

IN THE SUPREME COURT OF SEYCHELLES

Jonathan Searles
Plaintiff

Vs

Marion Kathleen Searles
of Anse Talbot, Mahé

1st Defendant

Jane Janssen
of Anse Talbot, Mahé

2nd Defendant

Peter Mc Court
of Banyan Tree Resort, Mahé

3rd Defendant

Civil Side No: 04 of 2006

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Mr. C. Lucas for the plaintiff
Mr. F. Bonte for the defendant

D. Karunakaran, Ag CJ

JUDGMENT

The plaintiff has brought this action claiming damages in the sum of R200, 000/- from all three defendants jointly and severally for a fault the defendants allegedly committed by trespassing on the plaintiff's property and invading his privacy. On the other side, the defendants having completely denied the plaintiff's claim seek the Court for an order dismissing the plaint

with costs.

It is not in dispute that the 1st defendant is the former wife of the plaintiff. The 2nd defendant, a South African National, who is officially a tourist in Seychelles, is the common-law husband of the 1st defendant. The 3rd defendant is a Quantity Surveyor and Cost Consultant employed by Banyan Tree Resorts in Seychelles, who works under a Gainful Occupation Permit as he is a non-Seychellois.

The back ground facts of the case may be marshalled as follows:-

The plaintiff and the 1st defendant were formerly husband and wife. They were married for about 35 years having lived together in Australia, USA and Seychelles. During marriage, they jointly acquired properties and businesses both in Seychelles as well as Australia, some in their joint names and others in their individual names. Following their separation in 1992, they instituted divorce proceedings before the Family Court in Australia. When the proceedings were pending in Court, the plaintiff, in or around 1997, met one Ms. Winsel Dominica Pothin, a Seychellois national and began to cohabit with her in Seychelles. During the period of their cohabitation the plaintiff on 25th April 1997 purchased a parcel of land T477 at Bougainville, Mahé for Rs 40,000/- He also built and furnished a dwelling- house thereon for a sum of Rs2.5 million. Since the plaintiff was then going through the divorce proceedings with his ex-wife (the 1st defendant) in Australia, he did not wish the new property, which he personally acquired in Seychelles (hereinafter referred to as the suit-property) to be considered as part of the matrimonial assets over which the case was still pending in the Courts in Australia vide exhibit D3. Hence, the plaintiff registered the bare ownership of the suit-property in the name of his concubine Ms. Pothin, with whom he had been cohabiting then in Seychelles. However, the common-law relationship between the plaintiff and Ms. Pothin was short-lived. On 24th June 2001, she left the plaintiff and started to cohabit with someone else in Seychelles. Following the breakdown of their relationship, the plaintiff requested Ms. Pothin to return him the bare ownership of the suit-property. Ms Pothin however, refused to do so. Hence, the plaintiff filed a civil suit - CS 250 of 2001- in the Supreme Court of Seychelles against Ms. Pothin, based on *unjust enrichment*, in order to recover from her the bare ownership of the suit-property. In the said suit, the plaintiff's former wife, the 1st defendant herein also intervened as a party and asked the Court for a declaration that she was also a co-owner of the suit-property as she

had an interest in the suit-property along with the plaintiff since it was purchased by the plaintiff during the subsistence of their marriage.

Be that as it may, the plaintiff and his ex-wife - the 1st defendant - obtained divorce from the Family Court in Australia. Their marriage was dissolved and the decree of divorce was made absolute on 4th September 2000. Following the dissolution of marriage, there were outstanding and pending litigation between them in the Courts of Melbourne, Australia, involving the issues of division and settlement of matrimonial properties, which included all properties, businesses and moneys in bank accounts both acquired in Seychelles, Australia, Singapore and Guernsey. Both the plaintiff and the 1st defendant had respectively engaged counsel, to represent them in those proceedings that were pending before the Family Courts in Australia.

For the purpose of those court-proceedings pertaining to division and settlement of the matrimonial properties, the plaintiff's counsel had requested the 1st defendant's counsel to obtain the valuation of the matrimonial assets situated in Seychelles, which were acquired by the parties during the subsistence of their marriage vide exhibit D1. Hence, the 1st defendant, on 3rd April 2003, admittedly, with the assistance of her common-law husband namely, the 2nd defendant and the quantity surveyor namely, the 3rd defendant, whom she had retained for valuation services, entered the suit-property in order to carryout the evaluation. The 1st defendant testified that since she was not in speaking terms with the plaintiff and moreso since the plaintiff was out of the Republic during that period she could not inform the plaintiff in advance about her intended visit to and inspection of the suit-property with the valuation-expert for the purpose valuation. According to the 1st defendant she obtained the necessary permission from one Raymond Nancy, the caretaker who was then in charge of the suit-property. Further the 1st defendant testified that she entered the premises with the other two defendants, inspected the suit-property simply for the purpose of valuation and nothing else. Moreover, she testified that during that inspection she did not cause any damage either to the suit-property or to any object kept therein nor had any clandestine access to any document of the plaintiff. The evidence of the 1st defendant in this respect runs thus:

“I believe the house is considered part of the matrimonial property in Australia. My ex-husband declared in court that he had put it as matrimonial property. ... I wanted to know the value of the house... I did not have any restriction to enter the house... the gardener showed

us around.. He walked around with us. We did not take anything out of the house. We just walked around, photographed around and took measurements... And then we went away. We were in there only for about half-an-hour to 45 minutes. All we did was the valuation”

Mr. Raymond Nancy (PW4), who was the caretaker of the suit-property at the material time, also testified in essence that since he knew the 1st defendant as the wife of the plaintiff, he had no right to stop her from entering and inspecting the suit-property.

Against the backdrop of these factual circumstances, the plaintiff has now come before the Court claiming that all three defendants unlawfully entered the suit-property without his consent, authority or knowledge in order to carryout an evaluation of that property for Court proceedings out of the jurisdiction of Seychelles. According to the plaintiff, neither the bear-owner Ms. Pothin nor the caretaker of his premises gave permission to anyone to evaluate the suit-property or gain entry for that purpose. Moreover, the defendants during their inspection gained access to some of his private documents kept inside the house. Hence, it is the case of the plaintiff that the intrusion into and inspection of his dwelling house by the defendants amount to a *faute* in law namely, trespass and a transgression of the plaintiff’s right to privacy for which the defendants are jointly and severally liable to make good. Hence, the plaintiff claims moral damages in the sum of Rs 200,000/- jointly and severally against all three defendants in this matter.

Obviously, the plaintiff’s action is based on “*faute*”. Hence, the principles of law applicable to this case are that which found under Article 1382-2 & 3 of the Civil Code of Seychelles. This Article reads thus:

“Fault is an error of conduct which would not have been committed by a prudent person in the special circumstances in which the damage was caused. It may be a positive act or omission.

“Fault may also consists of an act or an omission the dominant purpose of which is to cause harm to another, even if it appears to have been done in the exercise of a legitimate interest”

I carefully perused the entire evidence including the documents adduced by the parties in this matter. I gave diligent thought to the submission made by counsel on both sides. I also had the opportunity to observe the demeanour and deportment of the witnesses, while deposed in court. First, on the question of credibility, I believe the 1st defendant in every aspects of her testimony. She appeared to be a truthful witness. I believe her testimony particularly, as to why and under what circumstances she entered and inspected the suit-property with other two defendants. I believe her, in that

she simply inspected the suit-property with other two defendants for the genuine purpose of carrying out an evaluation since required for the legal proceedings pending before the Family Court in Australia. It is evident from exhibit D1, the plaintiff's counsel in Australia namely, *Whitewoods Family Lawyers* has requested the 1st defendant's counsel namely *Kliger Partners* to produce her valuation of the assets situated in Seychelles. Although their marriage had been dissolved on 4th September 2000, admittedly, the parties still continued to share the use, occupation and enjoyment of the matrimonial properties pending court-proceedings. For instance, though the residential apartment in Australia had been registered in the sole name of the 1st defendant, the plaintiff admittedly, continued sharing the use and occupation of that property, during the time the 1st defendant allegedly trespassed his property in Seychelles. Having regard to the entire circumstances surrounding the case including the special circumstances of their personal relationship that continued to exist soon after divorce, in my view, by inspecting the suit-property the 1st defendant did not commit **any error of conduct** which would not have been committed by a prudent person in the special circumstances in which the damage was allegedly caused to the plaintiff. It is obvious even the caretaker Mr. Raymond Nancy testified that he did not stop the 1st defendant from inspecting the suit-property at the material time, because he knew the 1st defendant as the wife of the plaintiff. Besides, it is evident that the dominant purpose of her visit and that of the other two defendants to the suit-property was not to cause any harm to the plaintiff or intended to invade his privacy but to carryout valuation for a genuine and lawful reason. In fact, the plaintiff was not even present in the property at the material time of the defendants' visit. In the circumstances, I find that the 1st defendant's visit to the suit-property does not constitute a **fault** in the eye of law under article1382-2 & 3 of the Civil Code of Seychelles. For the same token, the 2nd and 3rd defendant also in

my judgment, did not commit any **error of conduct** which would not have been committed by a prudent person in the special circumstances in which the damage was allegedly caused to the plaintiff. The dominant purpose of their visit to the suit-property was also not to cause any harm to the plaintiff or intended to invade his privacy but to carryout an evaluation for a genuine and lawful reason as they were accompanying the 1st defendant at her *bona fide* request.

Having thus considered the entire evidence on record, I find on a preponderance of probabilities that the defendants did not commit any unlawful act or fault in visiting or inspecting or evaluating the suit-property in the absence of the plaintiff. In my judgment, there was **no error of conduct** on the part of any of the defendants, which would not have been committed by a prudent person in the special circumstances in which the prejudice was allegedly caused to the plaintiff. Obviously, the plaintiff is exaggerating the episode and the entire situation and did not suffer any prejudice or moral damage on account of the said inspection of the suit-property by the defendants and so I find. For these reasons, I dismiss the suit and make no order as to costs.

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D. Karunakaran

Ag Chief Justice

Dated this 8th Day of March 2010