

Neo Boh Tan v Ng Kim Whatt
[2000] SGHC 31

Case Number : OS 74/2000
Decision Date : 07 March 2000
Tribunal/Court : High Court
Coram : Judith Prakash J
Counsel Name(s) : Leong Chooi Peng (Leong Chooi Peng & Co) for the plaintiff
Parties : Neo Boh Tan — Ng Kim Whatt

JUDGMENT:

GROUNDS OF JUDGMENT

The facts

1. The plaintiff and her youngest son, the defendant, are the joint owners of the flat known as Blk 232 Pending Road #08-21. They were allocated the flat in 1987 by the Housing and Development Board ('HDB') under its Resettlement Scheme. At that stage, as all the plaintiff's other children had grown up and had their own properties, the defendant (then aged about 23) and she were the only persons eligible to take up the offer of the flat.

2. The flat cost \$42,600. The only down payment required was the sum of \$200, which the plaintiff paid. The balance of the purchase price was settled by a loan which the parties took from the HDB and the monthly instalment payable in respect of this loan was approximately \$233. As at July 1998, there was an outstanding balance of \$28,592.25 remaining due under the loan.

3. The plaintiff and the defendant lived together in the flat from the time of purchase up till August 1998. In that month, he hit his mother and the plaintiff made a police report. The plaintiff also sought aid from the Legal Aid Bureau and an officer from the Bureau went to interview the defendant. After the interview, the defendant moved out of the flat and did not advise the plaintiff of his new address. She has not seen him or spoken to him since he left the flat.

4. In April 1999, the plaintiff commenced this action whereby she asked for a declaration that she was absolutely entitled to the flat and to have the title in the flat transferred entirely to her. She also asked for an order that if the defendant could not be traced or refused to convey his interest in the flat to her, the Registrar of the Supreme Court be authorised to execute the conveyance on his behalf.

5. As the plaintiff was unaware of the defendant's address, the originating summons herein had to be served on him by way of substituted service. Pursuant to a court order in that behalf, the originating summons was advertised in one issue of the Lianhe Zaobao and copies were posted on the notice board of the court. Service was effected in this manner in October 1999. Up to the time the matter first came on for hearing before me on 31 January 2000, however, the defendant had not entered an appearance. He did not appear, either, between that date and my final order on the summons which was made on 22 February 2000.

6. The plaintiff's contention was that she was beneficially entitled to an absolute interest in the flat to the exclusion of any beneficial interest on the part of the defendant because she had made all the payments due in respect of the purchase of the flat. Her evidence on affidavit was that until about 1997 she had earned an income as a part time casual worker. In addition, she had received allowances from some of her nine children including from one son who was a civil servant. That particular son gave her \$600 to \$700 a month with which she supported herself and paid the instalments on the flat, the conservancy charges and the property tax and other outgoings. The defendant had never contributed anything towards the instalments for the flat. Nor had he paid for any of the other expenses of the flat. He had not worked during the ten years prior to the application and had often borrowed money from her.

7. My first task was to decide whether to accept the plaintiff's story that she had made all the payments for the flat. I was mindful that I was hearing only one side of the story since the defendant had not appeared and no one else had given any evidence as to the plaintiff's circumstances. The plaintiff's evidence was not, however, unsubstantiated.

8. The plaintiff stated that she made payment of the instalments in cash. In order to do so, she would go down each month to the HDB office at Marsiling and her payment would be recorded in the receipt book issued by the HDB. In support of this contention, she was able to produce copies of the relevant receipt books. The HDB receipt books evidenced regular payment of the housing loan instalments from July 1987 up to January 1994, from March 1994 up to March 1998 and from April 1998 up to February 2000. The receipt books issued by the Bukit Panjang Town Council evidenced payment of service and conservancy charges from April 1990 up to March 1992 and she also produced a receipt book from the Sembawang Town Council showing payment of these charges from September 1999 to February 2000. The plaintiff explained that she had not been able to find the other books evidencing payment of the service and conservancy charges.

9. The fact that the plaintiff had most of the relevant receipt books in her possession to my mind showed, more probably than not, that she was the one who had made the payments concerned. I therefore found that the plaintiff had paid all or substantially all of the monies expended for the acquisition of the flat up to the date of the application. It was also clear from the receipt books that she had continued to pay the housing instalments after the filing of the application and up to the date of the hearing.

10. I therefore proceeded to consider the rights of the parties to the flat on the basis that the plaintiff had been the sole contributor to the purchase price.

Legal and beneficial ownership

11. As joint tenants of the flat, the plaintiff and defendant have at law an identical interest in the whole of the flat. The position is, however, different in equity because of the way in which they paid for the flat. The governing principle is that where two or more persons buy a property together but pay for it in unequal shares, then even if they register themselves as joint owners of the property, the law will presume that the express joint tenancy has been severed in equity into an implied tenancy in common in unequal shares proportioned to the amount of the purchase price contributed by each co-owner. As Professor Tan Sook Yee puts it in *Principles of Singapore Land Law* (at pp 91 to 92):

'Equity leans in favour of tenancies in common in given situations because of the inherent unfairness of the right of survivorship that obtains where there is a joint tenancy. For example, where A and B have contributed to the purchase price of property in unequal shares or have lent money on mortgage, or are business partners but the conveyance contains no words of severance, at law there would be a joint tenancy. If they are also joint tenants in equity, on the death of one of the joint tenants, the surviving joint tenant will succeed to the 'share' of the deceased joint tenant by the right of survivorship, so that the estate of the deceased joint tenant will get nothing. In the circumstances, this result is manifestly unfair and equity will recognise that while A and B are joint tenants at law, they are also tenants in common in equity and each should be entitled to a share proportionate to his contribution. The net result is that A and B are joint tenants in law, holding in trust for themselves as tenants in common in shares proportionate to their contributions.'

Professor Tan goes on to state in a footnote that this is a resulting trust and can be rebutted by evidence to the contrary.

12. In the present case, if the flat were private property the position would be free from doubt: the defendant and the plaintiff would be holding the property in trust for themselves as tenants in common in shares proportionate to their respective contributions which means that as the defendant contributed nothing, he would be holding the whole of his legal share on trust for the plaintiff. Nothing would have stood in the way of granting the declaration sought by the plaintiff, except perhaps, the doctrine of advancement. Quite apart from the question as to whether the presumption of advancement applies when the parent

purchasing the property is the mother (though I myself do not see any objection in principle to its application in this situation) I was satisfied here that, on the evidence, the presumption had been rebutted. It was the plaintiff's evidence that when she and her son were originally named as co-lessees it had not been her intention to make him a gift. I did not think it probable that a poor woman who was forced to relocate from her home of 40 odd years, who could only afford to make a \$200 down payment for her new home, and who was taking on a relatively huge financial burden by borrowing the balance of the purchase price, would by including her able-bodied and adult son as a co-lessee have been intending to give him a half share in the flat gratis. It was much more probable that her expectation at the time was that the defendant would work and contribute to the loan instalments. She might even have expected him, in due course, to take over the financial burden entirely. Such would have been the actions of a filial and responsible son and it would not have been unreasonable on her part to have contemplated this happening.

13. Having settled in my mind that at common law the plaintiff was entitled to the relief she sought, I had to consider, however, whether this common law position had been affected by the provisions of the Housing and Development Act, Cap 129 ('the Act') since the flat had been built by the HDB. This question has also been considered in two recent cases: the Court of Appeal decision of *Cheong Yoke Kuen & ors v Cheong Kwok Kiong* [1999] 2 SLR 476 and the High Court decision *Hajjah Sitiawah Bee Bte Kader v Rosiyah Bte Abdullah* (Originating Summons No. 10 of 1999, unreported). Both cases dealt with situations in which claims were being made to beneficial interests in HDB flats arising from resulting trusts.

14. The starting point is s 51 of the Act. To paraphrase it, this provides by ss (4) that no trust in respect of any flat which has been sold by the HDB shall be created by the owner of the flat without the HDB's prior written approval. Further, ss (5) specifically declares void 'every trust which purports to be created' in respect of any such flat without the prior approval of the HDB. These provisions are an advance on the previous legislation which did not even admit the possibility of a trust over an HDB flat being created with the consent of the HDB. The reason for the change in legislation was that Parliament recognised that there would be situations in which persons would have legitimate reasons for creating trusts over HDB flats and that the evil that the original legislation was intended to deal with (ie to prevent abuse by persons not eligible for HDB flats from purchasing a flat in the name of a nominee) could be eliminated without also eliminating all possibility of creating a trust over an HDB flat.

15. *Cheong Yoke Kuen's* case provides a graphic illustration of the manner in which the amended s 51 still stamps out abuse of the HDB system. There an HDB flat (the first flat) had been purchased in 1983 by the respondent and his mother as joint tenants. The respondent alone paid for the flat. Subsequently, he wished to purchase a second HDB flat for occupation by his family and himself, leaving the first flat to be occupied by the mother alone. Under the Act, the respondent was prohibited from buying a second flat while he remained a co-owner of the first. He therefore transferred his share in the flat to his mother and she became its sole legal owner. On her death, he asserted that the transfer had led to a resulting trust in his favour and that the first flat belonged to him solely and not to her estate.

16. The Court of Appeal took the view that the respondent's contention that resulting trusts over HDB properties were not prohibited by s 51(4) of the Act would give rise to a highly unsatisfactory result and would open the way to abuse by persons who would and could easily purchase HDB properties through nominees. In any event, the circumstances in which the respondent transferred his entire interest in the flat to his mother showed that by that transfer he intended that his mother would hold the flat on trust for him. The resulting trust which arose was 'created' by the respondent and fell within the prohibition of ss (4) and was void under ss (5) of the Act.

17. The obvious difference between *Cheong's* case and the present is that the parties here had no intention of circumventing any HDB regulation or policy. Nor did they do so since the HDB has no interest in the proportions inter se in which eligible persons hold HDB flats. The respondent in *Cheong's* case, on the other hand, deliberately created the impression that he no longer had any legal or beneficial interest in the first flat.

18. Here both plaintiff and defendant were at all times the registered legal owners of the flat and they were acceptable to the HDB as such. There was no question of either of them having to get the other to act as the nominee owner. At the beginning, the situation was unclear as to how the beneficial interests were divided since the flat had to all intents and purposes not been paid for. As time went on, each of the parties could have acquired a substantial beneficial interest in the flat by contribution

towards its purchase price. As it happened, the defendant failed to make any contribution leaving it to the plaintiff to bear the entire cost. As a result, she gained an equitable interest in all, rather than a part, of the flat. This interest was, I considered, implied in her favour by law (to reflect the equities of the situation) rather than created by her. Although the respondent in *Cheong's* case had not in the literal sense of the word 'created' a trust by executing a trust document, he had taken a deliberate action to misrepresent the ownership situation and thereby create the appearance of sole ownership in his mother whilst all along intending to retain his own beneficial interest in the first flat. In that way, he did, as the Court of Appeal held, in effect create a trust in the flat in his favour. The Court of Appeal gave a purposive definition to the word 'created' in the section so as to ensure that the legislative intent to prevent nominee ownership would not be flouted.

19. Although the type of trust which resulted from the legal implication I have referred to, is commonly called a 'resulting trust', I was of the view that since it was not created by the plaintiff either literally or in the sense given to that word by the Court of Appeal it could be given effect to despite the decision in *Cheong's* case. In my judgment, s 51 of the Act did not render void the resulting trust which arose in favour of the plaintiff in order to reflect the equitable position on the beneficial interests which she and the defendant had in the flat. I therefore made a declaration that by reason of the existence of an imputed trust in favour of the plaintiff, the plaintiff was beneficially entitled to the whole of the flat and that the defendant held his joint interest therein on trust for the plaintiff.

20. Since making that declaration, I have read *Hajjah Sitiawah* where in a similar factual situation Rajendran J came to a similar conclusion. In that case, the plaintiff and the defendant (who were mother and daughter respectively) were the joint owners under a joint tenancy of an HDB flat in Ang Mo Kio. Differences arose between them regarding the sale of the flat and the defendant contended that as she had contributed all or the major portion of the purchase price, she should be entitled to all or a major part of the sale proceeds. The plaintiff, on the other hand, argued that as resulting trusts were prohibited by s 51(4) of the Act, she and the defendant were entitled to equal shares of the sale proceeds.

21. Rajendran J found that the plaintiff had contributed approximately 23% of the cost of the flat while the defendant had contributed the balance 77%. He stated that if he were to apply equitable considerations in the case, he would hold that an equitable tenancy in common existed and that the plaintiff there held a 23% share in the flat whilst the defendant had a 77% share in it.

22. In the course of his judgment, His Honour said (at paras 14 and 15):

'14. The parties, when they purchased this flat, had purchased it as joint tenants. There was no express intention at that time of creating any trusts. On one view, as the resulting trust in this case was not 'created by the owners' of the flat, but rather arose by presumption of law ... it was a matter outside the scope of s 51 (4). The plaintiff and defendant in this case under the said presumption of law held the property in equity as tenants-in-common in the proportions of 23% and 77% respectively. As a matter of policy, I can see no objection to this result; the parties if they so desired could have themselves arranged for it at law by, in the first place, purchasing the flat as tenants-in-common in these percentages, or for that matter, in whatever percentages they desired. The plaintiff and the defendant, being acceptable to the HDB as joint tenants would have been equally acceptable as tenants-in-common of the flat.

15. Would the position be any different, vis--vis the HDB, if the parties were tenants-in-common, not in law, but in equity? I cannot see why it should. Such a tenancy would not be a breach of the HDB Act since the underlying intent of s 51(4) was to prevent ineligible persons (as opposed to eligible persons like the plaintiff and the defendant in this case) from using such trusts to acquire interests in HDB flats, and thereby circumvent the intention of Parliament to confer the privileges of HDB housing only on persons fulfilling certain eligibility criteria.'

23. The plaintiff in *Hajjah Sitiawah's* case relied on the *Cheong Yoke Kuen* decision to support her argument that in view of the provisions of s 51(4), a resulting trust could not arise. Rajendran J dealt with *Cheong's* case in some detail. He pointed out that

there the trust which had attracted the operation of s 51(4) of the Act was the resulting trust that the respondent tried to 'create' when he divested himself of his legal interest in the flat. In contrast, in *Hajjah Sitiawah's* case the conduct of the parties remained within the parameters set by the HDB. His Honour then went on to consider the statement by LP Thean JA in *Cheong's* case that in the court's view 'the respondent's contention that resulting trusts over HDB properties are not prohibited by s 51(4) of the Act would give rise to a highly unsatisfactory result and would open the way to abuse by person who would and could easily purchase HDB properties through nominees'. Rajendran J made the following comments (at para 20):

'A closer scrutiny of this statement shows, however, that Thean JA was not, in this paragraph, making a blanket statement that all resulting trusts would be void under s 51(4). All that Thean JA was doing was rejecting the somewhat wide claim of the respondent in that case that (all) resulting trusts are not prohibited by s 51(4). That clearly could not be so. If a party sets about creating a situation where a resulting trust will arise in his favour in order to circumvent the provisions of the HDB flat (as was the situation in *Cheong Yoke Kuen*) the resulting trust so created would be prohibited under s 51(4). The example that Thean JA gives in that paragraph that it cannot be right that a person who buys an HDB property in the name of a nominee and obtains a declaration of trust in his favour executed by the nominee would be caught by the provisions of s 51(4) but a person who does the same thing but without such declaration would not be caught as his interest would be that of a beneficiary under a resulting trust, was, in my view intended to do no more than illustrate the absurdity that would result if the submission that all resulting trusts are not within the prohibition envisaged in s 51(4) is upheld. In my view, paragraph 19 of the judgment of the Court of Appeal must be interpreted in the negative to mean simply that not all resulting trusts are outside the scope of the section. What Thean JA stated in the following sentences of the judgment (at paragraph 20) confirm this'.

24. I respectfully agree with the reasoning in the paragraphs cited above and adopt it as an additional ground for my finding that the trust in this case was a valid one enforceable by the plaintiff.

JUDITH PRAKASH

JUDGE

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