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1. G Nagarajan a/l Ganesan & Anor v Suthakari a/p Renu [2020] MLJU 2255

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G Nagarajan a/l Ganesan & Anor v Suthakari a/p Renu [2020] MLJU 2255

Malayan Law Journal Unreported

HIGH COURT (MUAR)

AWG ARMADAJAYA AWG MAHMUD JC

CIVIL APPEAL NO JB-32NCVC-182-07 OF 2018

16 December 2020

Shanker Sivapragasam (Lim Phang Kiat with him) (K Siladass & Partners) for the applicants.
A Krishnakumar (Kelvin Samuel Pillai with him) (Arnold Andrew & Co) for the respondent.

Awg Armadajaya Awg Mahmud JC:

GROUNDS OF JUDGMENT[1] INTRODUCTION

This is an application for Declaratory Orders pursuant to Enclosure 60 by the Respondent for the following:

a. A Declaration that a property that is being held under the Title HS(D) 5608, Lot. 8199 Kluang Sub District, in the State of Johore and has the address no.78 Jalan Koko, Lian Seng Garden, 86000 Kluang, Johore as the matrimonial home of the Deceased and the Respondent.

b. A Declaration that the Respondent has ½ share of the property which is the matrimonial home of the Deceased and the Respondent.

c. A Declaration that the District Land and Mineral Office to enter the name of the Respondent as the owner of ½ share of the property.

d. The cost of the application is to be borne by the estate.

e. Any other Order that the Court deems fit and just.

[2]THE CAUSE PAPERS The Cause Papers are as follows:

a. Notice of Application dated 5 March 2020 by the Respondent.

b. Affidavit-in-support by the Respondent dated 5 March 2020.

c. Affidavit-in-Reply by the 1st Applicant date 2 June 2020.

d. Affidavit-in-Reply by the Respondent dated 26 June 2020.

e. Affidavit-in-Reply (II) by the 1st applicant dated 22 July 2020.

f. Additional Affidavit by Vija Kumaran a/l M Muniandi dated 3 August 2020.

g. Affidavit Affidavit-in-Reply (II) by the Respondent dated 17 August 2020.

h. Affidavit-in-Reply (III) by the Respondent dated 17 August 2020.

i. Affidavit-in-Reply (IV) by the Respondent dated 17 August 2020.

[3] BACKGROUND FACTS

The Applicants are the brother and sister-in-law of the Deceased Ananthan a/l Ganesan (NRIC 660426-01-6071).

The impugned property that is being held under the Title HS(D) 5608, Lot. 8199 Kluang Sub District, in the State of Johore and has the address no. 78 Jalan Koko, Lian Seng Garden, 86000 Kluang, Johore, was bought by the Deceased's father in 1979 and subsequently transferred to the Deceased's mother Rajaletchumy Ganesan d/o Viruthchlam and the Deceased's elder brother Soundirapandian a/l Ganesan in 1980.

At the time the Deceased's father earned a living through his restaurant business and he paid the instalments from the profits of the restaurant business.

In 1984, the Deceased's father requested Soundirapandian a/l Ganesan to pay off the debts in the Deceased's father name. Soundirapandian a/l Ganesan took a refinancing loan from Bank Bumiputra Malaysia Berhad and paid off his father's debt.

When the Deceased's father died on 1986, Soundirapandian a/l Ganesan paid the loan instalments from the profit of the restaurant business.

Later in 1990, the Deceased took up a job in Singapore and paid off the remainder of the loan from his salary. The loan was fully paid in 1996 by the Deceased and his siblings decided that the property should be transferred to him totally as he paid off most parts of the loan. Further he took care of his mother and younger sister, Shanti a/p Ganesan.

The Deceased married the Respondent on 12 October 1998 and the marriage produces 3 children (one boy and 2 girls).

However, the Respondent filed for Judicial Separation in the Muar High Court on 30 March 2016 and the Deceased and the Respondent were granted a Decree of Judicial Separation vide Petition No. 33-76-06/2015. The Deceased was ordered to pay maintenance to the Respondent and the Children. No order in respect of any matrimonial property was ever given.

The Deceased passed away on 24 May 2018 in Kluang, Johore leaving a Last Will and Testament ("the said Will") prepared by Messrs Gerard Lazarus & Associates, Advocates and Solicitors firm on 15 December 2017.

Pursuant to the said Will, the Applicants were named as the Joint Executors and Trustees of the Deceased's Estate ("the Estate"). The Beneficiaries named in the said Will are the 3 Children of the Marriage only.

The application to obtain the Grant of Probate was filed at the Muar High Court on 26 July 2018. The Respondent applied to intervene and was granted the Order to intervene in the action, on 19 February 2019. This application pursuant to Enclosure 60 was filed on 5 March 2020.

[4] THE ISSUES IN THIS APPLICATION PURSUANT TO ENCLOSURE 60

The issues are:

i. Whether the said property that is being held under the Title HS(D) 5608, Lot. 8199 Kluang Sub District, in the State of Johore and has the address no.78 Jalan Koko, Lian Seng Garden, 86000 Kluang, Johore, is a matrimonial property.
ii. Whether the Law Reform (Marriage and Divorce) Act 1976 override the Probate and Administration Act 1959 and the Wills Act 1959.
iii. Whether a wife under the Decree of Judicial Separation is entitled to the property of a Deceased husband when there is a valid Last Will and Testament.
iv. Whether Section 76 Law Reform (Marriage and Divorce) Act 1976 applies.
v. Whether the Respondent succeeded in proving her claim to the impugned property.

I shall address the issues accordingly

i. Whether the said property that is being held under the Title HS(D) 5608, Lot. 8199 Kluang Sub District, in the State of Johore and has the address no.78 Jalan Koko, Lian Seng Garden, 86000 Kluang, Johore, is **a matrimonial property**

It is in evidence of the following:

a. The Applicants are the brother and sister-in-law of the Deceased Ananthan a/l Ganesan (NRIC 660426-01-6071).

b. The impugned property that is being held under the Title HS(D) 5608, Lot. 8199 Kluang Sub District, in the State of Johore and has the address no.78 Jalan Koko, Lian Seng Garden, 86000 Kluang, Johore, was bought by the Deceased's father in 1979.

c. It was subsequently transferred to the Deceased's mother Rajaletchumy Ganesan d/o Viruthchlam and the Deceased's elder brother Soundirapandian a/l Ganesan in 1980.

d. At the time the Deceased's father earned a living through his restaurant business and he paid the instalments from the profits of the restaurant business.

e. In 1984, the Deceased's father requested Soundirapandian a/l Ganesan to pay off the debts in the Deceased's father name. Soundirapandian a/l Ganesan took a refinancing loan from Bank Bumiputra Malaysia Berhad and paid off his father's debt.

f. When the Deceased's father died on 1986, Soundirapandian a/l Ganesan paid the loan instalments from the profit of the restaurant business.

g. Later in 1990, Deceased took up a job in Singapore and paid off the remainder of the loan from his salary. The loan was fully paid in 1996 by the Deceased and his siblings decided that the property should be transfer to him totally as he paid off most parts of the loan. Further he took care of his mother and younger sister, Shanti a/p Ganesan.

h. The Deceased married the Respondent on 12 October 1998 and the marriage produces 3 children (one boy and 2 girls).

i. However, the Respondent filed for Judicial Separation in the Muar High Court on 30 March 2016 and the Deceased and the Respondent were granted a Decree of Judicial Separation vide Petition No. 33-76-06/2015. The Deceased was ordered to pay maintenance to the Respondent and the Children. No order in respect of any matrimonial property was ever given.

j. The Deceased passed away on 24 May 2018 in Kluang, Johore leaving a Last Will and Testament ("the said Will") prepared by Messrs Gerard Lazarus & Associates, Advocates and Solicitors firm on 15 December 2017.

k. Pursuant to the said Will, the Applicants were names as the Joint Executors and Trustees of his Estate. The Beneficiaries named in the said Will are the 3 Children of the Marriage only.

l. The application to obtain the Grant of Probate was filed at the Muar High Court on 26 July 2018.

m. The Respondent applied to intervene and was granted the Order on 19 February 2019.

According to an article **"DIVISION OF MATRIMONIAL PROPERTY IN MALAYSIA: THE LEGAL HISTORICAL PERSPECTIVE. SEJARAH:"** by IBRAHIM, Norliah; ABDUL HAK, Nora. Journal of the Department of History, [S.I.], v. 15, n. 15, Nov. 2017. ISSN 2756-8253., **"Matrimonial property under the Malaysian family law refers to the property that is jointly** acquired **by** husband and wife during the marriage."

Duhaime's Law Dictionary defined **"matrimonial property"** as **"Property owned by one or both of two persons who are married to one another**

which, upon the application of one of the spouses to a court, is subject to division between them."

The Nova Scotia Matrimonial Property Act states, in the preamble to the statute:

> *"WHEREAS it is desirable to encourage and strengthen the role of the family in society;*
>
> ***"AND WHEREAS for that purpose it is necessary to recognize the contribution made to a marriage by each spouse;***
>
> ***"AND WHEREAS in support of such recognition it is necessary to provide in law for the orderly and equitable settlement of the affairs of the spouses upon the termination of a marriage relationship;***

"AND WHEREAS it is necessary to provide for mutual obligations in family relationships including the responsibility of parents for their children;

"AND WHEREAS it is desirable to recognize that childcare, household management and financial support are the joint responsibilities of the spouses ***and that there is a joint contribution by the spouses, financial and otherwise, that entitles each spouse equally to the matrimonial assets."***

In Malaysia the law governing non-Muslim marriage and divorce matters and any matter incidental thereto is the Law Reform (Marriage and Divorce) Act 1976. In respect of matrimonial property, it is section 76 of the Act which stipulates as follows:

76 Power for court to order division of matrimonial assets

(1) *The court shall have power,* ***when granting a decree of divorce or judicial Separation, to order the division between the parties of any assets acquired by them during the marriage or the sale of any such assets and the division between the parties of the proceeds of sale.***

(2) *In exercising the power conferred by subsection (1) the court shall have regard to-*

(a) *the extent of the contributions made by each party in money, property or work towards the acquiring of the assets or payment of expenses for the benefit of the family;*

(aa) the extent of the contributions made by the other party who did not acquire the assets to the welfare of the family by looking after the home or caring for the family;

(b) *any debts owing by either party which were contracted for their joint benefit;*

(c) *the needs of the minor children, if any, of the marriage;*

(d) *the duration of the marriage,*

and subject to those considerations, the court shall incline towards equality of division.

(3) (Deleted by Act A1546:s.6)

(4) (Deleted by Act A1546.S.6)

(5) For the purposes of this section, references to assets acquired during a marriage include assets owned before the marriage by one party which have

been substantially improved during the marriage by the other party or by their joint efforts.

The definitions of "matrimonial property" are therefore either

i. **"any assets acquired by married couple during the marriage"** or
ii. **"assets owned before the marriage by one party which have been substantially improved during the marriage by the other party or by their joint efforts."**

These are the 2 different parts in the definition of what constitute

"Matrimonial Property"

The 1st type is quite straightforward i.e.

a. The man and woman entered into a marriage lawfully.

b. During the subsistence of such a marriage, they acquired the property.

c. The property was not the property of anyone of the party that entered into the lawful marriage before entering into such a marriage.

d. The contribution is in form of money or tangible assets of value or in the case of non-monetary and / or non-valuable contribution, it is contributed in the well-being of the marriage and includes (but not limited to) acts of love and affection, support, care or other means that makes the marriage workable.

Under this definition, the property must be acquired after the entry into the marriage and not before.

Under the 2nd definition, the matrimonial property is one where:

a. The property acquired fully before the entry of marriage by parties.

b. The party that did not contribute in the acquisition of the property or both parties, contributed in the improvement of the property.

c. The improvement is both substantial and quantifiable, considering the facts and circumstances of the marriage.

d. The onus and burden of proving substantial improvement is on the party that did not contribute in the acquisition of the property.

The considerations of the Court in determining the portion or percentage of the property or its value (whichever is more convenient) are:

(a) the extent of the contributions made by each party in money, property or work towards the acquiring of the assets or payment of expenses for the benefit of the family;

(b) the extent of the contributions made by the other party who did not acquire the assets to the welfare of the family by looking after the home or caring for the family;

(c) any debts owing by either party which were contracted for their joint benefit;

(d) the needs of the minor children, if any, of the marriage;

(e) the duration of the marriage,

Having considered the facts that the impugned property was fully acquired before the marriage of the Deceased and the Respondent, the impugned property cannot fall under the 1st limb. I shall deal with the 2nd definition under a separate heading below.

ii. Whether the Law Reform (Marriage and Divorce) Act 1976 override the Probate and Administration Act 1959 and the Wills Act 1959

The Law Reform (Marriage and Divorce) Act 1976 is an Act to provide for monogamous marriages and the solemnisation and registration of such marriages; to amend and consolidate the law relating to divorce; and to provide for matters incidental thereto.

It is not a law that regulates succession. The Primary Laws that regulate succession (for non-Muslims in Malaysia) are

a. Probate and Administration Act 1959, which is an Act relating to probate and letters of administration.

b. Wills Act 1959 which is an Act relating to the law on wills.

The property of a Deceased husband (as in the case of subsisting marriage at the time of death) is governed by the Laws governing succession.

However, in the case of matrimonial property, if successfully proven as such, the property shall be divided by the Court in the proportion having regards to

(a) the extent of the contributions made by each party in money, property or work towards the acquiring of the assets or payment of expenses for the benefit of the family;

(b) the extent of the contributions made by the other party who did not acquire the assets to the welfare of the family by looking after the home or caring for the family;

(c) any debts owing by either party which were contracted for their joint benefit;

(d) the needs of the minor children, if any, of the marriage;

(e) the duration of the marriage,

The property that was successfully proved to be matrimonial property and apportioned accordingly, shall be the property of the surviving spouse and the remaining portion shall be divided according to the laws of succession whether or not, the spouse is entitled to any part of that remaining portion. This is because the surviving spouse portion is not part of the Estate of the Deceased and hence is not subject to the Laws of Succession.

In respect of the Estate of a Deceased, the Laws of Succession shall prevail over any other law based on the principle of **"Generalia Specialibus Non Derogant"**

The remaining part of the property which now becomes the Estate of the Deceased may be bequeath by will by virtue of section 3, Wills Act 1959 which reads **"Except as hereinafter provided, every person of sound mind may devise, bequeath or dispose of by his will, executed in manner hereinafter required, all property which he owns or to which he is entitled either at law or in equity at the time of his death notwithstanding that he may have become entitled to the same subsequently to the execution of the will."**

Hence, it is the view of this Court, for non-Muslims, a valid Last Will and Testament shall override any other claims in respect of the Estate for the purpose of succession.

iii.Whether a wife under the Decree for Judicial Separation is entitled to the property of a Deceased husband when there is valid Last Will and Testament

"Judicial Separation" is a Court Decree that makes it shall no longer be obligatory for the petitioner to cohabit with the respondent.

The conditions-precedent for a Decree for Judicial Separation are as follows:

a. The marriage is registered or deemed to be registered under the Law Reform (Marriage and Divorce) Act 1976;

b. The marriage was monogamous; and

c. Both parties to the marriage reside in Malaysia at the time of the commencement of proceedings.

In *AJS v. RIS & ANOR* [2020] 4 CLJ 170, her Ladyship, Justice Faizah has this to say,

> ***"[41] Unlike*** **a** ***decree of divorce, the pronouncement by this court of a decree of Judicial Separation does not legally dissolve a marriage. Once a decree of Judicial Separation is granted, the petitioner is no longer obliged to cohabit with the respondent s. 64(2) of the LRA. To dissolve the marriage after the granting of a decree of judicial Separation, the petitioner would then have to present a petition for divorce. Section 65(1) of the LRA expressly states the fact that a petitioner had been granted a decree of judicial petition will not bar the petitioner from presenting a petition for divorce or a court from pronouncing a decree of divorce. Pursuant to s. 65(2) of the LRA, the court may treat the decree of Judicial Separation as sufficient proof of the adultery, desertion, or other ground on which it*** **was** ***granted."***

The grounds for granting a Decree of Judicial Separation is found in Section 54 Law Reform (Marriage and Divorce) Act 1976 which are:

(a) that the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent;

(b) that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent;

(c) that the respondent has deserted the petitioner for a continuous period of at least two years immediately preceding the presentation of the petition;

(d) that the parties to the marriage have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition.

However, in considering whether it would be just and reasonable to make a decree the court shall consider all the circumstances, including the conduct of the parties and how the interests of any child or children of the marriage or of either party may be affected if the marriage is dissolved and it may make a decree nisi subject to such terms and conditions as the court may think fit to attach, but if it should appear to the court that in all the circumstances it would be wrong to dissolve the marriage it shall dismiss the petition.

Section 66 Law Reform (Marriage and Divorce) Act 1976 provides as follows:

66 Property of wife after judicial Separation

(1) ***The property of a wife who at the time of her death is judicially separated from her husband shall, <u>in case she dies intestate,</u> go* as *it would have gone if her husband had been then dead.***

(2) *Where, upon any such judicial separation, alimony has been decreed or ordered to be paid to the wife and the same is not duly paid by the husband he shall be liable for necessaries supplied for her use.*

The Act still recognises the marriage as subsisting after a Decree of Judicial Separation has been granted and hence this recognition entails the rights and obligations are still governed by the marriage except where the law provides otherwise. A clear example of this is that it shall no longer be obligatory for the petitioner to cohabit with the respondent.

Section 66(1) speaks as follows: "(1) **The property of a wife who at the time of her death is judicially separated from her husband shall, in case she dies** intestate, go as it would have gone **if her husband had been then dead."**

Pursuant to section 66(1), the property of the deceased wife shall be treated in the same manner as the property of the husband (if he had died intestate).

In other words, the property of the wife shall be governed by the laws of succession, keeping in mind that the marriage was subsisting at the time of death.

However, section 66(1) recognises that if there is a legally valid Last Will and Testament by the deceased wife, then it shall be treated as per the Will pursuant to section 3, Wills Act 1959 which reads **"Except as hereinafter provided, every person of sound mind may devise, bequeath or dispose of by his will, executed in manner hereinafter required, all property which he owns or to which he is entitled either at law or in equity at the time of his death notwithstanding that he may have become entitled to the same subsequently to the execution of the will."**

In our case, there is a Last Will and Testament of the Deceased husband.

This Court, from a reading of Section 66(1) Law Reform (Marriage and Divorce) Act 1976, is of the view that in cases where a Decree of Judicial Separation has been granted, the treatment given to Estate of a Deceased Wife who died intestate is the same if the husband survives her as in the case of the treatment given to the Estate of a Deceased Husband who died intestate if the wife survives him. This is in consonance with the spirit of Article 8(1) Federal Constitution.

In cases where a valid Last Will and Testament is found, the treatment of the Law on the surviving Wife is the same for a surviving husband.

In Enclosure 60, I found the attack is mounted on the validity of the Last Will and Testament of the Deceased Husband who died on 24 May 2018 in Kluang, Johore. The solicitor who drafted and attested to the Will along with another solicitor who became the witness to the Will are found in the Enclosure 5 and 6. The Respondent apart from alleging that the Last Will and Testament of the Deceased is invalid, null and void, provides no proof. The Court accepted the Last Will and Testament of the Deceased as valid and of full legal effect.

I found no further complaint on this issue and hence I take it there is no more issue on this. Further, the previous Court Order was to recognise the Last Will and Testament of the Deceased Husband. I have no reason to depart from the Order.

iv. Whether Section 76 Law Reform (Marriage and **Divorce) Act 1976 applies**

I reproduced the same for ease of reference.

76 Power for court to order division of matrimonial assets

(1) ***The court shall have power, when granting a decree of divorce or judicial separation, to order the division between the parties of any assets acquired by them during the marriage or the sale of any such assets and the division between the parties of the proceeds of sale.***

(2) ***In exercising*** *the power conferred by subsection (1)* ***the court shall have regard to-***

(a) ***the extent of the contributions made by each party in money, property or work towards the acquiring of the assets or payment of expenses for the benefit of the family;***

(aa) the extent of the contributions made by the other party who did not acquire the assets to the welfare of the family by looking after the home or caring for the family;

(b) ***any debts owing by either party which were contracted for their joint benefit;***

(c) ***the needs of the minor children, if any, of the marriage;***

(d) ***the duration of the marriage,***

and subject to *those considerations, the court shall* ***incline towards equality of division.***

(3) (Deleted by Act A1546: s.6)

(4) (Deleted by Act A1546: s.6) (5) For the *purposes of this section, references to assets* ***acquired during a marriage include assets owned before the marriage by one party which have been substantially improved during the marriage by the other party or by their joint efforts.***

In **MANOKARAM SUBRAMANIAM** v. **RANJID KAUR NATA SINGH**

[2008]6 CLJ 209, where the appellant's appeal against the decision of the Court of Appeal dismissing his appeal against the High Court order granting leave to the respondent to proceed with her application for ancillary reliefs. The single issue of law requiring determination was whether leave of the court could be granted to a party in a petition to proceed with a claim for property division under s. 76 and/or under any provision of the Law Reform (Marriage and Divorce) Act 1976 ('Act') after decree nisi has been made absolute. The High Court judge was of the view that under the provisions of the Act, she was vested with the power and/or jurisdiction to entertain the application made by the respondent, and she proceeded to make the order in favour of the respondent. The Federal Court ruled that, inter alia,

[7] I feel obliged to make these comments because the courts had been repeatedly accused of being unfair to parties when in fact parties themselves have *failed to file in* ***proper documents, make proper applications, and to do so within the time provided by law. It is not as if the lawyer concerned had interpreted the law differently. If there are authorities that support the respondent's actions perhaps the court could be sympathetic with her. The result of all these oversight is injustice to the client.***

[8] So all in all, the respondent did not protect her rights well. I do not like to comment who was at fault.

[9] I agree with my learned brother Arifin FCJ that the duty of the court is to interpret and apply the law. <u>In this case the words used in s. 76(1) and 76(3) are clear i.e., an order for division of matrimonial asset is limited to the time when granting a decree of divorce or Judicial Separation and not at a later stage. I am very sure that this is</u>

> ***<u>the interpretation that is to be given to s. 76</u>. Even Singapore had to amend their Women's Charter (see news. 112 of the Singapore Women's Charter) to enable that ancillary reliefs could be made at any time subsequent to the grant of a judgment of divorce.***
>
> ***[10] In conclusion, I*** *have this to say.* ***I sympathise with the respondent but the law is the law. In CHAI SAU YIN V. KOK SENG FATT [1966] 1 LNS 25 Thompson LP said "This, however, is a court of law and not a court of morals and it is on that basis that the case must be decided." That case was in respect of the Moneylenders Ordinance.***
>
> ***[11] In this present case, it is so clear that there is no room to argue that s. 76 should be interpreted in the way the respondent had asked us to do.***

There are several points to be noted here.

a. There is a Decree of Judicial Separation at the time of the death of the Deceased husband.

b. There is a valid and legal Last Will and Testament by the Deceased Husband.

c. The impugned property that the Respondent (wife) is now claiming.

d. The impugned property is not a matrimonial property under the 1st definition of section 76.

e. Since it is now claimed under the 2nd definition of section 76's definition of "matrimonial property", the burden to prove is on the Respondent.

f. The application must be made during the time of application for the

g. Decree for Judicial Separation.

I shall not repeat the facts that I set out earlier but suffice that I say, section 76 Law Reform (Marriage and Divorce) Act 1976 applies in our instant case.

This application has been made at this stage which is 4 years since the Decree of Judicial Separation that was granted on 30 March 2016. There is nothing much this Court can do. This is a High Court that is bound to follow the Federal Court's ruling and the ruling clearly states **"an order for division of matrimonial asset is limited to the time when granting a decree of divorce or Judicial Separation and not at a later stage."**

For this reason alone, the application pursuant to Enclosure 60 should be dismissed in limine.

v. Whether the Respondent succeeded in proving her claim to the impugned property

At the risk of being repetitive, the impugned property was first was bought by the Deceased's father in 1979 and subsequently transferred to the Deceased's mother Rajaletchumy Ganesan d/o Viruthchlam and the Deceased's elder brother Soundirapandian a/l Ganesan in 1980. At the time the Deceased's father earned a living through his restaurant business and he paid the instalments from the profits of the restaurant business.

In 1984, the Deceased's father requested Soundirapandian a/l Ganesan to pay off the debts in the Deceased's father name. Soundirapandian a/l Ganesan took a refinancing loan from Bank Bumiputra Malaysia Berhad and paid off his father's debt.

When the Deceased's father died on 1986, Soundirapandian a/l Ganesan paid the loan instalments from the profit of the restaurant business. Later in 1990, Deceased took up a job in Singapore and paid off the remainder of the loan from his salary.

The loan was fully paid in 1996 by the Deceased and his siblings decided that the property should be transfer to him totally as he paid off most parts of the loan. Further he took care of his mother and younger sister, Shanti a/p Ganesan.

The Deceased married the Respondent on 12 October 1998 and the marriage produced 3 children (one boy and 2 girls).

However, the Respondent filed for Judicial Separation in the Muar High Court on 30 March 2016 and the Deceased and the Respondent were granted a Judicial Separation vide Petition No. 33-76-06/2015.

Now that it is clear the total price of the impugned property was paid in 1996 but the Deceased married the Respondent on 12 October 1998.

The Respondent averred that she spent money for the religious observances during bereavement and that she contributed RM250-00 a month to the Deceased to pay a loan for the purpose of extending the back portion of the house while she was staying at the impugned property.

This was denied by the one Thanga Raja a/1 Subramanian who affirmed an affidavit (Enclosure 18) and that he further affirmed that the Respondent asked for receipts although she did not pay for the funeral services that were being carried out for the Deceased. On the contrary, it was the 1st Applicant that asked for the funeral services and paid them accordingly. I found that the Respondent lied in her affidavit (Enclosure 20) that she paid for the funeral services of the Deceased.

I perused over the affidavits of the Respondent as per Enclosure 68, 69 and 70) where the Respondent averred that she spent money on the living expenses while the Deceased used his money for the renovation and improvement of the impugned property. I found no receipts or other documentary proof to support these averments. It is challenged by the Applicants and they put the Respondent on strict proof.

It must be noted that under the 2nd definition of the matrimonial home it has to be **"assets owned before** the **marriage by** one **party which have been substantially improved during the marriage by the other party or by their joint efforts."**

As I have stated earlier, the facts-in-issue to prove that a property is a matrimonial property when it was acquired fully prior to the marriage are as follows:

a. The property acquired fully before the entry of marriage between parties.

b. The party that did not contribute in the acquisition of the property or both parties, contributed in the improvement of the property.

c. The improvement is both substantial and quantifiable, considering the facts and circumstances of the marriage.

d. The onus and burden of proving substantial improvement is on the party that did not contribute in the acquisition of the property.

It is important to bear in mind the requirements of proof for the 2nd definition are "the party that did not contribute in the acquisition of the property or both parties,**<u>contributed in the improvement of the property</u>** and that **<u>the improvement is both substantial and quantifiable</u>,** considering the facts and circumstances of the marriage."

The 1st definition is where the property was acquired during the subsistence of the marriage and the contribution of either spouse can be both tangible and non-tangible. The contribution can either be in the form of money or tangible assets of value <u>OR</u> in the case of non-monetary and / or non-valuable contribution, it is contributed in the well-being of the marriage and includes (but not limited to) acts of love and affection, support, care or other means that makes the marriage workable.

The 2nd definition is obviously different from the 1st definition of matrimonial property which does not require actual monetary or valuable contribution because under the 2nd definition the contribution (of the non- acquiring spouse) must be both substantial and quantifiable and the burden is on that non-acquiring spouse. In other words, under the 2nd definition, acts of love and kindness or care for the family is **insufficient** for the purpose of claiming the impugned property as matrimonial property

Since it must fall under the 2nd definition of the definition of the **"matrimonial property"** which is **"assets owned before the marriage by one party which have been substantially improved during the marriage by** the **other** party **or** by **their joint efforts."**

No details of the alleged loan nor the payment of the loan or that the Respondent actually obtained money (apart from her husband, the Deceased) and gave that money to the Deceased for either repayment of the loan or buying of materials for the alleged renovations of improvement.

The burden is on the party that claims the property have been substantially improved as per section 101 Evidence Act 1950 which reads as follows:

"101 Burden of proof

(1) ***(1) Whoever desires any court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist.***

(2) ***(2) When a person*** *is bound to prove the existence of any* **fact, it is said that the burden of proof lies on that *person."***

Pursuant to section 101(2) of the *Evidence Act 1950*, the burden of proof is on the Respondent to prove the existence of the facts he asserts. This principle was explained by his Lordship Acting Chief Justice (Malaya) Terrell in *SELVADURAY V. CHINNIAH* [1939] MLJ 253:

"The burden of proof under section 102 of the Evidence Enactment is upon the person who would fail if no evidence at all were given on either side, and accordingly the plaintiff must establish his case. If he fails to do so, it will not avail him to turn round and **say** ***that the defendant has not established his. The defendant can say*** "It ***is wholly immaterial whether I prove my case or not. You have not proved yours" (see the judgment of the Privy Council in RAJA CHANDRANATH ROY V. RAMJAl MAZUMDAR 6 Bengal Law Reports p 303)."***

The Court of Appeal *in THE CARBON CO SDN BHD & ANOR V. NG LEE HOON (CONDUCTING UNDER 'FOREST WOOD FLOORING')* *[2017] 4 MLJ 791* stated this fundamental principle of evidence as follows:

"[49] The law on the burden of proof is so settled. Pursuant to s. 101(1) of the *Evidence Act 1950*, a party who desires the court to give judgment in its favour as to the legal right or liability bears the burden to prove its case. The burden of proof on that party is twofold, firstly the burden of establishing a *case and secondly the* ***burden of introducing evidence. This burden lies on the party throughout the case and the standard of proof is on the balance of probabilities. Once that party has discharged its evidential burden of proof then the burden would then shift to its adversary. If a party has failed to discharge its burden of proof on the standard required by the law, his adversary does not bear the burden to adduce any evidence.***

In *BALAKRISHNAN A/L KALIAPPAN V. SHAMEENA A/P NATHESAN* 2019 [2019] 7 CLJ 762; [2019] MLJU 288, the Court of Appeal in dismissing the appeal by the respondent husband, had distinguished the meaning of matrimonial home and matrimonial assets and said as follows:

"Entitlement and *division of the matrimonial home*

[4] We have intentionally use the words 'matrimonial home' and not "matrimonial property or asset" to describe this house which **was** ***registered under the wife's name and bought vide a sale and purchase agreement dated 4/3/2009 from... which was 2 years before the marriage was registered. This is simply because a matrimonial home may not necessarily be a matrimonial property or asset which the court has the power to order division of under <u>section 76(1) of the LRA</u> in that a place where the parties cohabitated after the marriage may not be in their names, either solely or jointly but could be one which belongs to either of their respective families or even rented.....***

[5] It is of course specifically provided under <u>section 76(5) of the LRA</u> that **assefs** ***acquired during*** a marriage includes the ones ***acquired before the marriage by one party but which "have been substantially improved during the marriage by the other party or by their joint efforts..."***

In OH LEONG THYE V. WONG YOKE KUEN & ORS [2017] 1 LNS 526, the Court of Appeal held that:

"11*(i)* ***In dealing with matrimonial assets, it is incumbent upon the court first to identify the category of assets which will have to be dealt under LRA 1976, in particular (i) <u>section 76(1);</u> (ii) <u>section 76(3);</u> (Hi) <u>section 76(5)</u>. In***

addition, we must take into consideration the minor interest as provided for under sections 76(2)(c) and 76(4) (b)."

In *YAP YEN PIOW V. HEE WEE ENG* [2017] 1 MLRA 389, the Court of Appeal has classified matrimonial assets into two categories as follows: -

(ii) Matrimonial property which will fall under s. 76(1);

(ii) Non-matrimonial property which will fall under s. 76(3) and/or (5) of the LAW REFORM (MARRIAGE AND DIVORCE) ACT 1976. Whether it is a matrimonial or non-matrimonial property, both will fall under the caption of matrimonial assets.

However, since section 76 LAW REFORM (MARRIAGE AND DIVORCE) ACT had been amended with the deletion of section 76(3), presently therefore, the non-matrimonial assets are as specified under section 76(5) LAW REFORM (MARRIAGE AND DIVORCE) ACT, which provides that assets acquired during a marriage includes assets owned before marriage by one party which have been substantially improved during the marriage or by their joint efforts.

The Court of Appeal said joint efforts need not necessarily be in monetary terms but should include consideration in kind. When it relates to matrimonial property (or home), i.e., the house (one or several) and all movable and immovable assets in the house or having nexus to the house, such as a car, etc. which is meant to be used by the family, the courts have generally acknowledged that it falls under matrimonial property which will fall under s. 76(1) of the *LAW REFORM (MARRIAGE AND DIVORCE) ACT 1976*, provided it was acquired by the joint efforts of the spouses though one spouse may not have contributed in cash but the consideration may have been in kind.

The averments of the Respondent were that she contributed the betterment of the said properly which was denied by the Applicant. The burden is on the Respondent to support her claim. Apart from bare averments in her affidavit, no proof was offered.

After finding that she lied in her earlier affidavits in respect of the expenses on funeral services and religious observances, I have my reservations on the Respondent's averments unless adequate proof is offered and I found nothing of the sort proven before this Court. As such, I find that the Respondent failed to prove her claim that the impugned property is a matrimonial property that she has a claim to.

Assuming that, for the sake of the arguments the Respondent succeeded in proving her case, by the authority of *MANOKARAM SUBRAMANIAM v. RANJID KAUR NATA SINGH* [2008] 6 CLJ 209, the Respondent is barred from claiming the impugned property as matrimonial property, a little too late in the day. As such, it has to be dismissed.

[5] CONCLUSION

For the reasons aforesaid, I dismissed the Respondent's claim pursuant to Enclosure 60 with cost.

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