IN THE SUPREME COURT OF SEYCHELLES

Civil Side: CS 97/2013

[2016] SCSC 31

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1. Lizianne Reddy Plaintiffs
2. Michel Bernard Selwyn Gouffe

versus

Wavel Charles Ramkalawan Defendant

Heard: 27th January 2015, 29th January 2015, and 24th November 2015.

Counsel: Basil Hoareau for plaintiffs

Bernard Georges for defendant

Delivered: 26th January 2015

JUDGMENT

M. TWOMEY, CJ

[1] In an amended Plaint dated 15th January 2015 the 1st and 2nd Plaintiffs, the sister and half-brother of the Defendant respectively, sued the Defendant for their shares in land comprised in Parcel V12164 of the estate of their mother, the late Eva Kitty Ramkalawan, (the deceased). The property had been transferred by the deceased on 31st January 2008 to the Defendant.

1. The claim

[2] The Plaintiffs averred that that the transfer of the property to the Defendant purported to be a sale but was in reality a disguised sale (*donation déguisée).* As only one quarter of the estate could be legally disposed by gift *inter vivos*, the transfer of all the property to the Defendant had effectively disinherited them of their share in their mother's estate.

[3] They prayed for a declaration that the transfer of the property to the Defendant was a gift *inter vivos* disguised as a sale, that three quarters of the total asset value of all property existing at the time of death of the deceased be returned into the hotchpot pursuant to Article 922 of the Civil Code of Seychelles to be shared equally between the Plaintiffs and the Defendant, and an order that the Land Registrar rectify the register of Parcel V12164 to give effect to the declaration as prayed for. In the alternative, they prayed for monetary compensation from the Defendant to reflect the shares they would have been entitled to in the property existing at the time of death of the deceased. Or any order the Court would be pleased to make in the circumstances of the case.

[4] The Defendant in his statement of defence stated that the Plaintiffs' claim was time-barred. He also denied that the transfer was a *donation déguisée* and that the transfer was in respect of the land only as the house belonged to the Defendant. He added that the sale of the land was valid and for value and prayed for dismissal of the suit.

2. The evidence

[5] The 1st Plaintiff testified. She gave evidence that the Defendant had been appointed executor of their mother's estate and that he had sent an inventory of the accounts of the estate to her. The total value of the estate according to the inventory was SR116, 52.17 but the expenses amounted to SR101, 180. The transfer of their mother's property was dated 31st January 2008. She produced e-mails from the Defendant dated August 2008 informing her of the demolition of the old family home and the progress of the new house being built. She testified that she did not know the property had been transferred to the Defendant and that she brought the court case in an attempt to regain her rightful share of the property.

[6] In cross-examination, the 1st Plaintiff admitted that she had not been on speaking terms with her mother at the time of her death and that she had previously fallen out with her brother, the Defendant, as well. She also admitted that she was fully aware that the family home was being demolished and a new house constructed by the Defendant with his own funds.

[7] Mr. Stanley Valentin, a quantity surveyor with about eight years' practical experience also gave evidence. He testified that he was requested to carry out a valuation of the property at Serret Road, St Louis and that although he valued the land, he included the existing retaining and boundary walls in the valuation as these had been built before the Defendant constructed the new house. He stated that he made two valuations, one for the property in 2008 and another for 2012. His valuation for the property in 2008 was made based partly on photographs provided to him. The 2008 valuation included the house standing on the property at the time before it was demolished to make way for the new house built by the Defendant. Mr. Valentin also valued the property without the house in 2012. For reasons that will become obvious the valuation of the property in 2008 has no consequence for this case.

[8] At this stage of the proceedings the trial judge de Silva left the jurisdiction. Both parties elected to have the case heard by a different judge but adopting the evidence already led in the matter. Transcripts of these proceedings were produced formally by the Deputy Registrar. The cross examination of Mr. Valentin was therefore conducted before me. He was a voluble witness given to long explanations perhaps best summarised in the words of Blaise Pascal, the French mathematician and philosopher:

> "Je n'ai fait celle-ci plus longue que parce que je n'ai pas eu le loisir de la faire plus courte".

[9] He was challenged as to the valuation he had carried out. The difference between market value and property value was at issue. Defendant's Counsel, Mr. Georges put to him that he had been asked to value the property but instead his report gave a market value for the property. As I understand it, properly put the difference between market value and appraised value is that the former is largely dependent on the asking price at the time of sale whereas the latter is based on gathered data and the judgement of the professional

conducting the appraisal. The former is consumer driver, the latter is expert driven. He would not commit on the difference between the two. He also gave valuable and devaluable factors for his valuation although these factors or their impact were not satisfactorily explained.

[10] Mr. Valentin was adamant that the valuation he had submitted would remain the same even if the values for the boundary and retaining walls were also deducted. This is evident in his testimony as recorded at Page 15 -16 of the court transcript of the proceedings of 24th November at 10 a.m. :

> Q: Here is what the court ordered you to do: "this court authorises Stanley Valentin in his capacity as an expert in evaluating properties to inspect only the land comprised in the title number for the purpose of evaluating the land and to ascertain the market value of the land." Why didn't you do that what the court asked you to do…?
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> A. My excuse. I didn't see the court order.
>
> Court: Mr. Valentin I need to interject at this stage. Having heard the contents of the court order would you be willing to change the valuation?
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> A. It will change my presentation but will not change the quantities of pricing.
>
> …
>
> Q. …The value of the land as reached by you will not change because you removed the boundary wall and the house.
>
> A. No.
>
> Q. It will remain the same.
>
> A. Yes.
>
> Q. So the court can work with that figure.
>
> A. It is justified yes.

And in re-examination by Counsel, Mr. Hoareau at Page 21:

> "A. If I am asked to minus the external works, remove the external works, remove the dwelling house, we are left with the land only".

[11] No other valuation was produced by either party and the court is left with the unenviable task of making its own assessment of an unsatisfactory valuation report and a witness that was equivocal to say the least. His valuation of the property in 2012 without the frills mentioned above is SR 1,546,600.00 and that is the only figure this court can take into account for the purposes of this case and also given what he was ordered to do.

[12] The Defendant was then called on his personal answers. He testified that the payment of SR50, 000 for the land he purchased from his mother was done in instalments - she would ask for sums of money and would use them as gifts to her grandchildren or for the purchase of a bed. He added that in the end the price paid was much more than the transfer price described in the deed.

[13] The Defendant then gave evidence in support of his case. He testified that he was an Anglican priest and after getting married lived in the priest's house at Bel Eau, then went to University and on his return moved in with his mother. The family home they lived in had been built by his father from scratch. After his father passed away they took the decision to pull it down as it was in a bad state. He built the new house with his own funds and built separate quarters therein for his mother. His sister, the 1st Plaintiff, was kept informed of the progress of the construction. He did not tell his brother, the 2nd Plaintiff, as they were not on speaking terms. The new house was meant to be a family home whenever the family came to Mahé. He added that they were still welcome to build on the land.

[14] In cross examination, he was adamant that the transfer price of SR50, 000 for the property was genuine, that the transfer was not a gift disguised as a sale. In answer to a question put by the Court he stated that if there had been no court case his siblings would have had access to the house during their life time.

3. The Law- Prescription

[15] Before addressing the issue of whether or not the transfer from the *de cujus* to the Defendant was a disguised sale, I must address the issue of prescription as raised by the Defendant. In a plea in *limine litis*, Mr. Georges for the Defendant submitted that since the transfer of Parcel V12164 from the deceased to the Defendant was effected on 31st January 2008 and the Plaintiffs deemed to have had notice of it, the cause of action in this suit would have been prescribed five years thereafter, that is 31st January 2013. This is not a valid argument as before registration the transfer only bound the parties to the transfer. However, the argument would be better made if the date of registration of the transfer, that is 8th May 2008, was used as the starting point for deemed notice to the Plaintiffs. As the suit was filed on 14th November 2013, the Plaintiffs were, it would seem, clearly out of time. Presumably Mr. Georges is relying on Article 2271 (1) of the Civil Code which provides:

> "1. All rights of action shall be subject to prescription after a period of five years except as provided in articles 2262 and 2265 of this Code."

Article 2262 provides:

> "All real actions in respect of rights of ownership of land or other interests therein shall be barred by prescription after twenty years whether the party claiming the benefit of such prescription can produce a title or not and whether such party is in good faith or not."

[16] To ascertain the correct prescriptive period applicable to an action it is necessary to classify it. At first blush, Mr. George's submission is untenable since it would appear that this is a case involving property and therefore it would be the prescriptive period for immoveables that should apply. Title I of Book II of the Civil Code distinguishes between immoveable and moveable property. Article 526 provides:

> "Immoveable by reason of the property to which they apply are:
> A usufruct relating to immoveable property;
> Easements;
> Actions to recover immoveable property"

But Article 918 states:

> "The value of full ownership of the property alienated, whether subject to a life annuity or absolutely or subject to a usufruct in favour of one of the persons entitled to take under the succession in the direct line, shall be set against the disposable portion; the excess, if any, shall be returned to the estate. This calculation and return shall not be demanded by other persons entitled to take under the succession in the direct line who have agreed to the alienation, and in no circumstances by those entitled in the collateral line." (Emphasis mine).

[17] The perceived conflict between Articles 526 and 918 has been the cause of much argument in establishing the prescriptive period in actions for excessive gifts where the gift is immoveable property. The Civil Code does not state the position clearly. In the absence of clear legislative direction, the Court has sought to balance the conflict between what may be perceived as an action to recover property and an action to recover the value of the property.

[18] There is now a *jurisprudence constante* not only in France and in Seychelles but in other countries where the French Civil Code has formed the basis of civil law to the effect that an action for the reduction of a gift and its return to the hotchpot or collation as it is called in Louisiana, is regarded as an action relating to the value of the donation to the succession, and not in terms of the actual donation itself. Hence it is not the immoveable property that is the subject of the action but the value of the immoveable property. In France the prescriptive period is now statutorily fixed by Article 9 of the Loi n°2006-728 du 23 juin 2006 which specifies

> " Le délai de prescription de l'action en reduction est fixé à cinq ans à compter de l'ouverture de la succession, ou à deux ans à compter du jour où les héritiers ont eu connaissance de l'atteinte portée à leur réserve, sans jamais pouvoir excéder dix ans à compter du décès".

[19] It might be an opportune time for our laws to specify the same. In any case Mr. Georges has therefore rightly submitted in terms of Seychellois jurisprudence that the twenty year

prescription provision does not apply. He has relied on the decisions in *Clothilde v Clothilde* (1976) SLR 247 and *Hoareau v Contoret* (1984) SLR 151.

[20] But that is not the end of the matter. As submitted by Mr. Hoareau for the Plaintiffs, the five year prescriptive period is not triggered by the transfer of the property but rather by the death of the *de cujus*. Both *Contoret v Contoret* (1971) SLR 257 and *Hoareau v Contoret* (supra) are authority for the principle that the heirs' rights vest at the moment of death. Hence it was only on the death of the *de cujus*, Mrs. Eva Ramkalawan, on 18th February 2012 that the five year prescriptive period began to run. As the suit was first filed in 2014 and amended in 2015 it was clearly within time.

4. The Law- Donations *inter vivos* and rules of succession

[21] An owner of property is not precluded by law from selling his land or giving it away. A disguised sale is also valid if the sale respects the conditions of form, the rules of contract and public policy (see Article 931, Civil Code of Seychelles). Similarly the *de cujus* can sell or make a gift to an heir - as long as that sale or the gift does not so diminish the estate that the reserved rights of the heirs are not satisfied. These rules are distilled from the provisions of the following articles of the Civil Code:

> "Article 913: Gift inter vivos or by will shall not exceed one half of the property of the donor, if he leaves at death one child; one third, if he leaves two children; one fourth, if he leaves three or more children; there shall be no distinction between legitimate and natural children except as provided by article 915-1. Nothing in this article shall be construed as preventing a person from making a gift inter vivos or by will in the terms of article 1048 of this Code.
>
> Article 918 : The value of full ownership of the property alienated, whether subject to a life annuity or absolutely or subject to a usufruct in favour of one of the persons entitled to take under the succession in the direct line, shall be set against the disposable portion; the excess, if any, shall be returned to the estate. This calculation and return shall not be demanded by other persons entitled to take under the succession in the direct line who have agreed to the alienation, and in no circumstances by those entitled in the collateral line.

Article 920: Dispositions either inter vivos or by will which exceed the disposable portion shall be liable be reduced to the size of that portion at the opening of the succession.

Article 1048 (1). The property of which fathers and mothers are at liberty to dispose may be given by them, as a whole or in part, to one or more of their children, whether by an act *inter vivos* or by will, subject to their obligation to pass that property on to the children born or to be born of the said donees in the first degree only.

(2). It shall also be lawful for any person by deed inter vivosor by will to give, devise or bequeath to his legitimate child the whole or part of the reserved portion accruing to such legitimate child or to give, devise or bequeath to his natural child the whole or part of the portion which would have accrued to such child upon intestacy…

[22] Article 918 creates an irrebuttable presumption in favour of disinherited heirs – a donation to one entitled to succeed to the exclusion of others who are also entitled to succeed shall be reduced if it exceeds the disposable portion (*quotité disponible*). Nothing more, nothing less. It is nigh impossible to disinherit one's child under Seychellois law.

[23] In the circumstances, the submission made by Counsel for the Defendant in respect of proof that must be met to rebut the presumption of validity of a deed in respect of a donation has no application to this case. The fact that a donation is made to an heir in excess of the disposable portion does not amount to a fraud, it only amounts to a disinheritance disguised as a donation. That is the meaning of *donation deguisée* in this case. Hence, the question of fraudulent donation or its proof where it concerns disinherited heirs does not arise and is completely immaterial. To that extent the case of *Pragrassen v Vidot* (2010) SLR 163 was wrongly decided. This is rightly so since it is not the deed itself that is being attacked but the alienated inheritance.

[24] The question that follows is the nature of the inheritance that has been alienated. As I have already explained it is the value of the donation that matters in actions such as the present one. There is therefore no question of returning the immoveable property itself to

the hotchpot but rather it is the value of the property in excess of the *quotité disponible* that must be returned.

[25] The application of the provisions of Article 913 (supra) to the particular circumstances of this case, that is, where there are three children, dictates that the gift *inter vivos* should not have exceeded one quarter of the property of the *de cujus*. The three quarters transferred in excess has to be brought back into the hotchpot for redistribution into three equal shares. The value of the property now becomes significant.

[26] Mr. Valentin's valuation of the property in this respect must be utilised in the light of Article 922 of the Civil Code which provides:

> "The reduction shall be made by taking into account the total asset value of all the property existing at the death of the donor or the testator.
>
> After a deduction of the debts, the assets given by way of a gift inter vivos according to their condition when the gift was made and their value at the opening of the succession are added together. If the property has been alienated, its value at the time of the alienation and, if there is subrogation, the value of the converted property is taken into account when the succession opens."
>
> The disposable portion of which the deceased was entitled to dispose shall be calculated on the basis of all these assets having regard to the class of heirs whom the deceased has left."

[27] Using this formula, I find that the value of the land at the death of the donor was SR 1,546,600. The house which was built solely from the funds of the Defendant cannot be taken into account. Nor can the value of the home which was demolished prior to the building of the Defendant's house. The disposable portion of one quarter is also granted to the Defendant for the legal reasons already given. Out of the remaining three quarters of the reserve, each heir must receive an equal portion that is one quarter each. Hence the Defendant is under the law entitled to half of the value of the property that is SR773, 300 and the 1st and 2nd Plaintiffs a quarter each, that is, SR386, 650.00 each.

[28] The Defendant is also the executor of the estate of the deceased. Article 922 provides that it is the total asset value of all the property existing at the death of the donor or the testator that is taken into account for the reduction. Debts must also be deducted. I am of the view that six months is sufficient time both for the completion of such an assessment and for the reduction to be effected.

[29] I therefore order the Defendant to carry out the reduction as stated in Paragraph 27 of this judgment and to pay the Plaintiffs their shares of the estate of Eva Kitty Ramkalawan on or before the 26th of July 2016.

[30] The Plaintiffs are entitled to the costs of this action.

Signed, dated and delivered at Ile du Port on 26th January 2016.

M. TWOMEY
Chief Justice