

IN THE SUPREME COURT OF SEYCHELLES

DV 92/2009

[2017] SCSC 567

Marc Waye Hive

Applicant

versus

Judith Waye Hive

Respondent

Heard: 13 February 2017, 30 February 2017, 29 March 2017, Submissions 5 June 2017

Counsel: Mr. Elvis Chetty for Applicant
Mr. S. Rajasundaram for the Respondent

JUDGMENT

M. TWOMEY, CJ

- [1] The parties were married on 21 March 2000 and divorced on 4 October 2010.
- [2] In April 2011, the Applicant applied to the court for ancillary relief to the divorce namely for the determination of his beneficial entitlement in Parcel H4694, the matrimonial property at Majoie, Mahé.
- [3] In his Affidavit to the application, he stated that he had lived with his ex-wife for almost fifteen years prior to their marriage and that although his wife had acquired the land comprised in Parcel H 4694 from her grandmother he had contributed SR 150,000 towards its acquisition.

- [4] He also averred that he had physically contributed to the development of the land before the construction of the house and that his salary and that of his wife was taken into account for the grant of a mortgage for the construction of the house although the said mortgage was in his wife's sole name. He estimated that he had spent about SR220, 000 towards the cost of the building materials for the house and associated costs and later paid for the renovation of the house.
- [5] He further averred that he had purchased a car (S1305) for use by himself and his wife and that he also paid for the school fees of their child.
- [6] In her affidavit in reply, the Respondent averred that Parcel H4699 was a gift from her mother which had been made before she married. She took a loan of SR150, 000 to build the house.
- [7] She averred that she had been out of work for two years after the birth of her daughter and that throughout the marriage she looked after the family and the home.
- [8] She stated that the house had never been renovated and that the car S1305 was jointly owned as it was purchased by both herself and the Applicant. She further averred that during her marriage the Applicant had acquired two four ton pick-up trucks which he used as a business for his sole benefit.
- [9] In his sworn evidence the Applicant stated he had been engaged to the Respondent since 1994 and married in 2000 and their only child born on 15 June 1999. Altogether he cohabited with the Respondent for about 15 years.
- [10] He worked for Air Seychelles for about 31 years and was initially paid about SR5000 with an off base allowance of SR 10,000 monthly. By the time he left the company he was earning a salary of SR13, 600 monthly with another Euro 1000 allowance. He invested the allowance in an account with Halifax in England.

- [11] He paid SR6, 600 for the house plans. Together with the Respondent, they eventually built a three bedroomed house together with bedsitter which was completed in 1997.
- [12] A loan of SR150, 000 was obtained to construct the house for which he was the guarantor (Exhibit P1). The monthly repayments were deducted initially from the Respondent's salary but he made a personal contribution personally of SR 35,000 towards the repayment of the loan.
- [13] The Respondent had initially worked with Air Seychelles and subsequently for Masons Travel. During the time she did not work he made the loan repayments, the receipts for the same were issued in both their names (Exhibit P2).
- [14] He laboured on the land to make it accessible and then to construct retaining walls on difficult terrain with a gradient of about 45%. They had to walk up 47 steps to get to the house before he had the access road built. He bought building materials for the house for which he produced receipts amounting to SR 209,362 (Exhibits 4 and 5).
- [15] The cost of building the house was reduced by his own labour and the purchase of a two ton truck to transport the materials. The car was purchased by him.
- [16] Mr. Nigel Roucou, a quantity surveyor also testified. He valued the matrimonial home which is in dispute in March 2014. He confirmed that the property consisted of a house of about 156 square metres and a smaller one of 18 square metres. He also valued the retaining walls. Altogether he valued the whole property at SR1, 654,000.
- [17] The Respondent testified that Parcel H4694 was a gift from her mother in early 1991 before she met the Applicant but that she paid an undisclosed amount for it. When pushed on the question in cross examination she stated that she paid her

mother between SR 50,000 to SR 100,000 for the land. They both applied for a loan from SHDC for SR 150,000 for the construction of the house although the agreement was with her personally. The SR 2000 monthly repayments were deducted from her salary. These repayments were subsequently reduced to SR1600. It was her testimony that she alone paid off the mortgage.

- [18] She had worked for Air Seychelles but was grounded when she became pregnant in 1999. She stopped working altogether in 2003. However she continued to travel on rebated tickets to buy goods and resell them. The SHDC loan was subsequently paid off in 2003 with her gratuity from her job.
- [19] She admitted that the house cost more than SR150, 000 to build and in the region of SR500, 000 altogether and the bedsitter another SR40, 000. She however challenged the evidence of the Applicant in respect of his paying for the materials from his own finances. It was her case that he collected the mortgage disbursements and paid for the materials with it. It was her view that the Applicant's share of the matrimonial home was only about 25%.
- [20] The parties were invited to make closing submissions but the Respondent elected not to make any.
- [21] The Applicant made written submissions in which he invites the Court on the authorities of *Desaubin v Perriol* (unreported) SC 20 /1994 and *Esparon v Esparon* (2012) SLR 39 to consider awarding the Applicant a substantial share of the matrimonial home based on the contributions he made towards it. He has therefore submitted that based on his evidence he should be awarded at least a one third share of the matrimonial home if not more.
- [22] Section 20 (1) (g) of the Matrimonial Causes Act 1992 grants the Court the widest of powers to inquire into all matters which may assist it in coming to an equitable decision when settling matrimonial property. *Finesse v Banane (1981)*

SLR 103 is authority that in such exercise, the Supreme Court is vested with the same power, authority and jurisdiction as the High Court of England by virtue of section 4 of the Courts Act.

- [23] In this regard, the following extract of my decision in *Pillay v Pillay* (unreported) MA 322/2016 and MA 43/2016 (consolidated) (arising in CS 78/2015) is of equal application in the present case:

“This therefore enables the Court to take into account all considerations such as contributions made by each party both for the welfare of the family and for the home itself. What the Court seeks to do is find a level of equity so that each party is not deprived of their fair share of contributions to the matrimonial asset despite such assets being registered solely in the name of one party (Esparon v Esparon (2012) SLR 39). The Court of Appeal in Chetty and Emile (2008-2009) SCAR 65 went further establishing that the court may make an order for the benefit of one party even in the absence of any financial contribution by that party and that the acquisition of property during marriage is not solely through the consideration of monetary contribution but also through love and affection that permits such acquisition.”

- [24] The Parties in the present case spent a total period of about fifteen years living together. They reared their only child together. They both worked although the Applicant had a higher wage and worked throughout the relationship whereas the Respondent did not work for at least two years.

- [25] I am persuaded by the testimony of the Applicant regarding his physical labour towards the construction of the house, including the clearing and stabilising of the terrain. I also have documentary proof of his contributions towards the building of the house. The only aspect of these contributions which is seriously challenged is a sum of SR 75,000 which was expended towards the purchase of a pick-up truck to assist with transportation of materials for the house. Although I am prepared to discount that amount it would still mean that the Applicant

invested SR 134,000 over and above his physical labour.

- [26] There is also an admission by the Respondent that she did not work for at least two years. I am not prepared in the circumstances to find that she solely paid off the SHDC loan although she stated that she travelled to purchase materials to resell and make money. By her own admission she was pregnant during the time she was not working. That alone would have hindered travel for some time.
- [27] Although the Respondent testified that she acquired the land from her mother in 1991, her own documentary evidence reveals that the transfer was only made in 1996. I am therefore willing to accept that both parties contributed towards the purchase of the land although it was registered in her sole name. I am however prepared to give her a greater equity in the same given the fact that the consideration for the transfer would have taken into account the mother daughter relationship.
- [28] I am also conscious of the fact that the only child of the parties has since the marriage break up been cared for by the Respondent and that she continues to require a roof over her head although she has just turned 18.
- [29] Having regard to all the circumstances of the case and the evidence adduced by the parties I find it reasonable to assess the share of the Applicant as 40% and that of the Respondent as 60% in the matrimonial home.
- [30] An uncontested valuation of the property in issue was carried out in 2014. It was assessed at SR 1,654,000. The share of the Applicant therefore is SR 661, 000 and that of the Respondent SR 992, 400.
- [31] The Applicant is 51 years old whilst the Respondent is 46 and both parties are gainfully employed. They are therefore both in a position to raise the necessary funds to pay the other party. The matrimonial home is presently occupied by the Respondent and the parties' daughter.

[32] In the circumstances I make the following Orders:

1. The Respondent is to pay the Applicant the sum of SR 661, 000 as his share of the matrimonial home on or before the 4 January 2018.
2. In the event that the Respondent fails to make the payment by the due date, the Applicant is to pay the Respondent the sum of SR 992, 400 on the same date with the Respondent handing over vacant possession and transferring Title H 4694 to the Applicant.
3. If, despite receipt of the said sum in full, the Respondent fails to execute the transfer, I direct the Land Registrar to effect registration of the said parcel in the sole name of the Applicant upon proof to her satisfaction of payment of the said sum.
4. In the event that neither party is in a position to pay the other party his/her share in the matrimonial home on or before the 4 January 2018, the house is to be sold by public auction with the proceeds of sale being divided 40% for the Applicant and 60% for the Respondent.
5. Each party to bear his/her own costs.

Signed, dated and delivered at Ile du Port on 4 July 2017.



M. TWOMEY

Chief Justice