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SAINT LUCIA

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 2 of 1990

BETWEEN:

JENNIFER REMY

and

FREDERICK PROSPERE

Appellant

Respondent

Before: The Rt. Hon. Sir Vincent Floissac - Chief Justice
The Honourable Mr. Justice D. Byron J.A.
The Honourable Mr. Justice N.J.O. Liverpool J.A.

Appearances: Mr. H.D.A. Deterville and Dr.K.D. Anthony for the
Appellant
Mr. P.A. Bledman for the Respondent

1992: October 27, 28 and 30.

JUDGMENT

FLOISSAC, C.J.

This appeal relates to a Deed of Sale which was executed before Sir Keith Gordon notary royal on the 25th June 1982 and was registered in the Office of Deeds and Mortgages of Saint Lucia on the 29th June 1982 in Vol.122 No.136556 and whereby the respondent purported to sell and convey to the appellant an undivided one half share of the properties described in the Schedule thereto.

By judgment dated 16th September 1991, d'Auvergne J. declared the Deed of Sale null and void and ordered that the Deed of Sale be cancelled six months after the date of the judgment. The learned judge so declared and ordered on the grounds that (1) the respondent was married in legal community of property to Noelina Prospere (also known as Noelise Prospere) (2) the properties which the respondent purported to sell to the appellant formed part of the said community and (3) the respondent's said spouse did not consent, join in and sign the Deed of Sale.

The appellant has appealed against the judgment on grounds which activate four questions. These questions are (1) whether the Saint Lucian laws of community of property are confined to marriages where the husbands were domiciled in Saint Lucia at the times of their marriages (2) whether the onus lay on the respondent to prove and whether the respondent proved at the trial that he was domiciled in Saint Lucia at the time of his marriage (3) whether the respondent should be allowed to adduce fresh evidence of his domicile at the time of his marriage and (4) whether in any case, the respondent is estopped from impugning his own Deed of Sale by invoking community of property.

(1) The application of community

Article 1 (4) of the Civil Code of Saint Lucia defines "community" as follows:

" 'Community' means the common interest of a man and his wife in certain of their property, and is further explained in article 1188, et seq. The term is also used to designate the property to which this common interest attaches. The term 'a community' or 'the community' is always used in the latter sense."

Article 5 of the said Civil Code provides that:

"The laws of the Colony govern the immovable property situated within its limits. Movable property is governed by the law of the domicile of its owner. But the law of the Colony applies to determine the nature of property and in cases of disputed possession, and also in questions with reference to privileges and rights of lien, to the jurisdiction and procedure of the Courts, to the mode of execution and attachment, to public policy and the rights of the Crown, and in other cases specified in this Code.

The laws of the Colony relative to persons apply to all persons being therein, even to those not domiciled there; except that the laws of status and capacity do not apply to

persons domiciled elsewhere, and do apply to persons domiciled in the Colony, though they be absent therefrom."

Article 1180 of the said Civil Code provides that:

"If no covenants have been made, or if the contrary have not been stipulated, the spouses are presumed to have intended to subject themselves to the general laws and customs of the country, and particularly to the legal community of property.

From the moment of the celebration of marriage, these presumed agreements become irrevocably the law between the parties, and can no longer be revoked or altered:

Provided, however, that where the marriage takes place outside the Colony and the husband is at the time of the marriage domiciled in the Colony, and no covenants were made before the marriage, the spouses may within six months from the date of the husband's first return to the Colony make a declaration in notarial form to the effect that they are married in separation of property, and such declaration shall have the effect of a contract of marriage stipulating for the exclusion of community and the separation of property and shall take effect as from the date of the marriage."

The codal definition of "community" indicates that community of property is a question of status or matrimonial status. The definition signifies that community is a product, incident on consequence of the matrimonial status. Since article 5 provides in effect that the Saint Lucian laws relating to matrimonial status (which is the source of community) apply only to persons domiciled in Saint Lucia, it follows that the Saint Lucian laws of community do not apply to a husband who was not domiciled in Saint Lucia at the time of his marriage. Any doubt as to the restricted application of the Saint Lucian laws of community is removed by the proviso to article 1180 which accentuates the otherwise obscure precondition of Saint Lucian community that the husband should be domiciled in Saint Lucia at the time of his marriage.

(2) The onus of proof of domicile

According to article 48 of the said Civil Code:

"The domicile of a person, for all civil purposes, is at the place where he has his principal residence."

Counsel agree that articles 48 to 51 inclusive of said Civil Code encapsulate the principles developed on parallel lines in English and Quebec jurisprudence and tacitly acknowledge the concepts of domicile of origin and domicile of choice. A person who alleges that he inherited and retained a domicile of origin or acquired a domicile of choice makes an assertion based on facts which are peculiarly within his knowledge. The onus is therefore on such person to prove such domicile or the facts in support thereof. The respondent alleged that he was married in community of property, but he adduced no evidence of his Saint Lucian domicile of origin or choice which was the sine qua non of such marriage. The respondent therefore failed to prove his marriage in community of property.

(3) The fresh evidence

Counsel for the respondent invited this Court to admit the respondent's passport as fresh evidence of his domicile of origin. For this purpose, counsel invoked the **English Order 59 rule 10(2)** which may be said to have been incorporated in our Rules of Court by virtue of **section 24 of the West Indies Associated States Supreme Court (Saint Lucia) Act No.17 of 1969.**

Order 59 r 10(2) provides that:

"The Court of Appeal shall have power to receive further evidence on questions of fact, either by oral examination in court, by affidavit, or by deposition taken before an examiner, but, in the case of an appeal from a judgment after trial or hearing of any cause or matter on the merits, no such further evidence (other than evidence as to matters which have occurred after the date of the trial or hearing) shall be admitted except on special grounds."

Since this is an appeal from a judgment after trial or hearing of a cause or matter on the merits and since the fresh evidence sought to be admitted is evidence of matters which occurred or existed before or during the trial or hearing, such evidence cannot be admitted except on special grounds. The factors which collectively constitute those special grounds are summarised in a passage from the judgment of Denning L.J. in **Ladd v Marshall (1954) 3 AER 745** which was approved by the House of Lords in **Skone v Skone (1971) 2 AER 582** and **Langdale v Danby (1982) 3 AER 129**. The passage reads as follows (at 748):

"In order to justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial: second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive: third, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, although it need not be incontrovertible."

In the present case, reasonable diligence or indeed the minimum amount of diligence on the part of the respondent would have ensured the availability of the passport for use as evidence at the trial. There are therefore no special grounds for the admission of the passport in evidence at this stage.

(4) Estoppel

By the Deed of Sale executed on the 29th June 1982, the respondent impliedly represented to the appellant that the respondent had the right to sell the undivided one half share of the properties described in the Schedule to the Deed of Sale and had the right to do so without the intervention of his wife. If this is not a case of estoppel by deed, it is certainly a case of estoppel by convention or mutual assurance which is described in

Spencer Bower & Turner on Estoppel by Representation (3rd Ed. 1977, p157) as follows:

"This form of estoppel is founded not on a representation of fact made by a representor and believed by a representee, but on an agreed statement of facts the truth of which has been assumed, by the convention of the parties, as the basis of a transaction into which they are about to enter. When the parties have acted in their transaction upon the agreed assumption that a given state of facts is to be accepted between them as true, then as regards that transaction each will be estopped against the other from questioning the truth from the statement of facts so assumed."

This passage was cited with approval by Eveleigh & Brandon LJ in **Amalgated Investment v Texas Commerce** (1981 3 AER 577 where Lord Denning M.R. said (at p 584):

"When the parties to a transaction proceed on the basis of an underlying assumption (either of fact or of law, and whether due to misrepresentation or mistake, makes no difference) on which they have conducted the dealings between them, neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so. If one of them does seek to go back on it, the Courts will give the other such remedy as the equity of the case demands."

I repeat what I said in **Castaways Hotel Limited v University of Dominica** (Dominica Civil Appeal No.4 of 1990):

"These statements of the law of estoppel by convention or mutual assurance were recently adopted by Lord Donaldson M.R. and Mc.Cowen L.J. in **Hiscox v Outwaite** (No. 1) (1991) 3 AER 124. I would therefore regard this kind of estoppel to be now well established in law."

In the present case, the Deed of Sale predicated the basic or underlying assumption that the properties which the respondent purported to sell to the appellant did not form part of the community (if any) which existed between the respondent and his wife. In any case, the Deed of Sale was based on the assumption that the respondent had the right to sell the properties without the consent or intervention of his wife. Significantly, the respondent's wife has not impugned the Deed of Sale and did not even testify at the trial. In those circumstances, it would be unfair or unjust to allow the respondent to challenge his own Deed of Sale. He is estopped by convention or mutual assurance from so doing.

For these reasons, the appeal is allowed and the judgment is set aside with costs to the appellant.

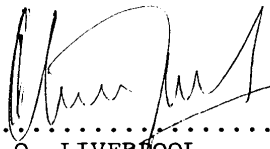


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SIR VINCENT FLOISSAC
Chief Justice

I concur.


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C.M.D. BYRON
Justice of Appeal

I concur.


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N.J.O. LIVERPOOL
Justice of Appeal