

**Attorney-General v Robert
(1997) SLR 97**

Anthony FERNANDO for the Applicant
Bernard GEORGES for the Respondent

Judgment delivered on 29 October 1997 by:

AMERASINGHE J: On behalf of the Government of Seychelles, the Attorney General instituted proceedings against the defendant as "the executor and fiduciary for heirs Ronald Robert" for an order directing the defendant to execute the transfer deeds or, on the failure of the defendant to execute such deeds, for the court to order that the judgment of this Court stand in lieu of such transfer deed" and "for costs".

On the pleadings of the parties, the following facts are without dispute.

- (1) The defendant is the executor and fiduciary for the heirs of Ronald Robert, the owners of land parcel S 365 - Providence Quarry.
- (2) The defendant, himself a co-owner, was granted by the co-owners in a document appointing him as fiduciary, the power to sell, lease, mortgage or otherwise dispose of or deal with the parcel S 365.

This Court on 6 March 1997 ruled on the plea in limine litis raised by the defendant to the effect that a bare direction to sell by the co-owners is sufficient to satisfy a 825 of the Civil Code without the specific approval in writing by the co-owners of the offer.

- (3) The plaintiff, by a letter dated 8 May 1986 (exhibit P1) addressed to the defendant, offered to purchase parcel S 365.
- (4) The defendant, after clarifications made by the plaintiff at his request, accepted the plaintiff's offer of R1,150,000 by his letter dated 26 August 1986 (exhibit P4).
- (5) The plaintiff, having first paid the agreed purchase price, obtained possession of the said parcel.
- (6) The defendant failed to execute the deed of transfer when requested by the plaintiff.

The defendant in his pleadings contended that the transaction between the parties was a disguised compulsory acquisition of parcel S 365 by the plaintiff as the offer amounted to a fraud as it was accompanied by a threat of compulsory acquisition and that the acceptance of the offer was under duress. It is further averred by the defendant that the purchase price offered and accepted on the threat of compulsory acquisition was out of

proportion to its real worth. The defendant therefore prays for a declaration that, "the offer and acceptance of payments by the government and the defendant respectively of parcel S 365 to be null, and to rescind such offer and acceptance, with costs".

The defendant by an amendment to the amended statement of defence claims that the plaintiff's action is time barred by the lapse of five years, under article 2271 of the Civil Code.

In dealing with the point of law arising on the plea of prescription it is of note that article 2271 of the Code is subject to the exceptions in articles 2262 and 2265 of the Code. The counsel for the defendant raises the point of law on the basis that the plaintiff has sued on the contract where the five years period of prescription is applicable under article 2271 of the Civil Code, but he conceded that the point of law should fail if it is decided by the Court that the action of the plaintiff is a real action in respect of rights of ownership of land or other interests therein. Principal State Counsel had no hesitation in describing the plaintiff's institution of proceedings as a real action in respect of rights of ownership of land. According to him the plaintiff seeks only a deed of transfer of land to establish the formal ownership of the parcel of land S 365 in respect of which exhibits P1 and P4 witness an offer and acceptance for sale, where the two parties have mutually agreed upon the thing and the price leading to a presumption of a sale under article 1589 of the Civil Code. There can be no doubt that the cause of action pleaded by the plaintiff is the defendant's failure to execute a deed of transfer resulting from the offer and acceptance for the sale of parcel S 365 for which the plaintiff has already paid the purchase price and obtained possession of the parcel of land. He cites the Louisiana Civil Law Treatise (2nd edition) Volume 2 paragraph 173 at page 470 where 'real actions' are described as actions for the enforcement of the right of ownership of movables and immovables. He also points out that in *Stroud's Judicial Dictionary* (4th edition) Volume 4 at page 2252 that a 'real action' is defined as "that action whereby a man claims title to lands, tenements or hereditaments in fee or for life".

I am satisfied that on the plaintiffs' pleadings and on the admissions by the defendant it is clearly established that the action before this Court is a real action in respect of the plaintiffs' right of ownership acquired by a purported purchase of parcel S 365 established by exhibits P1 and P4 for valuable consideration. Hence the period of extinctive prescription applicable to the instant action is 20 years which has not yet elapsed since the offer and acceptance and the presumed sale dates back to the year 1986. I therefore deny the defendant's point of law.

On the facts pleaded by the plaintiff, the defendant alleged that the contract constituted on the offer and acceptance was voidable on the grounds of duress, fraud and lesion. It is averred by the defendant that the plaintiff's offer of purchase was accompanied by a threat of compulsory acquisition of parcel S 365, therefore he contends that the acceptance was under duress and the offer amounts to a fraud. On the face of the plaintiffs' witness Simone Mellie, an Assistant Director of the Land Division, stating that to her knowledge no steps were taken by the plaintiff to acquire the subject matter and that no threat was made, the only evidence adduced on the issue of the threat was

restricted to the following question and answers that transpired in the examination in chief of the defendant.

Q "What was the Government's reaction when you said you did not want to sell the land?"

A "They said there were two options, accept price or we acquire it".

The evidence on the said issue is vague and unconvincing. On the evidence of the defendant the discussion between his brother Guy Robert and the Minister in respect of the sale and consideration for the property had taken place just after his mother's death in 1984, thus indicating the plaintiff's readiness to negotiate to determine the purchase price over a period of 2 years culminating with the offer and acceptance in 1986. Although the witnesses for the defendant attribute to the Government a threat of compulsory acquisition, in the absence of any writing to that effect, the failure of the witnesses to name any agent of the Government specifically responsible for such a threat is conspicuous. There was evidence elicited from the witness called by the plaintiff that acquisition of land during the period in question was a regular feature and that compensation paid on such acquisitions was during a period of time extending over 20 years. The evidence of the defendant and his brother Guy Robert very clearly demonstrates their feeling of hopelessness when the offer to purchase their property was made by the Government. Their reluctance to displease the Government due to the fact that Guy Robert was the highest ranking Government representative of Seychelles in Australia, that the defendants' son-in-law Patrick Lablache was in charge of lands at that time and that the Head of State was personally known to the defendant, very probably had a very strong bearing on the defendant's acceptance of the offer finally. In the event of an acquisition the risk of the defendant losing his house and the delay in the payment of compensation causing the defendant to be homeless for a long period of time were added reasons that influenced the defendant to accept the offer. It is obvious that in the conditions prevailing at the time of the offer and acceptance by the defendant, as depicted by their evidence, the defendant had found no alternative other than to accept the offer of the Government with the monetary value of the property being made available to the defendant without an inordinate delay, that would have otherwise followed in the event of a compulsory acquisition. However I find that the evidence fails to establish that the offer of the Government to purchase was accompanied by any real threat of acquisition for the simple reason as revealed in the evidence for the defendant, as well as by Simone Mellie for the plaintiff, that it could not have escaped the attention of the defendant that the Government in any event had the option to compulsorily acquire the property without resorting to any threats on a balance of probabilities I therefore hold that a threat was superfluous and was never made.

In the absence of a threat of compulsory acquisition of parcel of land S 365 by the plaintiff the contention that the agreement is voidable for duress and or for fraud fails.

Counsel for both parties also examined the resulting position if it is a fact that the Government did make a threat to the defendant, of compulsorily acquiring the property if the defendant failed to accept the offer. Because a compulsory acquisition of any

property is a lawful exercise of the Government, any such threat cannot make a contract voidable on the ground of duress (see article 1113-1 of the Civil Code).

In accordance with article 1116 of the Civil Code, if the threat of compulsory acquisition is an intentional contrivance practiced to make a party accept an offer then only fraud shall cause the contract to be null. In the instant action, as determined earlier, there is no evidence to conclude that the plaintiff intentionally brought to bear on the defendant any threat of a compulsory acquisition, as such intention cannot be presumed.

Counsel for the defendant, Mr George, submitted that in accordance with article 1118 of the Civil Code that lesion vitiates the contract and hence the demand for rescission. Whether the defendant made such a demand in his statement of defence is an issue that arises from his claim. As rightly pointed out by the Principal State Counsel, since the acceptance of the offer of sale by P4 there is no evidence of a demand orally or in writing made for rescission of the contract on the ground of lesion. The only averment with reference to lesion in the statement of defence is in paragraph 6 of the statement of defence as follows:

The defendant was compelled to agree to sell the said parcel S 365 and to accept a price for it out of proportion to its real worth.

In my view I find that there is no demand made by the defendant in accordance with article 1118 for the rescission of the contract on the ground of lesion. It is all the more significant that the purchase price paid by the plaintiff was R1,100,000 and the value of the property as assessed by the defendant at the time of negotiations as depicted in exhibit D5 was only R2,000,000, in view of the fact that the provisions of article 1674 of the Civil Code lay down that the price paid by the buyer should be less than one half of the value of the parcel of land for the seller to be entitled to rescission. The seller being the defendant, Guy Roberts' estimate in D4 is considered irrelevant.

Be that as may, at the stage of the submissions by counsel for the defence after the cases for the plaintiff and the defendant were closed, an application was made by the said counsel under article 1680 of the Civil Code for the appointment of three experts to produce reports on the valuation of the property as at the relevant date. He also submitted that article 1680 of the Civil Code provides that, "the court shall not admit any claims that a contract is vitiated by lesion, unless the plaintiff is able to make out a prima facie case that the circumstances are sufficiently serious to warrant an investigation by the court". It is counsel's view that to enable the party concerned to establish a prima facie case the Court should suspend further proceedings and give expression to article 1680 of the Code by appointing three experts as required in it. There is no doubt that the proposed procedure is not tenable. If counsel is right, after the closure of the case for the defendant without a prima facie case being established in the course of the hearing to warrant an investigation as in the instant case, the Court is called upon to look for evidence to support the defendant's case. It cannot be overlooked that it is at the hearing proper that the evidence to resolve the matters in issue has to be presented to Court, and not when judgment is due after the conclusion of the hearing (See section

135(1) of the Code of Civil Procedure). I therefore hold that a party concerned, having first made a demand under article 1118 of the Civil Code, should have had recourse to the provisions of Article 1650 to have three experts appointed by the Court, either before the commencement of the hearing or at the latest before the case was ripe for judgment after the hearing was concluded. Hence the defendant has failed in these proceedings to satisfy the Court that a prima facie case exists for it to admit the instant claim on lesion.

Defence counsel's claim of lesion while denying the sale of the parcel of land S 365 surprised the Principal State Counsel. On an examination of the statement of defence it discloses that the defendant has not specifically denied the sale of land but claims that the transaction is, "voidable on account of duress and fraud on the part of the Government". There is no dispute between the parties that by exhibit P1 the plaintiff made an offer to purchase parcel of land S 365 for R1,150,000 and the defendant by exhibit P4 communicated to the plaintiff the acceptance of the offer. In accordance with article 1589 the two parties, having mutually agreed upon the thing and the price, the transaction completes the sale as far as the parties are concerned.

In *Hoareau v Gilleaux* (1978-1982) SCAR 158, the Seychelles Court of Appeal held:

That the trial Judge had rightly interpreted article 1589 of the Civil Code of Seychelles, namely that when the parties have agreed on the thing and the price, a promise to sell, property subject to registration, is complete and effective as between the parties.

Principal State Counsel relying on article 1678 raised the point of law that this sale having been concluded on 26 August 1986 on the acceptance of the offer by exhibit P2, the defendant's right to sue for rescission on the ground of lesion after the expiration of 5 years is time barred. Mr Georges, counsel for the defendant, stated that on the grounds of duress and fraud there was no sale and in any event the property has not been transferred to the plaintiff. It is settled law on the authority cited that the defendant cannot in law deny the sale to the plaintiff on the operation of article 1589 of the Civil Code. I uphold the point of law that the defendant in any event is subject to a time bar in exercising his right to sue for rescission of the contract of sale with the 5 year period for extinctive prescription ending by 26 August 1991. I therefore find that the claim of rescission is proscribed.

In response to the statement of defence that the contract sought to be enforced is voidable on the grounds of duress and fraud on the part of the Government, Principal State Counsel raised a point of law that on the operation of article 1304 of the Civil Code the right to claim a nullity and rescission is time barred by the lapse of five years. On the cross-examination of the defendant and his brother Guy Robert it was established by Principal State Counsel that until the lapse of five years from the acceptance of the offer that there has been no allegation of any threat of compulsory acquisition if the offer was not voluntarily accepted. In spite of the reasons adduced by the defendant that due to the circumstances prevailing at the given time and their close association with the Head of State, it is a fact that there has been no complaint of any

compulsion or of an absence of voluntary acceptance of the offer during the said five years. As the alleged duress and fraud relates to the offer there cannot be a continuation of either after the acceptance of the offer. In considering the fact that not only did the plaintiff pay to the defendant the agreed price but also obtained possession forthwith, it is unacceptable that the defendant's silence and inaction was due to the plaintiff having had no deed of transfer to the property.

As submitted by Principal State Counsel, in view of article 1117 of the Civil Code, contracts entered into by duress or fraud shall not be null as of right but shall only give risk to a right to an action for nullity or rescission, and with the operation of article 1304 of the Civil Code such action will be time barred after a period of five years.

It is not the case of the defence that duress continued even after the acceptance of the offer or that the fraud was discovered thereafter. As declared before, a valid sale ensued with the acceptance of the offer, and the five years period runs from the acceptance of the offer on 26 August 1986.

Therefore the said point of law is upheld, and even if there has been duress and fraud affecting the offer and acceptance by the parties, the right to a claim for nullity and rescission is time barred by the lapse of five years under article 1304 of the Civil Code.

On the pleadings, admissions and on exhibits P1 and P4 the plaintiff, having established on the balance of probabilities a legally valid sale of parcel S 365, on the application of article 1589 of the Civil Code the defendant was obliged and was liable to execute a deed of transfer in favour of the plaintiff but has failed to do so. I therefore enter judgment in favour of the plaintiff, directing the defendant to execute a deed of transfer for parcel S 365, and on the failure of the defendant to execute a transfer deed within a period of one month from this day, it is further directed that this judgment of this Court is to be effective as the document of transfer in lieu of such deed.

The plaintiff is entitled to the costs of action.

Record: Civil Side No 428 of 1995