

IN THE SUPREME COURT OF SEYCHELLES

**DIANA SEDGWICK
VIVIENNE BARALLON**

Vs

JOURDANNE GUY

Civil Side No: 354 of 2006

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Mr. Rajasundaram for the plaintiff
Mr. Elizabeth for the defendant

JUDGMENT

By Plaint entered on 26 September, 2006, the Plaintiffs prayed this Court to enter judgment against the Defendant directing her to:

- a. Transfer the respective portions namely 1/3rd share each in the Title H1579 in favour of the Plaintiffs.

- b. Refund the Plaintiffs a sum of Rs71,666.67 being the value of the 2/3rd share in the rent proceeds up to March 2006 and the accrued rent proceeds until the disposal of shares in the property.

Alternatively

- c. Directing the Defendants to refund the Plaintiffs a sum of Rs250,000.00 each, being the value of 1/3rd share of the property comprised in H1579 and
- d. To award costs of this proceedings to the Plaintiffs.

Plaintiffs' Case

The Plaintiffs had jointly and together with the Defendant inherited an immovable property comprised in Title H1579 situated at Majoie, Mahe, Seychelles, from their mother the late Aline Gaetanne Sedgwick in February, 2002. They were all three registered as co-owners of that property in the records of the Land Registry.

The Plaintiffs alleged that in or about May 2002 the Defendant approached them to transfer their respective shares onto her name so that she becomes the sole and single owner of the property in order to facilitate a loan in her favour from Seychelles Housing Development Corporation to a commercial bank.

The Plaintiffs being the own sister of the Defendant agreed to help the Defendant by transferring their respective shares for no consideration and accordingly they transferred their titles, by virtue of Transfer Deeds dated 13 May, 2002 and 29 July 2002 respectively.

Those Transfer Deeds however respectively read a sale consideration of Rs30,000.00 although there was no consideration passed onto the Plaintiffs by the Defendant.

It is the case of the Plaintiffs that the Defendant was to have transferred back the respective portions of the Plaintiffs onto them after discharging her loan but the Defendant failed to do so and the Plaintiffs come to know that she had discharged the loan well before the execution of the Transfer Deeds, namely in February 2002.

The Plaintiffs on various occasions requested the Defendant to transfer their shares back to them, but the Defendant refused to do so.

The Plaintiffs are now saying that the Defendant is therefore liable to transfer back to them their respective 1/3rd share in Title H1579 and that she is also liable to return all the revenues derived from the rent proceeds of the residential house comprised in H1579 as she had unjustly enriched herself.

The Plaintiffs also contended that the Defendant has so far unjustly enriched herself in the sum of Rs107,500.00 from the proceeds of the residential rent as from 1 September 2002 until end of March 2006 at the rate of Rs4,000.00 per month and the unjust enrichment is accruing.

The Plaintiffs are alternatively claiming to be entitled to obtain their respective shares in that property in terms of money at Rs250,000.00 each, as the property is valued at Rs750,000.00.

Defendant's Case

The Defendant in her Statement of Defence raised a plea in limine litis as follows:

“The Plaintiffs cannot give oral evidence on a back letter in law since the agreement is of no force or avail whatsoever.”

On the merits, the Defendant agreed that Title H1579 was originally owned by the Plaintiffs' and her late mother Aline Gaetanne Sedgwick who passed away on 23 April, 1985.

That property was mortgaged to SHDC under A/C HL 1413. The Defendant averred that it was her together with 2nd Plaintiff who signed the mortgage agreement as guarantors to repay the loan since the deceased did not have any means to repay at the time.

The Defendant also averred that she had to repay the loan alone from 1982 until it was fully paid in 2002 because the 2nd Plaintiff stopped repaying the loan completely when she migrated to Australia in 1990. The 1st Plaintiff never contributed anything towards the repayment of the said loan and moved out of the house in March 1993.

The Supreme Court appointed the Defendant as Executrix of the estate of the late Aline Gaetanne Sedgwick on the 2 February 1998 in Civil Side No. 134/87 with the consent of the Plaintiffs and the Defendant.

The Defendant as Executrix had caused the property to be registered in the joint names of the Plaintiffs and herself and she also solely paid the cost of Discharge of the Mortgage and for the registration of Transmission by Death.

The Defendant averred that she continued to repay the outstanding loan to SHDC from her own funds by direct debit from her salary from August 1990 to January 2002, approximately 11 years and 5 months.

The Defendant also averred that the Plaintiffs agreed to transfer their shares to her because they acknowledged and accepted that it was her who had repaid the mortgage in full except for a small contribution from the 2nd Plaintiff.

The Defendant further averred that the Plaintiffs accepted that she had also paid for the cost of maintenance of the property and the cost of building an access road to the house.

The Defendant averred that the Plaintiffs accepted and acknowledge that it was her who paid the mortgage and other expenses associated with the property and that was why they agreed to transfer their shares to her.

The Defendant admitted that although the Transfer Deeds are dated 13 May, 2002 and 29 July, 2002, and made reference that she made a payment of a consideration of Rs30,000.00, there was indeed actually no consideration that passed between her to the plaintiffs, but she claimed to have repaid SHDC Rs89,000.00 which payment, according to her, the Plaintiffs acknowledged.

The Defendant averred that there was no agreement between her and the Plaintiffs to transfer back the property to them after the mortgage was fully paid and she put the Plaintiffs to strict proof of that allegation.

The Defendant also averred that she is under no obligation in law to transfer a share in the property to the Plaintiffs as there is no averment of illegality when the Plaintiffs transferred their shares in the property to her on the 13 May 2002 and 29 July 2002 respectively. The said Transfers were therefore valid and cannot be challenged or nullified.

The Defendant further averred that she left Seychelles on the 1 May 2003 and since she is the lawful sole owner of the said property she could not have unjustly enriched herself in law.

The Defendant finally averred that the Plaintiffs have no right in law to be entitled to any share in the said property since such share that they may have had was legally transferred to the Defendant on the 13 May 2002 and 29 July 2002 respectively.

Points of Law

The Defendant raised a plea in limine litis in her Statement of Defence. I allowed evidence to be led in this suit before I pronounce on the point of law raised. This I did in order to allow the Plaintiffs if they were so minded to examine the Defendant on her personal answers so as to obtain initial proof in writing in order to open the way for them to lead oral evidence as to the verbal agreement that they had alleged. The Defendant was not examined on her personal answers.

This Court will now consider the plea in limine litis and dispose it off before considering the suit on the merits. The point of law raised by the Learned Counsel for the Defendant is as follows:

“The Plaintiffs cannot give oral evidence on a back letter in law since the agreement is of no force or avail whatsoever.”

Article 1341 of the Civil Code of Seychelles states –

“Any matter the value of which exceeds 5000 Rupees shall require a document drawn up by a notary or under private signature, even for a voluntary deposit, and no oral evidence shall be admissible against and beyond such document nor in respect of what is subject to have been said prior to or at or since the time when such document was drawn up, even if the matter relates to a sum of less than 5000 Rupees.

The above is without prejudice to the rules prescribed in the laws relating to commerce.”

Article 1347 reads:

“The afore-mentioned rules shall not apply if there is writing providing initial proof.

This term describes every writing which emanates from a person against whom the claim is made, or from a person whom he represents, and which renders the facts alleged likely.”

In support of his contention Learned Counsel for the Defendant cited the case of ***Gabriel Adonis v Remy Larue SCA No. 39/99*** in which case the Seychelles Court of Appeal addressed the issue of back-letter.

The question of back letter as is being raised by the Learned Counsel for the Defendant, in my view, can only be appropriately taken up provided if there is an authentic document which had been drawn up prior. A document is deemed authentic when it is drawn up in due form and its contents are true, correct and reflecting the free will of the parties. It will have effect in relation to third parties if that document is duly registered.

It is in evidence that the Defendant admitted that even though the transfer deed drawn up by the Notary which have been registered make mention of consideration of Rs30,000.00 there was indeed no consideration agreed to by the parties or was ever paid. In fact the Defendant further admitted that the issue of consideration is yet to be decided. Therefore, it is my finding beyond doubt that the two Transfer Deeds though made in proper form before a Notary, indeed contain matters that are false, thus vitiating the authenticity of the document.

A Notary of an Attorney-at-Law, when drawing authentic documents, has the onerous responsibility of ensuring that the contents of such documents are verified to be truthful and correct.

The Defendant herself admitted that there was no consideration that passed between the parties despite this having been stated in the Transfer Deeds as attested by the Notary. The Notary in that respect attested to a false statement contained in the Transfer Deed.

It is my finding that the two Transfer Deeds relevant to this instant suit, contain incorrect and untruthful matter which go to the fundamental aspect of that document, in that there was no agreement as to "consideration" despite a sum of "Rs30,000.00" being stated in those documents. The Notary drawing up those documents must have been aware that there was no valid agreement or contract as such between the parties and he could not have witnessed the paying of the consideration as is required of the Notary to do.

I find therefore that the issue of agreement among the parties as to the proper consideration remained open and is still to be agreed upon by them in order to constitute a legally valid contract. As such the two transfer deeds in issue are still open to be challenged by the parties as far as consideration is concerned. The Plaintiffs have done just that in the instant suit. The sale and transfer can only be effectively concluded when all parties agree on the price and the Defendant pay the Plaintiffs that agreed price in order to conclude the transfer of the shares of the Plaintiffs onto the Defendant.

It is manifestly inappropriate for this Court to ignore a fundamental principle of contract simple because of the legally technical available safeguard that a party is absolutely prevented to challenge what is purported to be an authentic document. To do so will amount to a travesty of justice. On that same score, a Court cannot allow back letters to be read into a document the authenticity of which has been properly established.

Of the evidence adduced by the parties I believe those of the Plaintiffs. It is therefore my finding that the Defendant indeed convinced her sisters, the Plaintiffs, to enter into a sham transfer of their respective shares in the property in issue onto her name for no consideration, on the pretext to enable her, the Defendant, to be able to mortgage that property in order to obtain a loan from the Bank to clear the housing loan, and on the condition that the Defendant will transfer back the shares in the property to all three of them as it used to be, once the bank loan is repaid and the mortgage cleared. This agreement between the parties ought to be upheld and maintained.

The Plaintiffs are claiming that the respective shares in the property are now transferred back onto their respective names or alternatively they are paid their due consideration if the Defendant insists on their transferring their shares onto her name.

In the light of the pleading, I find that the Plaintiffs have indeed opened an alternative avenue whereby they are asking the Defendant to simply proceed with the payment of a proper consideration in respect of those transfers. The Plaintiffs

basing on the market value of the whole property have set the consideration at Rs250,000.00 each.

For reasons stated above, I find that the issue of “back-letter” cannot arise because there is no authentic binding agreement previously concluded by the parties. The plea in limine litis is accordingly dismissed.

On the merits

The Plaintiffs are the sisters of the Defendant and the latter is presently residing in the United Kingdom.

The Plaintiffs and the Defendant had jointly inherited an immovable property comprised in Title H1579 (hereinafter the property) situated at Majoie, Mahe, Seychelles from their mother, the late Aline Gaetanne Sedgwick in February, 2002. The Plaintiffs and the Defendant were registered as co-owners of that property in the records of the Land Registry.

The Plaintiffs signed transfer deeds before a Notary transferring onto the Defendant their respective shares in the property. In those transfer deeds the consideration is stated at Rs30,000.00. Both the Plaintiffs and the Defendant agreed that no consideration was actually paid and there was not and there is no agreement as to what the consideration should be.

The Plaintiffs agreed to transfer their shares in property Title H1579 free of any consideration in the belief that they were facilitating the Defendant to obtain a

loan by mortgaging the whole property and the intention was that the shares of the parties would be restored once the loan is repaid and the mortgage cleared.

The Plaintiffs transferred their respective share onto the Defendant without actually getting the sum stated as consideration in the Transfer Deeds as the Defendant had convinced her sisters, the Plaintiffs, to enter into those sham transfer deeds on the pretext to enable her, the Defendant, to be able to mortgage that property in order to obtain a loan from the Bank to clear the housing loan, and on the condition that the Defendant will transfer back the shares in the property to all three of them as it used to be, once the bank loan is repaid and the mortgage cleared.

The Defendant refused to transfer the shares back to the Plaintiffs and because of that, the Plaintiffs are now asking this Court to order the Defendant to do in terms of their verbal agreement. Alternatively, the Plaintiffs are asking that the Defendant paid them the due consideration if the Defendant insists on their transferring their shares onto her name.

The Defendant claims the whole property as hers on the ground that she had purchased the shares of her two sisters because she was the one who acted as guarantor and eventually repaid a loan of Rs89,000.00 obtained by her late mother to originally purchase the property in issue. The Defendant having bound herself as a guarantor to her mother when the latter took a loan to purchase the property in issue as no relevance to the inherited ownership of a co-owned property following the death of the mother.

The Plaintiffs having opened the avenue whereby they are now asking the Defendant to pay them the proper consideration in respect of those transfers based on the market value of the whole property, have set the consideration at Rs250,000.00 each.

The Defendant had enjoyed the property as belonging to her solely since July 2002, having maintained the property including construction motorable driveway and having collected and enjoyed the rent proceeds during that period, it is my judgment that it would be fair that the Defendant be allowed to maintain that status quo subject to her completing the transfer agreement by paying the Plaintiffs the appropriate consideration which should be the present market value of the property. The Plaintiffs pleaded that the market value of the property to be Rs700,000.00. The Defendant made a general denial of that averment and in the absence of evidence to the contrary led by the Defendant, this Court accepts the market value to be as pleaded, that is Rs700,000.00.

In the final analysis, I enter judgment in favour of the Plaintiffs as against the Defendant and direct the Defendant to:

1. Either pay the Plaintiffs the sum of Rs250,000 each as consideration for the transfer of their respective one third share of the property within six months of this judgment; or alternatively;
2. Transfer the property back into the joint ownership of herself and the two Plaintiffs in equal shares and refund each of the Plaintiffs one third

share of the accrued rent proceeds of the property from July 2002 to date and continuing.

I award costs of this suit to the Plaintiffs.

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**B. RENAUD
JUDGE**

Dated this 18 May, 2012, Victoria, Mahe, Seychelles