IN THE SUPREME COURT OF SEYCHELLES

IN THE MATTER OF:

ELFRIDA VEL - APPELLANT
V/S
SELWYIN KNOWLES - RESPONDENT

Civil Appeal No.41 and 44 of 1988

[Before: Goburdhun, P., Ayoola& Venchard JJA]

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Mrs. N. Tirant-Gherardi for the Appellant
Respondent – unrepresented

JUDGMENT OF THE COURT
(Delivered by Venchard, JA)

The Appellant made an application to be appointed as guardian of her minor children who were then aged 16, 14 and 4 years respectively. She also applied for the custody of the children. The Respondent also made similar applications to the court.

The Appellant also entered an action against the Respondent praying for the following orders:-

(a) "Order the defendant to leave the Plaintiff's house and grant sole occupation of the said house and parcel H1387 to the Plaintiff who is the lawful owner of the same;"

(b) "Order an injunction to restrain the Defendant from occupying the Plaintiff's property and from assaulting, threatening and intimidating the Plaintiff;"

(c) "An order to declare that the Plaintiff is the rightful owner of parcel H1387 with the house thereon;"

(d) "An order for declaration as to what share the Plaintiff has in the said property."

The Respondent was inops consilii in the Court below and in this court. He however gave a fairly elaborate and professional defence to the civil action.

The social services officer, the officer of the National Council of Children and the trial judge made laudable efforts to make the parties reach an amicable settlement as this would have been in the best interest of the children. The two elder children are grown up and were obviously devastated by the situation. Those efforts proved to be in vain.

The facts which are relevant for the purpose of determining the applications for guardianship and custody and the action in respect of the ownership of the land and house are not disputed.

The parties lived in concubinage for a period of over 17 years. Three children were born from their relationship. The children have been acknowledged (recognized) by the mother only and they bear the mother's surname. It is admitted that the Respondent is the biological father of the children. In October 1996 the Appellant moved out of the house and went to live with her mother. The children remained in the house with the Respondent. It is admitted that the house has adequate accommodation for the children who have expressed the wish to remain in the house. On the other hand the accommodation at the Appellant's mother's place is inadequate to house the children.

The Appellant purchased a plot of land (plot H1387) from the respondent's sister and she was registered in the Land Registry as the owner of the land. The funds for the purchase of the land were provided by the Respondent. The Appellant obtained a loan from SHDC for the purpose of building a house and the loan was secured by the plot of land and the building. The loan was serviced by monthly debits from her salary. She paid altogether the sum of Rs.71,000 but there was, at the time the case was heard, an outstanding balance on the loan.

Besides provision of the funds for the purchase of plot H 1387, the Respondent made substantial financial contributions towards the erection of the house on the land. He also participated in the building works. He carried the concrete blocks and the building materials required for the erection of the building. It was he who erected a stone retaining wall around the house.

The trial judge found that the parties were suitable parents. He appointed both of them to be the legal guardians of the children. He granted the custody of the three children to the Respondent with a right of access to the Appellant which right of access had to be agreed upon between the parties and the Social Services Officer.

As regards the plot of land H 1387 and the building thereon, the trial judge ordered that the Appellant be refunded by the end of April 1998 the amount of SR71,000 being the total amount of the loan repayment she had made and after receipt of that amount she would have to re-convey plot H 1387 to the Respondent and upon failure by her to do so the judgment of the court would be sufficient to effect the re-conveyance of plot H 1387 with the Registrar of Lands. He further ordered that the Respondent would forthwith assume responsibility for

the repayment of the SHDC housing loan granted to the Appellant. The trial judge had this to say with regard to the four prayers set out in Appellant's action regarding the property.

> "It follows that the plaintiff's first prayer cannot be granted because although parcel H1387 is registered in her name she never paid for it and it was registered in her name for expediency. Prayer (b) is refused too as the defendant is in lawful occupation of his property. The third prayer of the plaintiff cannot be acceded to because she is only the apparent owner of parcel H1387. Only prayer (d) is granted and the share of the plaintiff is estimated at SR71,000 which should be paid to her by the defendant by the date stated above."

It is, for the purpose of this judgment more appropriate to deal, in the first instance, with the issue of the ownership of plot H 1387. It is obvious that the orders made by the trial judge are ultra petita and have to be rejected. It has recently been held in the as yet unreported case of Charlie v. Francoise (1995) SCAR that civil justice does not entitle a court to formulate a case for a party after listening to the evidence and to grant relief not sought in the pleadings. He was of course at pains to find an equitable solution as to do justice to the Respondent but it was not open to him to adjudicate on issues, in particular the re-conveyance, which had not been raised in the pleadings. On the other hand, even if he could make an order for the Respondent to refund a capital sum, the amount of Rs.71,000 did not take into account the appreciation to the land and the building which has been valued at Sr.650,000/- a value

agreed by both parties. On the other hand, we entertain doubt as to whether there could be a substitution of debtors without the concurrence of SHDC which had not been put into cause.

The Appellant, as the registered owner of the plot H1387 is entitled to the declaration that she is the owner of the land. She is also deemed to be the owner of the house by virtue of the presumption enacted by Article 553 of the Civil Code. However, we cannot overlook the fact that the Respondent is entitled to compensation under Article 555 of the Civil Code by virtue of his contribution, both financial and otherwise, towards the purchase of the land and the erection of the building.

It used to be said that an immoral association would disqualify a claim where a financial contribution is made for the purposes of the immoral association (vide Payet vs. Larame [1987]). In the instant case the money provided by the Respondent for the purchase of the land did not have an immoral motive but was intended to provide proper housing for the couple and their children.

The jurisprudence in Seychelles has evolved in an equitable way to provide relief for parties who live in concubinage. It is now appreciated that living in concubinage is no longer regarded as sinful and it has been held in the case of Esparon vs. Monthy and others [1986] that where the two parties by their joint efforts acquired property for their joint benefit it would be inequitable for the holder of the legal estate (which is the case of the Appellant) to deny the other party a beneficial interest. It is true that in the case of Dodin v. Malvina (1990) after a review of the cases following the majority judgment in Hallock v. D'Offay (1988) SCAR) that a party living in concubinage was not entitled to any share in the property. However, in view of the readiness of the Courts to provide relief for "unjust enrichment" it is likely, on occasion arising, for the Courts to

reconsider the reasoning of Sauzier J. in his dissenting judgment in the Hallock v. D'Offay case where he held that the association of the parties who live in concubinage constitutes "une societe de fait".

The compensation to which the Respondent is entitled to receive from the Appellant as the legal owner of the plot H1387 carries a right of retention. Accordingly, the Respondent is entitled to remain in occupation of the house until the amount of compensation is determined and paid either by amicable settlement or judicial action. The right of retention of a person entitled to be compensated has been upheld by the Courts in Seychelles in the cases of Samson v Mousbe (1977), Cupidon v. Florentine (1978) and Dubignon and anor v. Germain and anor (1985). The Respondent is deemed to have such a right as he must be regarded as a "tiers de bonne foi". We are therefore unable to grant the Appellant's prayer for possession of the house.

We turn now to the issue of guardianship and custody of the children.

The trial judge erred in law when he granted the guardianship of the children jointly to both parties. It was not in dispute that the Respondent had not acknowledged the children and he was therefore not qualified to become the guardian even jointly with the Appellant. It was the latter, as mother of the children, who had to be appointed guardian by virtue of Article 394 of the Civil Code which provides as follows:-

> "1. Illegitimate children shall have a guardian in the same manner as legitimate children. If the father and mother of the illegitimate child have both recognised the child, the Court may decide which of them shall become guardian. If

> only one of the parents has recognised his child he shall be his guardian.
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> 2. If an illegitimate child has not been recognised he shall have his natural mother as a guardian as of right. The Court shall be entitled to grant the custody of a child to the mother, even if the father has recognised the child and acts as guardian.
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> 3. If the illegitimate child has no parent, or if the latter is unable to act, the guardian of the child shall be appointed by the Court.

That Article 394 has received judicial consideration in Seychelles in the cases of Medine, Ex Parte (1978), Morel v. Morel (1990) and Hoareau, Ex Parte (1991). In those cases the principle that the mother was legally entitled to be appointed guardian of a child as of right where the father has not acknowledged the child has been upheld.

As regards the issue of custody, it is universal practice that in the determination of such an issue the interest of the child is of paramount importance. The Court in Seychelles has adhered to this universal practice. In the case of Revera v. Sims (1989) it was held:-

(a) The interest of the child is of paramount importance;
(b) The Court should not lightly discard the views of the National council for Children.

In the instant case the trial judge had consulted representatives of Social Services and the National Council for Children. He found both