

Mauritius Commercial Bank v Kantilal

(2013) SLR 499

Domah, Fernando, Msoffe JJA

6 December 2013

Civil App No 53/2011

Counsel KB Shah for the appellant
S Rajasunderam for the first respondent
F Chang Sam for the second respondent

The judgment was delivered by

FERNANDO JA

[1] This is, as per the notice of appeal of the appellant, an appeal “against such parts of the judgment of the Supreme Court as deals with the claim of the plaintiff (now the first respondent) against the first defendant (now appellant) and with the non-liability of the second respondent” on the following grounds:

- 1) In the plaint and the amended plaint, the appellant was impleaded under a wrong name. The Mauritius Commercial Bank Ltd is a banking company in Mauritius and not in Seychelles. The Mauritius Commercial Bank (Seychelles) Ltd is a financial institution incorporated in Seychelles under the law.
- 2) The trial Judge was in error to find as a fact that Mr Dias, the representative of the appellant, had admitted in his testimony in Court that exhibit P2 bore the signature of an ex-employee of the appellant.

- 3) The trial Judge was wrong to find that in the circumstances the appellant was vicariously liable for the action or omission of any of its employee in the normal course of employment.
- 4) The Judge failed to take into account of the provisions of para 3 of art 1384 of the Civil Code of Seychelles which exonerate masters and employers from liability for a deliberate act of a servant or employee not incidental to his service or employment.
- 5) The vicarious liability of the appellant was not specifically pleaded. The finding of the Judge is therefore ultra petita.
- 6) The Judge was wrong to hold that it was right for the second respondent to deliver the goods even though the bill of lading had not been endorsed by the appellant, and hence title to the goods could not have been transferred from the appellant.

[2] By way of relief the appellant has prayed for:

a judgment allowing the appeal, reversing the judgment of the Supreme Court relating to the claim of the respondent against the appellant and ordering the first respondent to pay the appellant's costs in this Court and in the Court below and alternatively, ordering the second to pay the judgment award fully and partially with costs.

[3] In this case judgment had been:

entered in favour of the first respondent (then plaintiff) as against the appellant (then first defendant) in the equivalent sum of USD 37,615.00 with accrued interest thereon at the bank commercial lending rate prevailing during the period with effect from the date of entering the plaint to the date of payment under the judgment, plus costs of the suit payable to both the first respondent and the second respondent (then second defendant).

The first respondent's claim for damages had not been granted. There is no cross-appeal by the first respondent. The case against the second respondent had been dismissed.

[4] The first respondent's (plaintiff, before the Supreme Court) case before the Supreme Court as set out in the plaint filed by him before the Supreme Court was to the effect that he was an exporter based in Mumbai, India, and used to export goods, general merchandise to various importers in the Republic of Seychelles based on their orders. One such was M/s Krishna Mart & Co Pty Ltd which had its office at 5th June Avenue, Victoria, Mahe, Seychelles. The first respondent had sent a shipment of general goods to the said Krishna Mart & Co Pty Ltd under invoice No 424/02-03, dated 29 July 2002 for a value of USD 37,615.00 and sent the shipping documents including the bill of lading (No. POLBOM17000380) to the appellant, through its correspondent bank in India. It was expected of the appellant (then first defendant) as per normal practice to have received payment in Seychelles Rupees from the said Krishna Mart & Co Pty Ltd, to the credit of the first respondent and to transfer the same in foreign exchange to the first respondent through its correspondent bank in India, prior to release of the bill of lading to Krishna Mart & Co Pty Ltd, to take over delivery of the goods consigned. The appellant by its letter of 8 August 2002 had

acknowledged the receipt of the shipping documents. It is the complaint of the first respondent that the appellant had released all the shipping documents inclusive of the bill of lading to Krishna Mart & Co Pty Ltd without having received funds in Seychelles Rupees equivalent to USD 37,615.00 and thus allowed Krishna Mart & Co Pty Ltd to take delivery of the merchandise that had been imported into Seychelles. The first respondent had not been repatriated the funds of the imports bill amounting to USD 37,615.00.

[5] After commencement of the trial before the Supreme Court the appellant had moved for an order to add the second respondent to this appeal as a co-defendant on the ground that it was the second respondent who had released the goods to Krishna Mart & Co Pty Ltd without the appellant having endorsed the bill of lading in favour of Krishna Mart & Co Pty Ltd. The Court having heard both the appellant and the first respondent, who had objected to the application of the appellant, had made an order adding the present second respondent as the second defendant.

[6] The first respondent had then amended his defence by adding a new paragraph to the effect:

The first defendant avers that the bill of lading was not endorsed by it for the second defendant to release the goods; hence the second defendant is liable for such delivery of goods, according to the first defendant. The second defendant is therefore added as a necessary party as per the order of this honorable Court.

The first respondent had also amended his original averment in the plaint setting out his cause of action to include both the appellant and the second respondent's action as being in 'faute' in law and that the

first respondent had incurred financial loss and hardship due to the 'faute' of both the appellant and second respondent.

[7] The appellant in his defence had admitted that the first respondent had sent a shipment of general goods to the said Krishna Mart & Co Pty Ltd under invoice No 424/02-03, dated 29 July 2002 for a value of USD 37,615.00 and sent the shipping documents including the bill of lading (No. POLBOM17000380) to it. It had been the position of the appellant that in the normal course of business it would endorse the bill of lading to authorize the ship's agent to release the goods only after it had received payment in Seychelles Rupees. The appellant had specifically averred that it did not endorse any bill of lading for the said goods, release the bill of lading to Krishna Mart and Company Pty Ltd and receive any payment for the value of goods. The appellant had averred that the second respondent, in releasing the goods without the appellant having endorsed the bill of lading, was in error and breached its duty of care to the appellant as the lawful proprietor of the bill of lading at all material times.

[8] In its defence the second respondent had averred that the goods were delivered to the person named as the notified party in the bill of lading on presentation of the original copy of the bill of lading by the representative of the notified party. It had also been the position of the second respondent that in accordance with cl 6 of the terms and conditions of carriage as contained in the bill of lading (P 2/ D 1/ D 6) the case against the second respondent is time barred. Clause 6 states:

Unless clause 25 applies, the carrier shall be discharged of all liability whatsoever in respect of the goods, unless suit is brought and notice thereof given

to the Carrier within nine months after delivery of the goods or, if the goods are not delivered, ten months after the date of issue of the bill of lading.

The date of issue of the bill of lading is 25 July 2002 and the amended plaint is dated 7May 2007.

[9] As regards the first ground of appeal we wish to say that it is for the first time in this case that this point has been raised by the appellant. The appellant had responded to the letter of demand of the first respondent (exhibit D1) that was addressed to the “Managing Director, Mauritius Commercial Bank, Victoria, Mahe,” on the instructions of The Mauritius Commercial Bank of Seychelles (Exhibit D 2); had filed its defence to the amended plaint in which the appellant was named as “Mauritus Commercial Bank Ltd, represented by its Director Mr Joycelyn Ah-Yu having office at Carawell House Victoria, Mahe, Seychelles”; as MCB (Sey) Limited; had not raised this point in its defence; had proceeded with the trial on the basis that the plaint had been filed against it and filed its written submissions at the conclusion of the trial as MCB (Sey) Limited represented by its Director Mr Joycelin Ah-Yu of Caravelle House, Victoria, the very manner the representation of the appellant had been described in the amended plaint. Derrick Dias, Bank Supervisor at Mauritius Commercial Bank of Seychelles had testified on behalf of the appellant at the trial before the Supreme Court and had never taken issue that the appellant had been impleaded under a wrong name. The appellant having realized this had withdrawn this ground of appeal in its heads of argument filed four days before the hearing of this appeal. Counsel should take more care when raising their grounds of appeal.

[10] As regards ground 2 of appeal the trial court record does not bear out the fact that Mr Dias the representative of the appellant had

admitted in his testimony in Court that exhibit P 2 (bill of lading) bore the signature of an ex-employee of the appellant and the appellant is factually correct in this regard. Ground 3 of appeal is couched in such terms as if the trial Judge had decided this case on the basis of the vicarious liability of the appellant and such vicarious liability was based on the erroneous finding of fact referred to in ground 2 of appeal. A reading of the judgment however shows that the trial Judge although had made reference to vicarious liability of the appellant had come to a finding against the appellant on the basis of direct liability:

In the light of my findings earlier above, I hold that the action or omission of the 1st Defendant (Appellant) in releasing or causing the release of the ‘shipping documents’ to Kmart without first collecting and paying over to the Bank of the Plaintiff (1st Respondent) for the credit of the Plaintiff the sum stated in the invoice is, in law, a “faute”, and due to such “faute” of the 1st Defendant, the Plaintiff has incurred financial loss and hardship which the 1st Defendant is now liable to make good to the Plaintiff.

[Emphasis added]

[11] The pleadings in this case disclose that this was not a case based on para 3 of art 1384 of the Civil Code of Seychelles, but para 1 of art 1383. Even the appellant in its defence had not claimed that this was a case that falls under para 3 of art 1384. What the appellant had stated in its defence was that it “did not release the bill of lading to Krishna Mart and Company Pty Ltd” and not that an employee of it had done so in answer to the specific averment of the first respondent’s averment in the plaint that it was the appellant that had “released all the aforesaid shipping documents to Krishna Mart and Company Pty Ltd”. The evidence of Mr Dias, the representative of

the appellant was to the effect that in the normal course of events the bank releases the shipping documents to the importer after endorsing them, only when the amount payable for the goods imported is paid in full in Seychelles Rupees. Until then it is kept in the possession of the bank in a strong room at the bank. He had admitted that in this case the documents had gone missing in an “illegal manner” and he had no idea as to how they went missing. When questioned as to what he meant by an illegal manner his answer was: “The way Krishna Mart got it”. He had also admitted that the release of the goods was a mistake on the part of the bank. In answer to the question that the bank released the documents to Mahe Shipping when it was basically the responsibility of the bank not to have done so, Mr Dias had said “Suppose, yes”. Thus the appellant had not pleaded its defence based on para 3 of art 1384 of the Civil Code of Seychelles.

[12] Facts being such, it is not necessary in an adversarial system of civil justice as ours to explore the circumstances in which a defendant could be made liable for a fault outside what is known to the person who brings the action and plead it. This is sufficient to dispose of ground 3 of appeal.

[13] As regards ground 4 of appeal we reiterate that this was not a case based on para 3 of art 1384 of the Civil Code of Seychelles. Even the appellant in its defence had not claimed that this was a case that falls under para 3 of art 1384. Mr Dias the representative of the appellant had admitted that in this case the documents had gone missing in an “illegal manner” and he had no idea as to how they went missing, thus casting off the possibility of application of the provisions of para 3 of art 1384 of the Civil Code of Seychelles to this case. However the trial Judge had dealt specifically with ground 4 of appeal when he said:

It is my finding that the first defendant (appellant) have not provided this Court with good, cogent, reasonable and sufficient explanation as to how such very important documents which were kept in its strong room got into the hands of Kmart. There is no evidence before Court that the first defendant had indeed not authorized its employee to endorse such documents as part of its duties.

We therefore see no merit in ground 4 of appeal.

[14] As regards ground 5 we have already stated that the trial Judge did not come to a finding against the appellant on the basis of vicarious liability. We are also of the view that there was no necessity in this case for the first respondent to plead vicarious liability in view of exhibit D 2 (wherein the attorney for the appellant had requested of the first respondent's counsel, "Kindly let me know the name of the person(s) who is alleged to have connived at and colluded with the importer so that the Bank can fully investigate the matter and take a stand"); and the defence filed by the appellant. There was also no evidence in this case from which one could conclude that the release of the shipping documents was by a servant or employee of the appellant acting within the scope of their employment. The first respondent's case as pleaded in the amended plaint was, that it was the first defendant bank (appellant) that released all the shipping documents to Krishna Mart & Co Pty Ltd without having received funds from Krishna Mart. The appellant in its defence did not claim that the release of the shipping documents was by one of its servants or employees contrary to its express instructions and which was not incidental to the service or employment of the servant or employee nor did it offer any evidence to this effect at the trial. For that matter the appellant never sought to explain how the shipping documents

that were in its possession in a strong room at the bank went missing, other than admitting that it was by an illegal manner and it was its mistake. We are therefore of the view that it was not necessary for the first respondent to have pleaded the vicarious liability of the appellant. We therefore dismiss ground 5 of appeal.

[15] A consideration of ground 6 of appeal necessitates firstly an examination of P 2/D 6, namely the bill of lading. The bill of lading on the first right hand column gives the name of the first respondent as the 'shipper', on the second column below it which has to state the 'consignee or order', states, "ORDER" and in the third column the 'Notify Party/Address' states, "M/s KRIHNA MART & CO. (PTY) LTD, P.O.BOX NO.264, MAHE, SEYCHELLES". At the back of the document is an endorsement in small letters to the effect: "Pay/Deliver to the order of Banque francaise commercial ocean Indien" signed for the Indian Overseas Bank by its manager. We could also see the signatures of a partner of the first respondent, three other signatures, one of Nelson Pillay, the second that of a member of staff of the second respondent and the third unknown. In testifying before the trial Court the Managing Director (MD) of the second respondent has stated that the words "ORDER" in the column 'consignee or order'; is a blank endorsement which means that whoever holds the bill of lading is the rightful owner of that cargo. He had gone on to state that "In principal when there is a blank endorsement like in this case, we must release it to whoever presents us the original bill of lading", and that they also look at the next column which is the notified party, which in this case was Krishna Mart. The second respondent had thus issued the delivery order to Nelson Pillay on behalf of Krishna Mart & Co Pty Ltd as they had no reason for suspicion and because Nelson Pillay was a regular customer who had presented similar bills before on behalf of Krishna

Mart & Co Pty Ltd. He had also stated that normally the notified party is the consignee. The MD had denied the suggestion put to him in cross-examination that it was wrong for the second respondent to have released the goods without Banque Francaise Commerciale Ocean Indien endorsing it in favour of somebody else. The appellant has not placed any evidence to challenge the evidence of the MD regarding the correctness of his evidence in respect of the release of the goods to Nelson Pillay on behalf of Krishna Mart & Co in view of the blank endorsement and the notified party being stated as Krishna Mart & Co. Further the answer of Mr Dias, the representative of the appellant when questioned as to his stand regarding the bill, namely “We are waiting for the outcome of this case and Krishna Mart has to pay”, is indicative of the fact that the appellant’s claim against the second respondent is not serious.

[16] We are therefore in agreement with the trial Judge when he states:

It was not legally incumbent on the second defendant (second respondent) to embark on an inquiry to verify how the holder became the holder of bill of lading (exhibit P2). It was perfectly right for the second defendant to deliver the goods to the representative of Kmart which was the holder of the bill of lading (Exhibit P2) at the material time. The second defendant is not answerable to either the plaintiff (first respondent) or the first defendant (appellant) under or in connection with the bill of lading and/or under the Plaintiff.

We therefore dismiss the sixth ground of appeal.

[17] In the circumstances we have no hesitation in dismissing the appeal with costs to the respondents.

