence of information. The defendant had denied these breaches and had asserted that he had ceased his excavation because the local knowledge which the plaintiff agreed to provide had appeared to him (the defendant) too unreliable to merit further expenditure on excavation.

As he completed his arguments on these grounds Mr. Renaud, in answer to a question, stated that he would be content if a new trial was ordered in this action. In his grounds of appeal he had prayed that the appeal be allowed with costs. There had been no prayer for a new trial.

Having regard to the course which the trial had taken at first instance it appeared to us that this was a proper case in which to exercise the powers vested in the Appeal Court by section 73 of the Seychelles Court of Appeal Rules, 1978 to grant a new trial. These are the same as the powers of the Supreme Court in that regard which are set out in section 193 of the Seychelles Code of Civil Procedure. It appears in the words of section 193(c) "necessary for the ends of justice." The plaintiff suffered a substantial wrong when matters merely alleged in the defence were accepted as proved and the onus placed on himto disprove them.

This made further development of the remaining grounds of appeal unnecessary.

Accordingly it is ordered that there be a new trial of this action before another judge of the Supreme Court. The costs of this appeal will await the determination of the issues at the new trial.

Dated this 8th day of October 1990.

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PRESIDENT

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JUSTICE OF APPEAL

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JUSTICE OF APPEAL