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IN THE SEYCHELLES COURT OF APPEAL

Casino Des Seychelles Ltd.
(Rep. by Mr. Paul Lewis) ... ... Appellant

V.

Compagnie Seychelloise de Promotion Hoteliere (PTY) Ltd. (COSPRO) ... ... Defendant

Civil Appeal No. 2/94

BEFORE:

H. GOBURDHUN .... PRESIDENT

A. M. SILUNGWE .... JUSTICE OF APPEAL

E. O. AYOOLA .... JUSTICE OF APPEAL

Mrs. M. Twomey for the Appellant

Mr. J. Renaud for the Respondent

JUDGMENT OF AYOOLA J.A.

(Delivered on Day of 1994)

This is an appeal from the judgment of the Supreme Court (Perera J.) which in effect gave possession of premises situate at Beau Vallon Bay Hotel and known as Casino Des Seychelles to the respondent ("COSPRO"). The matter came before the Supreme Court on an application by the respondent (then applicant) for writ habere facias possessionem.

The application is a procedure for recovery of possession by summary judgment. It is a procedure to be watched jealously and adopted with circumspection. It is a hard thing to shut out a defendant from defending and the

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jurisdiction to order possession by such summary judgment should only be exercised when it is clear that the defendant has no real defence. In appropriate cases, the procedure is no doubt beneficial. It avoids the delay that occasions injustice when the person in possession has no real defence to the applicant's claim for possession.

The basis of the respondent's application in the Supreme Court as disclosed in the application and the supporting affidavit, in a nutshell, is that the applicant, a Non-Seychellois company, granted a lease by the respondent of the premises in question solely for the purpose of running a casino has been refused licence to run a casino by the relevant authorities upon expiration of a licence for 10 years which it had. In consequence of the refusal of its licence the appellant could no longer carry out the functions for which it had a lease originally and, in any event, the appellant had no sanction granted it under section 4 of the Immovable Property (Transfer Restriction) Act (Cap. 96).

In its answer and counter-affidavit respectively to the application and the respondent's affidavit, the gist of the defence which the respondent sought to put up is that the matter of refusal of a licence to it was at the time sub-judice, that it is a statutory tenant, that it had a sanction by implication and that it is the owner of the premises by virtue of Article 555 of the Civil Code.

Putting the question of sanction at the forefront of his decision, Perera, J. rejected the contention that a sanction was not required and the alternative contention that there was an implied grant of sanction. He held that notwithstanding the possibility that the refusal of licence

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to the appellant might be set aside by the court on the applicant's application for judicial review, such event has no bearing on the lease of the premises because the respondent had no intention of renewing the lease and any lease would require the sanction of the Council of Ministers. He rejected the appellant's contention that it is a statutory tenant on the ground that a "statutory tenant is not one who overholds a lease contrary to the wishes of the tenor, but one who has an implied or expressed consent of the lessor to retain possession after the lease agreement is entered or the occurrence of an agreed event." Relying on Knott v. Green 1976 S.L.R. 139 he held that article 555 does not apply to a lessee who builds on the lessor's property and therefore the appellant could not remain in possession of the property on the basis of article 555. Having rejected all the contentions raised by the counter-affidavit, he held that the appellant had not disclosed a serious defence in his affidavit and ordered a writ habere facias possessionem to issue accordingly.

On this appeal, Mrs. Twomey, counsel for the appellant, argued that the learned Judge was wrong to find that the lease held by the appellant had expired on 30th November 1993 when there was no evidence that there had even been a written lease between the parties nor the expiration of such a lease. It was argued that the learned Judge misdirected himself in fact when he found that the lease in the case expired on 30th November 1993. It was pointed out that it was the licence which expired and not the lease. The passage which Mrs. Twomey has referred to as amounting to a finding is the learned Judge's statement that:

> "The applicant company avers that the lease in the instant matter expired on 30th Nov. 1993 and that they have no intention to

renew the lease."

It is evident that this cannot be regarded as a finding at all but a statement of the facts relied on by the respondent (then applicant). Although the affidavit in support of the application does not contain those facts, they were contained on the application itself. It was rightly pointed out by Mrs. Twomey both in ground 1 of the grounds of appeal and in the course of her argument that the affidavit evidence did not state that the lease had expired. However, although there was an oblique reference by the learned Judge to an unwillingness of the respondent to renew the lease, the dominant issue in the judgment was whether or not there was a valid lease.

The main issue for determination in this appeal is whether the Judge was right in rejecting the contention that by virtue of the Licensing Authority granting a licence there has been an "implied grant of sanction." That issue arises from ground 2 of the grounds of appeal which is as follows:-

> "The learned trial Judge was wrong to hold that there was no implied sanction to lease the premises and did not address his mind to the issues raised by the Appellant in his Answer and Counter-Affidavit namely that the Respondent could not rely on the allegation having been party to it."

It is evident that as between the parties there was a lease; that by virtue of that lease the appellant had been in possession of the premises for more than ten years at the material time; that it had been granted a licence for ten years by the Seychelles Licensing Authority to operate a Casino but at the time of the application the Licensing Authority had refused to grant it a licence, and, that the

appellant is not a Seychellois company and therefore could not hold an interest in land without sanction of the Council of Ministers.

Mrs. Twomey on these facts argued first, that the respondent having been a party to the lease and having put the appellant in possession for twelve years should in equity not be allowed to turn round to say that the appellant had no sanction; secondly, that notwithstanding that the appellant may not have an interest in land without a sanction, absence of sanction does not render the relationship of landlord and tenant created between the parties null and void; and, thirdly, that COSPRO being an "arm of Government" the state does not need to grant itself sanction.

By section 4(1) of the Immovable Property (Transfer Restriction) Act ("the Act")

> "A non Seychellois may not
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> (a) Purchase any immovable property situate in Seychelles or any rights therein ..... without having first obtained the sanction of the Council of Ministers."

It is not contended on this appeal that the section does not apply and it seems to have been conceded in argument that a transaction in contravention of the provisions of the section is not valid. What is contended is that the respondent is not the appropriate person to raise non-compliance with that section and that in any event in the circumstances of this case sanction can be implied. The further contention that COSPRO being a Government agency sanction was not needed cannot rank as a serious contention. COSPRO, by all showing, is a limited liability company presumably with shares. It is thus a separate personality from the Government.

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That COSPRO might be a body in which the Government has interests, seems to me not relevant for several reasons, first, prohibition contained in section 4 is against the non-Seychellois purchaser and not against the Seychellois vendor. Secondly, if Government interest in the vendor is to be an exempting factor, such would be spelt out in the Act. The appellant does not rely on any exemption and has not called our attention to any statutory provision that exempts it from obtaining sanction by reason of the other party being a Government Agency or a company in which the Government has substantive interests.

The appellant's contention that the respondent is not the appropriate person to raise the question of non-compliance is purportedly founded on the maxim: He who comes to equity must come with clean hands. The argument would have held some sway were the provisions of section 4 capable of waiver by the Seychellois vendor. Section 4 is not for the protection of a vendor but was enacted as a matter of public policy. Complicity by the vendor in contravening the provisions of the Act will therefore not make the transaction of sale of any right in immovable effective to confer any interest in the non-Seychellois. The appellant who relies on a right in the premises as against the respondent must in order to retain possession of the premises show that it had the necessary sanction without which the right to the premises cannot be complete. I would reject the contention that the respondent could not raise the issue of non-compliance with the Act. It is manifest, in my opinion, that the appellant, since he has not obtained the necessary sanction, cannot set up a lease to resist the respondent's claim to possession of the premises. Whatever rights have arisen between the parties by reason of the arrangement between them which they

both referred to as, and no doubt intended to be, a lease, to hold otherwise would render section 4 of the Act ineffective and ~~to~~ defeat the public policy underlying its enactment, which is to retain some degree of control over the sale of immovable to aliens or acquisition by them of rights in such. In my view the Act has a manifest object of public policy of such clarity to make any transaction of sale or transfer of right inchoate pending the granting of sanction pursuant to section 4. In Denning v. Edwards (1961) AC 245 the Privy Council considering The Kenya Crown Land Ordinance which made the consent of the Governor a condition for allienation of Crown land, held under the wording of that Ordinance that between the signing of an agreement of alienation and the Governor's consent to the alienation the agreement was not void ab initio but it remained inchoate pending the consent of the Governor. In the same vein, in this case, pending the granting of sanction by The Council of Ministers under section 4 the transaction between the parties must, put at the highest, remain inchoate and the appellant cannot claim any property rights thereunder notwithstanding that he had been in possession of the premises. It is in this regard that I would hold that it is inapt to describe the relationship between the parties as that of landlord and tenant although with the grant of a sanction that is what it would have ripened into. The appellant may probably have other remedies against the respondent for refusing to proceed with the transaction, but, in the absence of the necessary sanction, holding on to possession would not be one of those remedies.

Another branch of the appellant's argument on this appeal is that there has been an implied sanction. The discretion to grant a sanction is by section 4 that of

the Council of Ministers. The grant of a license to operate a Casino which the appellant relied on as basis of the alleged "implied sanction" is exercised by a different body, a Licensing Authority. It is a cardinal principle of administrative law that where the exercise of discretionary power is entrusted to a named body or officer another body or officer cannot exercise such power instead of the named body or officer unless the empowering statute so provides. The Licensing Authority cannot exercise the powers of the Council of Ministers under the Act. It will be absurd to hold that while an express exercise of a power by a body will be ultra vires, an act of that body could result in an implied exercise of that same power. I venture to think that what cannot be done expressly cannot be done by implication. Furthermore, Mr. John Renaud, counsel for the respondent, had argued that there could be no question of implied grant of sanction when no application for sanction had been made. I think he is right in his submission. I hold that the learned Judge was right in his conclusion that there is no merit in the argument that there has been an implied grant of sanction.

By reason of its not obtaining a sanction pursuant to section 4, the appellant cannot validly claim to hold a lease. The question whether the learned Judge was right in his description of a statutory tenant becomes merely academic. Where there is a prohibition of acquisition of interest in property until consent or sanction is obtained there cannot be any question of statutory tenancy arising. The law cannot prohibit the emergence of tenancy in one hand and on the other hand protect it, when the circumstances of prohibition remain. For section 12 of the Control of Rent Act (Cap 166) to be applicable there must be a lessee. The policy of the

Immovable (Restriction of Transfer) Act is to prohibit a non-Seychellois from becoming a lessee until sanction under the Act has been obtained. The cases of Latiff v. Sivasubramania (1944) MR 23 and Madee & Ors. v. Moutia & Anor. (1978) SLR 189 cited by the Counsel for the appellant in support of the contention that the appellant was a statutory tenant were decided in circumstances very much different from the present one. In both cases there was no express prohibition of the transaction. In Latiff v. Sivasubramania there was in fact and in law a tenancy which had expired and section 15 of the Immovable Property (Judicial Sales) Act (Cap 66) considered in Hadee & Ors. v. Moutia & Anor. (1978) SLR 189 has been described in the side note as relating to "voidable leases". That case pertains to a lease, which as Sauzier J said, (at p. 195) does not become "null and void" ipso facto but must be so declared. The logic in Sauzier J's judgment in Hadee's case is not difficult to comprehend. Simply put, as I understand it, it is that the tenant is of that status until the annulment of the tenancy and its annulment is assimilated to a termination of the tenancy. What Hadee's case decided cannot be of assistance to the appellant in this case in which the effect of section 4 is that the non-Seychellois cannot acquire any right in immovable property without sanction. Even if the definition of statutory tenant by the learned Judge is susceptible to criticism, I am not persuaded that he came to a wrong conclusion in holding that the appellant was not a statutory tenant. The Rent Act is a protective Act offering security to a category of tenants. The law, as I have already observed, cannot be interpreted in such a way as to protect what it prohibits.

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A third issue which it is contended the learned Judge should have held constituted a real defence is an alleged defence founded on Art 555 of the Seychelles Civil Code (the Civil Code). The issue was said to be raised in para. 3 of the answer to the application in which it was stated that:

> "..... the Respondent claims to be the owner of the premises in question by virtue of Article 555 of the Civil Code of Seychelles".

Rightly, in my view, the learned Judge held that Article 555 of the Civil Code does not confer ownership. On this appeal it has not been suggested that he was wrong to so hold. The substance of the argument of counsel for the appellant is that the learned Judge should have held that the appellant has raised a defence that he has a right of retention of the premises unless and until compensation is paid to it. It is argued that this defence arose from para. 7 of the counter-affidavit where it was stated as follows:-

> ".... the Respondent avers that it built the premises in good faith on the applicant's land."

In considering the effect of Art 555, the learned Judge said:

> "..... if he has built with the permission of the lessor, the court may at the expiration of the lease treat the lessee as a "Possesseur de bonne foi" and the lessor will have the option of making refunds.

This is a correct statement of the law. It is in accord with the principle stated in Knott v. Green (1976) S.L.R. 140 at 142.

In Samson v. Mousbe (1977) S.L.R. 158 Sauzier, J. was of the view that the law was correctly stated in Knott v. Green (supra). However Samson v. Mousbe (supra) went further

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to decide that it is for the lessee to decide whether or not to remove the construction on the leased land and secondly that a "tiers de bonne foi" who has made improvements to the land has a right of retention over the land until he is paid compensation in respect of such improvements. For this latter view French jurisprudence and the opinion of some authors were cited as authority. As to the former, I would be hesitant to hold that the lessee assimilated to a "tiers de bonne foi" has an option in the matter. In terms of Art 555 the election is that of the lessor who may retain the ownership of the things or compel the third party to remove them, but whose power in cases of "tiers de bonne foi" to which Art 555(3) applies has been limited in that he may not compel the third party to remove the things. He may permit the third party to remove them but his right is to retain ownership of them and compensate the third party. As to the latter, I hold the view that it is not necessary to decide in this case whether or not the appellant in the position of a "tiers de bonne foi" has a right of retention even if a right of retention exists in Seychelles law. The issue has not been raised before the Supreme Court and it will not be right, in my view, to pronounce on the issue at this stage without a full discussion of the true ambit of the right to retention if it exists.

It suffices on this appeal to hold that the defence of right of retention has not been raised, as it should have been, by the appellant's counter-affidavit. It is not sufficient for the appellant merely to claim to have built on the land in good faith. It must show further, by its affidavit, the circumstances which entitle it to compensation, such for instance, that the respondent has opted to retain the structure; that the value of the property has been enhanced

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and that the appellant has not been compensated to the extent of such enhancement despite claim to be so compensated. When an applicant applies for possession by the summary procedure of application for a writ habere facias possessionem and his affidavit shows prima facie entitlement to that writ, it behoves the respondent to such application to condescend to details in showing by his counter-affidavit that he has a real defence to the claim for possession. In this case, the statement that the appellant has built on the respondent's land in good faith does not per se raise a defence of right to retain the premises pending the payment of compensation, particularly when as pointed out by Mr. Renaud, counsel for the respondent, the appellant had not claimed any compensation. On the whole, I hold that on the issue raised before him, the learned Judge was right in holding that Art 555 does not apply to vest ownership of the property in the appellant, but I am unable to agree with his conclusion that Art 555 does not apply because alterations made by the appellant to the premises being a portion of the Beau Vallon Hotel does not fall within the ambit of Article 555. The ambit of Article 555 which includes "works carried out by a third party with material belonging to such party", is wide enough to include such alterations as the appellant might have done to the premises. Notwithstanding, however, that Article 555 may apply, the counter-affidavit has not shown that circumstances exist whereby Art. 555 could afford a real defence.

The last issue raised by counsel for the appellant related to the ruling of Perera J. on the application for a stay of execution given on 9th February 1994. From the grounds of appeal relating to that ruling (Grounds 7-8), it

is manifest that what the appellant had intended was to appeal from that ruling of Perera J. refusing to grant a stay of execution. The notice of appeal in this case shows that the appeal before this court is from the decision of Perera J. dated 3rd February 1994. That notice was filed on 4th February, 1994 and it obviously could not have been in respect of a ruling not yet given. In so far as there is no appeal before this court from the ruling of 9th February 1994 the grounds of appeal criticising that ruling are incompetent and go to no issue on the appeal that is properly before us.

Counsel for the appellant seemed to have been under the impression that the matter is covered by Rule 21(6) of the Seychelles Court of Appeal Rules 1978. By Rule 21(1) an application to this court, barring a few exceptions, may be made in the first place to a single Judge. By Rule 21(5) such application may be adjourned by the single Judge for the consideration of the Court. Rule 21(6) provides that:-

> "Any person aggrieved by a decision of a single Judge refusing an application who desires to have his application determined by the full Court under Rule 5 of this Rules, shall give notice of such desire orally or in writing to the Judge or to the Registrar within seven days after the decision complained of."

Rule 5 provides, inter alia, that if any Judge refuses an application for the exercise of any power as he may exercise as a single Judge of the Court, the person making the application shall be entitled to have his application determined by the Court.

An application for a stay of execution is an application which can be made to the Supreme Court or this Court (Rule 53).

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Whenever an application may be made to this court or to the Supreme Court, it should normally be made in the first instance to the Supreme Court (Rule 20). The source of the confusion in this matter is the failure of the appellant to observe this latter rule. The learned Judge should have struck out the application for stay of execution headed as an application before this court. Instead he determined the application apparently exercising his power at first instance as a Judge of the Supreme Court. Even if it could be held that Perera J. heard the application as a single Judge of this Court proceedings pursuant to Rule 21 (6) should not be by way of appeal but in the nature of presenting the same application for fresh consideration by this court.

In my view, this court cannot consider grounds 7-10, and it is futile to consider afresh the application for stay of execution since the appeal has been heard and is now determined and possession had already been recovered. For future guidance, I venture to profer the opinion that barring exceptional circumstances, while an application for a stay of execution is still pending before this court a situation in which this court would be met with a fait accompli should be avoided. While an appeal does not operate as a stay of execution, to levy execution while an application for stay is pending may render such application nugatory. Such should be deprecated.

It is to be noted that at the Supreme Court,Counsel did not address the court. This cannot be right. Although the proceedings were all based on affidavits, counsel should have been given the opportunity of addressing the court and

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expatiating on reasons in support of or against the issue of the writ. That done, the trial Judge would be saved the burden of searching unaided by counsel for what possible defences are disclosed by the affidavit. A situation which gives an impression that the Judge formulates the issues, argues out the issues all unassisted by counsel and decides those issues should be avoided.

Be that as it may, on all grounds properly raised and argued on this appeal the appeal must fail and I would dismiss it. The respondent is entitled to costs of the appeal.

(E. O. AYOOLA)
JUSTICE OF APPEAL

Read and delivered on 7-12-94