IN THE COURT OF APPEAL OF SEYCHELLES

KRISHNAN CHETTY

APPELLANT

vs

P. SUBRAMANIYAN PILLAY

RESPONDENT

SCA 61 of 2011

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Counsel: Mr B. Georges for the Appellant
Mr F. Bonté for the Respondent

Date of hearing: 2nd April 2014
Date of judgment: 11th April 2014

JUDGMENT

TWOMEY, MATHILDA,.

[1]. The facts of this case are simple though its process through the courts has been rather convoluted. The respondent is the owner of a commercial building at Market Street, Victoria. He appointed one Céline Francis as agent to manage his affairs in Seychelles while he was abroad. In 1999, she entered into a lease agreement in respect of the premises with the appellant. In 2001, the respondent sought a declaration that the lease agreement concluded by his agent was outside the remit of the power of attorney he had granted her and should be declared null and void. This was acceded to by the Supreme Court in a decision given on 25th October 2004 by Karunakaran J. On appeal however, the Court of Appeal found that the power of attorney granted was sufficient to allow the agent to enter into "an agreement for a lease is conveying rights in personam" with the appellant.

[2]. It relied on the provisions of the Land Registration Act and the Seychelles Civil Code for its decision. In order to understand the genesis of the present case we find it necessary to revisit these provisions. Section 70 (1) of the Land Registration Act provides:

> *"Upon the application of the donor or the donee of a power of attorney which contains any power to dispose of any interest in land, such power of attorney shall be entered in the register of powers of attorney and the original, or with*

the consent of the Registrar a copy thereof certified by the Registrar, shall be filed in the file of powers of attorney.

(2) Every such power of attorney shall be in the prescribed form or such other form as the Registrar may in any particular case approve, and shall be executed and attested in accordance with section 60.

The prescribed form referred to is Form L.R.13 of the Land Registration Act. The power of attorney executed in this case did not conform with the said formula but as was pointed out by the Court such conformity is not mandatory to create powers of agency.

Section 60(1) provides that:

"Every instrument evidencing a disposition and executed in Seychelles shall be executed in the presence of a notary, barrister, attorney, magistrate, Justice of the Peace, a duly appointed Government Representative, or the Registrar, who shall attest the execution in the prescribed form."(our underlining)

The term *disposition* is defined in section 2 of the Act as

"any act by a proprietor whereby his rights in or over his land, lease or charge are affected, but does not include an agreement to transfer, lease or charge;"(our emphasis)

There is therefore a distinction made between a *lease* and an *agreement for a lease* but also between different forms of powers of attorney. It is to the Civil Code that we now turn for further elaboration.

[3]. The Code, which predates the Land Registration Act, also contains provisions in relation to the nature and forms of agency. Article 1984 states:

"Agency or power of attorney is an act whereby a person called the principal gives to another called the agent or proxy the power to do something for him and in his name.

The contract is made by the acceptance of the agent."

Article 1985 goes on to provide that:

"A power of attorney may be given by a notarial document or by a document under private signature or even by a letter. It may also be given orally; but oral evidence of it is only admissible in accordance with the Title Contracts and Agreements in General.

The acceptance of the agency may be implied and may result from the acts done by the agent thereunder."

Hence, the Court of Appeal rightly found that although the instrument signed by the respondent and his agent did not conform with section 70 of the Land Registration Act, the power of attorney concluded between the parties was valid and contained

provisions wide enough to permit the agent to enter into "an agreement to lease" the property of the respondent.

[4]. In terms of the validity of the lease itself the Court of Appeal found that although conformity with Form LR 5 under section 28 of the Land Registration Act is not mandatory, the lease did not comply with the provisions of the Act as to form and registration and hence was "ineffectual" as a lease. This is because section 28 strictly provides:

> *"Notwithstanding any provision contained in any other written law, no land, lease or charge registered under this Act shall be capable of being dealt with except in accordance with the provisions of this Act and every attempt to deal with such land, lease or charge otherwise than in accordance with the provisions of this Act shall be ineffectual to create, extinguish, transfer, vary or affect any right or interest in the land, lease or charge."*

However, articles 1714 and 1718(1) of the Code provide:

> *"Article 1714 - An agreement for a lease may be written or verbal. A lease must be executed in an authentic form…*
>
> *Article 1718 (1) -An agreement for a lease shall only confer personal rights upon the parties to it...*
>
> *(2)- A grant of a lease must be executed in an authentic form. That lease shall be registered in the register kept at the Office of the Registrar General and, if so registered, shall convey a real right in land limited in time as provided in article 543 of this Code. Registration shall constitute notice to all third parties. A lease in an authentic form which has not been registered shall be construed as an agreement for a lease as provided in paragraph 1.(our emphasis).*

[5]. Given the circumstances of this case and the operation of the provisions of the Land Registration Act and the Civil Code, the result is that there was no lease for lack of authenticity but there was an *agreement for a lease* conveying personal rights between the parties to it. In simple and practical terms what this means is that there was a contract enforceable between the parties but not a lease giving rights in rem (good against the whole world).

[6]. In reliance on the agreement, the appellant tenant sub-let a number of shops in the building to third parties. On 26th October 2006, by notice in writing, the respondent terminated the agreement for a lease with the appellant. The termination was duly registered on 31st October 2006. Meanwhile between 2005 and 2007 the respondent had collected rent from the sub-lessees of the appellant. In December 2009, the appellant filed a plaint against the respondent claiming SR1.5 million for rental monies collected by the respondent from the sub-lessees.

[7]. The learned trial judge Karunakaran on the 16th November 2011, dismissed the appellant's claim for the return of the rental monies collected by the respondent in his

stead. He found that the since the purported lease was "ineffectual" and only created a right in personam in favour of the appellant:

> *"it goes without saying that the [appellant] under such incompetent agreement cannot make any claim based on any real right in the premises such as a lease, charge etc, as it is a "right in rem"* (sic).

[8]. From this judgment, the appellant has appealed to this court on the following ground:

> *"The Learned Judge erred in his assessment that this Honourable Court in a previous appeal had - in holding that the agreement in issue between the parties granted rights in personam to the appellant- erroneously given life and force to the impugned agreement and, as a consequence of his wrong assessment of what this court had done erred in his finding that the agreement was incompetent to give the appellant any rights against his tenants I terms of which he was due rent."*

In support of this appeal, Mr. Georges for the appellant has relied on two cases: Van *Hecke v La Goelette (Proprietary) Limited (198) SCAR 332* and *Jumeau v Anacoura& anor (1978) SLR 180*. We shall return to these cases later.

[9]. Mr. Bonté for the respondent in response contends that the agreement for a lease conveyed personal rights but these rights were restricted and did not permit the appellant the right to sublet. He submitted that if the cancellation of the lease had caused prejudice to the appellant his remedy was in damages.

[10]. We find it difficult to follow Mr. Bonté and twice more difficult to understand the learned trial judge's reasoning in his unguarded comment on this court's clear exposition of the law and the enunciation of the rights arising from the provisions of the law. In his decision, the learned trial judge stated:

> *"The appellate court having thus found that the lease agreement was ineffectual in the eye of law, it surprisingly went on to give "life and force" to the said ineffectual lease agreement and made it effectual stating that it created "right in personam" between the parties, which the parties obviously never intended to attribute to the so called lease-deed they originally entered into. Be that as it may, the Court of Appeal in the process of determining the appeal, made so to say "a new contract" for the parties, as the one they originally entered into, was invalid and did not serve its purpose.(sic)"*

With great respect to the learned judge, had he taken pains to understand this Court's judgment in *Francis and anor v Pillay (unreported) SCA 20/2004,* to advert to the distinction between property rights and contractual rights and the relevant provisions of this country's Civil Code, he would have exercised restraint in making his comments.

[11]. In *Van Hecke v La Goelette (Proprietary) Limited (1983) 3 SCAR (Vol II) 332* the Court of Appeal had the opportunity to precisely explain the distinction between these rights. Sauzier JA stated

"… it is clear that under the Civil Code an agreement for a lease is, in all respects, equivalent to a lease except that it confers personal rights only.

Under an agreement for a lease, the lessor and lessee have the same rights and obligations as under a lease. The only practical difference between personal rights and real rights conferred by an agreement for a lease and a lease respectively is that where real rights are conferred the lease may be mortgaged.

In *Jumeau v Anacoura (1978) SLR 180,* Sauzier J had to consider the personal rights arising from an agreement to lease land belonging to co-owners that had neither been notarised nor registered and transcribed. He stated that a co-owner who leases land held in co-ownership must be treated the same way as a person who leases land belonging to a third party. Quoting Planiol and Ripert in *Traité Pratique de Droit Civil Francais*, he explains that although by comparison under article 1599 of the Civil Code, the sale of the property of another shall be null, the agreement to lease

"est un contrat simplement productif d'obligations. Le bailleur, par l'effet du contrat, ne transfère pas au preneur la jouissance de la chose louée; il s'oblige à le mettre à meme d'exercer paisiblement et sans obstacle cette jouissance.

Hence an agreement for a lease of land belonging to a third party is valid under the Civil Code and the provisions thereof apply to such a lease.

[12]. In order not to be further misunderstood, we find it apt to state categorically that there was most definitely a binding agreement between the appellant and the respondent signed by the respondent's agent on his behalf in 1999 for the lease of the shops. The appellant was entirely in his rights to sub lease the shops as no clause in the lease agreement precluded him from so doing. Hence all the sub-leases between the appellant and his tenants were valid and enforceable between them. In this respect, it is the respondent who was a third party to the agreements between the appellant and his sub lessees.

[13]. There should be no further doubt as to the distinction between rights *in rem* and *rights in personam* or between property rights and personal rights. Whilst the agreement between the appellant and the respondent was not one that conveyed property rights (rights in rem), they did convey personal rights. In this respect, if the lease had been executed in accordance with the Land Registration Act, it would have conveyed property rights that are absolute rights. The appellant would have been entitled, for example, to take a charge on the lease. As it was not, it was merely reduced to a binding agreement between the parties, producing personal rights and conveying obligations. Whereas property rights command respect and abstention from everyone in the whole world, personal rights reflect the rights and duties that our law of contract recognises and protects between two parties (vide article 1718 (1) Civil Code of Seychelles). Those personal rights were only cancelled by the termination letter and the operation of clause 4 (a) of the lease which provides:

"The Lessor and the Lessee mutually covenant as follows:

that this lease may be terminated by either party by giving the other one year notice in writing and the lease shall terminate upon the expiry of the notice period."

Since the notice letter was dated 26th October 2006, the agreement for the lease was terminated a year later on 27th October 2007. All rents from the sub lessees of the appellant were therefore due and payable to the appellant and not the respondent until the 27th October 2007` . Any monies appropriated from these sub lessees by the respondent are thus to be immediately returned to the appellant. Since the agreement for the lease stipulated that the appellant pay the respondent the sum of R25, 000 per month as rent, if that sum was paid or not paid to the respondent it must be set off against the whole sum held by the respondent.

[14]. For the reasons given above, we allow the appeal and quash the order of dismissal. Given the misapprehension of the law on which the decision was reached we consider that a hearing on the merits of this case is warranted. Accordingly we remit this matter to the Supreme Court to be heard anew before a differently constituted bench. We grant the appellant the costs both of the trial in respect of the claim which has been dismissed and of this appeal.

[15]. Finally, we cannot end this judgment without repeating the following observation made by our learned brothers in the case of *Hoareau v Hoareau SCA 38/1996* at page 5 of their judgment:

. *"…in making comments and pronouncements on the judgement of this Court judges must guard against unwittingly appearing to show scant regard for the need to avoid judicial anarchy which will surely introduce confusion and uncertainty into the legal system. A judge must not give the impression that he is upset by the reversal of his judgment by a higher court or that he needs to re-establish a view that he had been held to hold in error."*

Perhaps if this warning was heeded the need for some of the appeals before this Court might rightly be averted.

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M. TWOMEY	**S.DOMAH**	**J. MSOFFE**
JUSTICE OF APPEAL	**JUSTICE OF APPEAL**	**JUSTICE OF APPEAL**

Dated this 11th April 2014, Ile du Port, Mahé, Seychelles.