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

AMEGATCHER, JSC

CIVIL APPEAL
NO. J4/08/2019

20TH MARCH, 2019

INFITCO COMPANY LIMITED ..... PLAINTIFF/RESPONDENT/RESPONDENT

VRS

FRIGO LIMITED ..... DEFENDANT/APPELLANT/APPELLANT

JUDGMENT

GBADEGBE, JSC: -

This is an appeal from the decision of the Court of Appeal. By its decision, the Court of Appeal upheld the trial High Court's order of dismissal of an application to dismiss the action herein on a point of law. The circumstances in which the appeal arises may be stated shortly as follows. For convenience, in these proceedings, the parties shall bear

the same designation that they bore in the trial court and accordingly the respondent herein shall be described simply as the plaintiff and the appellant herein as the defendant.

The plaintiff claiming that the defendant had breached its contractual undertaking to construct a cold store for him took out the writ of summons herein claiming a refund of the sum of US $250,000.00 which it considered as due out of an amount of US$ 400,000.00 which he had paid to the defendant towards the execution of the contract. In her defence to the action, the defendant averred among others that the action was statute barred. As the appeal herein turns on a process founded on the said plea, it is useful to refer to it in extenso in paragraph 11 of the statement of defence filed by the defendant to the action. By the said pleading, it was averred thus:

"The Defendant says that the Plaintiff's claim is statute barred."

Subsequently, the plaintiff filed a reply in which he denied the said plea; the said process was filed in the registry of the trial court on June 12, 2015. Certain other steps were pursued in the matter which would be referred to in the course of this delivery in so far as they have a bearing on the issues to be resolved in the instant appeal. Since the proceedings herein is concerned with the defendant's aforesaid application, we turn our attention at once to the said process that was filed on November 17, 2015.

The said application was heard by the trial court and dismissed; the defendant claiming to have been aggrieved with the said ruling appealed to the Court of Appeal. The defendant's appeal suffered a dismissal and we are now faced in these proceedings with a further appeal to us.

As the parties to the proceedings herein having filed their respective statements of case and the matter adjourned for judgment, this delivery is directed towards the resolution of

the questions arising for decision in the matter. Having read the record of proceedings and considered the written briefs submitted to us by the parties, the critical question that in our view comes up for consideration is whether the application on which these proceedings are based comes within the scope of Order 33, r5, of the High Court (Civil Procedure) Rules, CI 47 under which the defendant purportedly filed his application. Before proceeding further, it is observed that although this question was not raised by either party, we think that it is of importance to our trial processes and deserves some consideration as when properly utilized it serves as a useful case management technique in our efforts to expedite justice delivery. A positive resolution of the question posed will enable us to proceed further to consider the appeal herein substantively in terms of the grounds of appeal. A negative resolution of the said question, however, will preclude us from inquiring into the grounds of appeal as its effect is that the application was improperly constituted. As indicated, the determination commences with the nature and or scope of Order 33 applications.

In the heading of the body of the motion paper filed on November 17, 2015 before the trial High Court, the defendant demanded from the court "MOTION ON NOTICE FOR AN ORDER TO DISMISS THE ACTION: ORDER 33 RULE 5)".

For a better understanding of the powers conferred on the trial court under the said rule, reference is made to the relevant rules of Order 33 and for this purpose, rules 3 to 5 of the said order may be alluded to.

> *"3. The Court may order any question or issue arising in any cause or matter whether of fact or law, or partly of fact and partly law, and raised by the pleadings to be tried before, at or after the trial of the cause or matter and may give directions as to the manner in which the question or issue shall be stated.*

4.(1) In every action, an order made on an application for directions shall, subject to any law, determine the place and mode of trial, and may be varied by a subsequent order of the Court made at or before the trial.

(2) In an action different questions or issues may be ordered to be tried at different places or by different modes of trial and one or more questions or issues may be ordered to be tried before the others.

(3) The references in this Order to an application for directions include references to any application to which, under any of these Rules, Order 32 rules 4 to 9 are to apply with or without modifications.

5. Where it appears to the Court that the decision of any question or issue arising in any cause or matter and tried separately from the main cause or matter substantially disposes of the cause or matter or renders trial of the main cause or matter unnecessary, it may dismiss the cause or matter or make such preliminary question order or give such judgment as may be just."

In order to fully appreciate the point raised by us, we make reference to a reply filed by the plaintiff on June 17, 2015 to the defendant's defence. Having filed the said process, by the requirements of Order 32 rule 2, an application for direction was to be filed within a month from the close of pleadings as set out in Order 11 rule 19. The effect of the filing of the reply is that there was a joinder of issues on the facts pleaded by the parties to the action including the plea of statute of limitation. This being the case, the defendant's obligation when the plaintiff failed to take out the application for directions was either to apply to dismiss the action or to apply for directions: See: Order 32 rules 2 and 3 of CI 47. As the plea of statute of limitation was denied by the plaintiff in paragraph 6 of his reply, there was no right in the defendant to have taken out an application for the trial of a preliminary point of law; his obligation was to either apply for

directions or wait for the plaintiff to do so and then seek an order at the hearing of the directions for the consideration of the court under order 33 rule 3 for the separate trial of the issue of limitation as that point in time there were other issues raised on the pleadings for trial. The case, it seems had by effluxion of time having regard to the state of the pleadings moved beyond an application being flied simply under Order 11 rule 8 for determination under Order 33 rule 5. In the circumstances, the issue of limitation could only have been determined by a full-scale trial or an order for separate trial under Order 33 rules 3 and 5.

At the stage of the proceedings that the defendant filed the application relating to the statute of limitation, the court was required to determine which of the rival factual versions put up by the parties on the statute of limitation was true, was it that the action was barred or it was within time? The determination of this question takes the matter outside the determination of a point of law and rendered it one for the trial of a preliminary point of law. Whiles the former use of the term refers to arguments on objections to pleadings such as that it discloses no reasonable cause of action in which the facts are not in dispute, the latter use of the term refers to a point of law which though raised on the pleadings requires evidence to sustain it such as res judicata and or as in this case the question of limitation. It is the latter category of point of law namely, the trial of a preliminary point of law that Order 33 regulates. Again, unlike the determination of points of law which can only be exercised in plain and obvious cases, that involving the trial of a preliminary point of law is decided by the court through a trial in a manner directed first by the court. Writing on the differences between these two terms, the learned authors in Atkin's Court Forms Volume 23 at page 155, 2nd edition (1978 issue) state as follows:

> *"A preliminary point of law is a particular form of a preliminary question or issue in which the only question for the decision of the court is a point of law.*

The trial of a preliminary point of law must be distinguished from the determination of a point of law otherwise than by trial, for example, a determination that the pleading does not disclose a reasonable cause of action or ground of defence……"

And in such a case, the applicant does not apply to the court by a motion setting out what in his thinking the result of the trial of such a point is likely to be but as provided in Order 33 rule 3 must seek an order from the court for the trial of the point of law. When such an application is made to the court, it is the judge who determines if it is a point that has the likelihood of substantially disposing of the action and if so may make an order setting down the point of law for a preliminary trial. The order granting the application identifies the point of law and directs the mode of trial for the purpose of the preliminary trial. The applicant is not entitled as was unfortunately done in this case to indicate what the result of the preliminary trial would be; it is the function of the judge after trying the point of law to decide if the action may be dismissed or judgment entered accordingly. Although the authorised rule was earlier on referred to, reference is again made to it for emphasis. By Order 33 rule 5 it is provided as follows:

"Where it appears to the Court that the decision on any question or issue arising in any cause or matter and tried separately from the main cause or matter substantially disposes of the cause or matter or renders the trial of the main cause or matter unnecessary, it may dismiss the cause or matter or make such other or give such judgment accordingly."

The application of the defendant quite clearly was not within rules 3 and 5 of the Order in many respects. First, it was made in a form which had unfortunately determined the mode of the trial of the point of law contrary to rules 3 and 4 of the order. By rule 3, the Court is required to carefully formulate the point of law or fact in issue and also the form that the trial of the said question will take. See: (1) Ofei Kweku Mante (Substituted by

Reverend Alex Aryeequaye) v Mike Similao and Others, an unreported judgment of the SC dated May 11, 2017 in Suit Number J4/10/2017. Secondly, it is the judge who after the hearing depending on how it is determined reaches the decision on whether or not the action should be dismissed or judgment entered accordingly. As the application failed to satisfy any

of the essential pre-requisites for the order of the trial of the preliminary question relating to the statute of limitation, the application was essentially an ordinary motion in the cause authorised by Order 19 rule1 and thus irremediably an incompetent process. Even considering it as an application under Order 11 rule 8, it suffered from substantial and procedural defects as the defendant sought to prove the question of limitation by reference to affidavit evidence contrary to the settled practice of the court in cases where objections are taken to pleadings under the Rules of Court.

We wish to observe that it is important for trial courts to uphold the provisions contained in the Rules. This can only be done when the rules are looked at sequentially, as for example when in the matter before us a reply was filed to a statement of defence in which the crucial facts on which the plea of limitation is based in denied then as a matter of law, the facts constituting the said plea cannot be determined without a trial subject to orders that the court may make under Order 33 rules 3 and 5. As stated earlier in the preceding paragraph, objections on pleadings taken under Rules of Court cannot relate to disputed facts. See: (1) Apenteng and Others v Bank of West Africa and Others. [1969]1 GLR 196, (2) Windsor Refrigerator Co Ltd v Branch Nominees Ltd [1961] 1 All ER 277. Accordingly, the application to dismiss the action filed by the defendant was improperly constituted and rendered the proceedings founded thereupon a nullity. Had the learned trial judge adverted his mind to the fact that the application before him was filed long after the close of pleadings and indeed after the time allowed under the Rules for directions to be taken, he would have realized that it could only properly have been sought either at the hearing of application for directions under Order 32r,5 or subsequently by way of an application for further directions in the matter under rule 9 of

the Order. In our view, had the trial judge exercised the powers available to him in accordance with the Rules, he would in all probability have refused the application for the reasons herein before mentioned.

Having reached this view of the matter, we are precluded from attending to the grounds of appeal filed by the defendant before us. It is unfortunate to observe that the trial High Court acceded to an application which even a casual reading would have revealed was not within the scope of the enabling rule. Then there is the question concerning the sufficiency of the pleading by which the point of law regarding the statute of limitation was raised. In raising a point of law relating to the statute of limitation, the defendant was required to have done so distinctly by referring to the statute and the particular provisions on which he relied and the facts which entitled him to so plead; it is not sufficient to say simply as appears in defendant's paragraph 11 of the statement of defence that:

> *"The defendant says that the plaintiff's action is statute barred."*

Even in cases where the statement of claim or other defaulting pleading on the face of it appears that the action is out of time, the objecting party is under an obligation to distinctly and specifically refer to the applicable statutory provisions and also state the facts on which the point of law is planked. A careful reading of Order 11, rule 18, of CI 47 which is reproduced below renders the position tolerably clearer.

> *"A party shall in any pleading subsequent to a statement of claim plead specifically any matter, for example, performance, release, any limitation provision, fraud or any fact showing illegality*
> *(a) which the party alleges makes any claim or defence of the opposite party not maintainable; or*
> *(b) which, if not sufficiently pleaded, might take the opposite party by surprise; or*

(c) Which raises issues of fact not arising out of the preceding pleading."

As the question of limitation is not apparent from the statement of claim and the defendant failed in making the plea contained in his paragraph 11 of the statement of defence to specifically state the statutory provision and the facts from which the defence of limitation was derived from, the purported trial was on an incompetent plea. See: Miller v Attorney General [1975] 2 GLR 31. In the Miller case, Abban, J delivered himself on the point at page 36-37 in the following words.

> *"A point of law must be raised on the facts pleaded. Otherwise how can the court, at that stage of the proceedings and in the absence of those facts from the pleadings, determine whether or not the said preliminary point of law as raised is well founded. Order 25 r, 2 gives a party the right to raise a point of law by his pleadings. But, in my view, the material facts upon which the point of law is to be grounded must be clearly pleaded."*

There is no doubt therefore that the pleading on which the point of law was raised was incompetent and deprived the proceedings based thereon of any validity.

The question which we then have to address is that arising under rule 6(8) of CI 16 namely affording the parties the opportunity to argue the point raised by us. There is authority in the court in situations where the point raised by the court is clearly unanswerable not to detain its precious time to afford the parties an opportunity which will serve no useful purpose. See: (1) Akufo-Addo v Catheline [1992] 1 GLR 377; (2) Tindana v Chief of Defence Staff [2011] 2 SCGLR 732. In any case, a party who takes out a process of court under a particular rule is obliged to satisfy the court that the application is within the scope of the enabling provision. There is no doubt in our mind that the course of proceeding had in this court will better serve the need for quality and expeditious justice delivery as by our decision the action has to be remitted to the trial

court. Further, it is hoped that this decision will provide future guidance to trial judges in our common endeavour to expedite the trial of cases. It is observed that our courts must be alert to the creeping practice of allowing preliminary points to be taken for trial without regard to their capacity to bring a substantial end to the matter. Such indiscretions add to the caseload of appellate courts and waste precious time which would otherwise have been expended on other cases and have the tendency of increasing the expenses incurred in litigation.

For the above reasons the appeal herein fails. The decision of the Court of Appeal is accordingly upheld although for different reasons.

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)

AMEGATCHER, JSC:-

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

N. A. AMEGATCHER
(JUSTICE OF THE SUPREME COURT)

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