IN THE SEYCHELLES COURT OF APPEAL

LORTA GAYON — 1ST APPELLANT

AND

GEORGIE GOMME — 2ND APPELLANT

VERSUS

ANTOINE COLLIE — RESPONDENT

Seychelles Court of Appeal no 8 of 2001

(Before: Ramodibedi P, Perera JA, Renaud JA)

Mr. Frank Elizabeth for the Appellants
Mr. S. Rouillon for the Respondent

JUDGMENT

PERERA JA

The Appellants, *(the plaintiffs in the case)*, sued the Respondent *(the Defendant)* for loss and damage suffered by them as a result of an alleged failure to transfer a land bearing Parcel No. V. 6331 for a sum of Rs.60,000, ***or*** in the alternative, to declare that there has been a sale of the said land by the Defendant to the Plaintiffs, in law, and to order the Registrar of Lands to register the Title in Parcel V. 6331 in the names of the Plaintiffs within thirty days of the judgment.

The Defendant in a defence filed on 5th November 1999 denied any oral agreement to sell Parcel V. 6331 to the Plaintiffs, as alleged. The Defendant further averred that the Plaintiffs paid Rs.150,000 in June 1990 for the purchase of Title V. 6431 and that the sale was effected on 15th June 1990.

The case for the plaintiffs was that the sum of Rs.150,000 paid for the purchase of Parcel V. 6431, included a sum of Rs.60,000 being the sum agreed upon for the transfer of Parcel V.

6331 which was situated adjacent to it. In the first alternative prayer, the Plaintiffs claim the refund of that sum of Rs.60,000 and also seek a further sum of Rs.40,000 as moral damages.

Admittedly, the defendant is resident in Australia. Although he was served with notice of action, he only retained Counsel, but did not appoint anyone to testify on his behalf. However his Counsel, Mr Rouillon, called one Ahmed Chang Seng to testify *"in his own capacity and within his personal knowledge in the matter"*. He testified that there were three properties, one registered in the name of the Defendant's wife, and two registered under the name of the Defendant. He further testified *"he told me that he was going to sell one plot and the second plot would be used as an access road"*. In the absence of any other evidence on the latter assertion, it remains hearsay. However, he further testified that the Defendant later sold the land reserved for the access road to one Mrs Harrison, his *(the witness's)* sister in law.

Digressing from the facts of the case, it needs to be stated that the said Mrs Harrison has filed a motion dated 20th February 2003, before this Court seeking leave to intervene *"as a party with legitimate interest"* in this case. In an accompanying affidavit, she has averred that she purchased Parcel V. 6331 from Mr Antoine Collie, the Respondent, on 11th June 1999, and that the consideration for the purchase was paid to the daughter of Mr Collie, in England. The Court notes that the plaint was filed in this case on 1st June 1999. Hence the alleged transfer was made after the filing of the plaint, but before the defence was filed by Mr Antoine Collie on 5th November 1999. No mention was made therein about the sale to Mrs Harrison.

Be that as it may, Mrs Harrison had ample opportunity to seek intervention in the Supreme Court, pursuant to Section 117 of the Code of Civil Procedure *(Cap 213)*. The Plaintiffs as well as the Defendant also could have sought to add Mrs Harrison as a party Defendant under the provisions of Section 112 of the said Code, as a person *"whose presence before the Court (was) necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter"*. For present purposes however, it only needs to be recorded that Mr Rouillon being referred by Court to the Rules of the Court of Appeal, decided not to pursue the motion, which is therefore formally dismissed.

Adverting to the merits of the case, the Learned Trial Judge found *inter alia* that the Plaintiffs had failed to prove any oral agreement whereby the Defendant agreed to sell Parcel V. 6331 to them for Rs.60,000, nor that the sum of Rs.150,000 paid to the Defendant on the transfer of Parcel V. 6431 (*exhibit P3)* included that amount. The Learned Judge made a specific finding that the Plaintiff attempted to adduce oral evidence against and beyond the registered deed (*exhibit P3)* to establish a subsidiary oral agreement, but that they were barred by the prohibition contained in Article 1341 of the Civil Code. He therefore agreed with the submission of Learned Counsel for the Defendant that the action should be dismissed for lack of evidence to Substantiate the averments in the plaint.

The Learned Trial Judge further proceeded to hold that in any event the action was time barred under the provisions of Article 2271 of the Civil Code.

The Appellants have raised three grounds of Appeal, as follows-

1. *The Learned Judge erred in his decision that the Appellants have failed to prove their case on a balance of probabilities.*

2. *The Learned Judge erred in law when he concluded that the Appellants were out of time.*

3. *The Learned Judge erred when he considered several points and issues not raised in the pleadings (ultra petita).*

In the notice of Appeal, the Appellants sought –

"1. *An order for a new trial since the Appellants intend to bring fresh and independent evidence showing that they paid two separate sums, one being Rs.90.000 paid by Seychelles Housing Development Corporation to the Respondent for the purchase of Title No. 6431 and one being*

Rs.60,000 paid by themselves to the Defendant for the purchase of Title No. V. 6331.

Or

2. *Grant the relief sought in the case proper".*

As regards the new trial sought, it is manifest from the proceedings in the trial court that the 1st Plaintiff testified that he purchased Parcel N0. V. 6431 and the house standing thereon from the Defendant from a loan of Rs90,000 obtained from the Seychelles Housing Development Corporation (*SHDC)* and produced a payment voucher dated 13th June 1990 for that amount issued by the SHDC in favour of the Defendant, which payment was acknowledged by him *(exhibit P1).*

The plaintiffs also produced two cheques for Rs.30,000 each, dated 6th June 1990 and 15th June 1990 respectively *(exhibits P4 and P5)* drawn in favour of the defendant. The issue before the Supreme Court was whether the total sum of Rs150,000 was the purchase price paid for Parcel V. 6431 or for Parcel V. 6331 as well. When the 1st plaintiff sought to adduce oral evidence, objection was raised by Learned Counsel for the Defendant under Article 1341. Learned Counsel for the Plaintiffs submitted that he would rely on the exception contained in Article 1347 and produce initial proof in writing. However no such proof was adduced except the three payments that constituted the purchase price of Rs.150,000 paid for the purchase of Parcel V. 6431, as evidenced by the deed of transfer *(exhibit P3)* Hence the ground urged by the Appellants to seek a new trial has no merit as proof of the payments of Rs.90,000 by the SHDC and the two sums of Rs.30,000 paid by them were already before the trial Court. It is trite law that Article 1341 applied only when the document sought to be interpreted was ambiguous and unclear. In terms of Article 1602, any ambiguity in a deed of sale has to be interpreted against the vendor. As was held in the case of ***Wilmot v. W & C French (Sey) Ltd (1972) S.L.R. 144,*** one of the best pointers to its interpretation is the way in which the parties had given effect to or acted upon the deed.

In the present case the plaintiffs did not claim the specific performance of the alleged oral agreement for nine years. There is no ambiguity in the Title deed of Parcel V. 6431, and hence the Learned Judge was right in holding that there was no evidence to establish the alleged oral agreement. This finding disposes ground 1 urged in appeal.

As regards ground 2, the issue of prescription was raised by Learned Counsel for the Defendant in the course of his cross examination of the 1st Plaintiff. Learned Counsel for the Plaintiffs also addressed that issue in his submissions and submitted that if the Court was minded to take up the issue of prescription, he relied on Article 2262 of the Civil Code which makes provision for a prescriptive period of 20 years in respect of any actions relating to rights of ownership of land or other interests therein.

Article 2224 provides that -

> *"A right of prescription may be pleaded in all stages of legal proceedings, even on appeal unless the party who has not pleaded it can be presumed to have waived it."*

Article 2223 of the said Code also provides that –

> *"The Court cannot on its own, take judicial notice of prescription in respect of a claim".*

When the Learned trial Judge dealt with the issue of prescription, he did not raise it on his own. That issue was raised by Learned Counsel for the Defendant in the course of the cross examination, which was a "*stage of legal proceedings*" envisaged in Article 2224 of the Civil Code. As regards the merits of the finding that the five year prescription period under Article 2271 applied, it was held in the case of ***Savy v. Rassool (1982) S.L.R. 191*** that the right of action for recovery *of the purchase price of a transfer of rights in a property* was subject to prescription after a period of 5 years. In the present case, the claim for the recovery of Rs.60,000 allegedly paid for the purchase of Parcel V. 6331 was an alternative prayer pleaded in the plaint. In appeal,

before us, Learned Counsel for the Appellants relied on the cases of ***Khany v. Cannie (1983) S.L.R. 65*** and ***Hoareau v. Contoret (1984) S.L.R. 151***, and contended that in the present case the 20 year period of prescription provided in Article 2262 applied. In *Khanny (supra)*, the plaintiffs were co-owners, and they alleged that the Defendant had usurped their rights and sold the properties under a disguised donation. That clearly was a claim based on right of ownership of property by succession. The plaintiffs there were seeking to enforce a *vested right of ownership of land*. That case has therefore no bearing on the present matter. In *Hoareau (supra)*, the action was brought to reduce the disposition to the disposable portion pursuant to Article 920 of the Civil Code. It was held that an action for reduction of the disposable portion was an action for recovery of compensation and therefore not an action in respect of rights of ownership in land. Hence the five year prescription period provided in Article 2271 applied.

In the present case, the five year period of prescription arises in respect of the first alternative prayer. The second alternative prayer however concerns alleged rights of ownership of land. Article 2262 contains a limitation in respect of *real actions* for rights of ownership of land. A "*real action*" has been defined in Stroud's Judicial Dictionary, as "*that action whereby a man claims title to land, tenaments or hereditaments, in fee or for life, and these actions are possessory, or auncestral; possessory, of man's own possession and seizing; or auncestral, of the possession or seizing of his ancestor*".

Hence a person seeking to enforce a right of ownership of land must have a *real or vested right*, or as in the case of *Khany (supra)*, must have a right of ownership by succession. However, such right must be enforced within 20 years. Otherwise the person in possession would acquire the land by acquisitive prescription even though "*he can produce a Title or not, and whether he is in good faith or not*".

The plaintiffs in the present case have no such real, or vested right to claim ownership of Parcel V. 6331, and hence could not have relied on Article 2262. Accordingly the claim being merely contractual, the five year period of prescription under Article 2271 applied. Hence grounds 2 and 3 taken cumulatively, fail.

On a consideration all these grounds, the finding of the Learned Trial Judge that the Plaintiffs cannot maintain the action for lack of evidence, and also as the claim is prescribed, cannot be faulted. Accordingly the Appeal is dismissed.

As Learned Counsel for the Respondent did not participate in the appeal due to lack of instructions, there will be no order for costs.

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A.R.PERERA

JUSTICE OF APPEAL

Dated 16th day of November 2004

I concur,

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M. RAMODIBEDI

PRESIDENT OF THE COURT OF APPEAL

Dated 16th day of November 2004

I concur,

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B.RENAUD

JUSTICE OF APPEAL

Dated this 16th day of November 2004