2022 IND 3

IN THE INDUSTRIAL COURT OF MAURITIUS

In the matter of:

Cause No.617/18

Mr. Aman Kumar Savetree

Plaintiff

v.

Mr. Mahendradev Gopee

Defendant

And in the matter of:

Cause No.170/20 **Mr. Mahendradev Gopee**

Applicant

v.

Mr. Aman Kumar Savetree

Respondent

Ruling

This is an application for a new trial in case bearing Cause No:617/18 given that the case was heard in the absence of Applicant (then Defendant) and judgment was delivered against him wherein he was ordered to pay to Respondent (then

Plaintiff) the sum of Rs. 132,251.35 inasmuch as he left default on the trial day viz. on 24 February 2020 without any explanation given on his behalf when both parties were present during the previous Court sitting and were both informed of the trial date.

Applicant (then Defendant) has moved for a new trial by relying on the following 2 grounds:

(1) A new trial of case bearing Cause No. 617/18 ought to be granted because Applicant (then Defendant), who was *inops consilii,* made a genuine error when giving his oral plea on 7 February 2019. He was not the owner of the bus and as such was not the one paying the remuneration to the Respondent (then Plaintiff).

(2) A new trial of case bearing Cause No. 617/18 ought to be granted in the interests of justice inasmuch as Applicant (then Defendant), has a *good*, *serious* and *bona fide* defence to the Plaint. He is not and cannot be qualified as the "employer" of the Respondent (then Plaintiff) and thus cannot be held accountable to the latter.

The application was resisted by way of a notice of objections as *inter alia* – (i) Applicant (then Defendant) has admitted that he was the employer of Respondent (then Plaintiff); (ii) Applicant has admitted that he had told Respondent that he would be paid his end of year bonus on or about 24.12.15. Had the Applicant not been the one employing Respondent, he would have had no knowledge of same; (iii) Nowhere in his oral plea, Applicant made mention of the name of the alleged owner of the bus. Respondent has, therefore, moved that the present application be set aside because it is not in the best interest of justice and that the Respondent should not be deprived of the benefit of the judgment which was given in his favour by the Court. Arguments were accordingly heard.

For the purposes of the arguments, Applicant (then Defendant) deposed on his behalf and there were 2 witnesses who deposed on behalf of Respondent (then Plaintiff) namely Miss Tina Conhye in her capacity as Acting Senior Labour Industrial Relation Officer and the Respondent (then Plaintiff) himself.

It is common ground that the Applicant (then Defendant) when giving his oral plea admitted the following:

(a) *Respondent (then Plaintiff) was in the continuous employment of Applicant (then Defendant) as bus conductor since 11 August 2014.*

(b) *On 20 December 2015, he requested Respondent (then Plaintiff) not to report to work as from 21 December 2015 as he would himself be working in his bus for the following two weeks.*

(c) *As at 20 January 2016, he failed to provide Respondent (then Plaintiff) with work.*

(d) *Respondent (then Plaintiff) therefore construed that on 20 January 2016 that Applicant (then Defendant), by his acts and doings, has unjustifiably put an end to his employment by failing to provide him with work.*

(e) *Respondent (then Plaintiff) has not been refunded nor paid wages in view of 18 days' annual leave which were still outstanding as at 20 January 2016.*

Applicant (then Defendant) has denied the other averments of the plaint in his oral plea as regards the rest of the payments claimed by averring that some of them had already been made by the owner of the bus and as for others, they were being looked into by the said owner of the bus.

Applicant (then Defendant) gave evidence in Court. He stated that he was working as bus driver. He used to inform the Respondent (then Plaintiff) of the days he had to come to work. He did not turn up on the day fixed for trial namely on 24 February 2020 as he was suffering from food poisoning. On the eve, he was brought by car by his sister to his treating doctor and he was aware on that very eve that he would not be able to come to Court. But he did not send someone to bring the medical certificate viz. Doc. NT1 on his behalf on the trial day as he was not aware that he had to do so. He was not the owner of the bus as it belonged to his mother and after her demise, his father was the owner. He entered the present application for a new trial as he was not the owner of the bus and had never employed someone to work. While giving his oral plea, he admitted certain paragraphs of the plaint and denied others. At no time the usher or the Magistrate forced him to give his answers. He was also told by the usher that he could add to his answers when giving his plea.

Ms Tina Conhye in her capacity as Acting Senior Labour Industrial Relation Officer gave evidence in Court. She stated that the Labour Office had taken steps to ascertain from the National Transport Authority as regards the owner of the said bus.

As per records from the National Transport Authority, the heirs of Lutcheemee Gopee as represented by Mr. Dharmasdev Gopee were the owners as per Doc. NT2.

Respondent (then Plaintiff) gave evidence in Court. He said that he was working as bus conductor for Applicant (then Defendant). The latter informed him of the day and time he had to attend work. At the end of a day's work, Respondent (then Plaintiff) would give Applicant (then Defendant) who was working as bus driver, all the money collected from that day's work and out of which he was given his daily wages by him. Although he could not say for sure where his salary meaning as a whole emanated from, he maintained that it was the Applicant (then Defendant) who gave it to him and not his father. It was the Applicant (then Defendant) who decided at what time his bus would leave the garage in order to collect passengers.

The main thrust of the argument of learned Counsel for Applicant (then Defendant) is that the said Applicant was *inops consilii* and did not have the benefit of legal advice for his oral plea. He did deny liability in a few paragraphs of the plaint as far as payment is concerned by relying on the fact that the owner of the bus was responsible and which sits uncomfortably with his admissions. He did not understand what an employer meant and he was not the employer of the Respondent. The Applicant was simply an employee and he never made any payment of salary and the judgment was an incorrect one.

The main thrust of the argument of learned Counsel for Respondent (then Plaintiff) is that the burden of establishing that an error had prevented the presentation of a defence rests on the party who asserts it. He referred to the Privy Council decision of **Saverettiar v Saverettiar [2015] UK PC 25**. He also relied on the Supreme Court case of **Lochun Baguth v Dr. H. Molliere** [1934 MR 2019] as there were no solid grounds showing an error so that it would have been necessary in the interests of justice to grant a new trial. He further relied on the case of **ADR Enterprise Ltd v Sondagur A.A.** [2019 SCJ 258] where an extract was referred to from the case of **Trianon Transport Co Ltd v Motee I.** [2016 SCJ 89] where the Court fully endorsed the views expressed in **Trianon Transport** (supra) as follows: *"if parties to a case wilfully disregard hearing dates fixed by the Court, they do so at their risk and peril"*. There is no error as it was a choice.

I have duly considered the arguments of both learned Counsel in the light of the evidence ushered for that purpose. It has remained unchallenged from the evidence so adduced that Applicant (then Defendant) who was the driver of the bus was the

one collecting the money for each day's work from the bus conductor viz. the Respondent (then Plaintiff). It has also remained unrebutted that he was the one giving the Respondent his daily wages and informing him when he had to turn up for work and not the Applicant's father. At no time, when he was giving his oral plea he stated in Court that he could not understand what an employer meant as he was *inops consilii*. Thus, it is abundantly clear that he did in fact employ the Respondent and did not make the payments claimed by him. Moreover, he admitted that he knew on the eve of the trial date that he could not attend Court as he happened to know that he was suffering from food poisoning after his sister had conveyed him in her car to his treating doctor and in relation to which he was given a medical certificate viz. Doc. NT1, but he did not send his sister or someone else to produce that medical certificate in Court in order to explain his absence on the day of the trial. Furthermore, he contended that he could not be held accountable to the Respondent as the latter was employed by the owner of the bus and which he was not and yet as per the records kept at the National Transport Authority as per Doc. NT2, he was bound to be a co-owner of that bus following the demise of his mother who was its previous owner. It is worthy to note that as per Section 2 of the **Employment Rights Act 2008 – Act 33/2008** in force at the material time (now repealed) has defined an employer as follows:

> *""employer", subject to section 33 –*
>
> *(a) means a person who employs a worker and is responsible for the payment of remuneration to the worker;*
>
> *(b) includes –*
>
> *(i) a job contractor;*
>
> *(ii) a person, other than another shareworker, who shares the profit or gross earnings of a shareworker;(**emphasis added**)*

Section 33 concerns the Sugar Industry which is not relevant for our purposes as well as Section 2(b).

The relevant provisions of the law governing the application for a new trial for the purposes of the present case are to be found in Rules 62 & 63 of the **District, Industrial and Intermediate Court Rules 1992** which are reproduced below:

*"**62.** Every District Magistrate shall have power to grant a new trial of the action (in every case) where fraud, violence, or error has been committed, or where new evidence can be produced, which was not accessible to the party, or was not within his knowledge at the time of the first trial, whether judgment has been given in the presence or in the absence of the opposite party.*

***63.** The Magistrate shall have power (on such conditions as to security for the amount of the judgment or for damages and as to payment of costs, as he may deem proper), to grant a new trial, in any case where it shall be in his opinion necessary so to do for the ends of justice."*

At this stage, I find it appropriate to quote an extract from the Supreme Court case of **Trianon Transport Co Ltd v Motee I. [2016 SCJ 89]** which was fully endorsed in **ADR Enterprise Ltd v Sondagur A.A. [2019 SCJ 258]** where the Supreme Court had this to say:

"if parties to a case wilfully disregard hearing dates fixed by the Court, they do so at their risk and peril".

The tenor of the evidence adduced compellingly show that the trial date has been wilfully disregarded by the Applicant as there was no error and he had his medical certificate available on the day before the trial and yet failed to send someone on his behalf to furnish that medical certificate in Court to explain his absence. I agree with learned Counsel for the Respondent that it was not an error but a choice. At this juncture, I find it most relevant to quote an extract from the Supreme Court case of **Lochun Baguth v Dr. H. Molliere [1934 MR 2019]** which reads as follows:

"That brings us to the last point we have to consider. In the present case is the grant of a new trial "necessary for the ends of justice"? We are satisfied that it is not. "When a litigant has obtained a judgment in a Court of Justice ….. he is by law entitled not to be deprived of that judgment without very solid grounds", Brown v Dean, A.C. (1910), 373. What are the grounds in this case which would warrant us in depriving the Plaintiff of his judgment? A shadowy plea of having a good defence; mere forgetfulness of the date of the hearings. To accede to such a request would be to open the door to countless applications of a similar character on the part of any number of persons who might choose to come forward with flimsy excuses. We are here to further the ends of justice not to assist in defeating them.

The appeal is dismissed with costs." (**emphasis added**)

It is apposite to reproduce an excerpt from the Privy Council decision of **Saverettiar v Saverettiar [2015] UK PC 25** as follows:

"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 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.

(…)

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.

(…)

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."

Thus, I take the view that there is no error in the oral plea given by Applicant. He does not have a *good, serious* and *bona fide* defence to the plaint as he made the choice of wilfully not being assisted by Counsel and of wilfully disregarding the trial date viz. 24.2.2020 by not having his medical certificate as per Doc. NT1 (wherein the Doctor specified that he would not be able to attend Court on 24.2.2020) available to him on the eve of the trial, produced in Court by someone else to explain his absence in relation to the claim of the outstanding remuneration due to the Respondent by him which led to judgment having been given against him. Besides, I hold that there has been no error on the part of the Applicant (then Defendant) as he was the employer of the Respondent (then Plaintiff) as rightly admitted by him in his plea as he was in his continuous employment as bus conductor since 11 August

2014 because he was the one paying him his daily remuneration and informing him when to turn up for work and that he was also a co-owner of the bus so that in the interests of justice a new trial is not called for.

For all the reasons given above, I hold that the application for a new trial has not been fully substantiated in terms of solid grounds in favour of Applicant (then Defendant) warranting the deprivation of the Respondent (then Plaintiff) of his judgment (see- **Lochun Baguth** (supra)).

The application is accordingly set aside with costs.

S.D. Bonomally (Mrs.) *(Vice President of Industrial Court)*

14.1.22