Camille v The Seychelles Government
(1998) SLR 147

Philippe BOULLE for the plaintiff
Romesh KANAKARATNE for the defendant

[Appeal by the plaintiff was dismissed on 13th August, 1999 in CA 57/1998.]

Ruling delivered on 14 September 1998, by:

PERERA J: This is a delictual action filed by the plaintiff on 15 January 1997 in respect of an alleged faute committed by one Francois Philoe on 15 August 1983 in the course of his duties as a soldier in the employment of the Government of Seychelles.

On 4 May 1998, before the hearing commenced, it was revealed that the first defendant, the said Francois Philoe had died after the institution of these proceedings. Counsel for the Plaintiff however informed the Court that he would proceed against the second defendant, the Government of Seychelles, without amending his pleadings. Accordingly the first defendant was deleted from the proceedings, and Mr A Juliette, his counsel, withdrew from the case.

The second defendant in their statement of defence filed on 3 June 1997 pleaded inter alia as follows:

> 4. (i) That the first defendant was not acting within the scope of his employment at the material time and the alleged act was not incidental to the service of employment of the first defendant.
>
> (ii) That the question of vicarious and joint liability on the part of the second defendant does not arise in view of the denial by the second defendant of the incident itself.
> (iii) That this action is prescribed under article 2271(1) of the Civil Code of Seychelles (Cap 33).

Paragraph 4 (iii) constituted a "point of law" envisaged in section 90 of the Code of Civil Procedure (Cap 213). That section reads as follows –

> 90. Any party shall be entitled to raise by his pleadings any point of law; and any point so raised shall be disposed of at the trial, provided that by consent of the parties, on the application of either party, the same may be set down for hearing and disposed of at any time before the trial.

On a plain construction of this section, the disposal of a point of law raised in the pleadings "at the trial" is the rule and its disposal "at any time before the trial," the

exception.

On 16 May 1998, counsel for the second defendant, Mr Kanakaratne, submitted inter alia that –

> It is the position of the second defendant that it would be more appropriate that the points raised in the plea in limine by the second defendant be argued upon and decided subsequent to the hearing of the evidence of this case, since there are certain factors which have to be clarified and the truthfulness of it ascertained before the second defendant could make certain submissions in respect of this plea.

On the basis of that submission, Mr Boulle stated that he would take it that the point in limine would be argued "at the end of the case." The Court thereupon made the following order –

> Counsel for the first and second defendants inform Court that they would not be arguing the point raised as plea in limine today and that they would do so at the end of the case after a hearing on the merits.

Accordingly, the plaintiff's case commenced on 4 May 1998 and after several adjournments was formally closed on 30 July 1998. Mr Kanakaratne thereupon moved to argue the point in limine raised in paragraph 4 (iii) of the second defendant's defence that the plaintiff's action was prescribed under article 2271 of the Civil Code. He submitted that having heard the evidence adduced by the plaintiff, he was now in a position to support his plea. The basis of the plea is that while article 2271 of the Civil Code provides that all actions are prescribed in 5 years from the time the cause of action arose, the present action which alleges a faute committed on 15 August 1993 has been filed 13 years and 5 months later. Mr Kanakaratne submitted that by not supporting the plea before the trial, the plaintiff was given an opportunity to adduce evidence to explain the delay. The plaintiff and his wife in the course of their testimonies have given the reason and adduced further evidence on that matter.

Mr Boulle objects to the plea being raised at the end of the plaintiff's case. He submitted that a plea in limine litis challenges the pleadings and not the evidence and hence should necessarily be raised before the trial. With respect, such an interpretation is contrary to the plain meaning in section 90, which, as I stated earlier, is that as a rule it should be disposed of 'at the trial", and exceptionally by consent of parties or by order of court be disposed of "<u>at any time before the trial</u>". Further, counsel for the second defendant did not abandon the plea, but specifically reserved his right to raise it after hearing the evidence in the case, and counsel for the plaintiff did not object to that procedure. Hence the plea could have been raised at the end of the case for the defence or at any time before. Mr Kanakaratne cited *Stroud's Judicial Dictionary,* vol I, p 216 wherein the words "at the trial" have been judicially defined as "during or at the end of the trial."

Apart from the technical construction of section 90, the following Mauritian cases are of particular application to this matter. In *Galea v Autard* 1869 MR 49in an action concerning land, the wife sued as plaintiff authorised by her husband. After the merits had been heard, the defendant raised a point of law that in the absence of positive proof that the land in question was the property of the wife, the husband ought to have sued as administrator of the legal community of goods, of which the land must be presumed to form part.

Shand CJ held that this objection having being waived in limine of the discussion could not be renewed after the merits of the case had been entered into.

In the present case, counsel for the second defendant did not waive the plea but reserved it to be raised at the trial. It was not a challenge of the evidence, as Mr Boulle submitted, but a challenge of the pleadings. It cannot therefore prejudice the plaintiff in any way when it is being raised after he had been given an opportunity to rebut the provisions of article 2271 which imposes a time bar for instituting actions.

In the case of *Pillay v Pillay* 1940 MR 48 (Part II), the plaintiff as an assignee of a debt obtained judgment for R92 against the defendants who were guarantors of that debt. The defendants pleaded in limine that they had not been given notice of the assignment. The trial judge overruled that plea, proceeded to hear the evidence and gave judgment in favour of the plaintiff.

At appeal, it was held that the trial judge was right in refusing to dismiss the action in limine, as the action would have been dismissed on the plea later after it had been proved that absence of notification of transfer had caused prejudice to the debtors or guarantors, and that such a consideration was not possible without hearing the evidence to that effect.

The present position of that instant case is somewhat similar. The evidence disclosed in the plaintiff's case would assist not only the second defendant, but also this Court to consider the plea of prescription both in substance and in law.

Accordingly, counsel for the second defendant is entitled to raise the plea of prescription as set out in paragraph 4(iii) of the defence as a point of law envisaged in section 90. If the plea succeeds, the Court will proceed to make any of the orders provided in section 91. However if the plea fails, the case will proceed to a hearing on merits, and in such circumstances, the second defendant will be entitled to adduce any evidence that may be considered necessary to substantiate the rest of the averments in their defence. Ruling made accordingly.

Record: Civil Side No 8 of 1997