Schoenebeck v Hopprich
(2001) SLR 65

Frank ELIZABETH for the plaintiff
France BONTE for the defendant

Judgment delivered on 2 November 2001 by:

PERERA J: This is a delictual action based on an allege ception, trickery or misrepresentation made by the defendant. The plaintiff aver t on 15 November 1992 he was deceived by the defendant by misrepresenti at she was taking contraceptives and tricked him into having sexual interco with her. On 21 December 1992, 36 days later, both parties entered into a wri greement, wherein the defendant, inter alia, renounced any claim against the pl in the event of an "unwanted pregnancy", whether it arises in Seychelles or in Ge /.

The agreement (exhibit P1) is as follows -

> AGREEMENT
> Throughout this document, consisting of a page, Ms Cla a Estico and Dr Jost V Schoenebeck reach the following agreement onfirm it free and not under duress with their signatures:
>
> On the occasion of an accidental flirt on the 15. 11.92 'S wanted to undertake adequate measures of contraception before ng to sexual contacts with Ms CE. But Ms CE said she doesn't like t preservative). On the question of Dr JVS whether there is no risk of un d pregnancy Ms CE answered "No, there is no risk." Therefore Dr. S. concluded that Ms. C.E. had taken sufficient contraceptive measure nerself.
>
> 2. Several days later on the same question of Dr JVS, CE confirmed again that there is no risk of pregnancy saying:
> "I give you my word."
>
> 3. Therefore Ms CE renounces now and in the future any ns on Dr JVS resulting from an unwanted pregnancy, no matter whe those claims originate from Seychelles or German laws.
>
> Victoria/ Glacis/ Mahe, Rep of Seychelles
> 21st December 1992
> Ms Claunada Estico
> Dr Jost V Schoenbeck

I have already overruled a plea in limine raised by counsel for the defendant that the

cause of action pleaded was against public policy.

Amos and Walton *Introduction to French Law* (2nd edition) dealing with "waiver of right to sue" states at page 224 thus -

> ……while in the field of contract the parties are usually at liberty to waive by antecedent agreement, their right to damages for inexecution or faulty execution of their obligations, such a waiver is inoperative when the breach is intentional, and also, though less clearly, when there is gross fault. This result is generally explained by saying that the waiver of contractual responsibility leaves intact the rules of delictual responsibility. These may not be waived. In a recent decision, the Court of Causation expressed the principle in the following terms "...clauses of exoneration from or attenuation of responsibility are null in the domain of delict, articles 1382 and 1384 or the Civil Code being d'ordre public and their application incapable of being paralysed in advance by agreement." This public policy is presumably based on the view that to admit the validity of such clauses would discourage people from being as prudent as they should be in their relations with other".

In the present case, the defendant's waiver of the right to sue did not per se affect public policy. In any event, it does not affect the plaintiff's right to sue in delict in respect of any loss or damage suffered by him (see *Hardy v Valabhji* (1963) SLR 98.) The instant action in delict is based on intentional trickery and deceit. Article 1382(5) provides that "liability for intentional or negligent harm concerns public policy and may never be excluded by agreement ……." However as I stated in my previous ruling, the burden is on the plaintiff to establish that the defendant intentionally caused damage to him, as averred.

The plaintiff testified that on 21 December 1992, 1 month and 6 days after the act of intercourse, the defendant told him that she was probably pregnant and drew up the agreement. He also stated that she showed him some pills which she claimed were being taken by her as hormone therapy for an ovarian cyst. He further stated that upon referring to medical literature, these tablets, if taken properly would in itself have acted as a contraception. However after over a month from the date of intercourse, he doubted her sincerity when she told him that she was awaiting her menstruation, as she ought to have known that that would not happen if she was under medication. He therefore concluded that the pills were either borrowed from her sister, who is a nurse, or from a friend, to trick him. He stated that it could have been done to obtain money or to enjoy a better lifestyle, as she later married another German dentist in 1995 and is presently living with him in East Berlin.

The plaintiff further testified that the defendant filed a maintenance case in Germany and that he was ordered to pay a sum of approximately R230,400 as maintenance for

the child until he reached the age of 18 years.

In that judgment (exhibit P3), it is stated that the present plaintiff produced the agreement claiming that he was deceived. However that Court held inter alia that-

> It doesn't matter in this connection whether the defendant was eventually cheated by the child's mother about having taken contraceptive drugs, nor, whether the child's mother has renounced any claims in connection with the pregnancy before she went to Court, because according to Section 1600 part 1 BGB, that man has to be declared the father that created the child. According to the genetics expert witness, with a probability of 99.99% it can be taken for granted that the plaintiff (child) is descending from the defendant.

The plaintiff in his testimony before this Court stated that due to this deceit, he lost his reputation as a dentist and suffered financial and psychological damage. He produced a medical report dated 24 July 1995 (exhibit P4) from a psychiatrist regarding a tremor of the right hand. That was before the German Court pronounced judgment on 4 March 1996.

The agreement discloses two distinguishable parts. First, the intention of the plaintiff to have protected sexual intercourse, but deciding on unprotected sex relying on the verbal assurance of the defendant that it was safe. According to the wording of the agreement (P1), the defendant only stated that there was no risk of a pregnancy. It was he who concluded that she was on contraceptives. The plaintiff, though a dentist, is a medical professional. It does not require one to be a gynecologist to know that no form of contraceptive affords a 100% guarantee against a pregnancy. Hence the plaintiff voluntarily consented to behaviour which he knew or ought to have known carried a very high risk of pregnancy.

The second part of the agreement is the waiver of the right to sue by the defendant, under the law of Seychelles or of Germany. The German Court rejected the agreement as that Court was only concerned with the determination of the putative father, and the granting of maintenance to the minor child.

The plaintiff is admittedly paying maintenance in accordance with the judgment of the German Court. Intercourse between two consenting unmarried parties will not of itself give rise to a claim for damages. But if such intercourse has been obtained by deceitful means, such as on a promise of marriage which one party had not intended to fulfil at the time of intercourse, then on proof of such intention, damages may be recoverable.

In the present case, the agreement signed by both parties which evidences the circumstances under which intercourse took place on 15 November 1992 and the waiver of the right to sue by the defendant, negatives any deceitful conduct on the part of the defendant. At that time, she could not be expected to have known that she would marry another German Dentist in 1995 and that a Court in Germany would grant maintenance for her child despite the waiver in the agreement. Hence the plaintiff cannot maintain an action in delict. Accordingly it is dismissed with costs.

Record: Civil Side No 350 of 1997