IN THE SEYCHELLES COURT OF APPEAL

CIVIL APPEAL NO. 8/92

JIM ADOLF HERMANN BOTEL .... APPELLANT

vs.

SIDNA AGNETTE M. RUDDENKLAU ... . RESPONDENT

JUDGMENT OF AYOOLA, J.A.

This is an appeal from two interlocutory rulings of the Supreme Court of Seychelles (Perera J.) made respectively on 3rd and 8th June 1992 in a suit between the appellant, (Plaintiff) and the respondent, (defendant). The two rulings pertain to an identical question namely: whether the unsworn personal answers of the respondent constituted beginning of proof rendering likely the fact alleged by the appellant such as would render oral evidence admissible against or beyond the document executed by the parties.

The appellant who is a German national resident in Germany commenced this suit against the respondent a Seychellois national ordinarily resident in Germany and married to a German national claiming among other things rescission of a contract of transfer dated 15th October, 1984 in so far as it concerned a parcel H1056 and to restore "things in the same State as they would have been if the contract had never existed". It is common ground that on 26th March 1980 the appellant purchased two parcels of land, described as H1055 and H1056 situate at Mahe Anglaise, Mahe. The appellant's case is that some time

...2/

in 1984 believing that the political situation in Seychelles was such that it would be in his best interest if his property in Seychelles were held by a Seychellois national instead of himself, he arranged with the respondent to come to Seychelles to sort things out for him and that it was intended that he would transfer parcels H1055 and H1056 to the respondent temporarily so she would hold the property on behalf and to the benefit of the appellant until "things got better in Seychelles" when the property would be returned to the appellant. As a consequence of the arrangement, the respondent came to Seychelles and ultimately a document registered in Register A37 No. 3966 was signed on 15th October 1984 by the respondent as purchaser and an agent and proxy for the plaintiff as vendor. That document shows inter-alia that the parties agreed that:-

> "In consideration of the sum of Five hundred thousand rupees R.500,000 which sum was paid by the purchaser to the vendor the receipt of which the vendor hereby acknowledges and consents unto the purchaser full and valid discharge thereof, the vendor hereby sells gives up, abandons and conveys unto the purchaser who accepts the same, a portion of land of the extent of 3.001 acres (12,160 square metres) situate at Mahe Anglaise, Mahe, registered as parcels H1055 and H1056 ..."

The appellant contending that certain actions of the respondent was an appropriation and conversion of the property to her own use and that she had thereby committed a breach of the arrangement whereby she would hold such property on behalf and for the benefit of the respondent, instituted this suit at the Supreme Court. The respondent filed and served a statement of defence denying the substance of the

...3/

appellant's case and averring that the parcels of land were transferred to her as "compensation" for a debt due by the appellant to the respondent's husband. She denied that such transfer was temporary.

The question with which the two rulings and this appeal are concerned arose in this way: After the respondent early in the proceedings has been examined pursuant to Section 167 of the Code of Civil Procedure on personal answers, an objection based on Article 1341 of the Civil Code was raised in the course of the evidence of the appellant to the question as to what he did about his property pursuant to his fear that they could be seized. His answer would have been oral evidence beyond and against the document of transfer of the parcels of land to the respondent. The learned Judge after hearing counsel on the objection, upheld the objection by his ruling of 3rd June 1992 on the main ground that in her personal answer the respondent's explanation for the transaction did not constitute an admission that the transaction was a fictitious one. He held therefore that there had there been no beginning of proof to render the facts alleged by the appellant likely.

The ruling of 8th June 1992 follows upon an attempt by the appellant in the course of his evidence to tender two documents (items 17 and 24). The admissibility of those two documents were objected to on the ground that they would constitute oral evidence in a written form. As noted by the learned Judge, item 17 is an undated letter alleged to have been written by the appellant to the respondent instructing the respondent to execute a fictitious contract on the basis that the sale price was paid in Germany

...4/

and item 24 is a letter dated 21st November 1986 alleged to have been written by the appellant to the respondent tending to establish that the intention of the parties was for the respondent to hold the property in trust for him. The learned Judge ruled that the two documents, both emanating from the appellant and not from the respondent, are self serving and that as such their production would be tantamount to leading oral evidence in a written form. He held that in the circumstances of this case, the two documents fall within the prohibition in Article 1341 and outside any of the exceptions thereto contained in Article 1347.

Article 1341 provides that:-

"Any matter the value of which exceeds 5000 Rupees shall require a document drawn up by a notary or under private signature, even for a voluntary deposit and no oral evidence shall be admissible against and beyond such document nor in respect of what is alleged to have been said prior to or at or since the time when such document was drawn up, even if the matter relates to a sum of less than 5000 Rupees.
The above is without prejudice to the rules prescribed in the laws relating to commerce."

Article 1347 provides that the rule contained in Article 1341 (and others not relevant to this appeal) shall not apply if there is writing providing initial proof, Such writing must be one which emanates from a person against whom the claim is made, or from a person whom he represents, and which renders the facts alleged likely. By an extension of Article 1347, the unsworn personal answers of the person against whom the claim is made or of his agent upon an examination of such person is treated as providing initial proof if it renders the facts alleged

likely. The trial court may hold that the answers render the facts alleged likely in certain circumstances.

The applicable rules are clear and have not been a subject of contention at the court below and on this appeal. The issue is whether the circumstances of the case fall within the extension of the exceptions provided by Article 1347. The learned trial Judge held that they do not. Counsel for the appellant by his four grounds of appeal and argument carefully presented in support thereof contend that the learned Judge erred in law in so holding. The main grounds on which the appellant's case rested on this appeal are that the respondent gave inconsistent answers and her admission in her unsworn personal answers that she did not pay any money for the property.

On a consideration of the question whether personal answers of a party provides initial proof, the issue of credibility of the person examined does not arise for consideration, nor is the question whether her answers are probative of the appellant's claim, or not. What comes for consideration is whether by her conduct on her examination on her personal answers, for instance, her inconsistency and her prevarication or outright refusal to answer or by the answers she gave, the court, on her personal answers, could come to a conclusion that the facts alleged by the appellant are likely. The learned Judge took a rather restricted view of the matter by not considering the inconsistencies and prevarications in the course of the examination of the respondent on her personal answers as well as what she admitted by her personal answers.

...6/

In my view, there is ample justification for the grounds on which appellant criticised the ruling. Inconsistencies and admissions are contained in the respondent's personal answers as the following passages from the record to which counsel called the attention of the court show:-

1. "Q. Were you coming to Seychelles to do any kind .....

   A I came to Seychelles, Mr. Botel with my husband had an arrangement of commission of which then it was at that time. He paid my fare to Sychelles, the tax and then ofcourse he did not receive a cent from me for that property. The money that he owes my husband this of course what he ....."

2. "Q. But did you pay any money for that land.

   A. Not at all.

   Q. What was this arrangement, how was the land transferred to your name with you not paying a single cent?

   A. In that case, you should ask Mr. Botel or my husband.

   Q. Do I understand you to say you did not know?

   A. I did know afterwards;

   Q. At that time you did not know

   A. No."

...7/

3. "Q. ..... You have said that there was an arrangement between your husband and the plaintiff, Mr. Botel which was made and which caused Mr. Botel to put the house in your name, is that correct?

A. That's right;

Q. At that time you did not know of this arrangement

A. No.

Q. And then you mentioned some commission which was paying?

A. Yes

Q. Was that commission the arrangement?

A. No. It was not the arrangement by the Commission, it was that Mr. Botel went bankrupt in Germany and I think this was the reason why he was afraid and then got these things to pay into my name as soon as possible then my husband later on refused."

4. "Q. As far as you know today, has your husband got this commission?

A. No.

These passages show unmistakably that contrary to what was contained in Exh. P21 signed by the respondent the appellant, according to her, received "no cent" from her. As to the arrangement with her husband which she mentioned, she shifted from a position that she did not know what it was about

..8/

until later, to an emphatic claim that it was an alleged commission; yet later, that it was not about commission but something related to the appellant's bankruptcy and finally on the question of commission she said her husband had not got the alleged commission contrary to the earlier stand in effect that the property was transferred in lieu of a commission owed to her husband. At every stage, she gave new or different versions of the alleged arrangement with her husband. That is inconsistency. Whatever version one considers, it is manifest that there was an admission that no money was paid to the appellant by the respondent.

In my judgment, on a careful consideration of the respondent's personal answers, those answers quite distinctly constitute a beginning of proof in writing rendering likely the contract which the plaintiff seeks to prove by oral evidence. The learned Judge should have so held and allowed the appellant to adduce oral evidence to prove facts alleged in his plaint and particularly in paragraphs 5 - 8 thereof.

For these reasons, I would allow the appeal and set aside the orders of the Supreme Court and overrule the objections of the respondent to the appellant adducing oral evidence in accordance with his plaint.

(E. O. AYOOLA)

Delivered in open Court in the presence of Mr Justice V Allman.

V. Allman
Judge
31/3/93.

In the Seychelles Court of Appeal

T.A.H Botel — Appellant

v/s

S A M Ruddenklau — Respondent

Valabhji with Shah for appellant

Georges for respondent

Judgement of Goburdhun J.A

Appellant brought an action before the Supreme Court seeking to rescind a sale by a deed of a portion of land at Mare Anglaise, Mahé to respondent. The consideration stated in the deed for the sale was R500,000. In his plaint appellant alleged that it was agreed between him and respondent that respondent would "hold the property on behalf and to the benefit of the plaintiff (now appellant) until things got better in Seychelles when the property would be returned to the plaintiff" (now appellant).

Appellant further alleged in his plaint that the consideration of R500,000. mentioned in the deed was not paid by respondent to him.

Appellant called the respondent on her personal answers and his Counsel argued before the learned trial judge that the personal answers of the respondent constituted a beginning of proof in writing and he should be allowed to prove his case by oral evidence.

After hearing Counsel from both sides the learned trial judge disallowed oral evidence. I do not propose to consider the second ruling of the learned judge disallowing production of two self-serving letters for reasons which are obvious. Appellant is challenging, the ruling of the learned judge disallowing oral evidence on several grounds which do not need reproduction.

In her personal answers respondent admitted that she did not pay any money for the land. When asked by Counsel for appellant: what was the arrangement, how was the land transferred to you with you not paying a single cent? Her answer was: 'In that case you should ask Mr Botel or my husband'. When asked by Counsel: 'Do I understand you to say that you did not know'. She answered: ' I did afterwards'. When pressed again: 'At that time you did not know'. She replied: 'No'. She continued in her answers to be reticent and vague.

Personal answers may constitute a beginning of proof in writing. This is what we read in Dalloz CCA. notes 179 and 189 under art 1347:

"*179. Les réponses des parties, dans un interrogatoire sur faits et articles bien que non signées d'elles, ont le caractère d'actes émanant de ces parties.*

189.....on peut considérer comme commencement de preuve par écrit les réticences de la partie."

The following extract from Planiol et Ripert at para. 1534 of Vol 7 of Droit Civil (2nd edition) is pertinent: Il ressort de décisions jurisprudentielles que le fait établi par le commencement de preuve doit rendre à première vue le fait allégué vraisemblable, que la vraisemblance n'est pas l'apparence de la vérité, mais ce qui est probable.....

A reading of the personal answers of respondent has satisfied me that she was untruthful, reticent, inconsistent and evasive.

Applying the above cited principles to the case I find that the personal answers of respondent render likely the alleged version of appellant and constitute a beginning of proof in writing opening the door to oral evidence.

I would accordingly allow the appeal and set aside the order of the learned judge disallowing oral evidence. I would order that the costs of this appeal be in the cause.

H Goburdhun J A

Delivered in open Court in the presence of both counsel by Mr Justice V. Alleear.

Dated at this: 31st day March 1993.

of

V. Alleear
Judge
31/3/93