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IN THE SEYCHELLES COURT OF APPEAL

GEORGES VERLAQUE	1ST APPELLANT
IDEA VERLAQUE	2ND APPELLANT

versus

GOVERNMENT OF SEYCHELLES	1ST RESPONDENT
THE ATTORNEY GENERAL	2ND RESPONDENT

Civil Appeal No: 8 of 2000

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

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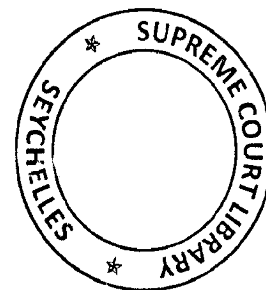
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Mr. P. Boulle for the Appellants

Hon. Attorney General - Mr. A. Fernando for the Respondents

JUDGMENT OF THE COURT

(Delivered by Ayoola, P.)

This appeal is from the decision of the Constitutional Court dismissing a petition brought on 24th September, 1999 by the appellants, Mr. Georges Verlaque and Mrs. Idea Verlaque, initially for orders for the 1st respondent, the Seychelles Government, to execute a deed of transfer of parcels of land PR2109 and PR2111 in favour of the petitioners; and, that in default of so doing within 1 month from the date of the judgment, that the said judgment be registered in the Land Registry to effect the transfer in title of a deed of transfer.

The 1st appellant Georges Verlaque was made executor and fiduciary of the heirs of the late Mederic Verlaque by an order of the Supreme Court made on 24th November 1992. He had brought the petition in that capacity. The 2nd appellant, Mrs. Idea Verlaque brought the petition in her own capacity. Sometime in 1980 a parcel No. PR595 formerly owned by Mederic Verlaque who died sometime in 1967 and on his demise was owned by Mrs. Idea Verlaque and heirs Mederic Verlaque

was compulsorily acquired by the Government of Seychelles under the Land Acquisition Act, 1977. Upon the coming into force of the Constitution of the Republic of Seychelles in June 1993 the appellants made an application pursuant to Section 14(1) of Part III to Schedule 7 of the Constitution within a period of 12 months from the date of coming into force of the Constitution in respect of Parcel No. PR595.

The appellants alleged by their petition that as a result of the application mentioned above the appellants and the 1st respondent embarked on negotiation with a view to the 1st respondent fulfilling its undertaking pursuant to Section 14(1) of the Constitution. The basis of the appellants' case in the Constitutional Court was that negotiations were concluded when the parties reached an agreement as confirmed by a letter from the 1st respondent dated 8th February, 1996. The terms of the agreement as alleged by the appellants were that the 1st respondent returned 2 parcels of land registered as PR2109 and PR2111 being part of parcel PR595 to the appellants while it undertook to pay compensation for retention of the rest of the land in the sum of SR408,000.00 inclusive of interests. By two instalments of SR200,000.00 and SR208,000.00 the 1st respondent paid the said sum of money respectively on 4th March 1996 and 18th September 1996. The proceedings before the Constitutional Court, according to the appellants, arose because the 1st respondent had failed to transfer the land it had agreed to return to the appellants pursuant to the agreement earlier mentioned.

The respondents' case was that there was no finality to the negotiation between the parties because the 1st appellant's appointment as executor was in respect of the land owed by the heirs at the time of his appointment on 24th November 1992 and not in respect of the estate of Mr. Victor M. Verlaque and because he had failed to obtain the consent of all the heirs to accept the offer made by the letter relied on by the appellants and to negotiate on their behalf. The respondents averred that "*since it*

was necessary to retain parcel 2111 for purposes of developing it and in the public interest, the Government continued to negotiate in good faith with the 1st Petitioner in respect of the retention of that parcel of land and payment of compensation."

In the course of the proceedings in the Constitutional Court it became apparent that the 1st appellant acting as executor and fiduciary for heirs Mederic Verlaque could not be a proper petitioner to enforce the rights of heirs Verlaque pursuant to section 14(1) of the Constitution, the reason being that by the time his appointment was made the property in question had ceased to be part of the estate of Verlaque and had become vested in the Government by virtue of the compulsory acquisition made in 1980 and by reason of the fact that as the law stood at the time of Mederic Verlaque's death there was a direct succession of the heirs who became co-owners. In the event the co-owners, nine in number, sought to join the petitioners as petitioners, but their application to be so joined was refused by the Constitutional Court. The petitioners successfully amended their petition by adding a prayer in the following terms:-

> "Declaring that the 1st respondent is in breach of S.14 of Part III to Scheducle 7 of the Constitution for having failed and refused to transfer Parcels PR2109 and PR2111 to the Petitioners."

The Constitutional Court (Perera, J., (Presiding) Juddoo and Karunakaran, JJ) dismissed the petition on its merits because they were of the opinion that contrary to the allegation that was the plank on which the petitioners' case rested, there had been no concluded negotiations. Perera, J reasoned that:-

> "... negotiations with a view to transfer back the lands had not reached a finality. The correspondence that followed show further negotiations based on the requirement of consent of

> co-owners and the change in circumstances that arose during the period of continued negotiations in respect of the acquired land under consideration. The petitioners cannot seek to implement a decision conveyed on 8th February 1996, as that decision was validly varied due to the change in circumstances in the process of continued negotiations that arose as a result of the legal incapacity of the 1st petitioner."

For his part, Juddoo, J., having rightly identified the main question in the case, namely, whether there was finality to the negotiations between the parties or not, was of the view that what the petitioners regarded as conclusion of negotiation was void for lack of authority of Georges Verlaque. Karunakaran, J agreed with Perera, J. but went further to consider the matter in terms of contractual agreement between the petitioners and the Government. In that context, he regarded Georges Verlaque's failure to obtain consent of the co-owners in order to effect a transfer to the land as rendering the contract incapable of fulfilment.

It is manifest that much time had been spent by the Constitutional Court on consideration of questions whether or not there has been a contravention of section 14(1) of the Constitution and whether the petition itself was time-barred because the parties have taken the issues in the case beyond those that properly arose from the pleadings. To put the issues that properly arise in the case in proper focus there must be an appreciation of the limiting effect of the facts pleaded in the petition and of the scope of the undertaking of the State under section 14(1) of the 7th Schedule of the Constitution.

The provisions of that section have been quoted in several cases and have become familiar by now. However, it bears repetition to quote them once again. That section provides as follows:-

"14(1) The State undertakes to continue to consider all applications made during the period of twelve months from the date of coming into force of this Constitution by a person whose land was compulsorily acquired under the Lands Acquisition Act, 1977 during the period starting June, 1977 and ending on the date of coming into force of this Constitution and to negotiate in good faith with the person with a view to –

(a) where on the date of the receipt of the application the land has not been developed or there is no Government plan to develop it, transferring back the land to the person:

(b) where there is a Government plan to develop the land and the person from whom the land was acquired satisfies the Government that the person will implement the plan or a similar plan, transferring the land back to the person;

(c) where the land cannot be transferred back under subsuparagraphs (a) or subsubparagraph (b) –

(i) as full compensation for the land acquired, transferring to the person another parcel of land of corresponding value to the land acquired;

(ii) paying the person full monetary compensation for the land acquired; or

(iii) as full compensation for the land acquired, devising a scheme of compensation combining items (I) and (ii) up to the value of the land acquired."

It is evident from the above provisions that the undertaking of the State is to consider all applications made by a person whose land was compulsorily acquired under the Lands Acquisition Act, 1977 during the period starting

June, 1977 and ending on the date of coming into force of the Constitution, that is to say on June 1993. The conditions of the undertaking are:-

(i) that the application must be made during the period of twelve months from the date of coming into force of the Constitution; and

(ii) that it must be made by a person whose land was compulsorily acquired under the Lands Acquisition Act, 1977 during the prescribed period.

The undertaking itself embraces an undertaking to consider the applications and to negotiate in good faith with the person with the view specified in subsection 1(a) – 1(c) of section 14.

The negotiation embarked upon pursuant to Section 14(1) must itself have as its objective an agreement either to transfer back the land to the person unconditionally as provided for in section 14(1)(a) or, (b) transfer back the land to the person subject to his developing, or implementing the plan of the Government to develop it; or (c) to pay compensation in any of the ways prescribed in section 14(1)(c). Once an agreement is reached on any of the above lines the constitutional obligation is fulfilled and what is left is performance of the agreement. Where the proceedings are to enforce performance of what has been agreed, it is doubtful if contravention of the Constitution can be alleged so that Article 130 of the Constitution could be invoked. We venture to think that no recourse to section 14(1) will be needed for enforcement of what was agreed to pursuant to the provisions of that sub-section.

It is clear that the basis of the claim to relief as prayed in the petition was that the State had considered the petitioners' application in terms of the undertaking contained in section 14(1); had negotiated in terms of that subsection; and, had reached an agreement pursuant to such

negotiation. What was complained of was failure to perform the agreement.

The Constitutional Court proceeded, in agreement with the contention of the respondents, substantially on the footing that Georges Verlaque in his capacity as executor and fiduciary not being the proper party envisaged in Section 14(1), any agreement reached could not be carried into performance. Numerous grounds of appeal were raised against the decision of the Constitutional Court by Mr. Boulle, learned counsel for the appellants. However, it is convenient to reduce the case he makes up for the appellants into four heads as follows:-

(i) That the right of co-owners under section 14(1)(a) was an unconditional right to get the land back once such circumstances for transfer of the land under section 14(1)(a) existed, that it was obligatory on the State to transfer back the land, and that "*negotiation*" was a mere procedural mechanism for effecting such transfer.

(ii) That since the co-owners have ratified the action of Georges Verlaque as their agent the finding that proper parties had not been in negotiation was flawed.

(iii) That in regard to ¾ shares of parcel PR595 the 2nd appellant was a proper party to the negotiation and to the petition and in regard to the remaining ¼ share the Constitutional Court should have permitted the co-owners to be joined.

(iv) That the petition was not time barred.

It is trite law that parties are bound by their pleadings and will not be permitted to set up a case different from what they have pleaded. In **Onezime v Onezime** [1978 – 1982] SCAR 267 this Court said at p271 - "*The purpose of pleadings in our courts is not to launch the court into a*

general enquiry but to indicate the precise issues which divide the parties and secure their determination." In this case the case set up by the appellants was that there was a concluded negotiation resulting in an agreement. The attempt on this appeal to present a case that a transfer of land back to the appellants is an absolute constitutional obligation is inconsistent with the case as pleaded. When a case is formulated on the basis that there was an agreement to be performed it is not right to ask for judgment on the basis that what was to be performed was a statutory duty, notwithstanding that the agreement was reached in the first place as a result of negotiations embarked upon consequent on a statutory obligation to negotiate.

Besides, the contention that a person who has made an application pursuant to section 14(1) has an unconditional right in terms of section 14(1)(a) to get the land back once the land is undeveloped does not stand up to close scrutiny. Where an enactment creates an obligation the conditions of the obligation cannot be ignored. Also where, as in this case, the main focus of State obligation is an undertaking to do certain things which could result in one of several other things being done, it is not right to construe the enactment as creating a primary obligation in the State to do those other things. On a plain reading of section 14(1) its intendment is that the obligation of the State to transfer back the land to the relevant person is a secondary obligation which can only arise after the primary obligations to consider application by that person, and to negotiate with a view to incurring any of the secondary obligations specified would have been discharged. To read that subsection otherwise would have been tantamount to a redrafting the subsection. It goes without saying that had the makers of the Constitution intended to provide that the obligation to transfer undeveloped land was not subject to the contingencies of consideration of an application and of negotiation leading to a conclusion it would without difficulty have so stated.

In argument, the learned Attorney General, Mr. Fernando, suggested reasons why the requirement of negotiation was made part of the enactment. Such were that the land although undeveloped had become the property of a third person, or that a transfer of the land back to the owner was not expedient for environmental reasons, or reason of national security or reason of deposit of oil or mineral or underground water. We may add also that negotiation may be directed at the State seeking equitable recompense for value added to the land by reason of development of the neighbourhood. The State may wish to extract a reservation of easement before agreeing to a transfer. The question does not here arise what weight could reasonably be attached to any of these reasons in the process of negotiation. They are adverted to in order to show that the requirement for negotiation is neither fanciful nor a superfluous appendage, nor can it be described as a mere procedural mechanism.

It is evident from what we have said that the argument that "*negotiation*" was a mere modus operandi for effecting transfer is without merit and must be rejected. It is clear that until there is a concluded negotiation there cannot be an obligation on the part of the State to transfer back the land to the relevant person nor can there be a right in such person to insist on a transfer back.

The question central to the issue whether or not there was a concluded negotiation was whether negotiation initiated and carried out by Georges Verlaque culminating as the petitioners claimed in the 1st respondent's letter of 8th February 1996 was valid in the context of section 14(1). As has been seen, the Government withdrew from the undertaking reached when it transpired that the 1st appellant had no authority to negotiate on behalf of the heirs. It was in evidence that one of the co-heirs – Dartania Verlaque by letter dated 26th August 1997 refused to appoint Georges Verlaque to act for her. By 22nd December 1998 as conveyed by

the 1st respondent's letter of that date, the Government having realised Georges Verlaque's lack of authority to deal with the rights of all the co-owners conveyed its decision to the heirs to deal with them individually.

Juddoo, J., has carefully and clearly set out the correspondence exchanged by the parties after February 1996. We are of the view that the Constitutional Court correctly analysed the legal position in regard to the lack of authority of Georges Verlaque to negotiate on behalf of the co-owners and in regard to the legal consequence of his lack of authority.

The conclusion reached by the Constitutional Court expressed by Juddoo, J., is correct when he said that:-

> "The persons entitled to remedy under section 14, Part III, Schedule 7 to the Constitution were and are Mrs. Idea Verlaque and each of the heirs of late Mederic Verlaque as individual co-owners." (emphasis ours).

Two consequences which follow from that conclusion as far as this appeal is concerned are, first, that those were the persons to whom the State owed an obligation of negotiation and with whom the State could arrive at a conclusion after such negotiation; and, secondly, that any understanding arrived at in negotiation with Georges Verlaque must be regarded as arrived at after an abortive negotiation. After Georges Verlaque was empowered by the co-owners (excluding Dartania Verlaque) to negotiate as agent on their behalf in January 1999, Mr. Boulle, Counsel acting on behalf of the agent conveyed to the 1st respondent the desire of all the heirs "*that the matter be settled as set out in your letter of 8th February, 1996.*" However, as at February 1996 Georges Verlaque had not been their agent and the "*accordance reached*" had already fallen to the ground for lack or capacity of Georges Verlaque to negotiate.

The case at the Constitutional Court should effectively have ended with the finding of that Court that the negotiation that led to the letter of 8th February 1996 Georges Verlaque lacked legal capacity to negotiate. Apart from the opinion of Juddoo, J., to which we have adverted to, Perera, J., had also concluded that:-

> "Hence the letter dated 8th February 1996 cannot be considered as containing the conclusion of all negotiations, and embodying any agreement for purposes of section 14(1) of Part III to Schedule 7 of the Constitution, and accordingly, the prayers sought for, cannot be granted."

We hold that the Constitutional Court was right in that view.

Although the only issue raised by the petition has thus been disposed of, the Constitutional Court had proceeded earlier in their judgment, to consider the questions that spawned the other issues raised on this appeal, namely; whether the other co-owners, apart from 2nd appellant who was already a party, should not have been permitted to be made parties to the proceedings. Perera, J., disposed of that aspect of the matter thus:-

> "Section 112 of the Code of Civil Procedure gives a discretion to the court to add parties 'who ought to have been joined or whose presence before the court may be necessary in order to enable the court to effectively and completely to adjudicate upon and settle all the questions involved in the cause or matter.' I am of the view that this discretion should not be exercised in a Constitutional petition where the persons sought to be added are in default of Article 130(1) read with Rule 4(1) as regards the filing within 30 days."

Juddoo, J., arrived at the conclusion that new petitioners should not be added, but by a slightly different route. He was of the view that:-

> The proposed amendment to add new petitioners will require this Court to determine negotiations carried between the parties and the alleged contravention pertaining to each of the new petitioners on their own which constitute a new matter not pleaded in the petition."

He also adverted to the limitation question in regard to the application for joinder of new petitioners.

The Constitutional Court has a discretion to permit a petition to be amended and to add new parties provided in regard to rights claimed under section 14(1) the conditions of state undertakings are shown to have been met, at least prima facie. The grounds on which the Constitutional Court refused the application to add new parties were that the parties sought to be added were in default of Article 130(1) read with Rule 4(1) as regards the time prescribed (30 days) within which a petition should have been brought and that adding them would raise *"a new matter not pleaded."* It has not been argued on this appeal that these were not valid grounds for exercising a discretion to refuse the application. This court will not interfere with the discretion of a court from which appeal is brought to it unless it is shown that the exercise of discretion was based on erroneous principles of law, or was made without proper appreciation of the facts or on a misconception by the facts, or is so utterly unreasonable to be erroneous, or it has not been made judicially and judiciously. None of these considerations can be said to apply in this case.

The law is clear that leave to add or substitute a plaintiff will not be granted where to do so will prevent the defendant from relying on the defence of time bar. [See 1995 UK Annual Practice 15/6/2 p. 201]. Also where as in this case a new case would have to be formulated in order to raise an issue in which the new party can be said to be interested a joinder may not be allowed. Consequent on the view by the Constitutional Court that the *"agreement"* which the petitioners sought to enforce by the

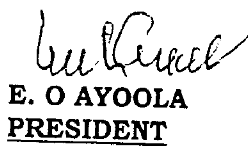
proceedings was not valid for lack of proper capacity of the "*negotiator*" whose act was held by the Constitutional Court not to have been ratified by the proper parties, it would have been inconsistent and futile to add to the proceedings fresh parties who were not parties to the negotiation leading to that "*agreement*". We hold that joinder of the other co-owners was rightly refused.

Although the 2nd appellant was a co-owner with ¾ undivided share in the land, negotiation with her alone to the exclusion of other co-owners would not have been properly constituted. Similarly a petition to enforce rights pursuant to section 14 in respect of land in co-ownership is better constituted if all co-owners are parties.

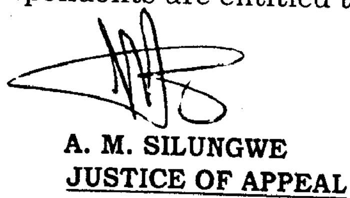
The question which the Constitutional Court devoted much consideration to and which had received substantial attention by counsel on this appeal, whether the petition is time-barred; or whether the State could decline to transfer the land as a result of the plan it has for the land, or, what should be an inevitable conclusion of any negotiation embarked upon with the co-owners, by themselves or their agent, are not necessary for the purpose of determining this appeal. The petition not having been brought by all the co-owners interested in rights under section 14(1), it is futile to ask or consider the question whether or not the parties who brought it acted within time or not. Also, the facts disclosed on the petition did not relate to any fresh negotiation or the circumstances in which the State declined to transfer back the land. Determining a case without proper guidance of the pleadings, where there are pleadings, fraught not only with difficulties but also with the danger of unfairness to the parties. Additionally where, as in this case, the relevant rules enjoin that the petition must contain a concise statement of "*the material facts*" it is wrong to determine a petition on facts not stated in the petition. For these reasons we must decline to pronounce on issues which are outside the facts disclosed on the petition.

Being of the view that the Constitutional Court was right in holding that the negotiation had with the 1st appellant was abortive for lack of capacity, we must conclude that the substratum of the appellants' case at the Constitutional Court had collapsed. The Constitutional Court was right to have dismissed the petition on that basis and we do hold accordingly.

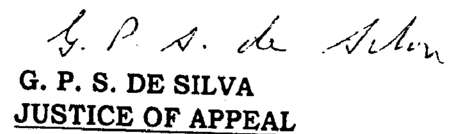
In the result, this appeal must be dismissed. We dismiss it accordingly. The respondents are entitled to costs of the appeal.



E. O AYOOLA
PRESIDENT



A. M. SILUNGWE
JUSTICE OF APPEAL



G. P. S. DE SILVA
JUSTICE OF APPEAL

Dated at Victoria, Mahe this 12 day of *April* 2001.