

SALA v SIR GEORGES ESTATE (PROPRIETARY) LTD

(2012) SLR 135

B Hoareau for the petitioners
B Georges for the first respondent
V Benjamin State Counsel for the second respondent

Judgment delivered on 22 May 2012

Before Egonda Ntende CJ, Gaswaga, Burhan JJ

BURHAN J:

This is an application by the petitioners under article 46(1) of the Constitution of the Republic of Seychelles, claiming that the first respondent has contravened the petitioners' constitutional right guaranteed under article 26(1) of the Constitution, to peacefully enjoy and dispose of their property namely parcel PR 2464 situated at Cote D'orPraslin (hereinafter referred to as the said property).

Article 26(1) of the Constitution of the Republic of Seychelles reads –

Every person has a right to property and for the purpose of this article this right includes the right to acquire, own, peacefully enjoy and dispose of property either individually or in association with others.

The background facts of this case are that the said property was transferred by the first respondent company to the petitioners who became co-owners in equal shares by transfer document dated 7 October 1998. It is apparent that the said transfer was subject to several conditions as set out in clauses (a) to (j) of the transfer document.

The petitioners contend that the conditions imposed in the transfer document prohibit the petitioners from peacefully enjoying and disposing of the said property and proceed to set out the prohibitory conditions in paragraph 3 of the petition which reads as follows:

- i. That the petitioner shall use parcel PR 2464, for residential purposes only and they shall not:
 - (a) Build more than one residential house on the said parcel, which residential house may be formed by not more than two separate units or sections joined together by a passage or connection showing that they form part of only one residential house; and
 - (b) Sub-divide parcel PR 2464 for sale or for any other purpose;
- ii. The first respondent may however, permit the petitioners to use parcel PR 2464 for some particular commercial propose to be agreed in writing between the first respondent and the petitioners but on no account shall permission be given for selling any drink, alcohol or otherwise food stuff provision;

- iii. The residential house built on parcel PR 2464 shall be mainly built of stone or brick or cement and shall be a one ground floor level building, having no storey or upper floor of any kind thereto or thereon; and
- iv. The petitioners or their agent shall only build on or cause to be built or erected a fence on parcel PR 2464 or along or around the said parcel, of such height, material and of such kind and colour as may be approved by the first respondent in writing.

It is further averred that the aforementioned conditions are not limitations prescribed by law or alternately if they are limitations prescribed by law, more specifically section 53 of the Land Registration Act CAP 107, they are not limitations necessary in a democratic society for any one of the purposes set out in article 26(2) (a) to (i) of the Constitution.

Article 26(2) (a) to (i) reads –

The exercise of the right under clause (1) may be subject to such limitations as may be prescribed by law and necessary in a democratic society –

- (a) in the public interest;
- (b) for the enforcement of an order or judgment of a court in civil or criminal proceedings;
- (c) in satisfaction of any penalty, tax, rate, duty or due;
- (d) in the case of property reasonably suspected of being acquired by the proceeds of drug trafficking or serious crime;
- (e) in respect of animals found trespassing or straying;
- (f) in consequence of a law with respect to limitation of actions or acquisitive prescription;
- (g) with respect to property of citizens of a country at war with Seychelles;
- (h) with regard to the administration of the property of persons adjudged bankrupt or of persons who have died or of persons under legal incapacity; or
- (i) for vesting in the Republic of the ownership of underground water or unextracted oil or minerals of any kind or description.

The petitioners therefore seek the following relief as set out in their prayer to the petition:

- (i) Declare that article 26 of the Constitution, more specifically the right to peacefully enjoy and/or dispose their property, namely parcel PR 2464, has been contravened in relation to the petitioners in their capacities as the co-owners of parcel S2464, by the conditions and limitations set out and paragraphs 3(i) to (iv) above and at paragraphs (a), (b), and (i) of the transfer document of 7 of October 1998;
- (ii) Declare that article 26 of the Constitution, more specifically the right to peacefully enjoy and/ or dispose of their property, namely parcel PR 2464, is likely to be contravened in relation to the petitioners in their capacities as the co-owners of parcel PR 2464 by the conditions and limitations set out and paragraph 3(i) to (iv) above and at paragraphs (a), (b), and (i) of the transfer document of 7 October 1998;
- (iii) Declare that article 26 of the Constitution more specifically the right to peacefully enjoy and/ or dispose of their property, namely parcel PR 2464, in their capacities as the co-owners of parcel PR 2464 had been contravened in relation to the petitioners by section 53 of the Land Registration Act;

- (iv) Declare that article 26 of the Constitution, more specifically the right to peacefully enjoy and/ or dispose of their property, namely parcel PR2464, is likely to be contravened in relation to the petitioners by section 53 of the Land Registration Act;
- (v) Declare that section 53 of the Land Registration Act is void; and/or
- (vi) Make any such declaration or orders, issue such writ and give such directions as may be appropriate for the purpose of enforcing or securing the enforcement of the right of the petitioners under article 26 of the Constitution and disposing of all the issues relating to this petition.

It should be borne in mind that article 26(2) of the Constitution provides for the existence of limitations to the right to acquire, own, peacefully enjoy and dispose of property. It states that the exercise of such rights may be subject to such limitations as may be prescribed by law and necessary in a democratic society and in the instant application it is the contention of the respondents that the limitations are prescribed by law and are necessary in the public interest.

The main thrust of the petitioners' case is that the restrictive conditions contained in the transfer document did not fall under any limitation prescribed by law and even if it were to fall within the ambit of section 53 of the Land Registration Act as relied on by the first respondent, the section did not meet the requirement of a prescribed law in that it was vague and ambiguous in its wording.

In this regard it is the duty of this court to first decide whether the restrictive conditions in the transfer document fall under any limitations prescribed by law. It is the contention of counsel for the first respondent that section 53 of the Land Registration Act is not necessarily the only legal provision but that article 537(2) of the Civil Code of Seychelles Act CAP 33 (hereinafter referred to as the Civil Code) too recognizes restrictive covenants which are means by which the use of land can be limited by private agreement.

Section 53 of the Land Registration Act reads –

- (1) Where the proprietor or transferee of land or of a lease agrees to restrict the building on or the user or other enjoyment of his land, whether for benefit of other land or not, he shall execute an instrument to that effect (hereinafter referred to as a restrictive agreement), and upon presentation such restrictive agreement shall be noted in the encumbrances section of the register of the land or lease burdened thereby, and the instrument shall be filed.
- (2) Subject to its being noted in the register, a restrictive agreement shall be binding on the proprietor of the land or lease burdened by it and, unless the instrument otherwise provides, it shall also be binding on his successors in title.
- (3) Where a restrictive agreement has been entered into for the benefit of land, the proprietor of such land and his successors in title shall be entitled to the benefit of it, unless the instrument otherwise provides.
- (4) The provisions of this section shall apply to all restrictive agreements entered into with the Government or the Republic or any statutory body whether or not any land will benefit from such agreement.

Article 537 of the Civil Code referred to by counsel for the first respondent reads –

- (1) Persons shall enjoy the free-right to dispose of the property which belongs to them, subject to the restrictions laid down by law. Property which is not owned by private person must be managed in the manner and according to the rules which apply to such property specially; and such property can only be alienated in the manner and in accordance with the rules peculiar thereto.
- (2) A clause restricting the right of disposal of immovable property or of a right attached to immovable property shall be valid. However, such a restriction shall be subject to two conditions: (a) that there is a serious reason for the imposition of such restriction; and (b) that it shall only be binding upon the transferee during his lifetime.
- (3) The court shall be empowered to delete such a restriction if it is satisfied that it is just to do so.

While section 53(1) of the Land Registration Act provides for the proprietor or transferee of land or of a lease agreeing to restrict the building on or the user or other enjoyment of his land, article 573(2) provides for a clause restricting the right of disposal of immovable property and that such a restrictive right attached to immovable property shall be valid. It is apparent that the prescribed law be it the Land Registration Act or the Civil Code categorically provides for the use of land to be limited or restricted by way of restrictive agreements and restrictive covenants. It is apparent that the restrictive conditions set out in the transfer document were based on these limitations prescribed by law and therefore counsel for the petitioners' contention that the restrictions in the said transfer document were not based on any limitations prescribed by law fails.

Counsel for the petitioner next proceeded to challenge section 53 of the Land Registration Act on the grounds that it did not amount to a prescribed law. He relied on the case of *Silver and Ors v United Kingdom* [1983] 5 EHRR 347 (ECHR) and submitted that according to the said case the requirement of a prescribed law are -

the law must be adequately accessible: the citizen must be able to have an indication that it is adequate in the circumstances, of the legal rules applicable to a given case.

and -

a norm cannot be regarded as "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct; he must be able if need be with appropriate advice to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.

Counsel for the petitioners contends that section 53 of the Land Registration Act specifically 53(1) is vague and does not sufficiently set out the type of restriction.

It is my considered view having perused section 53(1) that it grants the proprietor or transferee of land (as in this instant case) or of a lease not vague but definite powers to

restrict building on or the user or other enjoyment on the land thereby clearly indicating in no uncertain terms its intent to restrict the rights contained therein. I am satisfied that the said law is adequately accessible, precise enough to enable a citizen to regulate his conduct if he desires so in a land transaction and enables him to foresee the consequences of such restrictions. Therefore I am satisfied that section 53(1) of the Land Registration Act falls within the ambit of a prescribed law.

In the case of *The President of the Republic of South Africa & Anor v John Phillip Hugo* (CCT 11/96) relied on by counsel for the second respondent it was held that common law which was not codified had the necessary requisites to be included “as prescribed by law”, while in the Seychelles in the case of *Mancienne v Government of Seychelles* SCA 10(2)/2004 it was held by the Seychelles Court of Appeal “as prescribed by law” included statutes and case law as well. I therefore find no merit in the argument of counsel that section 53(1) of the Land Registration Act (a statute) is not a prescribed law and am of the same view in regard to article 537(2) of the Civil Code.

I therefore hold that restrictive agreements as set out in section 53 of the Land Registration Act and restrictive covenants as mentioned in article 537 of the Civil Code are both limitations prescribed by law. It is apparent that the restrictions contained in the transfer agreement are based on the above limitations prescribed by law and therefore are permissible.

Counsel for the petitioner next contended that the restrictions in the transfer document were not limitations necessary in a democratic society and did not fall into any of the categories mentioned in article 26(2) (a) to (j). Counsel for the first and second respondent both submitted that restrictions in the transfer document were not only limitations prescribed by law but limitations necessary in the public interest.

It is apparent on the facts before us as admitted by parties, that the first respondent had transferred 26 other adjoining plots of land to other persons with the same restrictions with the intention to ensure that the no commercial enterprise would be permitted in an area strictly reserved for all members of the community therein for residential purposes and approved accordingly by the Planning Authority. It is apparent from the submissions of the petitioners that they are now endeavoring to open up a commercial enterprise within this area which has been reserved strictly for residential purposes. It is the contention of the first and second respondents that the limitations prescribed by law such as restrictive agreements and restrictive covenants are necessary to ensure the homogeneity, maintain or enhance the value and provide a pressing social need for the community and therefore necessary in the public interest.

In this respect counsel for the first respondent directed our attention to the case of *Shelley v Kramer* 334 US 1(1948). In the case of *Seychelles National Party v James Alix Michel & Ors*(2010) SLR 216 the Seychelles Court of Appeal held that what is “necessary in a democratic society” implies the existence of a pressing social need.

On considering the facts before us I am satisfied that in this instant case limitations prescribed by law are necessary to ensure the homogeneity, continuity and value of all 27 residential premises and to continue to provide and maintain a pressing social need namely residential premises for the community living therein, and the use of restrictive agreements and restrictive covenants as set out by the prescribed law were necessary for the benefit of all the persons living in the 27 residential premises within the community. The Seychelles Court of Appeal held in the case of *Alfred Leite v Attorney-General* SCA 10/2002 that the acquisition of the land for the benefit of 36 families was in the “public interest” and, considering the salient facts of this case as admitted by parties, I hold that the limitations prescribed by law namely restrictive agreements and restrictive covenants on which the restrictions in the transfer document are based were necessary in this instant case in the public interest.

For the aforementioned reasons I am satisfied and hold that the restrictive conditions contained in the transfer document are based on limitations prescribed by law and necessary in a democratic society in the public interest and therefore the restrictions in the transfer document fall within the permitted derogation set out in article 26(2)(a) of the Constitution and therefore are not unconstitutional.

It is pertinent that at this stage that counsel for the petitioners’ attention is specifically drawn to section 54 of the Land Registration Act and article 537(3) of the Civil Code.

Section 54 of the Land Registration Act reads –

- (1) Upon presentation of a duly executed release in the prescribed form or of an order of the court to the same effect, the registration of an easement or restrictive agreement shall be cancelled and thereupon the easement or restrictive agreement becomes extinguished.
- (2) On the application of any person affected thereby, the Registrar may cancel the registration of an easement or restrictive agreement upon proof to his satisfaction that –
 - (a) the period of time for which it was intended to subsist has expired, or
 - (b) the event upon which it was intended to determine has occurred.

Article 537(3) of the Civil Code reads as follows: “The court shall be empowered to delete such a restriction if it is satisfied that it is just to do so.”

It appears that these two provisions clearly indicate the procedure to be adopted to set aside any conditions in a restrictive agreement or restrictive covenant. It appears these sections have escaped the eye of counsel for the petitioners and instead he has sought notably after a lapse of 13 years to come directly to the Constitutional Court.

It is also to be borne in mind that constitutional law and administrative law are branches of ‘public law’ as distinguished from ‘private law’ which deals with the rights and liabilities of private individuals in relation to one another. Constitutional law and administrative law deal with the relation of individuals with the State and other ‘public’

bodies, or the citizen and the State. (Dr (Justice) DurgaBasu *Administrative Law* (2nded) at 1 and Hilaire Barnett *Constitutional and Administrative Law* (8thed)).

On the face of the petition it is admitted that the infringement claimed in this case is based on a private transfer document between the petitioners and the first respondent, a private company registered under the Companies Ordinance. On this basis, as it is an agreement between two private individuals, public law would not apply unless the petitioners can satisfy us the constitutional rights of the petitioners had been infringed.

It is apparent that although the first respondent placed certain restrictions or limitations in respect of the transfer of the said property to the petitioners, the petitioners were well aware of these restrictions and limitations which were all part of a private agreement between the parties and which the petitioners knowingly and willingly agreed on.

Considering the background facts of this case I am inclined to agree with counsel for the first respondent that the proper forum of the petitioners would have been recourse to the civil courts if they wished to challenge or nullify the existing transfer agreement and not to attempt to challenge the existing laws which permit the existence of such limitations which would apply to very many other situations other than those limited to this particular transfer document or agreement between the parties to this case.

Counsel for the petitioners also contended that the petitioners, even though they may have willingly and knowingly signed the said transfer document, cannot by their own volition waive their fundamental rights. I am of the view that the petitioners' right to enjoy the said property has not been waived by them. They continue to do so and have been doing for the past 13 years subject to the permitted derogation set out in article 26(2)(a) of the Constitution which we have already held is applicable to this case. In this instant case the petitioners have not waived their rights set out in the Charter but have willingly and voluntarily limited their right under the permitted derogations available in article 26(2)(a) and having agreed to do so the effect of obligations between parties as contained in article 1134 and 1135 of the Civil Code take effect.

Article 1134 of the Civil Code reads –

Agreements lawfully concluded shall have the force of law for those who have entered into them.

They shall not be revoked except by mutual consent or for causes which the law authorises.

They shall be performed in good faith.

Article 1135 reads –

Agreements shall be binding not only in respect of what is expressed therein but also in respect of all the consequences which fairness, practice or the law imply into the obligation in accordance with its nature.

Counsel for the petitioners also attempted to dissociate the conditions from the property on the basis that the word "land" could only mean parcel PR 2464 and not the conditions attached to the land. It is to be noted that the definition of the word "land" is not limited to land alone as contained in the interpretation section 2 of the Land Registration Act. In this instant application before us it is clear the petitioners purchased the said property with the conditions contained in the transfer document. Had they purchased the land PR 2464 with no conditions attached and subsequently an attempt was made to impose the said conditions, then no doubt the petitioners' right to enjoy the parcel of land PR 2464 and the conditions to be imposed could be considered separately, but not otherwise.

For the aforementioned reasons I find no merit in the application of the petitioners and would proceed to dismiss the petition with costs.

GASWAGA J: I have had the benefit of reading in draft the judgment of Burhan J. I concur with the reasons and orders he has given.

EGONDA-NTENDE CJ: I have read in draft the judgment of Burhan J, and I agree with him that this petition has no merit. As Gaswaga J is in agreement, this petition is dismissed with costs.