

IN THE SEYCHELLES COURT OF APPEAL

Reportable

[2021] SCCA 26 (9 July 2021)

SCA 55/2018

Appeal from CC8/2016) [2018] SCSC
858

In the matter between

KARTHIK PARTHIBAN

(rep. by Joel Camille)

Appellant

and

1. SOONA OLIAJI

2. DARIUS OLIAJI

3. MEHER OLIAJI

4. BEROZE OLIAJI

5. OLIAJI PROPERTIES AND LEISURE (OPAL) CO. LTD. Respondents

(rep. by Kieran Shah SC and Emily Gonthier)

Neutral Citation: *Parthiban v Oliaji &Ors* ([2021] SCCA 26 (9 July 2021) SCA 55/2021
Arising in CC 8/2016) SCSC 858

Before: Fernando, PCA, Twomey, JA and Dodin JA

Summary: Appeal against the decision of Supreme Court dismissing claim for specific performance of an assignment of contract – circumstances in which assignment of contract can take place

Heard: 25 June 2021

Delivered: 9 July 2021

ORDER

The appeal is dismissed with costs.

TWOMEY JA

Introduction

[1] This case concerns the validity and enforceability of a purported assignment of interests to a third party, in a joint venture agreement that had been concluded by an investment

company with owners of property at Beau Vallon, Mahé, Seychelles.

- [2] The court a quo dismissed a claim by the purported assignee against the owner of the property for specific performance of the assignment of the joint venture agreement for the reason that the purported assignment did not conform to the legal requirements for a legal assignment.

The pleadings and case in the court a quo

- [3] The Plaintiff, (now the Appellant) Karthik Parthiban, (Parthiban) by a Plaintiff in the Supreme Court claimed that on 9 November 2006, the Respondents (Oliajee) had entered into a Joint Venture Agreement with an investment company, Siva Limited Bermuda (Siva), for the tourism development of Oliaji's land at Beau Vallon. Siva undertook to pay a million Pound Sterling to Oliaji if and when planning permission for the hotel was granted. In addition, Siva agreed to finance the cost of other preliminary matters associated with the application for planning permission. In return, Oliaji would contribute several parcels of land and both parties would agree a reputable hotel group to manage the project when it was completed.
- [4] Parthiban averred that it was also a term of the agreement that the joint venture would be furthered by a new company being formed in which Siva would hold 50% of the shares of the venture company and Oliajee would holding the other 50% or in the alternative that Oliajee would transfer 50 shares in Oliajee Properties (OPAL) to Siva or one of its affiliates.
- [5] Parthiban claimed that in pursuance of this agreement, Siva Limited nominated one of its affiliates, a company, namely Spring Wonder Limited to receive the shares from OPAL but that in breach of the joint venture agreement these shares were never transferred.
- [6] According to Parthiban, in pursuance of a further agreement dated 31 December 2012 between Siva and himself, all rights, powers and obligations under the agreement between Siva and Oliajee were transferred to him and that the latter was therefore under an obligation to transfer the shares of OPAL to him.

[7] Oliaji, in their Statement of Defence and evidence, denied that the Assignment Agreement was valid and bound them for the simple reason that they had not consented to it. They averred that there was therefore no contractual agreement between Parthiban and them.

[8] The purported Assignment Agreement relied on by Parthiban for his claim provides in relevant part:

“(4) In view of the said Assignment, the ASSIGNEE herein shall accrue all rights and control over all investments, advances and services rendered by the M/S Siva Limited Bermuda under the said Joint Venture Agreement.

(5) In view of the said Assignment, the ASSIGNOR herein shall absolve itself from all responsibilities, obligations under the said Joint Venture. Any amount due and payable by the said company including but not limited to the advances GBP 160,000 made by the ASSIGNOR shall henceforth be payable to the account of the ASSIGNEE.”

[9] It is this purported Assignment Agreement that is at the core of this case.

The grounds of appeal

[10] Dissatisfied with the court’s decision dismissing its claim for specific performance of the agreement by Oliaji, Parthiban has filed the following three grounds of appeal:

(1) The learned trial judge erred in law and on the facts, in having dismissed the plaint on the ground that the appellant had no cause of action against the respondent in a case of specific performance.

*(2) The learned trial judge erred in law in having wrongly interpreted the provisions contained in Article 1689 of the Civil Code of Seychelles, more specifically in concluding that the Assignment Agreement signed between the appellant and the company Siva Bermuda Limited, consisted in transferring to the appellant, a third party to the joint venture agreement, the *qualité de contractant* and accordingly did not assign rights to the appellant.*

(3) The learned trial judge erred in law and on the facts, in having failed to appreciate the totality of the evidence before the court and more specifically in having failed to conclude that a valid and enforceable contract, existed as between the appellant and the respondents in this case.

Submissions with respect to the grounds of appeal

- [11] In support of the appeal, the brief submissions of Counsel for Parthiban are to the effect that Article 1689 of the Civil Code provides that once an Assignment Agreement is delivered by the assignor to the assignee, the assignment becomes immediately effective. As notice of the assignment had been served on Oliaji, it was valid and enforceable. Since Oliaji refused to perform its obligations under the Joint Venture Agreement and the same had been assigned to the assignee, the latter was perfectly in his rights to seek its specific performance.
- [12] In response, Counsel for Oliaji has submitted that the Assignment Agreement amounted to a novation of the Joint Venture Agreement purporting to release Siva from his obligations towards Oliaji and confer the benefit of recovering money to Parthiban. Counsel further submitted that Parthiban would have a cause of action and standing against Oliaji only if the purported Assignment Agreement was valid and binding.
- [13] As the consent of Oliaji, the other party to the Joint Venture Agreement, was according to Article 1690 of the Civil Code necessary to make any assignment effective and this had not been obtained, Oliaji could not be bound by the purported assignment of rights and interests under the Joint Venture Agreement from Siva to Parthiban.
- [14] Counsel for Oliaji further submitted, relying on *Varnier v Alcindor*¹, that specific performance can only be ordered when a valid contractual relationship exists between contracting parties and obligations arising under the contract had been breached. As the Assignment Agreement was invalid insofar as Oliaji was concerned, there was no contractual relationship between Oliaji and Parthiban and there could therefore be no claim for specific performance arising.

The law

- [15] With regard to assignments of contracts, Counsel for each party has referred the Court to Article 1689 of the Civil Code which provides :

¹ (2002) SCAR 55.

“In the assignment of a claim or a right or an action to a third party, the delivery shall be effected between the assignor and assignee by the handing over of the document of title.”

[16] Counsel for Oliaji has also referred to Article 1690 which provides in relevant part:

“1. With regard to third parties, the assignment shall only be effective when notice of it is given to the debtor.

Nevertheless, the assignment may also be effective as regards the assignee if the debtor accepts the assignment by a document in an authentic form.”

[17] The Agreement on which Parthiban relies is called an Assignment Agreement but the terms of the Agreement in my view seems to amount to a novation of the Joint Venture Agreement as it supplants much of the original agreement. Hence, it would appear that the concepts of novation and assignment (*cession*) are confused by Parthiban. While the two processes have the same object, that is the substitution of one creditor for another, a novation requires the consent of both parties because it extinguishes a previous agreement and creates new benefits and potential liabilities to the substituted party. In an assignment, a party is substituted for another but only with regard to the execution of the same obligations which were the subject of the original contract. It is for this reason that the consent of the other party to the contract is not necessary.

[18] The judge a quo considered this point in her decision. She concluded that the Assignment Agreement consisted of transferring to Parthiban the *qualité de contractant* (that is the same conditionality as Siva, the original party to the agreement) and could not, therefore, be considered as an assignment under the law.

[19] Assignments are generally permitted in respect of some contracts especially of debts or other receivables (*cession de créances*) in general. Passing both one’s benefits and duties under a contract to a third party without the consent of the other party to the original contract is a far cry from passing one’s benefits as a creditor of a debt to a third party. When two parties enter into such a joint venture agreement, the experience, business acumen, financial status and assets to be contributed to the project, among other factors are the driving forces that lead to the original agreement. It is not conceivable that one

party could just assign benefits and duties under such a contract to a third party without the consent of the other original party to the contract.

[20] Counsel for Parthiban submitted that by notifying Oliaji, a party to the Joint Venture Agreement with Siva, of this assignment, this was sufficient for the substitution of Parthiban for Siva in the Joint Venture Agreement with Oliaji.

[21] Nothing could be further from the truth as this would ignore the most basic tenet of all contracts – the voluntary intentions of parties or autonomous choice. This is the purport of the proviso to Article 1690. As autonomous individuals, we should be entitled to undertake binding obligations if and only if we desire. As Marcel Planiol put it:

*“le consentement des parties, c’est à-dire l’accord des volontés, est l’élément essentiel de tout contrat.”*²

Terré, Simler and Lequette go further and state that:

*“En matière contractuelle, le terme “consentement” revêt une double acception. Il désigne d’abord la manifestation de volonté de chacune des parties, l’acquiescement qu’elle donne aux conditions du contrat projeté... Mais dans la conception française, le contrat naît non de la juxtaposition de deux déclarations dont chacune serait isolément obligatoire, mais de la rencontre des volontés qui fait naître une volonté nouvelle, celle de réaliser une opération commune qui est l’objet du contrat...”*³

[22] The above doctrinal writings are reproduced simply in Article 1108 of our Civil Code which provides for the four conditions for a contract including “[T]he consent of the party who binds himself”.

[23] It is true however that both the benefits and obligations under a contract such as the Joint Venture Agreement may nevertheless be assigned as contemplated by Siva and Parthiban but that is only in the case that Siva and Oliaji would have agreed to it in advance, that is to say, as provided for in Article 1165 namely:

² M. Planiol, *Traité de Droit Civil*, 8^{ème} ed, tome 2^{ème}, Paris 1921, p 318.

³ François Terré, Philippe Simler, Yves Lequette, *Droit Civil: Les Obligations* (10e edition, Dalloz 2009) p110- 111.

“ (3) If a party consents in advance that the other may assign his claim or debt to a third party, the assignment shall have effect as from the moment of notification and acceptance of such assignment.”

[24] Hence, for the purported Assignment Agreement to be valid, the Joint Venture Agreement would have had to have a clause pertaining to the consent of the parties to a prospective assignment of their benefits and obligations. As this was not the case it would be contrary to public policy to impose such a condition in the Joint Venture Agreement or infer such an intention of the parties.

Decision

[25] For all the above reasons, this appeal is dismissed with costs.

Signed, dated and delivered at Ile du Port on 9 July 2021.

Dr. Mathilda Twomey JA

I concur

A. Fernando PCA

I concur

G. Dodin JA