

IN THE SUPREME COURT OF SEYCHELLES
Civil Appeal: CA29/2013
Appeal from Magistrates Court Decision 215/2011

[2013] SCSC 44

JOHN MARENGO
ROSE MARIE MARENGO
ANDRE MARENGO

Appellant

versus

FRED C. ANDERSON

Respondent

Heard: 13th day of November 2015
Counsel: Mr. F. Chang-Sam for appellant
Mr. P. Pardiwalla for respondent
Delivered: 28th day of January 2016

JUDGMENT

Govinden J

[1] This is an Appeal by the Appellants being dissatisfied with the decision of the Learned Magistrate M. Ng’hwani, given on the 9th day of August 2013 (hereinafter referred to as the “decision”) to the Supreme Court

against the whole of the decision on the grounds as set out in the memorandum of appeal of the 24th day of February 2014.

- [2] By way of a short history of this case as made apparent from the record of proceedings before the Magistrates Court, in a gist, is that the Respondent was claiming the sum of Seychelles Rupees One Hundred and Fifty Two Thousand Four Hundred and Fifteen (S.R. 152,415/-), by way of damages together with interest at 4% plus costs from the Appellants on the ground that the Appellants had committed a “faute” in law because they failed to supply appropriate diesel to the Respondent’s car or negligently supplied diesel contaminated with water to the Respondent’s car.
- [3] The incident occurred on the 24th day of February 2006 and in the course of the testimonies it became apparent that due to lapse of time there was lapse of memory on both sides and this is understandable upon a careful reading of the proceedings on record.
- [4] The Respondent testified that in the year 2006 he bought S.R. 400 worth of diesel fuel at the Appellant’s petrol station and as he was going up Les Cannelles road his car stopped and would not start again. He called a pick up and towed his car home. He bought containers and drained his fuel tank. Two samples in coca cola pets and the presence of water was obvious from the visual examination. He then phoned the mechanic one Mr. Lau Tee who towed the car to his garage where it remained for some time awaiting spare parts. He complained to SEYPEC and to John Marengo the 1st Appellant. He also took the sample to NATCOF and this was analysed by SBS. The latter found that substantial water contamination, much worse than the accepted prescribed level was found in the samples taken. According to the mechanic Mr Lau Tee, the damage sustained to the car engine and fuel

system is typical of what would happen if contaminated by water. He was definite as to the cause of the damage to the engine.

[5] The Respondents also testified before the Magistrates Court as well as witnesses for both Appellants and Respondent inter alia officer of SBS, SEYPEC and mechanic were called in support. The whole of their evidence is transpired at pages 5 to 33 of the proceedings of which contents this Court has diligently considered in the course of this Appeal.

[6] The decision at page 2 thereof, after having set out the relevant evidence of both the Appellant and Respondent pronounced as follows:

“Issues to rely:

Did the plaintiff purchased fuel from the defendant’s station? Was the said fuel contaminated by water which leads to damage the engine of the plaintiff’s car? Did the plaintiff suffer damages? Are the defendants jointly liable for the claim?

I believe the plaintiff purchased the fuel from the defendant’s filling station on the 24th February 2006 at Anse Royale Service Station for the sum of S.R.400. The document admitted in court as exhibit P10 (a) which the defendants accepted to be similar receipts from his service station. To that effect I have no doubt to accept that version that the plaintiff purchased the fuel on the 24th February 2006 from Anse Royale Service Station.

Coming to the second issue its evidenced that the plaintiff was travelling to Baie Lazare via Les Cannelles Road. On the way down Les Cannelles Road his car suddenly stopped and his engine would not start again, that was few minutes after he had purchased the fuel from the station. He phoned his mechanics Mr Lau tee, the car was towed to

*Baie Lazare and later was towed to the garage, still could not start. The plaintiff took samples of fuel and put in two coca cola plastic bottles. He took the sample to NATCOF and was analysed by SBS and found substantial water contamination, much worse than the accepted prescribed level **See Exhibit P7, P8 & P9**. It is further evidence that the mechanics after been opened the engine he said the damage sustained to the car engine is due to the contaminated by water. I have no doubt again to believe the version of PW2 Mr. Lau Tee the mechanic that the engine was damaged due to the fuel been contaminated by water.*

Since the car was damaged, the plaintiff suffered damage to repair his car to PW2 Mr Lau Tee garage and the plaintiff supplied spare parts to him as Exhibit P2 and P4 are concerned.

*Conclusively to the issues above, I found both defendants liable for the faute occurred to the plaintiff's car". **(Reproduced verbatim from the Records of Proceedings before the Magistrates Court).***

- [7] The Learned Magistrate then proceeds to decide on quantum of damages at page 3 of her Judgment totalling to the sum of S.R. 42,915/- instead of S.R. 152,415.00/- as claimed in the plaint.
- [8] It is against the said decision that the present Appeal is now brought. The Appeal as per the Memorandum of Appeal afore-mentioned as filed is on eight grounds, namely that:
- 1) *"The Learned Magistrate erred in law in admitting the receipt produced by the plaintiff as Item P1 as an exhibit and in addition in admitting the other receipts introduced by the plaintiff for the first time when the 1st defendant was under cross-examination as exhibits P 10 (a) to (c);*

- 2) *The Learned Magistrate erred in law by not considering all the evidence before the Court when deciding on the pertinent issues in the case and, without prejudice to the generality of the aforesaid, including certain issues she specifically identified as relevant through her rhetorical questions.*
- 3) *The Learned Magistrate erred in law when in answer to her rhetorical question, “did the plaintiff purchase fuel from the defendant’s station?”, she wrongly concluded that the “defendants accepted that exhibit P10 (a) was similar to receipts from the service station” and therefore she has no doubt that the Plaintiff purchased the fuel from the Anse Royale service station on 24/2/2006;*
- 4) *Having decided that the plaintiff bought fuel from the service operated by the defendants the Learned Magistrate erred in law in finding that the 1st and 2nd defendants are “liable for the faute to the plaintiff’s car” when she did not determine (and if she did, in wrongly determining) that the fuel was contaminated as claimed by the plaintiff and that the plaintiff’s engine was damaged by the contaminated fuel bought from the defendants;*
- 5) *The Learned Magistrate erred in law in attributing the damage allegedly suffered by the plaintiff’s car to fuel bought from the service station operated by the defendants;*
- 6) *The Learned Magistrate erred in law in finding that the sample of fuel which was analysed by the Seychelles Bureau of Standards was contaminated fuel that came from engine of the plaintiff and which fuel the plaintiff bought from the service station operated by the defendants;*

- 7) *The Learned Magistrate erred in law in her finding that the contaminated fuel which Mr. Lau Tee found to have damaged the engine of the plaintiff's vehicle was bought by the plaintiff of the 24th February 2006 from the service station operated by the defendants; and*
- 8) *The Learned Magistrate erred in law in awarding any damage to the plaintiff against the defendants in the absence of evidence showing that the defendants were responsible for the alleged loss of the plaintiff."*

[9] Both Learned Counsels as above-mentioned filed written submissions in support and against the grounds of appeal dated the 28th day of October 2015 and 12th day of November 2015 respectively of which contents have been carefully considered for the purpose of this Appeal and I wish to commend both Learned Counsels for the direct references to the relevant part of the proceedings before the Magistrates Court vis- a-vis the grounds of appeal as raised.

[10] I propose to deal with the grounds of appeal twofold. Firstly, in view of the fact that Grounds 1 and 3 are interlinked, I thus combine both into one ground of appeal more particularly in that both grounds of appeal are contesting the admission of item 1 as Exhibit P10 (a) and P 10 (b) and (c) in evidence; and secondly, since the grounds of appeal 2, 4, 5, 6, 7 and 8 are all directly linked to alleged erroneous appreciation of the evidence before the Magistrates Court by the Learned Magistrate leading to the impugned decision, I hereby combine them all into one ground of appeal for analysis purposes.

[11] I further wish to point out at this stage of the proceedings that grounds of appeal should not be couched in such a manner which leads to duplication and or to render the memorandum of appeal bulky in the

eyes of the parties to the Appeal and or the Court, for it does not help neither the parties and or the Court in the appeal process, hence the very reason as to why the grounds of appeal afore-mentioned are being treated the way proposed at paragraph [10] thereof.

[12] Now in reference to grounds 1 and 3 vis-a-vis admission of exhibit P10 (a) to (c).

[13] It is argued by the Appellants that as a result of admission of the said exhibits, the Defendant's attorney was not able to cross-examine the Plaintiff on the exhibits. That his evidence as to where and how he got the receipts are important are crucial given the strong denial by the defendants (at page 24 and 30 of the Records) of the allegation of the plaintiff that the documents was from the defendants who testified to the fact as they do not recognise the signature on the receipts. That having denied the signature, the onus was on the plaintiff to prove the signature. In that respect the Appellant referred to the case law of **[Didon v Leveille (1983) SLR 187] and other cases of [Venchard's The laws of Seychelles Through The Cases at pages 241 to 241]** thereof.

[14] Now, bearing in mind the above arguments, this Court notes that albeit the Learned Counsel for the Appellant complaining that he was unable to cross-examine the Respondent on the Exhibits in issue, he is the same person at page 5 of the record of proceedings who objected to the admission as exhibit but them insisted on their admission as items. Further at the time of cross-examination of the Respondent on the very receipts admitted as items, there was not a simple iota of cross-examination or attempt to cross-examine the Respondent in the Court below on the receipts or the fact that the signature on the receipts were not those of the Appellant's employees. The Appellants on their part admitted to the receipts emanating from their service station

hence why admission by the Learned Magistrate as exhibit as contested. It is carefully noted that at the very stage of admission of the contested exhibits, there are no objections on record emanating from Appellants' Counsel contesting their admission at all.

On that very basis, it is thus as rightly submitted by the Respondent, that it is admittedly clear, that the 1st and 3rd grounds of appeal are simply a new excuse of an unrecognised signature. It is also abundantly clear that the Learned Counsel for the Appellant had ample time and opportunity to cross-examine the Respondent on the matter but he failed to do so at the right time. Further, he did not object to their admission at the time it happened which was the relevant time to do so hence he is debarred from raising this point for the first time on appeal.

The findings as made in the cases as cited and also the case of **[Falcon Enterprise v/s David Essack, The Wine Seller (Pty) Ltd and Eagle Auto parts Civil side no. 139 of 2000]**, treating a similar issue should not be confused with the facts of this current appeal. The facts and circumstances are dissimilar in various respects. In the latter case, objection was very evident on the record hence the Ruling called for on behalf of the Presiding Judge. In this case it was not the case as above illustrated hence this ground of appeal is devoid of merits in all the circumstances, hence dismissed accordingly.

[15] I will now treat grounds of appeal 2, 4, 5, 6, 7 and 8 directly linked to alleged erroneous appreciation of the evidence before the Magistrates Court by the Learned Magistrate leading to the impugned decision (paragraph [9] refers).

[16] Again it is argued by the Appellants that the erroneous appreciation and absence of evidence as alleged is clear "in the Learned

Magistrate's conclusion at page 3 of her judgement when she replies to her first 3 rhetorical questions". ***(Latter words being also a rhetoric of the appellants' it seems, for it appears throughout the memorandum of appeal without good cause)***, (Emphasis mine).

It is argued that at the top of page 3 of the Judgement, the Learned Magistrate deals with the issue of source of fuel and its contamination. That, the Learned Magistrate did not bear in mind the evidence of the Defendants about the daily checks carried out by the 1st Defendant, the evidence of the representative of SEYPEC, the fact that there was no evidence of any other motorist who purchased fuel on that day, the very relevant contradiction of the evidence of the Plaintiff at pages 5 of the record and from that of his mechanic at pages 13 and more particularly page 14 of the record of the way the car stopped, how the alleged sample of the fuel was collected. Then there is the issue of the recipient used to collect and keep the sample, the chain of possession of the person who kept the sample until it was analysed and which throws doubt on whether the sample was properly collected, was infact contaminated at the time of collection or along the way or whether it came from the car of the plaintiff.

[17] Now, bearing the above arguments in mind with regards to the second ground of appeal and a careful scrutiny of the impugned decision of the Learned Magistrate as reproduced verbatim at paragraph [6] thereof, it is abundantly clear without having to repeat and or rehearse the findings of the Learned Magistrate, that all these matters have been duly taken into consideration by the Learned Magistrate and the same issues were alive to the mind of the Magistrate at the time of her impugned decision for they were raised at the stage of submissions then by both Learned Counsels and this is revealed on the Records.

[18] The relevant law to be relied upon in case of this nature is as rightly pointed out by the Learned Magistrate at page 3 of her Judgement, the provisions of Articles 1382 as read together with 1384 of the Civil Code (Cap 33) thereof (hereinafter referred to as the “Code”)

Article 1382 provides as follows:

- “1. Every act whatever of man that causes damage to another obliges him by whose fault it occurs to repair it.*
- 2. Fault is an error of conduct which would not have been committed by a prudent person in the special circumstances in which damage was caused. It may be the result of a positive act or omission”*

Article 1384 provides as follows:

- “1. A person is liable for the damage that he has caused by his own act but also for the damage caused by the act of persons for whom he is responsible or by things in his custody”.*

[19] Now the basic issues to be determined in this case with due regards to the relevant provisions of the Code can be characterised threefold. Firstly, did the Respondent purchase fuel at Appellant’s service station as averred? Secondly, was the fuel contaminated by water as averred? and Thirdly, did the contaminated fuel cause the damage to the engine of the Respondent’s car as averred? What we can in simplest terms state to be as “cause and effect”

[20] Were these issues proved on a balance of probabilities before the Learned Magistrate in the Court below? With respect to the submissions of Learned Counsel for the Appellant, it is very difficult for this Honourable Court to answer otherwise than in the positive to these questions. It is evident at pages 5, 6, 8, 9, 13, 14, 19, 20, 24, 25, 26,

27, 28, 29 and 30 of pages 33 that there were ample evidence on record to support all these issues at the burden of proof required and this is clearly rehearsed by the Learned Magistrate as illustrated at paragraph [6] thereof and need not be rehearsed by this Court.

[21] Again, at this juncture, it is to trite but needs to be repeated, that in civil cases the burden of proof should not be confused with that in criminal cases. The burden of proof on the Respondent in the Court below was one of “a balance of probabilities” and not one of “beyond reasonable doubt”. It is in the humble appreciation of facts on record in the light of the relevant law as highlighted by this Court that the Respondent in the Court below did manage to overcome the burden on a balance of probabilities to prove his case against the defendants as far as the salient elements of the cause of action is concerned. The burden under Article 1315 of the Code as raised by the Appellants thus in the opinion of this Court was also proved by the Respondent to the satisfaction of the Court as decided accordingly.

[22] On the basis of the above findings, this Court finds that all the grounds of appeal are devoid of merits and hence dismissed accordingly.

[23] For the reasons stated hereinbefore, I hold that the decision of Learned Magistrate M. Ng’hwani of the 9th day of August 2013 in this matter is fully supported by the relevant law and evidence on record hence upheld and it follows therefore that I decline to grant this appeal and dismisses same in its entirety with costs.

Signed, dated and delivered at Ile du Port on 28th day of January 2016.

Govinden J

Judge of the Supreme Court