

**Mathiot v Mathiot  
(2006) SLR 158**

Antony DERJACQUES for the Petitioner  
Anthony JULIETTE for the Respondent

**Order delivered on 29 March 2006 by:**

**PERERA ACJ:** Subsequent to dissolution of marriage and decree absolute being entered, the petitioner, in a previous application sought a declaration that she was the sole owner of Parcel V. 1575 and the house situated thereon. She also sought an order on the Respondent to vacate the house, as allegedly, no contribution was made by him towards the purchase of the land and the construction of the house. By an order dated 7 May 2004, Karunakaran J, struck out the application and held that the application should have been made under Section 25 of the Matrimonial Causes Act, read with Rule 4(1)(f) of the Matrimonial Causes Rules 1993. The Respondent also had filed a counter application under Section 20(1) (g) of the Matrimonial Causes Act. By the same order, that application was also struck out on the basis that in *Renaud v Renaud* (SCA no 48/98) the Court of Appeal had held that when the purpose of the proceedings was to ascertain and declare property rights, it was inappropriate to invoke the jurisdiction of the Court under Section 20(1) (g) of the Act.

With respect, that view was expressed by the Court of Appeal on two erroneous interpretations of Section 21 of the status of Married Women Act, and Section 25 of the Matrimonial Causes Act. Hence this Court, pursuant to Article 5 of the Civil Code would depart for good reason. That Court held that where the objection is to ascertain the respective rights of the husband and wife to disputed property, the appropriate jurisdiction to invoke was under Section 21 of the status of Married Women Act. With respect, that Section specifically applies where parties have not been divorced, but questions as to Title or possession of property arise while living separated or otherwise. In the case of *Govinden v Govinden* (1979) SLR 28, it was held that that Section applied to a married couple who were living separated.

Section 25 of the Matrimonial Causes Act provides interim relief to protect a party, child, or property. Section 20(1) provides that:

Subject to Section 24, on the granting of a provisional order of divorce or nullity or an order of separation, or at anytime thereafter, the Court may, after making such inquiries as the Court thinks fit and having regard to all the circumstances of the case, including the ability and financial means of the parties to the marriage –

.....

- (g) make such order, as the Court thinks fit, in respect of any property or a part to a marriage or any interest or right of a party in any property for the benefit of the other party or a relevant child.

The Court of Appeal, in the *Renaud* case further observed that Section 25 was wider than Section 20(1) (g) but made no finding thereon. With respect, after dissolution of marriage, Section 20(1) enjoins the Court to make inquiries as regards the ability and financial means of the parties and all the circumstances of the case, and make orders regarding alimony, maintenance, and any property of a party to the marriage. Hence the appropriate jurisdiction to invoke after dissolution of marriage is under Section 20(1)(g) of the Matrimonial Causes Act. The petitioner and the Respondent have filed fresh pleadings under Rule 4(1) (f) of the Matrimonial Causes Rules, for ancillary relief in the form of an order “in respect of property of a party to a marriage or any interest or right of a party in any property for the benefit of the other party or a relevant child”. This is the same relief envisaged in Section 20(1) (g) of the Act. Hence, as for the reasons stated, the Ruling dated 7 May 2004 in this case had been based on an erroneous decision of the Court of Appeal, the present pleadings, are accepted as being competent.

In the application dated 10 May 2004, the petitioner seeks the following orders:

1. An order declaring the full lawful and beneficial ownership of land Parcel V. 1575 and the house be with the petitioner in accordance with Rule 4(1) (f).
2. An order that the petitioner shall have sole occupancy of the said property in accordance with Rule 4(1) (j).
3. An order restraining the Respondent from entering and remaining in the said property, in accordance with Rule 4(1)(h) (i).

The Respondent has filed objections to the above claims and has also cross petitioned for the following.

1. That ½ share of the land and house, registered in the name of the petitioner be transferred to him upon conditions decided by Court.
2. That the house be protected for his benefit.
3. That he be given right of occupancy until he has been paid for his share or vice versa.
4. That the Respondent be restrained from entering and remaining in the house.

Section 20(1) of the Matrimonial Causes Act (Cap 124) in respect of financial provisions

is based on Section 23 of the Matrimonial Causes Act 1973 of the United Kingdom. Section 20(1) (g) in respect of property adjustments is based on Section 24(a) and (b) of the Act. As the nature of the inquiry envisaged in Section 20(1), has not been specified in detail, it would be relevant to follow Section 25 of the U.K. Act as providing the guidelines. That Section authorises the Court to have regard to all the circumstances of the case, including the following:

- (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 the duration of the marriage;
- (e) The physical or mental disability of either of the parties to the marriage;
- (f) The 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;
- (g) In the case of proceedings for divorce or nullity of marriage, the value to either of the parties to the marriage of any benefit (for example a pension) which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring; and so to exercise those powers as to place the parties, so far as it is 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.

The inquiry in the present case revealed that the parties were married on 15 November 1973. The petition for divorce was filed on 28 July 1999. Hence they were married for 26 years. Two children were born in 1974 and 1975 respectively. The petitioner purchased land Parcel V. 1575, which forms the subject matter of this inquiry, on 30 April 1976 for a sum of R9000, which sum was a loan obtained from Barclays Bank (*P10*). That loan was repaid, and the charge was removed on 25 August 1977 (*P23*). Subsequently on 8 April 1978 the land was charged to the Government for two sums of

R25,000 and R12,000, for the purpose of “completing construction of the house” (P10a). The Respondent was the guarantor to that loan. That loan was fully repaid by August 1993, and the charge was removed on 20 September 1993 (P12). The S.H.D.C. loan statement for the period 29 July 1992 to 21 December 1992 shows that it was the petitioner who repaid the loan during that period. The petitioner also obtained a “staff loan” of R4000 from her employer Cable & Wireless Limited (P18). A further “staff” loan of R4000 was obtained on 2 March 1995(P19). A further loan of R40,000 was obtained by the petitioner from the S.H.D.C. on 19 May 1996 for construction of the house (P13). The petitioner obtained another loan of R57,234 from Barclays Bank on the basis of a lien on her fixed deposit account for R65,000. That loan was repaid by her on a standing order with the bank in a sum of R1580 monthly (P17). The petitioner once again obtained a “staff loan” of R3000 on 22 April 1996. (P20). The petitioner also produced two pro-forma invoices dated 24 March 1998 for R2247 and R533 for building materials from S.M.B. Trading Division (P21) and (P22) and claimed that she purchased them for the construction of the house.

The Respondent testified that he paid for the purchase of the land, but the receipt was made in the name of the petitioner. However exhibit P10 shows that it was the petitioner who obtained the loan of R9000 from Barclays Bank where she had an account, and that it was she who charged the property as security. The Respondent also stated that he, his father and a cousin constructed the house. No proof in any form was adduced. He also claimed that he contributed towards the payment of the loans. The documents produced by the petitioner show that the loan repayments to Barclays and the SHDC were made from deductions on her salary. The Respondent has therefore produced no proof of contributions towards the purchase of the land or towards the construction of the house. The Respondent stated that as she was now 60 years of age and has no financial means except his salary which he receives from the P.U.C, he has no possibility of obtaining alternative accommodation. He further stated that he was prepared to work hard and repair the house if he is given right of occupancy. He contradicted himself and stated that he would be retiring next year. He also stated that he could obtain assistance from the District Administration Office to repair the house.

The petitioner testified that although both of them were employed at the time of marriage, the Respondent did not make any contributions towards the purchase of the land or to construct the house. She stated that he squandered his earnings on alcohol, cigarettes and in entertaining friends. Often she had to repay his creditors. Since her divorce in 2001, she has not fixed place of abode. For some time she lived with her mother, and at times with friends. Off and on she returned to the matrimonial home only to sleep, but that was not possible as the roof leaked and the building is in a dilapidated condition. The Respondent however continues to live there.

The petitioner is 56 years old, while the Respondent is 60 years of age. Both are nearing the age of retirement. Hence their earning capacities in the foreseeable future are bleak. The petitioner obtained a dissolution of marriage on the ground that the Respondent had behaved in a way that she could not reasonably be expected to live

with him. He drank heavily and was violent and aggressive to the extent that the petitioner left the matrimonial home. The Respondent was unable to establish that he contributed towards maintenance of the household. On the other hand, the petitioner adduced overwhelming evidence to establish that she was the person who purchased the land and constructed the house from her own funds and also maintained the household. It was submitted that the Respondent was the guarantor to the loans taken by the petitioner from the Government on 5<sup>th</sup> April 1978. That was insufficient to hold that he contributed towards the construction of the house indirectly. In fact in the case of *Cowcher v Cowcher* [1972] 1 All ER 943, Bagnall J stated:

..... the mere payment by one beneficial owner of a mortgage instalment properly payable by the other could not alter the beneficial interest, or in my view, imply an agreement to alter those interest.

In the present case, apart from being the guarantor, the petitioner did not make any financial contribution towards repayment. The conduct of the Respondent as a husband does not merit any declaration of a beneficial interest in the property in his favour. Section 20(1) (g) gives the Court a discretion to make such order as it thinks fit upon considering all the circumstances.

In the case of *Peggy Confait v Clement Confait* (Civ no. 7 of 1993), the petitioner (wife) established that she obtained a loan of R147,000 from SHDC and that the whole sum was paid in installments of R1189.86 deducted monthly from her salary. However the land was transferred in the joint names of herself and her husband. In that case, I cited with approval the dicta of Lord Evershed *In Re Rogers Question* [1948] 1 All ER 328 that the duty of the Judge in making enquires is to:

Try to conclude what at the time was in the parties mind and then to make an order which, in the changed conditions now, fairly gives effect in law to what the parties, in the judge's findings, at the time of the transaction itself.

In that case I took into consideration the contributions made by the Respondent, who was a taxi driver, towards the maintenance of the family and declared that the parties should adjust the property in the proportion of 80% to the petitioner and 20% to the Respondent. The petitioner in that case had also sought an order to exclude the Respondent from the matrimonial home. In the case of *Figaro v Figaro* 1982 SLR 200, it was held that:

Before an order is made excluding a spouse from the matrimonial home, it must be shown that it would be impossible or intolerable for both spouses to live in the same house.

In *Confait*, there was evidence that the Respondent came home drunk every night, and disturbed the petitioner and the children. The petitioner had to receive treatment for depression and stress. On a consideration of those circumstances, the Court granted the Respondent one month to vacate the house as there was evidence that he had

alternative accommodation.

In the present case, the Respondent would have made indirect contributions towards the maintenance of the family during the long period of the marriage. On the basis of the averments in the petition for divorce, the Respondent's intolerable behaviour giving rise to the irretrievable breakdown of the marriage commenced in 1999. The Court is satisfied that the Respondent, by his own irresponsible conduct has made it impossible for both of them to live in the same house. The circumstances of the case do not permit the placing of the parties in their respective financial positions in which they have been if the marriage had not broken down, as the Respondent had failed to properly discharge his financial obligations and responsibilities towards the petitioner. Hence exercising the discretion in a just and equitable basis, I order that the land and house be valued, and that the Respondent be paid 15% of such value by the petitioner to compensate him for his indirect contributions.

Subject to such payment, the petitioner is declared the sole owner of the property. She shall have the right to occupy the house and property immediately from today. The Respondent is given three months to find alternative accommodation and vacate the house. Such vacation will not be conditional on the receipt of the money from the petitioner. If he interferes with the right of occupation of the petitioner in any manner or harasses her during the period of the said three months, he will be liable to be excluded forthwith.

Order made accordingly. Parties will bear their own costs.

**Record: Divorce Side No 56 of 1999**