

IN THE SEYCHELLES COURT OF APPEAL

MAUREEN DANIELLA CHANG-LENG

APPELLANT

VERSUS

OSVALDO DONISELLI

RESPONDENT

Civil Appeal No. 17 of 1997*(Before: Silungwe, Ayoola & Adam JJA)*

Mr. P. Pardiwalla for the Appellant

Mr. C. Lucas for the Respondent

JUDGMENT OF THE COURT*Delivered by Ayoola, J.A.*

This is an appeal from the decision of the Supreme Court (Amerasinghe J) entering judgment for the respondent in this appeal (plaintiff at the trial) against the appellant (then defendant) in the sum of SR906,023.93 with interest and costs.

In the amended plaint the respondent alleged that he at the request of the appellant, "advanced" money to the appellant to buy a "double storey" house at Ilot, Glacis, Mahe, and that it was agreed that the appellant "would accommodate" the respondent in a one floor apartment "in her house" until his death. The further agreement averred by the respondent was that the appellant would retain the property for her life time and thereafter, the appellant "cede the property" to the respondents grandchildren as evidenced by a Will dated 15<sup>th</sup> July 1993. The respondent further averred that he purchased a motor car for SR38,000 for the appellant for her use "to facilitate their living arrangement" and for his use whenever he required it.

The respondent pleaded an authentic deed whereby, it was averred, the respondent was granted use and habitation of the house for life from 1<sup>st</sup> July 1993. Despite requests by the respondent the appellant failed to take steps to enable the respondent, a non-Seychellois, to apply for the necessary sanction in terms of the Immovable Property (Transfer Restriction) Act (Cap 95) to enable



him to acquire the right of use and habitation. In para 9 of the plaint it was averred that:

“Meanwhile in the alternative the Defendant acknowledged receipt of money and undertook to refund the plaintiff the same, one year after the date of the land transfer dated 21<sup>st</sup> June 1993.”

The action instituted at the Supreme Court arose, as averred by the respondent, because the appellant in breach of her obligations under the agreement alleged, had retained the property for her own exclusive and personal use and occupation and had despite several requests failed to refund the money advanced to her. The respondent had on these facts claimed a refund of the money ‘advanced’ to the appellant, the value of furniture allegedly bought by him and put in the house, cost of motor car purchased for the appellant and moral damages.

The appellant on her own denied that she took an advance from the respondent but averred by her defence that the property in question was purchased in her name as a donation to her for services rendered and that the respondent paid the purchase price. She denied that any amount was refundable to the respondent. While admitting that there was an agreement for use and habitation as alleged by the respondent the appellant averred that she refused her consent to a sanction for good and valid reasons and that the respondent had breached the agreement in question, thereby extinguishing his rights. In the event, the appellant had counterclaimed for a rescission of the alleged agreement dated 17<sup>th</sup> July 1993 and for damages.

After having heard the evidence of the respondent and his witnesses and of the appellant the learned judge made several findings of fact the principal of which, for the purpose of this appeal, were as follows:-

- (1) “The plaint describes the said sum of money as an advance and the plaintiff in evidence calls it a loan. Plaintiff has not produced any evidence that the money was advanced by him with the understanding that the defendant returns same with or without interest. Further, documentary evidence of use and habitation by the plaintiff and the defendant’s rights being also restricted to the

enjoyment of the property during her life time as per last Will exhibit P4 are more consistent with a gift of money by the plaintiff for specific purposes than a loan.”

(2) “... the advance of money for several purchase was in fact a conditional gift to the defendant occasioned by the plaintiff's attempt to realise his ends as well as securing the interest of the defendant during her life time.”

From the evidence of the respondent at the trial it was evident that his case was based on the existence of a loan of money. For instance he was asked

“Q: If as you alleged that you loaned her the money you had sent from Italy, this was your testimony. Why would it be necessary to add you as signatory to recover that money.

A: Yes, that was the case ...”

Then later at page 78 of the record he said ;

“I told Mr. Valabhji in consideration of the loan with no interest I would like to have a right of living in the house which thing has been written on this.”

The question and answer that followed were thus:-

“Q: You told Mr. Valabhji that in return for the loan you wanted a right to stay in the house.?

A: Yes.”

Further cross-examined the respondent stated that he did not have a loan agreement drawn up because he had trusted the appellant. Earlier, the respondent had stated in the course of his examination in chief that he wanted to be reimbursed by the appellant as she undertook to do by a document Exh. P5 which contained an undertaking by the appellant “to refund the sum of SR860,000 upon the demand from Mr. Osvaldo Doniselli...”

From the findings made by the learned trial judge it was clear that he did not accept the respondent's case that the money received from him by the appellant was a loan. The appellant's case that the transaction was one of gift was not completely rejected by the learned judge but he went further to find a conditional gift which neither of the parties set up as his or her case.

That there is a difference between a gift and a loan is obvious. Article 894 of the Civil Code defines a gift in the following terms:

"A gift inter vivos is an act whereby the donor irrevocably divests himself of the ownership of the thing in favour of a donee who accepts it."

A simple loan on the other hand by virtue of Article 1892 of the Civil Code is:

"...a contract whereby one of the parties delivers to the other a certain quantity of things which are consumed by use on condition that the latter shall return to him as much of the same kind and quality."

There are exceptions to the irrevocability of gifts inter vivos, but a consideration of such exceptions is not relevant in this appeal.

What suffices for the purpose of this appeal is that the case of the respondent must stand or fall on his ability to prove the transaction on which he relied, namely a loan. The learned judge, while not accepting that the transaction was one of loan, proceeded to give judgment on the basis of a conditional gift which was not the basis on which relief was sought by the respondent and which was not the case set up by either of the parties. Where a party's case is formulated on the basis of a particular transaction and relief sought is based upon rights and obligations alleged to arise from such transaction, that party must prove the transaction in order to succeed. It is not open to the court to give judgment for a plaintiff who has failed to prove the transaction he relied on. A fortiori, it is not open to the court to give judgment for the plaintiff on the basis of a transaction which neither of the parties had set up. It is for this reason that the first ground of appeal canvassed by the appellant on this appeal must succeed. That ground reads as follows:-

“Having rightly come to the conclusion that the plaintiff had made a gift of money the learned judge erred in finding that such gift was subject to two conditions as the evidence does not support such a finding and, nor did the plaint disclose such conditions.”

It needs to be stated that a party who seeks to recover the subject matter of a gift upon due revocation of the gift, if such gift is revocable, must on the plaint allege the fact of the gift, circumstances of its revocation and the fact of its revocation. The relief such party would seek on the plaint would not rightly be for damages as sought in the present case.

Be that as it may, once the learned had found that the transaction was not one of loan, he should have dismissed the respondent's action. The question whether judgment should be given for the respondent on the basis of a conditional gift which none of the parties alleged should not have arisen.

It is not necessary to consider the further questions raised by the appellant on this appeal as to the validity of the conditions held by the learned judge to be conditions of the gift which he found or the question whether he misinterpreted Article 1146 of the Civil Code.

By her counterclaim the respondent sought a rescission of the contract embodied in Exh. P3- the use and habitation contract. The ground on which rescission was sought was that the appellant had breached the terms of the agreement by not respecting Clause 1 and 2 thereof. Clauses 1 and 2 read respectively as follows:-

“1. To live peacefully in the house allocated to him without altering the destination.

2. To have no right to give or rent his right to use and stay in the house conceded to him. These rights will be removed should he do otherwise.”

In regard to the grounds on which the appellant had sought rescission the learned judge said:-

"In respect of the allegations of conduct inconsistent with one sharing the same premises on the part of the plaintiff, it is only this defendant's testimony as against the plaintiff's denial of such conduct. In evidence before court she amplified the reasons as follows;

'he was not acting in a proper way that he should, he set fire on the house, he brought in a lot of rastas and a lot of women. He was under my responsibility and ..... He even brings people at night. I cannot sleep. The people he bring at night break everything, they steal everything ..... He brings Army Officers and he even brought in my sister who tampered with my telephone lines. He brought in an Army Officer with guns and when inquired about that he could not tell me why he was doing this.' The defendant made no attempt to substantiate the allegations by reference to specific occasions giving detailed account of the acts of the plaintiff and his guests. There is no doubt that the conduct of the plaintiff and his guests may have upset and disturbed the defendant but her oral evidence is extremely short of what could constitute unreasonable behaviour or conduct that could be deemed to be a threat to life and limb of any person, and serious enough to determine the contract."


Nothing has been usefully urged on this appeal by counsel for the appellant to lead to a conclusion that the learned judge erred in his comments. In the result, ground 4 of the grounds of appeal must fail. It is noted that the judge having found that the ground on which rescission was sought by the appellant has not been established ought to, but did not, dismiss the counter-claim. To rectify that omission an order of dismissal of the counter-claim is now made.

The result of the conclusions reached on this appeal is that the money transferred to the appellant by the respondent was not a loan and that assuming that the use and habitation agreement Exh. P3 is valid, it is open to

the respondent to claim whatever right he may be advised he has under the agreement.

In sum, the appellant's appeal against the judgment entered against him on the respondent's claim succeeds and is allowed. The judgment of Amerasinghe J given on 15<sup>th</sup> May 1997 is hereby set aside. In place therefor is judgment dismissing the plaintiff's claim. The finding of the learned judge that there was no sufficient evidence to justify a rescission of the use and habitation agreement Exh. P3 is confirmed. In the result the respondent's counter-claim is dismissed. The appellant is entitled to costs of the trial and of the appeal.

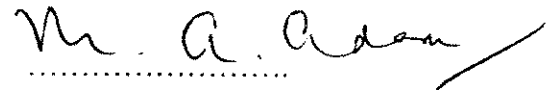
Dated at Victoria this 28<sup>th</sup> day of November 1997.



A. SILUNGWE  
JUSTICE OF APPEAL



E.O AYoola  
JUSTICE OF APPEAL



M. A. ADAM  
JUSTICE OF APPEAL

Handed down  
Adam JA