

IN THE SEYCHELLES COURT OF APPEAL

FRASER PADAYACHY

(Rep. by Sheila Padayachy)

APPELLANT

Versus

ANDY MATOMEE

RESPONDENT

Civil Appeal No: 25 of 2001

[Before: Pillay, De Silva and Matadeen JJ.A]

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Mr. F. Bonte for the Appellant
Mr. P. Boule for the Respondent



JUDGMENT OF THE COURT

(Delivered by Pillay, JA)

This is an appeal against a decision of the Supreme Court which allowed oral evidence to prove the sale of Parcel No. V5001 belonging to late Mrs. Bertha Moustache to the respondent.

The grounds of appeal are as follows:-

1. The Learned Judge allowed the Counsel for the Plaintiff (now Respondent) to adduce oral evidence to prove the sale of Parcel V5001 when the same deed of sale attests to the fact that the seller transferred Parcel No. V1402, thus erring against the Rule contained in Article 1341 of the Civil Code of Seychelles Act (Cap 33) in relation to the non-admissibility of oral evidence given against or beyond a document;
2. The learned Judge erred in coming to the conclusion that the evidence on the record taken as a whole proved that the common intention of the parties to the sale and transfer embodied in the notorial deed dated 7th day of December, 1992 was to transfer Parcel V5001.

It is to be noted that, at the hearing of this appeal, learned Counsel for the respondent rightly, in our opinion, dropped his cross-appeal as the

outcome of the appeal depends on whether or not oral evidence should have been adduced in the light of certain admissions made by the appellant in his pleadings which bind him.

The respondent, then the plaintiff, averred in essence that since the age of one he lived with the late Mr. Bailey and his common wife, the late Mrs. Albertine Moustache, also called Mrs. Bertha Moustache ("the deceased") at Mont Buxton, Mahe in a house situated on a portion of land registered as Title No. V5001. The second defendant who is the executrix of the estate of the late Mrs. Bertha Moustache who bore a name and surname identical to that of the deceased, owned a parcel of land registered as Title No. V1402 adjoining Title No. V5001 owned by the deceased. The deceased had received the Notice of Registration of Title No. V1402 which she believed pertained to the land on which she resided. It is significant that all those abovementioned facts were admitted by the appellant.

In December 1992, according to the respondent, the deceased sold and transferred to the respondent Title No. V5001, reserving the usufruct for herself and the first plaintiff for life. This is denied by the appellant who claimed that he became the owner of Title No. V4824, 5001 and 5003 for having inherited them from the testate succession of the deceased.

Since the appellant accepted through his former legal adviser that the deceased (a) owned portion of land registered as Title No. V5001 and (b) mistakenly believed that the Notice of Registration of Title No. V1402 given to her by the Land Registry and informing her that one Bertha Moustache was the holder of title No. V1402 pertained to the land on which she lived, whereas in fact only Title No. V5001 belonged to her whereas Title No. V1402 did not, this admission amounts to a beginning

of proof in writing which opened the door for the admission of oral evidence.

Moreover, the admission of the appellant, that the respondent's legal adviser did make on behalf of his client an application for a rectification of the Land Register under Section 87 of the Land Registration Act in respect of title No. V1402 and No. V5001, also amounts to a beginning of proof in writing which again opened the door for the admission of oral evidence.

Indeed note 1162 of Dalloz, Répertoire Pratique (Tome Neuvième) Vo. Preuve, is as follows:-

“L'avoué étant le mandataire de la partie, les aveux et déclarations qui émanent de lui sont censés émaner du mandant lui-même, et, par suite, peuvent lui être opposés comme commencement de preuve...

Ainsi peuvent servir de commencement de preuve par écrit, si elle rendent vraisemblable le fait allégué... les déclarations faites dans une requête signifiée par un avoué et non désavouée... (the emphasis is ours)

We hold that, consequently, the trial Court Judge was right in his ruling of 31st March 2000 to admit oral evidence, in the light of the admissions of the appellant. We need not consider whether there were any other additional reasons for adducing oral evidence. So much for the first ground.

With regard to the second ground of appeal relating to the real intention of the deceased to transfer Parcel No. V5001 to the respondent, the learned Judge came to the conclusion that the deceased wanted to sell and transfer the property on which she was then residing to the

respondent i.e. Parcel No. V5001 and that the content of her will bequeathed to the appellant did not consequently include parcel No. V5001. This was confirmed by the evidence of Mrs. Vivienne Matombe and the affidavits of the late Mr. Bailey on 2nd November 1994 and 21st February 1995.

With regard to the affidavit of the late Mr. Bailey dated 28th November 1994 wherein he requested the Registrar General to transfer to the appellant the bare ownership of Parcel No. V5001, the Court stated that it could not act on it, given Mr. Bailey's (a) assertion in the latter affidavit dated 21st February 1995 that he had not instructed his notary to file that affidavit with the Land Registry, (b) efforts to rectify Title No. V1402 and Title No. V5001 and (c) instructions to his legal adviser to file a plaint wherein he asked the Court for an order that the respondent be registered as owner of parcel No. V5001.

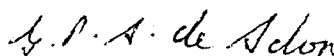
Having reviewed the evidence on record, in the light of the submissions made by learned Counsel on both sides, we consider that the conclusion reached by the trial Court cannot be impeached.

For the reasons given, we dismiss the appeal and uphold the judgment of the trial Court. With costs against the appellant.



A. G. PILLAY

JUSTICE OF APPEAL



G. P. S. DE SILVA

JUSTICE OF APPEAL



K. P. MATADEEN

JUSTICE OF APPEAL

Delivered at Victoria, Mahe this 19th day of **December** 2002.