Georges v Georges
(2004) SLR 76

Frank ELIZABETH for the Plaintiff
Wilby LUCAS for the Defendant

Ruling delivered on 14 October 2004 by:

KARUNAKARAN J: This is an application for a new trial bı t by the Defendant under section 194(c) of the Seychelles Code of Civil Procedure h reads thus:

> A new trial may be granted on the application of eithe / to the suit, when it appears to the Court to be necessary for the end ıstice.

The background facts of the case are the following.

At all material times, the Plaintiff and the Defendant were hus and wife but were living apart. By a plaint dated 7 May 2002, the Plaintiff (the w ıstituted the instant suit claiming a sum of R45,000 from the Defendant (the hus) on the ground of unjust enrichment, alleging that she had contributed this sum tc s the purchase of a motor vehicle, a car, which now remains in Defendant's contro possession having been registered in his name. The suit was filed on 8 May . The original suit-summons was duly served on the Defendant to appear a itting of the Court appointed to be held on 24 September 2002. Before the ap d date the Plaintiff filed a motion dated 6 June 2002 seeking an order for an urge ıring of the suit and for an interim injunction directing the Defendant to hand over th d car to the Plaintiff pending the final determination of the suit. Notice of that motio duly served on the Defendant informing him of the hearing to be held on 29 Augu 02. The Defendant retained Ms. Nicole Esparon, an attorney-at-law to appear e the Court as his counsel in the suit. Ms. Esparon accordingly, put up appeara on 29 August 2002 and sought an adjournment of the case, stating that the disp etween the parties was likely to be settled amicably, out of Court. The Cou refore, granted an adjournment and set the case to be mentioned on the 24 Sept r 2002 for report as to settlement, if any by then. In the meantime, the Defendant's sel Ms. Esparon left the Republic having handed over the brief to another legal pı oner Mr. W. Lucas. According to the Defendant, his counsel Ms. Esparon did inform him of her departure or of her decision to transfer the brief to Mr. Lucas. viously, without any instruction from the Defendant, Mr. Lucas put up appearance in Court on the 24 September 2002 on behalf of the Defendant and proceeded to have the hearing of the suit fixed for 5 March 2003. At this juncture, I should mention that the pleadings were not even complete by then. In fact, the Defendant had not filed his statement of defence, when both counsel jointly applied to the Court for a hearing date. I should pause here to observe that counsel owes a duty not only to his client to have the hearing of the case fixed at the earliest date possible to avoid undue delay, but also owes a duty to the Court in that, the counsel ought to ensure that the pleadings are

complete before he or she applies to the Court for a hearing , so as to save its precious time against unnecessary adjournments being soug the last minute on technical grounds. Be that as it may. On the 5 March 2003, e eleventh hour as and when the case came up before the Court for hearing, M icas appeared and informed the Court thus (in verbatim):

> My Lord, in September last year I was still standing in for M sparon. I have never met the client until today. I am not competent to proc with the hearing today because I have no instructions whatsoever. I ne o ask leave to withdraw from this case.

Therefore, the Court granted leave for Mr. Lucas to withdraw pearance from the case. Mr. Elizabeth, learned counsel for the Plaintiff swiftly app or leave to proceed ex parte against the Defendant and hear the case the same d However, the Court declined to hear the case the same day and made the following :

> We should be fair and give notice to the Defendant. Ex pa earing will only be allowed after due notice has been served on the De ant. Since the Defendant is absent, I grant leave for the Plaintiff to proc ex parte on 30 March 2003 at 1.45 p.m. However, the Defendant should b fied of the date as well as of the order for an ex parte hearing.

On the day appointed for hearing, the Defendant was not pres nd the Plaintiff was allowed to adduce evidence. On the strength of the untes evidence the Court proceeded to give ex parte judgment for the Plaintiff in the abs of the Defendant. I should also note here that despites Court's order, no notic been sent to the Defendant informing him of the ex parte hearing presumably, to inadvertence on the part of the Registry.

In the circumstances, the Defendant has now come before tl ourt for a new trial within the statutory period of three months from the date of t dgment in terms of section 196 (b) of the Seychelles Code of Civil Procedure.

I diligently perused the entire record of proceedings and the affi filed by the parties in support of and opposing the motion. I gave due consideration to the submissions made by the counsel on both sides. Firstly, I note that the circumstances, which led to an ex parte hearing in this matter, were not within the knowledge and control of the Defendant nor was he responsible for the change of counsel that took place behind his back. It is unfortunate to note that the counsel, whom the Defendant had originally retained for services, failed in her ethical duty as she has left the Republic without handing over the case file to her client and more so she did not even inform him or even the Court for that matter, of her departure from the jurisdiction. This has obviously resulted in an ex parte judgment being entered against the Defendant, for no fault of his own. In considering the ethical duty of a legal practitioner nothing is more important than protecting the interest of his or her client. However, in passing, I would like to remind the members of the Bar that the threefold duties of a practitioner in a civil case is

set out with admirable clarity in the speech of Lord Reid in the renowned case of *Rondel v Worsley* [1967] 3 All ER (HL) at 998 and 999 thus:

> Every counsel has a duty to his client fearlessly to raise every issue, advance every argument, and ask every question, however distasteful, which he thinks will help his client's case. As an officer of the Court concerned in the administration of justice, he has an overriding duty to the Court, to the standards of his profession, and to the public, which may and often does lead to a conflict with his client's wishes or with what the client thinks are his personal interests (emphasis added).

Coming back to the present case, as rightly held in *Naiken v Pillay* (1968) the principles of natural justice require that a Defendant should have reasonable opportunity to be heard, and in the case of non-compliance by him with a rule of procedure, he should not be deprived of that opportunity, unless his behaviour, or the nature of the defence he is endeavouring to put forward, indicates that he is making an abusive use of Court procedure, or that he has no material ground of defence.

Applying the same yardstick to the facts of the instant case, I find that the principles of natural justice – audi alteram partem – dictate that the Defendant should be given a reasonable opportunity to be heard on his defence in this matter. Obviously, the Defendant's behaviour does not indicate that he is making an abusive use of the Court procedure in this matter.

In view of all the above, I hereby set aside the ex parte judgment dated 31 March 2003 entered in favour of the Plaintiff in this case and order a new trial as it appears to be necessary for the ends of justice. Hence, I allow the Defendant to file his statement of defence so that the case may proceed on the merits. However, I order the Defendant to pay to the Plaintiff the costs, which the latter has so far incurred in this matter.
The application for new trial is accordingly, granted.

Record: Civil Side No 101 of 2002