OUVERTURES ET PROFILAGES PLASTIQUES LTEE v DE LAUNAY H.M.

2015 SCJ 216

Record No. 1121

THE SUPREME COURT OF MAURITIUS

[Court of Civil Appeal]

In the matter of:-

Ouvertures et Profilages Plastiques Ltée

Appellant

v

H.M De Launay

Respondent

JUDGMENT

This an appeal against a judgment of the learned trial Judge upholding a two-pronged plea *in limine* raised by the respondent, then defendant, based on abuse of process and *res judicata*, and setting aside the claim of the plaintiff, now appellant, for damages suffered as a result of misrepresentation made by the respondent when he sold his business for the manufacture of aluminium openings in South Africa to the appellant in 2003.

The present appeal seeks to challenge the finding of the learned trial Judge on the issue of both abuse of process and *res judicata*.

It is not disputed that prior to the appellant's claim, the respondent had brought a successful claim against the appellant for the balance due on the sale of his business to it. Almost four years after that claim was lodged and one month before it was scheduled for hearing, the appellant had lodged the claim which is the subject matter of the present appeal. The Court refused a motion to adjourn the hearing of the first claim for it to be in shape and for the two claims to be heard together.

We have given due consideration to the submissions of the learned counsel on both sides. However, we have not been persuaded that the learned trial Judge came to

the wrong conclusion. On the issue of abuse of process we note that the respondent's claim was lodged in April 2006 and was originally fixed for hearing on 27 July 2009 but later postponed to 19 January 2010. The appellant lodged its claim only on 18 December 2009 and it contained practically the same averments as those made in the appellant's plea to the respondent's claim. That plea is dated as far back as 22 February 2008. All this points to a lack of diligence on the part of the appellant. In the circumstances, we hold that the learned Judge's findings that "*by failing to counterclaim in the first case and in choosing to lodge its case so much later to raise substantially the same facts and circumstances and relying on the same as the substratum of the subject matter of the same contract for its claim, the plaintiff is indeed making an abuse of the process of the Court*" cannot be faulted, the more so as the appellant's tender of evidence in both claims mentioned the same 30 documents.

We now turn to the finding of the learned trial Judge that the respondent's plea based on "*res judicata*" was well-taken. Before reaching the conclusion that he did, the learned Judge referred to the following Note 1 from **Encyclopédie Dalloz, Droit Civil Vol III V° Chose Jugée** –

> « *1. L'autorité de la chose jugée peut être définie comme une force exceptionnelle attachée aux décisions de justice, qui interdit, de remettre en cause ce qui a été définitivement jugé. La notion d'autorité de la chose jugée se manifeste par deux aspects: 1° la chose jugée peut avoir, en premier lieu, une fonction négative. La partie qui a succombé ne peut plus engager une nouvelle instance pour obtenir d'une manière directe ou indirecte, ce qui lui a été refusé par un premier jugement … 2° en second lieu, l'autorité de la chose jugée peut revêtir un aspect positif. En effet le plaideur dont le droit a été reconnu par une décision de justice peut exercer toutes les prérogatives qui y sont attachées: le jugement constitue pour lui un titre dont le contenu ne peut plus être discuté. Dès lors, l'autorité de la chose jugée remplit un rôle probatoire, puisqu'elle s'impose au juge sans qu'il lui sont permis d'en discuter la légitimité.*»

We may also quote Note 144 which was referred to us by learned counsel for the respondent –

> « *144. D'une manière plus générale, un courant jurisprudentiel important admet que si un point litigieux a déjà été affirmé ou nié, à l'occasion d'une précédente instance, il ne peut plus faire l'objet d'un nouveau débat, et ce même si le demandeur intente un nouveau procès afin d'en déduire des conséquences différentes de celles qui l'avaient conduit à former la première demande.* »

It is clear that by proceeding with its claim against the respondent, the appellant was seeking not only to deprive the latter of the benefit of the judgment he had obtained on the strength of his own claim but also to obtain what it could not in the respondent's claim. We accordingly hold that the learned Judge's finding on that score cannot be faulted.

In the circumstances, we dismiss the appeal, with costs.

K.P. Matadeen
Chief Justice

G. Jugessur-Manna
Judge

22 June 2015

Judgment delivered by Hon. K.P. Matadeen, Chief Justice

For Appellant : Mr A. Robert, Attorney-at-Law
Mr M. Sauzier, S.C.

For Respondent : Mr J.C. Ohsan-Bellepeau, Attorney-at-Law
Mr G. Glover, S.C.