

**Botel v Monnaie Ruddenklau
(2001) SLR 241**

Kieran SHAH for the Plaintiff
Francis CHANG-SAM for the Defendant

Ruling delivered on 28 September 2001 by:

JUDDOO J: By way of a plaint entered against the Defendant, on 23 June 1997, the Plaintiff essentially claims that a transfer of property (H1056) to the Defendant witnessed by way a deed under private signature dated 15 October 1984 amounts to a gift inter vivos. It is further claimed that the said gift, not being by way of a notarial deed, offends against Article 931 of the Civil Code thereby rendering the deed and the transfer sought to be effected thereby null and void ab initio.

The Plaintiffs claim is resisted by the Defendant who raised a plea in limine litis as follows:-

1. The action of the Plaintiff is barred by prescription;
2. The action of the Plaintiff is res judicata.

There is no denial that a former plaint (CS57 of 1991) was filed by the Plaintiff against the same Defendant and included a request for determination pertaining to the same parcel H1056. A copy of the record was produced as exhibit.

The gist of the amended plaint in the former case, in as far as it concerns parcel H1056, was that the Plaintiff owned the property since 26 March 1980. Subsequently, in August 1984, the Plaintiff came to believe that it would be in his best interest if his property in Seychelles were to be held by a Seychellois national instead of himself. Accordingly, the Plaintiff made "certain arrangements" with the Defendant. It was averred in the amended former plaint as follows:

6. The Plaintiff arranged with the Defendant for her to come to Seychelles to sort things out for him. It was intended and agreed that the Plaintiff would transfer parcel H1056 to the Defendant temporarily so that she would hold the property on behalf and to the benefit of the Plaintiff until things got better in Seychelles when the property would be returned to the Plaintiff.
7. As a consequence of such arrangement the Defendant came to Seychelles where she contacted a lawyer. Ultimately, a transfer deed was signed on the 15th October 1984 by the Defendant, as purchaser, and an agent and proxy for the Plaintiff as vendor. The deed of transfer was registered in Register A.37 No. 3966 and

transcribed in Volume 65 No. 36 of the Register of Transcriptions.

8. The consideration stated in such transfer deed was R500,000 which in fact was never paid by the Defendant to the Plaintiff.
9. The Plaintiff paid the sum of R83,830 towards stamp duty, tax and legal fees for the land transfer and the power of attorney.
10. The Plaintiff paid the air fares of the Defendant and all the expenses incurred by her for coming to Seychelles on that visit.

....

15. The Plaintiff avers that the Defendant's actions in appropriating and converting the Plaintiff's property to her own use as described in paragraphs 11, 12 and 14 amount to a non-performance of the undertaking by the Defendant consequent upon the transfer of the Plaintiff's property to her on the 15th October 1984, that she would hold such property on behalf and for the benefit of the Plaintiff.
16. The Plaintiff avers, in the alternative, that as the consideration of R500,000 stated in the contract of transfer dated 15th October 1984 was never paid by the Defendant to the Plaintiff such transfer amounts to a gift inter vivos which should have been drawn up by notarial deed in accordance with paragraph 1 of Article 931 of the Civil Code of Seychelles. This defect offends a rule of public policy rendering the transfer null and void ab initio.

Wherefore the Plaintiff prays this Honourable Court:

- (a) to rescind the contract of transfer dated 15th October 1984 in so far as it concerns parcel H1056 and to restore things in the same state as they would have been if the contract had never existed;
- (b) and, in the alternative, to declare the contract of transfer dated 15th October 1984, insofar as it concerned parcel H1056, to be null and void ab initio and to restore things in the same state, as they would have been if the contract never existed.

The former plaint was heard in the presence of both parties and a judgment was delivered by this Court on 10 February 1995. The relevant part, thereof, reads:

...The case for the Plaintiff is that although on the face of the deed there had been an outright transfer of the property for valuable consideration, what was intended by the parties was, that the Defendant should hold the

property temporarily on behalf and to the benefit of the Plaintiff. This is denied by the Defendant save for the averment that she did not pay the purchase price ...

According to the Defendant, the decision to effect a "disguised transfer" of the property was taken on receipt of an anonymous letter ... The transfer was effected under private signature on 15th October 1984 (P21) ... Although the parties agreed that no money passed to the vendor as consideration stated in the deed they disagreed on the reason for the transaction ...

In the instant case, the deed of transfer evidences an absolute sale of the property in consideration of the payment of the purchase price, which is duly acknowledged by the vendor. However, both parties now admit that no payment was made nor received as stated in the deed. The Plaintiff avers that this was a 'disguised sale' not intended to transfer ownership. The Defendant avers it was an absolute sale in consideration of a debt owed to her husband.

On a consideration of the totality of evidence, I am satisfied on a balance of probabilities that the parties had from 1984 to 1986 conducted themselves on the basis that the Plaintiff continued to be the owner and that the document under private signature was not intended to transfer the beneficial interest in the property to the Defendant ...

In view of the above findings, I need not make any pronouncement on the alternative averment in paragraph 16 of the amended plaint as regards the nullity of the Deed of transfer on the basis of a "disguised gift inter vivos" which has not complied with the requirements in Article 931 as to form.

As Amos & Walton state in The Introduction to French Law 2nd Edition, 177:

It may happen that for some reason or other the parties to a contract desire to conceal its character. In such a case they may make an apparent contract and modify this or destroy its effect by a secret agreement. This is known as simulation...

In the instant case, the secret agreement to hold the property in trusteeship and to re-transfer it when requested has been established as prayed for in paragraph (a) of the prayer, "order is hereby made rescinding the contract of transfer dated 15th October 1984 in respect of parcel H1056...

An appeal was lodged against the above finding of the Supreme Court by the Defendant, then appellant. Seven grounds of appeal were filed in the Memorandum of appeal. However, at the request of the Court of Appeal, the parties were invited to address the Court on the effect of Article 1321 of the Civil Code.

After having heard the parties and in determination of the appeal the Court of Appeal found:

...By virtue of a deed made on 15th October 1984 and registered in the "old land register", the appellant became to all intents and purposes the ostensible owner of the property by right of purchase. She exercised rights of ownership thereon ...

Peres J who tried the action succinctly summed up the main issue in the case when he stated:

After consideration of the totality of evidence the learned judge concluded that the document, (Exhibit P21) under private signature was not intended to transfer the beneficial interest in the property to the appellant. The secret agreement relied on by the Judge to come to that conclusion was not proved by evidence in Writing. However, the learned judge held, rightly, that the secret agreement had been established by personal answers of the appellant which is tantamount to a commencement of proof in Writing under Article 1347 supplemented by oral and documentary evidence.

In this case it is evident that the 'back letter' relied on by the Respondent was not in Writing and consequently was not and could not have been registered as required by Article 1321(4) of the Code. In the result the back letter is of no force or avail whatsoever. Therefore, there was nothing that could in law be relied on as evidence that the transaction embodied in the deed of transfer (Exhibit P21) was a simulation or a sham. The ostensible agreement ought to have been given effect to ...

The core issue in the instant determination, is whether the trial Court and Appellate Court had dealt with all the issues raised in the former plaint or whether there subsists an issue raised in the pleadings which had not been so determined.

It is plain that there has been some form of a transaction between the Plaintiff and the Defendant, which transaction was attempted to be embodied in a deed by private signature on 15 October 1984. On the face of the record, the trial Court found that the deed of transfer, per se, "evidences an absolute sale" of the property in consideration of the payment of the purchase price which is duly acknowledged by the vendor. This finding is not upset by the Court of Appeal when it quotes the trial Court on this aspect

and states that it represents a proper identification of the issue.

The second finding of the trial Court was that the 'absolute sale' was in fact, on the totality of the evidence led in the case, a 'disguised sale' intended to transfer the beneficial interest in the property. The trial Court relied to find that the beneficial interest was not transferred. There were in existence between the parties a different secret agreement which destroyed the apparent and ostensible effect of the deed. The said secret agreement (termed a back letter) was not proved by evidence in Writing.

pleaded in the deed 'absolute sale' and was not ground upon which relied was that there was an agreement which destroyed the apparent (termed a back letter) was not proved by evidence in Writing.

The third finding of the trial Court was that the apparent and ostensible agreement in the deed ought to be rescinded by the effect of the back letter with the parties.

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In its determination the Court of Appeal found that by virtue of the deed made on 15 October 1984 the appellant became to all intents and purposes the ostensible owner of the property by right of purchase and that the trial Court rightly found the case as one of simulation in which the apparent and ostensible agreement is destroyed, in effect, by a secret contract. However, the Appellate Court found the secret agreement relied by the trial Court to be void by reason of the absence of Writing held the ostensible transaction, therefore, ought to have been given effect to.

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In support of the plea in limine litis raised, learned counsel for the defendant submitted that:

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the Plaintiff having participated in a transfer of land by Defendant cannot in the same breath argue that the sale is in fact not a sale but a gift. The Plaintiff must choose his cause of action and stay with it... and that although there is no pronouncement on the original alternative cause of action of the Plaintiff the decision of the Court of Appeal that the deed was valid and that the deed provided for the payment of consideration of Rs 1,00,00 by the Defendant to the Plaintiff effectively renders relevant the alternative claim by the Plaintiff that the transaction was vitiated for want of form in that it was a gift inter vivos...

In reply it is submitted on behalf of the Plaintiff that "the first cause of action which was adjudicated upon by the Supreme Court depended upon an oral agreement between the parties which amounted in law to a back letter, which, in accordance with Article 1321(4) of the Civil Code of Seychelles was of no force or avail whatsoever. That agreement could therefore not form the basis of a rescission as was prayed for by the Plaintiff. The second alternative cause of action raised in the former plaint and not adjudicated upon is:

whether the deed of 15th October 1984 is a disguised donation or not, depends on certain facts pleaded in the plaint and does not depend upon a

secret agreement of "back letter" between the parties.

The substance of the subject matter is entirely different from the subject matter of the first cause of action determined by the Supreme Court or the Court of Appeal and is not redundant as it has never been adjudicated upon.

To bring the issue into perspective, the two alternative claims that were pleaded before the trial Court in the former case was there was a "disguised sale" and alternatively that there was "disguised gift inter vivos." It is recalled that under paragraph 6 of the former plaint, quoted earlier, the Plaintiff pleaded that the intention and agreement reached between the parties was as follows –

It was intended and agreed that the Plaintiff would transfer the Defendant temporarily so that she would hold the property to the benefit of the Plaintiff until things got better in September 1986 when the property would be returned to the Plaintiff.

On these facts as pleaded the learned trial Judge when summarising the relevant issues before the trial Court succinctly stated:

...The case for the Plaintiff is that although on the face of the deed there had been an outright transfer of the property for valuable consideration, what was intended by the parties was that the Defendant should hold the property temporarily on behalf of the Plaintiff.

The issues therefore are whether the Plaintiff was entitled in September 1986, attempting to obtain a re-transfer of the property under his name at the end of the two years as alleged, and if not, upon ...

In the end result, the trial Court found in favour of the above finding that there was an agreement by the Defendant to temporarily hold the property on behalf of the Plaintiff and that in spite of the deed of sale, the Plaintiff had retained the "beneficial interest" of the land. Accordingly, the trial Court found that the sale was rescinded by the operation of a back letter. At that stage the Court could not proceed further, and determine, in the alternative, that the transaction amounted to a gift (whether disguised as a sale or not) since the Plaintiff had retained the beneficial interest in the property. Article 894 of the Civil Code would constitute "an act where a person divests himself of the ownership of the thing in favour of the person to whom it is transferred." The alternative claim that the transaction amounted to a gift, although not pleaded, was found to be redundant.

It is important to recall that it was not the act of rescission itself that was set aside by the Court of Appeal but rather the validity of the form of the said rescission. The Court of Appeal found the "oral" form of the back letter was deficient and for that reason invalid.

reason alone, the said rescission was not enforceable before a Court of law and did not "prevent the transaction embodied in the deed to be given full effect to ..." Had the form of the 'back letter' been in Writing and duly registered, it would have been enforceable. Having found that there was a temporary transfer of property by the Plaintiff to the Defendant with conditions attached to re-transfer, the trial Court was not able to also determine and hold that the same transaction amounted to a gift which necessitated an 'irrevocable' divesting of ownership.

Given that the instant plaint raises anew the issue of a gift between the same parties, pertaining to the same transaction, before the same forum, which claim was in the alternative in the former plaint and became redundant by virtue of the finding of the trial Court on the facts pleaded, the plea of res judicata succeeds.

As far as the plea of extinctive prescription of ten years under Article 2265 of the Civil Code of Seychelles is concerned, the instant claim is for the nullity of the act of transfer because of a defect of form. Accordingly, Article 2267 of the Civil Code is applicable and a title which is found null because of a defect in form cannot serve as the basis for the prescription of 10 years.

For reasons above, I uphold the plea in limine litis to the effect that the instant filed by the Plaintiff is res judicata.

Record: Civil Side No 55 of 1999