

TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

No. M-1023 of 2000

Between

HANSRAJ BHOLA Petitioner

And

KAHAMIT BHOLA Respondent

Before the Honourable Mr. Justice J. Tam

Appearances:

Ms. D. Ramnarine for the petitioner

Ms. C. Gobin for the respondent

Judgement

INTRODUCTION

Before the Court is the respondent/wife's Notice dated October 1, 2001, by which she seeks the following relief from the petitioner/husband.

1. A lump-sum;
2. Periodical payments for the children of the family;
3. A settlement or transfer of property, namely
 - (a) A transfer to her of property situated at Nos. 25-27 Prince Albert Street, San Fernando, free from encumbrances or such share therein as the Court deems just;
 - (b) A lump-sum payment;
 - (c) A lump-sum payment of a one-half share of the proceeds of sale of property situated at No. 6 Harris Street, San Fernando; and

- (d) Alternatively, a transfer to her of a one-half share in the Harris Street property;
- 4. Costs; and
- 5. Further or other relief.

In support the wife has filed 2 affidavits – the first was filed on October 1, 2001 and the second on February 22, 2002. In opposition the husband has filed 3 affidavits – the first was filed on January 7, 2002, the second on February 24, 2002, and the third on January 9, 2003. Paragraph 3 of the husband’s affidavit of January 7 was struck out by consent. Also by consent, the parties agreed to put in evidence the following documents.

- (1) A valuation report with respect to the Prince Albert Street property – (**Exhibit “A”**);
- (2) A letter dated May 1, 2002, from the Comptroller of Accounts, Pensions Branch, Treasury Division, Ministry of Finance with respect to the wife’s earnings, pension and gratuity – (**Exhibit “B”**);
- (3) A letter dated June 12, 2002, from First Citizens Bank with respect to the husband’s account No. 45020231370 – (**Exhibit “C”**);
- (4) A letter dated May 24, 2002, from Scotiabank advising that they hold no account in the husband’s name - (**Exhibit “D”**);
- (5) A letter dated February 15, 2002, from Republic Bank advising of balance in husband’s savings account – (**Exhibit “E”**);
- (6) A letter dated June 11, 2002, from Unit Trust Corporation with respect to withdrawal of monies by Sebaran Bhola – (**Exhibit “F”**);
- (7) A photocopy of Unit Trust Corporation’s cheque for \$250,000.12 payable to the husband - (**Exhibit “G”**);
- (8) A photocopy of the back of the Unit Trust Corporation’s cheque with the husband’s signature and showing that cheque deposited to First Citizens Bank account – (**Exhibit “H”**);

- (9) A letter dated June 11, 2002, by First Citizens Bank with respect to opening an account No. 1057182 by the husband for \$250,000.12 and closing of the account a day later – (**Exhibit “P”**);
- (10) A photo copy of a National Commercial Bank Manager’s cheque dated August 26, 1991, for \$100,000.00 in the name of Sebaran Bholu – (**Exhibit “J”**); and
- (11) A letter dated July 23, 2002, from First Citizens Bank with respect to the husband’s account No. 45020231370 – (**Exhibit “K”**).

Counsel for the wife has indicated that the wife is seeking only the following relief.

- (a) A transfer of all of the husband’s share in the Prince Albert Street property to herself, free from encumbrances; or
- (b) An order that the wife is entitled to a $\frac{3}{4}$ share in the said property and an order that the husband pay to her a lump sum representing such share based on an up-dated valuation of the property.

THE LAW

The law governing the application is to be found in sections 24, 26 and 27 of the Matrimonial Proceedings and Property Act. Sections 24 and 26 permit the Court to grant the orders that the wife seeks. Section 27 sets out the matters that the Court must consider in making its decision and is reproduced here for easy reference.

27. (1) In deciding whether to exercise its powers under section 24 or 26 in relation to a party to the marriage and, if so, in what manner, the Court shall have regard to all the circumstances of the case including the following matters:

- (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) any physical or mental disability of either of the parties to the marriage;*
- (f) 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) any order made under section 53;*
- (h) in the case of proceedings for divorce... the value to either of the parties to the marriage of any benefit (for example, a pension) which, by reason of the dissolution... 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 the other.

FACTS

The parties got married on April 11, 1976, when the husband was already 27 years old and the wife almost 23. He was employed as a Checker, but he was pursuing a degree at the University of the West Indies (“UWI”), while the wife was working as a Clerk/Stenographer in the Government Service, where she is still so employed. The marriage has produced 2 children - Kamini, born in May 1979 and Vijai, born in May 1980. Both children are now adults and have pursued tertiary education. Kamini is now a graduate of the UWI and, at the time of the hearing, was employed at a commercial bank, while Vijai is pursuing a degree in medicine and is expected to graduate as a doctor in the year 2004.

After obtaining his degree from the UWI, the husband worked as an employee at the San Fernando Borough Council. The parties purchased a parcel of land at Couva via a mortgage that the husband paid and subsequently sold the land at a profit. There is some dispute as to the size of the profit, but it is not important to resolve this dispute

in the overall scheme of things. The profit was placed in a joint bank account that was utilised for the family's benefit.

In 1981 the husband began to pursue full-time study for a law degree. This involved an initial year of study at the St. Augustine Campus of the UWI in Trinidad, followed by a stay of 2 years at its Cave Hill Campus in Barbados. The wife continued to work, save for a 6-month period of no-pay leave during the husband's final year in Barbados when she and the children joined him. During part of the period of the husband's study for his law degree, the wife and children had gone to stay with the wife's parents. The family's expenses were met mainly through the wife's earnings, some of the parties' savings and some of the proceeds of the husband's student loan. The wife made and sold roti during the 6-month period in Barbados. Again, while there is some dispute over the extent of this undertaking and the amount of money that she earned from it, it is not vital to resolve this dispute. The salient aspect is to recognise that the wife attempted to do something that generated extra income for the family and she was not content to merely sit at home and look after the children without further contribution to the family's welfare.

In 1984 the husband completed his law degree at the University of the West Indies and the parties returned to Trinidad where the wife resumed her job in the Government Service. Though not expressly stated, the husband would then have attended the Hugh Wooding Law School at St. Augustine for a period of 2 years and in 1986 he graduated as an attorney-at-law. Since that time to now, he has worked in private practice as an attorney-at-law, with his own law practice based in San Fernando.

Between 1976 to 1986 (with the exception of the short period when the wife and children had gone to stay with her parents), the parties resided in rental accommodation. In 1986, however, they went to reside rent-free at Marabella in a property belonging to the husband's brother. The family continued to reside here for 12 years, until 1998, when they moved into their own property at Prince Albert Street in San Fernando.

In 1989 the parties purchased the property (now known as No. 6 Harris Street, San Fernando) in which the husband's law practice is located. The property was purchased in the names of both parties for \$155,000.00. The purchase price was provided in the following manner - \$100,000 by mortgage with a commercial bank, and \$55,000 from the parties' savings. The property has always been used for the husband's law practice. He originally obtained rental income from another attorney-at-law, but that attorney-at-law moved out in 1993 and there appears to have been no tenant since then. The husband was responsible for paying the mortgage instalments. In October 1999, he sold the property to his mother and 2 of his sisters for the sum of \$250,000. According to the husband, a condition of the sale was that he be permitted to remain in the property rent-free for a period of 5 years. The proceeds of sale were invested as follows.

- (a) \$50,000 in a joint chequing account;
- (b) \$100,000 in their joint names in a 90-day Government Bond; and
- (c) \$100,000 in an Executive Flexible Premium Annuity with CLICO.

The monies generated from the 90-day bond were eventually placed in the joint chequing account upon maturity and all of these monies were expended on family expenses, mainly the educational and related expenses for the children. It seems that at the time of hearing, a sum of approximately \$55,000 was all that remained and that this sum was now under the sole control of the wife who professed that it was to be used to ensure that Vijai was able to complete his medical studies. This sum represented the balance remaining in the CLICO account.

The wife has alleged that there is some arrangement between the husband and his mother and sisters whereby the husband remains the beneficial owner of the property. The allegation is based on the fact that the property appears to have been sold at a gross under-value, with no proper valuation having been obtained and no advertisement on the open market. The husband refutes this by pointing to the payment of Stamp Duty on the deed of conveyance to cover a value of \$275,000 and contends that, while the property was sold below value, it cannot be considered to be

grossly so and that the sum of \$250,000 was a fair price, having regard to the condition that he be allowed to remain in occupation rent-free for 5 years.

The Court rejects this contention that the value placed on the property for Stamp Duty purposes is necessarily a fair estimation of the market value. That may or may not be so. It is not uncommon however to find one value being placed on a property for government revenue purposes and another for commercial purposes. The property is located in the heart of San Fernando in a commercial district, less than 100 metres from the Courts. There can be no doubt that it is a valuable property and perhaps worth much more than it was sold for.

In the end, however, the wife would have agreed to the sale price of \$250,000 because she was required to and she did execute the deed of conveyance as one of the vendors, and both parties enjoyed the use of the proceeds. There may very well be some private arrangement between the husband and his mother and sisters whereby he will regain ownership of the property. The Court is not, however, prepared to find that there was anything sinister with regard to the sale. The evidence simply does not support that conclusion. However, the Court notes that the husband has retained the right to occupy the property rent-free for 5 years, ending, presumably, in October 2004. This is a considerable benefit to him and his practice. A rental of, say, \$1,500 per month will represent a saving to him of \$90,000 over 5 years. The Court is satisfied that the husband's occupation of the property, even after the 5-year period elapses, is not under threat having regard to the closeness in his relationship with his mother and sisters. If it were, no doubt he would have said so.

In 1991 the parties also purchased the residential property at Prince Albert Street, San Fernando, although they continued to live rent-free at Marabella. This property was purchased for \$250,000.00. It is also situated in the heart of San Fernando, within easy walking distance of major commercial activity, schools, churches, hospital, Courts and police station. The valuation presented to the Court and accepted by the parties (Exhibit "A") shows its present value to be in the region of \$560,000. There can be no doubt that it was a wise investment. The property contains 4 self-contained apartments (2 storeys, each with 2 apartments). One of these is occupied by the

husband's sister (Jean Bhola). Prior to the parties moving in, the other 3 apartments were rented out to various tenants. The rents assisted with the mortgage for which the husband was responsible.

The husband alleges that his father provided him with \$100,000, \$80,000 of which was used towards the purchase price and \$20,000 on various repairs to the property. The balance of the money was raised by mortgage. Counsel for the wife contended that the husband had produced no direct evidence to show that his father had contributed any money at all towards the purchase price and the Court accepts that that is so. However, the Court is inclined to accept that the monies did come from the father's sale of one of his properties, as the husband has alleged. The husband exhibited a copy of the deed whereby his father had sold a property for \$100,000, as well as a copy of the manager's cheque for the purchase price in the name of his father and the dates of these documents are not at odds with the time frame for the purchase transaction for the Prince Albert Street property.

Income, Earning Capacity, etc.

The wife earns a gross salary of about \$3,700 per month. After deductions of about \$1,400 she is left with a net income of about \$2,300. Of the deductions, \$500 goes towards savings, approximately \$350 goes towards insurances, and the balance in various taxes. She appears to have no professional qualifications and no special skills outside of her job. In those circumstances, it seems that her earning capacity is likely to remain at or near its present level until she retires at age 60. She is now 50 years old. She has no financial resources apart from her job and the matrimonial assets and this appears to be the picture for the foreseeable future. Upon retirement, she will be entitled to a gratuity and a pension. According to the details in "Exhibit D", she can now retire with special permission from the Director of Personnel Administration and will be eligible to receive a gratuity of \$82,323.19 and an annual pension of \$19,757.57 or \$1,646.46 monthly. Counsel for the wife has hinted that it is unlikely that the wife will at this stage exercise the option to retire before age 60 because generally it would not be in her best interest to do so. The Court is in agreement with this suggestion because it is quite unlikely that the wife will be able to maintain a

reasonable standard of living over the next 10 years and beyond with a gratuity of only \$82,000 and a monthly pension of \$1,600. Even assuming that she is able to invest the gratuity at a good rate of interest, it is quite unlikely that her return will amount to much if taken monthly. At best, such a relatively small gratuity is likely to last only a few years. It would appear to be in the wife's best interest to continue working until the normal age of retirement at 60. Assuming that she does this, it is likely that both her gratuity and pension will be larger. There are no figures to assist the Court, but even if her gratuity were to be doubled, it may still be insufficient, in the Court's view, to maintain a reasonable standard of living after retirement. It must be borne in mind that the cost of living is likely to keep on increasing as time goes by.

Counsel for the husband has rightly stated that the husband is not likely to derive any benefit from the wife's gratuity and pension. In the Court's view, however this is not likely to place him in any adverse situation.

The husband is an attorney-at-law of 17 years standing. He is well-known in legal circles, particularly among the fraternity of the Southern Bar. His law office is based in San Fernando in the Harris Street property. He is self-employed as a sole practitioner. His practice can be described as a civil practice in both the High Court and the Magistrate Court, but this would include minor criminal offences (e.g. traffic offences) in the Magistrate Court, matrimonial and family work, as well as the occasional appearance before the Court of Appeal. In addition the husband has stated on affidavit that he also earns most of his income from non-contentious work. He is now 54 years old. In terms of retirement, he is to be viewed differently from the wife. At age 60, she is compelled to retire from her job. Not so with the husband, who can continue working for as long as he remains in good health, both in body and in mind, and there is no evidence that he is suffering from any particular ailment or condition that is likely to affect his ability to continue working well past age 60. Of course, he himself has no pension or gratuity to receive when he does decide to retire. But on the other hand, his income as an attorney-at-law with his own practice is not subject to the limitations that the wife is subject to. There can be no doubt that the husband's earning capacity is by far superior to the wife's. In addition, he owns a one-third

share in a 7-acre parcel of agricultural land at Brother's Road. He has neglected to place a value on this to assist the Court.

The husband's income is a matter of some contention in these proceedings. He has stated on affidavit that his average income is \$5,000 per month and under cross-examination, he initially told the Court that his was a gross figure. However, he was soon forced to admit that, when one took into account the expenses of running his office, this could not be a gross figure. He then stated that it was a net figure and that his gross monthly earnings was really in the region of \$9,000-\$10,000.

Apart from stating on affidavit that his average monthly income was \$5,000, he offered no further evidence of his income until specifically requested to do so by the wife's attorney. Further evidence came by way of 2 letters (Exhibits "C" and "K") written by First Citizens Bank Limited dated June 12, 2002 and July 23, 2002 respectively. These letters are not of much assistance in providing the type of information that the Court requires.

The July letter covers the period June 1, 1997 to April 30, 2000 and states simply that the husband had made deposits totalling \$509,391.08 and withdrawals totally \$498,618.55 over the period. The June letter covers the period May 1, 2000 to May 31, 2002 and, likewise, simply states that he made deposits totalling \$409,765.52 and withdrawals of \$382,866.55 in that period.

The husband created further confusion by stating in cross-examination that these deposits included funds belonging to his clients, as well as his own funds. He could not provide any satisfactory method for distinguishing which belonged to him, as opposed to clients, and while admitting that he knew this manner of accounting to be contrary to the Code of Ethics, had nonetheless chosen to operate in that fashion for many years. The impression he initially presented is that his accounting methods had continued in that vein, even up to the time of the hearing and on January 17, 2003 under cross-examination he stated categorically that he did not then maintain a separate clients' account. However, further cross-examination revealed that as of June 2002 he had begun to keep a separate clients' account and although stating that he

would produce evidence of what part of the mixed monies belonged to clients and what was his personally, he never did so. The husband also admitted that he had regularly filed income tax returns, but chose not to produce any copy or details from which the Court could determine his income.

The Court takes a very dim view of the husband's conduct with regard to this aspect of his case and is somewhat disappointed in the approach that he has chosen. He readily admitted that he practiced regularly in matrimonial matters similar to the instant case and that he knows that there is a duty upon him to freely and frankly disclose particulars concerning his income and assets. Yet despite knowing this, he has failed to make free or frank disclosure and to meet the required standard. The position is even more disturbing when one considers that as an attorney-at-law he is an officer of the Court who has failed to comply with what he has admitted is his duty. His approach in this matter of his income is to be strongly condemned and the Court is forced to conclude that it is nothing short of a deliberate breach of duty on his part. Surely it would have been simple for him to provide an income and expenditure statement prepared by his accountant, to be supported by copies of his bank statements. This would have been an even simpler task from June 2002 onwards when, by his own evidence, he had ceased to mix clients' funds with his own.

Counsel for the wife has submitted that the Court should draw robust inferences from these circumstances and the Court is in agreement with this. By way of attempting to soften the blow, Counsel for the husband referred the Court to the case of *Thomas v. Thomas* (1995) 2 FLR 688 and submitted that the fact that the husband had made a significantly larger contribution to the assets and welfare of the family than the wife should be a factor that should "wipe out" the effect of any non-disclosure. She referred the Court to the dictum of Waite, L. J., in which he quoted the Shakespearean principle that that "*it is excellent (for the Court) to have a giant's strength but tyrannous to use it like a giant*".

Counsel for the husband met this argument by submitting that the dictum of Waite, L. J., underscored the position she was asking the Court to adopt and that it in fact assisted the wife and not the husband. The Court accepts this submission. The learned

judge had gone on to say that “...*certain principles emerge from the authorities. One is that the court is not obliged to limit its orders exclusively to resources of capital or income which are shown actually to exist. The availability of unidentified resources may, for example, be inferred from a spouse’s expenditure or style of living, or from his inability or unwillingness to allow the complexity of his affairs to be penetrated with the precision necessary to ascertain his actual wealth or the degree of liquidity of his assets.*”

Financial Needs, obligations and responsibilities

At the moment, the wife is housed in the former matrimonial home into which the parties had moved in 1998. The parties had occupied two of the 4 apartments as their matrimonial home, while one is rented out. The 4th apartment is occupied rent-free by the husband’s sister (Jean Bholá). The husband is living on his own at Marabella. He has chosen not to divulge the circumstances surrounding his accommodation and the Court will not speculate, save to say that it must be presumed that it is adequate to his needs and comfort. If it were otherwise, no doubt he would have said so. Both parties therefore appear to be comfortably housed.

The children are now both adults. Kamini is 24 years old and working while Vijai is 23 years old and due to complete medical school next year. The husband is committed to meeting Vijai’s reasonable expenses up to completion of his medical studies but this is subject to the monies withdrawn by the wife from the Clico account being first applied towards those expenses.

The Prince Albert Street property is now mortgage free and the rental income is paid to the husband. The husband contends that Jean Bholá is entitled to live on the property for as long as she wishes because this was an arrangement which he had made with his father as a condition of his father’s financial assistance with the purchase of the property. The wife denies any knowledge of any such arrangement and has stated that in 1998 when they were contemplating moving into the property, Jean Bholá had begun to search for another place to live, but the parties had decided that she need not move because she was family. It is impossible for the Court to determine who is telling the truth. The onus, however, is on the husband to provide

some supporting evidence of the arrangement and this he has failed to do. The husband's father is now deceased and Jean Bhola has not come forward to state what, if anything, she knows about this alleged arrangement. In the circumstances, the Court finds that the husband has failed to establish any legal obligation on his part towards Jean Bhola's occupation of the property.

In terms of being able to support themselves, the Court finds that the husband is quite capable of supporting himself comfortably. The wife on the other hand is at a disadvantage. Her income is small and limited by comparison. This is unlikely to change when she retires in 10 years time. To maintain a reasonable standard of living she will need to supplement her pension with income from another source. Though, no doubt, the children will be willing to assist, the Court must be careful not to unwillingly place on them obligations that rightly the parties themselves must work out. If possible, the wife ought not be placed in a situation where she is likely to become dependant on the children for financial support.

Standard of living

The parties enjoy a moderately high standard of living. They have always been comfortably housed according to their station in life. The wife is employed in the Government Service. The husband is an attorney-at-law. Their daughter is a university graduate, while their son is soon to become a medical doctor. Their relationship apart, the parties appear to have done very well in uplifting their standard of living over the years and educating their children. The husband is to be especially commended for his commitment to the children's financial welfare. The wife is to be commended for her support and devotion during the 5 years of the husband's study of law. He was allowed to follow his ambition and his dreams, the plan being, no doubt, that the entire family would benefit by his pursuit of becoming a lawyer. The effort and commitment of both parties, first of all to ensure that the husband qualified as a lawyer and, secondly, to ensure that their children were well educated, are to be admired. It is unfortunate that the marriage has not worked out.

Age of Parties and Duration of Marriage

As already stated, the husband is now 54 years old and the wife is 50 years old. They lived together for some 24 years and 7 months until the husband left the matrimonial home. They are in the middle portion of their lives and their thoughts must necessarily turn towards provision for their retirement years.

Physical/Mental Disability

There is no evidence of any physical or mental disability on the part of either party.

Contributions by the Parties

This aspect has already been dealt with.

Section 53 order

No such order has been made or has been applied for.

Value of Benefits lost through dissolution of marriage

This aspect has also already been dealt with.

CONCLUSION

To return to a portion of the dictum of Waite, L. J., in ***Thomas v Thomas*** (supra.), “... *the Court is not obliged to limit its orders exclusively to resources of capital or income which are shown actually to exist. The availability of unidentified resources may... be inferred from a spouse’s expenditure or style of living, or from his inability or unwillingness to allow the complexity of his affairs to be penetrated with the precision necessary to ascertain his actual wealth or the degree of liquidity of his assets.*” Thus, considering the additional facts that the husband has been able over the years to travel to several countries (the United States, Canada, England, Germany and Australia), to purchase and own various motor vehicles, and to continue to be the main support of the family, it is clear that his income and/or asset base must exceed what he has condescended to disclose to the Court. He has failed to allow his affairs to be penetrated with the precision necessary to ascertain his actual wealth or the degree of liquidity of his assets. The Court consequently finds that his failure to disclose the necessary particulars of his income and assets is a factor that warrants robust inferences that are not in his favour. It is to be inferred that he is not wanting

financially and that he is well able to provide for his immediate needs, as well as his own foreseeable future.

In the circumstances, the Court finds that it is just and fair that the Prince Albert Street property be vested solely in the wife. The property is mortgage-free and will enable her to enjoy rental income with which she can supplement her present income, as well as her retirement income. The husband is consequently ordered to convey to the wife all of his share, title and/or interest in the Prince Albert Street property free from encumbrances. The conveyance is to be prepared by the husband or his attorney-at-law and submitted to the wife's attorney-at-law within 30 days hereof for vetting and approval. Thereafter, within 30 days after approval by the wife's attorney, the conveyance is to be executed and registered by the husband at his own expense and evidence of due registration together with a copy of the deed sent to the wife's attorney-at-law. In default by the husband, the deed is to be prepared by the wife's attorney-at-law for execution by the husband. In any event, the preparation and registration of the deed shall be at the husband's expense. Should the husband default in executing the deed, the Registrar of the Supreme Court is hereby authorised to execute the same on his behalf.

The husband shall also pay the wife's costs of the application to be taxed in default of agreement certified fit for Counsel.

Dated this 20th day of October, 2003.

Joseph Tam
Judge.