SUPREME COURT OF SEYCHELLES

Reportable
[2021] SCSC 651
CS78/2007

In the matter between

MERSIA CHETTY representing the Estate of Lea Chetty — **Plaintiff**
(rep. by Kelly Louise)

and

THE ESTATE OF MARIAPEN CHETTY
Represented by Priscille Chetty and Elvis Chetty — **Defendants**
(rep. by Basil Hoareau)

Neutral Citation:	*Chetty v Chetty* (CS 78/2007) 2021 SCSC 651 (10 September 2021).
Before:	Dodin J.
Summary:	Whether there was joint ownership of land parcel V 5497- whether land was matrimonial property – social partnership (societe de fait) - whether transfer null and void.
Heard:	6, 7, 12 August, 10 September, 19 November 2020.
Delivered:	12 October 2021

ORDER

It has not been established on the balance of probabilities that land parcel V5497 and the business thereon were partnership property destined and designed to be managed and shared accordingly at the end of the partnership.

The transfer of the land to the 2nd Defendant was not unlawful, null or void.

The Plaint is dismissed with cost to the Defendant.

JUDGMENT

DODIN J.

The Parties:

[1] Mersia Chetty is the daughter of the late Lea Chetty and the late Mariapen Srinivasen Chetty. Lea Chetty married the late Srinivasen Chetty the previous proprietor of land parcel V5497 on the 5th day of June 1965. Priscille Chetty is the executrix of the estate of the late Srinivasen Chetty. Elvis Chetty is the grandchild of the late Srinivasen Chetty and current proprietor of land parcel V5497.

The Pleadings:

[2] By a Plaint filed prior to her death, Lea Chetty, now represented by Mersia Chetty claimed as follows:

> 1. *Mrs. Lea Chetty, the Plaintiff hereinafter was a business-woman of Beau Vallon, at all material times. The 1st Defendant, is a businessman of Huteau Lane, Victoria, the 2nd Defendant is an Attorney-at-law.*
>
> 2. *The Plaintiff married the 1st Defendant on the 05th day of January 1965, at Huteau Lane, Victoria. The 2nd Defendant is the grandson of the Plaintiff and 1st Defendant.*
>
> 3. *On the 11th day of August 1988, absolute title was registered in favour of the 1st Defendant, in respect of land parcel V5497, situated at Albert Street, Victoria, Mahe.*
>
> 4. *The said land was purchased through the 1st Plaintiff and 1st Defendant's pooling their resources, their monies, their joint work and efforts and thereby establishing a shop. The Plaintiff and the 1st Defendant jointly constructed and established the shop on the said land. It was agreed that the afore-mentioned properties belonged jointly to the Plaintiff and 1st Defendant.*
>
> 5. *The said shop was operated through companies and in 1988, through M Srinivasan Chetty & Sons (Pty) Ltd, a locally registered company of which the said Plaintiff and 1st Defendant are registered as shareholders.*

6. *In the months of July, August, September, October and November 2006, Plaintiff and 1st Defendant became increasingly estranged as husband and wife and suffered matrimonial acrimony.*

7. *On the 16th of October 2006, Plaintiff attempted to register a restriction against the transfer or assignment of the said land parcel V5497, which remains in the office of the Registrar of Lands, to date and was not registered by the said Registrar.*

8. *On the 13th of November 2006, the Plaintiff filed divorced proceedings as against the 1st Defendant in DV 145 of 2006. Plaintiff filed several civil actions, including Cs no 330 of 2006 and Cs327 of 2006 to protect her properties as against the 1st Defendant on the 6th September 2006 and the 5th of September 2006, respectively.*

9. *On the 5th day of October 2006, the 1st Defendant, in an extraordinary general meeting of the shareholders of M Srinivasan Chetty and Sons (Pty) Ltd, acting through his proxy Basil Hoareau of Belombre and 2nd Defendant, removed the Plaintiff both as Secretary to the said company and a Director thereof, replacing Plaintiff with the 2nd Defendant.*

10. *On the 29th day of September 2006, the 1st Defendant, without the knowledge and with consent of the Plaintiff transferred the said property and building, namely land parcel V5497, to the 2nd Defendant for the purported sum of R1,000,000/-.*

11. *Plaintiff avers that the said transfer was unlawful and a fraud against Plaintiff, practiced by the 1st and 2nd Defendant, calculated to deprive her of ownership and interest in the said land parcel and building situated thereon.*

Particulars

a) *The said transfer was made contrary to the original mutual agreement between the Plaintiff and 1st Defendant.*

b) *The Plaintiff was not consulted, nor informed of the said transfer between her husband and grandson.*

c) *The 1st Defendant and 2nd Defendant were aware of the matrimonial difficulties and property disputes between the Plaintiff and 1st Defendant. They had knowledge of Plaintiff's rights and interest in the said property.*

d) *The purported transfer of R1,000,000/- to the 1st Defendant by the 2nd Defendant was a sham.*

e) *The 1st and 2nd Defendant had knowledge of the impending divorce proceedings and that matrimonial property adjustment orders would be sought.*

f) The 1st and 2nd Defendant jointly, participated in the said fraud to deprive Plaintiff of her ownership and interests.

g) The 1st Defendant practiced the said fraud which was accepted by the 2nd Defendant.

12. Plaintiff avers that the 1st and 2nd Defendant are liable to Plaintiff in law

AND Plaintiff prays this Honourable Court for the following orders;

a) To order that the transfer of land parcel V5497 from 1st Defendant to 2nd Defendant made on the 29th day of September 2006 is null and void and be set aside.

b) To order that land parcel V5497 be transferred to the joint names of the Plaintiff and 1st Defendant.

OR

c) To order that the land parcel is transferred to the 1st Defendant.

AND

d) To declare Plaintiff's right and interests in the said land parcel.

e) To make such orders that are just and fair in the circumstances.

AND

f) To make orders in respect of costs and interests.

[3] The Defendants contested the averments contained in the Plaint raising the following defence:

1 Save that it is denied that the Plaintiff is a business woman Paragraph 1 of the plaint is admitted.

2 Paragraph 2 of the Plaint is admitted.

3 Paragraph 3 of the plaint is denied and the Plaintiff is put to the proof. The 1st Defendant avers that absolute title in respect of parcel V5497 was registered in favour of the late Mariapen Srinivasan Chetty (hereinafter the "deceased") before 1988.

4 *Each and every allegation contained in paragraph 4 of the plaint is denied. The Defendants further avers that at the time parcel V5497 was purchased by the deceased, the deceased was not married and or living with the Plaintiff.*

5 *Save that the Plaintiff is and the deceased was shareholders in Srinivasan Chetty & Sons (Pty) Ltd paragraph 5 of the Plaint is denied. The Defendants further avers that the said company Srinivasan Chetty & Sons (Pty) Ltd was only incorporates in 1988, and not at the time Parcel V5497 was purchased.*

6 *Paragraph 6 of the Plaint is denied. The Defendants avers that the deceased bore no ill will towards the plaintiff.*

7 *Paragraph 7 of the plaint is denied.*

8 *Save that it is denied that the properties are the Plaintiff's, paragraph 8 of the Plaint is admitted.*

9 *Paragraph 9 of the plaint is admitted. The Defendant further avers that the said paragraph is irrelevant to the present cause of action.*

10 *Paragraph 10 of the plaint is admitted. The Defendants aver that there was no need to inform or to get the consent of the Plaintiff to effect the transfers the 1st Defendant was the sole owner of parcel V5497.*

11 *Save that paragraph 11 (b) of the plaint is admitted, each and every other allegation contained in paragraph 11 of the plaint is denied and the Plaintiff is put to the proof.*

12 *Paragraph 12 of the plaint is denied.*

WHEREFORE the Defendants pray this Honourable Court to dismiss the Plaint with costs.

Witnesses' Testimonies:

[4] For the Plaintiff;

i. Mersia Chetty, executrix of the estate of the Plaintiff, testified that the parcel V5497 was registered in the name of Srinivasen Chetty who was

married to Lea Chetty but she had no knowledge at the time of the particular transfer. She admitted that the land was purchased in 1957 in the sole name of Srinivasen Chetty. Srinivasen Chetty married Lea Chetty in 1965. Srinivasen Chetty sold the land to Elvis Chetty in 2006. Lea Chetty filed for divorce in March 2007. Srinivasen Chetty died on 12th July 2007 and the divorce was never concluded. She maintained that Lea Chetty was a business woman involved in the business together with her husband Srinivasen Chetty and she was shocked when she found out that the land had been transferred to Elvis Chetty.

[5] For the Defendants several witnesses were called to testified:

i. Mr Hoareau, the Deputy Registrar-General testified that parcel V5497 was registered on the sole name of Elvis Raja Chetty of Le Niole since September 2006 by Srinivasen Chetty who had an absolute title and no other person had any right in the property.

ii. Elvis Chetty, the 2nd Defendant testified that parcel V 5497 was transferred to him by Srinivasen Chetty for the sum of SCR 1,000,000/- paid by his father Levi Chetty, on the 13th September, 2006. He was present when payment was made by his father. He also did a diligence check which revealed that Srinivasen Chetty purchased the land for the sum of SCR 30,000, paying SCR 20,000/- from his own funds and the remaining SCR 10,000 from a friend whom he later repaid. He does not recall the late Lea Chetty being involved in the business but recalled her as a housewife.

iii. David Michel Chetty testified that he was born in 1948 and remembers his cousin Lea Chetty, then Pillay, living with his family at Bel Air. In 1955 Lea gave birth to Mersia Chetty and then moved to Albert Street. Then Lea went to live at Huteau Lane with Srinivasen Chetty and had another child Levi Krishna Chetty in 1959. As far as he recalled, Lea Chetty took care of the house but never saw her working in the shop.

iv. Frank Ally, then an Attorney-at-Law and Notary, testified that he drew up the transfer of land parcel V5497 on the instructions of Srinivasen Chetty and signed as attorney on the 14th September, 2006 at Huteau Lane. The transfer was from Srnivasen Chetty to Elvis Chetty for the sum of SCR 1 million. He had previously conducted a search at the land registry and found that Srinivasen Chetty was the sole owner with an absolute title and there was no encumbrance or restriction thereon.

v. Levi Krishna Chetty testified that he had lived at Huteau Lane since birth in 1959. As far as he can recall, his mother was a housewife and his father was a businessman running a shop first as sole trader and later formed a company. It was always the intention of his father to transfer the land and business thereon to Elvis Chetty and after negotiations the transfer was made by Honourable Frank Ally on the instructions of his father in September 2006 His father died in July 2007.

[6] All exhibits adduced were accepted on all sides as authentic and were not in contention.

Submissions:

[7] Learned counsel for the Plaintiff submitted as follows:

i. The Plaintiff's case is that on or about 14th September 2006, the 1st Defendant sold parcel V5497, located at Albert Street in Victoria to the 2nd Defendant through a transfer instrument, without the knowledge and or consent of Lea Chetty – at the time the wife and partner in fact of her husband Mariapen Chetty, now represented by the 1st Defendant. The Plaintiff's case continues in that, she deems this transfer to be one of fraudulent nature in view of the fact that Lea Chetty had invested monies in the property by working jointly with her husband, herein the 1st Defendant, who she had met and had a relationship with him as far back as 1955 – the date of birth of their daughter, Mersia Chetty -, and had thereby acquired an

interest in the property by virtue of their common and or shared endeavors as partners.

ii. *The Plaintiff submits that the transfer to the 2nd Defendant was effected without due and proper and consideration of Lea Chetty's vested legal interests in the above-mentioned property, this despite the 2nd Defendant holding in his evidence before this court that he was satisfied upon conducting his due diligence that the Plaintiff had no legal interest in the property because it had been purchased by way of a Mortgage which charge was secured over the above-mentioned property, parcel V5497. The Plaintiff submits however, that the sums generated for the repayment of this charge was so generated by both Lea Chetty and her husband at the time, as both of them were working as merchants in business together at the time, in order to pay discharge the obligations with regards to the above-mentioned charge. The Plaintiff submits that the fact that the 2nd Defendant found it necessary and considered the interest the Plaintiff at the time of the sale shows that there is an element of knowledge of the same on the part of the 2nd Defendant that the Plaintiff at the time at the very least, may have had a vested interest – despite not being yet placed on the Land Register – in parcel V5497. The Plaintiff submits that Lea Chetty did have such a vested interest in the property.*

iii. *In response to the case of the Plaintiff, the Defendants maintained the position that according to them, the Plaintiff at the time – Lea Chetty – had no interest in the property, and was according to them not entitled to any such interest in the property because she never worked with her husband herein the 1st Defendant in the business and in fact according to them, was only a housewife. To that end the witnesses for the Defendants' case testified to the effect that according to them, Lea Chetty had been but a housewife.*

iv. *Elvis Chetty the grandson of the Late Lea Chetty, testified that his grandmother had told him that she never worked in the business with her then husband. The Plaintiff submits that this representations being alleged are clearly in opposition of the*

pleadings in the case before this court which clearly and unambiguously states that according to Lea Chetty at the time of filing this matter, she was a business partner to her husband in all matters and both worked in the family businesses from the 1960's – before the coming into effect of the companies Act 1972 – and continued to do so for years after in numerous companies thereafter including but not limited to those companies whose incorporation documents have been produced before this Court including but not limited to the Company Ms. Chetty and Sons (Proprietary) limited.

v. *The Plaintiff submits that in view of the fact that it is Mr. Elvis Chetty the 2nd Defendant who received the benefit of the sale of parcel V5497 as the transferee therein, it is clear that any representations he makes with regards to this matter would be made with the intent to maintain the status quo vis a vis this particular transfer which clearly is in his interest. The Plaintiff denies that any such representations that she never worked were ever made and claims this to be untrue and not in line with what actually happened between the Plaintiff and the Defendant. The Defendants two other Witnesses were the father of Elvis Chetty, Levi Chetty, the son of the late Mariapen Chetty and one David Chetty who is the cousin of the late Lea Chetty. Again the two witnesses for the defence deponed before this court that Lea Chetty was just a housewife and had never actually worked in the family merchant business. Again the Plaintiff submits that this is untrue and not in line with what actually happened between the husband and wife duo herein. Levi Chetty's motivation to maintain such a position before this court must be considered in view of the fact that it is in his son's – the 2nd Defendant's – interest that the sale be upheld as valid. To that end it is submitted that his evidence and that of his son were clearly biased in favour of the Defendants case because it is in their interest to be so*

vi. *Their final Witness a Mr. David Chetty, maintained the Defendant's position and claimed that every single day he visited his cousin – Lea Chetty – she was never in the shop working only her then Husband Mariapen Chetty was, and yet, he further*

testified that on those occasions that the late Mariapen Chetty had travelled for business, which it is submitted by the Plaintiff he often did, at those times David Chetty conveniently never visited his cousin and therefore had no idea who ran the family business in Seychelles. The Plaintiff submits that the clear bias in David Chetty's evidence is palpable, especially considering the fact that he is currently working with Levi Chetty, the father of the 2nd Defendant, and expressed after being cross-examined by counsel that he was upset at the late Lea Chetty, who according to him filed divorce proceedings against her then husband despite him pleading with her to not do so.

vii. *The Plaintiff submits that the evidence produced before this Court by the Defence was done with the sole purpose to deprive the Late Lea Chetty of her entitlement and or interest in the property known as parcel V5497 and do not reflect an accurate description of her activities with her husband in business from the 1960's onwards.*

viii. *The Plaintiff submits that despite having been married, it is clear that section 20 (1) g of the Matrimonial Causes Act cannot apply as in this case there was no final decree of divorce despite the process having been initiated in 2006 by the Late Lea Chetty, when as testified by the witness for the Plaintiff, she realized her husband at the time was not safeguarding her interest in their jointly acquired assets. The Plaintiff submits that her action before this Court is couched in a De Facto Partnership or Societe de fait. Whilst this remedy is typically reserved for parties who had lived in concubinage and are settling their assets between them upon the breakdown of the same, in this case it is clear that the parties remained married until the death of the late Mariapen Chetty in 2008, husband and wife and therefore those provisions that would normally apply namely the Matrimonial Causes Act upon the dissolution of a marriage cannot apply in this case as it pertains to declaring an interest in property in favour of one spouse against another.*

ix. *In order to maintain such a claim, the Plaintiff must show as per Labiche v Ah Kong (SCA 3/2009) proof of the partnership between the parties, as per Dalloz, at para 26 –*

... une telle société n'existe pas par le seul fait que les concubins ont use en commun des biens qu'ils possèdent et participe aux dépenses sur leur ménage, ni même par le seul fait qu'ils ont mis en commun leurs resources et travaille ensemble. Le juge de fond, dans notre droit actuel, doit, pour affirmer l'existence d'une société relever les circonstances de fait d'où résultent l'intention des intéresses de participer aux bénéfices et au pertes du fonds social constate par les apports, et la volonté de s'associer.

x. *Further thereto the Plaintiff submits as per Dalloz, Encyclopedie Juridique, Verbo, "Concubinage" at page 3, para 27, "S'agissant d'une société de fait, il n'est pas nécessaire qu'elle soit constatée par écrit, même si elle comprend un immeuble dans son actif". If the existence of the de facto partnership is established, it is necessary that it should be dissolve by the judge who should then proceed to share out the assets of the partnership (per Labiche v Ah-Kong). It is clear therefore that while no written deed of partnership is required to establish the partnership proof of the same must be adduced before this Court. In the Plaintiff's case, at paragraph 4 of the Plaint the Plaintiff states that,*

"The said land [parcel V5497] was purchased through the Plaintiff and the 1st Defendant pooling their resources, their monies, their joint work and efforts and thereby establishing a shop. The Plaintiff and the 1st Defendant jointly constructed and established the shop on the said land, It was agreed that the afore-mentioned properties belonged jointly to the Plaintiff and the 1st Defendant."

xi. *The show of proof of the joint work and efforts of the parties the Plaintiff deponed to the activities of the late Lea Chetty the Plaintiff on the other hand relying on the*

evidence of Mersia Chetty, the daughter of the Late Lea Chetty and representing her late mother's estate herein as her Executrix, testified that at the time the shop first opened, unlike the witnesses of the defence, she had been there at all times, and remembered exactly what had gone on between her parents as it pertained to the family business as merchants operating through their shop on parcel V5497 at Albert Street. The witness for the Plaintiff gave details on the comings and goings of her later mother at the material time, explained and described her involvement in running the shop with her husband, banking monies, dealing with the stock merchandise of the shop, and while the late Mariapen Chetty was away from the jurisdiction, Lea Chetty running the shop without him, all while she maintained a household for her husband and their workers of which there were many. The partnership between the late Lea Chetty and her Late Husband continued well after they opened their first shop and continued when they incorporated various other businesses as exhibited before this court until the relationship between the parties broke down and the Late Lea Chetty initiated divorce proceedings.

xii. *As per Labiche v Ah-Kong, in deciding what orders to make upon the establishment of a de facto partnership, The sharing is done by the judge in accordance with the wishes of the parties as expressed by themselves when the partnership was established. In the absence of such expressed wishes, "elle doit l'etre en proportion des apports de chacun, compris des apports en travail" (Dalloz, ibid, para 28).*

xiii. *In this case, it is submitted by the Plaintiff that what was agreed by the parties was that their joint efforts would benefit both of them jointly and or equally, and therefore it is just and equitable that the court makes a declaration pursuant to prayer (f) of the Plaintiff's plaint, and declare the existence of a partnership in fact, with regards to the acquisition and ownership of parcel V5497, make an order declaring the legal interest in parcel V5497 in favour of the Plaintiff. In view of the fact that the property was transferred without the knowledge and or consent of the Plaintiff in the circumstances it is just and equitable that the transfer of parcel V5497 – being subject to a partnership in fact – be vitiated so that the property may*

be distributed between the estate of the late Lea Chetty and the Estate of the late Mariapen Chetty.

xiv. *In conclusion learned counsel submitted that*

1. *The parties at the material time being the late Lea Chetty and Mariapen Chetty were at the material time in a de facto partnership.*
2. *The parties at the material time being the late Lea Chetty and Mariapen Chetty were at the material time both owners of parcel V5497 by virtue of this de facto partnership;*
3. *The Court make a declaration of what the interest of the parties herein the estate of the Late Lea Chetty and the Estate of the Late Mariapen Chetty;*
4. *That the transfer from the late Mariapen Chetty to Elvis Chetty, of parcel V5497, dated 14th September 2006 be set aside as it was transferred in breach of the de facto partnership;*
5. *That the court makes any such orders it deems fit;*
6. *The court makes an order for costs and interest in favour of the Plaintiff.*

[8] Learned counsel for the Defendants submitted as follows:

i. *In her submission counsel for Plaintiff has argued that the Plaintiff's case is based on a defacto partnership or société de fait between the Plaintiff and 1st Defendant. Counsel has relied on the Court of Appeal case of Labiche v/s Ah Kong [2010] SLR 172. It is submitted that the argument that the Plaintiff's case is based on a "société de fait" is an afterthought of Counsel for the Plaintiff, which is not supported by the plaint. The plaint does not contain averments about the existence of a société de fait between the Plaintiff and the 1st Defendant in that –*

   a. *the plaint does not contain any specific averments that there was in existence a partnership between the Plaintiff and the 1st Defendant;*

b. *if the plaint was based on a "société de fait" it was imperative for the Plaintiff to have averred as to when this defacto partnership was terminated or dissolved. There is no such averment in the plaint. In the case of NG Cheon Ton v/s Ah Miaw NG Hoi Fat [1975] M.R 23, the Supreme Court of Mauritius quoted with approval from Hemards Nullitee de société et société de fait, 2 eme edition at pp 636 No 489 – at pp 26 of the judgment – that –*

"Les causes de dissolution des sociétés de fait son celles des sociétés régulières" (Refer to annexure D11 at pp 26 thereof);

c. *the provisions of the Article 1865 of the Civil Code is applicable in respect of the termination of a société de fait. Article 1865 of the Civil Code provides – it also possible for a partner in a "société de fait" to institute proceedings to dissolve the "société de fait".*
In Labiche v/s Ah Kong (supra) the Court of Appeal – at pp 177 – stated –
"If the existence of the defacto partnership is established, it is necessary that it should be dissolved by the judge who should then proceed to share out the assets of the partnership";

d. *in the present case the plaint does not contain any specific prayer for the Court to dissolve the partnership and to share out the assets of the partnership. In the present case if the court proceeds to dissolve the purported partnership that would be ultra petita and contrary to the ratio decidendi set out in Charlie v/s Francoise in that the Court would be*

granting the Plaintiff a relief not sought by the Plaintiff (supra at paragraph 2.2.7); and

e. *if the Plaintiff case was based on a société de fait, the Plaintiff would not have restricted her claim to the property only but she would also have demanded a share of the profits generated by the partnership and this the Plaintiff has not prayed for.*

ii. *It is submitted that the Plaintiff's case is simply based on a purported contract, between the Plaintiff and 1st Defendant, that the property would be jointly owned by the Plaintiff and the 1st Defendant but not on the basis that there was in existence a de facto partnership between the Plaintiff and the 1st Defendant to run and manage a business. This is clearly confirmed by the last sentence of paragraph 4 of the Plaint to the effect that; "It was agreed that the above-mentioned properties belonged jointly to the Plaintiff and the 1st Defendant". If the plaint was based on existence of a société de fait the averment would have been that the property belonged to the defacto partnership.*

iii. *It is submitted, on the basis of all the above, that the Plaintiff's case is not based on the existence of a defacto partnership which Counsel for the Plaintiff has attempted to raise as an afterthought.*

iv. *It is submitted that the evidence adduced before the Court does not prove either the existence of a defacto partnership between the Plaintiff and the 1st Defendant nor that there was an agreement that the property would belong to the Plaintiff and the 1st Defendant. Indeed the evidence is contrary to the averments on which the Plaintiff has based her case. It is uncontroverted that parcel V5497 was – unlike what is pleaded in the plaint – purchased solely by the 1st Defendant in 1957. At the time of the purchase of parcel V5497, the 1st Defendant was not married to the*

Plaintiff. The parties only got married in 1965, seven years after the property had been purchased by the 1st Defendant.

v. *In respect of the issue of defacto partnership, in Labiche v/s Ah Kong (supra) the Court of Appeal stated – at pp 177 of the judgment that; "the law requires that the said finding must be supported by evidence adduced by the claimant". Moreover in Hallock v/s D'offay [1983 – 1987] SCAR (Volume I) Civil cases pp 295 Sir Eric Law J.A observed – at pp 300 of the judgement that –*

> *"As regards the question whether a 'société de fait' or de facto partnership came into existence between the parties, the French authorities to which we have been referred seem to indicate that such an association must be evidenced by the intention of the parties, and must involve mutual contributions in case or in kind and an agreement to share gains and losses; in other words, what is envisaged is an association of a business or commercial character. That was not the case here and I find myself in full agreement with the learned Chief Justice on this part of the appeal" (emphasis is mine) (Refer to Annexure D11).*

Therefore the onus was on the Plaintiff to prove that there was an intention between her and the 1st Defendant to establish a defacto partnership which involved mutual contribution in cash or in kind and an agreement to share the gains and losses from the business.

vi. *It is submitted that no such evidence has been adduced. Mrs. Mersia Chetty was called as a witness in support of the Plaintiff's case. However she did not provide any evidence that there was an agreement or intention between the Plaintiff and the 1st Defendant to establish a defacto partnership which involved mutual contribution in cash or in kind and an agreement to share gains and losses. In the same vein she failed to establish any evidence that there was an agreement between the Plaintiff and the 1st Defendant that the property would belong to the Plaintiff and the 1st Defendant.*

vii. *As a matter of fact at the time that parcel V5497 was purchased Mrs. Mercia Chetty was only two years old and when the shop was built in the early 1960's she was still a child.*

viii. *The evidence of Krishna Chetty and David Chetty clearly established that the Plaintiff was merely a housewife and was not involved in the running of the business of the 1st Defendant. In her submission Counsel for the Plaintiff has argued that the evidence of Krishna Chetty and David Chetty are biased witnesses who should not be believed by the Court. It is submitted that the evidence of Mercia Chetty is one which is very biased and self-serving. It was established in cross-examination that Mercia Chetty – who has substituted the Plaintiff in her capacity as the executor to the Plaintiff's estate – is the only beneficiary under a will made by the Plaintiff. Therefore if this Honourable Court declares that the Plaintiff has any interest in the property then Mrs. Mercia Chetty stands to be the only person to benefit from such a declaration. In other words Mercia Chetty had a clear motive to lie to the Court.*

ix. *On the other hand, the evidence of Krishna Chetty and David Chetty corroborates and supports each other. As a matter of fact David Chetty came across as a very credible and truthful witness. At one point during his testimony he became emotional when he recalled begging the Plaintiff to reconcile with the 1st Defendant. He mentioned that the Plaintiff was his cousin and that they got on well and that he frequently visited the family home of the Plaintiff and 1st Defendant. Both he and Krishna Chetty confirmed that the role of the Plaintiff in the family was that of a housewife and she was not involved in the running and managing of the business. They both confirmed that the business was operated solely by the 1st Defendant. The 1st Defendant operated as a sole trader until the early 1980's when he started to trade through companies.*

x. *The marriage certificate in respect of the marriage between the Plaintiff and 1st Defendant – Exhibit P1 – confirms that the Plaintiff and 1st Defendant got married on 5 January 1965. This was seven years after the purchase of parcel V5497 and a good four years after the shop had been built on the said parcel. In Exhibit P1, the*

profession of the Plaintiff is mentioned as "Housewife" and that of the 1st Defendant as "Merchant". The Plaintiff and 1st Defendant got married in accordance with the Civil Status Act, 1893 which came into force in Seychelles in 1893. Section 72 (1) of the Civil Status Act, 1893 provides –

> *"72 (1) The act of marriage shall be drawn up in the form III of schedule A"*

Indeed Exhibit P1 is a copy of the act of marriage of the Plaintiff and 1st Defendant. In form III of Schedule A one column provides for information regarding the occupation of the parties getting married.

xi. *Thus the Plaintiff and 1st Defendant were obligated by law to provide information regarding their respective occupations at the time of their marriage in January 1965. It is clear from Exhibit P1 that the 1st Defendant provided his occupation as Merchant whilst the Plaintiff provided her occupation as Housewife. If at the time the Plaintiff was a merchant why did she not say so? The fact that this was information provided in accordance with the law, namely the Civil Status Act 1893, the Court has to take it that in 1965 the Plaintiff and gives credence to the evidence of Krishna Chetty and Mr. David Chetty that the Plaintiff was a housewife and not a merchant.*

xii. *In view that the Plaintiff was only a housewife and not a merchant in 1965, it means that in 4957 the Plaintiff did not have the resources to contribute to the acquisition of the parcel V5497 and to the establishment of the shop thereon in early 1960's nor that she was assisting the Plaintiff in the running and managing of the business. In other words Exhibit P1 flies in the face of the arguments that there was an intention and agreement between the Plaintiff and 1st Defendant to create a defacto partnership whereby they would share the gains and losses from the business or that it had been agreed between the Plaintiff and 1st Defendant that the property would belong jointly to them, this was certainly not the case here.*

xiii. *The fact that the Plaintiff was shareholder and director in a company, which in any event was incorporated long after the acquisition of parcel V5497 and establishment of the shop, does not establish that the Plaintiff was a trader or merchant. Moreover there is also Exhibit D4 – the transcription of a deed of transfer by virtue of which the 1st Defendant transferred the bare ownership of a parcel of land, on 25th January 1961, to the 1st Defendant, which parcel of land is now known as V5494. Exhibit D4 is proof that when the 1st Defendant intended to give the Plaintiff proprietary interest in a property the 1st Defendant would transfer such right to the Plaintiff. It is pertinent to note that D4 – by virtue of which the bare ownership in parcel V5494 was transferred to the Plaintiff – was executed in 1961, four years after the Plaintiff has acquired parcel V5497. If indeed the Plaintiff and 1st Defendant had agreed that the property was to belong jointly to the two of them, then surely the 1st Defendant would have transferred and undivided half share of the property to the Plaintiff. The fact that parcel V5494 was transferred in 1961 to the Plaintiff whilst the property remained registered in the exclusive name of the 1st Defendant is clear proof that the said property belonged solely to the 1st Defendant. As a matter of fact at the time the properly was transferred by the 1st Defendant to the 2nd Defendant, the 1st Defendant was registered as the absolute owner of the property – as confirmed by Exhibit P2. Therefore at the time of the property being transferred to the 2nd Defendant the 1st Defendant was vested with absolute ownership of the property.*

xiv. *The reliefs being sought by the Plaintiff is clearly to rectify the register of V5497 in accordance with Section 89 (1) of the Land Registration Act. Section 89 (1) states:*

> *"89.(1) Subject to subsection (2), the Court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration has been obtained, made or omitted by fraud or mistake".*

xv. *In the present case the Plaintiff is claiming that the register of parcel V5497 ought to be rectified on the ground of fraud. However the Plaintiff has not adduced any*

evidence of fraud on the part of the 1st and 2nd Defendants. The Plaintiff has clearly failed to prove her case on a balance of probabilities. In Ebrahim Suleman and Ors v/s Marie-Therese Joubert and Ors SCA 27/2010 the Court of Appeal stated –

> *"12. In such circumstances applying evidentiary rules we need to find that the Respondents discharged both their evidentiary or burden of proof as is required by law. The maxim "he who avers must prove" obtains and prove he must on a balance of probabilities."*

In Re B [2008] UKHL 35, Lord Hoffman using a mathematical analogy explaining the burden of proof stated:

> *"If a legal rule requires a fact to be proved ('a fact in issue'), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are 0 and 1. The fact either happened or did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of 0 is returned and the fact is treated as not having happened. If he does discharge it, a value of 1 is returned and the fact is treated a shaving happened".*

Similarly in Rhesa Shipping Co SA v Edmunds and Another [1985] 2 All ER 712 the house of Lords held that if the judge, regarded both competing causes as improbable, then it was perfectly appropriate for him to hold that the claimant had failed to establish his case on the balance of probabilities."

xvi. *Moreover contrary to what the Plaintiff averred, that the purported transfer of SR1,000,000 was a sham, evidence was led before the Court to prove that the consideration price of SR1,000,000 was indeed paid and also the reason as why the price was fixed at SR1,000,000. Mr. Krishna Chetty, the father of the 2nd Defendant, explained that in keeping with the Indian tradition, it was the wish of the 1st*

Defendant that the shop should be given to the 2nd Defendant as his only male grandchild and that the price of SR1,000,000 was agreed so that the 2nd Defendant would attach certain values to the property.

xvii. *It is further submitted that the 1st Defendant transferred the property to the 2nd Defendant in accordance with his right under Article 26 of the constitution and Article 544 of the Civil Code. It is also pertinent to note that that whilst the Plaintiff was making a claim to the 1st Defendant's property she was freely disposing her own property.*

[9] Learned counsel submitted that on the basis of all the above, this Honourable Court is prayed to be pleased to dismiss the plaint with costs.

Analysis – The Law

[10] It is doubtful whether the property acquired well before the union in marriage of Lea and Srinivasen and there having been no divorce can be treated as matrimonial property under the Matrimonial Causes Act. In fact both counsel agree though for different reasons that it should not be so treated.

[11] Learned counsel for the Plaintiff argued that this is a situation where the Court should consider the property as jointly owned based on the intention and contributions of the parties to the acquisition and development of the property; common intention and joint contribution underpinning the concept of there being a de facto partnership or a "*societe de fait*". One should be careful not to juxtapose a domestic partnership or a de facto partnership to a *societe de fait*.

[12] A *societe de fait* is defined in Dalloz, June 2021 as;

"La société de fait correspond à la situation où une société, voulue par les parties et ayant fait l'objet d'une immatriculation, se trouve entachée d'un vice de constitution et a été annulée. Elle est considérée comme ayant existé

avant son annulation afin d'éviter les inconvénients normalement attachés à la rétroactivité de la nullité"

Which literally translates into;

"The de facto company corresponds to the situation where a company, desired by the parties and having been the subject of a registration, is vitiated by a defect of constitution and has been canceled. It is considered to have existed before its cancellation in order to avoid the inconveniences normally associated with the retroactivity of the nullity".

Both counsel have addressed *in extenso* the specifics of a domestic partnership in their respective submissions, and referred the Court to considerable extracts of literatures mainly Dalloz and case laws in that context in support of their respective contention.

[13] A domestic partnership is a legal relationship between two people of the same or opposite sex who live together and share a domestic life, but aren't married or joined by a civil union nor are blood relatives. It may be established by contract or by registration according to procedures established by relevant jurisdiction but can also be by the simple act of the parties living together as partners. The French refer to the same as *concubinage* or *concubinage notoire.*

[14] Domestic partnership property division is inapplicable if the property division in question is the equitable division of marital assets. This is governed by statute, namely the Matrimonial Causes Act. Domestic partnership property division is also inapplicable to property disputes between unmarried parties not in or intending to be in a domestic partnership. Consequently, it is important to determine first whether a domestic partnership existed; when the partnership began and when the partnership came to an end. The factor to be considered by the Court are various but fundamentally, property acquired by domestic partners during a domestic partnership should be distributed according to the partners' intent. Whether such intention existed and when a domestic partnership began and ended is a question of fact.

Analysis - Facts

[15] The facts of the case have been extensively rehearsed above by the witnesses and both learned counsel who have given their take on the assessment from their respective perspectives. The evidence gives a timeline that shows that Srinivasen Chetty was employed in a shop on Market Street in early 1950s but shortly afterwards he was engaged in business as a sole trader running his own shop. In 1955 when Mersia Chetty was born, Srinivasen Chetty had his own business. In May 1957, he purchased amongst others, parcel V5497 situated on Albert Street in his sole name. He constructed the building now standing thereon known as Srinivasen Chetty and Son. A son Levi Krishna Chetty was born in 1959. It is not clear which year Lea Chetty and Srinivasen Chetty actually started co-habiting but it appears to be after Mersia and before Krishna were born. Srinivasen Chetty married Lea Chetty in 1965.

[16] A domestic partnership cannot be assumed only on the basis that the parties lived together in concubinage. Proof must also be brought establishing that such was the intention of the parties and that it was the intention of the parties that properties acquired during the concubinage would be share equally or in such proportion as was agreed between the parties. As stated by the Supreme Court of the State of Alaska in the case of *Dewayne Tomal v Jeannette Anderson S-16720/16760 Superior Court No. 1WR-16-00034 CI O P I N I O N No. 7282 – August 31, 2018* :

> *"...absent a controlling statute or a valid contract between the parties, property must be classified strictly according to the parties' intent. In some cases, the parties' intent with respect to all or broad classes of property will be easy to infer based on evidence that 'the parties formed a domestic partnership and intended to share in the fruits of their relationship as though married justifying an equal division of their property.' But not all property acquired during a partnership necessarily is intended to be partnership property: "We emphasize that simply living together is not sufficient to demonstrate intent to share property as though married, and, moreover, that parties who intend to share some property do not presumptively intend to share all property . . . ."And parties may not intend to*

share property equally; for instance, a couple who purchase real property together may intend to share it according to their respective investments. The trial court must be attentive to ensure that it properly determines the parties' intent for each disputed property item."

In this case, the onus was on the Plaintiff to prove her claim that the acquisition and development of land parcel V5497 was in the context of a domestic partnership or agreement.

Findings

[17] Having analysed that evidence adduced. I find that the evidence adduced by the Plaintiff was not sufficient to establish when or if at all a domestic partnership started between Srinivasen Chetty and Lea Chetty. It is unclear how long the partnership lasted although it can safely be said that in 1965, the parties entered into matrimonial status until the death of the Defendant in 2007. There is no evidence to establish that land parcel V5497 was partnership property whilst the other properties acquired around the same time were not. The Defendant's evidence has established that it was more likely than not that the parties never intended that the property in question was to be domestic partnership property.

[18] In view that in 2006 the 1st Defendant had sole and absolute title to land parcel V5497, and that the land and building thereon did not form part of a domestic partnership property, the transfer of the land by the late Srinivasen Chetty to the 2nd Defendant in 2006 was not unlawful, null or void.

[19] Consequently, the prayers and remedy sought by the Plaintiff cannot be granted as it has not been established on the balance of probabilities that land parcel V5497 and the business thereon were partnership property destined and designed to be managed and shared accordingly at the end of the partnership.

[20] The Plaint is therefore dismissed with costs to the Defendant.

Signed, dated and delivered at Ile du Port on 12 October 2021.

Dodin J