SUPREME COURT OF SEYCHELLES

Reportable/ Not Reportable / Redact
[2020] SCSC 517
CS 95/2017

In the matter between:

MOHANA SUNDARAM PADAYACHY **Plaintiff**
(rep. by Elvis Chetty)

and

GEORGE MILOBA **1st Defendant**
(rep. by Guy Ferley)

CHINNAPONNU PANJANATHAN **2nd Defendant**
(rep. by Guy Ferley)

Neutral Citation: *Padayachy v Miloba & Anor* (CS 95/2017) [2020] SCSC 517 (31st July 2020)
Before: Pillay J
Summary:
Heard: 19th October 2018, 24th September 2020
Delivered: 31st July 2020

ORDER

Judgment is entered in favour of the Defendants and the Plaint is accordingly dismissed with costs awarded to the Defendants.

JUDGMENT

PILLAY J

[1] The Plaintiff in the case seeks an order declaring as being illegal the eviction of the Plaintiff from the premises and/or the termination of the statutory agreement for lease,

arising in terms of section 12 of the Act by the first Defendant. He further seeks a mandatory injunction against the first and/ or the second Defendants compelling the first Defendant and/or second Defendants to grant possession of the premises to the Plaintiff and allowing the Plaintiff to operate and run a shop business in the premises. He further seeks a prohibitory injunction against the first Defendant prohibiting the first Defendant from harassing and/or illegally evicting the Plaintiff from the premises and/or from illegally interfering with the Plaintiff's peaceful enjoyment of the premises whether by himself or through any third party whomsoever. Lastly he seeks an order for the first Defendant solely or jointly and severally with the second Defendant to pay the sum of SCR 100, 000 to the Plaintiff with interest thereon plus costs.

[2] The Plaintiff's claims are as follows:

(1) The Plaintiff was and is at all material times a citizen of Seychelles.

(2) The 1st Defendant was and is at all material times the owner of a building, which has been used as a shop (hereinafter the premises).

(3) The 2nd Defendant was at all material times an employee of the 1st Defendant.

(4) By an agreement for lease dated 1st of July 2016, the 1st Defendant leased the premises to the Plaintiff.

(5) The Agreement for lease contained the following express term:

- *(i) the Plaintiff was to pay the 1st Defendant a monthly rental of SR 12, 000;*
- *(ii) the agreement for lease was to be for a period of one (1) year from the 1st July 2016;*
- *(iii) the Plaintiff was to use the premises to conduct a shop business.*

(6) The Plaintiff at all times complied with his obligations under the Agreement for lease and conducted a shop business from the premises under the business name Kaliya Shopping Centre.

(7) The Plaintiff was at all materials in possession of the premises.

(8) By virtue of a contract of employment dated the 17th of August 2015, the Plaintiff employed the 2nd Defendant as the manager of shop which was being operated in the premises of the Plaintiff.

(9) The Plaintiff avers that in accordance with Section 12 of the Control of Rent and Tenancy Agreement Act (hereinafter referred to as the Act) read with Section 13 of the Act, the Plaintiff was entitled to remain in possession of the premises beyond the one year term mentioned in the agreement for lease, based on the same terms and conditions as the original agreement for lease.

(10) The 1st Defendant acted in contravention of Section 12 of the Act read with Section 13 of the same, since the 1st Defendant illegal evicted and/or terminated the statutory agreement for lease which arose in accordance with the said Section 12.

(11) Further and/or in the alternative to paragraph 9 it is averred that the contravention by the Plaintiff of Section 12 of the Act read with Section 13 of the same, was done in cahoots and in conspiracy with the 2nd Defendant.

(12) Immediately after the 1st Defendant had evicted the Plaintiff and/or terminated the agreement for lease as averred in paragraph 10 above, the 1st Defendant leased the premises to the 2nd Defendant from which the 2nd Defendant is currently operating a shop business.

(13) The acts and conduct of the 1st Defendant and/.or the 2nd Defendants have caused moral damages to the Plaintiff in the sum of SR 100, 000.

[3] The Defendants denied the Plaint in its entirety and raised pleas in limine that the Supreme Court was not the proper forum for the case and that the proper forum is the Rent Board Tribunal amongst others. Counsel for the Defendant agreed that the pleas in limine be heard during the trial[1].

[4] The pleas in limine are as follows:

(1) The plaint is bad in law in that the Supreme Court has no jurisdiction to entertain this claim as it is the Rent Board that is the proper forum pursuant the Control of Rent and Tenancy Agreement Act.

(2) The plaint is bad in law in that a claim for an injunction must be brought by a motion supported by an affidavit and not by a plaint.

(3) The plaint is frivolous and vexatious as it has no basis in law.

[1] Proceedings of 29th November 2017 at 3pm

(4) The plaint is bad in law as is reveals no reasonable cause of action against the 1st and the 2nd Defendants.

(5) The prayer as contained in sub-heads (ii) and (iii), if granted, will constitute a contravention of the 1st defendant's right to peaceful enjoyment, without interference, of property as contained in article 26 of the constitution. (sic)

[5] With regards to the pleas in limine counsel for the first and second Defendants submitted that sections 9 and 10 of the Control of Rent and Tenancy agreement Act confer original and exclusive jurisdiction to the Rent Board in matters concerning rent and tenancy. It was his submission that the Supreme Court consequently is not the court of first instance for the present case.

[6] He also submitted that 'section 12 (1) states that a lessee who retains possession of a dwelling house…shall so long as he retains possession enjoys the benefit of the former lease.' (sic)

[7] Counsel declined to submit on the other pleas raised in light of the evidence produced before the Court.

[8] With regards to the merits counsel for the Defendants submitted that the Plaintiff sub-leased the premise contrary to an expressed provision of the lease agreement. Counsel further submitted that the first Defendant had given notice to the Plaintiff to quit and that at the time the first Defendant sub-leased the premises to the second Defendant the Plaintiff was not in possession of the premises, the Plaintiff confirming that he was living on Praslin at the time.

[9] Counsel for the Defendants submitted that though the Plaintiff claimed that the second Defendant was his employee, the Plaintiff did not produce any evidence to that effect, nor a payslip or contract.

[10] With regards to the claim for moral damages, counsel for the Defendant submitted that the Plaintiff adduced no evidence to show why he was entitled to such sum.

THE EVIDENCE

[11] The Plaintiff's evidence is that he is a business man and resides on Praslin. He stated that he knew the two Defendants. It was his evidence that he rented a shop, registered as Kalya Shopping Centre, from the first Defendant on 1st July 2016, whereas the second Defendant worked with him. The agreement was for the Plaintiff to pay rent of SCR 12, 000/- per month. He was paying the rent until he left for Praslin. Once he left for Praslin he asked the second Defendant to take care of the shop and she was paying the rent. He approached the owner for a sublease which he agreed to. The Plaintiff subleased the premises to the second Defendant. The Plaintiff testified that he rented the building from the first Defendant along with the stocks in it. The second Defendant did not pay him for the stock. He received an eviction notice from the first Defendant and was evicted without the first Defendant going through the Rent Board. The first Defendant did not return his one month deposit.

[12] The first Defendant testified that he owns a building in Mont Buxton which he rents out as a shop. He admitted knowing the Plaintiff and having rented the shop to the Plaintiff. He had a contract with the Plaintiff, PE2. The contract was for one year from 2015 to 2016. The first Defendant stated that he decided not to renew the contract after he learnt that the Plaintiff had sub-leased the shop without his knowledge and contrary to the contract. He informed the Plaintiff that he was not renewing the lease. Miss Pool wrote to him on behalf of the Plaintiff. The first Defendant stated that the rent was being paid by the second Defendant directly to him[2]. The first Defendant denied removing the Plaintiff from the premises or locking him out. He asserted that the second Defendant was already in occupation, the Plaintiff having sub-leased the shop to her. He further asserted that when he leased the shop to the second Defendant, the lease with the Plaintiff had already ended.

[13] The second Defendant testified that she was not employed by the Plaintiff but that she got a lease from the Plaintiff on a shop called Kayla Shopping Centre at Mont Buxton[3] for a monthly rent of SCR 12, 000 which she was paying to the Plaintiff. She produced the

[2] Page 19 of the proceedings of 24th September 2019 at 3pm
[3] Page 6 of the proceedings of 24th September 2019 at 3pm

lease as Exhibit P3. The shop was owned by the first Defendant. The second Defendant denied receiving any salary from the Plaintiff.

PLEA IN LIMINE

The plaint is bad in law in that the Supreme Court has no jurisdiction to entertain this claim as it is the Rent Board that is the proper forum pursuant the Control of Rent and Tenancy Agreement Act.

[14] It is trite that the ejectment of tenants is the exclusive jurisdiction of the Rent Board.

[15] On the authority of **Van Hecke v La Goelette (Proprietary) Limited *3 SCAR (Vol II) 332*,** a tenant cannot be evicted without an order of the Rent Board. The Court of Appeal in Van Hecke was unanimous on the point that the landlord was not entitled to repossess premises without an order of the Rent Board.

[16] Similarly, in **Kimkoon v Roman Catholic Church (1996) SLR 135**, the Supreme Court stated that no ejectment may be resorted to unless an application is first made to the Rent Board and an ejectment order obtained.

[17] The same principle was accepted in **David v Mortier (MC08/2018) [2018] SCSC 297 (26 March 2018)** reiterating the findings in **Hadee v Moutia (1978) SLR 189**.

[18] However in the present case it is the view of this Court that the Plaintiff is not seeking an order of eviction but a declaration that the eviction by the first Defendant was illegal.

[19] According to the case of **Majah v Majah (2010) SLR 327** the Supreme Court has unlimited jurisdiction in all civil matters under article 125 (1) (b) of the Constitution, as such the Supreme Court has jurisdiction to make the declaration sought.

[20] On the above the plea in limine has to fail.

The plaint is bad in law in that a claim for an injunction must be brought by a motion supported by an affidavit and not by a plaint.

[21] Applications for injunctions are made under section 304 and 305 of the Seychelles Code of Civil Procedure which reads as follows: -

> *s.304 – It shall be lawful for any plaintiff, after the commencement of his action and before or after judgment, to apply to court for a writ of injunction to issue to restrain the defence in such action from the repetition or continuance of the wrongful act or breach of contract or injury of a like kind, arising out of the same contract or relating to the same property or right, and such writ may be granted or denied by the said court upon such terms as to the duration of the writ, keeping an account, giving security, or otherwise, as shall seem reasonable and just.*
>
> *s.305 – Application under section 304 shall be made by way of motion in court upon due notice given to the defendant.*

[22] It is to be noted that section 304 applies to interlocutory injunctions - pendente lite. The Plaintiff however seeks a mandatory injunction as a permanent remedy as opposed to a temporary remedy before judgment.

[23] In the case of **Petit v Lefevre (1993) SLR 25** the Court held that an injunction may be made after the filing of a plaint whether the plaint contains a prayer for an injunction or not. The Court further found that there is no need for the main action to contain a specific prayer for a perpetual injunction. Even where there are disputed facts which can only be decided in the main case after hearing evidence, the judge may consider them and decide whether or not the status quo should be maintained.

[24] Given the above the plea in limine fails.

The plaint is frivolous and vexatious as it has no basis in law.

[25] The case of **Frank Elizabeth v The President of the Court of Appeal & Anor 2 of 2009 (2010) SCCC 2 (29 July 2010)** is relevant to the plea as to whether the plaint is

frivolous and vexatious. The Constitutional Court defined 'frivolous and vexatious' in the following manner:

> *Turning to the question of whether a matter is 'frivolous or vexatious' we note that the two words are not defined in the Seychelles Code of Civil Procedure. In fact we have not been able to come across a legislative interpretation of the words though the words are used in legislation in many jurisdictions. We shall start by looking at their dictionary definition. According to the Oxford Dictionary and Thesaurus (at page 600) frivolous is defined as 'adj. 1 paltry, trifling, trumpery. 2 lacking seriousness; given to trifling; silly.' We take it that this word in relation to a claim or petition means that the claim or petition has no reasonable chances of success.*
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> *Vexatious is defined at page 1750 of the Oxford Dictionary (supra) as 'adj. 1 such as to cause vexation. 2 Law not having sufficient grounds for action and seeking only to annoy the defendant.' Vexatious therefore relates to the effect on a defendant. It is vexatious if an adverse party is made to defend something that would not succeed.*
>
> *It appears from the wording of section 92 of the Seychelles Code of Civil Procedure that a finding of any one of these, frivolous or vexatious would be sufficient to trigger an order for stay of the action, or dismissal of the same on such terms as may be just.*

[26] The test then is whether or not the Plaintiff has any chance of success in his claim. The Plaintiff's claim amongst others is that he was illegally evicted, without an order of the Rent Board. Indeed as found above the Rent Board has sole jurisdiction over matters of eviction. In the circumstances the Plaintiff is within his rights to come before the Court seeking to prove his claim that he was illegally evicted and attempt to obtain an order in his favour. Therefore he cannot be said to be merely annoying the Defendants.

[27] On that basis the plea fails.

The prayer as contained in sub-heads (ii) and (iii), if granted, will constitute a contravention of the 1st defendant's right to peaceful enjoyment, without interference, of property as contained in article 26 of the constitution. (sic)

[28] With regards to this plea, this Court cannot make any such finding since jurisdiction to make any declarations with regards to any breaches or likely breaches of any Constitutional provision lie with the Constitutional Court.

[29] It needs to be said however that the first Defendant's right to peaceful enjoyment of his property is subject to him enjoying the property lawfully in accordance with the finding in **Hackl v Financial Inteligence Unit (2010) SLR 98** , the Plaintiff's claim is that the first Defendant acted unlawfully in evicting him when he had full protection of the law.

EVICTION

[30] It was the Plaintiff's own evidence that the second Defendant was an employee. "He was about to apply a GOP for the other employee but it got rejected and still is in the rejection stage."[4]

[31] In cross examination the Plaintiff accepted that the second Defendant had no contract of employment with him but had a sub letting agreement, Exhibit D3.

[32] In the circumstances there is no basis for his position that the second Defendant was only his employee and that the first Defendant was wrong to refuse to renew his lease.

[33] It is clear on the evidence that the Plaintiff subleased the premises to the second Defendant in breach of his lease agreement with the first Defendant. It was his testimony that the first Defendant gave him permission to sublease to the second Defendant, however there is no documentary proof that there was any such permission granted. Furthermore this Court has difficulty believing that the Minister of Employment would visit his premises and give him personal advise that should he grant a sublease to the second Defendant then he would get a GOP.

[4] Page 6 of the proceedings of 26th February 2019 at 9am

[34] In any event it is in evidence that after he signed the first lease with the first Defendant, the Plaintiff went back to Praslin, where had always resided, and left the second Defendant in the premises. Since 2016 the Plaintiff had not been in physical possession of the premises, having subleased the premises to the second Defendant on 1st August 2016.

[35] There was no issue of the first Defendant having to seek an order of ejectment since the Plaintiff had left the premises. In fact the evidence is that it was the second Defendant who had been paying the rent to the first Defendant all this time. There was no receipt produced that the second Defendant was making any payments to the Plaintiff or the Plaintiff paying anything to the first Defendant. All the evidence points to the second Defendant paying the rent directly to the first Defendant.

[36] According to PE3 the lease was signed on 1st July 2016 between the Plaintiff and first Defendant. One month later on 1st August 2016 he, the Plaintiff, entered into a sublease agreement with the second Defendant. By his own testimony that agreement for subleasing of the premises was sent to Praslin where he was living for him to sign.

[37] In order for a party to apply for eviction it presupposes that the said party was in physical possession of the building.

[38] On the evidence I find no illegal act committed by the first or second Defendants. On the contrary this Court finds the conduct of the Plaintiff highly suspect.

DAMAGES

[39] With regards to moral damages the Plaintiff claims SCR 100, 000.00. He explained that the sum was to cover the stock that was in the premises when he subleased the premises to the second Defendant as well as to cover the interest that he had to pay on the money he got from "outside" to buy the stock and the three or four days he had to deal with the Police[5].

[5] Page 18 of the proceedings of 26th February 2019 at 9am

[40] In cross examination as explanation for his claim for moral damages stated that he had been denied access to the shop and nobody took responsibility for the stock.[6]

[41] In accordance with the case of **Kopel v Attorney-General (1955) SLR 315** in principle moral damages are not to be awarded for breach of contract but in certain circumstances the court ought to do so. This position was adopted in the case of **Adeline v Ernesta (1992) SLR 13** in which the Court emphasized that the law does not ordinarily allow for moral damages for breach of contract but accepted that in circumstances such as inconvenience suffered for example for keeping a motor vehicle in the garage of a repairer, oral damages ought to be awarded.

[42] In the case of **Zatte v Joubert (1993) SLR 356** damages were awarded for inconvenience caused by a delay in obtaining a house and for loss of peace of mind.

[43] If the Plaintiff can show that he suffered some inconvenience, or the like, then he succeeds on his claim for damages.

[44] On the facts of this case, the doctrine of ex turpi causa comes to mind. In circumstances where a Plaintiff is the cause of his own misfortune he cannot expect to profit from his own illegal act. It is clear on the evidence that the Plaintiff was in breach of his lease agreement by leasing the premises to the second Defendant, in addition he failed to declare his taxes as well as attempted to bypass immigration laws by subleasing the premises to the second Defendant.

[45] In any event moral damages cannot cover specific claims such as the one the Plaintiff has made for loss of his stock. That should have claimed separately and specifically. There no evidence in any case of stock that he left in the premises or for that matter that he bought and paid for from the first Defendant when he initially leased the premises. In fact clause 2 (g) and (h) reads as follows:

> *The Lessee shall be responsible for outstanding balance to the wholesalers and suppliers.*
> *The Lessee shall be responsible for stock amount.*

[6] Page 32 of the proceedings of 26th February 2019 at 9am

[46] In light of the above I find no evidence of any moral damage to the Plaintiff and reject his claim for same.

[47] On the basis of the above I find in favour of the Defendants. Judgment is entered in favour of the Defendants and the Plaint is dismissed with costs awarded to the Defendants.

Signed, dated and delivered at Ile du Port on 31st July 2020

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Pillay J