Krishnamart & Co (Pty) Ltd v
Harry Savy Insurance Co Ltd
(2000) SLR 46

Antony Derjacques for the plaintiff
Francis Chang Sam for the defendant

Ruling delivered on 14 January 2000 by:

ALLEEAR CJ: In the present action the Supreme Court, in its judgment of 28 March 1999 found the defendant liable to make good the plaintiff's loss which resulted in a fire at the commercial complex owned by the plaintiff.

An appeal was lodged to the Seychelles Court of Appeal against the said judgment of the Supreme Court. At the hearing of the appeal, Hamid Moolan Q.C. conceded that there was a contract to provide an insurance cover by the defendant company to the plaintiff, but sought to canvass an issue not pleaded, namely that the plaintiff was in breach of the "contract of insurance." It would appear that Hamid Moolan Q.C. was unable to prevail upon the Seychelles Court of Appeal to accede to his viewpoint.

It will be recalled that in his statement of defence, paragraph 6, the defendant had stated:

> As regards paragraph 9 of the plaint, defendant has never been requested to issue any Fire or Special Perils Policy and did not therefore do so.

In paragraph 8 of the statement of defence it had further been averred by the defendant that:

> Defendant denies paragraph 11 of the plaint, specifically denies that the alleged peril or loss was covered by defendant or that there was any insurance contract between plaintiff and defendant in respect thereof.

In light of the above, liability was denied by the defendant who prayed for the dismissal of the plaintiff's action with costs. The defendant did not aver in his statement of defence that, "in the alternative, if there was a contract of insurance between the parties, the plaintiff was in breach of the terms of the said contract."

On the day the plaintiff's witness David Grant, a quantity surveyor, was about to depose, Mr. Chang Sam, who had replaced Mr. Valabhji as defendant's counsel raised a preliminary objection to the effect that since the plaintiff was in breach of the terms of the insurance policy, the court could not hear evidence on the issue of quantum. As David Grant had come from England specifically to depose in the case, the court took his testimony, but reserved the ruling on the preliminary objection of Mr. F. Chang Sam. If the objection of Mr. Chang Sam finds favour with this court, it goes without saying that

the question of quantum of damages to be awarded will not arise.

Section 75 of the Seychelles Code of Civil Procedure provides:

> The statement of defence must contain a clear and distinct statement of the material facts on which the defendant relies to meet the claim, A mere general denial of the plaintiff's claim is not sufficient. Material facts alleged in the plaint must be distinctly denied or they will be taken to be admitted**,"** (Emphasis added).

It is a procedural requirement that each party must state the whole of its case in the pleadings. The material facts on which the party intends to rely must be pleaded. If a defence is not raised in the pleadings, it may not be considered. In civil litigation, each party must state its whole case and must plead all facts which he intends to rely upon. Otherwise, he cannot at the trial, give evidence of facts not pleaded. For instance, a defence of an act by a third party in a motor vehicle collision case not having been pleaded, cannot be considered. (Vide case *Tirant v Banana* (1977).

In *Charlie v Francois* 1995 SCAR, it was held that:

> The system of civil justice does not permit the Court to formulate a case for a party after listening to the evidence and to grant relief not sought in the pleadings.

In the Mauritian case of *Ramjan v Kaudeer* 1981 MR 411, Supreme Court judgment 387, it was held:

> Where the pleadings aver a "faute" and the action for damages is thus based on Article 1382 Code Nap, the Court cannot go outside the pleadings and award damages under Article 1384 - Code Nap, on ground of 'responsabilité du fait de la chose'.

In *Bessin v Attorney General*, 1936-1955, it was held:

> The Court hearing such an application must limit itself to the allegations contained in the pleadings and no extraneous evidence was admissible to support the application.

In my considered view based on law and authorities cited above, the denial by the defendant in his statement of defence, paragraph 6, of the existence of the Fire and Special Perils Policy, does not permit him now to raise the issue of breach of the term of the Fire and Special Perils Policy.

In the light of the above, the conclusion that I must necessarily reach one which did find favour with the Seychelles Court of Appeal must be that no party can rely upon an averment not made in the pleadings. The objection of counsel for the defendant is

without legal basis and cannot be entertained.

Record: Civil Side No 97 of 1998