CIM FINANCIAL SERVICES LTD v BOOJHAWON B.

2021 SCJ 243

Record No.: 113879

THE SUPREME COURT OF MAURITIUS
(COURT OF CIVIL APPEAL)

In the matter of:-

CIM Financial Services Ltd.

Appellant

v

Boopendrasing Boojhawon

Respondent

JUDGMENT

This is an appeal from the judgment of a learned Judge of the Supreme Court, setting aside a motion for the respondent to be committed for contempt of Court and upholding a preliminary objection raised by the respondent to the effect that the said application was procedurally flawed. The appeal was lodged by Mauritian Eagle Leasing Co. Ltd. ("Mauritian Eagle") and is being continued by the present appellant following an amalgamation.

The two grounds of appeal read as follows –

"1. The Court erred when it found that "the proper procedure had not been followed i.e. (to) refer the matter to the Judge in Chambers", when such a procedure, it appears, does not exist in Mauritius; the Court having found, not only that there were no authorities on the subject locally but it was also unclear who was to bring the matter before the Juge des Référés.

2. *The Court erred in finding that the Respondent's objection to the effect that contempt proceedings did not lie in the teeth of unrebutted evidence that a lawful Order of the Court had been deliberately flouted by the Respondent."*

Ground 2 has, as observed by learned Counsel for the respondent, been infelicitously drafted. It is however not so vague as to amount to no ground of appeal, but we find that it can only make sense if the words *"finding that"* are replaced by the word *"upholding"*. We have read it accordingly, in the light of the tenour of the appellant's skeleton arguments and submissions.

The appeal is being resisted by the respondent.

While we need to bear in mind that this appeal is from a judgment on a motion for contempt of court, it also raises interesting issues in relation to the procedure to be followed for a *'saisie-revendication'*. We are thankful to both learned Counsel for their helpful submissions, in spite of the dearth of local case-law on the matter raised.

The main facts set out in the affidavit in support of the motion paper which was before the learned Judge are as follows –

(a) the respondent had entered into lease agreements with Mauritian Eagle for the lease of –

(i) one Ford Ranger "Double Cab 4 x 4" on 10 November 2010;
(ii) one Europemill – Turbo Packing Machine on 6 June 2011;
(iii) one Nissan motor car on 13 August 2012;
(iv) one BMW motor car on 24 February 2014,

(*"the leased vehicles and equipment"*);

(b) on 15 May 2015, Mauritian Eagle obtained the following *ex parte* order from a Judge sitting in Chambers ("the Judge in Chambers") –

*"**ORDER***

Upon the application of Mr Attorney N. Rama and after reading the praecipe and the affidavit, dated 13 and 12 May 2015 respectively and the annexes, I hereby authorise the above-named applicant to

proceed, at its own risks and perils and subject to the provisions of Articles 806 and 826 to 831 of the Code de Procédure Civile, with the saisie-revendication of [the leased vehicles and equipment] wherever and in whosoever's possession they may be found";

(c) the Usher in charge of the execution of the *'saisie-revendication'* was unable to effect the *'saisie-revendication'* initially as the respondent's whereabouts were unknown;

(d) he finally called at the respondent's place on 19 August 2016 to effect the *'saisie-revendication'* and he met the respondent in person. The latter's verbal response was recorded in the Memorandum of Seizure drawn up by the Registered Usher, which read as follows –

"And after having served him/her with true and certified copies of the said Rule, Proecipe, Affidavit and an agreement for the lease of Equipment marked Annex A and a Notice Mise en Demeure marked Annex B attached thereto and informed him/her that I have come in virtue of the aforesaid Rule to make and effect a seizure by way of 'saisie-revendication' of the above mentioned vehicles and equipment.

Thereupon the said Mr Boojhawon declared to me the following:

'Mo pas pou donne banne l'autos mentionné dans l'ordre du Juge et sa l'équipement la car mo fine deja payé sa et deja aina aine affaire pending devant la Cour Supreme concernant sa zaffaire la-meme'."

The motion for contempt of court was based on the above refusal of the respondent to deliver to the applicant the leased vehicles and equipment which, according to Mauritian Eagle, amounted to a *"clear breach of the Judge's Order"*. It was also averred that the respondent was *"deliberately flouting with (sic) the order of the Honourable Judge in Chambers"*. The respondent resisted the motion and raised a notice of preliminary objection to the motion for contempt, which read as follows –

"*Whilst reserving it (sic) rights to rebut the present application as support (sic) by affidavit solemnly affirmed on the 28th September 2016, the Respondent moves that this application be set aside with costs for it is procedurally flawed and cannot be entertained by this Honourable Court inasmuch as there is no contempt of court for non-compliance with an order for 'saisie-revendication' obtained ex parte."*

The matter was then fixed for arguments on the preliminary objection.

After hearing Counsel and considering French authorities on the matter, the learned Judge concluded that the preliminary objection is well taken as the proper procedure had not been followed and the matter ought, pursuant to Article 829 of the Code de Procédure Civile, to have been referred to the Judge in Chambers when the respondent refused to comply with the order.

The motion for contempt was accordingly set aside and the decision of the learned Judge is now being challenged on appeal.

We have carefully considered the submissions of Counsel as well as the authorities cited by them.

It is well-settled that disobedience to an order of the Court amounts to civil contempt (see **Halsbury's Laws of England (5th edition, 2019), Volume 24: Contempt of Court)**. The contempt, if proved beyond reasonable doubt, is visited by a sanction which may include a custodial sentence or a fine. Disobedience to a judgment or an order for the delivery of goods is a contempt and is punishable by committal in the English context only where the order "*does not give the defendant the alternative of paying the assessed value of the goods and where a time is specified within which the act is to be done*" (**Halsbury's Laws (supra)** at paragraph 74); the order allegedly breached must therefore require that the delivery be effected within a specified time.

As the Supreme Court observed in **Beekarry v Mauritius Revenue Authority & Ors [2012 SCJ 500]**, the proper administration of justice requires that *"Courts must be able to enforce their orders and judgments and more particularly to deal effectively with any breach of its orders"*. The Court also reiterated that the following conditions must be satisfied in order to establish civil contempt –

> ***"1. The terms of the order must be clear and unambiguous.***
>
> *The Court stated in **Iberian Trust Ltd v Founders Trust and Investment Co. Ltd [1932 2KB 87]**: "If the Court is to punish anyone for not carrying out its order, the order must in unambiguous terms direct what is to be done". (….)*

2. The defendant must have proper notice of the terms of the order.

It is an established principle that 'a person cannot be held guilty of contempt in infringing an order of the Court of which he knows nothing'. (…)

3. The breach must be proved beyond reasonable doubt.

Any breach alleged to constitute contempt must be strictly proved in accordance with the standard of proof which is applicable to criminal cases, so that the breach against the alleged contemnor must be proved beyond reasonable doubt. This is made explicit by Lord Denning in ***Re. Bramblevale Ltd [1969] 3 All ER 1062*** *where he said:*

> *"A contempt of Court is an offence of a criminal character. A man may be sent to prison for it. It must be satisfactorily proved. To use the time-honoured phrase, it must be proved beyond reasonable doubt. It is not proved by showing that, when the man was asked about it, he told lies. There must be further evidence to incriminate him." "*

This appeal therefore necessarily raises the issue of whether, as per the procedure set out in the Code de Procédure Civile, the *ex parte "order"* from the Judge in Chambers was a precise and unambiguous order such that the refusal of the respondent to comply with same amounts to a civil contempt.

The relevant provisions of our Code de Procédure Civile ("the Code") read as follows –

« 826. Il ne pourra être procédé à aucune saisie-revendication, qu'en vertu d'ordonnance du président du tribunal de première instance rendue sur requête; et ce, à peine de dommages-intérêts tant contre la partie que contre l'huissier qui aura procédé à la saisie.

827. Toute requête à fin de saisie-revendication désignera sommairement les effets.

828. Le juge pourra permettre la saisie-revendication, même les jours de fête légale.

829. Si celui chez lequel sont les effets qu'on veut revendiquer, refuse les portes ou s'oppose à la saisie, il en sera référé au juge; et cependant il sera sursis à la saisie, sauf au requérant à établir garnison aux portes.

830. La saisie-revendication sera faite en la même forme que la saisie-exécution, si ce n'est que celui chez qui elle est faite pourra être constitué gardien.

831. La demande en validité de la saisie sera portée devant le tribunal du domicile de celui sur qui elle est faite; et si elle est connexe à une instance déjà pendante, elle le sera au tribunal saisi de cette instance. »

Now learned Senior Counsel for the appellant has invited us to take into consideration the *'saisie-revendication'* process *"used in Mauritius"* and the way in which the above provisions of the Code are, in his view, applied in modern practice in the local context. He submitted that the learned Judge erred when he referred to French authorities on the matter as the procedure used in France is "*non-existing*" in Mauritius.

According to Counsel for the appellant, the procedure for obtaining a *'saisie-revendication'* in Mauritius consists of the following two stages –

(a) an application made *ex parte,* in view of the urgency, to the Judge in Chambers for an order authorising the seizing party to proceed with the '*saisie-revendication*' **(Jokhoo v Hossen [1995 MR 99])**;

(b) once the seizing party is authorised to proceed with the *'saisie-revendication'*, it is then *"open to him to apply for a validation order to the Judge in Chambers, the effect of which would be to authorise the seizing party to take possession of the moveable effects already seized. However, on good ground shown by the objector, the Judge in Chambers would then refer the matter to the open Court"* **(see Jokhoo v Hossen (supra))**.

According to him, there can be no objection raised at the first stage and a party cannot therefore, under Mauritian law, object to the '*saisie*' by refusing to comply with the order of the Judge in Chambers. There is no local case-law on the application of Article 829 of the Code because, in his view, refusal to comply with a valid order of the Judge in Chambers amounts to a contempt of Court so that Article 829 finds no application in Mauritius.

It is, in his submission, the practice in Mauritius that any objection can only be raised, under section 71(2) of the Courts Act, at the second stage of the *'saisie-revendication'* process, which is the validation stage provided for under Article 831 of the Code and section 71(1)(e) of the Courts Act, once the seized articles are placed under the guardianship of a designated person by the usher effecting the seizure (see **Mauritian Eagle Leasing Co Ltd v Gowreeshankur** [2007 SCJ 184] and **Mauritian Eagle Leasing Co Ltd v Solidarity Mechanical Cooperative Society Ltd** [2006 SCJ 272]). Moreover, once the respondent's vehicles and machinery would have been seized pursuant to the order, the respondent could also have resorted to an application under section 71(1)(d) of the Courts Act for a removal or *"main levée"* of the seizure (see **Piperdy v Liu Yuk Chong Liu** [1996 SCJ 394]).

Now, the Code de Procédure Civile, which dates back to 1808, is still replete with anachronistic terms of a bygone colonial era such as *"L'empereur" or the "procureur impérial de l'arrondissement".* Reference is also made in the Code to the "*préfet du département", "les communes"* (see Article 69), domicile being in France (see Article 72) and the currency being the *"franc"*. Unlike the Code Civil Mauricien, the Code de Procédure Civile has undergone no revision under the Revision of Laws Act, as it seems to require in fact substantive re-enactment.

We read from successive editions of the Revised Laws of Mauritius an Editorial Note in relation to the Code to the effect that –

> *"The Attorney-General has directed the preparation of a revision exercise for the Code de Procédure Civile.*
>
> *The text of the Code de Procédure Civile which is reproduced in this volume is that which is currently in force in Mauritius, namely, the text set out in Decaen, 'l'arrêté 177 du 20 juillet 1808' together with a few amendments expressly provided for in the 'arrêté' itself or subsequently by the Legislature."*

The Editorial Note further states that legislative amendments to the Code need to be considered to give proper meaning to its text and ensure its application in Mauritius, having regard to, *inter alia*, the language used which is old French, the unclear meaning, and the fact that "*those provisions were designed for the imperial legal set-up in France in early 19th century*" and need to be adapted to the current Mauritian legal system.

Reference is also made to the fact that we do not have in Mauritius counterparts corresponding to officers mentioned in the Code, such as the *"procureur impérial"*. It is further stated in the Note that the Attorney-General will *"on completion of the revision exercise, introduce appropriate amending legislation".*

We can do no more than urge the relevant authorities to attend to this task as a matter of urgency.

Learned Senior Counsel for the appellant may be right to submit, in the light of his extensive experience in the field, that the provisions of the Code on *'saisie-revendication'* are no longer being observed and applied in practice in Mauritius. However, even assuming that he is right, it is not this Court's role to modify statutory provisions by giving them an interpretation which accords with practice.

We are of the considered view that it is for the legislator, after giving due consideration to *inter alia* the substantive provisions on leasing introduced in 2011 (see Titre Huitième bis of the Code Civil Mauricien) and carrying out such consultation with stakeholders as may be appropriate, to re-enact the law on *'saisie-revendication'*. We decline therefore to take judicial notice of any allegedly different practice now obtaining in Mauritius as we are bound to apply the law in force in Mauritius, as set out in the Code de Procédure Civile and explained in French doctrine and in our own case-law. We shall of course not take into consideration any amendment to the French Code de Procédure Civile, and in particular the reforms made in France in 1991-2, which have not been replicated in our own Code.

Now it is not disputed that an order for a *'saisie-revendication'* is a *"mesure conservatoire"* which authorises the seizure of movables, which are placed *"sous la main de la justice"*, pending its validation. No seizure can be effected without first obtaining an order from the Judge in Chambers upon an *ex parte* application (**Jokhoo v Hossen (supra)**). Once the seizing party is authorised by such an order to proceed and the seizure takes place, he can apply for validation.

We are thankful to learned Counsel for the respondent who referred both in the Court below and on appeal to relevant extracts from **E. Glasson, Précis théorique et pratique de Procédure Civile, Tome Second, Deuxième édition (1908)** at pages 640 *et seq*.

In view of the paucity of authorities on Article 829 of our Code, we make no apology for quoting liberally from **Glasson**. It is worth, for example, highlighting the precise purport of a '*saisie-revendication',* which is explained as follows in **Glasson** at page 640 –

> *« **1548. Cas dans lesquels il y a lieu à la saisie-revendication ; importance de cette saisie**. – La saisie-revendication a, dans notre droit, une importance exceptionnelle qu'on n'a pas toujours suffisamment relevée. Les droits réels sur les meubles sont, on le sait, fort peu nombreux ; ils se ramènent à la propriété, à l'usufruit et au gage et encore ces droits réels sont-ils, le plus souvent, dépourvus du droit de suite, à cause de la règle : en fait de meubles possession vaut titre. (…)*
>
> *La revendication d'un meuble se présente encore, dans la pratique, toutes les fois qu'en cas de vente il a été stipulé que cette vente serait soumise à une condition résolutoire opérant de plein droit, par exemple sous la condition qu'elle serait anéantie par le seul défaut de paiement du prix à telle échéance ; dans ces circonstances, le vendeur redevient de plein droit aussi propriétaire et peut, en cette qualité, revendiquer. (…)*
>
> *Dans tous ces cas, encore assez nombreux comme on le voit, où la revendication d'un meuble ou d'un gage est permise, on se gardera bien, en pratique, de recourir à l'action en revendication de la propriété ou du gage ; cette action étant soumise à la tentative de conciliation et aux lenteurs de la procédure ordinaire, rien ne serait plus facile au défendeur que de faire disparaître l'objet mobilier.(…) Aussi, dans la pratique, n'use-t-on jamais de l'action en revendication ; on lui préfère un moyen plus énergique, plus rapide et qui assure au revendiquant la restitution de l'objet ou du gage : c'est la saisie-revendication empruntée à certaines coutumes de notre ancien droit (1) ».*

The effect of the *'saisie-revendication'* is to put the seized movable under the legal guardianship of a designated person. As **Glasson** puts it at page 642 –

> *« Le revendiquant, avec la permission du président du tribunal obtenue à l'insu du possesseur, met sur-le-champ le meuble sous la main de justice et désormais on ne peut plus le faire disparaître qu'en commettant le délit de détournement d'objets saisis (…). Ces sanctions pénales empêcheront bien des personnes de se permettre des détournements auxquels elles auraient recouru s'il s'était agi de commettre une simple faute civile ».*

The first step of the *'saisie-revendication'* process, as rightly submitted by learned Senior Counsel for the appellant, is to obtain the *"autorisation"* of the Judge in

Chambers. It would appear that this authorisation was also granted in France by a provisional order made *ex parte* by the *"Président du tribunal"* in France, that is, *"par ordonnance sur requête"* which is a *"procédure non contradictoire"*. The nature of this authorisation is explained by Glasson as follows –

> *« **1553. Autorisation préalable**. – La saisie-revendication est autorisée par ordonnance sur requête du président du tribunal (…).*
>
> *Cette autorisation du juge constitue une formalité substantielle et c'est pour ce motif que son omission entraîne nullité, bien que celle-ci ne soit pas écrite dans la loi. En outre, le saisi pourrait obtenir des dommages-intérêts contre le saisissant et, de son côté, le revendiquant serait en droit d'en réclamer contre son huissier (art. 826 C. pr.)(…).*
>
> *La requête tendant à saisie-revendication doit contenir la description sommaire des objets réclamés (art. 827 C. pr.). L'ordonnance répondant la requête désigne la personne chez laquelle la saisie pourra être pratiquée et cette autorisation comprend implicitement celle d'opérer une perquisition (1). A raison même de son caractère urgent, la saisie-revendication peut être autorisée un jour de fête légale par le président. »*

The issue of opposition to the seizure is specifically addressed at Article 829 of the Code. According to **Glasson**, the Usher cannot ignore any opposition to the seizure and must, in case of opposition, refer the matter to the Judge in Chambers. Should the Usher ignore any objection on the part of the possessor and proceed with the seizure in the face of such objection, he is liable to be sanctioned, as explained in the following extract –

> *« **1554. Procès-verbal de saisie**. – S'il y a refus d'ouvrir les portes ou opposition de fait à la saisie, l'huissier doit en référer au juge, mais il n'a pas le droit, comme en cas de saisie-exécution, de passer outre, même avec l'assistance d'un officier public. S'il pratiquait la saisie, il encourrait une amende (art. 1030 C. pr.), peut-être même des dommages-intérêts et des condamnations disciplinaires. Mais, dans le silence de la loi, on ne saurait prononcer la nullité de la saisie. (2). De même, l'huissier doit notifier la saisie et en remettre copie au saisi, sans que ces formalités soient prescrites à peine de nullité (3). »*
>
> (the underlining is ours)

The validation stage, which was rightly referred to by learned Counsel for the appellant as the 'second stage' and with which we are not concerned in the present appeal, only comes into play after the movable has been seized. It provides for the validation of the seizure and is governed in Mauritius by **section 71(d)(e)(2)** of the

Courts Act (see also **Shree Nathji Co Ltd v Nunkoo [2014 SCJ 318], Mauritius Eagle Leasing Co Ltd v Gowreeshankar (supra), Mauritian Eagle Leasing Co Ltd v Solidarity Mechanical Cooperative Society Ltd (supra), MUA Leasing Co Ltd v Travailleur [2006 SCJ 211]** and **Jokhoo v Hossen (supra)**. In contrast, the first stage does not appear to have been considered in our case-law.

Learned Senior Counsel for the appellant also argued that it would be futile to provide for opposition at the first stage as the movable may be dissipated in the meantime; while this argument is not unreasonable, we can only point to the express reference made in Article 829 to the possibility for the *"requérant"* to *"établir garnison aux portes"* and make his own security arrangements to prevent removal of the movable. This was therefore a scenario that was taken into consideration by the drafters of the Code at the time, although it no longer appears to be a realistic and workable solution any more in view of the evolution of our law.

The issue of who should refer the matter to the Judge in Chambers in case there is opposition on the part of the "*tiers détenteur*" gave rise to some debate before the learned Judge. Although **Glasson** opines that the Usher must report any opposition ("*doit en référer")* to the Judge in Chambers, the procedure that should be adopted for a referral to the Judge in Chambers has not been specified as such in our Code.

We have read with interest the following paragraphs from **Dalloz, *Répertoire Pratique*, *Tome Dixième*, *v° Saisie-Revendication*,** which shed more light on the matter**-**

> *« 45. S'il refuse d'ouvrir les portes ou s'oppose en fait aux opérations de la saisie, l'huissier ne peut, sous peine d'amende (C. proc. art. 1030), même de dommages-intérêts et de condamnations disciplinaires (GLASSON ET COLMET-DAAGE, t. 2, n° 1554, p. 646), passer outre à la saisie ; il doit assigner en référé le tiers détenteur, sauf au requérant à établir gardien aux portes (C. proc. art. 829) (GARSONNET, t. 7, § 2635, p. 160 ; GLASSON ET COLMET-DAAGE, loc.cit. ; CUCHE, n° 83, p. 94). (….)*
>
> *48. L'assignation en référé est donnée dans le procès-verbal dressé par l'huissier pour constater l'opposition ou le refus, et il en est laissé copie à la partie opposante (MARC DEFFAUX ET HAREL, t. 7, v° Saisie-revendication, n° 28).*
>
> *49. Sur la nouvelle ordonnance obtenue en référé, l'huissier, en cas de refus persistant ou de nouvelle opposition du tiers détenteur, procède comme en matière de saisie-exécution (V. Saisie-exécution, n°s 217 et s.). »*

(the underlining is ours)

In the absence of any local rules providing for the manner in which the *"tiers détenteur"* may, following an opposition, be *"assigné en référé"* before the Judge in Chambers by an Usher, we are of the view that, in the local context, once the Usher records the opposition of the *"tiers détenteur"* in his return or *"procès-verbal"*, it would be for the *"créancier",* as the interested party, to seise the Judge in Chambers anew for an order of *"saisie-revendication"* to issue, notifying the Judge of the opposition of the *"tiers détenteur"* as recorded in the Usher's *"procès-verbal".* The Judge in Chambers would then hear the parties *inter partes* and determine whether to make an order for *"saisie-revendication"*. If the *"tiers détenteur"* maintains his opposition upon being served with a fresh order of *"saisie-revendication"* made by the Judge in Chambers, the matter shall be dealt with by the Usher as for a *"saisie-exécution"* and validation may be applied for (see Articles 830 and 831 of the Code).

The fact that the above procedure is not clearly laid down in the Code or in Rules of Court cannot however avail the appellant as it is evident from Article 829 of the Code that the refusal of the respondent to comply with the *ex parte* order of the Judge in Chambers could not amount to contempt of Court.

We recall the need laid down in case-law on contempt cited above for the order allegedly flouted to clearly and unambiguously require that an act be done or not be done. Now the order issued by the Judge in Chambers at the first stage is not a coercive one requiring the *"tiers détenteur"* to hand the movables over to the Usher, but one conferring a power on the Usher to seize the movables mentioned in the order; the Judge in Chambers merely "*authorises*" the applicant to proceed with the *'saisie-revendication'* of the movables mentioned in the order on the conditions specified therein and does not require any person to hand them over to be seized. The movables may in fact remain in the custody of the possessor.

The order made by the Judge in Chambers is directed at the movables to be seized, not at the person having custody thereof. As stated in **Encyclopédie Dalloz, Procédure Civile, Tome VI, *'Saisie-revendication'*** at paragraph 23, *« en matière de saisie-revendication, c'est en somme moins la personne détentrice du bien qui importe que ce bien lui-même … toutes réserves gardées, il serait possible de parler ici d'une mesure in rem ».* Further, as rightly observed by learned Counsel for the respondent, the

order made by the Judge in Chambers was in any event made "*subject to Articles 826 to 831 of the Code*", including Article 829 which expressly provides for the right of the *"tiers détenteur"* to oppose the seizure. To hold that the respondent is liable to be committed for contempt of Court for refusing to comply with the *ex parte* order made by the Judge in Chambers would fall foul of the express provisions of Article 829 and deprive the respondent of a statutory recourse available to him under the Code.

The question of the respondent having flouted an order of the Court therefore does not arise and the principles of contempt of Court find no application in the present case. The learned Judge was therefore right to uphold the respondent's preliminary objection and set aside the motion for the respondent to be committed for contempt. Both Grounds of appeal are therefore without merit and fail.

In the light of the above, the appeal is dismissed. With costs.

A.A. Caunhye
Chief Justice

A.D. Narain
Judge

16 July 2021

Judgment delivered by Hon. A.D. Narain, Judge

For Appellant	**:**	**Mr N. Rama, Attorney-at-Law** **Mr G. Glover, SC together with** **Ms D. Choytah, of Counsel**
For Respondent	**:**	**Mr D. Ramdhur, Attorney-at-Law** **Mr. Y. Nazroo, of Counsel**