Ubheemun S. v Societe Clefoon & Anor.

2022 IND 61

Cause Numbers 501/17 & 500/17

IN THE INDUSTRIAL COURT OF MAURITIUS
(Civil Side)

In the matter of:-

Soondurlall Ubheemun

Plaintiff

v.

Societe Clefoon

Defendant

And in the matter of:

Rani Ubheemun

Plaintiff

v.

Societe Clefoon

Defendant

Ruling

On a joint motion by both learned Counsel appearing for the parties, the two above mentioned cases have been consolidated because they arise out of the same

set of facts, Plaintiffs are husband and wife in the respective two cases and there is a common Defendant. I shall, accordingly, give a single ruling which will be filed in Cause No. 501/17, hereinafter referred to as the first case and a copy will be filed in Cause No. 500/17, hereinafter referred to as the second case.

In the first case, Plaintiff has averred that he was in Defendant's continuous employment as Gardener since the year 1999 on a 6-day week basis drawing a monthly salary at the basic rate of Rs 1250. His terms and conditions of employment were governed by the Domestic Workers (Remuneration Order) Regulations 1983 as amended. Plaintiff has also averred that Defendant paid him wages at rates below than those prescribed ever since the commencement of his employment and he was never paid any end of year bonuses. On 30.3.2016, his employment with Defendant was terminated without notice and without any justification as alleged and he has claimed that Defendant was indebted to him in the sum of Rs 611,791 as per a breakdown given in the plaint.

In the first case, Defendant in its plea *in limine* which was not pressed was that Plaintiff was never in its employment but was a mere lodger. Its plea on the merits is as follows. It has denied liability and has averred that it was the owner of *"campement"* and Plaintiff was provided with free accommodation and free water supply. Plaintiff and his wife (who is the Plaintiff in the second case) were never employed by Defendant. Plaintiff and his wife were given a stipend in order to "keep a presence on the spot" and maintain the yard clean as and when required. Plaintiff had no working hours and never complained to the Authorities and in fact admitted in his Answer 1(g) of his Answers to Particulars that since the year 2011, he had been working for Winners Supermarket and Defendant did not object to that which give credit to the fact that Plaintiff was not employed by Defendant. In fact, Plaintiff cannot claim to work for Defendant as Gardener while working at Winners at the same time and Defendant has moved that Plaintiff's action be dismissed with costs.

In the second case, Plaintiff (who is the wife of Plaintiff in the first case) has averred that she was in Defendant's continuous employment as Watchperson since the year 1999 on a 6-day week basis drawing a monthly salary at the basic rate of Rs 1250 which was credited in the bank account of her husband (viz. Plaintiff in the first case). Her terms and conditions of employment were governed by the Domestic Workers (Remuneration Order) Regulations 1983 as amended. Plaintiff has also averred that Defendant paid her wages at rates below than those prescribed ever since the commencement of her employment and she was never paid any end of

year bonuses. On 30.3.2016, her employment with Defendant was terminated without notice and without any justification as alleged and she has claimed that Defendant was indebted to her in the sum of Rs 611,791 as per a breakdown given in the plaint.

In the second case, Defendant has put in a plea *in limine* to the effect that Plaintiff was never in its employment but was a lodger and Plaintiff in her Amended Answer to Further and Better Particulars has stated that she was verbally informed of the termination of her employment through her husband who was informed of same through the son of the Director of Defendant which is hearsay upon hearsay. The plea *in limine* was not pressed. Its plea on the merits is as follows. It has denied liability and has averred that it was the owner of *"campement"* and Plaintiff was provided with free accommodation, free electricity and free water supply. Plaintiff was never employed by Defendant. Plaintiff and her husband were given a stipend in order to "keep a presence on the spot" and maintain the yard clean as and when required. She had no working hours and she was not working. In fact, she was free to work as she wanted. Plaintiff's husband in the first case and who has alleged that he had been working as Defendant's Gardener, has admitted that since the year 2011, he had been working for Winners Supermarket and Defendant did not object to that as neither Plaintiff nor her husband was his employee. It is for that reason that Plaintiff has never complained to the Authorities. In fact, in her Amended Answer to Further and Better Particulars, Plaintiff has admitted in her Answer 4 of her Answer to Particulars that there was no letter of termination, but she was verbally informed of the termination of her employment through her husband who was informed of same through the son of the Director of Defendant. This gives credit to the version of Defendant that Plaintiff was only a lodger as Plaintiff keeps varying her version of her alleged termination of employment. Defendant has, therefore, moved that Plaintiff's action be dismissed with costs.

In the course of the trial while Plaintiff in the First case was deposing in chief, upon a question being put to him as to how he got to know the Defendant, he replied that there was a vacant post at its place as Watchperson and Gardener and he made his application. At that stage, learned Counsel for Defendant objected to oral evidence being adduced regarding his employment for the following reasons:

1. As per Article 1341 of the Civil Code, Plaintiff has to prove at least a "*commencement de preuve par écrit"* in this case such as a document of NPF or a letter from the employer or even a complaint with the Authorities.

2. In his Answer to Particulars, Answer 1(g), Plaintiff has admitted that he was working at Winners Supermarket since 2011. So, he could not be working there and working here at the same time.

3. In his Answer to Particulars, Answer 3, Plaintiff has said that he does not know the exact date when he was employed. In fact, even if he could not name the date, he should have been able to remember at least the month and the year and he did not complain to any Authorities regarding his salary for the past 17 years.

For those three reasons, he has objected to oral evidence being adduced unless Plaintiff comes with a "*commencement de preuve par écrit"*. A verbal statement is not a "*commencement de preuve par écrit"* and because Defendant in its plea has already said that he was a stipend or obtaining a stipend. The matter was fixed for arguments.

The main thrust of the argument of learned Counsel for Defendant in both cases is that at a certain point, his learned Friend was going to have oral evidence adduced to show that there was a contract of employment between the two parties namely Plaintiff in the first case and Defendant. He was not saying that there must be a full-fledged contract of employment between the parties as that was not possible and normally in Mauritius that was not done. But there must at least be a "*commencement de preuve par écrit"* such as a pay slip, NPF, a letter or something of that sort. But there is none as per the answers to particulars so that there is absolutely nothing in writing. He has relied on Article 1341 of the Civil Code and its corresponding exception as per Article 1347 to invoke that it is only when there is a "*commencement de preuve par écrit"*, that oral evidence would be allowed. But in both cases, as per the answers to particulars given by Plaintiffs, there was no "*commencement de preuve par écrit"*. Hence, his objection to oral evidence being adduced should be acceded to.

The main thrust of the argument of learned Counsel for Plaintiffs in both cases is that Plaintiff in the first case was working as Gardener and Plaintiff in the second case was working as watchperson and evidence will be adduced to that effect. Their cases cannot just be shut out because of "*commencement de preuve par écrit"* as they were not given pay slips nor NPF documents which necessarily have to emanate from their employer. Of course, there is nothing in writing but there has been an employer-employee relationship since the year 1999 and payment was

being made to both Plaintiffs. Someone is free to do a double job to sustain his family. He has stated that Article 1341 is not applicable here as it is not that someone is going to prove money when someone does not have a receipt. This is something very different as it concerns someone who is employed and has been paid well below the prescribed amount. A contract of employment could be in writing or verbal.

I have given due consideration to the arguments of both learned Counsel. The point that I have to decide is whether Article 1341 of the Civil Code is applicable in the context of an employment contract regulated by the Employment Rights Act 2008 in force at the material time although its terms and conditions could be governed by the Domestic Workers (Remuneration Order) Regulations 1983 as amended.

A useful starting point is that the provisions of Section 2 of the Employment Rights Act 2008 stipulate that a contract of employment, that is, such *"agreement" "means a contract of employment or contract of service between an employer and a worker, whether oral, written, implied or express;"*

At this stage, I find it appropriate to quote an extract from the Supreme Court case of **Chamroo v Northern Transport** [1969 MR 96] which reads as follows:

"The general principles of the Civil Code governing the law of contracts have not been abrogated in the matter of labour contracts, and are still applicable unless expressly or impliedly repealed by the various enactments constituting the labour legislation.

(…)

Where such circumstances as are contemplated in the section occur, the matter must be regulated exclusively by the section; but in cases falling outside the ambit of any particular provision of the Labour Law, recourse, must be had to the principles of the Civil Code to settle the matter."

Now, the provisions of Articles 1341 and 1347 of the Civil Code read as follows:

*"**SECTION DEUXIEME***

DE LA PREUVE TESTIMONIALE

1341. *Il doit être passé acte devant notaires ou sous signatures privées de toutes choses excédant la somme ou la valeur de cinq mille roupies, même pour dépôts volontaires; et il n'est reçu aucune prevue par témoins contre et outre le contenu aux actes, ni sur ce qui serait allégué avoir été dit avant, lors ou depuis les actes, encore qu'il s'agisse d'une somme ou valeur moindre de cinq mille roupies.*

Le tout sans préjudice de ce qui est prescrit dans les lois relatives au commerce. ***Amended by [Act No.15 of 2000]***

(…)

1347. *Les règles ci-dessus reçoivent exception lorsqu'il existe un commencement de preuve par écrit.*

On appelle ainsi tout acte par écrit qui est émané de celui contre lequel la demande est formée, ou de celui qu'il représente, et qui rend vraisemblable le fait allégué.

Peuvent être considérés par le juge comme équivalent à un commencement de preuve par écrit les déclarations faites par une partie lors de sa comparution personnelle, son refus de répondre ou son absence à la comparution."

Therefore, the general principle of the Civil Code governing the law of contracts stipulated in its Article 1341, is essentially that all contracts worth more than Rs 5,000 should be in writing and cannot be proved by oral evidence unless they fall within the exception of its Article 1347 namely when there is a "*commencement de preuve par écrit"* thus, opening the door to testimonial evidence.

Now as per Section 2 of the Employment Rights Act 2008, a contract of employment can be oral. It means that *ab initio,* a contract of employment can be oral although it exceeds the sum of Rs.5,000.

Therefore, the general principle of the Civil Code governing the law of contracts as per its Article 1341 that such a contract of employment exceeding the sum of Rs. 5,000 should be in writing unless it falls within the exception of its Article 1347 where there is a "*commencement de preuve par écrit"* thus, opening the door to oral evidence, does not apply as that general principle has been impliedly repealed by Section 2 of the Employment Rights Act 2008 constituting the labour legislation.

It is abundantly clear that as per the reasoning in **Chamroo**(supra), "*the matter must be regulated exclusively by the section"* viz. in the present case by Section 2 of the Employment Rights Act 2008 wherein *ab initio* there is no need for a contract of employment of whatever sum to be in writing thereby impliedly repealing Article 1341 of the Civil Code. It is apposite to note that a special law will have precedence over the general law by virtue of the maxim *Generalia Specialibus Non Derogant* (see - **Pabaroo D.T v. Varmah K.D. & Ors.** [2013 SCJ 197]).

Hence, it is plain enough that if the prohibition contained in Article 1341 does not apply to an employment contract because it can be oral *simpliciter*, then the exception to that Article 1341 contained in its corresponding Article 1347 rendering that prohibition inapplicable will equally not apply.

It means that oral evidence is allowed to prove an oral employment contract for a sum exceeding Rs 5,000 in the absence of a "*commencement de preuve par écrit".*

For all the reasons given above, the objection taken by learned Counsel for Defendant is overruled.

The matter is, accordingly, fixed *proforma* to 16 January 2023 at 9.30 a.m. for both learned Counsel to suggest common dates for continuation.

S.D. Bonomally (Mrs.) *(Vice President)*
29.12.2022