IN THE SUPREME COURT OF SEYCHELLES

SYLVIA FERLEY APPELLANT

VS

BERNADETTE HERTEL RESPONDENT

Civil Appeal no:01 of 2008

Ms. Pool for the Appellant

Mr. Elizabeth for the Respondent

JUDGMENT

Burhan, J

This is an appeal by the defendant-appellant (hereinafter referred to as the appellant) against the judgment of the learned magistrate who entered judgment for the plaintiff- respondent (hereinafter referred to as the respondent) in a sum of Rs 12,475.00 together with interest and costs.

The appellant's appeal is based on the following grounds;

1) The learned magistrate was wrong to find that the respondent has proved her case, when the respondent adduced no evidence

in the form of exhibits or the testimony of a material witness Martha Betsy as well as other evidence to prove her case.

2) The learned magistrate failed to hear the evidence of the 2nd defendant whom the respondent averred in her plaint, was jointly and severally liable.

3) It was on record that the land and house in question had been subdivided and that the house and land belonged to the appellant. The learned magistrate failed to give sufficient weight to the evidence and the fact that the respondent was occupying the appellant's house illegally.

4) The learned magistrate was wrong to rely on the evidence of the police officer who should not have been involved in a civil dispute. No charge was brought against the appellant for the lost items.

5) The learned magistrate failed to enquire into how the items were lost. There was no evidence that the appellant was responsible for the missing items.

In her submissions learned counsel for the appellant in support of the aforementioned ground 1, contended that the respondent had failed to satisfy court that she was the owner of the house by

adducing any documentary evidence or other evidence to establish same. It is clear on perusal of the averments contained in the plaint dated 22nd August 2000, that the respondent has based her claim not as owner of the said premises but as occupier of the said premises situated at Mont Buxton. It is clear that the learned magistrate having analysed the evidence led at the trial has come to the finding that the plaintiff was in legal occupation of the said premises at the time the appellant had come and broken the padlock and commenced dismantling the roof of the premises which the respondent had subsequently repaired at her own expense and from her own funds. This finding is further supported by the fact that the appellant herself has admitted that the respondent was in occupation of the said premises in paragraph 1 of the defence filed on the 23rd of January 2002. Hence there was no necessity for the respondent to call witness Martha Betsy or produce any documentary evidence to prove ownership, in the light of the appellant's admission in paragraph 1 of the defence that the respondent was in occupation of the said premises at the time of the incident. Therefore learned counsel's contention that as the respondent had failed to prove her ownership of the said premises her claim should fail bears no merit.

With regard to ground 2, if the respondent (plaintiff) has averred

in the plaint that the 2nd defendant too was jointly and severally liable for the claim of damages and thereafter decided not to pursue or establish the claim against him, the claim against the 2nd defendant fails. It is clear from the judgment of the learned magistrate that no judgment has been entered against the 2nd defendant. Therefore the fact that the learned magistrate failed to hear the evidence of the 2nd defendant or failed to come to a finding in respect of the 2nd defendant does not affect the finding made by the learned magistrate in respect of the appellant, the 1st defendant in the case, which was based on the evidence led at the trial against her. Further, it was open for the appellant to call the 2nd defendant as a witness if she felt his evidence was essential for her case. For the aforementioned reasons this is not a valid ground of appeal and is therefore dismissed accordingly. Learned counsel for the appellant further submitted that the trial court had dismissed the case as the plaintiff was not present but had thereafter reinstated it improperly. On perusal of the record it is apparent on the face of the record that the appellant had impliedly consented to the reinstatement of the case and the procedure adopted, by not objecting to same at the appropriate time and thus cannot now seek to complain of any defect in procedure having impliedly condoned same.

In respect of ground 3, learned counsel for the appellant in her submissions, stated that the learned magistrate had failed to give sufficient weight to the evidence and the fact that the respondent was occupying the appellants house illegally. However perusal of her pleadings namely the defence filed by the 1st defendant contains no averment to the fact that the respondent was in illegal occupation of the premises but in fact as already stated earlier, contains an admission that the respondent was in occupation of the said premises. It is not open for learned counsel to open issues at the appeal stage in the light of such admissions in the pleadings and where no issue of illegal occupation has been averred or raised in the pleadings filed in the trial court. Therefore ground 3 bears no merit and is dismissed accordingly.

With regard to ground 4 learned counsel for the appellant has submitted that the evidence of the police officer should have not been accepted as this was a civil action and the evidence was of a hearsay nature and thus should be rejected. Firstly the mere fact that this is not a criminal action does not debar police officers giving evidence. A party is entitled to call a police officer in a civil dispute if the evidence of the officer is relevant to his claim. The evidence of the police officer in this instant case is

that he came on the scene as the police were called in and has given evidence of what he saw and perceived himself. Therefore learned counsel for the appellant's submission that as his evidence was hearsay evidence the learned magistrate should have disregarded it, cannot be accepted. This court sees no reason to set aside the learned magistrate's findings, in accepting the evidence of the respondent and coming to the conclusion that the respondent had incurred expenses in repairing the said roof of the building which was rendered necessary by the "faute" of the appellant. This court will not seek to interfere with the findings of the trial judge in this respect as it not apparent that the witnesses' testimonies are so improbable that no reasonable tribunal would believe it.

With regard to ground 5 of the appeal which is relevant to the findings and damages awarded in respect of the lost items, it is to be noted that eventhough the police had been called to the scene and gave evidence at the trial, no statement or record was produced showing that the respondent had either promptly or even subsequently lodged a formal complaint to the police, in respect of any of the items being taken away by the appellant. In fact the police officer states in his evidence no report was made in respect of any items lost. The appellant in her evidence categorically denies taking any such items. Therefore this court holds that the respondent (plaintiff) has failed to establish even

on a balance of probability that the said items were actually taken away by the appellant. Thus the damages awarded in respect of the loss of jewellery in a sum of Rs 8000/= and the loss of fryer in a sum of Rs 600/= is set aside.

With regard to the quantum of damages awarded in respect of the repairs done to the house by the respondent, considering the evidence led at the trial and the extent to which the dismantling process had proceeded to, the sum awarded namely Rs 3000/= and the sum of Rs 375/= awarded in respect of the damaged flower pots are in no way excessive and therefore this court will not seek to interfere with the said quantum awarded in this respect.

In the case of ***Chaka Bros v Allied Agencies Ltd 1974 SLR No 15,*** Sauzier J awarded a sum of Rs 500 as moral damages as he was satisfied that the plaintiff's suffered prejudice to their right to property and to quiet enjoyment of their property as they were inconvenienced to an extent as repairs had to be affected on their shop which had been damaged due to the "faute" of the defendant. Therefore this court will not seek to vary the said award of Rs 500/= awarded under similar circumstances as moral damages in this instant case.

Therefore the total sum of damages in a sum of Rs 12,475.00 awarded by the learned magistrate is set aside and in lieu a sum of Rs 3875/= together with interest and cost is substituted therefore. There will be no cost awarded in respect of the appeal.

M. BURHAN

JUDGE

Dated this 7th day of April 2010