Jensen v Hoareau
(1998) SLR 84

Ramniklal VALABHJI for the Plaintiff
Pesi PARDIWALLA for the Defendant

Ruling delivered on 9th day of March, 1998 by:

PERERA J: The plaintiff, who is a non–resident, sues the defendant for the recovery of US dollars 14,276 which he avers was granted as a loan while he was a visitor to Seychelles in 1993. The defendant in her defence has averred that that sum was given to her as a donation or gift.

The instant ruling concerns an ex-parte application made by Mr Valabhji, counsel for the plaintiff, under section 163 of the Seychelles Code of Civil Procedure (Cap 213). It has been averred that since the defendant has admitted the claim as a gift unsubstantiated by any document, summons should be issued on her to appear in court to be examined on her personal answers "concerning all aspects of the case and particularly the claim of US dollars 14,276".

Although the application was titled "ex-parte"it had been served on the attorney for the defendant as the attorney for the plaintiff had endorsed on the application "to be served on defendant's attorney Mr Pesi Pardiwalla, Victoria". Hence the matter was heard inter partes.

Section 163 provides that –

> Whenever a party is desirous of obtaining the personal answers not upon oath of the adverse party, he may apply to the judge in court on the day fixed for the defendant to file his statement of defence or prior thereto, or he may petition the court ex parte at any time prior to the day fixed for the hearing of the cause or matter to obtain the attendance of such adverse party, and the court on sufficient ground being shown shall make an order granting the application or petition. And the party having obtained such order shall serve a summons, together with a copy of the order, on the adverse party to appear in court on the day stated therein.

In the supporting affidavit to the application Mr Valabhji, attorney for the plaintiff. has averred –

> 2. That my client will not be able to travel to Seychelles for the hearing of the case on the 11 July 1997.
>
> 3. That it is necessary that the defendant be examined on her personal answers before we proceed with the case proper.

Mr Pardiwalla submitted that the only reason adduced for making the application was the inability of the plaintiff to attend court on a particular day for the hearing, and that was not a valid reason for ordering summons on the defendant.

Mr Valabhji in reply submitted that the plaintiff was a foreigner and that he cannot come to Seychelles for various reasons. He further submitted that on the basis of the pleadings the plaintiff has to prove that there was a loan and the defendant would have to rebut it on the basis of a gift. He therefore maintained that he had a right to call the defendant on personal answers.

In the case of *Chez Deenu v Philibert Loizeau* (unreported) CS 202/86 the plaintiff, a merchant, claimed R17,449.13 in respect of goods supplied to the defendant. The defendant in his defence denied that he was indebted to the plaintiff in the sum claimed of at all. Counsel for the plaintiff in making an application to examine the defendant on his personal answers submitted that the defence was a total denial of indebtedness which indicated that there were no transactions between the plaintiff and the defendant and also that they did not know each other. The learned Chief Justice Seaton rejected the application on the basis that the plaintiff must first adduce some prima facie evidence before he could call on the respondent for his personal answers.

The Court of Appeal (SCA Appeal No. 17 of 1987) set aside that ruling. Goburdhun JA stated thus –

> The right of a party to examine his opponent on his personal answers should not be taken away from the party except on strong grounds …….
>
> The purpose of calling a defendant on his personal answers is to obtain admissions from him or evidence which would destroy his case or strengthen that of the party calling him. Of course if a motion to call a party on his personal answers is unreasonable the Court has a discretion to disallow it.

D'Arifat JA observed that –

> The parties to a civil action have a right to know the legal pretentions of their opponents and more specially the averments on which they rely to prove their case.

In the case of *Re Kassamally Esmael* 1941 MR 20 it was held that the right to examine a party on personal answer, being a legal right, could be denied only on strong grounds such as where the physical attendance of the defendant is impossible or dangerous to life, or if it is proved that the person to be examined is in no way concerned with the issue. There are no such grounds in the instant case.

The defendant had in her defence admitted receiving a total of US dollars 14,276 from

the plaintiff as a donation, but not as a loan. The plaintiff in such circumstances has the right to call the defendant on her personal answers to obtain admissions from her or evidence which could destroy her case or strengthen his own case. Such a procedure is not unreasonable nor does it give any unfair advantage to the plaintiff as such evidence is not given on oath and as under section 4 of the Evidence Act, the defendant's counsel has the right to examine his own client to correct any ambiguity arising from the answers given. There are therefore sufficient grounds for ordering summons on the defendant. Accordingly, the Court makes an order that summons be issued on the defendant to appear in court at the next date of hearing, to be examined on her personal answers.

Ruling made accordingly.

Record: Civil Side No 379 of 1996