IN THE SUPREME COURT OF SEYCHELLES

Murielle Anscombe
of the United Kingdom **Plaintiff**

Vs

Indian Ocean Tuna Limited of
New Port, Victoria, Mahé **Defendant**

Civil Side No: 277 of 2005

Mr. A. Derjacques for the plaintiff

Mr. Pardiwalla for the defendant

D. Karunakaran, J

RULING

The plaintiff in this matter sued the defendant for damages in the sum of Rs 290,770/- resulting from the breach of an alleged ***verbal agreement*** the parties had entered into, in connection with the leasing of a dwelling house belonging to the plaintiff.

At the outset of the hearing, when the plaintiff was giving evidence-in-chief, she attempted to adduce oral evidence to establish the said ***verbal agreement***. However, Mr. Pardiwalla, learned counsel for the defendant swiftly objected to any oral evidence being adduced to prove the plaintiff's claim in this matter as its value exceeded 5,000/- rupees. His objections were in essence, grounded on the following points of law:-

(1) *The rule of law under Article 1341 of the Civil Code prohibits the admission of oral evidence to establish any matter, the value of which exceeds 5000/- Rupees; and*

(2) *The rule of law under Article 1715 of the Civil Code again prohibits the admission of oral evidence to establish* ***any verbal agreement especially for a lease****, however small its price may be.*

On the other side, Mr. Derjacques, learned counsel for the plaintiff contended that oral evidence was admissible in this particular case, as it fell under exceptions to the rule embedded in Article 1341, since both parties were traders and the transaction involved in the alleged ***verbal agreement*** was a commercial transaction.

Having heard both sides on the issue pertaining to admissibility of oral evidence, this Court in its Ruling dated the 24th March 2008 - hereinafter called the ***"interlocutory order"*** - sustained the objections raised by Mr. Pardiwalla on both points of law and held that no oral evidence shall be admissible to prove the plaintiff's claim in this matter. Having been dissatisfied with the said ***"interlocutory order"*** the plaintiff has now come before this Court with the instant application - dated 28th April 2008 - in terms of Section 12 (2) (a) and (b) of the Courts Act seeking *leave to appeal* to the Court of Appeal against the said ***"interlocutory order"*** and hence is this ruling delivered hereof.

According to Mr. Derjacques, since the said ***"interlocutory order"*** has in effect, prevented his client - the plaintiff - from adducing oral evidence to prove her claim before this court, she stands no chance of success in the main suit. Therefore, it is important for the plaintiff to proceed with the intended appeal against the ***"interlocutory order"*** so that its correctness could be tested and rectified if necessary by the Appellate Court. Moreover, Mr. Derjacques contended that though the instant application for leave to appeal has been made after an elapse of 14 days from the date of the said ***"interlocutory order",*** this application is still competent and not time-barred, since there is no rule either under the Rules of the Court of Appeal or under the Courts Act, stipulating any time limit for making an application for leave. In support of this proposition, Mr. Derjacques cited the case of *Anisette Delcy Vs. Christelle Camille Civil Side No: 55 of 2001*, wherein Perera J (as then he was) has stated inter alia thus: *"There are no rules under any of those, which permit this Court to entertain an application for leave to file an application for leave to appeal to the Court of Appeal out of time".* In the circumstances, counsel contended that the plaintiff has no other option but to seek leave from this Court to appeal to the Court of Appeal against the said interlocutory order. Hence, Mr. Derjacques prayed this Court to exercise its discretion in favour of the plaintiff and grant leave in the interest of justice, in this matter.

On the other side, Mr. Pardiwalla, learned counsel for the defendant contended that the instant application for leave to appeal is incompetent in that *(a) it is not made within the time stipulated in law and (b) the question involved in the intended appeal is not one that ought to be the subject matter of an appeal* in that:

(i) The matter of admissibility of evidence is not one that would substantially dispose of the case.

(ii) The Civil Code of Seychelles provides for other avenues for obtaining evidence and these have not been exhausted.

(iii) An appeal is always available after full judgment is given, even on interlocutory matters.

For these reasons, Mr. Pardiwalla submitted that the instant application is devoid of merits and urged the Court to refuse leave to appeal, dismiss the application and proceed with continuation of hearing of the main case.

I diligently considered the submissions made by counsel on both sides for and against the instant application. I perused the relevant provisions of law relating to granting of leave to appeal under Section 12 of the Courts Act, which inter alia, reads thus:-

12(1) Subject as otherwise provided ...

(2) (a) In the Civil matters no appeal shall lie as of right -

(i) From any interlocutory judgment or order of the Supreme Court;

(ii) From any final judgment ...

(b) In any such cases as aforesaid the Supreme Court may in <u>its discretion</u> (underline mine) grant leave to appeal if, in its opinion, the question involved in the appeal is one which ought to be the subject matter of an appeal.

(c) Should the Supreme Court refuse to grant leave to appeal under the preceding paragraph, the Court of Appeal may grant special leave to appeal.

It is universal jurisprudence that right of appeal is not absolute or inherent, or automatic in any system of decision making process. It is a distinct statutory right created or required to be granted by a law or statute in favour of a person whose interest is affected or likely to be affected by the judgment or decision in question. In other words, there is no automatic right of appeal available to any person especially against a judicial decision unless a law specifically provides for it. At this juncture, it is interesting to note that particularly in criminal matters every person convicted of an offence has a constitutional right of appeal against the decision of conviction or sentence in accordance with law. This is a fundamental human right - sacrosanct - guaranteed by Article 19 (11), under Chapter III of the Constitution of Seychelles. Hence, it seems to me that a statutory requirement of *leave to appeal* in criminal matters, in effect, would abrogate the fundamental right to appeal guaranteed by Article 19 (11) of the Constitution. At the same time, the Court of Appeal has also been conferred with unfettered appellate jurisdiction to hear and determine generally all appeals from the judgments, directions, decisions, declarations, decrees, writs or orders of the Supreme Court in terms of Article 120(2), under Chapter VIII of the Constitution of Seychelles. This article, in my view not only covers both the civil and criminal matters including conviction and sentence but also all judgments and orders of whatever nature, whether interlocutory or otherwise. Indeed, the generic terms used in this article do not make any distinction in this respect. Be that as it may, Section 12 of the Courts Act provides for right of appeal in civil matters, against an interlocutory judgment or order of the Supreme Court to the Court of Appeal provided the Supreme Court at first instance grants the necessary leave to appeal. This statutory requirement of leave from the Supreme Court contemplated under Section 12 of the Courts Act, though appears to be repugnant to the unfettered overall appellate jurisdiction conferred on the Court of Appeal by Article 120(2) of the Constitution, such requirement seems to be salutary since Rule 16 of the Seychelles Court of Appeal Rules 2005, stipulates that *whenever an application may be made to the Court of Appeal or to the Supreme Court, it should normally be made in the first instance to the Supreme Court.* Whatever be the outcome of the application made to the Supreme Court under Section 12 of the Courts Act, obviously the Court of Appeal in effect, has overriding power to grant special leave to appeal in terms of Rule 17 (1) and (8) of the Seychelles Court of Appeal Rules 2005. Hence, leave requirement from the Court of first instance is more of a formality than substance. Having considered all, I find that the grant of leave in matters of such interlocutory nature though falls within its judicial discretion, this

Court may grant such leave if and only if the case satisfies the following two fundamental conditions:-

1. That the interlocutory order or the interim order in question disposes so substantially of all the matters in issue as to leave only ancillary matters for decision vide ***Pillay Vs Pillay (1970 SLR)*** **P79**; and

2. That there are grounds for treating the case as an exceptional one and the issue involved in the interlocutory order should be brought under review by the higher Court. In other words, the Court should be satisfied or in its opinion the question involved in the appeal is one which ought to be the subject matter of an appeal.

Indeed, the *interlocutory order* in the instant matter was made by the Court incidental to and as a result of a procedural issue pertaining to the admissibility of oral evidence, which obviously arose in the course of the hearing of the suit. It is not uncommon that particularly in trial courts such ancillary issues arise and bound to arise almost daily in all civil proceedings. The court has to give rulings every now and then, on the admissibility of evidence to regulate those proceedings. In the instant case, needless to say, the interlocutory order in question sprang from the application of the procedural rules governing the admissibility of evidence. Obviously, this order relates to an ancillary matter of adjective law, which simply regulates the procedure, pleadings and means of proof. This however, has nothing to with any substantive law, which alone substantially determines the rights, duties and liabilities of parties. In fact, the ***"interlocutory order"*** involved herein has not substantially disposed of the subject matter of the main suit namely, the alleged breach of contract and the claim for consequential damages. As rightly submitted by Mr. Pardiwalla, the matter of admissibility of evidence is not one that would substantially dispose of the main case. The Civil Code of Seychelles provides for other avenues for obtaining evidence and means of proof. Obviously, the plaintiff has not yet exhausted all those avenues. In any event, an appeal is always available to any aggrieved party even after full judgment is given in the main case, so as to canvass all issues including the ones involved or determined in the interlocutory matters.

Secondly, I note, the discretion given to this Court to grant leave in deserving cases should be used judicially, not arbitrarily. This discretion though wide, should be used sparingly, cautiously and that too, only when the case satisfies the two fundamental conditions hereinbefore formulated. In this matter, in my humble opinion, the question involved in the intended appeal as indicated by learned counsel for the applicant, is not one which ought to be the subject matter of an appeal. In fact, the interim order in my view, does not involve any question of law, which ought to be the subject matter of an appeal at this stage of the proceedings. Hence, I decline to grant leave to appeal in this matter.

On the issue of time-limit for filing of an application under Section 12 of the Courts Act for leave to appeal, it is truism that neither the Courts Act nor the Seychelles Court of Appeal Rules 2005 stipulates any period of limitation. Evidently, there is a gap in the procedural law in this respect. However, for the filing of an application to the Court of Appeal for ***special leave*** to appeal against an interlocutory judgment or order of the Supreme Court, Rule 17(2) of the Seychelles Court of Appeal Rules clearly stipulates that such an application should be filed within ***fourteen days*** from the date of judgment or order of the Supreme Court. In my considered view, what is sauce for the goose is sauce for the gander. When the Court of Appeal has in its wisdom made Rules setting the time-limit of fourteen days to apply for special leave, I find no reason why this Court should not set the same limit of 14 days for the same cause adopting the wisdom of the highest order and fill in the gap taking a progressive approach. This time limit of 14 days would not only be in consonance with the Court of Appeal Rules but also would accord with reasoning and justice. Hence, I endorse the contention of Mr. Pardiwalla in this respect. In the circumstances, I propound and hold **that a party to any civil proceeding, who intends to apply under Section 12 of the Courts Act, for leave to appeal to the Court of Appeal against any interlocutory judgment or order of the Supreme Court, ought to apply for such leave - as an implied rule - *within fourteen days* from the date of the said judgment or order of the Supreme Court.** Having said that, as rightly observed by Perera, J. in *Delcy supra* that there are no rules either under the Courts Act or the Court of Appeal Rules, which permit this Court to entertain an application for leave to file an application for leave to appeal to the Court of Appeal out of time. At the same time, I should state that lack of sufficient legal remedy or a gap in our procedural law in this respect, cannot and should not prevent an innocent party from invoking the equitable jurisdiction of this Court for condonation of the delay for a sufficient cause in deserving cases and obtain leave to file an

application for leave to appeal to the Court of Appeal out of time. Indeed, this Court is vested with equitable jurisdiction to grant suitable remedy in all cases where no sufficient legal remedy is provided by the law of Seychelles, vide Section 6 of the Courts Act. Be that as it may. Coming back to the case on hand, the applicant herein has filed the present application for leave to appeal after a delay of 34 days from the date of the ***"interlocutory order"*** and has neither applied for condonation of the delay nor has shown any cause for the delay, let alone a sufficient cause. In the circumstances, I uphold the submission of Mr. Pardiwalla in that the instant application is incompetent being time barred and so untenable in law.

Before I conclude I should also mention that I carefully perused all three rulings of Perera J (as then he was) delivered in the case of *Anisette Delcy Vs. Christelle Camille Civil Side No: 55 of 2001,* which Mr. Derjacques cited in support of his argument. None of those rulings in my considered view, appears to be relevant herein since the facts and the issues determined in those rulings, with due respect to counsel, are quite different in substance from that of the present case.

For the reasons stated hereinbefore, I decline to grant leave to appeal to the Court of Appeal against the Ruling of this Court delivered on the 24th March 2008 in this matter. I make no orders as to costs.

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D. Karunakaran

Judge

Dated this 28th day of January 2009