

IN THE SUPREME COURT OF SEYCHELLES

Marie-France
Plaintiff

Verlaque

Vs.

Seychelles International Mercantile

Banking Corporation (Nouvobanq)

(Herein represented by its Managing Director

Mr. Ahmed Saeed of Victoria, Mahé)
Defendant

Civil Side No.211 of 2003

Mr. W. Lucas for the plaintiff

Mr. K. B. Shah for the Defendant

D. Karunakaran, J.

JUDGMENT

The plaintiff in this action, Mrs. Marie-France Verlaque is an ex- employee of the defendant-Nouvobanq, the successor and assignee of the former Standard Chartered Bank of Seychelles. The plaintiff joined service on the 17th September 1974 as a clerk with the Standard Chartered Bank and thereafter continued her **pensionable service** with the defendant-bank until she took an early retirement from employment on 26th February 2003. By virtue and in pursuance of her employment with the defendant, the plaintiff had been admitted to membership of the Pension Fiduciary Fund, a Pension Scheme managed by the Fiduciaries. Being an employed-member of the said Pension Fund, undisputedly, the plaintiff was eligible to all benefits, rights and entitlements upon her retirement from service as are stipulated in the Rules of the said Pension Scheme, hereinafter called the "Pension Rules" vide exhibit P 10. Be that as it may, in 2003, the plaintiff had reached the age of 50 and had then completed 28 years of continuous service with the bank. She wanted to take an early retirement due to her health reasons. Therefore, she wrote a letter dated 25th January 2003 - exhibit P3 - to her employer, the defendant to consider her for an early retirement. This letter reads - in verbatim - thus:

"The Managing Director

Nouvobanq

Victoria.

Dear Sir.

*As I have **reached over the age of 50** and completed **more than 25 years of service** and **due to my health, to be considered for early retirement from your employment** effective 25th January 2003 so as to have my last day of work on the 25th February 2003.*

I would wish by that time all my due benefits have been sorted out.

As regards to my housing loan I wish to continue paying Rs800/- per month.

After 29 years of service I feel I ought to dedicate what's left of quality life to my family, home and particularly my health.

Despite this I leave with respect and appreciation of the management of the bank and the staff and all of the time I've spent here and also feel that even though I have left the services of the bank, but being a pensioner, remain a member of the group until my last day.

Yours Sincerely

(Sd) M. F. Verlaque"

In response to the above, the defendant considered the plaintiff's request favorably for an early retirement on health reasons and wrote a letter dated 21st February 2003 - exhibit P4 - to the plaintiff, which reads - in verbatim thus:

"Dear Mrs. Verlaque

Re: Early Retirement

*I refer to your letter dated 25th January 2003 **requesting for an early retirement due to health reasons.** I advise that the same has been considered and your working day will be 25th February 2003 when you will relinquish duties.*

Regarding your benefits and housing loan, the Manager of Bank will advise you the details by a separate letter.

*The Trustees of SIMBC **Pension Fiduciary Fund will advise you of the***

date of the commencement of payment of your pension.

I wish you all the best in your retired life.

Yours truly,

(Sd) Ahmed Saeed

Managing Director

Having requested her employer for the approval of an early retirement, the plaintiff simultaneously wrote a letter dated 27th January 2003 to the Fiduciaries of the Pension Fund. This letter - exhibit P5 - reads (in verbatim) thus:

“The Fiduciary of S. I .M .B .C

Seychelles Pension Fund

Victoria

Dear Sir,

I have approached my employer with a request to be considered for early retirement on the grounds that I have surpassed the 25 years service and have attained the age of 50, and reasons of health and family attendance.

I have been directed by manager too write to you on this subject as you are the Fiduciary of the Fund.

I look forward to a positive and early reply.

Yours Sincerely,

(Sd) M. F. Verlaque”

In response to the above, the Fiduciaries wrote back to the plaintiff, which letter reads in exhibit P6, thus:

“Dear Mrs. Verlaque,

EARLY RETIREMENT

We refer to your letter of even date regarding the above mentioned and advise as follows:-

Whilst the rules of our pension scheme make provision for early retirement, this is a matter to be discussed and agreed between the employer and yourself.

Once agreement is in place then the fiduciaries of the Fund will workout your benefit and communicate the same to you via your employer.

Yours sincerely,

(Sd) A. Almaze

(Sd) A. Moise

Fiduciaries of SIMBC

Seychelles Pension Fiduciary Fund

Following the defendant's approval for the early retirement **due to health reasons** vide exhibit P4, the plaintiff retired from service with effect from 25th February 2003, the date she had preferably indicated to her employer in her letter exhibit P3. Thereafter, she ceased to be employed with the defendant-bank and was waiting for the information regarding the commencement of her pension, hoping that monthly-pension-payments would start immediately. However, she received a letter from the defendant dated 14th April 2003 dashing her hopes, stating that pension will start only when she attains the age of 60. This letter in exhibit P7 reads thus:

“Dear Mrs. Verlaque,

We refer to your letter dated 25th January 2003 regarding your early retirement.

Please be informed that your pension will start from the month of May 2011 when you attain the age of 60.

Regards,

Ahmed Saeed

Managing Director”

Obviously, the defendant in its decision categorized the plaintiff as a “deferred pensioner” for the purpose of pension payments, under the “pension rules”, and deferred the payment up to May 2011 when she attains the age of 60 and therefore, refused to commence immediate pension payments. According to the plaintiff, the act of the defendant in deferring her pension has violated her constitutional right that guarantees her a “just and favorable conditions of work”. Therefore, the plaintiff has now come before this Court with the instant action for a remedy, pleaded in the prayer of the plaint in verbatim as follows:-

“[f]or judgment declaring that the said late payment of the said pension is a violation of the plaintiff’s constitutional rights and accordingly, the defendant should make payment timely enough to amount to a just and favorable condition of work”

In support of her case the plaintiff testified that she decided to take early retirement due to ill health. In the same breath, she testified that she was told by the defendant that if she had completed 25 years of service or 60 years of age, whichever comes first she was entitled to get immediate monthly pension upon retirement. But, according to the plaintiff although she had completed 25 years of service upon retirement, her entitlement was refused by the defendant. Therefore, she prayed this Court for a declaratory relief and remedy accordingly.

On the other side, Mr. Ahmed Saeed, the Manager of the defendant-bank testified that the said pension fund has been created by the contribution made only by the employer for the benefit of its employees. This fund is administered by three employees of the bank and governed by the “pension rules” first-above mentioned. These rules stipulate different categories of members, who shall be eligible to draw pension upon retirement at differing circumstances and age. In the normal circumstances, when a worker reaches the normal retirement age - in the case of the defendant 60 years - and retires that worker shall be eligible and entitled to an immediate pension-

payment. If the worker takes early retirement upon the request of the employer, on satisfying certain conditions shall be eligible to receive pension immediately upon such retirement. Since the plaintiff in this matter decided to take early retirement on her own volition the rule does not allow her to draw pension immediately upon early retirement. Moreover, according to the defendant, in the judgment of the fiduciaries, the plaintiff did not qualify under Rule 10 of the pension rules for retirement through ill-health or incapacity so as to receive pension immediately. The defendant did not ask the plaintiff to retire early and the Fiduciaries did not form the view that on account of ill-health or incapacity to perform her duties, she had to retire. Therefore, Mr. Shah, learned counsel for defendant contended that the plaintiff is not entitled to the declaratory judgment sought in this matter.

I carefully perused the pleadings and the evidence including the documents adduced by the parties in this matter. I diligently, analyzed the written submissions filed by both counsel.

Before embarking on the adjudication of any matter civil or criminal, obviously, the Court must at first place, be satisfied that it has the necessary jurisdiction and power in law, to entertain or hear or try that matter. In the instant case, at the outset of the proceeding and on the face of the pleadings in the plaint, it appeared to me that this Court has no jurisdiction to hear this matter since the subject matter of the suit is the alleged violation or contravention of the Constitutional right *a fortiori* the remedy sought therein was a declaration on the alleged unconstitutionality of the defendant's act and enforcement of the Constitution. At this juncture, I should mention here that this Court had the benefit of hearing the views of the Honorable Attorney General Mr. A. Fernando (as then he was) on the issue as to jurisdiction. Indeed, it was a sheer coincidence that AG was also present in Court the day I invited the plaintiff's counsel Mr. W. Lucas to clarify this issue in open Court. The Honorable AG accordingly, did his part as *amicus curiae*. At the same time, I gave opportunity to Mr. Lucas as well to address the Court on this issue, which he did in his written submission. In the circumstances, before I proceed to determine the case on the merits, I have to determine and ascertain whether this Court does possess the necessary jurisdiction to entertain the present suit as it now stands before the Court for adjudication.

It is pertinent to note article 129 of our Constitution reads thus:

129 (1) The jurisdiction and powers of the Supreme Court in respect of matters relating to the application, contravention, enforcement or interpretation of the Constitution shall be exercised by not less than two judges together.

(2) Where two or more judges sit together for the purposes of clause (1), the most senior of the Judges shall preside.

(3) Any reference to the Constitutional Court in this Constitution shall be a reference to the Court sitting under clause (1).

It is very evident from the pleadings and the prayer in the plaint that the instant suit relates to the application, contravention and enforcement of the Constitution. Since this Court is constituted by a single judge, obviously, it has no jurisdiction or power to hear this matter in terms of article 129(1) of our Constitution and so I find. The plaintiff has unfortunately, come before a wrong forum seeking a remedy, which this Court has no power to grant. Hence, in my judgment, the instant action is not maintainable in law before this Court and liable to be dismissed in limine. I do so accordingly.

Further, Mr. Lucas contended that since this Court has not referred this case to the Constitutional Court in terms of Article 46(7) of the Constitution, it is assumed that this Court has jurisdiction to hear this matter. Moreover, he contended that this Court is empowered to entertain this matter in terms of Article 125(1) (a) & (b) of the Constitution, which reads thus:

125(1) There shall be a Supreme Court which shall, in addition to the jurisdiction and powers conferred by this Constitution, have-

(a) Original jurisdiction in matters relating to the application, contravention, enforcement or interpretation of this Constitution

(b) Original jurisdiction in civil and criminal matters;

(c) Supervisory jurisdiction over...

With due respect to Mr. Lucas, it is a logical fallacy and wrong to assume that this Court constituted by a single judge, shall have power and jurisdiction to entertain a constitutional matter, just because it had given the parties opportunities of being heard in a matter brought before it for adjudication. For, no one, who comes before this Court will be shut out unheard and denied outright the opportunity of being heard in full, in violation of the principles of natural justice, even if that person had instituted the proceedings in this Court, believing by mistake or otherwise, that this Court has power to adjudicate on his grievance.

It is truism that a Supreme Court has original jurisdiction in matters relating to the application, contravention, enforcement or interpretation of this Constitution in terms of Article 125 (1) (a), but it can exercise such jurisdiction only when two or more judges sit together in that particular Supreme Court for the purpose of hearing that constitutional matter. This is what is referred to as the "Constitutional Court" under Article 129 (1) and (3) of the Constitution. In a sense, a Constitutional Court is also a Supreme Court but constituted by two or more judges, who should sit together for the purpose of hearing that matter. Be that as it may, the most fundamental question of law that arises herein is whether this Court presided by a single judge, has jurisdiction to hear the present suit. As I see it, any jurisdictional question may be broken down into three components:

1. *whether there is jurisdiction over the person (in personam),*
2. *whether there is jurisdiction over the subject matter, or res (in rem), and*
3. *whether there is jurisdiction to grant that particular remedy sought by the claimant.*

The term jurisdiction is really synonymous with the word "power". A court may possess jurisdiction over matters, only to the extent granted to it by the Constitution, or legislation of the sovereignty on behalf of which it functions. The question of whether a given court has the power to determine a jurisdictional question is itself a jurisdictional question. Such a legal question is referred to as

"jurisdiction to determine jurisdiction." In this matter, this Court has exercised its jurisdiction simply to determine, whether it has jurisdiction over the subject matter and whether it has jurisdiction to grant that particular remedy sought by the plaintiff in this action. Hence, it is wrong to assume that this Court possesses the necessary jurisdiction over the subject matter in dispute namely, alleged contravention of the constitution or to grant the remedy, which is sought by the claimant just because it has exercised its jurisdiction to determine the jurisdictional question.

In fact, the Supreme Court of Seychelles, when presided by a single judge has limited jurisdiction in that it can only hear cases that fall within the scope defined by the Constitution in [Article 125](#) (1) (b) and (c) and other legislations or statutes such as the Courts Act etc. In the circumstances, I find the argument of Mr. Lucas that this Court has jurisdiction in constitutional matters in terms of Article 125(1) (a) is fallacious and based on a misinterpretation of the Constitutional provision. In fact, the general principle of interpretation in paragraph 8 (b) under Schedule 2 of the Constitution reads thus:

"For the purpose of interpretation-

This Constitution shall be read as a whole"

Therefore, with due respect to the views of Mr. Lucas, for the purpose of interpretation, Article 125(1) (a) should not be read in isolation. It should be read and interpreted together with Article 129 (1) of the Constitution.

On the question of referral to the Constitutional Court in terms of Article 46 (7) of the Constitution, I note this Article reads thus:

*"Where in the course of any proceedings in any court, other than the Constitutional Court or the Court of Appeal, **a question arises** with regard to whether there has been or is likely to be a contravention of the Charter, the court shall, if it is satisfied that the question is not frivolous or vexatious or has already been the subject of a decision of the*

Constitutional Court or the Court of Appeal, immediately adjourn the proceedings and refer the question for determination by the Constitutional Court.”

Indeed, there is a fundamental difference between these two questions namely:-

(1) **a jurisdictional question** that arises from the very inception or institution of a proceedings or matter before a Court of law, which has no jurisdiction at all - *ab initio* - over that particular proceedings or matter with regard to all three components hereinbefore mentioned; and

(2) **a constitutional question** that arises in the course of any proceedings in a Court, which otherwise has jurisdiction over that proceedings or matter with regard to the said three components.

In the first scenario, the Court itself has the jurisdiction to determine its jurisdictional question and so it does so; whereas in the second, the court has no jurisdiction to determine the constitutional question and so refers it to the competent court for determination.

Since the present suit involves only jurisdictional question, it does not fall under article 46 (7) of the Constitution and hence referral to the Constitutional Court becomes irrelevant and otiose and so I find. In any event, as I see it, article 46(7) of the Constitution cannot be invoked as a troubleshooter to rectify any procedural mistake when a litigant happened to institute a proceeding before a wrong forum for a legal remedy, which that forum cannot grant in law.

Since the above finding of this Court on the jurisdictional question has effectively and completely disposed of the instant suit, I am loath to determine the other issues joined by the parties as they relate to the merits of the case in this matter. Indeed, the declaratory relief sought by the plaintiff, on the alleged violation of the plaintiff's constitutional rights ousts the jurisdiction of this Court rendering it powerless to determine those issues.

In the final analysis, I conclude that this Court has no jurisdiction to grant the remedy sought in the instant suit. Hence, it is not maintainable in law before this Court. The suit is accordingly, dismissed with costs.

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D. Karunakaran

Judge

Dated this 21st day of January 2009