EMPLOYMENT RELATIONS TRIBUNAL

ERT/RN 67/13

RULING

Before:

Rashid Hossen	**-**	**President**
Ramprakash Ramkissen	**-**	**Member**
Denis Labat	**-**	**Member**
Georges Karl Louis	**-**	**Member**

In the matter of:-

Mr Poorohitum Gopee

(Disputant)

And

Mauritius Telecom Ltd

(Respondent)

This referral for Arbitration emanates from the President of the Commission for Conciliation and Mediation.

On the 2nd of May 2013 the Disputant, Mr Poorohitum Gopee reported to the said Commission the existence of a labour dispute between himself and The Mauritius Telecom Limited as per **Section 64(1) of the Employment Relations Act 2008**, as amended.

The point in dispute is whether the Disputant should be paid a salary increment of Rs 1,700 yearly every 1st of July as from 1st of July 2000 up to 30th of June 2003 instead of 1st of July 2002 only.

Mr Desiré Basset, S.C., raised an objection to this referral based on the following:-

(i) The subject matter of the application is *res judicata* as it has been set aside by the Tribunal on the 7th of December 2010 in an Award bearing reference number **RN 959**;

(ii) The second ground is that the present application amounts to duplicity and is *connexe* to an application lodged before the Supreme Court by way of a plaint with summons dated 8th of August 2013;

(iii) Thirdly, the jurisdiction of the Tribunal is excluded in the present dispute because *ex facie* the Statement of Case of the Disputant it relates to a dispute pending before another forum and on the basis of **Section 71 of the Employment Relations Act 2008**, the Tribunal should not hear the matter;

and

(iv) Fourthly, the claim of the Disputant is time barred under the normal provisions of the Civil Code concerning "*action personnelle"* and this is not maintainable after 10 years.

With regard to the first ground, Senior Counsel submitted that the Disputant filed a case before the Permanent Arbitration Tribunal in June 2007 and point 1(c) of the dispute read as follows:-

> *"Whether Mr Gopee, should be granted a reasonable increase in salary as from July 2000 or otherwise."*

Counsel submitted that this was a live issue before the Tribunal and on the 7th of December 2010, the Tribunal gave its Award on *inter alia* point no. 1(c) and stated that after having considered all the evidence, it reached the conclusion that the Disputant's request cannot be granted. Counsel referred extensively to the Award delivered with regard to that point.

It was further submitted that in March 2011 the Disputant applied to the Supreme Court for a judicial review of the Award. On the 29th of March 2012 the matter came before the Supreme Court where the Chief Justice sitting with another Judge invited the parties to consider conciliation anew instead of proceeding for a judgment.

Counsel for the Disputant in the judicial review was agreeable to that course and the judicial review application was set aside. In the meantime discussions took place between the parties and the matter proceeded before

the Conciliation and Mediation Commission. By way of a letter dated 12th of August, the President of the Commission referred the matter to the Tribunal for arbitration on the issue whether the Disputant should be paid a salary increment yearly with effect from 1st of July 2000 instead of July 2002 up to June 2003. Counsel submitted that the present Terms of Reference falls squarely within the point 1(c) which was decided by the Tribunal and therefore the dispute followed by a determination has "*autorité de la chose jugée"* which is provided for in **Article 1351 of the Civil Code.**

The Disputant's Counsel submitted that the first requirement for *res judicata* is that *"la chose demandée soit la même"* and secondly *"que la demande soit fondée sur la même cause."* Also, *"que la demande soit entre les mêmes parties et formée par elles et contre elles en la même qualité."* Although the parties are the same in the present case the claim made in the previous case is not similar to the present one. In the previous one the Disputant claimed a reasonable increase in salary as from July 2000 or otherwise whereas in the present one the issue is whether it should be paid a salary increment of Rs 1,700 yearly with effect from 1st of July 2000 instead of 1st July 2002 up to 30th June 2003.

Counsel submitted that the present dispute takes into consideration the negotiation which has taken place following the invitation by the Chief Justice in the case of judicial review and as a result of which several meetings took place whereby an offer of Rs 1,700 with effect from 1st of July 2002 among other things was made. Some proposals made were accepted and settled whereas no settlement could be reached with regard to

the present issue and the matter was referred to the Commission for Conciliation and Mediation.

TRIBUNAL'S CONSIDERATIONS

Res judicata at Common Law

L'autorité de la chose jugée in Civil Law

Article 1351 of the Civil Code provides:-

> **1351.** L'autorité de la chose jugée n'a lieu qu'à l'égard de ce qui a fait l'objet du jugement. Il faut que la chose demandée soit la même; que la demande soit fondée sur la même cause ; que la demande soit entre les mêmes parties, et formée par elles et contre elles en la même qualité.

> "The doctrine of *res judicata* finds its way in Mauritian law by its establishment as one of the *présomptions établies par la loi* under **Article 1350 of our Civil Code**. The presumption of law attaching to *l'autorité de la chose jugée* is qualified by **Article1351 of the Code** which makes it clear that *chose jugée* cannot be invoked in all contexts and for all purposes but can only be pleaded in subsequent litigation where the requirement of threefold identity is satisfied, namely:
>
> (1) Same demand
> (2) Same cause of action
> (3) Same parties acting in same capacity." **(Beeharry v Beeharry [1998 SCJ 2011])**

> The Court also referred to the case of **Virapa v. Mauritius Fire Insurance [1869 MR 13]** where it was held that the requirements of **Article 1351 of Civil Code** are as follows:

(1) The thing demanded must be the same in the two cases and
(2) The demand must be grounded on the same cause of action and must be between the same parties in one and the same capacity which is the very restrictive approach of the civil law system.

The doctrine of *res judicata* would apply to a final judgment on the merits of an action which precludes the parties from re-litigating issues that were or could have been raised in that action.

Indeed the gap between the common law concept of *res judicata* and the civil law concept of *"autorité de la chose jugée"* is being reduced. In France, the Cour de cassation in an Assemblée Plénière of 7 July 2006 (Cass., ass. plén., 7 juill. 2006) rejoined the common law concept as reported and commented hereunder in **Dalloz, Répertoire de droit civil, chose jugée, notes 566, 567:**

> **566. …** La Haute juridiction, dans sa formation la plus solennelle, réunie sur renvoi de la deuxième chambre civile, rejette le pourvoi en posant le principe selon lequel « Il incombe au demandeur de présenter dès l'instance relative à la première demande **l'ensemble des moyens qu'il estime de nature à fonder celle-ci ».** Cette nouvelle jurisprudence, qui, avant l'intervention de l'assemblée plénière, avait été annoncée par un arrêt de la deuxième chambre civile retenant une conception extrêmement large de l'identité de cause (Civ. 2e, 4 mars 2004, D. 2004, 1024, obs. N. Fricéro), est depuis lors constant…
>
> **567.** Le revirement est total par rapport au précédent arrêt de l'assemblée plénière sur cette question, du 3 juin 1994 qui avait admis la possibilité d'actions successives pour obtenir la même chose dès lors que le fondement de la demande est différent. Pour parvenir à un

> tel résultat, l'assemblée plénière innove et modifie profondément les conditions pour que joue l'autorité de la chose jugée. En effet, elle ne recherche plus l'identité de matière litigieuse, comme l'y invite pourtant l'article 1351 du code civil, mais s'attache au comportement des parties à l'instance en créant de toute pièce une obligation de concentration des moyens. Les charges procédurales des parties sont par conséquent fortement alourdies : **tous les moyens susceptibles de fonder la demande devront être expressément invoqués dès le premier procès,** et l'oubli du moyen qui aurait pu être de nature à assurer le bien-fondé de l'action sera irrémédiable.

(i) <u>Same demand</u>

Article 1351 of the Civil Code makes provision for the demand to be the same. This does not connote that what is being prayed for should exactly and identically be the same. Indeed it should be looked at from a very pragmatic position. In **Dalloz, Répertoire de Procédure Civile, Dalloz, Chose Jugée, notes 510, 511:**

510. Pour savoir si la demande est la même que le contenu du jugement dont on cherche à opposer l'autorité, il est donc difficile d'adopter une démarche autre que purement pragmatique. En cela, la jurisprudence fournit de nombreux exemples qui peuvent être regroupés en plusieurs catégories allant du plus au moins évident.

511. En premier lieu, si le droit demandé est différent de celui sur lequel s'est prononcé le jugement, la nouvelle action s'avère recevable. Une action tendant à obtenir une indemnité pour perte de la chose louée n'a pas

le même objet que l'action en paiement du prix de location (Civ. 1re, 4 juill. 1960, Bull, civ. 1, no 361)…..

Among the disputes referred to the Tribunal in 2007, Disputant claimed a reasonable increase in salary as from July 2000 or otherwise. This was numbered dispute 1(c). In his then Statement of Case and in support of that claim, he elaborated the following:-

"The Independent Committee was set up mainly to propose a compensation mechanism in salary adjustment with effect from the year 2000, (see para 6 of introduction). In the absence of a final report from the above committee, Mauritius Telecom offered a salary conversion to Heads of Sections effective 1 July 2002 as per above table instead of a salary increase as from year 2000. (Underlining is ours). *There has been no negotiation between Mauritius Telecom and Applicant or any member of the Union representing the Applicant, and no salary conversion was applied in the offer made to Applicant on 28 December 2004."*

The Disputant expatiated lengthily before the Tribunal the circumstances which according to him led to his demand for a salary increase as from July 2000.

In its determination on that particular issue the Tribunal held:-

"….

The Tribunal has examined all the evidence adduced and the submissions of both Counsel. One preliminary remark is that the dispute under paragraph 1 of the terms of reference has been drafted under paragraph 1(a) or alternatively under paragraph 1(b) or still alternatively under paragraph 1(c). This inevitably creates the impression that the Disputants do not know on which foot to stand and that whilst there is a 'claim' that the Disputants should be granted an increase in salary of Rs 10,000 with effect from 1 July 2002, the Disputants are also contending (though in the alternative) that they should be granted a reasonable increase in salary as from July 2000 or otherwise…".

"…

Under the alternative item 1(c) of the terms of reference, suffice it to refer to what Disputant No 1 wrote in his own letter (Doc P1). He was referring to item 3 of the terms of reference of the Independent Conciliation Committee which reads as follows:

"The Committee will consider a mechanism formula to cover salary adjustment with effect from year 2000." (underlining is ours).

He wrote the following:

"It is understood that this substantial increase in salary effective as from July 2002 and offered in December 2004 under the "Implementation of New Salaries, Terms & Conditions of Employment" for Managerial Cadre, has been given in lieu of item 3 of the terms of reference."

Thus, even Disputant No 1 conceded that no increase had been given as from the year 2000 and that the "substantial increase" was effective as from July 2002. In Doc P1, he even mentioned that Head of Sections were

> granted an increase in their salaries starting from Rs 9000 effective as from July 2002. The Tribunal is at a loss to follow the arguments of Mr Sibartie and his counsel as to why the Disputants, who had not even been appointed Heads of Section should then be granted increases as from year 2000. Item 3 of the terms of reference of the Committee (which did not complete its assignment) by itself does not entitle the Disputants to an increase in salary. The Disputants had to show that an increase in salary was due to them as from the year 2000 and this they have failed to do. The increase of 20% mentioned by Disputant No 1 as having been given both to the non managerial grade and the Management grade cannot be the "reasonable increase" which the Disputants have in mind under dispute 1(c) the more so that it was in relation to an Award extended to Management grade. The Tribunal has no hesitation in finding that dispute 1(c) should be answered in the negative for both Disputants in the absence of any justification for the increase sought as from year 2000…" (underlining is ours).

The present matter springs from negotiations that took place following the request of the Supreme Court. Offers were made and some were accepted but it was all on a *without prejudice* basis. It is significant to note that the demand is still in relation to salary, albeit what is new now is a play on words that would allow the Disputant another bite at the cherry. Indeed what the Disputant added this time is the word 'increment' and a figure i.e. Rs 1700. *La demande* is still in relation to salary increase as from the year 2000, an issue which the Tribunal has already adjudicated upon.

Dalloz, Répertoire de droit civil, chose jugée, note 16:

« …

L'autorité de la chose jugée ne peut être attachée qu'à un jugement prononcé par une autorité judiciaire. La chose jugée ne porte que sur ce qui a été débattu et jugé (Civ. 2e, 10 juill. 2003, no 01-14.736, Bull. civ. II, no 237, Gaz. Pal. 9-10 juill. 2004, p. 9, obs,. E. du Rusquec)… »

Dalloz, Répertoire de Procédure Civile, Dalloz, Chose Jugée, notes 447, 448:

« …

447. Ensuite, la Cour de cassation fait appel à **la théorie de la chose implicitement jugée** pour tracer le champ précis du contenu décisionnel de la décision ; à cet égard, ce n'est pas tant l'étendue de ce qui est couvert par l'autorité de la chose jugée qui est en jeu, que l'étendue de la chose jugée stricte du terme, donc l'étendue des effets substantiels du jugement… On peut également considérer que la décision qui rejette une demande vaut rejet de toutes les demandes qui ne sont que l'accessoire, telles les demandes d'intérêts moratoires, de capitalisation de ces intérêts ou d'exécution provisoire (A PERDRIAU, article préc.).

448. Cette deuxième utilisation de la théorie de la chose implicitement jugée est parfois qualifiée de la « chose virtuellement jugée », car il s'agirait de reconnaître autorité, non pas aux antécédents logiques de la décision, mais à ses suites nécessaires (S. GUINCHARD et F. FERRAND, *op cit.,* no 223). Force est toutefois de constater que la Cour de cassation fait indistinctement appel à l'implicitement jugé dans ces deux séries de cas… »

We are satisfied that the demand in the present case is similar to the demand made before the Tribunal and which was not granted.

(ii) Same cause of action

This requirement should be met for a plea of *res judicata* to succeed whereby the cause of action has to be similar or identical. "Cause of action" is succinctly described in **Dalloz, Répertoire de procedure civile, chose jugée, § 2 Identité de cause, note 531:**

« …

531. En droit processuel comme en droit des obligations, la cause est une notion complexe. Si l'objet est le « quoi » de la demande, **la cause en est le « pourquoi ».** La cause peut alors de manière simple, être définie comme **le fondement juridique de la prétention...»**

A comparison between the referral emanating from Ministry of Labour, Industrial Relations and Employment and the present referral from the Commission for Conciliation and Mediation reveals that the present action is based on the same "cause of action" as what was before the Permanent Arbitration Tribunal namely a salary increase as from the year 2000.

We find it apposite to refer to what was held inter alia in **Labavarde M. R & Ors v Nam Cam A.D.D & Ors [2013 SCJ 81]**:-

« …

to successfully invoke the presumption of *"l'autorité de la chose jugée",* the respondent had to establish the existence of the *"triple identité de parties, d'objet et de cause".* It is not disputed that the action in the first

case was in respect of the same object, namely, the same plot of land and that the parties were the same and acting *"en la même qualité"*. However, learned counsel for the appellants urged before us that the "cause" was not the same as in the previous case in that in the previous case the appellants were having their case on occupation and acquisitive prescription whilst in the present case they were staking their claim on ownership by title deed.
In our view, learned counsel for the appellants is confusing *"cause"* or *"moyens"*. In the previous case the parties had joined issue on the question of ownership of the land *in lite*. And the Court had, after hearing evidence on both sides, found that the respondents were owners by title and rejected the claim of the appellants that they were owners of the land by acquisitive prescription. The central issue in the present case also relates to ownership of the land – an issue which has already been decided in the first case. As rightly found by the learned trial Judge, the appellants could only claim to have found *"un moyen nouveau"*, not a new cause of action…»

Also, we find it apt to reproduce the following excerpt from **De Bertier de Sauvigny & Ors v Courbevoie Limitée & Ors [1955 MR 215]:-**

« …
It is not easy accurately to give the meaning of *"la cause de la demande"*. That is due to the necessity of keeping very distinct *"la cause de la demande"* and *"les moyens de la demande"*. *"Les moyens"*are the arguments and submissions which can be advanced in support of the claim. It stands to reason that a party could not start an action anew simply because he failed to present to the court all the arguments which were available to him at the time of the trial, so that the identity of *"moyens"*is indifferent; the presumption of *"l'autorité de la chose jugée"* may well apply, notwithstanding the non-identity of *"moyens"*. *"La*

cause" is the fact, or the act, whence the right springs. It might be shortly described as the right which has been violated.

We may here quote notes 1019, 1020, 1021 of Dalloz, Code Civil Annoté, under article 1351.

1019. La cause, qui est le fait juridique formant le fondement direct et immédiat de droit qu'une partie fait valoir, ne doit pas être confondue avec les moyens, qui sont les éléments de fait ou de droit qui tendent à constituer la cause ou en démontrent l'existence ; de l'identité des moyens n'est pas, comme celle des causes, une des conditions nécessaires de la chose jugée.

1020. Bien que les moyens soient fréquemment assimilés aux causes secondaires ou éloignées, on doit limiter le sens du mot « moyen » aux simples développements ou arguments pour ou contre telle thèse de droit, pour ou contre telle cause proposée.

1021. Il est certain qu'une demande peut être repoussée par l'exception de la chose jugée, lorsqu'elle tend au même but qu'une autre demande antérieurement rejetée, bien que les moyens ne soient pas les mêmes... »

We also quote the following notes from **Encyclopédie Dalloz, Droit Civil Vol. III – Chose Jugée –**

189. Les moyens peuvent se définir comme des éléments qui démontrent la cause de la demande en justice afin que le juge fasse droit à la prétention ; peu importe qu'il s'agisse de moyens tirés des faits (moyens de fait) au déduits d'un texte ou d'une notion juridique (moyens de droit) ou mélanges de fait et de droit. Les moyens ne constituent pas un élément

de l'autorité de la chose jugée : si une modification de la cause de la demande permet de faire obstacle à l'exception de la chose jugée, il n'en va pas de même de la présentation de moyens nouveaux.

190. Il est souvent difficile d'établir une distinction entre cause et moyens, ce qui explique les incertitudes de la jurisprudence lorsqu'il s'agit de déterminer l'exacte étendue de la chose jugée dans des domaines variés. En fait, il y a entre la cause et le moyen plus « une différence de degré que de nature… »

(iii) <u>Same parties acting in the same capacity</u>

This requirement has remained constant and has been re-affirmed in **Dalloz, Répertoire de Procédure Civile, Dalloz, Chose Jugée, note 621:**

« …
621 s. *Identité des parties.* – L'autorité de la chose jugée s'impose aux parties. Et si la décision à laquelle cette autorité est attachée peut être remise en cause, ce n'est que par l'exercice des voies de recours. Il ne peut être intenté un même procès opposant les mêmes parties, ayant le même objet et la même cause que le précédent (Civ. 2e, 25 févr. 2010, no 08-21.718)…. »

As far as the parties are concerned it is clear from a comparison between the present action and the one lodged before the Permanent Arbitration Tribunal in 2007 that the same parties are in arbitration and in the

same capacity. The Plaintiff was suing as an employee of Mauritius Telecom at least on the referral date and the Defendant is being sued as employer.

There is no qualm that this requirement has been satisfied.

(iv) <u>Consequences of no appeal</u>

The decision of the Permanent Arbitration Tribunal was initially challenged on judicial review but the application was eventually withdrawn. Had there been any defect in the Award, failure to proceed with the judicial review makes the decision final and cures any defect in virtue of the doctrine called *phénomène de "purge des vices" which has been aptly described in* ***Dalloz, Répertoire de procédure civile, chose jugée, note 230:***

« …

230. La Cour de cassation décide fréquemment que « l'autorité de la chose jugée s'attache aux jugements qui **n'ont fait l'objet d'aucune voie de recours, quels que soient les vices dont ils sont affectés »** (Com. 14 nov. 1989, Bull. civ. IV, n° 289, JCP 1990 IV. 14), ou que « toutes les dispositions d'un jugement quel qu'en soit le mérite, acquièrent l'autorité de chose jugée » (Civ. 1re, 14 juin l966, Bull. civ. l, n° 363), ou encore, que « le principe de l'autorité de la chose jugée est général et absolu et s'attache, même aux décisions erronées » (Civ. 1er, 22 juill. 1986, Bull, civ. l, n° 225…Crim. 28 nov. 2000, Dr. pénal 2001, n° 40; *adde*: **C. ATIAS,** L'erreur grossière du juge, D. 1998. Chron. 280). Il s'agit du phénomène de "purge des vices"… »

Also, **Dalloz, Répertoire de droit civil, chose jugée, notes 55, 58 :**

« …

55. Un jugement est rendu «sur le fond », et a en conséquence autorité de chose jugée, toutes les fois qu'il met fin à une contestation de telle manière que le juge est dessaisi de la question qu'il a tranchée (C. pr. civ., art. 480 et 481). Il importe peu que la contestation résolue porte sur le principal, une exception de procédure, une fin de non-recevoir ou tout autre incident, l'autorité de la chose jugée s'attachant à toutes décisions statuant définitivement relativement à la contestation que le jugement a tranché.

58. Un jugement sur le fond devient « irrévocable » lorsqu'il ne peut plus être remis en cause par l'exercice d'une voie de recours, ordinaire ou extraordinaire. Cependant, un tel jugement n'en acquiert pas moins autorité de la chose jugée « dès son prononcé » (C. par. Civ., art. 480, al. 1er), même s'il peut être attaqué par une voie de recours (Civ. 7 juill. 1890, DP 1890. 1. 301; Req. 31 déc 1935, DH 1936. 117; Soc. 29 nov. 1956, Bull. Civ. IV, no 877; Com. 23 févr. 1970, Bull. Civ. IV, no 68). Aussi l'autorité de la chose jugée s'attache-t-elle aux jugements qui n'ont fait l'objet d'aucun recours, quels que soient les vices dont ils sont affectés… »

The Tribunal concludes that the plea in *limine litis* with respect to *res judicata* and *autorité de la chose jugée* has been well taken. The Disputant is not entitled for arbitration again on an issue which had already been canvassed before and decided by the Tribunal and which demand was

rejected. There is thus *autorité de la chose jugée en dernier ressort* hence *res judicata.*

In the circumstances, we need not address other issues raised.

The present matter is therefore set aside.

(Sd) Rashid Hossen
(President)

(Sd) Ramprakash Ramkissen
(Member)

(Sd) Denis Labat
(Member)

(Sd) Georges Karl Louis
(Member)

Date: 22 November, 2013