

**IN THE SUPREME COURT OF SEYCHELLES**

**Civil Side: CS 32/2011**

**[2015] SCSC 9**

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**AHTEE LABONTE**

Plaintiff

Versus

**LUCY FRED**

Defendant

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Heard: 30 October 2013, 21 March 2014, 23 June 2014

Counsel: Mr. A. Derjacques for plaintiff

Mr. J. Camille for defendant

Delivered: 21 January 2015

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**RULING**

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**Karunakaran J, Acting Chief Justice**

[1] This is a suit for specific performance of a contract of sale in respect of an immovable property, situated in Praslin. The plaintiff in this action seeks the Court for a judgment ordering the defendant to perform her part of the contractual obligation by executing a transfer deed in favour of the plaintiff in respect of the said property, which the defendant

had admittedly, agreed to sell to the plaintiff. However, the defendant now refuses to execute the transfer deed alleging that the plaintiff is in breach of the terms of the sale agreement. That is, the plaintiff did not pay the real purchase price in full and also did not make the instalment payments within the time frame agreed upon by the parties or within a reasonable period.

[2] According to the plaintiff, the purchase price was written down at Rs1, 000,000 in exhibit P3, which is an unregistered notarised transfer instrument dated 4<sup>th</sup> July 2008, and whereas the defendant claims that the real purchase price was agreed upon at Rs 2,500,000 plus Sterling Pounds 25,000.

[3] After the close of the case for the plaintiff, the defendant was attempting to adduce oral evidence to prove her claim that the real price orally agreed upon was Rs 2,500,000 plus Sterling Pounds 25,000, which is not written in the document exhibit P3.

[4] The Plaintiff swiftly objected to admissibility of oral evidence in this respect relying on two provisions of law in the Civil Code of Seychelles namely, Article 1341 and Article 1321 respectively.

[5] **Article 1341** reads thus:

[6] *“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 alleged 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.*

[7] *The above is without prejudice to the rules prescribed in the laws relating to commerce.”*

[8] **Article 1321** reads thus:

*1. Back letters shall only take effect as between the contracting parties; they shall not be relied upon as regards third parties.*

*2. Where a third party has an interest in declaring null a contract affected by a back letter, he may apply to the Court to set aside the ostensible transaction.*

3. *Back letters purporting to show that the real consideration for the sale or exchange of immovable property or commercial property or office is greater than the consideration set down in the deed of sale or exchange, or that a gift inter vivos of immovable property, commercial property or office is in reality a sale, exchange, mortgage, transfer or charge, shall be deemed to be fraudulent and shall in law be of no force or avail whatsoever.*

4. *Any back-letter or other deed, other than a back-letter or deed as aforesaid, which purports to vary, amend or rescind any registered deed of or agreement for sale, transfer, exchange, mortgage, lease or charge or to show that any registered deed of or agreement for, or any part of any registered deed of or agreement for, sale, transfer, mortgage, lease or charge of or on any immovable property is simulated, shall in law be of no force or avail whatsoever unless it shall have been registered within six months from the date of the making of the deed or of agreement for sale, transfer, exchange, mortgage, lease or charge of or on the immovable property to which it refers.*

[9] It is also relevant herein to note that Section 82 of the Mortgage and Registration Act reads thus:

(1) *Any counter letter (contre lettre) or other deed sous seing prive which purports to show that the real consideration for the sale or exchange of an immovable property, fonds de commerce, or ministerial office is greater than the consideration set down in the deed of sale or exchange, or that a donation inter vivos of an immovable property, fonds de commerce or ministerial office is in reality a sale, exchange, mortgage, transfer, or charge, shall be deemed to be fraudulent and shall in law be of no force or avail whatsoever.*

(2) (a) *Any counter letter or other deed other than a counter letter or deed as aforesaid which purports to vary, amend, or rescind any registered deed of or agreement (promesse) for sale, transfer, exchange, mortgage, lease or charge or to show that any registered deed of or agreement for, or any part of any registered deed of or agreement for, sale, transfer, mortgage, lease, or charge on any immovable property is simulated (simulé) shall in law be of no force or avail whatsoever unless it shall have been registered within six months from the date of the making of the deed or of agreement for*

*sale, transfer, exchange, mortgage, lease, or charge of or on the immovable property to which it refers.*

*(b) Any such counter letter or other deed which shall have been made prior to the twenty seventh day of April, 1948, hereinafter called the appointed day, and which shall not have been registered within the time prescribed in paragraph (a) of this subsection shall not be deemed to be invalid by reason alone of the same not having been registered, provided that it is registered not more than three months after the appointed day.*

*(3) Any counter letter or deed as described in subsection (2) drawn up prior to the appointed day, the sole copy of which is in possession of the holder of such counter letter or deed who shall be absent or away from Seychelles at the appointed day, may be registered within three months after the return of the said holder to Seychelles on application to the Supreme Court in the manner provided in subsection (5).*

*(4) The Supreme Court may, on the grounds of ignorance of the law due to illiteracy, fraud of any party not being the holder, incapacity of the holder due to unsoundness of mind, or imprisonment of the holder at the appointed day, extend the maximum period within which a counter letter or other deed must be registered under this section for a further period not exceeding three months in the case of fraud, incapacity, unsoundness of mind or imprisonment at aforesaid, from the time of the discovery of the fraud or the termination of the incapacity or imprisonment and, in the case of ignorance of the law through illiteracy for such further period as the court may think reasonable under the circumstances.*

*(5) Application for registration under subsections (3) and (4) shall be by petition supported by affidavit and such other evidence as the court may require. Copies of the petition shall be served on the Attorney General, the Registrar of Deeds, and the party bound by the counter letter or other deed; a copy shall be posted in a conspicuous place in the premises of the Supreme Court, and notice of the petition shall be published in the Gazette not less than fifteen days before the hearing thereof. The costs shall in all cases be borne by the petitioner.*

*(6) Articles 1321, 1322, 1323, 1324, 1326 and 1327 of the Civil Code of Seychelles in so far as they relate to the transactions mentioned in subsections (2), (3) and (4) of this shall be read subject to this section.*

[10] In view of the above Articles, Mr. Derjacques, Learned Counsel for the plaintiff objected to the admission of oral evidence based on two points of law submitting that:

(1) The defendant's oral evidence to establish the alleged real price Rs 2,500,000 plus Sterling Pounds 25,000 is inadmissible as it exceeds Rs5000/- vide **Article 1341** supra; and

(2) The defendant's claim being based on a back letter, which cannot be admitted in evidence as it has not been registered within the period of six months as stipulated in Article 1321(4) of the Civil Code.

[11] On the other side, learned Counsel for the defendant Mr. Camille submitted in essence that Article 1347 states that the rules in Article 1341, do not apply in the present case, as there is a writing providing initial proof emanating from the person against whom the claim is made. Article 1347 reads thus:

*“The above mentioned rule 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”.*

[12] And also it is the submission of the defendant that there is no back letter per se in the transaction that allegedly gave rise to the cause of action in instant suit.

[13] I carefully considered the submissions of counsel and perused the relevant provisions of law.

[14] Firstly, on the issue as to admissibility of oral evidence, it is evident that exhibit P1 and P3 which have been duly signed by and emanating from the plaintiff, clearly provide for a beginning of proof in writing. This writing as I see it, squarely falls within the description of the term **“every writing”**, which has been used in a broad sense in Article

1347 supra to cover all writings including the ones in the nature of exhibit P1 and P3. Moreover, these documents create liability on the part of the plaintiff to pay the purchase price to the defendant. This obviously, constitutes an exception to the rule, which entitles the Defendant to give oral evidence of the real price other than what is declared in the transfer deed. In support of the above proposition, the Defendant also cited the authority, the case of **Macaw v Jean (1990) SLR**. In that case, Plaintiff purchased the house of the 2<sup>nd</sup> Defendant for the alleged sum of Rs 150,000 through the 1<sup>st</sup> Defendant. The 1<sup>st</sup> Defendant is alleged to have agreed to effect repairs to the house for Rs50, 000. Plaintiff gave 1<sup>st</sup> Defendant a cheque for Rs190, 000. He also said that the Defendant failed to carry out the repairs and claimed damages. Defendants claimed that the sale price of the house was Rs200, 000 out of which a balance sum of Rs10, 000 remained payable. Defendants further denied the contract for repairs. It was held that the cheque was a beginning of proof in writing entitling the 1<sup>st</sup> Defendant to give oral evidence regarding the absence of the agreement for repairs and accordingly the 1<sup>st</sup> Defendant could testify against the content of the notarised deed, in which the parties had declared that the property was sold only for Rs150, 000.

[15] Besides, in the instant case, the alleged real price claimed by the defendant against the plaintiff is likely because of the following reason:

[16] The two documents exhibits P1 and P3 unequivocally state that on the 4<sup>th</sup> July 2008, the plaintiff had already paid the entire sum in full to the defendant, and he had received it. However, the plaintiff admitted in evidence, even on the 21<sup>st</sup> September 2009, he had not paid the instalment payments in full. Obviously, the plaintiff thus gave parole evidence *against and beyond his own document in this respect, which fact unequivocally renders the defendant's claim also likely. Hence, I find that the defendant is entitled to adduce oral evidence to prove the real price agreed upon by the parties, against and beyond the documents in question.*

[17] Now, I will move on to the second issue as to the alleged back letter.

[18] What is back letter? Back letter means a subsidiary or supplemental agreement between two or more parties drawn up to document their obligations and/or rights that for whatever reason, were hidden or secretive or to say the least, that agreement could not be

included in the original or principal agreement. Besides, there are two factors, which the Court should consider in determining what constitute a valid “back-letter. They are, namely:

(1) the words **any back-letter or other deed**, used in Article 1321 (4) supra; and

(2) the requirement of its registration within 6 months from the date of the original or principal agreement;

[19] These two factors unequivocally imply that such hidden agreement should have been documented in the form of a registrable deed. In my considered view, mere oral agreement without any documentation cannot on its own constitute a valid “back letter” in the eye of law. It cannot be treated like High Tree scenario of promissory estoppel. Hence, the plaintiff’s submission that defendant’s claim as to variance in the purchase price amounts to a back letter does not seem to hold water.

[20] It is true that back-letters are a problematic area of the law in Seychelles as is evidenced by a series of cases on the matter. It must be noted however that there is strong and unbroken line of precedent by the Court of Appeal on the issue vide **Botel vs Ruddenklau SCA8/1992, Hoareau v Hoareau SCA 38/1996** that back-letter cannot be proved by oral testimony because it is a formal, not an evidential requirement.

[21] In the circumstances, I overrule the objections raised by the plaintiff to the admission of oral evidence of the defendant to prove her claim in this matter. The defendant is therefore, allowed to adduce oral evidence to establish the real price agreed upon between the parties in this matter.

Signed, dated and delivered at Ile du Port on 21 January 2015

D Karunakaran  
**Acting Chief Justice**