HOSSEN Z v AIR MAURITIUS LTD

2014 SCJ 424

Record No. 107033

IN THE SUPREME COURT OF MAURITIUS

In the matter of:-

Miss Zeenat Hossen

Plaintiff

v

Air Mauritius Ltd

Defendant

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INTERLOCUTORY JUDGMENT

Plaintiff, who is a university student, has entered a plaint with summons, which was subsequently amended, claiming damages as a result of the "*faute*" of the defendant's employee.

The defendant has raised *in limine litis* that *"ex-facie the averments made in her Amended Plaint, it is not open for the Plaintiff to ground her action in tort inasmuch as the parties were linked at the material time by a contract and any alleged damage can only be contractual".*

In her amended plaint with summons, the plaintiff makes the following averments –

On 31.8.2011 she purchased a return air ticket from the defendant to travel to Strasbourg. The return journey was scheduled on 9th June 2012. The return date was changed from 9.6.2012 to 1.7.2012 as confirmed by the Booking Reference bearing No. ZHC7KP.

On several occasions plaintiff's father personally talked to the defendant's employee who confirmed and reconfirmed that everything was in order and that the ticket had been issued

to the plaintiff who just had to board the plane on 1st July 2012. When plaintiff called at the airport in Strasbourg, she was not allowed to board the plane and it was alleged that her confirmed reservation had not been registered on the "machine" by defendant's employee. She further avers that as a result of the laches and/or unprofessionalism and/or "*faute*" of the defendant's employee she has suffered prejudice which she estimated at the sum of 1 million rupees.

It is not disputed that the plaintiff's action is based on "*faute*". Counsel for the defendant submitted that, on the basis of "*la règle de non-cumul des responsabilités*", since the relationship between the parties is based on a contract, the plaintiff's remedy is only under contract and not in tort. Counsel for the plaintiff, on the other hand, submitted that the issue of "*non-cumul*" does not arise as the "*faute*" averred in the amended plaint with summons relates to a set of facts which is extraneous to the contract. In the alternative, counsel submitted that the case falls within the exception of "*faute lourde*" that would allow the plaintiff to enter her action in tort. In the course of their submissions, counsel referred to the following cases: **The Hong Kong & Shanghai Banking Corporation v M.S. Sairally [2002 SCJ 227], Mrs D. Fidele v Sun Resorts Ltd. & Anor [2005 SCJ 109], Air Austral v Abdool Hamid Ismael Hurjuk [2010 SCJ 202], Cascadelle Distribution & Cie. Ltée. v Nestlé Products (Mauritius) Ltd [2012 SCJ 279], Sotramon Ltd v Mediterranean Shipping Co Ltd [2013 SCJ 135] and La Patinoire Ltée v Lakepoint Ltd [2013 SCJ 344].**

I have considered the submissions of both counsel. The present claim arises out of a contractual relationship. The following legal principles emerged from the above cited cases. Our system of Civil liability which is set down in our Civil Code which is of French origin does not permit a *"cumul de la responsabilité contractuelle et de la responsabilité délictuelle"*. There is now a well-established doctrine and jurisprudence whereby parties who are linked by a contract must ground any claim they may have on the basis of contractual liability and not in tort. However, an action in tort is receivable irrespective of the contractual relationship between the parties if such breach amounts to "*faute dolosive*", "*faute intentionelle*" or "*faute lourde*". An averment of "*abus du droit*" would also be sufficient for a "*co-contractant*" even if there had been a breach of contract, to validly proceed with a claim in tort, for "*faute*".

On the first limb of his submission, counsel for the plaintiff argued that the facts as averred in the amended plaint with summons do not have anything to do with boarding the plane but were related to matters which fall outside the contract viz - the verbal conversation with defendant's employee who confirmed that everything was in order and that the ticket had been issued, and the failure of defendant's employee to register the confirmed reservation on the "machine". The mere fact that the defendant's employee orally informed the plaintiff's father that everything was in order and that failure by the defendant's employee to register the confirmed reservation, in my view, do not convert a contractual matter into one governed by tortious liability. In **HSBC v M.S. Sairally (supra)**, the appellate Court, in respect of a submission made that a tortious act was extraneous to a contract, held that the trial Court was wrong to find liability established under tort where a "*préposé*" wrongly advised a customer verbally on a matter which is governed by a contract.

On the second limb of counsel submission, the question which arises is whether *ex facie* the amended plaint with summons the averments disclose a factual substratum which enables the plaintiff to invoke the exception of "*faute lourde*".

At paragraphs (5), (6), (7) and (8) of the amended plaint with summons, plaintiff avers that following the change in the departure date, which was confirmed, her father spoke to the defendant's employee who confirmed that the ticket was issued and she just had to board the plane. But the reconfirmed reservation had not been registered on the "machine". Hence as a result of "*faute*" of the employee, plaintiff has suffered damages. Learned counsel has tried to convince me that the above facts amounts to a "*faute lourde*" that would allow the plaintiff to ground her action in tort.

In the case of **Mrs D Fidèle v Sun Resorts Ltd & Anor (supra),** the trial Court ordered that the case be proceeded with on its merits inasmuch as the averments in the plaint, although they could have been more felicitously drafted, are to the effect that the defendant acted "*mala fide*".

Likewise in **Cascadelle Distribution & Cie Ltée v Nestlé Products (Mauritius) Ltd (supra)** and **La Patinoire Ltée v Lakepoint (supra),** the preliminary objection was set aside as

it was averred in the plaint that the defendant acted in bad faith and "*abus de droit*", and "*mala fide*" respectively.

In the abovementioned cases the trial Court ordered that the cases be proceeded on their merits as specific averments of bad faith and "*abus de droit*' were made. However, in the present case, I note that there is no specific averment of "*faute lourde*" made in the amended plaint with summons.

I am of the view that, *ex-facie* the amended plaint with summons, the averments do not disclose a factual substratum to invoke the exception of "*faute lourde*" that would allow plaintiff to ground her action in tort.

For the above reasons, I uphold the plea *in limine* and non-suit the plaintiff, with Costs.

M. I. Maghooa
Judge

28 November 2014

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<u>For Plaintiff</u>: **Mr R. K. Ramdewar, Attorney-at-Law**
Mr M. Sauzier SC, together with
Mr S. Dabee of Counsel

<u>For Defendant</u>: **Mrs J. Robert, Attorney-at-Law**
Mrs U. Boolell of Counsel together with
Ms C. Parsooramen, of Counsel