IN THE SEYCHELLES COURT OF APPEAL

ACORN INVESTMENT (PROP) LTD APPELLANT

versus

MANOHANAN PILLAY RESPONDENT

Civil Appeal No: 35 of 1999

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

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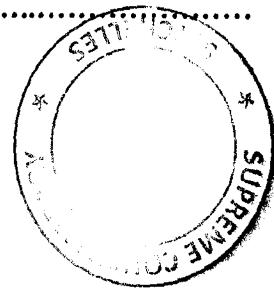
Mr. G. Ollivry QC for the Appellant
Mr. J. Renaud for the Respondent



JUDGMENT OF THE COURT

(Delivered by Pillay, JA.)

This is an appeal against a decision of the Supreme Court which dismissed with costs the action of the plaintiff appellant ("the appellant") for the rescission of a sale of a parcel of land bearing No. PR1048 in Praslin, on the ground of an alleged breach of conditions of the sale, namely the non-payment of interest at the commercial rate by the respondent defendant ("the respondent") before 31st August 1997, as ordered by the Court of Appeal in **Acorn Investment Ltd v Manohanan Pillay, Civil Appeal No. 43 of 1996,** a judgment delivered on 14 August 1997.

The trial Court after hearing the representative of the appellant and the respondent made the following findings of fact –

(1) The Court of Appeal in its judgment of 14 August 1997 did not specify the applicable commercial rate in calculating interest. The commercial rate had not been determined by evidence nor by

agreement of the parties at the time the appellant filed its present action.

(2) The respondent tried without success to obtain an agreement with the appellant on the commercial rate of interest to be paid. On 28 August 1997 i.e. 14 days after the order of the Court of Appeal, the respondent's attorney forwarded a statement of interest amounting to SR66,293-32 and sought confirmation before payment could be effected (P2).

(3) By letter of 29 September 1997, nearly one month after the date specified by the Court of Appeal for payment of interest had passed, the appellant's attorney claimed that the calculation of interest as given by the respondent's statement was unclear and that he would calculate and intimate the amount payable by 31 August 1997. The respondent's attorney replied by letter of 7 October 1997 that interest was calculated at 8 per cent per annum.

(4) The appellant's present action was filed on 4th September 1997. The balance capital sum of SR446,000 had already been deposited in Court and received by the appellant's attorney on 19 August 1997.

(5) On 31 March 1998, the respondent filed a motion before the Court of Appeal to define, among other things, the rate of interest payable by him.

(6) On 7 April 1998 the parties filed a joint motion (D5) signed by their respective attorneys as follows –

"Agreement of the Parties on Motion filed on the 2nd April 1998 for correction of judgment and defining rate of commercial interest

(1) The parties have reached the following agreement and wish that it be recorded as an order of this Honourable Court, correcting and supplementing its judgment dated 14th August 1997.

(2) The date of payment into Court was 8th August 1997 and it should replace 11 August 1997 wherever the latter date appears in the judgment.

(3) The commercial rate of interest in this case is 12 ½ % per annum" (the emphasis is ours).

(7) Judgment was entered by the Court of Appeal on the same day and the judgment of the Court of Appeal dated 14 August 1997 became executory only as from 7 April 1998 after the commercial rate had been determined and agreed by the parties.

(8) The condition that the commercial rate of interest should be paid by 31 August 1997 was expressly rendered nugatory by the consent order which supplemented the judgment of the Court of Appeal of 14 August 1997 in which it set down what was the commercial rate of interest agreed by the parties.

(9) The sum of SR34,287.83 was on 7 April 1998 paid over in court to the appellant by the respondent as SR69,266.64 had already been deposited in Court by the latter when the interest rate had unilaterally been calculated by him at 8 per cent. The appellant obtained the whole interest payable and due to it on 20 April 1998.

(10) The respondent satisfied the condition laid down by the Court of Appeal as soon as the commercial rate of interest was determined by agreement of both parties, as envisaged in paragraph 1 of Article 1153 of the Civil Code which states as follows –

> "With regard to the obligations which merely involve the payment of a certain sum, the damages arising from delayed performance shall only amount to the payment of interest fixed by law or by commercial practice; however, if the parties have their own rate of interest, that agreement shall be binding."

(11) The respondent had throughout acted in good faith and within his legal rights and obligations.

In the light of his findings of fact, the trial Judge refused to exercise his discretion in granting a rescission of the sale in the circumstances under Article 1655 which states –

> "The rescission of the sale of immovables shall be ordered forthwith if the seller is in danger of losing both the thing and the price" (the emphasis is ours).

Having examined the record, in the light of the submissions of learned Counsel on both sides, we have no difficulty in holding that his findings of fact are fully warranted by the evidence and his conclusion is unimpeachable.

We can only remark that it was through no fault of the respondent that no commercial rate of interest was fixed by the Court of Appeal. On

the contrary, he endeavoured to reach an agreement with the appellant but to no avail. Moreover, the appellant, as seller, was never in danger of losing both the thing and the price. After all, it had already been paid the balance capital sum of SR446,000, as indicated already, but only been denied payment of interest, which was admittedly due to it, as a result of the non-determination of the rate of interest payable. The respondent was always willing to pay the interest provided the rate thereof had been agreed by the parties. As soon as the parties reached agreement on this issue, the appellant was paid forthwith in full the interest due to it by the respondent. To order rescission of the sale would in the circumstances not have been in the interests of justice, as the trial Court implicitly found by not exercising its discretion in favour of the appellant.

Learned Counsel for the appellant laid great stress on the fact that the learned Judge had misconstrued the provisions of article 223 of the Seychelles Code of Civil Procedure which states as follows:-

> "Wherever damages or any sum of money to be paid shall not have been definitely determined by the judgment of the court it shall be lawful for the plaintiff, after notice given to the defendant and failure on his part to tender an acceptable amount, to apply to the court by way of motion for an order fixing the amount of such money or damages and the court after hearing the parties shall make an order fixing the amount" (the underlining is ours).

According to Counsel, "any sum of money" includes any interest payable and it was for the respondent to have seized the Court as soon as there was a dispute as to the rate of interest to be payable to the appellant.

Admittedly the trial Court was wrong in its interpretation of article 223 which applies also to interest payable. But so, too, was learned Counsel. The provisions of that article make it abundantly clear that they

could only have been invoked by the appellant i.e. the plaintiff at the trial, if it was so minded. But the fact of the matter is that it was not willing to do so as it wanted at all costs to pursue its own agenda and cash in on the fact that the commercial rate of interest had not been determined and so seek rescission of the sale, as is evidenced by its stand in this regard.

We note, however, that the respondent did try to work out an arrangement with the appellant with regard to the rate of interest which was payable, applied on 31 March 1998 to the Court of Appeal to define the rate of interest to be payable by him and paid in Court interest at the rate of 8 per cent.

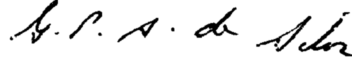
Moreover, it is clear from D5 that it was an agreement of the parties i.e. the appellant and the respondent. It is to be noted that the Court of Appeal, as it was then constituted, had the undoubted power to record the consent agreement reached by the parties, the more so as it does not sit permanently and is differently constituted at its periodic sessions.

In this regard, it is significant that the Seychelles Court of Appeal is in a special position in that it can direct any departure from its Rules at any time when this is required in the interest of justice or give directions as to the procedure to be followed where it has not been provided for in its Rules. Thus, Rule 3 of the Seychelles Court of Appeal Rules, 1978 states as follows:-

> "(1) The procedure and practice of the Court shall be as prescribed in these Rules, but the Court may direct a departure from these Rules at any time when this is required in the interests of justice.
>
> (2) In any matter for which provision is not made by these Rules or other legislation, the Court or a

Judge may on application or informally give directions as to the procedure to be adopted."

For all the reasons given, we affirm the judgment of the trial Court and dismiss the appeal, with costs.



A. M. SILUNGWE	A. G. PILLAY	G.P.S. DE SILVA
JUSTICE OF APPEAL	JUSTICE OF APPEAL	JUSTICE OF APPEAL

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