

**Chetty & Ors v Chetty
(2003) SLR 133**

Bernard GEORGES for the Petitioners
Jacques HODOUL for the Respondents

Ruling delivered on 5 May 2003 by:

PERERA J: The instant ruling arises from a plea in limine litis raised by the Respondent that individual co-owners cannot seek a division in kind of a co-owned property except through an executor acting in his capacity as a fiduciary. In the present case, the seven petitioners and the Respondent are the surviving children of one G.K. Chetty who died intestate on 8 May 1982. It is not in dispute that the 1st petitioner, Louis Camille Chetty was appointed as the executor of the estate of the said deceased, which comprised of an immovable property bearing Parcel no. T. 323 at Anse Gaulettes. After the appointment was made, the said executor, registered an affidavit on transmission by death at the Land Registry disclosing the names of the eight co-owners and acknowledging that they held an undivided 1/8 share each of the said property. Section 72(1) of the Land Registration Act (Cap 107) provides inter alia that "upon production and filing of an affidavit by them in the prescribed form, (they shall) be registered as the proprietors of the land, lease or charge of the interests and in the shares shown in the affidavit". Subsection (3) provides that:

The Registration of any person as aforesaid shall relate back to and take effect from the date of the death of the deceased proprietor.

It is also not in dispute that the said Parcel T.323 is now sub-divided into Parcels T. 2150, T.2151 and T.2152. The seven petitioners propose to sell their shares to a third party, excising from the totality of these parcels, the share of the Respondent who, it is averred is unwilling to sell his share.

The issue before the Court involves the interpretation of Articles 818 and 1029 of the Civil Code and Section 107(2) of the immovable property (Judicial Sales) Act (Cap 94). Article 818 of the Civil code provides that:

If the property subject to co-ownership is immovable, the right of the co-owners shall be held on their behalf by a fiduciary through whom only they may act.

Article 1028 provides that:

an executor in his capacity as fiduciary shall be bound by all the Rules applicable to fiduciaries.

Article 1029 provides that:

Executors shall represent the estate in all legal proceedings, and shall act in any legal action the purpose of which is to declare the will null...

Mr Hodoul, Learned Counsel for the Respondent in supporting the plea in limine relied on the decisions in the cases of *Michel v Vidot* (1977) SLR 214 and *Etheve v Morel* (1977) SLR 251. In the case of *Michel* (supra) the Court held that:

The rights exercised by a fiduciary under Article 818 of the Civil Code related to the exercise of the right of co-ownership in so far as it relates to the immovable property itself. Article 818 does not affect the right of the individual owners to deal with their right of co-ownership. A, co-owner is therefore entitled, without acting through a fiduciary, to exercise the retrocession provided for by Article 834.

There is therefore a distinction between a situation when the whole property is involved in the "*legal proceedings*" and where only an individual right to a share is in issue. Hence, are the co-owner petitioners in the present case seeking to exercise their right of co-ownership in respect of the property itself, or only in respect of their individual rights in the property?

In the case of *Etheve* (supra) all the co-owners refused to sign an agreement as to beacons and boundaries. It was contended that they should have acted through a fiduciary. This submission failed on the ground of estoppel. However, Sauzier J stated in obiter that it was necessary that a fiduciary be appointed before a notice of objection to the Survey was lodged by the Defendants, who were co-owners.

In that case, the *whole property* was in issue and hence Articles 818 and 1029 of the Civil Code required that the co-owners could have acted only through an executor, in his capacity as a fiduciary.

In the case of *Laporte v Sullivan & Ors* (1978-82) SCAR 191, the Appellant and the Respondent were co-owners of a parcel of land. The Appellant petitioned the Court for a division in kind, in terms of Section 109(2) (now Section 107(2) of the Immovable Property (Judicial Sales) Act (CAP 94) that sub-section is as follows:

Any co-owner of an Immovable Property may also by petition to a judge ask that the property be divided in kind, or, if such division is not possible, that it be sold by licitation.

In that case, the Court held that although Article 815 of the French Code has not been reproduced in the Civil Code of Seychelles, "it has found its way in another form in Section 109(2) of the Immovable Property (Judicial Sales) Act. Article 815 of the French Code, (as translated) was as follows:

no one can be compelled to own anything undividedly, and a division can

always be demanded notwithstanding any prohibition or any agreements to the contrary. It is lawful however, to agree not to proceed to a partition for a limited time. Such an agreement is not enforceable for more than five years, but it may be renewed.

Hence, the Court recognised that despite the provisions of Article 818 and 1029, a co-owner could petition for a division in kind.

The issue that concerns the present ruling came up for consideration in another case before the Court of Appeal, *Legras and Or v Legras* (1983 -87) 3 SCAR 367. In that case, the First Appellant and the Respondent were co-owners of a piece of land. The First Appellant sold an undivided portion of the land to a third party (Second Appellant), as if she were the sole owner thereof. The Respondent sought a declaration that the sale was null and void. The trial judge held that the vendor had acted unlawfully when she sold her undivided share to a third party without the intervention of a fiduciary and without the consent of the other co-owner. The Court of Appeal, by majority judgment (per Law JA and Goburdhun JA) upheld that decision. However Sauzier J A dissented, and allowed the appeal with costs.

In an editorial note to the report, Mr Sauzier states that "the majority judgments are weak and unauthoritative. They should not be followed".

In the headnote of the report, the Editor has extracted principles formulated by him as justice of appeal, in respect of issues of (1) nullity of sale (2) individual right of co-ownership (3) transfer or transmission of individual right of ownership (4) role of fiduciary under Article 818 (5) when co-owner may act alone apart from the transfer or transmission of individual right of ownership (6) meaning of exercise of right of co-ownership. Of these, only the 5th principle is relevant for present purposes, that is, that:

A co-owner may apply to the Supreme Court without the intervention of the fiduciary:

- (i) For partition
- (ii) For licitation
- (iii) For retrocession of a share sold by another co-owner to a third party under Article 834 of the Civil Code.

Although the minority judgment of Sauzier JA in that case is not binding on this Court, yet it is consistent with the previous decision of the Court of Appeal in *Laporte v Sullivan* (supra) and the Supreme Court decision in *Michel v Vidot* (supra).

Article 818 of the Civil Code was enacted to prevent fragmentation of land in the context of Seychelles, where, it is estimated, that there is only about 2000 acres of arable land. The requirement that the co-owners of immovable property may only act through a fiduciary was therefore based on a similar concept as the English concept of a trust. As Chloros states:

The reform, therefore, amounts to the effective disappearance of the undesirable consequences of co-ownership, while retaining the idea of co-ownership in principle. The real right survives, but it cannot be exercised as other real rights, for in practice it is only a claim of money.

Hence, as the "real rights" survive, co-owners can seek a division in kind without acting through a fiduciary. The individual "real rights" of co-ownership is preserved by Article 817 (2) of the Civil Code. Section 107(2) of the Immovable Property (Judicial Sales) Act (Cap 94) puts this position beyond dispute.

Accordingly, the plea in limine litis raised by the Respondent fails.

Record: Civil Side No 202 of 2001