

## HOUAREAU v HOUAREAU

(2011) SLR 47

S Rouillon for the plaintiff  
D Sabino for the respondent

### **Judgment delivered on 18 March 2011 by**

**KARUNAKARAN J:** This is a suit for a declaration to annul the registration of bare ownership of an immovable property. The plaintiff seeks a judgment to rescind the transfer of bare ownership, which he allegedly made in favour of the defendant in respect of an immovable property namely, land title 3680, hereinafter called the "suit-property", situated at Bel Ombre, Mahé, for the following reasons:

1. The plaintiff namely, the transferor was not in good mental capacity at the time of the alleged transfer, in other words, did not give a valid consent for the transfer. He was misled and so mistakenly, signed the transfer deed in favour of the defendant namely, the transferee; and
2. The defendant took unfair advantage of the plaintiff's desperate financial need for medical treatment and caused the suit-property to be transferred into her name having paid only R25,000 as purchase price, which amount was abysmally disproportional to and far less than the real value of the property. This disproportional purchase price results in a lesion in law and so rescinds or annuls the alleged contract of sale/transfer.

Hence, the plaintiff prays this Court for a declaration that the alleged transfer of bare ownership of the suit-property registered in favour of the defendant is a nullity; and consequently, seeks a Court order directing the Land Registrar to rectify the land register in respect of the suit-property by removing the defendant as bare owner and registering the plaintiff as sole owner thereof.

On the other side, the defendant in her statement of defence has denied the plaintiff's claim in its entirety, contending that the said transfer is valid, effectual and genuine and not vitiated by any adverse factor leading to lesion.

The facts of the case as they transpire from the evidence on record are the following.

The plaintiff is an elderly person. He is generally of poor health. He is suffering from chronic diabetes and hypertension. He has no family. He is single; living on his own. The defendant is the niece of the plaintiff. She is a young woman, 23 years of age. She is residing in the United Kingdom; whereas her parents are living in Seychelles at BelOmbre, the district where the plaintiff is also living. Incidentally, it appears that the plaintiff is much attached to and still having lots of love and affection for his niece, the defendant, although he has instituted the present suit pleading her as the defendant in this matter for the purported transfer engineered by her parents. In fact, when the plaintiff testified in Court he even stated that he is still willing to bequeath the suit-property to the defendant after his lifetime.

Be that as it may. The plaintiff was at all material times, the sole owner of the suit-

property until its bare ownership was transferred in favour of the defendant in March 2006. Ever since the start of his life, he has been in use and occupation of the suit-property that has been his permanent home. In the middle of 2005, the plaintiff suddenly fell ill due to severe diabetic complications and hypertension. He needed urgent medical treatment. He wanted to take treatment from the private clinics of Dr Murty and Dr Albert. He was desperately in need of money for medical expenses. He had no savings. He wanted to take a loan from his close relatives. He therefore approached the parents of the defendant and requested them to give him a loan of R25,000 to meet his urgent medical expenses. They agreed to give him that sum but proposed that he should sign a document giving the bare ownership of the suit-property to their daughter namely, the defendant, whereas the plaintiff could retain the usufructuary interest in his favour for his lifetime. The plaintiff without understanding the legal implications of the transaction and due to pressurised state of mind that existed then due to ill-health, agreed to the proposal on condition that when he returned the money, all his interests in the property should revert back to him. Following those arrangements, the parents of the defendant took the plaintiff to a notary public – Mr Ramniklal Valabhji - who had drafted a document on the instructions of the parents of the defendant. The notary, who had been instructed in advance by the defendant's parents, asked the plaintiff in his office to sign that document namely, the transfer of bare ownership in favour of the defendant dated 6 December 2005, in Exhibit P1, hereinafter called the "deed in dispute". The said document was registered on 15 March 2006 with the Land Registry. That was, nearly three months from the date of execution. Before signing the "deed in dispute", the plaintiff asked the notary, whether the property would revert back to him upon returning of the money. The notary replied to the plaintiff's query confirming that the property would be retransferred to the plaintiff if and when he returned the sum R25,000 to the parents of the defendant.

A couple of years later, the plaintiff got well after receiving medical treatment, recuperated and managed to acquire the funds; he wanted to return the loan and get back his interests in the suit-property, which interest according to him, had been surrendered in favour of the defendant to secure the loan repayment. He went to see the same notary who told him that the return of land was not possible, as the property had already been transferred to the defendant. This was a shocking revelation for the plaintiff to learn that his property had been sold for a meagre price of only R25,000 whereas its actual market price could be around R1,000,000. According to the plaintiff, the defendant and the notary have by trick caused him to sign a sale deed in respect of the suit-property, when the transaction was simply intended to secure the repayment of the loan. Hence, he went to see a lawyer for the recovery of his property. The lawyer, upon the plaintiff's instruction, issued a letter of demand - dated 30 May 2008 - in Exhibit P2 - demanding the defendant to return the property as he was ready and willing to refund the loan of R25,000. Since there was no response from the defendant, the plaintiff has now come before this Court for justice.

Following the present suit, three experts namely, independent quantity surveyors, who appraised on the value of the suit-property, submitted their individual reports to Court confirming that the value of the suit-property falls in the region of R850,000. In fact, two expert quantity surveyors Messrs Nigel Roucou (PW2) and Lester Quatre(PW3) also testified substantially, in agreement with the valuation made by

the third expert G M Surveys. According to all three experts in the field, the value of the suit-property, which consists of a two bedroom house located on 714 square metres of land situated on a prime location, very close to Beau Vallon Beach, is around R1,000,000. Obviously, the price paid by the buyer namely, the defendant, is less than one half of the actual value of the suit-property, even if one-third of the actual value is deducted for the usufructuary interest reserved for the benefit of the seller, namely the plaintiff in this matter. Indeed, the difference between the amounts namely, the real value of the suit-property at R1,000,000 and the price paid by the defendant at R25,000 is evidently, abysmal. In the circumstances, the plaintiff prays this Court for a declaration and consequential relief.

After the close of the case for the plaintiff, the defendant did not adduce any evidence in defence, but elected to submit no case to answer. The Court accordingly called upon the defendant to elect between standing on his submission or calling evidence before the Court ruled on the submission. Defence counsel elected standing on his submission. According to the defendant's counsel Mr Sabino, the plaintiff has failed to establish a prima facie case, since all three experts did not draw up a single report and express an opinion by majority as required under article 1680 of the Civil Code. Moreover, it is the contention of the defendant that the expert reports reflect the value of the suit-property in March 2009, not the value that existed in December 2005 when it was sold to the defendant. Also counsel submitted that there is no evidence to show that the defendant took unfair advantage of the plaintiff to acquire the property. Therefore, Mr Sabino urged the Court to dismiss the plaint.

On the other side, Mr Rouillon, counsel for the plaintiff submitted that the requirement contemplated under article 1680 of the Civil Code for one single report, containing an opinion by majority of the expert is simply a procedural requirement based on the literal interpretation of the article. According to Mr Rouillon, the Seychelles Civil Code is a living document, which therefore, should be interpreted in such a way that it is being updated and developed to satisfy the circumstances of each particular case. A property worth about one million rupees has been sold to the defendant for a meagre price of R25,000. One should not look at the literal interpretation of the article, but look at the spirit of the law and its intention, with commonsense and justice. Furthermore, Mr Rouillon submitted that the property remains today in the same condition as it existed at the time it was allegedly sold to the defendant in 2005. Since then, there has been no change made by alteration or addition to the house located on the suit-property. Hence, no change in value has taken place since its alleged sale to the defendant. Furthermore, Mr Rouillon submitted that there is sufficient evidence on record to prima facie show that the plaintiff has been very sick and was desperately in need of money for medical treatment. The defendant has taken unfair advantage of his adverse situation, paid a meagre sum of R25,000 as sale price to the property worth a million rupees and got it transferred in the name of their daughter. In the circumstances, Mr Rouillon submitted that since there is sufficient evidence before the Court to establish a prima facie case for the plaintiff, the defence submission of no case to answer should fail and judgment should be given for the plaintiff in this matter.

Having sieved through the entire pleadings, evidence including all exhibits on record and having carefully analysed the submissions made by both counsel, it seems to me, the following are the fundamental questions that arise for determination in this

matter:

- (1) Did the plaintiff give consent to the impugned transfer in Exhibit P1-(the contract of sale), which he signed at the office of the notary Mr Valabhji on 6 December 2005?
- (2) Is it a mandatory procedural requirement under article 1680 of the Civil Code that in all cases of alleged lesion, the three experts should draw up a single report to express an opinion by majority on the valuation of the property in question?
- (3) Should the contract of sale (the transfer of bare ownership) in this matter be rescinded for insufficiency of the price? And
- (4) Has the plaintiff established a prima facie case to find answers to the above questions?

Obviously, the first question above on the issue of consent is a question of fact. This does not involve any point of law. The answer to this question completely depends upon the credibility of the witnesses, their testimonies and the circumstantial evidence, if any, to validate or invalidate the alleged consent. In fact, there is only one version on record on this material issue. That is the only uncontradicted version of the plaintiff. According to the testimony of the plaintiff, he signed the document in question, only to secure the repayment of sum R25,000, which sum he intended to take only as a loan from the parents of the defendant. There is no evidence on record to the contrary.

On the question of credibility, I believe the plaintiff. I accept his evidence, in that he received the sum of sum R25,000 from the parents of the defendant only as a loan. When the plaintiff visited the office of the notary Mr Valabji, the latter confirmed to the former that when the loan is repaid the bare ownership transferred in favour of the defendant would revert back to the plaintiff. The evidence given by the plaintiff on this crucial issue is reliable, cogent, corroborative and consistent with the sequence of events narrated by the plaintiff as to why and under what circumstances he was desperate to take the loan from the defendant's parents and how the episode of transfer took place and how the defendant acquired title to the suit-property. Moreover, I find upon evidence that the plaintiff acted upon a mistaken belief as to reversion of the suit-property upon repayment of loan and so consented to sign the document in dispute. Presumably, the mistaken belief arose out of misrepresentation or misstatement made by the parents of the defendant and the notary at the material time, as to the nature of the transaction embodied in the document he signed. I also find that the plaintiff did sign the said deed without consent so to say valid consent, as such consent was obtained by misrepresentation or misstatement of facts and that too at the time when his state of mind had adversely been affected by ill-health and desperate financial need.

Incidentally, I should mention that the plaintiff has not pleaded fraud to be the cause in this matter to annul the deed in dispute. In law, I note fraud cannot be presumed by court, it must be proved by adducing positive evidence in terms of article 1116 of the Civil Code.

Needless to say, the document in dispute, which constitutes the "contract of sale", is vitiated by lack of valid consent by the plaintiff due to adverse state of mind the

plaintiff had on account of ill-health at the material time coupled with the mistaken belief triggered by misrepresentation of facts by the parents of the defendant and the notary. Indeed, consent shall not be valid if it is given by a mistake vide article 1109 of the Civil Code of Seychelles (CCS). Validity of consent is an essential condition for the validity of any contract of sale vide article 1108 of the CCS. Hence, I conclude that the plaintiff did not give valid consent to the impugned transfer. Evidently, the plaintiff in this respect has discharged his evidential burden and has established a prima facie case to the satisfaction of the Court showing that the impugned transfer is a nullity and is liable to be rescinded in law.

Accordingly, I find the answer to question no 1 in the affirmative and conclude that the deed in dispute is undoubtedly, a nullity and liable to be rescinded for lack of consent since the plaintiff did not give a valid consent to the impugned transfer in Exhibit P1 (the contract of sale), which he signed at the office of the notary MrValabhji on 6 December 2005.

I am also aware that the correctness of the statements recorded in a notarial deed and attested by the notary or in any authentic document executed by an attorney can only be impugned by the procedure of *inscriptio falsi* in terms of article 1319 of the Civil Code vide *Ladouceur v Bibi* (1975) SLR 278. However, in this case, it is not the correctness of the statements recorded in the notarial deed and attested by the notary that is impugned but the contract of sale evidenced by the document in dispute, which itself is null and void ab initio as it has failed to satisfy one of the essential conditions namely, consent, that is required for the validity of an agreement as contemplated under article 1108 of the CCS.

I will now turn to question no 2. It is also not in dispute that article 1680 states that three experts should draw up a single report to express an opinion by majority on the valuation of the property in question. It is also not in dispute that the plaintiff did not produce such a single report combining all three experts to express an opinion by majority. However, each expert has individually submitted his or her valuation report to the Court. They have been admitted in evidence. The Court can simply peruse all three reports and easily ascertain what the majority opinion is. This is a very simple exercise which the Court can competently and effectively carry out in this respect. The statute, in fact, does not prevent the Court from ascertaining the majority opinion by examining the informed opinion expressed individually by all three experts in their respective reports. In the circumstances, the literal meaning of the terms "a single report" used in the article in my view, cannot and should not be construed simply by reading those words in isolation or by going to any dictionary for lexical meanings of those terms. I decline, therefore, to ask myself: What do the words mean to a grammarian? I prefer to ask: What did the legislature intend to mean by using those words in this particular context? In such situations, it is the duty of the courts to embark on the task of discovering the contextual meaning which the legislature had intended to convey by using those terms in the context in which they are used. And, the courts should adopt such a construction as will "promote the general legislative purpose" underlying the provision. Evidently, the general legislative purpose in this regard is that the Court should accept, rely and act upon the majority opinion of the experts on the valuation of the property in question. In this situation, as rightly submitted by Mr Rouillon, the duty of the Court is to work on the constructive task of

finding the intention of the legislature and interpret the provisions of the Civil Code to meet the changing needs of time and to accord with reasoning and justice.

Generally, an expert opinion is sought by the Court only on matters, in which the Court may not possibly have the specialised knowledge. Indeed, an expert's opinion on any subject is relied and acted upon by the Court only for the reason/s given by the expert in validation of his opinion, to the satisfaction of the Court. The Court presumably, has the power and wisdom to gauge the degree of accuracy and validity of the expert opinion on the touchstone of the reasons on which that opinion is based. Only upon such satisfaction, the Court may rely and act upon that opinion. In this case, evidently, there are three experts' opinions expressed by three appraisers on this crucial issue of valuation. In the circumstances, I find that this Court is now equipped and competent to form its own opinion nevertheless, based on valid reasons to adjudicate upon the issue. With this approach in mind, I diligently scrutinised the entire evidence on record as to valuation made by all three experts.

As rightly submitted by Mr Rouillon, one should not look at the literal interpretation of article 1680 especially when it involves procedural matters.

The Court should look at the spirit of the law and the intention of the makers of it. For these reasons, I find the answer to question no 2 as follows: It is not a mandatory procedural requirement under article 1680 of the Civil Code that in all cases of alleged lesion, the three experts should draw up a single report to express an opinion by majority on the valuation of the property in question.

Coming back to question no 3 it is evident from the above that the defendant's parents have taken unfair advantage of the plaintiff's adverse situation, paid a meagre sum of R25,000 as sale price for the suit-property, the real price of which indeed falls in the region of R900,000 to R1,000,000, and got it transferred in the name of their daughter. Obviously, in terms of article 1658, any contract of sale may be rescinded by reason of the insufficiency of the price. This article reads thus:-

Apart from the grounds of nullity or rescission already explained in this Title, and those which are common to all contracts, the contract of sale may be rescinded by the exercise of the option to redeem and by reason of the insufficiency of the price.

Dehors my finding above on the issue of consent, I hereby rescind the alleged transfer, the contract of sale, that is the transfer of bare-ownership in this matter for insufficiency of the price in terms of article 1658 of the CCS.

In the final analysis, having carefully examined the entire evidence on record, I find that the plaintiff has established a prima facie case enabling the Court to find answers to all three questions formulated hereinbefore. Hence, in my judgment the defendant's submission on no case to answer fatally fails. The plaintiff is therefore entitled to judgment as prayed for in his plaint.

Accordingly, I enter judgment for the plaintiff as follows:

- (1) I declare that the purported deed of transfer - dated 6 December 2005 registered with the Land Registry on 15 March 2006 - transferring the bare-ownership in

respect of Title J680 in favour of the defendant, is a nullity and therefore, I hereby rescind the said transfer accordingly.

- (2) I order the plaintiff to repay the sum of R 25,000 to the defendant with interest on the said sum at 4% per annum as from 15 March 2006 until the sum is fully repaid.
- (3) I direct the Registrar of Lands to rectify the land register in respect of Title J680 by removing the defendant namely, Emma Rachel Juliette Houareau as the proprietor of the bare ownership thereof and registering the plaintiff namely, Ralph France Roch Houareau as the only proprietor of all interests in the said Title upon proof of payment of the said sum as ordered in paragraph (2) above, to the satisfaction of the Land Registrar. And

Having regard to all the circumstances of the case, I make no order as to costs.