

IN THE SUPREME COURT OF SEYCHELLES

Civil Side: CS 96/2013

[2016] SCSC 89

RICHARD MANCIENNE

Plaintiff

versus

SEBASTIAN SCHITZENBAUMER

1st Defendant

CHRISTIAN SCHITZENBAUMER

2nd Defendant

FLORIAN SCHITZENBAUMER

3rd Defendant

Heard: 17 June 2015

Counsel: Mr. Sabino for plaintiff

Mr. Rouillon for defendant

Ms. Alton for the Intervener

Delivered: 17 February 2016

RULING

Karunakaran J

[1] By a plaint dated 23rd October 2013, the plaintiff in this matter sought an order originally against the defendant one Otto Schitzenbaumer - hereinafter called the “deceased” - for

specific performance of a contract - a promise of sale - executed by the deceased on 1st November 2010, through his power-agent one Mr. Gunther Von Versbach, who was then a resident in Seychelles. The promise relates to the sale of certain portion of defendant's land situated in Seychelles - hereinafter called the "suit-property" -to the plaintiff for the price of Euros 22,000/-. Admittedly, as on the 17th June 2012, the said power-agent had received the sum of Euros 15,000/-in total as deposit from the plaintiff, towards part payment of the purchase-price leaving the balance of the purchase price Euros 7,000/-, which sum remained payable upon completion of the sale.

- [2] In view of the said deposit, the plaintiff has also sought an alternative relief in his plaint, for an order directing the defendant to refund Euros 30,000/- to the plaintiff, doubling the amount of deposit as provided for in law.
- [3] It was the agreement of the parties that the suit-property were to be extracted by subdividing an intended amalgamation of three parcels of land H 480, H 481 and H H482 belonging to the defendant.
- [4] After instituting the instant suit, the plaintiff also obtained an order against the deceased inhibiting the registration of any dealing with the said three parcels of land until the final disposal of the main case in this matter.
- [5] Indeed, the receipt dated 17th June 2011, issued by the Power-Agent of the deceased to the plaintiff shows that the said three parcels were to be first amalgamated and then the amalgamated one to be subdivided into two parcels. Out of the said two parcels one to be sold to the plaintiff for Euros 22,000/- and the other to one Mr. Charles Marzocchi. Incidentally, the said Marzocchi has also filed an application to intervene in this matter. Be that as it may.
- [6] According to the plaintiff, in breach of the said promise of sale the defendant refused or neglected to amalgamate, sub-divide, register and transfer the "suit-property" to the plaintiff. Hence, the plaintiff entered the instant suit against the deceased for specific performance of the contract and in the alternative seeking an order for the refund of the deposit.

- [7] At this juncture, I wish to mention that the original suit summons was never served either on the alleged defendant Otto Schitzenbaumer or on his power agent Mr. Gunther Von Versbach. On 26th February 2014 when the case was called in Court first time, the summons returned without service as none of them was then residing in the Republic. On that day, Mr. Rouillon, Attorney-at-law and Notary Public, who was present in Court that time presumably as amicus curiae informed the Court (De Silva, J.) that the defendant had passed away in Germany. The case was therefore, adjourned to enable the plaintiff - represented by Attorney Mr. Sabino - to take necessary steps to amend the plaint accordingly.
- [8] Subsequently, Mr. Sabino, by a motion dated 2nd July 2014 requested the Court to allow the plaintiff to amend the plaint presumably by deleting the deceased-defendant and substituting therefor the estate of the deceased since the deceased had passed away in Germany on 29th December 2012.
- [9] The trial Court presided by De Silva, J. granted leave for the plaintiff to substitute the legal representative/s of the deceased as defendant/s, obviously, to represent the estate of the deceased, in this action. However, going by the records it seems that the plaintiff has simply replaced the deceased-defendant by substituting three names thereof on local address, at the caption of the so-called substituted plaint (sic) without pleading who they were and in what capacity they were representing the deceased or his estate in this matter. During the proceedings before the trial judge, Mr. Sabino also revealed certain information in support of his motion for substitution. Consequently, the following material facts and circumstances come to light:
1. The original defendant Otto Schitzenbaumer was at material times, a non-resident living outside the jurisdiction of this Court.
 2. He died in Germany on 29th December 2012, whereas the plaintiff subsequent to his death, has instituted the instant suit, in Seychelles on the 23rd October 2013 against a dead person.
 3. The plaintiff has attempted to serve the original suit-summons on the power-agent Mr. Gunther Von Versbach, presumably, who was then a resident in Seychelles and

whose power of attorney had ended with the death of the principal Otto Schitzenbaumer.

4. The deceased allegedly had three sons according to the hearsay statement from the bar and all of them were said to be residing in Germany, but were given local address in the amended plaint.
5. The unregistered and unidentifiable suit property is situated in Seychelles and forms part of the estate of the deceased.
6. No one knows with certainty who the legal heirs are to the estate of the deceased and their whereabouts.
7. No executor has been appointed to manage the estate or to sue or be sued in the name of or on behalf of the estate of a non-resident, deceased defendant; to say the least, not to the knowledge of the Court.
8. The plaintiff's Attorney has filed the estate case before knowing/ascertaining who the heirs to the estate are, and who the executor/s or administrator if any, for the estate.
9. Even if one assumes that the Courts in Germany had appointed someone to manage the estate of the deceased, still such appointment requires the approval of the Court in Seychelles since the estate comprise immovable, the suit-property situated in Seychelles.

[10] This matrix of facts and circumstances have now given rise to a numerous issues pertaining to the institution of the suit against a dead person and the substitution of the deceased by his three sons residing in Germany. The material facts necessary to determine these issues are not even pleaded with clarity in the body of the plaint nor documents relevant to the issues have been produced. The court needs to ascertain the procedural propriety, regularity and legality of instituting a suit against a dead person and the substitution made thereafter at the instance of the plaintiff's counsel with the connivance of the defendants' Attorney Mr. Rouillon, who in fact, had no authority at all to represent the estate of a person, who died in Germany without going through executorship.

[11] Following the sequence of the irregular events, which culminated in the substitution for the deceased, Mr. Rouillon, strangely appeared for the improper substitutes, namely, the new defendants, who were non-residents and without summons having been served on them. He also filed a statement of defence presumably without instructions from the proper party to represent the estate. It is pertinent to note that Mr. Rouillon himself has signed as a witness to the promise of sale in question. To make the matters worse, he has also acted as a trustee for both parties to this litigation namely, the seller and buyer of the suit-property and also to another entity one Focus Enterprise (Pty) Ltd, (vide terms in the Promise of Sale) which apparently, has nothing to do with the promise of sale and the immovable property involved in the instant case. Despite such serious conflicts of interest and apparent breach of the LEGAL PRACTITIONERS (PROFESSIONAL CONDUCT) RULES, 2013, Mr. Rouillon has filed a defense on behalf of the non-resident defendants, who were never served with a *summons* nor had any legal authorization to represent the estate of the deceased, which consists of an immovable property situated in Seychelles. In his apparently collusive defence, counsel has raised a plea in *Limine Litis* contending that:

1. *This action was brought against a deceased person and the substitution of the deceased and joinder of his heirs cannot correct this defect that the case was not properly commenced before this court.*
2. *The heirs of the Plaintiff are not automatically vested with the immoveable or other rights of the deceased and the case against them should be struck out ab initio.*
3. *The agreement relied on by the Plaintiff is inadmissible in evidence.*
4. *This court cannot perfect an imperfect agreement between the original parties.*
5. *The inhibition placed ex parte against land Titles H480, H481 and H482 is not maintainable in law and that and any restriction against the said Titles should be removed. Hence, defendants seek dismissal of the suit.*

[12] In the light of the facts marshalled above, I meticulously perused the entire proceedings and all other relevant documents on record. I carefully examined the written submissions filed by both counsel on the *plea in limine litis* for the purpose of the instant ruling in this

matter. To my mind, both counsel have not only misled the court from the beginning on pleadings and procedural matters but also have now in their submissions attempted to mislead the Court by raising issues not relevant to the plea in limine such as admissibility of evidence, perfecting an imperfect agreement etc. With due respect, both counsel in their submissions have miserably missed the woods for the trees. First of all, I observe there is nothing in the pleadings to help the court to determine whether the court should allow the substitution of three names as sought by the plaintiff in this matter. Both counsel have obviously, misled the Court (De Silva, J.) on procedural, legal and factual issues on the substitution of defendants, estate of the deceased, requirement of executorship in this matter.

- [13] The law relevant to the issue of substitution is found in section 114 of the Seychelles Code of Civil Procedure, which reads thus:

114. Where a defendant is added or substituted, the plaint shall, unless the court direct otherwise, be amended in such manner as may be necessary, and a summons with a copy of the amended plaint attached shall be served on the new defendant and the proceedings as against such party shall be deemed to have begun only on the service of such summons. The court may order a copy of the amended plaint to be served on or supplied to the original defendant.

- [14] The instant suit was instituted on 23rd October 2013 against Mr. Otto Schitzenbaumer, who had already passed way in December 2012. Hence, I find the instant action is still born, ab initio incompetent, improper, irregular and bad in law. Hence, liable to be dismissed limine.

- [15] Besides, in terms of section 114 cited supra, in matters of substitution of defendants, it is mandatory that a summons with a copy of the amended plaint should be served on the new defendant/s and the proceedings as against such party shall be deemed to have begun only on the service of such summons. However, in the instant case summons were never served on the new defendants or on the executor/manager/administrator of the estate of the deceased. Hence, law presumes that no action has begun in this matter. Hence, I find the plaint is liable to be dismissed limine.

[16] In the circumstances, I find that Mr. Rouillon has no locus standi to represent any defendant in this suit. Hence, I decline to consider the plea in limine litis raised by Mr. Rouillon claiming himself as counsel to represent the improper defendants in this matter.

[17] For the reasons stated hereinbefore, I dismiss the suit in its entirety and make no order as to costs.

Signed, dated and delivered at Ile du Port on 17 February 2016

D Karunakaran
Judge of the Supreme Court