

Ho Kiang Fah v Toh Buan
[2009] SGHC 60

Case Number : Suit 45/2008, RA 282/2008
Decision Date : 10 March 2009
Tribunal/Court : High Court
Coram : Belinda Ang Saw Ean J
Counsel Name(s) : Appellant acting in person; Yap Teong Liang (T L Yap & Associates) for the respondent
Parties : Ho Kiang Fah — Toh Buan

Civil Procedure – Striking out – Whether jurisdiction of High Court properly invoked where proceedings relating to subject matrimonial asset already pending in Family Court – Whether proceedings an abuse of process of court

Family Law – Family court – Ancillary powers of court – Whether Family Court more appropriate forum to litigate issues relating to division of matrimonial asset – Whether fact that ancillary proceedings pending in Family Court relevant – Whether s 112 Women's Charter (Cap 353, 1997 Rev Ed) able to apply selectively to different matrimonial assets

10 March 2009

Belinda Ang Saw Ean J:

1 The plaintiff, Ho Kiang Fah, and the defendant, Toh Buan, are in the midst of matrimonial proceedings. For convenience, the plaintiff is referred to hereinafter as “H”, and the defendant, as “W”. The Writ for Divorce was filed on 31 August 2006. A *decree nisi* (now known as Interim Judgment) was granted on 29 January 2008. The next stage of the matrimonial proceedings deals with ancillary matters such as the division of the matrimonial assets of the parties, maintenance and custody of the children of the marriage (“the ancillary proceedings”). In that connection, both parties have filed their respective affidavits of assets and means. In September 2008, the parties were in the process of discovery which would have to be completed before the ancillary proceedings are listed for hearing. It was not disputed that the discovery process would include the subject property. In her Statement of Claim for Divorce, W sought, along with the declaration for entitlement to the matrimonial assets, custody of the children and maintenance from H.

2 On 23 January 2008, H filed the present proceedings in the High Court against W, the short title of which is Suit No. 45 of 2008 (“Suit 45”). The Writ of Summons was served on W on 28 January 2008, the day before the *decree nisi* was obtained. On 3 April 2008, H filed an O14 application by way of Summons No. 1535 of 2008 (“the O14 Summons”). The specific orders sought by H in Suit 45, and in the O14 Summons, related to a property known as Parc Oasis at 51 Jurong East Avenue 1 #18-03 Singapore 609782 (“the property”). In brief, the orders H sought were as follows:

(a) A declaration that H and W owned the property in equal shares or in such proportion as the court finds just;

(b) A declaration that H’s liability under the housing loan is only 22.8% of the loan amount of \$500,000;

(c) An order that W pays to H the sum of \$169,122.53 being excess payment by H towards the housing loan;

(d) Alternatively, an account by W of all sums paid by H towards repayment of the DBS loan in excess of H's liability and an order for payment by W to H of all sums found to be due from W to H on the taking of such an account;

(e) An order that the property or W's share in the property be sold in the open market;

(f) If the whole of the property is sold, an order that the sale proceeds are to be divided equally between the parties; and

(g) An order that W fully discharges the outstanding housing loan prior to completion of the sale of the property.

3 On 2 July 2008, Assistant Registrar ("AR") Ms Chung Yoon Joo granted W unconditional leave to defend H's claims. H's other application to strike out W's counterclaim to recover her share of the rental income from the property was dismissed. H appealed against that part of the order of AR Chung granting unconditional leave to defend his claim. The appeal was listed for hearing before me on 4 August 2008. H is a qualified lawyer. He acted in person as he did not instruct his counsel, Mr Leong Why Kong, to argue the appeal although Mr Leong was still his counsel for the matrimonial proceedings. After hearing the parties, I adjourned the appeal for the parties to consider further the question whether the jurisdiction of the High Court was properly invoked in the light of ongoing matrimonial proceedings in the Family Court of the Subordinate Courts. H's response to the court's question at the adjourned hearings on 8 and 18 September 2008, in brief, was the same – the proceedings were properly commenced; it was permissible to take the property and the associated disputes out of the Family Court since the jurisdiction of the High Court and the Family Court overlapped. Counsel for W, Mr Yap Teong Liang's position was the opposite. At the end of the adjourned hearing on 18 September 2008, I ruled that this was a case where an inappropriate attempt was made to use the proceedings in the High Court for a collateral purpose. The proceedings constituted a plain abuse of the court's process, and on the court's motion and in exercise of the court's inherent powers, the action and counterclaim were ordered to be struck out. I now publish the reasons for my decision.

4 By way of background facts, on or around 21 June 1993, the property was acquired by H and one Chong Thian Choy ("Chong") as tenants-in-common. A loan was taken out with Hong Leong Finance Ltd by H and Chong for this purpose ("the Hong Leong loan"). Not too long thereafter, on 10 November 1994, Chong sold his share in the property to W at the price of \$325,000. Upon completion, the property was registered in the names of H and W as joint tenants.

5 To finance this purchase from Chong, both H and W obtained a loan of \$500,000 ("the DBS loan") from the then Credit POSB Pte Ltd, which has since been taken over by DBS Bank Ltd ("DBS Bank"). The DBS loan was used to finance the purchase of Chong's share in the property as well as to redeem the outstanding Hong Leong loan of \$305,000 which was in the name of H and Chong.

6 H's main contentions in these proceedings were: (a) the parties had agreed that each was to have an equal share in the property; (b) his share of liability for the DBS loan was 22.8% of the loan amount of \$500,000; and (c) he had overpaid his share of the DBS loan and sought repayment of \$169,122.53 from W. His stance was that the disputes must be resolved applying, *inter alia*, the principles of property and contract law.

7 W rejected H's assertions. She argued that H had no basis to allocate to W the responsibility for the full payment of \$305,000 to redeem the Hong Leong loan. Separately, the alleged sum of \$161,785.05 attributed "to the parties' personal use" and towards expenses for the property was not supported by evidence. No evidence was produced as to which portion of the \$161,785.05 was used for personal expenses and which portion was for expenses pertaining to the property.[\[note: 1\]](#) In retaliation, W counterclaimed against H to recover her share of the rental income H had collected since the time the property was rented out in 1995.

8 The hearing before AR Chung was focused on the triable issues of fact and law to resist the application for summary judgment. That is not to say that Mr Yap did not submit before AR Chung that H's claims related to a property acquired during the marriage, and as it was a matrimonial asset, the disputes should be dealt with in the Family Court. Mr Yap's point was that the property and three other matrimonial assets were subject to division in a just and equitable manner under s 112 of the Women's Charter (Cap. 353, 1997 Rev Ed), and as such, the parties' respective direct and indirect contributions towards the property are important. Mr Yap filed, on behalf of W, her Defence and Counterclaim on 19 February 2008. It was pleaded in the Defence that the parties' respective share in the property and the application for the sale or transfer of the property were part of the ancillary matters to be determined in the ancillary proceedings.[\[note: 2\]](#) In his skeletal submissions dated 4 August 2008, Mr Yap repeated and questioned the appropriateness of the present proceedings. Plainly, taking into account the position repeatedly stated by Mr Yap, there was no basis for H's criticism that the court should not interfere with H's preference to seek declaratory orders from the High Court even though there was another court available to pursue the same relief.[\[note: 3\]](#) Above all, it must be remembered that the court has inherent jurisdiction to prevent an abuse of process (see *Lai Shit Har & another v Lau Yu Man* [2008] 4 SLR 348 at [\[22\]](#)). It follows that whenever there is an attempt to abuse the court's process the court can and must, even on its own motion, act to protect and control the court's process as was the case here. In the words of Punch Coomaraswamy J in *Heng Joo See v Ho Pol Ling* [1993] 3 SLR 850 at 855, a court cannot remain idle when abuse of process takes place in its face.

9 Coming back to the arguments canvassed at the appeal, H said that Suit 45 was brought to dissolve the parties' investment and resolve the disputes between the parties in relation to the investment of a property (see [\[6\]](#) above). He cited *Chong Li Yoon v Soo Yook Thong* [1993] SLR 181 to support his assertion that the action was properly brought in the High Court as the claims were primarily matters in the law of contract and quasi-contract and not ancillary matters to be determined in the ancillary proceedings. As such, the claimant had to commence a separate civil action and not invoke the jurisdiction of the court in matrimonial proceedings. Besides, proceeding by a writ action gave H access to the O14 procedure to have the dispute determined summarily. H relied upon *Temple v Temple* [1976] 1 WLR 701 in support of his proposition. Since that case held that it was possible to sue to enforce a maintenance agreement, by the same token and analogously, H claimed that he too could separately sue to recover moneys that he had overpaid W for the DBS Loan. In addition, H adopted his then counsel's (Mr Leong) argument before AR Chung that the present proceedings were brought under s 59 of the Women's Charter to resolve the parties' ownership dispute summarily. Section 59 reads as follows:

(1) In any question between husband and wife as to the title to or possession of property, either party may apply by summons or otherwise in a summary way to any Judge of the High Court, and the Judge may make such order with respect to the property in dispute and as to the costs of and consequent on the application as he thinks fit, or may direct the application to stand over, and any inquiry touching the matters in question to be made in such manner as he thinks fit.

(2) Any order made under this section shall be subject to appeal in the same way as an order made by the same Judge in an action pending in the High Court.

(3) The Judge may, if either party so requires, hear any such application in his chambers.

...

10 Besides s 59 of the Women's Charter, H cited para 2 of the First Schedule 1 to the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) on the powers of the High Court to order a sale of the property. Paragraph 2 states:

Power to partition land and to direct a sale instead of partition in any action for partition of land; and in any cause or matter relating to land, where it appears necessary or expedient, to order the land or any part of it to be sold, and to give all necessary and consequential directions.

11 In relation to the court's power to sever the joint tenancy, the argument was that upon severance, each party would share equally in the property. Even after the declaratory orders sought were made, so the argument developed, the parties' cash entitlement from the sale of the property could be accounted for in the division of assets at the ancillary proceedings. That last point did not sit well with H's cornerstone argument that [\[note: 4\]](#)

The property has yet to be considered as 'matrimonial asset'. It is submit [sic] that assets to be classified as 'matrimonial assets' they [sic] have to be determined by the Family Court proceedings and there is no evidence before the Court that the parties are dealing with matrimonial assets. As Defendant has admitted in the affidavit that [sic] the property is investment property.

12 In my view, H's argument was disingenuous and it exposed H's motives in commencing Suit 45. W's concession that the property was "investment property" was purely a factual statement – the property was bought to be rented out, not to be used as the matrimonial home. In the context of s 112(10) of the Women's Charter, the terminology "investment property" has no legal significance. The statutory provision recognises legal classifications like "matrimonial property" or "matrimonial asset". Furthermore, if the property had yet to be assessed by the Family Court as a "matrimonial asset", it was mischievous and wrong on H's part to argue that "there [was] no evidence before the Court that the parties are dealing with matrimonial assets". I emphasise, without so finding and without precluding the Family Court from adjudicating on the matter, that there was no evidence that the parties were *not* dealing with a matrimonial asset. It was not disputed that the property was acquired during the marriage and both H and W held the property as joint tenants. Both H and W had contributed financially towards the property. The dispute before me was on the quantum of their respective financial contributions.

13 As to whether the Family Court was a more appropriate forum to litigate the substance of the points raised in these proceedings, I turn to two cases as illustration of the court's approach on the matter. In *Quek Jun-Ling Patricia v Chang Koon Yuen* [1996] SGHC 52, the plaintiff commenced proceedings against her husband (prior to divorce proceedings proper) seeking a declaration that she was entitled to half of the main matrimonial assets. Lai Siu Chiu J stated the following (in the final paragraph of her judgment):

In respect of the declaration for the entitlement to the assets, I was informed by counsel for the plaintiff that divorce proceedings were being contemplated. *In the course of matrimonial proceedings, the court would have wide powers to divide the matrimonial assets. At this*

juncture, I did not think it appropriate nor necessary to determine the question of the flat and the business, although parties were at liberty to apply. There was also insufficient evidence before me to declare the proportions due to the parties. Therefore, I made no order in this respect.

[Emphasis added]

14 In *Yap Hwee May Kathryn v Geh Thien Ee Martin and another* [2007] 3 SLR 663, the wife (the second defendant) contended during divorce proceedings that the property of not just her husband (the first defendant), but also her husband's new girlfriend (the plaintiff there, but also co-respondent in the divorce proceedings between husband and wife) was a matrimonial asset that should be preserved and made available for division by the Family Court. Kan Ting Chiu J emphasized at [7] of his judgment:

In the present case, the property and the joint account were held by the plaintiff with the first defendant. As the plaintiff was already a party in the divorce proceedings before the Family Court, the Family Court can deal with the beneficial ownership of the property and the money in the joint account because all the necessary parties are before it.

[Emphasis added]

15 The pragmatic approach taken by both Lai J and Kan J is legally supported by s 112(1) (Cap 353, 1997 Ed) which provides:

The court shall have power, when granting or subsequent to the grant of a judgment of divorce, judicial separation or nullity of marriage, to order the division between the parties of any matrimonial asset or the sale of any such asset and the division between the parties of the proceeds of the sale of any such asset in such proportion as the court thinks just and equitable.

[Emphasis added].

The debate before me was on whether or not the Family Court has jurisdiction to decide on the issues raised. I make the following comments on the points raised by H.

16 First, s 59 of the Women's Charter is irrelevant. Their proprietary interest as joint tenants was not in dispute and as such that there was no title dispute under s 59 of the Women's Charter. Digressing for a moment, it seems to me that an application under s 59 is now heard by a District Judge in the Family Court following the passage into law of the Supreme Court of Judicature (Transfer of Matrimonial, Divorce and Guardianship of Infants Proceedings to District Court) Order 2005. Reverting to the main point, H's real objection, in essence, was that having, as he claimed to have done, paid his agreed share of the contributions, W could not enlarge her percentage share in the property by more than 50%, an advantage W could potentially enjoy if the property was subject to division in a just and equitable manner under s 112 of the Women's Charter. H's objection is confusing because it is unclear. A distinction must be drawn between W's proprietary rights and personal rights. Section 112 does not seek to declare or confer proprietary rights on a spouse where there are none. It must be remembered that the court's powers under s 112 to divide assets extends to those subsisting in the sole or joint names of the parties at the time of the hearing of ancillary matters. It is the spouse's personal rights as distinct from proprietary rights in relation to the matrimonial assets that the court adjudicates in ancillary proceedings applying the principles of a just and equitable division.

17 Second, the alleged contract, quasi-contract and facts giving rise to estoppel by convention were all not pleaded. The starting point would be the declaratory orders sought by H. Declarations as a matter of general principle are to be granted in relation to defined legal issues, and in relation to specific matters of controversy. H's claim for refund of mortgage instalments overpaid to W was founded on his assertion that W was responsible for the entire sum of \$305,000 from the DBS loan that was applied to discharge the Hong Leong loan owed by H and Chong. H based his justification for filing suit in the High Court on a passage from *Chong Li Yoon v Soon Yook Thong* at 185 where the court stated:

If there are liabilities between the husband and wife under contract or quasi contract (or restitution) the proper and only remedy is for a separate action and not to invoke the jurisdiction of this court in a matrimonial proceeding where there is no jurisdiction to deal with claims in contract, or quasi contract (or restitution).

18 The decision of *Chong Li Yoon v Soon Yook Thong* is distinguishable on the facts. In the present case, H had not pleaded in his Statement of Claim the underlying factual basis in support of his assertion that his responsibility was limited to 22.8% of the DBS loan amount of \$500,000. Details of the terms of the parties' alleged agreement in relation to their respective financial obligations in the investment were conspicuously missing from the Statement of Claim. The omission was telling for it contradicted H's contention at the hearing that his claims were matters in the law of contract.^[note: 51] His arid assertion that the proceedings were brought to dissolve an investment that no longer served its purpose as an investment for the parties and for an account to be taken was illusory. In *Temple v Temple* ([9] *supra*), the plaintiff was suing for arrears of maintenance due under a maintenance agreement entered into before the divorce, and it was clearly a claim for breach of contract. Whilst the litigation would result in a pronouncement on the validity of the maintenance agreement, the maintenance proceedings before the UK Family Court would not be affected. If anything, any orders on maintenance made would be looked upon as a variation of the maintenance agreement. Hence, *Temple v Temple* is distinguishable as no agreement or estoppel on the facts was pleaded by H.

19 Third, in seeking to obtain an order from the court for sale of either W's share or both parties' shares in the property, H had indeed intended to dispose of the property pending ancillary proceedings in the Family Court. If one thought about the implications of the declarations that were sought, it was abundantly obvious that the purpose was to curtail W's personal rights (as distinct from proprietary rights) in relation to that property. Insofar as it was not properly a matter for judicial declaration or judgment at all, it was an attempt to persuade this court to embark upon an exercise which was properly a matter for judicial determination by the Family Court.

20 Taking all the factors in play, the crucial question is whether abuse of process was shown by reason of misuse of the process of the court. In *Chee Siok Chin & others v Minister for Home Affairs and another* [2006] 1 SLR 582 ("*Chee Siok Chin*"), four categories of abuse of process were identified. VK Rajah J at [34] said:

The instances of abuse of process can therefore be systematically classified into four categories, viz:

- a) proceedings which involve a deception on the court, or are fictitious or constitute a mere sham;
- b) proceedings where the process of the court is not being fairly or honestly used but is

employed for some ulterior or improper purpose or in an improper way;

c) proceedings which are manifestly groundless or without foundation or which serve no useful purpose;

d) multiple or successive proceedings which cause or are likely to cause improper vexation or oppression.

21 The categorization countenanced in *Chee Siok Chin* at [34] has recently been followed in *NCC International AB v Alliance Concrete Singapore Pte Ltd* [2008] 2 SLR 565 at [71]. In the present context, the second category of abuse of process is relevant. As the Court of Appeal stated in *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR 239 at [130]:

130 ... The use of the judicial process for a purpose other than that for which it is established is regarded by the court as an abuse of its process. *Although the concept of "abuse of process" is not a precise one, its essence is the use of the judicial process for a purpose for which it is not intended or in circumstances where the extraneous purpose is the dominant purpose for its use.*

[Emphasis added]

22 To reiterate, the pleadings did not disclose a realistic debt against W. No cause of action in contract was pleaded against W in relation to the property. The timing of the Suit 45 and service thereof affirmed that it must have been brought solely for the collateral purpose of unilaterally removing the property from the ancillary proceedings. H's sole purpose in bringing the proceedings against W was to subject the declaration of each party's share in the ownership of the property to the principles of property law. The division of the property in a just and equitable manner under s 112 of the Women's Charter was not what H wanted as was evident from his line of argument. Indeed the property was being isolated (to adopt Mr Yap's word) and insulated from the other matrimonial properties subject to the just and equitable regime of s 112. It would certainly send a wrong signal to any husband and wife locked in divorce proceedings if such misuse of the court process was not checked and stopped.

23 In my view, the present proceedings were a blatant abuse of the judicial process. This was a case where inappropriate attempt was made to use the proceedings for a collateral purpose. In the circumstances, it was not a bona fide invocation of the court's jurisdiction. The Family Court is the proper forum to decide on the parties' share of the property after considering the parties' respective direct and indirect contributions towards the property. All liabilities of the parties in relation to the property would be resolved at the ancillary hearing.

24 For the reasons stated, I struck out H's action as an abuse of process of the court. As a corollary to my decision, W's counterclaim was struck out as well. An account of rental income used to pay the mortgage and outgoings of the property could be resolved in ancillary proceedings at the Family Court. In the result no orders were made on RA 282/2008/D save that H was ordered to pay W's costs of the appeal and below fixed at \$4,000 plus reasonable disbursements. W was ordered to pay costs of the counterclaim fixed at \$3,000 plus reasonable disbursements.

[\[note: 1\]](#) Para 12(c) of the plaintiff's affidavit dated 3 April 2008

[\[note: 2\]](#) Para 14 of Defence and Counterclaim filed on 19 February 2008

[\[note: 3\]](#) Plaintiff's written submissions dated 13 May 2008, para 3(a) to (g)

[\[note: 4\]](#) Plaintiff's Submission dated 1 September 2008 at para 27

[\[note: 5\]](#) 7 of the plaintiff's skeletal arguments dated 31 July 2008; para 31 of the plaintiff's submissions dated 1 September 2008.

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