(17)

IN THE SEYCHELLES COURT OF APPEAL

MARIE ANGE GREGORETTI APPELLANT

versus

MONIQUE DELPECH RESPONDENT

Civil Appeal No: 25 of 1998

[Before: Ayoola, Venchard & Adam, JJ.A]

.....

Mr. R. Valabhji for the appellant
Mr. P. Boulle for the respondent

JUDGMENT OF THE COURT
(Delivered by Ayoola J.A)

The question that has arisen on this appeal is whether a co-ownership arises as between vendor and purchaser where the vendor sells a parcel of land to the purchaser subject to a reservation to the vendor of a portion of the land to be extracted by agreement of the parties from the land sold to the purchaser.

The question arose because Mr. Donald Delpeche, deceased, who was the owner of "a portion of land situate at Beau Vallon, Mahe, Seychelles, of the extent of one decimal point eight five four acres (1.854 acres) registered as Parcel V772 as per survey of Mr. Yvon Savy, Surveyor, dated the 25th May 1973 registered in Register A.35 No. 3570" had by an instrument dated the 6th day of November 1973 transferred to Mr. Gunther Bongers the said parcel of land subject to the reservation inter alia that:-

> "There shall be reserved to the vendor from the remaining portion of plot V772 lying to the West of

> the new road a portion equivalent in area to Plot V712 (a plot formerly surveyed under this parcel number that now incorporated in the larger area registered under Plot V772). The location of the area reserved to be by agreement between the parties."

It was made clear in the instrument of transfer that:

> "From the date of these presents and in virtue thereof, the Purchaser will have save as aforesaid, the right of enjoyment and disposal of the said plot of land hereby conveyed as he will think fit and proper and as sole owner thereof." (emphasis supplied)

By an instrument dated 6th March 1981 Gunther Bongers sold the land vested in him by the instrument earlier mentioned to Marie Ange Gregoretti. The instrument of transfer to Gregoretti recited the fact inter alia under "Reference to title deeds" that:-

> "The said Donald Delpeche made the reservation of the enjoyment of a small portion of land excised from the portion conveyed but being now deceased the consolidation has taken place. It is also stated in the vendor's title deeds that the previous vendor Donald Delpeche made the reservation from the remaining portion of Plot V772 lying to the West of the new road a portion equivalent in area to Plot V712 (a plot formerly surveyed under this parcel number but now incorporated in the larger area registered under Plot V772)."

Of the parcel of land sold to Gregoretti, he sold 400 sq metres to Mr. Sylva Ah Time and Mrs. Nicole Ah Time, who in turn, by their fiduciary sold and transferred the parcel sold to Ah Time, to Mrs. Mary Morel.

Claiming as executrix of Donald Delpeche who died testate on 26th January 1974 Mrs. Monique Delpeche, the respondent in this appeal, brought a petition against Mrs. Gregoretti and Mrs. Mary Morel, wherein she alleged that:-

1. The reservation made in the instruments of transfer to Bongers and Gregoretti respectively forms part of a parcel No. V1112 which is of the extent of 1683.

2. The estate of the deceased is, as a result of the above, entitled to a 36.14% share in Parcel No. V1112.

3. The Petitioner desires to proceed to a division in kind of Parcel V1112,

and prayed for a division in kind of land registered as Title No. V1112.

The main plank of the appellant's defence at the trial was that the respondent having no rights of title to parcel V1112 could not apply for its partition.

The learned judge who heard the case, Perera, J, proceeded on the footing that the only question to be decided was "whether the reservation made by Donald Delpeche in transferring parcel V772 to Bongers was the portion of land parcel V712 which he had previously sold to Raymonde Fernandez or whether it was another equivalent portion from the remaining portion of land." He seemed to have concluded that the reservation could not have been in regard to the parcel V712 already sold to Fernandez. Having come to that conclusion, he found that the "heirs of Donald Delpeche did not lose their right to a reservation of 608.2 sq meters, which by various sub divisions of Parcel V.772 is easily identified as a portion of Parcel V1112." The main question on this appeal arose because the learned judge thereafter proceeded on an assumption that there was co-ownership of the Parcel of land sold to Bongers. It does not

really matter whether it is described as portion of Parcel V772 or as Parcel V1112.

At the forefront of the arguments by Mr. Valabhji, learned counsel for the appellant, on this appeal is the submission that there could be no partition in kind when co-ownership was denied and that as the learned judge did not find there was any co-ownership as defined in law, the judgment was ultra petita and ought to be refused. Part of the submission of Mr. Boulle, learned counsel for the respondent, is that the respondent claims to be a co-owner of the land in question in consonance with Article 815 and 816 of the Civil Code. The use of the phrase "ultra petita" in the appellant's submission had been inapt.

Article 815 of the Civil Code of Seychelles ("the Civil Code") 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."

Article 816 of the Civil Code provides that:

> "Co-ownership inter-vivos arises when two or more persons acquire or become entitled to property on their own account jointly, or when a party conveys property upon more than one person jointly. Co-ownership arises mortis causa when property devolves, whether on intestacy or by will, upon more than one person jointly."

The proper approach when co-ownership inter-vivos is disputed is to construe Articles 815 and 816 of the Civil Code on their own terms and ask (i) whether property is held by two or more persons jointly either (a) by jointly acquiring the property or being jointly entitled thereto; or, (b) by the property being jointly conveyed to them. On that approach, it is

incumbent on the enquirer to examine the instrument of title relied on for the claim of ownership. Where the instrument indicates neither a joint acquisition or joint vesting of property; nor joint entitlement thereto there cannot be said to be a co-ownership. It may well be added that where land is subject to encumbrances and overriding interests in terms of the Land Registration Act such encumbrances and overriding interests do not make the person or persons for whose benefit they exist co-owners with the owner of the encumbered land.

In the present case, it is evident from the instrument of transfer of land by Donald Delpeche to Gunther Bongers that there was neither a joint acquisition or joint vesting of, nor joint entitlement to property. As was earlier noted the property was transferred to Bongers "as sole owner thereof." There was no co-ownership created in regard to that right of sole ownership vested in Donald Delpeche. The reservation contained in the instrument of transfer excluded from the grant the area reserved, the location of which is to be determined by agreement between the parties. Put at the highest, but without deciding or pronouncing on the validity of such, the reservation constituted a derogation on the grant to Bongers and may be, so held by Perera, J., an encumbrance on the transfer. However, such derogation or encumbrance did not have the effect of causing a co-ownership to arise inter-vivos as between Donald Delpeche or Bongers or between their privies or successors. It will be absurd if a sole purchaser of land who has paid for land subject to such reservation as in this case were to find that (i) his right to the land he bought can only be held by a fiduciary and (ii) his right is only a claim of money. Yet, that is the consequence that would arise by virtue of Article 818 of the Civil Code were we to hold that a co-ownership has arisen.

Partition of land is predicated on land being held in undivided shares. In this case since Delpeche and his heirs and Bongers and his successors in title were not co-owners of land, the question of partition

should not have arisen at all. It follows that the relief sought by the respondent was not available to her and it should not have been granted.

It is not for us to speculate as to or to suggest what relief, if any, may have been available to Delpeche or his heirs. The laws of Seychelles are comprehensive enough to ensure that for every right there is a remedy. Without saying that there is a gap in the law as regards remedies that may be available to the vendor who has made a reservation such as in this case, it suffices to point out that the equitable jurisdiction of the Supreme Court, preserved and emphasised by section 6 of the Courts Act, (Cap 52) is wide enough to ensure that an aggrieved person is not left without a remedy notwithstanding that "no sufficient remedy is provided by the law of Seychelles."

Be that as it may, for the reasons given, this appeal succeeds and it is allowed. The judgment of Perera, J, given on 28th May 1998 is set aside. In place therefor judgment is entered dismissing the respondent's (petitioner's) petition. The appellant is entitled to costs of the trial and of the appeal.

Dated this 4th day of ***December*** 1998.

E. O AYOOLA
JUSTICE OF APPEAL

L. E. VENCHARD
JUSTICE OF APPEAL

M. A. ADAM
JUSTICE OF APPEAL