

**Gangadoo v Cable and Wireless Seychelles Ltd**

**(2013) SLR 317**

Domah, Fernando, Msoffe JJA

30 August 2013

SCA 2/2013

**Counsel**      D Sabino for the applicant  
                    S Rajasundaram for the respondent

**The judgment of the Court was delivered by  
FERNANDO JA**

[1]      This was an application by the defendant in Supreme Court case No CS 175/2011, now applicant before us in case No SCA MA 02/2013; for special leave to appeal against an interlocutory ruling of the Supreme Court dated 31 October 2012 dismissing the pleas *in limine litis* raised by the defendant, and against the order made by the Supreme Court that the suit shall proceed to be heard on the merits.

[2]      The plaintiff had filed suit before the Supreme Court in case No CS 175/2011 against the defendant seeking rent for encroaching on her land parcel C4755 by way of a telephone exchange installation that had been fixed on her land.

[3]      The applicant in its statement of defence had raised the following pleas *in limine litis* and had argued them before any evidence was led before the trial Court:

- 1) This matter is *res judicata* as per art 1351 of the Civil Code of Seychelles.

- 2) As an alternative to the above plea of res judicata, this matter is an abuse of process; it is an attempt to re-litigate on substantially the same issues.
- 3) The claim is prescribed. According to the plaint the claim was actionable upon from the date of the registration of the land transfer ie 5April 2004, over 7 years ago.
- 4) No cause of action can be discerned from the Plaint. There is what appears to be a claim for rent but no mention of any rental agreement or contract.

[4] Other than an averment, making reference to SC case CS No 274 of 2009 filed by the respondent, which the applicant claims was based on the same facts, the statement of defence does not contain any material upon which a court could on the face of the pleadings before it, come to the conclusion as to whether the necessary elements to establish res judicata are satisfied or as to whether there has been an abuse of process or an attempt to re-litigate on issues already litigated upon. The issue of making a determination on res judicata or abuse of process, based merely on the pleadings becomes complicated in view of the statement in the judgment in SC case SC No 274 of 2009, referred to briefly in the plaint, to the effect:

However, the court cannot and should not formulate a new case for the plaintiff basing on a cause of action, different from the one pleaded in the plaint and more so in the absence of any evidence on record. Unfortunately, the plaintiff has chosen a wrong provision of law basing on unjust enrichment to

prosecute her claim in this matter. Obviously, the plaintiff could have availed herself of another action in law. Hence, in my judgment there are other legal remedies available for the plaintiff.

[5] In his ruling dismissing the pleas *in limine* on res judicata and abuse of process, the trial Judge had said “the court needs to compare the previous suit before the Court as against the present suit in order to verify whether the conditions exist” to make such a determination and the Court, being unaware as to what the subject matter in suit No CS 274 of 2009, is unable to uphold the said issues raised. We cannot but agree with the ruling of the trial Judge on this matter.

[6] As per paragraph 5 of the plaint, the plaintiff had been verbally demanding suitable remedies from the defendant since she bought the property from the Government in April 2004 and by virtue of a letter dated 3 October 2008 the applicant had acknowledged its encroachment on the respondent’s property and never remedied it. The respondent claims that her cause of action is based on rent due to her. This is a matter that needs to be adjudicated upon as correctly stated by the trial Judge and cannot be determined on the basis of a plea *in limine litis*.

[7] On the plea of prescription the trial Judge had been of the view “There is established on the face of the pleadings that the parties were before the Court in 2009 which could have served to interrupt the period of prescription” and “This point will be better determined after hearing evidence.” We agree with the trial Judge on this and are also of the view that the averments in paragraph 5 of the plaint referred to in the previous paragraph may also serve to interrupt the period of prescription.

[8] The trial Court by its ruling dated 2 April 2013 had declined to grant leave to appeal, to the applicant before this Court, against the Interlocutory Ruling dated 31 October 2012 on the basis:

I ... find that it would be an abuse of process to grant the Applicant leave to appeal against the interlocutory judgment ... *The interlocutory judgment does not bar the Applicant to proceed to adduce evidence at the hearing to sustain the points of law so raised and likewise for the Respondent to adduce evidence in support of her claim. The ruling did not dispose of the case.* No prejudice will be caused to the Applicant. There is nothing exceptional that have arisen out of the interlocutory ruling. The comparative advantage will be in favour of the Applicant which is a large firm with a financial base out of proportion to the Respondent who would have to incur additional expenses to respond to an appeal against an interlocutory judgment. *The right of the Applicant to appeal against the interlocutory decision is preserved even until after the hearing of the suit on the merits.*[Emphasis added]

[9] The application for leave to appeal had been dismissed with costs to the respondent.

[10] It is in view of the refusal by the Supreme Court to grant leave to appeal, the applicant had sought relief from this Court under s 12(2)(c) of the Courts Act. It is to be noted that this is a fresh application for leave to appeal and not an appeal against the ruling of the Supreme Court dated the 2 April 2013, refusing to grant leave to appeal.

[11] The relevant provisions of the Courts Act read thus:

Section 12(2) (a) - “in civil matters no appeal shall lie as of right-

(i) From any interlocutory judgment or order of the Supreme Court; or

(ii) ...

Section 12(2) (b) - In any such cases as aforesaid the Supreme Court may, in its discretion, grant leave to appeal if, in its opinion, the question involved in the appeal is one which ought to be the subject matter of an appeal.

Section 12(2) (c) - Should the Supreme Court refuse to grant leave to appeal under the preceding paragraph, the Court of Appeal may grant special leave to appeal.

[12] The procedural bar to appeal as of right against an interlocutory judgment or order of the Supreme Court, is in accordance with art 120(2) of the Constitution which provides: “*Except as this Constitution or an Act otherwise provides, there shall be a right of appeal to the Court of Appeal from a judgment, direction, decision, declaration, decree, writ or order of the Supreme Court.*” [Emphasis added]

[13] This Court stated in the cases of Seychelles *Sangam v Pillay* SCA 17/2009 and *Islands Development Company v EME Management Services* SCA 31/2009, that the words “special leave” have been used with a purpose, namely in this situation the Court of Appeal is being called upon to exercise its jurisdiction in a matter where no appeal lies as of right but also interferes with the exercise of discretion by the Supreme Court in refusing to grant leave to appeal. In the opinion of this Court “special leave” should therefore be granted only where there are exceptional reasons for doing so, or in

view of reasons which may not have been in the knowledge of the applicant at the time leave to appeal was sought from the Supreme Court or for reasons that supervened after the refusal to grant leave by the Supreme Court. The reasons before the Court should be such that the non-granting of “special leave” by this Court is likely to offend the principle of fair hearing enunciated in the Constitution. In this regard it is to be noted that an appeal against an interlocutory judgment or order has a tendency to delay the main action and contravene the rights of a person to a fair hearing within a reasonable time as stipulated by art 19(7) of the Constitution.

[14] This Court also stated that

section 11(1)(b) of the Courts Ordinance 1964, was somewhat similar to section 12(2)(b) of Cap 52, save for the description it sought to provide to the words: “... the question involved in the appeal is one which ought to be the subject matter of an appeal” by the use of the words: “by reason of its general or public importance or otherwise”. The words: “by reason of its general or public importance or otherwise” is not to be found in section 12(2)(b) of Cap 52. The omission of those words from Cap 52 certainly does not mean that in the court’s exercise of discretion to grant leave to appeal this criterion is no longer valid. These words, in our view, would continue to be valid.

[15] In the case *St Ange v Choppy* MCA 18/1970 the Mauritius Court of Civil Appeal considered how its discretionary powers should be exercised in the case of an application for leave to appeal from an interlocutory judgment. It was of the view that before leave to appeal is granted the court must be satisfied:

- a) That the interlocutory judgment disposes so substantially of all the matters in issue as to leave only subordinate or ancillary matters for decision; and
- b) That there are grounds for treating the case as an exceptional one and granting leave to bring it under review.

[16] This view was followed by the Mauritius Court of Civil Appeal in the case of *Pillay v Pillay* (1970) SLR 79. In the case of *Pillay* the Mauritius Court of Civil Appeal held:

The interlocutory judgment in this case does not put an end to the litigation between the parties, or at all events does not dispose so substantially of all the matters in issue as to leave only subordinate or ancillary matters for decision. Moreover the applicant will be entitled as of right to question the decision in the interlocutory judgment if and when he exercises his right to appeal from the final judgment. An appeal at this stage would entail unnecessary delay and expense ...

[17] The cases of *Beitsma v Dinjan* (1974) SLR 302, *Collet v Albert* (1955) MR 107 also reported in (1953) SLR 263, *Mungur v Mungur* (1965) MR 21, *Coomootoosamy v Noorani* (1916) MR 95 have all adopted the same line of thinking as in *St Ange v Choppy* and *Pillay v Pillay*.

[18] In Bentwich, *Privy Council*, (3<sup>rd</sup> ed) at page 213, it has been stated: "The suitor need not appeal from every interlocutory order which does not purport to dispose of the case and by which he may feel aggrieved ... - the appeal from the final decision enables the Court to correct any interlocutory order which it may deem

erroneous” and that “the delay occasioned by taking an additional appeal adds to the procrastination which is the bane of Indian litigation.” This may become true of our litigation unless this Court is cautious in granting special leave. To treat a case as exceptional which would necessitate special leave of this Court to bring the interlocutory judgment or order of the Supreme Court under review, the applicant must be able to show that the interlocutory judgment or order is manifestly wrong and irreparable loss would be caused to him or her if the case proper were to proceed without the interlocutory judgment or order being corrected. It would not be in the ‘public advantage and interest’ to unnecessarily delay trials before the Supreme Court, otherwise.

[19] The applicant sets out the following grounds in its affidavit in support of the motion for special leave to appeal against the interlocutory ruling:

- 1) That the trial Judge erred in both the law and on the facts in his ruling.
- 2) That the intended appeal discloses important issues relating to our law concerning the principles behind, res judicata, the abuse of process, prescription and causes of action, upon which further argument and a decision of the Court of Appeal would be in the public advantage and interest.
- 3) The intended appeal has a realistic chance of success.



- 4) It is just and in the interest of justice that leave be granted to the applicant to appeal against the ruling on the plea *in Limine Litis*, in the circumstances.

[20] We are surprised to note that the counsel for the applicant has rushed to make this application for special leave to appeal against the interlocutory ruling of the trial Judge dated 31 October 2012, and thus delaying the proceedings before the Supreme Court, either without bothering himself to read such ruling and the ruling of the trial Judge dated 2 April 2013 declining leave to the applicant to appeal against the interlocutory ruling; or understanding the contents of the said rulings. The quotation from the ruling of 2 April 2013 referred to at paragraph 8 above and the ruling of 31 October 2012, against which special leave to appeal has been sought, makes it abundantly clear that the trial Judge had not made any final decision on *res judicata*, abuse of process, prescription or failure to plead a cause of action and that rightly so, due to insufficiency of material before him to make a determination on any one of those matters. The trial Judge had specifically stated that the ruling on the pleas in *limine litis* do not dispose of the action and the applicant would have the right to appeal against the interlocutory ruling even after the hearing of the suit on the merits. This obviously, if the trial Judge decides to dismiss the pleas on *res judicata*, abuse of process, prescription or failure to plead a cause of action after considering all the evidence led by the parties before him at the trial. Counsel would be better advised not to rush into the Court of Appeal seeking special leave to appeal against interlocutory rulings, thus delaying trials before the Supreme Court unless there is an absolute need to do so.

[21] We therefore dismiss the application for special leave to appeal against the interlocutory ruling of the Supreme Court dated 31 October 2012 and award costs to the respondent.