

SUPREME COURT OF SEYCHELLES

Reportable
[2020] SCSC 596
CS 99/2007

ELVIS CHETTY
(Executor of the estate of Mariapen Chetty)
(rep by Basil Hoareau)

Plaintiff

versus

MERSIA CHETTY
MERSIA CHETTY
(Executrix of the estate of Lea Chetty)
(represented by Kelly Louise)

1st Defendant

2nd Defendant

REGISTRAR OF LANDS

3rd Defendant

Neutral Citation: *Chetty v Chetty & Ors* (CS 99/2007) [2020] SCSC 596 (07 August 2020).

Before: Dodin J.

Summary: Order to declare a document of transfer illegal and contrary to the agreement between the Plaintiff and the 2nd Defendant.

Heard: 13 January, 25 January 2020. (Submissions 13, 21 July 2020)

Delivered: 7 August 2020

ORDER

JUDGMENT

DODIN J.

[1] The Plaintiff is the executor of the Estate of the late Srinivasen Chetty hereinafter referred to as “the deceased Plaintiff” who died in Seychelles on the 12th day of July 2007. The suit was commenced by the deceased. The Plaintiff substituted the deceased in accordance with section 178 of the Seychelles Code of Civil Procedure Act. The 2nd

Defendant Lea Chetty hereinafter referred to as “the deceased Defendant” also died in Seychelles on the 3rd day of June 2018 and is substituted by the 2nd Defendant who is the executrix of her estate agreeably with section 178 of the Seychelles Code of Civil Procedure Act. The 1st Defendant is the legitimate daughter of the deceased Plaintiff and the deceased Defendant and also recipient of the transfer by the deceased defendant of the half share now in contention. The 3rd Defendant, the Land Registrar has not put up any defence after stating to Court that the 3rd Defendant will abide by finding of the Court.

[2] The facts of the case are well rehearsed in the submission of the Plaintiff as summarised hereunder.

[3] The suit is based on a deed of transfer, dated 27 January 1961 (hereinafter the deed of transfer), whereby the deceased Plaintiff transferred parcel V5494 (hereinafter the property) to the deceased Defendant subject to the express conditions that; (i) the deceased Plaintiff kept the usufructuary interest of the property to himself; and (ii) the deceased Defendant was to grant the deceased Plaintiff or his heirs right of first refusal in the event that the deceased Defendant were to sell the property.

[4] The 3rd Defendant subsequently opened a register under the Land Registration Act in respect of the property by virtue of section 10 of the Land Registration Act and a file was open containing the document dated the 27th of January 1961. On the 22 of February 1996, the deceased Defendant, with the consent of the deceased Plaintiff, who waived his right of first refusal, transferred an undivided half share in the property to Levi Krishna Chetty, the 1st Defendant and Elvis Raja Chetty in the following manner: a. One fifth to Levi Krishna Chetty; b. One fifth to the 1st Defendant; and c. One tenth to Elvis Raja Chetty.

[5] On 27 July 2006, the deceased Defendant, further sold her half share in the property to the 1st Defendant for the consideration price of SR800,000 without granting the deceased Plaintiff, the right of first refusal. On 16 October 2006, the 1st Defendant executed a document granting usufructuary interest to the deceased Defendant upon the entire property. The 3rd Defendant registered the usufruct granted to the deceased Defendant by making an entry thereof in the encumbrance section of the register in respect of the

property and the 3rd Defendant opened a register in respect of the usufruct and filed the document granting the usufruct to the 2nd Defendant in the file of the property.

[6] The three issues now arising before this Court are:

- i. Whether there was a breach of the deed of transfer by the fact that the deceased Defendant transferred and sold her undivided half share in the property to the 1st Defendant without first granting the deceased Plaintiff the right of first refusal;
- ii. Whether the usufruct granted to the deceased Defendant by the 1st Defendant was illegal;
- iii. Whether the subsequent opening of the register in respect of the usufruct along with the entry of the usufruct as an encumbrance in the register of the property are all illegal.

[7] Learned counsel for the Plaintiff submitted that the determination of the case hinges principally on the interpretation to be given to the deed of transfer, Exhibit P3, more specifically the part of the deed of transfer which reads “[Il] est entendu entre les parties qu’an cas de vente du dit bien par l’aquereur, elle devra donner preference au vendeur ou a ses heritiers”. Learned counsel referred the Court to Article 1135 of the Civil Code states which states: “Agreement shall be binding not only in respect of what is expressed therein but also in respect of all the consequences which fairness, practice or the law imply into the obligation in accordance with its nature”. Learned counsel argued that on the basis of fairness, it is implied that the option of first refusal was to be applicable even if the deceased Defendant was to transfer and sell only an undivided share in the property.

[8] Learned counsel submitted that the above interpretation of the deed of transfer is supported by the fact that in 1996 when the defendant transferred and sold an undivided half share in the property to Levi Krishna Chetty, Elvis Chetty and the 1st Defendant, the deceased Plaintiff also executed the instrument of transfer whereby the deceased Plaintiff expressly declared that he waived his option to purchase. (Exhibit P4). Hence it is the

Plaintiff's case that during the lifetime of the deceased Plaintiff, the option of first refusal in the event of a sale of the property or any part thereof, should have been offered solely to the deceased Plaintiff. The option of first refusal was to be offered to the deceased Plaintiff's heirs only after the demise of the deceased Plaintiff.

[9] Learned counsel submitted that the 1st and 2nd Defendants' contention that the 1st Defendant was an heir of deceased Plaintiff at the time the deceased Defendant sold and transferred the undivided half share in the property to the 1st Defendant on the 27th July 2006, despite the deceased Plaintiff being alive at that time is incorrect. Learned counsel referred the Court to Article 1156 of the Civil Code of Seychelles which states: *"In the interpretation of contracts, the common intention of the contracting parties shall be sought rather than the literal meaning of the words. However, in the absence of clear evidence, the Court shall be entitled to assume that the parties have used the words in the sense in which they are reasonably understood"*. In accordance with paragraph 2 of Article 1156 the Court is entitled to assume that the deceased Defendant have used the word *"heritiers"* (heirs) in the sense they are reasonably understood. In its reasonable sense the word *"heirs"* connotes a person who has inherited from a deceased person. It is argued that a person does not become an heir of another person whilst the latter is still alive. Therefore, learned Counsel submitted that the 1st Defendant was not an heir of the deceased Plaintiff on 27 July 2006, since the deceased Plaintiff was still alive.

[10] Learned counsel submitted that it is also worth noting that the 1st Defendant was well aware of the rights of first refusal of the deceased Plaintiff, in view that she was party to the transfer effected on 22 February 1996 whereby the deceased Plaintiff made the declaration that he was waiving his option to purchase the undivided half share that was being transferred and sold by the deceased Defendant as per Exhibit P4. Learned counsel therefore submitted that the transfer and sale of the undivided half share effected by the deceased Defendant to the 1st Defendant for the consideration price of Seychelles Rupees Eight Hundred Thousand, by the instrument of transfer dated 27 July 2006, was contrary to the deed of transfer and should therefore be rescinded.

- [11] Learned counsel further referred the Court to the case of Barry Lee Cook and Another v/s Philip Lefevre [1982] SLR 416 where the Supreme Court made reference to French Jurisprudence, more specifically the comments on Articles 1156 to 114 in *JurisClasseur*, para 29, which reads - “[L]es juges examinant également le comportement des parties postérieur au contrat, pour déterminer qu’elles ont voulu lui donner”. Learned counsel further referred the Court to Chow vs Bossy (7 of 2005) [2006] SCCA 19, where the Court of Appeal referred, with approval, to the decision in Cook vs Lefevre (supra). Learned counsel submitted that the manner of the transfer and sale of the undivided share, of the deceased Defendant, in the property on 22 February 1996 is proof of the conduct of the deceased Plaintiff and deceased Defendant subsequent to the deed of transfer.
- [12] Learned counsel submitted that in the first transfer the deceased Plaintiff declared that – “*I, the undersigned, Mr. Srinivasen Chetty, the Usufructuary, hereby consent to the above transfer and waive my option to purchase*”. It is clear from the said declaration that the deceased Plaintiff was consenting to, and waiving his option to purchase, in respect of, the whole transfer of the undivided share which was being effected by virtue of Exhibit P4 including the transfer being effected to Levi Krishna Chetty and the 1st Defendant. This is clear proof that it was the intention of the deceased Plaintiff and deceased Defendant that the word “*heritiers*” (heirs), as used in the deed of transfer, was referring to heirs of the deceased Plaintiff after his death.
- [13] Learned counsel submitted that in view that the deceased Defendant has passed away the issue regarding the usufruct granted to the deceased Defendant has become obsolete since no damages have been claimed in respect of the illegal creation of the usufruct.
- [14] In respect of relief sought, learned counsel moved the Court to (i) declare that the 2nd Defendant should offer the half share in the property to the executor of the estate of the deceased Plaintiff at the market value of the half share at the time of the purported sale to the 1st Defendant in order that the executors of the estate may distribute this right in accordance with the will; Further, in accordance with the relief prayed learned Counsel submitted that in view that the deceased Defendant transferred and sold an undivided half

share in the property to the 1st Defendant for SR800,000, it is clear that the deceased Defendant intended to sell the property at the said price. Consequently the Court in ordering that the offer should be made to the estate of the deceased Plaintiff should order that the offer be made at the price of SR800,000 and not at the market value of the half share at the time of the purported sale.

[15] Learned counsel for the 1st and 2nd Defendants submitted the issues to be determined by this Court are:

1. Was the transfer in breach of the usufructuary interest as expounded above?
2. Was the 1st Defendant an 'heir' at the time of the sale?
3. When the deceased passed, did he retain this usufructuary interest?
4. If the sale is in fact found to be in breach of the usufructuary interest, can the court compel the 2nd Defendant to offer her half share in the property to the Plaintiff?

[16] Learned counsel submitted that the case for the 1st and 2nd Defendants is that the transfer was not effected in contravention of the usufructuary interest of the Plaintiff. Learned counsel submitted that the 1st Defendant, being a daughter of the late Mariapen Chetty, the deceased Plaintiff, is an heir for all intents and purposes by virtue of Article 731 of the Civil Code which states inter alia that "*succession shall devolve upon the children of the deceased....*" On a proper construction of the usufructuary right, what is being sought is the preservation of the property to either the deceased Plaintiff or his heirs as can be ascertained by virtue of article 731. It is therefore the contention of the Defendants that, bearing these provisions in mind, the transfer could not have been in contravention of the usufructuary interest.

[17] Learned counsel further submitted that if the court is minded to find that the transfer is in breach of the above-mentioned interest, the following should happen to the half share which subject of the transfer in this matter. It is the submission of the Defendants that As a usufructuary interest only subsists as long as the beneficiary of the same is alive and since the deceased Plaintiff passed away in July 2007 by virtue of Article 617 of the Civil

Code, such interests are terminated upon the death of the usufructuary. The Defendants therefore submit that the Plaintiff cannot claim the benefit of the exercise of this interest as this would contravene Article 617 and further cannot compel the 2nd Defendant to offer her half share to the Plaintiff.

[18] Learned counsel further submitted that should the Court find that the sale was effected at the time, in contravention of the usufructuary interest, the only legally sound decision the Court can maintain would be to rescind the sale so that the property would revert back to the seller, herein the deceased, represented by its Executrix, Mersia Chetty, the 2nd Defendant was the beneficiary of the sale transaction the Plaintiffs are now seeking to be set aside. Learned counsel submitted that the Court cannot, in line with the law as applicable, compel the 2nd Defendant to offer her shares to the deceased's Defendant's Executor as this would go against the fundamental principles of the absolute right of ownership of the 2nd Defendant and contravene Article 617 of the Civil code. Hence if the Court is of the belief and finds that the sale as effected should not have taken place it should restore the parties to their position before the transfer and the half share in the property should devolve to the 2nd Defendant forthwith for distribution in accordance with the rules of succession.

[19] Learned counsel submitted that whilst the sale to the 1st Defendant can be rescinded by the Court should the Court find that it was effected in breach of the usufructuary interest, there is no obligation for the 2nd Defendant to sell her shares once they revert back to her. Further, in any event, because of the nature of this right being attached to the lifetime of the beneficiary of the same, it is clear that upon the death of Mariapen Chetty this right terminated with him and cannot therefore be availed of by the Plaintiff so as to compel the Defendants to offer her shares to the Plaintiff at this present time.

[20] It is not in dispute that the transfer of the land parcel V 5494 contained a clause compelling the 2nd Defendant to make to the deceased Plaintiff or his heirs an offer of first refusal in the event of the 2nd Defendant wishing to sell the land. This process was followed by the 2nd Defendant when she sold shares in the land to Levi Chetty (1/5), Mersia Chetty (1/5) and Elvis Chetty (1/10). In fact that transfer only proceeded after the

deceased Plaintiff had waived his right of first refusal formally. In respect of the transfer of the deceased Defendant's half share to the 1st Defendant which took place whilst the deceased Plaintiff was still alive, no such offer was made and hence no waiver by the deceased Plaintiff was secured hence this plaintiff.

[21] The 1st and 2nd Defendants do not contest the validity of that clause of first refusal in favour of the deceased Plaintiff or his heirs. Their contention is that in any event since the 1st Defendant, the purchaser, is an heir the provision of that clause has been met, hence the transfer was lawful. In order to determine whether there was a breach of the deed of transfer by the fact that the deceased Defendant transferred and sold her undivided half share in the property to the 1st Defendant without first granting the deceased Plaintiff the right of first refusal a determination as to whether at the time the 1st Defendant was a heir must be ascertained.

[22] The Cambridge American Dictionary define an heir as

“a person who will receive or already has received money or property from another person at the time of that other person’s death”.

The same Cambridge Business English Dictionary (Law) defines an heir as

“the person who legally receives money, property, or possessions from someone who has died”.

Both the Collins Dictionary and The Free Dictionary define an heir in civil law as

“the person legally succeeding to all property of a deceased person, irrespective of whether such person died testate or intestate, and upon whom devolves as well as the rights the duties and liabilities attached to the estate”.

[23] The generic use of the word or term heir is as defined by the Cambridge American Dictionary which includes a person who stands to inherit from a person who may still be alive. The Cambridge Business English Dictionary (Law), the Collins Dictionary and The Free Dictionary however are more emphatic in their definition that an heir is someone

who succeeds upon the death of another. Chapter I Title I of Book of the Civil Code of Seychelles provides an insight into when someone can become an heir.

“Article 718

A succession shall open upon the death of a person. The succession shall open in the place where the deceased had his domicile.”

[24] Learned counsel referred the Court to article 731 which states

“Article 731

“Succession shall devolve upon the children and other descendants of the deceased, his ascendants, his collateral relatives and upon the surviving spouse in accordance with the order and rules hereinafter established.” [Emphasis mine].

It is obvious that despite the sometimes wide use of the word heir to refer to a descendant of a living person, the legal notion of an heir is the person who survives and succeeds a deceased person. It makes good sense that a person does not become an heir before the death of the deceased because the exact identity of the persons entitled to inherit is determined only at the death of the deceased. Hence the 1st Defendant was not an heir at the time of the transfer of the deceased Defendant’s half share to her. I so find.

[25] Further, on a careful reading of transfer and the clause in question I find that the deceased Plaintiff did not intend to give the deceased Defendant a free hand to choose whether to make a first offer to him or to any person who would be a heir upon his death. It is more likely that the first offer must be made to the deceased Plaintiff and only upon his demise could it be made to one or more of his heirs. This is evident in the way he waved his right to first refusal without referring to or consulting the persons who could succeed to his estate after his demise.

[26] I am also mindful of Article 1156 of the Civil Code of Seychelles as quoted above by learned counsel for the Plaintiff which states: *“In the interpretation of contracts, the common intention of the contracting parties shall be sought rather than the literal*

meaning of the words. However, in the absence of clear evidence, the Court shall be entitled to assume that the parties have used the words in the sense in which they are reasonably understood”. See also article 1135 of the Civil Code as reproduced above by learned counsel for the Plaintiff.

[27] The question now is whether the breach of that clause was fatal and nullified the transfer. In that respect it is important to determine whether this was a fundamental and operative clause of the transfer of the land to the deceased Defendant. Considering the circumstances it would appear so because on the first transfer of the shares to Krishna Chetty, Mersia Chetty and Elvis Chetty, she found it necessary to apply that provision and make the offer first to the deceased Plaintiff who formally waved his right of first refusal before the deceased Defendant proceeded with that transfer. There is no evidence or indication that since those transfers there had been any changes which had rendered that clause less applicable or reduced its strength as an operating condition of the transfer. Therefore breach of this provision was fatal to the contract making it void ab initio.

[28] Learned counsel for the Plaintiff submitted that upon cancellation of the transfer, an offer of first refusal should be made to the Plaintiff as per the initial transfer in the same sum of SR 800,000. Learned counsel for the 1st and 2nd Defendants on the other hand argued that the half now remains on the name of the 2nd Defendant to be distributed as part of her estate. In his further submission learned counsel for the Plaintiff submitted that by selling to the 1st Defendant, the 2nd Defendant has demonstrated a clear intuition to sell her undivided half share and she did so by breaching the contractual obligation towards the Plaintiff. Now the Plaintiff wants specific performance by having the offer of first refusal made to the Plaintiff's estate.

[29] Specific performance is an equitable remedy requiring a party to a contract to perform his or her part of the bargain as required by provisions of the contract. As with all equitable remedies, orders of specific performance are discretionary, so their availability depends on its appropriateness in the circumstances. Generally such order are granted when damages are not an adequate remedy and in some specific cases such as land the other

party stands to lose the immovable property for which damages would not be appropriate since each land is a unique property.

[30] In practice, specific performance is most often used as a remedy in transactions regarding land, such as in the sale of land where the vendor refuses to convey title. The reason being that land is unique and that there is not another legal remedy available to put the non-breaching party in the same position had the contract been performed. However there must be an obligation upon the seller to sell the property to the buyer such as a promise of sale or the seller refusing to convey the title when the buyer has performed his part of the transaction.

[31] In this case, there was no obligation on the 2nd Defendant to sell her half share of the land. The clause only placed an obligation upon the 2nd Defendant to make a first offer of refusal to the Plaintiff in the event she decides to sell. What this Court has determined is not that the 2nd Defendant has failed to sell the property to the Plaintiff but that she has failed to apply the provision of making first offer of refusal to the Plaintiff. Having failed to abide by that provision the direct sale to the 1st Defendant is void *ab initio* but the decision as to whether to sell or not still lies with the 2nd Defendant now deceased. In other words although the 2nd Defendant in her lifetime had shown her desire to sell her half share to the 1st Defendant albeit in breach of her contract to the Plaintiff, the decision as to whether she still wanted to sell remained with her as the contract does not compel her to sell but only if she decides to sell, the Plaintiff is entitled to first refusal.

[32] The limits of specific performance in this contexts is narrow. Moreover, performance based on the personal judgment or abilities of the party on which the demand is made is rarely ordered by the court. It would therefore now be upon the 2nd Defendant to decide whether to sell or to keep her half share of the property but if she was to sell she had to abide by the provision of first refusal to the Plaintiff. Consequently, other than nullifying the transfer to the 1st Defendant, the Court cannot order specific performance in this case.

[33] In respect of the usufructuary interest as noted by both parties and judicial notice is taken by the Court, both the Plaintiff and the 2nd Defendant are now deceased and there is no claim for damages. It is therefore unnecessary to determine the legality of the grant of

usufructuary interest as it extinguished upon the death of the Plaintiff and the 2nd Defendant so that as at now it does not exist as a matter of law. Consequently, since this matter has been going on for more than a decade, I find that it would do no harm to order the Land Registrar to cancel the usufructuary interest registered in favour of the Plaintiff and the 2nd Defendant if the said cancellations have not yet been made.

[34] Consequently, I find the transfer by the deceased Defendant to the 1st Defendant to be in breach of the contractual obligation for the deceased Plaintiff to have the first refusal. Since I have found that the provision was fundamental to the contract of sale to the deceased Defendant, I therefore find that the breach was fatal and the transfer based on it was illegal. I therefore find the transfer of the half share by the 2nd Defendant to the 1st Defendant to be null and void *ab initio* and I so declare.

[35] The 3rd Defendant, the Land Registrar, is hereby ordered to cancel the transfer made by the 2nd Defendant to the 1st Defendant dated 27th July 2006 so that the half share remains on the name of the 2nd Defendant. Also in conformity with paragraph 33 above, the Land Registrar is ordered to cancel all usufructuary interests in favour of the Plaintiff and the 2nd Defendant as they are both deceased.

[36] I award costs to the Plaintiff.

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

Dodin J.