

IN THE SEYCHELLES COURT OF APPEAL

[**Coram:** F. MacGregor (PCA) , S. Domah (J.A) , M. Twomey (J.A)]

Civil Appeal SCA 21/2013

(Appeal from Supreme Court Decision 103/2012)

Marie France Faure

Appellant

Versus

Louis Hoareau

1st Respondent

Keven Gonzague Hoareau

2nd Respondent

Heard: 21 August 2015

Counsel: Mr. S. Rajasundarm for the Appellant

Mrs. Alexia Amesbury for the 1st Respondent

Mr. Joel Camille for the 2nd Respondent

Delivered: 28 August 2015

JUDGMENT

S. Domah (J.A)

[1] On 31 August 2007, the Appellant lodged a civil case against Respondent No. 1 (CS 250/2007) ("the first claim") in which she claimed damages against him. Respondent No. 1 who was a single defendant in that case did put an appearance in October 2007. The case proceeded for hearing and at the end of the day, on 18 November 2010, she obtained judgment in her favour by order of Karunakaran J., as he then was, in the sum of Rs555,000.00. That sum remained unpaid. When execution was sought in the case, the appellant found that on 7 March 2008, i.e. while that case was still pending before the court, Respondent no. 1 had transferred a property C2462 which was then in his name to Respondent no. 2 who is no other than his own son. The appellant took the view that it was fraudulent on the part of Respondent No. 1 to have effected the transfer

at that moment in time. In her view, it was designed to frustrate, and did frustrate, her attempts to execute the judgment which she was due to obtain, and which she did obtain. In the event, she has been left without any hope of successful execution.

- [2] On 7 August 2012, therefore, she brought another action (“the second claim”) based on fraud against both Respondent No. 1 and Respondent No. 2. She sought a declaration that the transfer was null and void, an order for the Registrar of Lands and Deeds to divest the ownership of the property from Respondent No. 2 and direct that Respondent No. 1 does not alienate, transfer or dispose of the property in detriment to the appellant’s recourse to recover her judgment debt in the first claim.
- [3] The learned Ag Chief Justice of the Supreme Court dismissed this second claim. He accepted the argument that, on the face of the pleadings, the plaint disclosed an action based on fraud but dismissed it, without going through the merits, on the ground that the appellant had no *locus standi* to bring such an action.
- [4] The appellant appeals before us advancing 4 grounds of appeal. Language being the tool of legal practice, the grounds could have been worded – we feel bound to say – with greater attention to grammatical English. We reproduce same:

“Ground no1: The Learned Trial Judge, however, found and was satisfied that there was a ground, namely “fraud” which the judge himself ruled so, failed to allow the Plaintiff {Appellant} to proceed with the case on merits. The learned Judge ought to have allowed the Appellant to proceed with the case on merits.

Ground No. 2: The Learned Judge ought to have allowed the Plaintiff {Appellant} to give her a chance as to explain how she was an interested party on the property in C2461 in terms of the averment of the Plaint, in respect of the transfer dated 7th March 2008.

Ground No. 3: The Learned Judge failed to appreciate the existence of cause of action of the Appellant’s Plaint and further failed to provide an opportunity to the Appellant to prove her case on merits. The dismissal of

the Plaintiff on pleas in limine litis a failure of justice in terms of not providing an opportunity to the Appellant {Plaintiff} to prove her case.

Ground No. 4: The Learned Judge failed to appreciate the principles of Article 1134 of Civil Code of Seychelles and the provisions {section 253, 90 and 91} of Code of Civil Procedure and further failed to appreciate that there was no question of law raised by the Respondent {Defendant} for a Plea in limine litis.”

- [5] The respondents are resisting the appeal. It is worthy of mention that this second claim is by way of Plaintiff With Summons as opposed to straight summons as required by section 251 of the Code of Civil Procedure.
- [6] In his defence to the second claim, respondent no. 1 has pleaded that in 1998, he had granted permission to his son to construct his house on the land *in lite* which was then undeveloped. His son completed the construction only around 2007 in which year he caused the transfer to be made inasmuch as it is his son who had constructed the building found on it for himself with his own funds. That version is supported by respondent no. 2.
- [7] In this case, the appellant particularized the action as follows: *“in view of the Plaintiff’s chances of succeeding in the case at that time, purposely, with an intention to defrauding the plaintiff, transferred the “property” to his son Keven Gonzague Hoareau, the 2nd Defendant so that the 1st Defendant exonerates himself from his liability to pay the Judgment Debt.”* She has added that the sale executed in favour of the 2nd Respondent is also without any valid consideration from the 2nd Respondent to the 1st Respondent.

GROUND 1, 2 and 3

- [8] The appellant has submitted on all the grounds together. It is her argument that his action was based on fraud under section 253 of the Seychelles Code of Civil Procedure. Learned counsel argued before us that the mere intention to defraud at the

commencement of a suit is sufficient to ground an action under section 253. He relied on that part of section 253 which states that –

“if the court is satisfied that the judgment debtor - has transferred, concealed or removed any part of his property after the date of the commencement of the suit in which the judgment sought to be enforced was given or that after that date he has committed any act of bad faith in relation to his property with the object or effect of delaying the judgment creditor in enforcing his judgment or order ... the court may order such debtor to be imprisoned civilly unless or until the judgment is satisfied.”

[9] It is the argument of Mrs Amesbury under Ground 1 that in an action for fraud, the element of fraudulent transfer should be specifically particularized but the facts in this case suggest that it was a case of a natural transfer of a property the intention of which had occurred right in 1998, was duly concluded in 2007, if a couple of months after the case had been lodged but well before the judgment was given. Accordingly, the essential legal requirement that the appellant should be a judgment creditor at the time of the transfer was not met. Under Ground 2, her argument is that the appellant lacks any right or interest in the property which belonged to Respondent no. 1 so that he had the right to deal with it as he did. If the appellant was minded to stall the sale, it was open to her to make an application for a restraint order, which she did not. She also added that any matter of fraud should be raised within 3 months and that in the present case, it has been raised after 4 years. She also added that she was aware of the fact that her client was a judgment debtor in a case which has no bearing on the present case but that he is honouring his obligations regularly.

[10] Learned counsel for respondent no. 2 joined in the submissions of learned counsel for Respondent No. 1 and added basically that his client has acquired ownership to the property in good faith in the circumstances.

[11] All the above points of learned counsel for the respondents are matters on the merits, we are bound to say. The learned Judge, on the facts averred, found that there was a cause of action *ex facie* the pleadings. Indeed, we consider that there was enough material averred in the pleadings which could lead to the conclusion that the matter

should have proceeded to the merits. If he came to such a conclusion, as he did, he should have proceeded to hear the matter on the merits and not dismissed it *ex facie* the plaint and *in limine litis*, unless there was another reason for dismissing it at such a preliminary stage. This takes us to Ground 4.

Ground 4

[12] The learned Judge stated that the respondent did not have a *locus standi* to start the action. Two questions arise with respect to the right to sue of the appellant: whether the appellant was a judgment debtor and whether she had any right over the property that was transferred at the moment it was transferred.

[13] This takes us to section 253 of the Code of Civil Procedure on which the appellant has pitched his action.

[14] When the facts are read in the light of the requirements of section 253, it is easy to conclude that the action is not a section 253 action. It would have been so if, and only if, the transfer had been made while the second claim was pending for the purpose of thwarting the execution of the judgment given in CN250/2007. As it is, the transfer had been while the first claim was pending and judgment had not been delivered yet.

[15] As such, respondent no. 1 was not a judgment debtor in terms of section 253 of the Code of Civil Procedure even if he was a judgment debtor in the first case at the time of the lodging of the second claim. The right of appellant to bring an action under section 243 of the Code of Civil Procedure arose on the occurrence of the following events:

- a. A judgment is obtained in a first claim (CN250/2007 on 18 November 2010;
- b. That judgment remains unsatisfied within a reasonable time after the order;
- c. a Summons for Unsatisfied Judgment (“SAUJ”) under article 241 of the Code of Civil Procedure is issued for the purposes of execution of that judgment; and
- d. the judgment debtor frustrates the order of execution action by a fraudulent disposal.

[16] As it is, in this case, the purported fraudulent disposal was made at the time of the first claim and not in the second claim. That would have been apparent to learned counsel had he reproduced the introductory part of section 253 of the Code of Civil Procedure which underlies the above-mentioned four steps and he would have read the preceding sections to section 253, especially section 251. These two sections work in tandem.

[17] Section 251 of the Seychelles Code of Civil Procedure reads:
“A judgment creditor may at any time, whether any other form of execution has been issued or not, apply to the court by petition, supported by an affidavit of the facts, for the arrest and imprisonment of his judgment debtor and the judge shall thereupon order a summons to be issued by the Registrar, calling upon the judgment debtor to appear in court and show cause why he should not be committed to civil imprisonment in default of satisfaction of the judgment or order.”

This application was started by way of Plaint With Summons, side stepping the above provision.

[18] Section 253, thereafter, follows on section 251 and reads:
“If the judgment debtor does not appear at the time fixed by the summons or refuses to make such disclosures as may be required of him by the court or if the court is satisfied that the judgment debtor-
(a) *has transferred, concealed or removed any part of his property after the date of commencement of the suit in which the judgment sought to be enforced was given or that after that date he has committed any act of bad faith in relation to his property with the object or effect of delaying the judgment creditor in enforcing his judgment or order; or*
(b) *has given an undue or unreasonable preference to any of his other creditors; or*
(c) *has refused or neglected to satisfy the judgment or order or any part thereof, when he has or since the date of the judgment has had the means of satisfying it,*
the court may order such debtor to be imprisoned civilly unless or until the judgment is satisfied” .

[19] The main action to which section 253 becomes auxiliary is the *judgment sought to be enforced* which means the execution action following the Summons After Unsatisfied Judgment (SAUJ). In this particular case, the decision in CS 250/2007 having been

given on 18 November 2010 could not have been enforced before it was given: see **Delcy v Camille 2005 SLR 87; State Assurance Corporation of Seychelles v First International Financial Corporation Company Ltd 2006 SCSC 1.**

[20] There is no merit under Ground 4 which disposes of the merits under Grounds 1, 2 and 3. We dismiss the appeal with costs.

S. Domah (J.A)

I concur:. F. MacGregor (PCA)

I concur:. M. Twomey (J.A)

Signed, dated and delivered at Palais de Justice, Ile du Port on 28 August 2015