IN THE SEYCHELLES COURT OF APPEAL

[Coram: F. Macgregor (PCA), B. Renaud (J.A), F. Robinson (J.A)

Civil Appeal SCA 10/2017

(Appeal from Supreme Court Decision114/2011)

Parameswari Pillai — **Appellant**

Versus

S. Rajasundaram
V.T. Pandiyan Pillay — **Respondents**

Heard: 30 April 2019

Counsel: Basil Hoareau for the Appellant

France Bonte for the Respondents

Delivered: 28 June 2019

JUDGMENT

F. MacGregor (PCA)

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[1] This is a case in which the Appellant sought to be declared as an heir to the estate of the late V. Thirumani Pillai and thus be eligible to inherit from the said estate in accordance with Article 767 of the Civil Code.

[2] The Appellant in the case below sued the Executors of the estate of a deceased for failing to recognise her as an heir to the estate by virtue of her marriage in 1970 to the deceased. She sought the Court to declare her heir, so that by that status she would be entitled to one half of the estate and all the personal chattels.

[3] The Executors denied the validity of that marriage between the Appellant and the deceased and therefore, in essence saying that she did not qualify as an heir. The executors counter the validity of the Appellant's marriage by stating that there existed a prior valid marriage by the deceased in 1956 to one Kamatchi Ammal which was never annulled.

[4] The Court below then assessed the validity of both claimed marriages and found that as both marriages were in India and under Indian law that the marriage of the Appellant was void. Accordingly no question arose as to the Appellant's succession rights in the estate of the deceased.

[5] It is against the judgment of her Ladyship Chief Justice Twomey that his appeal is brought forth. The Appellant has advanced two grounds of appeal and these are as follows:-

1. The Learned Chief Justice erred in law and on the evidence in holding that there was a valid marriage between late V. T. Pillay and the late T. Kamatchi Ammal.
2. The Respondents adduced no evidence or sufficient evidence to prove any valid marriage between V. T. Pillay and T. Kamatchi Ammal and thus, the learned Chief Justice erred in holding that there was a valid marriage between them.

[6] The Appellant prays this Honourable Court to give the following relief:

1. That there was no valid marriage celebrated between V. T. Pillay and T. Kamatchi Ammal.
2. That the Appellant's marriage with V. T. Pillay is not void; and
3. That the Appellant be granted costs in the Supreme Court and in the Court of Appeal.

[7] At this juncture before we go further into looking into the grounds of appeal and arguments, it is pertinent and of judicial notice that at the time of the Plaint by the Plaintiff in 2011; there had already been a multiplicity of, and protracted litigations between the heirs to the estate and with the Executors of the estate.

[8] According to the records there has been a least 8 proceedings starting in 2002 and ending with the present appeal lodged in 2017. What do they show and what impact or significance do they or would they have on the appeal and its prayer for relief?

[9] The Appellant on ground one submitted that the Learned Judge was not entitled to make the finding that the marriage of the Appellant with V. Thirumali Pillai was already married and his second marriage was void due to the latter's first marriage, in light of the pleadings set out in the Defence.

[10] It is further submitted that the defence did not aver that the Appellant was married to V. Thirumali Pillai, that at the time of the marriage, the said V. Thirumali was already married and that his first spouse was still alive; and that in accordance with the Hindu Marriage Act, 1995 of India the Appellants marriage to V.Thirumali was void. It is the Appellant submission that the Respondent only averred that the Appellant never married V. Thirumali Pillai but rather that she was living with the said Thirumali Pillai out of "extra marital relationship and certainly not out of marriage.

[11] It is stated by the Appellant that the Respondent did not set out a clear and distinct statement of material fact. The Appellant relied on several cases and these are *Marie-ange Pirame v Armano Peri SCA 16/2005, Tex Charlie v/ Marguerite Francoise Civil Appeal no. 12/1994, Vel v Knowles Civil Appeal no.41 and 44 of 1998 and Tirant & Anor vs Banane [1977] 219* which held

> *"In civil litigation each party must state his whole case and must plead all facts on which he intends to rely, otherwise strictly speaking he cannot give any evidence of them at the trial. The whole purpose of pleadings is so that both partied and the Court are made fully aware of all the issues between the parties."*

[12] It is the submission of the Appellant that in the present appeal, the trial judge formulated a case for the Respondents and granted a relief not sought by the Respondents. The Appellant submitted that the trial judge wrongly formulated the case as the case was not based on

who was the lawful wife of a *de cujus* but rather whether the Appellant was an heir to the *de cujus*. The Appellant relied on the case of *Lesperance v Larue SCA 15/15, Civil Construction Company Limited v Leon & Ors SCA 36/2016 and Monthy v Seychelles Licensing Authority & Ano SCA 37/2016* which clearly state that the Court cannot formulate the case for a party.

[13] The Respondents made no submission on this point; the court however, has a few remarks to make in regard to this ground of appeal

[14] As a court, we are of the view that even though the legal issue was not captioned well, the fact of the matter remains that the Learned Trial Judge below could not determine whether the Appellant was an heir without delving into the question of whether there was a marriage, not just any marriage, but a valid one recognisable by the Court. Evidence had to be adduced to satisfy the court that the Appellant was married to the deceased and therefore eligible to inherit from the estate. As a result, the other party had to present proof to show otherwise.

[15] In the Supreme Court of India in *Bhagwati Prasad vs. Shri Chandramaul - AIR 1966 SC 735* : a case heavily relied upon by Justice Fernando in the case of *Sarah Carolus & Ors V Niall Scully & Ors (Civil Appeal SCA 23/2015) [2017] SCCA 45;* the following is stated,

> *"If a plea is not specifically made and yet it is covered by an issue by implication, and the parties knew that the said plea was involved in the trial, then the mere fact that the plea was not expressly taken in the pleadings would not necessarily disentitle a party from relying upon if it is satisfactorily proved by evidence. The general rule no doubt is that the relief should be founded on pleadings made by the parties. But where the substantial matter relating to the title of both parties to the suit was touched, though indirectly or even obscurely in the issues, and evidence has been led about them then the argument that a particular matter was not expressly taken in the pleadings would be purely formal and technical and cannot succeed in every case. What the Court has to consider in dealing with such an objection is: did the parties know that the matter in question was involved in the trial, and did they lead evidence about it? If it appears*

that the parties did not know that the matter was in issue at the trial and one of them has had no opportunity to lead evidence in respect of it, which undoubtedly would be a different matter. To allow one party to rely upon a matter in respect of which the other party did not lead evidence and has had no opportunity to lead evidence, would introduce considerations of prejudice, and in doing justice to one party, the Court cannot do injustice to another."

[16] Clearly the issue of whether a marriage existed was addressed by both parties and therefore, the learned Judge below had to make a determination on whether the marriage was valid or not as its validity came into question as the defence raised the issue that the deceased was married to one Kamatchi Ammal before the Appellant married the deceased, that being said, the trial judge did not formulate the case for the Respondents herein.

[17] We wish to interject at this point and address a point raised in the court below that was not even addressed. The defence raised a defence of res judicata and abuse of process in the lower court. The Court of Appeal on the decision of Juddoo J, Civil Side 13 of 2002 made this statement and we quote, *"the defendants are the children of the deceased born from a second relationship with their mother."* We are of the view that a justice of this Court could not have made such a pronouncement in the judgment without properly considering the facts and evidence before him to come to such a finite conclusion. In Civil Side SCA No. 6 of 2005, a judgement by Bwana (Acting President) as he then was, stated "the Appellants are the heirs of one V.Thirumeny Pillay while the Respondents are children from another relationship (not marriage)." Surely at this point even the children that were labelled as illegitimate would have protested to ensure they got what was rightfully theirs by bringing legal documents to show that they were children from a marriage validly conducted between the deceased and their mother. It is to be noted that no such action was taken.

[18] Having a thorough look into the documents before this court, it is clear via the 2nd Defendants request for further and better particulars of the plaint in paragraph 3.2 that the Appellant had knowledge of the appointment of the Respondents herein as executors to the

estate of Mr. Thirumemi Pillai in 2003 but it is stated that it was only upon the purported distribution of the succession by virtue of the Report dated 27th April 2010, by which the Appellant was not included in the said succession that she decided to take action. It must be noted that Report dated 27th April 2010 was contested by the Appellants' children and a case brought in 2012, shouldn't she have joined the moving train knowing fully well that she had been omitted as heir?

[19] The circumstances of this case in totality renders this court to pronounce that this is a case that clearly on the face of it is an abuse of court process, taking the court as a playfield to settle scores. This Court shall in no terms entertain such abuse.

[20] Having considered the submissions made and the circumstance of this case as a whole, we find no merit in the 1st ground of appeal and therefore dismiss it.

[21] On the second ground of appeal, the Appellant submits that there was no evidence or sufficient evidence to prove any valid marriage between V.T Pillay and T.Kamatchi Ammal. That the affidavit relied upon by the learned trial judge was not produced either under Section 168 or 169 of the Seychelles Code of Civil Procedure.

[22] Additionally, it is the submission of the Appellant that in view that the affidavit was sworn overseas, purportedly before a notary public, the court could not accept and rely on the affidavit without proof of verification of the authority of the said person the affidavit sworn before. It is stated that verification may be by affidavit of a person who can depose to the authority of the person administering the oath, or by a certificate of a British consular officer, or by a certificate under seal of a local court.

[23] As a result, the affidavit the learned trial judge relied on should have been disregarded and attached no weight to it. It was also submitted that the learned trial judge was wrong to rely on the evidence of Mr. Vijay Kumar in holding that there was a valid marriage between V. Thirumali Pillai and Karamatchi Ammal as he did not have sight of the Exhibits D2 and was never questioned about the validity of the certificate. Hence his testimony could not

be relied upon.

[24] The Respondent submits that whether the marriage between V T Pillay and T Kamatchi is proved or not sufficiently proved does not arise. The marriage between the two had already been proved. The only question therefore, before the court below and before this court is only whether the marriage between the Appellant and the deceased was valid or invalid. It is submitted that the Appellant never disputed in her plaint dated 27 May 2011 the marriage between the deceased and his wife Kamatchi Ammal.

[25] It is the contention of the Respondent that Exhibit D1 (marriage invitation); D2 (marriage certificate issued by Tahsildar); D3 (experts affidavit on the marriage certificate); D4 (the death certificate showing the husbands name) and D5 (birth certificate of the 2nd Respondent and one Rajendran Pillay), are abundantly clear proof of marriage between the V T Pillay and Kamatchi Ammal. The above exhibits were not controverted by the Appellant before the Court below; hence they can not become a topic of dispute now.

[26] On this ground, we do find that the there was evidence sufficient enough for the learned trial judge to draw a conclusion that there existed a marriage relationship between V T Pillay and Kamatchi Ammal. This invariably meant that any other marriage contacted after this one without the 1st being annulled implied that the second marriage was void.

[27] It has been submitted by the Appellant that in the event that this Court finds that the marriage between the deceased and Appellant was void, an alternative argument should be considered based on Article 201 of the Civil Code which provides,

> *"1. A marriage which has been declared null shall have, nevertheless, civil effects with regard to the spouses provided it was contracted in good faith.*
>
> *2. If one of the spouses was in good faith, the marriage shall have civil effects for the innocent spouse only*
>
> *3. Unless there is evidence to the contrary, good faith shall be presumed in favour of the spouse. Good faith need only have existed at the time of the celebration."*

[28] It is the Appellants submission that the said marriage between the Appellant and V. Thirunami Pillai should have civil effect with regards to the Appellant as the Appellant contracted the marriage in good faith as there is no evidence on record which established that at time of the Appellant wedding the deceased, the Appellant knew that the deceased was legally married to Kamatchi Ammal.

[29] Consequently, if the line of thought advanced above is adopted by this Court, the Appellant would therefore be entitled to inherit from the estate of the de cujus in accordance with Article 767 of the Civil Code.

[30] It is the view of this Court that the Appellant could not have possibly contracted the marriage with the deceased as an innocent party acting in good faith. The facts brought forth and clear from the proceedings of the lower court is that the Appellant lived with her sister and the deceased. Nothing stopped her inquiring from her blood sister if the man she was about to wed was married to her sister or not. This is not one of the cases where one can claim that ignorance is hliss. She had an obligation to do so, seen that her sister had children with the deceased. To the mind of any reasonable person, that would be the most prudent thing to do. With that being said, we find that the alternative argument does not hold water in this particular case at hand.

[31] Further to this, there appears to be a res judicata situation as a practical difficulty in redistribution of the estate. Should the Appellant succeed in proving to be an heir this would go counter to the Order made by the Court of Appeal in SCA 08/2013, the Judgment of April 2015 where the executors were ordered to distribute the estate in accordance with proposals submitted to Court contained in paragraph 4 of the appeal.

[32] The last one before the present appeal, is the Court of Appeal Judgment SCA 9/2013 delivered in April 2015. The material parts of that Judgment are found at para. 22 which states:

> *"In the circumstances we are of the view that this proposed partition is the best that can be done to bring a fair and conclusive end to this sorry family infighting. We*

therefore make the following orders:

1. *The executors of the estate of V. Thirumany Pillay are to distribute the estate in accordance with the proposal submitted to the court and contained in paragraph 4 of this appeal.*
2. *We make no order as to costs."*

Just on that premise can another Court of Appeal give a judgment that differs from or counter to that Order, which also as the Executors were bound to implement?

[33] That Judgment was the culmination of previous Court Judgments as in CS 13/2002, SCA 02/2005 and a later Supreme Court Judgment by Judge Gaswaga.

[33] The prior Court of Appeal Judgment of 2005 ordered all business assets alienated by one of the heirs to be returned to the estate. A Surveyor to be appointed to recalculate and distribute the estate according to law. These to be placed before another Judge of the Supreme Court to ensure implementation of its Order.

[34] Further, Judge Gaswaga in implementing those Court of Appeal directions further ordered an evaluation of the property, the drawing up of an inventory and editing the accounts produced by one of the heirs.

[35] In the Respondents' Skeleton Heads of Argument in this appeal dated 11th March 2019, was declared the Respondents in their capacities had distributed the succession and inheritance of the estate of the deceased as guided by the Supreme Court of Seychelles in another proceeding in CS 13/2002 which distribution was confirmed by the Seychelles Court of Appeal in SCA 9/13 settled in 2015.

[36] There is also the application of Article 830 and 831 read with Article 1028 of the Civil Code where the executor has also the powers of a fiduciary and has done acts in accordance of any Order of the Court.

830: "Where a fiduciary has given a discharge in respect of any asset, debt or obligation, or sold or otherwise disposed of property or any interest therein or part thereof or done any other act in relation to the property which he holds as fiduciary, in accordance with the terms of the instrument of appointment or with any order of the Court or with the provisions of the law, such discharge, sale, disposal or act shall have the same effect, in all respects, as if it had been given, made or done by all the co-owners whatever their status or capacity.

He shall not be personally liable in respect of any act done or obligation incurred in the proper exercise of his functions."

831: "A fiduciary shall be entitled to full indemnity from the co-owners for acts properly done."

[37] This case also poses a question of whether it is legally possible to allow an individual who sleeps on their right to come to court and claim what isn't there. The Judgment of 2015 by the Court of Appeal was given whilst this case was ongoing; wouldn't it have been prudent on the part of the Appellant to have applied for a stay of execution till the case at hand was fully determined? This was not done. The estate has been duly distributed to the heirs that were disclosed from the very start.

[38] There is also the Rule of Finality, implicitly touched on in the Court of Appeal Judgment at para. 20 in SCA 09/2013 where it says:

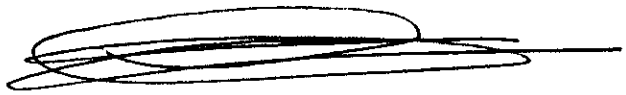
"This matter has been in the annals of the courts since 2002 in one guise or another. 13 years later it is time to lay this matter to rest."

[39] We are now 17 years later, where the matter of the estate has come to Court at least 6 times, 3 in the Supreme Court, 3 in the Court of Appeal.

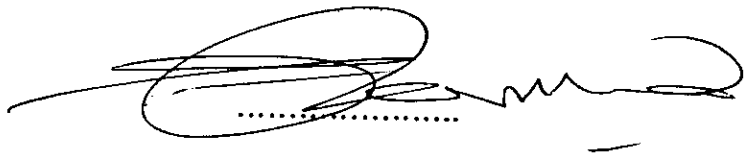
[40] I believe the claim and issue of inheritance or succession the appropriate place for determination is at the appointment of executor proceedings in 2002 where the death of the property owner is declared in Court, with a declaration of who are the heirs of the deceased

in which the 5 children of the Appellant participated in the declaration of the heirs there and the Appellant was aware of the proceedings.

[41] As a result, we uphold the ruling of the lower court and dismiss this appeal entirely with costs to the Respondent.



F. MacGregor (PCA)

I concur:.  B. Renaud (J.A)

Signed, dated and delivered at Palais de Justice, Ile du Port on 28 June 2019