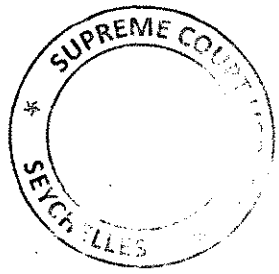
IN THE SEYCHELLES COURT OF APPEAL

ANDRE EDMOND

V.

HELEN EDMOND



Civil Appeal No. 2/96.

(Before H. Goburdhun, P., E.O. Ayoola, M.A. Adam, JJA)

Mr. C. Lucas for the appellant
Mr. J. Renaud for the respondent

JUDGMENT OF THE COURT

On the undefended petition of Helen Edmond ("the wife") the marriage had and celebrated by the wife and Andre Edmond ("the husband") on 18th December 1977 was dissolved by the Supreme Court on 23rd July 1990. There is no child of the marriage. Pursuant to sections 24 and 26 of the Matrimonial Causes Act Cap.72 (1971 Edition of the Laws of Seychelles) the wife applied to the Supreme Court for the following reliefs:

> "(a) to determine the respective interest of the parties in excess of 50%, in the matrimonial property
>
> (b) to make an order transferring to the Petitioner the whole of the Respondent's interest in the former matrimonial home, to provide a secure home for the Petitioner."

On his part the husband requested the Supreme Court -

> "(a) to declare that my ex-wife has no interest in the house at Petit Paris and;
>
> (b) to transfer the property into my sole name."

The matrimonial property in respect of which these several reliefs were sought was evidently the landed property situate at Petit Paris held in the joint names of the husband and the wife. By virtue of a document dated 15th February 1980 and also as fiduciaries of the said title No.831, a house was built on the land with a mortgage from the Seychelles Housing Development Corporation which they were both liable to repay. The husband in his affidavit claimed to have bought the land and to have developed it with loans obtained by him, but it is clear from the documentary evidence that the purchase of the land as well as the several loan transactions relating to the land and the building thereon were in the joint names of the parties.

When the matter was heard by Perera J. the parties led evidence on several other movable properties, namely, a boat, furniture and pigs and there was much conflict of evidence on whether it was the husband or the wife who sold the pigs or removed furniture from the matrimonial home. However, the reliefs sought from the court remained unaffected by evidence led on those properties.

Perera, J. found "that the land was purchased, house built and furnished mainly from the earnings of the respondent (i.e. the husband) who alone was the sole bread-winner." He however observed that "the petitioner's (i.e. the wife's) contribution by way of services cannot be disregarded." Finally, he held that by virtue of Article 815 of the Civil Code of Seychelles ("the Civil Code") it should be presumed that both parties are entitled to half share. This would necessarily follow from the view he had held, rightly, that the property was held in joint ownership. He found that the presumption in Article 815 of the Civil Code had not been rebutted and held that the wife was entitled to half share of the property to which he added

half of the sum of R.69,700 which the husband had earned as rent from the property for "the period December 1987 to the beginning of 1992." This came to R.35,850 from which he deducted a sum of R.8,000 represented what in his view was the value of a boat sold by the wife. At the end of the day, Perera J. declared that the parties would hold the property in equal shares and adjudged in addition that the wife was entitled to R.26,850.

On this appeal by the husband from that decision, the points have been taken: (1) that the judge was wrong to find, as he did, that the husband did not claim his share in the piggery, boat, furniture and salary of the wife but only the immovable property; (2) that he ought to have made findings about the sale of pigs, boats and engines and about removal of furniture and withdrawals from a certain bank account and (3) that the judge was wrong to have found that the wife was entitled to half of the property and rents.

Mr. John Renaud, learned counsel for the wife, conceded that in these proceedings, the wife should not have been adjudged entitled to half of the rent from the property because the rent was used to offset the joint liability of the parties and because the proceedings related to the matrimonial home in joint ownership. It is evident from the reliefs sought in the proceedings that rights which were submitted to the court for adjudication were in relation to the matrimonial home. The question does not rightly arise in the proceedings, as to the refund of any rents collected by the husband or movable properties allegedly sold or removed by either the wife or the husband. Also irrelevant to the proceedings is the question whether or not it was the husband alone who repaid the mortgage loan on the house. The straightforward questions that arose in the proceedings were (1) whether the wife was entitled as she claimed to

anything in excess of 50% share in the property and, (2) whether as claimed by the husband she was not entitled to any share at all thereof.

Article 815 of the Civil Code provides that :

> "Co-ownership arises when property is held by two or more persons jointly."

From the documents of title in evidence in the instant case it is established beyond peradventure that a co-ownership had arisen in respect of the property now in question. Article 815 of the Civil Code further provides as regards the shares of the co-owners in the property jointly owned as follows:

> "In the absence of any evidence to the contrary it shall be presumed that co-owners are entitled to equal shares."

The presumption that co-owners are entitled to equal shares is rebuttable by evidence that they are not so entitled. Counsel for the husband argued, in effect, that such rebuttal is found in evidence that the husband repaid the mortgage loan with his own money and that the wife had sold or removed movable property belonging to the husband or to the home. These pieces of evidence evidently fall short of what is required to rebut the presumption of a co-owners' entitlement to equal shares of the property. There is no evidence that the parties had pre-arranged to contribute to the purchase of the property in any particular proportions as would determine their respective shares in the property. All that the evidence shows is that the husband discharged the obligation which the parties jointly incurred in respect of the mortgage. This does not <u>per se</u> deprive the wife as a co-owner of her half-share of the property. Where a co-owner has discharged an obligation jointly incurred by the

co-owners in respect of the property under co-ownership that the co-owner may recover what he has spent beyond his own share of liability from the other co-owner or co-owners would not affect the entitlement of the co-owners to equal shares, if there is no other evidence in rebuttal of the presumption of entitlement to equal shares. Similarly, the liability, if any, of the wife in this case to account for goods of the husband, or of the family sold or removed by her, would not affect her entitlement to equal share in the property under co-ownership or, as the husband's pleadings would seem to seek to suggest, her right in the property.

In these circumstances, Perera J. was right, even though for a different reason, not to have made any findings on who sold pigs or removed furniture. Such findings would have had no relevance to the question of the interest, or proportion thereof, of the wife in the matrimonial home.

The view of the matter held by Perera J. is consistent with the decision of the Supreme Court in Figaro v. Figaro (1982) SLR 200 where at p.206-207 Sauzier J said:

> "When the husband and the wife are co-owners of the matrimonial home their proprietary rights are governed by the provisions of Article 815 et seq of the Civil Code of Seychelles. In the absence of evidence to the contrary they are presumed to be entitled to equal shares."

No one can seriously suggest that that is not a correct statement of the law. Applying that statement of the law to this case it is clear that Perera J. was correct in his conclusion as to the right of the wife to an equal share in the property with the husband.

However, to avoid any future dispute that may arise between the parties as to the rent derived from the property

which was said to be on the sum of R.69,700, it is expedient to state that on the evidence that that sum was spent to discharge part of the mortgage obligations incurred by the parties in respect of the property such amount was no more available for sharing by the parties. It was erroneous, therefore to have ordered the husband to refund half of the amount of such rent to the wife.

All the grounds on which this appeal has been argued having failed this appeal must fail as well. However upon the concession made by learned counsel for the wife that the award of R.26,850 made to the wife is ultra petita, that award would be set aside and the judgment of Perera J. would be varied accordingly.

However, before we part with this appeal, a few pertinent observations would be made. First, the application was brought by the wife inappropriately pursuant to sections of the Matrimonial Causes Act (Cap.72 of the 1971 Edition of Laws of Seychelles) which has, at the date of the commencement of the present proceedings, been repealed by section 28(1) of the Matrimonial Causes Act, 1992. Secondly, Perera J. had refused to grant the second prayer in the wife's application which he regarded as a prayer for an exclusion order in relation to the matrimonial home. There has been no appeal from his decision refusing to grant that prayer. Thirdly, if the intention of the parties had been to effect a distribution of assets by way of the present proceedings, then the facts before the Supreme Court were grossly insufficient to enable the Court to embark on that exercise. The better view, however, is that the wife's application was for an order in relation to the matrimonial home and this has been appropriately dealt with by the decision of Perera, J. It would thus not have been appropriate for the Supreme Court to deal with the application as if it had been one for distribution of family

assets at large. The case of Desaubin v. Perriol (Divorce Side No. 20 of 1994, Judgment dated 16th May 1996) to which counsel for the husband has invited our attention is thus not of relevance to the limited issues raised by her counsel before the Supreme Court in the wife's application.

In the result, the judgment of Perera, J. is varied only to the extent that the award of R.26,850 made to the wife is set aside. The judgment that the parties would hold the property in equal shares is hereby affirmed. Parties are to bear their own costs.

Dated this day of 1996.

H. GOBURDHUN
(PRESIDENT)

E.O. AYOOLA
(JUSTICE OF APPEAL)

M.A. ADAM
(JUSTICE OF APPEAL)

Handed down
on 5th July 1996
Adam JA