

SUPREME COURT OF SEYCHELLES

Reportable
[2020] SCSC 29
CS 36/2017

In the matter between

JUDE BARRA

1st Plaintiff

MARIE-JONA RADEGONDE
(*rep. by Guy Ferley*)

2nd Plaintiff

and

THE GOVERNMENT OF SEYCHELLES

Represented by the ATTORNEY GENERAL
(*rep. by George Thatchett*)

Respondent

Neutral Citation: *Barra & Anor v The Attorney General* (CS 36/2017) [2020] SCSC 29 (20 January 2020).

Before: Twomey CJ

Summary: formation of contract - breach – rescission -specific performance -

Delivered: 20 January 2020

ORDER

The Plaintiff is ordered to pay the sum of SR 17,300 together with the associated stamp duty to the Defendant on or before the 30 April 2020 and the Defendant to transfer Parcels J3700, J3701 and J3693 to the Plaintiffs on or before the same date after the transfer price is paid. With costs.

JUDGMENT

TWOMEY CJ

[1] The Plaintiffs, co-owners and fiduciaries of a parcel of land at Bel Ombre, Mahe sue the Defendant for breach of contract. They aver that the Defendant by a letter in 2014 had

offered to sell them three small parcels of land namely Parcels J3700, J3701 and J3693 for amalgamating the same with their own parcel of land (J3024) with the aim of them securing their property.

- [2] They further aver that they accepted this offer and that on 29 September 2015 the Defendant reneged on this offer and later in 2017 made them a fresh offer to sell them Parcels J3700 and J3701 but not Parcel J3693.
- [3] They claim to have suffered inconvenience and moral damage from the breach of the agreement. They pray for specific performance of the contract and for an order for the payment of moral damages in the sum of SR 50,000 or any order the court deems fit in the circumstances of the case.
- [4] In their statement of defence, the Defendant pleaded in *limine litis* that the matter was statutorily barred by section 5(3) of the Public Officer's Protection Act 1976, that the plaintiff did not disclose a reasonable cause of action against the Defendant. It has also averred that as it was at all material times the sole proprietor of the disputed parcels of land and the Plaintiffs had not paid for them in the time stipulated, and by virtue of Article 1654 of the Civil Code, the Defendant was within its rights to withdraw the offer.
- [5] On the merits, it stated that the Plaintiffs' averments regarding the contract are neither admitted nor denied and the letters of offer of 22 May 2014 and subsequent letter of 9 June 2014 were without prejudice, which prejudice it has not waived.
- [6] It admitted that it permitted the Defendant to enter Parcel J3693 subject to certain conditions. It also admitted that it offered to sell Parcels J3700 and J3701 to the Plaintiffs in 2017. It further stated that the agreement was vitiated by the Plaintiffs' failure to pay for the transfer of the parcels and that the moral damages claimed are without factual basis and manifestly excessive.
- [7] The plea in *limine litis* was not pursued and is therefore deemed abandoned and not necessitating consideration by the Court.

- [8] The hearing of the evidence was commenced before my brother Nunkoo J and after his departure the parties elected that this Court adopt the evidence adduced thus far and complete the hearing of the matter.
- [9] The First Plaintiff testified that he was the owner of Parcel J3024 at Fisherman's Cove Estate at Bel Ombre. He stated that he was offered three small parcels of land, namely J3700, J3701 and J3693 adjacent to his property by the government. He explained that this was necessary in order to secure his property with the construction of a boundary wall.
- [10] The offer to sell him the land by the government was communicated to him by letters dated 22 May and 9 June 2014. An objection was taken to admit these documents as they were marked without prejudice. These letters were marked as items pending their admission as exhibits when the relevant officer appointed by the Defendant testified. I shall return to this issue later in the judgment.
- [11] The First Plaintiff further testified that consideration for the transfer of the parcels of land was SR 17,300 as evidenced in the letter of 2 May 2014. Subsequently he was asked to see the then Principal Secretary of the Ministry of Land Use and Planning, Mr. Francois, who informed him that the government would not accept the money as another person wanted the land and they were considering giving it to him. He named the person as Dr. Roland Barbé who was his next-door neighbour.
- [12] However, by letter dated 26 November 2014 (Exhibit P1) he was informed that the three parcels of land would be transferred to him for the consideration of SR 13,700. This offer was then withdrawn on 29 September 2015 with the promise of a new offer to be made to him "once re-adjustment of the boundary line of the plot to be sold [...was] completed."
- [13] By letter dated 16 February 2016, he was granted early entry onto part of Parcel J3693 for planning purposes. He started making plans, cleaned the property but its transfer to him was never made. On 17 June 2016, he wrote to the Ministry asking that the land be transferred as per the agreement. He stated that it was essential that the land was

transferred so that he could build a retaining wall thereon and to allow him to secure the rest of his property. He stated that the three parcels of land were very small.

[14] He therefore prayed the court for an order for specific performance of the agreement and the payment by the Defendant of SR 50,000 for the moral damage he had suffered in respect of this matter.

[15] In cross-examination he admitted that he had initially asked the government to purchase the land for landscaping, cultivation and for access but added that the letter he wrote (Exhibit D1) also stated that the land was sought for fencing purposes. He was adamant that he had gone to pay for the land but that he had asked the government to revise the price by letter dated 17 June 2014. He stated that he had in any case tried to pay for the property but was told by Mr. Francois that the cashier had been advised not to take the money.

[16] Further, on 18 November 2014, he wrote to the Principal Secretary asking him to disregard the letter regarding the price of the land and that the offer was accepted. He further asked to be informed about procedures to pay for the land offered. On 26 November 2014, he was guided by a letter from the Defendant to call at the cashier to make payment within fourteen days. He attempted to do so but the payment was refused. It was only in September 2015 that he was informed by letter that the offer to sell the land had been withdrawn and subsequently only two of the three parcels were offered to him.

[17] The Second Plaintiff confirmed the First Plaintiff's evidence. The offer had been made and then withdrawn after they had made plans for the land to be transferred and they had suffered moral damages as a consequence. They had not accepted the second offer of the transfer of only two of the three parcels of land initially offered.

[18] Mr. Denis Barbé, the current Principal Secretary for the Ministry of Lands and Housing testified on behalf of the Defendant. He did not have first-hand knowledge of the matter but he stated that he had gathered his information from the case file. The transfer of the land comprising of the three parcels to the Plaintiffs had been approved in principle. The only outstanding matter was the consideration for the transfer and its payment. The

agreement was never completed and at some point in time, Dr. Barbé approached the government to also purchase the same land and since the land had not been transferred to the Plaintiffs the Ministry decided to re-evaluate the situation and the offer to the Plaintiffs was retracted.

[19] One parcel in particular, namely parcel J3693 was being asked for purchase by both the Plaintiffs and Dr. Barbé.

[20] At this point in time, a locus in quo was conducted by Nunkoo J and the matter referred to mediation but the proceedings failed.

[21] Mr. Denis Barbé further testified that the Plaintiffs were offered the three parcels of land in issue by the government and accepted the offer in 2014 but had not paid within the fourteen days stipulated. When early entry to the lands was offered to the Plaintiffs, they had not yet made payment. That offer was made to allow the Plaintiffs access to their land. He denied that the offer was withdrawn only after Dr. Barbé applied to purchase the land. He stated that the offer was made on 9 June 2014 and accepted on 20 June 2014 and was only retracted by the Defendant in 2015. No reason was given in the letter but the Plaintiffs were informed they would be made a fresh offer of purchase.

[22] He accepted however, that the documented reason on file, was that while finalising the deal with the Plaintiffs, the government had had a fresh request for the purchase of property by a third party, Dr. Barbé. In studying that request, it was of the view that Dr. Barbé's house was in a precarious position from erosion and the situation had to be re-evaluated in terms of transferring the whole property to the Plaintiffs.

[23] He further stated that if the Plaintiffs had paid the money within the stipulated time in the letter of 26 November 2014, the matter between the parties would have been resolved and would not have come to court. He could not say for certain whether the Plaintiffs had attempted to pay or not. The offer had been withdrawn partly because the Plaintiffs had not effected the payment for the land and partly because the Ministry had been approached by Dr. Barbé to purchase the land.

[24] The issues to be determined by the Court in this case are the following:

1. Whether there a contract concluded between the Plaintiffs and the Defendant for the sale of Parcels J3700, J3701 and J3693

2. Whether the contract was breached?

3. If so, can specific performance be ordered?

[25] The Defendant has submitted that the Plaintiffs' failure to sign the letter of acceptance as requested by letter of 9 June 2014 and their subsequent counter offer contained in their letter of 17 June 2014 regarding the reconsideration of the value of the price for the transfer of the properties resulted in the non-completion of the contract. In this respect, since there was no agreement on price, no valid agreement in terms of Article 1583 or Article 1589 of the Civil Code was concluded.

[26] The subsequent letter from the Plaintiffs of 18 November 2014 asking the Defendant to disregard their letter of 17 June 2014 could not be recognised as acceptance of the offer. A fresh offer dated 26 November 2014 was made by the Defendant to the Plaintiffs asking them to comply with the condition of full payment within fourteen days of the letter but was not accepted as there was no proof that the Plaintiffs attempted to effect payment and were refused. Hence the said offer was also not accepted. The Defendant submits therefore that there was no binding or valid agreement between the parties.

[27] The Defendant submits in the alternative that if there was indeed acceptance of the offer, by virtue of Article 1654 of the Civil Code the Defendant had a right to demand the rescission of the sale for the non-payment of the consideration of the contract.

[28] Further, the Defendant submits that the claim for moral damages is not sustainable as no evidence was brought for the loss sustained by the withdrawal of the offer and that in any case the revised offer comprised of two of the three parcels of land and early entry being given to the Plaintiffs.

[29] The court has received no submissions from the Plaintiffs.

[30] With respect to the first issue of whether there was an agreement between the parties, it is important to consider the distinct stages in a contract. A promise of sale of land, for

example, as pointed out by Sauzier J in *Abdou v Wistanley* (1978) SLR 62 consists of three distinct stages: first, the buyer offers to buy the land without an acceptance of the offer by the owner. This offer is known as *pollicitation*. Secondly, the sellers accept the offer. At this stage, it is still a unilateral promise to buy, an option to purchase. Thirdly, both parties bind themselves to this agreement, the promise to buy and the promise to sell. This is a bilateral agreement. It is at this third stage that Articles 1583 and 1589 of the Civil Code, relied on by Counsel for the Defendant has application. These provisions state in relevant part:

“1583 1. A sale is complete between the parties and the ownership passes as of right from the seller to the buyer as soon as the price has been agreed upon, even if the thing has not yet been delivered or the price paid.”

1589 A promise to sell is equivalent to a sale if the two parties have mutually agreed upon the thing and the price.” (Emphasis added)

[31] The evidence in this case as borne out in the documents produced will decide whether the third stage as described above was completed. In this regard, the First Plaintiff attempted to produce them, and later the Defendant their production was objected to on the basis that they were qualified “Without Prejudice”. Since both parties now rely on them, and another so called Without Prejudice letter admitted the Court assumes that the objections to their production have been withdrawn and in the event they can be scrutinised in the interest of justice to assist the court in determining whether an agreement was concluded by the parties.

[32] Further, it must be noted that the “Without Prejudice” qualification refers to a privilege the parties have from excluding from court details of a settlement to settle a dispute between parties. This criterion is certainly not applicable to letters of offer and acceptance in contract and is therefore wrongly used by the Defendant in the context in which it was. It therefore has no effect to preclude the admission of the letters of offer from the court record.

[33] The letter of 22 May 2014 addressed to the Plaintiffs states in relevant part:

“I am pleased to inform you that approval in principle has been granted for the sale of Parcels J3700 (extent 16 sq m) J3701 (extent 25 sqm) and J3639 (extent 69 sqm) to you. However, we shall proceed with the other formalities for the sale once the boundary beacons for the properties are shown to you. ...

NB the sale will be subject to the final approval by Government of Seychelles and your ability to make payment in full to the Ministry of Land Use and Housing (emphasis by the Defendant).”

[34] The letter of 9 June 2014 addressed to the Plaintiffs states:

“RE: Offer Parcels J3700, J3701, and J3639 at Fisherman’s Cove Estate, Bel Ombre

...

I am pleased to inform you that approval in principle has been granted to offer you the above parcels of land for a consideration of SR 17,300... Payment is to be made in full, cash, outright or through a loan.

...

If the above is acceptable to you, please sign two original copies of this letter and return one copy to me within the next 14 days from the date of this letter.”

[35] On 17 June 2014 the Plaintiffs wrote to the Defendant as follows:

“...

We write to ask you please sir to reconsider the amount of SR17,300 for the said parcels of land considering that it is only 110 sqm and consisting of rocks and boulders... Looking at the same piece that we are asking for, a rate of SR89 to SR90 [per metre] will be more acceptable “(sic)

[36] In this regard, no answer came from the Defendant but the Plaintiffs again wrote on 18 November 2014 to the following effect:

Reference is made to the letter of offer addressed to us... dated 9 June 2014...

Please disregard the letter we addressed to you regarding same on 17 June 2014, as we still accept the offer.

Kindly proceed with the further procedures so that we can pay the land..." (sic).

[37] On 29 September 2015, it would appear that the hammer fell with regard to the agreement. The Defendant wrote:

"Please be informed that after further assessment and discussion the ministry has decided to withdraw the offer made to you of the sale of state land..."

Please note that a new offer will be made once survey work on the readjustment of the boundary line of the plot to be sold to you is completed..."

[38] In February 2016, the Defendant made a new offer for only two of the original parcels offered to the Plaintiffs.

[39] With regard to the documentary evidence and the testimony of the parties and their witnesses, I find that an offer for three parcels of land (Parcels J3700, J3701, and J3639) was firmly made to the Plaintiffs on 9 June 2014. All the conditions for the sale were contained therein. The "approval in principle" terminology is meaningless in the circumstances. The first of the three stages of the sale in the context of *Abdou* (supra) was therefore completed.

[40] The second stage of the prospective agreement was passed when the Plaintiffs on 18 November 2014 wrote to the Defendant to say that despite their early plea for reconsideration of the sale price, the offer for sale was accepted.

[41] The third stage of the agreement was the coincidence of the offer by the Defendant with the acceptance by the Plaintiff on 18 November 2014. Mr. Denis Barbé in his testimony actually stated the Plaintiffs were offered the three parcels of land in issue by the government and accepted the offer in 2014 but had not paid within the fourteen days stipulated. In terms of the provisions of Article 1583, the ownership of the three parcels

of land passed as of right from the Defendant to the Plaintiffs as soon as the price had been agreed upon, even if the land had not yet been delivered or the price paid. And even if the acts of the parties are construed as a promise of sale it is equivalent to a sale as the two parties have “mutually agreed upon the thing and the price” (see in this regard *Wilson v Teesdale* (1970) SR 88.

[42] There was therefore a meeting of minds and a contract. In this respect Article 1134 stipulates:

“Agreements lawfully concluded shall have the force of law for those who have entered into them.

They shall not be revoked except by mutual consent or for causes which the law authorises.

They shall be performed in good faith.”

[43] In respect of these provisions the parties are bound to give effect to the contract. Their obligations have the force of law.

[44] I now have to decide whether the agreement between the parties was breached. The Defendant has submitted that the non-payment of the contract price by the Plaintiffs amounted to a breach of the agreement. It however also admitted that the documented reason on file for the non-adhesion to the contract was that while finalising the deal with the Plaintiffs, the government had had a fresh request for the purchase of property by a third party, Dr. Barbé. That amounts to an equivocality and acceptance of a breach of the contract by the Defendant. I have in any case no reason to disbelieve the evidence of the two Plaintiffs that they tried to effect payment but that this was refused especially given the fact that the Principal Secretary engaged with them with regard to the third party to the agreement, Dr. Barbé wishing to purchase one of the properties they had already contracted to buy.

[45] If in any case, the Defendant wanted to rescind the contract for non-payment by the Plaintiffs, self-help was not available to them. They necessarily had to come to court to ask for the remedy as stipulated by Article 1184 of the Civil Code, the provisions of

which state that rescission must be obtained through proceedings but that the Defendant may be given time to meet his obligations. In *Intour S.R.L. v Emerald Cove* (CS 220/1998) [2000] SCSC 3 (10 February 2000) Perera J explained that there are two types of rescission within Article 1184 - commonly known as "résolution judiciaire" and "résolution de plein droit". The second exists when a clause for this purpose is inserted in the contract. We are in the present case not concerned with a rescission *de plein droit* (rescission by operation of law) as no such clause (*clause résolutoire*) was contained in the agreement between the parties in this case.

[46] Rescission could only therefore have happened by judicial pronouncement. Suffice it to say that it was not sought. Had it been sought, the court may well have given the Plaintiffs time to pay the transfer price as was held in *Wilson* (supra) as there was no formal demand for the money made by the Defendant. Hence, the agreement is still binding on the parties and remains so as long as the court has not pronounced on the dissolution of the contract. (See also in this respect *Phillips v Vista Do Mar* (1973) SLR 394, *Jumeau v Aanacoura* (1978) SLR 180, *Chang Tave v Talma* (1979) SLR 125 and *Confait v Panagary* (1984) SLR 75.

[47] The third issue raised is whether the court can order the specific performance of the contract. Article 1142 is couched in language that expresses the rule that performance of the contract in kind is the rule and the only exception would be when the execution of the obligation is impossible in which case an award of damages would be the remedy. In *Grandcourt and Ors vs Gill* (SCA 7 of 2011) [2012] SCCA 31 (07 December 2012) which concerned a contract to sell land, the Court of Appeal (Twomey JA) stated:

“[19] We view this case as arising purely out of a right of action under Article 1142 of the Civil Code, i.e. the obligation to perform. French jurisprudence has maintained that despite the provisions of Article 1142 there is an inherent right to specific performance corresponding with that contained in Article 1183:

“La partie envers laquelle un engagement contractuel n'a point été exécuté a la faculté de forcer l'autre à l'exécution de la convention lorsque celle-ci est possible” (Cass. civ. 1 16 janvier 2007).

[48] In the circumstances of this case, I cannot entertain any third party competing rights to the property that the Defendant had undertaken to transfer to the Plaintiffs as the third party, Dr. Barbé has not been joined to this case. Ultimately, I find the agreement by the Defendant to transfer to the Plaintiffs the three parcels of land binding. It was breached by the Defendant when it refused to accept payment of the consideration and their subsequent transfer to the Plaintiffs. In the circumstances the Plaintiffs are entitled to specific performance of the contract.

[49] I am not of the view that proof of damages has been made out by the Plaintiffs and I make no order in this respect.

[50] I therefore order the Plaintiff to pay the sum of SR 17,300 together with the associated stamp duty to the Defendant on or before the 30 April 2020 and the Defendant to transfer Parcels J3700, J3701 and J3693 to the Plaintiffs on or before the same date after the transfer price is paid. With costs.

Signed, dated and delivered at Ile du Port on 20 January 2020.

Twomey CJ