IN THE SUPREME COURT OF SEYCHELLES

Film Anstalt

Represented by Mr. Charles Lucas **Plaintiff/Applicant**

Vs

Francis Gill and 7 others

Defendant/Respondents

Civil Side No: 182 of 2000

Mr. B. Georges for the plaintiff

Mr. C. Lablache for the 1st defendant
Mr. F. Bonte for the 2nd, 3rd, 4th, 5th, 6th and 7th defendants
Mr. P. Pardiwalla for the 8th defendant

D. Karunakaran, J

RULING

The plaintiff-company in this matter, entered a plaint dated 20th July 2000, seeking the Court for a declaration that it is the owner of certain immovable properties situated in Praslin. All eight defendants fervently, contest the plaintiff's claim and seek a dismissal of the suit.

At the outset, one cannot ignore the fact that this matter has been procrastinated for the past nine years in Court; obviously, due to various factors including judicial delay, which I should confess on the part of the Court since an expatriate Judge (Juddoo, J.) who had partly heard the case in 2004, suddenly left the jurisdiction for good before completing his contractual tenure. This necessitated the Court to rehear the whole case *de novo* and the duplication of work in this respect has indeed, added unnecessary overload to the already accumulated delay, which we have inherited over a decade primarily, due to shortage of judges, supportive

staff and above all the snail's pace with which we move ahead in modernising our judiciary with technology in order to advance and match with that of the rest of the world. Be that as it may, on the 19th November 2007, this matter had been listed before this Court for mention at 9 a. m for the purpose of fixing a hearing-date in consultation with all counsel concerned. At around 9 a. m, when the case was called in Court, counsel for all defendants were in attendance. However, on the other side the plaintiff had no representation nor its counsel Mr. B. Georges was present. Besides, the case-file had also been misplaced and was not traceable that time for the Court to ascertain the position from the record of the previous sittings. In that cloudy circumstances, Mr. Lablache (learned counsel for the 1st Defendant), Mr. F. Bonte (learned counsel for the 2nd, 3rd, 4th, 5th, 6th, and 7th defendants) and Mr. Pardiwalla (learned counsel for the 8th Defendant), jointly moved the Court for an order of dismissal of the case due to non-appearance of the plaintiff or its counsel. The Court accordingly, granted the joint-motion of the defendants and dismissed the suit with costs. Soon after, counsel for the defendants left the courtroom with unusual swiftness for reasons best known to them only. A couple of minutes later in the same session, Mr. B. Georges, learned counsel for the plaintiff, appeared in Court, apologised for his late attendance. According to him, he had been in attendance at this Court earlier in the same morning. However, the Court had not resumed sitting then. Therefore, he had gone to attend the other Court presided by Gaswaga, J. in order to take-up another mention before him. Having thus given his explanation, Mr. B. Georges orally moved the Court for an order to set aside the said dismissal order made in his absence and urged the Court to reinstate the case to the list in the interest of justice. Since all counsel for the defendants had already left the session, the Court could not then entertain his motion without giving due notice to the other parties. Hence, the Court advised Mr. Georges to file a proper motion in writing with notice to others. Accordingly, he has now filed the instant motion dated

27th of March 2008 with an affidavit of facts in support, showing those reasons for his late attendance in Court on that particular morning. Accordingly, he now seeks the Court to allow the motion, set aside the order of dismissal and reinstate the case to the list to be heard on the merits. On the other side, all counsel for the defendants vehemently resist the motion and urge the court to uphold the said order of dismissal in this matter.

I diligently perused the affidavits, and other relevant documents filed by counsel on both sides. I carefully analysed the written submissions filed by counsel for and against the instant motion. I meticulously went through the relevant provisions of law. As I see it, the contention of the parties in essence, raises the following questions for determination in the present motion.

1. *Is the plaintiff in this matter entitled to invoke Section 69 of the Seychelles Code of Civil Procedure for the remedy of setting aside the said dismissal order? Or*

2. *Is the plaintiff entitled to invoke Section 194 (c) of the Seychelles Code of Civil Procedure for the remedy of a new trial in this matter? If not;*

3. *Is the plaintiff entitled to invoke any other provision of law for the remedy in the interest of justice? and*

4. *Is it reasonable and relevant for the Court to consider the case history, the repeated change of counsel, the delay and the chances of success of the plaintiff's claim, in the determination of the instant motion?*

As regards the first question, I quite agree with the submissions of the defendants' counsel relying on the judgment of the Court of Appeal *in Cedric Petit Vs. Marghita Bonte - Civil Appeal No: 9 of 1999*, and that of the Supreme Court in *Biancardi Vs. Electronic Alarm Case No: 31 SLR, 1975 wherein* it has been held clearly that Section 69 is of limited application. This Section does not apply to non-appearance at an adjourned hearing or mention but is limited only to non-appearance of a party on the day fixed in the summons served after a plaint is filed. This Section reads as follows:

> "If in any case where one ***party does not appear*** *on the day fixed in the summons, judgment has been given by the court, the party against whom judgment has been given may apply to the court to set it aside by motion made within one month after the date of the judgment if the case has been dismissed, or within one month after execution has been effected if judgment has been given against the defendant, and if he satisfies the court that the summons was not duly served or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the court shall set aside the judgment upon such terms as to costs, payment into court or otherwise as it thinks fit and shall order the suit to be restored to the list of cases for hearing. Notice of such motion shall be given to the other side"*

Evidently, the case on hand does not fall under Section 69, since it was dismissed on the day of mention, not on the day fixed in the summons or

for hearing. Therefore, I find that the plaintiff in this matter is not entitled to invoke Section 69 of the Seychelles Code of Civil Procedure for the remedy of setting aside the said dismissal order.

Regarding the second question, with due respect, I beg to differ with the submissions of the defendants' counsel stating that it is open for the plaintiff in the instant case to apply for a new trial, relying on the judgment of the Court of Appeal *in Cedric Petit and* in *Biancardi* cited supra. It is correct that the Courts in both cases have held that if a party aggrieved by an ex parte judgment could not invoke Section 69, then it is open for the party, to invoke Section 194 (c) of the Seychelles Code of Civil Procedure and apply for a new trial. In fact, Sections 194 to 198 under the title "New Trial" read - in entirety - as follows:

194. **A new trial** may be granted on the application of either party to the suit -

(a) where fraud or violence has been employed or **documents** subsequently discovered to be forged have been made use of by the opposite party;

(b) when new and important matter or **evidence,** which after the exercise of due diligence was not within the knowledge of the applicant or could not be produced by him at the hearing of the suit, has since been discovered or become available;

(c) when it appears to the court to be necessary for the ends of justice.

195. Application **for a new trial** shall be made by petition supported by an affidavit of the facts, and shall be

served on the opposite party in the same manner and subject to the same rules as to time for appearance as in the case of plaints.

198. The court may grant an order **for a new trial** on such terms, if any, as to costs and finding of security for the amount **for which judgment was given at the first trial,** or such other terms as to the court may seem fit.

If one would carefully peruse all Sections of law in the Code of Civil Procedure pertaining to ***"new trial"***, it is so plain and evident that there is a common thread which passes through all sections thereunder. That is the use of the term **"new trial"** and its cognate terms such as "judgment of the first trial", documents, evidence etc. Undoubtedly, the repeated use of the term **"new trial"** throughout those sections presupposes the fact that there should have been a previous or first trial, in which the impugned decision or judgment should have been given by the first trial Court. Only then, a party aggrieved by that trial would be able apply for a new trial. Therefore, if the aggrieved party intends to annul any decision of the first trial, he may seek a new trial by invoking section 194 (c) supra, provided the impugned decision or judgment therein should satisfy three conditions in law, namely:

(1) *The impugned decision or judgment should have resulted from a trial previously held by the Court;*

(2) *Such decision or judgment should relate to the subject matter of the suit; and*

(3) *Quashing the previous decision or judgment and granting a new trial in such cases, should appear to the court to be necessary for the ends of justice*

I will now, move on to the case on hand. It is evident that the ex parte order in dispute was made by the Court for non-appearance of the plaintiff. The Court did not hold any trial for making that order. In other words, the impugned order did not result from any trial previously held by the Court. The order was made simply on procedural technicality due to non-appearance of a party, not based on any issue relating to the subject matter of the suit. Moreover, the question of a new or second trial does not arise at all in the instant case, since there had been no trial at first place. In the circumstances, I find that the plaintiff does not satisfy any of the three conditions mentioned supra. Hence, I conclude that the plaintiff in the instant case is not entitled to invoke Section 194 (c) of the Seychelles Code of Civil Procedure for the remedy of a new trial in this matter.

In view of all the above, it is apparent that a plaintiff, who is aggrieved by *an ex parte order of dismissal* of his plaint, due to non-appearance and/or late appearance of his counsel in court on a mention day, has no legal remedy at all in the Code of Civil Procedure for setting aside that exparte order or judgment dismissing the plaint. Strictly speaking, in this

particular case, the plaintiff's counsel did not default appearance in Court on the day in question. He did appear and was in attendance in Court but he was simply late by few minutes. In the intervening period, his case was called and dismissed, due to procedural technicality, which the defendants' counsel religiously invoked in their favour.

As I see it, there is a world of difference between **"*non-appearance* of a party in Court on the appointed day for hearing"** and **"late-appearance of a party at the same session of the Court on the appointed day for mention".** Thus, the difference between these two scenarios is vital not formal; it is to be gathered not simply by reading the words from the provisions of law in Section 69 or 194 (c) of the Procedure Code pertaining to ex parte judgments or new trial, but by considering the entire facts and circumstances peculiar to the particular case, in which such an ex parte order was made.

A strict constructionist, who goes by the letter of the procedural law and technicality, would insist that if a counsel is not punctual and present in Court at the time his case is called for mention, the Court ought to dismiss it for non-appearance. For a strict constructionist it does not matter, whether the counsel for the other side could be late by a couple of minutes or might even be changing and hurrying up from the cloakroom. But, what matters for him is the technical interpretation of the words used in Section 63-69 of the SCCP namely, *"a party does not appear"* and its strict adherence to procure quick justice by abrupt disposal of the case. Therefore, he insists that the Court is bound to apply the provisions of the Procedure Code and make an *ex parte order* giving a strict interpretation to those words. Alas! It is the approach of those who adopt the strict literal and grammatical construction of the words, heedless of the consequences that may lead to injustice and unfairness to the other side. They presume that the judges have their hands tied by the words of the statute. Faced with glaring injustice, judges are seen to

be impotent, incapable and sterile and ought to apply the strict literal interpretation of the words appear in the statute and make ex parte orders, when justice indeed, demands otherwise. Not so with us in this Court. The literal approach is certainly, out of date. It has been replaced by the purposive approach, which Lord Diplock described in *Kammins Vs. Zenith Investment Ltd. [1971] AC 850 at 881*. In all cases now, in the interpretation of the words namely, "a party does not appear" used in Section 63-69 of the CCP, the Courts should take the purposive approach and adopt such a construction that would accord with reasoning and justice taking into account the vital difference between **"*non-appearance* for hearing"** and **"late-appearance for mention".**

Having said that, as I have found supra the plaintiff in this matter obviously, has no sufficient legal remedy under the Procedure Code. Needless to say, lack or absence of legal remedy has given rise to an absurd and unjust situation to the detriment of the plaintiff's interest. In such circumstances, it goes without saying that the plaintiff is *entitled to invoke the equitable jurisdiction of the Court in terms of Section 6 of the Courts Act for a suitable remedy in the interest of justice.* This Section reads thus:

> "The supreme Court shall continue to be a Court of Equity and is hereby vested with powers, authority, and jurisdiction to administer justice and to do all acts for the due execution of such equitable jurisdiction in all cases where no sufficient legal remedy is provided by the law of Seychelles"

Before I conclude, I should state that it is neither reasonable nor relevant for the Court to consider the case history, the repeated change of counsel, the delay and the chances of success of the plaintiff's claim, in the determination of the instant motion. The submissions made by counsel for the defendants touching on those issues did not appeal to me in the least, since it is wrong and *ultra petita* for the Court to consider matters

extraneous to the merits of the instant motion.

In the final analysis, having regard to all the circumstances of the case, I conclude that it is just and necessary to set aside the ex parte order dated 19th November 2007, made by the Court dismissing the plaint in this matter. *Procedural laws should be steered towards the administration justice rather than the administration of the letter of the law.* With this thought, I allow the motion. The suit is therefore, reinstated to the list for a hearing on the merits. I make no order as to costs.

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D. Karunakaran
Judge

Dated this 6th day of July, 2009