IN THE SEYCHELLES COURT OF APPEAL

ALEXIS MONTHY APPELLANT

V.

ANDRE ISAAC RESPONDENT

CIVIL APPEAL NO. 4 OF 1996

GOBURDHUN P., SILUNGWE & ADAM, JJA.

Mr. D. Lucas for the appellant
Mr. K. Shah for the respondent

JUDGMENT OF THE COURT DELIVERED BY SILUNGWE, J.A.

On the pleadings and the evidence of the parties in this case, there is no dispute that the appellant (i.e. the Defendant before the trial court) sold his boat on December 21, 1993, to the respondent (i.e. the Plaintiff) for the sum of SR.125,000. It is further common cause that two of the terms of the contract of sale were, firstly, that SR.30,000 was to be "deposited" by the respondent (this was effected on January 20, 1994); and, secondly, that the balance of SR.95,000 was to be paid "free of interest, by three equal instalments with effect from 31 December 1993." Although the term used is "deposited", it is clear that what was paid was, in reality, not a deposit but a part-payment towards the purchase price. In any event, the sum paid could not have been a deposit as the payment was not made when the agreement was entered into but rather it was done subsequently and so the "promise to sell" was not accompanied by a deposit in terms of Article 1590 of the Civil Code of Seychelles (hereinafter referred to as the Code): see Hoareau and Lanza v. Gonzague Payet Civil Appeal No. 5 of 1991 (per Mustafa, J.A. as he then was). It thus goes without saying that the instant case falls outside the ambit of Articles 1589 and

1590 of the Code.

The appellant averred that, under the agreement, the balance was to be wholly paid off in three monthly instalments effective from December 31, 1993 which meant that the debt was to be liquidated by the end of February 1994. As it happened, no instalment was ever paid. The appellant's version was that this was so despite his repeated threats that failure to pay instalments would result in his having to take the boat back. The appellant asserted, that with the respondent's knowledge and agreement, he took away the boat on June 6, 1994.

The respondent maintained, however, that under the agreement, the three equal instalments were to be paid after December 31, 1993 and that there was no fixed time frame within which this was to be achieved. In paragraph 6 of his Plaint, he alleged that the appellant had "agreed to pay the plaintiff back his SR.30,000/-" plus other itemised expenses which, when added to the R.30,000, came to R.55,000. But the appellant denied that he had agreed to reimburse the sum claimed by the respondent.

Early in his judgment, the learned trial judge (Amerasinghe, J.) rightly identified in these terms what the issue before him was:

> "On the pleadings in paragraphs 5 and 6 of the plaint it appears that there has been a subsequent transaction and a contract arising therefrom. The only dispute left to be resolved by the court is in respect of the terms of the second contract which resulted in the defendant taking over the boat from the plaintiff."

What was termed the "second contract" was clearly a novation within the purview of Articles 1271 and 1234 of the Code. The result was that all obligations of the parties under the first contract thereby became discharged.

Mr. Lucas, learned counsel for the appellant argues that there were no findings on the terms of the new contract and that the question of credibility was not dealt with by the learned trial judge.

This argument is not, in my opinion, a fair reflection of the judgment, an examination of which shows that the expressed concerns were both addressed, though succinctly. This is what Amerasinghe, J. said in his judgment:

> "Therefore I hold on a balance of probabilities that the parties have agreed for the return of the boat to the defendant only on the plaintiff being refunded the sum of SR.30,000."

The clear findings on the terms of the new contract were that the parties had agreed (a) to the return of the boat to the appellant; and (b) to the refund of SR.30,000 to the respondent. There is thus no justification in the criticism levelled against the learned trial judge on this point.

Turning to the criticism on credibility, there was in reality no dispute attaching to the return of the boat. The only bone of contention was about the question of reimbursement. Here, we are in complete agreement with Mr. Shah in regard to his submission that the issue of credibility was dealt with by the trial court which had to choose between two versions: the respondent's and the appellant's.

The respondent's version was that the appellant had, under the new contract, agreed to refund SR.30,000 plus certain items of expenditure particulars of which he had set out in his Plaint and which brought the total amount claimed to SR.55,000. On the other hand, the appellant's story was a denial that he had agreed to reimburse, or that he owed the respondent the sum claimed. In the view that we take, the trial judge's use of the words: "Therefore I hold on a

balance of probabilities that the parties have agreed ....." indicates, and can only indicate, that he weighed the evidence on both sides and that, in so doing, he addressed himself to the question of credibility and accepted the respondent's version regarding the refund of R.30,000. It is arguable that this aspect received less treatment than it deserved but this is not, and cannot be, synonymous with saying that it received no treatment at all. We would say that Mr. Lucas's contention on the question of credibility is misconceived.

Without going into any detail, it suffices to state that, contrary to Mr. Shah's argument on Articles 1183 and 1184 of the Code, this is not a case of a condition precedent, it is one of novation. Consequently, the said Articles are irrelevant for the purposes of this case.

It would serve no useful purpose in this case to argue that the respondent derived benefit from the use of the boat since the same thing can be said of the appellant in relation to the part-payment of SR.30,000 that he had received. In any event, it is immaterial whether one party only or both of them derived any benefit from their initial contract as all this falls outside the terms of the new contract.

In conclusion, we would uphold the trial court's judgment in favour of the respondent and dismiss the appeal with costs.

Dated this day of 1996.

H. GOBURDHUN
PRESIDENT

A.M. SILUNGWE
JUSTICE OF APPEAL

M.A. ADAM
JUSTICE OF APPEAL

Handed down on
5th July 1996
Adam JA