IN THE SUPREME COURT OF SEYCHELLES

ROSINA ALBERT PLAINTIFF

VERSUS

EMOGINE ROSE

DEFENDANT

Civil Side No 244 of 2001

Mr. B. Georges for the Plaintiff

Miss F.Ally for the Defendant

JUDGMENT

Perera J

The plaintiff is the sister of one Charles Alphonse who died on 1st November 2000. After his death, the plaintiff was appointed the executrix of his estate on 20th July 2001. In the application for appointment as executrix, it was averred that the appointment was sought *inter alia* to institute legal action against a third party.

The instant action was filed on 3rd August 2001 by the Plaintiff in her capacity as an heir, and as the executrix of the estate, against the defendant on the basis of a sale of a Parcel of land bearing no. C. 1087 with a house standing thereon at Les Cannelles, by the said Charles Alphonse on 29th September 2001. Admittedly there was no "*estate*" at the time the appointment of executrix was made. The Plaintiff's *locus standi* in the present matter is therefore more as an heir, rather than as the executrix.

In the plaint, the plaintiff sought (1) to set aside the transfer on the ground of mistake on the part of Charles Alphonse, (2) in the alternative, to order recession of the transfer on the ground of lesion, and (3) in the alternative to (1) and (2), to order the defendant to pay the plaintiff for the benefit of the estate of the late Charles Alphonse, the sum of Rs.40,000, which on the face of the deed has been stated as having been paid previously. However, Mr.

Georges, Learned Counsel for the plaintiff informed Court at the hearing, that upon subsequent instructions, the plaintiff would proceed only on the third prayer. Hence the only issue to be decided is whether the defendant paid the sum of Rs.40,000 to the late Charles Alphonse prior to the execution of the deed of transfer executed on 29th September 2000, which was one month before his death.

The plaintiff is a sister of Charles Alphonse, and a cousin of the Defendant. She testified that Charles told her that he would be selling the property, but that he would tell her when he was ready. However he became ill on a visit to the defendant's house and was brought to her sister's house. The property was transferred to the defendant by Charles on 29th September 2000, and he died on 1st November 2000. The Plaintiff further testified that Charles came to her house on 22nd September and told her that he was selling the property on the 29th September 2000, but did not tell her to whom he was selling. However he told her that the defendant was pressurizing him to sell it to her on condition that the purchase price would be paid in instalments of Rs1000 per month. Subsequently when she visited Charles when he was sick, he told her not to talk about the money from the sale. From that reply she understood that the Defendant had not paid for the property. On being cross-examined, she stated that she gave Charles various amounts ranging from Rs25 to Rs.100 whenever he asked, for his expenses or to pay the loan instalments for the property to the Government. She denied that the defendant paid Rs.1000 per month towards the purchase price of Rs.40,000 stated in the deed of transfer. She denied that the Defendant had paid Rs.500 per month to Charles for 7 years prior to the sale of the property.

The defendant was called by the Plaintiff on her personal answers. She subsequently, upon oath, adopted the answers given by her in the examination in chief, the cross examination and the re-examination. Hence her testimony is considered as sworn evidence for purposes of the case. The defendant stated that she paid the sale price of Rs.40,000 in instalments of Rs.500 monthly, until Charles told her that he was ready to sell the land to her. She was however unable to recall how much she had paid by then. No receipts were obtained. The transaction was known only to both of them. She claimed that she had paid Rs.500 monthly for about 7 years. It was Charles who took her to the notary to effect the transfer. No money was paid before the notary as payment had been made before. The defendant further stated that Charles was fit to travel to the notary. She also claimed that the loan instalments to the Government were paid by Charles from the money given by her for the property.

Mr Francis Chang Sam, the notary who executed the deed of transfer on 29th September 2000 testified that the words "in consideration of the sum of rupees forty thousand(*Rs.40,000) (which sum has been paid)"* was inserted upon instructions from the vender and the vendee. It is trite law that a notary is the agent of both parties and that he takes instructions not only from the venders as to what is sold, but also from the vendees as to what is purchased and

at what price. Mr Chang Sam further stated that he did not witness the exchange of any money and that Charles Alphonse told him that he had received the purchase price. He then explained the consequences and told the vendor that once he signed the deed he will not be able to challenge the payment. Mr Chang Sam also stated that Charles appeared to be physically and mentally fit at that time.

The cause of action of the executrix is now limited to an averment that although both the vendor and the vendee had instructed the notary to stipulate on the deed that the full sum of Rs.40,000 had been paid prior to the execution of the transfer on 29th September 2000, that amount had not been paid. In fact, Learned Counsel for the Plaintiff suggested to the Defendant that she pays the sum of Rs.40,000 and to keep the property. She however declined and stated that she had already paid.

In case no. C.S. 132 of 2001, the Plaintiff was appointed executrix of the succession of Charles Alphonse, for the purpose of instituting legal action against a third party who had purchased property from the said deceased. The executor can be appointed under Article 1026 only where there is a succession consisting of immovable property, or of both immovable and movable property. In that case it was not averred that the deceased person owned any immovable property other than Parcel C 1087 which he sold to the defendant on 29th September 2001, one month before his death. In this respect, Article 1319 of the Civil Code provides that –

> "An authentic document shall be accepted as proof of the agreement which it contains between the contracting parties *and their heirs or assigns. Nevertheless, such documents shall only have the effect of raising a legal presumption of proof which may be rebutted by evidence to the contrary evidence in rebuttal, whether incidental to legal proceedings or not, shall entitle the Court to suspend provisionally the execution of the document and to make such order in respect of it as it considers appropriate".*

In terms of Section 22 of the Notaries Act (Cap. 149), a notarial deed is an *"authentic document".*

The 2nd paragraph of Article 1319, which is a new provision, did away with the procedure known as inscriptio falsi which had to be followed in relation to acts or facts which were stated in the document to have happened in the presence of the notary or which the notary himself had performed. Now the legal presumption of proof casts the burden on the party who challenges the document to prove its falsity. This can be done whether the acts or facts happened in the presence of the notary or otherwise.

Section 63 of the Land Registration Act (Cap 107) provides that –

> "An instrument, the execution of which is duly attested in accordance with Section 60 or Section 61, shall be presumed, unless the contrary is shown, to have been duly executed by the parties thereto. The attestation shall be evidence of the facts set out therein and

such facts shall be presumed to be true unless the contrary is shown".

The 1st paragraph of Article 1319 of the Civil Code binds both the contracting parties and *their heirs* and assigns as to the validity of the deed.

Similar facts, as in the present case were considered in the Sri Lankan case of ***Munasinghe v. Vidanage (1969) New Law Reports (P.C) 97.*** The deed stipulated that the property was sold for Rs.20,500 *"well and truly paid to the said vendors*".

The Notary, in the attestation clause also stated that the full consideration of Rs20,500 was acknowledged before him to have been previously received. The vendor subsequently sued the vendee on the ground that no consideration was received by him, and that, according to Roman Dutch Law, no beneficial interest in the property had passed to the vendee. The trial Judge, in accordance with the findings of fact, which involved assessment of the veracity of witnesses, held that no consideration had passed. In Appeal, the Supreme Court reversed that finding on the basis of the attestation clause which recorded an admission of the vendor. The Privy Council conceded that the case was of "*rather complicated and difficult facts",* and that there was a good deal to be said on each side. However, Lord Pearson, delivering the judgment of the board, held that the decision of the trial Judge based on facts ought not to have been set aside as he had the advantage of seeing and hearing the witnesses. It was also held that although the statements of the Notary in the attestation clause of a deed of sale are admissible evidence, and may well be important evidence regarding consideration, it was not conclusive evidence. The decision of the Supreme Court was therefore set aside.

In that case, there was clear and convincing evidence to establish that there was no previous payment of the purchase price. In fact the Notary had testified that the vendor instructed him to "*put it down as received before hand".* After the deed was signed, he asked the vendor why he took the money before hand and not pay it at the time of the execution of the deed. Then he admitted that he did not take the money. When asked why he then transferred the property, he stated "that is our business" and that it was all right between relations".

A somewhat stricter view was taken in the case of ***Rrimmer v. Webster (1902) 2 Ch: 163 at 173*** – the Court held that –

> *"If a man acknowledges that he has received the whole of the purchase money from the person to whom he transfers property, he voluntarily arms the purchaser with means of dealing with the estate as the absolute legal and equitable owner, free from every shadow of encumbrance or adverse equity, and he cannot be heard to say that he was not in fact received such purchase money".*

In the present case, has the plaintiff rebutted the presumption in Article 1319 as well as Section 63 of the Land Registration Act? As the issues of mistake, and lesion are not relied upon, the limited issue for consideration is whether in fact the vendor, Charles Alphonse had received the consideration of Rs.40,000 in respect of the transfer.

The plaintiff in her testimony stated that Charles Alphonse told her on 29th September 2003, that he had sold the property to the defendant "on credit" and that she was supposed to pay Rs1000 per month. However she replied Counsel for the defendant thus –

> *"Q. After Charles Alphonse died immediately after he died, didn't you go around to so many people in respect of this transfer?*
>
> A. *Yes, we went for a search, because we wanted to know when did my brother sell that land.*

Q. *So, you wanted to know when and who had bought the land?*

A. *I wanted to know his case.*

1. *What do you mean by his case?*

A. *I wanted to know where his Rs40,000 had gone".*

It is clear that the plaintiff and the other heirs were unaware of the transactions between Charles Alphonse and the defendant, and that she came to know of the sale only after the death of Charles. Hence the assertion of the plaintiff that Charles told her that the defendant purchased on "credit" and that she was required to pay Rs.1000 monthly, is contradictory, and therefore is not credible.

Both the defendant and Mr Chang Sam have testified that Charles Alphonse executed the deed while in a fit mental condition. The plaintiff admitted in evidence that Charles was a secretive type of person. If he did not receive money, why he stated to the Notary that he had received previously, and if he and received money, what he did with the money, would not be within the knowledge of the plaintiff nor any of the heirs. Under Article 1319, the agreement between Charles and the defendant are binding on them. In the cases of ***Munasinghe*** ***(supra) and*** ***Rimmer***

(supra), the vendors themselves sought recession of the transfers on the ground that no consideration had passed although it was stated otherwise in the deeds. In the present case, the heirs, in any event would have been entitled to the succession if any, available at the time of the death of the testator. However they could, sue a third party if any fraud, deceit or duress had been exercised on the testator which had resulted in depriving them of their legitimate dues. No such allegation has been made by the plaintiff. The ground of mistake has also been abandoned.

The plaintiff's evidence is therefore insufficient to rebut the presumption in Article 1319 and Section 63 of the land Registration Act. Hence the plaintiff's action fails, and is accordingly dismissed with costs.

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A. R. PERERA

JUDGE

Dated this 24th day of February 2006