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SAINT LUCIA

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

Suit No. D6 of 1992

BETWEEN: VIRGINIA JOSEPH

Petitioner

and

JULIAN JOSEPH

Respondent

APPEARANCES:

Mr. H. Deterville for the Petitioner
Mr. M. Foster for the Respondent

1994: December 20 and 21

JUDGMENT

MATTHEW J. (In Chambers)

The Petitioner is 47 years old and the Respondent is 44 years old. They were married at the Deliverance Baptiste Church at Ciceron on January 22, 1975. They have three children as follows:-

(a) David Bathelme born July 23, 1977;

(b) Damian Willis born December 19, 1982; and

(c) Dahlia Caroline born January 30, 1985.

On July 17, 1992 the Petitioner obtained a decree nisi for divorce

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which was made absolute on August 3, 1993.

On an application for ancillary relief filed by the Petitioner on January 8, 1993 the Parties adopted a consent order made on June 16, 1993. By the terms of that order custody of the first child was granted to the Respondent and custody of the other two children were granted to the Petitioner. The Respondent was also ordered to pay the Petitioner a monthly sum of $200.00 for the maintenance of each of the children in her custody.

The order also provided that the Respondent, who is a building contractor, would construct a house for the Petitioner within twelve months of the date of the order and in any event not later than June 30, 1994 and that on completion of the said house the Petitioner would deliver up possession and occupation of the matrimonial home to the Respondent.

On November 29, 1994 the Petitioner filed a summons for injunction in which she sought an order to restrain the Respondent from entering into and/or remaining in the matrimonial home until she had ceased occupation thereof as provided for in the order made on June 16, 1993.

The Petitioner under that summons asked for a number of other heads of relief which in any judgment are not the proper subjects for injunctive relief. The orders sought deal with matters of fact

which are strongly contested and for which damages would be an adequate remedy if proved.

I am asked for an order to direct the Respondent to remove a door he constructed in a place where a window was. I am asked to restrain the Respondent from taking and or keeping property belonging to the Petitioner. Having heard the evidence I am not persuaded that the things taken belonged to the Petitioner.

I am asked to direct the Respondent to return certain goods which even if it is proved they are hers, damages would be an adequate remedy.

I am asked to direct the Respondent to make payments to the Petitioner in a particular account at Barclays Bank. I think this is a request which one Counsel could make of the other and at the hearing learned Counsel for the Respondent had no objections to the Respondent making payments at Barclays Bank, Jeremie Street Branch, in Account No. 024598640 standing in the name of Virgina Joseph.

I refuse to make any directions in the matter. It is for the benefit of the Respondent if he does so since he could prove much easier whether he had made payments or not.

The summons for injunction was supported by an affidavit of the Petitioner filed on December 2, 1994. In that affidavit it was

stated that the Respondent on October 14, 1984 had entered and remained for short periods on three separate occasions at 1:00 a.m.; 2:00 a.m. and 3:00 a.m. The Petitioner deponed that entering her home at such times was unreasonable. Earlier she had stated that before and since the making of the order of June 16, 1993 the Respondent had been living away from the matrimonial home but had been making irregular visits to the said matrimonial home at unreasonable times.

The Respondent filed an affidavit in reply on December 16, 1994. In that affidavit he stated that he had been residing at the matrimonial home before and after the making of the order of June 16, 1993 but he admitted that he had not constructed the building for the Petitioner. He denied that he had entered the matrimonial home on October 14, 1994 at the times stated.

The Parties were not satisfied that the matter should be dealt with on the affidavit evidence alone and they gave viva voce evidence and the Petitioner called the first child of the marriage as a witness.

The Petitioner was cross-examined on her affidavit by learned Counsel for the Respondent. There she stated that she can defend herself not only with a cutlass but with any weapon. Then she replied: **"No, I am not afraid of him"**. She further stated that she did not want to get back with the Respondent. She said when

the Respondent entered the house at those unreasonable times he did not make noise with her.

When she was re-examined the Petitioner stated that she did not know where the Respondent lives and he did not sleep in the house. She said the last time he slept in the house was in July 1993. She said she did not feel safe with the Respondent coming to the house at all hours.

David Joseph stated that he really did not know where his father lives. He said his father used to live at the matrimonial home before but he dose not live there any more. When he was cross-examined he said he loved his father who had not been abusive to him and he would like to see his daddy live in the matrimonial home.

When he testified Julian Joseph stated that he lives in the matrimonial home together with his family and has not got another house but he sleeps out occasionally to avoid confrontation.

He said David is untruthful when he said he did not know where the Respondent lived.

In his closing address learned Counsel for the Respondent submitted that in this case there was conflicting evidence on trivial matters. He submitted that Respondent lived in the house and if he

came into the house at all hours which the Petitioner did not like that was not a ground for ousting him from the matrimonial home. Counsel submitted that the Petitioner was not in fear of the Respondent as she said and all the indication was that the Respondent was a gentle man. Counsel cited the House of Lords case of **RICHARDS V RICHARDS 1984 1 AC 174.**

In his closing address learned Counsel for the Petitioner pointed out that the first question of fact to be decided is whether or not the Respondent lived at the matrimonial home for if he did not live there the question of ouster did not arise.

Counsel submitted that the order made by consent on June 16, 1993 suggested that the Parties should live apart as each was granted custody of one or two of the children.

In **RICHARDS V RICHARDS 1984 1 AC 174** the wife sought an injunction to exclude the husband from the matrimonial home. The Judge held that the allegations made by the wife were flimsy and that she had no reasonable grounds for refusing to return to live in the same house, but he made the order sought in the interests of the children.

The Court of Appeal dismissed the husband's appeal. The husband appealed to the House of Lords who held that the power of the High Court to make orders relating to the occupation of the matrimonial

home during the subsistence of the marriage was derived from section **1** of the Matrimonial Homes Act **1967** and was to be exercised having regard to the four matters specified in section **1 (3)**, namely:-

(a) the conduct of the spouses in relation to each other and otherwise;

(b) the respective needs and financial resources of the Parties;

(c) the needs of any children; and

(d) all the circumstances of the case -

and that none of these matters was paramount over any other but the weight to be given to each depended on the facts of each case.

The House held that the decision of the Judge was demonstrably wrong because in reaching his decision he had failed to take into account the wife's conduct in refusing to return to the matrimonial home when there were no reasonable grounds for such refusal.

What that case instructs is that the Judge should have regard to all of the four factors referred to above. But let me say two things about the applicability of that case. The decision was based on the provisions of the Matrimonial Homes Act 1967 which is

spelt out in the judgment. Our Divorce Act has no such provisions. Further the jurisdiction of the Court is to make such orders during the subsistence of a marriage. The marriage between the Parties in this case ended on August 3, 1993.

However, I shall be guided by the Act and I will especially take into account the conduct of the Respondent in coming to the matrimonial home at the times specified. I agree with learned Counsel for the Respondent that the facts indicate that the Respondent is not a violent man. I shall also have regard to the clean break principle usually applied in these matters.

I accept as a fact the evidence of the Petitioner and David that the Respondent does not live at the matrimonial home and that has been the position for over one year.

I find that the Respondent's behaviour in making these visits in the early hours of the morning is unreasonable.

I reject the evidence of the Respondent that the situation is simply that of a man entering his home at the early hours of the morning.

It must be remembered that this is a case where the marriage has ended. By the consent order made on June 16, 1993 the Parties were to share custody of the children and that order suggests that the

Parties were going to live apart. Further than that the property order suggested that the Petitioner should have occupation of the matrimonial home until the Respondent had constructed a home for her. He had up to June 30, 1994 to do so. He has not done so up to now and he does not even show any likelihood of his complying with the order in the near future.

I have already referred to the clear break principle above. It seems that the Respondent would seek to benefit from his own default and keep matters in perpetuity.

I believe Respondent can find somewhere else to live and I believe he has been living else where. The balance of convenience dictates that I made the order in the Petitioner's favour.

My order is that:-

1. **Upon the Petitioner undertaking to pay the damages in case the Court shall hereafter be of the opinion that the Respondent shall have sustained any by reason of this Order which the Petitioner ought to pay:**

   IT IS HEREBY ORDERED that the Respondent be restrained and an injunction is granted restraining the Respondent from entering into and/or remaining in the former matrimonial home until after the Petitioner has ceased occupation of the said house as provided for in the order for ancillary relief made on June

16, 1993.

2. The Respondent is ordered to pay the Petitioner's costs to be taxed if not agreed.

A.N.J. MATTHEW
Puisne Judge