SAINT LUCIA

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE

Claim HMT 2003/0009

BETWEEN

REUBEN EPHRAIM SMITH

Petitioner

AND

CELESTINE CLAUDIA SMITH

Respondent

Appearances:

Mr. Mark Maragh for the Petitioner
Miss Samantha Charles for the Respondent

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2008: June 10

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RULING

[1] The problems between this couple began long before the presentation of the petition for the dissolution of their marriage. The proceedings when begun on 22nd January, 2003 proved both contentious and acrimonous.

[2] Subsequent to the grant of the decree nisi on 11th June 2004, the Petitioner filed his application for ancillary relief on 10th August 2005. Hearing of that application continued.

On 26th October 2006 the Respondent also filed her application for ancillary relief. Prior to the date of hearing of the application on 16th November 2006, the parties entered into discussions and on the said date of hearing filed a consent order duly signed by all of the parties which was then approved by the court.

[3] However when an order was finally entered on 26th February 2007 it was discovered that that there was an additional sentence to the original paragraph 2 and a new paragraph had been added.

[4] The Respondent now applies to have that order set aside and an order made for rehearing of the application for ancillary relief. The grounds of the application are as follows:

(1) The Order as entered on 26th February 2007 does not reflect verbatim the order that was made on 16th November 2006

(2) The Petitioner has failed in his undertaking under paragraph 3 of the Order which was intended by the parties to be a precondition to the other Respondent's obligation under the Order.

(3) The wording of the Order at paragraph 2 is ambiguous and leaves room for uncertainly as to its execution, and may therefore lead to future and further contention between the parties.

(4) The order made not having taken into consideration or making any allowance for any maintenance or lump sum payment by the Petitioner to the Respondent.

[5] It should be noted that during the course of the hearing of this application, Counsel for the Petitioner conceded that the order of 26th February 2007 had been entered in error, the additions being reflective of discussions held subsequent to the consent order of 16th November 2006.

[6] Counsel for the Respondent based her submissions on the case of SvS (Ancillary Relief: Consent Order) 2002 3 WLR 1372 where it was stated that there are three (3) ways to reopen a consent order viz: (1) fresh action; (2) appeal and (3) application for a rehearing. Also stated by that case, in proceedings without a jury the judge shall have power on application to order a rehearing where no error of the court at the hearing is alleged. This Counsel states is similar to the provisions of Rule 38(1) of the Divorce Rules of St. Lucia. She contends therefore that the present application is the correct procedure.

[7] Counsel is of the view that the Petitioner, having failed in his undertaking under the Order in that he did not within 60 days of the making of the order cause the relevant letter to be delivered to the Respondent's attorney, has given cause for the order to be set aside. Counsel argues that delivery of the letter was meant to be a precondition to the Respondent's performance in relation to paragraph 2. ((This last was the result of the discussions subsequent to the consent order of 16th November 2006).

[8] Counsel asserts that since the wording of paragraph 2 is ambiguous and more than likely to lead to further contention between the parties as it makes no allowance for the value of the land (which has been agreed to be the sole property of the Respondent) to be

deducted before the proceeds in respect of the matrimonial home are divided, this is an issue which needs to be addressed.

[9] Counsel also notes that there was no allocation made for maintenance to the Respondent and that this was an omission during the discussions leading up to the making of the Order.

[10] Counsel submitted that the issues related are unusual and unique and are not those normally dealt with by the cases of setting aside and rehearing of ancillary relief matters. She continues that if the court is not so persuaded then the court should view as a "supervening event" (per the decision SvS (supra) the Petitioner's failure in his undertaking as well as the incorrect wording of the order as was entered and set aside the order and make an order for the matter to be reheard.

[11] Counsel for the Petitioner, while admitting that the order of February ought not to have been entered, contends that the procedure adopted by the Respondent i.e. by way of Notice of Application to Set Aside Ancillary Relief Order, is incorrect, that there should be a separate proceeding under the Divorce Rules.

[12] Counsel states that Rule 38 of the Divorce Rules specifies the procedure for rehearing and that by Rule 38 (4) a notice to apply for rehearing must issue after entry of judgment. Counsel contends that the remedy for failing to comply with the order is to come to court and seek to have the matter determined.

[13] With respect to the Order, it is Counsel's view that the Respondent seems to be suggesting that because the letter was not provided within sixty (60) days that she is absolved. Counsel queries whether the Respondent should be permitted to choose on what she wishes to rely and in so doing have a second "bite at the cherry".

[14] In relation to the question of maintenance Counsel counters that the mistake occurred prior to the signing of the consent order and the Respondent ought not to be allowed to have the order adjusted in order to include this aspect.

[15] Counsel also refutes the suggestion that paragraph 2 is ambigious.

[16] Consent Order of 16th November, 2006

> *(1) The Respondent shall pay the Petitioner the lump sum of $339,732.00 based upon the agreed valuation of the matrimonial home by Charles Heywood in the sum of $566,220.00 on or before 16th May, 2007 in respect of the Petitioner's share of the matrimonial home and the contents hereof excluding the land referred to at paragraph 2 below which the parties agree to be the separate property of the Respondent.*
>
> *(2) Should the Respondent fail or for any reason be unable to comply with paragraph 1 above by the date stipulated therein, the said matrimonial home situate at Grande Riviere in the Quarter of Gros Islet and erected upon lands registered in the Registry of Lands of Saint Lucia as Block 1251 B Parcel 301, shall forthwith be put up for sale and upon any such*

sale the said sum shall be paid to the Petitioner or the equivalent of 60% of the total consideration of such sale.

(3) The Petitioner undertakes to cause a letter issued and delivered to the Respondent's attorney's, Caribbean Law Offices, from the Petitioner's former employers their successors or assigns, indicating the irrevocability and security of the Respondent's survival benefits emanating from the Petitioner's pension with the said former employer. The said letter shall be delivered within sixty (60) days of the date of the consent order herein.

(4) ……..

[17] Law

Rule 38 of the Divorce Rules 1976 provides:

Application for Rehearing

(1) An application for re-hearing of a cause tried by a judge alone where no error of the Court at the hearing is alleged, shall be made to a judge.

(2) Unless otherwise directed, the application shall be made to the judge by whom the cause was tried and shall be heard in open court

(3) The application shall be made by a notice to attend before the judge on a day specified in the notice, and the notice shall state the grounds of the application

(4) Unless otherwise directed, the notice must be issued within six weeks after the judgment and served on every party to the cause not less than fourteen days before the day fixed for the hearing of the application.

(5) The applicant shall file a certificate that the notice has been duly served on each person required to be served therewith.

(6) The application shall be supported by an affidavit setting out the allegations on which the applicant relies or exhibits a copy of any pleading which he proposes to file if the application is granted and a copy of the affidavit shall be served on every other party to the cause.

(7) ……..

(8) Any other application for re-hearing shall be made by way of appeal to the Court of Appeal.

Findings

[18] The Court, accepting the Petitioner's admission that the order of February 2007 was entered in error, will as a consequence concern itself solely with the contents of the consent order of 16th November, 2006, and more specifically paragraphs 2 and 3 which are essentially the subject of dissension between the parties.

Whether procedure is correct

[19] This application not being an instance of "an error of the court" - the order being one by consent of the parties – I am satisfied that, in accordance with the provisions of Rule 38 (1) the Respondent, in making an application for a rehearing, has adopted the correct

procedure. Had there been an error of the court or other situation e.g. fraud or mistake, the application would be by way of appeal : Rule 38(8).

[20] I am in agreement with Counsel for the Respondent that since neither the Divorce Act nor the Divorce Rules makes specific provision for a particular form pursuant to Rule 38, it would be necessary to adapt an application form under the Rules in order to fit the present circumstances.

[21} I also consider as cogent Counsel's reasoning with respect to paragraphs 2 and 4 of Rule 38 (see [paragraph 17 above) in counteracting any discrepancies between this rule and the Respondent's application. While the Rule at paragraph 2 states that the application must be made to the judge by whom the cause was tried, it is not within Counsel's control before whom the application is brought. In any event that judge is not now available to determine the matter.

[22] Based on the admission by the parties, even after the consent order of 16th November had been signed, discussions continued in the hope of resolving the relevant issues. The time period of six (6) weeks as required by Rule 38(4) for an application to be brought was therefore not feasible.

[23] It is my view that in the premises neither the nomenclature nor the adaptation of the application form is fatal to the present application since the application itself gives a clear indication of what the Respondent is seeking.

Paragraph 2 Consent Order

[24] I am unable to accept Counsel for the Respondent's assertion that there is ambiguity in this paragraph. It is my view that this paragraph must be read in conjunction with paragraph 1 where it is clearly stated that the valuation of the matrimonial home "exclud(es) the land referred to at paragraph 2 below which the parties agree to be the separate property of the Respondent". I have read this paragraph to indicate that based on an already completed valuation, the Petitioner is entitled only to a specified sum by a specified time. However if by that specified time the Respondent fails or is unable to pay that specified sum, the property will be sold and the Petitioner is thereby entitled to 60% of the proceeds of the value of the house.

Paragraph 3 of Consent Order.

[25] In reaching a decision under this head, I considered the following cases which dealt with the question of setting aside of consent orders in ancillary relief matters:

> *"de Lasala v de Lasala (1979) 2 AER 1146*
>
> *Thwaite v Thwaite (1981) 3 WLR 96 Barder v Caluori (1988) 1AL 20*
>
> *SvS (Ancillary Relief: Consent Order) 2002 3WLR 1312*

[26] The case of de Lasala influenced the decisions in the later cases. That case originated from Hong Kong and involved in part the question of the jurisdiction of the court to vary a consent order which incorporated terms agreed by the spouses and whether such an

order is a final order. The consent order reserved liberty to apply in respect of the implementation of a deed of arrangement and trusts deeds appended to the order. The husband had fully executed the arrangements but the wife applied for an order to set aside or vary the consent order. It was held in part that the deed of arrangement and trust deeds, having been made the subject of a consent order, no longer depended on the parties' agreement for their legal effect (which derived from the court's order) and enforcement of their provisions, so far as they remained executory, would be by summons under the order, pursuant to the liberty to apply reserved by the order, and not by action between the parties.

[27] Diplock LJ stated:

> *Financial arrangements that are agreed on between the parties for the purpose of receiving the approval and being made the subject of a consent order by the court, once they have been made the subject of the court order no longer depend on the agreement of the parties as the source from which their legal effect is derived. Their legal effect is derived from the court order; and the method of enforcing such of their provisions as continue to be executory (in the instant case the provisions of trust deeds A and B) is not by action but by summons under the court order pursuant to the liberty to apply reserved in the instant case by paragraph 8 of the consent order of 23rd May 1970".*

His Lordship was also of the view that final orders of all kinds can be challenged on appeal (e.g. where there is fraud or mistake) or may also be set aside on other grounds. He continued:

> *"The test whether a judgment or order finally disposes of the issues raised between the parties is not determined by enquiring whether for the purposes of rules of court relating to time or leave to appeal it attracts the label "final" or "interlocutory". The test is: has the court that made the order a continuing power to vary its terms, as distinct from making orders in aid of enforcing those terms under a liberty to apply?"*

[28] Applying this determination to the present case where the Petitioner has not fulfilled his obligations under paragraph 3, the order could at that stage be considered executory. There is however no liberty to apply reserved under the order which would have allowed the court to make an order to aid in the enforcement of the terms of the order. I therefore adjudge the order to be a final order to which certain considerations can apply.

[29} In coming to this conclusion reference must again be made to the provisions of Rule 38(1) (supra) i.e. where the court of first instance has not adjudicated upon the evidence, its decision cannot be challenged on the ground that the court has reached a wrong conclusion through "an error of the court". There would therefore be no question of an appeal as provided for by Rule 38(8) (supra). It rather leaves the way open for there to be a rehearing after the order has been set aside. The legal effect of the order having been derived from the order itself the court his jurisdiction over it and should deal with it as far

as possible in the same way as a non-consensual order and can in the circumstances set it aside: see Ormrod LJ in Thwaite.

[30] Counsel for the Respondent's submission that delivery of the letter was meant to be a precondition to the Respondent's performance must be disregarded in light of the fact that this decision was reached subsequent to the consent order.

[31] I am unable to agree to the appellation of "supervening event" which Counsel for the Respondent attached to the Petitioner's failure to provide the letter to the Respondent's attorneys. This label is usually given to instances where there has been a material or unforeseen change in circumstances after the order so as to undermine or invalidate the basis of the consent order: Barder (supra). Although in my view the Petitioner's failure to comply with the order is sufficient to severely affect its viability, it cannot be categorized as a "supervening event".

Issue of Maintenance

[32] The learning gleaned from Rayden on Divorce, 14th edition, page 761 is that where parties have entered into an agreement and one of them later seeks to assert that he or she should not be bound by its terms, an important change of circumstances, unforeseen or overlooked at the time of making the agreement is relevant to the question of justice between the parties. Also of importance is the general proposition that formal agreements, properly and fairly arrived at with competent legal advice, should not be displaced unless there were good and substantial grounds for concluding that an injustice would be done by holding the parties to their agreement. Men and women of full age, education and

understanding acting with competent advice available to them, must be assumed to know and appreciate what they are doing, and their actual respective bargaining strengths will in fact depend in every case upon a subjective evaluation of their motives for doing it.

[33] With this in mind the Respondent having failed and or neglected to have a claim for maintenance considered during the conclusion of the consent order cannot now seek to have this aspect of ancillary relief included.

[34] However the consent order of 16th November 2006 now being set aside by this ruling, the Respondent ought to be able to request that a claim for maintenance be part of a fresh application and fresh discussion.

ORDER

That the consent order of 16th November 2006, be and is hereby set aside and that there be rehearing of ancillary relief.

No order as to costs.

Sandra Mason Q.C.

High Court Judge