IN THE COURT OF APPEAL OF SEYCHELLES

COURT OF CIVIL APPEAL

Jessley Cecile Appellant

vs

M. T. Rose & Ors Respondents

SCA 8 of 2009

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Before: Mc Gregor PJA, Hodoul JA, Domah, JA

Counsel: Mr S. Rouillon for the Appellant
Mr F. Bonte for the Respondents

Date of Hearing: 6 August 2009
Date of Judgment: 14 August 2009

Judgment

[1] This is an appeal against the decision of the learned Judge of the Supreme Court who, on a motion by learned counsel for the appellant to seek to invalidate a judgment by consent, declined to grant: (a) an order for stay; and (b) an order for a new trial.

[2] The case has a long history of dispute the details of which we need not delve into on account of the single issue with which we are concerned in this appeal: whether the refusal to grant a stay and a new trial was justified.

[3] The matter against which the stay and a new trial was being prayed for involved a dispute between other parties to those in the present appeal, for their respective rights over a property in the island of La Digue. The record shows that an immensely laborious task had been put in by both counsel, with several attempts, to reach a settlement. The dispute was finally reduced to writing on 17 July 2006 on which date judgment was duly entered. The

matter should have been closed there and then. But, somehow, it was not. Court registries should ensure that once a case has been dealt with the file is "archived" so to speak.

[4] On 22 November 2006, some heirs who regarded themselves as the beneficiaries in the order made on 17 July 2006 re-entered the scene and somehow right into the case 302/2000 making an application for an order, inter alia, that the appellant in his capacity as executor should discharge his duties as such and according to law, if under the supervision of the Court. Procedurally, that application should have been by way of a new case altogether. However, if one goes by the number of the original case, 302/2000, on which judgment by consent was given on 17 July 2006, it was made in the same case as a continuation of that case. Neither registry, nor counsel nor court thought that it was most irregular under the doctrine of functus officio whereby the matter 302/2000 was dealt, done away with and closed right on the 17 July 2006.

[5] Be that as it may, the matter continued and, to our utter astonishment, it was re-opened for pleadings. By 8 March 2007, pleadings were closed as a second bite at the cherry in case 302/2000. It was soon ready for trial. On 23 July 2007, the new parties attempted to reach a settlement between themselves, after a number of allegations and counter allegations having been made between them, and between counsel. Some not so kind comment was made even against the Judge. An agreement to disbursement was, finally, reduced to writing, dated 18 October 2007 and another judgment by consent entered on 26 October 2007. Under the same doctrine of functus *officio*, the matter should have been again dealt, done away with and "archived" there and then. But it was not.

[6] A third bite at the cherry was attempted and, indeed, allowed and the saga continued. More than a year later, on 9 December 2008, counsel for the appellant decided to file a motion to stay execution of the judgment dated 17

July 2006 on the basis that the said judgment was not valid and moved for a new trial.

[7] To challenge the judgment by consent dated 17 July 2006 by way of the motion before the Supreme Court to ask for orders to stay execution thereof and move for a new trial, Learned counsel in this third bite to the cherry evoked the authority of **Christopher Gill v/s Wilfred Freminot and Edwina Freminot SCA 4 of 2006.**

[8] That motion for stay became another fertile field for protracting the dispute. The matter would not finally be disposed of by the court until 20 March 2009 when the learned Judge decided that it was not maintainable in law. He, therefore, set it aside. We were made to understand he did not want to hear about either the text of the law or of **Christopher Gill v/s Wilfred Freminot and Edwina Freminot SCA 4 of 2006.**

[9] The appellant has filed 2 grounds of appeal against that decision of the learned judge. They read as follows:

(1) The learned trial Judge in entering the Judgment by Consent and ignoring the motion of the Appellant to set aside the Judgment by Consent ignored the clear provisions of the Seychelles Code of Civil Procedure Cap 213 section 131 (sic) and failed to even consider the clear precedent by this Court in the case of **Christopher Gill v/s Wilfred Freminot and Edwina Freminot SCA 4 of 2006** in respect *of* judgment by consent.

(2) The terms and conditions in the disputed Judgment by Consent were not complete; it was not signed by the parties and it did not state the full terms and conditions agreed upon by the parties in relation to the amount of compensation to be paid and the full conditions of settlement of the case. Therefore, there

was a clear cause not to give judgment on the alleged settlement.

[10] The appellant, accordingly, is seeking in the present appeal an order to the effect that the Supreme Court: (a) should not have entered the judgment by consent; (b) should not have dismissed the motion to set it aside. In the circumstances, he seeking an order for a new trial on the merits.

[11] As may be seen, the grounds of appeal on the face of them have little to do with the case appealed from. We asked learned counsel what was the decision he was challenging: the judgment by consent of 17 July 2006 for which the delay had long lapsed or the decision of dismissal of the stay of 9 December 2008 for which there had been no grounds as such evoked.

[12] Learned counsel stayed content with stating that he relied on **Christopher Gill v/s Wilfred Freminot and Edwina Freminot SCA 4 of 2006.** But he was candid enough to confess his embarrassment at pursuing the appeal with multifold procedural complexities. All he was desirous of was his right to be heard, which we gave him.

[13] Inasmuch as the crux of the matter in dispute is the application of section 131 of the Code of Civil Procedure (Cap 50) and the decision of **Christopher Gill v/s Wilfred Freminot and Anor,** we proceed to examine these and their applicability to the case in hand.

[14] Section 131 of the Code of Civil Procedure (Cap 50) provides:

> "The parties may at any stage of the suit before judgment,
> appear in court and file a judgment by consent signed by both
> parties, stating the terms and conditions agreed upon between
> them in settlement of the suit and the amount, if any, to be paid
> by either party to the other, and the court, unless it

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not to do so, shall give judgment in accordance with such settlement."

[15] In the case in hand, the parties on reaching an agreement, reduced it in writing on 17 July 2006. It was signed by their respective legal representatives and one of the parties, the other party stating that they were not concerned and their counsel confirming that fact before the Court. The document starts with the recitation of the parties. The opening paragraph reads:

> "The parties to the above suit have agreed that judgment by consent be entered as in full and final settlement of all claims against the Respondents in the suit ... "

[16] The closing paragraph reads:

> "This judgment by consent has been entered into by both parties of their own free will and no pressure or coercion has been exercised on any of the Parties to enter this Judgment by Consent."

[17] The agreement was presented to the court on same date, 17 July 2006. That agreement was duly made judgment of the court, after formal confirmation by counsel appearing for respective parties.

[18] It is the case for the appellant that there was no full compliance with the provision of section 131 of the Code of Civil Procedure (Cap 50) and that the Court should not have entered judgment on the ground that not all the parties had signed. That is our view is stretching the scope of section 131 as well as our decision in **Christopher Gill** to impermissible limits.

[19] In the case of **Christopher Gill v/s Wilfred Freminot and Anor**, we stated that it is a rule of best practice that the actual provisions of section

131 of the Code of Civil Procedure (Cap 50) be followed which imposes obligations upon both the parties and the court" [emphasis added].

[20] Now before us and before the court below, learned counsel for the appellant attempted to challenge that judgment by consent on the ground that section 131 had not been complied with and on the authority of **Christopher Gill v/s Wilfred Freminot and Anor**, a stay of execution should have been granted for the purpose of a new trial of the property dispute between the parties. As may be seen from the above emphasis, this court had made it clear that a faithful compliance with section 131 is a rule of best practice. Non compliance with all the elements as set out in the decision cannot result in a nullity of the agreement reached which would, in all cases, become a ground for an application for new trial and a stay.

[21] An agreement may well fall short of the strict requirements of section 131 but substantially comply with it. There may also be other situations such as where an agreement may not lead to judgment as such for jurisdictional reasons. In such cases, the "agreement (has) the force of a judicial contract between the parties " We did say so in **Christopher Gill**. That decision was never meant to be used as though the rule of best practice with the intervening time has graduated into a rule of law with mandatory effect.

[22] The facts of **Christopher Gill v/s Wilfred Freminot and Anor** were not on all fours with the present case, contrary to what learned counsel argued. There were many distinguishing features. We mention just three of the salient ones: first, one of the parties had not appeared in court and judgment had been given in his absence; second, his so-to-say "consent" which was challenged by his kin had been obtained from his sick bed by telephone; third, that party had since expired and there was no way of knowing what he had consented to; fourth, there had been no motion to make the agreement judgment of the court; and, fifth, the court had not made the agreement a judgment unlike in the present case. The result was

that both the "judgment" component and the "consent" component of the term judgment by consent were flawed. That is not the case in our present instance.

[23] It cannot, therefore, be seriously argued that the case of **Christopher Gill v/s Wilfred Freminot and Anor** applies in this case**.**

[24] Now as regards the stay of execution of the judgment. We might wish to note that a stay is only a remedy and it has to be based on an action. Like wise a new trial is a remedy which has to be equally based on a cause of action. In this case, appellant sought two remedies, a stay and a new trial but without showing his cause of action. He may have adumbrated it before the trial court and before us but he has shown neither on the facts of his application.

[25] Indeed, there was ample evidence that all parties concerned had begun to rely, therefore, execute on that first judgment by consent to effect a second judgment by consent. They also allowed third parties to execute on it so that an order to stay execution of what was executed was misconceived and pathetically belated. Government had begun to pay huge sums of money to the appellant in his capacity as a trustee on behalf of the estate he had represented except that it was later directed to stop payment on account of the fact that there was an allegation of defalcation of funds and mal-distribution by the appellant of those sums that had been disbursed to him, which mat-distribution included payment of legal fees.

[26] By no stretch of imagination, the motion to stay execution of the judgment could have been conceivably granted in the circumstances. The same goes for the application for new trial.

[27] It scarce need be said that a party who has received a judgment, whether by consent or otherwise, if not appealed from within the prescribed

time given for appeal is entitled to his judgment; or in a case where he applies for a new trial, on good cause shown, soon after he became aware of the judgment. There was no justification in law either for a stay or a new trial.

[28] Where the facts fall short of full compliance with article 131 of the Code of Civil Procedure, the court agreement reached between the parties to a dispute results in a "contrat judiciaire" which may only be challenged under the normal rules respecting contract: i.e. article 1101 et seq., of the Seychelles Civil Code as was the case in **Christopher Gill v/s Wilfred Freminot and Anor.**

[29] On these matters, we are comforted to read identical pronouncement from French Courts as may be gathered from **Dalloz, Contrats et Conventions, Jugements et Arrets, 2673, at para 238:**

> "Le contrat judiciaire (suppose) un accord entre les parties constate par le juge **" Cass. Soc. 19 juin 1958: J. C. P. 58, IV, ed.**
> **G., 113; Bull. Civ. IV, no. 753, p. 559)**

[30] The above proposition of law expressed by French jurists on the decisions of the Cour de Cassation we regard as persuasive authority for our jurisdiction. As may be seen **at para. 238**. (ibid), French **Jurisprudence and Doctrine** are also agreed that:

> "Lorsque, par conclusions regulierement signifiees, le defendeur a declare accepter la demande et a demande acte de son offre, it y a eu entre les parties echange des consentements dans les conditions qui mettent fin au litige et le tribunal ne peut que consacrer cet accord:
> **Trib. Gr. Inst. Seine 5 mai 1961: Gaz. Pal. 1961, 2, 341).**

[30] For the reasons given above, we dismiss this appeal. With costs.

S.B. DOMAH

JUSTICE OF APPEAL

I concur: **MACGREGOR**

PRESIDENT

JUSTICE OF APPEAL

I concur: **J.M. HODOUL**

JUSTICE OF APPEAL

Dated this 14 August 2009, Victoria, Seychelles