(19)

IN THE SEYCHELLES COURT OF APPEAL

R. NATARAJAN PILLAY **APPELLANT**

versus

BANK OF BARODA **RESPONDENT**

Civil Appeal No: 28 of 2001

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

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Mr. B. Georges for the Appellant
Mr. R. Valabhji for the Respondent

JUDGMENT OF THE COURT

(Delivered by De Silva, JA)

The defendant-respondent raised in limine litis the plea of res judicata, relying on the pleadings in Civil Side No. 51 of 1996 and the judgment in Civil Appeal No. 2 of 1997. The trial Court upheld the plea of res judicata and dismissed the action. The plaintiff-appellant appeals against the aforesaid ruling.

The plea of res judicata is based essentially on paragraph 1 of Article 1351 of the Civil Code of Seychelles which reads as follows:-

> "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 relates to the same class, that it be between the same parties and that it be brought by them or against them in the same capacities."

Referring to the plea of res judicata, Ayoola P in the case of **La Serenissima Limited v/s Francesco Boldrini** (Judgment delivered on 19/10/2001) succinctly stated the principle in the following terms - "*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 case. (see Gamatis v Chaka Brothers 1989 SLR 235)." It is founded on two maxims of the law, namely, (1) "*that it is in the interest of the State that there should be finality to litigation*"; (2) that "*no person should be vexed twice in respect of the same litigation.*" These are principles based on public policy.

At the hearing before us Mr. Bernard Georges, for the plaintiff-appellant rightly conceded that the parties and subject matter were identical between the present action, (Civil Side 117/2000) and the previous action (Civil Side 51/1996). Therefore the only issue before us is whether there is identity of the cause of action. It is relevant to add that it is not disputed that the previous action was decided on its merits by the Supreme Court and subsequently by the Court of Appeal.

Since the plea of res judicata is based on the averments in the plaints, it would be proper to set out the facts pleaded in the two actions. In the present action (C.S. 117/2000) the averments in the plaint read:-

1. At all material times, the plaintiff was a customer of the Defendant, a commercial bank operating in Seychelles at Albert Street, Victoria.

2. On 10th December 1986, the Plaintiff invested a sum of Rs.200,000.00 with the Defendant on a three year fixed deposit. This was renewed for a further period of three years on 3rd August 1989.

3. At some point between 1986 and 1989, the Plaintiff gave a lien over the said sum in favour of the Defendant to guarantee, inter-alia, a loan taken from the Defendant bank by one Ward Govinden.

4. The plaintiff only agreed to grant the said lien on the agreement and understanding with the Defendant bank that the Defendant would also secure the said loan taken by the said Ward Govinden by taking charges over movable by taking charges over movable and immovable property of the said Ward Govinden.

5. The Defendant, failed to register the said charges over the said movable and immovable property of the said Ward Govinden and thus had only the said lien on the Plaintiff's fixed deposit to secure the said loan to the said Ward Govinden.

6. At some time unknown to the Plaintiff, the said Ward Govinden defaulted in the repayment of the said loan and the Defendant, without notice to the Plaintiff, appropriated the sum of Rs.240,198.65 from the Plaintiff's said fixed deposit.

7. The Plaintiff avers that the Defendant abused its rights in the matter in appropriating the said sum of Rs.240,198.65 from the Plaintiff's said fixed deposit without:

    (i) first going against the assets of the said Ward Govinden.

    (ii) having recalled the said loan to the said Ward Govinden upon the said Ward Govinden not putting up the security requested by the Defendant.

8. The Plaintiff avers that the Defendant had no right to have appropriated the said sum or any other sum from the said fixed deposit in that this only became necessary because of the failure of the Defendant to have taken charges over the property of the said Ward Govinden as agreed.

9. The Plaintiff avers that the Defendant is bound to return to him the sum of Rs.240,198.65 with interest thereon at the commercial rate since 27th August 1993."

The averments in the previous plaint (C.S.51/1996) read thus:-

1. At all material times, the Plaintiff was a customer of the Defendant, a commercial bank operating in Seychelles at Albert Street, Victoria.

2. On 10th December 1986, the Plaintiff invested a sum of Rs.200,000.00 with the Defendant on a three year fixed deposit. This was renewed for a further period of three years on 3rd August 1989.

3. At some point between 1986 and 1989, the Plaintiff gave a lien over the said fixed deposit in favour of the Defendant to guarantee inter alia a loan taken from the Defendant bank by one Ward Govinden.

4. The Plaintiff only agreed to grant the said lien on the agreement and understanding with the Defendant bank that the Defendant had or would also secure the said loan taken by the said Ward Govinden by taking charges over movable and immovable property of the said Ward Govinden.

5. The Defendant, by its negligence, failed to register the said charges over the said movable and immovable property of the said Ward Govinden and thus had only the said lien on the Plaintiff's fixed deposit to secure the said loan to the said Ward Govinden.

6. At some time unknown to the Plaintiff, the said Ward Govinden defaulted in the repayment of the said loan and on 27th

August 1993 the Defendant without notice to the Plaintiff appropriated the sum of Rs.240,198.65 from the Plaintiff's said fixed deposit.

7. The Plaintiff avers that the Defendant had no right to have appropriated the said sum or any other sum from his said fixed deposit in that this only became necessary because of the failure of the Defendant to have taken charges over the property of the said Ward Govinden as agreed.

8. The Plaintiff avers that the Defendant is bound to return to him the sum of Rs.240,198.65 with interest thereon at the commercial rate since 27th August 1993."

On a consideration of the averments in the plaints in the present action and the previous action, it is clear that they are the same except for the averments in paragraph 7 of the plaint in the present action. Indeed this was very properly conceded by Mr. Bernard Georges. However, upon a scrutiny of paragraph 7 of the plaint in the present action, it is manifest that except for the words "*the defendant abused its rights*" (emphasis is ours) the averments in paragraph 7 of the previous plaint are substantially the same. It was the contention of Mr. Bernard Georges that in the present action the plaintiff-appellant alleges "*abuse of rights*" which is a distinct tort from that of "*negligence*" which the Court of Appeal found was the cause of action in the previous case. Mr. Bernard Georges further argued that in the present action the plaintiff-appellant alleged "*not that there was negligence in the respondent not taking additional security from the third party, but that the respondent abused the exercise of its right to enforce the lien on the funds of the appellant without first having had recourse to the assets of the third party (the principal debtor of the respondent) or without, at the outset, having recalled the loan when the additional security was found not to have been given by the third party*" (vide the written submission dated 20th November 2002).

In our view the cause of action in the present plaint and in the previous plaint is clearly grounded in tort. Mr. Bernard Georges relevantly cited before us the case of **De Bertier de Sauvigny & ors v Courbevoie Limitee & Ors** (Mauritius Reports 1955 at page 215). The dicta at page 219 is of relevance to the issue before us. "*La cause, is the fact or the act whence the right springs. It might be shortly described as the right which has been violated.*" The right which is alleged to have been violated in both actions is founded on tort and tort alone, whether it be "*negligence*" or "*abuse of rights*" which constitutes only "Les moyens, *qui sont les elements de fait ou de droit qui tendent à constituer la cause ou en démontrent l'existence* » - vide: note 1019 of Dalloz, Code Civil Annoté , under article 1351 of the French Civil Code, which is an exact replica of article 1351 of the Civil Code of Seychelles, reproduced in **De Bertier de Sauvigny,** referred to earlier at page 219. We accordingly hold that the cause of action pleaded in the earlier action and the present action is identical and the plea of res judicata has been rightly upheld.

For these reasons, the judgment of the Supreme Court (Juddoo J) is affirmed and the appeal is dismissed with costs.

A. G. PILLAY	**G. P. S. DE SILVA**	**K. P. MATADEEN**
JUSTICE OF APPEAL	**JUSTICE OF APPEAL**	**JUSTICE OF APPEAL**

Delivered at Victoria, Mahe this 18th day of **December** 2002.