IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA – A.D. 2019

CORAM: YEBOAH, JSC (PRESIDING)
GBADEGBE, JSC
APPAU, JSC
MARFUL-SAU, JSC
KOTEY, JSC

CIVIL APPEAL
NO. J4/66/2018

23RD JANUARY, 2019

WINDWORTH HOLDINGS (PTY) LTD. ….. PLAINTIFF/RESPONDENT/RESPONDENT

VRS

DUPAUL WOOD TREATMENT (GH) LTD …… DEFENDANT/APPELLANT/APPELLANT

JUDGMENT

GBADEGBE, JSC:- We have before us an appeal from the decision of the Court of Appeal, which upheld the judgment of the trial High Court in favor of the plaintiff for summary judgment against the defendant on part of the claim. The defendant's main complaint before us relates to the refusal by the trial court to grant him leave to defend the action and arising therefrom the award of a figure different from that endorsed on the writ of summons. In these proceedings, for reasons of consistency, I shall refer to the parties by the designation that they bore in the trial court. By the judgment of the Court of Appeal, the position was reiterated that the defendant's statement of defence by which she sought to show cause against the application for summary judgment disclosed no triable issues.

Before proceeding with the appeal herein, the observation is made that it is quite plain from the record of appeal that the parties and to some extent the court exercised unusual latitude regarding the nature and scope of Order 14 applications resulting in the parties taking some steps in the proceedings, which may be described as unauthorized. A quick reference may be made to one such step namely an application filed by the defendant to dismiss the application for summary judgment. It is trite learning that at the hearing of an application for summary judgment, one of the of the orders available to the court at the hearing under the High Court (Civil Procedure) Rules, CI 47 of 2004 is an order of dismissal of the application and accordingly it makes no sense that a formal application was made by the respondent to the said application for an order dismissing the application. It being an application, it stood either to be granted or refused having regard to the affidavit evidence placed before the trial judge. It is unfortunate to observe that at certain times in the course of the proceedings had in the trial court, the learned trial judge lost control of the management of the case, a situation that had adverse effect on the pace of the litigation and accounts for the length of time that such a simple matter took before him.

Regarding the steps preceding the hearing of the application under Order 14, the plaintiff who had previously filed an application for summary judgment that was pending before the trial court must have been compelled by the challenge to his capacity to take out an application for directions under Order 32 as the point relating thereto cannot be conveniently dealt with under an application for summary judgment. As the parties to an action cannot have a point of law arising on the pleadings conveniently disposed of before directions are taken in the matter, there was some merit in the approach adopted by the learned trial judge which allowed the parties to have the preliminary point of law touching the plaintiff's capacity to be determined before the hearing of the application filed under Order 14 of the High Court (Civil Procedure) rules, 2004, CI 47. That step has been the basis of objection by the defendant, as in her view, it tended to move the matter from one fit for a summary determination to one requiring a full-scale trial. However, the course of proceedings had in the trial court was necessary to enable the issue of capacity that stood in the way of the Order 14 application to be dealt with

before it was heard. Thus, it is clear that notwithstanding the fact that an application for directions was filed, its purpose was to enable the issue of capacity of the plaintiff that was under challenge to be determined and although it seems at first blush that something was amiss procedurally, a close scrutiny of the proceedings contained in the record of appeal reveals that it was a case - management technique that opened the way for the hearing of the pending application for summary judgment. Reading Order 14 in its entirety, one reaches the conclusion that it was not intended to cater for a point of law such as turned on the pleadings in this case; neither has the said point been the subject of a previous determination such as to provide us with some guidance in the matter. Being a matter of procedure, the paramount consideration is whether the course of proceedings adopted by the learned trial judge enabled the "ultimate issue" to be decided in the matter without occasioning injustice to either party to the cause. In this regard, we must be guided by the overriding objective of the High Court (Civil Procedure) Rules, CI 47 which provides as follows:

> *"These Rules shall be interpreted and applied so as to achieve speedy and effective justice, avoid delays and unnecessary expense, and ensure that as far as possible, all matters in dispute between the parties may be completely, effectively and finally determined and multiplicity of proceedings concerning any such matters avoided."*

Regarding the suggested approach, the decision of this court in the case of Armah v Hydrafoam Estates Ltd [2013-2014] 2 SCGLR 1551. At page 1561 of the judgment, Benin JSC delivered himself thus:

> *"We take note of the fact that in view of rule 7(10) of Order defendant of CI 47, the trial court could have gone further to record the fact that the parties had shifted their positions having regard to the issue they had agreed to be tried in the sense that the plaintiff was no longer asking for a restoration of the unpaid for land, that is the alternative relief asked for and on the other hand, the defendant had abandoned the claim that it had paid for the entire land. But in this case, there was no injustice*

caused to either party as both sides agreed to the entire process and fully co-operated with the trial judge……"

As was the situation in the Armah case, the parties herein took full part in the proceedings and co-operated fully with the court and in my view the proceedings had not the slightest appearance of an action in which the ends of justice were not well served.

The disposal of the issue of capacity in the matter by the trial court necessarily implied a finding that the plaintiff had a cause of action vested in him regarding the subject matter of the plaint, including the issue of taking the benefit of the contract between the defendant and the entity on whose behalf he was pursuing the claim. The record of appeal reveals that after the determination of the issue of capacity, the matter was adjourned for the hearing of the application for summary judgment, which was heard and granted with the defendant appealing to the Court of Appeal That appeal having failed, the defendant is now before us by way of a further appeal. Although the defendant promptly appealed against the ruling on the issue of capacity, she did not take any further step to have the future course of the proceedings stayed and so there cannot be any substance in any complaints regarding the hearing of the application under Order 14 of CI 47 for summary judgment.

Turning attention to the appeal, it is noted that the defendant has raised by way of complaint against the decision of the learned justices of the Court of Appeal on three main grounds that were argued as follows:

(a) The court below erred and misdirected itself when it held that the learned trial judge was right in granting summary judgment when the defendant's defence raised triable issues on the pleadings.

(b) The court below erred when it failed to hold that the trial court exceeded its jurisdiction when it granted the Respondent's application for summary judgment.

(c) The court below erred when it held that the books of Cachecorp Pty were ceded to the Plaintiff and the defendant was estopped from denying the debt.

The above grounds of appeal were substantially argued by the defendant and refuted by the plaintiff. Observation is made that although the defendant made considerable submissions on the said grounds, the issue before us for decision turns simply on the question whether the summary judgment was within the scope of Order 14 of CI 47 and also whether the court was right in making an award for a sum different from that claimed by the plaintiff. The question of the cession of the books of Cachecorp Pty to the plaintiff is matter which is inextricably woven with the issue of the defendant's liability for the debt and thus for reasons of convenience the two grounds numbered above as (a) and (c) will be subsumed under the question of liability under the summary judgment while that related to the award and numbered as ground (b) will be treated separately. I shall commence the consideration of the issues from the question of the summary judgment that was entered against the defendant.

The gist of the said grounds is that the statement of defence raised triable issues. In their decision, the learned justices of the Court of Appeal came to the view that having regard to the conduct of the defendant in accepting liability for the debt and not only proposing terms of payment but also making some payment to the plaintiff, she was estopped from denying the existence of the debt. After giving careful and anxious consideration to the issues raised regarding the question of liability under Order 14, I hereby express my agreement with the decision of the learned justices of the Court of Appeal. It is unacceptable that the defendant who accepted absolute liability for the amount in respect of which the writ herein issued and offered to pay the indebtedness in instalments but failed so to do can be said either in conscience or principle to have a defense to the action herein. The acceptance of liability by the defendant in the circumstances of this case created a conclusive presumption under sections 24 and 26 of the Evidence Act, NRCD 323. By the said provisions, we are precluded from receiving evidence to the contrary of the presumed fact which in this case is the admission of liability by the defendant. It repays to refer to the said provisions as follows:

SECTION 24(1)

"Where the basic facts that give rise to a conclusive presumption are found or otherwise established in the action, no evidence contrary to the presumed fact may be considered by the tribunal of fact.

SECTION 26:

Except as otherwise provided by law, including a rule of equity, when a party has, by his own statement, act or omission, intentionally, and deliberately permitted another person to believe a thing to be true and to act upon such belief, the truth of that thing shall be conclusively presumed against that party or his successors in interest in any proceedings between that party or his successors in interest and such relying person or his successors in interest."

The effect of the acceptance of liability and the related steps taken thereon by the defendant renders the subsequent issue of the cession of the books of Cachecorp Pty to the plaintiff, an assertion that was not made in good faith as that assertion cannot co-exist with the admission of liability on which the plaintiff placed reliance. The statutory preclusion arising out of the conclusive presumption aside, it is difficult to comprehend how a person who alleges that he owes A but not B can accept liability for the payment of the debt to B. As the Evidence Act precludes us from considering a view of the facts contrary to that arising from the acceptance of liability by the defendant, there cannot be any legitimate complaint directed at the finding of liability of the defendant by the intermediate appellate court. Going further, it may be said that in the absence of any showing by the defendant that the entity with which it had contracted denied the authority of the plaintiff to sue her, the issue of capacity which was raised in her defence to the action was not credible but a bait which was thrown into the matter for the mere purpose of having a semblance of a defence to the action, a sham to say that was intended to delay the trial of the action and undermine the rationale for Order 14.

Then comes the question of the amount awarded. Suffice it to say that as the amount allowed by the learned trial judge under the summary judgment was lower than that which was claimed, the learned trial judge in making the award preferred the amount

contained in exhibit "M" instead of the entire amount being claimed by the plaintiff and in respect of which the application was filed. His award was the result of the lawful exercise of a discretion conferred on the court under Order 14. Therefore, there appears to be no reason for the complaint. Indeed, Order 14 rule 5 of CI 47 provides authority for the trial judge to make an award, which is part only of the amount claimed. Sub-rule 1 of the said rule provides:

> "*On the hearing of the application the Court may*
> *(a) give such judgment for the plaintiff against the defendant on the relevant claim or part of the claim as may be just having regard to nature of the remedy or relief sought……."*

The above words are free from any complexity in terms of their meaning and removes any doubt as to the authority of the learned trial judge to allow by way of summary judgment an award which is less than that which was claimed in the action. The amount awarded under the summary judgment properly in ordinary and technical legal usage belongs to that which may be described as "part of" within the meaning of Order 14 rule 5(1) (a) of the High Court Rules.

Having disposed of the issues turning on the grounds argued in the appeal herein in the negative, the result is that the instant appeal fails and it is hereby dismissed.

N. S. GBADEGBE
(JUSTICE OF THE SUPREME COURT)

YEBOAH, JSC:-

I agree with the conclusion and reasoning of my brother Gbadegbe, JSC.

ANIN YEBOAH
(JUSTICE OF THE SUPREME COURT)

APPAU, JSC:-
I agree with the conclusion and reasoning of my brother Gbadegbe, JSC.

Y. APPAU
(JUSTICE OF THE SUPREME COURT)

MARFUL-SAU, JSC:-
I agree with the conclusion and reasoning of my brother Gbadegbe, JSC.

S. K. MARFUL-SAU
(JUSTICE OF THE SUPREME COURT)

KOTEY, JSC:-
I agree with the conclusion and reasoning of my brother Gbadegbe, JSC.

PROF. N. A. KOTEY
(JUSTICE OF THE SUPREME COURT)

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