IN THE SUPREME COURT OF SEYCHELLES

Desita Ah-Kong
of La Passe, La Digue **Plaintiff**

Vs

Robert Labiche
of La Passe, La Digue **Defendant**

Civil Side No: 201 of 2003

Mr. C. Lucas for the plaintiff
Mr. F. Chang-Sam for the defendant

D. Karunakaran, J

JUDGMENT

The plaintiff has brought this action against the defendant claiming restitution in the sum of R475, 000/- for a detriment, which the plaintiff allegedly suffered without lawful cause, since the defendant made an unjust enrichment to his benefit. Such enrichment has allegedly caused a corresponding loss and damage to the plaintiff. On the other side, the defendant in his statement of defence, has not only denied the plaintiff's claim for restitution but also has averred that the plaintiff never contributed anything either to the properties or to the business which all solely belongs to the defendant. In any event, according to the defendant, the parties never had any joint venture or agreement in relation to any of the defendant's properties or business.

It is not in dispute that the plaintiff and the defendant are residents of La Digue. In the past, they were living together in concubinage for a period of about 19 years until the defendant severed the relationship in 2001. It is averred in the plaint that during the course of their

relationship, the plaintiff and the defendant were employed as a chambermaid and as a cook respectively, at various hotels and island tourist resorts at Felicité, Darros, and La Digue. The parties orally agreed that they would engage in life, pool their income and operate their expenses as one unit for their joint benefit. Among other things, the parties intended to buy land in Mahé to build a house for them and to establish a small guesthouse business in La Digue for the retired life. Hence, on 6th February 1998, the parties purchased a parcel of land Title H5274 situated at Majoie, Mahé for the consideration of Rs 20,000/- and in exchange of Title B883, which they had previously purchased at Rs 40,000/- Moreover, on 27th October 1998, the parties also purchased another property Title LD959 situated at La Passe, La Digue for the consideration of Rs 30,000/- Both properties H5274 and LD959 were transferred and registered in the sole name of the defendant, as he at that time took all official steps to realise both transaction for their joint convenience. The defendant took a housing loan of Rs 400,000/- and used the proceeds to build a 3 bedroom double storey house with attached bathrooms and toilets. Since the loan of the plaintiff was not sufficient to complete the house, the plaintiff also raised an additional loan of Rs 25,000/- for that purpose. The plaintiff subsequently, repaid that loan from her own earnings. The parties occupied the premises until 2001. The furniture currently remain in the premises were purchased jointly. The defendant presently operates a self-catering guest house in the premises. However, he has kept all income and has failed to account or pay the plaintiff her half share of the income derived therefrom. Despite repeated requests by the plaintiff for the defendant to pay her half-share the latter has failed to make any payment whatsoever. Despite several attempts by the plaintiff to carryout a written inventory of furniture and expert valuation of land and buildings, the latter has refused permission and access to the property. In the circumstances, the plaintiff now claims that she has suffered a loss in the sum of Rs 450,000/ as well as moral damage estimated in the sum of Rs 25,000/- for which the defendant is liable to make good. Hence, the plaintiff prays the court for a judgment against the defendant in the total sum of Rs 475,000/- with interest and costs.

However, the defendant, in his defence has averred that there had never been at any time, any joint planning with regard to the purchase of either H5274 or LD959. All business-planning and purchase were done by the defendant alone. The plaintiff never contributed in any way whatsoever towards the purchase of the said properties or to the business. The defendant at all times acted alone and there was no joint-undertaking in relation to the properties. According to the defendant, the plaintiff never raised any additional loan to build house on any of this properties. As regards the furniture, the defendant avers that they were not purchased jointly by him and the plaintiff. All the furniture in the house belongs solely

to the defendant. The few items which belonged to the plaintiff had long ago been removed from the house by the plaintiff. Although the defendant owns and is running a guesthouse in La Digue, the plaintiff has no share or any investment or interest either in the property or in the business run therein. All his properties and business belong to him solely as he alone paid for all of them. There was no joint venture of any kind between the plaintiff and the defendant in any of the defendant's business. In the circumstances, the defendant prays the Court to dismiss the plaintiff's claim with costs.

The plaintiff, who is now 40, testified that she first met the defendant, in 1983 when she was 18. She had then been employed as a chambermaid at La Digue Lodge, wherein the defendant had also been employed as a cook. In early 1983, the defendant had his own apartment in La Digue. The plaintiff cohabited with him in that apartment, as his common-law wife for about six months. During that period, the plaintiff was earning a monthly salary of Rs 17, 00/- and was contributing all her earnings to buy food and other items for the maintenance of the family. After six months, the couple left their respective jobs with La Digue Lodge and went to "Darros Island". Both worked therein for a holiday resort owned by the Prince of an Iranian Royal Family. The defendant was employed therein as a cook, whereas the plaintiff as a chambermaid. According to the plaintiff, both lived together in Darros Island for about 16-18 years by virtue of their employment with the Prince. During their stay in Darros, both lived together as man and wife sharing the same residential unit provided by their employer. The plaintiff was contributing all her earnings for the maintenance of the family. She did not make any savings for her own future. The defendant also had other financial liabilities. He was paying from his earnings, a monthly sum of Rs400/- to 800/- for the maintenance of his two children. Therefore, the plaintiff had to spend all her earnings to help him with other things and to run the family. When they were cohabiting in Darros, they had a common plan for their future and settlement in retired life. They planned to buy a piece of land, build a small guesthouse thereon and start a little business in tourism as a joint venture. In mid 1990s, the Iranian Prince gave them a gift of Rs 50,000/- for their joint benefit. Since the plaintiff had trust in defendant, she allowed him to deposit the entire sum in his personal bank account so that the money could later be used to buy land for their intended joint-venture. By a transfer deed dated 6th February 1998 in exhibit P1, the parties purchased a parcel of land Title H5274 situated at

Majoie, Mahé for the consideration of Rs 20,000/- and the exchange of Title B883, which they had previously purchased at Rs 40,000/- vide exhibit D3. Moreover, on 27th October 1998, the parties also purchased another property Title LD959 at La Passe, La Digue for the consideration of Rs 30,000/- According to the plaintiff, both properties H5274 and LD959 were transferred and registered in the sole name of the defendant, as he at that time, took all official steps to realise both transaction for their joint convenience. The plaintiff also produced in evidence a letter dated 11th September 2001 issued by the manager of D'Arros Development (Pty) Limited vide exhibit P2, which states thus:

> *"This is to certify that Miss. Jeanette Desita Ah-Kong, NIN: 965-0069-4-0-15 was employed by the above company on D'Arros Island from 07.04.1985 to 08.04.1996 as a waitress. Her last salary was Rs. 1750.00. During the period of her employment on D'Arros Island, she cohabited with Robert Labiche as man and wife"*

The plaintiff further testified that after they left D'Arros Island in 1996, both went to work in Felicité Island, again, the plaintiff as a Chambermaid and the defendant as a cook. Both were employed by one Mr. Gregoire Payet. As they were jointly working for Mr. Payet, he offered to sell them a piece of land at La Digue. By a transfer deed dated 27th October 1998 vide exhibit P3, they purchased that piece of land Title PR 959 from Mr. Payet for the consideration of Rs 30,000/- For the sake of their joint convenience and since the plaintiff had trust in defendant, the land was transferred and registered in the sole name of the defendant. Subsequently, in the year 2000, while they were working in Felicité the defendant took a loan of Rs400, 00/- from the Development Bank of Seychelles and built a house thereon, to be used as a tourist guesthouse cum personal residence. Since the said loan was not sufficient to meet all expenses, the plaintiff took a personal Home Improvement Loan of Rs25, 000/- from SHDC vide exhibit P4 and gave the sum to the defendant for the purchase of furniture, tiles, cutlery, bed-sheets and curtains required

to start the guesthouse-business. Subsequently, the plaintiff repaid the entire loan from her salary. In 2001, as the couple continued living in Felicité, cracks started appearing in their relationship. The defendant was every now and then harassing the plaintiff. Hence, she left Felicité and came back to La Digue, to work with La Digue Lodge. She moved into the newly built guesthouse and started to live therein. The defendant however, continued his employment at Felicité. Whenever he got pass from Felicité he used to visit La Digue and stayed with the plaintiff in the new house. Upon every such visit, the defendant picked up quarrel and physically assaulted the plaintiff. At times, he threatened the plaintiff with violence and asked her to leave the house. At one stage, the defendant told the plaintiff that if she did not leave the house, he would kill her. However, the plaintiff did not move out. She continued her stay in the house and was also helping the defendant in the guesthouse business. The defendant used to send tourist-clients to stay in the house and was collecting rent from them at Rs300/- per day, whereas the plaintiff was providing her services to the clients. Eventually, in September 2001, the defendant issued a legal notice through his lawyer vide exhibit P5, to the plaintiff demanding her to vacate the house. The plaintiff asked the defendant to pay her share of contribution she made for 19 years during cohabitation. The defendant refused to pay any share and forced the plaintiff to leave the house by coercion and threat. Having left the house, the plaintiff went to live with her brother and sent a legal notice dated 5th November 2002 - in exhibit P6 - through her lawyer claiming restitution of her contribution estimated at Rs400, 00/- This notice inter alia, reads thus:

> *"During your relationship, my client worked together with you at various hotels namely, Felicité, Darros, and La Digue Island Lodge. You pooled in your funds together and as a result you purchased two plots of land namely, H5274 at Majoie, Mahé and LD959 at La Passe, La Digue. Both titles are registered in your name only as my client trusted you and accepted that you hold her share in your name, for convenience even though she remained the beneficial*

owner of half undivided share. At La Digue, you have built a 4 bedroom house with ensuite bathrooms for the purpose of leasing such rooms to tourists, which you now do at the rate of Rs350/- per room on a daily basis. This investment was meant for the joint benefits of Miss. Ah-Kong and yourself.

To date you have failed to pay my client her share, which she estimates to be at R400, 000/- You have turned down offers by friends who attempted to assist in the negotiations and you have objected to Mr. Jacques Renaud, the Quantity Surveyor to value the property at La Passe unless he has a Court order.
My client had never anticipated court action, on account of your longstanding relationship, but she will have no option but to proceed with legal proceedings should you refuse to settle her share. In law you have unjustly enriched yourself and she has been impoverished by the corresponding sum.

In cross-examination, the plaintiff stated that while they were working in Felicité the defendant was earning a monthly salary of Rs 10,000/- whereas she was earning Rs2, 500/- per month. Further, she denied the suggestion that the loan of Rs 25, 000/- she took from SHDC was spent on the renovation of her mother's house at La Digue. Further, she reiterated in cross-examination that she contributed all her earnings towards the purchase and/or helped the defendant indirectly to invest the funds in the purchase of the properties and in the establishment of the guesthouse business in La Digue. In the circumstances, the plaintiff contented that she was impoverished to the extent of Rs450, 000/- and the defendant has correspondingly and unjustly enriched himself to the same extent. In addition to the loss sustained in the sum of Rs 450,000/-, she also claims that she suffered moral damage estimated in the sum of Rs 25,000/- for which the defendant is liable to make good. Hence, the plaintiff urged the court for a judgment against the defendant in the total sum of Rs 475,000/- with interest and costs.

The defendant in essence, testified that in 1994 during the period of his cohabitation with the plaintiff, he bought a plot of land Title B883 at Barbarons, Mahé for Rs 40,000/- in his sole name using his own funds. The plaintiff did not contribute any sum towards its purchase. According to the

defendant, even the agreement - exhibit D1 - he made for the purchase of that plot bears his sole name as the intended purchaser. Further, the defendant testified that while he was working in Darros Island, he took a loan of Rs50, 000/- from the Prince, (vide exhibit D4) who subsequently, treated that loan as a gift to the sole benefit of the defendant and the plaintiff was not a beneficiary of the gift nor entitled to any share in the gift-amount. When he bought the property Title H5274 at Majoie, he gave his Barbarons' property B883 in exchange, as part of the consideration plus Rs 20,000/- from his own pocket and the plaintiff did not contribute any sum towards the purchase-price. Although the defendant discussed with the plaintiff about the purchase of the properties, the plaintiff had nothing to do with any of his properties nor contributed any sum nor had any interest in those properties. As regards the guesthouse in La Digue the defendant testified that he purchased the land Title PR 959 from Mr. Gregoire Payet for the consideration of Rs 30,000 paying out of his own savings and the plaintiff did not contribute any sum. Hence, he got that property registered in his sole name. Further the defendant testified that even the planning application for the construction of the guesthouse in La Digue was made only on his sole name and the plaintiff was not a party to any transaction pertaining to the property or the guesthouse business run thereon. Moreover, according to the defendant, he personally applied for a loan of Rs400, 000/- from Mortgage Finance in his own name vide exhibit D12 and even the Insurance for Mortgage Protection Assurance was taken on his sole name with SACOS vide exhibit D15. While the guesthouse construction work was in progress the defendant also took an additional loan of Rs 100,000/- from Savings Bank vide exhibit D16 to complete furnishing the guesthouse and even the loan repayments were made solely by himself and not by the plaintiff. The evidence of the defendant pertaining to his living and employment in Darros Island runs thus:

> "[At the time when I was at Darros, the plaintiff was staying with me] She was some sort of companion for me. She asked me to look for a job for her and I took her to the Island with me on condition that she earns her salary and saves it and do what she wants with it. I was helping her for lodging because I was a senior staff and I had

> accommodation and I received a lot of foodstuff instead of buying. I spent 12 years there. She came later. I was a chef. She was a chambermaid and waitress. We lived together for about 12 years. I was doing the most cooking. I got provisions from the main house. We didn't buy anything. In fact, when visitors in the Prince's house go, everything left is with me. Otherwise it would go bad. When new clients come, we buy new provisions… while I was working in Felicité she was looking for a job and she again came to work with me. She was earning a salary. I was manager and chef. I was earning Rs10, 000/- She was chambermaid. I was the one in charge… the owner of the place was Gregoire Payet. I am not good at paperwork so she sometime did the paperwork and I would give her Rs2500/- and she was getting a salary from the company also…. But we were living together"

Furthermore, the defendant testified that after the completion of the guesthouse in La Digue, he had employed one Ms. Zabeth (DW2), who was looking after the business. The plaintiff without the defendant's knowledge collected the key from Ms. Zabeth and occupied the guesthouse. According to the defendant, the plaintiff's only belonging was a washing machine, which she has already taken away from the house. Further, the defendant testified that the plaintiff never contributed anything to the guesthouse project nor towards the purchase of any of his personal properties. In the circumstances, the defendant contended that the plaintiff has no right to claim any share or interest either in the properties or business. Ms. Zabeth testified briefly, that she was working as a cleaner in the guesthouse, while the parties were working in Felicité. During that period, the parties every now and then used to come and stay in the house and then go back to Felicité to work. The plaintiff also at times, used to come alone to La Digue and collect the key from her and stay in the guesthouse. After some time, on a particular occasion she collected the key from her but did not return it to her and continued her stay, use and occupation of the house.

Mr. Glyne Purridge (DW3), who was working with the Iranian Prince at Darros

Island, testified that he was the one who employed the defendant and the plaintiff at Darros and they were living together as man and wife. They were given free lodging on the Island and were employed as individuals. Regarding the loan of Rs50, 000/- which the defendant obtained from the Prince, DW3 testified that the said loan was subsequently treated as a gift to the defendant as a token of appreciation for his dedicated service to the Prince. However, he stated that he was not aware whether that sum was given to both as a gift. In the circumstances, the defendant seeks this court for a judgment dismissing the plaintiff's claim.

Obviously, the plaintiff's action in this matter is based on "unjust enrichment." Hence, the principles of law applicable to this case are that which found under Article 1381-1 of the Civil Code of Seychelles. This Article reads thus:

> "If a person suffers some detriment without lawful cause and another is correspondingly enriched without lawful cause, the former shall be able to recover what is due to him to the extent of the enrichment of the latter. Provided that this action for unjust enrichment *shall only be admissible if the person suffering the detriment cannot avail himself of another action in contract, or quasi-contract, delict or quasi-delict; provided also that detriment has not been caused by the fault of the person suffering it."*

In fact, there had been no express provision relating to "unjust enrichment" in the French Civil Code (Code Napoleon), which had been in force in Seychelles until 1975, when it was repealed and replaced by the present Civil Code of Seychelles. However, the concept of "unjust enrichment" had all along been a well-established principle in the French School of Jurisprudence, though it may appear to be unknown in the English Legal System. Under our Civil Code, "unjust enrichment" springs from the category of legal obligations, which arise **without agreement,** evidently tracing its origin from the French soil. On the other side of the Continent, in the English legal system, the ***principle of unjust enrichment*** had historically been unknown to the body of Common law principles. The English Courts have repeatedly denied for more than two centuries what Lord Mansfield had pleaded for, namely a general

enrichment action for restitution based on '*natural justice and equity*'. Instead, English law made use of **quasi or implied contract** to justify an enrichment claim. In fact, this concept has changed over the last 50 years in the English School of jurisprudence much by the evolution of anthropomorphic concept of justice nurtured by Lord Denning starting from ***High Trees [1947] 1 KB 130,*** wherein he fused law with equity. While still in 1978, Lord Diplock had held that '*there is no general doctrine of unjust enrichment recognized in English law*' *i*n 1999, it had become possible for Lord Steyn to hold the opposite: 'Unjust enrichment ranks next to contract and tort as part of the law of obligations as an independent source of rights and obligations'. The height of this development in English law was reached when Peter Birks, in his famous textbook on "Restitution", treated unjustified enrichment almost entirely separate from quasi-contract in the same way A. G Chloros - the author of "Codification in a mixed jurisdiction - did incorporate into our Civil Code. The main reason for the coming about of this separate restitution category was that it was found to be a fictitious exercise to qualify as a "contract" what is actually "not a contract" but a restitution based liability. Whichever road we take, whether English or French, what eventually matters to us is the destination - the destination of restitution for the ends of justice. No one should be allowed to suffer a detriment without lawful cause resulting from an unjust enrichment of another. As is stated in the ***Noble Qur'an*** *"And eat up not one another's property unjustly (in any illegal way means e.g. stealing, robbing, deceiving, misleading, breaching trust etc.) and that you may knowingly eat up a part of the property of others sinfully"* ***vide part 2 - Sûrah 2 - Al-Baqarah verse 188***. The suffered should be able to recover from the unjustly enriched what is due to the former. This is rooted in '*natural justice and equity*' and this is the pith and substance of the principle enshrined in Article 1381-1 of the Civil Code of Seychelles. In fact, in English law, at present, "contract" and "unjust enrichment" are regarded as separate sources of obligations. This is what we as a pioneer, have already formulated and codified way back in 1975, in our Civil Code drawing a clear demarcation between ***"Obligations arising from Contract"*** and ***"Obligations arising without agreement"***. Be that as it may.

In our jurisdiction, as rightly formulated by Justice E. E Seaton C. J (as he then was) in ***Antonio Fostel V. Magdalena Ah-Tave and another SLR 1985 p113,*** that the action for unjust enrichment or *de in rem verso* as evolved in France ought to satisfy five conditions and all of them are included in Article 1381-1 of our Civil Code quoted supra. They are namely: **(i)** an enrichment **(ii)** an impoverishment **(iii)** a connection between the enrichment and impoverishment **(iv)** an absence of lawful cause or justification, and **(v)** an absence of another remedy, which the French Jurists refer to as the ***"caractère subsidiaire"***.

Whether under French or Seychelles Civil Law, the root principle of an unjust enrichment is that ***an economic benefit is added to one patrimony*** (condition 1) to the ***economic detriment of another*** (condition 2), without a corresponding transfer of compensation intended to be adequate. The manner in which the conditions prescribed may limit operation of the action *de in rem verso* has been illustrated in the case of **Dingwall vs. Weldsmith (1967) Vol, 4, SLR 47.** The plaintiff in that case sued the defendant for remuneration for services rendered during the period they lived together in concubinage. ***Souyave J*** (as he then was) in holding that the plaintiff could not succeed because she had suffered no **"appauvrissement"** of her own **"patrimonie"**, cited from Encyclopédie Dalloz, Droit Civil, Vol II, verbaux Enrichissement sans cause Para. 90 as follows:

> *".....Elle (l"action de in verso) doit, d'autre part, satisfaire aux exigences particulière que comporte le recours en matière d'enrichissement sans cause ; le prétendu créancier doit, en conséquence, justifier à l'encontre de son débiteur de l'existence d'un enrichissement à lui procuré par le fait d'un appauvrissement survenu de telle conditions qu'aucune voie de recours autre celle qui est mise en mouvement, ne soit susceptible de les réparer (même arrêt) »*

In the case of *Hoareau vs. Hemick (1972), Vol. 6 SLR 167* also the

Court has reiterated the conditions required to be satisfied in the action *de in rem verso*. Apart from the first three conditions defined above, I believe, it is important to examine the fourth and the fifth conditions, which are explained in Encyclopédie Dalloz, paragraph 71 as follows:

> "La constatation de l'enrichissement d'un autre ne suffit pas pour permettre à l'appauvri d'agir, *de in rem verso. Il faut encore, adjoute la Cour la Cessation, l'absence de cause légitime et l'absence de toute autre action… »*

The French jurisprudence does not provide any clear-cut and complete definition of the terms underlined in the above quotation. As I see it, this action could not however, be relied upon in a case, where the claimant suffered economic detriment because of his own fault or blame. For example, (a) one's own failure to comply with the legal requirements or to draw up a contract when the law so requires in order to hold the other party liable for the detriment (b) one's voluntary assumption of risks or detriment and the like situations, may in my considered view, constitute a legitimate cause to justify the detriment of the one and the alleged corresponding enrichment of the other. In such cases, the impoverished cannot claim restitution invoking Article 1381-1 cited supra. This explains the fourth condition namely, *l'absence de cause légitime.*

I would now turn to the fifth condition namely, *l'absence de toute autre action*. This condition is in fact, common to and required in both English and French schools of jurisprudence. Under common law, one of the preconditions to invoke an equitable remedy for restitution is that the claimant should not have any other legal remedy provided by law, vide Section 6 of the Courts Act. The same condition is required to be satisfied under Article 1381-1 of the Civil Code of Seychelles as well, to uphold an unjust enrichment claim. This is evident from the clause used therein, which reads thus: "*unjust enrichment shall only be admissible if the person suffering the detriment cannot avail himself of another action in contract, or quasi-contract, delict or quasi-delict.*

I will now revert to the case on hand and consider whether the five conditions defined supra, have been fulfilled to uphold the claim of the plaintiff in this action.

Condition 1

On the question of the alleged **enrichment** of the defendant, I believe the plaintiff and accept her evidence in toto, in that, throughout her cohabitation for about 19 years with the defendant, she has been an earning partner having been employed as a chambermaid or waitress in La Digue Lodge, Darros Island and Felicité Island. By reason of their intimate and personal relationship, she had been not simply rendering household or uxorial services as a concubine but had been making regular and substantial contributions by cash and in kind directly and indirectly enabling the defendant to purchase the immovable properties namely: (i) Plot of land Title H5274 at Majoie (ii) Plot of land Title LD959 in La Digue. The plaintiff also took a personal loan of Rs25, 000/- from SHDC and gave the sum to the defendant for the purchase of furniture, tiles, cutlery, bed-sheets and curtains required to start the guesthouse-business. Subsequently, the plaintiff repaid the entire loan from her salary. As a result, the defendant acquired ownership the said properties and got them registered in his sole name including the guesthouse business. Consequently, I find that ***economic benefit was eventually added to the patrimony of the defendant*** by the acquisition of those properties and the guesthouse-business**.** In other words, the defendant did gain enrichment consequent upon the alleged ***economic detriment suffered by the plaintiff*** in making those contributions. Therefore, I conclude that the condition No. 1 required for establishing the claim on unjust enrichment, is satisfied in the present case.

Condition 2

On the question of “impoverishment”, the plaintiff categorically testified that she trusted the defendant and contributed all her earnings over a period of 19 years directly and indirectly to the acquisition of the said properties and the business by the defendant. She did not make any savings on her own to provide for her own future, as the parties had a common-plan to start a joint business on their own and settle in their retired life. I also accept her evidence that she took a loan of Rs25, 000/- from SHDC and invested the entire loan in the guesthouse business. Admittedly, the defendant did not make any repayment of the said loan

nor made any refund of the contributions the plaintiff made. In the circumstances, needless to say, the plaintiff did incur economic loss. At the same time, the defendant had been running the business since 2001 and has thus benefited from the use and occupation of the guesthouse and other properties, which were purchased partly through contributions made by the plaintiff in 1990s. At this juncture, I also take judicial notice of the fact that the land value in the Republic has drastically appreciated in the past 5 years. In the circumstances, I find that the plaintiff did suffer loss or economic detriment corresponding to the alleged enrichment of the defendant. Hence, it is evident that the present case does satisfy condition No. 2 as well.

Condition No. 3

Undoubtedly, both elements namely, (i) the enrichment and (ii) the corresponding impoverishment, which constitute the condition No. 1 and 2 respectively, are present in this matter. Therefore, it goes without saying that the necessary nexus or connection does exist between these two elements since both conditions relate to the same transactions, subject matter and parties. Hence, I find that the condition No. 3 is also satisfied in the instant case.

Condition No. 4

An absence of lawful cause or justification is the fourth condition, which has to be verified by the Court on its objective assessment of the entire circumstances surrounding the case on hand. In the present case, it is evident that the plaintiff has invoked Article 1381-1 of the Civil Code alleging unjust enrichment, because she could not avail herself of an action in contract or quasi-contract. The plaintiff had been in love with the defendant, trusted him, and had been living with him as his common-law wife for a couple of decades. She had a legitimate expectation having plans for their shared future and mutual benefit. Obviously, because of their personal situation of facts, close relationship and intimacy, it is not morally possible for the plaintiff to obtain a written proof of her contribution or a proper contract being drawn by the parties creating legal rights and obligations in respect of the investments or contributions the plaintiff made directly or indirectly in the properties and the business in question and of its returns. Had there been no such *moral impossibility*, the plaintiff could reasonably be expected to obtain a proper contract with

the defendant and so the need for her to invoke Article 1381-1 would not have arisen at all. Hence, it appears to me that the plaintiff's *moral impossibility* to obtain a proper contract with the defendant in this respect has resulted in impoverishment of the plaintiff and enrichment of the defendant without justification. As I see it, the principle stated *in the Mauritian Case: Nunkoon and others Vs Nunkoon vide Mauritian Report 1973 at page 269*, on the question of *moral impossibility*, though it was intended to bend the strict rule on the admissibility of oral evidence, it still holds good and could equally be extended to the case of unjust enrichment claims between parties, who lived together in concubinage for a substantial period. Indeed, the Court in Nunkoon (supra) held inter alia, thus:

> "What constitutes impossibility is not defined by law and the court is allowed complete freedom in deciding in each case having regard to all the circumstances, including the relation between the parties, whether or not it was possible for a party alleging a certain transaction to obtain proof thereof"

In construing the *moral impossibility* of a common-law wife in this respect, the court ought to look at it in a broad commonsense way, putting itself in her shoes, sitting in her bedroom, having engaged in pillow talks with the man whom she loved and trusted, with all the circumstances known to her at the time. Then the Court has to ask itself: *Is it morally possible for her in those circumstances, to ask the man to execute a contract for the share of her contributions and investments in the properties and the business?* We ought not to answer this question by reference to any technical rules of law. Those technical rules have only too often led the courts astray and pushed them to sacrifice justice for the sake of law. Eschewing technical rules, we need to see simply what a common-law wife would have intended, when she was making financial support and contributions to the man during their concubinage. Looking at this case, in the light of the surrounding circumstances, it seems to me quite plain that when the plaintiff was making her contributions over the period of 19 years of her cohabitation, she should have intended that all her contributions would lead to a common pool of mutual benefit and shareable future. She did not contemplate that their relationship would end one day and she would suffer economic loss for no fault of hers. Her eyes of love and trust for defendant could have been blind then, but such blindness can no way constitute a *lawful cause or justification* for the defendant to take advantage and make enrichment to the detriment of the plaintiff. In the case of ***Anicette v. Christelle Camillle CS55 of 2001*** the Court held:

"Unlike in situation where there is a legal requirement that parties must express their intentions or agreements in writing, the only factor to be considered when deciding on *moral impossibility* would be the relationship between the parties and the closeness of the relationship. A similar view was also taken by Alleear C J (as he then was) in ***Francois Vs. Herminie CS 115 of 1991.*** In the case of ***Andre Esparon vs. Serge Esparon CS157 of 1990*** the Court stressed that when "trust played a prominent part in the occurrence" *moral impossibility* could be invoked. Hence, the plaintiff in my view thus suffered economic loss without lawful cause or justification. Therefore, I find condition No. 4 is also satisfied in the present case.

Condition No. 5

Admittedly, the parties never entered into any contract nor did they whilst in love contemplate that they would end up in a court of law with litigation over properties, which the defendant had purchased in his sole name during their concubinage. Obviously, the plaintiff, though suffered the detriment, cannot avail herself of another action in contract, or quasi-contract, delict or quasi-delict in this matter. Hence, there is no other legal remedy available for the plaintiff apart from the one found under *Article 1381-1 of the Civil Code* for *unjust enrichment* so as to have restitution of the economic loss she suffered without justification. This clearly indicates that the fifth condition discussed supra is also satisfied in the instant case and so I conclude.

Having said that, I find the ***economic detriment, which the plaintiff suffered in*** making those contributions over the period of 19 years of her concubinage with the defendant amounts to Rs450, 000/- as claimed by the plaintiff. This detriment obviously, culminated in ***economic benefit to the patrimony of the defendant*** by the acquisition of those properties and the guesthouse-business***.*** In other words, the defendant did gain correspondingly enrichment consequent upon the impoverishment suffered by the plaintiff. As I see it, the plaintiff's claim for moral damage in the sum of Rs25, 000/- appears to be reasonable, having regard to all the circumstances of the case.

For these reasons, I enter judgment for the plaintiff and against the defendant in the sum of Rs475, 000/- with costs. I make no order as to interest.

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D. Karunakaran
Judge
Dated this 30th day of September 2009