ATTIAS v. ATTIAS and McHARD

SUPREME COURT (Pizzarello, A.J.): January 24th, 1996

Family Law—financial provision—post-nuptial settlement—purchase of matrimonial home as joint tenants by husband and wife may be post-nuptial settlement for purposes of Matrimonial Causes Ordinance, s.42 if intention shown to benefit each other as spouses

The petitioner in divorce proceedings applied for ancillary relief.

The parties purchased the lease on an unfurnished flat in Gibraltar in their joint names and used some of the proceeds from the sale of their home in England to refurbish and furnish it. The financing of the purchase itself involved a complicated scheme of mortgages and endowment policies.

Pursuant to her petition for divorce the wife applied for the transfer of the husband's interest in the flat to her and the payment to her by him of a lump sum of £10,000.

She submitted that (a) the court had a discretion to order the transfer of the husband's share in the flat to her on the basis that its purchase constituted a post-nuptial settlement of the property by the parties as joint tenants on trust for themselves, which the court had power to vary under the Matrimonial Causes Ordinance, s.42; and (b) since the court had found at an earlier hearing that her husband had received a capital sum of £20,000, there was no reason why an order should not be made for the transfer of one-half of it to her.

The husband submitted in reply that (a) the mere conveyance of the flat into their joint names was insufficient to give rise to a settlement within the meaning of s.42 of the Matrimonial Causes Ordinance, since no such intention had been evinced by the transaction, and no trustees had been appointed; and (b) it would be unfair for the court to order the transfer to his wife of both a half share in the property and a lump sum of £10,000, since it was possible that the sale of the flat would not realize enough funds to pay off the various mortgages on the property.

Held, ordering that the flat be sold, the proceeds divided between the parties, and the husband pay the wife a lump sum:

(1) Since the wife had shown that the parties intended to make provision for themselves, otherwise than by way of gift, with reference to their married state, the conveyance of the flat into their joint names constituted a post-nuptial settlement within the meaning of s.42 of the Matrimonial Causes Ordinance. Since they were both legal and beneficial owners of the lease, there was no need to appoint trustees to hold the property for them. Accordingly, the court was at liberty under s.42 to

make an order for a transfer of the whole or part of the settled property to either of the parties, but in this case it would leave the property in joint ownership with an order that it be sold and the proceeds divided between the parties (page 208, line 20 – page 209, line 4; page 209, lines 17–20).

(2) Since it was possible that the sale of the flat would produce insufficient funds to pay off the various mortgages, the husband would be ordered to pay the sum of £7,500 to the wife. The wife would be given a charge over the husband's half of the property to the extent of this lump sum until payment was made (page 209, lines 20–36).

Cases cited:

(1) *Brown* v. *Brown*, [1959] P. 86; [1959] 2 All E.R. 266.
(2) *Cook* v. *Cook*, [1962] P. 235; [1962] 2 All E.R. 811.
(3) *G* v. *G*, [1973] 2 All E.R. 1187.
(4) *Parrington* v. *Parrington*, [1951] 2 All E.R. 916; [1951] 2 T.L.R. 918.
(5) *Prinsep* v. *Prinsep*, [1929] P. 225; (1929), 141 L.T. 220.
(6) *Smith* v. *Smith*, [1945] 1 All E.R. 584; (1945), 173 L.T. 8.
(7) *Thompson* v. *Thompson*, [1986] F. 38; [1985] 2 All E.R. 243.

Legislation construed:

Matrimonial Causes Ordinance (1984 Edition), s.33(2): The relevant terms of this sub-section are set out at page 209, lines 7–13.

s.42: "The court may after pronouncing a decree for divorce . . . enquire into the existence of ante-nuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree, and may make orders with reference to the application of the whole or any part of the property settled either for the benefit of the children of the marriage or the parties to the marriage, as the court thinks fit, and the court may exercise the powers conferred by this section not withstanding that there are no children of the marriage."

Ms. J.A. Evans for the petitioner;
E.C. Ellul for the respondent.

PIZZARELLO, A.J.: Mr. and Mrs. Attias bought their flat at 8 Sydney Court, Harbour Views, on a 50/50 basis. There was a complex arrangement entered into under which there were endowment policies, supplemental mortgages with the Government, and a whole host of things which had to be done before the property was leased to them. I am told by counsel that the parties had previously had a matrimonial home in England which they sold, and from the proceeds of that sale, it seems, they spent about £12,000 on the refurbishment of the property and the purchase of furniture. It has to be remembered that the premises at 8 Sydney Court, when leased, were given as a shell and the tenants had to furnish and decorate them.

Ms. Evans for the petitioner is asking that the court make an order under s.42 of the Matrimonial Causes Ordinance as to the application of settled property and submits that the property—a leasehold of 8 Sydney Court, Harbour Views—is held under a post-nuptial settlement within the meaning of s.42, and also that a lump sum payment be made, since Harwood, A.J. was satisfied in October last year, after hearing the parties, that Mr. Attias had received £20,000 just a year before and that he still retained it.

Ms. Evans refers to these proposals as a property adjustment order in connection with divorce proceedings but Mr. Ellul, quite rightly I think, points out that the question of property adjustment orders comes under the provisions of s.24 of the Matrimonial Causes Act 1973 and, therefore, what Ms. Evans is asking for cannot be a property adjustment order under the Matrimonial Causes Ordinance. Nevertheless, Ms. Evans makes the point that the court has power, under s.42 of the Matrimonial Causes Ordinance, to do what she is asking. She submits that the lease, which is in both their names, was granted to both of them jointly and is held jointly for their beneficial use on trust for sale and that this automatically makes the arrangement a settlement under the provisions of s.42.

Ms. Evans refers to Duckworth, 1 *Matrimonial Property & Finance*, 4th ed., at 207–211 (1991) and the notes to s.25 of the English Matrimonial Causes Act 1950 at 29 *Halsbury's Statutes of England*, 2nd ed., at 412. I have read the cases, namely, *Prinsep* v. *Prinsep* (5), *Smith* v. *Smith* (6), *Parrington* v. *Parrington* (4), *Brown* v. *Brown* (1), *Cook* v. *Cook* (2), *G* v. *G* (3), and *Thompson* v. *Thompson* (7). The purport of these, as assessed by the learned editors of *Halsbury*, is that the judgments in these cases show that—

> "a wider meaning has been given to the word 'settlement' than it ordinarily connotes in connection with conveyancing; it is extended to include any provision (other than an absolute gift) made for the benefit of the parties to the marriage, either by the parties or one of them, or by a third party."

I believe it is clear from a perusal of those cases that the parties can make the settlement on themselves, there being no need to provide for trustees of the settlement. They are themselves the trustees.

I am not persuaded that a conveyance of itself creates a settlement, even though it is true to say that the spouses hold beneficially for their own use on trust for sale, as they are joint tenants. But one has to look at the circumstances surrounding each case in order to come to a conclusion whether, in the state of affairs which has arisen, the conveyance gives rise to a settlement in respect of the property.

I have come to the conclusion that in this case, the circumstances which surround the purchase of the property are sufficient to raise the transaction to the status of a settlement within the meaning of s.42 and therefore the court can make such order regarding the whole or any part

of the property settled as it thinks fit. It is therefore possible, in my view, for the court to make the order that Ms. Evans seeks, namely, that the respondent's half in the property should be transferred to the petitioner and that she can stay in the house or sell it and keep the proceeds.

Ms. Evans also asks for a lump sum order. It is quite clear under s.33(2) of the Matrimonial Causes Ordinance that—

> "on pronouncing a decree *nisi* for divorce . . . or at any time thereafter . . . the court may, if it thinks fit, order that the husband shall, to the satisfaction of the court, secure to the wife such gross sum of money or annual sum of money for any term, not exceeding her life, as, having regard to her fortune, if any, to the ability of her husband and to the conduct of the parties, the court may deem to be reasonable."

I think that under this provision I can order the respondent to pay to the petitioner a lump sum payment of an amount which I have quantified, at the commencement of hearing the ancillary matters, to be £10,000.

However, having reflected further and taking into consideration all the circumstances of the case, it does not seem to me to be fair that I should make an order for a lump sum payment and also to give the petitioner the respondent's half in the property. I am told by counsel and both agree that there is what is called a negative equity in the property, *i.e.* it will probably be sold for a lesser amount than was paid for it. But Ms. Evans assures me that in her experience, it is possible that the property might yet be sold at a price which takes into account the expenditure which has been made on it (one has to remember that the property was bought as a shell), so therefore there is some likelihood that it can be sold for enough money to raise the amount of money that was put into it initially or at least some part of it, and she considers that this particular property would be sold and, after expenses, leave a net £6,000. If the property remains in their joint names both would share that amount. If I transfer the respondent's half of the property to the petitioner she will get £6,000, roughly speaking.

It is my view that the order I should make is (a) that the respondent pay to the petitioner a lump sum of £7,500 and (b) that the property be sold and the proceeds shared between the two parties; the petitioner to have a charge over the respondent's half until the lump sum payment is met. That is my thinking on this matter at the moment, subject to hearing counsel. The furniture in the house is to be the wife's, and the furniture taken by the husband is to remain his.

Orders accordingly.
