Trinity Term
[2015] UKPC 25
Privy Council Appeal No 0085 of 2014

JUDGMENT

Saverettiar (Appellant) *v* Saverettiar (Respondent) (Mauritius)

From the Supreme Court of Mauritius

before

Lord Kerr
Lord Clarke
Lord Hughes

JUDGMENT GIVEN ON

8 June 2015

Heard on 15 April 2015

Appellant	*Respondent*
Jaya Rama Valayden Manoj Seeburn (Instructed by Lu Oliphant Solicitors LLP)	Dhununjay Sibartie (Instructed by Mardemootoo Solicitors)

LORD KERR:

1. The appellant and the respondent are brother and sister. In a plaint with summons issued on 9 November 2009, Ms Saverettiar claimed against her brother for the return of keys of a building which she owned and which her brother had operated as a supermarket. The building was located at J N Roy Street, Mahebourg, Mauritius. Ms Saverettiar also claimed various sums which were said to be owing in respect of rent and/or indemnity for use and occupation of the building and for her share of the profits of the business. Finally, she claimed a sum which she said was required in order to restore the building to its original condition. The summons required the defendant, Mr Saverettiar, to appear before the Supreme Court of Mauritius on 25 November 2009.

2. On 25 November, Ms Saverettiar's lawyer was replaced and the new lawyer, Mrs Attorney Umrowsing, asked that the matter be postponed so that fresh service could be effected. Mr Saverettiar was not present. The case was adjourned to 13 January 2010. On 12 January 2010 Mr Saverettiar wrote to his sister's lawyers asking that the hearing scheduled for the following day be postponed so that he could contact an attorney and in order to get in touch with his sister to find out "what she really want[s]". On 13 January 2010, the court, having considered a copy of this letter, ordered that the trial should take place on 20 January. On that date, the hearing proceeded in the absence of Mr Saverettiar. His sister gave evidence about the building and the arrangements between her and her brother concerning the payment of rent on the building and her entitlement to a share of the profits. She produced some of her brother's bank records in support of the latter claim.

3. The judge pointed out that the claim for rent was statute barred but for the period of three years prior to the issue of the proceedings and he awarded her 720,000 rupees in respect of that three year period, at the rate of 20,000 rupees per month which was the sum that Ms Saverettiar said her brother had agreed to pay. He also allowed a claim for her share of the profits of the business – Ms Saverettiar had testified that it had been agreed that she should receive 50% of the profits which, after some exchange between Ms Saverettiar, her lawyer and the judge, she estimated at 300,000 rupees per month over a period of ten years. A total award of 3,720,000 rupees plus interest was made, therefore.

4. On 2 February 2010 Mr Saverettiar made an application to the court for a new trial and for a stay of execution on the judgment which had been given on 20 January. This was supported by an affidavit sworn by him on 29 January 2010. In this affidavit, Mr Saverettiar claimed that he had gone to a Supreme Court building on 13 January and entered Court No 3 where he remained throughout the hearing of cases but that his case was never called. This was, according to Mr Saverettiar, the first time that he had been

to that court building and he was completely unaware that his case was in fact being dealt with before the Commercial Division of the Supreme Court which is located in an entirely different building from that in which, as transpired from his evidence given during the hearing of the application, he had passed two hours until the end of the sitting day. On 21 January he telephoned his sister's lawyers, only to discover that judgment had been pronounced against him the previous day.

5. In the affidavit Mr Saverettiar made a number of unvarnished claims. He said that there had never been an agreement between him and his sister about the sharing of profits; that she had been paid what was due to her by way of rent; that it was not he who had occupied the premises but a company called King Savers Ltd – his sister's claim should have been directed to that company; and that, by virtue of these matters, he had a good defence to her claim. This affidavit prompted a reply from Mr Saverettiar's sister's lawyer, Manogoran Mardemootoo, in which he suggested that, if Mr Saverettiar were to be believed, he left the Supreme Court without inquiring about the outcome of his case and "waited for another eight days before he made the next move". On Ms Saverettiar's behalf, Mr Mardemootoo denied the claims made by her brother in relation to the sharing of profits; the payment of rent; and the identity of the person or company against whom Ms Saverettiar's claim should have been directed.

6. In its turn, Mr Mardemootoo's affidavit stimulated a response from Mr Saverettiar. In his second affidavit he said that when he did not hear his case being called, he assumed that Mr Mardemootoo had "done the needful" in postponing the case with a view to reaching an amicable settlement with his sister. Two further affidavits, containing desultory averments, were exchanged. It is unnecessary to refer to the contents of those.

7. The application for a new trial was heard on 2 April 2010. On Mr Saverettiar's behalf it was submitted that his application was based on rule 45 of the Rules of the Supreme Court 2000 which, in material part, provides:

> "(1) The court may grant an application for a new trial whether judgment has been given in the presence or in the absence of any other party where it is satisfied that –
>
> (a) fraud, violence or error has been committed;
>
> (b) …
>
> (c) it is necessary in the opinion of the court to do so for the ends of justice."

8. Counsel for Mr Saverettiar said that his case was "mainly based on the limb of error". Mr Saverettiar had claimed in evidence that he had been directed by someone (whom he was not in a position to identify) to the court in which he sat for two hours. It was also submitted that Mr Saverettiar had a good defence based on his claim that (i) no agreement about the sharing of profits existed between him and his sister; (ii) the stipulated rent had been paid; and (iii) the occupier of the premises was, in any event, King Savers Ltd to whom any claim should have been directed. Counsel did not produce any material to support these unembellished submissions.

9. Judgment on Mr Saverettiar's application was given on 28 June 2010. Hamuth J dismissed it. He was clearly sceptical of the appellant's claim that he had been directed to the wrong court, observing:

> "It is difficult to understand why he waited in Court No 3, as he alleges 'till the end of the court sitting but the case was never called'. He admits that he did not see the respondent, then plaintiff, his own sister who he admits should have been present as plaintiff, and expects this court to believe that he still did not discover that he was in the wrong court room. Finally his inaction for the eight following days is totally unexplained."

10. The judge was dismissive of Mr Saverettiar's claim to have a good defence, commenting that he found the respondent's case (that the agreement was between her and her brother and that he was responsible for payments to her, whether he used the premises in his own name or in the name of the company) to be "quite plausible". On the question of whether the interests of justice required that there be a new trial, the judge was emphatic. Citing a number of authorities, Hamuth J said that one should not lose sight of the interests of the party that had obtained judgment. A judgment so obtained should not be set aside "in the absence of very valid grounds".

11. Mr Saverettiar's appeal against Hamuth J's decision was heard on 27 May 2013 and judgment was given on 26 June 2013. The judgment of the court (Matadeen SPJ and Fekna J) recorded that the appellant had abandoned all grounds of appeal except for that which asserted that he had a good defence to the respondent's claim. This, in turn, was based on three main averments. The first was that he had paid the rent due; the second was that there had been no agreement about the sharing of the profits; and the third that it was a company that was running the business and against whom Ms Saverettiar's claim should have been directed. The Court of Appeal's decision dismissing the appeal was cryptically expressed:

> "The learned judge considered that alleged good defence but found that the respondent's averment, namely, that the agreement between the parties who were brother and sister was for the appellant to be responsible as

> occupier for payments to the respondent, whether he used the premises in his own name or in the name of a company, was a plausible one. We are unable to say that the learned Judge's conclusion is flawed, the more so as to deprive the respondent of the benefit of the judgment given in her favour would not in the circumstances of the present case serve the ends of justice."

12. On the hearing before the Board, the appellant sought to revive grounds that had been abandoned before the Court of Appeal and sought to introduce a new ground viz that, contrary to rule 4(3) of the Rules of the Supreme Court 2000, the plaint with summons had not been served on him within 14 days before the returnable date. This argument had not featured before Hamuth J or the Court of Appeal. No investigation of its merits had hitherto been undertaken. No opportunity had been given to the respondent to deal with it. No evidence on the issue had been led. In these circumstances, plainly, the Board could not entertain it and it was decided that the appellant should not be permitted to proceed with it.

13. The grounds which the appellant sought to revive were that he had acted in error in going to the wrong court and that the trial judge had failed to fully explore the interests of justice argument. These are, to an extent at least, inter-related. If the appellant had indeed acted in genuine error, this might have a bearing on whether the interests of justice required that there should be a new trial, although that fact alone would not guarantee the grant of that relief. If it was clear that there was no viable defence to the claim, the circumstance that a party failed, for reasons found acceptable, to attend the court where the litigation against him was being conducted is unlikely to avail him. Conversely, if it is found that the party was absent from court deliberately, it does not automatically follow that he will, on that account alone, be refused a new trial. If, for instance, it could be shown that the defendant had an unanswerable defence to the claim, even though he was in default in failing to attend the trial, he might well be entitled to have the matter reconsidered in the interests of justice, although it is likely that he would be penalised in the costs of the application for a new trial.

14. It is convenient, in this context, to deal with a point raised before the Board by the respondent to the appeal. It was argued that, since rule 45 made no explicit mention of entitlement to a new trial by reason of there being a good defence to the claim, it was not open to the appellant to advance the 'good defence' ground as a reason that the action against him should be re-litigated. That point can be disposed of shortly. If a party against whom a default judgment was obtained could convincingly show that he had a good defence to the claim, it will in most circumstances be in the interests of justice that he should not be denied the opportunity to advance that defence, although, as observed above, he might well face a penalty in relation to costs for his failure to proffer that defence timeously.

15. On the issue of the error in going to the wrong court, if it could be shown that this had indeed been responsible for the appellant being denied the opportunity to present a defence, a question would arise as to whether he should be permitted to advance this as a ground of appeal, since he expressly abandoned it before the Court of Appeal. The Board has decided that it is unnecessary to address that question, however, since the claim is plainly not viable.

16. Before the court can exercise its power to grant an application for a new trial on the ground that an error had occurred, it must be satisfied of that fact. Obviously the burden of establishing that an error had prevented the presentation of a defence rests on the party who asserts it, in this case, the appellant. While Hamuth J did not make an express finding on the issue, it is clear from the tenor of his judgment that he did not consider that the appellant had established that an error had occurred, much less that it was responsible for the appellant being deprived of the chance to present his defence to his sister's claim.

17. The Board does not find this in the least surprising. The appellant's story was inherently unlikely. He was only able to give the vaguest description of the person who, he claimed, directed him to Court No 3. He has not offered any reason for his failure to make further inquiry when his case was not called or, even more significantly, when there was no sign of his sister. According to the appellant, he sat passively in court throughout the two hours that the sitting for that day took place, making inquiry of no-one throughout that time, although neither his sister nor any lawyer on her behalf was present. It was only, apparently, when the sitting day ended that he made the assumption that his sister's lawyer had had the matter postponed. He made no inquiry about the length of any postponement until eight days after the date on which, he claims, he had attended court. Yet, for all he knew, the case might have been adjourned for two or three days or, indeed, as was the position, for one week. No explanation for his delay in making inquiry has been offered. Against this background, it is not only not surprising that the trial judge did not accept the appellant's version of events, it would have been astonishing if he had done so.

18. Although the "failure to explore the interests of justice" point was identified as a separate ground of appeal, on the hearing before the Board, it was subsumed into the argument that the appellant had a good defence to his sister's claim and that the trial judge had failed to take proper cognisance of that. There were two strands to this argument. The first comprised a series of assertions by Mr Saverettiar about the nature of the defence that he would have presented. The second consisted of an attack on the basis on which the trial judge had found in favour of the respondent and the manner in which he had quantified her claim.

19. On the first of these, the appellant's failure to produce any evidence to sustain his claim that he had a good defence was fatal to any prospect of it succeeding. He did

not go beyond declaiming that there had not been an agreement to share profits; he produced no documentary evidence or other material to support the assertion that he had paid rent at the agreed rate; and he failed to supply any evidence that King Savers Ltd was the occupier of the supermarket building. Faced with this complete absence of vouching evidence, it was entirely to be expected that the trial judge preferred Ms Saverettiar's version of the arrangements between her and her brother.

20. It is unquestionably true, however, that the approach to the calculation of the respondent's claim partook strongly of a rough and ready estimate of what it might be worth based on fairly limited information. And the claim was moderated during exchanges between the judge and counsel for Ms Saverettiar on a somewhat ad hoc basis. But one must be realistic about what was available to the judge, given that only one side was present. He correctly dismissed that part of the respondent's claim that was statute barred and he questioned the rate claimed for loss of profits. On the latter point he made his estimate of the quantum of the claim on the basis of a paucity of material, chiefly in the form of bank statements from the appellant's account in 1996 and he was required to extrapolate from these to reach some sort of calculation of the likely value of her claim. It is now said that these records were obtained illegally but no reasoned basis for that claim has been advanced. Moreover, it appears to the Board that these documents would undoubtedly have been exigible on an application for discovery if the action had proceeded as an *inter partes* suit. In the circumstances, the Board is satisfied that the judge did his best on the basis of the material that was available to him and while one might have expected a rather more detailed examination of the claim had both parties been represented, his approach, within the constraints that were inevitable given the nature of the proceedings, is not to be faulted.

21. The appeal is dismissed. The appellant will have 28 days within which to make submissions as to why the costs of the appeal should not be awarded against him. In the event that such submissions are made, the respondent will have 14 days from the date of their receipt to reply to them.