

IN THE SUPREME COURT OF SEYCHELLES

Civil Side: CS168/2011

[2018] SCSC 1059

KALIAPERUMAL DEIVANAYAHAM CHETTY

Plaintiff

Versus

KRISHNAMURTHY CHETTY

Defendant

Heard:

Counsel: Mrs Domingue for plaintiff

Mr Camille for defendant

Delivered: 8 October 2018

JUDGMENT

Robinson J

- [1] This suit is before the Court on Kaliaperumal Deivanayaham Chetty's ("Plaintiff's") plaint filed against Krishnamurthy Chetty ("Defendant"), wherein Plaintiff requested *inter alia* an order compelling Defendant to transfer two parcels of land together with damages.
- [2] In his amended statement of defence, Defendant contended that, pursuant to Article 2271 of the Civil Code of Seychelles Act (hereinafter referred to as the "*Civil Code*"), Plaintiff's cause of action is time barred.

- [3] In his plaint, Plaintiff alleged that in August, 2001, he purchased parcel B427 (at Barbarons) and in April, 2002, he purchased Parcel V4736 (at Plaisance) — collectively the "Parcels". Plaintiff contended that because he was away from Seychelles undergoing medical treatment, he and Defendant agreed that Defendant would effectuate the purchase and register the Parcels in Defendant's name. Plaintiff alleged, however, that they agreed that (i) upon Plaintiff requesting that the Parcels be transferred to him, Defendant would comply without any consideration being paid; and (ii) that the Parcels would only be registered in the name of Defendant; and that Defendant would have no right to develop, dispose of, or deal whatsoever with the Parcels.
- [4] Furthermore, Plaintiff alleged that Defendant started to develop parcel V4736 in breach of the agreement. Despite repeated requests that the Parcels be transferred to him, Plaintiff alleged that Defendant has failed, refused, and neglected to do so. Plaintiff, therefore, requested: (a) an order compelling Defendant to transfer the Parcels into his name; (b) in the alternative, if Defendant does not effectuate the transfers, an order authorising the Land Registrar to register the Parcels in his name; (c) an order that Defendant be prohibited from developing, disposing of or dealing with the Parcels; and (d) an order that Defendant pay 100,000/- rupees together with cost for the case.
- [5] In his amended defence, Defendant contended that, pursuant to Article 2271 of the Civil Code, Plaintiff's cause of action is time barred. And he essentially denied that there was any agreement between him and Plaintiff, and averred that he is the *bona fide* purchaser of the Parcels; and that he has been renting out a house on Parcel V4736 per a lease agreement dated August, 2002, which Plaintiff never claimed for rent.
- [6] *The evidence of Plaintiff.* Plaintiff confirmed that he purchased two parcels of land namely B427 and V4736 in 2001, and 2002, respectively, with both Parcels of land registered under the name of Defendant. Parcel number B427 P1 was transferred to his brother's name on 30 August, 2001. When asked who paid 100,000/- rupees for the property he said that he did not know. However, he testified that he paid about 300,000/- rupees to his lawyer.

- [7] When asked about parcel V4736 P2, Plaintiff said that he paid 850,000/- rupees; and that the transfer was made on 17 June, 2002, but that one of his brothers in England helped him with the transfer of money due to foreign exchange problems at that time. He eventually gave back the money to his brother in rupees. Plaintiff also confirmed that parcel V4736 was registered in the name of Defendant.
- [8] When asked why the two properties are registered in the name of Defendant, Plaintiff said that he was not in the country when the land was going to be registered; and that his brother, the Defendant, was in charge of all his business. Plaintiff was in India when the parcel V4736 was ready to be transferred in 2002. With regards to the parcel B427 transferred in August, 2001, Plaintiff testified that the money transfer was effectuated in instalment from overseas. Moreover, due to the fact that he was not present in the country, he could not complete the transfer and eventually register it himself.
- [9] Plaintiff confirmed that there was a sale document signed and dated 2 December, 2010, and given to him personally by the seller, Mr. Faure, representing the transfer of money for the parcel B427.
- [10] Plaintiff later testified that his brother in England made available a bank statement with regards to the payment amounting to £16,090/- made on his behalf; and that this was done for Mr. David Pothin for the purchase of parcel V4736.
- [11] Defendant promised to transfer the Parcels on his name but he later became aware during the procedure of transfer that parcel V4736 was going to be sold to some Chinese. He indicated that he had requested restriction be placed on both Parcels to cease their disposition.
- [12] When asked if he contacted Defendant before instructing any filing of proceedings, Plaintiff testified that he attempted to amicably approach Defendant through his lawyer; and that a letter of demand was sent (P3) on 12 August, 2011, addressed to Defendant with regards to the Parcels, but that there was no response of any kind to the request of the letter.

- [13] When asked why he took substantial amount of time to file a case against Defendant regarding the re- transfer of parcel B427 and V4736, ten years and nine years, respectively, Plaintiff testified that he thought the Parcels would have been transferred back to him since he was related to Defendant. It is only after he noticed that construction was being undertaken that he proceeded to file a case before the Court.
- [14] Plaintiff incurred physical and medical damages amounting to 100,000/- rupees. Moreover, he was diagnosed with cancer; and that it affected him a lot. And the fact that he lost a good deal of invested money led him to file this case.
- [15] Plaintiff testified that developments have been conducted on parcel V4736 without his permission, but that he is unaware if there is any development on parcel B427 apart from the demolition of a building done again without his permission by Defendant.
- [16] When asked why Defendant stated that he fully paid for the purchase of the Parcels, Plaintiff denied the claim testifying that he himself paid 313,000/- rupees for the property; and that Defendant paid 37,000/- rupees of the 350,000/- rupees balance for the registration of the parcel B427 because he was not in the country to do so himself. He refunded Defendant 37,000/- rupees which Defendant had paid.
- [17] Plaintiff also denied the claim that his brother paid for the parcel V4736 because Defendant was unaware that he was going to purchase the property since the Pothin brothers were in Seychelles at that time. He continued by saying that his brother abroad, Govind Chetty paid £16,000/- and the money that he paid by portion in rupees was the money he had taken from the shop.
- [18] Plaintiff confirmed that Defendant had paid the stamp duty for the property because he was out of the country and the registration fee itself since the Pothin brothers were out of the country for some time. He testified that Defendant was informed that he would have been refunded back the money once the transfer of land would have been made.
- [19] Plaintiff was aware that there was a house on the parcel V4736 at Plaisance; and that it was being rented out since 2002, but that he never benefited from the rents which were being

paid. The reason for that he explained is Defendant was a contractor so he granted him the permission to do renovations for the house at his own expense; and Plaintiff never asked for any money in return to this day.

[20] When cross-examined, Plaintiff testified that in 2002, during the purchase of Parcel V4736, he was out of the country in India; and that there was a possibility he was in another country, Singapore. Similarly, Plaintiff testified that he was not in the country around August, 2001, for the purchase of parcel V427. If he were in the country, he would have signed the land transfer deeds and registered the Parcels himself. When he was abroad, he heard that the seller, Mr. Faure, wanted to sell quickly because he was having problems with his wife. He explained that that was why he asked Defendant to effectuate the purchase in his stead.

[21] Plaintiff confirmed that he paid 300,000/- rupees for parcel B427 and 850,000/- rupees for parcel V4736. When asked whether he had receipts of those payments, Plaintiff testified that:

I have a paper that shows the money my brother transferred. The value of the paper is about Rs.450,000 /- and then there was the book the Pothin bothers signed each time they collected the installments, they were all with my brother and when I was not in the country he kept it and I do not where it is now.

[22] Then, he testified that he does not remember signing a power of attorney granting Defendant proxy to act on his behalf in respect of the Parcels. He testified that when he was out of the country, Defendant was in charge of his businesses. Moreover, Plaintiff testified that regarding the land at Plaisance (parcel B4736) that he had bought from the Pothin, he had spoken with Mr. Morel and told him that his brother would come and do the papers, as he was not in the country. He later spoke to Mr. Morel about this, but that Mr. Morel could not remember as it had been quite some time. He also indicated that he had a promise of sale with the Pothin brothers when they were in Seychelles, but that he was unable to trace a copy as it had been quite some time.

- [23] When asked why Plaintiff had not taken steps to recover the Parcels upon his return to Seychelles, Plaintiff testified that he had already spoken with Defendant, who had told him and their sister that he would transfer the Parcels. He confirmed that Defendant had paid the stamp duty for the property because he was out of the country, and that he was waiting for Defendant to transfer the property so that he could pay him back. He testified that Defendant had not made any claims for the payments of the stamp duty; and that there was a possibility that Defendant could have used funds from one of Plaintiff's shops, instead of his own.
- [24] Plaintiff confirmed that the property at Plaisance had a house on and that since 2002, it was being rented out by Defendant. He explained that Defendant had spent money doing renovations on it and, therefore, he did not bother to ask him for any rent. Plaintiff filed this suit because he learned the Chinese were going to enter upon the property. He explained that he is trying to prevent that from happening because he had promised his two daughters that one day they could build their house on that land.
- [25] Moreover, Plaintiff confirmed that the title deeds were signed by Mr. Morel, the notary, and that prior to the signing of the parcel at Plaisance (parcel V4736), Defendant had called him and made him speak to Mr. Morel because he had a promise of sale with the Pothin. He told Mr. Morel that Defendant could draft up the papers. When asked why he did not have the promise of sale, he testified that there was likely a promise of sale document that was in his office at Plaisance, which he used with Defendant, and that maybe Defendant had gained access to them.
- [26] *Testimony of Bryna Dufresne.* Ms. Dufresne testified that Plaintiff was not present in the Seychelles on 3 August, 2001, and was absent from 12 July, 2001, through 24 August, 2001. Moreover, she testified that Plaintiff was away on travel on 4 April, 2002, through 26 May, 2002.
- [27] *Testimony of Dr. Govind Chetty.* Dr. Govind Chetty testified that all he knows about the dispute between his brothers, Plaintiff and Defendant, is "who paid what to the original

owners of the land and who the land belongs to." He was instructed by Plaintiff to make two transactions for property at Plaisance: (1) a direct cash transfer to Mr. David Pothin on 30 May, 2002, for £16,090/- (P7 – Copy of Dr. Chetty's Bank Account Statement); and (2) and another cheque on 11 April, 2002, for £3,242.24/- to Mr. Albert Pothin.

[28] On cross-examination, he testified that at the time of these transactions he was not aware of any debts owed by Plaintiff to Defendant. And he agreed with Defendant's Counsel that the cheque payment is not indicated on his bank statement.

[29] *Testimony of Fred Faure.* During trial, Fred Faure testified that he knew Plaintiff (also known as Mohan) and Defendant, as they had all grown up together. He and Plaintiff had reached an agreement regarding Parcel B427 (at Barbarons), which he was selling, and that Plaintiff had paid him in installments over what he believed to be a month or two. When asked why Defendant's name appeared on the transfer, Fred Faure testified that:

There was SR 37, 000/- that was left and had not been paid so Mr. Mohan didn't pay that SR 37, 000 /- because he was not in the country so [Defendant] paid the SR 37, 000/- on his behalf.

[30] He testified that he knew it was done on behalf of Plaintiff because Plaintiff and Defendant were together when they told him that Defendant would pay 37,000/- rupees. He testified that he had not talked with Plaintiff about the transfer and Plaintiff had not told him that Defendant would be signing the transfer (P1, Transfer of Land Property (Parcel B427) Agreement between Fred Faure and Defendant, dated 30 August, 2001). He testified that did not question why the Defendant was signing. He then testified that he later wrote a letter to Plaintiff (P4, Letter from Fred Faure to Plaintiff, appears to be dated 2 December, 2010), confirming that Plaintiff had paid him 317,000/- rupees and Defendant 37,000/- rupees. He testified that there was a house on the parcel transferred, but that he vacated the house one year after the transfer.

[31] On cross-examination, he testified that the arrangement of 100,000/- rupees, the consideration sum declared in the transfer deed P1, was between Plaintiff and Defendant.

All he knew was that he was being paid 313,000/- rupees. Moreover, he gave him 37,000/- rupees on behalf of Plaintiff because Plaintiff was out of the country.

- [32] Regarding the letter P4, he testified that he drafted it and Plaintiff typed it. And he did not have a copy of the draft. With respect to D1, which appears to be a handwritten note dated 3 August, 2001, which he signed and wherein he acknowledged that he sold the property to Defendant; and that he will vacate the house on parcel B427 before the end of November, 2001, he testified that Plaintiff's name does not appear. However, he indicated that verbally Plaintiff and Defendant had made such an agreement. He also indicated that the letter was done four years after the transfer deed.
- [33] *Testimony of Defendant.* At trial, Defendant testified that he purchased the Parcels. Plaintiff told him that there were persons selling the property (parcel B427) and told him to buy it. He indicated that Plaintiff had already made some payments towards the property, but that there was an amount outstanding. At the time of payment there was an agreement between him and Plaintiff for the parcel to be registered in Defendant's name. There were no discussions with Mr. Faure, only that Plaintiff had told Mr. Faure that Defendant would be taking the land. He testified that had Plaintiff wanted Defendant to transfer the land back, he would have given him the power of attorney.
- [34] He testified that he paid 54,000/- rupees for the other piece of land (parcel V4736) from the Pothin brothers (i.e., the sellers); and that he paid the registration fees for parcel B427. Since 2001, Plaintiff had not requested that the parcel be returned to him.
- [35] Regarding parcel V4736 (P2, Transfer of Land Property (parcel V4736) Agreement between David Pothin (one-third owner) and Defendant), Defendant testified that David Pothin, the seller, was not in the Seychelles, but was in England. Defendant testified that his name was on the land transfer. He explained that the "sale developed" when Mr. Morel wrote a letter to his brother, his brother signed it and sent it back to Seychelles for registration.¹ He testified that two of the Pothin brothers were in Seychelles (Albert Pothin

¹See P2, Transfer of Land Property (Parcel V4736) Agreement between David Pothin (one-third owner) and Defendant, dated 30 August, 2001; D2 – Transfer of Land Property (Parcel V4736) Agreement Between Albert Pothin (one-third

and Jack Francis Pothin); and that one was in England (David Pothin). He testified that Plaintiff had advised him to buy the land because he had already paid the money. His brother, Govind Chetty, who was in England at the time had paid some money to David Pothin, the brother in England, because it was difficult to pay in foreign exchange. He paid the balance of the transaction.

[36] It was correct that Govind Chetty had paid the money on behalf of Plaintiff. At the time he paid the balance, Defendant testified that there was no arrangement that thereafter the property would be transferred back to Plaintiff, as he and Plaintiff had an arrangement where Plaintiff owed him for constructing his building. He again reiterated that he did not purchase the property on behalf of Plaintiff, otherwise he would not have paid 54,000/- rupees for the registration and fees. Defendant testified that he made this payment via a cheque from his Barclays account. There was a building on parcel V4736 with three bedrooms; and that he did renovations; thereafter, he testified that he signed a lease agreement with Mr. Balasundaram for the lease of that property (D4, Tenancy Agreement between Defendant and Mr. Balasundaram, dated 26 August, 2002).

[37] He rented the property for 5500/- rupees. When asked whether the payment for rent was paid to his brother, he testified that it was "*left there and [he] went to collect SR5500*". There was no power of attorney granted to him in respect of that property. Then, Defendant confirmed that an evaluation of the property was commissioned in his name; and that he believed he had paid around 3000/- rupees to 5000/- rupees for it. (Valuation of Parcel V4736, dated 8 August, 2003). Moreover, he testified that Plaintiff had never asked him for rent or any official demands in regard to that property then and when the property had been made subject to certain restrictions/pledges arising out of a court case. (*See D5, Letter from Land Registrar (Bernard Georges) Regarding Removal of Restriction Regarding Parcel V4736, dated 4 March, 2010*). Plaintiff had not taken any steps to prevent him from leasing the property. Finally, he testified that he is the rightful owner.

owner) and Defendant, dated 17 June, 2002; D3 – Transfer of Land Property (Parcel V4736) Agreement Between Jack Francis Pothin (one-third owner) and Defendant, dated 17 June, 2002.

- [38] On cross-examination, Defendant testified that in the past Plaintiff had not asked him to oversee his business; he testified that Plaintiff has his own people to sign cheques for him. However, that he would come in and see that things are running smoothly, but not concern himself with the business itself. In the family the brothers help each other out. He has assisted his brother with his construction business; and that is why Plaintiff asked Govind Chetty to pay for the parcel. He said that if there was money paid, it is because Plaintiff knew he had done work for his building. There were no documents because this was among brothers.
- [39] Moreover, Defendant agreed with Plaintiff's counsel that: "So basically what you want is you want to keep these two properties which have been paid for by my client in return for what you perceived as what he owes you.". Defendant maintained that he paid the stamp duty of 54,000/- rupees as well as the outstanding balance for the purchase price. Thereafter, he confirmed that there is a relation of trust in the family; and that everyone trusts him in the family. He reiterated that there are no document between his siblings.
- [40] On re-examination, Defendant testified that he received a letter from Plaintiff's counsel dated 12 August, 2011, (P3). Such transactions between family members were generally normal and based on trust.

Defendant's submissions and court's analysis

- [41] This court has considered the evidence and the submissions submitted on behalf of Defendant. No submissions were submitted on behalf of Plaintiff.

Plea in limine litis

- [42] In the view of Mr. Camille, Plaintiff's plaint is a personal action falling under the purview of article 2271 of the Civil Code (hereinafter referred to as 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.
2. Provided that in the case of a judgment debt, the period of prescription shall be ten years."

Had the Plaintiff brought a real action in respect of rights of ownership of land, Mr. Camille is of the opinion that Plaintiff would have enjoyed the prescription period stipulated under article 2262 of the Civil Code. Article 2262 of the Civil Code 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.*"

[43] The issue for this court to decide is whether the plaint is a personal action and if it is a personal action, whether it is time barred under article 2271 of the Civil Code.

[44] Paragraphs 2, 3, 4, 5 of, and prayer (a) in, the plaint, provide —

"2. In August 2001 and in April 2002 the plaintiff purchased and paid Parcel B 427 and Parcel V 4736 respectively.

3. As the Plaintiff was away from Seychelles undergoing medical treatment the Plaintiff and the Defendant agreed that the said Parcels of land would be registered in the name of the Defendant.

4. The said agreement contained the following further terms:

- upon the Plaintiff requesting that the said Parcels of land are transferred on his name the Defendant would comply with the request with no consideration being paid to the Defendant;*
- the said Parcels of land would only be registered in the name of the Defendant but that the Defendant would have no right to develop, dispose of or deal in any manner whatsoever with the said parcels of land.*

5. In breach of the said agreement the Defendant has started to develop Parcel V 4736 and the Defendant is acting as the owner of the said Parcels of land.

...

WHEREFORE the Plaintiff prays this Honourable Court for the following orders:

(a) *An order compelling the Defendant to transfer parcels B427 and V 4736 into the Plaintiff's name within 30 days...*".

[45] This court having considered the plaint, as drafted, agrees with Counsel for Defendant that the present action is a personal action. Plaintiff in his plea alleged that Plaintiff and Defendant entered into a verbal agreement; and that the Defendant breached the said verbal agreement. Moreover, in my judgment it is pertinent that prayer (a), in the plaint, praying for an order compelling Defendant to transfer the Parcels into Plaintiff's name is one of specific performance and is a personal action. In the case of *Cedric Petit v Marghita Bonte Civil Appeal No:15 of 1999*, the Court of Appeal of Seychelles held "*The appellant's action in Civil Side No. 161 of 1993 was admittedly one for specific performance of an alleged agreement to sell. Now, the jurisdiction to order specific performance is based on the existence of a valid and enforceable contract and the action is one whereby the plaintiff elects to insist on the actual performance of a contractual obligation. The action is therefore a contractual action and the remedy is an equitable one based on the contract. Moreover an action for specific performance is one in personam*". In this respect, the cause of action disclosed, in terms of section 71 of the Seychelles Code of Civil Procedure, being one for enforcement of an alleged agreement, without amending the plaint, it will be contrary to natural justice to expect Defendant to meet a case other than the one pleaded or to pronounce judgment on the basis of a cause of action different from that disclosed by the plaint: (See, for example, *Julie Varnier v Michel Alcindor & Michel Alcindor v Julie Varnier Civil Appeal No. 28 of 2000*). See also *Gallante v Hoareau 1988 SLR 122*, which reiterated that "*the function of pleading is to give fair notice of the case which has to be met and to define the issues on which the court will have to adjudicate in order to determine the dispute between the parties*".

[46] This court has to decide whether the plaint is time barred under Article 2271 of the Civil Code. According to the plaint, Plaintiff purchased parcel B427 and parcel V4736 at about August, 2001, and April, 2002, respectively. Plaintiff's evidence established that parcel B427 and parcel V4736 were registered into the name of Defendant on 30 August, 2001,

and 17 June, 2002, respectively. Plaintiff stated in evidence that he amicably approach Defendant through his lawyer; and that a letter of demand was sent (P3) on 12 August, 2011, addressed to Defendant with regards to the Parcels. Defendant admitted that he took a substantial amount of time to file the present action with respect to the *re-transfer* of parcel B427 and V4736, ten years and nine years, respectively, because he thought that the Parcels would have been transferred back to him since he is related to Defendant. The plaint was filed on 22 August, 2011. It is to be noted that there is no evidence establishing that prescription has been interrupted. Article 2242 of the Civil Code provides "*Prescription may be interrupted either naturally or by a legal act*". In the light of the above, this court agrees with Counsel for Defendant that the present action which was filed on 22 August, 2011, is time- barred.

[47] This court, therefore, upholds the plea in *limine litis* raised on behalf of Defendant.

[48] This court has said enough to explain why the plaint should be dismissed. For the sake of completeness, however, this court has considered the following argument in the alternative to Defendant's plea that Plaintiff's plaint is a personal action - whether the Parcels were allegedly purchased on behalf of Plaintiff through Defendant acting as *prête-nom*.

[49] There are averments in the plaint of an alleged *prête-nom* agreement. This court has considered the pleadings and the evidence and is satisfied that the alleged *prête-nom* agreement pleaded does not fulfil the requirements of article 1321 (4) of the Civil Code. See, for example, *Jourdanne Guy v Dianna Sedgwick and Vivienne Barallon SCA 54 of 2011*, which holds, at p. 7 of the judgment—

"Back-letters are admissible against agreements (subject to certain conditions) except where these agreements concern deeds relating to immoveable property.

2. In such cases, a **back-letter cannot be proved by oral testimony as it is a formal and not an evidentiary requirement.**

3. Written back-letters are only admissible where they have been registered within 6 months of the making of the deed or agreement relating to immoveable property. The above falls in line with what is decided in the case of Hoareau v Hoareau (supra): **It is only where the requirement of writing is only evidential that beginning of proof in writing and oral evidence can be accepted in substitution of writing.**",

Emphasis is mine

and at p. 8 of the judgment —

"We therefore have to accede to this appeal. We not only have to do justice but have to do justice in accordance with the law. We reiterate the views of Ayoola J in Ruddenklau [v Botel (unreported) SCA 4/1995] that it would indeed be *"a daring and unnecessary piece of judicial legislation to restrict the effect of ... article 1321 (4)"*.

[50] In the light of the above, this court dismisses Plaintiff's case with costs.

Signed, dated and delivered at Ile du Port on 8 October 2018

A handwritten signature in black ink, appearing to be 'F Robinson', written in a cursive style.

F Robinson
Sitting as a Judge of the Supreme Court