

SAINT VINCENT AND THE GRENADINES

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 16 of 1989

BETWEEN:

LESLINE HO YOUNG

and

NORLES HOLDINGS LIMITED - Appellants

and

ARDON BESS (Administrator of
the Estate of Norton Wilfred
Bess, Deceased) - Respondent

Before: The Honourable Sir Lascelles Robotham - Chief Justice
The Honourable Mr. Justice Moe
The Honourable Mr. Justice Byron

Appearances: O. Sylvester, O.C., and M. Williams for the Appellants
B. Commissiong and S. Commissiong for the Respondent

1990: Dec. 10, 11,
1991: Mar. 25.

JUDGMENT

MOE, J.A.

This appeal is against a judgment of Mr. Justice Singh in which he made certain declarations in respect of the Estate of Norton Wilfred Bess, now deceased, in favour of the respondent both as administrator and beneficiary of the said Estate.

The deceased Norton Bess was married to one Doreen Hinds on 23rd April, 1939, and the respondent was born out of the marriage on 12th January, 1941. During the subsistence of this marriage, the deceased lived together with the first appellant in Canada and on 7th December, 1965 went through a ceremony of marriage in Ohio, U.S.A. The deceased's marriage to Doreen Hinds was dissolved on 29th July, 1977. Norton Bess died on 17th June, 1982 intestate and Letters of Administration to his estate was granted to the respondent on 27th June, 1983. The deceased's marriage to the first appellant was declared a nullity in 1986.

The first appellant and the deceased during the period of their relationship bought two properties relevant to this appeal namely:-

/(1) 27,271.....

- (1) 27,371 square feet of land situate at Spring
as evidenced by Deed of Conveyance No. 241 of 1969; and
- (2) 15 acres of land situate at Yambou evidenced by Deed
No. 1938 of 1971.

Both these properties were by the respective deed conveyed to the first appellant and the deceased as joint tenants.

The learned trial Judge found that at the time of the acquisition of the properties concerned the first appellant was an unlicensed alien and held that as such her interests in the properties were forfeited to the Crown as at the date of such acquisitions by virtue of the Aliens (Landholding Regulation) Ordinance, Cap. 96 hereafter referred to as the Ordinance. He also held that at the said date there was severance of title. He found that the beneficial interests in the properties were equal and accordingly held that at the death of Norton Bess, he died possessed of a half-share in the two properties and that his interests in these properties passed to his estate at his death.

He also found that from a joint account of the first appellant and the deceased \$130,000 was paid towards the purchase of a property situate at Villa. The purchase having fallen through, on return of the \$130,000 the respondent took possession of it.

Declarations relevant to this appeal which the learned Judge made were:-

- "(a) The declaration that the plaintiff in his capacity as administrator and sole beneficiary of the estate of the deceased is entitled to all of the real and personal property belonging to the said estate.
- (b) The declaration that the first defendant is not entitled to any of the realty and personal property which forms the estate of the deceased.
- (c) The declaration that the first defendant being an unlicensed alien at the material time was incompetent to hold or own any legal or beneficial interests in any real property in the State of St. Vincent and the Grenadines."

He also ordered the appellants to pay the respondents costs of the action and also the costs of a successful defendant.

The first complaint is that the learned Judge was wrong in law in holding that the Deeds No. 241 of 1969 and No. 1938 of 1971, which

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clearly expressed that the first appellant and the deceased were joint tenants of the respective properties created tenancies in common between the deceased and the Crown. Counsel's submission was that although the Ordinance under section 3 contemplates forfeiture - it also contemplates under section 5 an intervening act to divest the interest of the alien which relates back to the time when the land became forfeited. There is therefore no divesting of title or interest in the alien except under section 5 of the Act and until such time as the land is divested it remains the alien's. There being no such divesting in this case, the joint tenancy established under the relevant Deeds remained until the death of Norton Bess at which date the entirety passed to the first appellant under the Jus accrescendi rule. In support of his submission that there is no automatic forfeiture under section 3, Counsel relied on two cases:-

Attorney-General v Parsons and Others (1956) 1 All E.R. 65;
 Lenner v Gordon 7 W.L.R. 247.

The Ordinance is entitled an Ordinance to regulate the holding of land by Aliens and Companies under Alien Control. Section 3 provides:-

"Subject to the provisions of this Ordinance, neither land in the State nor a mortgage on land in the State shall after the commencement of this Ordinance be held by an unlicensed alien and any land or mortgage so held shall be forfeited to Her Majesty:

Provided that....."

and in paragraphs (a) to (e) five exceptions are provided for:

Section 5 states:-

"(1) Land or a mortgage forfeited under this Ordinance shall not vest in Her Majesty unless and until a judgment is obtained declaring the forfeiture; but on such judgment being obtained, the title to Her Majesty shall relate back to and commence at the time when the forfeiture took place.

(2) A judgment declaring a forfeiture of land shall operate to vest in Her Majesty all the estate and interest of the alien in the forfeited land."

By section 2 "land" includes any interest therein.

The case of Attorney-General v Parsons & Others (supra) does not assist. In that case the House of Lords was concerned with the construction to be placed on a section appearing in a consolidating and amending Act. The language of that section is quite different from the section of the Ordinance and the majority of the House in interpreting the word forfeited in the context in which it was used, construed /the section...

the section in the light of considerations as to whether the section was intended to effect a radical change in the Law. In *Lehrer v Gordon* (supra) the British Caribbean Court of Appeal was concerned with the construction to be placed on section 4 contained in the Aliens Land Holding Regulation Act, Cap. 76 of Antigua and identical to section 4 in the Ordinance. Section 4(1) provides for the Governor-General from time to time to grant to an alien a licence to hold land as an owner or tenant or mortgage for any estate or interest either subject to any conditions or not.

Subsection (2) states:

"On breach of any condition in a licence to hold land as owner or tenant or mortgage, the estate and interest of the alien in the land or mortgage held under the authority shall be forfeited to Her Majesty."

The Court held that failure to observe conditions attached to a licence may, but does not automatically, result in forfeiture of land to which the licence refers.

The question of the construction to be placed on identical sections 3 and 5 contained in the Aliens Land Holding Regulations Act of St. Christopher/Nevis was considered and ruled on by this Court in *Ramsaran v The Attorney-General of St. Christopher/Nevis*, Cr. App. No. 5 of 1985. In that case this Court held that section 3 expressly forbids an unlicensed alien from holding land or a mortgage on land. Further that forfeiture takes place under that section and it is only the vesting of the title in Her Majesty which is postponed until the judgment is obtained declaring the forfeiture. Again in *Chase Manhattan Bank N A v Kaffka*, 33 W.I.R. 132 the Court considered identical provisions in the Aliens Land Holding Regulation Act, Cap. 102 of Anguilla and held that forfeiture to the Crown is effected even in the absence of any judgment declaring the forfeiture. Those decisions in my view, correctly state the construction to be placed on the sections and the learned Judge was right to hold that the first appellant's interests in the properties were forfeited to the Crown as at the date of the relevant conveyance.

Counsel next argued that even if there was automatic forfeiture to the Crown a joint tenancy was created between the Crown and the deceased and there being no severance during the life of Norton Bess at his death the entirety passed to the Crown. I do not see how this argument could benefit the appellant but be that as it may, the contention is without merit. There being a forfeiture to the Crown there would not be the four unities between the deceased and the Crown

/which is.....

which is necessary for there to be a joint tenancy. For a joint tenancy there must be unity of title, interest, possession and time. In this case unity of title would be clearly absent.

The appellant also challenged the finding that the sum of \$130,000 formed a part of the estate of the deceased on the ground that the finding was against the evidence. This complaint was without foundation there being no such finding by the learned Judge.

Under a third head of complaint, the first appellant contended for a share in the Estate of the deceased on two grounds:-

- (1) Having lived in a de facto marriage with the deceased and pooled her resources with him, she is entitled to share in his estate.
- (2) The Court has power to make financial and property orders under the matrimonial Causes Act and ought to have made such an order in her favour having regard to all the circumstances of the case.

Reference was made to a line of cases which set out principles which may be followed in determining the interests of couples in properties acquired during the period in which they lived in a married relationship. The cases however are in my view of no assistance in this case. The first appellant never asked the trial Judge to consider such a case as now argued on appeal. She claimed that she is the person entitled to the properties by virtue of having substantially paid for them with her own money and solely making the mortgage payments therefor. In *Wilson v United Countries Bank* (1920) A.C. 190, it was held that a party may be precluded, by his method of conducting his case, from raising a different case on appeal. This Court has in numerous cases ruled similarly. See e.g. *Nellie Sherman v Davis*, Civil Appeal No. 10 of 1989, (St. Kitts) *Lillian Carey v Mildred Williams*, Civil Appeal No. 1 of 1990. In the circumstances the appellant must fail on this head.

As a fourth and separate complaint the appellant appealed on the ground that the Judge totally disregarded the legal effect and consequence of the numerous and regular remittances made by the first appellant during the purchase of the said properties and the mortgage payments by the first appellant on the property at Yambou and wrongly came to the conclusion that the first appellant and the deceased contributed equally to the acquisition of the properties. The ground of appeal indicates a misapprehension of the process the learned Judge went through. The record shows that the learned Judge was unable to place any credibility on the account given by the first appellant as to the respective contributions of the....

butions of the parties to the purchase of the property concerned and did not accept the appellants' evidence that the properties were substantially purchased and paid for by her from her separate monies. He bore in mind he had no account from the deceased on this matter. But he did find that the appellant and the deceased had a very close relationship, worked together and pooled their resources for their joint benefit and in the circumstances concluded that their interests in the properties were equal.

The learned Judge clearly approached the matter in accordance with the principle laid down in *Rimmer v Rimmer* (1952) 2 All E.R. 861. In that case Sir Raymond Evershed M.R. said at p. 867:

"Where the court is satisfied that both the parties have a substantial beneficial interest and it is not fairly possible or right to assume some more precise calculation of their shares, I think that equality almost necessarily follows."

The doctrine "equality is equity" has been consistently applied in cases concerning "family assets".

There was no express statement in the relevant deeds as to the beneficial interests of the respective parties in the properties concerned. In the absence of any express declaration as to the beneficial interest a Judge must look to see the respective contributions made towards the purchase price and the contributions must be viewed broadly by the Judge to guide him in determining the beneficial ownership. See Griffiths L.J. in *Bernard v Josephs* (1982) 3 All E.R. 162.

In this case where the Judge found himself with no clear or satisfactory evidence as to the respective contributions to the purchase of the properties he would have had to determine as best he could the respective beneficial interests. In the circumstances he applied the presumption of equality. I cannot fault his approach or his conclusion.

There was a tenuous argument that the conveyances of 1969 and 1970 having been entered into during a de facto marriage and declared a nullity after the death of the deceased cannot be overturned even by the operation of law. The ruling on the construction to be placed on section 3 of the Aliens Land Holdings Regulation Act (*supra*) answers this argument. By that section the transaction entered into and concluded by the appellant at the relevant dates was void as from those dates.

/A final...

A final ground of appeal was that the Judge awarded costs on wrong principles in that (i) the appellants were ordered to pay the respondents' costs of the action when the respondents had not fully succeeded in their claims and therefore were not entitled as of right to their full costs of the action and (ii) the appellants were ordered to pay the costs of a successful defendant and no order with respect thereto was made against the respondent. The learned Judge found that it was as a result of the manipulations of the appellants why the respondent was compelled to make the successful defendant a party to the action. He accordingly ordered as he did. Counsel contended there was no material on which the learned Judge could make the finding he did, that is, there was no evidence to support the finding of manipulation.

The respondent gave evidence that he had no quarrel with the successful defendant. He said:-

"My concern is that it purports to take over Norles Holdings Ltd. My understanding is that it was set up to buy Norles Holdings Ltd. 47 acres were conveyed to Norles Holdings Ltd. I do not know if Yambou (successful defendant) actually took over the 47 acres from Norles. I do not know if any property that Yambou bought from Norles or that Norles sold any property to Yambou.

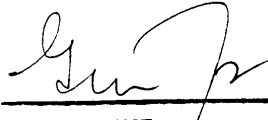
My claim against Yambou is that Yambou claimed to have purchased Norles in which I and my father had an interest and if it was done it was done without my knowledge. I saw no documents of assets being transferred from Norles to Yambou. If Yambou did acquire Norles Holdings Ltd. I would ask that it be deemed to be part of my father's estate."

The first appellant testified that Yambou was formed

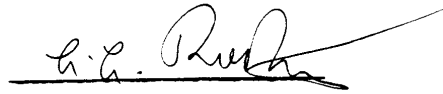
"because with the Villa affair being quite unsettled we would have needed some vehicle by which to raise funds to finance Villa. We felt that with the assets of Norles it would have given us some financial footing. As well, Norles being a company with a governing director my understanding was that people would not readily want to go to Norles, that Yambou would have been a choice route."

There was therefore evidence on which the learned Judge could reasonably have concluded that on account of what the appellants had done, the respondent was put in the position where he had to ask the Court to determine whether the successful defendant Yambou Development Co. was a party against whom he should have an order. This circumstance the learned Judge was entitled to take into account in exercising his discretion on the award of costs. I would dismiss the appeal with costs to the respondents.

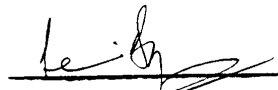
/G.C.R....



G.C.R. MOE,
Justice of Appeal



L.L. ROBOTHAM,
Chief Justice



C.M.D. BYRON,
Justice of Appeal