

SAYFOO E. v SAGAR HOTELS AND RESORTS LTD

2018 SCJ 340

Record No. 106885

THE SUPREME COURT OF MAURITIUS

In the matter of:-

E. Sayfoo

Plaintiff

v

Sagar Hotels and Resorts Ltd

Defendant

JUDGMENT

The plaintiff has brought an action in tort claiming damages from the defendant for the prejudice suffered by him as a result of defendant's faute.

The defendant has raised a preliminary objection in law moving that the Plaintiff with Summons be set aside inasmuch as the plaintiff is suing the defendant in tort whereas the plaintiff has referred all along in his plaint to the contractual relationship of the parties arising from a lease agreement.

Learned Counsel for the defendant relied on the decision of the Judicial Committee of the Privy Council in **Mediterranean Shipping Company v Sotramon Limited 2017 UKPC 23** to submit that the plaintiff cannot bring an action in tort for an alleged breach of contract by the defendant. In the above case, the Judicial Committee explains, by reference to the principle of "non-cumul", that an aggrieved party is not only precluded from bringing an action both in tort and for breach of contract but is also confined to bringing an action founded only in contract where the prejudice results from the breach or inexecution of a contractual obligation. Their Lordships Judicial Committee describe the principle of "non-cumul" at para. 19 of their judgment by reference to the following extract from **Encyclopédie Dalloz Vo Responsabilité Contractuelle (1989)**, p2, para 5::

"Principe dit non-cumul – Ce principe, dont la dénomination n'est pas suffisamment claire, interdit à la victime, non seulement de cumuler ou de combiner les deux régimes de responsabilité, mais encore de choisir l'un ou

l'autre. Si les conditions de mise en jeu de la responsabilité contractuelle sont réunies, ses règles doivent s'appliquer, sinon il convient de se référer à celles de la responsabilité delictuelle."

Their Lordships also refer to the following passage from **Dalloz, Droit Civil: Les Obligations 11th ed. (2013)** edited by Prof Terré, Prof Simler and Prof Lequette:

"Jurisprudence. La jurisprudence, après avoir hésité, s'est prononcée, en principe, contre le 'cumul' des responsabilités. Elle a décidé que les dispositions des articles 1382 et suivants sont sans application lorsqu'il s'agit d'une faute commise dans l'exécution d'une obligation résultant d'un contrat."

"... en cas d'inexécution dolosive, les règles de la responsabilité sont certes différentes, mais cela ne tient pas à ce que la responsabilité cesse d'être contractuelle. Comment le cesserait-elle, puisqu'il y a toujours inexécution du contrat? "

The Judicial Committee, following a further review of French Jurisprudence and Mauritian case law, went on to observe that:

"It sees no unfairness or injustice in a principle which recognises that an action for damages resulting from the non-performance of a contractual obligation is an action founded in contract, no less when the breach is particularly bad than otherwise. The gravity of the breach does not alter the fact that it is founded on the non-performance of an obligation which arose from the contract."

In the present case, the pleadings reveal that the relationship between the parties was eminently contractual. The plaintiff's action is founded on his lessor-lessee relationship with the defendant. By virtue of a written lease dated 11 December 2008, the plaintiff leased from the defendant a boutique which was located in the Shopping Arcades of defendant's hotel. Plaintiff had leased these premises in order to carry out his business as an exhibition tailor.

The Plaintiff indicates that there exists between the parties a contractual relationship of lessor and lessee which governs the right of occupation of the premises *in lite* by the plaintiff, and which essentially constitutes the subject matter of the present litigation.

It is also evident from the pleadings that the loss claimed to have been suffered by the plaintiff occurred mainly as a result of defendant's failure to respect its contractual obligations towards the plaintiff. The pleadings thus include averments to the effect that the defendant unlawfully denied plaintiff access to the boutique leased to the plaintiff; that the

defendant had required plaintiff to quit, leave and vacate the premises; and that the defendant made unjustified claims of arrears of rent.

It is abundantly clear therefore that in such circumstances, where the parties are bound by a contractual relationship and the action as set out in the plaint flows from an alleged breach of contract on the part of the defendant, it is not open to the plaintiff to claim damages for loss of his trading activities by way of an action in tort.

For the given reasons, I uphold the preliminary objection and order that the plaintiff be non-suited. With costs.

**A. Caunhye
Ag. Senior Puisne Judge**

18 October 2018

Judgment delivered by Hon. A. Caunhye, Ag. Senior Puisne Judge

**For Plaintiff : Mr Attorney M.I. Dauhoo
Mr D. Kissoon, of Counsel**

**For Defendant : Mrs F. Maudarbocus-Moolna, SA
Mrs U. Boolell, SC, together with
Ms. C. Parsooramen, of Counsel, and
Mr. A. Callea, of Counsel**