

IN THE SUPREME COURT OF SEYCHELLES

Civil Side: CS 56/2017

[2018] SCSC 512

ANISSA PAYET

Plaintiff

versus

MR ALEX MONTHY

Defendant

Heard: 28th May 2018
Counsel: Mr Derjacques for plaintiff
Mr Elizabeth for defendant
Delivered: 1st June 2018

RULING

Nunkoo J

- [1] This a plaint from a lady who is claiming the sum of SCR 932,000.00 from the Defendant, who was her boyfriend in a recent past.
- [2] She is alleging that the Defendant had borrowed a sum of SCR 712,000.00 from her for the purchase of a motorboat, and a further sum of SCR 120,000.00 for the purchaser of a vehicle-vehicle registration number S 24515.
- [3] Plaintiff avers that it was agreed between herself and defendant that the latter would transfer and delivere the vehicle to her in lieu of that sum.

[4] The Plaintiff is therefore claiming the sum of SCR 932,000.00; SCR 832,000.00 being total of debts that is SCR 732,000 plus 120,000- and SCR 100,000.00 as moral damages.

[5] There is no written agreement to support her claim except for the recording of electronic conversations on which she is relying.

[6] The Defendant has raised the following objections in limine based on article 1341.

- 1. *The Plaintiff cannot give oral evidence to prove a matter the value of which exceeds SR 5000.00 without a document drawn up by a notary or under private signature.***

[7] Section 1341 reads as follows:

Any matter the value of which exceeds 5000 rupees shall require a document drawn up by a notary or under private signature, even for a voluntary deposit, and no oral evidence shall be admissible against and beyond such document nor in respect of what is alleged to have been said prior to or at or since the time when such document nor in respect of what is alleged to have been said prior to or at or since the time when such document was drawn up, even if the matter relates to a sum of less than 5000 rupees.

[8] Learned Counsel for the Defendant has also referred the court to the exceptions under section 1347, which reads as follows:

The aforementioned section shall not apply if there is writing providing initial proof.

This term describes everything which emanates from a person against whom the claim is made or from a person whom he represents and which renders the facts allegedly likely.

[9] It is not disputed that the value exceeds 5000 rupees.

[10] Learned counsel forcefully argued that the Plaintiff cannot proceed with her claim as it is above Rs 5000.00.

[11] As the Plaintiff is relying on the reproduction of an electronic material Learned counsel has in his submission invoked section 15 of the Evidence Act and which reads as follows:

Section 15: Documentary evidence from computer records.

15 (1) *In any trial, a statement contained in a document produced by a computer shall be admitted as evidence of any fact therein of which direct oral evidence would be admissible, if it is shown that*

- (a) *The computer was used to store, process or retrieve information for the purposes of any activities carried on by any body or person;*
- (b) *The information contained in the statement reproduces or is derived from information supplied to the computer in the course of these activities; and*
- (c) *While the computer is also used in the course of those activities*

- (i) *Appropriate measure were in force for preventing unauthorized interference with the computer; and*
- (ii) *The computer was operating properly or, if not, that any respect in which it was not operating properly or was out of operation, was not such as to affect the production of the document or the accuracy of its contents.*

[12] Learned counsel for the Defendant has stressed that his objection was spontaneous or timely, just at the right time, that is , it was made as soon as the Plaintiff showed that she was relying on oral evidence.

[13] He also submitted that the Defendant had never texted to the Plaintiff to accepting that there was a debt and therefore there was no writing emanating from him as such. He further referred to the conditions that must be fulfilled in regard to hearsay evidence in accord with the Civil Evidence Act 1995.

[14] Learned Counsel for the Plaintiff submitted that he has sufficiently made it clear that on the list of documents upon which he is relying includes CD recording of agreement inter partes; that he had attached the list to his plaint and indeed in the answer to request for further and better particulars, dated 10 September 2017, or para item 10 it reads: *Verbal agreement. Recordings. Supporting documents.*

[15] He has submitted that he has nearly 20 pages of text recording that could be backed by CD and downloaded from a pendrive. He submitted that all that can be viewed on a computer and can also be printed.

[16] The question to be determined by this court is whether the recordings and information on the CD and the pendrive, capable of being printed, amounts to a beginning of proof in writing.

[17] The Electronic Transactions Act for example has given a wide definition *for electronic record* which means data, text, images, sound, codes and databases;

Reference has been made by both counsel to Section 15 of the Evidence Act above. I find it very instructive to refer to the definition of document under that section in the interpretation section.

[18] We must look at the meaning of the term “ document” as provided in the interpretation section, which I reproduce here: “document” includes

(a) A map, plan, graph or drawing;

(b) A photograph

(c) A disc, tape, sound track or other device in which sounds or other data (not being visual images) are embodied so as to be capable with or without the aid of some other equipment, of being reproduced therefrom; and

[19] An electronic record, for example has been defined in the Electronic Transaction Act as meaning data, record, data generated image, or sound store, received or sent in electronic form. Electronic form means any information generated, sent, sent received or stored, in any computer storage media such as magnetic, optical, computer memory, or other similar devices.

[20] A reading of Article 1347 does refer to a wide meaning of writing; it refers to every writing. Certainly computer generated writing was not in existence. It is certain that in the early days it was the handwritten material that was before the court. And that constituted the writing, amounting to the beginning of proof in writing. But a time came when

typewriters came into existence and the classical handwriting gave way to the typed material. And the courts had to give way and make room for that innovation. The following passage is very instructive both from the point of view of the new material which was the “dactylographie”, which made its entry in the court and became established, and also the evidential requirement that it refers to.

Acte nonsigne: un texte dactylographie peut constituer un commencement de preuve par écrit, bien que nonsigne, des lors que la partie a laquelle on l’oppose reconnaît qu’elle l’a elle même dactylographie et qu’il est son oeuvre materielle et intellectuelle Civ.ier.jan.1961.Null. Civ.no 41. (reproduced from para 27 of judgment of SCCA in Nathalie v Sarah Louise WALsh 2012).

- [21] I presume it would appear foolish to imagine that objections could have been made on the ground that the typed material was different from handwriting. From handwriting to typed material the transition must have been very smooth.
- [22] Electronic gadgetry has now become part of our daily life and culture.
- [23] Legislators and policy makers have rightly amended the law and given to the various electronic gadgets devices, information storages system and new electronic tools the evidential role that they have. Section 15 of the Evidence Act and the Electronic Transactions Act go in that direction. New methods of bringing evidence to the court have been recognized in the legal system of Seychelles. It would be lagging behind if the exceptions to article 1347 would not be extended to include these electronic recordings and data.
- [24] I have no difficulty in holding that the documents referred to by Learned counsel for the Plaintiff is admissible as a beginning of proof in writing in as much as the contents of the CD and the pendrive can be printed and produced in court. Learned Counsel for the Plaintiff has rightly remarked that times have changed. Electronic communications and recordings are now admissible as evidence.
- [25] I have one more point to make. I would like to refer to the following paragraph from COOPOOSAMY V DUBOIL (SLR) 2012.

[26] Four instances of where this exception applies are then given in the Code. To further temper the strict applicability of article 1341 and its unjust consequences to certain parties in some circumstances, jurisprudence has provided further exceptions. Further the Court of Cassation of France has stated that the exceptions provided in Article 1348 of the Code are not exhaustive and that where that where it is impossible to secure written proof it is certainly possible to bring proof of obligation by either by oral evidence or by presumptions. (Cass 17 déc 1982, Pas 1983 I P 1982-1983 col 2451; Cass 6 dec 1988. See also De Page t III 3e ed no 904). One of these exceptions has been the moral impossibility to provide such proof arising from the relationship between the parties. Not all relationships even between close family members give rise to this exception. There must also exist close ties as a result of the family relationship (lien de famille) friendship, or trust. In this respect the court is vested with immense power and discretion to appreciate each case on its own facts to determine whether there is such a moral responsibility in any particular relationship to bring a written proof (see Civ 1re, 28 fevr. 1995, Defrenois 1995.1043, obs. Mazeaud). In Seychelles we have followed this approach and it has become our law (Victor v The Estate of André Edmond (1983) SLR 203, Renaud v Dogley (1983-1987) SCAR II 202, Aniella Vidot v Jerome Padayachy (1991) SLR 279, Esparon v Esparon (1991) SLR 59, Port Glaud Development v Larue (1983-1987) SCAR II 152).

[27] I am inclined to reproduce here the following excerpt from the judgment of my sister Judge Robinson JA, from the case *of Natalie Sarah Louise Walsh* on the principles relating to the admissibility of initial proof in writing.

[28] In the case of *Robertson v Quinlan* 1934 CanLII 77 (SCC) (Supreme Court of Canada), which is an appeal from the judgment of the Court of King's Bench, appeal side, which affirmed the judgment of the Superior Court, and maintained the respondent's action, Cannon J. made the following comment in regard to the commencement of proof in writing (initial proof in writing) —

"Il n'est pas nécessaire que l'écrit établisse un des éléments du fait à prouver; il peut être simplement le point de départ d'un

raisonnement pour le juge. 25 Revue Trimestrielle de Droit Civil (1926) p. 410.

Il ressort des décisions jurisprudentielles (nous dissent Planiol & Ripert, 7 Droit Civil, n° 1534) que le fait établi par le commencement de preuve doit rendre à première vue le fait allégué vraisemblable, que la vraisemblance n'est pas l'apparence de la vérité, mais ce qui est probable, mais qu'il ne suffit pas que le fait allégué soit rendu seulement possible. [Colmar, 12 nov. 1948. D 1949. 72.].

Le juge ne se contente pas de prendre en considération le fait établi et le fait allégué; mais il examine tout le procès en se basant sur ces circonstances extrinsèques.”.

[29] Upon the basis of the observations and reasoning contained in the case of ***Cooposamy V Duboil*** quoted above, paragraph I have no hesitation to hold that the relationship between the Defendant and the Plaintiff was such that the need for writing could not have been contemplated and oral evidence can therefore be admissible. This constitutes an additional reason for me to allow oral evidence to be adduced in this case.

[30] As for the contentions made under the Civil Evidence Act I do not find them relevant in the light of my findings.

Signed, dated and delivered at Ile du Port on 1st June 2018.

S Nunkoo
Judge of the Supreme Court