

R. Joseph

SAINT LUCIA



IN THE HIGH COURT OF JUSTICE
(CIVIL)
A.D. 1994

Suit No. D.43 of 1993
BETWEEN:

CECILE JOSEPH

Petitioner

and

ANTOINE JOSEPH

Respondent

APPEARANCES:

Mr. P. Husbands Q.C. for Petitioner
Mr V. Gill for Respondent

1994: October 20;
November 9.

JUDGMENT

MATTHEW J. (In Chambers)

The Parties were married on June 12, 1958. The Petitioner is now 69 years old and the Respondent is 65. On November 15, 1993 the wife obtained a decree nisi for divorce which was made absolute on April 29, 1994. There are no children of the marriage but the Petitioner had a daughter before the marriage who is presently about 39 years old. The Respondent has three children with the Co-Respondent all born during the subsistence of the marriage. The children are aged 17, 15 and 5.

On June 6, 1994 the Petitioner on an ex-parte application obtained an order of injunction restraining the Respondent from entering or coming in or around the matrimonial home situated at La Ressource. There was a returnable date of June 15, 1994. On June 15, 1994 it was ordered that the copy of the petition for injunction and the supporting affidavit be served on the Respondent and the matter further adjourned to June 29, 1994.

On June 29, 1994 the injunction order made on June 6, 1994 was modified and among other things the Respondent was permitted to use the downstairs portion of the matrimonial home for his jewellery business.

Since the injunction order and probably before the Respondent has been living at the home of the Co-Respondent, Joyce Mark, together with their three children.

On December 16, 1993 the Petitioner filed a notice of application for ancillary relief in which she sought an order from the Court that the Respondent convey to her all his rights, title and interest to the extent of a half share in the matrimonial home situated at La Ressource together with the contents thereof.

On February 7, 1994 the Respondent filed an affidavit of his means. In that affidavit he said that his average monthly income was \$1,000 and his average expenses were about \$1,245.00.

He stated that he was the joint owner with the Petitioner of a wooden house situate on the land of U.D.C. at La Ressource.

On February 10, 1994 the Petitioner filed an affidavit in support of her application for ancillary relief. In that affidavit the Petitioner stated that the matrimonial home was built on a loan from the Co-operative Bank and she contributed a major share of the repayment of the loan. She said most of the items of furniture belong to her. She said also that the Respondent has his own home which he built for his mistress and his children and for over two months he had stopped sleeping in the matrimonial home.

At the hearing the Parties gave oral evidence. Before the Petitioner commenced her evidence her Counsel asked to amend the application to include an order that Respondent pay her a lump sum or periodical payments. Learned Counsel for the Respondent had no objections and the application was granted.

Cecile Joseph stated that she knows Joyce Mark very well because Joyce used to work with her as a sales clerk in her club and later at the restaurant at the airport which she managed. She said Joyce was like a daughter to her and used to be in charge of her business when she was out. She said Joyce is presently living in Antoine's house on St. Jude's highway although she was the one who tendered in evidence two deeds of sale from the National Development Cooperation to Joyce Mark made in September 1991.

She said she did not think Joyce was able to pay \$25,000 for the lots neither was she able to build the kind of house located on the lots. By consent pictures of the matrimonial home and Joyce's home were tendered in evidence. Joyce's house is without doubt the more impressive one. It is larger and is made of wall and stands on pillars. The matrimonial house is made of wood and is said to be in much need of repairs.

The Petitioner stated that before she lived in the matrimonial home at La Ressource she lived in Vieux Fort town in a house which the Respondent inherited from his mother. She said there were two houses on the lot. They lived in one which was a dwelling house. The other was a shop and to that building she and her husband did a lot of work and they also added on a club at the top of the shop. She said she saw about the shop downstairs and managed the club called Pigalle upstairs. She said the money to improve the shop building and to construct the club was borrowed. She said she got credit for the materials and paid back from her sales from the shop and club. She said her profits were about \$2,500 a month.

She said the property in Vieux Fort town was sold by her husband to Teresa Barley as the property was in his name alone. She tendered in evidence a deed dated September 10, 1987 of a sale by Antoine Joseph to Teresa Barley of a portion of land measuring 42' x 30' in Vieux Fort town for \$113,000. She said she does not know anything about the money received by her husband for that sale.

As regards the matrimonial home at La Ressource she said the land did not belong to them. She said they took a loan to build the house at La Ressource. She said the present condition of the house is very bad. She said the furniture in the house belongs to her except a rocking chair which belongs to the Respondent. No list of the contents of the house or any evidence of the contents was given by either Party.

The Petitioner stated that at one time she managed a restaurant at the airport. She said Joyce worked with her there and she made profits of between \$2,000 and \$3,000 a month which she used to pay the bills pertaining to the matrimonial home while the Respondent did not pay any bills. She said she did not work and all she had was her savings from her profits at the airport which were presently in the region of \$23,000.

She said she has heard the Respondent talk of Joyce's building as his own and on one occasion he told a friend that he did not borrow any money at all to build that house.

Antoine Joseph stated that he inherited the Vieux Fort town property from his mother who died in Curacco. He said at one time he worked as an operator at Moule-a-chique with some Americans while his wife worked as a maid with an American couple. He said he and his wife worked for the same period but he could not remember the exact period. He said it was with their savings that

they decided to modify a building where his mother had a grocery shop to turn into a rum shop. He said not to his knowledge the Petitioner took credit to build the shop. He said he built Pigalle from what they made in the rum shop.

He said it was his own finances which built the home at La Ressource and he did not take a loan from the Co-operative Bank to build that house.

He admitted he sold the property at Vieux Fort town but it was only after the Nova Scotia Bank had told him that the Petitioner had withdrawn all the money from their joint account.

The Respondent states that at present he does a little jewellery part time and a little farming part time. He admitted not giving the Petitioner anything from the sale of his house in Vieux Fort town.

When he was crossed-examined he said he did not know Joyce Mark's salary and could not say where she got \$25,000 to pay for the two lots or the money to build the house. He said it was not his money that built the house. He stated with joy and pride "O Yes" when asked whether he maintained his three children with Joyce.

It was suggested that he made \$50.00 a day from the rearing of his animals and he agreed that might be the case.

In his closing speech learned Counsel for the Respondent submitted that there was no supporting evidence that the Petitioner helped to build the shop and club or the home at La Ressource, but the latter is not germane for it is community property and each is entitled to a half share.

Let me say that on the evidence I believe the Petitioner and I find she made a substantial contribution to the modification of the shop and the Pigalle in Vieux Fort town and to the building of the matrimonial home at La Ressource. One difficulty is that there is no valuation of the shop and the club. I am not persuaded that the Petitioner drew out the funds from the joint account of the Parties at the Bank of Nova Scotia.

Learned Counsel for the Respondent submitted that in respect of the Vieux Fort town property it was the separate property of the Respondent in accordance with Article 1192 (2) (c) of the Civil Code and therefore, presumably, he could do as he liked with it without accounting to the Petitioner; and in respect of the property at La Ressource it is community property and each is entitled to a half share and it should be so declared.

That would probably be the end of the matter if there was not in existence the Divorce Act No. 2 of 1973. But that Act is in force and learned Counsel himself reminded me of the provisions of Section 25. The basic application of the Petitioner is for an

order for transferring of property within Section 24. Section 25 states what the duty of the Court is in deciding whether to exercise its powers under Section 24.

Section 25 of the Divorce Act has to be considered together with the law of the community. One of the best contested cases I have done in this jurisdiction was Suit No. D.49 of 1984. It pertained to ancillary matters between FITZ MARCELLIN V ANNE MARCELLIN and was decided on June 10, 1987. The hearing took four enjoyable days. I gave a written decision 15 days later. During the subsistence of the marriage the Parties had acquired three properties. Each lived on one property and there was a third in High Street. As I said in my judgment:

"The gravamen of the case rests around the distribution of property and in particular the distribution of one parcel of land situated on High Street in the City of Castries".

The Petitioner in that case asked the Court to order that each of the Parties retain the property in which each lived and to give him one-half share of the property in Castries.

That of course would have been legal community pure and simple. But at Page 9 of my judgment I said:

"I think it right and just that the High Street property be declared the sole property of the Respondent. I do so order".

The Petitioner's appeal to the Court of Appeal of the day failed. Learned Counsel for the Respondent in this case has referred to the case of PETTITT V PETTITT 1969 2 AER 385, 389. I read the reports from the **House of Lords** at 1970 (H.L.(E)) Page 776. The question for determination by the House of Lords in that appeal was the interest, if any, acquired by a spouse in the matrimonial home, when such matrimonial home was purchased entirely by one spouse, the wife, and the other spouse, the husband, has done some work there. The Registrar had given the husband an interest valued at £300. The Court of Appeal affirmed that decision. The wife appealed to the House of Lords who allowed the appeal. **Lord Reid** gave two reasons why the claim should fail at page 796. One reason was that the improvements were nearly all of an ephemeral character - for example, redecoration which would only last for a few years.

The second reason, adopting **Lord Denning's** view, was that a husband should not be entitled to a share in the house simply because he did "*do-it-yourself jobs*", and a wife did not get a share in the house simply because she cleaned the walls or worked in the garden.

In GISSING V GISSING 1970 2 AER 780 H.L. the husband paid the mortgage instalments for the house costing £2,695. The wife provided some furniture and did the lawns. In all she spent £220. It was held that on the facts it was not possible to draw an inference that there was any common intention that the wife should have any beneficial interest in the matrimonial home.

These cases are not applicable to the present case as I have found that the Petitioner made direct and substantial contributions to the modification of the shop, the construction of the Pigalle and the construction of the house at La Ressource. Further the law of community applies to impose a half share on each spouse in the matrimonial home. The applicant is asking for the Respondent to convey his half share to her and the Respondent in paragraph (4) of his affidavit stated he is the joint owner with the Petitioner of a wooden house.

In WATCHTEL V WATCHTEL 1973 1 AER 113 the husband and wife in 1956 purchased the matrimonial home in the husband's name with 100 percent mortgage. They divorced in 1972. The only capital asset was the home which was worth £20,000. Ormrod J. looked at section 5(1) of the Matrimonial Proceedings and Property Act which was similar to our section 25 and held that capital should be available to the wife who was the Party leaving the home to enable her to get a house. He divided the capital assets and ordered £10,000 to be paid to the wife.

At page 117 letter C he states:

"Apart from the general tenor of the new code, there are three specific changes in the new law which must modify the approach to these problems. The first of them is Section 4(a) which gives the Court the new power to order property to be transferred from one spouse to the other"

**These provisions obviate the difficulties arising from PETTITT
V PETTITT etc."**

I have already referred to the power of the Court to make an order that a party to the marriage shall transfer to the other party such property as may be so specified, being property to which the first mentioned party is entitled. See Section 24(a) of the Divorce Act, 1973.

The Petitioner is asking under Section 24 to give her the Respondent's half share of the matrimonial home, a wooden house which is in need of repairs. She is 69 years old and is unemployed. She only has her savings remaining most of which she would have to spend on the house if she obtains an order.

The Respondent is 64 years old and is able to work and does in fact rear his animals and do a little jewellery. I believe the Respondent has some interest in the house in which he lives though the deed for the land is in the name of Joyce Mark. I believe too he had a hand in the financing of the land and the house built on the land in question.

I do not think Joyce Mark would permit him to be in the house if it were otherwise. I bear in mind that their last child is only 5 years old.

I bear in mind also that it would be desirable to adopt the clean break principle.

I have referred to Section 25 of the Divorce Act and the provisions in particular of paragraphs (a), (b), (d), and (f). In all the circumstances of this case I order that the Respondent transfer his half share in the matrimonial home situated at La Ressource to the Petitioner.

I said earlier that just before I began to take the oral evidence of the Parties the Petitioner asked for an amendment of the notice to include an order for a lump sum or periodical payments. These are in the alternative. I must also in this regard look at the income and earning capacity of the Respondent.

In PRESTON V PRESTON 1981 3 WLR 619 C.A. in ancillary proceedings the Judge ordered the husband to pay a lump sum of £600,000. The husband appealed saying the figure of £250,000 was the appropriate figure. The Court of Appeal dismissed his appeal.

In GOJKOVIC V GOJKOVIC 1990 2 AER 84 the Judge awarded the wife a maisonette worth £295,000 and a lump sum of £1 million. The husband appealed saying the proper award was the maisonette and a sum of £532. The Court of Appeal dismissed his appeal.

In both cases the husbands were very wealthy multi-millionaires.

My assessment is that Mr. Joseph is far from being a Mr. Preston or a Mr. Gojkovic. If I order his half share in the matrimonial home to go to the Petitioner I could not justify a lump sum in addition. Besides I do not think judging from his affidavit of means and the evidence that he is able to pay a lump sum.

The same applies to periodical payments. And it must be remembered that the Respondent uses the downstairs portion of the house for his jewellery business so there is potential for obtaining some income by the Petitioner when the Respondent leaves the premises.

For the avoidance of doubt I order the Respondent to deliver the downstairs portion of the matrimonial home to the Petitioner not later than November 30, 1994. I also order the Petitioner to retain the contents of the matrimonial home except the rocking chair which should be delivered to the Respondent.

Each party shall bear his or her own costs.

A.N.J. MATTHEW
Puisne Judge