IN THE SUPREME COURT OF SEYCHELLES

Civil Side: CS19/2012

[2016] SCSC 57

Georgie Monnaie Plaintiff

versus

Lina Waye-Hive Defendant

Heard: 3rd October 2013, 13th June 2014, 6th February 2014, 13th June 2014, and 1st December 2015.

Counsel: Ms. Karen Domingue for plaintiff

Mr. Joel Camille for defendant

Delivered: 3rd February 2016

JUDGMENT

M. TWOMEY, CJ

[1] The Plaintiff filed a suit on 22nd March 2011 praying for a valuation and apportionment of his share in a property (Parcel PR 2124)and a house situated at Marie Jeanne Estate, Praslin which he had bought and built together with the Defendant with a bank loan and asked for the first option to purchase the Defendant's share. In her statement of defence, the Defendant admitted that the property had been purchased and built together with the Plaintiff by way of a bank loan but stated that she was solely making the loan repayments

for the preceding two years. She also stated that the Plaintiff had vacated the house. She prayed for the court to declare that each party had a half share in the property.

[2] The hearing of this matter was much delayed since it proved difficulty to obtain a valuation report for the property although it is nowhere explained why such a difficulty was encountered. The matter was further delayed as attempts were made to settle the matter out of court which in the end proved to be a fruitless exercise.

The evidence

[3] The trial started before de Silva J in 2013. Page 5 of the court transcript of 3rd October 2013 records the following:

> "Chief Examination by Ms.Domingue.
> Ms.Domingue to the Plaintiff"

There is no evidence that the Plaintiff, Mr. Monnaie was sworn in but there followed a question and answer session conducted by Ms.Domingue with some questions from the court as well. I can only comment that this was a most unorthodox way of proceeding and renders the testimony of the witness open to challenge. It would appear that questions were put to the Plaintiff to ascertain whether the house and the loan were in the joint names of the parties or not.

[4] In any event, the Plaintiff testified that he had borrowed SR200, 000 from the Savings Bank for the construction of the house and in addition to that had spent another two hundred and twenty thousand for its completion. He stated that in the first seven to eight years of the life of the loans he alone made monthly repayments of SR2000 as he was working as an operator with the Public Works Department at night and during the day had a business as a welder and earned quite a bit from the job. He stated that the Defendant had made SR1000 monthly repayments for only 2 years and he had continued paying the monthly balance. The repayments that he made were in the form of direct debits from his salary.

[5] He testified that in 2007 he opened a shop and the Defendant was paid a salary of SR3000 to work in the shop. The arrangement did not work and in 2010 he transferred the shop into the Defendant's name. There was at the time SR75,000 of stock in the shop. Even as their relationship broke down he continued contributing towards the house, utility bills and the maintenance of their son.

[6] He also tendered receipts (Exhibit 14 a-i) to show that he had from his own funds paid the purchase price of the property at Praslin amounting to SR33,000 (SR 20,000 in one lump sum payment and five instalments of SR 2000) whereas the Defendant had only contributed SR3000. He tendered receipts (Exhibits P15 a-j, P16, P17, P18, P19, P20, P21, P22a-d) amounting to 74,380.74 evidence of the materials he had purchased for the construction of the house.

[7] It is only in cross-examination that the story is given perspective and the relationshipbetween the parties explained- again a most unsatisfactory way of proceeding. The parties met in 1998 when the Defendant was in Praslin on a hotel training course. She returned to live with him at his mother's house in 1999 and worked as a waitress. She stopped working in 2002 to have their baby. Subsequent to that the Defendant received small contributions from her father and then helped out in a shop where she received as small salary of SR1000 monthly.The title deed of the property on which both parties appear as the purchasers of Parcel PR 2124 and the loan agreement for SR200,000 with the Seychelles Savings Bank on which both parties appear as the borrowers were produced.

[8] The Plaintiff agreed that the money was disbursed by the bank into his account but denied that that was the source of the funds from which he purchased the building materials for the house. He insisted that money from the loan was used to pay for labour costs only. He conceded that one receipt for materials for the ceiling was made by a cheque from the bank from the loan monies. There was other evidence in terms of the purchase of the shop that had first belonged to the Plaintiff and then the defendant but they are not taken into account in terms of the repayments towards the housing loan. Evidence was led as to different loan repayments made by both parties.

[9] At this stage of the proceedings, the learned trial judge left the jurisdiction and the parties applied to have the matter heard before a different judge but adopting the evidence already led. I, therefore proceeded to hear and complete the matter.

[10] James Camille, a Legal Officer with the Seychelles Commercial Bank testified on behalf of the Plaintiff. He explainedthat the Seychelles CommercialBank was the successor of the Seychelles Savings Bank and all the assets and debts of the latter were transferred to the former. He stated that there was an agreement on 26th November 2002 between the Bank and the Plaintiff and the Defendant to borrow SR 200,000 in joint names from the Bank. It was a term of the agreement that the money was to be repaid jointly. However, in this particular case the account of Mr. Monnaie in the same bank was used to service the loan. His personal account was credited with his salary every month from which the monthly loan instalment was paid out to the bank. The interest on the loan varied at different times and the repayments he made reflected these fluctuations. The last salary paid into the account was in February 2007, after which cash payments were made to service the loan. Some of these payments were made in the name of the Defendant. Mr. Camille stated that there was an outstanding sum of SR47, 959.73 on the loanas of the end of December 2015.

[11] The Defendant then testified. She stated that at the time they jointly purchased the land she was working as a waitress, earning SR2, 500. She could not recall how much she had contributed towards the purchase of the land. She then became pregnant and had their son. She could not work but got some contributions from her father every month. She returned to work when their son was three years old. She stated that her contributions to the loan for the house are evidenced by the receipts she submitted. She stated that she continues to make repayments on the loan. She added that her contributions towards the house were also in kind, inthat she cooked, cleaned and ironed the Plaintiff's clothes.

[12] I find on the documentary and oral evidence that the land comprised in Parcel PR2124 was purchased by the parties in 2001 for SR 36,000. It is not seriously contested that the Plaintiff paid SR33,000 and the Defendant contributed the rest of the SR3000 for its purchase. It is also not contested that the Plaintiff paid the bulk of the housing loan taken

out in 2002. Withdrawals were made from the account in which his salary was paid from 2002 until 2007. He paid the full monthly loan instalment until then amounting to over SR130, 000. Thereafter the repayment of the monthly loan instalment was shared by both parties, each paying about SR1000 monthly. This amounts to about another SR109, 000 totalling SR239, 000.It is also clear from the evidence that the house was completed with more contributions from the Plaintiff. This is supported by the receipts produced amounting to SR74, 380.74.

[13] I also find on the documentary evidence and oral evidence that the Defendant has made monthly cash deposits towards the repayment of the housing loan averaging about SR1000- monthly starting on 1st April 2010 and continuing. This amounts to about SR73, 000. She testified about the repayment of loansin relation to the shop transferred toher by the Plaintiff. This evidence is not relevant to the present proceedings and is disregarded.

[14] I find that the Plaintiff has proved a contribution of SR 346,380.74 (33,000 + 239,000 + 74,380.74) to the property and the Defendant SR76,000 (3000 + 73,000) These are crude figures I have distilled from the receipts and other documentary and oral evidence and from which I am able to work out a rough ratio representing the parties' share of the property. I am forced to resort to this rudimentary arithmetic in the absence of evidence brought by the parties. It would appear that the Plaintiff has contributed about four fifths of the cost of the home and the Defendant about one fifth.

[15] Both parties have tried to bring evidence about a shop that was transferred from one to the other and have attempted to include that as part of the valuation to be considered in this case. It must be noted that the Plaintiff's prayer only concerns the house and Parcel PR2124. This Court cannot adjudicate on the matters relating to the shop transferred by the Plaintiff to the Defendant.

The law

[16] The Defendant has also testified that she cooked, washed and ironed for the Plaintiff. The question arises as to whether as unmarried parties I can take into account this payment in

kind together with her financial contributions into the equation when working out her contributionin the home.

[17] In*Monthy v Esparon*,(2012) SLR 104, the Court of Appeal held that whereproperty legally held in joint names of concubines whose relationship endsand the parties no longer wish to remain in indivision,they may proceed on actions either for asale by licitation, partition, or by action de in rem verso (based on unjust enrichment) to recover their shares in the co-owned property.

[18] The Immovable Property (Judicial Sales) Act (Cap 94) provides in section 107(2) thus:

> "Any co-owner of an immovable property may also by petition to a judge ask that the property be divided in kind or, if such division is not possible, that it be sold by licitation."

No division in kind or a sale by licitation was petitioned by the Plaintiff in this case and in my view such remedy would not have been available in this case.

[19] Ms.Domingue, Counsel for the Plaintiff has submitted that the right of action in this case is unjust enrichment. She stated that the Plaintiff had contributed far more than the Defendant both in the acquisition of the property and in the house that was constructed thereon and yet he had moved out of the house in 2010.

[20] Article 1381-1 provides:

> "If a person suffers some detriment without lawful cause and another is correspondingly enriched without lawful cause, the former shall be able to recover what is due to him to the extent of the enrichment of the latter. Provided that this action for unjust enrichment shall only be admissible if the person suffering the detriment cannot avail himself of another action in contract, or quasi-contract, delict or quasi-delict; provided also that detriment has not been caused by the fault of the person suffering it."

An action *de in rem verso*or unjust enrichment is maintainable so as long as all the five conditions specified in Article 1381-1 are fulfilled: an enrichment, a corresponding impoverishment, a connection between the enrichment and the impoverishment, the absence of lawful cause, no other remedy beingavailable (see *Dodin v Arrisol*(2003) SLR 197.

[21] It is clear that the circumstances of this particular case do not meet the conditions of the provisions of Article 1381 (1). The Defendant has not evicted the Plaintiff. She has not been enriched as she has not alienated his rights *in rem* or *in personam*. He has in any case been the source of his own detriment in the sense of not enjoying his own house in that he has left it of his own accord. Similarly the Defendant cannot ask for a share of the property over and above what she has financially contributed in this case. In the case of *Michel Larame v Neva Payet* (1987) SCA 4 Eric Law JA stated:

> "no enforceable legal rights are created or arise from the mere existence of a state of concubinage, but the cause of action "de in rem verso" can operate to assist a concubine who has suffered actual and ascertainable loss and the other party has correspondingly enriched himself by allowing the party who has suffered loss to recover from the other party who has benefited."

[22] A case under quasi contract (Article 1376) would also not succeed as neither party has received something that is not due. There is also no possible action under Articles 553, 554 and 555 of the Civil Code as the "third party" involved in the present matter since both parties are owners of the property.

[23] Mr. Camille for the Defendant has submitted that there is no cause of action in this case and that the court should not formulate one for the Plaintiff. He relies on the authority of *Vel v Knowles* SCA41/1998. I do not agree that no cause of action arises. I also note that the Defendant has asked for a half share in the home. In my view this is a case where no legal remedy exists and one where only equity would assist the parties.

[24] In the circumstances sections 5 and 6 of the Courts Act are applicable. They provide that:

"5 The Supreme Court shall continue to have, and is hereby invested with full original jurisdiction to hear and determine all suits, actions, causes, and matters under all laws for the time being in force in Seychelles relating to wills and execution of wills, interdiction or appointment of a Curator, guardianship of minors, adoption, insolvency, bankruptcy, matrimonial causes and generally to hear and determine all civil suits, actions, causes and matters that may be the nature of such suits, actions, causes or matters, and, in exercising such jurisdiction, the Supreme Court shall have, and is hereby invested with, all the powers, privileges, authority, and jurisdiction which is vested in, or capable of being exercised by the High Court of Justice in England.

6 The Supreme Court shall continue to be a Court of Equity and is hereby invested with powers, authority, and jurisdiction to administer justice and to do all acts for the due execution of such equitable jurisdiction in all cases where no sufficient legal remedy is provided by the law of Seychelles."

[25] This is a case where the dissenting judgement of Sauzier J in *Hallock v d'Offay* (1983-1987) 3 SCAR (Vol1) 295 should have proper application. He stated:

""… it would be a denial of justice if the Supreme Court were to decline to use such powers on the ground that there is no remedy and that the solution to these problems are better left to the legislator."

[26] Having established that there is no legal remedy applicable to the facts of this case, I therefore propose to make an order to bring justice and settle the material issues between the parties. The Plaintiff has spent SR 8,000 on a valuation of the property(towards which cost the Defendant owes SR4000). Based on this report the parties have in court agreed that the land is currently valued at SR 242,000 and the house at SR1, 492,000, a total of SR1, 734, 000. They both would like their share in the property ascertained. The evidence

adduced bears out the fact that both parties would like exclusive ownership of the property.

[27] I therefore order that the Plaintiff pay the Defendant the sum of SR346, 800 which represents her one fifth share in the home. On this payment the property (Parcel PR2124) shall be registered in the sole name of the Plaintiff. This amount should be paid on or before the 2nd July 2015. Thereafter if the amount has not beenpaid the Defendant will have the right to pay the Plaintiff the sum of SR1,387,200 on or before the 2nd January 2017. If on that date neither party has been able to make payment as ordered the house will be sold by public auction and the proceeds of sale shared out in the ration of four fifths to the Plaintiff and one fifth to the Defendant.

[28] The Defendant shall pay the Plaintiff the sum of SR4000 towards the cost of the valuation report of the property and house.

[29] I make no order as to costs.

Signed, dated and delivered at Ile du Port on 3rd February 2016.

M. TWOMEY
Chief Justice