

**TRINIDAD AND TOBAGO**

**IN THE HIGH COURT OF JUSTICE**

**H.C.A. M637 OF 1998**

**BETWEEN**

**DORGHA MARAJ**

**PETITIONER**

**AND**

**ELAWATEE MARAJ**

**RESPONDENT**

**Before The Honourable Mr. Justice Stollmeyer**

**Appearances:**

**Mr. G. Delzin for the Petitioner**

**Ms. D. Gouviea for the Respondent**

**JUDGMENT**

The applications before me concern the property at No. 6 Moore Street, Pasea Village, Tunapuna. It is a parcel of land comprising 7,706 square feet with two residential buildings on it, each containing a number of rental units, all of which are tenanted save one which is now occupied by the Respondent and at least one of the three children of the marriage. This property comprises the sole asset of the family, quite apart from providing the matrimonial home during the marriage. It is vested in the name of the Petitioner solely.

The applications before me for determination are the Petitioner's Notice of 7<sup>th</sup> June, 1999 and the Respondent's Notice of 19<sup>th</sup> November 1999, both of which seek a settlement or transfer of property.

When these applications came on for hearing on 16<sup>th</sup> May, 2001 both parties applied for, and I granted leave, to amend their respective Notices to include the following additional or alternative reliefs: a declaration as to the respective beneficial interests of the parties in this property; an order that it be sold; and the net proceeds of sale be paid to the Petitioner and Respondent in accordance with their respective beneficial interests.

The affidavits before me were those of the Respondent filed on 19<sup>th</sup> November, 1999 and 10<sup>th</sup> December 1999, as well as the Petitioner's affidavit of 3<sup>rd</sup> December, 1999. Both the Petitioner and the Respondent were cross-examined on their respective affidavits.

The amendment to the Notices of the parties was applied for, and granted, on the basis that the affidavits filed show clearly that the respective behaviour and behavioural patterns of the parties make it extremely difficult, if not impossible, for them to continue to enjoy the benefits of the property together. Indeed, the Petitioner moved out of the property some years ago. It is common ground that a clean break is necessary.

The parties were married on 10<sup>th</sup> March, 1974. Although the marriage certificate exhibited to the Petition gives the ages of the Petitioner and the Respondent as being 24 and 16 respectively, it came out in cross-examination of the Petitioner that he was at that time 31 years old and the Respondent was 14. They are now 59 and 42 years old respectively. The parties separated in 1996 when the Petitioner moved out, although the Petition gives the date of separation as 1991. It is a marriage of 22 years. At the time of the marriage the Petitioner was unemployed, having left his job as a barman some two weeks previously. The

Respondent was also unemployed. I am not told what occupation, if any, the Petitioner now enjoys but the Respondent describes herself in her affidavits as a "landlady". It is common ground that the parties have been known by various other names over the years, and these other names appear on various documents, rent receipts and the like which came into evidence.

The parties have three children: Davindra Darin Maraj born 10<sup>th</sup> September 1975; Karen Anita Maraj born 15<sup>th</sup> October, 1976; and Narindra Harold Maraj born 20<sup>th</sup> July, 1981. The eldest of these children is now employed in the insurance industry as a claims officer and adjuster and the youngest, Narindra, is a student at Sam's School of Accounting and Management in St. Augustine doing a course in accounts, computers, and business management which he started in 2000 and is expected to last another 3 to 5 years. He lives with and is supported by the Respondent. I am not told anything as to the present circumstances of the daughter, Karen, who is now some 25 years old.

After the marriage in March of 1974, the parties went to live at the property. The property had been purchased by the Petitioner in 1969, by a deed of conveyance registered as No. 11303 of 1969, and he had built a house on it located at the rear of the parcel of land. This building comprised three apartments: two were each made up of one bedroom, a drawing room and a kitchen; and the third of two rooms, which the newly married couple occupied. There was no water connection to this building at that time. It is in contention whether the building had been completely finished or whether there were certain of the internal walls, as well as the entire external wall area, remaining to be plastered. Given that there was not yet a water connection, I find it more probable that the plastering work had not been completed. There was also at this time a tapia house located at the front of the property occupied by Cleo Baptiste. The Petitioner had bought this house from Ms. Baptiste in 1970 but she continued to occupy it (although I am not told on what terms) until she moved out in or around 1979.

At the time of the marriage neither of the parties was employed and they lived off of the rental income from the two other tenanted apartments, which each yielded a monthly rent of some \$25.00 per month, with some help from the Respondent's parents, until such time as the Petitioner obtained employment. There is contention as to when this occurred. The Petitioner says that he was employed at Mootilal Moonan Ltd. from 1974 to 1977 as a labourer but gives no details of what he was paid. It is not in contention that in 1977 he gained employment at Brinks Security Ltd. as he referred to it ("Brinks"), starting with a salary of some \$108.00 per week, and worked there until 1986 when he was made redundant. The Respondent contends that the Petitioner was not to her knowledge employed at Mootilal Moonan Ltd. but does not go so far as to say that the Petitioner never in fact worked there, nor does she say what he did, if anything at all, during the period 1974 to 1977.

While deciding issues of fact before me has been made difficult by the Petitioner's vagueness and failure of recollections when giving evidence during cross-examination, which I do not necessarily ascribe to being evasive, as well as the Respondent's failure to withstand the rigours of cross-examination in relation to certain issues, it would seem to me that the onus of satisfying me that the Petitioner enjoyed gainful employment between 1974 and 1977 falls to him and that he has not satisfied this burden.

I accept, however, that the Petitioner was employed after having been made redundant by Brinks in 1986 and that this employment, although not necessarily continuous, lasted up to at least April of 1992. He claims that his income during this time from such employment averaged about \$1,000.00 per month and exhibited certain salary slips in support of this. None of this evidence is contradicted and I therefore accept his evidence in this regard.

In or around 1979 the parties decided to build a second house at the front of the parcel of land to replace the tapia house. The Petitioner was by this time

employed at Brinks and obtained various loans for this purpose. There were, as I understand the evidence, three small loans: one from his then employer, Brinks which was used to repay an earlier loan of some \$7,000.00 from the Huggin's Credit Union; and further small loans of \$8,000.00 and \$4,000.00 in 1983 which were used to complete the ground floor of this new building. I am not told details of the repayment conditions of these loans, but they are not in contention and I accept his evidence. He also claims to have received \$5,000.00 from his brother Rampaul; \$10,000.00 from his sister Priscilla; and \$3,000.00 from his mother Rosie all of which was used in the construction of this second house. These loans or gifts are denied by the Respondent but the Petitioner's assertions as to the monies given to him by the members of his family is supported to some extent by his evidence that when the National Housing Authority was first approached for a loan of \$100,000.00 they required him to provide some capital. These amounts obtained from the members of his family, therefore, would in my view and on a balance of probabilities be the capital amount, or a part of it, which the National Housing Authority required him to provide. The Respondent in turn claims that she was given \$5,000.00 by her parents for the purpose of building this second house. This latter gift is not denied by the Petitioner. I accept that the Petitioner's family provided approximately \$18,000.00 towards the construction of this building and the Respondent's family some \$5,000.00, both by way of gift. Those gifts do not in my view alter, at least materially, the contributions made by the parties nor their respective beneficial ownership of or in the property.

The National Housing Authority granted a loan of \$65,000.00 to the Petitioner. repayable by monthly instalments of \$392.60. There is no copy of the security document in evidence and I am therefore unable to confirm the period of payment, or the date by which the loan is due for payment in full, but given the wife's uncontradicted evidence that there was \$35,586.14 still due as at 30<sup>th</sup> September 1999 it would appear that the repayment period was 25 years.

Construction of this second house continued over a period of years and, as I understand the evidence, it is not yet completely finished. Sometime in or shortly after 1984, however, while work was continuing on the construction of the upper portion of this house, the parties and their three children moved into this upstairs area and lived there while construction continued. The downstairs portion of this second house had been completed, comprising two apartments, and the first two tenants moved in during the course of that year.

In or around 1992/1993 the first house was converted to a total of seven apartments. The second house now comprises three apartments on the ground floor and the area upstairs where the Respondent lives.

The principal issue at the hearing of the applications surrounded the respective contributions of the Petitioner and the Respondent to the present state of the property. One matter, however, is abundantly clear. It is that the rental income from the property was used for the welfare of the family during the period March 1974 to the time when the Petitioner left the property to go and live with his sister in adjoining premises in or around 1996. Indeed, the rental from the property continues to provide the Petitioner with his principal, or sole, source of income to the present day from the last occasion on which he was employed. That, as I understand the evidence, was some time in about 1992. There is also, little, if any, doubt that the rental income provides the Respondent with at least partially, if not solely, the means by which she supports herself and maintains the youngest of the children.

What is in issue, and acrimoniously at that, is whether the rental income is being received by the Petitioner and the Respondent respectively in the appropriate proportions or amounts.

There were three possible sources of funds for use in construction of the second house; to repair and maintain both houses; to pay the monthly instalments on the

loan from the National Housing Authority, and any other loans; for payment of water, sewerage, electricity, land rates and building taxes; as well as to meet the living expenses of the family.

The first of these possible sources is the Petitioner's income. There is the issue of his employment at Mootilal Moonan Ltd. but there is then little doubt that he was employed at Brinks and various other places from 1977 up to 1992 or thereabouts. His salary at Brinks was initially \$108.00 per week, rising to perhaps \$250.00 to \$300.00 per week by the time he was retrenched in 1986. His evidence of income from employment thereafter up to 1992 is that his monthly earnings averaged \$1,000.00 per month. This is not contradicted in any way and I accept it.

The Respondent's contention is that the Petitioner only gave to her a part of his salary occasionally and that he would then come and ask her for money to spend before his next pay day. Her further contention is that whatever monies he earned he dissipated by drinking and gambling but this was not put to him in cross-examination.

Insofar as the Respondent's earnings are concerned, she deposed in her affidavit to having started selling pies, phulowrie balls and kurma from somewhere around 1983 from which she made some \$25.00 to \$30.00 per day. She says that her income from this "catering" business, as she referred to it in cross-examination, increased to some \$75.00 per day in 1984 and from about 1986 to some \$600.00 per week, an amount which she said in cross-examination she continues to earn to the present time. In cross-examination, however, she also sought to say that she had started this catering business from the time of the marriage in 1974 and that it was not until 1983 that she began selling "in public". I regret that this evidence having emerged only in cross-examination I find difficulty in accepting it, particularly given the Petitioner's contention that her venture into the catering business was short lived at best.

I accept, however, that by 1983 (or 1983 at the latest) there would have been the need to increase the family's income because of the necessity to pay the instalments on the National Housing Authority mortgage. It must be kept in mind as well that the youngest of the children had been born in July 1981, and that by 1983 the Respondent would have had more time available which would enable her to enter this catering business. Further, the increase in earning from this catering business in 1986 to \$600.00 per week would be coincident with the Petitioner being retrenched from his position at Brinks and the need, once again, to find further income to meet the family's expenses.

The third possible source of funds is the rental income to which I have already referred. In 1974 there were two apartments being rented out in the first house (at the back) at \$25.00 per month each. Over the years the rental income increased quite considerably, particularly after the construction of the second house, and further yet after the conversion of the first house in 1992 to a total of seven apartments or rental units. It should also be kept in mind that 1992 is the last year in which the Petitioner has given any evidence of earnings from employment, so that there would have been a necessity to, once again, increase the rental income.

These financial, or direct, contributions apart, however, there is the non-financial contribution of the Respondent to be considered. This factor has assumed a growing importance over the years when determining a party's interest in a matrimonial home or the family assets. It is clear that the Respondent bore the brunt of looking after the matrimonial home and the family. The Petitioner says that there were times when he held down more than one job and if this is so then there would have been a correspondingly greater input by the Respondent into the time and energy spent caring for the family and looking after the property. She was at home and would have therefore also dealt with the tenants and their problems, if any, to as great, if not greater, extent than the Petitioner. She would have been there to supervise the workmen, or at least keep an eye on them while construction and repair work was taking place. She collected rent from the

tenants and went personally to pay the National Housing Authority loan instalments. She in my view was the one who looked after the property and filled the role of landlady. She continues to do so up to the present, and if there was input from the Petitioner into these functions it ceased altogether when he moved out. It is a considerable contribution to the improved state of the property and to the income of the family which she made over the years of the marriage, and beyond the stage of the decree nisi to the present day.

In my view, the rental income provided the financial foundation for the family's welfare from 1984. The income of the Petitioner from employment prior to that time provided most of the family's needs. The Respondent's earnings from her catering business assumed greater importance from 1986. The rental income now is some \$3,650.00 per month. It has been used to pay the instalments in the loan from the National Housing Authority, water and sewerage rates, the electricity bill, groceries, market produce and the children's expenses.

All income, however, in whatever form, went into a common pool for the payment of the various expenses and it is not possible to come to any definitive conclusion as to whether, from 1974 to the end of the marriage or to the present, either of these parties made a financial, direct, contribution to the improvement of the property which was greater than the contribution of the other.

There is no doubt that the parcel of land and the first house were owned by the husband prior to the marriage. That property, however, clearly provided the matrimonial home and an increasingly greater, and more important, contribution to the family's income and welfare over the years of the marriage. That is still so. The loan was obtained from the National Housing Authority to build the second house and thereby increase the family's income by way of the rentals. It is in my view proper to regard it as a family asset and to treat it as such, although the circumstances require me to give recognition to the husband having brought it into the marriage with him.

Apart from the matters I have already referred to. I am to consider the respective needs and requirements of the parties and attempt, as best as circumstances permit, to determine this application so as to place the parties in the position they would each have been had the marriage not broken down.

The Petitioner's income now is limited to a share of the rents received. He has not worked for some eight years now and there is no mention of him seeking employment. He, however, has some earning capacity, perhaps \$1,000.00 per month. He is now 59 and his working life span is shorter than the Respondent's. He has no assets apart from his interest in the property. He has lived with his sister since leaving the matrimonial home.

The Respondent is solely responsible for the maintenance and welfare of the youngest child, Narindra, who is now nearly 20 and whose existing course of education is to last another 4-6 years. The Respondent earns some \$600.00 per week from her catering business. She has built it up over the years. She is now 42 and clearly has a longer working life ahead of her. She has money in a bank account and, although she has not disclosed what this may amount to, it is reasonable to conclude that she has saved something, after meeting the expenses of herself and the children and the property, from the rents and her income from the catering business.

Mr. Delzin submits that the appropriate order to be made in the circumstances of this case is the payment of a lump sum to the Respondent by the Petitioner without a sale of the property, contrary to the rationale behind his application to amend the Petitioner's Notice. He further submits that an appropriate lump sum payable to her would be \$145,920.00. This sum, he says, when invested at 10%, would provide her with an income of \$1,216.00 per month (\$14,592.00 per annum) which is sufficient to meet her needs when added to her catering business income. It appears that he arrives at this quantification after deducting from the existing total rental income one third of same for the Respondent's expenses of

maintaining the child Narindra, and then apportioning the balance equally between the Petitioner and the Respondent. He also submits that there should be a deduction from this sum of \$145,920.00 an amount of \$25,532.00. I am not entirely clear as to how he arrives at this figure, despite the explanation in his written submissions, but it appears to be on the basis that it represents what the Respondent should have paid to the Petitioner as his share of the rental income during the three years prior to the filing of the Petitioner's affidavit and for one year thereafter, as well as a deduction for the Respondent's maintenance during that period of time.

In any event, I have several difficulties with this methodology. First, it assumes no increase in rentals for the various units, and no variations in the interest rates. To ignore the possibility of change in either or both of these factors is to my mind unrealistic. Additionally, there have been many criticisms at attempts to simply capitalise monthly payments as was done in *Duxbury v. Duxbury* [1990] 2AllER 77.

Second, it ignores completely the Respondent's contribution to the matrimonial home and to the family over the years of the marriage.

Third, payment of a lump sum requires identification of a capital asset or fund out of which it can be realised and/or paid. Further, this must be done without crippling the earning of power of the party making the payment (see e.g. *Wachtel v. Wachtel* [1973] 1AllER 829). There is no such fund here, and the sole asset is the property in question.

The Petitioner is now 59 years old and has been unemployed for nearly 10 years. While I accept that there is a rental income from the property, I do not think it realistic to assume that he will obtain a loan in the amount of the proposed lump sum, even if the property were to be acceptable as security for such a loan. Further, there is then to be answered the question as to how the Petitioner will

find the income on which to live if he is repaying such a loan. I do not think it appropriate to impose this burden on him.

Where the assets of the parties are small, or the sole asset is the matrimonial home, there is very often no scope for a lump sum order to be made "...save as part of a distribution of the proceeds of sale of the home". (See *Rayden & Jackson on Divorce and Family Matters* 16<sup>th</sup> Ed. para. 29.113).

Section 54 (2) of the *Matrimonial Proceedings and Property Act* Chap. 45:51 provides that an order for the sale of a matrimonial home is not to be made where it (as defined in Section 51 of the Act) is not exclusively or principally used as the home of the parties, or if land appurtenant to the home is not so used, unless the Court considers it fair and equitable in the special circumstances of a particular case.

It is agreed that a clean break is desirable, necessary, in this case particularly given the relationship – or lack of it – between the parties. I do not see how a financial clean break can be accomplished, however, by ordering payment of a lump sum if there is no reasonable prospect of it being paid, and none has been demonstrated to me. Perhaps recognising this, Mr. Delzin suggested that payment of a lump sum be ordered and that a further order be made that the property be sold in default payment being made, but I think that to be only postponing the inevitable.

Similarly, Ms. Gouviea's submission that the Petitioner be ordered to transfer his interest in the property, which she placed at 50%, to the Respondent and that the Respondent then pay him for his share, requires further contact between the parties and is a matter not likely to be concluded sooner rather than later.

Further, the dispute as to the rental income will continue to the detriment of all concerned.

Further yet, there is no evidence before me to demonstrate that the Respondent is in a position to pay the Petitioner for his interest in the property.

It appears to me, therefore, that there are special circumstances in the instant case and that the only reasonable, realistic, approach is to order a sale of the property and the payment of a lump sum from the proceeds of sale. It will then be for the parties to arrange their affairs in such a fashion, utilising their respective shares of the net sale proceeds, to provide the required accommodation and living expenses. I should add that Narendra's continuing education and the need for his accommodation and maintenance during this time is a factor which I have also considered.

Given the conclusions I have come as to the respective contributions made by the parties to the property and to put it into its present state, the length of the marriage and the other factors I am to consider under the provisions of Section 27 (1) of the *Matrimonial Proceedings and Property Act*, I find the Respondent to be entitled to a 45% interest thereto and therein, after allowing in some measure for her not having put before this Court all the information she should have relative to the rental income and her assets.

There will therefore be a declaration that the Respondent is entitled to a 45% beneficial interest in the property at 6 Moore Street, Pasea Village, Tunapuna, and I make the following orders:

1. The said property is to be sold on the open market by private treaty. Conduct of the sale is to be in the hands of a real estate agent agreed between the parties on or before April 19<sup>th</sup> 2002. In default of such agreement the property is to be sold by public auction as hereinafter ordered.
2. If there is default in agreement as to the real estate agent as aforesaid, or in the event that there is such agreement but a sale of the property is not completed on or before 30<sup>th</sup> September 2002,

then the property is to be sold by public auction and the Registrar of the Supreme Court is to have conduct of the sale.

3. The net proceeds of sale after satisfaction of any balance due on any existing mortgage and the expenses of and associated with the sale are to be paid as to 55% to the Petitioner and as to 45% to the Respondent.
4. There will be leave to each of the parties to make an offer to purchase on a sale by private treaty or to bid on a sale by public auction, as the case may be.
5. The Registrar of the Supreme Court is to execute any necessary or required documentation to effect a transfer of title to the said property to a purchaser, whether on a sale by private treaty or by public auction, on behalf of either or both the Petitioner or the Respondent, in default of either of them doing so.
6. There will be liberty to apply.

As to the question of costs, I am mindful that each of the parties having failed to provide me with the best possible evidence in order for me to determine the applications. I am also mindful of the Respondent's apparent failure to disclose fully and in the circumstances I order that each party bear its own costs of the applications.

28<sup>th</sup> March, 2002.

C.V.H. Stollmeyer  
Judge