SUPREME COURT OF SEYCHELLES

Reportable
[2019] SCSC …
MA 43/2018
(Arising in CS NO. 20/2015)

In the matter between:

MARGITTA BONTE **Applicant/Defendant**
(rep. by Anthony Derjacques)

and

NATHALIE LEFEVRE **Respondent/Plaintiff**
(rep. by Elvis Chetty)

Neutral Citation: *Bonte v Lefevre* [case number] MA 43/2018) [2019] SCSC 31st January 2019).
Before: ANDRE J
Summary: Judgment by Consent– Setting aside – New Trial – Sections131, 194 and 195 Seychelles Code of Civil Procedure (Cap 213)
Heard: 8th November 2018
Delivered: 31st January 2019

ORDER

The Motion is dismissed with costs.

RULING

ANDRE J

[1] This Ruling arises out of a notice of Motion of the Applicant / Defendant of the 8th February 2018 and supported by affidavit of the 12th February 2018 (hereinafter referred to as 'Applicant"). The Motion seeks for *setting aside of the Judgement by Consent of the 25th January 2018* ***entered before this Honourable Court, which Judgment is duly signed by both parties and for ordering of a hearing***. (Emphasis is mine)

[2] The Respondent / Plaintiff (hereinafter referred to as the Respondent"), resists the Motion by way of Affidavits of Learned Counsel Mr. Bassil Hoareau of the 18th May 2018 and of Respondent of the 1st October 2018.

[3] The relevant factual and procedural background to this Motion is in essence as follows:

1. An amended plaint was filed as against the Applicant in Civil Side No. 20 of 2015 on the 21st April 2016. The plaint sought from the Respondent payment of certain sums of money in the sum of Euro 180,433; USD 25,949.76; and SR 138,919/- with interests and costs thereon, which claims arose out of alleged debts owed by the Applicant to the Respondent. The Applicant denied the claims by virtue of her amended statement of defence of the 31st October 2016 and moved for dismissal of the plaint with costs. On the 25th January 2018 the matter was fixed for whole day hearing and the Learned Counsels in the presence of the parties in open Court moved for time to file a Judgment by Consent as per proceedings of the 25th January 2018 would reveal. The Court allowed Motion *viva voce* for both Learned Counsels were in agreement to the Judgment by consent being entered and the matter was fixed for the same day to avoid further delay in the case which case had been adjourned on several occasions upon Motion of both parties to try settle the matter but to no avail. Judgment by Consent was entered and endorsed with both parties in open Court in the presence of their (then) counsels and there were no objections in Court to the Judgment being entered and the Judgment by Consent was signed by both parties in open Court without objections.

[4] The Applicant now claims by virtue of her stated Affidavit that she is moving for the setting aside of the Judgment by Consent afore-mentioned on the ground that on the 25th January 2018, *"I attended Court and prepared for a hearing only. I was ill, I had life-threatening high blood pressure, I was stressed and I was not in control of my emotions. I was not calm, nor in a position to make any major legal decisions with respect to the action before the Court, nor my company shares or immoveable properties. Land parcels V4650, V4665 and V4651, had to and never been an issue in CS NO. 20 of 2016. Basil Hoareau had no proof in hand to make this decision and only made a phone call to the*

Registrar of Land to Independence House. I did not instruct my Counsel that I was ready to enter into any Judgment by Consent nor give away all my interests in land parcels V4650, v4665 and V4651 to the Plaintiff. I am not instructed by my other daughter, Mrs Marisa Womble, to sell or transfer her rights in these said land parcels without her express written consent. I was pressured by both Mr France Bonte and Mr B Hoareau, Counsel for the Plaintiff to sign the Judgment by Consent. I even asked the Court Interpreter Mr. P. Brigilia, to talk to the judge as I was being pressured under duress and I was stressed and ill. I did not want to sign the Judgment by Consent. I have requested from the Registrar, a copy of the taped and recorded proceedings, as it would prove that I stated I did not want to sign the Judgement by Consent, I was emotional and was not acting freely and could not exercise free will. I repeated in Court, a few times that I did not want to sign the Judgement."

[5] Mr. Basil Hoareau by virtue of Affidavit of the 18th May 2018, avers that the allegations made by the Applicant to the effect that, *"I pressured her to sign the Judgment by Consent is incorrect, baseless and a blatant lie. I aver that at no point did I pressure Mrs Margitta Bonte to sign the Judgement by Consent. Mrs Margitta Bonte came to me, whilst I was in Court and enquired from me as to whether I knew who was the registered proprietor of Parcel V4050, V 4665 and V4651. I informed Mrs Margitta Bonte that I did know for certain who was the registered proprietor of the said land parcel but I could find out from Mrs Wendy Pierre, the Land Registrar. I called Mrs Wendy Pierre in the presence of Mrs Bonte and I was informed by her that the Three Musketeers Limited was the registered proprietor of the said parcels and I thereafter informed Mrs Bonte accordingly. As far as I could observe, Mrs Margitta Bonte was behaving and acting normally. When the matter was called before the Court, Mrs Margitta Bonte did not record any objections to the Judgment by Consent being made a Judgment of the Court despite the fact that she had the right and opportunity to do so"*.

[6] Nathalie Lefevre on her part as per Affidavit of the 1st October 2018, averred that, *"I aver that the allegations made by Mrs Margitta Bonte to the effect that she was pressured to sign the Judgment by Consent is incorrect, baseless and a blatant lie. I aver that I was present on the 25th of January 2018 before the Court when the Judgement by Consent was*

entered into between myself and Mrs Margitta Bonte. And that at no point in time was Mrs Margitta Bonte ever pressured to sign the Judgment by Consent, in the company of her Lawyer, and mine. In fact, it was her Lawyer Mr Bonte who initiated the settlement agreement. As daughter of Mrs Margitta Bonte I know her very well and I can confirm that she was behaving and acting normally. My mother is not someone that can be forced to do anything against her will".

[7] Both Learned Counsels Mr. Anthony Derjacques and Mr. Elvis Chetty (newly appointed Counsels for both parties), upon leave of the Court, submitted for and against the Motion on the 8th November 2018 in open Court.

[8] Learned Counsel Mr Anthony Derjacques submitted in a gist, firstly, that the Applicant relies on her Affidavit (supra) and all Authorities attached to the Motion; and secondly, that the plaint refers to damages which is liquidated damages and the Judgement by Consent is in respect of land parcels V 4650, V4665 and V4651, hence in his opinion the Judgment by Consent is in respect of matters which are *ultra petita*. It is to be noted at that juncture that the latter submissions is not part of the filed Motion and or Affidavit of the Applicant thus in itself *ultra petita*. And in any event the terms of the Judgement by Consent as endorsed as Judgement of the Court was well within the Jurisdiction of this Court as agreed mutually by the parties to this case. *(Reference is made to the case of* ***(Gill v/s Freminot SCA No. 4/2006, LC 290).***

[9] Learned Counsel Mr. E. Chetty, on his part submitted on behalf of the Respondent in a gist, that, firstly, the Notice of Motion states that the Judgment by Consent entered on the 25th January 2018 before this Honourable Judge be set aside and that the Plaintiff's action should proceed to a hearing. It is thus submitted that the Applicant has instituted the wrong action to bring before the Court and this in line with the provisions of Section 194 of the Seychelles Code of Civil Procedure (Cap 213) *(*hereinafter referred to as the "Code"). It is submitted that the said section provides that, *"a new trial may be granted on an application or other party to the suit"* which means in essence that the Applicant ought to have moved the Court for a new trial and not for the existing Judgment by Consent to be set aside. On that basis the action should be dismisse*d.* Secondly, that in

line with the provisions of section 195 of the Code, it is provided that, *"application for a new trial shall be made by Petition supported by Affidavit of facts"*. That in this matter the Applicant has filed a Notice of Motion and not a Petition and hence wrong procedure followed by the Applicant and reference is made in that light to the matter of **(Choppy & Ors v. Choppy & Anor 1959 SLR 162)**, wherein it is held that, *"in the event where there is special rules to be followed such rules must be abided to."* On that basis also it was submitted that the application should fail.

[10] Upon the summary of the salient facts and submissions of the parties, I will now move on to address the legal standards and its analysis thereto.

[11] As an initial matter, the Respondent has raised a procedural objection arguing that the Applicant has improperly filed its application to set aside the Judgement by consent of the 25th January 2018 and that the Applicant's action proceed to hearing.

[12] Reference has been made to the provisions of Sections 194 and 195 of the Code (supra). Section 194 of the Code provides that, *"a new trial may be granted on the application of either party to the suit -*

(a) where fraud or violence has been employed or documents subsequently discovered to be forged have been made use of by the opposite party;

(b) where it appears to the Court to be necessary for the ends of justice.

[14] Section 195 of the Code, on the other hand provides that, *"Application for a new trial shall be made by petition supported by Affidavit of the facts, and shall be served on the opposite party in the same manner and subject to the same rules as to time for appearance as in the case of plaints"*.

[15] Now, looking at the contents of the application before the Court by way of Motion and Affidavit of the Applicant, both seek for setting aside of a duly endorsed Judgement by Consent of all parties which was, ***"in full and final settlement of all the matters and issues raised by the parties in this case***" and that, ***"the parties irrevocably agreed"* and *"to proceed with a hearing".*** (Emphasis is mine)

[16] Now, the gist of the Affidavit of the Applicant is moving for nullity of the Judgment by consent as endorsed as Judgement of the Court which led to finality of the matter in CS No. 20 of 2015, on the ground of violence in that she was being pressured and under duress to sign the Judgement by consent.

[17] The Judgment by consent was entered as Judgement of the Court upon the Court being satisfied that there were no impediments before it rendered it as such. Judgment of Court renders it executory and subject to application for stay of execution and orders of new trial based on a cause of action. And a consent Judgement has the same prescription period for appeal as other Judgments. *(Reference is made to the case of* ***(Cecile v Rose SCA No. 8 of 2009.LC 338)***. Should there be allegations of violence or duress as alleged by the Applicant in her Affidavit, it is clearly provided by the provisions of Section 194 and 195 of the Code as to the proper procedure and grounds as above-stated for petitioning of the Court for a new trial to be considered.

[18] Now, as indicated the Applicant has moved this Court by way of Notice of Motion and Affidavit to set aside a Judgment by consent and a new trial to be granted in the disguised prayer of the Applicant's Motion "*should proceed to hearing*". There is to my mind no difference between moving for a hearing and seeking for a new trial and hence as clearly described in the **Choppy case**, "*where a suit is instituted for the specific object of declaring a marriage null and void, the question of nullity cannot be treated as an incidental matter and the normal procedure must be followed."*

[19] Further in the same case citing Lord Halsbury L.C., in **(Passmorer v. Oswald/Twistle U.D.C. (1898) A.C. 387)**, it was held that, *"the principle that when a specific remedy is given by a statute it thereby deprives the person who insists upon a remedy of any other form of remedy than that given by the statue is one which is very familiar and runs through the law."* Same decision was rendered in the matter of **(Walt v. Kesteren C. Council, 1954 W.L.R. 729.)**.

[20] The Court in the **Choppy case** went further to state that, *"In England the question of determining whether a given remedy was an exclusive remedy one should have been the subject of numberless decisions is quite understandable because in many cases one finds*

common Law and equitable law remedies running parallel to statutory remedies. But in Seychelles the position is altogether different." Albeit in the **Choppy case,** the matter was dealing with nullity of a divorce, the legal point in issue is similar to the current one namely "*the mandatory procedure for an annulment"*, hence its reliance by this Court.

[21] Following the above stance vis-a-vis position of Seychelles by virtue of the cited provisions of the Code for the purpose of request of a new trial, (which legal position I do not intend to depart from), it is clear that the Applicant ought to have filed an application under section 194 of the Code for a new trial by way of Petition for annulment of the Judgment by consent on ground of violence and duress and hence seek for new trial. Failure for following same is a gross procedural irregularity and cannot be cured by filing of an incidental Motion upon completion of a matter in full and final settlement before Court. It follows that this '*vice de procedure*' in terms of form is fatal to the application and hence dismissed accordingly on that basis.

[22] Secondly, I find it opportune in this matter to refer to the provisions of Section 131 of the Code entitled Judgment by consent, whereby it is clearly provided that, *"the parties may at any stage of the suit before Judgment, appear in Court and file a Judgment by consent signed by both parties, stating the terms and conditions agreed upon between them in the suit and the amount, if any, to be paid by either party to the other and the court, unless it see cause not to do so, shall give judgement in accordance with such settlement."*

[23] Contesting the Judgment by consent through the wrong procedure as explained and ruled above, the Applicant has further cited two Authorities namely **(Jessley Cecile v/s M.T. Rose & Ors SCA 8 of 2009)** and that of **(Christopher Gill v/s Wilfred Freminot and Anor)**, which cases in my humble opinion is not on all fours with this case hence irrelevant for the purpose of procedure and contents. In any event, even in the two cited cases albeit all the distinguishing features different from this case, the Court did rule that non-compliance with all the elements as set out in the decision cannot result in a nullity of the agreement reached which would, in all cases, become a ground for an Application for a new trial and a stay.

[24] Thirdly, in the interests of justice, this Court albeit the procedural flaw as ruled above, based on a careful scrutiny of the records of proceedings of the 25th January 2018 (which speaks for itself as to the procedure adopted for the drafting and signing of the duly endorsed Judgement by consent by all parties in open court at the sight and hearing of the presiding Judge), as read in line with the Affidavit of the Applicant and documentations attached thereto of the Applicant and those of the Respondent and the then Counsel Mr. B. Hoareau, I find that the allegations made by the Applicant are unfounded and unsubstantiated both in law and facts hence, the matter is also dismissed on that basis.

[25] It follows, thus that the Notice of Motion is dismissed for all the reasons given both in law and substance with costs.

Signed, dated and delivered at Ile du Port Victoria on the 31st day of January 2019.

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ANDRE J