

## SHAMSHUL NISHA

v.

ABDUL MUNIF

[HIGH COURT, 1999 (Shameem J) 13 October]

Civil Jurisdiction

*Equity- constructive trust- whether contributions in cash and in kind entitle the contributor to a share in the ownership of the family home.*

A mother and son shared the family home of which the son was the registered owner. The mother claimed that she had contributed to the home by donating building materials and furnishings and by helping with the mortgage. She claimed a half share in the property. The High Court HELD: that in the circumstances of the case it was clear that the parties had intended to share the property equally. Accordingly a constructive trust to that effect was imposed on the son.

Cases cited:

*Banister v. Banister* [1948] 2 All ER 133

*Baumgartner* (1988) 62 AWR 29

*Doohan v. Nelson* (1973) 2 NSWLR 320

*Gissing v. Gissing* [1971] AC 886

*Grant v. Edward* [1986] 2 All ER 426

*Hussey v. Palmer* [1972] 1 WLR 1286

*Morris v. Morris* (1982) 1 NSWLR 62

*Sheila Maharaj v. Jai Chand* [1986] 1 AC 898

Action for declaratory judgment in the High Court.

*V. Maharaj* for Plaintiff

Defendant In Person

**Shameem J:**

On 27th November 1998 Shamsul Nisha f/n Abdul Karim (the Plaintiff) filed originating summons in the High Court seeking an order that one half share in Housing Lease N0.328414 (Lot 18 on DP 6921) be transferred to her by Abdul Munif f/n Abdul Rasheed (the Defendant). The order was sought on the ground that the Plaintiff contributed substantially to the purchase of the said property conferring constructive and/or resulting trust of one half share in favour of the Plaintiff.

The application was supported by the affidavit of Shamsul Nisha.

On 6th April 1999, after several attempts at reconciliation between the parties, the Defendant filed an affidavit in reply.

A The matter was set for hearing on 15th July 1999. It continued on 4th October 1999 and 6th October 1999. The Plaintiff called Asesela Ravudi, Legal Officer, Housing Authority, (PW1) Shamshul Nisha (PW2) and Abdul Jalil (PW3). The Defendant gave evidence himself and called Selina Tuiloma from the Housing Authority (DW2) Asesela Ravuni (DW3) and Shareen Nisha (DW4).

B On hearing the evidence, it was apparent that the areas of dispute were limited. The Defendant is the Plaintiff's eldest son. She lived formerly in the Muslim League Estate as a squatter but later moved with her family of four children to Lot 18 Moci Place, Nadawa, the Housing Authority lease which is the subject of the dispute. In 1992, an application for loan assistance was made to the Housing Authority in the name of Abdul Munif. The Housing Authority offered assistance and lease over the property to the Defendant. He accepted on 12th March 1997. The Housing Authority file referred to in the evidence of Asesela Ravudi, shows that on 8th June 1992, the Plaintiff had made an application for housing assistance. However, by that time the contract with Abdul Munif had been concluded.

C The proprietor of the lease thereafter was the Defendant. In 1992, the Defendant was 24 years old. The Lease was issued to him on 11th March 1992.

D In September 1992, the Defendant agreed to transfer the whole of the property to his mother. Whilst his reason for so agreeing is in dispute, it is clear that some attempt was made to effect the transfer. On 25th September 1992, (Annexure D of the Plaintiff's affidavit) the Housing Authority wrote to the Defendant in the following terms:

E "RE : TRANSFER OF LOT 18 ON DP 5921 NADAWA."

We refer to your application dated 8/6/92 and the Housing Authority are pleased to inform you of our consent to the transfer of the above property to Mr. Shamshul Nisha f/n Abdul Karim subject to the following conditions' :

- F (a) That a sum of full balance owing on the account concerned to the end of three calendar month period hereof that is to 8/12/92 be paid to us in full not later than the expiry of such 3 calendar month period as stipulated above ....
- G (b) That this transaction is registered with the Registrar of Titles or Registrar of Deeds within a period of 3 calendar months, failing which the consent as hereby given shall be deemed null, void and of no effect..."

A further letter was sent to the Plaintiff on 30th October 1992 informing her that if she wished to seek financial assistance from the Housing Authority she would need to provide information and fill in the appropriate forms (Annexure D-1 to Shamshul Nisha's affidavit).

Those conditions were not complied with, and the property was not transferred to the Plaintiff. It remains in the name of the Defendant. In 1998, the Plaintiff left the house and went to live with her married daughter.

A

In her evidence before the court, the Plaintiff said that she had contributed to the repayments on the housing loan on the lease, to the Housing Authority. Although at paragraph 13 of her affidavit, she had said that only she had made regular payments to the Housing Authority between 1992 and 1996, in her evidence she agreed that the Defendant also contributed to the repayment. She was unable to say with any certainty how much she had contributed but said in re-examination that she had made all payments in respect of the receipts for \$50 and \$100. She always paid cash. The total amount of she said she paid was approximately \$4000.

B

The balance remaining on the loan is \$8,342. The original loan amount was \$6473.50 with interest at 11.5% per annum.

C

The Plaintiff said in evidence that she did not know that she had no registered share in the property until 1996. She then asked the Defendant about it, and the Defendant agreed to transfer a half-share of the property to her. She said that he filled a form (Annexure D) agreeing to the transfer, and that she showed the form to her solicitors. When the Defendant discovered that she had consulted solicitors he tore the form up. However, the Plaintiff had kept a photocopy which is annexed to her affidavit.

D

The Defendant said in evidence that the Plaintiff had contributed nothing to the property except for \$200 worth of concrete blocks and the cost of laying a carpet in the house. He also agreed that the Plaintiff had bought furniture for the house and had generally helped to run and maintain the house. He said that he had made all repayments from his earnings as a signwriter and that he had earned his own living since he left school. He denied agreeing to transfer half-share of the property to his mother in 1997 and said that his earlier attempts to transfer were to escape the consequences of legal action brought against him by the Plaintiff's brother.

E

He denied forcing his mother to leave the house by assaulting her in 1998, and said that he was willing to contribute to her expenses if she agreed that she had told lies in court.

F

Shareen Nisha, the Defendant's wife gave evidence of the bad relationship between her husband and her mother-in-law and said that the Defendant had never assaulted his mother.

G

It is clear having heard all the evidence that the Plaintiff did make contributions to the property, not only directly in the buying of building blocks, cement and timber, and in the paying of some instalments, but also indirectly in contributing towards the upkeep of the house and the family. Between 1992 and 1998 the Plaintiff, the Defendant and one other sibling lived in the house, and were supported

A by the earnings of the Plaintiff and the Defendant. "The Application for Housing Assistance" form (Annexure C) shows the Defendant's weekly wage to be \$100, the Plaintiff's weekly wage to be \$28.96 and the younger son Abdul Farook's, to be \$25.

I accept the evidence of Shamshul Nisha that she made some contributions to the house and repayments, and I note that Abdul Jalil confirms her purchase of blocks for \$1000.

B The question is whether the effect of her contributions creates a constructive trust in the Plaintiff's favour.

The leading local case on the creation of equitable trusts in property is Sheila Maharaj v. Jai Chand [1986] 1AC 898 a decision of the Privy Council reversing the judgment of the Fiji Court of Appeal.

C In that case the parties had lived together for twelve years in a *de facto* relationship. They had one child of their own. The Plaintiff had obtained land from the Housing Authority and had made all contributions for the financing of the home. The Defendant used her earnings to support the family.

D The Plaintiff sought vacant possession of the property. The Defendant claimed an equitable trust and estoppel. At page 125 of the Judgment, the Privy Council said:

E "The authority now classic is the speech of Lord Diplock in Gissing v. Gissing [1971] AC 886, 902 - 911, and later reviewed in the judgments of the Court of Appeal in Grant v. Edward [1986] 2 All ER 426, which concerned an unmarried couple. In such cases a contract or an express trust as at the time of the acquisition may not be established, because of lack of certainty or consideration or non-compliance with statutory requirements of writing; but a constructive trust may be established by an inferred common intention subsequently acted upon by the making of contributions or other action to the detriment of the claimant party. And it has been held that, in the absence of evidence to the contrary, the right inference is that the claimant acted in the belief that she (or he) would have an interest in the house and not merely out of love and affection."

G The court held that as a result of the trust the Defendant had the right to continue to live in the house permanently with her children. However her right was "a personal right not amounting to a property interest diminishing the rights of the plaintiff's lessor and mortgagee."

This application goes beyond an application to acknowledge a right not to be evicted, and a right to possession. This is an application for an order to transfer half share in the property to the Plaintiff.

The purpose of the equitable doctrine of constructive trusts is to prevent the person with the legal interest in that property from behaving unconscionably. A presumption of advancement exists where the legal owner is related to the purported equitable owner, although of course this presumption may be rebutted, as it often is in family property disputes. In the early case of Bannister v. Bannister [1948] 2 All ER 133, the plaintiff had sold a house at a low price to the defendant on terms that she be permitted to live there rent free so long as she liked. The property was then transferred to the defendant. It was held that the defendant held the property on trust during the life of the plaintiff to allow her to live in it as long as she liked. The Court of Appeal held that in equity a constructive trust existed to prevent a legal owner from defeating a beneficial interest belonging to another.

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B

In Hussey v. Palmer [1972] 1 WLR 1286 the plaintiff had paid for an extension to the defendant's home on a promise by the defendant that she could live there as long as she liked. She left and claimed reimbursement to the value of her contributions.

C

Lord Denning M.R. and Phillimore LJ held that the defendant held the property upon a constructive trust for the plaintiff of a beneficial interest proportional to the amount of her payment. Lord Denning said of the doctrine of constructive trusts at p.1290.:

D

"It is a liberal process, founded upon large principles of equity, to be applied in cases where the legal owner cannot conscientiously keep the property for himself alone, but ought to allow another to have the property or the benefit of it or a share in it. The trust may arise at the outset when the property is acquired, or later on as the circumstances may require. It is an equitable remedy by which the court can enable an aggrieved party to obtain restitution."

E

In Gissing v. Gissing [1971] AC 886 Lord Diplock said at p.905:

"A resulting, implied or constructive trust - and it is unnecessary for present purposes to distinguish between these three classes of trust - is created by a transaction between the trustee and the *cestui que trust* with the acquisition by the trustee of a legal estate in land whenever the trustee has so conducted himself that it would be unequitable to allow him to deny to the *cestui que trust* a beneficial interest in the land acquired. And he will be held so to have conducted himself if by his words or conduct he has induced the *cestui que trust* to act to his own detriment in the reasonable belief that by so acting he was acquiring a beneficial interest in the land."

F

G

The principle is not confined to interests in the matrimonial home. The court should look for evidence of the common intention of the parties when the property was acquired. A common intention can be construed where both persons

contributed to the property in money work and labour (Doohan v Nelson (1973) 2 NSWLR 320).

- A No such intention was found in Morris v Morris (1982) 1 NSWLR 62 where a plaintiff, living with his son and daughter-in-law, spent \$28,000 building an extension to the defendant's house. It was held that there was no intention to create a trust but that wider equitable principles created an equitable charge over the property in the sum of \$28,000 with interest.
- B Nor was such common intention found by High Court of Australia in Baumgartner v Baumgartner (1988) 62 AWR 29 where a woman in a de facto relationship gave her partner her earnings to meet household expenses including mortgage payments, thus allowing the loan amount to be more rapidly reduced than would otherwise be the case. However a constructive trust was nevertheless imposed to prevent one partner from unconscionably retaining the benefit of the other's contributions (Mason C.J, Wilson and Deane JJ).
- C

There is ample evidence in the present case to construe the common intention of the parties. Although the defendant is the plaintiff's son, and is the legal owner, I accept the plaintiff's evidence that she thought she was so co-owner, and on that basis contributed in labour and money to the construction and upkeep of the house, and to periodic payments to the Housing Authority in respect of the loan. Furthermore, I accept that the defendant knew why the plaintiff was making such contributions and agreed that half of the property should be transferred to her in 1997.

- D
- E It is clear that it was the common intention of the parties that the plaintiff was not making contributions as an unconditional gift, but was investing in the future of her family, including her younger son. The presumption of advancement has therefore been rebutted by the evidence.

- F Consequently, the principles of constructive trusts apply here to protect her interests. The question is to what effect? The plaintiff is unable to put an exact monetary value to her contributions direct and indirect. She no longer lives in the house, and the defendant continues to repay instalments to the Housing Authority. She simply asks for a half share. It is not clear how much of her weekly wage the plaintiff spent on the home and on family expenses between 1992 and 1996. However I accept that it was the intention of the parties in 1997, to share the properties in equal half shares. I accept that the defendant signed a consent to transfer form intending to give effect to this intention but later resiled from the agreement when he found that the plaintiff had consulted her solicitors.
- G

I therefore infer from these circumstances that the parties had intended to share the property equally, that the plaintiff believed that she was a co-owner, that she made contributions on that basis, and that she is entitled to a beneficial interest in half-share of the property.

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The defendant cannot now, in all conscience, insist that the plaintiff live elsewhere, nor can he deny, her beneficial interest in the property.

I therefore find order that the defendant holds a half share in the property at 18 Moci Place Nadawa on trust for the plaintiff, that he must either allow her to live in the house for as long she wishes or with her consent, must pay her a half-share on the market value of the house.

The defendant must pay the plaintiff the costs of this action to be taxed if not agreed.

*(Judgment for the Plaintiff.)*

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