IN THE SUPREME COURT OF SEYCHELLES

Creole Holidays ***Appellant***

Vs

James Evenor ***Respondent***

Civil Appeal 9 of 2006

Mr. F. Bonte for the appellant
Mr. A. Derjacques for the respondent

D. Karunakaran, J.

JUDGMENT

This is an appeal from the Ruling dated 25 August 2006, given by the Magistrate's Court in Civil Side No. 10 of 2003, wherein the learned Magistrate refused an application made by the appellant's counsel for setting aside an order the Learned Magistrate had made for an ex parte hearing of the suit.

The grounds of appeal read thus:

(i) The Learned Magistrate's ruling was ultra petita in *that* the Plaintiff (now respondent) had not objected to the aplication that the ***exparte*** order be set aside and that the matter be heard ***inter partes.*** The ruling should have been on whether to allow costs or not.

(ii) The Learned Magistrate erred in not having allowed the matter to be heard *inter partes* in that, the Plaintiff did not object to the defendant's application.

Therefore, the Appellant's counsel Mr. Bonte urged this Court to allow this appeal ordering the matter to be heard ***inter partes*** in the Magistrate's Court. On the other side, Mr.

Derjacques, learned counsel for the respondent contended that although he did not object to the application made by Mr. Bonte, the Magistrate's Court used its discretion conferred by Section 19 of the Magistrate's Court (Civil Procedure) Rules and thus, refused the application.

According to the records, on 12 May 2006 when the case was called in the Court below, upon non-appearance of counsel for the defendant (now appellant) the learned Magistrate set the suit to be heard ex parte on 17 August 2006. However, the counsel for the defendant having had notice of the date appeared on the 17th August 2006 and applied to the Court verbally for the order for ex parte hearing to be set aside. In fact, counsel for the plaintiff did not object to the application but it was subject to cost being awarded for his appearance on the said date that is, the l7 August 2006. The magistrate adjourned the case to 25th August 2006 and thereon delivered the impugned ruling, whereby refused the application giving her reasons, which inter alia run thus:

"Since no provisions of the law or authorities have been cited in support of the application I am left in the dark as to which provisions of the law the application is based on. In any event, for guidance, I look to section (sic) 19 of the Magistrates' Court (Civil Procedure) Rules, which gives the Court the discretion to hear the defendant who appears after the Court has adjourned the hearing of the suit ex parte 'upon such terms as the court directs as to costs or otherwise'.

In addition to granting the Court the authority to hear the Defendant who appears subsequent to a matter being set for hearing ex parte, the above section (sic) imposes a duty on the defendant to assign good cause for his previous non-appearance. In fact showing good cause is a pre-requisite to Court exercising its discretion.

The Defendant has, however, given no reasons for his previous absence. In the circumstances I find that though the court has the discretion to allow the Defendant to be heard and to award costs, in this instance the discretion cannot be exercised in favour of the Defendant. For the above reason the application is not allowed"

Before I proceed to consider the grounds of appeal on the merits, it is important to examine the law relevant to the issue in this matter and ascertain their correct interpretation. It is laid down under Rule 18 and 19 *of the Magistrates' Court (Civil Procedure) Rules,* which reads thus:

If defendant does not appear.	*18. If on the day so fixed in the summons when the case is called on, the plaintiff appears but the defendant does not appear or sufficiently excuse his absence, the court after due proof of the service of the summons, may proceed to the hearing of the suit and may give judgment in the absence of the defendant, or may adjourn the hearing of the suit ex-parte.*
If defendant subsequently appears.	*19. If the court has adjourned the hearing of the suit ex-parte, and the defendant, at or before such hearing, appears and assigns good cause for his previous non-appearance, he may upon such terms as the court directs as to costs or otherwise, be heard in answer to the suit as if he had appeared on the day fixed for his appearance.*

On a plain reading of the above sections, it is very evident that having received the summons (first time) if the defendant defaults appearance without sufficient excuse and after due proof of such service, the Court may (i) either on the same day, proceed to hear the suit ex-parte and give judgment in the absence of the defendant or (ii) the Court *may adjourn the hearing of the suit ex-parte* for another date. This is what Rule 18 says without any ambiguity. Under the second option, **"If the court had (thus) adjourned the hearing of the suit ex-parte for another date"** and the defendant subsequently appears and assigns *good cause for his previous non-appearance, the defendant may upon such terms as the court directs as to costs or otherwise, be heard in answer to the suit as if the defendant had appeared on the day fixed for his* appearance. This is what Rule 19 says. The common thread, which passes through these two rules, is the requirement of the date fixed in the summons for appearance of the defendant.

In the instant case, the record clearly shows that on the 12th day of May 2006, *when the case* was called on, the learned Magistrate chose to adjourn the hearing of the suit exparte, presumably acting in terms of Rule 18 (supra). In fact, the 12th day of May 2006 (i)

was not *the day so fixed in the summons for the defendant to appear and more so (ii) there was no proof of service of summons on record. In the circumstances, the Learned Magistrate should not have at first place ordered/adjourned* the hearing of the suit exparte *since these two preconditions contemplated under Rule 18 were not met. In passing I should state that a notice issued to counsel informing him of the mention date of the case, cannot in law, be equated to, or treated as summons served on the parties especially, in a civil proceeding commenced by a plaint.*

Having said that, Rule 19, which the learned Magistrate relied, interpreted and applied in her Ruling, should obviously be read in conjunction with Rule 18 in order to avert the ambiguity that may arise in the interpretation of the expression that appears in Rule 18 to wit: ***"If the court has adjourned the hearing of the suit"***. Unfortunately, the learned Magistrate has read Rule 19 in isolation and has thus misinterpreted it having no regard to the preceding rule, Rule 18, which qualifies this expression. Indeed, Rule 18 and 19 should be read together so as to get the correct meaning of the said expression contained in Rule 19 and avert the ambiguity that seems to arise in the interpretation when read in isolation. It is, at all events, reasonable to presume that the same meaning is implied by the use of the same expression in every part a statute vide **Maxwell on the Interpretation of Statutes** 12th Edition at p278.

In the circumstances, I find that the Ruling in dispute is based on a misinterpretation of the procedural law. Hence, it is untenable in law. Since, this finding substantially disposes of this appeal, I believe, it is not necessary for this Court to go further and consider the merits of the other grounds of appeal.

In any event, I wish to make the following observations for guidance of Magistrate's Courts in this respect.

1. Any statutory provision, either procedural or substantive law, should be interpreted and steered towards the administration of justice rather than the administration of the letter of the law.

2. Magistrates should not hesitate, where circumstances so dictate, to adopt measures that are just and expedient to avert multiplicity of litigations on matters of triviality, and prevent delays in and frustration of the due administration of justice.

3. The discretion given to the Courts in the statutory provisions should be exercised judicially, not arbitrarily in such a way the decision accords with reasoning and justice. When there is a choice among different approaches and among different interpretations of law, it is always desirable and better to chose as far as possible, the one that leads to an inter parte hearing and judgment that is based merits, rather than an exparte judgment.

For these reasons given hereinbefore, I allow the appeal, set aside the order made by the Magistrate's Court for the *ex parte* hearing of the suit and quash the impugned ruling. Therefore, I direct the Magistrate's Court to hear the suit accordingly on the merits *inter parte*.

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D. Karunakaran

Judge

Dated this 28th day of November 2007