

**Friminot & Or v Gill
(2005) SLR 77**

Serge ROUILLON for the Plaintiff
Philippe BOULLE for the Defendant

The Appeal was dismissed on 29 November 2006 in CA 4 of 2006

Judgment delivered on 10 October 2005 by:

KARUNAKARAN J: The Plaintiffs in this action seek a judgment declaring that the consent-judgment entered by the Court on 23 January 1997, in Civil Side No. 174 of 1995, hereinafter called the "Judgment by consent" is not a proper judgment of the Court and so seek a number of consequential relieves, inter alia, for an order setting aside the terms and conditions contained in the said judgment. On the other side, the Defendant vehemently contests this matter. In his statement of defence, the Defendant has raised a number of defences based on points of law as well as on the merits and thus, seeks a dismissal of the action.

The facts of the case are these.

Both Plaintiffs herein, are the joint executors of the estates of the deceased couple namely Mr Odrade GrandCourt and Mr Charlemagne GrandCourt, who died on 10 November 1978 and on 8 March 1997 respectively. The Plaintiffs' appointment as joint-executors was made by the Supreme Court on 1 June 2000 vide exhibit PI. The Plaintiffs, in their capacity as such, have now instituted the present action on behalf of the estates of the said deceased couple.

It is not in dispute that Mrs GrandCourt predeceased Mr GrandCourt on 10 November 1978. Following the death of Mrs Odrade GrandCourt, the Supreme Court, on 27 of November 1979 - in Civil Side Case No. 109 of 1979 - first, appointed her husband Mr Charlemagne GrandCourt as the executor of her estate vide exhibit P2. Pursuant to that appointment, Mr GrandCourt was vested with the said estate, which included a parcel of land Title T696, hereinafter called the "suit-property" situated at South Mahe. On 4 of February 1993, Mr GrandCourt, during his life time, in his capacity as the executor of the estate of his late wife, sold the said parcel of land to the Defendant herein, for a sum of R500,000 (hereinafter called the purchase price), under a notarial sale-deed. On the same day, the purchaser namely, the Defendant also executed a Charge deed, charging his interest in the said property Title T696 to secure the payment of the whole purchase price R500,000 to the seller Mr GrandCourt. Subsequently, the Defendant started making payments to Mr GrandCourt on instalment basis. The final payment of the purchase price was to be made by December 1993. However, the Defendant did not complete the said payments within the period agreed upon. In fact, by the end of 1993, he had left a balance of R130, 000 due and payable to Mr GrandCourt pending the final registration of the said deed of sale and the charge.

In the meantime, on 2 March 1994 Mr GrandCourt without the knowledge of the Defendant, subdivided the suit-property T696 into two plots namely, T1393 and T1394 and caused registration of the said two parcels at the Land Registry. As a result, the Defendant could not effect registration of the sale deed executed by the parties in respect of the parent parcel T696, at the Land Registry, though the Defendant was ready and willing to complete the final payment and settle the balance outstanding on the purchase-price.

Having been aggrieved by the discreet subdivision and the resultant difficulty encountered in registering the sale deed at the land registry, the Defendant requested the seller Mr GrandCourt to accept the balance outstanding on the purchase-price and transfer the two parcels, the subdivisions of the parent parcel T639 to the former. However, Mr GrandCourt refused to do so. This necessitated the Defendant, Mr Christopher Gill to file a civil suit in Civil Side 109 of 1979 for specific performance of the contract of sale, ordering Mr GrandCourt to effect the transfer of the subdivided parcels to the Defendant as per the contract.

In the said suit, both parties were represented by counsel. The suit was settled as the parties agreed through their counsel, to a consent-judgment being entered on 23 January 1997, which in essence contained the following terms:

- (1) The Plaintiff (Mr Christopher Gill) shall pay the Defendant (Mr GrandCourt) the sum of R375, 000 without interest within two years... etc.
- (2) The Land Registrar is hereby ordered to transfer Parcels T1393 and T1394 immediately, in the name of Christopher Gill, the Plaintiff.
- (3) Each party to bear its own costs.

About two months after the said consent judgment was entered Mr GrandCourt died leaving a will whereby he bequeathed his entire estate to one Marie Claire Legaie of Baie Lazare, Mahe. The Plaintiffs, who are the executors of the estate of the deceased GrandCourts have now come before this Court seeking a declaratory judgment to nullify the said consent judgment on grounds alleging the following facts:

- (1) The heirs of Mrs Odrade GrandCourt at the time of her death were her husband Mr Charlemagne GrandCourt and their three children namely, (i) Percival GrandCourt (ii) Lora Therese Berry and (iii) Phyllis Hobbs.
- (2) The said three children did not consent to the purported sale of the property Title T696 by their deceased father Mr GrandCourt to the Defendant.
- (3) The said judgment by consent in Civil Side No. 174 of 1995 entered into, by counsel was invalid in that, it did not have the authority of the heirs and it

was not signed and endorsed by the said three children, the other heirs to the estate of their deceased mother Mrs GrandCourt.

- (4) The Defendant did not pay the sum of R375,000 to Mr GrandCourt within the period stipulated in the said consent-judgment.

One of the Plaintiffs Mr Wilfred Friminot (PW1) gave evidence in support of the case for the Plaintiffs. He testified that he knew the deceased Mr GrandCourt as a close friend and a neighbour for the past 15 years. In 1994, the Defendant Mr Christopher Gill had filed a suit in Civil Side No. 74 of 1995 against Mr GrandCourt for specific performance of the contract of sale. In the said case, learned counsel Mr Bonte was representing Mr Christopher Gill and learned counsel Mr S Rouillon was representing Mr GrandCourt.

As a friend Mr Friminot was helping Mr GrandCourt in the said case by participating in the negotiations with counsel and gave him instructions on behalf of Mr GrandCourt, though Mr Friminot stated that he had no mandate or authority to do so.

In early 1997, when the case was pending before the Court, Mr GrandCourt was 87. He was sick, feeble and bedridden. On 23 January 1997, when the judgment by consent was entered, Mr GrandCourt was not present in Court. According to Mr Friminot, his counsel Mr Rouillon advised him to reach a settlement in the case and enter judgment by consent in the best interest of his client Mr GrandCourt. Thus, according to Mr Friminot the impugned judgment was entered. A couple of months after the said judgment, Mr GrandCourt died testate bequeathing his entire estate to one Mrs Marie Claire Legaie. Subsequently, Mr Friminot heard from the said three children of GrandCourts that they did not consent to the sale of the suit-property by their father to the Defendant. However, in cross-examination Mr Friminot admitted that he did not know whether they really gave consent directly to their father Mr GrandCourt for entering the said consent-judgment. Further, Mr Friminot testified that all three children subsequent to the demise of their father thus, instructed him, to file the instant action to set aside the said judgement in question. As a result of this litigation in Court, the Plaintiff also caused an inhibition being registered against the suit-property. In the circumstances, the Plaintiffs pray this Court for a declaratory judgment granting the relief mentioned above.

On the other side, Mr Boulle, learned counsel for the Defendant submitted essentially on a point of law contending that this Court has no jurisdiction to declare its judgment improper. He argued that all judgments are judgments of the Court and should be treated as such for all legal intents and purposes, unless and until set aside by the competent Court namely, the appellate Court. Our law does not make any distinction between a consent-judgment entered by the Court based on the terms agreed upon by the parties, and the one given by the Court after hearing the parties on the merits.

According to him, there is no provision in the Seychelles Code of Civil Procedure, hereinafter called "Civil Procedure Code" granting jurisdiction to the Supreme Court to set aside, cancel or declare its own judgment improper, bad or null and void, irrespective of the fact, whether the judgment was obtained by consent of parties or

given after adjudication by the Court on the merits. This is the rule. There are only two exceptions to it. They are:

- (1) The "Judgment of the Court obtained ex parte" due to nonappearance of a party, so to say "default judgments", which can be set aside by the same Court in terms of Section 69 of the Civil Procedure Code; and
- (2) The "Judgments given inter parte", which are vitiated by fraud, violence or discovery of new evidence etc. can be set aside by the same Court by ordering a new trial in terms of Sections 194-204 of the Civil Procedure Code.

Hence, Mr Boule submitted that first of all, in the absence of any specific statutory provision in the Seychelles Code of Civil Procedure this Court has no and cannot assume jurisdiction to cancel or set aside its own judgment by declaring it improper or null and void. Secondly, it is the submission of Mr Boule that the plaintiff in this matter does not disclose any cause of action against the Defendant. He therefore, urged the Court to dismiss the action on both grounds.

In his reply Mr Rouillon, learned counsel for the Plaintiff contended that whenever the Seychelles Code of Civil Procedure is silent on any matter, the Court should adopt the English procedure. According to him, the Rules of the Supreme Court 1975 of the UK (the White Book) and the English practice provide for setting aside the judgments by consent. In support of this proposition, Mr Rouillon cited a number of excerpts from the White Book: *The Supreme Court Practice* 1995 vol 2 page 1452, part 2-18, the *Halsbury's Laws of England* (4 ed) vol 37 and from the *English and Empire Digest* vol 51 page 732. In the circumstances, he submitted that this Court does have jurisdiction to declare any Judgment by Consent null and void and accordingly set aside the same. Having thus argued Mr Rouillon also submitted as follows:

We are basically saying that the agreement was fraud for the judgment by consent to be entered and by that fact there is no judgment as such.

Obviously, the fundamental issue that arises here, for determination is whether this Court may assume jurisdiction by adopting the English procedure and practice if any, for setting aside a judgment by consent, in the absence of any specific provision in the Seychelles Code of Civil Procedure in this respect.

Firstly, as I see it, the remedy claimed by the Plaintiff in this matter namely, to have a lawful Judgment of the Court being set aside by the same Court, is not a matter, which simply involves rules of practice. Obviously, it involves a substantive right, which is required to be conferred on the claimant by a statute or procedural law. Needless to say, a legal remedy cannot exist without a legal right and vice versa: *ubi jus ibi idem remedium*. As rightly submitted by Mr Boule, our Civil Procedure Code grants jurisdiction and provides for setting aside judgments, only under two specific circumstances.

They are, namely:

- (i) When an ex parte judgment is given by the Court, the aggrieved party has a statutory right in terms of Section 69 of the Civil Procedure Code to seek a remedy from the same Court, and if sufficient cause is shown, the Court may set aside its judgment and order trial inter parte; and
- (ii) When an inter parte judgment is vitiated by fraud, violence or discovery of new evidence etc. the aggrieved party has a statutory right in terms of Sections 194 of the Civil Procedure Code to seek a remedy from the same Court, which may set aside the said judgment and order a new trial.

Admittedly, the impugned "judgment by consent" in the instant case does not fall under any of the said two exceptional circumstances. Therefore, it goes without saying that this Court has no jurisdiction to set aside the said judgment and so I find, upholding the submission of Mr Boulle in this respect.

It is pertinent here to note, Section 17 of the Courts Act, which reads thus:

In civil matters whenever the laws and rules of procedure applicable to the Supreme Court are silent, the procedure, rules and practice of the High Court of Justice in England shall be followed as far as practicable.

However, a new right and remedy of setting aside a consent-judgment in my view, cannot be granted by this Court to the Plaintiff in the absence of the necessary statutory provisions or amendments to the Seychelles Code of Civil Procedure. Indeed, no Court is empowered to assume jurisdiction and make new laws in the guise of interpreting Section 17 supra in order to grant a new right and remedy to any party. Indeed, when the Civil Procedure Code does not expressly grant a legal remedy based on a substantive right to a party whether Plaintiff or Defendant in a civil litigation, the Court cannot and should not on its own fill in the gaps with English legislation and grant that remedy and right to that party.

The Court cannot thus, bring in amendment to the Procedure Code usurping the function of the legislature by interpreting the silence. For these reasons, I find that the present action before this Court for a declaration to negate its judgment is not maintainable in law.

In any event, on a plain reading of the plaint, it is so evident that the pleading does not disclose any cause of action against the Defendant on any ground whatsoever. Hence, on the face of it, the plaint is liable to be dismissed. On the question of "fraud", although Mr Rouillon submitted that the agreement, which gave rise the "Judgment by consent" was vitiated by fraud, there is not even a scintilla of pleading in the plaint, let alone the evidence, to support his contention in this respect. Hence, for this reason too, I hold that the instant suit for a declaration to negate the judgment of the Court on the

alleged ground of fraud is also not tenable in law. Indeed, a judgment by consent is binding until set aside and acts as an estoppel see *Kinch v Walcotte* [1923] AC 483.

In view of all the above, I hold that the Consent-judgment entered by the Court on 23 January 1997, in Civil Side No. 174 of 1995 is still valid and binding. The Land Registrar is therefore, hereby ordered to transfer Parcels T1393 and T1394 in the name of Christopher Gill, upon payment of the sum R375, 000 to the Plaintiffs, in compliance with the terms of the said judgment. The present action is accordingly, dismissed with costs.

Record: Civil Side No 154 of 2000