

SUPREME COURT OF SEYCHELLES

Reportable

[2023] SCSC ...
CS09/2020

In the matter of:

REGINA LEPATHY
(rep. by K.Domingue)

Plaintiff

and

ANDY MICHEL LABONTE
(rep. by K. Dick)

Defendant

Neutral Citation: *Lepathy v Labonte* (CS09/2020) [2023] SCSC..... (03 February 2023)

Before: Carolus J

Summary: Article 834 of the Civil Code of Seychelles Act – Where a share of an undivided portion of land is sold to a third party by a co-owner, are the other co-owners required to buy back the share at the price at which it was sold or at the value of the share at the time that the co-owners offer to buy back such share.

Delivered: 03 February 2023

ORDER

1. In accordance with Article 834 of the Civil Code of Seychelles Act, I hold that the sum to be paid by the plaintiff to the defendant is the value of the defendant's ¼ share in Title No. T586 at the time of filing of this case namely 27th January 2020. Since no valuation has been provided by either of the parties this Court is not in a position to make any determination as to the exact sum to be paid by the plaintiff to the defendant. The plaintiff should also bear the costs and dues of the transfer.
 2. The parties shall each bear their own costs of these proceedings.
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JUDGMENT

CAROLUS J

- [3] This case concerns a plot of land Title No T586 situated at Takamaka, Mahe which is currently co-owned by the plaintiff Regina Lepathy, Bernadette Sylvette Joubert and the defendant Andy Michel Labonte. The Certificate of Official Search dated 7th September 2017 shows that they hold a $\frac{1}{2}$ share, $\frac{1}{4}$ share ($\frac{1}{8} + \frac{1}{8}$) and a $\frac{1}{4}$ share respectively.
- [4] According to the plaint and documents annexed thereto, Title No T586 came to be in their ownership as follows: The plaintiff and her sister were the co-owners of the property before the latter passed away. It is stated in an Affidavit on Transmission by Death dated 13th June 2001 registered at the Land Registry on 2nd July 2001, that the property was originally registered in the name of Heirs Wilhelm Joubert who died leaving behind as his heirs the plaintiff Regina Lepathy nee Joubert and Marthe Francine Belle nee Joubert. Marthe Francine Belle nee Joubert also died leaving behind two heirs namely Joseph Winsley Joubert and Jean Joubert. The plaintiff, Joseph Winsley Joubert and Jean Joubert therefore became co-owners of a $\frac{1}{2}$ share, a $\frac{1}{4}$ share and a $\frac{1}{4}$ share of the property respectively.
- [5] Joseph Winsley Joubert was appointed as Fiduciary in respect of the land by deed dated 13th June 2001 and registered at the Land Registry on 18th July 2001. By deed dated 9th July 2003, and registered at the Land Registry on 16th July 2003, the plaintiff Regina Lepathy and Joseph Winsley Joubert were appointed joint fiduciaries in respect of the land.
- [6] Joseph Winsley Joubert died on 13th March 2008 (as shown by his Death Certificate) and his $\frac{1}{4}$ share devolved upon his wife Louisianne Joubert and daughter Bernadette Sylvette Joubert who each became entitled to a $\frac{1}{8}$ share of the property. Louisianne Joubert transferred her $\frac{1}{8}$ share to her daughter Bernadette Sylvette Joubert who now owned a $\frac{1}{4}$ undivided share of the property ($\frac{1}{8} + \frac{1}{8}$).
- [7] In 2012 Jean Joubert transferred his $\frac{1}{4}$ share to the defendant for One Seychelles Rupee (SCR1/-). This is confirmed by transfer deed dated 14th May 2012 and registered on 12th

June 2012 at the Land Registry. The Death Certificate of Jean Joubert shows that he passed away on 15th March 2019.

- [8] Except that the defendant avers that it is unknown to him that the plaintiff and her sister were co-owners of the land before the latter passed away, the above matters are admitted by the defendant in his amended statement of defence dated 23rd March 2022.
- [9] It is further averred in the plaint that the “purported transfer document” by which the late Jean Joubert transferred his $\frac{1}{4}$ share to the defendant is defective in that Jean Joubert should have given the plaintiff and all the other co-owners of the property at the time, namely plaintiff Regina Lepathy, Louisianne Joubert, Bernadette Sylvette Joubert, first choice to purchase the said $\frac{1}{4}$ share in Title No. T586. It is also averred that the transfer is defective because the defendant is not the son of Jean Joubert as stated therein, and the NIN number of the Defendant is incorrect.
- [10] The plaintiff avers that Title No. T586 was sold to the defendant without giving the plaintiff and the other co-owners the first right of pre-emption to purchase the late Jean Joubert’s share in the property before it was transferred to the defendant. No offer was made to any of the co-owners for them to purchase the same. Furthermore the plaintiff and the other co-owners neither consented to nor had knowledge of the transfer of his Jean Joubert’s share to the defendant, and that it was only in 2018, upon an application for a division in kind being made that the same was discovered. The plaintiff avers that she seeks to purchase the defendant’s $\frac{1}{4}$ share of Title No. T586 for One Seychelles Rupee, which is the value of the share at the time the defendant purchased it from Jean Joubert.
- [11] Finally she avers that that the purported transfer of the $\frac{1}{4}$ undivided share in Title No. T586 is null and void or alternatively should be rescinded.
- [12] In terms of the plaint the plaintiff seeks a judgment:
 - a) *Declaring that the purported transfer dated 14th May 2012 registered and transcribed in Volume 11 Folio 329 is null and void; alternatively*

- b) Rescinding the sale document and transferring the ¼ share of the late Jean Joubert to the Plaintiff and Bernadette Sylvette Joubert, who were the actual co-owners of the Parcel T586 at the time of the transfer of the ¼ share to the Defendant;*
- c) Any other orders that this Honourable Court deems just and proper in the circumstances of this case.*

The whole with interests and costs.

- [13] In his amended statement of defence, the defendant denies that the transfer document dated 14th May 2012 is defective for the reasons given by the plaintiff as stated at paragraph [7] hereof. He avers that he is the stepson of the late Jean Joubert and has lived with him for more than 35 years, that the late Jean Joubert was not married, and that other than his stepson, he did not have any legitimate children. He also avers that the NIN No. on the transfer document dated 14th May 2012 is correct.
- [14] He further avers that the plaintiff knew that the late Jean Joubert intended to transfer his share to the defendant and that she did not, at the time, show any interest in the property. Instead the co-owners requested that the late Jean Joubert give permission to build to Lucy Confiance.
- [15] The defendant also avers that he is willing to sell and transfer his ¼ share in Title No. T586 to the plaintiff, but at the current market value and not for One Seychelles Rupee as prayed for by the plaintiff, and further on condition that the plaintiff bears the costs and dues of the transfer. He denies that the transfer of the ¼ undivided share in Title No. T586 from Jean Joubert to him is null and void or that it should be rescinded.
- [16] The defendant prays for the following orders:
- 1. The Plaintiff shall pay the Defendant the current market value of ¼ of his share in Parcel T586.*
 - 2. The Plaintiff shall pay all costs and dues of the transfer including stamp duty fees.*
 - 3. Any other orders that this honourable court deems just and proper in the circumstances.*
 - 4. That the Plaintiff shall bear the interest and cost of this case.*
- [17] It is clear from the pleadings that the defendant is not objecting to Title No. T586 being transferred to the plaintiff. In response to paragraph 9 of the plaint in which the plaintiff

states that she “*seeks to purchase the ¼ share of the Defendant for 1 Seychelles Rupee, the value of the share at the time the defendant purchased the ¼ share of Jean Joubert*”, the defendant at paragraph 5 of his amended statement of defence states:

5. *Paragraph 9 of the Plaintiff is denied. However the Defendant is willing to sell and transfer his ¼ share to the Plaintiff at the current market value and also on condition that the Plaintiff agrees to bears the costs and dues of the transfer.*

[18] Counsels also stated as much in Court (see Court proceedings of 7th March 2022). The only contentious matter therefore is the sum to be paid by the plaintiff to the defendant for such transfer: The plaintiff contends that this should be the sum of One Seychelles Rupee - which is the sum paid by the defendant to Jean Joubert for the transfer of the property to the defendant. The defendant on the other hand has pleaded that the plaintiff should pay him the current market value of the property in consideration of such transfer. The question arising for the Court’s determination is confined to which of the two sums should be paid by the plaintiff to the defendant. Counsels for both parties have filed written submissions in support of their respective views which I have considered and will refer to as appropriate below.

[19] Counsels for both parties agree that the applicable law in this case is Article 834 of the Civil Code of Seychelles Act 1976. The present action was filed on 27th January 2020 while the 1976 Civil Code was still in operation and before it was repealed and replaced by the Civil Code of Seychelles Act 2020, which came into operation 1st July 2021 – after this case was filed.

[20] Article 834 provides as follows:

Article 834

*In the case of the sale of a share by a co-owner to a third party, the other co-owners or any of them shall be entitled, within a period of ten years, to buy that share back by offering to such third party **the value of the share at the time of such offer** and the payment of all costs and dues of the transfer.*

[21] Before dealing with the issue of the sum to be paid by the plaintiff to the defendant, I wish to address the following matter arising from the pleadings and submissions. Although the defendant is not objecting *per se* to the plaintiff purchasing his ¼ share in Title No. T586 sold to him by Jean Joubert, in his statement of statement of defence, he raises the issue of the definition of “third party” in Article 834, and argues that he does not fall within the definition of a “third party” in the context of Article 834 and therefore that provision is not applicable to this particular case. In that regard, his counsel, Miss Dick in paragraph 2 of her submissions, states that “[a] third party in the context of retrocession is a party who is not a co-owner” but qualifies this statement by reference to the case of *Chetty v Chetty* (2013) SLR 519 and submitting that in that case “the Court of Appeal suggested that the term ‘third party’ in the context of Article 834 should be limited to strangers to the co-ownership, but not to members of the families of the co-owners”. Counsel continues at paragraph 3 of her submissions to state that “[i]t is the Defendant’s case that he is the foster child of the late Jean Joubert and therefore he is not a stranger”.

[22] Ms Domingue representing the plaintiff, in her submissions (para. 4), maintains that the defendant is a third party in terms of Article 834. She states that the defendant is neither the son of, nor any relation, be it by blood or through marriage, to the late Jean Joubert and/or the plaintiff, and consequently the term “third party” applies to the defendant.

[23] In fact the case of *Chetty v Chetty* does not make a definitive pronouncement on whether the term “third party” in Article 834 includes a family member of a co-owner or means only a total stranger to the co-owners but only discusses the matter obiter. In that case Domah JA presents two viewpoints on the issue as follows: “There is one view that third party in the context can mean only un tiers acquéreur who is not a family member of the co-owner. The competing view is that art 834 would not apply where the transfer by sale or donation is made to a family member”. He proceeds with a discussion of the two but does not make any finding as to which is the correct view and merely concludes as follows:

[17] We are unwilling to venture into this issue at this stage in this case and as an appellate court. The constitutionality of this provision was broached at one time

but not pursued. We are in a civil dispute. The matter has not been raised by either party whether at the trial stage or at the appeal stage. It is enough for the time being that we bring this to the attention of the Civil Code Revision Group which is currently dealing with the revision of the Seychelles Civil Code so that the term third party may be defined with clarity. Nor is art 834 predicated by any general article from which this specific article could be interpreted. The rationale for its existence and its relevance in our modern society is anybody's guess...

- [24] Furthermore even if this Court found that the term “*third party*” in Article 834 did not include relatives and family members of the co-owners, rendering the provision inapplicable where a share of co-owned property was sold to a relative or family member of a co-owner, the defendant has not brought any proof that he is Jean Joubert’s stepson. In fact his birth certificate shows that he is the son of Maxwell Labonte. There is no evidence to show that Jean Joubert married his mother thereby making him related to Jean Joubert if not by blood at least by marriage.
- [25] In addition if the objective of Article 834 is “to ensure that property is kept within the family circle” (see para 10 of *Chetty v Chetty*), it is arguable whether ownership of a share of co-owned property by a stepson who is not a blood relative of the other co-owners would meet that objective.
- [26] I will now deal with the main issue in this case, that is the sum to be paid by the plaintiff to the defendant for the purchase of the defendant’s $\frac{1}{4}$ share in Title No. T586. Article 834 provides that this shall be “*the value of the share at the time of such offer*”. Since no offer was made by the plaintiff prior to filing this claim, the time of the offer must be taken to be the date of filing of the claim namely 27th January 2020, which I note is within the ten year period given under Article 834 to make such offer. The offer made by the plaintiff was to buy back the defendant’s share for One Seychelles Rupee. This obviously cannot be the value of the share at the time of the offer.
- [27] Ms Domingue submits that notwithstanding the express provision in Article 834 that “*the other co-owners ... shall be entitled ... to buy that share back by offering to such third party the value of the share at the time of such offer*”, the particular circumstances of this case must be taken into account. These circumstances, she submits, are that only one

Rupee was paid by the defendant to Jean Joubert for the transfer of his ¼ share of the property to the defendant, and that in the document effecting such transfer Jean Joubert refers to the defendant as his son.

[28] Ms Domingue argues that if a third party (who is not related to the other co-owners) purchased a share in co-owned property, it is likely that the purchase price paid by such third party would have been the market price at the time of purchase. She argues that the intention of the legislator in using the term “third party” when enacting Article 834, was to ensure that the money paid by such third party could be recouped in the event that the other co-owners chose to exercise their right under Article 834 to buy back the share which had been sold to the third party. If on the other hand the share is purchased by a family member and not a “third party” it is unlikely that such family member would have paid the market price for the share, hence the reason why the application of Article 834 is limited to third parties and not family members of the co-owners, as it could not have been the intention of the legislator for that family member to be reimbursed the market price for the share at the time the offer to purchase it is made by the other co-owners.

[29] In *Chetty v Chetty Domah JA*, stated that Article 834 “*is specific to Seychelles. We have not found its counterpart in any other jurisdiction*”. I note that the mechanism provided for under Article 834 somewhat resembles the “retrait successoral” which existed under the French Civil Code which was applicable in Seychelles prior to the enactment of the Civil Code of Seychelles Act 1975 but which was omitted from the 1975 Act. Article 841 provided as follows:

841. *Toute personne, même parente du défunt, qui n’est pas successible, et à laquelle un cohéritier aurait cédé son droit à la succession, peut être écartée du partage soit par tout les cohéritiers, soit par un seul, en lui remboursant le prix de la cession.*

[30] This provision as translated by E. Blackwood Wright reads:

841. *Any person who is not an heir can be prevented by the co-heirs or any one of them from taking part in the partition, even though he may be related to the deceased, although he may be a person to whom a co-heir has transferred his*

right to the succession, by the co-heirs repaying him the amount he paid for such transfer.

[31] The old Article 841 applies to property held in indivision by co-heirs to a succession of which one of the co-heirs has transferred his or her share to another person who is not an heir and therefore not entitled to a share of the succession. The other co-heirs may purchase back such share by paying to the person to whom the share was transferred the “amount he paid for such transfer”. Article 841 applies whether or not the person to whom the share was transferred was related to the deceased from whose succession the co-owned property derives (as long as such person - to whom the share was transferred - is not entitled to inherit from the de cujus). Article 834 is much wider and deals with the transfer of a share of co-owned property by one of the co-owners to a third party regardless of how such co-ownership arose. Its wording suggests that its application extends to co-ownership arising other than by succession although it falls under the part of the Civil Code dealing with successions (Title I of Book III). The other co-owners may purchase back the share by paying to the person to whom such share was transferred, the value of the share at the time the co-owners offer to buy the share, in addition to costs and dues of the transfer.

[32] In my view, Article 834 is clear – it provides for the payment of “the value of the share at the time of [the] offer and the payment of all costs and dues of the transfer”. Under that provision, the other co-owners are not required to pay “the amount ... paid for [the] transfer” as in Article 841. To my mind if the legislators had wanted the purchaser of a share of a property in co-ownership to be paid the sum he or she had paid for the property, they would have stated this expressly. Where the law is clear and ambiguous it is not for the judge to substitute itself for the legislature under the guise of interpreting the law.

[33] In *Georges v Electoral Commission* (2012) SLR 199, Karunakaran J stated at page 203 –

It is a fundamental principle of interpretation of statutes that while interpreting any provision of law in a statute the court ought to apply the “literal rule” as the first rule; the “golden rule” is to give effect to the meaning the legislature intended to convey, unless such meaning leads to utter absurdity. Under the literal rule, the

words of the statute are given their natural or ordinary meaning and applied without the court seeking to put a twist or gloss on the words or seek to make sense of the statute. In other words, the words of a statute must prima facie be given their ordinary meaning. When the words of the statute are clear, plain and unambiguous, then the courts are bound to give effect to that meaning, irrespective of the consequences. Even if such consequences appear to be unfair and ungenerous ... It is said that the words themselves best declare the intention of the law-giver.

- [34] On the issue of a literal application of a statute leading to an unjust or unfair result he went on the say at page 204 -

Having said that, I note Mr Derjacques also submitted that since the literal interpretation does not accord with fairness and justice to the petitioner, he invited the Court to consider a farfetched interpretation of section 97(2) in order to meet fairness and justice in this matter. With due respect, were I to accept Mr Derjacques' submission in this respect, I would have to import additional words into section 97(2) of the Elections Act. This I am not empowered to do as this Court thereby would legislate rather than interpret the law.

On the issue of consequences, I too, as a man of the world share the concern of Mr Derjacques. However, as a judge I have no doubt that this Court should apply the law as it stands today in the Elections Act until such time the Act is repealed or amended accordingly to meet the changing needs of time and the socio-political dynamics.

- [35] Likewise in the present case, I am of the view that although it may be considered unfair for the plaintiff to pay the defendant the market price for his $\frac{1}{4}$ share in Title No. T586 for which the latter paid only One Seychelles Rupee, the law must be complied with.
- [36] Accordingly pursuant to Article 834 I hold that the sum to be paid by the plaintiff to the defendant is the value of the defendant's $\frac{1}{4}$ share in Title No. T586 at the time of filing of this case namely 27th January 2020. Since no valuation was provided by either of the parties this Court is not in a position to make any determination as to the exact sum to be paid by the plaintiff to the defendant. The plaintiff should also bear the costs and dues of the transfer as provided under Article 834.
- [37] Given that it was agreed by the parties that the issues for the Court's determination would be confined to the sum to be paid by the plaintiff to the respondent, I see no reason to

address the plaintiff's prayer that the transfer dated 14th May 2012 be declared null and void or alternatively that it be rescinded.

[38] Further, given the circumstances of this case each party shall bear their own costs of these proceedings.

Signed, dated and delivered at Ile du Port Victoria on 3rd February 2023

Carolus J