

AXW v AXX
[2012] SGHC 121

Case Number : Divorce No 5364 of 2010 (Registrar's Appeal Nos 235 and 236 of 2011)
Decision Date : 05 June 2012
Tribunal/Court : High Court
Coram : Lee Seiu Kin J
Counsel Name(s) : Hui Choon Wai (Wee Swee Teow & Co) for the plaintiff; Soo Poh Huat (Soo Poh Huat & Co) for the defendant.
Parties : AXW — AXX

Family Law – Matrimonial assets – Division

5 June 2012

Lee Seiu Kin J:

1 On 13 December 2011, the district judge in the Family Court (“the DJ”) ordered that the net sale proceeds of the parties’ matrimonial home (after refunding the parties’ CPF accounts and a sum of \$102,848 to the parents of the defendant (“the Husband”)) to be divided 40:60 between the Husband and the plaintiff (“the Wife”) respectively. The DJ also ordered the Husband to pay to the Wife \$1,000 per month for maintenance of their daughter who lives with the Wife. The Husband appealed in Registrar’s Appeal No 235 of 2011 to vary the ratio of division to 50:50. The Wife appealed in Registrar’s Appeal No 236 of 2011, claiming that the DJ was wrong to deduct the sum of \$102,848 and that it should also be divided in the ratio of 40:60. The Wife also sought to increase the amount of maintenance for their daughter to \$1,590 per month.

2 I dismissed both appeals against the order concerning the division of the matrimonial asset and allowed the Wife’s appeal against the maintenance order, increasing the amount of maintenance to \$1,150 per month. In these grounds of decision I will deal only with the appeal concerning the division as it concerns a point that merits clarification.

3 The parties married in 2003. Prior to their marriage, in 2001, they applied for a Housing Development Board (“HDB”) executive condominium (“the Matrimonial Home”). However it was not ready by the time they got married and so they lived initially with the Husband’s parents and brothers in an HDB flat at Bishan Street 23 (“the HDB Flat”). This was a resale flat purchased for \$363,000 in 1998, long before the marriage, in the joint names of the Husband and his mother (“the Mother”). Sometime in 2004, the parties and the Husband’s extended family moved into the Matrimonial Home. The HDB Flat was sold as the Husband had to dispose of it under the HDB ownership requirements. Due to the poor economic conditions at the time of sale, the Husband and the Mother sustained a loss of some \$90,500.

4 The parties’ daughter was born in 2005. Unfortunately, shortly after that, the marriage turned rocky. The parties continued to live together for another five years, along with the Husband’s parents and younger brother (who at one point got married and moved out), but the parties slept in separate bedrooms. It was only in 2010 that these proceedings were commenced.

5 The Wife did not dispute that a sum of \$102,848 was provided by the Husband’s parents to pay

for the purchase of the Matrimonial Home. However she disputed the Husband's claim that this was a loan and relied on the presumption of advancement. The DJ found that it was a loan and set out his reasons in [15]–[35] of his grounds of decision. I need not discuss these in detail save to say that there was evidence that this \$102,848 represented virtually the entirety of the parents' assets and, in such circumstances, it was highly unlikely that the parents would have intended it as a gift to the parties at that stage of their lives. I therefore upheld the DJ's finding that it was an interest-free loan which had to be repaid upon the sale of the Matrimonial Home.

6 The DJ concluded from the evidence that the direct financial contributions of the parties towards the purchase of the Matrimonial Home were roughly equal, taking into account the cash contribution made by the Husband towards the renovations. Both parties did not dispute this finding. The DJ then considered the parties' indirect contributions and, taking a broad brush approach and guided by decisions in comparable cases, he awarded the Wife an additional 10% of the matrimonial asset. This is the bone of contention of the Husband, whose counsel, Mr Soo, pointed out four factors that he claimed the DJ had failed to give sufficient weight to.

7 But before proceeding to the arguments advanced by both sides, it is necessary to examine the exact nature of the division ordered by the DJ. This is the clarification I referred to in [2] and which is the primary objective of these written grounds. The DJ's order affected the cash proceeds in the completion account for the sale of the Matrimonial Home. This is the sale price less cost and less refunds to the parties' respective CPF accounts. The sale price (less cost) was \$857,530.62, out of which \$135,932.75 and \$162,818.88 were refunded to the CPF accounts of the Husband and Wife respectively. This left the cash sum of \$558,778.99. The DJ's order was for \$102,848 to be taken from this sum to repay the Husband's parents, with the remaining sum of \$455,930.99 to be divided in the ratio of 40:60. This meant that the cash received by the Husband and the Wife was \$182,372.40 and \$273,558.59 respectively. What the parties actually got in terms of cash plus CPF refund was as follows: \$318,305.15 to the Husband and \$436,377.47 to the Wife. This totals \$754,682.62 ("the Distributable Amount"), which is also the sale price less cost and less the \$102,848 repaid to the Husband's parents.

8 If the total amounts received by each party in terms of cash plus CPF refunds were divided by the Distributable Amount, one would find that the Husband and the Wife obtained 42.2% and 57.8% of the Distributable Amount respectively. This is slightly different from the 40:60 split that one would have thought the DJ had decided on. The Husband got 2.2% more and the Wife got correspondingly less. The reason for this difference stems from the fact that the DJ ordered the 40:60 division on the proceeds *after* deducting CPF refunds ("Partial Division"), instead of ordering it to be done on the entire proceeds *before* deducting CPF refunds ("Effective Division") and then ordering both parties to refund their own CPF accounts from their respective shares. I term the latter method the Effective Division because that is in fact how the Distributable Amount was split, as a refund to one's CPF account is one's property even though one may only use it on certain terms.

9 A court making an order for division should be aware that the resulting overall division of matrimonial assets produced by the Partial Division method may deviate drastically from that produced by the Effective Division method. This depends on the relative sizes of both parties' CPF refunds and the ratio of division ordered. A simple numerical example would illustrate this point clearly. Take the case where the matrimonial assets for division is \$100, the ratio of division is 60:40 in favour of party A, and party A's and party B's CPF refunds are \$30 and \$10 respectively. Under the Partial Division method, the total CPF refund of \$40 is deducted from the \$100, leaving the balance of \$60 to be divided in the ratio of 60:40. This gives a distribution of the cash sums of \$36 and \$24, and the total of cash plus CPF refunds for party A and party B would be \$66 (\$36+\$30) and \$34 (\$24+\$10) respectively. The parties effectively received 66% and 34% of the assets in a situation where the

ostensible split is 60:40. In contrast, if the Effective Division method was used, the effective split would be 60:40. Under the Effective Division method, a split of 60:40 would first be ordered on the \$100, and party A and party B would receive \$60 and \$40 respectively. Party A and party B would then refund \$30 and \$10 to their own CPF accounts from their shares of \$60 and \$40 respectively. Different combinations would lead to different effective splits and the two methods would lead to exactly the same split only under certain circumstances, eg where the ratio of division is 50:50 and the amounts of CPF refunds are the same.

10 I emphasise that there is nothing in law to preclude the use of the Partial Division method. Pursuant to s 112(1) of the Women's Charter (Cap 353, 2009 Rev Ed), a court is only enjoined to order a division as it thinks just and equitable. However, in making its decision, a court would look to divisions that have been ordered in similar cases. Such comparisons are only meaningful if the divisions considered relate to the Effective Division. For this reason alone, if a court is making a division based on a single division of the total matrimonial assets method and is relying for guidance on divisions done in comparable situations, then it is important to use the Effective Division method.

11 In the present case, the effective split was 42.2:57.8 and not 40:60, which is the first impression given by the DJ's order. I turn now to consider whether this is an appropriate award. The first factor highlighted by Mr Soo was that the marriage was short as it essentially lasted only two years, and there was only one child. Mr Soo referred to *Ong Boon Huat Samuel v Chan Mei Lan Kristine* [2007] 2 SLR(R) 729 ("*Ong Boon Huat Samuel*") in which the Court of Appeal said (at [28]) that in "a short and childless marriage, the division of matrimonial assets will usually be in accordance with the parties' direct financial contributions as non-financial contributions will be minimal". In that case the marriage effectively lasted only 19 months although the decree nisi was only granted after three years of marriage as the wife was unsuccessful in obtaining leave under s 94 of the Women's Charter (Cap 353, 1997 Rev Ed) to commence divorce proceedings before the expiration of three years from the date of marriage. Mr Soo submitted that although there was a child in the present case, the Wife's indirect contribution did not justify the additional 10% (actually 7.8%) awarded to the Wife. Counsel for the Wife, Miss Hui, pointed out that the Wife stuck with the family for some seven years before divorce proceedings were commenced.

12 The second factor was that the Husband and Mother had suffered a loss on the sale of the HDB Flat in order to purchase the Matrimonial Home. Mr Soo submitted that although the loss was not attributable to the Wife, it was nevertheless one factor to be considered in the Husband's favour as his indirect contribution. Miss Hui submitted that the court cannot take this into consideration as it was not one of the factors listed in s 112(2) of the Women's Charter. I did not agree with this contention. That subsection provides as follows:

(2) It shall be the duty of the court in deciding whether to exercise its powers under subsection (1) and, if so, in what manner, to have regard *to all the circumstances of the case*, including the following matters:

- (a) the extent of the contributions made by each party in money, property or work towards acquiring, improving or maintaining the matrimonial assets;
- (b) any debt owing or obligation incurred or undertaken by either party for their joint benefit or for the benefit of any child of the marriage;
- (c) the needs of the children (if any) of the marriage;
- (d) the extent of the contributions made by each party to the welfare of the family,

including looking after the home or caring for the family or any aged or infirm relative or dependant of either party;

(e) any agreement between the parties with respect to the ownership and division of the matrimonial assets made in contemplation of divorce;

(f) any period of rent-free occupation or other benefit enjoyed by one party in the matrimonial home to the exclusion of the other party;

(g) the giving of assistance or support by one party to the other party (whether or not of a material kind), including the giving of assistance or support which aids the other party in the carrying on of his or her occupation or business; and

(h) the matters referred to in section 114(1) so far as they are relevant.

[emphasis added]

13 The operative words in s 112(2) of the Women's Charter require the court to have regard to "all the circumstances of the case" and therefore the list of factors is not closed. The factors listed in subsections (a) to (h) are those that the court must consider. Even then, the court may attach such weight to each factor as is appropriate in the circumstances of the case. Therefore, the fact that the Husband and his Mother had sustained a loss is a factor that the court may take into consideration. The real issue is what weight ought to be given to this factor. In my view, this factor should be given very little weight.

14 The third factor related to an email sent by the Wife to the Husband in which she agreed to an equal division of the sale proceeds after repayment of the loan extended by the Husband's parents. Mr Soo claimed that this was an agreement in contemplation of divorce under s 112(2)(e). Miss Hui pointed out that this email was sent by the Wife at a time when she was not legally advised and eager to get the divorce settled, and that it was not an agreement but was instead part of the negotiation process. I agreed with the DJ that this factor did not carry much weight.

15 The fourth factor was that the parties' indirect contributions were about the same. Mr Soo referred to [42] of the DJ's grounds of decision where the DJ said as follows:

In their affidavits, each party made claims about the extent of their own contributions and denied various contributions by the opposing party in order to show how much they had contributed and how little the other party had contributed. Neither party was, however, able to prove that their contributions far outstripped those of the other party and that the other party did little of value during the marriage. In all likelihood, both parties had probably made indirect contributions to the marriage.

16 However the paragraph cited above relates to the parties' indirect contributions pertaining to the upbringing of the child (it must also be noted that the DJ opined in the next paragraph that at least in more recent times, the Wife was more involved in the care of the child than the Husband, although Mr Soo pointed out that the Husband claimed that the Wife restricted his access to the child). What the DJ left unsaid was the fact that it was the Wife who had borne the child and this was an important factor in determining the extent of the Wife's indirect contribution. Indeed this was implicitly recognised in the expression "short and childless marriage" in *Ong Boon Huat Samuel*.

17 While the four factors raised by Mr Soo might have been overlooked (or insufficiently ventilated)

by the DJ in his grounds of decision, the 7.8% awarded for the Wife's indirect contribution, even if it might have been excessive, was not so high as to be beyond the range of discretion that an appellate court would concede to the court below. In other words, even if I would have awarded a lower figure had I heard the case at first instance, the 7.8% awarded by the DJ was not so far off as to justify interference on appeal. For that reason, I upheld the DJ's order in relation to the division of the matrimonial asset.

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