(28)

IN THE SEYCHELLES COURT OF APPEAL

GONSALVES MORIN APPELLANT

Versus

INDIAN OCEAN EXPORT CO. (PTY) LTD RESPONDENT

Civil Appeal No:22 of 1996

[Before: Goburdhun, P., Ayoola & Adam, JJ.A]

....

SEYCHELLES
SUPREME COURT LIBRARY

Mr. R. Valabhji for the Appellant
Mr. P. Boulle for the Respondent

JUDGMENT OF THE COURT
(Delivered by Ayoola J. A.)

The is an appeal from the judgment of the Supreme Court whereby judgment was entered for the plaintiff (now "the respondent") in the sum of 95,300 South African Rands with interest at 14% per annum from 1st January 1994 until payment in full and costs.

The respondent had sued the defendant (now "the appellant") to recover money due on several contracts for the exportation of goods from South Africa for delivery to the appellant in Seychelles. There were five such transactions pleaded by the respondent in its plaint as follows:

09.02.93	...	SR 930.00
03.11.93	...	SR 3,423.50
07.12.93	...	SR 32,300.00
07.12.93	...	SR 31,500.00
07.12.93	...	SR 31,500.00

In response to a request for particulars, the respondent pleaded that the goods were ordered orally.

The appellant by his defence denied he ordered, took delivery of and paid for the goods listed in the plaint save for the transaction covered by invoice No. 2095 dated 3rd November 1993 for SR3424.58. The respondent admitted that the money due in respect of the transaction admitted by the appellant had been paid.

The respondent relied on document produced at the trial in proof of the facts that goods were exported to the defendant as pleaded in the plaint. The documents included invoices in which the buyer had been described as "continental stores, Revolution Avenue, Mahe, Seychelles" and Bills of Lading in which the same had been described as "Notify Parties." Notwithstanding these documents the learned trial judge came to a correct conclusion that:

> "... neither the plaintiff nor the defendant was able to prove either the plaintiff placed an order or did not place an order for the exportation of the goods referred to in the plaint. The burden however is on the plaintiff to prove the contract and the fulfilment of its obligations giving rise to the claims."

In order to obtain a beginning of proof in writing in terms of Article 1347 of the Civil Code of Seychelles, the respondent called the appellant on his personal answers in course of which the appellant admitted sending a exhibit p.24 to the respondent. The letter read as follows:

> "Att'n Mr. Kevin Foot
>
> Refer to Snacks namely Cheas Naks and Potato Chips (WILLARDS).
>
> We understand that duty on the above item has actually increased from 20-40-15 to 20-200-15.
>
> This amendment by the government has more than double the actual retail prize of the above

items and has eventually reduced the wholesale profit more than two thirds, which ends up to around 5% gross.

Due to the high investment cost that will be needed to clear the three containers and to store it, we think. that we will never be able to sell those goods at this high prize on the local market before the expiry date and will eventually cause us big financial problems if we try to get hold of those goods.

Because this will be a big problem if we try to get hold those goods. Therefore we are suggesting that if your company considers of shipping back the three containers.

On Monday or Tuesday we will be having a complete details of the tax increased problems.

Your understanding regarding this matter will be very much appreciated.

Best Regards.

(Sgnd Gonzalves Morin)

Commenting on the letter the learned judge said:

"In p.24 the defendant clearly refers to three containers, suggesting that the plaintiff should consider shipping them back which necessarily suggest that the three containers concerned the defendant and as on 08/01/1994 the defendant has never alleged that they were consignments shipped to the defendant without any orders being placed b him. He also discussed in p.24 what could be his predicament if he takes

> delivery of them when he states 'because this will be a big problem if we try to get hold of those goods.' The inferences that is necessarily drawn from the contents of p.24 leave no room for the defendant to escape from accepting the fact that the importation of the goods on 7/12/1993 in the three containers referred to in paragraph 2 of the plaint were at his instance, thus establishing the oral agreement between the parties, on which liability for payment n invoices marked P13, P16 and P19 will arise."

In his evidence on oath the appellant explained how the goods were shipped to him. The substance of his explanation was that the products were shipped to him by someone who worked for the respondent in order to enable the respondent acquire agency rights from the manufacturers. such acquisition of rights being dependent on the quantities the respondent was able to export. He denied that he ordered the goods. He explained that p.24 was to let the respondent know that "we can't help him in this area". He was clear in his denial that there was anything in p.24 to suggest that he accepted the goods or ordered the goods.

There is obviously nothing in p.24 that, on the face of it, shows that the appellant ordered the goods or was prepared to accept the goods. It is difficult to see in p.24 anything that approximated to an admission that the goods were ordered by the appellant. The learned judge should have taken into consideration the totality of the circumstances in which p.24 was written. The only evidence regarding such circumstances was the evidence of the respondent. Although the respondent was cross-examined on his evidence there was no controverting evidence. What is significant is that the learned judge did not consider the respondent's evidence of the circumstances in which p.24 was written and did not reject the evidence.

The letter p.24 is quite consistent with the evidence given by the respondent as to the probable circumstances in which the goods were shipped. If the circumstances in which the goods were shipped as

testified to by the appellant had represented the true situation, p.24 could not be construed as an admission of any liability to pay for goods shipped to the respondent without an order by him.

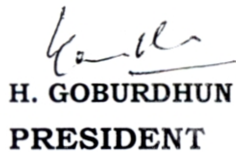
For these reasons the conclusions seem inescapable as submitted by Mr. Valabhji, learned counsel for the appellant, that the circumstances in which p.24 had been written having been explained by the appellant, that being the only sworn evidence before the court on the issue, the learned judge was wrong to have drawn the inferences that he did against the appellant. Even without the explanatory evidence of the appellant, the contents of the document p.24 do not justify the inference drawn by the judge.

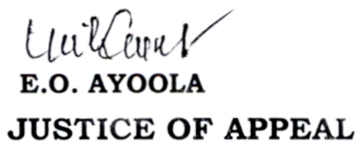
The learned judge came to a wrong conclusion when he held that the respondent had proved its case and had given judgment against the appellant.

In the result, the appeal is allowed. The judgment of the Supreme Court is set aside. Therefor, the plaintiff's case is dismissed.

The appellant is entitled to costs of this appeal and of the trial.

Dated at Victoria, Mahe this ...9th... day of *April* 1998.


H. GOBURDHUN
PRESIDENT


E.O. AYOOLA
JUSTICE OF APPEAL

M.A. ADAM
JUSTICE OF APPEAL

Handed down
Adam JA