

IN THE SUPREME COURT OF SEYCHELLES

- 1. DILIP GILBERT**
- 2. JEAN CLAUDE GILBERT**
- 3. LOUIS GILBERT**
- 4. RONALD GILBERT**
- 5. PAUL GILBERT**

PLAINTIFFS

VERSUS

FLEURANGE GILBERT

DEFENDANT

Civil Side No 246 of 2003

Mr. W. Lucas for the Plaintiffs
Mr. F. Elizabeth for the Defendant

JUDGMENT

Perera J

The plaintiffs in this case, are the brothers of the defendant. Admittedly, Parcel LD 424 at La Passe, La Digue was owned by one Therese Moloney Nee Mellon and Marlene Grace Corgat Nee Mellon. The plaintiffs aver that the 1st plaintiff Dilip Gilbert was given permission to build a house thereon by the said owners with the intention of acquiring that plot later on. There was also another house on the land, which was occupied by the plaintiffs, the defendant their sister and Elisia Gilbert their mother. It is averred that sometime in 1988, there was a collective agreement between all the parties that the plaintiffs would contribute towards the purchase of Parcel LD. 424 and that the defendant took responsibility to organise payments to the Vendors and obtain a transfer. It is further averred that the defendant, without the knowledge of the plaintiffs, purchased the whole property on 24th January 1990 from the Vendors acting through their fiduciary one Ghislaine Payet, for a sum of Rs.15,000 (D 6) . The transfer was registered on 29th January 1990. By a

letter dated 7th February 2001 (P²), the defendant, through her lawyer informed the plaintiffs that as the sole owner of the property she intended to sell, but made the following proposals to them -

- “1. That you take steps to sub-divide the property extracting a Parcel of land surrounding your respective houses approximately 1000 square metres per house.
2. That you pay for the costs of the sub-division.
3. That you pay the sum of Rs75,000 per plot of land.”

By an order letter dated 15th January 2001, (P1) the defendant had informed the plaintiffs through her lawyer that she had “*through the goodness of her heart*” allowed them to build houses and occupy the property until their deaths, and that thereafter, the surviving wives and children will have no right to remain on the property.

The plaintiffs in a letter dated 15th February 2002 (P4) maintained that according to the arrangement the land was to be subdivided and the costs of such subdivision were to be shared by all. There was no agreement for her to obtain the transfer in her sole name. They also maintained that contributions towards the purchase were made to their mother, for payment of the defendant.

The defendant in her amended statement of defence avers that the property was purchased from her own personal funds and that she received no contributions from the plaintiffs. She also avers that she gave permission to them to build their houses, and the first option to purchase their respective plots around their houses. It has further been averred that the plaintiffs by instituting this action is seeking to avoid payment by claiming that they contributed towards the purchase price. She also avers that at a meeting before a lawyer the plaintiffs agreed to purchase their plots, but at a lower price. She therefore seeks an order appointing a Surveyor to ascertain the market value of the land and then ordering them to pay that sum to the

defendant, or appoint a Surveyor to value the respective houses of the plaintiffs and order the defendant to pay the market value of those houses to the respective plaintiffs and thereafter leaving the property. Thus, if the plaintiffs pay the market value of the property to the defendant, they could continue to occupy the land, or if the defendant is ordered to pay the market value of the houses to the plaintiffs, they would lose their right to remain on the property. The plaintiffs on the other hand seek a declaration of this Court that the sale of 24th January 1990 is null and void on the ground that it had been obtained by fraud, or alternatively to declare them to be co-owners in equal shares.

The 1st plaintiff Dilip Gilbert testified that he built a shop around 1989 with the permission of one Golbert Mellon. His brother Jean Claude Gilbert, the 2nd plaintiff also built a house while the 3rd plaintiff Louis Gilbert only constructed a foundation for a house. After the death of Golbert Mellon, Ghislaine Payet, the fiduciary of the other co-owners informed them that the land was for sale, and the family agreed to purchase it on instalments. The defendant was to be responsible for the arrangements. It was the defendant who was appointed by them to collect the contributions and to make the payments. He claimed that he paid Rs.300 monthly for nearly two years when the defendant informed them that the purchase price was completely paid and that the land would be divided after purchase. He stated that he as well as some of the other brothers were Artisans selling handicrafts to tourists, and that he earned around Rs.4500 per month. He and the 2nd plaintiff started to pay sometime in 1989 after the agreement. The money was given to the defendant with the knowledge of their mother, sometimes the money was left with the mother to be given to the defendant. He further stated that he and the 2nd plaintiff contributed as they had constructed a shop and a house on the land. On being shown documents from the SHDC which shows that a loan of Rs.15,000 had been obtained by the defendant, he denied that at a meeting before a lawyer, he and his brothers agreed to pay for the land, as contributions had been made. He explained that none of the plaintiffs were

aware that the deed was in the sole name of the defendant until the letter dated 15th January 2001 (P1) was received by them. They did not suspect the defendant as they trusted the defendant who was their eldest sister.

Roland Gilbert, the 4th plaintiff also claimed a share of the land on the basis that he paid Rs.1000 per month to his mother and sister with whom he was staying, in respect of the land and for food and other bills. He also confirmed that the family arrangement was that the land was to be equally divided upon purchase. He stated that he paid Rs.100 per month from 1988 to around 1991, and that Rs500 went towards the purchase of the land.

Jean Claude Gilbert the 2nd plaintiff testified that around 1989, he was a carpenter and earned around Rs2500 per month. He paid Rs300 per month towards the purchase of the land. They expected the transfer to be made in the name of their mother, so that she could subdivide it later. However after he was told that the sale was completed, his mother explained that the sub division will proceed. He did not suspect anything as they were all members of the family.

Louis Gilbert the 3rd plaintiff also claimed that he paid Rs.350 per month towards the purchase of the land. He is presently living on Mahe, but he always believed that he could have a share in the property.

Paul Gilbert, the 5th plaintiff also claimed that he contributed Rs.1000 per month towards the purchase price of the land and for food while he was living on the land with other members of the family. He does not have a house on that property, but claimed that his mother had shown the area which would be allocated to him.

Ronald Gilbert the 4th plaintiff stated that he contributed Rs1000 per month partly for food and partly as a contribution towards the purchase of the

land. After the family house was burnt down in a fire, he contributed towards its reconstruction.

The defendant testified that there were four houses on the land in dispute. One was for herself, and the others for Dilip Gilbert (*1st plaintiff*), Jean Claude Gilbert (*2nd plaintiff*) and Jimmy Gilbert. The mother lives with her. All of them moved into a house on Parcel LD 424 in 1980. The house which they rented belonged to one Cecile Rose. However the property was owned by the Mellon family whose fiduciary was Ghislain Payet. By letter dated 13th July 1989 (D2) she was informed that a loan of Rs15,000 was approved by the SHDC for her to purchase the land on which the house stood. On 16th November 1989 (D3) the SHDC informed her that the loan of Rs15,000 was at an interest rate of 3% per annum, and that the monthly instalment payable from 1st January 1990 was Rs680. On 19th January 1990, she mortgaged the property to the SHDC to secure the loan (D4). Ghislain Payet, in her capacity as fiduciary transferred the property in the sole name of the defendant on 24th January 1990. (D6). The mortgage to the SHDC was released on 13th October 1992 (D5).

The defendant further testified that she sub divided the property on 24th July 2001 at her sole expense, and produced a Survey plan (D8) of Parcel No LD 1319 (sub division of Parcel LD 424) which was to be transferred to Dilip Gilbert the 1st plaintiff. He was informed by letter dated 7th December 2001 that he had the right of first option to purchase that plot for Rs70,000. She made the same offer to the 2nd plaintiff Jean Claude Gilbert to purchase plot No LD 1323 (D10) by letter dated 8th February 2002 (D9). She stated that she made those offers only to those two brothers as only they had constructions on the land, while the others did not have anything to do with that land. The defendant further stated that at the meeting before her lawyer, the two plaintiffs agreed to purchase the plots, but at a reduced price. She therefore reduced it from Rs75,000 to Rs70,000 initially, and later reduced it further. However they decided to file the present case.

The defendant stated that after she purchased the property in 1990, none of her brothers claimed a share. She also stated that they may have contributed towards the maintenance of their mother, but no part of those contributions were for the purchase of the property. As regards the constructions towards the purchase of the land, she stated that the 1st plaintiff built his house after 1990, but he had a craft shop before that. She did not object to that construction; as he agreed to purchase that plot. She also permitted the 2nd plaintiff and Jimmy to build, on the same condition. Explaining the contents of the letter dated 15th January 2001 (P1) whereby she informed the 1st and 2nd plaintiffs and Jimmy Gilbert that they could remain on the property until their deaths, but that their respective wives and children would have to leave thereafter, she stated that that letter was sent through her lawyer as a concubine of one of those brothers constantly harassed her, and hence she thought that that was the solution to the problem. She then proceeded to sub divide the land into four plots. She however denied that any of the brothers contributed towards the purchase of the property.

Eliza Gilbert, the mother of the plaintiffs and the defendant confirmed that the children who lived with her in the family house gave her some money for her food. She denied that there ever was any discussion about purchasing the property by joint contributions. She was presently residing with the defendant. According to her, it was the defendant who was interested in the purchase as by then the others had left the house to live separately. She maintained that it was the defendant who purchased the property obtaining a loan and that the plaintiffs did not contribute anything.

Before the merits of the case are considered, it is necessary to deal with the plea in limine litis raised by the defendant in her statement of defence, that the plaint was bad in law in that it seeks to plead two causes of action in the same plaint. It was submitted that the plaintiffs have pleaded fraud against the defendant on the basis that the transfer of the property by

Ghislain Payet to her on 24th January 1990 was done without their knowledge and consent and therefore seeks a declaration that the sale is null and void. It was also submitted that the plaintiffs have averred that they had contributed towards the purchase price, and hence should be declared co-owners with the defendant in equal shares. On a perusal of the prayer to the plaint, it is clear that the two causes of action have been pleaded alternatively and hence conforms to the provisions of Section 105 of the Code of Civil Procedure. Hence the plea in limine litis fails.

Learned Counsel for the defendant also raised the issue of prescription at the stage of the final submissions basing himself on the provisions of Article 2224 of the Civil Code, which provides that -

“2224. A right of prescription may be pleaded in all stages of legal proceedings, even on appeal unless the party who has not pleaded it can be presumed to have waived it.”

In the case of **Lorta Gayon v. Antoine Collie (S.C.A. no 8 of 2001)** the Court of Appeal accepted that the issue of prescription being raised during cross examination, was a “*stage of legal proceedings*” envisaged in Article 2224 of the Civil Code.

In that case, the plaintiffs averred that the defendant had agreed to sell a Parcel of land, and that on that agreement they had paid Rs60,000, but the defendant had failed to transfer the property. They therefore claimed the refund of Rs60,000 and moral damages or *alternatively* for a declaration that there has been a sale between the parties, in law. The Court of Appeal held that while the 1st prayer fell within five year period of prescription under Article 2271 of the Civil Code, the second alternative prayer fell within the 20 year period of prescription provided in Article 2262, as it was a claim to enforce a right of ownership of land. The Court also defined the words “*real action*” in that Article to mean, *inter alia* a claim of title to land.

The alternative prayers in the plaint in the present case are somewhat similar. However, when does prescription commence? As regards the first prayer to declare the sale null and void on the ground of fraud, it should commence from 24th January 1990, the date of the transfer. The plaintiffs aver that they were unaware of the sale in the sole name of the defendant until her lawyer informed them in February 2001. The instant plaint was filed on 11th September 2003. When then did the cause of action arise? In the case of **The Attorney General v. Ray Voysey & Ors, (S.C.A. no. 12 of 1995)**, the Court of Appeal held *inter alia* that -

“There is no statutory provision that confers power on the Court in this jurisdiction to postpone the accrual of a right of action by reason of ignorance of the plaintiff to material facts relating to the cause of action.”

Hence the first prayer is prescribed under the five year period of prescription provided in Article 2271 of the Civil Code.

The alternative prayer for a declaration that the plaintiffs are co-owners by virtue of their alleged contributions towards the purchase price is a claim to enforce a right of ownership in land. Article 2262 applied to actions in respect of *“rights of ownership of land or other interests therein”*. Allegedly, contributions with a view to obtain a share of the property commenced sometime in 1989. Hence, the 20 year period of prescription under Article 2262 applies, and consequently the plaint in relation to the second prayer was within the prescriptive period.

The issues before the Court therefore are whether the property was purchased solely by the defendant from her own funds, and if so, what rights her three brothers who had constructed on the land with her permission would have on the land. So also, what the other brothers who claim that they also contributed financially, would have.

On a consideration of the totality of the evidence, the Court is satisfied on a balance of probabilities, that the plaintiffs trusted the defendant who was their eldest sister to proceed with the transaction to purchase the property for the benefit of all the members of the family. Accordingly, on 19th January 1990 she obtained a housing loan of Rs15,000 from the SHDC subject to the land being mortgaged (P4). The transcription of the transfer (D6) shows that land Parcel LD 424 in extent 7386 square meters was transferred by Ghislain Payet to the defendant on 24th January 1990. That loan was repayable in monthly instalments of Rs680 per month from 1st January 1990. Hence on a balance of probabilities, the plaintiffs who genuinely expected a share of the property, made contributions to the defendant monthly to pay the loan instalments. The Court has to take into consideration that the plaintiffs were unable to obtain any receipts from the defendant due to the family relationship.

In this respect I do not believe the evidence of the defendant and her mother that no such payments were made by the plaintiffs. As regards the defendant obtaining the transfer in her sole name, it is reasonable to accept that she as the representative of the plaintiffs did so as she had to obtain a loan from the SHDC and to mortgage the property. It is evident from her testimony that she had an intention to share the property with her brothers once the loan was paid up and with that view, she sub divided the property. But subsequently changed her mind due to some dispute with the concubine of one of the brothers. The Court therefore declares that the plaintiffs are entitled to a share in Parcel LD 424 which is presently registered in the sole name of the defendant. The defendant shall, after being reimbursed the costs of the sub division, transfer the respective shares to the plaintiffs within two months from today. Failing which, the Registrar of Lands shall register the five plaintiffs as co-owners of the said land with the defendant on the basis of the finding in this judgment.

Judgment is accordingly entered in favour of the plaintiffs, but without costs.

.....

A. R. PERERA

JUDGE

Dated this 14th day of November 2005