

## Pragassen v Vidot

(2010) SLR 163

Bernard GEORGES for the plaintiff

France BONTE for the defendant

### **Ruling delivered on 2 July 2010 by**

**RENAUD J:** On 10 October 2007, I gave my considered ruling in this matter and declared that a lease agreement (the lease) dated 7 June 1996 signed by the late Doreville Vidot (the deceased), leasing to the defendant for a period of 99 years, renewable, for a monthly rent of R1, a shop standing on the deceased's land, was valid in law.

### **Plea in limine litis**

The defendant raised a plea *in limine litis* worded as follows:

The matter before the Court is *res judicata* or has "autorite de la chose jugee" by virtue of the Supreme Court's Ruling dated the 10<sup>th</sup> day of October 2007 delivered by his Lordship Judge B. Renaud, in that the purported cause of action of disguised donation as averred by the Plaintiff in its amended plaint at paragraph 5 was an integral part of the Plaint that was dismissed by the Court in the aforementioned ruling. The Plaintiff's reliance on this cause of action is fully demonstrated by its written submission dated the 28<sup>th</sup> day of March 2007 wherein at paragraph 2 of the said submission he took up as argument entitled "Disguised donation" and "the authority of Articles 918 and 920 of the Civil Code"

Is the matter before the Court *res judicata*?

This Court delivered its considered ruling in this same suit between the same parties and the issue on which this Court gave that ruling was to the effect that "the lease agreement dated 7 June 1996 between the deceased Doreville Vidot and the defendant Margaret Vidot is legally valid." The plaintiff raised the issue in terms of articles 389(4) and 450 of the Civil Code of Seychelles. The cause of action was therefore whether a lease agreement, between the parties before Court dated 7 June 1996, was null, void and of no effect. That issue was one of four prayers of the plaintiff in his original suit. The three other prayers were to be continued with after the Court ruling on the first prayer was delivered.

After the delivery of that ruling the plaintiff, with leave of this Court, amended his pleading in his original plaint, to the effect that the lease agreement entered into by the deceased with the defendant on 7 June 1996 was invalid and added a new phrase - "for being a disguised donation". The first prayer was accordingly amended by the addition of the phrase – "and reducing the gift of lease to the disposable portion".

Article 1351-1 of the Civil Code of Seychelles provides that:

1. The authority of a final judgment shall only be binding in respect of the subject-matter of the judgment. It is necessary that the demand relate to the same subject-matter; that it relate to the same class, that it be between the same parties and that it be brought by the or against them in the same capacities

The defendant contended that by virtue of the ruling of this Court dated 10 October 2007, the lease agreement dated 7 June 1996 between the deceased and the defendant was legally valid and that the Court had ruled out all possibilities of illegality and irregularity as argued then by the plaintiff. That contention is indeed not disputed by the plaintiff, but what the plaintiff is now saying is that the said valid lease was a gift made ultra the provision of articles 913 - 918 of the Civil Code.

For the plea of *res judicata* to be upheld there must be the threefold identity of subject-matter, cause and parties between the first and second case. On the facts I find, firstly, that there are not two cases before the Court but only one ie CS 360/05 entered on 27 September 2005.

For this reason alone, it is sufficient for this Court to find that the plea of the defendant that this matter is *res judicata* raised *in limine litis* by the defendant cannot be upheld and it is accordingly dismissed.

### **On the merits**

By his pleadings, the plaintiff is now contending that the same lease agreement be declared invalid for being a disguised donation. The plaintiff further prays that in the circumstances of the said declaration by this Court, the same lease must be reduced to the disposable portion and the remainder returned to the estate for distribution.

The plaintiff is also calling upon the defendant to account and pay for the proceeds of rents or income that she obtained from the renting of the shop to the plaintiff.

It is the case for the plaintiff that a 99 year lease would amount to a gift *inter vivos* from the deceased to the defendant, in view of the term of years given to the benefit of defendant. According to the plaintiff the lease would amount to a disposition by the deceased to the defendant. The same disposition would be a disguised donation made for the purpose of depriving the other heirs of the deceased of their rights in the succession of their father.

The plaintiff submitted that the deceased's act towards the defendant would fall foul of article 913-918 of the Civil Code of Seychelles. Hence, in view of the fact that the deceased had more than three children, the gift of the leased shop to the defendant must be regarded as a gift *inter vivos* which exceeds the capacity of the donor to make. The plaintiff argued that defendant cannot be expected to gain more than one quarter of the deceased's estate. In view of the fact that the shop burdens the succession, the same gift would be contrary to article 913.

It is also the argument of the plaintiff that in accordance with article 918, the value of full ownership of the property alienated shall be set against the disposable portion. Any excess shall be returned to the estate. Article 920 further states that a disposition by way of a gift inter vivos which exceeds the disposable portion shall be liable to be reduced to the size of that portion at the opening of the succession. In the case of the defendant, that portion cannot be more than the one quarter to which she would be entitled under article 913 of the Code. The remainder of the gift must therefore be returned to the succession for distribution. Hence, the plaintiff prays for an order to account for the rents received as prayed in prayer (b) and (c) of the plaint.

For ease of reference I will hereunder cite the relevant articles of the Civil Code of Seychelles referred to in the submissions of the parties.

Articles 913 of the Civil Code reads:

Gift inter vivos or by will shall not exceed one half of the property of the donor, if he leaves at death one child; one third, if he leaves two children; one fourth, if he leaves three or more children; there shall be no distinction between legitimate and natural children except as provided by article 915-1.

Nothing in this article shall be construed as preventing a person from making a gift inter vivos or by will in the terms of article 1048 of this Code.

Article 918 of the Civil Code reads:

The value of full ownership of the property alienated, whether subject to a life annuity or absolutely or subject to a usufruct in favour of one of the persons entitled to take under the succession in the direct line, shall be set against the disposable portion; the excess, if any, shall be returned to the estate. This calculation and return shall not be demanded by other persons entitled to take under the succession in the direct line who have agreed to the alienation, and in no circumstances by those entitled in the collateral line.

Article 920 of the Civil Code reads:

Dispositions either inter vivos or by will which exceed the disposable portion shall be liable to be reduced to the size of that portion at the opening of the succession.

Article 1048 of the Civil Code reads:

1. The property of which fathers and mothers *are at liberty to dispose* may be given by them, as a whole or in part, to one or more of their children, whether by an act inter vivos or by will, subject to their obligation to pass that property on to the children born or to be born of the said donees in the first degree only.

2. It shall also be lawful for any person by deed inter vivos ....

It is not in dispute that the deceased is survived by nine heirs, in addition to the defendant who is the youngest of them all. It is also not in dispute that the deceased passed away on 9 June 1999. It is also agreed that the lease was signed by the deceased on 7 June 1996, three years prior to his death.

The parties in their respective submissions agreed that the lease of the shop by the deceased to the defendant was a gift inter vivos. The shop given obviously burdens the succession of the deceased as it is situated on the property of the deceased.

It is contrary to the provisions of article 913 of the Civil Code of Seychelles if the deceased as donor made a gift inter vivos, the value of which is in excess of one fourth of the value of his property when he had nine other children. It is not the extent of immovable property given which forms the basis in determining the "*quotite disponible*" but rather, it is the value of the property in issue, in relation to the value of the whole property that must be considered. That also applies to the gift inter vivos made in the present context as well as in a case of "*donation deguisee*".

Does the value of that gift inter vivos exceed the capacity of the donor to make in terms of article 918 Constitution of Seychelles?

There is neither any pleading nor any evidence before this Court adduced during the hearing of this suit as to the value of the whole property of the deceased. Neither do we have the value of the gifted property. Hence this Court cannot determine the value of the gifted property in relation to the value of the whole property of the deceased in order to ascertain whether this falls foul of article 918 of the Civil Code of Seychelles. As it is the plaintiff who asserts, the onus is on him to prove that element. I find that the plaintiff has failed to do so.

If the plaintiff is now raising an objection to the lease agreement on the ground of "disguised donation", the plaintiff has to prove that the contract in this case, the lease agreement, infringed basic public order principles and was fraudulently executed to deprive him of his inheritance. The "disguise" has likewise to be proved by evidence. The lease agreement in dispute was legally executed by the deceased on her behalf and it was a gift inter vivos made during the lifetime of the *de cujus* and this, in my judgment, is perfectly legal.

The plaintiff has also to prove that the value of his disposable portion has been encroached upon and evidence to this effect has not been forthcoming from the plaintiff.

To invoke "*donation deguisee*", bad faith on the part of the *de cujus* and for that matter fraudulent pretence should not only be averred but must be proved against the defendant. In this case, none of the elements which constitute "*donation deguisee*" has been proved nor is apparent in the pleadings. It is clear that the lease agreement was a legally executed legal document as far as competence of the parties to it and its form is concerned, hence the issue of disguised donation does not arise at all unless proved otherwise.

It is my judgment that it is indeed perfectly legal during the lifetime of the *de cuius* for him to make a gift inter vivos and by having done this he did not infringe the basic public order principles. If the plaintiff is alleging that the defendant acted in bad faith and/or under fraudulent pretence, the onus is on him to prove that element; I find that he had not done so to the satisfaction of this Court. This Court is unable to determine, on the basis of evidence or pleading laid before it, the value of the gift inter vivos in relation to the whole succession of the deceased. In the circumstances, I find and conclude that it is not possible for this Court to adjudicate whether the value of the disposition by way of that gift inter vivos exceeds the value of the disposable portion in terms of article 920 of the Civil Code of Seychelles for such to be reduced to the size of the appropriate portion at the opening of the succession.

In the light of my finding and for reasons enunciated above, the plaint is accordingly dismissed with costs.

**Record: Civil Side No 360 of 2005**