

Chan Fook Kee v Chan Siew Fong
[2001] SGHC 114

Case Number : Div P 488/1999, RA 720051/2000
Decision Date : 29 May 2001
Tribunal/Court : High Court
Coram : Lai Kew Chai J
Counsel Name(s) : Amarjit Kour d/o Balwant Singh (Peter Low Tang & Belinda Ang) for the appellant; Low Wee Jee (Thomas Tham & Partners) for the respondent
Parties : Chan Fook Kee — Chan Siew Fong

Civil Procedure – Appeals – Adducing fresh evidence – District judge ordering division of matrimonial assets – Wife appealing – Wife applying to admit fresh evidence to prove payment of instalments – Husband resisting application – Whether special grounds for admitting fresh evidence exist – O 55D r 11(1) Rules of Court

Family Law – Matrimonial assets – Division – Substantial direct and indirect contributions from wife – Some contributions from husband – Whether wife should be awarded entire flat – ss 112(2), 114(1) Women's Charter (Cap 353, 1997 Ed)

[Please note that this case has not been edited in accordance with the current Singapore Law Reports house style.]

Lai Kew Chai J:

Introduction

1 This is an appeal concerning the division of matrimonial assets and maintenance, which were ordered after the divorce of the appellant ('wife', who is 54 years old) and the respondent ('husband', who is 60 years of age). The matrimonial property is known as No 30 Ah Hood Road, #12-02 Nadia Mansion, Singapore ("the flat"). It has an area of 212 m² and usefully it had seven balconies which helped in the accommodation of student lodgers. At all material times it was accepted by all concerned that it was worth about \$960,000. The district judge ordered that the flat be sold in the open market and the proceeds of sale after discharging the mortgage loan and related expenses was to be in the proportion of 35% to the husband and 65% to the wife. It was further ordered that any refund which the husband might be required to make to the Central Provident Fund Board shall be made by him out of his share of the net proceeds of sale of the flat. As to the maintenance, the district judge ordered the husband to pay her a lump sum of \$40,000 and that it shall be deducted by the wife out of his share of the net proceeds of sale. No order as to costs was made in respect of the proceedings below.

2 To give a perspective of the sums involved, I would set out in broad terms how the division would have panned out in monetary terms. During the appeal before me, I was told that the mortgage loan and the related expenses were estimated to be \$100,000. The wife would have received about \$559,000 and the husband \$301,000. Out of that sum he would have to pay her the lump sum maintenance of \$40,000 and return to the CPF Board a small sum but retaining the bulk of \$164,000 (inclusive of interest deemed as earned) since he is past the CPF withdrawal age of 55.

Appeal and additional evidence

3 The wife appealed against the orders for division of the flat and the maintenance. When the appeal first came on for hearing before me I was told by counsel for the wife, Steven Lam, that he had studied the papers and concluded that the records showing the sources for the payments had to

be collated and adduced before the court to show that the wife in truth and in fact had made direct contributions and that the husband, rather belatedly and in circumstances of sheer necessity, contributed to the payment of the flat out of his CPF account. Those crucial evidence was not led before the district judge. The district judge had found that the evidence regarding the direct contributions were "confusing and convoluted" but she was of the firm view, which I entirely shared as it was amply supported by the overwhelming evidence, that the wife had made substantial indirect contributions within the relevant paragraphs of ss 112(2) and 114(1) of the Women's Charter (Cap 353, 1997 Ed) ("the Charter"). The district judge found on the incomplete evidence before her that each spouse contributed "slightly more than \$100,000, towards the purchase price". The judge was in that finding referring to the initial progress payments. In relation to the subsequent payments for the flat, the district judge found that the husband paid \$123,970.91 through his CPF account and that the wife contributed the sum of \$92,258.94. In percentage terms, the husband on the incomplete evidence contributed 58% and the wife 42% towards the purchase of the flat.

4 Why did the district judge award the wife 65% of the net proceeds of sale of the flat in view of her lesser direct financial contributions? The reason is this. Having considered the compelling evidence of the wife's indirect contributions under the aforesaid statutory paragraphs of ss 112(2) and 114(1) of the Charter, she concluded that it was just and equitable to award the wife another 20% "for her indirect contributions". I will set out the evidence with sufficient particularity and my views on the respective conduct, roles and contributions of the spouses later in these grounds of decision.

5 I return to the wife's application to admit the additional evidence, which was heard on 27 October 2000. The husband strongly resisted the admission of the additional evidence. The evidence was available and no reason was offered why the evidence, if they were important, were not adduced.

6 The appeal is governed by O 55D r 3(1) which stipulates that such an appeal is by way of a rehearing. In relation to the admission of further evidence on questions of fact, the High Court under O 55D r 11(1) has power to do so by, among other means, affidavit evidence but in the case of an appeal from a judgment after trial or hearing of any cause or matter on the merits, "no such further evidence (other than evidence as to matters which have occurred after the date of trial or hearing) shall be admitted except on special grounds".

7 Counsel for the wife referred me to para 50.35 of *Rayden and Jackson on Divorce and Family Matters* and the case of *Hughes v Singh* (1989) Times, 21 April in which the English Court of Appeal decided in April 1989 that a court should admit fresh evidence when to refuse it would affront common sense or a judge's sense of justice. In my view, the tests are quite settled. Yong Pung How CJ, in delivering the judgment of the Court of Appeal in *Nikko Merchant Bank (Singapore) v Syamsul Bachri* (1991) CA 17/89 (unreported), stated that "(to) justify reception of fresh evidence ..., three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; secondly, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; thirdly, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible".

8 I go to the substance of the matter. I examined the 14 banking documents exhibited in the wife's affidavit affirmed on 25 October 2000. They proved that the husband did not pay any part of the initial deposit of \$200,217.60. In 1984 they agreed to purchase the flat for \$500,544, having exercised the option to purchase on 20 March 1984. The flat was still under development. It was completed in July of the following year. The first four initial deposits were of \$50,054.40 each. The couple had in fact agreed to pay for them in equal shares. But the documentary evidence, which she

sought to adduce, proved that he did not carry out his part of the bargain. She paid the initial "booking fee" out of her UOF SGD Fixed Deposit Account No 606-405-729-1. The balance of \$54.40 was withdrawn from her DBS savings account. In April 1984 the second instalment became payable. She again lifted another UOF fixed deposit of \$50,000 and paid the balance of \$54.40 from her DBS savings account. When the third and fourth instalments fell due in June 1984, the husband was unable to pay. The wife used her UOB Fixed Deposit No 51128 to pay for the third instalment. In his letter to United Overseas Bank of 6 June 1984 the husband admitted just as much. As for the payment of the fourth instalment, the husband's letter confirmed that he was strapped for cash in his business in Indonesia and again the wife used her UOB fixed deposit under receipt No 51128 to pay for it.

9 When considering the additional evidence, I read the previous depositions of the husband as to who had paid for the four initial instalments. In para 18 of his first affidavit, he claimed that the wife "never worked" and never contributed to the purchase price. Her name "was only inserted as a co-lessee". He claimed he paid by his cash and by a loan from Overseas Finance Ltd. The truth was that they obtained a loan against a mortgage of the flat of \$500,000 out of which \$300,000 was used to pay for the balance of the flat to the vendors. The other sum of \$200,000 was used by him for his garment business in Indonesia where he had bought a "big" house. In his second and third affidavit, he conceded that the wife paid for only one initial deposit. However, he maintained that the three instalments were paid by him. He referred to the "golden years" of the garment business in 1981 to 1983. The fact of the matter was that by 1984 the garment market turned against him very badly. He was to a large extent an "absentee" husband and father and his depositions just referred to were astonishing, given the very low grade quality of the marriage, which I will shortly recite. On the other hand, the wife had herself asserted (and admitted) in her previous affidavit of 19 January 2000 that "(o)n 4th July 1984, the Petitioner (*ie* husband) managed to make payment of the 4th instalment". In considering the conflicting evidence, I decided to place importance on contemporaneous independent documents and evaluated them against the primary and inferential material facts of the marriage. In the end, I felt compelled to follow the guidance of Lord Wilberforce in *Mulholland v Mitchell* [1971] AC 666 at 680A; [1971] 1 All ER 307 at 313 which was expressed in these terms: "Positively ... it may be expected that courts will allow fresh evidence when to refuse it would affront common sense, or a sense of justice." The other factors were these. First, the further evidence might ultimately affect the outcome of the appeal before me. Second, the wife's failure to obtain the banking documents in time hampered the preparation of her case earlier. The documents came into existence 16 years ago and it was not unexpected that her memory too might have lapsed here and there. The husband on the other hand is a meticulous person, seeing the prolific number of letters he wrote to her and the vendors. Thirdly, I was also happy that the wife was better served in her cause after another solicitor had taken a look into her case.

10 In the circumstances, I was satisfied that there were "special grounds" and I allowed the application and admitted the affidavit evidence and exhibits of the wife. As I had stated, they proved that he did not make any direct financial contributions except for the payment of the lump sum and monthly instalments from his CPF account, which as I had noted, he reluctantly agreed because the wife had by then exhausted all her means to pay for them.

11 On 2 February 2001 the wife sought the admission of another affidavit, which she had filed. She wanted to admit the OCBC banking documents, which confirmed her version that one of her friends, an Indonesian lady by the name of Amy Lousiana, had extended to her financial assistance throughout the years when she needed to pay for the flat and household expenses. This lady was the mother of one of the several Indonesian lodgers who lived in the flat. The wife had incurred liabilities which she has to pay back to Amy Lousiana and this was a relevant factor to take into account.

12 At that hearing, having read the affidavits in the meantime, I formed the impression that the husband had been less than forthcoming. I directed him to disclose his residential address, file his income tax returns and assessments of the tax authorities in South Africa where he was living and affirm whether he owned any property directly or indirectly. He affirmed an affidavit on 23 February 2001. He said he was residing in a farm along Balfour Rod, Heidelberg, Gauteng, Republic of South Africa. He then talked about his life after he left Tex Line Associates Pte Ltd in April 1993. He was in financial difficulties and his sister and his brother gave him financial assistance. His younger brother, who is in Singapore, had previously filed an affidavit to this effect. From 1994, after a short spell in Hong Kong, he went to Johannesburg. There he helped a friend, Mrs Ingrid Cheyree Van Essen, run an illegal flea market until November 2000. He earned between R800 and R1,200pm. He said he still owed her the airfare for the travel from Singapore to South Africa. Her friend has confirmed his evidence by affirming and filing an affidavit.

13 The husband went on to say that to make ends meet he had to work during weekends for Korsum Trading as their consultant giving advice on clothing business, marketing and manufacturing of clothes. His salary was R1,000pm and was given lodging by the owner, Mdm Tso Kum Yung. Both are living at 522 DWY KWA Street, Erasmuskloof, South Africa. But counsel for the wife tendered to me a Registry of Company instant search printout of the husband's two companies in South Africa. He was a director together with Mdm Tso Kum Yung. He also has another company with the same lady: namely, Texline Import & Export which evidently was engaged in the same line of business in which his wife had significantly assisted him almost from the beginning of their marriage. Counsel for the husband told me that it was Mdm Tso who had incorporated the company and she tendered a letter from their auditor to the effect that they had applied to de-register Texline in 1998. I was reluctant to accept his assertion that he had no assets at all.

The background facts

14 I must return to the beginning. The couple first met in a textile company. He was the manager and she was his assistant. On 23 June 1969 they were married. From their courtship they pooled their earnings to enable him to start his own business. He started his own business under the style of "International Industrial and Trading Co". It traded in garments. She joined him. She handled the clerical work, marketing, correspondence, book-keeping and even designing and sketching the garments. By 1972 they had two sons; both of them have since graduated from the Polytechnic. By August 1973 they had a daughter; she is a University graduate. From 1960 to 1977 she lived and worked in the company's factory and hardly had any social life. Through her initiatives and creativity, she "invented" a new management method referred to as "the Colour-Dotted Management Method". It improved productivity. The factory grew and it had 20 employees on the payroll.

15 In 1977 the husband had an affair with a seamstress in their employ. One cannot but note that, putting aside the act of infidelity, his devotion to another woman did mean having to spend money on that woman and consequently there would be less for the wife and children. The wife left the business but she continued with the marriage for the sake of the children. She gave tuition over extremely long hours from 7.00am to 9.30pm with a two-hour lunch break and a _ hour dinner break. By 1984 she managed to save \$100,000. She kept it in her UOF fixed deposit and DBS account.

16 His business fortunes, on the other hand, took a turn for the worse. By November 1980 he was unable to pay the rent for the factory and the salaries. In March 1982 the factory was closed and the business ceased. The husband felt there was no future for him in Singapore and he left for Indonesia to work for a garment factory known as PT Busana Indah Inter Industry. He was appointed the manager but production was unsatisfactory. On his urgent pleas, she went to Indonesia to help him. He left their children with her mother to look after them. As confirmed by his own letter, her efforts

saved him his job. For a very short while, in 1981 to 1983 the garment business was looking up and he planned to expand his own business.

17 Hence, they bought the flat and leveraged him beyond its original price, no doubt due to the appreciation of the value of the flat. But in 1985 his fortunes again waned and he returned to Singapore and worked for Texline Associates Pte Ltd. In the following year he renewed the licence for International Industrial and Trading Co. The husband did not pay for the household expenses nor the monthly instalments for the flat. He was even aggressive to her. He reported to the police and through the intervention of their friends he agreed to pay her \$1,000pm towards household expenses. It was during these difficult times that on 26 June 1989 the husband agreed to pay out \$50,000 from his CPF account to redeem in part the UOF term loan. A sum of \$1,000pm was deducted monthly from his CPF account to pay the UOF loan. The wife topped up the balance. He, however, did pay for their sons' education. These contributions were repaid after they had completed their courses.

18 She was assaulted and no maintenance was paid. She had to apply for maintenance and he agreed to pay her and the three children \$1,260pm. The husband untruthfully told her that he was earning only \$3,000pm. In 1990 she was granted a PPO against him.

19 On the evidence, I formed the view that it was at this time that the wife took in a number of lodgers who were Indonesian students. During the appeal hearings, he claimed that she was earning \$7,000pm for seven years from 1986 to 1993. In my view, she did earn not insubstantial sums. It was not as much as he claimed. The lodging enterprise accounted for the expenditure in renovations. They were enough to pay for the household expenses and the instalments for the flat. He could not but allow the monthly deductions of \$1,000pm from his CPF account. In 1992 he played no role in the family life and, according to counsel for the wife, he "disappeared" from their lives. However, it transpired that in fact in 1992 he earned the substantial income of \$147,000 but he had the gall to continue to maintain that he was earning only \$3,000pm.

20 Out of that annual salary of \$147,000 he was only paying the sum of \$1,260pm for the maintenance of the entire family. As I had stated in my brief grounds, I had great difficulty believing the husband. In the end, I accepted the figures submitted by the wife. She claimed that she had contributed \$884,857.55. The particulars are set out on p 25 of her written submissions of 5 March 2001. The husband, on the other hand, contributed the sum of \$123,970.91 from his CPF account, which I agree, is part of the matrimonial assets to which the wife is entitled to a share. Her direct contributions totalled 87.7%. In view of the wife's substantial indirect contributions to the accumulation of the matrimonial assets, I was sorely tempted to accede to her request that I award her the entire flat and order him to repay his own CPF, as it would mean that he would immediately take out the bulk of it since he is past 55 years old. But I did not do so because it would be out of line with the facts. He was not totally derelict. He did pay for half of the daughter's education. Though under compulsion, he did pay maintenance. He did give money to his son when the latter was in need. He had made some contributions. I would fall into error in awarding him no share in the matrimonial flat. I therefore awarded him 20% of the net proceeds of sale. The other terms of my order are set out in an order which I approved.

21 Finally, I turn to the lump sum maintenance. The district judge awarded the wife the lump sum of \$40,000 based on the monthly sum of \$315pm which she had accepted and she awarded that sum over the period of ten years, rounding up the figure in her favour. I saw no reason to disturb the assessment of the district judge. I would further make the reasonable inference that she could quite easily continue to provide lodging to her network of foreign students studying in Singapore and she would be earning a tidy sum per month for her maintenance.

Appeal allowed in part.

Reported by May Loh

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