Judgment Book

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

SUIT NO. D.L. 064/85

BETWEEN	JOYCE HILDA LAMBERT	PETITIONER
A N D	ROY IVAN LAMBERT	RESPONDENT

Mrs. M. Forte, instructed by Messrs. Frater, Innis and Gordon for Petitioner.

Mr. T. Ramsay, instructed by Messrs. Tenn, Russell, Chin Sang, Hamilton and Ramsay for Respondent.

Heard: July, 30&31, 1987; November 24&25, 1988; May 15,16&17, 1989 June 29, 1989 and October 30, 1989.

RECKORD, J.

By summons under section 16 of the Married Woman's Property Act dated 14th November, 1986, the wife petitioner asks the Court to declare the respective interest of the petitioner and respondent in premises known as No. 6 Molynes Place, St. Andrew which is their matrimonial home and registered in the names of both as joint tenants.

On the 15th of June, 1987, the respondent filed a summons under the same Act asking for a similar declaration. In a second summons dated 30th July, 1987, the respondent not only asks for declaration as to the Molynes Place property but also what are the respective interest in::

(a) personal property purchased during the continuance of the marriage, and

(b) the business operated at 194a Orange Street, Kingston.

He also asked for an order that the Petitioner account for (a) rental of the said Molynes Place house, and (b) income derived from the business operated formerly at 71 Waltham Park Road, St. Andrew, 'No Door' Bar at East and Waltham Park Roads, St. Andrew and at 194a Orange Street, Kingston.

Several affidavits were filed by each party in support of their summons and in reply. Each party also gave oral evidence under detailed cross-examination. From that mass of evidence the following has emerged without conflict.

The parties were married in 1970. At that time the petitioner was bar attendant and respondent a carpenter. Both migrated to Canada in 1973- she in February and he in August. While there they both worked and made savings. From their savings

they sent the sum of $6,000.00 through petitioner's brother-in-law to a real estate agent in Jamaica towards the purchase of a house at 62 Pembroke Hall Drive. They lost this deposit when the agency folded and the agent migrated without repaying any of the deposit.

Undaunted, they continued working and saving - sometimes each had two (2) jobs at a time. They purchased furniture for the apartment from their savings. They shared housekeeping expenses. Although they both had children, there were no children of the marriage.

All written correspondence to family were through the petitioner as respondent was barely literate. From their earnings they both sent money to their mothers and children in Jamaica.

The petitioner had no work permit and because of immigration problems she left Canada for Jamaica in July, 1977. All the furniture they had purchased were shipped home. On her return petitioner resided with her sister. In December, 1977, petitioner started a business in rented premises at 71 Waltham Park Road.

The respondent returned home in January, 1979, and found petitioner operating this business which was later extended from just a bar to include a cook shop. After the petitioner received a notice to quit from her landlord, the business was removed to a premises known as 'No Door' at the corner of Waltham Park Road and East Road. Light for the premises was obtained from Jamaica Public Service after contract which was signed by respondent.

On the 5th of September, 1980, the property with dwelling house situate at No. 6 Molynes Place, St. Andrew, was purchased for $54,500.00 and registered on the 4th of March, 1985 at Vol. 1079 Folio 301 of the Register Book of Titles in the name of Roy Ivan Lambert and Joyce Hilda, his wife as joint tenants. The purchase price and costs of transfer were paid by a deposit of $10,000.00 and a loan of $45,100.00.

On a document bearing date the 28th of February, 1985, the property was mortgaged to Blaise Trust and Co. Ltd. to secure a loan of $28,500.00. The mortgage instrument was signed by both the petitioner and respondent. Both had signed the agreement for sale,

the instrument of transfer and now the instrument of mortgage. Because of deterioration of relationship between them, on the 20th of December, 1985 the petitioner filed a suit for divorce on the ground of cruelty. The respondent entered appearance and filed an answer.

In November of 1986, the summons under the Married Women's Property Act was issued and on the 26th of February, 1987, the petitioner took out a summons for interlocutory injunction which was granted on the 1st of April, 1987 restraining the respondent from molesting the petitioner in her occupation of part of the premises at 6 Molynes Place and from entering the premises at 194a Orange Street or in any way molesting the petitioner.

The respondent went to United States of America in 1986 and while there sent money to petitioner towards payment of expenses regarding the mortgage. Respondent returned to Jamaica on the 19th of July, 1986 and "since time I have got nothing from the business".

The business "Lamberts Restaurant and Lounge" at 194a Orange Street is still being operated by petitioner.

Petitioner's Case

While they worked in Canada they never pooled resources - each kept separate savings account. She denied that they both sent money to her mother for saving for purchasing house. The respondent beat her regularly whenever they had dispute about anything.

On her return to Jamaica, respondent sent her money on two occasions only, each Canadian $80.00. It was her decision to start the business - she received no financial assistance from respondent to start same. Her mother lent her $1,000.00 and her brother-in-law, $300.00. Her friend Barbara Robinson, who ran a similar business, assisted her in setting up the bar operations and recommending her to her supplier from whom she got credit.

When respondent returned to Jamaica, he took no part in the actual management of the business. He was not assigned any duty - indeed, she often advised him "to go and look work" - as she found him to be very lazy. This led to regular quarrels and fights. Occasionally he would run errands purchasing goods when requested and did odd jobs in the business premises. He drank heavily from the stock

with his friends. From the business she fed him, clothed him and gave him pocket money. Once she asked a friend to get a job for respondent in a construction firm - he got job, worked for 1½ days and refused to return to the job despite several requests. He has not had a job after this.

The down payment and mortgage payments on the house were all paid by petitioner from the business - none by respondent. She also paid the taxes, rates and insurance for the house. She had agreed to respondent signing the agreement for sale and mortgage instrument on the advise of a lady at Judah, Desnoes and Company from whom the loan was being obtained. She had been advised that it was unlikely the loan would be made in her name only.

It was her evidence that apart from the odd jobs performed by respondent occasionally at the three places she kept business, he had made no contribution to the acquiring and maintaining either the house or the business and asked the court to declare that she was entitled to the entire beneficial interest in the said house.

In cross-examination the petitioner testified, "If I sold the house I would give him something out of the sale price - not ½ about 10%".

Respondent's Case

After their first attempt to purchase a house had failed respondent claims that himself and petitioner continued a joint savings account from which the petitioner would send money to her mother to save on their behalf.

He was saving far more than petitioner and that his contribution to the sums sent to her mother was far more than petitioner's.

The furniture purchased in Canada and taken to Jamaica by petitioner was bought from their joint savings and was to be used "to establish a matrimonial abode in anticipation of my return". He gave her over $4,000.00 when she was coming home. After petitioner's departure he sent her money ever fortnight.

The business that petitioner started after she returned home was a joint venture and that the money which he sent from Canada was utilised by the petitioner in establishing and running it.

Upon his return he found the business good - He worked "toe to toe" with her. His total cash input at the commencement of the business was in excess of $4,000.00. This business was extended to include a restaurant and ice cream parlour - He did the cooking and the serving and clearing up.

When they removed to 'No Door' bar the contract for the supply of electricity was in his name and upon later removing to Orange Street the contracts for electricity and for telephone were also in his name. He worked up to sixteen hours per day in the business. He did all the stock buying.

Here they started a catering service - He got lots of contract from his lodge members also from businesses in the area. They catered for a different lodge every month - sometimes for up to 300 people at a time - on a number of occasions he hired a chef from Oceana Hotel to assist in the catering business - He had borrowed $3,000.00 from Judah, Desnoes & Co. and $8,000.00 from a Mr. Brown to start Orange Street business. This loan was repaid from earnings in the business.

They drew from income from the business to make downpayment on the house. He had brought over Canadian $4,000.00 to Jamaica. This was used up by them in the business, e.g. to buy a refrigerator. Petitioner and himself had planned to buy house. While he in U.S.A. in 1985 he send U.S. $600.00 to pay for closing cost on the mortgage.

Between 1984 and 1988 he had been to the U.S.A. on six occasions - four times since January 1986. He was turned out of the business in July 1986. Respondent admitted in cross-examination that since Hurricane 'Gilbert' in September of 1988, he worked only once on a carpentry job for a period of about 6 - 8 weeks. He could not do more carpentry jobs because he was involved in a motor vehicle accident in the U.S.A. in 1986 and suffered injuries to his head and his waist. Since July, 1986, he has not made any contributions towards payment of mortgage or insurance. These were paid from the business before.

At home there was a drawer in which money from the business was kept. Either of them would take money from this drawer as the need arose. He denied that this drawer was under the sole control

of petitioner and that he had no access to it. He admitted that 'No Door' bar was closed because it had been broken into several times by thieves who stole all the stock and they could put no more money in it.

Finally, because of his input in the business from its inception both financially while in Canada and physically after his return and up to July, 1986, when he was restrained by the court, he was asking this court to declare that he was entitled to half of the value of the business and the matrimonial home.

SUBMISSIONS

Mr. Ramsay for the respondent submitted that it was the intention of the parties from the time they decided to go to Canada to work enough money to purchase a home in Jamaica. This intention was manifested by their attempt to purchase 62 Pembroke Hall Drive. It was agreed by both that the deposit of $6,000.00 was from their joint effort - furniture taken to Jamaica by petitioner was also agreed to be from the joint effort.

The purchase of the Molynes Place property was in names of both parties, both also joined in obtaining the mortgage - this was intended to be a continuing provision for the parties. Not only was respondent entitled to ½ share of the legal interest but also to ½ beneficial interest - He cited the case of Harris v Harris S.C.C.A. No. 1/81.

In relation to the operation of the business, Mr. Ramsay submitted that this was a joint venture from the inception. As soon as respondent returned to Jamaica he asserted himself in the running of the business - the business was expanded from a bar to include a restaurant. He promoted the business - contracts for light and telephone were in his name and he regularly secured catering contracts for the restaurant. He did most of the manual work and when the petitioner was absent, the respondent was the person in charge.

In relation to the house, the transaction for the purchasing started in 1980 and culminated in 1985 when it was registered. The letter from the mortgage company concerning

outstanding closing costs was addressed to respondent who was then in U.S.A. When contacted he responded promptly by sending U.S. $600.00. In all documentation save and except the registration of the business at Orange Street, the respondent's name appears.

He asked the court to make an order in terms of respondent's summons and to reject the application of the petitioner.

In response, Mrs. Forte for the petitioner contended that on the facts the respondent made contribution to neither the business nor the purchasing of the house - the respondent was in Canada when petitioner commenced the business. There was no prior discussion between them about this business which began with the help of others. She referred to affidavits from three persons who supported petitioner in this regard. The two amounts of Canadian $80.00 each which she admitted getting from respondent ought not to be regarded as contribution to the business but as maintenance for the wife.

While admittedly respondent did odd jobs in the business, the petitioner repeatedly advised him to seek employment as a carpenter as there was no place for him in the businesss.

With reference to the purchasing of the house it was submitted that respondent's name was put on the title for mere convenience in order to get the mortgage loan. The only amount petitioner received from the respondent towards the house was U.S. $200.00 (J.A. $1,100.00). This small amount would give him no share in the property. The petitioner testified that respondent was a lazy man who regularly refused to work in his calling as a carpenter.

This, she submitted, was manifested in respondent's own evidence that from his return from Canada he did no carpentry work up to the time of their separation and that since the hurricane of September, 1988 he worked once only for a period of about six to eight weeks.

ON THE LAW

Mrs. Forte submitted that respondent's name being on the title raises a presumption that he is beneficially entitled, but that this presumption had been rebutted. She referred to the case of GRZECZKOWSKI vs JEDYNSKA and another at page 126 Solicitors

Journal d/d 12/1/71.

In this case the wife purchased a house with no contribution by the husband but the building society which granted the mortgage required that both the house and the mortgage should be in their joint names. Lord Denning M.R. said:

> "The case was different from the ordinary matrimonial home case where everything went in a common pool and where it did not matter who paid the instalments and who looked after the house in which case there would be a joint beneficial interest. But here the wife had her own asset and wisely invested it in the purchase of a house which she calculated would be a self-supporting asset, as it turned out to be. The fact one or two rooms were the matrimonial home did not affect the position. The house remained her property. The Judge had rightly concluded that the wife had the entire beneficial interest in it and that the house was held in trust for her for her own absolute use and benefit. The appeal should be dismissed."

In relation to the business, Mrs. Forte submitted that by reason of work done in leisure time - jobs which husbands normally do - would not entitle him to an interest. In support she cited the case of Pettitt v Pettitt (1969) 2 AER 385.

If the court were to find that the respondent had interest in the house, and business the question would be evaluation of the share. She cited the case of Gissing v Gissing (1970) 2 AER 780 and submitted that at most respondent not entitled to more than 10%.

Finally she urged the court to dismiss the respondent's summons and make an order in terms of the petitioner's summons.

FINDINGS

The issue for the court to decide is what are the interest of the parties in the business and the house. In dealing with the business first, it was agreed that it was petitioner who started it up while respondent was in Canada. What, therefore, is respondent's input in this?

His claim that this was decision made between them before petitioner left Canada and that he gave his wife some Canadian $4,000.00 toward the business when she was leaving must be looked upon with some

amount of scepticism. In none of the several affidavits filed by respondent is this mentioned - it came out only during cross-examination. He explained that he told this to his Attorney when he gave him instructions. Did his Attorney forget to mention such an important material?

In paragraph 14 of his affidavit of the 11th of June, 1987, respondent stated that he returned to Jamaica with Canadian $500.00. Under cross-examination he testified he brought Canadian $4,000.00 to Jamaica which was used in the business to purchase a refrigerator and other necessaries. At paragraph 19 of a joint affidavit dated 20/3/87, Miss Monica Bryan stated that respondent told her he had only Canadian $10.00 on his return to Jamaica as he had not worked for a long time. If this is true, could respondent have been sending moneys to petitioner every fortnight after she left as he has stated?

On this point therefore, I accept the petitioner's case that the respondent made no input into the commencement of the business and that the odd jobs that he did can give him no beneficial interest in the same - Indeed, he seemed to have got a lot more out of the business than what he put in. (See the judgments of Lord Reid, Lord Morris and Lord Hodson in Pettitt v Pettitt (supra).)

On the question of purchasing of the house, different considerations will have to be applied. The agreed purpose for going to Canada was to earn sufficient money to purchase a home in Jamaica. Their initial effort failed due to the fraudulent bahaviour of an estate agent who ran off with their deposit. Did their desire to own their own home die here? I would think not. Although $6,000.00 is a relatively substantial sum of money, they were still a young couple who could bounce back - they had together purchased a substantial amount of furniture which the petitioner took home. They had to find a place of their own. The petitioner, who is the driving force of the union, started her business and earned sufficient money within three (3) years to make a deposit on the Molynes Place property in 1980.

From the evidence it was the respondent who first became aware that this place was up for sale and took the agent to the petitioner. They along with the agent, viewed the property and then

they both went seeking the purchase money. They having signed the agreement for sale, the instrument of transfer and the mortgage instrument and obtained title as joint tenants, they not only had legal estate in this property but prima facie, I find that they also had the beneficial interest as tenants in common.

In Pettitt v Pettitt (supra) Lord Upjohn said at page 405 (H):

> "In the first place, the beneficial ownership of the property in question must depend on the agreement of the parties determined at the time of its acquisition. If the property in question is land there must be some lease or conveyance which shows how it was acquired..." Continuing he said at p. 406 (C) "But the document may be silent as to the beneficial title ..." then in the absence of all other evidence ....if conveyed to the spouses jointly, that operates to convey the beneficial interest to the spouses jointly ...."

The strong prima facie case has not been rebutted and accordingly I find that they both have the beneficial interest. What then, are their respective shares?

Lord Morris in "Pettitts" case at page 398 (H) said

> "There will be some cases in which a court is satisfied that both parties have a beneficial interest and a substantial beneficial interest, but in which it is not possible to be entirely precise in calculating their respective shares. In such circumstances, as Sir Raymond Evershed M.R. said in Rimmer v Rimmer equality almost necessarily follows."

In the local case of Harris & Harris S.C.C.A. # 1/81 at page 7, Carey J.A. said:

> "As I understand the law in relation to matters of this kind, two propositions can be stated where property is transferred into the joint names of husband and wife. The first in plainly stated in Cobb v Cobb (1955) 2 AER 696, namely that prima facie the parties are to be treated as beneficially entitled in equal shares."

Further at page 8, the learned judge of appeal said:

> "There was in my view evidence from the wife which showed that the intention of the parties was to secure a family home - Both were involved in the negotiations, both went to the mortgage office. There was thus conduct from which their

> intention could be ascertained viz, that the property was intended as a continuing provision for them during their said lives."

With this reasoning of the Learned Judge I respectfully agree and wish to adopt as my own in the instant case.

In the Harris case, the husband claimed that the wife had signed the documents as a matter of convenience. At page 18 of the judgment, Campbell J.A. on this point commented:

> "What the respondent in this is ascerting as a signature of convenience is the gratutious undertaking by the appellant of personal obligations under a mortgage to enable him to acquire a house in which he would have the entire beneficial interest. If there is default in the mortgage payments, the appellant could be sued at the option of the mortgagee for the arrears."

Indeed, in this case the mortgage company wrote to the respondent concerning an outstanding amount of some $4,000.00. The petitioner, having received the letter, telephoned the respondent in the U.S.A. and he promptly sent a contribution. I regard this as very strong evidence that the petitioner regarded the respondent as a party to the beneficial ownership of the house and that he had not signed merely as a matter of convenience.

Mr. Justice Campbell J.A. in the Harris case continuing at page 19 said ...

> "...evidence of relative contribution by the husband and wife is per se totally irrelevant to support a claim by a husband to a share of the beneficial interest greater than that which would be implied in law by reference exclusively in the instrument creating or vesting the legal estate in the parties. Thus the vesting of the legal estate in the parties as joint tenants carries precise implications in law, namely, that the interest of each joint tenants is the same in extent, nature and duration ..."

There being no credible evidence to establish an apportionment different from which the transfer documents impliedly bespeaks, I find that each party is entitled to one half of the beneficial interest in the Molynes Place property.

Accordingly, with reference to the Petitioner's summons

of the 14/11/86,

(i) Each party is entitled to one half of No. 6 Molynes Place, Kingston 10 in the parish of St. Andrew.

(ii) The property to be sold ~~at public auction~~ and the purchase price after clearing expenses and secured debts, to be divided equally.

With reference to respondent's summons of the 30th of July, 1987,

(1) Respective interest in the property as at (i) above.

(2) The evidence as to personal property purchased out of joint savings related only to furniture and their respective interest is one half share.

(3) That the respondent has no interest in the business operated at 194a Orange Street, Kingston and that the petitioner is solely entitled.

(4) The court is satisfied from the evidence that rental from the premises is used to assist in making the mortgage payments.

(5) No account necessary - all the businesses were solely belonging to the petitioner.

(6) See (ii) above concerning petitioner's summons.

(7) Application for business to be wound up refused.

(8) Each party having asked for a similar declaration with respect to the house, each to bear his own costs.