Maurice A. v Compagnie Du Mapou Limited

2021 IND 2

Cause Number 933/17

IN THE INDUSTRIAL COURT OF MAURITIUS
(Civil side)

In the matter of:

Mr. Arjoon Maurice

Plaintiff

v.

Compagnie Du Mapou Limited

Defendant

Ruling

In this Plaint, Plaintiff has contended that he was in the continuous employment of Defendant as Field Worker since 12 July 1990.

He was employed on a 5-day week basis during intercrop season and 6-day week basis during crop season.

He was last remunerated at monthly intervals at the basic rate of Rs.301 each.

On 5 November 2013, he proceeded on retirement after attaining 60 years.

On 10 December 1999, The Permanent Arbitration Tribunal hereinafter referred to as "PAT" granted a salary increase of 14% to all agricultural workers of the Sugar Industry who were employed by the members of the Mauritius Sugar Planters Association.

On 23 September 2009, the Employment Relations Tribunal extended the 14% increase in salary as per the PAT award dated 10 December 1999 to the whole of the Sugar Industry with effect from 1 July 2009.

Following an application by the Cane Growers Association, for a judicial review of the PAT Extension Award, the Supreme Court gave a judgment on 15 October 2014 whereby the application was set aside and thus, the 14% salary increase became applicable to the whole Sugar Industry with effect from July 2009.

Defendant failed to pay to Plaintiff the arrears of wages due for July 2009 to October 2013.

Thus, Plaintiff is claiming from Defendant the sum of Rs 48,126/- representing arrears of wages as from July 2009 to October 2013 a breakdown of which has been given in the annex of the plaint.

Defendant, for its part, has raised a plea *in limine* to the effect that the claim of Plaintiff is time barred pursuant to Article 2279 of the Civil Code. He relied on the above *ex facie* averments of the plaint and then laid emphasis on para.1(g) of the said plaint namely "*following an application by the Cane Growers Association, for a judicial review of the PAT Extension Award, the Supreme Court gave a judgment on 15.10.2014 whereby the application was set aside and thus the 14% salary increase became applicable to the whole Sugar Industry with effect from July 2009*". The point in law was resisted and arguments were heard.

The main thrust of the argument of learned Counsel for the Defendant is that the award of the Employment Relations Tribunal which was confirmed by the Supreme Court was in respect of salary namely an increase in salary which is an item of remuneration. By operation of the law namely the Employment Rights Act at the relevant time but it is still the case under the Workers' Rights Act, salary is necessarily a payment which is made monthly at latest, it can be made fortnightly but it is made monthly at latest. Salary by the very operation of the law is a payment made *périodiquement*, periodically at regular intervals in time, a maximum of one month as per the operation of the law. Obviously if it is the claim of the Plaintiff that a certain sum of money

has not been paid to him on a monthly basis, obviously, it will amount to a bigger lump sum in the end. But his point being that given the amount that is being claimed is salary allegedly unpaid, the prescription that would apply to it is necessarily three years given the fact that by operation of the law, salary is an amount which is paid periodically to an employee. The judgment of the Supreme Court was given on 15 October 2014 wherein it could be inferred that the 14% increase became applicable to the whole Sugar Industry with effect from July 2009 on the basis of which Plaintiff deduced that Defendant failed to pay to him the arrears of wages due from July 2009 to October 2013. The plaint was lodged more than three years after the judgment of the Supreme Court dated 15 October 2014 meaning outside the delay of three years, the claim is time barred because of the applicability of Article 2279 of the Civil Code.

He relied on the following extract from the case of **L.B. Veerasamy v. Quality Beverages Ltd.** [2013 IND 12] as follows: *"(…) the criteria for both périodicité and fixité being present, the provisions of article 2279 of the Code Civil would find its application to the present claim. A perusal of the record shows that the plaintiff is claiming for the payment of the Cardex Commission for the period May 2003 to April 2008. The last date the plaintiff could have entered his claim would have been March 2011. The present plaint, although dated 29 June 2011, has been lodged at the Registry on 01 July 2011 and given a cause number by this Court. Hence the present claim is time barred by 4 months."* and the case was dismissed on the basis that the delay of 3 years was not complied with as provided by the said Article 2279.

He also referred to an extract from **JurisClasseur Civil Code > Art 2219 *à* 2223** 21 Juin 2017 **Fasc. unique: PRESCRIPTION EXTINCTIVE.- Dispositions générales** at page 8 note 20: *"D'abord l'objet de la prescription est selon elle l'action plutôt que le droit (C.civ., art. 2224,2225,2226,2227 et 2235). (…) non – recevoir, c'est - à -dire un "moyen qui tend à faire déclarer l'adversaire irrecevable en sa demande, sans examen au fond, pour défaut de droit d'agir". (…) la prescription de l'action constitue une fin de non-recevoir(…)."* His point being that once it is found that a claim for unpaid wages or salary or any component of remuneration has been lodged outside delay of 3 years, the effect of this is that: *"la prescription constitue une fin de non-recevoir, c'est - à -dire un moyen qui tend à faire déclarer l'adversaire irrecevable en sa demande sans examen au fond pour défaut de droit d'agir."* In other words, the Plaintiff being given that his claim is time barred does not in the first place have a claim before this Court.

The main contention of learned Counsel for the Plaintiff is the following. Article 2279 of the Civil Code applies to claims relating to short claims which are paid annually or at lesser

intervals. Plaintiff retired in 2013 and the final decision came in 2014. The Article 2279 cannot be applied in the present matter as it does not fit the test where payment is made at a regular interval. The two conditions referred to namely *périodicité* and *fixité* meaning the latter is no longer one of the criteria which is being used nowadays. *Périodicité* is the main criterion *sine qua non* for the Article 2279 to apply. But in the present case, the complainant has retired in 2013 and the judgment of the Supreme Court was given in 2014 so that we cannot talk of him having a claim on a monthly basis or on a regular payment, he is not claiming a payment to be made at a regular interval as he has retired. At that point in time when the judgment became final, Plaintiff had already retired and we have a claim arising in a global sum. It is no longer a claim which arises at the end of each running month in which the work has been performed.

She relied on the Supreme Court case of **Government of Mauritius v Dr. Satiss Kumar Dabee [2001 SCJ 216].** She explained that in that case, the Plaintiff was claiming a payment of overtime and there was an objection on the ground of prescription under Article 2279 of the Civil Code and that page 3 of the judgment reads as follows:

"We now turn to grounds 2 and 3. The plaint was lodged on 29 July 1997 after a mise en demeure had been served on 19 May 1995. The claim was in respect of overtime allegedly performed for the period September 1988 to June 1993 i.e. between some 4 to 9 years prior to the lodgement of the plaint. The learned Magistrates stated that the cause of action only arose when the appellant wrote to respondent in January 1997 to say that the claim would not be paid. This is clearly wrong. It is not the letter written by appellant's ***préposé*** *which triggers a right of action for the benefit of the respondent but the very fact that no payment for overtime was made at the time it became due viz. at the end of each running month in which such overtime has been performed."* It became due at the time at each running month when it became due. In the present case, it never became due prior to the retirement. So, now we cannot say that it is a claim that should have been made on a monthly basis to which the Article 2279 applies. In the present matter, the claim which becomes due is a claim in a global sum and therefore the Article 2279 is not applicable.

She relied on notes 123 and 124 of an Article from the learned Author **Jean-Jacques TAISNE** (**PRESCRIPTION. Prescription inférieures ou égales à dix ans** (1987) page 16) in relation to "*prescription quinquennale*" which is the corresponding Article 2277 of the French Civil Code as follows:

Note 123:

"Faute de présenter ce caractère de périodicité, les indemnités de rupture de licenciement ne peuvent donc être assimilées aux salaires au regard de l'article 2277 (…)".

Note 124:

"Lors même qu'une dette serait originairement périodique, la prescription quinquennale est écartée si les parties décident ultérieurement de la transformer en une dette de capital. (…) C'est le cas lorsque créancier et débiteur sont convenus que les intérêts à échoir se capitaliseront à la fin de chaque année et produiront eux-mêmes des intérêts; dans cette hypothèse, ils ne constituent plus des intérêts, mais un nouveau capital qui s'ajoute au premier et la prescription trentenaire devient applicable."

She was making an analogy to say that what was initially claimable on a monthly basis, when it is no longer the case, it is not possible to have the claim on a monthly basis and it is as it says, it has transformed from a "*dette"* to a "*capital"*, it is not the Article 2279 which applies. Article 2279 of the Civil Code limits the right of action on any debt payable annually or within any shorter interval to a period of three years.

I have given due consideration to the arguments of both learned Counsel. The point that I have to decide is whether the conditions of the Article 2279 have been met in the present case. It is appropriate to reproduce Article 2279 of the Civil Code below:

"Les arrérages des rentes perpétuelles et viagères, ceux des pensions alimentaires;

Les loyers des maisons, et le prix de ferme des biens ruraux;

Les intérêts des sommes prêtées, et généralement tout ce qui est payable par année, ou à des termes périodiques plus courts.

Se prescrivent par trois ans." (**Emphasis added)**

At this stage, it is useful to quote an extract from the Supreme Court case of **Keep Clean Ltd v The University of Mauritius [2020 SCJ 268]** where it was held that a "*créance déterminée*" is an essential condition required in order to enable the Defendant to invoke the Article 2279:

"Article 2279 of our Civil Code in Mauritius is couched in the same terms as Article 2277 of the French Civil Code except that the prescription period is 5 years in France ("prescription quinquennale") whereas it is 3 years under our Article 2279. (…)

Counsel however argued under grounds 3 and 4 that the learned Judge failed to appreciate that in the present matter there was not only a "créance indéterminée" but that the "créance" was also "indéterminable". Counsel submitted that the deductions made by the respondent in respect of the absences of the cleaners could not be determined when the contract did not provide for an applicable rate for computing such deductions. Counsel added that since there was a valid dispute and a "litige" with regard to the amount which the respondent could claim as deductions, the prescription period under Article 2279 would not be applicable.

Learned counsel for the appellant referred to the following note from ***Dalloz****,* ***Mega Code Civil****,* ***edition 2003****, which was cited in* ***A.Teelock v A. Juddoo & Partners Ltd*** *[2014 SCJ 20].*

1. *"La prescription quinquennale n'atteint les créances qui y sont soumises que lorsqu'elles sont déterminées…….Il n'en est plus ainsi lorsque leur fixation fait l'objet d'un litige entre les parties."* ***{Dalloz, Mega Code Civil - << Détermination et certitude de la créance>>)***

   Counsel also referred to Note 85 of ***Dalloz, Répertoire de Droit Civil Vo***

   Prescription Extinctive *which was quoted with approval in* ***Central Water Authority v La Ferme and Magenta Water Users Association*** *[2016 SC J 278]:*

   85. *"Mais les dispositions de l'article 2277 du code civil ne peuvent s'appliquer aux créances non déterminées quant à leur montant (Cass.3e civ. 17 nov.1999, Bull civ. III, no. 218; Cass. 1re civ. 14 mars 2000, Bull. civ.1, no 93, JCP 2000.1.257, no 10, obs. Simler). C'était d'ailleurs déjà la position de la jurisprudence antérieure."*

   The learned Judge, following an extensive review of the law, including all the above authorities referred to by Counsel, indeed observed in her judgment that if a "créance" is not certain and its "fixation fait l'objet d'un litige entre les parties" it will not constitute "une créance déterminée" for the purposes of Article 2279.

The Full Bench, in ***Government of Mauritius v Dinarobin Inns Motels Co Ltd*** *(Glover CJ, Lallah SPJ, Yeung Sik Yuen J) [1993 MR 262], carried out an in depth examination of the concept behind Article 2279 and its evolution, in the light of French doctrine and jurisprudence.*

The Court observed that the notion of "fixité" in respect of the "caractère determiné" of a "créance", for the purpose of Article 2277 in France, had become far less rigid:

"The concept behind the article, and its evolution, are well described in "La notion de créance à caractère périodique au sens de l'article 2277 du Code Civil" by L Topor(Revue Trimestrielle de Droit Civil (1986) page 1). The author explains that, originally, the concept implied "outre la périodicité des paiements, les deux traits fondamentaux suivants: d'une part, le caractère determiné des prestations périodiques,…"[page 2]. Those two latter elements were often encompassed in a notion of "fixité". The author, after a detailed analysis of recent French case law, concludes that this idea of "fixité" is now far less rigid:

Ce sont des considérations de fait qui vont permettre de tracer une ligne de démarcation entre les créances soumises à l'article 2277 du code civil et les créances ne relevant pas de ce texte. En premier lieu, en ce qui concerne le caractère indéterminé du montant des prestations périodiques, tout va dépendre de la question de savoir si cette indetermination s'accompagne ou non de la possibilité pour le créancier d'effectuer le calcul au moment de l'échéance. ***(Emphasis added)****.*

A "créance" would therefore fall within the purview of Article 2277 where it can be factually established that it is possible for the "créancier d'effectuer le calcul au moment de l'échéance".

The following excerpts from ***Traité Pratique de Droit Civil Français, 2eme edition Tome VII by Planiol et Ripert*** *further indicate that the condition as to "fixité du montant de la dette à chacune de ses échéances" would be fulfilled even where there is "une créance certaine de montant variable." Should the "créancier" fail to make his claim within the prescribed time-limit in such a situation, his claim would be time-barred.*

*"**1337**. Caractère de fixité de la dette à l'échéance. – Suffit-il cependant, pour l'application de l'art. 2277, du seul caractère de périodicité? La jurisprudence, de façon à peu près constante, exige en outre la fixité du montant de la dette à chacune de ses échéances. … …*

La doctrine (3) critique ce système, en faisant observer que rien dans la loi ne fait allusion à une telle condition et que, à la difference de la périodicité de la dette, la fixité de son montant n'est pas exigée par le fondement assigné à la prescription quinquennale. … …

*Il semble que les tribunaux se soient engagés sur cette voie par déviation d'une idée juste: à savoir, qu'une créance, même périodique, mais indéterminée dans son montant, ne peut être régie par l'art. 2277 (4), et à plus forte raison, si elle n'a qu'une existence aléatoire ou éventuelle (1) (Civ.17 mars et 30 avril 1856, D.56, 1, 398 et 99; Req. 19 décembre 1871, D. 71,1,300). … …si la prescription quinquennale ne court pas vis- à-vis d'une créance incertaine, c'est parce que l'action en exécution ne peut encore être exercée. … …Toute autre est la situation, lorsqu'il s'agit d'une créance certaine de montant variable: le créancier a un droit susceptible d'exécution actuelle et par là même de prescription, s'il demeure inactif;"**(Emphasis added)***

It was in the light of these legal principles that the learned Judge embarked into an examination of the evidence in order to ascertain whether it was possible for the appellant as "créancier" "d'effectuer le calcul au moment de l'échéance" in respect of "une créance certaine de montant variable" which would attract the application of the 3-year limitation period under Article 2279."

In **Keep Clean Ltd (supra) ,** it was held that all the information necessary to compute the short payment every month was readily available at the material time in order to compute with precision the "*créance*" at the time of the "*échéance", "the finding of the learned Judge that the periodical amount due by the appellant at the end of each month could have been indisputably calculated by the appellant in conformity with the contractual agreement therefore remains unimpeachable".*

Indeed, **Keep Clean Ltd (supra)** reiterated the principles laid down in **Government of Mauritius v Dinarobin Inns Motels Co Ltd [1993 MR 262]**, in that the notion of *fixité* was no

longer a condition on its own but rather encompassed in the condition of *périodicité so* that the condition as to *"fixité du montant de la dette à chacune de ses échéances"* would be fulfilled even where there is *"une créance certaine de montant variable"* and that should the *"créancier"* fail to make his claim within the prescribed time-limit in such a situation, his claim would be time-barred and resort was also made to ***Traité Pratique de Droit Civil Français, 2eme edition Tome VII by Planiol et Ripert*** above**.**

In the present case, the "*créance*" at the time of the "*échéance"* prior to the Plaintiff's retirement was computed as per the terms of his contract of employment and it concerned his salary which was a source of revenue for him and which was paid periodically every month. True it is that Plaintiff has retired in 2013 and there were no arrears of salary then due to the Plaintiff and same could not have possibly been calculated at the time of the "*échéance".* Had the Plaintiff still remained in employment in 2014 after the Supreme Court judgment was given in 2014, the *créance* then becoming *déterminée* in 2014, the arrears in salary would have been added to the following monthly salary of the Plaintiff at the time of the following monthly "*échéance"*. This is because we are not in the presence of a fluctuating capitalization of interests each year for the arrears of payment of salary attracting a new capital each year for which the 14% increase is applicable. In other words, there is a *"créance certaine"* and "*lorsqu'il s'agit d'une créance certaine de montant variable"* besides the annex of the plaint*: "le créancier a un droit susceptible d'exécution actuelle et par là même de prescription, s'il demeure inactif;"* see - **Keep Clean Ltd(supra)**. The plaint being dated 27.11.17, lodged on 14.12.17 and the judgment having been delivered by the Supreme Court on 15.10.14 being the day the *créance certaine* became *déterminée* and the plaint having been lodged more than 3 years after that judgment of the Supreme Court becoming applicable would have been time barred because the provisions of Article 2279 of the Civil Code would have been met in the sense that the *"créance"* would have therefore fallen within the purview of the Article 2279 where it could be factually established that it was possible for the *"créancier d'effectuer le calcul au moment de l'écheance"* as regards the 14% increase in salary which was a source of revenue for Plaintiff.

Now in the present case, the Plaintiff had already retired about one year prior to the judgment of the Supreme Court becoming applicable and I agree with learned Counsel for the Plaintiff that the essential condition *sine qua non* of *périodicité* has not been met because Article 2279 clearly stipulates that it only applies to short claims which are paid annually or at lesser intervals namely *généralement* <u>*tout ce qui est payable par année, ou à des termes périodiques plus courts, se prescrivent par trois ans.*</u> The arrears in salary did not arise when he was still in

employment but only after his retirement although it covers the period when he was still in employment. Hence, the essential condition of *périodicité* has not been met as it concerns payment in one lump sum for arrears of salary and is not a claim in relation to a *créance ayant le caractère de revenus* enabling the Defendant meaning the *"créancier d'effectuer le calcul au moment de l'écheance"* meaning in relation to a periodic *écheance not exceeding a yearly basis which in the present case is on a monthly basis* so that it would have been added to his following monthly salary thus being in violation of Article 2279 of the Civil Code.

For the reasons given above, the plea in *limine* has not been acceded to. The matter is being fixed Proforma to 4 October 2021 for both learned Counsel to suggest common dates for Trial.

S.D. Bonomally (Mrs.) *(Vice President)*
27.9.2021