

SUPREME COURT OF SEYCHELLES

Reportable
[2023] SCSC 70
(CS No. 161 of 2019)

In the matter of:
Bernadette Naidoo
(rep by Mr. S. Roullion)

Plaintiff

Versus

Innocente Alpha Vintigadoo

1st Defendant

&

Abdul Kalam Azad
(Both Defendants rep by Mr J. Camille)

2nd Defendant

Neutral Citation: *Bernadette Naidoo v Innocent Alpha Vintigadoo & Anor* (CS No. 161 of 2019) [2023] SCSC 70 (30 January 2023)

Before: Andre JA (sitting as a Judge of the Supreme Court)

Summary: Rescission of contract – Loss and Damages

Heard: 15 November 2022 (last sitting to fix Judgment date)

Delivered: 30 January 2023

ORDER

The Court makes the following orders:

- (1) The agreement between the parties of 10 April 2019 **Exhibit P5** is rescinded for substantial breach of agreement as analysed in this judgment;
- (2) I order the defendants to refund the plaintiff the whole advance payment in the sum of Seychelles Rupees Two Hundred and Sixty-Five Thousand and Eight Hundred (SR 265,800.00/-);
- (3) I dismiss the claim of moral damages for inconvenience and stress for the reasons given;
- (4) I award costs and interests at commercial rates in favour of the plaintiff as of the

filing of the plaint as prayed for.

JUDGMENT

ANDRE JA

Introduction

- [1] This judgment arises out of an amended plaint filed by Bernadette Naidoo (the plaintiff) on 13 January 2020 against Innocente Alpha Vintigadoo (the 1st defendant) and Abdul Kalam Azad (the 2nd defendant) (cumulatively referred to as the defendants).
- [2] The plaintiff claims breach of an alleged contract entered by the parties on 10 April 2019 and loss and damages arising in the sum of Seychelles Rupees Three Hundred and Sixty-Five and Eight Hundred (SR 365,800) with costs and interest at commercial rates from the filing of the plaint.
- [3] The defendants, through the statement of defence of the 20th February 2020 excepted as outlined below, deny the plaint and pray for its dismissal.
- [4] Both parties filed written submissions in this matter and I have given thereto due consideration in this Judgment.

Background

- [5] In gist, the case as per the pleadings reveals as follows.
- [6] The plaintiff, Bernadette Naidoo, the client for whom a dwelling house was to be constructed at Ma Constance, Mahe is praying for the rescission of a construction contract with the defendants and claims the advance paid to the Defendants with interest.

The defendants Innocente Alpha Vintigadoo Gangadoo and Abdul Kalam Azad are the Directors of the business trading as Niloy Builder.

- [7] They signed an agreement on the 10th of April 2019 between the parties hence the plaintiff was a client of the Defendants, who are licensed contractors trading under the said business name.
- [8] On 10 April 2019, the parties agreed for the defendants to construct a dwelling house on Title H6415 belonging to the plaintiff at Ma Constance for the sum of Seychelles Rupees Eight Hundred and Eighty-Six Thousand (SR886,000). The plaintiff made an advance payment to the defendants in the sum of Seychelles Rupees Two Hundred and Sixty-five Thousand Eight Hundred (SR265,800) as they had agreed upon beforehand, to get the construction started.
- [9] The works done were assessed by a civil engineer of the plaintiff, namely, Mr Franky Lespoir, who consulted with the independent retaining wall contractor Mr Mike Jeannie.
- [10] After fifteen days after the commencement of the works, the plaintiff asked the defendants to stop the works because she thought they were not doing the work up to standard and did not comply with the plan approved by the Planning Authority. They demolished the foundation to avoid encroachment and overlap with the neighbour's property.
- [11] The plaintiff claims to have suffered loss and damages of Seychelles Rupees Two Hundred and Sixty-Five Thousand and Eight Hundred (SR265,800) provided as (advance payment) and moral damages in the amount of Seychelles Rupees One Hundred Thousand (SR100,000) for alleged stress and inconvenience.
- [12] The parties agree the defendants had *Contractors All Risk Insurance* with SACOS Insurance.
- [13] The Plaintiff claims she informed SACOS of the situation so that the defendants could sort out the issue with their insurance, who could then pay the plaintiff. But, the plaintiff

claims the defendants did not comply with the insurance's conditions and did not provide the documents for them to pay the plaintiff.

[14] The defendants alleged that the works they had done on the plaintiff's property were up to standard and according to the approved drawings. They stated that the Planning Authority had permitted them to continue with the works before the plaintiff ended the contract. Therefore, they believe, the contract was ended by the plaintiff per the legal agreement, which is why they gave up their claim to the advanced payment, as the defendants were not in breach of contract. They aver that the plaintiff is not owed any money because they have used the advance payment, according to the agreement, to conduct the works on the plaintiff's property.

[15] The plaintiff not having received any payments from the defendant claims Seychelles Rupees Three Hundred and Sixty-Five and Eight Hundred (SR365,800) plus interest at commercial rates from the date of filing of the Complaint and costs.

Evidence adduced

[16] In the Sitting on the 22nd of March 2022, the plaintiff testified that the works started on 15 July 2019 and only continued for about 15 days **Exhibit P9**.

[17] That the distance of the house to the boundary line should have been at least 2m as per the site plan of **Exhibit P8 (1)**. According to the plaintiff, the building was too close to the boundary line, as it had a distance of less than 1 (one) metre. That the columns were not according to approved drawings either and that this would cause a clear encroachment on the neighbouring property if the construction continued. Thus, there would have been a problem with overlap with the neighbouring property.

[18] The plaintiff testified further, that it was the contractor who is responsible to set the building according to the approved plan and inform the workers of the same and that Mr Jeannie was told by the foreman where to dig and was waiting for instructions thereon. The other people present stood aside and did not interfere, as the contractor had a license class II.

- [19] According to the plaintiff, the contractor failed to notice the mistake in the construction's placement before they put the footings down. No planning officer ever came to the site.
- [20] The plaintiff revealed she had some knowledge about construction projects being a co-owner of a construction company herself.
- [21] She testified further that she told the contractor about the problem with the distancing and therefore she had to cancel the works because she noticed mistakes in the construction very early on and that the contractor did not seem to know what he was doing and she wanted to avoid encroachment.
- [22] She further testified that the defendants have not paid her any money, hence she is claiming damages for inconvenience and stress because the issue she stated: "*delayed me from what I was supposed to do because definitely, the bank will not be responsible for it*".
- [23] Mr Lespoir, a witness called on behalf of the plaintiff, testified that he never met with the defendants' engineer, Mr Tom. That (***Exhibit D1, being a notice of commencement***) was incomplete and as a result, could not have been filed with the Planning Authorities. That it was not his job to check the location for boundaries and according to him this had also not been done in the checklist for the Planning Authority and that this is the job of the contractor, namely the defendants.
- [24] Witness Lespoir further testified that the defendants do not substantiate their claim that the Planning Authorities had authorized them to continue with their work before the plaintiff stopped them from doing so. That they also did not bring any kind of proof as a justification for keeping the advance payment for their 15 days of work. Neither did they prove the claim that they performed the works, nor that they were done according to standard.
- [25] That the letter from the quantity Surveyor Gustave Larue, dated 18 August 2019 states that only three column bases had been cast and they had partly erected the reinforcement for the columns before the workers left the site.

[26] In her Submissions (supra)), the plaintiff reiterates the defendants breached the contract aforesaid by building too close to the boundary line and, as a result, the Court should give a judgment in her favour.

[27] In the light of evidence led, the defendants submit by emphasizing Article 1710 of the Civil Code of Seychelles ('the Code'), and claim that the plaintiff opted out of continuing with the construction and that her claiming back the advance payment is an act of bad faith because the defendants had already begun their work.

Legal analysis and Discussion of evidence

[28] I now turn to the legal analysis of the merits of the case.

[29] In contract law, rescission is an equitable remedy that allows one party to end the contract **(See: NSJ Construction (Pty) Ltd and Anor V F.B Choppy (Pty) LTD (SCA 16/2019 [2021] SCCA 53 (07 September 2021))**. Parties might rescind if they are the victims of misrepresentation, fault, duress, unjustified influence, etc. To improve the chances of being granted rescission, parties should describe those circumstances, as shown in the Australian case of **Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd**.

[30] Article 1184 of the Civil Code provides in its relevant part:

“If a contract is only partially performed, the Court may decide whether the contract shall be rescinded or whether it may be confirmed, subject to the payment of damages to the extent of the partial failure of performance. The Court shall be entitled to take into account any fraud or negligence of a contracting party.”

[31] Where there are no termination clauses in the contract, termination is still possible where one party has committed a repudiatory breach. In these circumstances, the injured party can end the contract immediately and claim damages.

[32] A repudiatory breach touches the root of the contract, frustrates the commercial purpose of the contract, or deprives the party that is not at the fault of essentially the whole value

of the contract (**Hong Kong Fir Shipping Co. Ltd v Kawasaki Kisen Kaisha Ltd [1962] 2 QB 26**).

[33] A simple breach of a contract cannot create a right to end a contract (**See: Bentsen v Taylor Sons & Co (1893) 2 QB 274, 281**), as this would directly contradict Article 1134 of the Code. The interests of justice are upheld by limiting rights to rescind to instances of serious and substantial breaches of contract (**See: Ankar Pty Ltd v National Westminster Finance (Australia) Ltd.**).

[34] Therefore, for the termination of a construction contract, the breach must concern either an essential term, which is a condition of the contract, or a non-essential term that has caused the significant loss (**Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd [2007] HCA 61**). A condition is a term in the contract that is so important that the one party would not have entered the contract without being sure that the term would be adhered to by the other party (**See: Tramways Advertising Pty Limited v Luna Park (NSW) Pty Ltd (1938) 38 SR 632**).

[35] In considering whether the plaintiff may have a declaration in her favour for rescission, the Court is entitled in terms of Article 1184 of the Code, to consider the negligence of the defendants and part performance of the obligations by the parties (**See: Bossy (heirs) v Chow (CS 289/2001) [2005] SCSC 14 (04 March 2005)**).

[36] Because rescission is supposed to be executed equally on both sides of a contract, the party looking for rescission usually offers to return all benefits received under it. As a result, rescission undoes the transactions to, as far as workable (**See: Fink v. Friedman, 78 Misc. 2d 429**), bring the parties back to the position they were in before they made the contract.

[37] Rescission is not possible in cases, where the party that is at fault, has already done a substantial part of his or her performance, meaning one party has completed most of their legal duty under the contract (**See: Jacob & Youngs v. Kent 230 N.Y. 239 (1921)**).

[38] In deciding whether to grant rescission, the Court should first consider whether a breach of contract by the defendants was so serious that it justifies the extreme measure of

rescission. Second, provided rescission is granted, it has to determine if the defendants have to pay all the money the plaintiff has claimed and if the plaintiff owes the defendants any compensation for the work they had already done before the termination of the contract.

[39] When a breach of contract has occurred, Article 1134 of the Code provides that:

“Agreements lawfully concluded shall have the force of law for those who have entered into them. They shall not be revoked except by mutual consent or for causes which the law authorizes. They shall be performed in good faith.”

[40] Article 1142 of the Code provides that:

“Every obligation to do or refrain from doing something shall give rise to damages if the debtor fails to perform it.”

[41] Now, in the present case, the defendants and the plaintiff entered a contract **Exhibit P5**, that binds the defendants to build a house on the plaintiff’s property. In the contract, the defendants bind themselves (**Articles 1101 and 1134 of the Civil Code**), to build the plaintiff’s house according to the pre-approved plans.

[42] As Article 1108 of the Code prohibits contracts that are against the law, it was part of the contract of construction to comply with the law, especially keeping the lawful distance to the neighbouring property. In any other case, the neighbours could claim demolition of the building because of Article 555 of the Code. Therefore, it was an essential term of the contract between the parties that the construction would conform to the law and not cause claims of demolition by neighbours.

[43] Testimonies illustrated above have proved that the construction should lawfully have kept a distance of two meters or more to the boundary line. The evidence of the Plaintiff, witnesses Jeannie and Lespoir, prove that the construction did not keep that distance, but as evidence of witness Lespoir and the plaintiff, they built the construction less than a meter from the boundary line.

[44] It has been established in evidence, that in that contract, it was not the plaintiff's job to make sure the construction kept the distance to the boundary line to avoid encroachment and overlay, but the defendants' obligation to do so. As a result, the construction not keeping within the required distance was not the plaintiff's fault, but the defendants'.

[45] The defendants' claim that the Planning Authority had granted permission to continue building as they started has been disproved by the evidence of witness Lespoir (supra).

[46] It is evident from the witness evidence above referred which evidence I believe to be truthful, that there was a serious and substantial breach that happened, as it has been proven that the construction could not have been continued without leading to encroachment and overlay, effectively rendering the building worthless as it would have to be demolished with no compensation under Article 555 of the Civil Code. As a result, had the plaintiff allowed the defendants to continue and complete the construction, the aim of the contract could not have been non-existent. This breach occurred solely by the negligence of the defendants, who were the ones responsible for measuring the distance from the boundary line.

[47] The plaintiff would not have agreed with the defendants, had she known they were going to build the dwelling house in a manner that would not comply with the law and lead to her having to remove it afterward.

[48] Although, in **Noella Figaro v. Armand Samson 1983 SLR 68** states:

“Both the law and the fairness require that before bringing a claim for failure to perform the obligations of a contract, the defaulter should first be put under a notice of default and given a chance to fulfill his obligation.” (emphasis added),

effectively giving the contractor a “right to try again” after having failed to fulfill the contract on the first try, this right only exists within the boundaries of fairness.

[49] In this case, this right no longer exists. The breach was serious enough to destroy every trust the Plaintiff could have had in the Defendants to be able to conduct the construction lawfully, as agreed upon in the contract. As a result, it would be unfair to Plaintiff to

force her to give the Defendants a second chance, given the high level of incompetence they had shown before, having had to be made aware of their grave mistake by Plaintiff.

[50] The defendants had also not yet done a “substantial performance” in terms of the contract, since they had only built part of 3 columns, which is a minor part of their contractual duty to build an entire house.

[51] It is only fair that the contract is rescinded, and the transaction amounts paid returned to the plaintiff, as claimed. This includes the whole advance payment the plaintiff had paid to the defendants. The defendants unfortunately are not entitled to a claim of compensation for the works carried out, because the works partly executed are completely useless for the plaintiff.

[52] The contract provides that the price is owed for the “*execution and completion [of] the works*”, meaning that it only has to be paid if ‘the works’ that have been agreed upon have been executed. This did not happen in the present case, as the work conducted was minimal and has no worth, as the foundation for the columns was built too close to the boundary line and therefore had to be demolished.

[53] In the same light, Article 1710 of the Code, which article the defendants rely upon to support their defence, does not change that position as analyzed in paragraph [52]. Article 1710 provides that:

“Hire of work or services is a contract whereby one of the parties binds himself to do some work for the other in return for a price agreed between them.”

[54] Now, that the parties agreed upon advance payment does not give the defendants any right to keep that payment under all circumstances. “Advance payment” only shows the time. The first part of the full payment is due but doesn’t give a reason on its own why the payment is owed. In construction contracts, advance payment of a fraction of the full price to enable the beginning of the construction process by providing the funds for the first stages. The only reason for the advance payment in the present case was, as illustrated through the evidence above, for the execution and completion of the work that

had been agreed upon. In the instance that this condition is not met, the payment is not owed, and as a result, has to be returned in cases of rescission.

[55] In addition, to the repayment of SR 265,800.00 from Defendant, Plaintiff has claimed moral damages for inconvenience and stress in the amount of Seychelles Rupees One Hundred Thousand (SR 100 000/-) and I find under that count that no proof was provided on a balance of probabilities for this claim noting also the principle that coining profit is not the aim to be achieved in same and similar circumstances.

[56] I further find that the plaintiff is also not entitled to damages for the demolition costs, as she also did not prove the same to the cost and its ancillaries.

[57] It follows thus, that the plaintiff is not entitled to any additional damages for stress or inconvenience, as claimed in the absence of proof that any exceptional stress has occurred. Merely the inconvenience and delay in the construction are to my mind not enough to substantiate such a claim.

Conclusion and final determination

[58] Noting the analysis of the evidence on the issues which fall to be determined in the present case, this Court partially allows the plaint and makes the following orders:

- (1) The agreement between the parties of 10 April 2019 **Exhibit P5** is rescinded for substantial breach of agreement as analyzed in this judgment;
- (2) I order the defendants to pay to refund to the plaintiff the whole advance payment in the sum of Seychelles Rupees Two Hundred and Sixty-Five Thousand and eight Hundred (SR 265,800.00/-);
- (3) I dismiss the claim of moral damages for inconvenience and stress for the reasons given;
- (4) I award costs and interests at commercial rates in favour of the plaintiff as of the filing of the plaint as prayed for.

Signed, dated, and delivered at Ile du Port on the 30 day of January 2023.

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ANDRE JA
(Sitting as a Judge of the Supreme Court)