

AEF v AEG
[2014] SGHC 113

Case Number : Divorce Suit No 48 of 2012/Z (Registrar's Appeal from Subordinate Courts No 30026 of 2013/T)
Decision Date : 30 June 2014
Tribunal/Court : High Court
Coram : Lee Kim Shin JC
Counsel Name(s) : Zaminder Singh Gill (Hillborne Law LLC) for the appellant; Christina Goh (Christina Goh & Co) for the respondent.
Parties : AEF — AEG

Family Law – Consent orders

30 June 2014

Lee Kim Shin JC:

Introduction

1 This was an appeal against the decision of a Deputy Registrar in Summons No 9458 of 2013 in Divorce Suit No 48 of 2012/Z. The Deputy Registrar had dismissed the appellant's application under s 112(4) of the Women's Charter (Cap 353, 2009 Rev Ed) to vary a consent order for the division of matrimonial assets.

2 The orders sought to be varied relate to the division of the matrimonial home, and the apportionment of the sale proceeds in the event of a sale of the home.

3 I heard and dismissed the appeal on 3 March 2014. The appellant has filed an appeal against my decision to the Court of Appeal. I therefore set out the grounds for my decision.

The two draft Orders

4 The respondent wife filed for divorce against the appellant husband on 5 January 2012 and the matter proceeded on an uncontested basis. The divorce application was fixed to be heard on 27 February 2012. Before this hearing, the respondent's solicitors wrote to the appellant on 13 February 2012, enclosing a draft consent order ("the First Draft Order") for the ancillary matters.

5 The terms of the First Draft Order were as follows:

(1) Joint custody of the two (2) children of the marriage namely [N] (f) and [P] (f) shall be granted to the [respondent] and the [appellant]. The [respondent] and the [appellant] shall have care and control of [P] and [N] respectively, with parties having reasonable access to the other child;

(2) The [respondent] and the [appellant] shall maintain the child in his/her care and control;

(3) There shall be no maintenance for the [respondent];

(4) The [appellant] shall within three (3) months of the Final Judgment (Divorce) transfer all his share title and interest in the matrimonial flat at [address redacted] to the [respondent], **upon the [respondent] paying the [appellant] the sum of \$50,000 into the [appellant's] CPF account.** The [respondent] shall bear the cost and expenses of the said transfer;

(5) The [respondent] shall within three (3) months of the Final Judgment (Divorce) transfer all her share title and interest in the property in Belgium to the [appellant] with no cash consideration. The [appellant] shall bear the cost and expenses of the said transfers;

(6) Each party shall bear his own costs; and

(7) There shall be liberty to apply.

[emphasis added]

6 The respondent's solicitors in the same letter also advised the appellant, who was unrepresented at that time, to seek independent legal advice before agreeing to the terms of the First Draft Order. On 16 February 2012, the appellant's present solicitors wrote to the respondent's solicitors to say that they had been appointed to act for the appellant.

7 It is pertinent to note that the appellant did not sign the First Draft Order. According to the respondent, the parties had instead continued to negotiate, for a period of at least four months, up to 27 June 2012. On that date, the respondent's solicitors sent a further draft consent order ("the Second Draft Order") to the appellant's solicitors for the appellant's approval.

8 The terms of the Second Draft Order were as follows:

(1) Joint custody of the two (2) children of the marriage namely [N] (f) and [P] (f) shall be granted to the [respondent] and the [appellant]. The [respondent] and the [appellant] shall have care and control of [P] and [N] respectively, with parties having reasonable access to the other child;

(2) The [respondent] and the [appellant] shall maintain the child in his/her care and control;

(3) There shall be no maintenance for the [respondent];

(4) The [appellant] shall within three (3) months of the Final Judgment (Divorce) transfer all his share title and interest in the matrimonial flat at [address redacted] to the [respondent] **with no cash consideration.** The [respondent] shall bear the cost and expenses of the said transfer;

(5) After the flat is transferred to the [respondent] and in the event of a sale of the flat, the net sale proceeds shall be divided as follows:-

(a) 50% to the [respondent];

(b) 25% to [P]; and

(c) 25% to [N].

(6) In the event that the flat is not sold upon [N] attaining twenty-one (21) years old, then [N] shall move out of the flat within two (2) weeks of attaining twenty-one (21)

years old.

(7) The [respondent] shall within three (3) months of the Final Judgment (Divorce) transfer all her share title and interest in the property in Belgium to the [appellant] with no cash consideration. The [appellant] shall bear the cost and expenses of the said transfers;

(8) Each party shall bear his own costs; and

(9) There shall be liberty to apply.

[emphasis added]

9 On 28 June 2012, the appellant's solicitors approved (without any amendment) the terms of the Second Draft Order and returned it to the respondent's solicitors.

10 On 24 October 2012, a consent order ("the Consent Order") was entered by a District Judge in terms of the Second Draft Order.

This appeal – variation of the Consent Order

11 In the appeal before me the appellant sought to have paragraphs (4) and (5) of the Consent Order varied to read:

(4) The [appellant] shall within three (3) months of the Final Judgment (Divorce) transfer all his share title and interest in the matrimonial flat at [address redacted] to the [respondent] **upon the respondent paying the sum of \$50,000.00 into the appellant's CPF accounts** (sic). The [respondent] shall bear the cost and expenses of the said transfer;

(5) After the flat is transferred to the [respondent] and in the event of a sale of the flat, the net sale proceeds shall be divided as follows:-

(a) **51%** to the [respondent];

(b) **24.5%** to [P]; and

(c) **24.5%** to [N].

[emphasis added]

12 It was the appellant's case that the terms recorded in the Consent Order were not in line with his intended agreement with the respondent, which he said was set out in the First Draft Order instead. He said that when he approved the Second Draft Order, he did so under the impression that its terms were the same as the First Draft Order.

My decision

13 It will be obvious from the words set out in emphasis in the orders set out in [5] and [8] above that the differences between the First Draft Order and the Consent Order lie in the division of the matrimonial home, being a HDB flat (the "Flat"), and the distribution of the sale proceeds in the event of a sale of the Flat.

14 The differences may be summarised as follows:

(a) in paragraph (4) of the First Draft Order, the transfer by the appellant of his interest in the Flat to the respondent is subject to the respondent paying \$50,000 to the appellant's CPF account. In the Consent Order, it is explicitly provided that the transfer of the appellant's interest in the Flat to the respondent shall be for no cash consideration; and

(b) the First Draft Order does not deal with the apportionment of the proceeds of sale in the event that the Flat is sold. Paragraph (5) of the Consent Order requires that the respondent allocate 25% of the proceeds of sale to each of the parties' two daughters.

15 It will also be obvious that the variations sought by the appellant in [11] above, again based on the words set out in emphasis in [11], constitute a hybrid of the terms set out in the First Draft Order and the Consent Order. The appellant is not seeking to replace the Consent Order with the First Draft Order in its entirety.

16 In my view, the appellant's contention that he had approved the Second Draft Order under a mistake was untenable. For a start, he had approved the Second Draft Order with the benefit of legal advice. It would have been plain to any person, let alone one who was legally represented, that the Second Draft Order provided for the transfer of the Flat with "no cash consideration". The fact that he did not sign the First Draft Order also made it improbable that the First Draft Order reflected the true intentions of the parties at that time. In the same vein, the fact that the Second Draft Order was only sent to the appellant's solicitors for approval some four months after the First Draft Order supports the respondent's contention that the parties remained in negotiations after the First Draft Order was sent.

17 Counsel for the appellant, Mr Zaminder Singh Gill ("Mr Gill"), also submitted at the hearing before me that the only difference between the Consent Order and the First Draft Order was that paragraph (4) of the former specified that the Flat was to be transferred "with no cash consideration". This submission is plainly wrong. As I have made clear in [13] and [14] above, the First Draft Order did not provide for the respondent to share with the parties' two daughters the proceeds in the event of a sale of the Flat. The First Draft Order allowed the respondent *to keep the whole of the sale proceeds*. If the appellant was genuine in his position that the First Draft Order represented the true intentions of the parties, then surely the respondent should also be entitled to the whole of the sale proceeds of the Flat. The appellant could not, in the variations that he sought, cherry-pick and rely on some of the terms set out in the First Draft Order while ignoring the rest.

18 At this juncture I would also make the following observation on s 112(4) of the Women's Charter, which confers upon the court power in the following terms:

(4) The court may, at any time it thinks fit, extend, vary, revoke or discharge any order made under this section, and may vary any term or condition upon or subject to which any such order has been made.

Although s 112(4) is framed in wide language, the power that it confers must be exercised judiciously. In *AOO v AON* [2011] 4 SLR 1169, the Court of Appeal held (at [22]) that an absence of full and frank disclosure was a ground for setting aside or varying a consent order but, in light of uncertainty in the case law, declined to identify further grounds for setting aside or varying a consent order. In my judgment, even if mistake (whether unilateral or common) were a ground for variation, the court's discretion under s 112(4) requires consideration of all the circumstances of the case, including the prejudice to both parties of granting (or refusing) the variation, the clean-break principle and the need for finality in divorce proceedings.

19 With these considerations in mind, I was of the view that to grant the variation sought would have been prejudicial to the respondent because, as her counsel, Ms Christina Goh, correctly pointed out, the ancillary matters in the present case were settled on a *global basis*. If the respondent's share in the flat was reduced by \$50,000 in line with the variation proposed by the appellant, then the parties' intention with regard to the orders relating to their other assets (and perhaps even maintenance) would also have been affected. The appellant submitted that the proposed variations would benefit the respondent by attributing to her an additional 1% share in the sale proceeds of the Flat as compared to the Consent Order. However, this was ill-conceived given what I have said at [17] above.

20 Based on the overall division achieved by the Consent Order, I also did not see how the appellant would suffer material prejudice if he was deprived of an additional \$50,000. In this regard, I was also of the view that the Consent Order (as compared to the First Draft Order) was beneficial to the appellant as it provided for his own daughters to get a substantial share of the sale proceeds of the Flat in the event that it was sold.

21 I finally deal with Mr Gill's reliance on passages in *AOO v AON* where the Court of Appeal (at [13]–[17]) made observations to the effect that a court, in scrutinising a consent order, should not be a mere "rubber stamp" and should instead confirm the reality of each party's consent. I do not think *AOO v AON* assists the appellant's case. Even if I accepted that a mistake on the appellant's part could suffice to vitiate the consent between the parties, it did not follow that the Consent Order should be varied or, for that matter, set aside. In *AOO v AON*, the Court of Appeal (at [17]) cited with approval the following passage in *Livesey (formerly Jenkins) v Jenkins* [1985] AC 424 where Lord Brandon held (at 445–446):

I would end with an emphatic word of warning. It is not every failure of full and frank disclosure which would justify a court in setting aside an order of the kind concerned in this appeal. *On the contrary, it will only be in cases when the absence of full and frank disclosure has led to the court making either in contested proceedings or by consent, an order which is substantially different from the order which it would have made if such disclosure had taken place that a case for setting aside can possibly be made good...*

[emphasis added]

22 I was generally surprised by the brevity of Mr Gill's written submissions in this appeal – they comprised four short paragraphs. The appellant in the present case did not allege that the terms of the Consent Order failed to achieve a just and equitable division of the parties' assets or that he would suffer material prejudice if a variation was not granted. At the hearing, I invited Mr Gill to submit on these two grounds, apart from simply arguing that his client had approved the Second Draft Order thinking that its terms were identical to the First Draft Order. He did not have any submissions on these grounds at all.

Conclusion

23 For the reasons set out above, I dismissed the appeal and ordered that the appellant pay the respondent's costs, fixed at \$800. I note that the appellant has filed his notice of appeal in Civil Appeal No 50 of 2014 without obtaining my leave to do so, as seems to be required under Order 6(2) of the Supreme Court of Judicature (Transfer of Matrimonial, Divorce and Guardianship of Infant Proceedings to District Court) Order 2007 (Cap 332, S 672/2007).