

IN THE SUPREME COURT OF SEYCHELLES

Civil Side: CC 27/2014

[2016] SCSC 439

ASCENT PROJECTS (SEY) (PTY) LTD.
Plaintiff

versus

EVELYN FONSECA
First Defendant

ROCH PILLAY
Second Defendant

Heard:

Counsel: Mr. Basil Hoareau for plaintiff

Mr. Melchior Vidot for first defendant
Mr. Melchior Vidot for second defendant

Delivered: 17 June 2016

RULING

Robinson J

[1] I ruled on 12 June, 2016, that the point of law argued before me that the present suit is res judicata should be refused. I now give reasons.

[2] ***Reasons for ruling:***

[3] Plaintiff is Ascent Projects (Sey) (Pty) Ltd..

[4] First Defendant is Evelyn Fonseca. Second Defendant is Roch Pillay.

[5] On 19 September, 2014, the present suit by Plaintiff was commenced. The plaint is identical with the plaint in Commercial Cause 01/2013. A defence has been filed in the present suit.

[6] First and Second Defendants raised three points of law. (1) That the present suit is res judicata. (2) *"The Plaintiff has no cause of action against the 1st Defendant as there is no privity of contract between them as the 1st Defendant who was no party to the agreement between the Plaintiff and the 2nd Defendant and therefore the case against the 1st Defendant should be dismissed."* (3) *"The action is an abuse of process."* Only the first point of law was argued before me.

[7] Learned counsel argued that res judicata is founded on dismissal for want of prosecution. He relied on the judgment in Commercial Cause 01/2013, delivered on 25 April, 2014, as the final judgment between Plaintiff and First Defendant.

[8] Plaintiff opposed the point of law argued. Learned counsel argued that res judicata cannot be based upon an order of the nature which the Honourable Chief Justice, as he was then, made in Commercial Cause 01/2013. The order reads —

"The plaintiff has applied that the suit to be withdrawn. Counsel for the defendant has no objection, and in accordance with section 182 of the Seychelles Code of Civil Procedure, this suit is discontinued. So we can get on with hearing your counter claim."

In furtherance of the argument, learned counsel argued that res judicata cannot arise because there is no final judgment between Plaintiff and First and Second Defendants in terms of section 1351 of the Seychelles Code of Civil Procedure. The counterclaim was not disturbed by the discontinuance of Commercial Cause 01/2013 by Plaintiff. The

Honourable Chief Justice delivered judgment, "*only in respect of the counterclaim brought by the defendant against plaintiff*". Moreover, for the plea of res judicata to succeed there must be "*l'identité de l'objet de la cause*" (plaint - counterclaim), which according to him, is missing in the present case.

[9] I come to the substantial issue argued before me. Is the order made under section 182 of the Seychelles Code of Civil Procedure of such a nature that res judicata can be founded on it?

[10] Article 182 of the Seychelles Code of Civil Procedure provides —

"182 — The plaintiff may, at any time before the statement of defence has been filed, or after it has been filed before taking any other proceeding in the suit (save any interlocutory application) by notice in writing to the Registrar, wholly discontinue his suit against all or any of the defendants or withdraw any part of his claim and thereupon he shall pay such defendant's costs of the suit, or if the suit be not wholly discontinued, the costs occasioned by the part of the claim so withdrawn. Such costs shall be taxed, and such discontinuance or withdrawal, as the case may be, shall not be a defence to any subsequent action.

Save as in this section otherwise provided, it shall not be competent for the plaintiff to discontinue the suit without leave of the court, but the court may at any time before judgment, upon such terms as to costs, and as to any other suit, and otherwise as may be just, order the suit to be discontinued, or any part of the claim to be struck out.

The court may, in like manner, and with the like discretion as to terms, upon the application of a defendant, order the whole or any part of his alleged grounds of defence to be withdrawn or struck out, but it shall not be competent for a defendant to withdraw his defence or any part thereof without such leave".

[11] Article 1351 of the Civil Code of Seychelles Act provides —

"1. The authority of a final judgment shall only be binding in respect of the subject matter of the judgment. It is necessary that the demand relate to the same subject matter; that it relate to the same class, that it be between the same parties and that it be brought by them or against them in the same capacities.


2. Paragraph 1 of this article shall also have effect in respect of proceedings to establish status, without prejudice, however, to


the binding effect of uncontested declarations relating to civil status or to judgments which establish new status, such as a decree of divorce, or to the actions to establish descent, to the extent that only certain specified persons are entitled to bring certain types of proceedings.

3. Repealed. (3/7/1990)".

[12] Observed that Commercial Cause 01 of 2013 was not dismissed for want of prosecution. Commercial Cause 01 of 2013 was discontinued with leave of court on the day of hearing of it. It is noted that First Defendant did not object to Commercial Cause 01 of 2013 being discontinued. Moreover, there were no terms attached to the discontinuance. The counterclaim was proceeded with as an independent action. The counterclaim dealt with the breach of the undertaking by Plaintiff to complete the work within the stipulated time leaving First Defendant to complete some work, and the failure by Plaintiff to supply all materials, tools and equipment for the work, in breach of the building contract entered into between Plaintiff and First Defendant. With respect to the plaint, Plaintiff is claiming a sum of money from First Defendant (final claim) to the sum of Euro 103, 288.99/- in terms of the building contract. In my judgment it is correct to say that Plaintiff retained the right of bringing the present suit for the same subject matter in terms of section 182 of the Seychelles Code of Civil Procedure. In sum, I accept the submissions made on behalf of Plaintiff that res judicata cannot be founded on such an order.

Signed, dated and delivered at Ile du Port on 17 June 2016


F Robinson
Judge of the Supreme Court



The seal is circular with a double border. The outer border contains the text 'FIONA ROBINSON' at the top and 'JUDGE' at the bottom, separated by two stars. The inner border contains the text 'SUPREME COURT' at the top and 'SEYCHELLES' at the bottom, also separated by two stars. In the center of the seal is a crest featuring a lion's head facing left, with a crown above it and a banner below it.