

**THE REPUBLIC OF SEYCHELLES**  
**IN THE CONSTITUTIONAL COURT OF SEYCHELLES**

**[Before: Egonda-Ntende, CJ., Burhan and Robinson, JJ]**

CONSTITUTIONAL CASE NO. 05 OF 2012

[Arising from Supreme Court Civil Suit No. 113 of 2011]

Achilla Durup	1 <sup>st</sup> Plaintiff
Josette Oshen	2 <sup>nd</sup> Plaintiff
Marie Luce Georges	3 <sup>rd</sup> Plaintiff
Hubert Savy	4 <sup>th</sup> Plaintiff

Versus

Joseph Brassel	1 <sup>st</sup> Defendant
James Savy	2 <sup>nd</sup> Defendant

ON REFERENCE MADE UNDER ARTICLE 46(7) OF THE CONSTITUTION OF  
THE REPUBLIC OF SEYCHELLES

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*Heard: 26<sup>th</sup> March 2013*

*Basil Hoareau for the Plaintiffs*  
*Pesi Pardiwalla for Defendant No. 1*  
*Alexandra Madeleine, Assistant Principal State Counsel for the Attorney General*

*Delivered: 28<sup>th</sup> May 2013*

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**RULING**

[1] The Supreme Court exercising its jurisdiction under Article 46(7) of the Constitution of the Republic of Seychelles [Cap. 42] (hereinafter referred to as the "Constitution") in Civil Suit No. 113 of 2011, referred for the determination of the Constitutional Court the question of —

*"Does article 913 of the Civil Code of Seychelles, and the resultant statutory scheme for succession with regard to testate succession, contravene Article 26 of the Constitution*

*of Seychelles by inhibiting a testator from freely disposing of his property and a donee from receiving and enjoying such bequest?"*.

- [2] The facts that give rise to these proceedings are substantially not in dispute. The plaintiffs and defendants and others who are not before the Supreme Court are siblings, the children of the deceased Mr. Henri Emmanuel Ange Savy.
- [3] The deceased is the testator in this matter. The testator was the owner of the land comprised in title no. V373 with a house situated thereon. The testator bequeathed the bare ownership of the land comprised in title no. V373 to Josepha Brassel and the usufructuary interest in the said land to his wife. He also bequeathed to his wife all the monies he may have left behind.
- [4] The testator was pre deceased by his wife, leaving Josepha Brassel the sole heir to his estate, by testamentary disposition.
- [5] The plaintiffs filed a plaint to reduce the testamentary disposition of the testator to disposable portion of one fourth ( $\frac{1}{4}$ ), and for the reserved portion to be shared equally among the plaintiffs, defendants and other descendents, pursuant to the rules of succession.

### **Submissions of Counsel**

- [6] At the hearing of this reference Mr. Pesi Pardiwalla for the 1<sup>st</sup> defendant relied on written submissions filed in Court earlier on pursuant to the order of this Court and submitted orally for the defendants. Mr. Basil Hoareau submitted orally for the plaintiffs, in addition to relying on the written submissions filed prior to the hearing of this reference. Miss Alexandra Madeleine for the Attorney General relied on the written submissions filed in Court earlier on and submitted orally.

[7] It is contended for the 1<sup>st</sup> defendant that the limitation contained in Article 913 of the Civil Code of Seychelles Act [Cap. 33] (hereinafter referred to as the "Civil Code") is not a permitted limitation under Article 26(2)(a) of the Constitution and does not amount to a law necessary in a democratic society, neither is it in the public interest. It is contended for the defendants that —

*"[...] limitations that are necessary in a democratic society are such that are necessary to regulate the procedure and method of, in our case the disposal of property, so that it creates certainty and order in a society. [...]. These limitations should only be aimed at providing formal prerequisites for carrying out a legal transaction in accordance with law."*

[8] Mr. Pesi Pardiwalla further submitted that Article 205(2) of the Civil Code is a limitation, which is justifiable and necessary in a democratic society and in the public interest under Article 26(2)(a) of the Constitution. He submitted that a Court has the discretion under Article 205(2) of the Civil Code to order the provision of maintenance from the estate of the deceased spouse upon a claim made by the surviving spouse pursuant to that Article. In support of this point he referred this Court to the Inheritance (Provision for Family and Dependents) Act 1975 of England and Wales, which he claims contains provisions similar to Article 205(2) of the Civil Code.

[9] Mr. Basil Hoareau for the plaintiffs submitted that Article 913 of the Civil Code is a permitted limitation under article 26(2)(a) of the Constitution and amount to a law necessary in a democratic society and is in the public interest. He cited the cases of Silver and others v/s the United Kingdom A. 61 1963 at pp. 32 - 33, James and others v/s The United Kingdom, A. 81 (1986) p. 30, in so far as they are relevant to this point.

[10] It is further contended for the plaintiffs that —

*"[...] the limitation contained in Article 913 of the Civil Code is proportionate to the legitimate aim pursued in that:  
(i) It does not prohibit or limit the right of the parent to dispose his/her entire property for consideration;  
(ii) It also allows for the disposition by gifts inter vivos or by will of a certain portion of the property depending on the number of children;  
(iii) The limitation of Article 913, is moreover only in respect of a small class, namely the descendant of the donor (see Article 921 of the Civil Code)."*

[11] Miss Alexandra Madeleine for the Attorney General submitted that the scheme of Article 913 of the Civil Code and the resultant provisions of Book 3, Title II: Gifts Inter Vivos and Wills of the Civil Code consist of a justifiable limitation to the right to freely dispose of one's property by a law necessary in a democratic society.

[12] She further submitted that such limitations to the right to freely dispose of one's property under Article 913 of the Civil Code and the resultant provisions of Book 3, Title II: Gifts Inter Vivos and Wills of the Civil Code are primarily based on the administration of property of persons who have died, and also on the wider notion of public interest.

[13] She further made the point that the rights of the reserved heirs to the reserved portion of the succession of the deceased, who have died intestate under the Civil Code, is arguably an extension of the protection of the economic rights of the family as guaranteed by Article 32(1) of the Constitution. She stated however, that the rights of the reserved heirs to the reserved portion of the succession of the deceased are not absolute rights.

### **Discussions and decisions**

[14] Discussions of the matters in issue and findings and conclusions of this Court follow the same order as the submissions of counsel. We start with the burden

of proof, standard of proof and principles of constitutional interpretation that guide this Court.

- [15] The burden of proof in constitutional matters is governed by Article 130(7) of the Constitution, which provides —

*"Where in an application under clause (1) or where the matter is referred to the Constitutional Court under clause (6), the person alleging the contravention or risk of contravention establishes a prima facie case, the burden of proving that there has not been a contravention or risk of contravention shall, where the allegation is against the State, be on the State."*

- [16] With regard to the principles of interpretation Article 47 provides —

*"47. Where a right or freedom contained in this Chapter is subject to any limitation, restriction or qualification, that limitation, restriction or qualification —*  
*(a) shall have no wider effect than is strictly necessary in the circumstances; and*  
*(b) shall not be applied for any purpose other than that for which it has been prescribed".*

- [17] Domah JA in Frank Elizabeth v The Speaker of the National Assembly and Another, SCA 002 of 2009, with the other members of the panel concurring, made the point that —

*"42. We have had a couple of occasions in the recent past to state the best guide to the interpretation of the Constitution of Seychelles is the Constitution itself: See John Atkinson v Government of Seychelles and Attorney General SCA 1 of 2007. The Constitution is not to be treated as a legislative text. The Constitution is a living document. It has to be interpreted 'sui generis'. In the case of Paul Chow v Gappy and ors 2007 SCA, we also emphasized on the specific role of the Constitutional Court as well as the principles of interpretation that should obtain when it sits as such. In as much as the Constitution enshrines the freedoms of the people, the constitutional provisions have to be interpreted in a purposive sense. Foreign material on the same matter aid interpretation*

*but it should be from jurisdictions which uphold the bill of rights which our Constitution enshrines.*

*43. We need, admittedly, to go to a foreign source for persuasive authority. At the same time, we need to recall that paragraph 8 of the Schedule 2 of the Constitution makes it eloquent as to the manner in which we should interpret our Constitutional provisions:*

*For the purposes of interpretation —*

*(a) the provisions of this Constitution shall be given their fair liberal meaning;*

*(b) this Constitution shall be read as a whole; and*

*(c) this Constitution shall be treated as speaking from time to time.*

*44. We need not likewise, not overlook the existence of Article 48 which requires that the rights enshrined in Chapter III shall be interpreted in such a way as not to be inconsistent with any international obligations of Seychelles relating to human rights and freedoms and a court shall, when interpreting the provision of this Chapter, take judicial notice of the Constitutions of other democratic States or nations in respect of their Constitutions".*

## **Right to Property and Protection of Families**

[18] The right to property is constitutionally protected under Article 26(1) of the Constitution. Article 26(1) is set out as well as clause 2(a) and 2(d) of it, which permit limitations therefrom as follows —

*"26.(1) Every person has a right to property and for the purpose of this article this right includes the right to acquire, own, peacefully enjoy and **dispose of property** either individually or in association with others.*

*(2) The exercise of the right under clause (1) may be **subject to such limitations as may be prescribed by law and necessary in a democratic society.***

*(a) **in the public interest;***

*(b) ;*

*(c) ;*

*(d) **with regard to the administration of the property of persons adjudged bankrupt or of persons who have died or of persons under legal incapacity;**"*. Emphasis is mine

[19] I agree, as rightly pointed out by counsel for the 1<sup>st</sup> defendant, that clause (2)(d) does not find application in these proceedings.

[20] The right to protection of families under Article 32(1) of the Constitution is also set out —

***"32.(1) The State recognises that the family is the natural and fundamental element of society and the right of everyone to form a family and undertakes to promote the legal, economic and social protection of the family."***

[21] Book III of the Civil Code deals with the various ways of acquisition of ownership. Title I of this Book is devoted to the subject of succession and Title II to the subject of gifts inter vivos and wills. Chapter III of Title II is devoted to the subject of disposable portion and reduction. Article 913 of the Civil Code features under Chapter III of Title II, and the said Article is set out —

***"913 — 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 prevent a person from making a gift inter vivos or by will in the terms of article 1048 of this Code."***

[22] I note that at the heart of the submissions of counsel is the constitutionality of the law of reserved heirs, the essence of which is contained in Articles 913 through 916 of the Civil Code. The law of reserved heirs of the Civil Code drew its Articles from the Civil Code of the French extended to Seychelles by decree of Decaen on the 21<sup>st</sup> April 1808. The 1808 decree was repealed by Act 13 of 1975, titled "Civil Code of Seychelles Act", which Act brought into operation on the 1<sup>st</sup> January, 1976, the Civil Code.

[23] Article 5 of the Civil Code provides —

*"5(1) The text of the Civil Code of Seychelles as in this Act contained shall be deemed for all purposes to be an original text, and shall not be construed or interpreted as a translated text.*

*(2) Nothing in this Act shall invalidate any principle of jurisprudence of civil law or inhibit the application thereof in Seychelles except to the extent that it is inconsistent with the Civil Code of Seychelles."*

[24] I shall therefore, at the outset briefly state the juridical nature of the law of reserved heirs and the legal consequences flowing from the juridical nature.

[25] Article 913–1 of the French Civil Code (law of 3<sup>rd</sup> January 1972) (it is noted that the Article has remained unchanged by the said law) provides —

*"913–1 Les libéralités, soit par actes entre vifs, soit par testament, ne pourront excéder la moitié des biens du disposant s'il ne laisse à son décès qu'un enfant; le tiers s'il laisse deux enfants; le quart s'il en laisse trois ou un plus grand nombre; sans qu'il y ait de distinguer entre les enfants légitimes et les enfants naturels, hormis le cas de l'article 915."*

[26] The juridical nature of the "réserve héréditaires" is explained in Juris-Classeur Civil Art. 882 à 966 5, 1982 under the title: "Quotité disponible et réduction" at notes 15 and 16. I reproduce them in parts —

*"15. – [...] La réserve héréditaire demeure une partie de la succession soumise au régime commun des biens successoraux avec cette seule particularité qu'elle limite la liberté de disposer du decujus et qu'elle protège les réservataires contre les libéralités excessive de celui-ci.*

*16. – [...] Le patrimoine successorale a été decoupé en deux parts... L'une qui est disponible et qui peut être entièrement absorbée par les libéralités (entre vifs ou à cause de mort) émanant du decujus, c'est la quotité disponible, l'autre qui est frappés d'indisponibilité, c'est la réserve.*

*Les réservataires sont donc des héritiers choisis par la loi en raison de leurs proche parenté avec le decujus et le seul titre qui leur permet de prendre les biens frappés d'indisponibilités c'est leur qualité d'héritier. Ils sont des héritiers comme les autres, appelés par la loi à prendre une part de la succession, mais ils ont simplement en plus une qualité, celle de réservataires, qui leur*

*permet de s'insurger, éventuellement, contre les libéralités excessive faites par le défunt... ce que ne peuvent faire les héritiers non réservataires (Planiol et Ripert op, cit., n. 24). Emphasis is ours*

- [27] One of the important consequences flowing from the juridical nature of the "réserve héréditaires", which is of relevance for the purposes of the proceedings before the Supreme Court, is explained in Juris-Classeur Civil Art. 882 à 966 5, 1982 op, cit., at note 25 —

*"25. — La cinquième conséquence est que les biens qui constituent la réserve héréditaire sont dévolus selon les règles de la succession ab intestate. De telle sorte que, en présence d'un testament, il se produit une division de la succession : les biens faisant partie de la quotité disponible obéissent aux règles des successions testamentaires et ceux constituent la réserve suivent les règles des successions ab intestate."*

- [28] This is further explained in Planiol et Ripert, Traité Pratique de Droit Civil Français, Tome V Donations et Testament at note 24:

*"24... La réserve est une partie de la succession ab intestate. Leur droit à son fondement dans les art. 745, 746 et 758 à 760 relatifs aux successions, sous le couvert des art. 913 et s. relatives à la réserve et à la quotité disponible.*

- [29] It is not disputed that the law of reserved heirs is a limitation to the exercise of an owner of property of his or her rights to dispose of property by way of gifts *inter vivos* or by will, which is guaranteed under Article 26(1) of the Constitution. Such a limitation entails a violation of Article 26(1) if it does not fall within one of the exceptions provided for in clause 2 of Article 26. This Court therefore, has to examine whether the limitation is "prescribed by law" and the aim or aims is necessary in a democratic society.

*Is the limitation prescribed by law?*

- [30] In Roger Mancienne v Government of Seychelles (No 2) SCA 10(2)/2004, LC 262 the President of the Court of Appeal Ramodibedi with Bwana JA

concurring, interpreted the term "as prescribed by law" with respect to a restriction that may be imposed by law under Article 22(2) of the Constitution. I reproduce paragraph 35 of the judgment in part —

*"[35] In my opinion, the words "as may be prescribed by a law" [...] are clearly designed to serve a purpose which is this, namely, to include any law either statutory [...] or the common law that may be necessary in a democratic society for the protection of the values set out in sub-clauses (2)(a)(b)(c)(d)(e) and (f) of Article 22. [...] In this regard it is important to note that the word "law" is defined in section (1) of the principles on Interpretation in Schedule 2 of the Constitution to include "any instrument that has the force of law and any unwritten rule of law"."*

[31] Furthermore, I observe that the law must contain certain qualitative characteristics and afford appropriate procedural safeguards so as to ensure protection against arbitrary action. In the case of James and others v/s The United Kingdom op, cit., the Chamber of the European Court of Human Rights reiterated that —

*"[...] the term "law" or "lawful" in the Convention [...] also [relate] to the quality of the law, requiring it to be compatible with the rule of law".*

[32] Accordingly the Chamber of the European Court of Human Rights in the case of Silver and others v/s the United Kingdom op, cit., interpreted the term "prescribed by law" with respect to a restriction that may be imposed by a law in terms of the European Convention on Human Rights as follows

*" [...]  
A second principle is that "the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances, of the legal rules applicable to a given case."  
A third principle is that "a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in*

*the circumstances, the consequences which a given action may entail".*

- [33] It follows from the above interpretations that the limitation contained in Article 913 of the Civil Code and the resultant provisions of Book 3, Title II: Gifts *Inter Vivos* and Wills of the Civil Code is a limitation prescribed by law, which is adequately accessible to the citizen of this country and attains the level of certainty that is reasonable in the circumstances.

*Is the limitation necessary in a democratic society and in the public interest?*

- [34] In the case of Silver and others v/s the United Kingdom op, cit., the Chamber of the European Court of Human Rights summarises the principles of the phrase "*necessary in a democratic society*" as follows —

*"(a) the adjective "necessary" is not synonymous with "indispensable", neither has it the flexibility of such expressions as "admissible", "ordinary", "useful", "reasonable" or desirable...";*

*(b) ...*

*(c) the phrase "necessary in a democratic society" means that, to be compatible with the Convention, the interference must, inter alia, correspond to a "pressing social need" and be "proportionate to the legitimate aim pursued" [...];*

*(d) those paragraphs of Articles of the Convention which provide for an exception to a right guaranteed are to be narrowly interpreted [...]."*

- [35] I note that the principles enunciated in Silver and others v/s the United Kingdom have been endorsed by our Courts. In the case of Seychelles National Party v/s James Alix Michel and others SCA No. 4/09, Hodoul JA with the other members of the panel concurring stated that —

*"[...] what is necessary in a democratic society implies the existence of a "pressing social need": Lingens Vaustria, para 39; Steel Morris v United Kingdom, para 87; Malisiewicz-Gasior v Poland para 58; Steel and Morris v United Kingdom (2005)41 EHRR 403, para 88 and Bowman v United Kingdom 26 EHRR 1 [...];"*

[36] It follows from the above interpretations that I am not inclined to agree with the argument of counsel for the 1<sup>st</sup> defendant that *"limitations that are necessary in a democratic society are such that are necessary to regulate the procedure and method of, in our case, the disposal of property, so that it creates certainty and order in a society"*. In sum therefore, this Court has to assess this *"pressing social need"* bearing in mind that any such limitation to the right of an owner of property to freely dispose of his or her property is to be narrowly interpreted.

[37] Article 745 of the Civil Code provides —

*" 745— Children or their descendants succeed to their father and mother, grandfathers and grandmothers or other ascendants without distinction of sex or primogeniture, even if they are born of different marriages.*

*They take in equal shares, and per head, if they are all of the first degree and inherit in their own right; they take per stirpes when all or some of them inherit by representation.*" Emphasis is ours

[38] Article 913 of the Civil Code provides that no distinction shall be made between legitimate and natural children except as provided by Article 915-1 of the Civil Code. We however, note that a distinction is made under Article 760 of the Civil Code between legitimate children and natural children. Article 760 of the Civil Code makes it clear that natural children, whose father or mother, at the time of their conception, was married to another person, shall be entitled to succeed together with any legitimate children of that marriage; in that case, however, the share of such natural child shall be one half of what it would have been if all the children of the deceased had been legitimate.

[39] Be that as it may, I observe that the law of reserved heirs under the umbrella of Article 913 of the Civil Code recognises the special link that exists between parent and child without regard to the age of the child and

distinction of sex. It is grounded on the principle of equality among heirs, subject to Article 760 of the Civil Code.

[40] It is also bound on the notion of support as rightly pointed out by Miss Alexandra Madeleine for the Attorney General. I repeat in part notes 622 of Précis Dalloz, droit civil, Les Successions Les libéralités, François Terré, Yves Lequette, 1983 Titre II : Le Pouvoir de la volonté, Sous-Titre : Les limites du pouvoir de la volonté, Chapitre II : La Reserve Héritaire —

*"622. — ... La reserve apparait ainsi comme l'expression d'un devoir d'assistance familial. La procreation des enfants impose non seulement à leur auteur de les nourrir et de les élever, mais encore de leur donner les moyens de poursuivre leur existence, en assurant leur avenir [...]".*

[41] I note that the State recognises that the family is the natural and fundamental element of society and undertakes to promote the legal, economic and social protection of the family under Article 32(1) of the Constitution. This limitation contained in Article 913 of the Civil Code affords the widest possible legal, economic and social protection to the family, which is the natural and fundamental group unit of society and is therefore, in the public interest under Article 26(2)(a) of the Constitution.

[42] The 1<sup>st</sup> defendant has contended that the obligation to maintain a surviving spouse, which obligation arises out of marriage is a limitation that is justifiable and necessary in a democratic society and is in the public interest. I observe that, under Article 205-2 of the Civil Code, maintenance owed to the surviving spouse is a prior charge upon the estate of the deceased and takes precedence over the claims and rights of heirs.

[43] I further observe that the Inheritance (Provision for Family and Dependents) Act of England and Wales 1975 empowers the court under the said Act to award reasonable provision out of a deceased estate for the maintenance of

certain dependants if the will or intestacy fails to make such provisions for them. Such provisions of the said Act clearly restrict the freedom of the testator under English law to dispose of his or her property in any way he or she chooses.

[44] In light of the above arguments, I have no difficulty to further hold that there is also a "*pressing social need*" to protect the reserved heirs from total and unjust disinheritance from a succession, in which they are entitled, to the benefit of third parties.

[45] Therefore, I have no difficulty to find that the law of reserved heirs contained in Article 913 of the Civil Code is proportionate to the legitimate aim pursued in that —

(i) the Civil Code provides for only two types of reserved heirs (parents and children including descendants of all degrees (doctrine of representation) in the absence of which, gifts *inter vivos* or by will may exhaust the entire property (Article 913 through 916 of the Civil Code);

(ii) Article 727 of the Civil Code provides for circumstances where a person shall not succeed to a succession as unworthy to do so;

(iii) it does not prohibit or limit the right of an owner of property from disposing of his or her entire property for consideration, subject to Article 918 of the Civil Code. Under the said Article of the Civil Code there is an irrebutable presumption whereby a sale by a person to one of his or her heirs in direct line "*avec reserve d'usufruit*" is deemed to be a "*donation*": Robert v. Robert SLR (1974) No. 35, Clothilde v. Clothilde SLR (1976) No. 43, Pillay v. Pillay SLR (1976).

[46] In the result, I find that the law of reserved heirs contained in Article 913 of the Civil Code is a limitation that is necessary in a democratic society

guaranteeing the family, which is the fundamental group unit of society legal,  
economic and social protection.

Signed, dated and delivered at Victoria this 28<sup>th</sup> day of May 2013.

**F. Robinson**  
**Judge**