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IN THE SEYCHELLES COURT OF APPEAL

WALTER CONSTANCE

APPELLANT

versus

ROY CHANG-FANE

RESPONDENT

Civil Appeal No: 9 of 2002

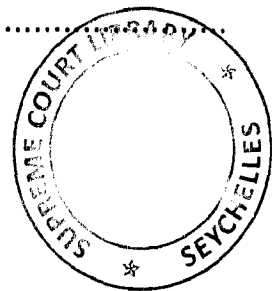
[Before: Pillay, De Silva & Matadeen JJ.A]

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Mr. F. Elizabeth for the Appellant

Mr. F. Bonte for the Respondent

JUDGMENT OF THE COURT

(Delivered by De Silva, JA)



This appeal by the defendant-appellant is consequent upon an ex parte judgment delivered by the trial Court in favour of the plaintiff-respondent in a sum of SR65,000 with interest claimed by him on the basis of a debt. The ex parte hearing was on 2nd July 2001 and judgment was entered on the same day. Mr. Elizabeth for the defendant-appellant submitted that the trial Court was in error in fixing the case for ex parte hearing on 2nd July 2002 when pleadings were not closed. Admittedly, the statement of defence also contained a counter-claim but no defence to the counter-claim had been filed. The proceedings of 2nd July 2001 have a direct bearing on the submission made by Mr. Elizabeth. The proceedings read as follows:-

“Mr. F. Bonte for the plaintiff
Mr. F. Elizabeth for the defendant – absent
Defendant – absent

Mr. Bonte: The matter is for hearing today
and I am ready to proceed.

Court: You have not filed your defence to the counter claim.

Mr. Bonte: Is there a counter claim?

Court: At the rear of the defence there is a counter claim in the sum of Sr. 85,000 and there is no reply to it.

Mr. Bonte: I shall take time to file the defence to counter claim. May we take a mention date?

Court: You can proceed on the plaint since the defendant is absent."

It is clear from the proceedings that learned Counsel for the plaintiff moved for time to file his defence to the counter-claim and also asked the Court for a "mention date". Thus the submission of Mr. Elizabeth, that the trial Court proceeded to hear the case ex parte, when it was manifest that the pleadings were not closed, is well founded. What is more, learned Counsel for the plaintiff made no application for an ex parte hearing. We hold that, in the circumstances, the trial Court was in error in hearing the case ex parte.

Mr. Elizabeth next contended that an application for a new trial was made pursuant to Section 194(c) of the Seychelles Code of Civil Procedure but the trial Court refused the application. Section 194(c) reads as follows:-

"A new trial may be granted on the application of either party to the suit when it appears to the Court to be necessary for the ends of justice." (emphasis added)

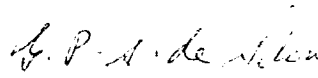
It was the position of Mr. Elizabeth that he was abroad at the relevant time, having obtained leave from the Chief Justice, but had made arrangements for another Counsel to replace him and move for a


postponement. There is no evidence that that Counsel had been instructed to represent the defendant-appellant. Unfortunately, the other Counsel failed to attend Court. It is true that the defendant-appellant should have been present in Court, as stressed by learned Counsel for the plaintiff-respondent.

However, on a consideration of the totality of the circumstances, particularly the fact that the pleadings were not closed, and no application was made on behalf of the plaintiff-respondent to proceed to an ex parte hearing, we are of the view that in the interests of justice this is a fit case to order a new trial.

We accordingly allow the appeal, set aside the ex parte judgment, and make order that a trial de novo be held before another Judge. We make no order as to costs.


A. G. PILLAY
JUSTICE OF APPEAL


G. P. S. DE SILVA
JUSTICE OF APPEAL


K. P. MATADEEN
JUSTICE OF APPEAL

Delivered at Victoria, Mahe this ¹²20 day of **December** 2002.