Katerina Khvedelidze v Dell Olivio
(2003) SLR 81

Frank ALLY for the Plaintiff
Pesi PARDIWALLA for the Defendant

Appeal by the Plaintiff was allowed on 11 April 2003 in CA 18 of 2002.

Order delivered on 10 February 2003 by:

PERERA J: This is an application under Section 194(c) of the Code of Civil Procedure, seeking a new trial. In the main case, the Plaintiff is seeking specific performance of a promise of sale. It has been averred, inter alia that the Plaintiff made a deposit of R300,000 with the Defendant pursuant to the agreement. This is admitted by the Defendant who claims a forfeiture of that sum on the ground of a breach of agreement by the Plaintiff. On the whole, the pleadings disclose a serious cause of action.

The case was first listed for hearing on 4 December 2000, when it was adjourned to 31 May 2001 upon a joint application made by Counsel for the parties. On 31 May 2001, Mr Frank Ally, Attorney at Law replaced Mr France Bonte as Counsel for the Plaintiff. A further adjournment was sought by Mr Ally on the ground that his client who is resident in Moscow had been unable to attend Court. Mr Pardiwalla, Learned Counsel for the Defendant objected on the ground that previous adjournments had been granted for the same reason. The Court thereupon stated:

> I will grant a last postponement to this matter. No more postponements would be granted.

Accordingly the case was fixed for hearing on 3 and 6 December 2001. On 3 December 2001, Mr Chang Sam, Attorney at Law stood in for Mr Ally and informed Court that Mr Ally was sick and had been admitted to hospital. There has now been produced a medical certificate dated 6 December 2001, issued by the D'Offay Ward certifying that Mr Ally was admitted to hospital on 2 December 2001. However on 3 December 2001, Mr Pardiwalla, in objecting to an adjournment did not rely on the absence of Mr Ally due to illness. Instead, he applied to the Court for a dismissal of the case on the ground that despite Mr Ally's incapacity the Plaintiff ought to have been present in Court either in person or through her representative. The Court thereupon made the following order –

> This case was earlier fixed for hearing on 31st May 2001. At the hearing date, all parties were present except the Plaintiff, who according to her Counsel had missed a connecting flight from Moscow to Seychelles. Despite objections on behalf of the Defendant to any postponement, such motion was granted with the express permission (sic) that it would be a last postponement.

> I understand that Counsel is unable to attend today for Medical reasons. But there Is no excuse for the Plaintiff not to be present at this already postponed hearing. If the Plaintiff is not present. Counsel would in any case have been unable to proceed.
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> In such circumstances, I find that the absence of the Plaintiff cannot be condoned. Further the plaint is dismissed with costs.

There was however no order made on the counterclaim filed by the Defendant. Hence, a counterclaim being for all practical purposes a "separate action," the Plaintiff, having filed a defence to the counterclaim is still before Court.

Be that as it may, the application for a new trial has been made within the time specified in Section 196 of the Code of Civil Procedure. Although Learned Counsel for the Plaintiff has, in his affidavit in support of the application sworn to facts establishing his absence on 3 December 2001 due to medical reasons, it is apparent from the order of the Court that the case was dismissed on the basis that the Plaintiff had not prosecuted the case with due diligence.

Mr Pardiwalla, Learned Counsel for the Defendant submitted that on several previous occasions, the Plaintiff had failed to attend Court despite her Counsel being present. This submission is not borne out by the record of proceedings. After the pleadings were closed, the first trial date was 4th December 2000. On that day the adjournment was granted to 31 May 2001 by mutual agreement. No reasons were adduced to Court. On 31 May 2001, it was disclosed that the representative who was to testify on behalf of the Plaintiff had missed his connecting flight from Moscow. Mr Ally in his affidavit avers that he was admitted to hospital on 2 December 2001 (as is evident from the medical certificate filed) and that he informed a representative of the Plaintiff that he would not be able to appear in Court the next day and that hence there was no necessity for either the Plaintiff or any representative to attend Court. He also informed his employer in the Law Chambers, Mr Francis Chang Sam, to stand in for him and make an application of an adjournment. Admittedly, Mr Pardiwalla was also informed of these developments through Mr Vidot of his Chambers before he attend Court. It was perhaps for this reason that Mr Pardiwalla did not seek a dismissal of the case due to the absence of Mr Ally.

In civil proceedings, a plaint can be dismissed for want of prosecution only under Section 186 of the Code of Civil Procedure, which provides that:

> All causes and matters are extinguished for want of prosecution when no proceeding has been taken therein during three years.

If however, the parties default appearance, or their witnesses absent themselves on trial dates for good cause or otherwise, the opposing party is invariably compensated with an order for costs. In terms of Section 133 of the Code of Civil Procedure it is only when the parties and their lawyers default appearance on a trial day without sufficiently

excusing their absence, that the Court would Act in terms of either of the provisions in Sections 64, 65 and 67 and either dismiss the case or fix the case for ex parte hearing.

In the recent case of *Walter Constance v Roy Change-Fane* (SCA No 9 of 2002) (decided on 20 December 2002), Counsel for the Defendant had proceeded abroad, instructing another Counsel to appear on a trial date and seek an adjournment. However neither that Counsel nor the Defendants were present in Court, and the Court entered ex parte judgment in favour of the Plaintiff. Like in the present case, Counsel for the Plaintiff-Respondent stressed before the Court of Appeal that although Counsel for the Defendant-Appellant had a valid excuse, the Defendant ought to have been present in Court.

The Court of Appeal, on a consideration of the totality of the circumstances ordered a trial de novo.

As was held in the cases of *Naiken v Pillay* (1968 SLR 101 l *Morel v Hoareau* (1971) SLR 127), as a general principle, a new trial under Sec L94(c) ought not to be granted except in very special circumstances. In the cas *Naiken* (supra) Sir Campbell Wylie CJ stated that principles of natural justice requ at a (party) should have reasonable opportunity to be heard and, in the case of compliance by him with a Rule of procedure, he should not be deprived of that ortunity, unless his behaviour, or the nature of the defence or (the cause of act ndicates that he is making an abusive use of Court procedure.

Mr Pardiwalla contended that the instant application for a ne was incompetent, and that the Plaintiff ought to have filed an Appeal against the al of the trial Judge to grant an adjournment. Mr Ally cited the case of *Cedric Peti arghita Bonte* (SCA no 9 of 1999) where an action was dismissed when both the P ff and her Counsel were absent. The trial Judge entertained an application under ion 69 of the Code of Civil Procedure and set aside the order of dismissal. Howeve ppeal, the Court of Appeal held that in these circumstances, an application under S n 69 was improper and that, the proper course was the filing of an application unc ection 194(4) of the Code of Civil Procedure.

The present Plaintiff has therefore followed that ruling. The o onsideration that is relevant now is whether there are special circumstances in the nt matter to grant a new trial. As I stated earlier, no order has been made in the ter claim, which is based on matters arising out of the subject matter of the main a . Further the Court accepts the averments in the affidavit of Mr Ally that he had tak necessary steps to inform Counsel for the Defendant of the application for an urnment and also informed the representative of the Plaintiff not to attend Cour that day. In these circumstances, the order of Court granting the final adjourn on 31 May 2001, cannot be construed as a rigid and inflexible order which is cable whatever the circumstances may be. Hence on a consideration of the circ ances in the case, lack of diligence cannot be ascribed to the Plaintiff. Further o onsideration of the

seriousness of the cause of action in the case, I order a new trial under Section 194(c) on the ground that a trial is necessary "for the ends of justice". The Defendant will be entitled to the costs of 3 December 2001.

There will however be no order for costs in respect of the instant application.

Record: Civil Side No 41 of 1999