

# **IN THE SUPREME COURT OF SEYCHELLES**

1. LEON FABIEN
2. BERRYL FRANCOISE

**PLAINTIFFS**

**VERSUS**

MR JEAN ESPARON

**DEFENDANT**

Civil Side No

113 of 2002

Mr. Rajasundaram for the Plaintiffs

Mr. Serge Rouillon for the Defendant

## **JUDGMENT**

**Perera J**

The plaintiff sues the defendant for rescission of a sale of an immovable property. It is averred that the defendant purchased a portion of land Parcel V. 2910 from the plaintiff for a sum of Rs.125,000, although the consideration shown in the registered deed was Rs.50,000. He avers that there was an oral agreement that the defendant would sub divide Parcel V. 2910, and give back the portion with the house to him and retain the vacant balance portion. In that respect the plaintiff retained the usufructuary interest over the whole property. The plaintiff further avers that prior to the execution of the deed of transfer, a sketch for sub division was prepared by G&M Surveys, and that sketch was approved by the Planning Authority on 18<sup>th</sup> February 1997. The deed was executed on 29<sup>th</sup> April 1998.

The plaintiff avers that the defendant has failed to give back the portion of land with the house as agreed and is evading the sub division, taking advantage of his old age and illiteracy. At present, the defendant has bare ownership of the entire property, while the plaintiff is in occupation by virtue of his usufructuary rights.

In these circumstances, the plaintiff seeks rescission of the sale and agrees to refund the sum of Rs.125,000 together with interest at the rate of 4% per annum from the date of the deed of sale.

Alternatively, he prays that the defendant be ordered to pay him the difference between the valuation of the entire property and the sum of Rs.125,000 so that he gets the value of the whole property.

The defendant admits paragraph 2 of the plaint but avers that the sum of Rs.125,000 included *“additional financial and other assistance given by him to the plaintiff and the cost of the repairs and development of the property and also the purchase of an out board motor”*. He further avers that the sketch plan of a proposed subdivision cannot go against the authentic notarial deed of sale. He denies any agreement to return any portion of the land, and avers that he paid a fair and just consideration for the entire property. He also avers that he has made extensive improvements and renovations to the land and house. The plaintiff admits that the defendant built a retaining wall on plot 1 which was intended to be sold to him, and that he also backfilled that wall with soil.

The plaintiff had sent a letter dated 17<sup>th</sup> March 2002 (P2) through his lawyer making a formal request for retransfer of the bare ownership rights over plot 2 with the house. He received no reply.

The defendant in his testimony stated that the plaintiff offered him a portion of his land after subdividing, for Rs.15,000. Later he offered the whole land but he was not interested. He stated that the plaintiff borrowed Rs.3000, and later Rs.10,000 to purchase an outboard engine. After subdividing, he offered the smaller portion for Rs.25,000 and the larger portion with the house for Rs.100,000. Accordingly, bare ownership of the whole land was transferred to the defendant by a notarial deed on 29<sup>th</sup> April 1998 which was duly registered at the Land Registry on 20<sup>th</sup> May 1998 (P1). The plaintiff retained the usufructuary interest therein. The defendant claimed that it cost him Rs.80,000 to construct the retaining wall. The defendant further stated that the subdivision was not registered as the plaintiff who had earlier decided to sell him only a portion, later decided to sell the whole land to him. He purchased the whole land in order to transfer it to his son. He considered Rs.125,000 to be a good price as he paid a sum of Rs.115,000 to purchase a similar land in 1990 from one Mr Lebon. That land had only a shop, while the plaintiff's land had a house. He denied any agreement to retransfer the portion with the house.

The parties produced two valuation reports relating to the property as at the time of sale in 1998. Mr. D.B.R. Blackburn Quantity Surveyor retained by the defendant has made the following estimates-

-	Two bedroom house	-	Rs. 175,000
-	Land Parcel V. 2910 (670 sq metre)	-	<u>Rs. 50,000</u>
			<b><u>Rs. 225,000</u></b>
-	Portion of land Parcel V. 2910 (267 sq metre)		<u>Rs. 15,000</u>
			<b><u>Rs. 240,000</u></b>

However, Mr Blackburn has valued the dry stone retaining wall built by the defendant at Rs. 60,000 and the red earth filling and leveling at Rs.25,000, and valued the 267 sq meter plot at Rs.100,000, with the value of the retaining wall and earth filling added. Otherwise the valuation of that plot which the plaintiff claims was intended to be sold out right to the defendant is Rs.15,000.

Ms. Cecile Bastille Q.S. retained by the plaintiff has valued the whole property including the house at Rs.240,000. She has made no separate valuation of the two plots, but the two valuations are the same.

Learned Counsel for the plaintiff submitted that he was relying on the provisions of Article 1118 and also Article 1674 of the Civil Code. Article 1680 provides that *"to satisfy Court that a prima facie case exists the plaintiff must submit a report by three experts who shall be bound to draw up a single report and to express an opinion by majority"*.

In this case both Counsel agreed to abide by the valuations of two experts. However, although Mr Blackburn's report is comprehensive, Ms. Bastille's report does not assist the Court to determine the issue on a prima facie basis. The policy of the principle of lesion as provided in Article 1118 is as follows-

- “1. If the contract reveals that the promise of one party is, in fact, out of proportion to the promise of the other, the party who has a grievance may demand its rescission; provided that the circumstances reveal that some unfair advantage has been taken by one of the contracting parties. The loss of the party entitled to the action for lesion shall only be taken into account if it continues when the action is brought.
2. The defendant to an action for lesion as in the proceeding

paragraph shall be entitled to refuse rescission if he is willing to make an adequate contribution to the other party in such manner as to restore a more equitable balance between the contracting parties.”

The plaintiff's main prayer is based on paragraph 1, and alternatively on paragraph 2. It is not in dispute that bare ownership of the whole property was sold by the plaintiff for Rs.125,000 reserving his usufructuary interest for life. Admittedly only a sum of Rs.50,000 was shown as the consideration on the notarial deed, to evade stamp duty, which is a revenue offence. Be that as it may, Learned Counsel for the plaintiff contended that the reservation of the usufructuary interest evidences the agreement relied on by the plaintiff that the defendant agreed to re-transfer lot B in the sketch with the house once the subdivision was effected.

The plaintiff in his testimony stated –

“Q. Can you explain to the Court as to why you decided to retain usufructuary interest for you and Mr Esparon has also agreed to that proposal when you sold the property.

A. It is because my daughter and I had a disagreement and I told Mr Esparon about it. He asked me to sell him the piece of land and since it was something that was bothering me I agreed to sell to him.”

On the basis of the evidence of the plaintiff himself, it is clear that in 1997, there was an agreement to sell only a small portion of the land to the defendant. However, due to some disagreement with his daughter he decided to sell the bare ownership of the whole land to the defendant for Rs.125,000 reserving usufructuary interest for life. According to the two valuations, the value of the whole property in 1998 was Rs240,000, which is almost double the amount of the purchase price, but less than  $\frac{1}{2}$  as stipulated in Article 1674. As was held in the case of ***Toolsy v. Jhangeer*** 1980 M.R. 335, in a case based on lesion, the element of free will and consent goes to the very root of the contract of sale. “The nullity of the sale which can be the consequence of lesion is based not on any presumed mistake or error, but on a “*contrainte morale*” which has affected the free will and consent of one of the parties.” The defendant contends that the difference between the actual market value as at 1998 and the sum of Rs.125,000 paid by him constitutes the value of the usufructuary interest granted to the plaintiff. Barry Nicholas, in “*The*

*French Law of Contract*" (2<sup>nd</sup> Edition) states that the essence of lesion is the gross disproportion between the performances required of the parties. He cites the example of a contract where a party, usually elderly or disabled, sells land to another and receives as the price a life annuity. He states, "*since what the buyer has to pay depends on how long the seller lives, it is usually held that there can be no remedy for lesion.*" He also states, "*since the price is not expressed in money, it cannot be a sale and the question of lesion cannot therefore arise.*"

In the present case therefore, the defendant cannot rely on the usufructuary interest retained by the plaintiff as providing the difference between the actual market value and the price he paid, as its value was not ascertained, and in any event could not have been ascertained, as in 1998 there was no indication as to how long he could live to enjoy the usufruct. He is presently 80 years old.

In paragraph 2 of the defence, the defendant has averred that –

"2. .... the defendant avers that the real amount quoted for the sale in the plaint (Rs.125,000) involved additional financial and other assistance given by the defendant to the 1<sup>st</sup> plaintiff including for the repairs and development of the 1<sup>st</sup> plaintiff's property and for the purchase of an outboard motor."

That was an admission that Rs.125,000 did not constitute the value of the property in 1998, but was partly the repayment of a debt payable by the plaintiff to him. Hence the evidence reveals that the defendant had taken an unfair advantage of the indebtedness of the plaintiff, who is old and illiterate, and at that time having a dispute with his daughter, to obtain the whole land for nearly half its market value conceding a usufructuary interest to an aging person. Hence the plaintiff is entitled to rescission under Article 1118. However the defendant will be entitled to plot 1 in extent 267 sq metre which, with the improvements made by him is valued at Rs.100,000, as that was the real intention of the parties.

Judgment is accordingly entered in favour of the plaintiff, rescinding the sale of Parcel V. 2910 to the defendant. The plaintiff will however receive only plot 2 in extent 670 sq metres with the house thereon. The defendant shall take necessary action to proceed with the subdivision in terms of the approved sketch. As plot 1 is valued by Mr Blackburn at Rs.15,000, the plaintiff shall

refund the defendant Rs.110,000 together with interest at the rate of 4% per annum from the date of the deed of sale, as prayed for in prayer 1 of the plaint. In addition, the plaintiff shall abandon the usufructuary interest in respect of plot 1 so that the defendant has sole ownership thereof. In view of the advanced age of the plaintiff, the Court directs that the aforesaid findings be implemented within a period of six months from the date of this judgment.

Judgment entered accordingly.

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A..R. PERERA

**JUDGE**

Dated this 5<sup>th</sup> day of November 2007