

**Chez Deenu Pty Limited v
State Assurance Corporation of Seychelles
(2006) SLR 84**

Somasundaram RAJASUNDARAM for the Plaintiff
Danny LUCAS for the Defendant

Judgment delivered on 20 January 2006 by:

ALLEEAR CJ: On 2 April 2004, Chez Deenu, Pty Ltd of Victoria, Mahe, hereinafter referred to as the Plaintiff, sued the State Assurance Corporation of Seychelles, represented by its Chairman, Mr Antonio Lucas, hereinafter referred to as the Defendant, for alleged breach of an insurance contract and prayed for judgment in its favour the sum of R245,712.92 with interest at 8% per annum and costs.

It is common ground that the Plaintiff, which has its headquarters at Quincy Street, Victoria, and its warehouse at Providence is engaged inter alia in the purchase, sale and distribution of Seybrew products.

The Defendant is an Insurance Company. The Plaintiff who has been insuring its business with the Defendant for the past 20 years had at all material times a cash insurance policy with the Defendant referred to as risk No. 016, loss of cash and cheques while in transit from Providence warehouse to the head office at Quincy Street. A limit of R400,000 was set to the Plaintiffs loss under the said policy.

It is averred in paragraph 4 of the plaint that for the last ten years it has been the practice for the Plaintiff to collect cash as payment made for sales of Seybrew products to its various customers on Mahe and bring same to a transit centre at Providence warehouse for checking against receipts. The same afternoon the said cash is transferred to the Plaintiffs headquarters in Victoria for safe keeping.

It is not in dispute that on 1 July 2003 at around 5.15 pm two employees of the Plaintiff's staff were attacked and robbed while they were awaiting transport at the Providence warehouse to take them to Victoria.

In its statement of defence the Defendant, whilst admitting that there was a report of a robbery having taken place at the Plaintiffs warehouse, challenges the Plaintiffs averments that it had lost the sum stated in the plaint. Additionally, the Defendant's contention is that the Plaintiffs alleged loss is not covered by its insurance policy with the Defendant, in that the monies allegedly stolen were not in transit within the terms of the policy.

In this case, as I see it, there are basically two issues which call for adjudication:

- (i) whether there had been a robbery at the Plaintiffs warehouse at Providence resulting in the loss of the sum of money claimed in the plaint; and
- (ii) whether the Plaintiffs alleged loss falls within the definition of transit under the terms of the said Insurance Policy.

The first witness to depone in support of the Plaintiffs action was Pinaya Gamurthy Moarchthy, the Manager at Chez Deenu Pty Ltd who has been employed in that capacity for the past 8 years. Moarchty explained that the Plaintiff is, inter alia, engaged in the import, retail and wholesale of goods and products of various kinds and the distribution of Seybrew products.

This witness went on to elaborate that cash collected from Plaintiffs customers around the island and cash paid by customers at Providence warehouse are kept during the day at the Providence warehouse. In the evening the cash and cheques collected from the sales are counted and checked against receipts at Providence before they are taken to the headquarters in Victoria. The witness stated that the above transaction takes place on a daily basis. The Manager at Providence warehouse, Venkatesan Pillay is based there whilst another employee of the Plaintiff, Andre Marengo goes round to distribute products of Seybrew to customers. Both Venkatesan Pillay and Marengo are authorised to issue receipts to customers upon receiving payment for sales of Seybrew products.

It is not in dispute that on the day of the alleged robbery it was Andre Marengo who had gone around the island collecting cash from customers. This witness explained in even greater detail the transactions taking place at Providence warehouse. He said after receiving orders from clients for Seybrew products, they distribute same to them from the warehouse where stock of Seybrew products are stored.

According to Venkatesan Pillay his duties involve the taking of stocks, buying of bottles and collecting money at the warehouse. Andre Marengo distributes goods to customers and collects money from sales. Upon receiving cash or cheques from customers, Venkatesan Pillay stated that he issued them with a receipt. Andre Marengo too has a receipt book when he goes around distributing Seybrew products to customers.

The evidence shows that the warehouse at Providence normally opens at 8 am and closes at 4.45 pm. On 1 July 2003, after he had collected all the cash and cheques, Venkatesan Pillay placed them in a plastic bag and was awaiting transport to take him to the Victoria headquarters. At the same time Andre Marengo went inside a parked vehicle to answer a telephone call. While Venkatesan Pillay was standing in an open veranda with the said plastic bag in his hand and Marengo was in the car talking on the mobile phone, Venkatesan Pillay saw somebody climb down a wall and enter the premises. At the same moment the phone rang inside the warehouse, and Venkatesan Pillay went inside the warehouse to take the call. From inside the warehouse, he heard a noise outside. He took the plastic bag containing the cash and cheques which he held in his hand and placed it in a drawer and went outside to see what the commotion was

all about. Venkatesan Pillay saw two men assaulting Ramabarathy a fellow employee. The two men then came towards him and one of them hit him with the flat side of the blade of a long knife. The same man who had assaulted him then went inside the warehouse and seized the said plastic bag and ran away with it. According to Venkatesan Pillay that man was Richard Rosette, a former employee of the Plaintiff. Venkatesan Pillay said that the day's collection which included cash and cheques amounted to R748,849.72.

Soon after the said incident Venkatesan Pillay made a complaint to the police about the robbery. Following the making of the complaint he proceeded to Victoria Hospital where he was medically examined and treated. He said Marengo had given him all the money that he had collected on that day and he had placed all the cash and cheques in the said plastic bag. He said he counted only the money that he had collected at the Providence warehouse and there was roughly R60,000. He did not count the cash given to him by Marengo.

Venkatesan Pillay explained that the receipt book which he used on the day of the incident was with him in the morning and in the afternoon when Andre Marengo went out to distribute the Seybrew products to customers he used the same receipt book.

Venkatesan Pillay testified that at the Providence warehouse there is an Indian manager, by the name of Ramabarathy Pakshinamoorthy, a fellow employee of the Plaintiff. Mr Ramabarathy is in charge of cash sales at the warehouse and keeps all cash collected separately. Venkatesan Pillay collects money from customers who had obtained credit from the Plaintiff. In the morning Andre Marengo stays at the Providence warehouse. He receives purchase orders on the telephone and in the afternoon he goes out to deliver the Seybrew products around the island. Venkatesan Pillay stated that the day after the incident, he, Andre Marengo and Ramabarathy all gave statements to the police who recorded same at the Chez Deenu headquarters. Venkatesan Pillay maintained that while he and Ramabarathy were waiting outside under the veranda for transport to take them to the head office the phone rang inside the office. He went inside with the plastic bag containing money to answer the phone. Moments later he placed the plastic bag containing cash and cheques under the counter and ran outside to see what was going on. He saw Ramabarathy was being attacked by two persons. Upon seeing him one of the assailants left Ramabarathy and came to him and struck him with a machete. He was hit with the flat part of the blade. After he had received the blow, the witness said he stepped backwards. Both assailants went inside the warehouse. They each had a machete with them. When they came out, he saw Richard Rosette leaving with the plastic bag which he had left under the counter.

Ramabarathy had left the day's takings in a drawer. The witness admitted that none of the money which was in Ramabarathy's bag was taken.

After the alleged robbery Mrs Aldindor of State Assurance Corporation of Seychelles interviewed Venkatesan Pillay. The latter denied that he had told Mrs Alcindor, during the interview that followed, that Richard Rosette had emptied the contents of the plastic

bag on the floor and had grabbed a few hundred rupee notes and ran away with his accomplice. He further denied that he had said that the balance of the money left in the plastic bag was handed over to the police.

Venkatesan Pillay maintained that he was telling the truth in Court. He said that when he spoke to the, police he was still in a state of shock. In his statement to the police, which was read out to him, Venkatesan Pillay had not said that he came outside with the plastic bag containing money. Venkatesan Pillay maintained that when he was attacked by Richard Rosette under the warehouse veranda the plastic bag containing money was under the counter inside the warehouse.

Venkatesan Pillay further denied that he had told Mrs Alcindor that after the robbers had left the premises cash was scattered all over the floor, He also denied that he had mentioned to Mrs Alcindor that the remaining cash that was not stolen was handed over to the police.

He explained for the benefit of the Court that in the morning he used one receipt book at the warehouse. In the afternoon the same book was used by Andre Marengo when he went out on his round to distribute Seybrew products. However, if a customer happened to come at the warehouse at Providence in the afternoon, when Andre Marengo was out, Venkatesan Pillay would use a fresh receipt book to record the sale. The witness denied that he had made out receipts for payments not received on the day of the robbery.

Venkatesan Pillay said that if his evidence in Court differs from the statement that he had given to the police that was because he was answering questions put to him by the police. The witness maintained everything he stated in chief.

According to Venkatesan Pillay the police arrived five or ten minutes after the robbers had left the warehouse and there was no money scattered on the floor. Venkatesan Pillay maintained in cross-examination everything that he said in chief.

Andre Marengo testified that he had worked for the Plaintiff for 20 years. He started working in the year 1982. On 1 July 2003, he worked from 8 am until about 5 pm. He did not witness the alleged robbery incident, but was only informed about it, he said. His job at the Providence warehouse was to deliver Seybrew products to shop keepers around the island and to collect cash and cheques given its payments for the said products.

Andre Marengo clarified that he collected money from clients who were supplied goods on credit. After payment was received, he issued a cash or cheque receipt to the client. He explained that after he collected money from clients of the Plaintiff same was taken to the Providence headquarters. Payments, he stated were made either by cash or cheques.

On 1 July 2003, Andre Marengo started his round between 12.30 and 1pm. After collecting payments from customer of the Plaintiff, he handed the money to Mr Venkatesan Pillay. He said he handed the money in a black leather brief case. That day after dropping his wife in town he was informed about the alleged robbery incident. He went back to the headquarters and saw two police officers. The officers remained at the said warehouse for about 20 minutes. He recalled that on that day he had collected R340,000 in cash from one Lydia Sinon at Glacis.

Andre Marengo said it is Venkatesan Pillay who could tell how much money had been stolen. He stated that the money he had placed in the brief case was not counted at the warehouse at Providence but at the Plaintiffs headquarters at Quincy Street. On that day he recalled handing over the brief case to Venkatesan Pillay at the counter at which the latter sat. When he returned from his round on the day of the alleged incident only Venkatesan Pillay and Ramabarathy were in the warehouse. After the incident he said he never saw the leather bag again.

The financial controller of the Plaintiff, Chandran Kanand, testified that since 2002 he had occupied the said position. He is based at the Plaintiffs headquarters at Quincy Street. Every afternoon, after money is collected from customers over the island of Mahe, it is taken to Providence warehouse, and finally to his office. His work is to reconcile the accounts with the invoices and receipts and prepare a statement. From the receipt books produced to him, the witness was able to ascertain the exact amount of cash lost. He prepared a cash missing statement. The statement that was prepared by the witness consists of five columns. The five columns indicate the receipt number, the name, cash or cheques and the amount.

According to this witness, the cash that went missing on that day amounted to R246,260. He identified four cheques that were lost on that day. They were for the sum of R14,540 — receipt No. 6777, receipt No. 6779 for R8,060, receipt No. 6788 for R37,675.90, receipt No. 6787 for R1,047.60, receipt No. 6798. According to the witness a payment of R340,000 by cheque was received on that day. According to the said statement the figure written as the amount lost was given as R278,260.50 and the claim by the Plaintiff is R245,712. The witness explained that the above discrepancy in the above figures was due to the amounts of the four cheques which were deducted. Subsequently the customers issued fresh cheques as payments after they had been informed about the lost cheques. The customers were also informed to advise their banks to stop payment on the cheques that had been lost.

The witness admitted that after the incident of 1 July 2003, Mrs Alcindor and one Ms. Juliette visited his headquarters. Present at that meeting were Venkatesan Pillay, Ramabarathy, and himself. He said he did not recall Venkatesan Pillay saying to Mrs Alcindor that Richard Rosette had grabbed a few hundred rupees notes from the plastic bag and ran away with it and that the remaining cash was scattered on the floor. He further stated that he did not recall hearing Venkatesan Pillay making the same statement to the police. He did not remember whether Venkatesan Pillay had stated

during the said meeting that the money in the briefcase had been handed over to the police.

According to Mr Kanand monies collected are brought in plastic bags but not in a brief case to the headquarters. On 1 July 2003 the witness did not see the brief case. According to the reconciliation done against receipt books, the total cash collected on that day was R246,260.92. On that day R81,538.80 was collected by Venkatesan Pillay and Andre Marengo had collected R165,207.12. The witness was asked to look at receipt No. 6779 issued by Venkatesan Pillay and he said that that was a cheque transaction. The witness was again asked to look at receipt No. 6782 and he said it is a cash receipt issued by Mr Venkatesan Pillay.

Learned Counsel for the Defendant pointed out to the witness that some of the receipts failed to mention whether it was a cash or cheque transaction. The witness was again asked to look at receipt No. 6852 and state whether it is cash transaction. Nothing was written on that receipt to indicate whether it was a cash or cheque transaction. Receipt No. 6789 was partly a cash of the amount of R3000 and the balance a cheque transaction of R9600. Receipt No. 6799 did not indicate whether it is cheque or cash transaction. So is receipt No. 6793. The sum of R340,000 collected by Andre Marengo was paid according to the witness by cheque whereas Andre Marengo said he was paid in cash. Receipt No. 6790 does not mention whether it is cash or cheque transaction. Receipts No. 6800, 6797, 6795, 6794 and 6785 do not indicate whether it is cash or cheque transaction. This witness said he prepared his statement based on the receipt books.

It was put to the witness that after he had reconciled all the payments made by cheque he assumed that the balance was received by way of cash. The witness said he prepared his statement based on the receipt books. He said on that day all the information was given to him by Mr Venkatesan Pillay.

This witness explained that Venkatesan Pillay supplied him with information on receipts which did not indicate whether it was a cash or cheque transaction. It is noted that the Plaintiff company made a cash deposit with Barclays Bank on 7 July for the amount of R65,300. The witness denied that the brief case used by Andre Marengo was handed over to him. He strenuously and repeatedly denied that officers from SACOS were informed that only a few notes had been taken by the alleged robbers. The witness remained silent when asked whether the said brief case was handed over to the police. He finally denied that the evidence he gave in Court was based on incorrect data.

Following the alleged incident at the Providence warehouse, investigating officer Godfrey Hermitte received a complaint at the station that two persons, one of whom had been identified as Richard Rosette had assaulted two Indians and taken money from them. The two alleged victims were one Mr Pillay and Ramabarathy. This witness said that Richard Rosette had been charged with the offence of robbery. He was unsure as to the amount having been robbed but he thought it was around R100,000. No money had been recovered from the accused, according to the officer. The officer deponed

that no complaint was received that the money from the briefcase had been stolen; only monies from the plastic bag were reported to have been stolen. No money was found at the premises at Providence warehouse.

Christine Alcindor, the claim executive manager employed by the Defendant for the past 1.6 years referred to a claim made by the Plaintiff in respect of an alleged robbery at Providence warehouse on 1 July 2003. She and a colleague of hers investigated the said claim. This witness stated that from information gathered and from questioning the Plaintiff, it was found that cash were still on the premises at the time the alleged incident occurred. This witness said that when she interviewed Mr Venkatesan Pillay the latter said at the time of the incident the money was in a drawer. Mrs Alcindor stated that no mention was made about the brief case containing money having been stolen.

Juliette Nibourette who assisted Mrs Alcindor went to the warehouse at Providence and the office of the Plaintiff. She saw Mr Kanand, the accountant, and Mr Venkatesan Pillay who told her that Richard Rosette had barged into the building on 1 July 2003 and taken a plastic bag containing money. She added that Richard Rosette had allegedly taken the bag, shaken it and grabbed some notes which fell on the floor and ran away. The remaining cash was collected and handed over to the police. The police denied that, any money was handed over to them. I found the testimony of this witness to be vague and unhelpful.

On the evidence, it is clear that on 1 July there had been a robbery at Providence warehouse. The robbers took off with a plastic bag containing cash. The one million rupees question is the amount taken by the robbers.

It has been proved to my satisfaction that only monies collected on the morning of 1 July by Venkatesan Pillay had been lost. This money was in a plastic bag which the robbers took away with them. I am unable to say on the evidence what happened to that brief case which contained money collected by Andre Marengo on the same day. From the receipt books produced by the Plaintiff a total amount of R81,053.80 is proved to have been lost. There are some invoices produced which fail to indicate whether the proceeds were received by way of cash or by cheques. The Court cannot engage in mental gymnastics to ascertain whether those receipts were in respect of cash of cheque transaction.

The next issue as stated earlier in the judgment is for the Court to interpret the contract of insurance and to determine the definition of "in transit". In the case of *Crows Transport Ltd v Phoenix Assurance Co Ltd* Lord Denning MR, Danckwerts and Salmon LJ considered this phrase.

The Plaintiffs were a firm of hauliers carrying goods by lorry to and from London and the North. They had a London depot consisting of a yard and covered garage, and a basement office, access to which was from some steps and along a passage. The office was normally occupied by their London manager and a clerk, his wife.

Lorries came down from the north overnight and while their drivers rested during the day goods were brought by various means to the depot for consignments often being brought in the consignors' own vehicles. On the morning of 12 September 1962, a gramophone record company delivered to the depot in their own van 17 cartons of records. The cartons were unloaded in the yard and the Plaintiffs' manager signed the receipt. He then carried the cartons down the steps to the lobby outside the office for safe custody, for loading on to a northbound lorry the same evening. During his 20 minute absence for lunch and while his wife was in the office but with the door closed, seven of the cartons, valued at £222 16s 3d, were stolen.

The Plaintiffs claimed that sum from their insurers under a "good in transit" policy which covered goods against loss or damage (inter alia) "whilst temporarily housed during the course of transit whether on or off the [insured] vehicles." The insurers denied liability. The county Court judge found in favour of the insurers that though the goods were "temporarily housed," they were not covered by the policy since "the course of transit" did not begin while the hauliers had taken some steps towards loading the goods on to one of their vehicles; and he dismissed the claim. On appeal by the Plaintiffs, it was held, allowing the appeal, (Salmon LJ dubitante), that the loss was within the cover provided by the policy, for where goods were housed as an incident of the transit, whether for minutes, hours, or a day, and awaiting loading on to the insured's vehicles, they were "temporarily housed during the course of transit."

Per Danckwerts, L.J. These goods were in transit from the moment they left the consignors' premises until they reached their destination in the north.

It is quite clear that these goods were "in the custody and control of the insured." They were not being "loaded upon carried by or unloaded from" any of the Plaintiffs vehicles. The question is whether they were "temporarily housed during the course of transit whether on or off the vehicles." It is clear that they were "temporarily housed ... on or off the vehicles." The sole question is whether it was during the course of transit."

The County Court judge held that these goods were not in the course of transit. He said:

The course of transit does not begin until some step has been taken by the hauliers towards loading the goods on to one of their own, or a sub-contractors', or other hauliers' vehicle.

I think that this is too narrow a construction. It seems to me that goods are "temporarily housed during the course of transit" if they are housed as an incident of the transit, such as when they are temporarily housed for a few hours awaiting loading. Mr Dehn stressed that it has got to be transit "per the insureds vehicles." I agree. But they are in transit per the insured's vehicles when they are awaiting loading in those vehicles. Instances were put in the course of the argument. When you take a parcel to the post office or to a railway station and you hand it over and get a receipt, the goods are in transit from the moment the post office or the railway take them. They are in transit by the post office or the railway's vehicles, as the case may be, because from that moment

onwards everything that is done is incidental to that transit. So here it seems to me that from the moment that the Plaintiffs accepted these goods from Decca and took them down the steps, they were there temporarily housed awaiting loading on the Plaintiffs' own vehicles. It was an incident of the transit by those vehicles. That seems to me to be 'in transit per the Plaintiffs' vehicles.'

In my view, in a case such as the present, where the consignees, Decca sent the goods in their own lorries to the Plaintiffs' premises, those goods were in transit from the moment they left the premises from Decca. It is true that that part of the journey was not one for which the Plaintiffs were responsible, and of course it was not covered by the terms of this policy; but the goods when they left Decca then started on their journey to the north to Gates head and they remained, in my view, in transit from that point until they reached their destination. When they reached the Plaintiffs' premises they had to be unloaded and, as a practical matter, it is obvious that they might occasionally be carried from one vehicle to another, but such more probably, I should have thought, in most cases they would be put down temporarily on the ground or someplace where it was convenient and kept there, it might be for minutes or it might be for hours or it might be for a day. In all those cases it seems to me it was part of the transit and therefore plainly covered by the terms of the concluding part of the indorsement, "temporarily housed during the course of transit whether on or off the vehicles."

In the case of Eurodale Manufacturing Limited v Ecclesiastical Insurance Office Plc, per Lord Justice Longmore, it was held:

When you take a parcel to the post office or to a railway station and you hand it over and get a receipt, the goods are in transit from the moment the post office or the railway takes them. They are in transit by the post office or the railway's vehicles, as the case may be, because from that moment onwards everything that is done is incidental to that transit. So here it seems to me that from the moment that the Plaintiffs accepted these goods from Decca and took them down the steps, they were there temporarily housed awaiting loading on the Plaintiffs' own vehicles. It was an incident of the transit by those vehicles. That seems to me to be 'in transit per the Plaintiffs' vehicles.'

The judge proceeded to state:

I accept that in the absence of express wording in the insurance contract the goods would not in these circumstances properly be regarded as being in transit. But the effect of the voyage provision, in my judgment, is that the parties agreed that the goods should fall within the transit cover. This agreement does not seem to me an improbable arrangement or one repugnant to the essential nature of the transit cover. On the contrary, it seems to me unsurprising that the parties agreed that these arrangements should be regarded (in the words of Lord Denning) as 'an incident of the

transit.' There is no reason that effect should not be given to the natural meaning of the typed clause for which Eurodale contends.

In the case of *John Martin of London Ltd v Russell*, it was held:

(1) that transit shed at Liverpool was the place at which goods were placed as soon as they were discharged and they were then waiting patiently to go somewhere else; and that, therefore, the transit shed was not the final warehouse that insurer's contention that cover ceased if consignee did not intend to send goods to a final warehouse did not give reasonable businesslike meaning to the clause and that there was no condition that goods were only covered so long as they were intended to go to a final warehouse; and that, therefore, the insurer had failed to prove that goods were not covered when damaged.

In the present case, in my judgment, R81,053.80 had been robbed on the day of the incident. That cash was in transit awaiting to be transported to the Plaintiffs headquarters. Any other conclusion that would be drawn would be perverse in the light of the authorities cited above and under the insurance policy. In a manner of speaking, the cash had not reached its final resting place, i.e. the Plaintiffs headquarters in Victoria before it was eventually banked. Any other interpretation would defeat the very purpose for which the Plaintiff had insured the risk to the cash collected at the warehouse.

Judgment is accordingly given in the sum of R811053.80 in favour of the Plaintiff with interest at 8% per annum and costs.

Record: Civil Side No 92 of 2004