IN THE SEYCHELLES COURT OF APPEAL

TEX CHARLIE

V

MARGUERITE FRANCOISE

Civil Appeal No 12/1994

(Before H. Goburdhun, P., A. M. Silungwe,
E. O. Ayoola, JJ. A.)

Mr. C. Lucas for the Appellant
Mr. F. Bonte for the Respondent

Judgment of Ayoola, J.A.

This is an appeal from the decision of the Supreme Court (Perera, J.) whereby judgment was entered for Marguerite Francoise, then the plaintiff, for the sum of R53,000. In an action instituted by her against Tex Charlie, then defendant, she had claimed an order that the defendant vacate a house situate at North East Point in which the parties were cohabiting and allocate the house to her and her three children, or alternatively, to order that the defendant pays to the Plaintiff the equivalent sum of her half share in the said house.

At all material times the parties, both employed, were cohabiting as man and wife and have been so cohabiting for some time. There were four children but the defendant admitted paternity of only three of them. Sometime in 1988 the parties jointly agreed with the Seychelles Housing Development Corporation ("the corporation") to purchase a house which is new the subject-matter of this action ("the property"). On their contract with the corporation the two of them, described as purchasers, agreed with the Corporation to

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contributions, direct and indirect, towards the fulfilment of the agreement to purchase the property.

Perera, J. held the view which has not been challenged by any cross-appeal that "there was no evidence of joint ownership entitling the plaintiff to the presumption contained in Article 815 of the Civil Code." Art. 815 provides that:

> "Co-ownership arises when property is held by two or more persons jointly. In the absence of any evidence to the contrary it shall be presumed that co-owners are entitled to equal shares."

The corporation not having yet transferred the property to the parties, it cannot be said that he came to a wrong conclusion. Having stated, as the truth was, that the parties had lived in concubinage and that the plaintiff had no right to settlement of property, he held that the only remedies available to her would be an "action de in rem verso for compensation where one party had rendered domestic services and suffered an impoverishment of her or her patrimony and the other party has been unjustly enriched, and where there has been a "societe de fait" between the parties during their period of cohabitation, in which case one party could claim a share in the proceeds of such a societe upon its dissolution." Treating the plaintiff's claim on such basis he proceeded to make findings of fact as to the quantum of the plaintiff's contribution to the joint effort. He found: (1) that the loan repayments up to the date of the plaint have been made by the defendant by way of salary deductions, and (2) that at least from sometime in 1990 to April 1993 the plaintiff contributed her monthly salary of R2,000 for the maintenance of the family. Consequent on the latter finding, he held that the plaintiff had "therefore suffered an impoverishment

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"3. The Learned Judge erred in that he acted Ultra Petita in (a) determining the Plaintiff's half share to be more than half the total of the loan; (b) relying on grounds which were not pleaded and did not constitute part of the plaintiff's case."

Mr. Lucas, counsel for the appellant, has presented this appeal with scrupulous fairness to both parties. It is only because of the concessions he was prepared to make that a close consideration of the grounds of appeal becomes unnecessary. Nevertheless, credit will not be done to the painstaking preparation and presentation of this appeal by counsel if a few comments are not made on the merits of the appeal in relation to the grounds of appeal argued.

The basis of the plaintiff's case on the pleadings was that she had a half share in the house by way of her own contribution. It was on this basis that she sought the reliefs contained in the plaint which had been set out at the beginning of this judgment. It is manifest that all she sought was the entire property or, at least, the equivalent in money of half a share of the property. On a strict view of her case, once the learned judge had found that there was no property to share and that she had no marital status on which to found her claim for property settlement, that should have been the end of the matter. The system of civil justice in this country does not permit the court to formulate a case for the parties after listening to the evidence and to grant a relief not sought by either of the parties that such evidence may sustain without amending the plaint. In the adversarial procedure the parties must state their respective cases on their pleadings and the plaintiff must state the relief he seeks on his plaint.

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figure by the amount, also assumed, which the plaintiff would have spent for her own upkeep. It would have been reasonable to assume that half of R39,600 found due to the plaintiff would have been spent on her own upkeep, thus leaving a balance of R19,800 due to her, to which her direct contribution of R14,080 should be added to give a grand total of R33,880 as her entitlement.

The above figure was arrived at using the approach adopted by the learned judge but adjusted to take account of the plaintiff's upkeep. Mr. Lucas has suggested an alternative approach which is that the plaintiff would be entitled to half of all the payments made while the parties were living together in concubinage. Computing on that basis from 1990 to the end of April 1993 he arrived at a total sum of R31,548 inclusive of the direct payments of R14,080 which the plaintiff made. Along the line, in the course of this appeal, Mr. Lucas after a brief consultation with the defendant agreed to add R2,000 to this sum thus conceding a total sum of R33,548 to the plaintiff. It is clear that there is not much difference in what the defendant conceded and the figure which the judge would have arrived at had he taken into account what proportion of her expenses the plaintiff could be said to have used on her own maintenance.

I need only add that Mr. Bonte, counsel on behalf of the plaintiff, argued strenuously that the property should be valued and that the amount of liability still remaining should he deducted from the value and the balance shared equally between the parties. Not much headway could be made with this argument since there has been no cross-appeal from the

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In the Seychelles Court of Appeal

Tex Charlie

v

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CA 12/94

Judgment of Goburdhun P

I have had the privilege of reading in draft the judgment of my brother Ayoola. I agree with his reasoning and conclusion. I would reduce the sum of R53,680 appearing in the judgment to R33,548. No order as to costs.

H Goburdhun
Justice of Appeal

Judgment delivered in the presence of counsel

A. R. Perera
ORGS
10/5/95