GUJADHUR GUNESS & ANOR v GUJADHUR GHANESHWAR & ORS

2004 SCJ 65

CHAMBERS
Record No. CH 1924/03
Writ No. 3022

IN THE SUPREME COURT OF MAURITIUS

In the matter of:

1. **Guness Gujadhur**
2. **Sewpeearee Singh**

Applicants

v.

1. **Ghaneshwar Gujadhur**
2. **Lajpati Gujadhur**
3. **Rajkumar Gujadhur**
4. **Sheoshankar Gujadhur**
5. **Dimeshwar Gujadhur**

Respondents

In the presence of:

1. **Luxmi & Ganesh Ltd**
2. **The Registrar of Companies**

Co-Respondents

JUDGMENT

The two applicants are religiously married and respondents nos. 1 to 3 are the nephews of applicant no. 1 and the sons of late Sir Radhamohun Gujadhur. Respondents nos. 4 and 5 are the sons of respondents nos. 1 and 2 respectively.

On 22 October 2003 the two applicants applied for an interim ***"ex parte"*** order in the nature of an injunction prohibiting the five respondents from pledging or otherwise creating encumbrances over the shares of co-respondent no. 1, Luxmi & Ganesh Ltd (LGL) allotted in their names but alleged to be held by them in a nominee capacity. The application also prayed for the issue of a summons calling upon the respondents and the co-respondents to be and appear before the Judge in Chambers to show cause why an

order in the nature of a mandatory injunction should not be made against the respondents ordering them to:

(i) restitute and transfer the shares of LGL held by them in such capacity as nominees to applicants;

(ii) each sign and deliver to applicants the deeds witnessing the restitution, without consideration, of the shares of LGL which they hold in such nominee capacity;

(iii) deliver to applicants all certificates in relation to the shares of LGL held by them in such nominee capacity and in the absence of such certificates, to issue such indemnity as the Honourable Judge in Chambers may order;

(iv) cause all the needful to be done, whether in their capacity as registered holders of the shares held in such nominee capacity or as directors of LGL, to cause the names of Respondents to be struck off from the register of the members of LGL and to cause the shares of LGL held by them in such nominee capacity to be registered in the name of Applicants, including, waiving all pre-emption rights to which they are entitled pursuant to the Constitution of LGL.

The application was said to have been lodged pursuant to article 806 of the Code de Procédure Civile and Section 73 of the Courts Act.

The interim order was granted and the respondents and co-respondents were duly ordered to appear to show cause why the interim order should not be enlarged or discharged or otherwise dealt with after hearing parties and why the other prayers mentioned in the proecipe should not be granted.

Co-respondent no. 1 has taken side and cause with the applicants.

Co-respondent no. 2, the Registrar of Companies, is abiding by my decision.

Numerous affidavits have been exchanged and voluminous annexes have been filed on record which now runs close to 700 pages. A number of connected issues have been raised but the crux of the application on which I am being called upon to decide relates to the capacity in which shares in LGL are being held by the five respondents. The question is whether the shares are being so held by the respondents as nominees of the applicants and should therefore be restituted following the expressed wish of the latter or whether the shares are legally and beneficially held by the respondents in their own names and personal capacities.

Article 806 of the Code de Procédure Civile provides that:

> *"Dans tous les cas d'urgence, ou lorsqu'il s'agira de statuer provisoirement sur les difficultés relatives à l'exécution d'un titre exécutoire ou d'un jugement, il sera procédé ainsi qu'il va être réglé ci-après.»*

In the case of **Ragavoodoo v. Appayah** [1985 SCJ 50], Lallah J. stated that a Judge of the Supreme Court sitting at Chambers has a residual jurisdiction in cases requiring celerity **(urgence)** to implement or protect a clear legal right to the exercise of which there is no serious and ***bona fide*** defence.

The issues which call for my decision are:

(1) whether the applicants have a clear legal right to the shares in LGL which are presently in the names of the respondents;

(2) whether the situation requires celerity or **"urgence"**; and

(3) whether the defence put forward by the respondents is ***bona fide*** and serious.

(1) <u>whether the applicants have a clear legal right to the shares in LGL:</u>

On the first issue, we need go back several years. It is not contested that applicant no. 1 and his brothers, late Ackbar Gujadhur and late Sir Radhamohun Gujadhur, had pooled their resources to conduct business since the early 1950s. When Ackbar Gujadhur died in 1956, the common assets and liabilities were not divided. In or around September 1967, following an arbitration by the late Mr Harold Glover with the aim of giving autonomy to the three groups, the assets and liabilities were distributed to three companies viz. Radhamohun Gujadhur Ltd, (RGL) Ackbar Gujadhur Ltd (AGL) and Luxmi & Ganesh Ltd (LGL). The heirs of late Ackbar Gujadhur became the sole beneficial owners of AGL. Sir Radhamohun Gujadhur was the beneficial owner of RGL, and on his demise in August 1988 his heirs, viz. respondents nos 1 to 3 and Sir Radhamohun's three "other sons", Ramapatee, Sheokumar and Vijay Kumar became the beneficial owners.

The ownership in the shares of AGL and of RGL is not being questioned by the respondents but they do question the ownership of the shares in LGL.

It is the applicants' claim that although applicant no. 1 was the sole beneficial owner of LGL in 1967, a number of shares in the company were registered in the names of other persons viz. in the name of his brother Sir Radhamohun as well as those of three of his nephews viz. late Madun Gujadhur, Moorli Gujadhur and late Khemraj Gujadhur. But the other "shareholders", it is said, held their shares in the company only as the nominees of applicant no. 1. This is indeed reflected in Annex 1 to the first affidavit of applicant no. 1 which is a certificate dated 16 October 1967 emanating from the other "shareholders" acknowledging that they held those shares as nominees for applicant no. 1.

When new shares in LGL were issued to respondents nos. 1 to 3 and to the "three other sons" on 9 March 1982 all the six "shareholders" gave a **"contre-lettre"** signifying that each of them:

> *"déclare et reconnaît pour rendre hommage à la vérité que toutes actions détenues par moi dans la compagnie*

> *«Luxmi & Ganesh Ltd» appartiennent en fait à Monsieur Gunness Gujadhur.*
> *En conséquence je m'engage et m'oblige sur la première réquisition du dit Monsieur Gunness Gujadhur à lui transférer ou à toute personne, société ou compagnie qu'il m'indiquera les dites actions.»*

I must pause here and observe that the eloquence of the prose subscribed individually by six educated adults of apparent moral, material and intellectual substance and acumen and which is purported to bear testimony to truth can hardly be meaningless (vide, annexes 2 to 7 appended to the first affidavit of applicant no. 1).

Again on 14 September 1988 when 300 shares belonging to the applicant no. 1 were allotted to the five respondents and the "three other sons", respondents 1 to 3 and the "three other sons" acknowledged, by affixing their signatures to a document prepared by respondent no.2 in his own handwriting and addressed to applicants nos 1 and 2 (Annexe 8), that *"all the shares in the company Luxmi & Gunesh Ltd registered in our respective names <u>in truth and in fact</u> belong to you both during your lifetimes and you both have absolute proprietary rights over such shares for as long as you live <u>and we undertake to do anything with</u> such shares according to your wishes and instructions."* (emphasis added). Respondents nos. 1 and 2 had besides signing the acknowledgement on their own behalf also done so on behalf of their respective sons – respondents nos. 4 and 5.

The legal foundation for any claim under a **"contre-lettre"** which is a contract is nothing more than Article 1134 of the Civil Code which provides that *"les conventions légalement formées tiennent lieu de loi à ceux qui les ont faites. Elles ne peuvent être révoquées que de leur consentement mutuel, ou pour les causes que la loi autorise. Elles doivent être exécutées de bonne foi.* Provided that a **"contre-lettre"** is not tainted with illegality, which would render it null and void, it would normally bind the parties. J. Carbonnier, Droit Civil, t. 4, Obligations PUF, 22e éd. 2000, p. 173, no. 85 aptly explains the principle:

"L'acte secret a été voulu par les parties et c'est se conformer aux postulants de l'autonomie de la volonté et du consensualisme que de reconnaître force obligatoire à ce contrat.»

Since a **"contre-lettre"** is by its very nature a secret agreement, the purpose of which is to modify or override another apparent contract, article 1321 of the Civil Code provides that *"les contre-lettres ne peuvent avoir leur effet qu'entre les parties contractantes, elles n'ont point d'effet contre les tiers."*

It is the contention of the respondents that the applicant no. 1 was never the sole beneficial owner of the company and that although they did sign the **"contre-lettres"** of 9 March 1982 and 14 September 1988 in so far as they are concerned, they were in fact the beneficial and legal owners of the shares which had been registered in their respective names. Those shares were said to have been issued to them because of the special relationship which applicant no. 1 had with his brother Sir Radhamohun, the respondents' late father and grandfather respectively, who had in his life time been supportive of applicant no. 1 at a time the latter had faced financial difficulties. Also, the fact that they were all living together and that the respondents and the other brothers had always been at the disposal of the applicants for over thirty years [at their "beck and call"] was also put forward by the respondents to explain why they were allotted the shares ***in lite***. Such explanations of the respondents to justify their claim that they have become the legal and beneficial owners of shares in LGL in spite of the existence of the **"contre-lettres"** appear to be rather shallow.

The "other sons" have admitted on their part that the **"contre-lettres"** of 9 march 1982 and of 14 September 1988 reflect the veracity of the situation in relation to the real ownership of the shares in LGL.

The stand of LGL, which is reflected in the affidavits put in on its behalf by Mr Ramapatee Gujadhur, one of the directors and one of the "other sons" and also by the accountant of LGL, Mr Naiken, is along the same line as the stand of the applicants

and of the “other sons”. Mr Naiken has in fact explained that between 1 January 1998 and 28 November 2003, LGL had paid a total of Rs 4,535,718.- to the applicants. A substantial part of that sum was transferred to their bank accounts. On the other hand, sums of money paid to other members of the Gujadhur family including the respondents, said to have been effected upon the sole instructions of applicant no. 1, were much less significant viz. respondent nos. 1, 2, and 3 were paid the sums of Rs 12,653, Rs 84,847, and Rs 455,773 respectively and Messrs Ramapathee, Sheokumar and Vijay Kumar Gujadhur (the “other sons”) a sum of Rs 363,129 altogether.

In respect of each payment the applicant no. 1 gave clear instructions that it was a gift from him to one of the nephews for a specific purpose, e.g. contribution to traveling or education expenses, details of which were duly entered in the books of the company. The respondents deny that there was any gift and have averred in an affidavit dated 24 December 2003 that the sums mentioned and which have accordingly been received by them *“are treated in the books of the LGL as loans made to the shareholders.”* The respondents do not however say that they were real loans, the purposes and terms of those loans, and the modalities of the refund. On the other hand applicant no. 1 has explained in his affidavit dated 9 January 2004 that the various payments made to him had also been entered in the books of LGL as loans made to him in his capacity as a shareholder but that all the payments booked as advances or loans are not intended to be refunded.

Furthermore, no explanation has been given to justify the disparity in the sums distributed when there is apparent parity in the shareholding of LGL among the lines of the six sons. There is also no explanation forthcoming from the respondents as to how in their capacity as substantial shareholders in LGL [93 shares each] they could have permitted applicant no. 1 who officially holds only 41 shares to have caused to be distributed to himself dividends well in excess of his proportionate shareholding.

It cannot be gainsaid that there is overwhelming affidavit and documentary evidence indicating that the applicants appear to have a clear legal right to the shares in LGL which have been allotted in respondents' as well as in the "other sons' " names.

(2) <u>whether situation requires celerity or "urgence"</u>

On the second issue, it is the applicants' contention that, considering their advanced age and the likelihood that a main case would take several years to decide, there are serious risks that they will suffer irreparable prejudice if they have to wait for redress, the more so when their title over the shares held nominally by the respondents in LGL is clear and evident.

Article 806 of our Code de Procédure Civil indeed provides for *"tous les cas d'urgence."*

According to Littré *"l'urgence est la qualité de ce qui est urgent, qu'est urgent ce qui ne souffre point de retardement."*

In an article *"L'urgence en matière de référé"* published in the Gazette du Palais 1955 (2ème sem.) Doctrine, p. 45, the learned author considers the issue in the following terms at page 46:

> *''J'ai un intérêt certain, matériel ou moral à m'adresser aux tribunaux; il n'en résulte pas nécessairement que je puisse me faire entendre à l'audience des référés; il me faut établir le caractère urgent de la mesure à prendre. La Cour de cassation le rappelle sans cesse; le juge des référés ne peut se borner à constater la violation d'un droit, fût-il conventionnel et assorti d'une clause résolutoire. «Attendu, répète-t-elle, que, ne s'agissant pas, en l'espèce, de difficultés relatives à l'exécution d'un titre exécutoire ou d'un jugement, le juge des référés, en présence des termes du bail, était compétent pour prononcer l'expulsion, mais seulement en cas d'urgence; attendu qu'il ne résulte ni expressément, ni implicitement, d'aucun des motifs de la décision entreprise que la cour se soit trouvée dans un cas d'urgence.»*
> *Quand y a-t-il urgence? Les ordonnances, les arrêts invoquent tous le retard à statuer, le péril qu'il y aurait à*

attendre, le préjudice irréparable qui en résulterait pour les intérêts d'une partie.
Aucun ne définit l'urgence et le danger auquel il importe de parer. Certes l'urgence suppose des droits ou des intérêts légitimes à protéger, un dommage ou tout au moins un danger à éviter. Ces éléments ne suffisent pas à la créer. Il faut encore qu'un retard à statuer constitue, à lui seul, un péril ou qu'il l'aggrave. Quelle règle permettra de dire que ce péril existe? Il est à peu près impossible de la formuler. C'est que le danger d'où naît l'urgence est tout relatif: il dépend des lenteurs de la procédure, des droits et intérêts en cause, des circonstances."

Under the sub-title *"caractère du dommage ou du danger"* at pages 47 and 48 the learned author identifies a number of general principles governing *"urgence"* viz.

«(1) pour qu'il y ait urgence, il n'est pas nécessaire qu'un dommage soit d'ores et déjà réalisé; il suffit que les intérêts du demandeur au référé en courent sérieusement le risque;

(2) à plus forte raison y aura-t-il lieu à référé si l'une des parties supporte déjà un préjudice;

(3) la réalisation du préjudice, son ancienneté ne suppriment pas nécessairement l'urgence;

(4) s'il suffit d'un danger pour créer l'urgence, encore faut-il qu'il existe réellement;

(5) si le risque couru rend la demande recevable, la mesure sollicitée doit être efficace pour être ordonnée.»

It was submitted that the applicants had amply established that there was *«urgence»* calling for the intervention of the Judge in Chambers in the light of the following:

(1) both applicants are of an advanced age and of failing health. Unless the Judge in Chambers grants relief, there is real risk that neither applicant will see the end of an action before the Supreme Court to vindicate their rights in the shares;

(2) both applicants are being held at ransom in respect of their expenses following the amendment of the new constitution which now requires that one of respondents nos. 1, 2 and 3 signs cheques of LGL;

(3) applicant no. 2 is not civilly married and may not enjoy effective protection in relation to her legal or beneficial rights in the shares unless the Judge makes an order;

(4) the respondents may burden or dispose of the shares;

(5) the livelihood of the employees employed at the applicant no. 1's stable is being threatened.

I am of the view that all the points are well taken.

Towards the end of the hearing in Chambers, learned Counsel for the respondents stated that he was instructed to state that his clients would not create any difficulty to sign cheques of LGL to the tune of a maximum of Rs 100,000 per month to meet for the personal expenses of the two applicants. That sensible stand is a marked improvement from the negative one they adopted on 18 December 2003 when they had refused to sign a cheque of Rs 27,000 to meet the end of year expenses of applicant no. 2, including an amount of Rs 2,000 for medical expenses. But it may appear rather impudent from the applicants' point of view that persons who are mere agents or **"prête-noms"** could be allowed to dictate to their principals on how much and in which manner they should spend their wealth.

(3) <u>Whether the defence put forward by respondents is serious and bona fide</u>

On the third issue, a number of reasons have been advanced by the respondents in support of a claim that they have a serious and ***bona fide*** defence viz.

(a) that the Judge in Chambers has no jurisdiction to hear the present application;

(b) that the **"contre-lettres"** were barred by prescription, and

(c) that intervening factors would have rendered the **"contre-lettres"** *"caduques"*.

(a) The Judge in Chambers has no jurisdiction

First, it was submitted on behalf of the respondents that no main case had been lodged nor was contemplated by the applicants and that the remedy asked for by the applicants was in the nature of a final order which was beyond the powers of the Judge in Chambers to grant. Reference was made to Article 809 of the **Code de Procédure Civile** which provides that *"les ordonnances sur référés ne feront aucun préjudice au principal; …."*.

It is settled law that the Judge in Chambers exercises a jurisdiction similar to that of the French *"juge des référés"*. It is also common ground that any intervention of the Judge in Chambers should not prejudge any issue raised in a main action and upon which the competent trial Court could eventually have to adjudicate (**Gujadhur v. Réunion Ltd & Ors** [1960 MR 208]). The remedy, if granted, should accordingly be of a temporary nature and provide for the interim protection of the interest of an applicant. In no way can an order obtained before the Judge in Chambers become a bar to a subsequent action lodged before a Court of competent jurisdiction to vindicate a party's substantive rights. A main case, as is commonly referred to in legal circle, may not necessarily be initiated by the applicant in a Chambers case though; for example, a writ ***Habere Facias Possessionem*** need not be assorted with a main case at the initiative of the applicant. In such a case, if the applicant obtains the writ it will still be open to the respondent to vindicate his right to possession before the competent Court, if he so wishes – **(vide Gujadhur *(supra)*** and **Beenessreesing v. Sawmy** [1976 MR 205]. There is also the decision in **Beerjeeraz v. United Basalt Products** [1990 MR 159] where it was held that it was unnecessary for an applicant to aver that she is entering a main case in the supporting affidavit where the granting of an interlocutory injunction would afford him a complete remedy.

But even on the assumption that the principle in **Gujadhur, Beenessreesing** and **Beerjeeraz *(supra)*** could be said to be limited in its application to cases strictly in the nature of a writ ***Habere Facias Possessionem***, it would still be open to the Judge in Chambers to grant an order on specific terms in order to meet that contingency of the questioned necessity of lodging a main case.

It is opportune at this stage to consider as well the types of remedy which are being invoked by the applicants in the present application.

The first prayer is to prohibit the respondents from pledging or otherwise creating encumbrances over the shares of LGL which have been allotted in their names. It is in the nature of a prohibitory interlocutory injunction. There is here no reason at all why the interim order which has been granted on the very day of the application should not be made interlocutory pending whatever action may be taken to have the question as to the proprietary rights over the shares canvassed before the competent Court.

The second set of four remedies is connected with the prayer to restitute and transfer the shares back to the applicants. Those remedies are in the nature of an order for a mandatory interlocutory injunction which is less readily granted than a prohibitory interlocutory injunction. This is so because such an order is more drastic in its effect. Dicta abound that a case must be *"unusually strong and clear"* or that there must be *"a high degree of assurance"* before a mandatory injunction is granted – see Megarry J. in **Shepherd Homes Ltd v. Sandham [1971 Ch 340]** at page 349; or that the damage to the plaintiff should not be trivial and the detriment to the defendant disproportionate to the benefit conferred on the plaintiff by granting such an injunction (**Sharp v. Harrison [1922 1 Ch 502]**).

Taking all relevant matters into consideration, I am of the view that the respondents' apprehension, that any order I may make which falls in line with the

applicants' prayers would be a "final" as opposed to an "interlocutory" order, is misguided. Should the prayers be granted the question of ownership of the shares could still be questioned in a main case which any of the parties may be advised to lodge.

(b) Prescription

It is common ground that shares were registered in the respondents' names in 1982, 1984 and 1988 and **"contre-lettres"** were signed in 1982 and 1988. It was submitted on behalf of respondents that being in the nature of an **"action personnelle"** the applicants' right of action was debarred by the 10 years prescription under Article 2270 of our Civil Code.

Learned Counsel for the respondents referred to Juris-Classeur Civil – 2002 V° Contrats et Obligations: fasc. 138, where the question of prescriptive period to prove a **"contre-lettre"** is considered.

> *"43 Dans les rapports entre les parties et pour les tiers, le droit de faire reconnaître la force obligatoire de la contre-lettre est-il soumis à prescription extinctive?*
>
> *Certains auteurs répondent par la négative, considérant que la partie qui agit en déclaration de simulation contre son cocontractant réclame l'exécution des obligations qui ont été effectivement voulues par les parties (M. Planiol et G. Ripert, op. cit., n° 345. – A. Colin et H. Capitant, op. cit., . II, n° 458. – L. Josserand, op. cit., t. II, n° 707); d'autres auteurs considèrent au contraire que la prescription trentenaire est une prescription de droit commun qui doit jouer pour l'action en déclaration de simulation (A. Sériaux, Droit des obligations: PUF, 1re éd. 1992, p. 142. – B. Starck, H. Vincent et L. Boyer, Les obligations, t. 2, Contrat: Litec, 6e éd. 1998, n° 1143. – M. Planiol, G. Ripert et J. Radouant, op. cit., t. VII, n° 972)."*

The nature of the *«action en déclaration de simulation»* is described in Note 42 in the following terms:

> *«l'action en justice par laquelle toute personne qui y a intérêt tend à faire établir que la situation réelle est*

différente de celle qui a été apparemment voulue par les parties contractantes».

There is, therefore, divergence of opinion in French Doctrine on the applicability of a *"prescription extinctive"* to an *"action en déclaration de simulation"*.

A decision of the Cour de Cassation of 9 November 1971 held that an *"action en déclaration de simulation n'est pas soumise à un délai de prescription abrégé et obéit au mécanisme de la prescription trentenaire de droit commun" [Cass. 1ère Civ., 9 nov. 1971 : D.1972 p. 302]* and that the starting point of the prescriptive period is the date on which the simulation was realised. Note 43 of the Juris-classeur reports that decision in the following terms:

> *"Ce délai de trente ans, soumis aux règles communes de suspension et d'interruption, court à compter du jour où la simulation a été réalisée: ce délai, qui est une prescription extinctive, doit être compté à partir de la date à laquelle l'intéressé aurait pu faire valoir ce droit d'invoquer la contre-lettre en agissant en déclaration de simulation. »*

It appears however that the above decision has been distinguished in other decisions of French Courts which are reported in the same Note 43 of the Juris-Classeur:

> *"Si ce sont des héritiers de l'une des parties qui exercent l'action en déclaration de simulation pour établir que la vente consentie par leur auteur est en réalité une donation dont il doit être tenu compte dans le calcul de la réserve, le délai de prescription trentenaire doit courir à compter du jour de décès de cet auteur : ce n'est qu'à cette date que les héritiers ont acquis un droit propre à leur réserve successorale et le droit d'agir en réduction et en déclaration de simulation (Cass. 1re civ., 24 nov. 1987 : Bull. civ. I, nº 309 ; JCP G 1989, II, 21214, note F.-X. Testu; RTD civ. 1989, p. 803, obs. J. Patarin).»*
>
> *Même lorsque le délai de prescription est écoulé, la partie à l'opération qui invoque les dispositions de la contre-lettre pour se défendre contre une action menée par son co-contractant sur le fondement de l'acte apparent, ne peut se voir opposer une prescription extinctive de son droit: d'après l'adage* ***«Quae temporalia sunt ad agendum, perpetua sunt ad excipiendum»****,*

l'exception est perpétuelle (V. M. Storck, L'exception de nullité en droit privé : D. 1987, Chron. P. 67).»

I must observe here that the text of Article 2262 of the Civil Code in France and of our Code Napoléon prior to 1983 used to be similar, except for the prescriptive period which is one of 30 years in France. Our Article 2262 used to read as follows:

> *"Toutes les actions, tant réelles que personnelles, sont prescrites par vingt ans, sans que celui qui allègue cette prescription soit obligé d'en rapporter un titre, ou qu'on puisse lui opposer l'exception déduite de la mauvaise foi.»*

A new Article 2270 was introduced in our Code Napoléon in 1983 (vide **[Act No. 9 of 1983]**) to the effect that *"Sous réserve des dispositions particulières de la loi, les actions personnelles se prescrivent par dix ans."*

The amendment brought by **[Act No. 9 of 1983]** to the new articles 2260 to 2283 of the Code Napoléon in relation to the various prescriptive periods were themselves of Canadian inspiration. In the footnote to article 2219-1 in Venchard's Code Civil Annoté it is stated that:

> *"Les nouveaux articles 2260 à 2283, relatifs aux délais de prescription, faisant désormais une distinction entre la prescription acquisitive et la prescription extinctive, il était nécessaire par souci de présentation, de définir ces deux sortes de prescription. Ces définitions s'inspirent du Projet de Code Civil du Québec.»*

It is, therefore, in the light of the above observations on the origin of our new articles 2260 to 2283 that the questioned authoritativeness of French decisions on that aspect of our jurisprudence must be construed. Another reason is said to be found in the provision of Article 2271 of our Code Napoléon as amended by **[Act No. 9 of 1983]** which states that *"le délai de prescription court à compter du jour où le droit d'action a pris naissance".* That text is inspired by the second limb of Article 2880 of the Code Civil du Quebec which provides that *"La dépossession fixe le point de départ de la prescription acquisitive. Le jour où le droit d'action a pris naissance fixe le point de départ de la prescription extinctive.»*

It was submitted on behalf of the applicants that the *"droit d'action"* started not from the date of the **"contre-lettre"** but from the date that compliance with the terms of the **"contre-lettre"** was requested of the respondents and was refused. **Shersing v. Shersing** [2002 SCJ 157] appears to be on authority for that proposition. In that case the appellant had been granted a loan by the respondent, his brother, on 20 March 1987. The loan was reduced in writing and stated that it was without interest but was refundable at first demand. Interest was said to be payable in case the appellant failed to pay after the demand. On 2 July 1997 the appellant was required to refund the loan but failed to do so. It was submitted that pursuant to article 2271 the right of action started on the day the loan agreement was signed and that respondent's claim for refund was prescribed by the prescription of ten years under Article 2270 of the Civil Code for *"action personnelle"*. The Court held that the right of action only started from the date he was required to pay as clearly stipulated in the loan agreement.

An interesting Canadian case on the interpretation of the term *"jour où le droit d'action a pris naissance»* is that of **Caisse Populaire Desjardins de la Vallée de l'Or c. Dion.**, a decision of 24 September 2001 of the Cour Supérieure du Québec. In that case the plaintiff had advanced a loan to a company and one Mr Beaulieu had stood as **"caution"** to refund the loan. Mr Beaulieu died in April 1997. The company disposed of its assets **[cession de ses biens]** in December 2000 in violation of the terms of the loan agreement and the plaintiff claimed the sum due in March 2001. The defendant who was sued in her capacity as the *"légataire universelle et liquidatrice de la succession de feu Claude Beaulieu"* invoked in her defence Article 2925 of the Code Civil du Québec which provides that *"l'action qui tend à faire valoir un droit personnel ou un droit réel mobilier et dont le délai de prescription n'est pas autrement fixé se prescrit par trois ans»*. She also invoked Article 2361 which provides that *"le décès de la caution met fin au cautionnement, malgré toute stipulation contraire."*

The plaintiff, on the other hand, invoked Article 2364 which provides that *"lorsque le cautionnement prend fin, la caution demeure tenue des dettes existantes à ce moment, même si elles sont soumises à une condition ou à un terme.»* The *«terme»* or delay to pay the debt was 7 November 2001 but the agreement provided that the *"terme"* would have no effect in case the borrower went into liquidation. The plaintiff also invoked article 2880.

The salient part of the decision is found at paragraphs 51 to 59 of the judgment which are reproduced:

> *"51. Alors, à partir de quel moment doit-on commencer à calculer le délai de prescription? A partir du décès de la caution ou au moment ou la dette est devenue exigible?*
>
> *52. L'article 2880 C.c.Q. indique que le point de départ de la prescription extinctive est le jour où le droit d'action a pris naissance.*
>
> *53. La dette n'était pas exigible avant la date de la cession de biens, le 7 décembre 2000. C'est alors qu'il y a eu déchéance du terme comme le prévoit la clause 22a) du contrat de prêt et d'hypothèque, pièce P-1. Le droit d'action n'a donc pas pu prendre naissance avant cette date et la Caisse n'aurait pas pu poursuivre le débiteur principal pour le tout avant ce moment.*
>
> *54. Au surplus, il est bon de citer les propose exprimés par le Juge Yvan A. Macerola dans Forget c. Hôpital Maisonneuve-Rosemont.*
>
> *Le tribunal ajoute que, pour accorder une requête en irrecevabilité de la nature de celle dont il est présentement saisi, la prescription invoquée doit apparaître de façon claire et précise sans nécessité d'interpréter avec subtilité les nuances de la jurisprudence et de la loi qui s'appliquent.*
>
> *Bref, dans un tel contexte, le juge doit permettre au demandeur de se faire entendre de façon exhaustive devant un juge au mérite dans le but, bien sûr, que notre système judiciaire lui apporte la meilleure sanction de ses droits, si tel est le cas.*
>
> *55. Le Tribunal conclu donc que le délai de prescription commence à courir à partir du 7 décembre 2000, date de la faillite de 9011-8971 Québec inc.*

> *56. En date du 6 mars 2001, date à laquelle la demanderesse-intimée réclamait les sommes dues, le recours n'était pas prescrit.*
>
> *57. **POUR CES MOTIFS, LE TRIBUNAL:***
>
> *58. **REJETTE** la présente requête;*
>
> *59. **LE TOUT** avec dépens.»*

There is also the submission of learned Counsel for the applicants that the respondents cannot be heard to invoke the defence of prescription since they had by their own action and behaviour tacitly renounced it. Article 2221 of our Code Napoléon provides:

> *"La renonciation à la prescription est expresse ou tacite : la renonciation tacite résulte d'un fait qui suppose l'abandon du droit acquis."*

It was submitted that the respondents, by respectfully placing themselves at the "beck and call" of the applicants for over thirty years, could not be said to be claiming thereby that they were acting against the letter and spirit of the **"contre-lettre"** and acquiring prescriptive rights over the applicants' shares in LGL. On the contrary, such commendable behaviour by a younger and stronger generation to attend at all times to the needs of an old "chachi" and an even older "chacha" could be suggestive of a clear renunciation of any prospective right of prescription and indicative of an interested compliance with the term of the **"contre-lettres"** whereby shares belonging to applicants and held in the names of respondents may hopefully remain theirs for keeps as a result of their apparent shareholding after the lifetime of both applicants who have no issue of their own.

Furthermore, the defence of prescription can hardly be invoked in the present case since the effect of the **"contre-lettres"** which resort to the use of **"prête-noms"** creates a situation of agency. **Encyclopédie Dalloz, Répertoire de Droit Civil, Vo. Simulation, n. 14** reads:

> *"Un autre procédé de simulation consiste à substituer une tierce personne à celle que l'acte intéresse réellement. L'acte secret est alors un mandat qui établit que la personne qui a figuré dans l'acte ostensible n'était, en réalité, qu'un représentant … La responsabilité du prête-nom à l'égard du mandant est celle d'un mandataire. Cette interposition de personne peut avoir lieu avec l'accord de l'autre contractant ou à son insu.»*

Also, note 16 which reads:

> *"Les rapports entre le prête-nom et le mandant sont régis par les règles relatives aux obligations du mandant et du mandataire de sorte que la responsabilité du prête-nom à l'égard du mandant ne peut être engagée que s'il a commis une faute à l'encontre de ce dernier.»*

There is hardly need for the applicants to resort to any *"action en declaration de simulation"* to vindicate their rights under the **"contre-lettres"**. The issue is not whether the existence of the **"contre-lettres"** can be proved since they have been admitted but whether they have been superseded by intervening events. This brings us to the question of **"caducité"** which was raised by learned Counsel for the respondents.

(c) Caducité

The respondents also invoked that, following the last drawing up of a **"contre-lettre"** in 1988, intervening events have occurred whereby the **"contre-lettre"** became obsolete or "caduque". A vivid example of "caducité" is the decision of the Cour d'Appel de Paris 5^{e}ch., sect. C. 2 nov. 1990 which is reported in Juris-Classeur – 2002 V^{o} contrats et obligations: fasc. 138 at note 32:

> *"Lorsque, après avoir établi une contre-lettre, les parties conviennent de nouvelles dispositions incompatibles avec la contre-lettre, celle-ci doit être considérée comme caduque et cesse de produire effet. Des parts sociales ayant été cédées en propriété à la gérante d'une SARL, les parties avaient stipulé dans une contre-lettre que les parts de la société mentionnées comme appartenant à la gérante lui étaient seulement remises à titre de dépôt; même en l'absence d'un nouvel acte occulte, cette contre-lettre est devenue caduque par la signature de nouveaux protocoles d'accord totalement incompatibles avec ses dispositions et reconnaissant à l'ancien dépositaire des droits de propriété sur ces mêmes parts sociales.»*

It is said here that the "distribution" of dividends and lands of LGL to the various "shareholders" including the respondents, as well as the amendment of the Constitution of LGL giving the respondents a right of veto, is proof that they are legally and beneficially entitled to those shares. We shall, in turn, examine the affidavit and documentary evidence on record on:

(1) the alleged distribution of dividends;

(2) the alleged distribution of lands; and

(3) the amendment of the Constitution of LGL which has allegedly given a right of veto to the respondents.

(1) The distribution of dividends

The disparate sums paid to applicant no. 1, respondents nos. 1, 2 and 3 and the three "other sons" from the funds of LGL and which are mentioned in the affidavit of LGL's accountant, Mr Naiken, are not denied. Dividends in ***"specie"*** which were distributed to respondents in 1999 and

2000 had not been mentioned by applicants in their first affidavit dated 22 October 2003. Those dividends concern the Mauritius Commercial Bank's and the New Mauritius Hotels' shares worth some Rs 460,865.- and Rs 5,655,000 respectively. In answer to respondents' affidavit on that issue, applicant no. 1 averred that he unilaterally procured the distribution by LGL of dividends ***"in specie"*** because he had resolved to assist the respondents and the "other sons" to build their respective houses and bungalows, which explanation does not ***prima facie*** appear to be far fetched or implausible.

Learned Counsel for the respondents submitted that the applicants had given three different versions on the dividends viz. first, that dividends were ploughed back into the company's account on instructions; second, that the applicant no. 1 unilaterally procured dividends ***"in specie"*** to be distributed; and, third, that all benefits received by the respondents were made on purely "gratuitous basis". A perusal of the affidavits shows that there are different explanations offered for the payment / distribution of different dividends. Taxing applicants with providing three different "versions" is not called for specially where those explanations are not contradictory and are not mutually exclusive.

The respondents themselves state at paragraph 13 of their affidavit of 25 November 2003 [R1] that the applicant no. 1 *"has always occupied a position of authority with regard to family business, including the three other companies, and to personal family matters, without prejudice whatever to the rights of ownership of the respective parties which were never questioned."* The family business in fact consists of four companies, LGL, RGL, Cie Immobilière de Rose Hill Ltée and Cie du Rex Cinema Ltée.

On 7 May 1999 applicant no. 1 wrote a letter (Annexe 9) to all the shareholders of RGL and to the heirs to the succession of late Sir

Radhamohun Gujadhur, to which was annexed a list of assets and liabilities, calling for suggestions as to the way those assets should be partitioned. The last paragraph reads:

"As far as the company Luxmi & Ganesh Ltd is concerned, I circulate copy of a letter signed by all of you whereby it is acknowledged that the shares although registered in your respective names belong in truth and in fact to me and my wife. I do not propose to proceed to any distribution of the shares owned by that company."

The respondents have averred at paragraph 15.1 of R1 that no distribution of the shares of LGL could be envisaged in as much as the shares held under their respective names were legally and beneficially owned by them. In the absence of any rejoinder then and there by the respondents denying the assertion of applicant no. 1 that the shares *"in fact and in truth belong to me and my wife"* the claim which they are now making that they hold the shares legally and beneficially in their names cannot be serious. Neither the defence of *"caducité"* nor indeed that of prescription can hold in the light of the letter of 7 May 1999 reminding the respondents of the full effect of the **"contre-lettre"** and which none of them had then dared to challenge.

(2) <u>The lands at Poste Lafayette and Curepipe</u>

(i) <u>Poste Lafayette</u>

LGL and RGL are the lessees of two contiguous plots of Pas Géométriques at Poste Lafayette of the extent of 1A60 and 55P respectively. Applicant no. 1, together with respondents nos. 1 to 3 and the three "other sons" subscribed to a deed in September and October 1998 whereby the two plots of land were subdivided into six plots with the avowed purpose of regulating the use and occupation of the respective plots among the respondents nos. 1 to 3 and the three "other sons". No plot was earmarked for applicant no. 1, but it was expressly stipulated

that both applicants would during their lifetime be entitled to the *"pleine et entière jouissance des six lots sus-mentionnés."*

(ii) Curepipe

LGL and RGL are the joint owners of five contiguous portions of land of a total extent of some 3 A 38 P at Curepipe. In November and December 1998 several plots distracted from that large plot were leased to respondents 1, 3, 4 and 5 for a term of 99 years. Again the usufruct in all the plots of land which were leased was retained in favour of applicants during their joint lives. Respondent no. 4 failed to disclose that applicants had in the meantime withdrawn their consent to his building a house on the leased land.

The retention by the applicants of the usufruct during their lifetime in the plots of land at Poste Lafayette and Curepipe which have been partitioned clearly shows their desire to exert control over all those properties during their lifetime.

(3) The amendment of the Constitution of LGL

It is a fact that the Constitution of LGL was amended following dissent between the six brothers resulting in a split into two groups. One of the effects of the amendment of the Constitution of LGL effected in January 2003 is that cheques would henceforth be signed by applicant no. 1 together with one signatory from each of the two groups. It is this requirement to have a signatory from each of the two groups of dissenting brothers which forms the basis of the respondents' claim that they have a right of veto under the amended Constitution and that they hold the shares in LGL in a *"beneficial and legal"* capacity.

But that claim of a right of "veto" of the respondents does not entail any increase in their powers as a group to draw up cheques by LGL. Indeed prior to January 2003 cheques issued by LGL were signed by one of its directors and by its secretary. While cheques could be co-signed by any of the seven directors (i.e. respondents 1 to 3, the three "other sons" and

applicant no. 1), the essential and inescapable signatory used to be respondent no. 2 who has, since the 1970s been the secretary [vide paragraph 18 of affidavit of applicant no. 1 of 9 January 2004].

At the end of the day, all things having been considered, the respondents' claim to the "legal and beneficial" rights in the LGL shares allotted in their names rests on the alleged gratitude of applicant no. 1 to his late brother, and gratitude to his nephews for their benevolence to him and his wife over the years. However, the alleged "intervening" events are far from being incompatible with the terms of the **"contre-lettres"** in the light of ***"prima facie"*** plausible explanations of the applicant no. 1. Those events have simply to be considered along with the **"contre-lettres"** which existence are not denied by the respondents and which clearly show that the applicant no. 1 had all along reserved his full rights to recall the shares in any manner and at any time he wished. The respondents, who are all educated persons, must be held to have known and agreed to the tenor of the documents they willingly signed. Thus, they have a clear moral and legal obligation to comply with the wishes and instructions of the applicant no. 1 to restitute the shares pursuant to the secret agreement contained in the **contre-lettre**.

Whatever special relationship may have existed between applicant no. 1 with his late brother Sir Radhamohun and with his nephews and grand nephews can hardly explain the respondents' claim that the shares had been allotted to them in full beneficial and legal ownership when those shares are tied with the "**contre-lettres"** of 1982 and 1988 and when such a forceful reminder of the existence of the **"contre-lettres"** as the one conveyed in applicant no. 1's letter of 7 May 1999 (Annexe 9) remained so eloquently without reply from the respondents.

It may be quite understandable that applicant no. 1 as the patriarch of the Gujadhur family would in his old days indicate who would be the ultimate beneficiaries of his wealth, the more so when he and his wife have no issue of their own. He chose to do so by allotting shares to his nephews and grand nephews carefully maintaining parity among the six nephews and their progeny. But those nominal allotments were assorted

with a **"contre-lettre"** clearly indicating that his expressed intention was a revocable one. In fact everyone knew and agreed that he was to remain in full control of the final disposal of those shares and that whatever decision he had taken could be recalled at any time.

I simply cannot act on the shallow explanations of the respondents which are contained in their mere ***ipse dixit*** to the effect that they are the owners of the shares when there are documentary evidence signed in their own hands indicating in no uncertain terms that they were mere holders of the shares as nominees who could be revoked at will.

For all those reasons, the interim orders in relation to all the prayers for the prohibitory as well as the mandatory orders of injunction are made interlocutory on the following terms which take into account the provisional nature of the present orders pending the determination of any main case which any party may wish to lodge:

(1) In connection with the shares in LGL presently allotted in the names of the five respondents, the five respondents are prohibited from pledging or otherwise creating encumbrances over those shares;

(2) the five respondents are ordered:

  (i) to restitute and transfer those shares to the applicants;

  (ii) to sign and deliver to applicants the deeds witnessing the restitution of those shares;

  (iii) to deliver to applicants all certificates in relation to those shares, failing which, to issue a written indemnity to that effect;

  (iv) to cause their names to be struck off the Register of LGL.

With costs against the respondents. I certify as to Counsel.

Y.K.J. Yeung Sik Yuen
Senior Puisne Judge

11 March, 2004

For Applicants	**:**	**Mr R. Pursem, of Counsel** **Mr A. Robert Jr, Attorney**
For Respondent	**:**	**Mr A. Domingue, of Counsel** **Mr F. Hardy, Attorney**
For Co-Respondent No. 1	**:**	**Mr T. Gujadhur, of Counsel** **Mr Georgy Ng Wong Hing, Attorney**