

IN THE SUPREME COURT OF SEYCHELLES

Civil Side: CS 17/2011

[2014] SCSC 62

SIMONE MADELEINE-ANDREU-MARX

Plaintiff

versus

THE DEVELOPMENT BANK OF SEYCHELLES

Defendant

Heard: 4 February 2013, 23 May 2013,

Counsel: Mr. C. Lucas for plaintiff

Mr. W. Herminie for defendant

Delivered: 19 February 2014

JUDGMENT

Karunakaran J

[1] This is an action in delict. The plaintiff in this action - vide plaint dated 16th December 2010 - prays this Court for a judgment:

- (i) Ordering the defendant or the Land Registrar to discharge the charge registered against *land Title LD826 (hereinafter called the suit-property)* situated at Roche Bois, La Digue; and
- (ii) Also ordering the defendant to pay damages in the sum of Rs100, 000/- to the plaintiff for the fault the defendant committed, and with interest and costs.

[2] On the other side, the defendant-bank in its statement of defence - dated 13thOctober2011- denies the entire claim of the plaintiff and seeks dismissal of the suit. According to the defendant, it did not commit any fault in effecting registration of the charge in question against the suit-property. It is the case of the defendant that the husband of the plaintiff, one Mr. Denis Madeleine -a fisherman-took a loan of SR206, 000/- from the defendant-bank in 2004 to purchase a fishing-boat and an engine for his use. He agreed to repay the said loan by monthly instalments of SR6, 410. With a view to guarantee repayment of the said loan and cover his general liability, Mr. Madeleine agreed to three conditions as stipulated by the bank, namely:

- (i) to give a Pledge on the boat and engine in favour of the bank
- (ii) to assign the Hull Insurance benefits in favour of the bank and
- (iii) to obtain a personal Guarantee for repayment from one Gregoire Payet of La Digue vide exhibit P8 & P9.

[3] However, the barrower subsequently, defaulted in monthly repayments. Following the default, the bank allegedly requested the barrower to sign the necessary documents to create charge against the suit-property for securing the repayment of the loan. However, the borrower refused to create such charge. Hence, the defendant-bank purportedly relying on Section 43 of the Land Registration Act, unilaterally applied to the Land Registrar by way of an affidavit, and caused registration of so-called a “Legal Charge” against the suit-property vide exhibit P10.In the circumstances, the defendant seeks the Court for an order dismissing the suit.

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

[5] At all material times, the plaintiff was a non-Seychellois and of German origin. In 1990s, she came to Seychelles and started cohabiting with one Denis Madeleine in La Digue. During the period of her cohabitation, she wanted to buy an immovable property in Seychelles. In April 1997 she paid the sum of SR 30,000/- to L' Union Estate and purchased the suit-property from them. As she was a non-Seychellois then, she could not have the property registered in her own name because of the restrictions stipulated in the Immoveable Property (Transfer Restriction) Act. Hence, she registered the ownership of the suit-property in the name of her cohabitant Mr. Madeleine vide exhibit P3. Subsequently, in June 1997, she got married to Mr. Madeleine and continued to live with him. In December 1999, the Plaintiff wanted to take a loan of SR 225, 000/- from Barclays Bank for the construction of a house on the suit-property. She raised that loan in joint-names with her husband from Barclays Bank and built a house on the suit-property. The said housing-loan with Barclays Bank has been maintained throughout by the Plaintiff who is bound to make repayments until year 2015. The loan is secured by a charge against the suit-property TitleLD826 vide exhibit P5. In 2000, she applied for naturalization and became a Citizen of Seychelles. Following the acquisition of her Seychellois Citizenship, she legally became eligible to own Immoveable Property in Seychelles. Hence, she wanted to have the suit property registered in the joint name with her husband. On 7th July 2006, she legally acquired undivided half share in the suit-property by virtue of a transfer made by her husband in her favour vide exhibit P7. Since then, the Plaintiff has been registered co-owner of the suit-property together with her husband Denis Madeleine, who is now an absentee from the Republic. At the time, when she took that loan from Barclays, the only encumbrance against Title LD826 was the charge in favour of Barclays Bank as security for the housing loan. However, in 2009, to her shock, she found another charge had been registered by the defendant stealthily without her knowledge. Be that as it may, the plaintiff now prosecutes this suit in her capacity as Fiduciary in the co-ownership of the suit-property.

[6] Undisputedly, the Defendant is a bank inter alia, carrying on its activities as lender in capital projects in Seychelles. According to the plaintiff, her husband obtained a personal loan from the Defendant to build a fishing boat. The loan was granted subject to the following securities as per letter of offer dated 16th June 2004:-

- i) Pledge on boat and engine in favour.
- ii) Assignment of Marine Hull Insurance in favour of the Defendant-bank; and
- iii) Personal Guarantee of Mr. Gregoire Payet.

[7] The Plaintiff's husband migrated to Madagascar in 2006. In January 2008 the Defendant sent a statement of loan account to the Plaintiff's residential address which disclosed inter alia the security that had been put in place for the loan under (i), (ii) and (iii) mentioned supra.

[8] On the 8th June 2009, the Defendant without notice to the Plaintiff and without her knowledge and consent registered a charge in terms of Section 43 of the Land Registration Act Cap 107 purporting the same to be the security for the loan granted to the Plaintiff's husband, 5 years ago. The Plaintiff testified that the charge was not a condition or security for the loan and if there were any such condition it would have been reflected in the letter of offer and subsequent statement of accounts or correspondence. Although her husband is the registered co-owner in in-division of LD826, she is in fact the rightful and beneficial owner entitled to the whole title, which issue is in the process of being settled as part of the ongoing divorce proceedings between them. According to the plaintiff, the justification and reasons given by the Defendant for registration of the Charge are incorrect and renders the Charge against Title unlawful. The Charge against the suit-property was an after thought and a manipulation of the defendant as it registered after proceedings were commenced by the Defendant against the Plaintiff's husband in case C.S. NO.143 of 2008. The Plaintiff further contented that the Defendant acted arbitrarily without due diligence and consideration to her property rights and acted knowingly in bad faith as the search of the register of lands for LD826 would have disclosed her co-ownership. No notice was given to the Plaintiff by the Registrar of Lands or the Defendant and had she been served, she would have defended her title for reasons of her coownership and the false declaration in the Defendant's affidavit that "*Mr. Madeleine has refused or neglected to sign the necessary documents to charge and secure the loan*" and that "*the loan facility was received by Denis Madeleine on the condition that he would charge parcel No. LD 826 to the Bank*". On the 21st July 2010 after search in the Registry by the Plaintiff, the Defendant was issued a letter of demand

for the removal of the charge vide exhibit P12. The defendant failed to comply but it subsequently took steps to correctly add Mr. Gregoire Payet (Guarantor) as co-Defendant in C.S. No. 143/ 2008 in terms of the loan agreement.

[9] It is also the case of the Plaintiff that the charge by the Defendant, against the suit-property has:

- i) *Prejudiced and caused a breach of her covenant with Barclays Bank, which secured by a charge against Title, to maintain the Title free of subsequent encumbrances and dealings.*
- ii) *Created default that may cause Barclays Bank to demand full repayment and foreclose LD826 at any time.*
- iii) *Without lawful cause rendered her interest in LD826 the subject matter of a likely execution of judgment against a 3rd party.*
- iv) *Prevented her from dealing with Title in any way whatsoever.*

[10] In view of the above, Mr. C. Lucas, Learned counsel of the Plaintiff submitted that the act of the Defendant is a *fault* in law for which it must make good to the plaintiff for damages. Thus, the plaintiff claims that she suffered damages as follows:

- (i) *Prejudice to ownership and peaceful enjoyment of Title by unwarranted encumbrance SR 50,000.00*
- (ii) *Moral damage for stress and inconvenience SR 50,000.00*

Total SR: 100,000.00

[11] According to Mr. Lucas, the evidence of the Plaintiff and the Exhibits produced to the Court *prima facie* disclose that the application of the Defendant under Section 43 of the Land Registration Act and the subsequent registration of a Charge in its favour was obtained illegally without any supporting documents of consent by the Plaintiff or the Defendant's debtor Mr. Denis Madeleine. The Defendant's representative could not produce any documentation or any form of consent, advice or knowledge of the co-

owners of LD826 that the Charge was to be registered as security for any loan. Indeed, the condition for the loan was simply a personal guarantee from Mr. Gregoire Payet of La Digue. The Application and the Charge under Section 43 of the Land Registration Act was secured by misrepresentation emanating from the Managing Director of the Defendant-bank, who stated that by oversight the Charge had not been registered despite the intention of the parties. The Defendant failed to support this contention in any way, whatsoever in terms of Article 1341 of the Civil Code. The registration of the Charge by the Defendant against Title LD826 transgressed the terms and conditions of an existing Charge in favour of Barclays Bank which terms inter alia, contained provisions for making instant demand for full repayment of the loan it had granted to the Plaintiff. Further it also caused the Plaintiff severe prejudice including moral damage for stress due to the failure of the Defendant to withdraw the Charge after the letter of demand was issued. Therefore, the plaintiff claims moral damages for the same. Further, it is the submission of Mr. Lucas that the Defendant failed in all respects to obtain a proper security from Mr. Denis Madeleine and with hindsight and afterthought decided to take steps beyond the terms of the loan agreement to unilaterally secure a Charge for loan which repayment had been neglected. The only security for the loan is the guarantee of Mr. Gregoire Payet. The Defendant ought to take action against Mr. Payet and not seek the registration of a Charge beyond the ambit of the loan agreement with Mr. Denis Madeleine and beyond the provisions of the Land Registration Act. The issue of fiduciary under Article 818 of the Civil Code was pleaded in the plaint, but the Defendant did not deny the same in its statement of defence. Learned Counsel for the defendant did not even cross examine the Plaintiff on that matter. He did not raise any *Plea in Limine Litis* at any time during the hearing. Further, the cause of action is not the one for rights *in rem* but contractual in the sense that the Charge was allegedly registered pursuant to an agreement as security for a loan. Any person who had an interest in the transaction or had been affected as a result thereof has the inherent right to seek redress. For these reasons, the plaintiff seeks the Court to enter judgment granting the reliefs first above-mentioned.

[12] On the other side, an officer from the defendant-bank testified in essence, that although the loan given to the husband was not initially secured by any charge against the suit-property, it was subsequently registered as the borrower defaulted in monthly payments.

According to the defendant, in the month of June 2004, the husband of the Plaintiff Mr. Denis Madeleine took a loan of SR206, 000/- from the Defendant-Bank, to purchase a boat and engine. The loan was not repaid, it remains unpaid to date. The borrower has left the jurisdiction together with the boat and Engine. In order to secure its interests in the loan, in June 2009, DBS applied to the Registrar of Land, under Section 43 of the Land Registration Act Cap 107 to register a charge against parcel LD826, which parcel of land the Borrower, has an interest therein. The Registrar agreed to register the charge. It is the submission of Mr. W. Herminie, Learned Counsel for the defendant, that although the plaintiff contests the legality of the procedure, arguing that the Registrar was wrong in law to register the charge, that it would need the consent of the parties to register the charge, on a close examination of Section 43 of the Land Registration Act, the Registrar does not need the consent of any person to register the charge. The Registrar has only to satisfy himself that the applicant DBS has a legal interest in the land and that it requires to be protected by the Law. Indeed, DBS had advanced a loan to the borrower and it was having difficulty in getting back its money. DBS could not seize the boat and engine because they were physically not available. Whilst there was a guarantor, it was deemed fair and sensible to first pursue the property of the borrower and hence the charge against his property. Further, it is the submission of Mr. Herminie that the Plaintiff although claims to prosecute this suit as fiduciary in the coownership, she did not adduce a shred of evidence to support her position. Article 818 of the Civil Code of Seychelles states: -

“if the property subject to co-ownership is immovable, the rights of the co-owners to be held on their behalf by a fiduciary through whom they may act”.

[13] Therefore, Mr. Herminie submitted that since the parties hold parcel LD826 in co-ownership, it is a requirement of Law that any prosecution relating to immovable property must be done through a fiduciary, which is not the case here. The Plaintiff has acted alone. Therefore, he invited the Court to dismiss the plaint against the Defendant, with costs.

[14] 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 provisions of law, quoted by counsel in

support of their respective arguments. With due respect, some of the issues raised 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.

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

- (1) Had the plaintiff or her husband ever expressly or tacitly agreed or authorized the defendant-bank to effect registration of a charge against the suit-property, or the plaintiff in her capacity as fiduciary for that matter?*
- (2) Was there a valid or any agreement at all between the plaintiff's husband and the defendant- bank to register a charge against the suit-property as a collateral security to secure the loan repayment?*
- (3) Whether the suit is maintainable as the plaintiff did not adduce any documentary evidence to show that she is prosecuting this suit in her capacity as fiduciary in respect of the suit property?*
- (4) Is the registration of the charge caused by the defendant-bank unlawful and is plaintiff entitled to the main relief sought for in the plaint?*
- (5) If so, Is the plaintiff entitled to consequential damages payable by the defendant for the unlawful registration of the charge?*

[16] The questions Nos. 1, and 2 above, are obviously questions of mixed law and facts. The answers to these questions (i) depend upon the interpretation of law relating to “Registration of Legal Charge” under Section 43 of the Land Registration Act Cap 107 and (ii) depend upon on the evidence if any, on record to show that there was indeed, an agreement to create the charge. In fact, there are two versions on record on this material issue as to the alleged agreement. According to the affidavit deponed by the Managing Director of the defendant-bank, the plaintiff’s husband agreed to give a charge against the suit-property, whereas the bank officer (DW1) testified that there was no such term agreed upon between the barrower and the bank in the loan agreement in exhibit P8 and P9.

[17] Obviously, the evidence of the Plaintiff, whom I believe to be a credible witness and the Exhibits P8 and P9 on record clearly show that there was no such term agreed upon between the borrower and the bank to secure a charge against the suit-property. Undoubtedly, the registration of a Charge in favour of the defendant-bank was obtained illegally without any supporting documents of consent by the Plaintiff or the Defendant's debtor Mr. Denis Madeleine. In any event, no single co-owner on his or on her own can agree to create a charge against or encumber a co-owned property without the consent or authority or knowledge of the other co-owner/s and especially without going through the appointment of a fiduciary in term of Article 818 of the Civil Code cited supra. As rightly submitted by Mr. Lucas, learned counsel for the plaintiff the Defendant's representative could not produce any documentation or any form of consent, advice of the co-owners of LD826 that the Charge was to be registered as security for any loan. Indeed, the condition for the loan was simply a personal guarantee from Mr. Gregoire Payet of La Digue. The Application and the Charge under Section 43 of the Land Registration Act was secured by misrepresentation emanating from the Managing Director of the Defendant-bank, who stated that by oversight the Charge had not been registered despite the intention of the parties. The Defendant failed to support this contention in any way, whatsoever in terms of Article 1341 of the Civil Code.

[18] Besides, the defendant's interpretation of the term "legal charge" referred to under Section 43 of the Land Registration Act has been, in my view, misconstrued by the bank in this matter. This Section reads thus:

"The Registrar shall, upon the application in writing of the officer or person responsible for obtaining or entitled to obtain the registration of a legal charge, register the same as a charge in the register of the land affected, and file the application"

[19] In fact, the terms "Charge" and "Legal Charge" are defined under Section 2 of the L.R. Act, which read thus:

"charge" means a mortgage charging land for securing the payment of money or money's worth or the fulfilment of any condition and includes a legal charge and the instrument creating a charge"

"legal charge" means a legal mortgage or a privilege over immovable property arising under the law in favour of any person, of the Government or the Republic or of any statutory body;

- [20] It is evident from the above definitions that to create a charge over an immovable property there should be an agreement between the Chargor (the proprietor, who has agreed to mortgage or charge his property) and Chargee (the bank or mortgage lender), which agreement has the force of law between the parties vide Article 1134 of the Civil Code. This kind of charges or mortgages are termed as “Conventional Mortgages” and governed by Articles 2124- 2133 of our Civil Code. On the other hand, to create a legal charge - in the absence of any such agreement - there should be a special law that provides for a privilege or right in favour of any person or any legal entity or government or any financial institutions such as bank to have a legal charge registered against any immovable property without obtaining consent from the proprietor. In fact, the term “Legal Mortgage” is referred to in Article 2121 and 2122 of the Civil Code. These Articles read thus:

Article 2121

The rights and claims which a legal mortgage secures shall be:

Those of minors and interdicted persons upon the property of their guardians;

Those of the Republic and public bodies upon the property of receivers and civil servants whose duty extends to accounting.

Article 2122

A creditor who is entitled to a legal mortgage may enforce his right upon the whole of the immovable property of his debtor, and upon those which the debtor may subsequently acquire, subject to the restrictions hereinafter expressed.

- [21] Obviously in the instant case neither there was any agreement nor is there any law enabling the defendant-bank to register a charge unilaterally on its own against the suit

property in the name of *legal charge* without the knowledge and consent from its co-owners. Hence, I find the answer to questions Nos. 1 and 2 (*supra*) in the negative as follows:

(1) No; neither the plaintiff nor her husband ever expressly or tacitly agree or authorized the defendant-bank to effect registration of a charge against the suit-property, on her behalf with her husband or in her capacity as fiduciary.

(2) No; there was not any valid agreement expressly or tacitly between the plaintiff's husband and the defendant- bank to register a charge against the suit-property as a collateral security to secure the loan repayment.

[22] As regards question No: 3, it is evident that the plaintiff has clearly averred in paragraph 1 of the plaint that she was prosecuting the suit in her capacity as fiduciary in respect of the suit property. However, the defendant in its statement of defence has not denied the averment. In the circumstances, I find there is no evidential burden on the plaintiff to prove what has been impliedly admitted by the defendant. Furthermore, the plaintiff categorically testified in chief-examination that she was acting in her capacity as fiduciary in this matter.

[23] Hence, I find the suit is competent and maintainable in law although the plaintiff did not adduce any documentary evidence to show that she was prosecuting the suit in her capacity as fiduciary in respect of the suit property.

[24] In view of all the above, I find that the registration of the charge, which the defendant-bank arbitrarily effected against the suit-property is unlawful, which amounts to a fault in law. Therefore, I conclude that the plaintiff is entitled to the relief sought for in the plaint.

[25] Obviously the plaintiff is entitled to damages payable by the defendant for the fault namely, the unlawful registration of the charge. However, in my assessment the quantum

of damages claimed by the plaintiff under both heads appear to be unreasonable and exorbitant. Having taken into account the entire circumstances of the case, I find Rs 50,000/- would be an appropriate and reasonable global sum that should be awarded to the plaintiff for the damage she suffered as a result of the fault committed by the defendant in effecting an unlawful registration of the charge against the suit-property in this matter.

[26] For the reasons stated hereinbefore, I enter judgment for the plaintiff and against the defendant-bank as follows:

- (i) I declare that the Charge registered in the Land Register on 8th June 2009, against land Title LD826 situated at Roche Bois, La Digue, at the instance and in favour of the Development Bank of Seychelles, is unlawful and hence the said charge is null *and void ab initio*;
- (ii) Consequently, I order the Land Registrar to discharge or remove the said charge registered against Title LD826 from the Land Register; and
- (iii) Further, I order the defendant, the Development Bank of Seychelles to pay damages in the sum of Rs50,000/- to the plaintiff with interest on the said sum at 4% per annum (the legal rate) as from the date of the plaint and costs of this action.

Signed, dated and delivered at Ile du Port on 19 February 2014

D Karunakaran
Judge of the Supreme Court