SUPREME COURT OF SEYCHELLES

Reportable
[2020] SCSC .366
CS 253/2008

MERSIA CHETTY — **Plaintiff**
(rep. by Kelly Louise)

versus

ELVIS CHETTY

PRISCILLE CHETTY
Executors of the estate of the late
Mariapen Srinivasan Chetty — **Defendants**
(rep. by Basil Hoareau)

Neutral Citation:	*Chetty v Chetty & Anor* (CS 253/2008) [2019] SCSC 366 (2 July 2020).
Before:	Dodin J
Summary:	Succession – *quotite disponible* – Plea *in limine litis* – commencement of proceedings against incorrect defendants – failure to disclose a cause of action – determination of *quotite disponible* in the absence of the proven value of the estate – certain relief sought cannot be claimed against the Defendants – insufficient evidence to determine the value of the *quotite disponible* - plea *in limine litis* accepted subject to conditions.
Heard:	24 January, 4 October 14 November 2019
Delivered:	2 July 2020

ORDERS

The plaint is dismissed but with the following conditions:

i. The Plaintiff shall not be prescribed from filing fresh proceedings against the proper defendants within a period of 6 months from the date of this Ruling.

ii. The Defendants in their capacities as executors shall not execute the Will until the expiration of a period of 6 months within which no fresh proceedings have been initiated and if proceedings have been initiated until the conclusion of such proceedings.

JUDGMENT

DODIN J.

[1] The Plaintiff, Mersia Chetty, is the daughter of the late Mariapen Srinivasan Chetty, ("the deceased"), who died testate on the 12 July 2007 in Seychelles. The Defendants are joint executors of the estate of the deceased and also the grandchildren of the deceased.

[2] The deceased drew up his last will and testament in which the deceased made provisions and gifts for the Plaintiff, the Plaintiff's brother, Levi Krishna Chetty and the Plaintiff's mother, Lea Chetty, now deceased. The Will also contained gifts and legatees to the Defendants and to three of the deceased's employees namely Sabrina Esparon, Joliff Orphee and Francis Marie.

[3] The Plaintiff avers in her plaint that:

i. the deceased had no right to disinherit her from his succession or reduce her lawful entitlement;

ii. she is entitled to a share as the daughter of the deceased in the compulsory share of his succession known as the reserve;

iii. the testamentary bequests made by the deceased to Elvis Raja Chetty, Priscille Saroj Chetty, Sabrina Esparon, Joliff Orphee and Francis Marie were in excess of the disposable portion;

iv. the testamentary bequest made by the deceased to his issue Levi Krishnan Chetty far exceeded his entitlement in equal shares with heirs of the same class namely the Plaintiff;

[4] The Plaintiff further avers in her plaint that she is entitled to a 25% share of the estate and that the Will in its entirety fails to make provisions in accordance with law of succession

for the establishment of the *quotite disponible,* the lawful entitlement of the Plaintiff and the allotment of the legal heirs who are his surviving spouse and his issues.

[5] In her prayers the Plaintiff is asking for the following reliefs from this Court:

i. To declare that the Plaintiff is entitled to 25% share in the succession of the deceased;

ii. To set aside the provisions made in the Will to the testamentary legatees outside the class of heirs of the deceased which exceed the *quotite disponible.*

iii. To order the Defendants to disclose and account for the totality of the estate of the deceased and to produce the estate bounty accounts and details to the Court.

iv. To, in so far as is practicable and fit in the circumstances, set aside those parts of the Will and to substitute provisions of the gifts in favour of the Plaintiff as per her lawful entitlement.

v. To order the Defendants to refrain from administering the estate as per the testamentary instructions on legacies, gifts, assets, both moveable and immovable, bank accounts, transfers of land held in escrow or pending bank accounts, cash, rents and any other property or entitlement of the deceased until they are fully instructed by the Court on how to distribute the bounty.

vi. To make any such orders as the Court thinks fit in adjustment of the succession to incorporate the Plaintiff into the class of lawful heirs of the deceased in order to realise her entitlement to the estate.

[6] In defence, the defendants raised a plea *in limine litis* in the following terms:

> *"The Plaint has been commenced against the wrong defendants in that a claim for reduction of a succession should be brought against the heirs who will suffer any reduction and not against the executors of the succession and*

as a result thereof the Plaint does not disclose a reasonable cause of action against the defendants and should be struck off."

[7] On the merits, the Defendants maintain:

i. that the deceased had the right under the law of succession to bequeath his properties to anyone by virtue of a will and testament;

ii. that apart from the persons named by the Plaintiff in the plaint, properties were also bequeathed to the Plaintiff's daughter Emilie Laura Chetty;

iii. Apart from the Will referred to in this Plaint, there is a second Will with regards to properties in India bequeathing them to the Plaintiff, Levi Krishna Chetty, S Jayalakshmi Chetty, Muthuvel Srinivasan Chetty, Srinivas Naveen Kumar, Murali Kannan Chetty, Elvis Raja Chetty and Ratha Nisanthi.

iv. The deceased had four children at the time of his death namely the Plaintiff, Levi Krishna Chetty, S Jayalakshmi Chetty and Muthuvel Srinivasan Chetty and as such the deceased was entitled to dispose of ¼ of his estate by Will.

v. That ¾ of the disposition made in the Wills should therefore be brought back into the hotchpot and be shared equally amongst the Plaintiff, Levi Krishna Chetty, S Jayalakshmi Chetty and Muthuvel Srinivasan Chetty.

vi. That the Plaintiff inherited properties under the Will and was not disinherited from the succession.

[8] The issues to be determined were addressed at length by learned counsel for the parties who also addressed the Court on the plea *in limine litis*. They come down to the following three fundamental questions which will allow this Court to determine whether all the prayers can be addressed:

i. Whether the plaint was commenced against the wrong defendants in that a claim for reduction of a succession should be brought against the heirs who will suffer any reduction and not against the executors of the succession;

ii. Can the Court determine this issue of "*quotite disponible*" without the executors or the plaintiff having established the actual value of the estate so that the value of the portion allotted to the workers can be established?; and

iii. Whether any of the above two issues are fatal to the plaint.

[9] Learned counsel for the Defendants, submitted that the case has been brought against the wrong parties and thus should be struck out. Learned counsel referred to Article 1029 of the Civil Code, which stipulates that:

> *'Executors shall represent the estate in all legal proceedings, and shall act in any legal action the purpose of which is to declare the will null.'*

He submitted that a case against the estate is one which could be brought against the *de cujus* during his lifetime but was not brought. In the present case, learned counsel submitted that the case for reduction could not have been brought against the *de cujus* during his lifetime because pursuant to Article 920 of the Civil Code, the right to a claim for reduction only arises at the time of the opening of the succession.

[10] Learned counsel submitted that the right to reduction therefore lies against those that have benefitted from the alleged excess of the disposable portion and not against the estate. Therefore this case should have been brought against Priscille Chetty and Elvis Chetty in their private capacity and Sabrina Esparon, Jodie Orphey, Francis Marie and Krishna Chetty as other beneficiaries. Learned counsel further submitted that although these other beneficiaries were not made defendants in the plaint, they could have been joined as parties by the plaintiff after the plea *in limine* was raised. This was, however, not done. He submitted that it is necessary that these other persons be a party to the proceedings as they may be affected by the judgment. In support of his submission, learned counsel referred to Article 109 of the Seychelles Code of Civil Procedure and the right to a fair trial as protected by Article 19(7) of the Constitution. He also cited the Court of Appeal's decision

in *Hall v Morel & Ors Civil Appeal* SCA22/2017 (Appeal from Supreme Court Decision CS 184/2011).

[11] On that point it is noted that learned counsel for the Plaintiff stated that she '*would leave this particular submission in the hands of the Court in view of the fact that there had been judgments in the Court of Appeal.*' It is also noted that the evidence adduced is consistent with the pleadings and well rehearsed in the respective arguments by counsel and need not be repeated in this judgment. The Court also determined that the plea *in limine litis* would be determined at judgment stage after hearing evidence.

[12] The plea *in limine litis raises* two issues: (1) against who does an action for reduction lie? and; (2) was the failure to join the other beneficiaries as defendants and the Defendants in their capacities as beneficiaries fatal to the claim for reduction?

[13] In the case of *Chetty v Chetty* (Civil Side No. 14 of 2008) a similar plea i*n limine litis* was raised. The substance of the plea *in limine* was that the plaint had been commenced against the wrong defendants on the ground that it was a claim for reduction of the succession granted to some heirs to be readjusted to enable the plaintiff to receive her rightful portion of the estate. The defendants thus sought that the plaint be struck out. Learned counsel for the Defendants, submitted that: *'much as there is no case law in support of the plea, the plea itself is trite law. All the people that would be affected by this action ought to be made parties to it.'*

[14] Honourable Egonde-Ntende CJ dismissing the plea *in limine* concluded that the key issue was whether the plaintiffs had a valid cause of action. He noted:

> *'It is trite law that for a plaint to disclose a cause of action it must show three elements. It must show that the plaintiff enjoyed a right. Secondly that such a right has been violated. And thirdly that the plaintiff is entitled to relief against the defendants'.*

[15] In that case, the Chief Justice considered that there was a valid cause of action, and that the plaintiffs were entitled to relief from the defendants in respect of at least some of the prayers in the plaint with the following added qualifications:

"Of course as was argued by Mr. Ally and conceded by Mr. Lucas, for the full, effectual and final determination of all matters in controversy it may be necessary that all heirs be joined to this action. Nevertheless that does not lead to the conclusion that Mr. Ally pressed upon this court, that the plaint in question did not disclose a cause of action. The necessity to join the heirs to the present action and whether a cause of action arises as against the present defendants are two matters that are separate and raise different legal considerations."

[16] In deciding the key question in issue in the present case, it is observed that the prayers sought in paragraph 8(iii) and (v) of the plaint in respect of accounting for the estate and refraining from administering the estate, relate to relief that the Plaintiff is entitled to claim against the Defendants in tier capacities as executors. The other prayers relate to the apportionment of the provisions of the Will to all the beneficiaries as well as determining the *quotite disponible*. It is not good drafting and not desirable to make claims in respect of conflicting demands in the same plaint unless it is clear that the parties in their separate and distinct capacities are able to address the different claims in that one capacity.

[17] Articles 109 and 112 of the Code of Civil Procedure provide as follows:

109. All persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally or in the alternative. And judgment may be given against such one or more of the defendants as may be found to be liable, according to their respective liabilities, without any amendment.

112. No cause or matter shall be defeated by reason of the misjoinder or non-joinder of parties and the court may in every cause or matter deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.

[18] Under article 112 the court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order

that the names of any persons improperly joined, whether as plaintiffs or defendants, be struck out, and that the names of any parties, whether plaintiffs or defendants, who ought to have been joined, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter, be added.

[19] Further article 112 favours not striking out a claim for failure to join other parties. The Court of Appeal has however taken a more restricted view of article 112. In *Hall v Morel (supra)*, Fernando JA stated in respect of a failure to join a third party whose interests would be affected by the relief sought:

> *"Further since the wife of the 2nd respondent is a co-purchaser of Title V 12077 and co-seller of Title V 11933, to pray for rescission without joining her as a party to the suit, violates the fair hearing principle, as rightly decided by the learned trial judge".*

[20] Robinson JA, who wrote a separate judgment, also dismissed the same appeal on this basis. She gave the following elaborated reasoning:

> *"After having considered the plaint, I am satisfied that the whole tenor and contents of it reveal that Mrs Hugette Sophola has interests in this case. However, I note with dismay that the plaint proceeded as if the second respondent is the alleged exclusive owner of the land comprised in title number V12077.*
>
> *I do not agree with the view of the appellant that I can proceed to determine the interests of the parties present, in as much as any decision on the issues in this case, will not only affect the interests of the second respondent but will also affect those of Mrs Hugette Sophola. In my view Mrs Hugette Sophola is an interested party whose presence may be necessary in order to adjudicate upon and settle all questions involved in the case.*
>
> *I observe that the plaint made reference to all the heirs in the estate of the late Mr. France Morel. The plaint averred inter alia that: "6. [...] at the time of the said sale the 1st Defendant did not have the consent of all the heirs of the late France Morel to dispose of the said property." I also observe that the remedies claimed by the appellant are remedies to which all the heirs are entitled. Since the appellant is praying for a judgment*

declaring inter alia that the sale of the Property to the estate by the executrix was null on account of "lack of consent from all the heirs", I am of the view that the said heirs are also interested parties whose presence may be necessary in order to adjudicate upon and settle all questions involved in the case.

In the circumstances, I hold the view that the failure to put both Mrs Hugette Sophola and the said heirs into cause was fatal to the plaint. I find that the learned trial Judge did not err.

I bear in mind that the dismissal of a plaint under section 112 of the Seychelles Code of Civil Procedure would be an extreme measure which, in my opinion, is not contemplated by the said section.

For the reasons given, I uphold the decision of the learned trial Judge that the appeal should be dismissed but for the reason that the failure to put both Mrs Hugette Sophola and the said heirs into cause, was fatal to the plaint".

[21] One may argue that since the court has discretion to order the joinder of third persons as defendants where the determination of the action would directly affect the third persons' legal rights or pecuniary interests. This argument is not legally unsound but its effect is to absolve a plaintiff from filing a proper and complete plaint which would correspond with the relief being sought. In my view the discretion under article 112 is not for the benefit of a plaintiff who deliberately leaves out a defendant against whom the plaintiff is seeking redress and whose interest would clearly be affected by the judgment as prayed for.

[22] In the case of *Wilmot v W&C French* (1971) SLR 326, Sauzier J concluded that the only reason which makes it necessary to make a person party to an action is so that he or she should be bound by the result of the action which cannot be effectually and completely settled unless he or she is a party. He also cited *Amon v Raphael Tulk & Sons Ltd. (*1956) 1 QB 357 in support.

[23] It must be further noted that section 6 of the Court's Act provides:

"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."

In the present case, given the impact of the orders sought on the other beneficiaries and the fact that the Defendants were being sued in their capacities as executors, the Court cannot entertain the prayers in paragraphs 8(i), (ii), (iv) and (vi) in the absence of the parties identified in paragraphs 6(iii) of the plaint and the fact that the 1st and 2nd Defendants were not brought in their capacities as beneficiaries to the Will.

[24] Consequently, the plea *in limine litis* is upheld in respect of and the plaint is dismissed in respect of paragraphs 8(i), (ii), (iv) and (vi) but subject to the following conditions:

i. The Plaintiff shall not be prescribed from filing fresh proceedings against the proper defendants within a period of 6 months from the date of this Ruling.

ii. The Defendants in their capacities as executors shall not execute the Will until the expiration of a period of 6 months within which no fresh proceedings have been initiated and if proceedings have been initiated until the conclusion of such proceedings.

[25] On the 2nd issue raised by learned counsel for the Defendants in respect of the same prayers this Court has to determine whether the failure on the part of the Plaintiff to lead evidence as to the value of the estate is fatal to the claim. Having upheld the plea *in limine litis* on the grounds above, albeit with conditions, a determination of this point would be purely academic. However, I shall express my opinion on the same so that the parties may, if they so wish, take guidance should the matter be pursued further.

[26] The relevant articles of the Civil Code are article 922 and 926 which state:

922. 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.

926. When the testamentary dispositions exceeds either the disposable portion or the part of that portion which would remain after deducting

the value of the gifts inter vivos, the reduction shall be made pro rata without distinguishing between universal and particular legacies.

Hence 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] It is clear that what matters when determining the *quotite disponible* is the total asset value of all the property as per article 922. It will therefore be necessary for the value of the deceased's property to be ascertained in order for the Court to make any reduction or adjustment order. The case of *Hall v Parcou* (CS 353/2009) [2017] SCSC 92 (07 February 2017) highlights that there may be situations where the Court is nevertheless able to make orders for reduction but that appears limited to instances where it is clear what the estate comprises of without further adjudication of its value.

[28] In the case of *Pragassen v Vidot (*CS 360/2005) [2009] SCSC 124 (02 July 2010) Renuad J noted:

"There is neither any pleading nor any evidence before this Court adduced during the hearing of this suit as to the value of the whole property of the deceased. Neither do we have the value of the gifted property. Hence this Court cannot determine the value of the gifted property in relation to the value of the whole property of the deceased in order to ascertain whether this falls foul of article 918 of the Civil Code of Seychelles. As it is the plaintiff who asserts, the onus is on him to prove that element. I find that the plaintiff has failed to do so".

[29] *In Hall v Parcou & Anor* (supra), Twomey CJ noted:

"The value of the estate comprising of the three alienated properties has not been established. In the absence of such value being established, I am only in a position to make limited orders."

[30] In *Bibi & Ors v Estate of Joseph Samuel Bibi* (CS 26/2017) [2019] SCSC 1052 (27 November 2019) the Court acknowledged the approach adopted by the Chief Justice in the *Hall* case but found on the facts in the *Bibi* case that such orders were not possible.

[31] The question therefore is whether the Court has enough facts before it to grant the prayers sought by the Plaintiff. On a review of the pleadings, evidence and submissions that answer is in the negative.

[32] The last issue is whether the Court should make orders in respect of prayers (iii), and (v). in respect of ordering a declaration of the accounts and refraining from making any apportionment. The appointment, powers and duties of executors are found in the following provisions of the Civil Code of Seychelles:

Article 1025

> *"The testator may appoint not more than three testamentary executors. Any executors appointed shall act as fiduciaries with regard to the rights of the persons entitled under the will, as provided by this Code, and also with regard to the distribution of the inheritance. The appointment of such executors shall be confirmed by the Court".*

Article 1026

> *"If the succession consists of immovable property, or of both immovable and movable property, and if the testator has not appointed a testamentary executor or if an executor so appointed has died or if the deceased has left no will, the Court shall appoint such an executor, at the instance of any person or persons having a lawful interest. A legal person may be appointed to act as an executor. But a person who is subject to some legal incapacity may not be so appointed".*

Article 1027

"The duties of an executor shall be to make an inventory of the succession to pay the debts thereof, and to distribute the remainder in accordance with the rules of intestacy, or the terms of the will, as the case may be.

He shall be bound by any debts of the succession only to the extent of its assets shown in the inventory.

The manner of payment of debts and other rights and duties of the executor, insofar as they are not regulated by this Code, whether directly or by analogy to the rights and duties of successors to movable property, shall be settled by the Court."

Article 1028

"The executor, in his capacity as fiduciary of the succession, shall also be bound by all the rules laid down in this Code under Chapter VI of Title I of Book III relating to the functions and administration of fiduciaries, insofar as they may be applicable".

Article 1029

"Executors shall represent the estate in all legal proceedings, and shall act in any legal action the purpose of which is to declare the will null. At the end of their function, they shall render account of their administration as provided for fiduciaries in the Chapter referred to in article 1028".

Article 1032

"The powers and duties of the executor shall not be transmissible to his heirs".

Article 1033

"If two or more executors have accepted the appointment, one on his own may act in the absence of the other or on his failure to act; they shall also be jointly and severally liable for the execution of the will unless there is agreement to the contrary".

Article 1034

"The costs incurred by the executor in the administration of the estate, and any other necessary expenses incurred, such as the affixing of seals, the drawing-up of the inventory and other costs relating to his functions, shall burden the succession".

[33] In the plaint, the Plaintiff acknowledged the appointment and confirmation of the testamentary executors, the Defendants, but did not raise any issue with respect of their capacity or performance which would justify the demand for the Court to interfere with their functions under the Civil Code. In fact it appears that the proliferation of matters placed before the Courts have had the effect of impeding the executors in their functions. I find prayers (iii) and (v) to be premature, without factual or legal basis and therefore devoid of merits.

[34] Furthermore, in view that the plea *in limine litis* has succeeded with appropriate conditions, I find no reason to grant prayers (iii) and (v) of the Plaint.

[35] This case is therefore dismissed subject to the conditions of paragraph 24 (i) and (ii) above.

[36] I make no order for costs.

Signed, dated and delivered at Ile du Port on 7 June 2020.

G Dodin J.