

SAINT LUCIA

IN THE HIGH COURT OF JUSTICE

SUIT NO. D 51 of 2001

BETWEEN:

BARBARA JOSEPH

Petitioner

and

RYTIS JOSEPH

Respondent

Appearances:

Ms. Veronica Barnard for the Petitioner

Ms. Leandra G. Verneuil for the Respondent.

2002: December 09

2003: April 09

MATRIMONIAL PROCEEDINGS...LAW OF COMMUNITY OF PROPERTY...WAS RODNEY BAY
PROPERTY COMMUNITY OR SEPARATE PROPERTY...IMPACT OF DIVORCE ACT 1973 ON
CIVIL CODE...CLEAN BREAK APPLIED

JUDGMENT

1. **HARIPRASHAD-CHARLES J:** Barbara and Rytis Joseph were married on December 13, 1990 at the Deliverance Baptist Church in Ciceron. He was 32 and she was a year his senior. Unpleasant differences arose between them and the once harmonious marriage relationship became turbulent and rocky. On May 23, 2001, Mrs. Joseph petitioned the court for dissolution of the marriage. A decree nisi was pronounced in her favour on October 15, 2001. On February 28, 2002, she filed the present application for ancillary relief.
2. Two fundamental issues arise for the Court's determination namely:

- (a) Whether the property described in the Land Register as Block 1256B 198 situate at Rodney Bay is community property?
- (b) Whether the Court ought to order, and if so what would achieve a clean break in the circumstances?

Property at Rodney Bay

3. The case for Mrs. Joseph is that she is entitled to half-share of the property at Rodney Bay by virtue of the Civil Code as well as her contributions to the family business. She alleged that at the time of the purchase of this property, she and her husband operated joint businesses which paid all expenses including the mortgage on this property. Mrs. Joseph next alleged that she worked in the business as a wife and co-owner and she did so, assiduously and single-handedly when Mr. Joseph went on pleasure trips sometimes for three months in the United Kingdom. In cross-examination, she stated:

"I worked for three years. I was paid \$1,000.00 monthly. I did everything. I did not only check cash. When he was away, I was in charge of the entire business. Ms. Sadia Paul was there also. She sold sand also. I assisted. Ms. Paul and I worked together. I was the second boss after my husband. When the business started, I was part of it. I participated in getting the business started. I organized the entire accounting procedures. I hired an accountant to assist me. "

4. On the other hand, Mr. Joseph asserted that the property is his separate property as it was acquired with his own separate funds and earnings at a time when his wife had already left the matrimonial home and he was uncertain of their future together. He contended that he is solely responsible for the monthly mortgage repayments and that his wife has never made any contributions, financial or otherwise to the acquisition of the property.

The Law of Community Property

5. Article 1192 (1) of the Civil Code provides that the property of persons married in community is divided into separate property and the property of the community. The effect of this is that it is not automatic that all property acquired by the spouse during a marriage is community property.

6. Article 1192 sets out the circumstances under which a spouse may acquire separate property during marriage. Subsection (2) (b) states that separate property comprises the income and earnings of either spouse, investments in the name of one spouse, and insurance policies taken out on the life of one spouse.
7. Mrs. Barnard argued that the general principle is that any assets purchased or acquired during the marriage is jointly owned by the parties unless admitted otherwise or proven to fall within the exceptions contained in Article 1192. She submitted that if Mr. Joseph is asserting that the property is separate property, he has to displace that burden.
8. It is clear from Article 1193 that the burden of proving that property acquired during the community is separate property is placed firmly on the person who is alleging that it is separate property. A mere statement in the Deed of Sale does not automatically create separate property. There is no evidence that the parties were separated judicially or otherwise when the property was acquired.
9. The evidence reveals that the property at Rodney Bay was purchased by Deed of Sale dated May 11, 1995 and registered on June 7, 1995 as Instrument No. 2139/95 in the sole name of Mr. Joseph. The Deed of Sale expressly provides that Mr. Joseph was purchasing the property with his own separate funds and earnings. He is solely responsible for the mortgage repayments of \$4,305.00 monthly. There is still an outstanding debt on the property of approximately \$241,280.64 which will expire in 2009. Mrs. Joseph has not contributed financially to the mortgage repayments. Indeed, her knowledge of the property is quite minimal. Even if the business paid for the property, Mr. Joseph was the driving force behind the business. It is his business acumen that steered the companies to moderate success.
10. In all the circumstances, I think it would be improper for me to conclude that the property is community property. See *Rene Cenac v Earl Cenac (Civil Suit No. D 31 of 1984) (unreported)* and *Spooner v Spooner (Civil Suit No. D 127 of 2000) (unreported.) (Saint Lucia)*.

The Impact of the Divorce Act 1973

11. But in my considered judgment, the matter does not end here. In addition to the Civil Code, there is the Divorce Act, No. 2 of 1973. It complements the Civil Code. Section 45 states that the court may make an order-

(b) "If any property of the parties or of either of them is separate property within the meaning of the Civil Code and the court is satisfied that the other party has made a substantial contribution (whether in the form of money payments, or services, or prudent management, or otherwise howsoever) to the improvement or preservation of such property-

(i) directing the sale of such property and the division of the proceeds, after the payment of the expenses of the sale, between the parties in such proportions as the court thinks fit; or

(ii) directing that either party pay to the other such sum,...as the court thinks fair and reasonable in return for the contributions made by the other party."

12. Section 24 empowers the court to make orders for transfers and settlements of property and Section 25 sets out certain matters to which the court is to have regard in deciding what orders to make under sections 22 and 24.

13. Section 25(1) states:

"It shall be the duty of the Court in deciding whether to exercise its power under sections 22, 23 or 24 in relation to a party to the marriage and, if so, in what manner, to have regard to all the circumstances of the case including the following matters, that is to say:

(a) the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future;

(b) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;

(c) the standard of living enjoyed by the family before the breakdown of the marriage;

(d) the age of each party to the marriage and duration of the marriage;

- (e) any physical or mental disability of either of the parties to the marriage;
- (f) contributions made by each of the parties to the welfare of the family including any contribution made by looking after the home or caring for the family..."

14. Broadly speaking, it is the duty of the Court so as to exercise those powers as to place the parties, so far as practicable and, having regard to their conduct, just to do so, in the financial position in which they would have been if the marriage had not broken down and each had properly discharged his or her financial obligations and responsibilities towards each other.

15. The court's fundamental duty however remains to apply the matters set out in paragraphs (a) to (f) of Section 25 (1) to all the circumstances of the case in an attempt to arrive at a fair outcome. Although the issue of the parties' contributions has been uppermost in the minds of the parties, I observe that that issue can claim no statutory priority in the discretionary exercise.

16. Turning to the facts of the case, Mr. and Mrs. Joseph were married on 13 December 1990. The marriage lasted 11 years. There are no children of the family. The parties' humble fortune arose from the operation of two businesses, Ryte Welding Enterprises Limited and R.J. Joseph & Associates Limited. The former was incorporated in 1992 when Mr. Joseph was still gainfully employed with the Rodney Bay Marina; the latter in September 1995. The Companies are no longer in existence having been struck off the Register of Companies on January 4, 2001.

17. There is little evidence in terms of Mrs. Joseph's contribution as a wife. She stated that because she worked so hard in the business, she had little time left to run the home necessitating someone to assist at home. Then there are no children of the family. Her contribution as a mother and wife is therefore negligible.

18. The companies were created during the marriage. During the years of cohabitation, Mr. Joseph's achievement was the product of his drive and initiative. He launched the two companies and set them on a successful path. He was involved in the actual day to day

operations of his business. He is a machinist and a welder and knows the tools of his trade. I have no doubt that he was an excellent businessman and a successful entrepreneur. In latter years, he was involved in sand mining and made a lot of money from it. With those monies, he was able to purchase the property at Ciceron as well as the Rodney Bay property.

19. By contrast, I did not see Mrs. Joseph's role in the business as pivotal. It would not be fair to describe it as purely incidental since she took charge of the operations of the business when he was away. She was paid a salary of \$1,000.00 monthly to keep the accounts of the company in order (an accounting system which she was instrumental in setting up), to pay salaries to workers and to do all banking transactions. Mrs. Joseph worked for less than three years in the business.
20. I would say that her contribution to the business was minimal when compared to that of her husband. Bearing in mind the words of the statute, her contribution must be substantial in order for a beneficial interest to arise in the Rodney Bay property. It is difficult to find that she contributed substantially either in the form of money or services or prudent management to the enhancement of the property.
21. Mrs. Barnard submitted that as a general rule equality should not be departed from only if, and to the extent that, there is good reason for doing so: *White v White (2000) 3 WLR 157*. I agree with the submission. However, there is no legal presumption of equal division when awarding ancillary relief under the Divorce Act, 1973 but a judge in exercising his statutory discretion pursuant to section 25 of that Act should, before making the final decision, check his tentative views against the yardstick of equality of division and depart if there was good reason for doing so.
22. The ratio of the judgment in *White v White* is that the judge's objective is about fairness rather than equality. The recent English authority of *Lambert v Lambert (2002) EWCA Civ 1685 (14 November 2002)* followed the principles enunciated in *White v White*.

23. In the present case, the decree nisi has not yet been made absolute but I think that I can safely say that the 11 year old marriage relationship is at an end. The acrimony between the parties is too intense to conclude otherwise. The parties should be put back in the position they were in before the breakdown. Mr. Joseph is now 45 years old and was recently comatosed as a result of high blood sugar. He has lost a lot of weight and cannot be as effective in his profession as he once was. Mrs. Joseph is 46 and is a diabetic with high blood pressure. Except for basic courses in cake decorating, sewing and hairdressing, she is not sufficiently equipped to face the present competitive job market. She is presently employed with Ripple Marketing, a Company managed by her nephew. That Company is in dire financial straits and is the subject of many law suits before the court. However, I do not believe that she does not earn a salary.

24. In addition to the law governing the community of property, I have carried out the exercise required by Sections 25 systemically and realistically to ascertain those interests in a broad way so that one can see the justice of each side's case. In respect of section 45 of the Divorce Act, the evidence shows that Mrs. Joseph has not substantially contributed either in the form of money or services or prudent management to the enhancement of the Rodney Bay property.

25. In the circumstances, I find that the Rodney Bay property is the separate property of Mr. Joseph and does not fall within the community.

The Clean Break Principle

26. I think that in all the circumstances, this is a fit and proper case for a lump sum award to be made as maintenance. There are no children of the family. For all intent and purposes, the parties are permanently estranged. A clean break may assist to remove the bitterness which is so evident in this case. The difficulty however which this case poses is: what order should the court make to achieve a clean break?

27. Mrs. Barnard submitted that the Ciceron property should to be awarded to Mrs. Joseph and that Mr. Joseph should continue to pay the mortgage repayments. She submitted that the Rodney Bay property should be awarded to Mr. Joseph.

28. On the other hand, Ms. Verneuil was not so generous to Mrs. Joseph. She submitted that the only fair and equitable way to exercise the clean break principle is for the court to order that the Rodney Bay property is the separate property of Mr. Joseph. This is exactly what the court found. And secondly, that the Ciceron property be declared to be community property to be divided equally between the parties. The latter submission was never in dispute.

29. I believe that a clean-break would be best achieved by looking at Section 24 of the Divorce Act. My consideration is drawn to a lump sum payment. In *Wachtel v Wachtel*, Lord Denning MR at page 840 observed:

“In every case the court should consider whether to order a lump sum to be paid by her husband to her...One thing is, however, obvious. No order should be made for a lump sum unless the husband has capital assets out of which to pay it – without crippling his earning power.

Another thing is this: when the husband has available capital assets sufficient for the purpose, the Court should not hesitate to order a lump sum. The wife will then be able to invest it and use the income to live on. This will reduce any periodical payments, or make them unnecessary. It will also help to remove the bitterness which is so often attendant on periodical payments. Once made, the parties can regard the book as closed. The third thing is that, if a lump sum is awarded, it should be made outright.”

30. Coming now to the facts of the present case. I do not think that I could consider Mr. Joseph to be a man of straw. But I would not consider him a wealthy man either. I do not think that he could be compared to the husband in *Antoine v Antoine (Civil Suit No. 32D of 1998) (unreported) (Dominica)* to which Mrs. Barnard alluded.

31. Despite his recent hospitalization, he is still able to continue his business. His present net income is estimated at about \$15,000.00 monthly. He has to pay 4 workers and the related expenses that flow from a business operation. One thing is certain: I do not wish to cripple the earning power of Mr. Joseph.

32. On the other hand, his wife, Barbara's elementary academic qualification in computers and basic skills in cake decoration and hairdressing are insufficient to provide her with a decent

salaried job. Her present job is unstable. Now, at 46, she is suffering from hypertension and diabetes. Her prospect of remarriage dwindles with the passage of time.

Conclusion

33. Both parties provided valuations. Valuations may overstate or understate the results of realization of assets, many of which may not be realizable within the immediate or foreseeable future: *O' Donnell v O' Donnell* (1975) 2 All ER 993, 996.

34. In *P.V.P (1978) 1 WLR 483* at *page 487*, Ormond L.J., after analyzing Section 25 of the Matrimonial Causes Act [U.K.] had this to say:

"It is useful to ascertain these interests in a broad way so that one can see the justice of each side's case, but I would prefer to avoid quantifying or seeking to quantify these rights in terms of figures because the moment one quantifies them people begin to do arithmetic with the figures, and it is a well-known statistical fallacy that if you start with an estimate and you multiply it and divide it, you multiply and divide the error as well. So that I am not helped particularly by these valuations."

35. Like Ormond L. J. I have not been assisted by the valuations provided. In my opinion, the matter can be dealt with satisfactorily by carrying out, once again the exercise required by Section 25(1) systemically and realistically, to ascertain those interests on a broad way so that one can see the justice of each side's case.

36. In doing so, I conclude that the property at Rodney Bay is the separate property of Mr. Joseph. There is no contest as it relates to the Ciceron property. It is accepted that it is community property with each party having an equal half-share in it. The husband will continue to pay the outstanding mortgage of \$80,000.00 on that property. In order to achieve a clean break, I will make an order that the husband do pay to the wife a lump sum of \$82,632.00 being the exact equivalent of two years maintenance. In assessing financial needs, I took into consideration, the age, health, accustomed standard of living, income and earning capacity of the wife and the available pool of resources. I am hopeful that the lump sum award will steer her to an independent path as she faces the challenges of life alone.

37. I am conscious that this conclusion does little to increase clarity or predictability of outcomes. However, any expectation of such was surely unrealistic.

38. My order is as follows:

- (1) That the property described in the Land Register as Block 1256B 198 situate at Rodney Bay is the separate property of Mr. Joseph.
- (2) That the Ciceron property is community property with each party having an equal half share in it.
- (3) That Mr. Joseph do continue to pay the balance of the loan repayments of \$80,000.00 owing on the said property.
- (4) That Mr. Joseph do pay a lump sum of \$82,632.00 to his wife within 6 months hereof.
- (5) That each party do bear his or her own costs.

INDRA HARIPRASHAD-CHARLES
High Court Judge