

IN THE SUPREME COURT OF SEYCHELLES

Kevin Roucou

of 10, Charmwood Garden, London E149ud

Plaintiff

Vs

Nichol Anthony

of La Misere, Mahé

Defendant

Civil Side No: 269 of

2000

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Mr. B. Hoareau for the plaintiff

Mr. C. Lucas for the defendant

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D. Karunakaran, J.

JUDGMENT

This is a suit for recession of sale - lesion - in respect of an immovable property - Title C303 with a dwelling house thereon, hereinafter called the "suit-property"- situated at Anse La Mouche, Mahé.

At all material times, one late Ms. Finette Anthony, who died on 25th June 2006, hereinafter called the "deceased", was the sole owner and occupier of

the suit-property. The plaintiff in this matter is the adopted son of the deceased. He is presently residing in England.

The deceased purchased the suit-property taking a housing loan from SHDC. She had mortgaged the suit-property for securing the loan repayments. However, the deceased could not repay the loan in full. She was grossly in arrears of her monthly repayments. On 13 March 1991, while the suit-property was under mortgage with SHDC, the deceased transferred the bare ownership of the suit-property to the defendant for a consideration of Rs100, 000/- Since then the defendant became the registered bare-owner of the suit-property. Although, the deceased transferred the bare-ownership to the defendant, she did not part with possession and enjoyment of the suit-property. She continued to stay in the house and remained as usufructuary of the suit-property throughout her lifetime.

Following the death of the usufructuary in June 2006, the usufruct ended by operation of law under Article 617 of the Civil Code as it reads thus:

“The usufruct shall be terminated -

By death of the usufructuary...”

Since the usufruct terminated, the usufructuary interest merged with the defendant’s bare ownership interest and the defendant became the absolute owner of the suit-property and now remains registered as such, with the Land Registry.

Be that as it may. On 18 July 2006, that is, a couple of weeks after the death of the deceased, the plaintiff came before the Court with the instant suit seeking a declaration to annul the registration and rescind the said transfer of bare-ownership made by the deceased, in favour of the defendant in respect of the suit-property. The plaintiff seeks recession on the following grounds:-

1. Firstly, since the plaintiff was not in a good mental capacity at the time of the alleged transfer, she did not give a valid consent for the transfer of the bare-ownership to the defendant.
2. Secondly, at the time of the said transfer the sale-price of Rs100,000/- for parcel C303, was less than one-half of the real value of the property. This disproportionality in the purchase-price results 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 the suit-property registered in favour of the defendant is a nullity. As a consequential relief, the plaintiff also seeks an order directing the Land Registrar to rectify the land register by removing the defendant as proprietor of the suit-property and registering the plaintiff and his half-sister one Amanda Joyce Harris as owners thereof.

On the first ground, it is the contention of the defendant that the plaintiff was in a good mental capacity at the time of the transaction. She gave a valid consent for the transfer. Hence, according to the defendant, the transfer of bare ownership made by the deceased during her lifetime is valid, effectual, genuine, and not vitiated by any adverse factor leading to lesion.

Regarding the second ground, the defendant contended that the deceased originally purchased the suit-property by taking a housing loan from SHDC and had mortgaged the suit-property in favour of SHDC for securing the loan repayments. However, the deceased could not repay the loan in full. She was grossly in arrears of her monthly repayments. On the date of the said transfer, the deceased therefore, assigned her housing loan liability in the sum of Rs294, 667.40 to the defendant, who agreed to clear that sum being the balance of her housing loan repayments. The defendant

subsequently, paid off the entire balance of the housing loan Rs294, 667.40, which sum remained due and payable to SHDC. This payment made by the defendant to clear the balance of the housing-loan also formed part of the consideration of the sale. The defendant had to pay off the said sum to SHDC to remove the charge that had been encumbering the suit-property. Therefore, the defendant's total payment of consideration amounted to Rs100, 000/- plus Rs294, 667. 40. Thus, the total sale-price paid by the defendant was Rs 394,667. 40, not Rs100, 000/- as claimed by the plaintiff.

Since the present suit is for lesion, three experts namely, Independent Quantity Surveyors made an appraisal on the value of the suit-property at the time of the sale to the defendant. The experts submitted their report to Court confirming that the real value of the suit-property at the time of the sale to the defendant, was Rs475, 000/-. In the circumstances, the defendant claimed that the total sale-price Rs 394,667.40/- paid to the deceased for parcel C303, was higher than one-half of the real value of the property that is, Rs237, 500/- Therefore, there is no undervaluation in the sale-price to cause lesion in law. According to the defendant, therefore, there is no ground in law to rescind or annul the alleged sale/transfer.

I diligently, sieved through the entire pleadings, evidence including all exhibits on record. I carefully analysed the submissions made by both counsel.

First of all I note, although the plaintiff has pleaded the issue of "consent" in the plaint, the plaintiff's counsel in his final submission did not rely on it or raise it as a ground of challenge to annul the sale. Therefore, the only issue joined by the parties that requires determination is whether the sale of the suit-property by the deceased to the defendant should be rescinded on the grounds of lesion. Since the facts relating to this issue are

not in dispute, the only fundamental questions that needs answer herein, is this:-

Should the contract of sale (the transfer of bare ownership) in this matter be rescinded for undervaluation of the price in that, the price paid by the defendant was less than one half of the real value of the suit-property?

On a point of law, as rightly submitted by Mr. C. Lucas, Learned Counsel for the defendant, on points of law, that for lesion to be invoked “the price paid by the buyer must be less than one half of the value of the thing bought.... subject to provisions of Articles 1675 and 1676 and the rule of Article 1118 and Article1674.

In matters of lesion, it is pertinent to peruse the following articles of our Civil Code:

Article 1675: “In order to establish whether there is a lesion of more than one half, the value of the property shall be calculated according to its condition at the time of the sale. In the case of a unilateral promise of a sale the lesion is estimated on the day of fulfilment.”

Article 1118 (2): “The Defendant to an action for lesion as in the preceding paragraph shall be entitled to refuse rescission if he is willing to make and adequate contribution to the other party in such manner as to restore a more suitable balance between the contracting parties.”

Article 1679: “The Court shall not admit any claims that a contract is vitiated by lesion unless the plaintiff is able to make out a prima case (underline mine) that the circumstances are sufficiently serious to warrant an investigation by the Court.”

Article 1681: “If the action for rescission succeeds the Court shall make an order as under article 1674. If, in the meanwhile, the property has passed on to a third party, the right to a supplement shall be exercised against such party; subject to the right of the third party to recoup his loss against the buyer.”

Article 1682: “If the buyer prefers to keep the thing and pay a supplement as provided in article 1118, he shall also pay interest on the supplement as from the day when action for rescission was brought. If he prefers to return the thing and recover the price, he must also surrender the income of the thing as from the day when the action was brought. If he has received no income he shall be entitled to interest on the price as from the day fixed for payment of the supplement.”

Undisputedly, the experts in this matter have submitted their report to Court confirming that the real value of the suit-property at the time of the sale to defendant, was Rs475, 000/-. The defendant has indeed, paid a total sale-price of Rs 394,667.40/- to the deceased for the suit-property. Obviously, the total price Rs 394,667.40/- which sum the defendant paid to the plaintiff towards consideration, is higher than one-half of the real value of the property that is, Rs237, 500/- Therefore, there is no undervaluation in the sale-price to cause lesion in law and so I find. I uphold the contention of the defendant that, there exists no ground in law to rescind or annul the alleged sale/transfer for lesion, in the instant case.

In the circumstances, I find that the plaintiff has miserably failed to make out even **a prima case** that the circumstances are sufficiently serious to warrant an investigation by the Court for lesion as required under article 1679 above. Hence, this Court rejects the plaintiff’s claims that contract of sale in this matter is vitiated by lesion.

Besides, I wish to mention that upon perusing the pleadings and the tripartite expert report in matters of this nature, the Court may determine whether the Plaintiff has made out a prima facie case that requires investigation by the Court vide Articles 1679 read with 1681 and *Mauritius Code Annoté by Venchard J. Volume II page 139 Khadun v/s Naveerasson and Or.* The judge may also first consider whether the merits of the pleadings disclose a prima facie case **“suffisament graves on suffisament vraisemblés”** (sufficiently serious and sufficiently likely) that an action for lesion is maintainable before ordering an evaluation report.

In the final analysis, having carefully examined the entire evidence on record, I find that the plaintiff has failed to establish **a prima facie case** for lesion. Hence, in my judgment the plaintiff’s suit herein for lesion is not maintainable in law. The suit is accordingly dismissed. However, having regard to all the circumstances of the case, I make no order as to costs.

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D. KARUNAKARAN

JUDGE

Dated this 31st October 2011