

**Delpeche v Gregoretti & Or
(1998) SLR 182**

Philippe BOULLE for the petitioner
Ramniklal VALABHJI for the first respondent
Nichole TIRANT for the second respondent

[Appeal by the petitioner was dismissed on 4 December 1998 in CA 25/1998]

Judgment delivered on 28 May 1998 by:

PERERA J: This is an application for a division in kind filed by the executrix of the estate of one Donald Delpeche who died on 31 January 1974 leaving a notarially executed last will dated 26 January 1974. In this will (exhibit P2), he bequeathed all his estate jointly to the following persons –

- (1) Linda Marie-Antoinette Delpeche (natural child) - 1/6 share
- (2) Harold Delpeche – brother (now deceased) - 1/6 share
- (3) Daniel Delpeche – nephew (now deceased) - 1/6 share
- (4) Ralph Andre Delpeche – nephew - 1/6 share
- (5) Ms. Marinete Cecile Bernadette Ah-Time nee Delpeche – niece - 1/6 share
- (6) Monique Denis, nee Delpeche – niece - 1/6th share.

The said Monique Denis nee Delpeche, the petitioner, was appointed the executrix, purportedly under article 1026 of the Civil Code, in case 134/1995 of this Court. The appointment was consented to by the fourth and fifth above named persons. However the first^t named person objected to the appointment on the basis that there was no estate to be administered as the deceased had disposed and transferred all his properties before his death. That objection was later withdrawn prior to the order of appointment being made on 22 April 1996.

Both Mr Valabhji, counsel for the first respondent, and Mrs Tirant, counsel for the second respondent, have raised a joint preliminary objection to the petitioner acting without the apparent consent of the heirs. As a matter of law, it was contended that Donald Delpeche, having died before the Civil Code of Seychelles came into operation, there was no necessity to appoint an executor to administer the will as the heirs at that time became seized of their rights upon the death of the testator.

Admittedly, the two properties parcel V712 and V772 owned by Donald Delpeche had been disposed of prior to his death in 1974. The petitioner seeks to partition a portion of

land purported to have been reserved when he transferred parcel V772 to one Gunther Bongers on 6 November 1973. That reservation is now identified by the petitioner as parcel V1112, presently registered in the names of the first and second respondents. Both these respondents deny that their purchases were subject to any such reservation. This position raises the second objection that the executor cannot apply for partition of a land to which the deceased had no title, or without first establishing the deceased's title by a principal action before this Court.

The second respondent raised a further objection that having purchased the rights in parcel V112 on 16 June 1986, she has acquired a prescriptive right under article 2265, having acquired title for value and in good faith. The first respondent has raised no plea of prescription, as her objection to the application for division in kind is based on an absolute ownership by virtue of an unreserved transfer of title by Bongers on 6 March 1981.

As the second and third objections are based on facts to be ascertained on a close consideration of the various transfers of title as evidenced by the deeds and the connected survey plans, I shall presently deal with the first objection, which is purely a matter of law.

Under the French Code Civil, as applicable in Seychelles prior to the promulgation of present Civil Code of Seychelles on 1 January 1976, there was a system of direct succession; the successors becoming seized of the property as of right upon the death of the testator. The petitioner, as one of the heirs in succession, thus became entitled to a 1/6 share of the estate of the deceased. Prof Chloros states that –

The old system of direct succession with the benefit of inventory was retained in all cases in which the estate of the deceased did not include immovable property. In these cases property vests as of right in the heirs of the deceased. However where immovable property is involved, an executor must be appointed. He also acts as fiduciary of such property and may pass title to property in his capacity as agent of the heirs, which is not burdened by any rights of succession.

Article 724 of the French Code Civil which applied at that time, provided that –

The legitimate and illegitimate heirs are seized ipso of the property, the rights and the rights of action of the deceased, subject to having to pay all claims against the succession ...

Hence upon the death of Donald Delpeche on 31 January 1974, the petitioner as the niece, as well as Linda Marie-Antoinette Delpeche, the natural child, and the other heirs by descent became legatees under the will. The appointment of the petitioner as executrix in 1996 was therefore superfluous, but the petitioner has locus standi as a legal heir and legatee to seek a division and an "action en partage" is not barred by the 20 year period of prescription laid down in article 2262 of the Civil Code.

A further consideration is whether, when a question of ownership arises in the course of summary proceedings for a division in kind or for licitation, such question could be decided in those proceedings or whether there should be a stay of proceedings to enable the parties to settle the dispute in a regular action. In the case of *Sedgwick v Sedgwick* (1974) SLR 84 such a course of action was taken as the question of ownership depended upon the validity of a deed of sale under private signatures.

In the case of *Lesperance v Lesperance* (1976) SLR 64, the legitimate children of the testator filed a petition for partition more than 30 years after the death of the testator. By then the property was possessed by the natural children of the deceased testator and a person who had purchased one of the parcels of land from them. A plea of prescription was raised against the petitioners.

Sauzier J held that although the petitioners had made out a prima facie case of co-ownership, the respondents should be given an opportunity to establish their exclusive rights based on prescription in a regular action as the summary procedure involved in the Immovable Property (Judicial Sales) Act was inadequate for the Court to deal with such objection. It was however held obiter that:

If the respondents prove that they have acquired the sole right to the ownership of the parcels of land by prescription as against the petitioners, then the petitioners have lost rights to bring this action. On the other hand if the respondents have not acquired such exclusive rights to ownership as against the petitioners, the petitioners are still entitled to bring this action although more than 30 years have elapsed since the death of Armand Lesperance.

The natural children of Armand Lesperance filed a regular action to settle the issue of prescription. Sauzier J in the second case of *Lesperance v Lesperance* (1977) SLR 139 on a consideration of the evidence adduced came to the conclusion that the natural children of the deceased had failed to establish prescription. According, even after 30 years, the co-heirs were entitled to seek a division in kind.

In the present case, the petitioners and the respondents are not co-heirs. The respondents are purchasers for value from a vendor who had a qualified title over land with a portion reserved by his predecessor in title. The petitioner had identified the portion of land to be divided as parcel V1112 presently possessed by the first and second respondents. The only question to be decided is whether the reservation made by Donald Delpeche in transferring parcel V772 to Bongers was the portion of land parcel V712 which he had previously sold to one Raymonde Fernandez or whether it was another equivalent portion from the remaining portion of land. Both parties have in the present proceedings adduced oral and documentary evidence to enable this Court to make a determination. Hence I shall proceed to consider such evidence before me.

By deed of transfer dated 6 November 1973 (exhibit P3) the late Donald Delpeche transferred to Gunther Bongers "a portion of land situated at Beau Vallon, Mahe

Seychelles, of the extent of 1.854 acres (7504 square metres), registered as parcel V772 as per survey of Mr Yvon Savy, surveyor, dated 25 May 1973..." (exhibit P7). This transfer was however subject to three reservations, the relevant one for present purposes being the following:

There shall be reserved to the vendor from the remaining portion of plot V772 lying to the west of the new road a portion equivalent in area to plot V712 (a plot formerly surveyed under this parcel number but now incorporated in the large area registered under plot V772). The location of the area reserved to be by agreement between the parties.

According to survey plan dated 6 October 1972 (exhibit P8), parcel V712 referred to in the reservation consisted of 0.1503 acres (608.2 sq meters) within the area of 1.854 acres which comprised the entire land bearing parcel no V772 sold to Bongers. On a comparison of the two plans exhibits P7 and P3, parcel V712 can be identified as a portion of land situated on the south-western portion of parcel V772. Parcel 712 was sold to Raymonde Fernandez on 8 July 1972 (exhibit 1D1).

As stated earlier, Donald Delpeche died on 31 January 1974, less than 3 months after the transfer of parcel V772 to Bongers with the aforesaid reservation. There is no evidence that the reserved portion was located by agreement between the late Donald Delpeche and Bongers as stipulated. However the transfer was encumbered with the reservation.

On 18 June 1974, parcel 772 was subdivided into three plots; plot V1112 consisting of 0.416 acres (1683 square metres) located in the south-western portion of parcel V772, plot V964 consisting of 0.276 acres (1117 square metres), located in the central portion diagonally from north to south portion of parcel V772, and plot V968 consisting of 1.168 acres (4725 square metres) located in the north-eastern and south-eastern portion of parcel V772; the total average being 1.860 acres (7525 square metres). These subdivisions were however approved by the Chief Surveyor only on 26 December 1984.

On 6 March 1981, Gunther Bongers transferred to Marie Ange Gregoretti, the first respondent, parcel V772 (subdivisions still unapproved). Under the heading "reference to title deeds" it was stated inter alia –

It is also stated in the vendor's title deeds that the previous vendor Donald Delpeche made the reservation from the remaining portion of plot V772 lying to the west of the new road a portion equivalent in area to plot 712 (a plot formerly surveyed under this parcel number but now incorporated in the large area registered under plot V772.)

Thus with the approval of the sub-divisions, the first respondent was the registered owner of parcels V969, V965 and V1112.

On 4 February 1982, parcel V965 was sub-divided into parcel V4197, consisting of 3698 square metres. Parcel V965 was 4725 square metres in extent. There was therefore a balance portion of 1027 square metres. The survey plan to parcel V4179 was however approved on 22 March 1985.

On 19 August 1985, the first respondent transferred to Sylva Ah-Time and Nicole Ah-Time 400 square metres extracted from the land she had purchased from Bongers. The description of the portion transferred corresponds to a portion of parcel V1112 as it has the stream as its western boundary. However, it could not be the whole of parcel V1112 as that parcel consisted of 1683 square metres, whereas only 400 square metres thereof was transferred.

By deed of transfer dated 16 June 1986, Sylva Ah-Time and Nicole Ah-Time transferred the 400 square metres they had purchased from the first respondent to Mrs Mary Morel, the second respondent.

The first respondent on being cross-examined stated that she knew that her sister Raymonde Fernandez had a share in the property, parcel V772, which she purchased from Bongers on 6 March 1981 (exhibit P4). She was however referring to the portion of 0.1503 acres which Raymonde Fernandez purchased as parcel V712, which by 1981 formed part of the large land parcel V772. She denied that there was a second reservation of an equivalent portion in the land she purchased from Bongers in 1981.

The question arises as to why or how Donald Delpeche, having sold parcel V712 to Raymonde Fernandez on 7 July 1972, could on 6 November 1973 reserve to himself an equivalent portion in parcel V772 which by then had been consolidated into one land. Mr Valabhji, counsel for the first respondent submits that it would have been done to exclude parcel V712 which had already been sold from parcel V772. But if that be so, why did Donald Delpeche state in the deed “there shall be reserved to the vendor”? Further it is clear that the reservation did not relate to parcel V712 already sold but to “the remaining portion of plot V772 lying to the west of the new road, a portion equivalent in area to plot V712”. Thus if parcel V772 in consolidation consisted of an area of 7504 square metres (1.854 acres), with the portion of 608.2 square metres (0.1503 acres) being the extent of parcel V712 (now forming part of parcel V772) and an equivalent extent of 608.2 square metres from the reservation being excised, the first respondent would have become entitled only to the extent of 6287.6 square metres by virtue of her purchase from Bongers. From that extent she sold 400 square metres to Sylva Ah-Time and Nicole Ah-Time (exhibit P5), thus leaving a balance of 5887.6 square metres. Mr and Mrs Ah-Time sold that portion of 400 square metres to the second respondent, Mrs Mary Morel.

Where the second respondent is concerned, she has an undivided portion of 400 square metres in parcel V1112. Hence as evidenced by exhibit P12, she has a qualified title as a co-owner of that parcel with the first respondent. As regards the first respondent, Bongers could only transfer what he lawfully owned. Hence, as stated above, the property passed was subject to the reservation. The heirs of Donald

Delpeche therefore did not lose their right to a reservation of 608.2 square metres, which by various subdivisions of parcel V772 to the first respondent without reserving the portion withheld by Donald Delpeche, but merely giving notice to such reservation in the recital "reference to title deeds" makes no difference to the position that the First Respondent received the land subject to that reservation.

The question which arises is whether the petitioner has lost the right to seek a division in kind by prescription as over 20 years have elapsed since the death of Donald Delpeche. Where the second respondent is concerned, she is a bona fide purchaser for value of 400 square metres in parcel V1112 within well defined boundaries. She purchased the land on 16 June 1986 and the present case was filed on 8 October 1996. The petitioner admitted that she has been in undisturbed and uninterrupted possession during this period, and accordingly she has acquired prescriptive title as against the petitioner in terms of article 2265 as pleaded. Hence the defined portion she holds has to be excluded from any partition of parcel V1112.

The first respondent however identified the reservation on the deed of transfer from Donald Delpeche to Bongers as parcel V712 which he had already sold to Raymonde Fernandez prior to his death. But as has been seen, the plain words used in the deed do not support such a view. In a vain attempt to ignore the reservation of a portion equivalent to parcel V712 which the vendor, Delpeche retained, Bongers sought to transfer the whole land, however taking care to give notice of a reservation to the first respondent. The first respondent therefore possessed the whole and with the knowledge of the reservation in favour of the heirs of Delpeche. The first respondent has not pleaded prescription against the petitioner's right to institute this case. Hence in terms of article 2224, prescription should be presumed to be waived.

In the result therefore the petitioner can maintain the application for a division in kind of parcel V1112 in respect of the reserved portion of 608.2 square metres (portion equivalent in area to plot V712). However in any appraisal made, the second respondent shall be entitled to her 400 square metres falling within the metres and bounds described in the schedule to her title deed, by right of purchase and by prescription.

Accordingly order is hereby made for a division in kind of parcel V1112 by an appraiser in terms of the findings of this Court.

Costs of the petitioner and of the second respondent to be paid by the first respondent.

Recorded: Civil Side No 305 of 1996