

VC

IN THE SUPREME COURT OF SEYCHELLES

Civil Side: CS 256/2007

[2014] SCSC 155

1. PAOLO GHEZZI

First Plaintiff

2. NADINE ANDRE

Second Plaintiff

versus

1. GIUSEPPE IMBERGAMO ALSO KNOW AS ALBERT DANTON

First Defendant

2. CALA MARIA DI NUNZIO ALSO KNOWN AS CARLA DANTON

Second Defendant

Counsel: Mr. S. Rajasundaram for plaintiffs

Mr. C. Lucas for defendants

Delivered: 9th May 2014

JUDGMENT

Karunakaran Acting Chief Justice

This is a suit for specific performance of a contract. The plaintiffs seek the Court for a judgment ordering the 1st and the 2nd defendants to transfer all their shares constituting 100% of the shares in a locally registered Company

Kaz Kreol Investments (Pty) Limited to the 2nd defendant and perform of their part of the contractual obligation. Besides, the plaintiffs also claim damages from the defendants for recurring loss of revenue in the sum of Rs333, 000/- per month as from September 2007 until the final disposal of the suit resulting from the delay.

The defendants vehemently deny the plaintiffs' claim in its entirety contending in essence that:

1. The plaintiffs were in breach of their obligation under the contract dated 25th August 2006 - hereinafter called the original contract - in that the plaintiffs did not get the consent of the defendants to appoint the 2nd defendant as nominee for the alleged transfer of shares. Being themselves in breach, the plaintiff now cannot ask the defendants to perform their part of the contractual obligation;
2. In the alternative, the addendum dated 22nd October 2006, which amended the original contract annulled paragraph 10 and 11 therein, in effect did away with the requirement of appointing a nominee for the alleged transfer of shares. Hence, the defendants are under no contractual obligation to make the transfer of the shares to the nominee, the 2nd plaintiff.
3. In any event, nomination of the 2nd plaintiff to obtain the shares in the immovable property on behalf of the 1st plaintiff, a non-Seychellois, is illegal as no sanction has been obtained at first place by the 1st plaintiff as required under the Immoveable Property Transfer Restriction Act.

The facts of the case as transpire from the evidence on record are these:

At all material times, the 1st Plaintiff and his friend one Mr. Andrea Colucci - hereinafter both collectively referred to as the "business-partners" were foreign Nationals - non-Seychellois. They frequently used to visit Seychelles as tourists. The defendants were and are shareholders and directors in a locally registered Company *Kaz Kreol Investments (Pty) Limited* - hereinafter called the Kaz Kreol. The assets of this company comprised immovable

property namely: land Title Nos. C 482 and C 2216 situated in Seychelles. Both defendants jointly owned 100% of shares in the Kaz Kreol. The business-partners were desirous of making investments in Seychelles. They wanted to acquire 80% of the shares in the Kaz Kreol, owned by the defendants. The defendants also agreed to sell those shares to the partners. Since both partners were foreigners and the Kaz Kreol's assets were immovable properties, they could not make direct purchase of the said shares from the defendants, in view of the statutory restrictions stipulated under Section 3 of the *"Immovable Property Transfer Restriction Act Cap 95*. This Section reads thus:

"3. (1) *A non-Seychellois may not -

(a) purchase or acquire by any means whatsoever and whether for valuable consideration or not, except by way of succession or under an order of the court in connection with the settlement of matrimonial property in relation to a divorce proceedings any immovable property situated in Seychelles or any right therein; or

(b) lease any such property or rights for any period; or

(c) enter into any agreement which includes an option to purchase or lease any such property or rights,

without having first obtained the sanction of the Minister.

(2) For the purposes of subsection (1) it is immaterial whether the purchase takes place as the result of an agreement or of an auction or of a judicial sale or through a person who himself is not prevented from purchasing without sanction, provided that there is an ultimate transfer for valuable consideration to a person who is prevented from purchasing without sanction"

*(3) A financial institution which is a non-Seychellois shall not require sanction to purchase property which is burdened by a mortgage in favour of the said financial institution and which is sold by a Judge under the *Immovable Property (Judicial Sales) Act*.*

(4) A court shall not make an order or decision which would have the effect of contravening or circumventing subsection (1).

Be that as it may. Eschewing the statutory restrictions stipulated under Section 3(1) (c) above, the business-partners on 25th August 2006,

undisputedly, entered into an agreement - the original contract -*vide exhibit P1* -with the Defendants for the purchase of the shares in Kaz Kreol in effect, to acquire interest or ownership on immovable property. The original contract, inter alia, had the following terms and conditions:-

1. The Purchasers shall apply for sanction to purchase 20% of the shares for Seychelles Rupees 280,000. It is understood and agreed that this sum will be paid in foreign exchange to the Central Bank of Seychelles which will convert it into Seychelles Rupees for payment to the Sellers. The Buyers will deposit the Euro equivalent of Rupees 280,000 with Notary Public Ramniklal Valabhji for that purpose.

2. The Sellers shall submit the Application for Planning Permission for the Construction Project. A description and/or architectural plans or artists' impression of the same is set out in the Schedule annexed to this Agreement.

3. Failing approval of both the sanction and the Planning Permission, by 31st August 2007, this Agreement shall lapse and the payment held in escrow in paragraph 5 below shall be refunded to the Buyers.

4. If Sanction is granted to purchase the shares, and Planning Authority grants permission for the Construction Project, the Purchasers shall pay R280,000/- through the Central Bank of Seychelles from the money held in Escrow by the Notary Public.

5. On or before - 15th September 2006, the Buyers shall deposit the sum of Euros 60,000 to Notary Public, Ramniklal Valabhji, who shall hold this sum in escrow pending approval of the conditions in paragraphs 1 and 2. The Sellers shall execute blank share transfer for 20% which will be completed in favour of the above Buyers upon Conditions in paragraphs 1 and 2 being approved

6. Within 2 months of obtaining sanction and Planning Permission in paragraphs 1 and 2 above, (whichever is the later date) the Purchasers shall purchase 60% of the shares through a nominee company or 3rd party not requiring sanction under the Immoveable Property (Transfer Restriction) Act.

7. Upon the Sellers executing the share transfer for 60 per cent, the

Purchasers shall pay the Sellers Euros 195,000/-.

8. The Restaurant is presently rented out. After the Purchasers would have acquired 80 percent of the shares, the Sellers shall give the Tenant notice to vacate the premises. If the Tenant does not vacate the premises within a period of 8 months from the date of transfer of the first 20% of the shares the Sellers shall pay the Purchasers a Penalty of R 30,000/- per month for every month that the Tenant remains in occupation until he vacates.

9. Upon acquisition of 80% of the shares, the Purchasers shall be appointed directors of the company ... etc.

10. The cost of the Construction Project is estimated ... etc.

11. The term buyers in this agreement mean: Paolo Ghezzi, Andrea Colucci, and any other person of good character and financial standing nominated by them, and with the consent of the Buyers, provided that such consent shall not be unreasonably withheld, nor unreasonably delayed.

12. On or before 15th September 2006 and as a precondition to entering this Agreement, the Sellers must be paid Euros 17,000. If such sanction is refused without an opportunity to appeal, the 17,000 Euros will be retained pro rata at the rate of 1/12 per Calendar month from the date of the application for sanction, and the balance refunded to the Sellers.

13. The Notary Public shall hold the following in Escrow

(a) 60,000 Euros which will be used ... etc. (if sanction to purchase shares is granted and planning approval is also granted).

(b) Blank share transfer of 20% signed by the Sellers to be completed ... etc.

(c) Blank share transfer of 60% shares to be completed in favour of the Buyers or their nominees when they pay the Sellers Euros 195,000/-.

(d) Blank share transfer of the last 20% shares signed by the Seller to be completed and held in Escrow to guarantee Seller's obligations under this agreement.

(e) Upon satisfactory completion of the obligations ... etc.

(f) Upon satisfactory completion of the obligations ... etc.

14. The Purchasers shall pay the sanction application fee, the fees for their legal advisers, and stamp duty for the share transfer.

15. The Purchasers and the Sellers shall pay the professional fees ... etc.
16. The Purchasers and the Sellers shall pay ... etc.
17. The Sellers only shall pay the Estate Agents Fees and expenses.
18. This Agreement shall be governed by the laws of Seychelles. In case of any dispute arising from the Agreement, the parties shall endeavor to resolve it by mediation, and failing that, by arbitration in Seychelles.

The 1st plaintiff testified that in accordance with the terms of the original agreement, before executing the original contract, he directly paid Euros 17,000 to the defendants and also deposited the sum of Euros 60,000/- with his then Attorney Mr. Shah to be held in escrow, which sum now remains in the hands of his present Attorney Mr. Rajasundaram. Having thus fulfilled their part of the contractual obligations, the business-partners applied for the necessary sanction from the Government of Seychelles to purchase. The sanction was refused by the Government.

Following the refusal of government sanction, on 22nd October 2006, the defendants and the business-partners again entered into another agreement on the same subject matter, entitled as "Addendum to the lease agreement", in exhibit P2, which misnomer, indeed begins thus: "this addendum concerns the agreement for the purchase of shares of Kaz Kreol Investment (Pty) Limited made and signed last August 20th 2006 at the Chamber of Mr. Kieran Shaw"

The said addendum in essence, states that the defendants confirmed to sell and the partners agreed to purchase the remaining 20% shares in the Kaz Kreol for the sum of Euros 65,000/- , in addition to the 80% shares that had already been contracted for sale under the original contract in exhibit P1. Following the above contractual embroilment, in August 2007 the business-partners identified a Seychellois national by name Ms. Nadine Andre - who is none else than the 2nd plaintiff in this action-to be their nominee to purchase the 100% shares from the defendants. The partners unilaterally appointed a nominee, without defendants' knowledge and consent, although such

consent is required in terms of clause 11 (supra) of the original contract. Having thus appointed a nominee on their own, the business partners issued a letter of demand dated 10th August 2007- in exhibit P3 - to the defendants requesting them to effect transfer all the shares in Kaz Kreol (100%) to the 2nd plaintiff against payment of Euros 320,000/- However, the defendants refused to make the transfer for the reasons stated hereinbefore and agreed to refund the deposit of Euros 17,000/- they received from the business-partners vide their letter dated 23rd July 2007, in exhibit P7. The business-partners still insisted that the defendants should make the transfer of all the shares in Kaz Kreol as per the terms of the original contract to the nominee, the 2nd plaintiff against payment of Euros 320,000/- and hence this action. Although originally, both business-partners and the nominee - all three - jointly instituted the instant action, subsequently, one of the business-partners withdrew his claim against the defendants. This necessitated the plaintiff's counsel to amend the plaint accordingly. In view of all the above, the plaintiffs seek the Court for a judgment ordering the defendants to transfer all their shares constituting 100% of the shares in Kaz Kreol to the nominee, the 2nd Plaintiff and perform their part of the contractual obligation.

I meticulously perused the pleadings and went through the entire evidence on record including the documents adduced by the parties. I diligently considered the submissions made by counsel on both sides touching on a number of legal and factual issues. I examined the relevant provisions of law applicable to the transactions that gave rise to the instant dispute between the parties. To my mind, the following are the fundamental questions that arise for determination in this matter:-

- 1. Is the original agreement (exhibit P1), which the parties had entered into, for the purchase of shares in Kaz Kreol by non-Seychellois lawful and valid in law?*
- 2. What is the legal effect of the subsequent addendum (exhibit P2) the parties had executed in furtherance of the original agreement?*

3. *Is the 1st plaintiff entitled to the remedy of specific performance under the original agreement in exhibit P1 or under the addendum in exhibit P2?*

Admittedly, the agreement for the purchase of shares in Kaz Kreol by the plaintiff is tantamount to purchase of ownership or interest in immovable property namely, land Title Nos. C 482 and C 2216, the assets of Kaz Kreol. Since the 1st plaintiff was a non-Seychellois, undoubtedly, he required the Government sanction to purchase, even before he entered into any such agreement. This is the law under Section 3(1)(c) quoted supra, which reads thus:-

“A non-Seychellois may not...enter into any agreement which includes an option to purchase or lease any such property or rights’ situated in Seychelles, “without having first obtained the sanction of the Minister””.

Obviously, the 1st plaintiff and his non-Seychellois former business-partner Andrea Colucci have entered into the original agreement, which included an option to purchase the shares in question without having first obtained the sanction of the Minister. Evidently, they have done so against the law under Section 3(1) (c) and 3(2) of the “Immovable Property Transfer Restriction Act Cap 95, which stipulates that such sanction is a condition-precedent to enter into an agreement with option to purchase. Such purchase even if done through a nominee or a person who himself is not prevented from purchasing without sanction, is prohibited in term of section 3(2) supra. Needless to say, an agreement with option to purchase is equivalent to an agreement for sale - **vide Wilson Teesdale (1970) SLR 88**. Obviously, one of the essential conditions, a legal requirement for the validity of any contract is that it should not be against the law - vide Article 1108 of the Civil Code. In the circumstances, I find that the

original agreement (exhibit P1), which the parties had entered into, for the purchase of shares in Kaz Kreol is illegal, unlawful and invalid in law. It is unenforceable in law being void ab initio. This answers the first question.

Moving on to the second question pertaining to the addendum, it goes without saying that whatever germinated from or based on a void agreement, whether addendums or collateral agreement or addendum to the lease agreement, whatever the name one gives to it, all such deeds and transactions shall become void ab initio. Therefore, I find that the addendum (exhibit P2), which the parties entered into in furtherance of the original contract is also void ab initio. Hence, I hold that the said addendum is also not enforceable and has no life in law. This answers the second question.

In view of the above findings, I conclude that the plaintiffs are not entitled to any remedy for specific performance of contract, either under the original agreement in exhibit P1 or under the so called “addendum to the lease agreement” in exhibit P2.

Incidentally, it is interesting to note that there is a statutory restriction on the decision making power of the Court itself in terms of Section 3 (4) of the *“Immovable Property Transfer Restriction Act” Cap 95*. This Section reads thus:

“A court shall not make an order or decision which would have the effect of contravening or circumventing subsection (1)”.

Obviously, subsection (1) (supra) in essence, stipulates that a non-Seychellois is not allowed to purchase or enter into any agreement for the purchase or even to take on lease any immovable property in Seychelles, without first obtaining the sanction from the Government.

Coming back to the case on hand, even if one assumes for a moment that

this Court finds that the impugned agreement is valid in law and enforceable, it has no power to order the defendants to transfer an immovable property to a non-Seychellois in the guise of transferring to his nominee. At first place, the 1st plaintiff being a non-Seychellois, he himself has no locus standi to have or hold title, not even as a beneficial owner of the property without sanction under any kind of agreement. Hence he cannot give or opt to give to a third party (nominee) what he himself doesn't have". *Nemo dat quod non habet* - literally means "no one can give what he doesn't have.

For these reasons, I find that the instant action is not maintainable either in law or on facts and is therefore, liable to be dismissed. However, as I see it, mere dismissal of the instant action based on a narrow interpretation of the procedural laws, cannot effectively and completely resolve the disputes. The partners/plaintiffs have already made certain payments relying on the so called agreement, which the Court has already found void ab initio. Hence, mechanical dismissal may only give a technical conclusion to the case; it may not lead to justice, nor would that prevent multiplication of litigation that may arise between the parties in future, on the refund of the deposit sums and the like.

As this Court observed in *Global Natali Vs Elpida Marine Company Limited - Civil Side No. 265 of 1997* - that a Court of law, be it appellate or trial, should steer the law towards the administration of justice, rather than the administration of the letter of the law. In that process, undoubtedly, its primary function amongst others is to adjudicate and give finality to the litigation. However, such finality in my view cannot and should not be given mechanically by the Court just for the sake of a technical conclusion of the case or for statistical purposes. In each adjudication, the Court ought to ensure that all disputes including the latent ones pertaining to the cause or matter under adjudication, are as far as possible completely and effectively brought to a logical conclusion once and for all. The good sense of the Court, I believe, should always foresee the long term ramifications of its

determination and adjudicate the cause so as to prevent or control the contingent delay that could possibly, proliferate in future, due to multiplicity of litigations on the same cause or matter. Needless to say, prevention of potential delays with judicial foreseeability is always better than curing the backlog. Therefore, our Courts in Seychelles - like any other Court with such foreseeability and sense would do - should adjudicate the disputes accordingly and prevent the chronic delays that have cancerously afflicted our justice delivery system.

After all, the law is simply a means to an end; that is, justice. If the means in a particular case fails to yield the desired result due to procrastination or procedural technicality, we have to rethink, reinvent, reinterpret and sharpen those means in order to eradicate the judicial delay, the enemy of justice, as Lord Lane once remarked. Hence, the Courts should never hesitate, where circumstances so dictate, to adopt measures that are just and expedient to prevent the delays, procrastination and the resultant frustration in the due administration of justice. Now then, I would simply ask: Which is to be preferred the “means” or the “end”? Please, forgive me for my long-winded observation though obiter herein, I have to restate that the Courts shortsighted by the letter of the law, at times, prefer the “means” over the “ends”. They use obsolete technicalities of law such as “ultra petita”, “no pleadings” “no prayer” etc. and impliedly delay, deny and defeat justice by paving the way for multiplicity of litigations. To ensure that all disputes including the latent ones are completely and effectively brought to a logical conclusion in this matter, I enter judgment as follows:

(1) I dismiss the instant suit;

(2) I order both defendants to refund jointly and severally the deposit sum Euros 17,000/- to the 1st plaintiff;

(3) I direct the plaintiffs’ counsel to return the sum of Euros 60,000/- held in escrow, to the 1st plaintiff; and

(4) I make no order as to costs.

Signed, dated and delivered at Ile du Port on 9 May 2014.

D Karunakaran

Acting Chief Justice