SUPREME COURT OF SEYCHELLES

Reportable
[2019] SCSC 603
CA 38/2018
(Appeal from 29/2017)

In the matter between:

STEPHEN PAYET **Appellant**
(rep. by Joel Camille)

and

FRANKY CEDRAS **Respondent**
(rep. by Karen Dick)

Neutral Citation: *Payet v Cedras* (CA 38/2018) [2018] SCSC (18 July 2019).
Before: Burhan J
[1] **Summary:** Claim for damages for injury occurring at work place. Appellant has failed to establish negligence on part of respondent. Section 8 (a) of Occupational Safety and Health Decree also castes a duty on the employee to take reasonable care for the health, safety and well-being of himself and others whilst he is performing his duties. Appeal dismissed with costs.

Heard: 12 January and 05 March 2019
Delivered: 18 July 2019

ORDER

On appeal from the Magistrates' Court, Seychelles (Brassel Adeline – Senior Magistrate, then).

The appeal is dismissed with costs.

JUDGMENT

BURHAN J

[2] The plaintiff- appellant (hereinafter referred to as the appellant), filed plaint in the Magistrates' Court seeking a sum of SCR 200,000.00 (two hundred thousand) from the

defendant- respondent (hereinafter referred to as the respondent) as damages for pain and injury as a result of the loss of two fingers in his right hand due to the negligence of the respondent. The total sum claimed includes claims for inconvenience, anxiety and distress and moral damages as well.

[3] The background facts of the case as set out in the plaint are that on the 5th of July 2016, the appellant was employed by the respondent as a building contractor and was working on concrete placement on a worksite at Anse Aux Pins, when his right hand got crushed and injured by the concrete mixer resulting in the loss of two fingers in his right hand. It is further averred that the injury occurred during the course of his employment and as a result of the negligence or *faute* of the respondent.

[4] The negligent acts of the respondent as set out in the plaint are that the respondent failed to provide a safe system and place of work for his employees. The respondent further negligently allowed the appellant to attend to concrete placement work without safety equipment, failed to give proper instructions to his employees or agents and the ~~appellant~~ respondent failed to take reasonable care for the safety of the appellant.

[5] After trial the Learned Senior Magistrate then (Mr. B.Adeline) by judgment dated 31st of August 2018, dismissed the plaint with costs.

[6] Being aggrieved by the said decision the appellant seeks to appeal on the following grounds as set out in his memorandum of appeal:

1. *The Learned Senior Magistrate erred in law in holding that the pleadings of the Appellant, before the Court, has failed to disclose material facts, as required under Section 71 (d) of the Seychelles Code of Civil Procedure.*

2. *The Learned Senior Magistrate erred in law and on the facts in holding that the Appellant has failed to adduce evidence to support his allegations as averred in his Plaint.*

3. *The Learned Senior Magistrate erred in law in not appreciating the totality of the evidence presented in the case and more specifically the evidence of the Appellant which supports finding of faute on the part of the Respondent.*

4. *The Learned Senior Magistrates erred in law in applying the wrong test in assessing the evidence before him and applying the law in relation to the finding of faute in the case.*

5. *In the circumstances of the above the Appellant moves the Court to reverse the finding of the Learned Senior Magistrate and enter judgment in favour of the Appellant with costs.*

[7] I would like to first deal with the main issue in the case i.e. whether the appellant was able to on a balance of probabilities establish that the injury caused to him was a result of the negligence of the respondent. His evidence on this issue is that he was working as a mason at a house at Anse Aux Pins laying concrete and while he was placing cement in the mixer, his right hand got stuck in the mixer. He had pulled his hand out and his index finger had fallen down and the 3rd finger was held with finger skin only. He had removed his shirt and tied it around his wrist. Thereafter, he had been taken to hospital more than an hour later. It is to be noted the facts that he was employed by the respondent and it was during the course of his employment with the respondent that the injury occurred are not matters in issue but admitted by the respondent. Further the fact the appellant lost two fingers as a result of the incident, is not a contentious issue and the fact that this has affected him permanently has not been challenged.

[8] He further denies the suggestion that he was lying when he stated that he was putting cement into the mixer and denied the fact that the incident occurred when he was cleaning the mixer. It was further suggested to him that the incident occurred as he attempted to clean the mixer without switching it off and the incident and injury occurred as a result of his own negligence which he denied. It was suggested to him that one uses a spade to put cement into a mixer. His contention was that the cement bag was opened and the cement was poured into the mixer and no spade was used. However, it appears from the evidence of Mike Lesperance and Roy Cedras that spades were available at the site. It also transpired

from the evidence that when a mixer machine is cleaned, it should be switched off and a brush is provided to clean the mixer.

[9] According to the evidence of Roy Cedras who was working with the appellant at the site, the appellant had attempted to clean the mixer with a cement bag instead of a brush which was provided for such a purpose and had done so without switching the cement mixer off. While cleaning the cement mixer, the piece of cement bag which he was holding and cleaning with, went into the crank resulting in the injury to his index and middle fingers. The evidence of Mr. Roy Cedras indicates that boots and gloves were provided to the workers for their safekeeping. His evidence is corroborated by the evidence of Mike Lesperance. Their evidence too indicates that the incident occurred at the end of the working day when they had finished mixing the cement and the cement mixer was being cleaned by the appellant. From their evidence it is clear the appellant had failed to use the provided brush to clean the mixer and failed to switch off the machine whilst cleaning resulting in his injury.

[10] The Learned Senior Magistrate in his judgment has considered the evidence of both parties and decided to accept the evidence of the respondent as to how the incident occurred, on the basis that the evidence of the respondent stood corroborated. When one peruses the medical certificate filed on record, it is apparent that the appellant was admitted to hospital at 4.10 p.m. on the 5th of July 2016, indicating that the incident would have occurred towards the end of the working hours for the day. It would be unlikely that at the close of working hours, cement bags were being open and cement mixed as it would be unwise to keep excess cement overnight. It is more likely considering the time the incident occurred that the cement placement work was concluded and the mixer was being cleaned.

[11] Twomey JA in her dissenting opinion in ***Graham Pothin v R (Criminal Appeal SCA 13/2017) [2018] SCCA 17*** held:

"It is trite that an Appellate Court will not readily overturn the factual findings of a Trial Judge, specifically because the Appellate Court "is disadvantaged in that it has to weigh these matters with only the record of proceedings before it and cannot observe the

witnesses at first hand to gauge their truthfulness" ***Beeharry v R* SCA 28/2009 [2012] SCCA 1[at para 15].**

[12] In ***Akbar v R* [1998] SCCA 37** this Court stated *"An appellate Court does not rehear the case on record. It accepts findings of facts that are supported by the evidence believed by the trial Court unless the trial Judge's findings of credibility are perverse."*

[13] In ***Styles v Attorney General* 2006 JLR 210** it was noted that *"it is not part of the powers of the Court of Appeal to review the totality of the evidence, sift through points of alleged weakness and attempt to make its own evaluation of that evidence.* [at 32-34].

[14] Based on the aforementioned reasoning and case law this Court would therefore not proceed to interfere with the finding of the Learned Senior Magistrate that the appellant was not able on a balance of probabilities to establish that the injury caused to him was a result of the negligence of the respondent.

[15] It is also the contention of Learned Counsel for the appellant that the Learned Senior Magistrate erred in law to have concluded in his judgment that that the appellant had failed to disclose material facts in his plaint as required under section 71(d) of the Seychelles Code of Civil Procedure, when the statement of the defence of the respondent had not averred that the plaint discloses no cause of action. It is the contention of the appellant that the judge cannot formulate a defence after listening to parties or grant a "relief not sought in the pleadings." He further contends that the judge cannot adjudicate on issues which have been not raised in the pleadings.

[16] Section 71 (d) of the Seychelles Code of Civil Procedure CAP 213 reads as follows:

The plaint must contain the following particulars:

d) a plain and concise statement of the circumstances constituting the cause of action and where and when it arose and of the material facts which are necessary to sustain the action;

[17] When Learned Counsel states that a judge should not grant "relief not sought in the pleadings" it is correct but this applies to where no such relief is claimed in the prayer to the plaint or counter claim. In such instances a Court would be acting ultra petita. However

in this instant case all the respondent has requested as a relief is that the plaint be dismissed. The Learned Senior Magistrate is free to consider any short comings in the pleadings and in the evidence, in coming to a conclusion that the plaint be dismissed.

[18] What the Learned Senior Magistrate has stated at paragraph [30] of his judgment, is that although the appellant avers that the respondent failed to provide him with a safe system of work other than that averment, there is nothing averred in the plaint or any material facts relating to this issue set out in the plaint, for Court to come to a conclusion that the respondent had failed to provide him with a safe system of work. At paragraph [31] of his judgment, the Learned Senior Magistrate states that another allegation made by the appellant was that the respondent failed to provide him a safe place of work. Once again he states, the appellant failed to plea the material facts that enabled him to come to the conclusion that his place of work was unsafe and Court heard no evidence as to what made the appellant's place of work unsafe and what should have been done to make it safe. In ***Tirant v Banane (1977) SLR 219,*** it was held in civil litigation, each party must state their whole case and must plead all facts intended to be relied on. It is the view of this Court, once the material facts giving rise to or sustaining the cause of action have been pleaded, further detailed evidence could be led of facts which are relevant to the material facts set out in the plaint, even though such intricate details may not be set out in the material facts in plaint.

[19] The respondent has denied that he negligently allowed the appellant to attend to concrete placement work without safety equipment and his evidence indicates gloves, boots, spades and brushes were provided for the various chores to be handled at a construction work site. The evidence on this issue of the respondent has been accepted by the Learned Senior Magistrate on the basis that the evidence stands corroborated. The evidence also reveals that the workers at the site had been insured and the respondent had been paid by the insurance company though he had not banked the cheque on legal advice. Therefore on consideration of the above facts, it cannot be said that the respondent had failed to take reasonable care for the safety of the appellant. Further, the appellant was not a novice at this work who had to be placed under close supervision in order to be given proper instructions how to work. The appellant in his own evidence admits in his own evidence,

he is an experienced person in construction for 15 years and therefore should have known that failure to use the provided spade to place cement in the mixer or failure by him to clean the mixer after it was switched off with the provided brush was a failure on his part. To clean the mixer with a cement bag and not the brush provided was negligence on his part. Therefore it cannot be said that the respondent is negligent as he had failed to give proper instructions to his employees. The respondent cannot be blamed for the ambulance not arriving when called and he denies he took an hour to come to the site but was there on being informed in 20 minutes and had taken the appellant to the hospital.

[20] It is pertinent at this stage to mention that while section 4 of the Occupational Safety and Health Decree CAP 151 sets out the duties of the employer in regard to the health, welfare and safety of the workers, section 8 (a) sets out the duties of the employees in regard to same and reads as follows:

It shall be the duty of every employee while at work –

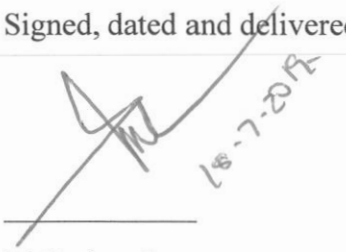
a) to take reasonable care for the health, safety and well-being of himself and of other persons who may be affected by his acts or omissions at work;

[21] Therefore the law as contained in the said Act, also castes a duty on the employee to take reasonable care for the health, safety and well-being of himself and others whilst he is performing his duties.

[22] For all the aforementioned reasons, this Court is of the view that the facts contained in the plaint are inadequate ~~for lack of~~ want of material facts in order to sustain the cause of action and there is a failure on the part of the appellant to satisfy the evidential burden placed on him to prove on a balance of probabilities that there was negligence or *faute* on the part of the respondent.

[23] I therefore proceed to uphold the findings in the judgment of the Learned Senior Magistrate and dismiss the appeal with costs.

Signed, dated and delivered at Ile du Port on 18 July 2019



M Burhan J