IN THE SEYCHELLES COURT OF APPEAL

In the matter between:

	Octave Arrissol	Appellant
	Versus	
	Stepenie Dodin	Respondent

Civil Case SCA No. 6 of 2003

Before: M. M. Ramodibedi, P.; D. Karunakaran, J. A; B. Renaud, J. A

Date of Hearing : 9th of November 2004

Date of Judgment : 16th of November 2004

Mr. J. Hodoul for the Appellant

Mr. S. Rajasundaram for the Respondent

JUDGMENT

D. KARUNAKARAN, J. A

The respondent herein was plaintiff in the Supreme Court in a suit commenced by an amended plaint dated 14th of December 1994. The appellant herein was defendant in the said suit. For convenience the respondent and the appellant are referred to, respectively, as the plaintiff and the defendant in this judgment.

The defendant and the plaintiff had lived together as man and wife for fourteen years. During their cohabitation both had acquired properties. They separated in

April 1994. The defendant had acquired an immovable property, a parcel of land C1059 and had a house constructed thereon. This property, hereinafter called the *"defendant's property"* was and is still registered in his sole name. Besides, the defendant had in his possession a number of movables, mostly household articles, including a gas cooker and a wheel barrow. Likewise, the plaintiff (the common-law wife) also during concubinage, had acquired an immovable property, a parcel of land S329 and had a house partly constructed thereon. This property, hereinafter called the *"plaintiff's property"* was and is still registered in her sole name.

Following the separation of the parties, the plaintiff filed an action in the Supreme Court against the defendant claiming that the defendant's property and the movables in his possession were acquired as a result of their joint contributions in cash and kind during the period of their cohabitation. Moreover, the plaintiff claimed that she was entitled to a half share in the defendant's property, the values of which amounts to SR. 100,000/- In addition, she claimed a sum of SR 50,000/- from the defendant towards the value of her movables that remained in defendant's possession. Her claim was based on Article 1381-1 of the Civil Code of Seychelles for unjust enrichment or de in rem verso, the equivalent under French Law.

The defendant in his defence, resisted the claims made by the plaintiff. He denied that the plaintiff had made any contributions towards the acquisition of the *"defendant's property"* and maintained that he acquired the land, constructed the house and purchased the movables from his own funds, without any contribution from the plaintiff. In the same suit, the defendant made a counterclaim against the plaintiff in the sum of SR 163,820/- claiming that he was entitled to a half share in the *"plaintiff's property"* because of his financial contributions made towards the acquisition of that property.

The Supreme Court *(Perera J.)* heard the case on the merits as well as on the points of law submitted by the counsel on both sides. Having examined the evidence and the relevant provisions of law, the learned Judge concluded in his judgment that since the plaintiff could not avail herself of another action in contract, or quasi-contract, delict or quasi-delict, she had instituted the present action correctly based on unjust enrichment in terms of Article 1381-1 of the Civil Code. The Judge also held that since no property adjustment is done in cases where the parties had lived in concubinage, he pronounced that the *"defendant's property"* belonged to the defendant and the *"plaintiff's property"* belonged to the plaintiff. Further, the learned Judge proceeded to assess *"the actual and ascertainable loss"* suffered by the plaintiff and quantified the amount at SR 23, 883/- In his well considered judgment dated 6th of March 2003, the trial Judge accordingly, entered judgment in favour of the plaintiff in the sum of SR 23, 883/- and against the defendant with interest and costs. The Judge also found on a balance of probabilities that the defendant could not maintain his counterclaim. Hence, he dismissed the defendant's counterclaim accordingly, with costs.

The defendant, being dissatisfied with the said judgment has now appealed to this Court against the whole of the decision.

Mr. Hodoul, the learned counsel for the defendant in essence submitted that although the trial Judge had correctly set out the principle of law governing the action de in rem verso, he eventually came to an erroneous conclusion that the plaintiff had no other cause of action available to her and that the *"proper remedy was a claim based on unjust enrichment"* According to Mr. Hodoul, the plaintiff had another remedy to base a claim on *"quasi-contract"* as well as on *Article 555* of the Civil Code to obtain compensation for the investments she allegedly made in constructing the house on the *"defendant's property".*

Moreover, the counsel submitted that in the present case the plaintiff- as per pleadings in the plaint- was not claiming any compensation for the services rendered but has claimed only her interest in the "*defendant's property*" because of her contributions made towards its acquisition. Therefore, counsel submitted that the plaintiff cannot bring an action under *unjust enrichment*. In support of his submission he cited the case of *Dingwall V. Weldsmith SLR 1967* wherein the Court held that to succeed in an action *de in rem verso,* a concubine must not only prove that she rendered services, but that she has suffered in so doing an *"appauvrissement"* of her own *"patrimonie"* . Mr. Hodoul submitted that the plaintiff in the present case did not render any extra service or rendered any service more than a normal house wife would do. Therefore, in the light of the decision in *Dingwall (supra),* according to Mr. Hodoul, the plaintiff in this matter cannot claim any compensation based on unjust enrichment. Furthermore, it is the submission of Mr. Hodoul that the award in favour of the plaintiff in respect of the wheel barrow and refund for the payments she made in foreign currency is not maintainable being *ultra petita,* since the plaintiff did not plead those claims in her plaint. For these reasons, Mr Hodoul urged this Court to allow the appeal and set aside the judgment of the trial Court accordingly.

In reply to the above, Mr. Rajasundaram, the learned counsel for the plaintiff submitted in essence, that the criticism leveled against the judgment in question are not well-founded. They are not maintainable either on facts or in law. According to Mr. Rajasundaram, the trial Judge having given diligent consideration to the evidence and law, came to the correct conclusion that the plaintiff had no other remedy available in law save unjust enrichment. Moreover, he submitted that the present case does not attract Article 555 of the Civil Code as the plaintiff is not a third party, who has put up buildings or structure on another's land. The contributions were made simply by virtue of her relationship as concubine of the defendant. Further he contended that all the issues including

the one as to *"quasi-contract"* raised by the defendant's counsel before this Court now, were all raised before the trial Court, which has already determined those issues properly and effectively in its judgment. Therefore, the learned counsel contended that the judgment in question can in no way be faulted for any error of findings by the trial Judge. In the circumstances, Mr. Rajasundaram submitted that this appeal is devoid of merit and so urged the Court to dismiss the appeal with costs.

We diligently considered the submission made by counsel on both sides. We meticulously perused the pleadings, evidence and the submissions available on record.

Undoubtedly, the law applicable to the case on hand is that which falls under the heading of *"unjust enrichment"*. Article 1381-1 of the Civil Code of Seychelles provides as follows:

> *"If a person suffers some detriment without lawful cause and another is correspondingly enriched without lawful cause, the former shall be able to recover what is due to him to the extent of the enrichment of the latter. Provided that this action for unjust enrichment shall only be admissible if the person suffering the detriment cannot avail himself of another action in contract or quasi-contract, delict or quasi-delict, provided also that the detriment has not been caused by the fault of the person suffering it" (underlining added)*

It is interesting to note, there had been no express proviso of a similar nature in the *"Code Napoleon"*, which had been in force in Seychelles prior to 3rd of November 1975. The principle of unjust enrichment is however, a well

established principle in French jurisprudence. The action for "unjust enrichment" or the action "*de in rem verso*" as it evolved in France had all the conditions which are included in Article 1381-1 of our Civil Code.

As observed in *Antonio Foster Vs Magdalena Ah-Tave and another [1985] SLR p117* whether under French or Seychelles Civil Law, the root principle of an *unjust enrichment* is that an economic benefit is added to one *patrimony* to the economic detriment of another, without a corresponding transfer of compensation intended to be adequate. The manner in which the conditions prescribed may limit operation de in rem verso has been illustrated in the case of *Dingwall Vs. Weldsmith [1967] Vol. 4 SLR p47.* The plaintiff had sued for remuneration for services rendered to the defendant during the period they lived together in concubinage. Souyave J (*as he then was*) in holding the plaintiff could not succeed because she had suffered no *"appauvrissement"* of her own patrimony, cited from *Encyclopédie Dalloz, Droit Civile, Vol. II, verbo Enrichissement sans cause; para 90* as follows :

> *« ....Elle (l'action de in rem verso) doit, d'autre part, satisfaire aux exigences particularières que comporte le recours en matière d'enrichissement sans cause ; le preténdu créancier doit, en conséquence, justifier à l'encontre de son débiteur de l'existence d'un enrichissement à lui procuré par le fait d'un appauvrissement survenu dans de telle conditions qu'aucune voie de recours autre que celle qui est mise en mouvement, ne soit susceptible de les réparer (même arrêt) »*

Hoareau V. Hemrick [1972] Vol. 6 SLR 167 was another illustration of the application of the conditions applicable to the action *de in rem verso.* Therefore,

an action for unjust enrichment is maintainable in law if and only if, the evidence discloses a cause of action, which satisfies the following five conditions:

1. *There must be an enrichment*
2. *There must be a corresponding impoverishment*
3. *There must be a causal connection between the enrichment and the impoverishment*
4. *An absence of lawful cause or justification and*
5. *An absence of another remedy, which the French Jurists refer to as the "caractère subsidiare"*

I shall now revert back to the present case. Obviously, the defendant is not disputing the fact that the present case satisfies the conditions No 1, 2, 3 and 4 above. However, Mr. Hodoul in effect submitted that the instant case does not satisfy condition No. 5 supra i. e *the "caractère subsidiare"* in order to constitute a cause of action for unjust enrichment. In this respect, it should be noted that the plaintiff and the defendant were living only in concubinage. This social relationship undoubtedly, does not and cannot give rise to any legal relationship between the parties. Indeed, their claim and counterclaim herein were not based on any contractual or legal rights and obligations that arose from any property or financial dealings between them. As rightly pointed out by the trial Judge in his judgment, no enforceable legal rights are created or arise from the mere existence of a state of concubinage. Therefore, the only cause of action available to the plaintiff was *"de in rem verso"*, which alone could operate in assisting her to obtain compensation for *the actual and ascertainable loss* she suffered. In the light of the ratio decidendi given in *Michel Larame Vs. Neva Payet (S. C. A 4 of 1987)* the learned trial Judge has thus, rightly come to the conclusion that the plaintiff had no other alternative legal remedy available in law.

As regards the issue of *"quasi-contract"* raised by Mr. Hodoul, pursuant to Article 1378 of the Civil Code, we note the remedy contained in this Article obviously, has no application to the facts of the present case as the defendant did not receive anything from his concubine in error, or knowingly, received what was not due to him. The learned trial Judge rightly held that the plaintiff could not have brought *a real action* for a right of co-ownership as she had no legal right to the land, which was registered in the sole name of the defendant.

On the question of the alleged remedy available under Article 555 of the Civil Code of Seychelles, with due respect to the views of Mr. Hodoul this Article is not at all relevant to the case on hand as there is a world of difference between the rights and obligations of a third party, who has erected buildings or structures on another's land and that of a concubine, who has contributed in cash or kind to her cohabiter. The trial Judge rightly, therefore, rejected the contention of the defendant in this respect.

In the case of *Dingwall (supra)* the Court inter alia, held that the concubine could not succeed because she had suffered no *"appauvrissement"* of her own patrimony. In fact, this is one of the conditions -see, condition No. 2 supra- required to be satisfied in order for a claimant to succeed in an action *de in rem verso*. This does not mean that a concubine, in order to succeed in such action should have rendered an extra domestic service or rendered any service more than a normal housewife would do, as argued by Mr. Hodoul. In any event, the plaintiff in this case had all along been employed as a nurse with the Ministry of Health and had contributed financially to the family in addition to the domestic services she rendered as a normal housewife. Hence, Mr. Hodoul's argument in this respect appears to be misconceived and is not supported by the authority he cited.

At this juncture, it is pertinent to observe that the cases, which were decided by the Courts in Seychelles prior to 3rd November 1975, were based on the interpretation and application of law as it was found then, in the Civil Code of France *(Code Napoleon)* and in French authorities. However, since the Civil Code of Seychelles came into force on 3rd November 1975, the Civil Code of France has ceased to have effect in Seychelles by virtue of Article 4 of the Civil Code of Seychelles. It is also pertinent to note Article 5 (1) thereof, which reads thus:

> *"The text of the Civil Code of Seychelles as in this Ordinance contained shall be deemed for all purposes to be an original text, and shall not be construed or interpreted as a translated text"*

Therefore, one should be cautious, when resorting to the precedents of case law or authorities that were decided before coming into force of the Civil Code of Seychelles. Indeed, the Civil Code of Seychelles is not a replica of "Code Napoleon" and therefore, should not be construed or interpreted as a translated text thereof. The judicial decisions in cases of *"de in rem verso"*, given before 1975 shall enjoy a high persuasive authority before this Court as far as they are consistent with Article 1381-1 of the existing Civil Code of Seychelles. Needless to say, the existing Code was specially designed and enacted by tailoring the then *"Code Napoleon"* in order to suit and cater for the indigenous requirements of the Seychellois society, obviously, in response to the changing needs of time.

Finally, there remains one more point to be considered. Mr. Hodoul drew our attention to the pleading in the plaint. True it is, as he pointed out, the pleading therein does not refer to any wheel barrow or cash payments the plaintiff allegedly made in foreign currency to the Defendant. However, it is reasonable to construe that the term *"movables"*, which appears in paragraph 4 of the plaint means and includes a wheel barrow. As we see it, the averment made under

paragraph 6 of the plaint which reads "*the plaintiff has been unjustly enriched at the plaintiff's expense*" in our considered view, covers generally each and every contribution the plaintiff could have possibly made either in cash or kind. Hence, we find that the evidence on record is sufficiently supported by the pleadings in respect of all the facts and particulars that are necessary to constitute the cause of action on *unjust enrichment* in this matter. We hold therefore, that the complaint against the judgment in this respect is also without substance.

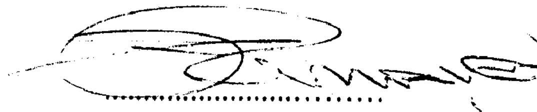
In the final analysis, we find all the grounds of appeal have failed in this matter. We therefore, uphold the judgment of the Supreme Court. The appeal is accordingly, dismissed with costs.

D. KARUNAKARAN
<u>JUSTICE OF APPEAL</u>

I concur:

M. M. RAMODIBEDI
<u>PRESIDENT</u>

I concur:



B. RENAUD
<u>JUSTICE OF APPEAL</u>

Dated this 16th Day of November, 2004