

IN THE SUPREME COURT OF SEYCHELLES

Civil Side: CS 61/2009

[2014] SCSC 11

MR. ALLEN ERNESTINE

Plaintiff

versus

MRS. ELIZABETH LOUISE BEAUFOND GUMMERY

Defendant

Heard: 24 November 2011

Counsel: Mr. P. Pardiwalla for plaintiff

Mr. F. Ally for defendant

Delivered: 21 January 2014

JUDGMENT

Karunakaran J

- [1]** This is a suit for specific performance of a contract. The plaintiff herein is a businessman residing at Providence, Mahé, Seychelles. The defendant is a Seychellois National residing in the United Kingdom. At all material times, she was the owner of an immovable property- a parcel of land Title PR 359 situated in Praslin.
- [2]** The Plaintiff in this action - vide plaint dated 12th March 2009 - prays this Court for a judgment:

(i) Ordering the defendant to discharge her obligation under a sale agreement and execute the necessary transfer of land Title PR359 (hereinafter called the suit-property) in favour of the plaintiff;

(ii) ordering an inhibition against the suit-property to prevent the registration of any dealing thereof under the Land Registration Act; and

(iii) ordering the defendant to pay damages for breach of contract in the sum of Rs344,000/- to the plaintiff and with interest and costs.

[3] On the other side, the defendant in her statement of defence - dated 4th March 2011- denies the entire claim of the plaintiff and seeks dismissal of the suit. According to the defendant, although she had authorized one Mr. Bernard Georges, an Attorney-at-law of Victoria as her agent to enter into any pre-contract negotiations for the sale of the suit property to any potential buyer, she did not execute any special power of attorney as required under the Land Registration Act empowering the said agent to make any transfer of the suit property to the plaintiff or to any other third party.

[4] Furthermore, it is the case of the defendant that she never authorized Mr. Bernard Georges to enter into any sale agreement for the transfer of the suit property to the plaintiff. It is also the case of the defendant that the consideration of SR 500,000/- to be paid for the said transfer was totally out of proportion to the real value of the property. In any event, it is the case of the defendant that the plaintiff was in breach of a condition-precedent of the sale agreement, in that the plaintiff failed to make the payment of the purchase-price into the defendant's bank account in the UK in foreign currency. Furthermore, it is pleaded in the defence that the plaintiff's claim is time-barred in terms of Paragraph 1 of Article 2271 of the Civil Code, as the suit has been filed 5 years after the cause of action arose. In the circumstances, the defendant seeks the Court for an order dismissing the suit.

[5] The facts of the case as transpired from the evidence on record are these:

The plaintiff in this matter Mr. Allen Ernestine, aged 57, is a resident of Providence, Mahé, Seychelles. He owns a company dealing in roofing sheets called "Rapid Roofing."

He was a schoolmate and an old friend of the Attorney Mr. Bernard Georges, who had also been his legal advisor in the past.

- [6] In 1996, the plaintiff undisputedly, entered into an agreement with Mr. Bernard Georges, who was then admittedly acting as the Attorney and agent of the defendant for the sale of the suit property. Based on the instruction from the defendant, the principal Mr. Bernard Georges by a letter dated 20th February, 1997 addressed to the plaintiff - vide Exhibit P 1- accepted the price of Rs.500, 000/- offered by the plaintiff and confirmed that the owner had agreed to sell the suit property for the price offered. In fact, the said letter inter alia, reads thus:-

“As at the date hereof you have paid Rs 250,000/- towards the property, the balance to be paid by the end of March 1997.”

- [7] According to the plaintiff, at the time of purchase that was, in 1997 the price agreed upon for that portion of land at Rs500, 000/- was fair and *reasonable*.

- [8] The plaintiff did not personally negotiate or see the seller. It was the defendant's Attorney/agent Mr. Bernard Georges, who finalized the price and confirmed the sale on behalf of the defendant. Subsequently, the plaintiff also paid the balance of the purchase price Rs 250,000/- to the defendant's agent. On the 26th June 1998- vide Exhibit P 2-the agent also confirmed the receipt of the full purchase price of Rs 500,000/- from the plaintiff and agreed to make necessary arrangements for the transfer of title in favour of the plaintiff under the Land Registration Act, at the earliest. However, this formality of registration never happened. Although the plaintiff had paid the agreed purchase price in full as per the sale agreement, and performed his part of the contractual obligation, the defendant failed or refused to effect registration of the transfer as required under the Land Registration Act. Aggrieved by the refusal of the defendant and with intent to protect his interest in the suit-property, the plaintiff in 1998, caused registration of a “Caution” against the suit-property at the Land Registry and restrained the defendant from alienating the suit-property to any other third party. After a prolonged battle between the parties over the removal of the said Caution, in September 2006 - vide exhibit P3 - the Land Registrar decided to remove the Caution and gave plaintiff 14 day- notice of his intention to do so. Thus the caution, which the plaintiff had caused registration against

the suit-property to secure his real right in the suit-property, remained in the Land Register until September 2006. The removal of the Caution prompted the plaintiff to immediately institute the instant action before the Court seeking the reliefs hereinbefore mentioned.

[9] The plaintiff did all sale negotiations only through Mr. Bernard Georges. The plaintiff had no direct conversation with the seller, who had admittedly authorized Mr. Bernard Georges to negotiate the sale transaction on her behalf with any potential buyer. According to the plaintiff there was no condition-precedent in the sale agreement between the parties that the plaintiff should remit and make payment of the purchase price into the defendant's bank account in foreign currency in the UK nor was the plaintiff made aware of any such condition at any stage of the sale agreement by anyone. Having paid the entire purchase-price in full, the plaintiff required the defendant to arrange for the registration of the transfer but in vain. The Attorney Mr. Bernard Georges (PW2) also testified for the plaintiff corroborating, the evidence given by the plaintiff in this respect. In view of all the above, Mr. Pardiwalla, Learned Counsel for the plaintiff contended that the plaintiff has established his case for specific performance of the contract of sale in respect of title PR359 more than on a balance of probabilities; and so he urged the Court to grant the reliefs sought by the plaintiff in this matter.

[10] On the other side, the defendant testified that at all material times she was a Seychellois but was residing in the UK. In 1980s, the Government of Seychelles acquired some of her immovable properties in Seychelles. She had retained Mr. Bernard Georges as her attorney to negotiate with the Government and get compensation on her behalf following the adoption of the Constitution of the Third Republic. In 1995, the Government gave the suit-property to the plaintiff as part of compensation for the land acquired. As she was away from the Republic, she had instructed and authorized Mr. Bernard Georges to act as her agent to negotiate and sell the suit-property to any potential buyer. She also instructed Mr. Bernard Georges that the price should be deposited into her bank account in the UK in foreign currency. She also testified that she gave a special power of attorney in favour of Justice Andrew Sauzier, the former Judge of the Supreme Court, as required under the Land Registration Act to make the transfer of the suit-property to any potential buyer upon the price being paid into her bank account in foreign currency in the UK. According

to the defendant, the plaintiff was in breach of the said condition of the sale agreement as he failed to make the payment into the bank account of the defendant in the UK in foreign currency. Justice Sauzier DW2 also testified in support of the case for the defence. In the circumstances, the defence counsel Mr. Ally sought dismissal of the suit.

[11] I meticulously perused the entire pleadings and the evidence including all exhibits on record. I gave diligent thought to the submissions made by both counsel raising a number of factual and legal issues. I examined the authorities cited by counsel in support of their respective arguments. With due respect, some of the issues and authorities cited are in my view, not relevant to the case on hand. They do not fall within the parameters of the pleadings and the evidence on record.

[12] The real issues involved herein are simple and straightforward. To my mind, the following are the only fundamental questions that arise for determination in this matter:

1. *Had the defendant authorized her Attorney Mr. B. Georges to enter into a sale agreement in respect of the suit-property, on her behalf with the plaintiff or with any other potential buyer for that matter?*
2. *Was there a valid contract of sale between the plaintiff and the defendant in respect of the suit-property?*
3. *Was there any condition-precedent agreed upon between the seller and the buyer that the buyer (the plaintiff) should make the payment of the purchase-price into the bank account of the seller (the defendant) in the UK in foreign currency?*
4. *Is the instant action time-barred in terms of Paragraph 1 of Article 2271 of the Civil Code?*
5. *Is the plaintiff entitled to the relief of specific performance of contract?*
6. *Is the plaintiff entitled to damages payable by the defendant for the delay or breach in the performance of her contractual obligation?*

[13] Before I proceed to find answers to the above questions, for the avoidance of doubt, I should mention here that the present action is not a suit for lesion governed by Articles

1674 to 1681 of the CCS. I say so because the defendant in her defence has averred that since the value of the suit-property has now increased, it would be inequitable for her to complete the transfer in favour of the plaintiff. It seems to me, the defendant is raising this line of defence to annul the alleged sale agreement based on lesion. As I see it, and as was held in the case of ***Christopher Gill Vs. Estate of Grandcourt - Civil Side No: 174 of 1995*** - an action for lesion is available only to a plaintiff, the seller, to be used it as a “sword” - see the repeated use of the term “plaintiff” in Article 1679 and 1680 of the CCS – so as to obtain a declaratory relief against the buyer. In my view, this relief is not open or available to a defendant to be used as a “shield” in his defence to an action brought against him for specific performance of a contract. In fact, the defendant did not bring this action to set aside or rescind or annul the sale of the suit-property made in favour of the plaintiff; rather it was the plaintiff, who came before the Court for specific performance of the contract by the defendant. Evidently, completion of sale is a condition-precedent required for instituting an action for lesion. The defendant in the instant case however, does not concede that there was a valid sale at first place. Therefore, I have to exclude from my consideration the defence taken in the line of “lesion” in this matter.

- [14] Coming back to the questions Nos. 1, 2 and 3 above, they are simply questions of mixed law and facts. The answers to these questions completely depend upon the interpretation of law relating to sale of an immovable property under the Civil Code and the statutory requirement of registering such sale under the Land Registration Act, whereas finding on facts depends upon the credibility of the witnesses, their testimonies and the circumstantial evidence if any, surrounding the alleged agreement for sale. In fact, there are two versions on record on this material issue. According to the testimony of the Attorney Mr. B. Georges and that of the plaintiff, the defendant had given authority to Mr. Georges to negotiate and conclude the sale of the suit-property to the plaintiff or to any potential buyer for that matter. In fact, the defendant is not disputing the fact that she had given implied authority to Mr. Georges to negotiate and conclude the sale on her behalf as she was a non-resident
- [15] On the question of credibility, I believe the Attorney Mr. B. Georges and the plaintiff. I accept their evidence in its entirety.

- [16] The evidence given by Mr. B. Georges and the plaintiff on this crucial issue is reliable, cogent, corroborative and consistent with the contents of the authentic document in exhibit P1 and P2 evidencing the agreement for sale of the suit-property in favour of plaintiff for a valuable consideration. Hence, I find and conclude that there was a valid sale of the suit property in favour of the plaintiff. It was not vitiated by any adverse factor such as lack of authority from the principal to effect a sale agreement on her behalf by her Attorney. Moreover, I find upon evidence that Mr. Georges as an attorney and as an agent of the principal, the defendant properly and correctly ascertained, communicated and explained to the parties as to the nature of the transaction, the suit-property, its extent and the price agreed upon by the parties before confirming and concluding the sale agreement. The principal is bound to perform the obligation contracted by the agent in accordance with the authority conferred on him in terms of Article 1998 of the Civil Code. The sale of the suit property is complete between the parties and ownership passes as of right from the seller to the buyer as soon as the price has been agreed upon. Having said that, I note, the defendant has pleaded alluding or implicitly alleging that the plaintiff was in breach of a condition-precedent as to payment of the purchase price in her bank account in foreign currency with intent to annul the sale agreement. In law, such condition-precedent and a breach thereof cannot be presumed by Court, the defendant should prove by adducing positive evidence. In fact, the defendant claims herein that there was a condition-precedent and the plaintiff was in breach thereof, which in effect released her from performing her contractual obligation. Obviously, the evidential burden of proof in this respect lies upon the defendant in terms of Article 1315 of the Civil Code, which she has miserably failed to discharge. Although she had instructed Justice Sauzier pertaining to bank remittance of the price in foreign currency, this in my view, has nothing to do with the sale agreement. The plaintiff was not even made aware of such bank remittance by the defendant. In any event, the plaintiff was not privy to such instruction by the defendant to her agent Mr. B. Georges (PW1) or to her Power of Attorney Justice Sauzier (DW2).
- [17] Needless to say, the sale has not been registered yet under the provisions of the Land Registration Act. Registration of a transfer deed is only a procedural formality. Non-registration cannot invalidate any contract of sale or any agreement for that matter. All

agreements lawfully concluded shall have the force of law for those who have entered into them. They shall not be revoked except by mutual consent or for causes which the law authorizes. They shall be performed in good faith *vide* Article 1134 of the CCS. Therefore, there arises a rebuttable presumption of law in favour of the plaintiff that the sale agreement he entered into through defendant's agent constitute a valid sale of the suit property by the defendant to the plaintiff and so I find.

[18] De hors, the above finding on facts, it is pertinent to note, Article 1582 of the Civil Code clearly states that a sale is complete between the parties and the ownership passes as of right from the seller to the buyer as soon as the price has been agreed upon, even if the thing has not been delivered or price paid.

[19] On the question of damages claimed by the plaintiff, I do not find any concrete evidence on record to show on a balance of probabilities that the plaintiff did suffer any special loss or damage following the non-performance of the contractual obligation by the defendant. Hence, in my judgment the plaintiff is not entitled to any damage in this respect except a nominal moral damage for breach of contract by the defendants.

[20] As rightly submitted by Mr. Pardiwalla, on the 20th February 1997 the Plaintiff paid over to Mr. Bernard Georges SR 250, 000 towards the purchase price, with the transfer deeds to be signed upon payment of the balance of the agreed price. The balance of the purchase price was paid by the 26th June 1998, receipt of which is acknowledged by Mr. Georges. So, for all intents and purposes there is agreement as to the object and the price (which has been paid and had it been otherwise Mr. Bernard Georges would not have accepted the money on behalf of the Defendant). All that remained to be done was for the registration of the purchaser/Plaintiff as the owner of the land in terms of the Land Registration Act. In order to do this, one has to follow certain formalities of the Land Registration Act. One of these being that the instrument must be in a certain form and must be executed by a person holding a Power of Attorney *vide* Section 69 (1) of the Land Registration Act. For the purpose of complying with the Act, Mr. Andre Sauzier was so appointed, so that he may execute the instrument on behalf of the Defendant. This is normal procedure. Mr. Sauzier would have signed on behalf of the Defendant (she being absent), the Plaintiff would have signed as the Transferee and the instrument would

be executed in the presence of an Attorney-at-Law or Notary Public etc. in terms of section 60 (1) of the Land Registration Act. When asked in Cross examination as to why he would not sign the transfer document, Justice Sauzier replied that it was a condition that the purchase price should be paid into the account of the Defendant in the UK in foreign currency. It is true that Mr. Sauzier did not deny that there was an agreement, but he simply said that that Agreement was subject to a condition that had not yet been satisfied. As rightly pointed out by Mr. Pardiwalla, then it is irrelevant and improper for the Defendant to raise a defence that Mr. Bernard Georges was not authorized by her to sell the land. She raised it technically by invoking a provision of the Land Registration Act concerning Power of Attorney. But the Defendant himself in cross examination never said that she did not authorize Mr. Bernard Georges to sell the land for SR500, 000, but she also reiterated the condition as stated by Justice Sauzier, that the money should be paid in her Bank Account in the UK. Mr. Bernard Georges was not giving the Defendant legal advice, but rather selling a parcel of land on her behalf.

[21] I quite agree with the submission of Mr. Pardiwalla, in order to try and get out of her agreement, a legal argument is raised by the defendant in respect of the Land Registration Act requirement as to Power of Attorney. The Civil Code has not been abrogated in view of the provisions of the Land Registration Act requirement as argued by Defendant. That requirement as to the Land Registration Act is as to form only. What appears to be a contradiction between 1589 of the Civil Code and the Land Registration Act requirement was considered in the case of **Hoareau vs. Gilleau** vide Court of Appeal Reports 1978-82. This case gives a clear picture of how the two provisions of law co-exist and complement each other. One can see from this that the Civil Code is not abrogated, but rather that the Land Registration Act is an enabling provision. Whether the Court considers the present case to be a sale or a promise of sale, the consequences are the same. The Plaintiff is seeking specific performance of the Agreement. As was previously held by this Court in the case of **Christopher Gill c/s Estate of C Grandcourt and Ors CS 174/95 (judgment 23.03.2011 p 24)** “Registration of a transfer deed is only a procedural formality. Non registration cannot invalidate any contract of sale or any agreement for that matter. Agreement lawfully concluded shall have the force of law for

those who have entered into them. They shall not be revoked except by mutual consent or for causes which the law authorizes. They shall be performed in good faith”

- [22] On the issue of prescription, I agree with the submission of the plaintiff’s counsel that prescription becomes irrelevant as the Defendant testified that a condition has yet to be fulfilled. In my view, the continuous breach of an agreement gives rise to a continuous cause of action. The relevant part of the plaintiff’s submission runs thus:

“She (the defendant) says there was a condition and until that condition is fulfilled the property would not be transferred. What does the law say? I refer to the case which my learned friend has quoted and highlight the relevant parts. From the above, it can be gathered, that if there is such a condition as confirmed by the Defendant, then the dissolution of the Agreement must be claimed from the Court, and the Court may give the Plaintiff time to fulfil that obligation. I would invite your lordship to consider this, as this is what the Defendant is saying here. If this were to be considered, then prescription becomes irrelevant as the Defendant testifies that a condition has yet to be fulfilled. (i.e. payment in foreign currency in her Bank account) (See, Article 2357 Civil Code of Seychelles) on Prescription”

- [23] Of course prescription starts to run when it becomes obvious that the fault has occurred. In this case, the representative of the Defendant, Mr. Bernard Georges, kept telling the Plaintiff not to worry, that matters were in hand and the transfer would be done. There was no reason why the Plaintiff would doubt his old school friend and lawyer in many other cases. Cautions are as a matter of course placed in the Registry as a precaution when Registration has not been effected and money having already been paid. It is not necessarily because of a breach or fault. It is simply a precaution. It is not an indication of breach from which the period of prescription commences. When it became evident that the matter was outside Mr. Bernard Georges control and that the Defendant had other ideas, the Plaintiff filed his plaint. This is when the period starts to run and that is within the 5 year period being advanced by the Defendant as being relevant to this case.

- [24] The argument of the defence counsel Mr. Ally that since Mr. Georges was never given by the Defendant a special power of Attorney in relation to her interest in title PR 359 as required by the Land Registration Act, he had no legal authority to bind the Defendant in

any pre-contract agreement to transfer Title PR 359. This argument does not appeal to me in the least. As I see it, there is a world of difference between entering into an agreement to sell and giving a special power of attorney to someone to execute a transfer deed under the Land Registration Act. The former act falls in the realm of substantive law and creates legal obligations between the parties under a contract of sale, whereas the latter act falls in the realm of procedural law and simply constitutes a formality to register a transfer of land under the L.R. Act.

[25] After analyzing the submissions of both counsel and examining the entire evidence in this matter, I find answers to the above questions in seriatim as follows:

1. *Yes: the defendant had authorized her Attorney and agent Mr. B. Georges to enter into a sale agreement in respect of the suit-property, on her behalf with the plaintiff or with any other potential buyer for that matter.*
2. *Yes; there was a valid contract of sale between the plaintiff and the defendant in respect of the suit-property, which contract is binding the parties.*
3. *No; there wasn't any condition-precedent agreed upon between the seller and the buyer that the buyer (the plaintiff) should make the payment of the purchase-price into the bank account of the seller (the defendant) in the UK in foreign currency.*
4. *No; this action is not time-barred in terms of Paragraph 1 of Article 2271 of the Civil Code.*
5. *Yes; the plaintiff is entitled to the relief of specific performance of contract.*
6. *Yes; the plaintiff is entitled to only nominal damages payable by the defendant for the delay or breach in the performance of her contractual obligation.*

[26] In any event, there is no dispute between the parties as to the existence of an agreement for sale in respect of the suit property. The main contention of the defendant is that there was a term in the sale agreement so to say, a condition- precedent as to mode of payment of the purchase price by the plaintiff and it is alleged that the plaintiff was in breach thereof. Whatever be the merits and demerits of the submissions made by both counsel

the fact remains- to say the least-there is an obscurity or ambiguity in the alleged term as to payment. In such circumstances, evidently, the law - in terms of Article 1602 of the Civil Code - operates in favour of the buyer namely, the plaintiff in this matter. This Article reads thus:

“The seller shall be bound to explain clearly what he undertakes. An obscure or ambiguous term shall be interpreted against the seller.”

[27] In the final analysis, I conclude that the sale agreement in dispute constitutes a valid sale in the eye of law, which cannot be annulled or rescinded or faulted for any reason, whatsoever. The plaintiff is therefore, entitled to the relief of specific performance of the contract as prayed for in his plaint; In my considered view, the plaintiff is entitled to nominal damages payable by the defendant for having unlawfully delayed the plaintiff from having the transfer registered with the Land Registry in respect of the suit-property.

[28] In the final analysis, therefore, I enter judgment for the plaintiff as follows:

(i) I direct the Registrar of Land to register the plaintiff namely, Mr. Allen Ernestine as owner of the parcel of land comprised in title PR359 - situated at Praslin, upon payment of stamp duty made by the plaintiff to the satisfaction of the Stamp Duty Commissioner/Land Registrar, who shall ascertain and adjudicate the present market value of the property for the purpose of charging, assessing and computing the stamp duty, treating the registration herein, as transfer on sale of the said parcel of land. The Commissioner may adjudicate on such valuation in such manner and by such means as he/she may think fit and, for that purpose, may authorize any person to value the property in terms of Section 22(5) of the stamp Duty Act and whose decision on such valuation shall be final in this respect.

(ii) I award the sum of Rs1000/- to the plaintiff as nominal damage, payable by the defendant for the delayed registration of the transfer with the Land Registry; and

[29] *(iii) Having regard to all the circumstances of this case, I make no order as to costs.*

[30]

Signed, dated and delivered at Ile du Port on 21 January 2014

D Karunakaran
Judge of the Supreme Court