(4)

IN THE SEYCHELLES COURT OF APPEAL

CIVIL APPEAL NO. 1 OF 2003

In the matter between

MARIE DANIELLA CHARLES APPELLANT

VERSUS

JASON EMMANUEL CHARLES RESPONDENT

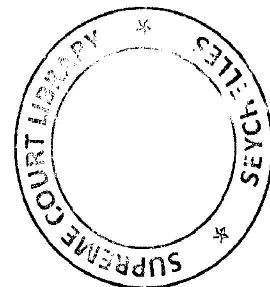
BEFORE: RAMODIBEDI, P., KARUNAKARAN, J.A., RENAUD, J.A.

HEARD ON 15 November 2004

RULING Delivered on 3 December 2004

Mrs. K. Domingue for the Appellant

Mr. C.Lucas for the Respondent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RULING

RAMODIBEDI, P.

[1] In this matter, acrimonious litigation continues between the parties with no quarter seemingly asked for or given. At the outset, it is necessary to record that on 15 November 2004 this Court heard applications by each of the parties to the dispute as a prelude to their appeal on the merits. The Appellant on the one hand applied for adjournment of the appeal in question "until all Court of Appeal judges have been appointed by the Constitutional Appointments Authority." The Respondent on the other hand made an application "to order a new valuation of the matrimonial home and land namely Title V7292 situated at English River."

[2] After hearing submissions, both applications were dismissed and it was intimated that reasons would be given later. These are the reasons.

The Appellant's Application

[3] In her affidavit in support of the Notice of motion set out in paragraph [1] above, it became clear that the Appellant was actually applying, albeit in a subtle way, for recusal of the two members of this Panel namely my Brothers KARUNAKARAN and RENAUD on the ground that they are "subordinates of the Chief Justice who handed down the judgment which is now on appeal" and that accordingly "not only is there a likelihood that justice may not be done but further justice is not being seen to be done."

[4] The Appellant's allegation that the learned Judges in question are "subordinates" of the Chief Justice raises squarely, in my judgment, the question of the independence of the judiciary. To that extent therefore, and only to that extent, the question raised in this application is an important one deserving of treatment in accordance with constitutional law principles. It is thus necessary for this Court to rule on the point once and for all.

[5] It requires to be noted at the outset that the Appellant has not pitched her application at the level of challenging the integrity and competence of the learned Judges in question. Nor is it suggested that they would have any personal or financial interest in the outcome of the matter. On the contrary, it requires to be stressed that, as Supreme Court Judges, the learned Judges have obviously qualified for appointment as Judges under Article 126(1) of the Constitution which reads as follows:-

> "126. (1) A person is qualified for appointment as a Judge if –
>
> (a) the person has been entitled to practise before a court of unlimited original jurisdiction for not less than seven years; and
>
> (b) in the opinion of the Constitutional Appointments Authority the person has shown outstanding distinction

> in the practice of law and can effectively, competently and impartially discharge the functions of the office of a Judge under this Constitution." (Emphasis added).

The words I have highlighted in the Article clearly indicate, in my judgment, that for a person to qualify for appointment as a Judge he/she must be able to rise above self-centred considerations such as bias. Equally important in those few words, I venture to say, is the notion that such a person will possess judicial independence which is ever so important for proper discharge of judicial functions. I proceed then to consider this concept in the context of constitutionalism in so far as this country is concerned.

Judicial Independence

[6] It is important to note that Articles 131(1), 132(1), 132(2), 133 and 134 of the Constitution equally provide a key to judicial independence to Judges to the extent that they guarantee their security of tenure and salary.

In terms of Article 131(1) a person holding office of Judge shall vacate that office –

(a) on death;

(b) if that person is removed from office under Article 134;

(c) if the person resigns in writing addressed to the President and to the Constitutional Appointments Authority;

(d) on attaining the age of seventy years, in the case of a person who is a citizen of Seychelles;

(e) at the end of his/her contract of appointment, in the case of a person who is not a citizen of Seychelles;

(f) if the office is abolished, with the consent of the person.

Article 132(1) provides that the office of Judge shall not be abolished without his/her consent during the continuance in office of such Judge.

In terms of Article 132(2) a person who has been appointed to the office of Judge may continue in office notwithstanding any change of the qualification for appointment to the office during the Judge's term of office.

Article 133(1) provides that the salary, allowances and gratuity payable to a Judge shall be prescribed by or under an Act and shall be a charge on the Consolidated Fund

Article 133(2) in turn provides that such salary, allowances or gratuity shall not be altered to the disadvantage of the Judge after appointment save in circumstances where such Judge is removed from office under Article 134.

[7] It is important to note for that matter that in terms of Article 134 a Judge may be removed from office only for (a) inability to perform the functions of the office, whether arising from infirmity of body or mind or from any other cause or for misbehaviour and (b) in accordance with clauses (2) and (3) which in turn provide an elaborate machinery in terms of which, if the Constitutional Appointments Authority considers that the question of removing a Judge from office ought to be investigated, the Authority is enjoined to appoint a tribunal to inquire into the matter, report on the facts thereof to the Authority and recommend to the President whether or not the Judge in question ought to be removed from office. Only upon a recommendation so made can the President remove the Judge from office.

[8] The composition of the tribunal in question is such that the Judge who is investigated is guaranteed a fair hearing by a competent and impartial body. Such tribunal consists of a President and at least two other members, all selected from among persons who hold or have held office as a Judge of a court having unlimited original jurisdiction or a court having jurisdiction in appeals from such a court or from among persons who are eminent jurists of proven integrity.

[9] Of singular importance, in my judgment, is the fact that in all the Articles quoted above, the Chief Justice plays no part at all. He does not play any part in the appointment of Judges, in the security of tenure of the Judges and in their salaries. It is thus incomprehensible to me how, by simply being the administrative head of the judiciary, the Chief Justice would influence Judges in the discharge of their judicial functions. Certainly the learned Judges in this case do not feel hampered in their consciences to do justice in accordance with the law.

[10] Besides, it is important to stress that all these Judges have subscribed an oath in terms of Article 135 of the Constitution to do justice without fear or favour, affection or ill will. The beauty of such oath lies in the fact that it is binding on their consciences and is thus a guarantee against the fears expressed by the Appellant.

[11] In so far as the Court of Appeal is concerned, it is of utmost importance to bear in mind that in terms of Article 121 of the Constitution, Judges of the Supreme Court are ex officio members of the Court. That Article provides as follows:-

> "121. The Court of Appeal shall consists of –
>
> (a) a President of the Court of Appeal and two or more other Justices of Appeal; and
>
> (b) the Judges who shall be ex-officio members of the Court."

Section 1(1) on "principles of interpretation" in Schedule 2 of the Constitution in turn defines the word "Judge" as "the Chief Justice or a puisne Judge."

[12] Now Article 136(1) of the Constitution empowers the President of the Court of Appeal to make Rules of the Court of Appeal. Currently, such Rules are the Seychelles Court of Appeal Rules 1978 As Amended. Rule 4 thereof is, in my view, decisive of the matter at hand. It reads as follows:-

> "4. In respect of any appeal the Court shall consist of those Judges, not being less than three, whom the President shall select to sit for the purposes of hearing that appeal."

For the avoidance of doubt, the word "President" is defined in the interpretation section as "the President of the Seychelles Court of Appeal."

[13] It follows from the aforegoing considerations, in my judgment, that where a Supreme Court Judge is selected by the President of the Court of Appeal to sit for the purposes of hearing any appeal, that Judge is fully entitled to sit like any other Justice of Appeal and thus enjoys the same judicial independence in the discharge of his/her judicial functions as any other Justice of Appeal. It is not disputed that the learned Judges in question have been duly selected by the President of the Court of Appeal to sit on appeal in this matter. In this regard it cannot be overemphasized that when discharging their judicial functions in this Court, the Judges in question are subject to nobody but the law. This conclusion disposes of the matter.

[14] One pertinent comment, however, remains to be made at this juncture. It is this. It is obviously important in comparative constitutional law to observe that there is no correct formula for judicial independence anywhere in the world. Provided the essential principles of judicial independence are observed, as the Articles of the Constitution quoted above amply demonstrate, it is not necessary for all courts anywhere in the world to meet the same standard of judicial independence. See the leading Canadian Supreme Court case of Valente v. The Queen 1985 24 DLR (4th) 161 (SCC) 183. Although that case is not binding on this Court it is nevertheless of persuasive authority and in the absence of any similar authority in this country it is a decision which this Court is happy to follow more especially as it comes from a Commonwealth country like ours.

[15] Lest it be thought that it was overlooked, something must be said briefly about the Appellant's submission relating to the alleged perception that not only is there a likelihood that justice may not be done but that justice is not being seen to be done. Viewed in the context of the constitutional provisions set out above, this submission is with respect unsound and falls to be rejected. The Constitution as

the supreme law empowers Supreme Court Judges to sit in the Court of Appeal as ex officio members of the Court. When they so sit, they are obviously not Judges of the Supreme Court but Justices of Appeal. The alleged perception relied upon by the Appellant does not arise in those circumstances. In any event even if there be such perception, the situation is clearly sanctioned by the Constitution itself and therefore the question becomes moot and does not assist the Appellant's case. Similarly, the alleged perception is, in my judgment, not one that may reasonably be held by an informed person knowing full well the constitutional provisions set out above.

[16] For the aforegoing reasons, coupled with the fact that this is an old matter in which an appeal was noted as far back as March 2003 and thus cries out for finality in the interests of justice, the Appellant's application was dismissed with no order as to costs.

The Respondent's Application

[17] As will be recalled from paragraph [1] above, the Respondent made an application "to order a new valuation of the matrimonial home and land namely Title V7292 situated at English River." In essence, therefore, the Respondent is basically applying for leave to lead fresh evidence on appeal. It will thus be convenient to start with the law in such a situation as this.

[18] As a starting point, I should like to state categorically that this Court has discretionary power to admit fresh evidence on appeal in fitting cases. Such power is, however, one which is sparingly exercised on special grounds only. In this regard Rule 71(1)(2) of the Seychelles Court of Appeal Rules 1978 as Amended bears reference:-

"71. – (1) Appeals to the Court shall be by way of re-hearing, and the Court shall have all the powers and duties, as to amendment or otherwise, of the Supreme Court, together with full discretionary power to receive further evidence by oral examination in Court, by affidavit, or by deposition taken before an examiner or commissioner.

(2) Upon appeals from a judgment, decree or order, after trial or hearing of any cause or matter upon the merits, such further evidence, save as to matters which have occurred after the date of the decision from which the appeal is brought, shall be admitted on special grounds only and not without leave of the Court." (Emphasis supplied).

[19] It requires to be noted here that the reason why appellate courts have over the years only exercised their power to admit fresh evidence on appeal sparingly and on special grounds stems directly from public policy. It is certainly in the public interest that there should be finality to a trial. As was succinctly pointed out in the South African Appellate Division case of Stein v Excess Insurance Co. Ltd. 1912 AD 418 at 429 (followed by Colman v. Dunbar 1933 AD 141):-

> "The investigation of the facts by the tribunal of first instance ought to be, as a rule, final; and if a suitor is willing to close his case and to submit to the finding of the trial judge upon the evidence adduced, he should not, save in exceptional circumstances, be allowed to bring forward further evidence. Otherwise there would be no finality in these matters."

Under English law, the special grounds in question are contained in what is known as the Ladd v.Marshall test after a decision of the Court of Appeal in a case bearing that name and reported in [1954] 1 W.L.R.1489.

See also Sutcliffe v Pressdam Ltd 1990(1) ALL ER 269 (CA).

Happily, this Court has followed the principle in such cases as Payet v.R. (1966) S. C. A. R. p. 21, Tyndale-Biscoe L'Estrange v. R. (1966) S. C. A. R. p. 29, Elgood v. Regina (1968) E. A. L. R. 274.

[20] Although it is undesirable, in my judgment, to attempt an exhaustive list of special grounds or circumstances on which an appellate court ought to consider in its judicial discretion in granting leave to call further evidence on appeal, it is nevertheless necessary to state the following guiding principles:-

(1) It is of utmost importance in the administration of justice that there be finality to litigation and the appellate court will thus grant leave to call further evidence on appeal sparingly and only in exceptional circumstances.

(2) The litigant making the application to call further evidence on appeal must show that the evidence could not have been obtained at the trial if he/she had used reasonable diligence.

(3) The evidence sought to be led on appeal must be such that it is relevant and material and that, if given, it would probably have important bearing on the outcome of the appeal.

(4) The evidence must be such as is presumably to be believed in the sense that it must be prima facie credible.

(5) The litigant making the application to lead further evidence must tender such evidence clearly in the form of an affidavit by the potential witness together with an explanation as to why the evidence could not have been available for use at the trial if such litigant had used reasonable diligence.

(6) Conditions must not have changed to such an extent that the other litigant to the dispute will be prejudiced by the fresh evidence.

[21] Reverting to the facts of the instant case, it has to be noted that the Respondent was in fact the winner in the court a quo. His application to bolster his case with further evidence on appeal, therefore, is in itself as unusual as it is strange. Quite understandably in the circumstances, therefore, the Appellant makes the point that the Respondent has no confidence in the soundness of the judgment that he obtained from the court a quo.

[22] The Respondent's material averments in support of his application are contained in paragraphs 6 and 7 of his affidavit in the following terms:-

"(6) The house was last valued over 2 years ago at SR1.1 million inclusive of contents which she (the Appellant)

removed. I verily believe the house is now worth much less than SR1.1 million, given its state of disrepair and continued vandalization and neglect by Appellant occupier.

(7)I aver that in considering the amount payable to the appellant the value of the house is the key factor. As the house is now worth less due to reasons given above I pray that a new valuation ought to be requisitioned in all fairness of the case. It is thus in the interest of justice and would be most prejudicial to me should the new valuation not be effected in the event that the Court of Appeal decides to vary the award to the Appellant based on value of the property."

[23] It is pertinent to note that the Respondent's allegations are disputed by the Appellant in paragraphs 6 and 7 of her affidavit in the following terms:-

"6. I state that at the time the house was valued both the Respondent and I accepted the valuation. I have not neglected nor vandalized the house or property it stands on. I state further that at the time of the valuation it was only the house and property which were valued. The movables did not form part of the valuation. (See attached a copy of the valuation which makes no reference whatsoever to movables.) I state that in most cases of matrimonial property, unless there is a specific request by either or both parties, movables are not valued. I state that the reason the Respondent may be asking the Court for a fresh valuation is because the Respondent realizes that there is a real likelihood that I may be granted a half share of the matrimonial home and he realizes that in the light of past decided cases I stand a real likelihood of being granted a half share of the value of the house and property and he is therefore seeking to bring down the share he may eventually have to pay me. I state that the Respondent is estopped at this stage, when the case is on appeal, to come before the Court seeking a fresh valuation and trying to bring new or additional evidence, which should have been brought in at first instance.

7. In answer to paragraph 7 of the Respondent's affidavit I reiterate the fact that the Respondent is estopped at this stage to

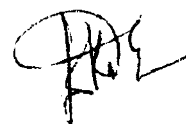
seek a new valuation. The Respondent is delaying the conclusion of this case and he is also seeking to have a second bite of the cherry."

[24] It is clear, as it seems to me, that not a single one of the guidelines 3, 4 and 5 referred to in paragraph [20] above has been met by the Respondent. Of particular concern to this Court is the fact that the Respondent has failed to tender the proposed evidence in the form of an affidavit by the potential witness in question (either a qualified valuer or quantity surveyor as he admittedly did at the trial). The result is that the Respondent has presented a bare and unsubstantiated allegation that the value of the property in question has deteriorated since the judgment of the court a quo. This, in circumstances where, as pointed out earlier, the allegation is disputed.

[25] It requires to be stated that an application for leave to lead further evidence is in the nature of an indulgence. That being so, this Court would, in exercising its judicial discretion, be very reluctant to grant an application where there is a dispute of fact as in this case. This view is, I should add, in line with the guideline 4 in paragraph [20] above.

[26] In the result, the Respondent's application to lead further evidence was dismissed with no order as to costs.

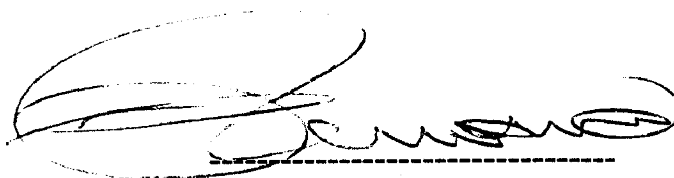
M.M. RAMODIBEDI
PRESIDENT



I concur:

D. KARUNAKARAN
JUSTICE OF APPEAL

I concur:



B. RENAUD
JUSTICE OF APPEAL

Delivered at Victoria, Mahe this 3rd day of December, 2004.