IN THE SEYCHELLES COURT OF APPEAL

MARCELLA GARDUCCI APPELLANT

versus

BERJAYA BEAU VALLON BAY RESPONDENT

Civil Appeal No: 3 of 2000

[Before: Silungwe, Pillay & De Silva JJ.A]

Mr. F. Elizabeth for the Appellant
Mr. K. Shah for the Respondent

JUDGMENT OF THE COURT

(Delivered by Silungwe JA)

This is an appeal from a judgment of the Supreme Court (Perera, J.) wherein the appellant's (then plaintiff's) delictual action was dismissed.

It is not in dispute that on March 7, 1998, the appellant, who was then aged 76 years, visited the respondent hotel in the company of her daughter (Dr. Sylvana Bisauni) and son-in-law. As the appellant entered a Casino of the defendant hotel, walking about 1 ½ to 2 meters behind her daughter and son-in-law, her right leg slipped backwards and so also did the left leg when she endeavoured to counteract falling down. She nevertheless fell on the floor face-down and sustained a broken nasal bone which led to surgery and a disfigurement of the nose.

Consequently, the appellant filed a plaint against the respondent for damages on the basis of the alleged "faute" and negligence the particulars of which were couched in these terms:-

> "7(a) Polishing the floor of the casino with highly slippery and dangerous substance, liquid and/or polish.

(b) Authorising, permitting and consenting to polishing the floor of the casino with a substance, liquid and/or polish when they knew or ought to have known that the same was highly dangerous, hazardous and slippery and that the visitors and guests to the casino may slip and fall.

(c) Failed to take the necessary care and precaution to prevent the risk of slipping and falling to guests and visitors to the casino.

(d) Failed to warn guests and visitors to the casino of the danger of slippery floor in the casino or at all."

On a consideration of the pleadings and the evidence led by both parties to the action, the learned trial judge came to the following conclusion:-

"I therefore find that the granite tiled floor area where the plaintiff fell was not intrinsically slippery, nor has the plaintiff proved on a balance of probabilities that any polish, liquid or substance of a slippery nature were present on the floor where she fell."

Mr. Elizabeth has raised, and strenuously argued, seven grounds of appeal the gist of which is that the learned trial judge failed to give adequate weight to the evidence of the appellant and her daughter that that part of the floor where the incident occurred was slippery due to polished granite tiles which were different from other tiles in that area. As

such, once the said tiles are "*cleaned and polished*", they "*would result in a more hazardous and slippery surface.*" On the other hand, Mr. Shah urges the Court to uphold the trial court's "*careful and thorough*" judgment and to thus dismiss the appeal.

In considering this appeal against the backdrop of the pleadings, the totality of the evidence adduced and the able argument advanced by both learned counsel, it emerges that what is most critical, in the final analysis, is whether or not the appellant established her case in the court below on a balance of probabilities. The appellant alleged in her plaint, and subsequently sought to prove, that her fall and the injuries that flowed therefrom had been occasioned by the respondent's alleged "*faute and negligence*" namely; items (a), (b), (c) and (d) of the plaint to which reference has already been made.

It is common cause that the casino is fitted with glazed granite tiles. The appellant testified as follows:-

> "I slipped where there is a very bright floor. I don't know whether there was water, I slipped with both feet on the back, I could not hold myself and I broke my nose...
>
> [M]y feet slipped and I fell. I put the feet on this slippery floor and I slipped. You say there was no water, but me I can say that it looks like I put my feet on soap. You can say whatever you want."

In support of her mother, Dr. Bisauni stated that the floor inside the casino was partly glazed and partly unglazed: "it is not slippery", an apparent reference to the non-glazed portion. In examination-in-chief, she was asked:-

> "Q: The defendant is claiming that your mother fell down not because of the slippery floor but because of her age, the state of her health, she lost her balance, and fell, is that correct?
>
> A: I think Berjaya has to put a board outside not to allow people more than 70 years old to go inside. If she was young maybe (sic) she could have helped her balance. I think everybody understands that she is perfectly normal."

It is not in dispute that Dr. Bisauni did not observe her mother falling down. As if this were not enough, the respondent's video recording of the appellant's falling incident could not throw light as to the cause of the fall.

For the respondent, Mr. Christopher Wilson, the Casino Manager, testified that the casino area is cleaned daily during the period 10.00 and 11.00, that no substance, liquid or polish which is highly dangerous, hazardous and slippery is used in the casino area or elsewhere in the hotel; that the floor tiles in the hotel, which are not confined to the casino area, are cleaned in the same manner; that the casino is open to guests and visitors with effect from 12 noon; and that, besides the appellant, no one else has ever fallen down on the glazed floor of the hotel. Another witness for the respondent, Dr. Kenneth Selwyn, a sports medical doctor, told the trial court that she had viewed the video recording of the incident and observed the appellant swaying from side to side with an unstable gait, which was normal for her age. He continued as follows:-

> "[P]robably and while she was turning round the corner maybe she knocked her bag, I do not know, I cannot say from the angle of the camera."

It is common ground that this is not a case of strict liability since it was clearly founded up on faute, which is covered by the provisions of Article 1382 of the Civil Code, as the learned trial judge properly found. It is well recognised that when a plaintiff bases his claim on the alleged faute of a defendant, the precise nature of the faute must be proved on a balance of probabilities; and the burden of proof lies on the plaintiff.

Although the appellant alleged in paragraph 7(a) and (b) of the plaint that the floor of the respondent's casino had been rendered slippery and hazardous by having had it polished with a dangerous substance such as liquid and/or polish, there was no evidence whatsoever to substantiate the allegation. The averment contained in paragraph 7(d) which alleged the respondent's failure to warn guests and visitors to the casino of the danger of the slippery floor in that area also suffers a similar fate. This is so because a warning could merely have served the purpose of alerting guests and visitors to the casino of the alleged slippery floor but, as the learned trial judge held, there was no evidence to show that the floor had either been polished with a slippery substance or that it was inherently slippery. Turning to paragraph 7(c), there was equally no evidence to establish that there had been a risk to guests and visitors of slipping and falling down.

Although it is not possible to say with precision what caused the appellant's fall in the casino, Dr. Selwyn attributed it to her frailty, an unsteady gait, and loss of balance as one walked on glazed tiles. Indeed, Mr. Elizabeth concedes that the appellant's age possibly contributed to her fall. The evidence of the appellant's daughter is also to the same effect.

For the reasons given, the learned trial judge was justified in finding that the appellant had failed to establish her action on a balance of probabilities. There was thus no misdirection in dismissing the action. In

the result, the appeal fails. We do not, however, consider that this is a suitable case for us to make an order of costs.

A. M. SILUNGWE
JUSTICE OF APPEAL

A. G. PILLAY
JUSTICE OF APPEAL

G. P. S. DE SILVA
JUSTICE OF APPEAL

Dated at Victoria, Mahe this 12 day of ***April*** 2001.