IN THE SEYCHELLES COURT OF APPEAL

MARIE-CLAIRE VADIVELLO APPELLANT

versus

S. H. D. C. RESPONDENT

Civil Appeal No. 39 of 1999

*[**Before:** Ayoola, P., Pillay & De Silva, JJ.A]*

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Mr. A. Derjacques for the Appellant
Mr. J. Renaud for the Respondent

JUDGMENT OF THE COURT

(Delivered by De Silva, J.A)

The respondent (Seychelles Housing Development Corporation) made an application under Section 8 of the People's Housing Mortgages Act (hereinafter referred to as the Act) seeking a decree of possession of the property comprised in Parcel H2259 at Anse Etoile. The respondent granted a loan of SR59,700 to the appellant on 21st December 1992 and transferred the said parcel H2259 to the appellant by deed of transfer marked as exhibit P1. By exhibit P6 dated 21st December 1992 the appellant charged the same property to the respondent and agreed, inter alia, to repay the loan of SR59,700 in monthly instalments of SR600 together with interest at the rate of 3% per annum. The amount of the instalment was subsequently increased to SR1016 and the rate of interest to 8%. There was an old house on the land. The appellant requested the respondent to demolish the old house and to build a new one. The respondent has now built a new house. The aforesaid facts are not in dispute between the parties.

It is also common ground that the respondent sent two notices in terms of Section 8(1)(c) of the Act informing the appellant of the breach of the

conditions of the mortgage, namely, the default in the payment of the monthly instalments in respect of the loan. The first notice is dated 20th December 1996 (exhibit P5) and the second notice is dated 20th April 1998 (exhibit P4). Both notices sent to the appellant specifically stated that, unless the appellant pays the arrears set out in the notices within a period of 28 days, legal action will be taken to recover possession of the land. Since no payments were made by the appellant, the present application for a decree of possession was filed in the Supreme Court on 2nd June 1998.

While this application made by the respondent was pending in Court, the respondent accepted a letter of authorization dated 21st August 1998 (exhibit D1) from one Mr. Savy who was living in concubinage with the appellant. D1 has been signed by both Mr. Savy and the legal Counsel of the respondent. It is addressed to the Accountant of the National Sports Council where Mr. Savy was employed. D1 reads as follows:-

> *"I hereby authorise you to deduct the sum of SR1500 each month from my salary with effect from September 1998 towards the payment of my Housing loan to Seychelles Housing Development Corporation. My account number with the corporation is H.L. 4990 which please quote in all remittances. I also agree that this authorisation is not revocable unless agreed by the Corporation."*

However, by letter dated 7th September 1998 (exhibit D2) the authorisation given to make monthly deduction from the salary of Mr. Savy was cancelled by the respondent.

The principal submission of learned Counsel for the appellant was that there was no breach of the conditions stipulated in exhibit P6 because the exhibit D1 which was signed by the legal Counsel of the respondent had the

effect of modifying the conditions set out in P6. There was *"no breach"* on the part of the appellant but it was the respondent who unilaterally cancelled D1 by D2 and thereby prevented the appellant from paying the instalments due on the loan. Learned Counsel further contended that the breach, if any, of the terms in P6 was waived by the respondent by reason of the letter of authorisation, D1 which was accepted by the respondent.

In short, learned Counsel submitted that an application under Section 8(1) of the Act could be maintained only where "*there has been a breach by the borrower of a condition of the mortgage*" (Section 8(1)(b) of the Act) and that in the present case there has been no such "*breach*". It was further urged on behalf of the appellant that the respondent was wrong to cancel the letter of authorisation D1 because Mr. Savy was *"the common law husband"* of the appellant and the source of payment is not material at all. Finally, the Court was invited to exercise the equitable powers vested under Section 6 of the Courts Act.

It is not disputed that the appellant has not up to now paid any of the instalments due on the loan. The loan agreement was only between two parties, namely, the appellant and the respondent. The obligation to pay rested with the "*borrower*". As submitted by learned Counsel for the respondent, the expression "*borrower*" has been defined in the Act. The definition reads thus – *"Borrower means the mortgagor or chargor in respect of a housing loan."* The letter of authorisation D1 has to be read in the context of the provisions of Section 6(1) of the Act which read as follows:-

> *"The Corporation may require a borrower to authorise his employer, bank or other person to deduct sums in respect of housing mortgage repayments from his salary, wages, or other monies due to him and to repay those sums to the Corporation."*

Having regard to the definition of the term "*borrower*", we take the view that the respondent could not in law have agreed with a third party to discharge an obligation of the "*borrower*". Accordingly, we hold that the submission of learned Counsel for the respondent that D1 was not enforceable against Mr. Savy is well-founded. The Act provides sanctions against the "*borrower*" in the event of default and not against a third party. The contention advanced on behalf of the appellant that D1 modifies P6 is not acceptable, for D1 is contrary to the provisions of the Act. Moreover, the plea of waiver is not available in the face of express statutory provisions. A statutory body cannot validly waive its statutory rights in the manner exhibit D1 purported to do.

The Supreme Court (Perera, J.) was accordingly correct in its finding that the appellant "*has breached the condition of the agreement of the loan and hence the applicant Corporation is entitled to a decree of possession.*"

We have given our anxious consideration to the totality of the facts and circumstances of this case and the submissions made by Counsel for both parties. Section 10(1) of the Act provides inter alia that:-

> *"the grant of a decree of possession may be made either unconditionally or on such terms as to giving security or as to time of trial or otherwise as the Supreme Court may think fit." (emphasis added).*

The respondent is accordingly granted a decree of possession of the property comprised in Parcel H2259 at Anse Etoile, together with the buildings and plantations standing thereon, unless the appellant pays the respondent the sum of SR59,700 together with the entirety of the interest accrued on the loan to date within a period of one month from today.

The judgment of the Supreme Court is amended to the extent that the appellant is granted one month's time to pay the aforesaid sums of money due to the respondent. In the event of default the appeal stands dismissed. We make no order for costs.

E. O. AYOOLA	**A.G. PILLAY**	**G. P. S. DE SILVA**
PRESIDENT	**JUSTICE OF APPEAL**	**JUSTICE OF APPEAL**

Dated at Victoria, Mahé, this 13th day of ***April*** 2000.