

COOPOOSAMY v DUBOIL

(2012) SLR 219

B Hoareau for the appellant
F Bonté for the respondent

Judgment delivered on 31 August 2012 by Twomey J

Before MacGregor P, Twomey and Msoffe JJ

The appellant in this case brought an action claiming that in 2006 she lent the respondent the sum of US\$20,000 to purchase a pickup truck, which money was to be repaid by the end of 2006. At the time of the contract, the respondent was the common law husband of the appellant's sister.

In his statement of defence, the respondent agreed that the plaintiff, now appellant, had indeed given him the money. He stated however that this money was not to be refunded as it would reimburse him for expenses by him for the refurbishment of the appellant's family home.

At the hearing of the action, the appellant deposed in chief and gave evidence of the statements contained in her plaint. She was then cross-examined by counsel for the respondent. It was during the course of this cross-examination that the following exchange took place:

Q Madam to put an end to all this, where is your agreement, your loan agreement?

A He was staying with my sister.

Q The law does not say that when someone is staying with your sister-

A But this has nothing to do-

Q No, no the agreement of the loan because the law says that when you lend someone a sum of more than R 5000 you must have writing. Where is the writing?

A But we have the proof that I sent him the money

Court: Mr Bonte, the claim is not based on a written agreement. She has not alleged there is a written agreement for her to produce it.

Mr Bonte: Your lordship, but the Seychelles Civil Code says that if you are claiming money, a sum which is superior to R 5,000 there must be writing.

Court: That I understand, then you will address that as an issue of law. Here we are just gathering evidence. At the appropriate stage you will address that as an issue of law.

Mr Bonte: I want to raise it now your Lordship.

Court: Finish cross examination of this witness so that we excuse the witness.
(verbatim)

The respondent's counsel, Mr Bonte then continued with his cross-examination of the appellant. At the end of the cross-examination Mr Bonte again raised his "plea." Mr Hoareau, the appellant's attorney, contended that Mr Bonte had raised an objection under article 1341 of the Civil Code tardily. The Chief Justice then proceeded to hear the "plea."

In his ruling of 31 January 2011 he relied on the case of *Michaud v Lucia Cuinfrini SCA* 26/2005, more specifically on the following statement:

If a party does not object to oral evidence when it is given, that evidence is assumed admissible.

If a party objects to oral evidence on the grounds of non-compliance with article 1341, then the Judge must hear the evidence and arguments from the parties to determine whether an exception under article 1374 or 1348 applies. The Judge must give a ruling on the admissibility or otherwise of the evidence before the proceedings are resumed.

In the circumstances the Chief Justice found that the present case was on all fours with the cited authority and that the objection of Mr Bonte was well founded and the appellant's oral testimony rejected. It is not clear if the case was dismissed but the respondent was granted costs.

It is from that decision that the appellant has now appealed. She has raised four grounds of appeal which invite the following issues to be decided:

- (1) At which stage of a trial should an objection under article 1341 of the Seychelles Civil Code be made?
- (2) What is the procedure for an objection under article 1341 to be taken?
- (3) Should the oral evidence of the appellant have been admitted in the circumstances of this case?

Raising an objection under article 1341

It follows from the provisions of article 1315 of the Civil Code of Seychelles that the plaintiff in an action must support his claim by proof. Article 1341 precludes the admissibility of such proof by oral evidence in all matters, the value of which is above 5000 rupees. There are however several exceptions to this general rule, some are provided by the Code itself and some by jurisprudence. An objection under article 1341 of the Civil Code of Seychelles stems for the fact that French law from which we have inherited the Code insists on contracts being proven in writing unless of course the significance of the matter at issue is small, hence the stipulated value of R5000 in our Code. The purpose of article 1341 however, is not to restrict oral evidence in a contract but rather to restrict evidence that a written document, if it exists does not faithfully reproduce all that has been agreed by the parties and to exclude what is known in the common law of contract as parole evidence (see René David *English law and French*

Law – A Comparison in Substance). Hence the court has the option under several exceptions in the Code and jurisprudence to permit oral evidence for proving contracts.

There are however two rules contained in article 1341: the first relates to an objection relating to the juridical act itself - in this case the loan and repayment of the money ie an oral agreement not evidenced in writing; the second relates to the circumstances where a document is available and produced and a party tries to bring evidence “against and beyond” the terms of the agreement itself. The present case only concerns the first rule as there is no document produced relating to the agreement.

It is this distinction between the two rules that caused the confusion in this present case. In the case of *Michaud v Cuinfrini* (supra) it was the second rule that was involved as there was a document produced. In such cases oral evidence may be heard but if an objection is made at any time during the trial relating to the agreement produced, the trial judge hears all the evidence and at the end of the case decides whether the oral evidence is “against and beyond” the agreement.

Procedure at trial when an objection is made under article 1341

In the present case the situation is different. There is no written agreement and hence it should be obvious that the objection to the evidence in such cases ought to take place before the material oral evidence on which the plaintiff is relying as proof of the obligation is adduced. Hence, when the appellant’s counsel started leading evidence on the alleged agreement, the respondent’s counsel should have objected to the oral evidence on the grounds of article 1341. But in this case the whole of the examination-in-chief of the appellant had taken place and it was only in the final stages of the cross-examination that counsel made the objection. The oral evidence was therefore already on record. Counsel for the respondent was cross-examining the appellant on the issue of the existence of the written agreement when he decided to make the objection. Hence as pointed out by counsel for the respondent he had missed the boat as he had already waived his right to the objection. Further, as Sauzier J put it in *Corgat v Maree* (1976) SLR 109 at 114 -

The provisions contained in article 1341 are not absolute. They are subject to many exceptions one of which being that they do not apply where a party either expressly or impliedly waives them. [Dalloz, *Encyclopédie, Droit Civil, Verbo preuve*, nos 65, 66, 84.]

As the respondent’s counsel had not objected to the evidence he must therefore be taken to have tacitly waived the application of article 1341 and such oral evidence was therefore admissible. Having allowed the evidence onto the record the respondent is now limited either by cross-examination of the plaintiff or by leading contradictory evidence to show that such an obligation did not exist. The trial will then proceed as normal with the trial judge weighing the evidence to decide if the burden and standard of proof have been discharged.

Mr Bonté for the respondent has argued that when an objection is made under article 1341 at trial a voir dire should be held. We do not subscribe to this view. As we have pointed out, there are two possible objections that can be made under article 1341 and the procedure differs depending on which particular objection is being made. Neither requires a voir dire as in any case in Seychelles there are no jury trials for civil cases. We have outlined the alternatives above and do not need to repeat them. In the present case, as there is no written agreement it suffices for either party to raise an objection when the oral evidence is being led and for the judge to give a ruling either ex tempore or in a reserved written ruling on the matter. The case then proceeds in the absence of the oral testimony of the agreement.

Admissibility of oral evidence

We have already decided that the oral evidence was admissible as counsel for the respondent had waived the application of the provisions of article 1341. However we feel it necessary to point out that even if the respondent had objected to the oral evidence it may still have been admissible under the provisions of article 1348 of the Civil Code which states:

[The provisions of article 1341] shall also be inapplicable whenever it is not possible for the creditor to obtain written proof of an obligation undertaken towards him.

Four instances of where this exception applies are then given in the Code. To further temper the strict applicability of article 1341 and its unjust consequences to certain parties in some circumstances, jurisprudence has provided further exceptions. Further, the Court of Cassation of France has stated that the exceptions provided in article 1348 of the Code are not exhaustive and that where it is impossible to secure written proof it is certainly possible to bring proof of an obligation either by oral evidence or by presumptions. (*Cass 17 déc 1982, Pas 1983 I P 478; R W 1982 -1983 col 2451; Cass 6 déc 1988. See also De Page t III 3e ed no 904*). One of these exceptions has been the moral impossibility to provide such proof arising from the relationship between the parties. Not all relationships even between close family members give rise to his exception. There must also exist close ties as a result of the family relationship (*lien de famille*), friendship or trust. In this respect the court is vested with immense power and discretion to appreciate each case on its own facts to determine whether there is such a moral impossibility in any particular relationship to bring written proof (see *Civ 1re, 28 févr. 1995, Defrénois 1995. 1043, obs . Mazeaud*). In Seychelles we have followed this approach and it has also become our law (*Victor v The Estate of André Edmond* (1983) SLR 203, *Renaud v Dogley* (1983-1987) SCAR II 202, *Aniella Vidot v Jerome Padyachy* (1991) SLR 279, *Esparon v Esparon* (1991) SLR 59, *Port Glaud Development v Larue* (1983-1987) SCAR II 152).

In the case of the appellant there was certainly a *lien de famille* with the respondent as he was her putative brother-in-law for over 20 years and at the time of the alleged loan he was living in the appellant's family home implying closeness between them. It may well be, therefore, that this would have met the requirements to allow the oral evidence

under the provision of article 1348. It would have been the only possibility under which the oral evidence would have been allowed if the objection had been made at the right time since the provisions of article 1347 would not have been applicable. The defendant has clearly admitted in his statement of defence and counterclaim that the payment by the plaintiff was indeed made but that it was a set-off from a debt owed to the defendant for repairs he had carried out to the family home. Since this is not a simple denial but rather a qualified denial his statement of defence could not have been used as “evidence providing initial proof.”

For the reasons given above therefore, this appeal is allowed. It must be emphasized, however, that although the oral evidence of the appellant is admissible, the trial judge still has to appreciate at the end of the case if she has proven her case.

The case is therefore remitted to the Supreme Court for continuation. The costs of this appeal are awarded to the appellant.