Jadhakhan Z. v Axess Ltd

2025 IND 16

Cause Number 326/12

IN THE INDUSTRIAL COURT OF MAURITIUS
(Civil Side)

In the matter of:

Mrs. Zaheeda Jadhakhan

Plaintiff

v.

Axess Ltd

Defendant

Ruling

The essential averments of this amended plaint for the purposes of the present arguments are to the following effect: -

(a) Plaintiff was in the continuous employment with Defendant since January 1999 in her capacity as Sales Executive. Her main duty was to promote the brand "FORD" which is one of the brands exploited by Defendant.

(b) She initially drew a monthly salary of Rs.10, 000/- plus commission until her constructive dismissal on 17 April 2012 when she was drawing a net salary of Rs.35, 000/- plus commission.

(c) She received commission on the basis of innovative activities as per the averments of paragraph 2 of the amended plaint as reproduced below:

"Over and above the requirement of her duties and responsibilities as per contract she was more involved in innovative activities as listed below: -

(i) Design of strategic marketing plans to achieve volume sales and identification of new markets.

(ii) Project on development of fleet management of key accounts.

(iii) Assistance to the Brand Manager in the preparation of yearly business plan.

(iv) Continuous efforts at maintaining customer loyalty.

(v) Promoting after sales maintenance programs."

(d) Following the appointment of a Business Development Manager by Defendant about September 2010, the innovative activities that caused her to get commission were largely taken over by him. Thereafter, the post of "FORD" Brand Manager became vacant in October 2011 and she was not promoted to that post as legitimately expected by her.

(e) She was deprived of the activities that would give her the full amount of commission and related payments she used to have and such trend was observed by other high ranked employees and other employees of Defendant. According to her, she was harassed, victimized and oppressed by those employees so that she could not benefit from the full amount of commission and related payments she used to have and which impacted on her state of health.

(f) On 17 April 2012, she informed Defendant by way of a letter that she considered herself as being constructively dismissed and she left employment. She has claimed the sum of Rs. 7,200,840 from Defendant as a result.

Defendant has denied liability in its amended plea and has averred that it is not indebted to the Plaintiff in the sum claimed or in any other sum whatsoever and that Plaintiff had been offered the post of Brand Manager for the Mazda brand but she refused by stating that it was too much of a responsibility for her.

Plaintiff at some stage, during her examination in chief, sought to produce a set of emails and recordings in as much as extensive reference was made to them in over a hundred documents already produced before the Court. However, the maker was not going to be called but only those documents and recordings would have been produced by her in Court so that learned Counsel for the Defendant objected to such production and the case was fixed for arguments.

The main thrust of the argument of learned Counsel for the Plaintiff is that those emails and recordings are in a way already before this Court as extensive reference was made to them. Not allowing them to be put in, would leave the version of Plaintiff uncorroborated and the Court cannot rely on scattered evidence. Out of Court statements are admissible by virtue of Sections 181B and 181 C of the Courts Act 1945. The issue of confidentiality is not applicable as they are being produced before a Court of law and it is not meant for profit or gain. The Court will not be able to assess the veracity of Plaintiff's testimony and truthfulness of the averments of her plaint if those documents are not put before the Court. Without those documents, it is impossible for the Court to assess the fairness of the trial. Although the maker of the documents and recordings will not be called, but the Plaintiff can be cross-examined on them. As a matter of practice, hearsay evidence is admissible in civil matters and it is the weight that has to be attached that is to be ascertained by the Court.

The trail of emails and recordings are relevant evidence to show constant victimization and oppression subjected by Plaintiff to have her confidence undermined. Plaintiff had no alternative than to leave Defendant against her will because of unacceptable condition and treatment she suffered leaving her feeling degraded and preventing her from doing her assigned duties. The trail of emails and other documents are credible evidence to show the Plaintiff's constructive dismissal of how she was being bullied and harassed constantly, having an impact on her health and work pace which was not a breach of contract on her part, but she was constructively dismissed.

The main thrust of the argument of learned Counsel for the Defendant is that Sections 181B and 181 C of the Courts Act 1945 do not apply to parties but only to witnesses. His contention is that documents and recordings which Plaintiff is intending to produce are privy to the company and they are precluded from

production based on the secrecy clause of Plaintiff's contract of employment (from paragraph 11 to 30 of the amended plaint). There has been no exercise of selecting the relevant documents, but rather attempting to produce any and all documents which the Plaintiff had, admissible or not. The number of irrelevant documents to be produced and the ensuing burden on the Court of having to peruse hundreds of pages of documents amounts to an abuse of process. He has moved that the bundles of documents and recordings not be allowed to be put in and that his objection be sustained.

I have given due consideration to the arguments of both learned Counsel for the Plaintiff and Defendant and the authorities filed. However, I have not been apprised of any authority that admissibility of hearsay evidence in civil matters applies to witnesses only and not parties. Be it as it may, there is no need for the Court to thrash out that issue for the reasons which will become apparent later.

It is relevant to note that the Plaintiff has changed Counsel on more than two occasions and has continuously produced bundles and bundles of documents in the process upon her insistence that they were important for her to establish her case without leaving it to her learned Counsel to say so and who was present in Court representing her despite the Court's remark to stick to the best evidence rule. However, it was contended by learned Counsel for the Plaintiff that she was insisting upon those documents being produced as they are essential for her to establish her case as per his instructions received. In that manner, bundles and bundles of documents were produced pertaining to her performance as Sales Executive in order to promote the brand "FORD" fetching her commission for her innovative activities in relation to that brand.

Now, it is also relevant to note that she was not employed as a high ranked employee for the brand "FORD "and nor was she a shareholder in the Defendant company, in order to have a say in the board decision of the company in relation to, for instance, the design of "*strategic marketing plans to achieve volume sales and identification of new markets"* and the project on the *"development of fleet management of key accounts"* having obviously to do with the *assistance "to the Brand Manager in the preparation of yearly business plan"*, although they pertain to innovative activities(which have been denied by the Defendant in its amended plea) that would get her to obtain commission.

The Defendant has deemed it proper for the reasons best known to it, to employ a Business Development Manager around September 2010 having for effect to have those innovative activities which were not part of Plaintiff's contract of employment as averred by her in her amended plaint, that caused her to get the full amount of commission, to be largely taken over by him so that the Business Development Manager would be benefiting from a major amount of commission from then onwards. Furthermore, she was not promoted to the post of "FORD" Brand Manager which became vacant in October 2011 as legitimately expected by her.

It is imperative to note that, there is nothing in Plaintiff's contract of employment (vide- Doc. A) stipulating that should Plaintiff reach a certain threshold in those innovative activities as per the averments at paragraph 2 of her amended plaint concerning the brand "FORD" fetching her the full amount of commission she used to have, it will be a *"droit acquis"* in the obtention of the full amount of commission and she will be entitled or eligible to a Managerial position like, for example, "Ford" Brand Manager.

Now, the Plaintiff employee is trying to establish that she was constructively dismissed by her Defendant employer, because she was hampered in the exercise of the activities which would get her to obtain her full amount of commission as before, by other higher ranked employees and other employees, which she attributed to her being victimized, bullied and oppressed by the Defendant as per the recordings and emails sought to be produced by her, so that she was left with no choice but to leave employment upon the employment of the Business Development Manager.

Therefore, the purpose of having those emails and recordings being put in without calling their maker and without any reason given as to why such maker of those emails and recordings are not being called, is to deprive the Court of having their demeanor being assessed and the veracity of such evidence be ascertained as the Defendant will have no opportunity to cross-examine their maker.

Thus, Plaintiff intends to prove that she has been constructively dismissed by Defendant which is the real question in controversy between the parties on the basis of such emails and recordings without their maker being called as a witness to testify so that her appreciation of such evidence of such maker will be unquestionable by having such maker being allowed to stay away from the trial and leaving the Defendant being confined to shaking their maker's version simply by adducing its own evidence. Now by invoking that such evidence will corroborate scattered pieces

of evidence already produced before the Court in order for the Court to assess its veracity in conformity with the fair trial principle is misconceived let alone that corroboration is neither required as a matter of law nor as a matter of practice in cases of constructive dismissal. On the contrary, the Defendant runs the risks of being implicated by evidence it has no opportunity to challenge in cross-examination as the Plaintiff is not the maker. Hence, a relaxation of the rules against hearsay evidence in the present civil proceedings is highly likely to lead to injustice to the Defendant in causing the Court to be misled or unduly swayed by the volumes of such particular items of evidence (namely over a hundred emails and recordings). As rightly pointed out by learned Counsel for the Plaintiff herself, leave of the Court (which is to be assessed on a case to case basis pursuant to the rules of court) is necessary in order to allow such hearsay evidence to be put in.

At this juncture, I find it relevant to quote the following extract from the case of **Duval A C v The Electoral Commissioner & Ors.** [2021 SCJ 365] where the Supreme Court had this to say:

"The purport of sections 181B and 181C of the Courts Act has been examined in ***Callychurn Roopchand v Joomun Aboobakar & Anor [2004 SCJ 1]****,* ***Seeburn v Doomun*** *[2009 SCJ 372]****, Bundhoo Geeta & Anor v Abdool Lootefiya Bibi & Ors*** *[2010 SCJ 1]****, C. Soyjaudah & Ors v Ww S. Soyjaudah & Ors*** *[2015 SCJ 313] and* ***Toorabally B.N. & Ors v Mohamod Hossen & Ors*** *[2021 SCJ 324].*

We find it apposite to reproduce the following excerpts from the judgment of ***Soyjaudah(supra)*** *wherein the Court of civil Appeal observed as follows:*

"…. these provisions were introduced in our law by the Information Technology(Miscellaneous Provisions) Act 1998 which was introduced in Parliament by the Minister responsible for the subject of Information Technology. Unfortunately, the parliamentary debates then do not shed much light on the purpose behind those new provisions except to say that they were English inspired and that the then Chief Justice had indicated that Rules of Court would be made once the law would have been passed.

It is to be noted that sections 181 B and 181 C are, subject to some minor drafting or cosmetic variations, identical to sections 2 and 4 of the Civil Evidence Act 1968 of the United Kingdom. The intention of the UK Parliament in enacting such legislation was to ensure that first hand statements were, subject to certain Rules of

Court, admissible in civil proceedings not only for the fact that the statements were made but also for the facts stated therein……

…the situation in the UK has evolved since. Following the Report of the Law Commission in 1993 on "The Hearsay Rule in Civil Proceedings", a new Civil Evidence Act 1995 has been passed, thereby rendering hearsay evidence in civil proceedings automatically admissible. The judicial discretion whether or not to admit hearsay evidence for failure to comply with any of the specified notice provisions was thereby removed. The focus in the UK is now clearly on the weight to be attached to such evidence."

Section 181 B of the Courts Act deals with the admissibility of out-of-court statements and allows the admission of relevant hearsay evidence in civil proceedings whether the maker of the statement is called as a witness or not, subject to rules of Court. However, we note that no rules of Court pursuant to sections 181 B et seq. have been made.

It is settled principle that prior to admitting hearsay evidence in civil proceedings, leave of the Court is mandatory, vide ***Callychurn Roopchand (supra)*** *and* ***Toorabally(supra)****.*

In ***Bhundoo Geeta & Anor v Looteflya Bibi Abdool & Ors (supra)****, it was held that "hearsay evidence is generally admissible in civil proceedings with leave of the Court, and, it is the weight rather than the admissibility of such evidence that the Court is to attach importance."*

Also in ***S. Seeburn v K. Domun (supra)****, it was stated that "our Courts do retain the necessary discretion to decide whether or not to admit hearsay evidence and above all, leave of the Court is needed."*

However, the Courts Act is silent as to how the Court would exercise its discretion to grant leave or not. We agree with learned Counsel for the respondents Nos. 1 and 3 that although sections 181B and 181C of the Courts Act have been inspired and borrowed from the English Civil Evidence Act 1968, they are not to such an extent as has been provided under the English Evidence Act 1995 where hearsay evidence is admissible automatically. The exercise of the Court's discretion to grant leave is not restricted to being a mere formality and leave should not be granted for the mere asking. The exercise of the Court discretion calls for an analysis on a case to case basis.

In the present matter, no valid reason has been put forward by the petitioner to justify the inability of Mrs M.O.C. Evremont who has sworn an affidavit on 26 November 2019 to personally depose in Court, (…). (…)

We further note that ex facie the pleading, paragraphs 34 and 35 are hotly disputed. The Court cannot, in the circumstances, condone the non-attendance of Mrs M.O.C. Evremont and admit hearsay evidence on disputed facts as this would open the floodgates, allowing the petitioner to adduce evidence "through the backdoor," without allowing the respondents and co-respondents Nos. 1 and 3 to test the veracity of her evidence through cross-examination. It would indeed set a dangerous precedent, the moreso in view of the stand of learned Counsel for the petitioner that witness Mrs M.O.C. Evremont will not be called to give oral evidence on behalf of the petitioner." (**all the above underlining is mine**)

Hence, learned Counsel for the Plaintiff by invoking that without such corroborative evidence (namely the emails and recordings) pertaining to the hotly disputed issue viz. constructive dismissal of Plaintiff by Defendant, that the Court will not be able to assess the veracity and truthfulness of the averments of Plaintiff's plaint so that without such evidence, it is impossible for the Court to assess the fairness of the trial, is again misconceived (see - **Duval A C (supra**).

Now, it is significant to note that at no point in the course of her argument, learned Counsel for the Plaintiff disputed the existence of the confidentiality or "Secrecy" clause of Plaintiff's contract of employment viz. Doc. A raised in the course of the argument by learned Counsel for the Defendant which reads as follows:

"Secrecy

Except in the normal course of your duties during your employment with the company, you will not divulge to third parties any information relating to the affairs of the company, nor to the affairs of any enterprise associated with it, neither shall you do so after the termination of your employment with the company".

Obviously, the emails and recordings if allowed to be produced will be akin to a public document and will necessarily be divulged to the public, information pertaining to the affairs of the Defendant company after the termination of Plaintiff's employment.

Further, it is pertinent to reproduce two more clauses of Plaintiff's contract of employment namely Doc. A below:

"Duties

Your duties together with standards of performance will be communicated to you in due time by your immediate supervisor. However, these guidelines will not be exhaustive and you may be asked to perform any additional duties connected with your responsibilities. (**emphasis added**)

(…)

Remuneration

Your salary will be at the rate of Rs 10 ,000.- per month plus an additional (or 13th) month salary which is paid normally at the end of November and is calculated proportionately to your time of service during the year. Commission quantum will be decided after agreement". (**emphasis added**)

Now, it has not been stipulated in the said contract that Plaintiff's duties as Sales Executive were confined to the "Ford" brand only bearing in mind that as per the amended plea of Defendant, Plaintiff had been offered the post of Brand Manager for the "Mazda" brand but she refused by stating that it was too much of a responsibility for her.

It is significant to note that the quantum of commission to be paid to the Plaintiff was to be decided "*after agreement"* but it has not been spelt out in her contract of employment that "*after agreement"* meant after agreement between the parties (namely the employer and employee).

At this stage, it is abundantly clear that the Plaintiff is overlooking the fundamental terms of her contract of employment which are the crux of her case by virtue of the principles propounded in **Joseph J v Rey & Lenferna Ltd [2008 SCJ 342]**:

"Our case law has laid down that the test for constructive dismissal is a contractual test. A constructive dismissal by an employer occurs where an employee is entitled to put an end to his contract of employment by reason of his employer's conduct. Although the employee terminates his employment, it is the employer's conduct which constitutes the breach of contract." (**emphasis added**)

In **Raman Ismael v United Bus Service [1986 SCJ 303]**, the following extract is relevant:

"This is not the first case of constructive dismissal that has come before our Courts. Examples of particular instances are the cases of the Vacoas Transport Company v Pointu [1970 MR 35] and Periag v International Beverages [1983 MR 108], where the notion of constructive dismissal in its application to unilateral action by the employer (irrespective of the latter's intentions) prejudicial to the employee's interests is discussed. Constructive dismissal is inherently different from dismissal in the sense that it is the employee who necessarily takes the initiative in considering the contract as having been repudiated, with the result that the expressed intentions of the employer are not strictly relevant. We, therefore, consider that in looking primarily at the expressed intentions of the employer rather than at the objective effects of the conduct of the employer in imposing the sanction he did, the trial Court misdirected itself." (**emphasis added**)

Now, by virtue of the reasoning propounded in **Joseph JB (supra)**, it is clear enough that the Defendant has passed the contractual test inasmuch as there is no breach of contract committed by its conduct pursuant to Plaintiff's contract of employment (vide- Doc. A).

In the same breath, by allowing hearsay evidence to be put in, so as to establish that Plaintiff was victimized, oppressed, humiliated and bullied, because she was hampered in the exercise of the activities which would get her to obtain her full amount of commission as before, by other higher ranked employees and other employees of Defendant, would be tantamount to the Court to be "*looking primarily at the expressed intentions of the employer rather than at the objective effects of the conduct of the employer"* in imposing the marked decrease in her amount of commission in relation to the "Ford" brand, would mean that the Court would be misdirecting itself (see- **Raman Ismael(supra)**).

For all the reasons given above, the motion for allowing the emails and recordings and other related documents to be produced by the Plaintiff without their maker being called, is not acceded to.

The matter is accordingly fixed *proforma* to 27 March 2025 at 9.30 a.m. for both learned Counsel to suggest common dates for continuation.

S.D. Bonomally (Mrs.) *(Vice President)*
21.3.2025