INFORMATION AND COMMUNICATION TECHNOLOGIES AUTHORITY v EMTEL LTD

2020 SCJ 4

Record No. 1498

IN THE SUPREME COURT OF MAURITIUS

(Court of Civil Appeal)

In the matter of:

The Information and Communication Technologies Authority

Appellant

v/s

Emtel Ltd

Respondent

JUDGMENT

This is an appeal against a judgment of the Commercial Division of the Supreme Court ordering the appellant to pay to the respondent the sum of Rs 9,249,530 and interest in the sum of Rs 4,077,725 with costs.

An additional ground of appeal was dropped at the hearing. The four grounds of appeal read as follows:

"*Ground 1:*

The learned Judge was wrong to hold that Rule 38(2) of the Supreme Court Rules 2000 is mandatory and was wrong in refusing a postponement to enable the Appellant to serve the Third Party procedure.

Ground 2:

Because on a proper construction of Rule 38(2) of the Supreme Court Rules 2000, which is a rule concerned with procedure and, as such, is directory rather than mandatory, the Court retains a discretion to grant a postponement in order to meet the ends of justice.

Ground 3:

The failure of the Learned Judge to grant the postponement prayed for was unfair in the circumstances and the Appellant was deprived of the opportunity to join all the parties to the case and to present its defence fairly and properly.

Ground 4:

Because in all the circumstances of the case the judgment ordering the Appellant to pay to the Respondent the sum of Rs 9,249,530 and Rs 4,077,725 as interests and costs should be set aside and a new trial granted ordering the Third Party procedure be consolidated with the main case so that the Court can thrash out all the issues in controversy between the parties."

The 4 grounds were argued together.

It was submitted by learned Counsel for the appellant that learned Judge erred and acted unfairly in refusing to grant a postponement to the defendant on the day of the hearing. Counsel for the defendant (now appellant) had informed the Court that an action in guarantee had been entered against L'Entreprise Telecom as a third party following which counsel had moved the Court for a postponement to proceed with the third party procedure and for the cases to be heard together with another case which had been fixed for trial on 20 September 2018.

Counsel submitted that Counsel for defendant had explained to the Court that the case was coming for merits for the first time on 8 February 2018 and that it would be in the interest of justice that all cases be heard together in order to have a single judgment and to avoid conflicting judgments.

Counsel for the appellant went on to submit that Rule 38 of the Rules of Supreme Court 2000 ("the Rules"), upon which the learned Judge relied, were not mandatory but only directory and that the Court retained a discretion in order to decide whether to grant the postponement or not. Counsel added that in the circumstances of the case, the learned Judge should have exercised his discretion to grant the postponement for the reasons advanced by counsel for the defendant.

The learned Judge relied, *inter alia*, upon section 38(2) of the Rules which reads as follows:

"38(2) The defendant or the respondent shall lodge the third party procedure prior to the filing of the plea"

It is not in dispute that the appellant had failed to comply with this requirement. There is a settled line of decisions that failure to comply with the Rules would not irremediably be fatal in

all cases. The following oft-quoted passage from **Quesnel and Ors v Dorelle & Ors** [1867 MR 61] has served as a basis for the Supreme Court to consistently invoke the exercise of its discretionary powers in deciding upon what is the right course to follow where there has been a non-compliance with the Rules:

> "*The Judges who have framed those rules retain in their application a certain amount of discretion, they are to be enforced in all cases, but they are to be enforced so as to further not to defeat the ends of substantial justice; non-compliance with their provisions ought to be visited with some penalty, but where 'such non compliance' does not affect the substantial merits of a case, and where the Court is satisfied, not on a mere statement of parties but upon proper evidence that the strict application of a rule in a matter of form would work irremediable injury to one of the parties, it lies with the Court to modify the application under the penalty of costs, and this, in the way which would appear to them more conducive to ends of justice."*

We however see no reason to interfere with the judicious exercise of his discretion by the learned Judge which led him to the only conclusion which was conducive to the ends of justice in the present matter and which was to reject the appellant's motion for postponement.

The appellant's plea had been filed on 16 June 2017. Its counsel came with the motion for postponement to proceed with the third party procedure only when the case came for trial nearly 8 months later and more than a year after the case had been lodged. On the day of the hearing, the case was in shape for hearing with all the witnesses in attendance. No reason whatsoever was advanced by counsel for the defendant to explain the appellant's failure to proceed in a timely manner with the third party procedure so as not to disrupt the trial process.

Nor was there any reason advanced which could have prompted the Court to exercise its discretion to condone the admitted failure by the appellant to comply with Rule 38(2). The appellant had conceded in that respect that it had failed to lodge the third party procedure prior to the filing of the plea.

On the contrary, the record shows that on 7 July 2017 the appellant's attorney had written to the Court asking that the 2 connected cases of ICTA v L'Entreprise Telecom be fixed on the same date for trial i.e on 8 February 2018. The request for the cases to be consolidated was not acceded to and the appellant was informed of the objection by the respondent (then plaintiff) by way of a letter from the Court which is dated 12 July 2017. The appellant was thus fully aware as far back as 12 July 2017 that the cases had not been consolidated as requested by appellant's attorney. Yet nothing was done by the appellant until the case came for trial as initially fixed by the Court on 8 February 2018.

Furthermore, there was only a mere statement from the bar by counsel that L'Entreprise Telecom should be joined as a party and "*that the third party procedure together with this action be consolidated so that one will have an effect on the other*". There was not any evidence before the trial Judge which could indicate that the postponement was necessary in order to join L'Entreprise Telecom as a party in order to adjudicate on the issues at hand.

There was in fact only one issue at the trial upon which the trial Judge had to adjudicate. This was whether the respondent was entitled to be reimbursed for the '*fraud tracking charges'* which had been claimed by, and paid to, the appellant. On 28 April 2014, the Supreme Court had ruled with regard to a similar claim that the appellant was not in law entitled to claim such "*fraud tracking charges"* **[ICTA v Hot Link** [2014 SCJ 129].

In the course of the hearing of the present matter it was unequivocally admitted by the representative of the appellant under oath in Court that in the light of the above judgment, the appellant was not entitled to payment in respect of the fraud tracking account.

> *"Q: Just to be clear you are aware that the Supreme Court has said that the ICTA had no power to issue the directive of 2010 and it had no power to collect the fraud tracking account, is that correct?*
>
> *A: It is correct…"*

More important still, there was an unqualified admission in Court that the appellant was indebted to the respondent in the sum claimed:

> "*Q: You agree that the amount of Rs 9,249,530 is due to Emtel?*
>
> *A: Yes"*

In any event, there is no longer any live issue with regard to Third Party proceedings in view of the decision of the Supreme Court to set aside the proceedings for joining 'L'Entreprise Telecom' as third party in **Emtel Limited v The Information and Communication Technologies Authority [*vide* SC/COM/PWS/00122/2018]**

For all the above reasons, we see no merit in this appeal which is dismissed with costs.

A. Caunhye
Senior Puisne Judge

V. Kwok Yin Siong Yen
Judge

8 January 2020

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

For Appellant : **Mrs Attorney S. Sonah-Ori**
Mr R. Gulbul, of Counsel

For Respondent : **Mr Attorney F. Hajee Abdoola**
Mr A. Moollan, SC, together with
Mrs J. Konfortion, of Counsel