Neutral Citation Number: [2021] EWFC 54

Case No: ZC19D00292

IN THE FAMILY COURT
SITTING AT THE HIGH COURTS OF JUSTICE

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/06/2021

Before :

THE HON. SIR JONATHAN COHEN

- -

Between :

JM — **Applicant**

- and –

KK — **Respondent**

- -
- -

Mr J M (appeared in person) **Applicant Husband**
Mr N Fairbank (instructed by **JMW LLP**) for the **Respondent Wife**

Hearing dates: 16 & 17 June 2021

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Approved Judgment

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THE HON. SIR JONATHAN COHEN

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

The Hon. Sir Jonathan Cohen :

1. I am dealing with the parties' cross applications for financial remedy orders.

The facts:

2. The husband ("H") is a British national now aged 50. The wife ("W") is an Indian national now aged 41.

3. The parties married by two ceremonies held respectively in India (February 2005) and England (April 2005). They have one child, a much loved daughter, N, who will soon be 13.

4. The parties lived in England (2005-2007) before moving to India (2007-2010) and then to the Middle East. They lived in a variety of countries in the Gulf between 2010-2019, when they separated. Thus it is that I am dealing with a 14 year marriage.

5. W has contended that cohabitation began in September 2003. This is denied by H. It is clear that the parties spent some of their time together between 2003-2005 and some of their time apart. They each had their own separate residences throughout the period and I discount the assertion by W that I should treat the marriage as being of 16 years' duration, not that it would make any significant difference to the outcome.

6. H had a succession of jobs in the Gulf region acting as an in-house recruiter/HR advisor. As an expatriate worker he was able to command a high salary and tax was minimal. Towards the end of the marriage W took jobs as and when she could find them as an events' organiser. As a result, the parties lived a comfortable lifestyle.

7. All that changed in December 2019 when, following an argument between the parties, H flew with N to England without the knowledge or agreement of W. The family were planning to spend Christmas in England but instead spent the couple of days before the festival issuing applications in the Central Family Court. Each party made a variety of applications. H petitioned for divorce on 23 December on the jurisdictional basis of his domicile in England and Wales.

8. The subsequent litigation between the parties has had three distinct elements:

    i) In January 2020, before Ms Fottrell QC sitting as a Deputy High Court Judge. She and I have been critical of both parties' conduct in that litigation, the Father/Husband for creating a situation that gave rise to the litigation and the Mother/Wife for her stance in the litigation. The conclusion of that case was that the judge ordered, as H sought, that N should be returned to Bahrain where she was living before the departure for England. As her mother did not return to Bahrain, N lived with her father.

    ii) In April 2020, H became aware that W was in the process of instituting proceedings before the religious court in Bahrain. She had, subsequent to the first round of proceedings, converted to Islam without telling anyone. Notwithstanding the existence of an anti-suit injunction, she then sought the assistance of the religious court in Bahrain, a step open to her as a Muslim but not open to H. In my subsequent judgment I was very critical of the steps taken

by the mother which were a deliberate attempt to circumvent the orders of the English court. Nothing I have heard in these proceedings makes me think that my criticisms were unjustified. The inevitable result of her actions was that H applied to the court and was given permission by me to bring N to England. The second round of proceedings concluded in my confirming that N should live with her father in England until the conclusion of a welfare enquiry.

iii) The welfare hearings took place in late 2020 and early 2021 and were to determine the very difficult issue as to whether N should be educated in and live with her mother in India and spend her holidays with her father in England or vice versa. I concluded that N should live with her mother in India and be educated there but spend approximately 2 months a year in England with her father and such other times with him as he was able to be in India.

At the end of the proceedings the father made an application for costs in respect of the second round where he had incurred costs of some £39,000. His application was justified on the merits but I adjourned it to be dealt with within the financial remedy proceedings as I knew insufficient about the parties' means. It was for that reason that I reserved to myself the financial remedy proceedings in the event, as has proved to be the case, that the parties were unable to settle them.

9. The result of what has happened has been financially disastrous for the parties. First, they have spent approximately £150,000 between them on legal proceedings which has exhausted their savings and more. Secondly, the result of W's steps in Bahrain have had the consequence of H losing his employment. Thus it is, that the parties have lost most of their capital and income.

10. Following the failed FDR the matter came before me on 30 April 2021 when W applied for orders under section 37 Matrimonial Causes Act and for interim maintenance. I adjourned those applications to be heard with these proceedings. They have not been pursued before me. They were misconceived. There was and remains no evidence that H was attempting to defeat W's claims nor that he was in any position to pay periodical payments. I now formally dismiss those applications.

The Assets

11. H remains living in a 2-bedroom ground floor flat in Tunbridge Wells. It was bought during the marriage in H's sole name and rented out. It has been his home since it became vacant in spring 2020 and N has lived there with him until she went to India in late May 2021. I have seen photographs of the property. It has 2 bedrooms, 1 living room, a small kitchen and a bathroom. It provides a modest but appropriate home for H and for N when with him. N has friends in the area having attended school in England both remotely and physically in the time that she was in England.

12. The judge at the FDR made a conventional order that H select 3 local valuers from whom W should choose one to conduct the valuation as a single joint expert. In fact the parties agreed that they would use estate agents rather than qualified valuers. The selected agent came up with the figure of £215,000. This upset W who had obtained higher valuations previously in the sum of £275,000 and £290,000. H was taken aback by W's approach as she had herself chosen the agent. He tells me, and I recall having

heard before, that there were previous valuations at lower figures than £215,000, but he did not put them before the court as he understandably took the view that the parties should be bound by the court's direction.

13. Mr Fairbank, who represents W and has done so with his typical persuasion and fairness, has sought to argue that I should take the mid-point of the three valuations or alternatively take the mid-point of the higher two. I decline to take that course for the following reasons:

    i) The figure of £215,000 is the one that resulted from the exercise ordered by the court. There is no order permitting any other evidence;

    ii) It would be wrong for me to start considering the higher valuations when I know there are lower ones as well, albeit not before me;

    iii) H has accepted without demur the result of an identical exercise that was carried out in respect of the Indian property, which he says has resulted in a value lower than he thought appropriate;

    iv) When the agreed agent was asked to reconsider her valuation in the light of the higher quotes, her view remained unaltered having taken the advice of her manager.

14. I therefore take the value of the property as being £215,000. After deduction of the mortgage of some £80,000 and costs of sale there is an equity of approximately £130,000.

15. There are two properties in India. W and N live in a new build apartment held in joint names in a development in Gurgaon, a city on the outskirts of Delhi. It is a luxury 3 bedroom, 3 bathroom apartment with a maid's room and with the usual additional facilities of a shared swimming pool, gym etc. It is far more spacious and modern than the English property.

16. The valuation exercise carried out by the appointed valuer produced a value at current exchange rates of a little over £70,000. The property is subject to a mortgage of £34,000. If W wants to pay for a personal parking space for the apartment rather than using the slightly distant communal car park and if she bears the costs of registering the property in her name there will be a remaining equity of some £23,500.

17. The very much lower value of this property when compared to the English property reflects the fact that property on the outskirts of Delhi costs far less than arguably inferior property in the South-East of England.

18. There is a holiday home in India which has negligible equity. Neither party wishes to retain it. As W is in India and H in England, it should be transferred to W to deal with as she wishes.

19. I ignore the parties' bank accounts and investments which are of minimal value and the family car which has been abandoned by W somewhere in the UAE. Only she knows where it is and neither of the parties want it. I simply order that if it is sold the proceeds are to be divided equally.

20. I likewise ignore W's jewellery. It has not been valued and I accept that it will be passed on to N in due course. She alleges that H has retained a couple of bangles of value. He denies that this is the case and I regard it as unlikely, notwithstanding an obvious untruth that he told about the circumstances in which he came about a watch.

21. Thus it is that the total realisable assets are some £154,000. I shall deal with H's pension separately.

Debts of W

22. It is not surprising that W has incurred considerable debts. She has not had an income of any significance since the breakup of the marriage in December 2019. She has had available to her only the approximate sum of £60,000 which had been built up in her account during the marriage.

23. The examination of these debts has occupied a significant part of the hearing and Mr Fairbank was critical of my questioning about them. I regarded it as a necessary and informative exercise. This was because:

    i) Some of the debts clearly required explanation.

    ii) W's case in the child proceedings was that she needed no financial assistance from H yet, in this hearing, her case was that she needed financial support from him to meet the expense of caring for N, the exact opposite of what she had previously said.

    iii) The figures were often difficult to follow. What were at some stages described as outstanding legal fees had morphed into borrowing from friends and family.

    iv) Loan agreements had been entered into by W with family members and friends which on their face contradicted W's own evidence of what monies had been lent to her and when.

24. It was only by a thorough investigation of the evidence that I was able to obtain a clear picture of what is payable and what might be described as a hard debt and what is a soft debt. As it happens, I accept much of W's account but only after the exercise has been carried out. I find as follows:

    i) Mrs S (counsel): I accept that £8700 is owed but I am astonished to see a charge for no less than 7 conferences on money matters [D88/89] when she has made no appearance.

    ii) EAH: This is a firm of Bahraini lawyers. W engaged them, and they instituted proceedings in Bahrain notwithstanding the anti-suit order of Ms Fottrell QC, and their involvement has produced the disastrous financial consequences that I have mentioned. W says that EAH no longer have her address and that the debt may have been written off. Whether or not that is the case, it is not proper that this liability, if it exists, should impact on the award made.

    iii) W's brother: He has rendered 4 invoices for his work as an attorney which he says he carried out for W. Two of the invoices relate to work on property matters relating to the two Indian properties and his charge for them is put at the

approximate equivalent of £6,500. The other two invoices relate to the children's matter. There is a question over all the invoices as to whether in fact he really would require W to reimburse for the time that he has spent. I am prepared to allow the property transactions in the sum of £6,500 to be regarded as a soft debt. I am not prepared to take into account his assistance in the child proceedings in circumstances where he appeared as W's Mackenzie Friend and where I found his involvement to be inflammatory and unhelpful.

iv) Ms L (counsel): I am told there is an outstanding liability of £1500, albeit that it may have been written off (although I am not making that assumption).

v) Mr M: He is a good friend of W and has lent £9000. That sum went towards W's representation in these proceedings and I accept that it is a sum that is owing albeit not one that W is going to be pursued for until she can afford it.

vi) Mr B: He has lent, W alleges, a total of £6,167. Part of it was lent in small sums when W asked, and £3,000 was used to complete the payment for W's representation in this hearing. The debt is gradually being paid off by work that W is doing for him. He is a very close friend of both parties, but particularly W, and I have no doubt that although he expects to be paid he will wait for his money or until W has worked it off. I shall work on the basis that the £3000 needs repayment and that the remining sum will be paid off by W's work. I shall refer to this again when dealing with income.

vii) Ms S: W says that her friend had lent somewhere between £14-15,000. W's evidence on this shifted at various times and was produced piecemeal rather than in one schedule. I am in broad terms prepared to accept this as a liability albeit I am sure that she too will wait for payment if W feels unable to make it immediately.

viii) W's father: I disregard this alleged debt. His evidence in the child proceedings was that he would help his daughter to extent she required within his means and would pay N's school fees until his help was not needed. I do not think there is any question of him calling upon his daughter to repay the sums that she says that she has borrowed from him, and which were not mentioned in the child proceedings when his ability and willingness to assist W financially were being discussed.

25. There is room for manoeuvre in all these figures other than those owed to counsel. But, I am prepared to accept that W has debts that she needs to repay in cash at some stage and which I should take into account of £43,200, rather than the £58,000 which she claims or the £31,000 which H accepts. Of that £43,200, I regard some £10,000 as being imminently payable and the rest will need to be repaid in due course.

26. As I have indicated both above and during the course of the hearing I would have made a costs order in respect of the second set of proceedings. It is correct, as Mr Fairbank points out, that H's costs of those proceedings have been paid from resources built up during the marriage, and thus it can be said that W has in effect already paid half H's costs. Likewise. to the extent that W has paid her costs of those proceedings out of the lesser sum that was available to her, H has contributed to her payment. However, the fact remains that if W had not taken the actions that she did, there would have been a

further £39,000 plus whatever she paid to her lawyers to share. I do not intend to make a precise arithmetical deduction of that sum. Instead, I have taken it into account as one of the factors which impact on the award.

Income

27. Each party has really struggled. After some 35 unsuccessful applications H managed to find a job as an employment coach. His gross income is just over £23,000 pa., £18,000 pa net. This is a far lower income than he has earned at any time over the last 10 years.

28. I find no evidence on which I can rely to assume that his income will significantly increase. I see him as someone who has been very much shaken by the events of the last 2 years. He is not a confident person and I think he is just relieved to have found a job after a period of such difficulty.

29. W likewise has suffered. She has found it much harder than she expected to get back into employment as an events manager. No doubt Covid has been a big blow to her sector. The job promised to her by Mr B has been postponed or cancelled and instead she does piecemeal work for him. I am prepared to accept that she does not have any income of significance at the moment, notwithstanding her assertions to me in the children's proceedings of her ability to be financially independent. She is a very driven lady and not one who will sell herself short. She is able, and I am sure that in the foreseeable future will get back into remunerative employment.

30. For the avoidance of doubt I do not accept that H has artificially reduced his income or has taken any other step to reduce the value of W's claim.

The position of each party

31. H offers W a lump sum of £40,000 for a clean break. He makes no offer of child maintenance relying on the order that I made with the agreement of both parties towards the end of last year that each party would be responsible for the expenses of N when with him/her, and that N's school fees in India would be paid for by her maternal grandfather. He would forgo his claim for a costs order.

32. W asks that her debts (at her figure) should be cleared and that everything that remains should be divided equally. Taking a value of £215,000 for the Kent property, that would mean that each party would end up with about £50,000 after W's debts have been cleared.

33. She asks also that there should be a clean break and that H should pay maintenance for N at the rate of £6,000 pa.

34. It seems to me self-evident that the solution that W seeks would be both unfair and contrary to N's interests. It would create a situation where H would be unable to house himself at any sort of adequate level in Tunbridge Wells (or elsewhere in the South-East). W sought to buttress her case by the production of several estate agent's particulars showing properties available at £125,000, which she says H could buy with his deposit of £50,000. They had problems with the length of lease as the particulars made clear and were rightly dismissed by H as "dumps". The suggestion made by W

that H should have to rent is not only inappropriate but the particulars produced by her were for inadequate properties whose rent cost more than the mortgage payments and would be likely to be unaffordable.

35. I remind myself of the statutory requirement set out at section 25(1) Matrimonial Causes Act 1973 that

It shall be the duty of the court … to have regard to all the circumstances of the case, first consideration being given to the welfare while a minor of any child of the family that has not attained the age of 18.

36. N needs to see both her parents properly housed, as they currently are. In my view it is important for N that H is able to retain the Tunbridge Wells flat which she knows as her only home in England. To see her father reduced to living in a studio flat or a bottom of the range property, as would be the case on W's proposals, would be very much against her interests.

37. I accept the force of Mr Fairbank's argument that H has been able to pay his living expenses when he was out of work and his costs out of resources built up during the marriage. It would follow, he says, that W must be put in the position where she can clear her debts. In general terms I agree with that submission. The problem of course is that the cost of housing in England is so much greater than the cost of housing in India.

The European Regulations

38. This divorce petition was filed 8 days before the European Regulations ceased to apply to the United Kingdom and Mr Fairbank argues that I am bound by Article 3(c) EU Maintenance Regulations, Council Regulation (EC) No 4/2009, which provides that:

In matters relating to maintenance obligations in Member States, jurisdiction shall lie with: …

c) the court which, according to its own law has jurisdiction to entertain proceedings concerning the status of a person if the matter relating to maintenance is ancillary to those proceedings, unless that jurisdiction is based solely on the nationality of one of the parties.

He goes on to say as follows:

As Rayden & Jackson note:

"The EU Maintenance Regulation covers all maintenance obligations arising from a family relationship, parentage, marriage or affinity… However, it does not cover matrimonial property rights. Van den Boogaard held that a lump sum or transfer of property may be in the nature of maintenance if it is intended to ensure the support of a spouse. If, however, it serves only the purpose of division of the assets, it will not be treated as maintenance."

And continuing at 1.336:

"It is important to bear in mind the exception in Art 3(c) which applies where a divorce petition is based on the sole domicile of one of the spouses under BIIa, Art 7. In such circumstances, the English court does not have jurisdiction to deal with maintenance since none of the limbs of Art 3 apply. However, the English court would have jurisdiction to consider a claim based on property rights, including the sharing principle, as opposed to a needs based claim."

39. Mr Fairbank refers me to paragraph 80 of Moore v Moore [2007] 2 FLR 339 which reads as follows:

The ruling by the European Court was that a lump sum payment was to be regarded as maintenance if its purpose was to ensure the former spouse's maintenance. Although its formulation differs slightly from that of Jacobs AG

(who spoke of the 'essential object' of the order for payment), the European

Court expressly approved much of Jacobs AG's opinion. The following propositions may be derived from this decision: first, whether a claim is for

maintenance depends upon an autonomous interpretation of the term, and the

label given to the claim by national law is not decisive; secondly, payment of

a lump sum or transfer of property may be in the nature of maintenance if it is

intended to ensure the support of a spouse; thirdly, payment of a lump sum or

transfer of property which serves only the purpose of a division of property or

compensation for non-material damage is not in the nature of maintenance;

fourthly, a payment or transfer of property intended as a division of assets will

concern 'rights in property arising out of a matrimonial relationship'; fifthly,

whether a claim relates to maintenance will depend on its purpose, and in

particular whether it is designed to enable one spouse to provide for himself

or herself or if the needs and resources of each of the spouses are taken into

consideration in the determination of its amount, or where the capital sum set is designed to ensure a predetermined level of income; sixthly, where the

provision is solely concerned with dividing property between the spouses, the

decision will be concerned with rights in property arising out of a matrimonial

relationship and will not therefore be enforceable under Brussels I.

40. He says that my approach has to be a strictly arithmetical division so as to divide/share equally all the net assets, and that therefore I must:

a) Assess what the assets are

b) Take off what I find the debts to be

c) Divide the balance by 2.

If H needs more than 50% to meet his/N's reasonable housing needs that is immaterial as consideration of needs is outside the terms of the Regulations.

41. This is a reframing of W's case which had until the day before the hearing been put on needs.

42. I disagree with Mr Fairbank's approach for a number of reasons:

i) The division of matrimonial assets is governed by reaching a fair outcome in all the circumstances of the case; in some circumstances equality will be appropriate but in others it will not.

ii) I have to have as my first consideration the interests of N.

iii) I do not accept that I have my discretion removed from me and am bound to produce an arithmetical result from the exercise even if it is unfair.

iv) I must arrive at a fair division of the matrimonial assets. Payment of a lump sum or transfer of property is not necessarily in the nature of maintenance as set out in the third proposition extracted by the Court of Appeal in Moore at paragraph 80.

v) What I am doing is ordering a payment or transfer of property intended as a division of assets arising out of a matrimonial relationship. The payment that I order is in part to reflect W's interest in the Tunbridge Wells property which is held in H's name.

vi) I am entitled to take into account the matters set out at paragraph 26 above.

43. In my judgment a departure from equality is justified in this case in N's interest to reflect the all the circumstances of the case and to ensure that both parties have proper housing in which they can look after N when with him/her and to let themselves both to go forwards in their new lives.

Outcome

44. The orders will be that:

i) The property in Kent is in H's sole name. It will remain in his name. I order him to pay W a lump sum of £48,000. I accept that this is at the absolute upper limit of what he can afford. He ascertained from an online search that he can borrow a further £30,000 on mortgage. That will mean that he has a borrowing of almost 5 times his annual income. He said that he could borrow some £10,000 from his parents. I realise that an award of £48,000 requires him to go further than he wishes.

ii) I order the transfer of the 2 Indian properties to W at her expense.

iii) Both parties agree that it would be disastrous if I did not make a clean break order. I agree. Litigation must stop. In any event, H cannot afford to make a payment of any significance.

iv) Child Maintenance/Support: I regard W's suggestion that H should pay one third of his net income by way of child maintenance as way beyond the bounds of reasonable. It would not permit him to service the borrowing that he will need or meet his living expenses.

A good starting point is the child support tables. I commence with H's gross income of £23,300. I deduct the costs of contact in the form of air fares for 3 return journeys (2 for N to England and back and 1 for H return to India) at a cost of £1350 pa. That means that H has a gross weekly income of £422 which would lead to a child support payment of £48p.w. which falls to be reduced by 14.29% for the nights spent by N with him. £41p.w. means a payment of £177p.m. I realise that this is a liability that H did not expect to have to pay in the light of the agreement made between the parties last year but I am satisfied that it is needed by W to help her meet N's expenses.

The Pension

45. H has a pension with a fund value of £80,000. It is currently placed in the Isle of Man as a result of financial advice that was given in 2017. I reject W's assertion that this was done to defeat her claims. It was plainly part of the financial planning when it was not anticipated that an old age would be spent in England. It is agreed that the bulk of the pension is non-matrimonial, having been accrued by H before the parties commenced their co-habitation which I have found to be upon marriage. On that finding they agree that 2/11 is the element of the pension attributable to the marital relationship. Mr Fairbank puts forward a number of arguments as to why a greater sharing award than 9% is justified. The one that has force is that as a result of decisions taken during the marriage, W has forgone the opportunity to accumulate her own pension. There is inevitably be an element of discretion, but I consider taking all the points into account that an appropriate sharing order would be 25%. H has agreed that the pension will be transferred back to England and the evidence is that this could be done without any adverse fiscal expenses or penalty.

Effects of the order

46. Excluding pensions, H will be left with net assets after payment of the lump sum with a value of just over £80,000. He will have absolutely no spare income. At age 50 he will be mortgaged to the hilt.

47. W will be left with the equity in the Indian property of £23,000 (or £28,000 if the parking is not purchased). How she uses the lump sum is a matter for her. She could, for example, clear her mortgage, buy a car as she wishes, and clear the priority debts. That would of course leave her with the soft debts. There are other options that are open to her. I have increased the sum payable above £43,200 so that for the first year she will have, when added to the child payment I order, the sum of £7,000 which is

what she said she needed to receive by way of income. After 1 year I would expect her to be self-supporting.

48. I shall expect the payment of the lump sum and pension share to be implemented within 3 months of handing down judgment, with a sale in default. There will be the usual liberty to apply.

Epilogue

49. This case has been a classic example of how what is sometimes described as small money cases can be infinitely more difficult than cases involving larger sums. It is impossible to find a solution that can leave both parties happy. The decisions that each party took as the marriage broke down and in their understandable desire to be the carer of their daughter have been hugely detrimental financially to them both.