Labiche v Ah-Kong

(2010) SLR 172

Francis Chang-Sam for the appellant
Frank Elizabeth for the respondent

Judgment delivered on 13August 2010

Before MacGregor, Hodoul, Domah JJ

Desita Ah-Kong, a 40 year old chambermaid, initiated legal proceedings (CS No201/2003) against Robert Labiche, above-named, a cook by profession. The couple had lived in concubinage notoire, for 19 years.

During those 19 years they lived and worked in various islands, namely, La Digue, Felicite, D'Aros, depending on the availability of employment in tourism establishments.

In her plaint before the Supreme Court, the respondent (then plaintiff), inter alia, averred as follows:

> Para 3. The parties orally agreed that they would engage in life and operate their expenses as one unit for their joint benefit. Inter alia the parties intended to buy land in Mahe to build a house for themselves and to establish a small guest house business in La Digue when they would stop employment.
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> Para. 4. As a result of the aforesaid on the 6th February 1998, the parties purchased title H5274 situate at Majoie, Mahe for the consideration of R20,000 and the exchange of title B883 which they had previously purchased at R40,000. The parties to this suit also purchased LD959 situate at La Passe, La Digue for the consideration of R30,000 on the 27th October 1998.
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> Para. 5. Both H5274 and LD959 were transferred and registered onto your (sic) sole name as the plaintiff trusted defendant who at that time took all official steps to realize both transactions for their joint convenience.

The words in para [3]: "The parties orally agreed that they would engage in life...." have a solemnity reminiscent of an exchange of marriage vows. The respondent (then plaintiff) thereby intended to and did root her action in quasi-contract. We do find accordingly.

When, after a period of 19 years, the relationship broke down amidst much acrimony and bitterness, the parties failed to reach a settlement *al'amiable* and the respondent (then plaintiff), resorted to legal action, CS No 201/2003.

What cause of action was available to the plaintiff (now respondent)? We have found that she rooted her action in quasi-contract and her claim is formulated in para 9 of her plaint, as follows:

> By reasons of the aforesaid, the plaintiff has been unjustly impoverished and the defendant has been unjustly enriched by the sum of R. 450, 000 which the plaintiff estimates to be her half share of the properties and furniture. The plaintiff claims R25,000 moral damages.

The case was heard by Karunakaran J, who gave judgment dated 3 September 2009, in favour of the plaintiff, as follows:

> For these reasons, I enter judgment for the plaintiff and against the defendant in the sum of R 475,000 with costs. I make no order as to interest.

The appellant was aggrieved and submitted his appeal, raising six grounds:

(1) The learned trial Judge erred in law in his application of the principles of law to the fact of the case.

(2) The learned trial Judge erred in law in not properly considering and weighing the whole evidence put before the court at the hearing of the case, in particular the evidence adduced by the appellant (then defendant).

(3) The learned trial Judge erred in his finding that the respondent (then plaintiff) had suffered an impoverishment as there was no evidence to support such finding.

(4) The learned trial Judge erred in finding that the appellant (then defendant) enriched himself on the fruit of the respondent's (then plaintiff's) labour.

(5) The learned trial Judge erred in law in his finding that the Defendant suffered a detriment in amount of R450,000 and the appellant was corresponding enriched in the same sum on the basis of the evidence before the court.

(6) The learned trial Judge erred in law in finding that the respondent (then plaintiff) has suffered moral damage in an amount of R25,000.

The Law: We shall endeavour first to state the law pertaining to concubinage upon the breakdown of the relationship. The claim is intended to redress the situation resulting from the alleged unjust enrichment of one party at the expense of the other. The existence of a de facto partnership must be proved and pronounced accordingly by the trial Judge. We thank the two advocates for the parties for their written

submissions supported *viva voce* in open court. We particularly wish to commend F Chang-Sam, Esq, for stating the law with clarity. He relied mostly on *Dalloz*. We shall do likewise and also refer to our own caselaw and jurisprudence.

De facto partnership *(société de fait)*:Upon the breaking down of the relationship (conbinage notoire),in most cases, one of the former concubines wishes to claim some payment in compensation before the courts. The action available to the claimant is one based on quasi-contract, on condition that the existence thereof, is the subject of a finding by the Judge of first instance. Further, the finding must be based on evidence adduced by the claimant.

Dalloz, *Encyclopédie Juridique*,Verbo, "Concubinage" at page 3, para 27 explains: "S'agissant d'une société de fait, il n'est pas nécessaire qu'elle soit constatée par écrit, même si elle comprend un immeuble dans son actif".If the existence of the de facto partnership is established, it is necessary that it should be dissolved by the Judge who should then proceed to share out the assets of the partnership.

The sharing is done by the judge in accordance with the wishes of the parties, as expressed by themselves when the partnership was established. In the absence of such expressed wishes, "elle doit l'être en proportion des apports de chacun, compris des apports en travail"(*Dalloz*, ibid, para 28).

Proof of partnership: It cannot be assumed by the mere fact that the parties were living together that a partnership did exist. Dalloz at para 26 states -

> ... une telle société n'existe pas par le seul fait que les concubins ont usé en commun des biens qu'ils possèdent et participé aux dépenses sur leur ménage, ni même par le seul fait qu'ils ont mis en commun leurs resources et travaille ensemble. Le juge de fond, dans notre droit actuel, doit, pour affirmer l'existence d'une société relever les circonstances de fait d'où résultent l'intention des intéressés de participer aux bénéfices et au pertes du fonds social constaté par les apports, et la volonté de s'associer.

Evidence: Further, the law requires that the said finding must be supported by evidence adduced by the claimant. Although some documents might be available, by reason of the special relationship between the parties, it is well established in law that, as regards concubines, there is an impossibility of proof by documents. This constitutes an exception to the rule of evidence in article 1341, Civil Code of Seychelles, namely, that testimonial evidence is normally not admissible.

Action *de in rem verso:*Incases where the concubine claiming redress knows or is advised that he/she has no or not sufficient evidence to establish the existence of a de facto partnership, the claimant must institute his/her claim in an action *de in rem verso* (unjust enrichment), pursuant to article 1381(1), Civil Code of Seychelles.

Where a concubine knows or is advised that, on the facts, he/she is unable to establish a *société de fait,* as the ultimate resort an action *de in rem verso* (unjust enrichment), grounded on article 1381(1) of the Civil Code of Seychelles is available. It is abundantly clear from article 1381(1) that such action *de in rem verso* isonly

available where a concubine cannot bring an action in contract or quasi-contract. "... if the person suffering the detriment cannot avail himself of another action in contract, or quasi-contract, delict or quasi-delict; ..."

In the present case, it is our finding that the claimant is combining a claim based on *société de fait* with one based on "unjust enrichment" or *de in rem verso,* which article 1381(1), Civil Code of Seychelles, clearly prohibits. This constitutes a fundamental error which, on its own, is fatal to the action. We are mindful that the advocate for the defendant raised a pertinent objection in his submission at p 148 of the record.

The cumulation of both types of claims in the plaint was raised and objected to by counsel for the defendant in his submission at page 148, last paragraph. The trial Judge ignored the objection and dealt with the case as if it were based completely on "unjust enrichment" (see the opening of his judgment at page 178). He further ignored or failed to properly address the point of the alternative remedy when analyzing the requirements of the law with regard to a case based on article 1381(1) (see 195 at lines 22 downwards).

Our contention is that the plaintiff (now respondent) in using the words "orally agreed" expressed her intention to ground her claim in contract or quasi-contract. Any insistence that these words manifest an intention to ground her claim in "unjust enrichment", can only proceed from bad faith.

In his judgment, the trial Judge states –

> the defendant in his statement of defence has not only denied the plaintiff's claim for restitution but also has averred that the plaintiff never contributed anything either to the properties or to the business ...

Further, the Judge states: "The parties orally agreedthat they would engage in life ..." (7th line, p 179, record). This statement is overridden by another pronouncement of the Judge, namely, "It is not in dispute that the plaintiff and the defendant ..." (1st line, page 179, record), followed by an enumeration of various matters, including the oral agreement.
Be that as it may, good drafting practice may require that a party denies, in the statement of defence, any plea or averment in the plaint, which is favourable to his/her case. Legal practitioners know that, in pleadings, any averment of facts is taken to be proved, unless denied by the other party. At the hearing, the parties adduce evidence in support of their averments. In the end, it is the trial Judge who decides whether the issue or the plea has been proved or not. As judges of appeal, we have found no evidence, on a balance of probabilities, that the oral agreement has been disproved. We find that the parties had indeed orally agreed.

According to the trial Judge "the plaintiff's action in this matter is based on unjust enrichment". It is humbly submitted that the trial Judge was error in respect of matters pertaining to the following:

1. He overlooked the issue of the cumulative claim, despite the objection from the advocate for the appellant;

2. he failed to consider adequately or at all, the question of an alternative claim;

3. he proceeded as though the claim was entirely grounded in unjust enrichment and failed to give any or sufficient consideration to the alternative claim.

Where a concubine is unable to establish *a société de fait,* he/she can, as a last resort, bring an alternative action, in *de in rem verso,* grounded on article 1381(1), Civil Code of Seychelles. It is trite law that a party cannot bring an action based both on "unjust enrichment" and on quasi-contract *(Antoine Fostelv M Ah-Tave* (1985) SLR 113).

In the present case the plaintiff starts her claim in para 3 as follows: "The parties orally agreed that they would engaged in life and operate their expenses as one unit for their joint benefit." However in para 9, the plaintiff seems to shift her claim to one in*de in rem verso* when she refers to "unjustly impoverished" and "unjustly enriched". But this is clearly prohibited by article 1381, Civil Code of Seychelles as stated by the advocate for the appellant (then defendant) at page 148 of the record. His objection was overruled by the trial Judge. This constitutesa grave error.

Finally, on the authority of the judgment of this Court in *Tex Charlie v Marguerite Francoise*(SCA 12/1994, LC 72), it was not open to the trial Judge to find a case for the plaintiff based on "unjust enrichment" when the plaintiff had chosen to bring an action arising from *société de fait* (quasi-contract). However, in the interest of justice, this should not be the end of the matter.

By reason of the matters aforesaid, the appeal is allowed with costs. We therefore remit the case to the Supreme Court for rehearing before another judge.

Record: Court of Appeal (Civil No 3 of 2009)