(11)

IN THE SEYCHELLES COURT OF APPEAL

GLOBAL INVESTMENT & BUSINESS CORPORATION LIMITED **APPELLANT**

versus

ZAID AL-KAZEMI SONS TRADING COMPANY
ZAKSAT GENERAL TRADING COMPANY W.L.L. **RESPONDENTS**

Civil Appeal No: 13 of 2002

[**Before**: *Ayoola P, De Silva & Matadeen JJA]*

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Mr. C. Lucas for the Appellant

Mr. R. Valabhji for the Respondents

JUDGMENT OF THE COURT

(Delivered by Ayoola, P.)

The respondents were plaintiffs in the Supreme Court in a suit commenced by a plaint dated 21st January, 1999. The appellant was defendant in the said suit. For convenience the respondents and the appellant are referred to, respectively, as the plaintiffs and the defendant in this judgment. The plaintiffs' claim as contained in their plaint were as follows:-

> "1. First plaintiff is a partnership and a shareholder in the second plaintiff Company, both registered in Kuwait and second plaintiff is the assignee of the first plaintiff of a sum of U.S. dollars 200,000—paid by first plaintiff to the Central Bank of Seychelles for the account of the defendant.
>
> 2. On the 1st June 1997 first plaintiff transferred to the Central Bank of Seychelles the said U.S.$200,000—as a deposit for the purchase by Defendant of Parcel B1596 from Government.

3. Defendant has duly used the U.S.$200,000—for payment to Government for the purchase of Parcel B1596 which Government has transferred to the Defendant as per Title Deed dated 20th July 1998.

4. Plaintiffs have by letter dated 13th January 1999 requested Defendant to refund to plaintiffs the said sum of U.S.$200,000—but the defendant has failed to do so.

Wherefore plaintiffs pray for a judgment of this Honourable Court ordering defendant to pay plaintiffs the said sum of U.S. dollars two hundred thousand with interest from 1st June 1997 at the commercial rate and costs."

After trial had been concluded, the parties having adduced evidence both oral and documentary, the trial judge came to the conclusion that:-

> "A reading of the plaint discloses, as between the parties before this Court, merely that "on 1st June 1997 the first plaintiff transferred to the Central Bank of Seychelles the said USD200,000 as a deposit for the purchase by defendant of parcel B1596 from Government ..." and that the defendant has "failed to refund the plaintiffs the said sum." There is not an ounce of disclosure from the plaint as to why the defendant should be made to 'refund' the amount of USD200,000 to the plaintiffs. No breach of contract has been pleaded. Accordingly, I find that the plaint fails to disclose a cause of action against the defendant."

In the result he dismissed the suit and the counter-claim brought by the defendant. On the plaintiffs' appeal to this court the parties agreed to a consent order that the "*matter be remitted to the Supreme Court for determination on the evidence already adduced in the case on the basis of the points in issue agreed by them and embodied in the document dated*

16th April 2002 signed by their counsel". The judgment was set aside and the matter was accordingly remitted to the Supreme Court to be determined by Juddoo, J. on the evidence already on record. By the document dated 16th April 2002 the parties agreed the points in issue as follows:-

> "1. The claim of the Appellants being one for a debt, the action is not based on contract. There is a cause of action pleaded in paragraph 4 of the plaint as per letter Exhibit P6 referred to therein.
>
> 2. The counter-claim and the defence thereto need to be considered in all their aspects as per submissions filed.
>
> 3. The case is remitted to the same Judge of the Supreme Court to rule on the above points without a re-trial on the evidence and submissions on record in both the Supreme Court and the Court of Appeal."

Pursuant to the consent order the matter came before Juddoo, J who on 2nd August 2000 gave judgment for the plaintiffs in the sum of USD200,000 with interest at legal rate as from 3rd June 1997 with costs. It may as well be noted that the defendant also brought a counter-claim whereby it claimed from the plaintiffs the sum of USD180,000 being rent due from 31st July 1998 to 31st July 1999 in respect of a property B1596 at La Misere pursuant to a lease agreement. Juddoo, J. dismissed the counter-claim.

The defendant appealed from the decision of Juddoo, J. Although by the notice of appeal filed by counsel on its behalf the appeal was stated to be "*against the whole of the decision*" it is evident that the grounds of appeal were directed at that part of the decision whereby judgment was entered for the plaintiffs on their claim. No ground of appeal challenged

the decision of the learned trial Judge dismissing the counter-claim. That position became more evident by the only ground of appeal substituted by leave of this Court for the four grounds of appeal initially filed. The only ground of appeal raised against the decision of the Supreme Court by an amended ground of appeal is as follows:-

> **"Ground 1**
>
> The trial judge having observed at page 341 that *"the Plaintiff's claim is one for a debt in the sum of USD200,000"* and having found at page 347 *"that the instant determination is as to whether the said amount of USD200,000 was a mere transfer of money by the 1st plaintiff to the Defendant to enable the Defendant to put up a deposit for the purchase of Parcel B1596 or whether the amount was transferred in contemplation of an agreement for a lease to be reached between the 1st plaintiff and the Defendant,"* correctly concluded at page 350 *"that the amount of USD200,000 was transferred in pursuance of the Franchise Agreement dated 10th April 1997,"* but was wrong in fact and law at page 357 when he found that *"the plaintiffs' claim to be proved in the sum of USD200,000"* and *"entered judgment in favour of the plaintiffs in the sum of USD200,000; and entered judgment in favour of the Plaintiff."*

To put this ground of appeal and the arguments advanced in relation thereto, both for and against it, in proper perspective it is

expedient to appreciate the judgment of the learned trial Judge who proceeded, initially, on the footing that *"the plaintiff's claim is one for a debt in the sum of USD200,000"*. In so proceeding he was rightly conforming to the *"Points in issue"* agreed to by the parties and what seemed manifest on the plaint. He found that:-

> "there is no denial that a sum of USD200,000 has been transferred by the 1st plaintiff to be paid to the Government of Seychelles on account of the defendant. The said transfer was made on 3rd June 1997 as per Exhibit P8. Before that date it is not disputed that the defendant company had embarked into negotiations with the Seychelles Government to be granted exclusive licence to operate a cable T.V. system in the country."

With that finding no exception has been taken in this appeal. The negotiations show, as narrated by the trial judge that, among other things, the Government agreed to transfer to the defendant *"the plot of land near the ex-US Tracking Station site"*; that approval has been granted for the sale of the said approximately 1500 sq. m. of land, La Misere to the defendant for a consideration of USD400,000 payable by a first instalment of USD200,000 upon signature of the transfer document and USD200,000 twelve months thereafter, subject to specified conditions; and, that the defendant had been granted sanction to take an option to purchase Parcel B1596, La Misere from Government for a consideration of USD500,000. It was in the light of these facts that the trial judge formulated the issue for determination in the case thus:-

> "Suffice to say that the instant determination is as to whether the said amount of USD200,000 was a mere transfer of money by the 1st plaintiff to the defendant to enable the defendant to put up a deposit for the purchase of Parcel B1596 or whether the amount was transferred in contemplation of an agreement for a lease to

> be reached between the 1st plaintiff and the defendant."

The learned Judge prefaced a consideration of that issue with a finding that:-

> "there is no 'direct' confirmation from any of the parties that the transfer of USD200,000 was for a stated and specific purpose. The transfer document itself, Exhibit P8, does not contain any particulars of payment instructions nor has the said transfer been accompanied by a correspondence confirming the purpose of the transfer."

At the end of the day, apparently reasoning from the circumstances, he found that the amount of USD200,000 was not transferred by the 1st plaintiff as advance rental for rent of land as claimed by the defendant but was transferred in pursuance of a Franchise Agreement dated 10th April 1997. Leaping from the latter finding the trial Judge concluded that the defendant was liable to refund USD200,000 to the plaintiffs.

Mr. Lucas for the defendants argued in his oral arguments along the lines of his skeleton heads of argument on this appeal from the decision of the learned Judge in substance as follows: The plaintiffs pleaded that the claim was for debt but the evidence did not disclose a debt. There was no evidence of a loan. Evidence that USD200,000 was paid pursuant to a contract under a Franchise Agreement dated 10th April 1997 or in contemplation of later contracts/understanding do not entitle the plaintiff to succeed since it relates to transactions under the laws and principles of contract. He referred to oral and documentary evidence which seemed to indicate that the money was transferred pursuant to a contract.

Also along the lines indicated in his skeleton heads of argument Mr. Valabhji, learned counsel for the plaintiffs, argued that the learned Judge

correctly interpreted the consent order by this court and the document attached to it containing the agreed *"points in issue"*. He reiterated that *"the claim of the appellant being one for a debt, the action is not based on contract."* He pointed out that at the time when the transfer was made the management agreement Exhibit D8(a) of 1.5.97 had not been concluded.

The threshold difficulty in this case lies in the initial obscurity of the plaintiffs' cause of action. Section 71 of the Seychelles Code of Civil Procedure provides that the plaint must contain, among other things, *"a plain and concise statement of the circumstances constituting the cause of action and where and when it arise and of the material facts which are necessary to sustain the action."* The plaint did not contain much beyond stating that the 1st plaintiff transferred to the Central Bank of Seychelles the sum of USD200,000 *"as a deposit for the purchase by Defendant of Parcel B1596 from Government"*, that the defendant had *"duly used"* the money for that purpose but failed to refund the sum of money when requested by the plaintiffs to do so. The letter dated 13th January 1999, (Exhibit P6) which, leaning over backwards, was permitted to be incorporated in the plaint stated that that money was deposited at the Central Bank of Seychelles at the defendant's request and on its behalf by the first plaintiff and that the sum of money was refundable because the defendant has *"failed to honour the agreements under which the deposit was made at the Central Bank of Seychelles on your behalf."* However, the plaint, beyond listing certain documentary evidence which included Franchise Agreements dated 10th April 1997 and 25th July 1997, and shareholders and management agreement between the parties dated 1st May 1997 did not specify the agreements which have not been honoured and in what respect.

At the end of the day, the parties agreed and the trial Judge conformed with their agreement that the plaintiffs' claim was in debt.

Proceeding on that footing the main question is whether there was evidence of a loan transaction.

Article 1892 of the Civil Code of Seychelles ("the Civil Code") provides that:-

> "The loan for consumption is a contract whereby one of the parties delivers to the other a certain quantity of things which are consumed by use on condition that the latter shall return to him as much of the same kind and quality."

One significant element of the loan for consumption is the promise of the borrower to return things of the same quantity and quality as the things lent and at a time agreed upon. (See Article 1902 of the Civil Code). The obligation of the borrower to return the things lent does not accrue before the expiry of the agreed term (Article 1899) or such time as the Court may grant (Article 1900). Although loan for consumption falls generally within obligations arising from contract the loan for consumption as Article 1892 of the Civil Code shows is a specific contract with its distinct nature, obligations, rights and duties. It is not to be equated with the ordinary contract in which, in terms of Article 1142 of the Civil Code, the primary consequence of breach of an obligation to do or to refrain from doing something shall give rise to damages if the debtor fails to perform it. The primary obligation of a borrower for consumption is to return to the lender as much of the same kind and quantity of the things loaned, pursuant to his promise.

Having regard to the nature of a loan for consumption, the pleadings in an action by the lender for return of the kind and quantity of things loaned must essentially show: (i) the existence of a contract whereby the plaintiff delivers to the defendant certain quantity of things; (ii) an agreement that the latter may consume it by use; (iii) an

undertaking that the latter shall return to the plaintiff as much of the same kind and quantity of the thing lent; (iv) the nature and quantity of the thing lent; (v) the time for return of the thing as may be agreed. Where, on the other hand, the claim is founded on a breach of contract in that there has been a breach of an obligation to do or refrain from doing something, the pleadings of the plaintiff should state: (i) the contract and its terms and (ii) the particular respect in which a breach has been occasioned, that is to say what term has not been performed. An obligation the breach of which lies primarily in damages cannot give occasion for an action in debt.

It is evident in this case that the learned trial Judge was faced with the initial problem of insufficiency of averments in the plaint compounded, no doubt, by the agreement of the parties that the claim was one for debt. Parties are trammelled by their pleadings and the plaintiff by the cause of action for which relief is sought. It was not open to the trial judge to formulate a fresh cause of action as the evidence may permit and grant relief in relation to such newly formulated cause of action which was not the cause of action raised by the plaint, without amending the plaint.

In this case learned Counsel for the defendant criticised the decision of the learned trial Judge by referring to pieces of evidence of the main witness for the plaintiffs which he argued go to show that the evidence did not support an action in debt. The witness, Mr. Strover, did say in his evidence, highlighted by Counsel for the defendant that –

> "the company called Zak (not the defendant) made payment to the Government of Seychelles <u>in relation to a Franchise Agreement</u> that had been signed on 10th April 1997", (Emphasis ours)
>
> "...the money was transferred through a Franchise Agreement which Zak believed to have been signed on 10th April 1997,"

> "It was money paid to the Government of Seychelles in terms of the temporary funds as a deposit for the purchase ..."

On these pieces of evidence the learned trial Judge made the crucial finding that *"the amount of USD200,000 was transferred in pursuance of the Franchise Agreement dated 10th April 1997."*

The Franchise Agreement signed on 10th April 1997 was Exhibit P9(5). Clause 5.2 of the Agreement was as follows:-

> "The Government shall take necessary steps to ensure that the Government sells the parcel of land as agreed upon price and terms. As discussed the Company hereby agrees to purchase the agreed upon parcel of land located near the old Tracking Station Site, for the sum of USD400,000 payable USD200,000 upon execution of this agreement and USD200,000 upon completion of the cable television system installation."

Clause 5.2 is not by itself conclusive or even indicative of the purpose for which the 1st plaintiff transferred USD200,000 or even of the fact that it was a loan to the defendant. However, in his address in the Supreme Court learned Counsel for the plaintiffs put the plaintiffs' case thus at pp308-309 of the record:-

> "In consideration of the said Franchise Agreement dated 10th April 1997 the first plaintiff then concluded three agreements with the defendant on 1st and 2nd May 1997 as per Exhibits D8(a), D8(b) and D8(c). Under Clause 3.5 of the agreement dated 1st May 1997 Exhibit D8(a) the Company Global Direct Television (s) Ltd was to be owned 75% by first plaintiff and 25% by the defendant. The 1st plaintiff relying on the said agreements and promises by the defendant and pending the incorporation of

> 2nd plaintiff on the 1st June 1997 transferred to Seychelles the sum of USD200,000 to the Central Bank of Seychelles as a deposit in part payment for parcel of land as required under Clause 5.2 of the Franchise Agreement of 10th April 1997. (Emphasis ours)
>
> "In breach of Claue 3.5 of Exhibit D8(a) the defendant, coorperated (sic: incorporated) Global Direct Television Seychelles on the 7th August 1997 with 99% shares in the name of Abdullah bin Yousef Al Shaibani of Dubai."

The circumstances in which USD200,000 was transferred thus became manifest and the reason why the learned Judge found that the amount was transferred in pursuance of the Franchise Agreement dated 10th April 1997 became clear. Far from being a loan for consumption made to the defendant by the plaintiff it seems clear that the case which the plaintiffs sought to make was that the amount was transferred pursuant to an agreement that they would participate in the project to which the Franchise Agreement related. The Shareholders and Management Agreement Exhibit D8(a) to which learned Counsel referred showed the mode and proportion of such participation.

If the money transferred by the 1st plaintiff had been utilised for the purpose envisaged in Clause 5.2 of the Franchise Agreement, it cannot be said that a loan of that money had been made to the defendant in the light of what the plaintiffs' Counsel claimed in his address at the trial as consideration for making the transfer. Utilisation of the money for the purpose of an anticipated participation in the project cannot be a breach of contract but, rather, a partial performance thereof. If there was any breach of an agreement to let the 1st plaintiff or its assignee into participation in the project to which the Franchise Agreement related, the remedy of the plaintiffs did not lie in claiming the money transferred as a debt.

The plaintiffs have not alleged any breach of contract in respect of which refund of the money transferred could be regarded as part of the loss it suffered by reason of the breach. It had not alleged a contract and a breach thereof even in the letter Exhibit P6 which was made part of paragraph 4 of the plaint. Even if going by Exhibit P6 the plaintiffs alleged that the deposit allegedly made at the request and on behalf of the defendant was made pursuant to some agreements which the defendant failed to honour and that the deposit became refundable by reason of failure to honour the agreements, the plaintiffs should have alleged, but, failed to allege what the failure to honour consisted of. The action as formulated was purely an action in debt. An action in debt is not proved by evidence that there may have been a breach of a contractual obligation to perform an act other than the return of the same quantity and kind of the thing loaned for consumption.

Nothing that has been said in this judgment should be interpreted as indicating, nor is there need to decide, that had the action been formulated as a breach of contract it would have succeeded. The scantiness and inadequacy of the averments in the plaint would have made such finding an unwarranted speculation. It suffices to say for the purpose of this appeal that upon the evidence in the case adduced by the plaintiffs, put at the highest, the transfer of shares of money was pursuant to a contract other than a loan. The submission by learned Counsel for the defendant that: *"Transfer of any sums under that agreement was definitely a transfer pursuant to a contract and not a debt, loan or a mere transfer"* seems to us unanswerable.

In the circumstances, the leap by the trial Judge from a finding that *"the amount of USD200,000 was transferred in pursuance of the Franchise Agreement dated 10th April 1997"* to a conclusion that the defendant should refund the sum of USD200,000 is in view of the evidence adduced unwarranted, not based on anything that is evident in the evidence and,

in any event, cannot be supported in an action in debt. For these reasons the appeal of the defendant succeeds and the decision of the Supreme Court whereby judgment is entered for the plaintiffs against the defendant in the sum of USD200,000 with interest at legal rate as from 3rd June 1997 with costs is set aside. In place therefor judgment is entered dismissing the plaintiffs' claim. The defendant is entitled to costs of this appeal and costs of the trial in regard to the plaintiffs' claim to be assessed.

E. O. AYOOLA	G. P. S. DE SILVA	K. P. MATADEEN
PRESIDENT	**JUSTICE OF APPEAL**	**JUSTICE OF APPEAL**

Delivered at Victoria, Mahe this 16th day of **December** 2002.