IN THE SEYCHELLES COURT OF APPEAL

1. Mrs. Louise Legras — Appellants
2. Rosalind Sinon

v/s

Ebrahim Legras — Respondent

Civil Appeal No. 6 of 1986

Mr. K. Nathan for the appellants
Mr. J. Lucas for the respondent

Judgment of Sauzier J.A.

On the 29th September 1943 one Abraham Legras acquired a parcel of land situated at Machabée, Mahé. He died intestate on the 9th May 1965, his only heirs being his wife, the first appellant, and his son, the respondent, for half share each of his estate. The first appellant and the respondent thus became co-owners of the parcel of land for half share each.

On the 12th March 1985, by notarial deed, the [redacted] lant, a minor, a portion of the parcel of land amounting to 200 square metres for R.1000. The sale was not made through a fiduciary and without the participation of the respondent.

The respondent entered a plaint in the Supreme Court dated 6th December 1985 asking that Court

(a) to declare the sale dated 12th March 1985 to be null and void;
(b) to order the rectification of the land register to annul the said sale; and
(c) to award him R.5000 damages with costs.

After the entry of the said plaint, the parties to the sale signed a deed of rectification of such sale before the same notary on the 20th January 1986. The effect of the rectification was to make it clear that the transfer referred to the rights of the vendor in the portion of land.

The main defence to the plaint was that the first appellant as owner of a share in the property was entitled to transfer such share to whomsoever she pleased.

The learned trial Judge found that the first appellant acted unlawfully and without capacity when she sold her undivided share to the second appellant without the intervention of a fiduciary and without the consent of the respondent. He held that the sale dated 12th March 1985 to be null and void to all intents and purposes. He ordered the appropriate authority to cancel the said sale registered at the Land Registry. He made no award of damages but ordered the appellants to pay the costs of the case.

The appellants have appealed to this Court against the whole of the decision of the learned trial Judge on the following grounds which I reproduce verbatim:-

"1. That the Honourable Judge has erred in law in his findings that a co-owner cannot act independent (sic.) of other co-owners under article 818 of the Civil Code of Seychelles.

2. That the Honourable Judge has erred in law in holding, being unmindful of the law relating to the fiduciary as existed up till 1.1.1976, that the appointment of a Fiduciary in case of death of a person was a sine qua non in law.

3. That the Honourable Judge has erred in law in constructing (sic.) considering article 818 of the Civil Code of Seychelles in isolation [redacted] application permits a sale of his share by a co-owner to a third party."

Before I deal with the grounds of appeal I would like to make a few remarks about the type of action which has been relied upon in this case.

This action is one for nullity of a sale. It rests on the provisions of paragraph 1 of Article 1599 of the Civil Code of Seychelles, hereinafter referred to as "the Code", which runs as follows:-

"Article 1599

1. The sale of the property of another shall be null."

The former Article 1599 of the Civil Code of the French ran as follows:-

"Article 1599

La vente de la chose d'autrui est nulle: elle peut donner lieu à des dommages intérêts lorsque l'acheteur a ignoré que la chose rût à autrui."

The application of Article 1599 to this case appears clearly from the commentary contained in Jurisclasseur Civil (1438-1707) under Art. 1599. Paragraph 13 is particularly relevant.

> "13. - Dans ces divers exemples, il apparait nettement que le vendeur, bien qu'ayant certains pouvoirs sur la chose vendue, n'a pas celui d'en disposer. Il y a donc vente de la chose d'autrui."

French jurisprudence has interpreted Article 1599 and laid down the following principles:-

(a) The nullity declared by Article 1599 is only relative, that is, not absolute, and is not a matter of public policy (d'ordre public). (Op. Cit. Paragraph 4).

(b) The nullity of Article 1599 only serves to protect the interests of the buyer and its provisions may be invoked by the buyer only. (Op. Cit. Paragraph 73).

(c) Where a property held in co-ownership has been sold by one co-owner without the consent of the other co-owners the nullity of the sale only affects the rights of those co-owners who did not consent to the sale. It concerns the rights of the vendor as co-owner of the property. (Op. Cit. Paragraph 96, Bhoyraz & Ors. v/s Caniapen & Ors. 1955 M.R. 361, 363).

(d) However where the buyer can prove that :-

(i) He did not know the property to be held in co-ownership; and

(ii) He intended to buy the property as a whole,

then the buyer may have the sale of the whole property by the co-owner to be declared null and void.

(e) The true owner or the other co-owners may only enter an "action en revendication" and may not impugn the sale as null under Articles 1599. However co-owners may only set up an "action en revendication partielle", that is, in so far as their rights have been affected by the sale of the whole property. (Op. Cit. Paragraphs 77 & 103).

In this case, both in the defence and in the grounds of appeal, the point was not taken that the respondent could not avail himself of Article 1599 and ask the Court to declare the nullity of the sale, such claim being open only to the second appellant. That being the case and the point not being a matter of public policy (d'ordre public), this Court cannot raise the point proprio motu. (Vide. Op. Cit. Paragraph 77).

I fail to see what interest the respondent had in the case once the original sale of 12th March 1985 was altered by the deed of 20th January 1986. That deed preserved all his interests in the land in question.

I shall now deal with the grounds of appeal together.

On the 9th May 1965 when Abraham Legras died, the first appellant and the respondent became co-owners by inheritance for half share each in the parcel of land at Machabée which Abraham Legras had acquired in 1943 and which is hereinafter referred to as "the parcel of land". That co-ownership was governed by the Civil Code of the French up to the 1st January 1986 when the Code came into force. From thenon, it became regulated by the [illegible] by virtue of paragraph 5 of the transitional provisions contained in the Second Schedule to Ordinance 13 of 1975 by which the Code was enacted. Paragraph 5 provides as follows:-

> "5. Any rights of ownership to immovable property held in co-ownership at the commencement of this Ordinance shall be converted to money claims in accordance with article 817 of the Civil Code of Seychelles ....."

The first question which arises is, what happened to the individual right of co-ownership of the first appellant and of the respondent in the parcel of land? Was that right converted automatically into a money claim by virtue of paragraph 5 abovequoted? If that were so, the real right of co-ownership would have come to an end and co-ownership itself would have disappeared. To find the answer one has to refer to Article 817 of the Code which provides as follows:-

> "Article 817
>
> 1. When property, whether movable or immovable, is transferred to two or more persons, the right of co-ownership shall be converted into a claim to a like share in the proceeds of sale of any such property.

2. Paragraph 1 of this article regulates the exercise of the right of co-ownership. It does not affect the right of co-ownership itself."

Paragraph 2 of Article 817 specifically preserves the real right of co-ownership of each individual co-owner.

The conclusion therefore is that in spite of the apparent absolute provisions of paragraph 5 above quoted and of paragraph 1 of Article 817, the first appellant and the respondent remained vested with their individual real right of co-ownership in the parcel of land.

The second question which arises is, how does one reconcile the concept which I have just stated and the provisions of Article 834, with the apparent absolute provisions of Article 818? This will take us nearer to the solution of the issues raised in this appeal. Articles 818 and 834 of the Code provide as follows:-

"Article 818

If the property subject to co-ownership is immovable, the rights of the co-owners shall be held on their behalf by a fiduciary through whom only they may act.

(c) [illegible] in Article 834

In the case of the sale of a share by a co-owner to a third party, the other co-owners or any of them shall be entitled, within a period of ten years, to buy that share back by offering to such third party the value of the share at the time and dues of the transfer."

In the case of Michel v/s Vidot (No. 2) 1977 S.L.R. 214, 215, in which I adjudicated as a Judge of the Supreme Court, on deciding whether a co-heir could bring an action for "retrait" or retrocession on his own, without acting through a fiduciary, I stated as follows:-

"Article 818 of the Code provides that if ~~pro~~ property subject to co-ownership is immovable, the rights of the co-owners shall be held on their behalf by a fiduciary through whom only they may act. It is worthy of note that the preceding Article 817 regulates the exercise of the right of co-ownership. I am of the opinion that Article 818 only affects the exercise of the right of co-ownership in so far as it relates to the immovable property itself and does not affect the right of the individual co-owners to deal with their rights of co-ownership."

I have quoted the above passage because it reflects my present view of the law although the expression "the right of the individual co-owners to deal with

their rights of co-ownership" requires further clarification. The following remarks are relevant to a consideration of the matter:-

(a) The very wording of Article 818 shows that it was intended to apply to the whole property and to the rights of all the co-owners in it.

(b) Article 825 of the Code which lays down the functions and powers of the fiduciary is a pointer to the interpretation to be given to Article 818. The more salient provisions are:-

(i) "The functions of the fiduciary shall be to hold, manage and administer the property ..... as if he were the sole owner of the property".

(ii) "He shall have full powers to sell the property as directed by all the co-owners and if he receives no such directions to sell in accordance with theprovisions contained in articles 819, 1686 and 1687 of this Code and also in accordance with the Immovable Property (Judicial Sales) Ordinance Cap. 66, as amended from time to time."

It should be noted that the powers of administration and of sale refer to the property as a whole.

(c) There are instances in law where a co-owner may act on his own behalf or his property may pass, without the intervention of the fiduciary:-

(i) Article 821 provides in paragraph 1 that "the fiduciary or a co-owner" may decide to proceed to licitation.

(ii) Section 109(2) of the Immovable Property (Judicial Sales) Act, Cap. 66 provides that any co-owner may initiate proceedings for partition of the property. No provision was made for such a co-owner to act through the fiduciary although that Act was amended in several other respects in the Third Schedule of Ordinance 13 of 1975.

(iii) On the death of a co-owner his real right of co-ownership in land would devolve to his estate, either by will or by intestacy, without the intervention of the fiduciary. The estate itself would have to vest in an executor

as any succession consisting of immovable property, whether held in co-ownership or not. (Paragraph 4 of Article 724).

(d) The wording of Article 834 envisages the sale of a share by a co-owner to a third party. If the intervention of the fiduciary was required in such a case, Article 834 would have provided specifically for this (Contrast the wording of Article 821 paragraph 1). It should be noted that the sale of a share by a co-owner is not provided for under Article 825 referred to above which deals with the powers and functions of the fiduciary.

After anxious consideration of the various points which I have mentioned above, of the Code in general and of its enacting Ordinance 13 of 1975, I have formed the concluded opinion that the following principles may be safely formulated:-

1. Article 818 of the Code only affects the exercise of the right of co-ownership in so far as it relates to or involves the immovable property itself.

2. In spite of the provisions of paragraph 5 of the Second Schedule of Ordinance 13 of 1975 and of paragraph 1 of Article 817, the individual co-owners remain vested with their real right of co-ownership in the immovable property by virtue of paragraph 2 of Article 817.

3. Such real right of co-ownership, representing the share of the co-owner in the immovable property, may be transferred or transmitted to a co-owner or to a third party without the intervention of the fiduciary.

4. A co-owner may apply to the Court for partition or licitation of the immovable property or for retrocession of a share sold by another co-owner to a third party under Article 834, without the intervention of the fiduciary.

Although this is not a concluded opinion, I would like to suggest that the transfer of the right of co-ownership by a co-owner does not amount to the exercise of that right. The exercise of a right is the "employment" or "making use" of a right. For example,

mortgaging or leasing the right, or collecting the fruits of the common property and selling them. The transfer or transmission of the right is not an exercise of the right in that sense, it just amounts to the passing of the right to someone else.

In that perspective therefore, it could be argued that as there is no exercise of the right of co-ownership there is no conversion into money claims and therefore there is no need for the intervention of the fiduciary. However I do not base my concluded opinion on these considerations which I have mentioned only as a basis for further thought on this tricky problem of co-ownership.

Having come to the above conclusion I would allow the appeal on grounds 1 and 3 of the memorandum of appeal. I would setaside the judgment of the Supreme Court and would order the respondent to pay the appellants' costs in this Court and in the Court below as from the day after the filing of the defence.

A. Sauzier

A. Sauzier
Justice of Appeal