2021 IND 6

Cause Number 454/13

IN THE INDUSTRIAL COURT OF MAURITIUS

In the matter of:

Mrs. Devianee Roopun

Plaintiff

v.

Jyoti's Clinic Ltd

Defendant

Ruling

Plaintiff has averred in the present plaint which was amended that she had entered a case before Industrial Court against the Defendant in case bearing Cause No. 489/09. On 30 November 2011, while Plaintiff was deponing in that case, she suddenly became incoherent due to a mental stress. The case had to be withdrawn.

Learned Counsel appearing for the Defendant has put in a plea in *limine* which is to the effect that Plaintiff cannot proceed with the present matter as she herself put an end to her contract of employment, a fact confirmed by her admission in the course of the proceedings of the previous case. Plaintiff did herself put an end to her contract of employment when she was confronted with falsified entries made by her in a list of valuable belongings of patients on 4 July 2008. In fact, Plaintiff walked away from the premises of the clinic and did not report back on duty. Defendant, therefore, prays that the present matter be dismissed with costs as Plaintiff herself has put an end to her contract of employment.

The plea in *limine was* resisted and the matter was fixed for arguments.

For the purposes of the plea in *limine,* upon agreement of both learned Counsel appearing for the parties, the proceedings of the previous court record bearing Cause No. 489/09 was put in. Furthermore, it has not been contested in the course of the arguments that the present amended plaint is setting out the same facts again as in that previous case namely - (a) Plaintiff was in the continuous employment of Defendant as Nursing Aid since 1 March 1996. (b) She was remunerated at monthly intervals at the terminal basic rate of Rs.8,500 a month but her average monthly remuneration amounted to Rs. 16,897.50. (c) On 7 July 2008, Defendant terminated her employment without notice and without any justification. (d) Plaintiff is, therefore, claiming from Defendant the sum of Rs. 625,207.50 representing severance allowance for unjustified termination of employment for 148 months' continuous service (Rs 16,897.50/2 x 148 years/12 x 6).

The main thrust of the arguments of learned Counsel for the Defendant is that the present amended plaint is an exact replica of the previous plaint. It is repeating all the facts that have already been disclosed in the previous plaint. The sum claimed is exactly the sum claimed in the previous case. In the course of the examination in chief of Plaintiff in the proceedings of the previous case, she had this to say at page 3 of the proceedings of Wednesday the 30th of November 2011 at the bottom: *"En Juillet mo fine quitte travail",* that is, *"En Juillet 2008, mo fine quitte travail"* , this is very important, that is, she left the job and further in cross-examination by learned Counsel at page 13, Question 4, *"Ca veut dire quand ou ine gagne depression, ou pas fine ale travail? A: lerla mone malade. Q: Oui, Combien temps ou ine malade? A:Presque ene mois mo pas ti alle travail."* Last question *"Pou aine mois ou pas fine alle travail parcequi ou ine gagne depression? A: Oui."*

She said she suffered from depression and she admitted that for a period of one month, she did not turn up to her place of employment. If she has not attended her work for a period of one month, this is putting an end to her contract of employment so that the question of unjustified dismissal does not arise. Thus, following the answers given in the proceedings of the previous case meaning her own admissions made in the previous occasions when she said she did not attend work for a month, he took a plea in *limine* and learned Counsel for the Plaintiff moved for an adjournment and finally the case was withdrawn. That is very important as the case was withdrawn following the answers given by the Plaintiff in the previous proceedings and he did not object and did not ask for costs. This is an agreement between the parties which amounts to a *"transaction"* in the sense of an agreement reached between the parties to put an end to the litigation pending between them. He relied on Articles 2044, 2052 and 2053 of the Civil Code. Hence, a *"transaction"* "*peut être rescindée"*, when there is "*erreur de la personne ou sur l'objet de la contestation"*. In that particular case, there is no *"erreur de la personne"*, nor "*sur l'objet de la contestation"*. He has, therefore, moved that the present case be set aside/ to be dismissed with costs.

The main thrust of the arguments of learned Counsel for the Plaintiff is that his learned friend is seeking a very drastic remedy to strike off pleadings straightaway without hearing evidence and that remedy should be used very sparingly. True it is that the previous case was purely and simply withdrawn with no order as to costs and his learned friend did not insist on costs. But then, Plaintiff is not precluded from coming again with an additional paragraph wherein Plaintiff has averred that she had entered a case before the Industrial Court against Defendant in case Cause No. 489/09 as while Plaintiff was deponing in that case, she suddenly became incoherent due to mental stress and the case had to be withdrawn. She will come and explain why certain admissions were made and which have been referred to by his learned friend. She said in chief that she was suffering from depression. Then, she became incoherent on major issues. Will the Court deny her the right to come and depone as to why she was incoherent and as to what had happened to her. That drastic remedy will deny her the right to come to Court and explain to the Court as to why she was unjustifiably dismissed.

Learned Counsel for the Defendant replied that the Plaintiff had admitted that she did not attend work for one month because she was suffering from depression and that should have been followed by a medical certificate and which was not done.

She has decided on her own not to go to work. In the course of examination in chief by his learned friend so that she was not under stress, she said *"Juillet, mo ine quitte travail."* She cannot at this stage come and say that she was under pressure or stress. She was still being examined in chief by her learned Counsel and said *"Moi mo finne quitte travail",* so the question of unjustified dismissal does not arise. Incoherence is no reason for a revocation of *aveux* as there is no *erreur de faits* because her version came out in the course of examination in chief by her own learned Counsel and her *aveux* cannot be revoked because she was under stress.

Learned Counsel for the Plaintiff has further replied that the evidence should be looked at globally. Plaintiff should be given a second chance and not a second bite at the cherry, but a second chance to depone as to how it all occurred in the first case.

I have given due consideration to the arguments of both learned Counsel put forward before me. It is not contested that there is again before this Court in the present amended plaint, the same facts disclosed for the same claim for unjustified dismissal involving the same parties as in case bearing Cause No. 489/09 where Plaintiff admitted that she did not turn up to work for about one month as she was suffering from depression. Indeed, learned Counsel for the Plaintiff admitted that there was only one additional paragraph namely that on 30 November 2011, while Plaintiff was deponing in that previous case, she suddenly became incoherent due to mental stress and the case had to be withdrawn. The present case is to give Plaintiff a second chance to depone as to how it all happened in the previous case and as to why she was unjustifiably dismissed.

At this stage, it is relevant to note that as per the Court proceedings of the previous case, following her admission that she did not turn up to work for about one month in the absence of a medical certificate produced or her having testified that she would call her doctor as witness to show that she was suffering from depression at the time, learned Counsel for the Defendant took up a plea in *limine* that following Plaintiff's clear admission that she did not report on duty, her plaint cannot stand in law for unjustified dismissal. Then, the proceedings in the previous case continues as follows:

"Mr. Jaddoo further states that he intends to refer Doc A to Police for enquiry in a suspected case of larceny and/or forgery*.*

Mr. Ramchurn: *Yes, let us put it for Argument on the point in limine raised and we shall wait the outcome of the Police enquiry, if there is one.*

Court: *You will refer it to the Police? There is no motion for the Court to refer it?*

Mr. Jaddoo: *No we'll do it. We'll take it on ourselves.*

Mr. Ramchurn*: We don't involve Your Honour in this.*

In the circumstances, Mr. Ramchurn moves that the case be fixed for Argument in the light of the plea in limine raised.

No objection from Mr. Jaddoo. Motion granted.

Common dates are suggested.

Witnesses present are warned in Court for 06.02.2012*.*

ATS, Mr. Ramchurn states that a copy of the list of oncoming calls is handed over to him by witness Mr. Dhanraj Liliah from Mauritius Telecom.

ATS, Mr. Jaddoo moves that a copy of Plaintiff's statement given to the Labour Inspector be communicated to the Defence.

Argument on 06th of February 2012*."*

The proceedings of the 6 February 2012 are reproduced below:

"Mr. V. Ramchurn,of Counsel, appears for the plaintiff.

Mr. A.R.Jaddoo, of Counsel, appears for the defendant.

Mr. Ramchurn moves to withdraw the case.

No objection

M.G.

Case is withdrawn with no order as to costs."

Now the point that I have to decide is whether the proceedings reproduced above in relation to the previous case lead to the conclusion that there has been an agreement within the meaning of a *transaction* pursuant to Article 2044 of the Civil

Code so that then, pursuant to Article 2052 of the Civil Code whether the Plaintiff cannot proceed with the present amended plaint given that the effect of the *transaction* is that it has *"l'autorité de la chose jugée en dernier ressort."*

Article 2044 of the Civil Code reads as follows:

*"**2044.** La transaction est un contrat par lequel les parties terminent une contestation née, ou préviennent une contestation à naitre.*

Ce contrat doit être rédigé par écrit."

In the supreme Court case of **Roi Gems (Mauritius) Ltd v Air Mauritius Ltd [2017 SCJ 155]**, the Court had this to say in relation to that Article 2044 which reads as follows:

*"In **Thanacoody v New Diary Co. Ltd** [1973 SCJ 4], quoting from **Encyclopedie de Droit Civil, Dalloz: Vo. Transaction**, it was held that 3 conditions needed to be satisfied for a transaction to be valid namely: -*

1. *Une situation litigieuse*
2. *L'intention des parties d'y metre fin*
3. *Des concessions réciproques consenties dans ce dessein"*

I take the view that in the light of the above proceedings in the previous case reproduced, all the 3 conditions for the Article 2044 of the Civil Code to operate as highlighted in **Roi Gems (Mauritius) Ltd(supra)** have been met for the following reasons:

(a) There is *une situation litigieuse* namely a case of alleged unjustified dismissal in relation to which a plea in *limine* was taken by Defendant following the admission made by Plaintiff that she had abandoned her work for about one month and thus, she had no case in law for unjustified dismissal.

(b) Then, prior to the case being fixed for arguments, there were documents to be communicated to both learned Counsel appearing for the parties and there was an intention of the parties to deal with some of the issues at their level only without the intervention of the Court namely the referring of a document produced in Court to the police for enquiry in a suspected case of larceny and/or forgery. Such a state of affairs shows an unfolding intention of the parties to put an end to the dispute that separates them. Rightly so, on the day so fixed for

arguments on that plea *in limine*, learned Counsel for the Plaintiff moved to withdraw the case of the Plaintiff and learned Counsel for the Defendant stated that he was not objecting and he did not make any motion to insist on costs so that the plaint was withdrawn with no order as to costs. This means that Plaintiff made a concession in the light of the plea in *limine* raised by Defendant by withdrawing the plaint and Defendant did not object and nor did he press for costs which amply shows that there were *concessions réciproques consenties dans ce dessein*. Therefore, clearly the second condition has been met meaning that there was an intention of the parties to put an end to the *situation litigieuse* between them as there were *concessions réciproques consenties dans ce dessein.*

(c) Hence, that *intention des parties d'y metre fin* is reduced in writing *ex facie* the above proceedings in the previous case with the intention to be legally bound by them although the term agreement *stricto sensu* has not been used.

(d) Thus, I have no difficulty in construing that such an agreement has been reached between the parties in the previous case within the meaning of a *transaction* under Article 2044 of the Civil Code as all the 3 conditions required have been met.

Now, it is significant to note that when the motion for withdrawal was made in Court in the above previous proceedings by learned Counsel for the Plaintiff, at no time did he say that it was done because Plaintiff suddenly became incoherent due to a mental stress so that it can be construed that as a result of which there was no objection taken by learned Counsel for the Defendant and no order as to costs pressed by him.

On the contrary, a perusal of the previous Court proceedings produced shows that it was in the course of Plaintiff's examination in chief by her own Counsel that she said that she abandoned her work in July 2008 as she was suffering from depression and at that point in time she did not say that she had a medical certificate to produce or that she had her treating doctor who will be called as witness at later stage to prove same. There was no reason for any stress or incoherence as she was deposing in the course of her examination in chief by her own Counsel as rightly pointed out by learned Counsel for the Defendant.

Furthermore, learned Counsel for the Plaintiff for his part has contended that a second chance be given to the Plaintiff to depone as to how it all occurred in the

previous case and that striking out pleadings is a very drastic remedy which should be sparingly used. In the present case, there has been no motion for the case to be struck out but to have the case set aside /to be dismissed within the meaning of a *transaction* which is an agreement reached between the parties to put an end to the litigation pending between them pursuant to Articles 2044, 2052 and 2053 of the Civil Code relied upon by learned Counsel for the Defendant. At this particular juncture, I deem it appropriate to reproduce Articles 2052 and 2053 of the Civil Code below:

*"**2052**. Les transactions ont, entre les parties, l'autorité de la chose jugée en dernier ressort.*

Elles ne peuvent être attaquées pour cause d'erreur de droit, ni pour cause de lésion.

***2053**. Néanmoins une transaction peut être rescindée, lorsqu'il y a erreur dans la personne, ou sur l'objet de la contestation.*

Elle peut l' être dans tous les cas ou il y a dol ou violence."

Now, litigating the same dispute anew in the present amended plaint before this Court by the addition of the new paragraph that Plaintiff had entered a case before Industrial Court against the Defendant in case bearing Cause No. 489/09 and that on 30 November 2011, while Plaintiff was deponing in that case, she suddenly became incoherent due to mental stress, the case had to be withdrawn is not proper. This is because the present amended plaint being used to mount a collateral challenge to the *transaction/*agreement reached between the parties before a Court of law, is direct, patent and cannot be condoned, because to allow it to proceed would be to imperil the future administration of justice - vide **Hurnam v Bholah [2010] UKPC 12 (12 July 2010) -** which the Board of the Privy Council described as "an utterly impermissible tactic". Therefore, the inescapable conclusion is that this agreement or *transaction* reflecting the intention of the parties does not have the effect of *"l'autorité de la chose jugée en dernier ressort"* pursuant to Article 2052 which is against the gist of the plea in *limine* raised in the present amended plaint.

For all the reasons given above, I do not uphold the plea in *limine* within the ambit of Articles 2044, 2052 and 2053 of the Civil Code but in the same breath, I cannot condone the contention of learned Counsel for the Plaintiff as such a course of action is an utterly impermissible tactic and if the present amended plaint is allowed to proceed, it will imperil the future administration of justice (see- **Hurnam(supra).** In the circumstances, I set aside the present amended plaint with costs.

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

10.12.21