IN THE SEYCHELLES COURT OF APPEAL

ELIAS RADEGONDE APPELLANT

Versus

PRASLIN BOAT YARD RESPONDENT

Civil Appeal No: 2 of 1998

[Before: Goburdhun, P., Silungwe & Venchard, JJ.A]

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Mr. F. Elizabeth for the Appellant
Mr. F. Bonte for the Respondent

JUDGMENT OF THE COURT

(*Delivered by Venchard, J.A)*

The Appellant entrusted his boat to the Respondent for repairs which had to be completed by an agreed date. The repairs were not completed by the agreed date and the Appellant sought and obtained delivery of the boat. He was, at the request of Respondent required to furnish security for costs in the sum of Rs. 3000 pursuant to section 219 of the Code of Civil Procedure and Article 16 of the Civil Code. He duly deposited that amount in the Registry of the Supreme Court.

Three issues have been canvassed in this appeal namely:-

"(a) the trial judge erred in holding that the deposit of Rs3000 should accrue to the Respondent;

(b) the respondent was not justified not to have completed the repairs by the agreed date;

(c) the trial judge should have made an award regarding the damages suffered by the Appellant by reasons of his breach of contract."

As regards (a) the deposit was made for security for costs and, as the trial judge ordered that each party should bear his own costs, the amount of Rs3000 should have been refunded to the Appellant and should not have accrued to the Respondent. Mrs. Antao who appeared for the Respondent very properly conceded that the trial judge erred in awarding that amount to the Respondent. We accordingly rule that the amount of the deposit should be refunded to the Appellant.

As regards (b) the Respondent invoked as an excuse that the delay to complete was due to the fact that he had more pressing work. Such an excuse cannot be of any avail to the Respondent and cannot exonerate him from liability for breach of contract since the excuse invoked does not constitute "force majeure" for the purposes of Article 1146 of the Civil Code.

As regards (c) the Appellant gave evidence that he had suffered loss at the rate of Rs15000 per month. This evidence was vigorously challenged by Respondent's counsel. The trial judge invited the Appellant to produce documentary evidence or otherwise of his assertion and he agreed to do so. He however failed to produce any evidence in support of his assertion. It would have been easy for him to do so as he, being a trader, is required under the taxation legislation in force to keep records of his transactions. On the other hand, he could have summoned persons to whom he had provided services to give evidence in his favour. The Respondent did not adduce any evidence in support of his bare assertion on this issue.

The trial judge felt that the Appellant's failure to provide evidence which was easily available made of him a non-credible witness on the issue of quantum. Mr. Elizabeth submitted that the trial judge should have acted on the evidence of the Appellant as such

evidence had not been contradicted notwithstanding the Appellant's failure to provide corroborative evidence which the Appellant himself had undertaken to provide. The submission of Learned Counsel on that score is alarming. It implies that a Court would have to approve an intolerable excessive claim where the defence is unable to obtain evidence to disprove the excessive claim. A Court, in our view has to determine issues of fact on the assessment of the credibility of witnesses.

The appeal is dismissed except as regards the amount of Rs.3000 which was deposited in Court as security for costs. We make no order as to costs.

Dated at Victoria, Mahe this 14th day of ***August*** 1998.

H. GOBURDHUN	**A.M. SILUNGWE**	**L.E. VENCHARD**
PRESIDENT	**JUSTICE OF APPEAL**	**JUSTICE OF APPEAL**