IN THE SUPREME COURT OF SEYCHELLES

MARIE ANDRE JOANNEAU & ORS **PLAINTIFFS**

Versus

1. THE GOVERNMENT OF SEYCHELLES

(Rep by the Attorney General)

2. THE COMMISSIONER OF POLICE

(Rep by Andre Kilindo)

DEFENDANTS

Civil Side No 12 of 2005

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Mr. A. Derjacques for the Plaintiffs

Mr. C. Jayaraj for the Defendants

JUDGMENT

D. Karunakaran, J

At all material times, one Robin Jourdan Henriette - aged 25 - a casual labourer - hereinafter called the deceased - was a resident of Port Glaud, Mahé. He had a family. He was living with his common-law wife and two minor children. The deceased had 7 siblings - 3 brothers and 4 sisters - and also his

surviving mother, who were all living in the neighbourhood at Port Glaud.

On the 12th January 2005 an unfortunate incident happened that sadly resulted in the death of the deceased. On that fateful day, the police were conducting a raid in a sugar plantation adjoining the house of the deceased at Port Glaud. During the course of the raid, the deceased was killed by some police officers of the Seychelles Police Force, who were shooting with fire arms.

Following the death of the deceased, his mother, his common-law wife, both minor children and all of his seven siblings - in total 11 Plaintiffs - jointly instituted a delictual action against the defendants namely, the Government of Seychelles and the Commissioner of Police, wherein the plaintiffs claimed damages, in their own capacities, as well as heirs, legal representatives and *ayant droits* of the deceased person. The defendants admitted liability before the trial court for the fault of causing the death of the deceased but disputed the quantum of damages claimed by the plaintiffs.

After hearing the parties on the limited issue of quantum, the Supreme Court presided by Perera, J- as was he then- in his judgment dated 19th January 2007, awarded moral damages in the total sum of Rs 77,000/- to the plaintiffs. Having been aggrieved by the said assessment of damages awarded by the trial Judge, the plaintiffs appealed to the Seychelles Court of Appeal against the said judgment. The Court of Appeal in its judgment dated 24th August 2007, allowed the appeal. It

increased the quantum of damages from Rs 77,000/- to Rs 152,500/-

The Court of Appeal in the course of its judgment inter alia, made the following observations:

1. “It is to be noted that compensation claimed by all plaintiffs is in respect of moral damages only, i.e., essentially for “distress, anxiety, shock” and no material damage is alleged to have been suffered and none is claimed by or on any plaintiffs, and an award therefore, would be *ultra petita*. However, at page 90 of the record, the learned trial Judge states the following: “The deceased was a self-employed farmer. There is no evidence regarding his income. However, he was 25 years old at the time of his death. He had a common law wife and two children to support.” Hence, it appears that that the children and their mother, Harianna Labrosse, could have claimed for loss of maintenance.”(vide page 2)

2. As stated in paragraph 4, no award may be made in respect of a prejudice, moral or material, which has not been specifically pleaded and claimed. No claim was made in respect of the personal moral suffering of the children, resulting from their father’s death. Likewise, no claim was made on their behalf in respect of loss of maintenance. The learned trial Judge could not make any award to them under these two heads. No injustice should be done to minor children and their mother and their attorney should

consider filing another action for compensation under those heads”(vide page 3)

In view of the above observations made by the Court of Appeal in its judgment, three plaintiffs in the original suit namely, the common-law wife and the two minor children of the deceased have now come before this Court by way of a petition, seeking an order for a new trial in order to have two new claims speculated by the Court of Appeal in its judgment, determined by this Court namely:(i) moral damages payable by the defendants, to the two minor children; and (ii) loss of maintenance amount payable to both minor children as well as to the common-law wife. These two sets of claims were never raised nor canvassed before the trial court nor were material facts necessary to constitute these claims pleaded in the plaint.

In the circumstances, Mr. Derjacques, learned counsel for the petitioner submitted that this court should in the interest of justice order a new trial in terms of Section 194 (c) of the Seychelles Code of Civil Procedure. On the other side, Learned Counsel for the defendants Mr. Jayaraj vehemently objected to the petition raising several grounds based on points of law and on facts.

I meticulously perused the records on file including the judgments of the trial court and that of the Court of Appeal. I carefully examined the submissions made by both counsel for and against the instant petition for a new trial.

I

First of all, I note, the present petition for a new

trial arises out of the proceedings originated in Civil Side 12 of 2005 instituted in the Supreme Court, which culminated in appeal SCA 14 of 2007, before the Court of Appeal. Obviously, the original proceedings have been given finality by virtue of the judgment of the Court of Appeal dated 24th August 2007-in SCA 14 of 2007.

Indeed, the Court of Appeal, in its wisdom did not remit the case for retrial nor counsel for the appellant sought any order to that effect before the appellate court. The Court Appeal allowed the appeal and gave a judgment, the final one in favour of the appellant. Had such retrial been legally proper as sought by Mr. Derjacques before this Court in the present petition and especially, when the Appellate Court felt that no injustice should be done to the minor children and their mother, it ought to have ordered a retrial. However, it did not and could not do so for obvious reasons. As rightly pointed out by the Appellate Court in its judgment, no material damage was alleged to have been suffered and none was claimed or pleaded by or on behalf of any plaintiff, and an award therefore, would be *ultra petita.* In fact, no Court can formulate a case for a party in the name of ordering a new trial or in the interest of justice. In fact, the Respondent herein had accepted liability from the beginning and the only issue before the trial Court was the assessment of moral damages and the trial court accordingly as per pleadings and based on the evidence on record awarded Rs 77, 000 as damages. Overruling the sum awarded, the Court of Appeal finally settled it at Rs152, 500.Therefore, there cannot be, in law a

“Petition” arising out of a matter which has already been given finality by the Court of Appeal - the final Court - and thus it has become a matter of *res judicata.* Hence, the instant petition is not maintainable in law and so I find.

Besides, the present petition has been filed on the ground that no claims were made in the original civil suit on behalf of the said two minor children of the deceased and that no claim was made on behalf of the common-law wife for the loss of maintenance upon the death of her husband. Now, the petitioner is obviously, attempting to reopen the suit to formulate a new case for fresh claims, which were omitted presumably, through inadvertence on the part of counsel, who represented the plaintiffs. This petition in effect has no legal basis to sustain itself. Therefore, this Court in my considered view cannot entertain this petition.

The Court of Appeal has observed in paragraph[8] of its judgment that the Counsel for the two minor children and their mother should consider **filing another action** for personal moral suffering of children and loss of maintenance. Since it was not specifically pleaded in the plaint and not claimed in the original suit, the trial judge could not make any award to them under those heads. Although, the Court of Appeal has clearly indicated in its judgment to **file another action**, I fail to understand how the counsel can now come before this Court seeking a new trial, whereby impliedly calling upon this Court to set aside the final

judgment of the Court of Appeal and order a new trial in this matter.

Be that that as it may. To my mind, the observations of the Court of Appeal in its judgment hereinbefore mentioned, are mere *obiter dicta* and cannot form any legal basis for a new trial. The Court of Appeal has stated in unequivocal terms that the claimants herein ought to **file another fresh action**. Fresh action means that the petitioners have to file a fresh plaint with necessary pleadings and evidence. As rightly submitted by Mr. Jayaraj, learned counsel for the defendants, the petitioners are now attempting to convert an *obiter dictum* into a cause of action in the thin disguise of seeking an order for a new trial. This attempt, in my view, should never be encouraged.

Before, I conclude I must observe that it is true as canvassed by Mr. Derjacques, learned counsel for the petitioners, under Section 194 (c) of the SCCP a new trial may be granted on the application of either party to the suit when it appears to the court to **be necessary for the ends of justice.** Obviously, this phrase "**necessary for the ends of justice"** germinates from the inherent power of the Civil Court to do justice in deserving cases. Indeed, Section 194(c) of the Code provides for the saving of the inherent power of the Court in order to meet the "ends of justice". However, this phrase is nowhere defined in the Code. In order to find the practical meaning of this phrase, one needs to look into the various case

laws. For instance, it was held by the Supreme Court in ***Naiken Vs Pillay (1968) No: 9 SLR*** that as a matter of general principle a new trial ought not to be granted except in very special circumstances, where the applicant has failed to exercise a right of appeal that was open to him. However, in the instant case, the petitioners did exercise their right of appeal, succeeded and got final judgment in their favour from the competent Court.

In fact, the scope of the Section 194 (c) is frequently misunderstood and various applications are being made before our Courts under this section which does not fall within its purview. It is truism that the inherent powers of the Court are very wide. They are not in any way controlled by the provisions of the Code. They are in addition to the powers specifically conferred on the Court by the Procedure Code. The Courts are free to exercise them. The only limitation put on the exercise of the inherent power is that when exercised they are not in conflict or inconsistent with what has been expressly provided for in the Code or where specific provision does not meet the necessities of the case. In any event, the inherent powers of the Court cannot be invoked in order to cut across the powers of the Appellate Court, which has given its final judgment in this matter. This power can be invoked only to supplement the provisions of the Code and not to override or render the judgment of the Court of Appeal ineffective or to formulate a new case for a party, who omitted to make out his case at the Court of first instance.

As a man of the world, I share the concern of Mr. Derjacques that interest of the minor children may be jeopardized if a new trial is not ordered due to legal technicality in this matter; however, as a judge I have to state that in the long run the “Rule of Law” would be jeopardized still more, if our Courts make laws for themselves in the name of equity or justice using those fancy phrases such as “in the interest of justice” or “for the ends of justice” and the like.

For the reasons stated hereinbefore, I decline to order a new trial in this matter. The petition is therefore, dismissed accordingly. No orders made as to costs.

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D. Karunakaran

Judge

Dated this 27th Day of March 2013