

IN THE SUPREME COURT OF SEYCHELLES

Pamela Philo

Executor of the Estate of the Late

Lawson Philo of House 29, St. Ange Estate,

Takamaka, Mahé

Plaintiff

Vs

Marie-May Philoe

of Baie Ste Anne, Praslin

Defendant

Civil Side No: 126

of 2006

Mr. Frank D R Ally for the plaintiff

Mr. C. Lucas for the defendant

D. Karunakaran, J.

JUDGMENT

This is an action in tort. The plaintiff, in her capacity as executrix to the estate of the late Lawson Philo - hereinafter called the deceased - claims the sum of R 49,500/- from the defendant for loss and damage, which the deceased suffered, as a result of an alleged fraudulent act of the defendant. On the other side, the defendant denies the plaintiff's claim in entirety and contends that she never committed any fraudulent act against the deceased nor did she cause any loss or damage to him.

It is not in dispute that the plaintiff is the executrix to the estate of the deceased, one late Lawson Philo, who died intestate in Seychelles on 27th November 2005. In fact, the executrix herein is the daughter, whereas the defendant herein is the sister of the deceased. According to the plaintiff, in August 2005, the deceased received a cheque in the sum of SR 87,507.36 from the Government of Seychelles as gratuity payment for his past employment with the Government. Since the deceased was sick and had been hospitalised during that period, he gave that cheque to the defendant requesting her to deposit the same into Barclay's Bank account No: 4509428, held in the joint names of the deceased and the defendant.

On the 30th August 2005, the defendant admittedly, received the cheque from the defendant and deposited the same in the said joint-account. According to the plaintiff, the defendant subsequently in the month of September 2005, withdrew SR 37,500/- and again on 26th September 2005 withdrew SR2000/- from the said joint-account. According to the plaintiff, the defendant made those withdrawals totalling Rs39, 500/- fraudulently and without the knowledge, permission or authority of the deceased. Subsequently, when the deceased came to know about the fraudulent withdrawals, he requested the defendant to return the moneys withdrawn. The defendant however, evaded and refused to do so. Hence,

the deceased sought legal advice from his Attorney Mr. F. Ally and instructed him to issue a letter of demand dated 28th October 2005 - in exhibit P3 - to the defendant. In reply, the defendant wrote a letter dated 10th November 2005 - in exhibit P4 - to the plaintiff's Attorney stating that the plaintiff was indebted to her in the said sum of Rs39, 500/- for services she rendered to him during his 48 months' stay with her. In consideration of the said services, the plaintiff agreed to pay to the defendant from that gratuity payment. Hence, the defendant took part of the money realised from the cheque and returned the balance to him. However, the plaintiff claims that there was no such agreement between the parties for any service charges and the withdrawals were made by the defendant fraudulently. Consequently, the plaintiff claims that the deceased suffered loss and damage as follows:

- | | | |
|------|------------------------------|-------------|
| (i) | Money withdrawn fraudulently | SR 39,500/- |
| (ii) | Moral damage for the fraud | SR 10,000/- |

Total **SR 49,500/-**

Marie Pamela Philo (PW1), the first daughter and executor to the estate of the deceased testified that her father, the deceased was 76 years old, when he died in November 2005. In August 2005, he was suffering from a terminal illness and had been admitted in hospital. According to her, during his hospitalization the deceased received that cheque and gave it to the defendant requesting her to deposit the same in his account. But, the defendant after depositing the cheque in the bank account tricked him and withdrew the sum of SR 39,500/- from the proceeds of the cheque fraudulently, without the deceased's knowledge and authority. When the deceased came to know about the fraudulent withdrawals he called the defendant to come and see him at the hospital. However, the defendant ignored his calls and did not go to the hospital to see him. Subsequently, the deceased decided to take legal action against the defendant for the recovery of the sums. The deceased wrote several letters of demand to the defendant through his Attorney Mr. Frank Ally, requesting the defendant to refund the sum she had withdrawn from the bank account. In fact, PW1 testified that since the deceased was bedridden at the material time, Mr. Ally had to go to see him at the hospital in order to take instructions from him. Besides, PW1 produced the copies of those letters of demand, which

were admitted in evidence as exhibits P2-P5. According to PW1, all the said letters of demand sent by Attorney Mr. Ally were based on the instructions, which the Attorney received directly from the deceased, who was then sick and bedridden at the hospital. Moreover, PW1 testified that there was no agreement between the deceased and the defendant for the sharing of the gratuity for any reason whatsoever. Further PW1 testified that the deceased was first staying at the District Social Centre in Praslin and sometimes used to go to the defendant's house to eat and drink. However, according to PW1 there was no agreement between her deceased father and the defendant for the sharing of the gratuity payment. PW2 Lorna Philo, the second daughter of the deceased also testified for the plaintiff corroborating the evidence of PW1 on all material particulars. According to PW2, at the request of her father she approached the Attorney Mr. Ally, and requested him to go the hospital in order to take instructions from her ailing father. Moreover, she stated that she was present at the hospital, when her bedridden father gave instructions to the Attorney to institute legal action for the recovery of the money from the defendant. In the circumstances, the plaintiff claims that the defendant has fraudulently withdrawn the money from the plaintiffs account and so prays this Court for a judgment ordering the defendant to pay the sum of **SR 49,500/-** to the plaintiff with interest on the said sum at the commercial rate from the 28th October 2005 plus costs of this action.

On the other side, the defendant denied any fraudulent act on her part. She has averred in her statement of defence that the deceased was an alcoholic and stayed with her for the last 4 years of his life. Throughout his stay she cared for him, maintained him without any financial assistance from any of the children or other relatives of the deceased. According to the defendant, she was the one who attended to each and every step for the application, processing, and approval of the gratuity payment in the sum of SR 87,507.36 the deceased received from the Government of Seychelles. The deceased only appended his signature to the documents. The defendant paid for all costs including travel for that process of obtaining the gratuity from the Government. According to the defendant, it took about 3 years to obtain the gratuity and it was agreed between the deceased and the defendant that they would share whatever proceeds received equally between the two of them. A joint bank account was therefore, opened with Barclays Bank to deposit the cheque and thereafter to share/apportion the

entitlement of each party drawing from the account itself.

According to the defendant, the cheque in the sum of SR87, 507.36 was deposited into the account as per agreement and instruction. Until August 2005, no deposits had been made into the account as it was the mutual intention of the parties to operate the account in the manner they had agreed. Both the deceased and the defendant carried out disbursement of the cheque as per the terms of the agreement. Of the sum received from the Government the defendant was entitled to SR43, 753.68. According to the defendant, she and the deceased had mutually agreed that whatever sum she ultimately receives from plaintiff that would be considered as his contribution for his stay and upkeep at her premises.

The Defendant has further averred in her statement of defence that in September 2005 she withdrew funds from the account in exercise of her right and pursuant to the agreement she had with the deceased. In any event the sums withdrawn did not exceed her entitlement of half of the proceeds of the cheque. The Defendant in her statement of defence although has admitted receipt of the letter dated 29th September 2005 in exhibit P 7 purporting to be instructions from the deceased when such transactions had already been attended to by the latter on a date prior to that letter. The Defendant further averred that the letter was a sham calculated as a "mise en demeure" by the Plaintiff to prosecute this instant suit.

The defendant has further averred that the deceased who was terminally sick with cancer was removed from the hospital and placed at Mont Plaisir, Praslin where the defendant no longer had access to him until he passed away, save for the 28th September 2005 when the deceased, his daughter Lorna Philo -PW2 - and defendant attended the Bank for her to close the account and remit the balance SR 47,997/- to Lorna. This was done under threats, blackmail, insults in public by Lorna and out of disgust for the repugnant attitude of the deceased's children who after 30th August 2005

saw it fit to take care of their father only after he received a large sum of money.

According to the Defendant that none of the deceased's children attended to him during the last four years of his life when he had no home, was a drunkard and terminally ill with cancer until they discovered of the money he received. Further the defendant testified that she refused to accept two of the letters sent by the plaintiff's Attorney as her name had been wrongly spelt on the address of those letters. In the circumstances, the defendant contents that the children of the deceased have failed to appreciate the agreement between the deceased and the defendant that the defendant would take half of the said gratuity amount since the defendant had throughout the years maintained him.

Having sieved through the entire pleadings, evidence including all the exhibits on record, and having considered the submissions made by counsel on both sides, it seems to me, the following are the fundamental questions that arise for determination in this matter:

1. *Was there any agreement between the deceased and the defendant to share equally the gratuity amount Rs 87,507.36, which sum the deceased received from his past employer?*

Did the defendant withdraw the sum Rs39, 500/- from the joint bank account of the parties in terms and pursuance of the said agreement? Or Did the defendant withdraw that sum fraudulently without the knowledge, consent and authority of the deceased?

If so, is the plaintiff entitled to recover the sum from the defendant with moral damages payable, if any for such fraudulent act?

I will now proceed to find answers to the above questions in seriatim as they appear above, in the light of the evidence on record and the law applicable to the issues.

Question No: 1& 2

As regards the issue as to *the alleged agreement raised by the defendant*

for the sharing of the gratuity amount, it is obvious that the evidential burden of proving the existence of such agreement lies on the defendant in terms of Article 1315 of the Civil Code, as it clearly states that a person who claims to have been released shall be bound to prove the payment or performance or the fact, which has extinguished his/her obligation. The defendant in this matter has admittedly withdrawn the sum Rs39, 500/- that belonged to the plaintiff from his bank account. Hence, the defendant has the burden to adduce evidence in order to prove- on a balance of probabilities - the existence of that agreement which claims to have extinguished her obligation to repay the said sum to the plaintiff. Although as a rule no oral evidence is admissible to prove any matter the value of which exceeds 5000 Rupees, as rightly submitted by Mr. Lucas, learned counsel for the defendant, since the plaintiff and defendant are related by blood - being brother and sister respectively - there is a moral impossibility on the part of the defendant to obtain a written-proof of the alleged obligation contracted towards her brother. Hence, I find that it is permissible for the defendant in this matter to adduce oral evidence so as to prove the alleged agreement. However, such evidence should be credible, strong and sufficient enough for the Court to find on a balance probability that the alleged agreement did exist between the parties. First of all, on the question of credibility of the witnesses, this Court had the opportunity of observing the demeanour and deportment of all the witnesses particularly, the defendant, whilst she gave evidence on personal answers as well as testified under oath. The defendant in my assessment did not appeal to me as a credible witness, in that when she testified that there was an agreement for sharing the gratuity amount equally between the parties. It may be true that she could have incurred some expenses, when the plaintiff was staying with her for a couple of years. This simple fact cannot create any legal obligation contractual or otherwise save a moral one, on the part of the deceased to compensate the defendant for those expenses. Indeed, the defendant did not adduce any concrete evidence with specificity as to when, where and how that alleged agreement was concluded and what specific terms were agreed upon. Although the defendant testified that the agreement was to share the amount equally, the evidence reveals that she has withdrawn the money from the bank account on two occasions, two different amounts namely, Rs 37,500/- on the first occasion and Rs2000/- on the second occasion. These two figures neither individually nor in total constitute half of the gratuity amount as per the terms of the alleged agreement as claimed by the defendant. Had there been any truth in equal sharing, it is inexplicable what prevented the defendant from withdrawing her half-share, when she decided to take away her alleged share and withdrew relatively a larger sum at first instance from the bank account. Had there been any truth in the alleged agreement for equal sharing and genuine withdrawals of the money, what prevented defendant - if she had been honest in her dealings - from meeting the deceased at the hospital, and asking him about the letter of demand, his Attorney had issued on his behalf. In any event, had there been any truth in the alleged agreement for equal sharing, what prevented the defendant from disclosing or pleading this material fact in her reply - in exhibit P4 - when she indeed, had the earliest opportunity to refute the allegation of fraudulent withdrawals. In the circumstances, to my mind the

evidence on record does not seem to be credible, strong and sufficient enough for the Court to find on the balance probability that the alleged agreement did exist between the parties as portrayed by the defendant. In my judgment, the defendant has thus failed to discharge her evidential burden of proving the existence of the alleged agreement for the sharing of the gratuity amount equally or otherwise. Hence, I find answers to questions 1 and 2 above respectively, in the negative as follows:

1. *There was no agreement between the deceased and the defendant to share equally or otherwise the gratuity amount Rs 87,507.36, the deceased received from his past employer and in any event, there is no evidence in the eye of law for the Court to find otherwise.*
2. *The defendant withdrew the sum Rs39, 500/- from the joint bank account of the parties, not by virtue or in pursuance of any agreement between the parties and she did so - to say the least - without the deceased's knowledge or authority.*

Question No: 3 & 4

Admittedly, the defendant has made the first withdrawal of cash in the sum of Rs37, 500/- from the bank on 1st September 2005 that is, the very next day following the deposit of the cheque in the joint account. Given the fact that the said bank account had been held in the joint name of the parties, any prudent account-holder in the normal circumstances, in my view, would not rush to the bank the very next day in order to withdraw cash in the sum of Rs37, 500/- unless an immediate need arose for such a huge sum in cash to meet out an urgent expense. In any event, the defendant in this particular case did not give any reason, why she had to do that so swiftly, even before the deceased came to know about the realisation of the cheque deposited in his bank account. In the absence of any evidence to show such reason, and having regard to the entire circumstances surrounding the withdrawals of those sums, the Court is entitled to presume that the defendant did so only with the fraudulent intent in order to prevent the deceased from realising the fruits of the cheque deposited in his bank account. Obviously, the defendant made those withdrawals without the knowledge or consent or authority of the deceased, whilst he was bedridden in hospital and so I find. Accordingly, I find answers to questions 3 and 4 above, in the affirmative as follows:

3. *Yes; the defendant did withdraw those sums fraudulently without the knowledge, consent and authority of the deceased.*

Consequently, the plaintiff is entitled to recover the entire sum Rs39, 500/- from the defendant with moral damages for such fraudulent act.

However, the quantum claimed by the plaintiff in the sum of Rs10, 000/- for moral damage is not substantiated by evidence. The figure claimed also appears to be highly exaggerated and unreasonable in the surrounding circumstances of the case. Moreover, I note, the defendant being the sister of the deceased, has been caring for him during the evening of his life. Having taken all relevant facts and circumstances into account, I award a nominal sum of Rs500/- to the plaintiff as moral damages.

In view of all the above, and for the reasons stated hereinbefore, I enter judgment for the plaintiff and against the defendant in the sum of Rs40, 000/- And, I make no order as to costs.

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D. Karunakaran

Judge

Dated this 29th day of January, 2009