

Married Women's Property Act - Property registered in joint names of plaintiff and defendant - whether presumption of advancement or whether presumption rebutted. Held - Plaintiff entitled to beneficial interest. Case referred to (p. 94)

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

SUIT NO. E. 73 OF 1980

BETWEEN

MAUREEN LYNCH

*Civil Procedure
(Family Law)
Remedies*
PLAINTIFF

AND

NEVILLE LYNCH

DEFENDANT

Mrs. Margaret Forte for the plaintiff.

D.M. Muirhead Q.C. and L.O'B Williams for the defendant

Heard: November 18 and 19, 1982, November 28 and 29, 1985
June 26 and December 15, 1987, January 25, 28, 29
and December 9, 1988, March 16, 1989.

WALKER J.

This is an originating summons under the Married Women's Property Act in which the plaintiff is Maureen Lynch and the defendant is her former husband, Neville Lynch. Hearing of the summons commenced on November 18, 1982 and ended on December 9, 1988. Judging by Olympian standards this was, therefore, a marathon. But several factors contributed to this state of affairs. For one thing the defendant who was required for cross-examination resided abroad and this circumstance posed a real problem in arranging a convenient date for his attendance in court. For another thing the legal representation of the plaintiff was changed in mid-stream, Mr. Derek Jnes who initially represented her withdrawing from the case and being replaced by Mrs. Forte who at once requested, and was allowed, time to familiarize herself with the evidence that had been adduced in her absence. Having on November 29, 1985 granted this adjournment on the application of Mrs. Forte, for reasons unknown to me, the matter did not come on again for hearing until June 26, 1987, some 19 months later. Then again, it proved extremely difficulty for counsel on both sides to arrange with the Registrar of the Supreme Court convenient dates for the continuation of the hearing from adjournment to adjournment, a difficulty which was exacerbated by the varying nature of my judicial assignments from term to term. In the end it was only as a result of a determined effort on the part of all concerned that hearing was completed, and that on an unscheduled date.

To turn now to the summons itself, the substantial question which I have to decide is whether the plaintiff is beneficially entitled to a share in the matrimonial home which was purchased during the marriage. Further, on the assumption that I answer this question in favour of the plaintiff, the plaintiff seeks an order requiring the defendant to account for rent and profits pertaining to the said matrimonial home, and also for furniture, wedding presents and other personal property which she alleges have been retained by the defendant.

The parties were married on July 12, 1975 and the property in dispute was acquired during the following year. It is situated at No. 19 Graham Heights in the parish of St. Andrew and was registered under the Registration of Titles Act at Volume 1015 Folio 620 in the Register Book of Titles in the names of the plaintiff and the defendant as joint tenants. The relevant document of transfer was dated November 4, 1976 and the conveyance was duly registered on November 17, 1976. The house was purchased at a price of \$58,000 and was subject to a mortgage of \$46,000 with interest. It is a fact that in obtaining this mortgage the plaintiff joined with the defendant as co-mortgagor. It is also a fact that the plaintiff made no direct financial contribution either to the down payment on the house or to any subsequent instalment paid in respect of the mortgage debt. It was accepted that from the date of purchase onwards the defendant in fact paid all instalments due on the mortgage debt. Admitted in evidence in these proceedings as Exhibit 1 was a document, an incomplete form of transfer of land which was signed by the plaintiff. This document, so it was argued for the defendant, provided evidence of the common intention of the parties at the time of purchase of the house. According to the defendant, that common intention was that, notwithstanding the fact that the plaintiff was registered as a joint owner of the property and had assumed liability jointly with him for repayment of the mortgage debt, she should have no beneficial interest in the house. But the plaintiff strenuously denied that this was so. She remained adamant in contending that subsequent to the purchase of the house she had been coerced by threats issued by the

defendant to sign the document, exhibit 1. It was the unchallenged evidence of the plaintiff that, having acquired the house, the defendant and herself moved into occupation of it on November 1, 1976, and that they lived there together between that date and March 1, 1977 when the defendant left Jamaica to live and work temporarily in Japan. During the defendant's sojourn in Japan the plaintiff continued to occupy the house along with her grandfather and upon the defendant's return to Jamaica the parties resumed cohabitation at the house from December 23, 1977 until they finally separated on January 15, 1978. They were divorced on December 12, 1980 on a petition brought by the plaintiff on the ground of the defendant's cruelty. On these facts two central questions arise for my determination. Firstly, there is the question as to whether or not the presumption of advancement arises in favour of the plaintiff. Secondly, assuming that the presumption does arise, I must decide whether or not it has been rebutted by the defendant. Addressing the first question, I consider it to be trite law that where a husband purchases property in the joint names of himself and his wife a gift to the latter is presumed in the absence of evidence to the contrary (vide *in re Bishop* (deceased) (1965) 1 All E.R. 249 and *Pettit v Pettit* (1969) 2 All E.R. 385). On a local basis the law on this point was restated in the case of *Harris v Harris* (unreported) (Supreme Court Civil Appeal No. 1/81).

Therein Campbell J.A. succinctly observed (at p. 14 of his judgment):

"However in cases where a presumption of advancement arises, the presumption of a resulting trust is ousted because the presumption of advancement rests on the presumption of a gift of the beneficial interest in the property to the person in whose name the legal estate is transferred. This presumption of advancement is not based on contribution to the purchase price, it is raised by implication of law as being consistent with an intention by a husband to satisfy an equitable obligation to support or make provision for a wife or a child or a person in relation to whom he stands in loco parentis."

and again (at p. 20 of the same judgment):

"These implications of law illustrated in the case of a joint tenancy cannot be affected adversely to a wife..... because as I have already said the

presumption of advancement is not dependent on any contribution whatsoever of the wife. It arises wholly and exclusively from the recognition of an equitable obligation by a husband to support and or make provision for his wife."

Accordingly, on the facts as I have already stated them it must be abundantly clear that the presumption of advancement does, indeed, arise in this case, and I so hold.

However, the second question may not be as easily determined. Essential to a resolution of this question is, I think, a determination of the further question as to when and in what circumstances exhibit 1 was signed by the plaintiff. The defendant placed great reliance on this document which he maintained proved positively that at the time of acquisition of the property in dispute the common intention of the parties was that the plaintiff should have no beneficial interest in it. It was a fact that the plaintiff had joined with the defendant as co-mortgagors in obtaining the mortgage loan with which the house was purchased. In the circumstances the plaintiff had assumed legal responsibility for repayment of the mortgage debt. The credible evidence was that the parties were living together in reasonable amity at the time and that having acquired the house they moved into it on November 1, 1976 with the marriage in that state. The plaintiff maintained that it was subsequent to this time that she signed exhibit 1, in point of fact some time during the month of December, 1976. She insisted that she did so in consequence of threats of violence directed at her by the defendant. She said that she signed exhibit 1 in these circumstances after it was presented to her by the defendant at the matrimonial home. On the other hand the defendant testified that exhibit 1 was signed voluntarily by the plaintiff in acknowledgment of the common intention and understanding between them, namely that she should have no beneficial interest in the matrimonial home. He said that exhibit 1 was given to him by the plaintiff at the matrimonial home having been signed by her beforehand. Turning then to consider the legal effect and significance of exhibit 1, I need hardly say that that document is not a legal or enforceable transfer. It is undated, it is not signed by the defendant who is the transferee and it is silent

as to the nature and extent of the consideration. From a legal standpoint, therefore, in that state of incompleteness it transferred nothing at all. However, as I understand the case for the defendant, it was not being suggested that exhibit 1 was a legal transfer. Rather, it was tendered in evidence to support the contention of the defendant as to the common intention of the parties at the time of acquisition of the house. It was the defendant's evidence that, initially, the question of the plaintiff being made a joint owner of the house was not contemplated by him, and that he only knew that the plaintiff would have to be made a party to the transaction upon receipt of a letter dated October 15, 1976 addressed to him by the mortgage company advising him in such terms. He said that having received this letter he objected to the condition imposed therein that the plaintiff should join in the mortgage, and that he only agreed for the transaction to proceed in that way after a meeting between the plaintiff, Mr. Shamshudeen (the attorney representing the mortgage company) and himself. At that meeting, he said, a solution to his objection was proposed by Mr. Shamshudeen in furtherance of which exhibit 1 was signed by the plaintiff. The evidence of Mr. Shamshudeen is, in my view, highly relevant. Therein he stated that he prepared exhibit 1 which was subsequently collected by the defendant. This evidence, I found, seriously contradicted the evidence of the defendant as to the circumstances in which exhibit 1 came to him. Here, as between the evidence of these two witnesses, arose a discrepancy which was never explained. In resolving it I prefer the evidence of Mr. Shamshudeen which is entirely consistent with that of the plaintiff on the point. In considering all the circumstances in which exhibit 1 was conceived and eventually signed by the plaintiff, I ask the question: "Would the plaintiff have assumed personal liability under a mortgage taken in order to facilitate the purchase of property in which the defendant would have the entire beneficial interest and she none?" I think not. And for a second question I would ask: "Would the plaintiff have voluntarily divested herself of her beneficial interest in the matrimonial home while at

the same time retaining liability under a mortgage which had not been discharged? Again, I would think not. As Campbell J.A. so aptly observed in the case of Harris v Harris (supra) at page 16 - and I would adopt these words as my own -

"It is inconceivable that a husband would honestly and reasonably expect his wife to sign a mortgage on a property which the husband states quite clearly and unequivocally would be his exclusively. The evidence lacks realism and persuasion that a wife would be so indulgent to a husband to co-sign a mortgage which imposes personal liability on her, merely to provide a house for a husband at a time when the marriage had broken down and where no provision is made for the wife herself in the event that, as would be highly probable, she may be compelled by circumstances as has happened in this case, to leave the very house towards the purchase of which she has, without consideration, incurred financial obligations."

Indeed, in the instant case wasn't the defendant, himself, acknowledging the fact that the plaintiff did have a valuable, beneficial interest in the matrimonial home when, according to his evidence, he accepted the advice of Mr. Shamsudeen which was to the effect that in completing exhibit 1 a figure which was not "a ridiculous figure" should be inserted therein as and for the purchase price? I would certainly think so. I find, therefore, that at the time of acquisition of the matrimonial home there was no common intention as between the parties as alleged by the defendant. On the contrary, I have concluded that at this time, fair wear and tear excepted, the parties lived together in reasonable amity as husband and wife. I find that the defendant was amenable to the plaintiff being joined as a party to the mortgage contract, and that he approved of the plaintiff being registered as joint proprietor of the house. Despite the evidence of the defendant which is to the contrary, the irresistible inference which I am prepared to draw from the defendant's conduct in signing the letter from the Royal Bank Trust Company (Jamaica) Limited dated October 15, 1976 and addressed to the parties (copy of which was marked M11 and exhibited to the affidavit of the plaintiff

dated 22nd September, 1981) and, thereafter, in proceeding with the transaction is that he accepted the terms and conditions set out in that letter. Indeed, the matter admits of no doubt as the second sentence of paragraph 1 of that letter reads as follows:

"Our non-refundable negotiation fee of 3% will amount to \$1,380.00 and we would suggest that you sign the attached copy of this letter by way of acceptance of the terms and conditions set out herein and return it to us together with your cheque for the amount of \$1,390.00 in settlement of the negotiation fee and application fee."

But the true position appears to be, and I do make such a finding, that very soon after the acquisition of the house the parties' marriage began to turn sour and the defendant suffered a change of heart. As a consequence he clearly resolved that the plaintiff should be divested of her interest in the house and he set about achieving that objective. In the course of doing that, exhibit 1 was conceived and produced to the plaintiff for her signature. I have no doubt that the plaintiff's signature to this document was obtained by threats of violence issued to her by the defendant. Indeed, this type of behaviour on the part of the defendant appears to have been consistent with his natural propensities, it being a fact as he, himself, admitted, that he had been twice divorced, each time on a petition filed by his wife on the ground of his cruel conduct. More pertinently, in the instant case, when asked whether there had been any incidents of violence as between ...himself and the plaintiff, his reply was "I cannot answer if there have been incidents of violence between myself and wife. I have to deny that." This was a most unconvincing response as I find.

In arguing that the mere concurrence of the plaintiff in the mortgage did not, ipso facto, confer on her a beneficial interest in the property, counsel for the defendant cited the case of Grezeckowski v Jedynska and Another S.J. 126. I found this case to be unhelpful as it dealt with a situation which was in no way analogous to that which

obtained in the instant case. In that case the asset belonged to the wife and, therefore, the presumption of advancement did not, as here, arise. In the instant case the legal estate in the asset belonged to both parties and the evidence which I accept reveals that from time to time while the parties lived together the plaintiff was accustomed, out of her own earnings, to contribute financially towards housekeeping expenses and the outgoings of the household. Furthermore, it was not challenged that she also bought furnishings for the house and paid the cost of physical improvements to the house in the nature of grill work. By making these financial contributions it cannot be gainsaid that the plaintiff was easing the financial burden which rested on the defendant who alone, admittedly, paid the mortgage instalments. Indeed, the credible evidence showed quite clearly that without such assistance from the plaintiff, the defendant would have found it most difficult, if not impossible, to satisfy solely from his personal income all his financial obligations including the mortgage instalments. Accordingly, I find that, even if not expressed, there was at the time of acquisition of the matrimonial home, at the very least, a tacit agreement between the parties that each would assist the other by application of their separate incomes in this way.

In the result I find as a fact that the document, exhibit 1, was signed at the time and in the circumstances described by the plaintiff. I hold that the presumption of advancement to the plaintiff which arises on the facts of this case has not been rebutted with the consequence that the plaintiff is entitled to a beneficial interest in the property in dispute. That share I am prepared to quantify at one-half on the basis that equality is equity. It is ordered that the defendant do account to the plaintiff for rent and profits accrued and accruing in respect of the said property. As regards the plaintiff's

prayer for an order requiring the defendant to account for furniture, wedding presents and other personal property allegedly retained by him, I make no order, accepting, as I do, the defendant's evidence on this aspect of the matter. This summons, therefore, succeeds to the extent that I have indicated. There will be costs to the plaintiff to be agreed or taxed.

Further, it is hereby ordered that the property, the subject matter of this suit, be sold and that the net proceeds of sale be divided equally between the parties or, alternatively, that the said property be valued at the current market value by a valuator agreed between the parties, failing which by a valuator to be approved by the court, and that the defendant do pay to the plaintiff her one-half share in the said property. Costs of the sale to be borne equally by both parties.

Cases referred to

- ① Pettit v Pettit (1969) 2 ALLER 385
- ② In re Bishop (deceased) (1965) 1 ALLER 249.
- ③ Jarvis v Jarvis (unreported) (SC Civil Appeal No 1/81)
- ④ Grzeckowski v Jedynska and another SJ 126