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IN THE SEYCHELLES COURT OF APPEAL

LA SERENISSIMA LIMITED — ***Appellant***

VERSUS

MR. FRANCESCO BOLDRINI
MR. GUISEPINA TOTANI
LEUCODON LTD. — ***Respondents***

Civil Appeal No. 26 of 2000

Mr. F. Chang-Sam for the Appellants
Mr. Ollivry, QC, with Mr. C. Lablache for the 1st & 2nd Respondents
Mr. P. Boulle for the 3rd Respondent

Reasons for Decision of the Court

(Delivered by Ayoola, P.)

We allowed the appeal of the appellant, Lâ Serenissima Ltd, in the April 2001 session and indicated that we would give our reasons later. We now give our reasons.

The background facts have been carefully set out in the judgment of Juddoo, J. at the Supreme Court. Drawing largely from his narration of the facts, it is easy for us to state the facts very briefly. This case concerned the disputed ownership of a Catamaran named *"Gloria Maris"*. The vessel was registered in Mauritius, the appellant which lays claim to ownership of the vessel is a company incorporated in Mauritius. Prior to the proceedings which led to the present appeal the appellant had recourse to the Supreme Court of Mauritius which issued a provisional seizure *("saisie conservatoire")* against the vessel and directed the Director of Shipping in Mauritius not to allow the vessel to leave Mauritius. On 19th August 1998 on the application of the respondents the Supreme Court of Mauritius lifted the provisional seizure. The appellant appealed to the Civil Court of Appeal from the judgment lifting the

provisional seizure. That appeal has since been withdrawn. In the meantime, the respondents have removed the vessel from Mauritius and brought it to Seychelles. The appellant on 17th December therefore caused the vessel to be arrested in Seychelles and commenced an action in rem claiming a declaration that the appellant was the owner of the vessel; and, possession of the vessel.

The first and second respondents applied to the Supreme Court for order dismissing the action on the ground that it was *"frivolous and vexatious or is otherwise an abuse of this court"* by reason that the *"same issues or substantially the same issues arising in the plaintiff's action have arisen between the same parties in the Supreme Court of Mauritius and judgment has been given in favour of the applicants..."* and, that some of the averments of facts made by the appellant in its affidavit and its statement of claim are *"incorrect, misleading and in bad faith."* The third respondent, claiming to be owner of the vessel, obtained leave to intervene. Counsel on its behalf applied to the Supreme Court for dismissal of the action also on the grounds, inter alia, that it was frivolous and vexatious or otherwise an abuse of process of the court by reason that the most convenient forum in all aspects and circumstances of the case is the court of Mauritius.

The learned judge, Juddoo, J., on these motions, dismissed the appellant's action on the grounds raised by the first and second respondents and also on the ground raised by the third respondent that the court had no jurisdiction to proceed on the merits of the case in view of the prior determination which bound the appellant. Substantially, the ground on which he came to that conclusion was that the judgment obtained in the Mauritius court by the respondents is a final judgment which determined the rights of the parties in the vessel, and thereby caused an *estoppel per rem judicatam* against

the appellant. While acknowledging that the *"fact that the vessel had sailed to a different jurisdiction entitled the plaintiff to take any proceedings against the wrongdoer, if any, in the land where the wrong was committed and take whatever measures it deemed fit to protect its alleged proprietary interest in the asset"*; he held that *"it does not entitle the plaintiff to re-litigate what is substantially the same issues between the same parties and which issue had been formerly determined by a court of competent jurisdiction in favour of the defendants."* He further held that the issue of ownership of the vessel had been finally and conclusively determined between the parties.

The issues on the appeal from the decision of the Supreme Court fell within a narrow compass, even though the appellant by his counsel had raised a number of grounds of appeal. The main issue was whether the judge was right in the view he held that the question of ownership of the vessel had been finally and conclusively determined.

It is manifest that the law of Seychelles is the applicable law in determining whether a plea of *res judicata* successfully bars an action before a court in Seychelles. The principle is well established, and hardly needs citation of authorities, that for a successful plea of *res judicata* to be raised there must be identity of subject-matter, cause of action and parties between the previous case and the present. (see: Gamatis v Chaka Brothers [1989] SLR 235). Furthermore, article 1351 of the Civil Code of Seychelles (Cap 33) provides that:-

> *"The authority of a final judgment shall only be binding in respect of the subject matter of the judgment. It is necessary that the demand relate to*

> *the same subject matter; that it relate to the same class, that it is between the same parties and it be brought by them or against them in the same capacities."*

Thus, it is essential that the judgment relied on for the defence of *res judicata* must be a final judgment. Unless there is an unequivocal admission, by the pleadings, of the three fold identities, of subject-matter, cause of action and parties, the judgment itself must be produced before the court in which the plea was raised. Where there is contention as to the finality of the judgment it is also expedient that the contents of the judgment be proved. Usually, the manner of proof of the contents of the judgment is by producing a duly authenticated copy.

In this case, as has been stated, Juddoo, J., relied on and quoted extensively from what was said to be a copy of the judgment of the court in Mauritius annexed as exhibit D to the affidavits of the respondents. That copy was unsigned and unauthenticated. He came to the conclusion that the judgment was a final judgment. Mr. Chang-Sam, learned counsel for the appellant, on the appeal criticised the decision on two grounds; first, that the judgment being that of a foreign court was not properly produced as evidence before the court as it had not been "*legalised*" in terms of section 28(2) of the Evidence Act; and, secondly, that since the law of Mauritius concerning the finality and conclusiveness of the judgment, assuming it had been properly admitted in evidence, had not been proved, the law of Mauritius must be presumed, to be the same as that of Seychelles under which a provisional seizure is only interlocutory in nature and therefore cannot be relied on for the purposes of the application of the principle of *res judicata.*

Section 28(2) of the Evidence Act (Cap 74) as amended by Act No. 16 of 1996 provides as follows:-

> *"When any public document executed in the territory of a Convention State is produced before any court in Seychelles purporting to bear on it or on an allonge a certificate issued by the Competent Authority of the Convention State in which the document is executed, such document shall be admitted in evidence without proof of the seal or signature of the person executing it and the court shall presume that such seal or signature is genuine and the person signing it held at the time it was signed the official character which the person claims and the document shall be admissible for the same purpose for which it would be admissible in accordance with the law of evidence for the time being"*

A *"Convention State"* means a State signatory to the Convention or a State which has acceded to that Convention. The *"Convention"* means the Convention Abolishing the Requirements of Legislation for Foreign Public Documents Signed at the Hague on 5th October 1961. *"Public Documents"* means, among others, *"documents emanating from an authority or an official connected with the courts or tribunals of a Convention State, including those emanating from a public prosecutor, a clerk of a court or a process server."*

The appellant's submission proceeded on the footing, not contested by the respondents, that Mauritius is a Convention State. So the question was whether the document produced as a copy of the judgment relied on by the respondents was admissible notwithstanding that section 28(2) of the Evidence Act had not been complied with. It was not claimed that the document bore on it or on an allonge a certificate issued by the competent authority of Mauritius. The law on the admissibility on evidence of a foreign judgment has been stated in several judgments of the Supreme Court. In Privatbanken Aktieselskab v Bantele [1978] SLR 226, 232 Sauzier, J., repeating what he had said in Green v Green [1973] SLR 295, 197, said:-

> *"Section 7 of the United Kingdom Evidence Act, 1831 which applies in Seychelles by virtue of Section 12 of the Evidence Act (Cap 46) provides inter alia that if the document sought to be proved be a judgment, decree, order or other judicial proceedings of a foreign court or an affidavit, pleading or other legal document filed or deposited in such court, the authenticated copy to be admissible must purport to be sealed with the seal of the foreign court to which the original document belongs with proof of the seal."*

That opinion must now be read in light of section 28(2) of the Evidence Act, the effect of which is to dispense with the need to prove the seal. However, the law still remains that if the judgment produced and sought to be proved is a foreign judgment its copy must be authenticated by a certificate issued by a competent authority of the state concerned.

In this case it was not the respondent's case that the document produced as copy of Mauritian judgment before the Supreme Court bore on it any authenticating certificate or seal. Rather, it was argued by counsel on behalf of the first and second respondents that:

> *"The judgment of the Supreme Court of Mauritius was properly before the Seychelles Supreme Court, having pleaded in paragraph 3 of the affidavit in support of the motion to dismiss the plaintiff's action (page 13) and produced as exhibit D and admitted by the plaintiff in its affidavit in reply dated 3rd February 2000 at paragraph 6 (after H3). See also paragraph 10 of plaintiff's affidavit of 3rd March 2000 in response to motion for intervention."*

For his part, counsel for the third respondent was content to adopt the reasoning of the trial judge who had dismissed the argument of counsel for the appellant by holding that the objection raised was *"clearly of **'form'** and not of **'substance'** since the existence of the judgment delivered and the contents thereof have not been denied"*. He referred to the affidavit of the appellant in support of the issue of a warrant of arrest against the vessel wherein it was deposed to in paragraph 11 thereof that:- *"On the 19th August 1997 (sic 1998) the Supreme Court of Mauritius gave judgment lifting the **'saisie conservatoire'**"*; and, to the averment in another of the appellant's affidavit to like effect. The learned judge then referred to and relied on the Mauritian case of La Mivoie Ltd v Harrack [1970] MR 49 where, after acknowledging that the

normal way to establish a plea of *res judicata* is to produce the record it was held:-

> *"But **'res judicata'** does not fall within the class of **'actes solonnels'** which depends on specific forms for their validity. Thus a clear and unequivocal admission by the other side would be sufficient."*

Juddoo, J., being of the view that *"the judgment is admissible by virtue of the averment and admission by the plaintiff of the existence of the judgment and secondly by their reliance on its contents"* held that there was no need for *"this court to verify into the judgment delivered, a copy of which was annexed to the affidavit filed on behalf of the first and 2n^d^ defendants and marked as D."* He then proceeded to delve into the contents of the judgment, quoting extensively from passages therein and, as he himself put it, proceeded to an examination of the judgment.

The question of the admissibility of a copy of a judgment is one of admissibility of its contents. In the case of Privatbanken v Bantele (Supra) Sauzier, J., whose opinion has always been accorded respect in this jurisdiction, did not see an objection to the admissibility of an unauthenticated foreign judgment as one merely as to form. In that case he decided, in regard to one such judgment, thus (at page 233):

> *"Exhibit 33, although admitted at the hearing in spite of the objection of the defendant's counsel, does not fall within section 7 and therefore the*

contents of that document have not been proved. I shall therefore not take exhibit 33 into account."

Where there is a decision of a superior court in Seychelles directly on a point of law, recourse to the persuasive authority of a foreign jurisdiction is hardly proper. No argument has been addressed to us on this appeal why we should not accept Sauzier, J's opinion as a correct statement of the law of Seychelles on the question. However, there may be cases in which the contents of a document are sufficiently admitted to make a proof of them unnecessary, the law being that what is admitted need not be proved. In this case, not only was there serious controversy as to the nature of the judgment in question, that is to say, whether it was a final judgment or an interlocutory judgment, but also, the specie of *res judicata* raised was issue *estoppel.* In these circumstances, proof of the contents of the judgment in order to determine what it decided and whether it finally determined the rights of the parties or not was essential. The Supreme Court should have insisted upon production of an authenticated copy of the judgment of the Supreme Court of Mauritius in the face of the objection raised by the appellant's counsel and noted by the trial judge to the use sought to be made of the unsigned and authenticated copy.

Assuming that the document marked exhibit D could be relied on, was it a final judgment? Whether or not, it was a final judgment was to be determined by the laws of Mauritius. In this regard the law of Mauritius is foreign law which has to be pleaded and proved. Although it was common ground that there was a judgment of the Supreme Court in Mauritius dismissing the appellant's application for the validation of the "*saisie conservatoire*" and allowing the removal of the "*saisie conservatoire*", there was no averment in

the affidavit of the respondents that in the laws of Mauritius that amounted to a final judgment disposing of the rights of the parties.

The learned judge should have applied the established principle of the laws of Seychelles that foreign law must be pleaded and proved by evidence and that unless there is proof to the contrary, foreign law is to be presumed to be the same as the law of the foreign country concerned. (see Green v Green (supra) at p. 300 and Privatbanken Aktieselshab v Bantele (supra) at p. 239). The principles which guide courts in this jurisdiction, in this regard, are the same as in England, a clear statement of which is contained in Halsbury's Laws of England Vol. 8 (1) (4th Edn) paragraph 1093, thus:

> *"Subject to certain exceptions, foreign law is a question of fact which must be especially pleaded by the party relying upon it, and must be proved to the court. The English court cannot generally take judicial notice of foreign law, and it presumes that this is the same as English law unless the contrary is proved. Thus, the onus of proof of foreign law lies on the party relying on it."* (Emphasis, ours).

And, as regards the mode of proof, it was stated thus in paragraph 1094:

> *"The English court will not, in general, make its own researches into foreign law. Foreign law must be proved by properly qualified witnesses."*

In this case the respondents called a qualified witness whose evidence was evidently inconclusive as proof of foreign law. It was not surprising that the

trial judge did not make use of it. Even if he had, he would have found evidence in favour of the appellant as follows:

> *"Q: If in the course of the validation and maintevee proceedings ownership becomes an issue and is decided by the judgment, what is the effect of that decision between the parties?*
>
> *A: The judge has no power to decide that."* (Emphasis ours).

That was sufficient evidence if relied on to lead the trial judge to a conclusion that as regards the question of ownership of the vessel, the judgment in the validation proceedings was not final.

However, the learned judge apparently, unimpressed by the evidence of the respondent's expert, embarked on his own research into Mauritius law and, apparently, using his special knowledge of Mauritius law, assumed it was open to him to take judicial notice of Mauritius law. The approach of the learned judge to the ascertainment of Mauritius law has been rightly criticized by Mr. Chang-Sam who submitted that in making the analysis of the related law of Mauritius and taking judicial notice of that law, the judge erred in law.

The judge should have held that there was no proof of the relevant law of Mauritius and applied the principle that in the absence of proof of the law of Mauritius, the law of Mauritius on provisional seizure is the same as the law of Seychelles. Under the law of Seychelles proceedings relating to provisional seizure are interlocutory proceedings. We held the view that the judge should not have held that the judgment relied on by the respondents was a final

judgment, even if we were to assume without so holding that the contents of the document, Exh. D, which was unsigned and not authenticated in any way, were admissible in evidence. In the result we held the view that *res judicata* has not been established. The Learned judge was wrong in holding otherwise.

Perhaps we should add, as a postscript to this aspect of the appeal, in order that the unwary may not be confused, that when the exercise embarked upon by a court in Seychelles is the ascertainment of the principles of Seychelles law reference to and research into the laws of other jurisdictions is permissible as persuasive authority. However, when what is in issue is the ascertainment of foreign law which has to be proved as a fact, such research by a judge is not permissible, in the absence of express statutory provision permitting such an exercise or permitting judicial notice to be taken of the relevant aspects of foreign law.

The two remaining issues on the appeal were (i) whether the Learned judge erred in law in giving leave to Leucodon Ltd to intervene; and (ii) whether the Learned judge should have given judgment by default in favour of the appellant for want of service of defence. We were of the view that both issues could be shortly disposed of. In regard to the first issue, we were of the view that at the stage of the proceedings when Leucodon Ltd sought to intervene, an enquiry into the question whether or not it was *"a company duly incorporated and existing under laws of Channel Island"* was not expedient or essential. That averment, if not admitted, might well await proof at the trial of the action.

In regard to the second issue, we were of the view that the trial judge was right in not entering judgment in default of service of defence. There were

pending before him, first, an application challenging his jurisdiction to embark on the trial on the merits by reason of *res judicata;* and, secondly, an application for extension of time to file a statement of defence. These were sufficient justification for his declining to enter judgment in default of defence.

We noted that although the trial judge heard arguments on the question whether he should decline jurisdiction by reasons of the principles of "*forum non conveniens*" and noted arguments of learned counsel extensively from pages 353 – 355 of the record, in the end, he dismissed the action on the ground that the court was prevented "from exercising jurisdiction to proceed on the merits of the case in view of the prior determination which binds the plaintiff." It was thus that the question whether the action should be stayed by reason of the principles of *forum non conveniens* was not an issue in the appeal. Even if it had arisen, we would not have exercised a discretion to stay proceedings in the Seychelles Court which is the forum where the vessel was and in which the appellant could regain the possession it claimed.

It was for the reasons stated above that we allowed the appeal, set aside the judgment of the Supreme Court and ordered that the action be heard on its merits in the Supreme Court.

E.O AYOOLA	*A. M. SILUNGWE*	*G.P. S. De SILVA*
PRESIDENT	*JUSTICE OF APPEAL*	*JUSTICE OF APPEAL*

Dated at Victoria, Mahe, this day of 2001

I delivered in open Court
on this 19th day of October 2001

(D. KARUNAKARAN, J.)