

SAINT VINCENT & THE GRENADINES

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 10 of 1991

BETWEEN:

BERTILLE DA SILVA

Appellant

and

SILVIA DA SILVA

Respondent

Before: The Honourable Chief Justice Floissac - President
The Honourable Mr. Justice Byron, J.A.
The Honourable Mr. Justice Redhead, J.A. (Ag.)

Appearances: Mr. O. Sylvester, Q.C., and Mr. Williams for the
Appellant
Mr. B. Commissiong for the Respondent

1991: Dec. 13.
1992: Apr. 6

JUDGMENT

BYRON, J.A

THE BACKGROUND

Consequent upon Divorce Proceedings in suit 66 of 1976 between the appellant and the respondent, a consent Order was made on 16th May 1986, wherein it was ordered:

"That Da Silva Holdings Limited transfers to the Petitioner the Indian Bay Property in fee simple absolute which forms the subject matter of deed of conveyance Number 818 of 1960 within two months from the date hereof."

Da Silva Holdings was not a party to the proceedings and the appellant failed to procure the transfer of the said property to the respondent.

These proceedings were commenced by the appellant who issued the writ seeking that the Consent Order be varied to enable him, instead of procuring the conveyance of the said property, to pay the sum of \$150,000.00 which he alleged was the value placed on the property by the Court at the time of the Consent Order in 1986.

The learned trial Judge, Joseph J. assessed the value of the said property on 30th April, 1991 at \$319,604.00, and varied the Consent Order for the appellant to pay that sum instead of procuring the transfer of the Indian Bay property.

THE APPEAL

In brief, the appellant challenges the order to pay \$319,604.00 on two grounds:

- 1) That as a matter of law the court did not have jurisdiction to re-open the question of the value, and accordingly was bound to order the payment of \$150,000.00.
- 2) That the judge was wrong to rely on the evidence of Gurley Gibson in assessing the value of the property.

Ground 1

Counsel submitted that the narrow point is that in performing the order it became impossible to convey and the aid of the Court was sought to substitute the conveyance of the property with the value of the property at the time of the earlier order relying on an assessment of Singh J.

In St. Vincent and the Grenadines, modern legislation, based on and similar in terms to the English Matrimonial Causes Act 1973, has been enacted as the Matrimonial Causes Act 1989 No. 58 of 1989.

Counsel for the appellant referred to the 14th edition of Raydon on Divorce at p. 836 to advocate that the "clean break" principle which informed the modern legislation requires an interpretation of the relevant statutory provisions against the idea of re-opening the question of the value of the property.

"The law now encourages spouses to avoid bitterness after family breakdown and to settle their money and property problems.... Since the statute gives jurisdiction to make "an order", it does not empower the court to make a second or subsequent order after an earlier periodical payments application has been dismissed. As to lump sum or sums the statute permits only a single order which may, where appropriate, include provision for the payment of more than one lump sum contingently upon the happening of a future event such as the falling of a reversionary interest in an estate to which one of the parties to the marriage is entitled."

It was his contention that all that the court was entitled to do was to make an order for the payment of a sum equivalent to the value of the property at the date of the Consent Order in 1986.

This proposition does not seem fit in with the idea of avoiding bitterness between these spouses after their family breakdown. It does not fulfill the apparent object of the Consent Order of providing a home for the respondent; nor does it provide any compensation for the appellant's default which has lasted nearly six years. As a matter of ordinary commercial knowledge, property values have increased between 1986 and the present time,

confers a benefit to the payer and a detriment to the payee.

Counsel for the appellant, however, relied on the law and cited a line of cases, *Minton v Minton* (1971) 1 All E.R. 79, *de Lasala v de Lasala* (1979) 2 All E.R. 1146, and *Thwaite v Thwaite* (1981) 2 All E.R. 789 in support of the proposition that the Court had no jurisdiction to embark on an assessment of the property.

These cases were based on the particular sections of the Matrimonial Causes Act and the jurisdiction of the Court was affected by the interpretation of these sections as could be seen in the brief passages below.

Minton's case involved a maintenance order based on an agreement between the parties in accordance with sec. 23(1) of the Matrimonial Causes Act. The Court refused the wife's application to vary the order by increasing the amount payable by way of maintenance. Lord Scarman succinctly put the distinguishing feature at page 608:

"For these reasons I conclude that sec. 23(1) of the Act of 1971 does not empower the court to make a second or subsequent maintenance order after an earlier application has been dismissed..... The short answer to the point, however, is that upon the true construction of sec.23(1) the court does not have the jurisdiction. Once an application has been dealt with upon its merits, the court has no future jurisdiction save where there is a continuing order capable of variation or discharge under section 31 of the Act."

It is perhaps relevant to note that Lord Scarman specifically indicates that different jurisdictions are prescribed by sections 23 and 31.

de Lasala approved and applied *Minton* to similar legislation in Hong Kong. In that case the court order was based on agreed financial provisions, contained in a deed, for the husband to pay a lump sum to the wife and further sums to trustees to buy a residence for her use for life and the furniture for it. After execution of the financial provisions by the husband, the wife's application to set aside or vary the Consent Order was refused.

At page 1151 Lord Diplock said:

"The statutory language which in *Minton v Minton* was construed as excluding the jurisdiction of the court to make a second or subsequent order once an application for financial relief has been dismissed appears in ss 23(1) and 24(1) of 1973 English consolidation Act and is in the following terms:

'On granting a decree of divorce, a decree of nullity of marriage or a decree of judicial separation or at any time thereafter (whether, in the case of a decree of divorce or of nullity of marriage, before or after the decree is made absolute), the court may make

is to say....'

There follow in s 23(1) references to orders for periodical payments, secured or unsecured, and lump sum payments to a party to the marriage or for the benefit of a child of the family and, in s 24(1), references to property adjustment orders. These words in the consolidation Act are taken from ss 2 and 4 of the English Matrimonial Proceedings and Property Ordinance which was in force in Hong Kong in 1975 when the wife made her application which is the subject of the instant appeal. They had previously been used in s 16(1) of the English Matrimonial Causes Act 1965, which had been reproduced in the matrimonial Causes Ordinance which was in force in Hong Kong at the date of Briggs J's order of 23rd May 1970. So unless some relevant distinction can be found between the wife's claim in the instant case for financial relief for herself after her original claim had been dismissed, and the claim of the wife in *Minton v Minton* for financial relief in similar circumstances, the reasons for the judgment of the House of Lords are decisive in the husband's favour on what is now the only contested issue in this appeal.

In *Thwaite* the Consent Order was based on the wife undertaking to return the children to England and the husband undertaking to pay their school fees and convey his interest in the matrimonial home to the wife. The arrangements broke down when the wife took the children to Australia without informing the husband. The court set aside the consent Order and considered the financial position de novo. At p. 794 Ormrod L.J. made specific reference to the fact that jurisdiction to vary and discharge the order was specifically conferred in section 31 of the Matrimonial Causes Act.

"The fact of eliminating the contractual basis of these consent orders should simplify the problems. If their legal effect is derived from the court order it must follow, we think that they must be treated as orders of the court and dealt with, so far as possible, in the same way as non-consensual orders. So, if the order is one of those listed in sec.31(2) of the 1973 Act, it can be varied in accordance with the terms of that section (see *B(GC) v B(BA)* (1970) 1 All E.R. 913."

In *St. Vincent and the Grenadines* sec.40 of the Matrimonial Causes Act No. 58/89 parallels and is in the same terms as sec. 31 of the Matrimonial causes Act of 1973 of England to which reference was made in the passages quoted from *Minton* and *de Lasala* and *Thwaite*.

Sec. 40 of No. 58/89

"40(1) Where the court has made an order to which this section applies, then, subject to the provisions of this section, the court shall have power to vary or discharge the order or to suspend any provision thereof temporarily and to revive the operation of any provision so suspended.

(2) This section applies to the following orders, that is to say -

(e) any order for a settlement of property under section 32(1)(b) or for a variation of a settlement under section 32(1)(c) or (d), being an order made on or after the grant of a decree of

divorce or judicial separation:

- (7) In exercising the powers conferred by this section the court shall have regard to all the circumstances of the case, including any change in any of the matters to which the court was required to have regard to when making the order to which the application relates and, where the party against whom the order was made has died, the changed circumstances resulting from his or her death."

In this case the Consent Order was an order which falls under section 32(1) (b) which provides for

"a settlement of such property as may be so specified, being property to which a party to the marriage is so entitled, being made to the satisfaction of the court for the benefit of the other party to the marriage....."

The statutory provisions in section 40 do not leave any room for doubt that the court has power to vary the order in this case. The words of the statute are clear. The cases referred to by Counsel for the appellant recognize that the "clean break" is statutory and is subject to the provisions of section 40, which give the Court power to vary consent orders in matrimonial proceedings.

The matter is put beyond debate in the case of *Lewis v Lewis* (1977) 3 All E.R. 992 where Ommrod L.J. specifically considered the interpretation to be attached to this section of the Act, at p. 994:

".....The relevant section now is s 31 of the Matrimonial Causes Act 1973, which by sub-s (1) gives the court the same powers to vary, and in sub-s (7) provides:

'In exercising the powers conferred by this section the court shall have regard to all the circumstances of the case, including any change in any of the matters to which the court was required to have regard when making the order to which the application relates.....'

So what we are now required to have regard to are changes in any of the matters effectively mentioned in s 25 of the 1973 Act.

I am bound to say that it has always seemed to me, with respect, that the powers of variation, which were given by statute to this court in a series of enactments going right back to 1857, have been, if anything, progressively enlarged and that the intention of Parliament is that, in handling these family matters where money is concerned, the court should have as unfettered a discretion as possible to deal with the situation as it is when the matter comes before it. I am sure it is not the intention of Parliament in any way to trammel the discretion by any kind of technical reasoning or technical grounds.

The court here has to provide reasonably for the maintenance of three growing children. In those circumstances, it seems to me that the learned judge was perfectly right to look at the matter as it stood at the time when the case was before him and make an order which

was reasonably in the circumstances of that case, both from the point of view of the husband and father and from the point of view of the wife and mother."

Section 40(7) prescribes the manner in which the Court should exercise the powers conferred in the section. The broad and wide discretion it gives to the Court, by the requirement to have regard to all the circumstances of the case, must include the duty to consider and determine the value of the property at the time the matter was before the Court. As has been seen exercising the discretion in this way accords with the way the section is applied by the Court of Appeal in England and in the Privy Council.

It is clear, therefore, that the Judge had jurisdiction, conferred by section 40 of the Act, to look at the changed circumstances. The significant change resulted from the failure of the appellant to transfer the Indian Bay property to the respondent. It seems to me that any fair and reasonable consideration of the situation by a court would require that the Judge would look at the matter in the light of the facts as they were when the matter came on for hearing. I am of the opinion that the Judge exercised her discretion properly in varying the order to substitute the payment of the real monetary value, in lieu of the property itself.

In any event, Counsel for the appellant had other problems because he was unable to show that the Court had ever made any order or decision that the value of the property at the time of the Consent Order was \$150,000.00 or any other sum. During the hearing of the appeal the counsel for the appellant indicated that he relied on the evidence of Samuel Commissiong, Esq., the respondent's solicitor, concerning what transpired at the hearing that led to the consent order. This evidence was to the effect that, during the hearing which led to the Consent Order, there was a discussion as to the value of the property and Singh J., the trial Judge, expressed the opinion that the value should be accepted as \$150,000.00 which was a figure somewhere between the values being argued for by the parties. There is no principle by which a party to litigation, or the Court, would be bound by opinions expressed by a judge during a trial. It is the decision that is binding and there was absolutely no indication that any decision was made. In fact it would have been completely unnecessary because the proceedings ended in a consent order by which the parties agreed for the conveyance of the property. The formal judgment which was filed does not contain any reference to a value, so there was no factual basis for the proposition that the Court had established a value of the property at the time of the Consent Order.

This ground of appeal fails.

Ground 2

The appellant, who was the plaintiff, did not lead any valuation evidence, apart from opinions he expressed about the value. The Court refused him an adjournment to call evidence to rebut the evidence of Gurley Gibson, after the case for the respondent was closed.

Counsel for the appellant submitted that the Judge was wrong to rely on the evidence of Gibson because it was a valuation based on hearsay. He referred us to the case of *English Exporters v Eldonwall* (1973) 1 All E.R. 726. Megarry J. considered the law of evidence relating to the testimony of valuers and expressed his conclusions at 733 as follows:

"Putting matters shortly, and leaving on one side the matters that I have mentioned, such as the Civil Evidence Act 1968 and anything made admissible by questions in cross-examination, in my judgment a valuer giving expert evidence in chief (or in re-examination) -

(a) may express the opinions that he has formed as to values even though substantial contributions to the formation of those opinions have been made by matters of which he has no first-hand knowledge;

(b) may give evidence as to the details of any transactions within his personal knowledge, in order to establish them as matters of fact; and

(c) may express his opinion as to the significance of any transactions which are or will be proved by admissible evidence (whether or not given by him) in relation to the valuation with which he is concerned; but

(d) may not give hearsay evidence stating the details of any transactions not within his personal knowledge in order to establish them as matters of fact."

The learned trial Judge stated:

"I turn to consider the evidence of building contractor, Gurley Gibson. This witness did not take measurements of the property himself and although he said he checked it over, he could only have meant that he checked the calculations and the information given to him by his son, Michael Gibson who was the one who took the measurements.

However, Gurley Gibson did have a look at the house from the outside and, as an experienced builder of some thirty years, I accept his evidence that it would cost about \$200,000.00 to build a house similar to the Indian Bay property.

Gurley Gibson's evidence was that the price of land is \$12.00 a square foot. Area of the land of the Indian Bay property as shown from deed no. 396/1976 is 9967 sq.ft. a total cost of \$119,604.00."

In my view this passage speaks for itself and is consistent with my review of the record. Gibson's testimony showed that he

valuation was based on his estimate of construction price and the price of land at Indian Bay matters which were well within his own personal knowledge and experience. The contention that the Judge's finding as to value was based on hearsay evidence from Gibson is erroneous.

It seems to me that there was evidence, capable of belief, which supported the Judge's assessment of the value of the property.

In the circumstances I would dismiss the appeal with costs to the respondent.

REDHEAD J.A. (Ag.)

This is an appeal against an Order made by Joseph J. on the 3rd May, 1991 whereby the learned judge varied an Order made by Singh J. made on 30th May, 1986.

The Appellant and the Respondent were married in April 1961. In 1975, unhappy differences arose between them. As a result, the Respondent's Solicitor wrote to the Appellant on 18th February, 1975 informing him that the Respondent intended to commence divorce proceedings against the Appellant and in that letter mention was made of a property settlement.

On 27th February, 1976 the Appellant conveyed to Da Silva Holdings Limited, three properties, one of which was the subject of an Order made by Singh J.

After divorce proceedings, as part of the settlement, Singh J. on 16th May, 1985, made inter alia, the following Order:

"It is by consent ordered that Da Silva Holdings Limited transfers to the Petitioner the Indian Bay Property in fee simple which forms the subject matter of Deed of Conveyance Number 818 of 1960 within 2 months from the date hereof."

The second part of the Order which is not material to this appeal was for the payment of \$150,000 in full and final settlement of all ancillary matters.

The Appellant complied with the second part of the Order. But on 15th July, 1986 by application to the Court, the Appellant sought an Order that the Respondent consent to a variation Order in respect of the property. He was

then proposing to pay to the Respondent the sum of \$150,000 which he said represented the value of the property because as he was contending, the Company, Da Silva Holdings Limited, would not consent to the transfer of the property to her. The Respondent opposed the application and leave to withdraw the application was granted on 25th July, 1986.

On 28th November, 1986, the Appellant commenced proceedings against the Respondent. On 13th March, 1987, Singh J. made an Order that the Company, Da Silva Holdings Limited be joined as a defendant in the action.

The Appellant in his Statement of Claim, prayed, inter alia, for an order that part or portion of the Order of the Court made by consent on 16th May, 1986 be set aside and an Order that the Appellant do pay to the Respondent the value placed on the property at the time of the making of the Order, that is, the sum of \$150,000. Such further or other Orders may be made as the Court shall deem meet.

The case came on for hearing commencing on 8th April, 1991 and after approximately 8 days of hearing the learned trial judge delivered judgment on the 3rd May, 1991. On 16th May, 1991 the following Order of Court, so far as is material, was entered:-

"IT IS THIS DAY ORDERED that the first part of the said Order of Singh J. wherein it was by consent Ordered that Da Silva Holdings Limited transfer to the Petitioner/Defendant by Original action in this suit, in fee simple absolute the Indian Bay Property which forms the subject matter of Deed of Conveyance Number 818 of 1960 be and is hereby set aside with no order as to costs.

AND IT IS ALSO ORDERED that BERTILLE DA SILVA, the plaintiff by Original action pay to Sylvia Da Silva, the Defendant by Original action, the sum of \$319,604.00..."

It is this Order of the learned trial judge that is appealed against.

The Grounds of Appeal are as follows:

"1. The Learned Trial Judge having found that

"Singh J. had put the value of
\$150,000.00 on the property and
the first Defendant (Respondent)
is bound by that value."

was precluded as a matter of law by that finding
of fact from receiving any fresh evidence as to
the value of the property in order to ascertain
the money's worth of the property to be
substituted for or to be placed in lieu of
the actual transfer of the property.

2. The Learned Trial Judge failed to appreciate that the
only difference between a lump sum order and a property
transfer order is that the one provides money and the
other money's worth and came to a wrong conclusion in
law that she could ignore the money's worth of the
property found by Singh J. to be \$150,000.00 in May,
1986 and intended then to be transferred by the parties
and imposed an entirely new value at the time of the
making of the variation order.
3. The Learned Trial Judge erred in relying on the evidence
given by Gurney Gibson as the basis of her variation order
for the following reasons:

- (i) Gibson's evidence is so far as it
purported to be material was provided
to him by a third party thereby violating
the hearsay rule;
- (ii) The unreliable nature of Gibson's evidence
was obvious when the Learned Trial Judge
was forced to reject his evidence in
respect of the area of land which comprised
the property in issue in the light of
the stated area in the relevant deed
of conveyance;

(iii) Gibson had not examined and inspected the property and was in no position to give a considered opinion of its value in 1986 the material date or at all;

(iv) It was not open to the parties to proceedings to re-open the value of the property in the proceedings;

and came to a wrong conclusion in law that she could place a different money's worth to the property.

4. Alternatively, if it was open to the trial judge to let in evidence on the issue of the money's worth of the property then the Trial Judge erred in law in rejecting evidence in rebuttal of Gibson's evidence and deprived herself of the benefit of relevant evidence on that issue to the prejudice and detriment of the Appellant since the Trial Judge used Gibson's evidence as the basis on which she established the money's worth of the property and thereby came to the inconsistent conclusions on the money's worth of the property.

5. There was no evidence upon which the Learned Trial Judge could have made the following findings:

- (i) That the consent order was made in 1976
- (ii) That the Judge attached a value of \$150,000.00 to the property at 1976.
- (iii) That at that date property value was not as high as it is today (1991)
- (iv) That the Court can and does take judicial notice of this.

And which findings led her to the erroneous conclusion that the sum of \$150,000.00 which was the money's worth of the property at the time of the making of the Order was merely a suggested sum of the Plaintiff (Appellant) who wished a sum of money to be substituted.

6. The decision of the Learned Judge was against the weight of the evidence and cannot lawfully be supported thereby.
7. The exercise of the Judge's discretion in refusing to award costs to the Appellant was based on wrong principles having regard to the following factors:
 - (i) The Plaintiff was successful in his claim for a variation of the order.
 - (ii) The Plaintiff acted with promptitude in seeking the variation.
 - (iii) The Respondent at all material times refused to co-operate in achieving the variation.
 - (iv) The findings of the Trial Judge:
 - (a) that the Respondent failed to establish that the Appellant's application ought not to be entertained.
 - (b) Counsel for the Respondent's argument amounted to "qualified consent" to the variation.
 - (c) That the Respondent ought not to have counterclaimed against the Appellant."

Learned Counsel for the Appellant argued that Singh J. when making the Order had arrived at a valuation of the Indian Bay Property which was put at \$150,000. That the trial judge had no authority to make the Order whereby she place a value of \$319,604 on the said property. The making of that Order by her was in effect to make a second Order for lump sum payment, so argued Learned Counsel for the Appellant.

It is my view that when Singh J. made the Order transferring the Indian Bay Property to the Respondent, he was not making a lump sum payment to the Respondent of \$150,000 as counsel contends. He was making provision for a home for the respondent to live.

Learned Counsel also submitted that the \$319,604 (value of house plus land) ordered by the learned trial judge is a new order for financial provisions and this the judge was not entitled to do. He stressed that this was contra the clean break principle enunciated in de lasala v de lasala 1979 2 All E.R. 1146 - a case on which counsel relies heavily.

Learned Counsel submitted that Singh J. having found as a fact that the property was valued at \$150,000 in May 1986, it was not open to the trial judge to open the issue de novo. The value of the property was an issue estoppel which binds the Respondent. So argued Learned Counsel for the Appellant.

The only record as to how Singh J. arrived at the \$150,000.00 as the value of the Indian Bay Property is to be found on page 25 of the record when Mr. Samuel Commissiong, Solicitor for the Respondent in cross-examination to Mr. Sylvester said:-

"My recollection in this aspect is correct. I did say judge and I tossed figures around. Not correct to say that tossing up continued with you and Mr. Da Silva, Judge and myself. The question of tossing figures was friendly chat (off the record chat) between myself and the judge. Not a case of doing anything behind a back. Value of Indian Bay Property was issue in Chambers. I had value from buyers around \$130,000.00. You had valuation of \$175,000.00. Judge put value of \$150,000.00 as a median."

So it was that the judge arrived at a value of \$150,000 for the Indian Bay Property, a very informal way in my view.

In North West Water Ltd v Binnie & Partners (a firm) 1990 3 All E.R. 547 at P. 552 Drake J. said:

"Much of the argument before me turned on the limits which should be put on the application of issue estoppel. Consideration of the authorities reveals two schools of thought on this one approach is what I call the broad one which holds that the true test of an issue estoppel is whether all practical purposes the party seeking to put forward some issue has already had that issue determined against him by a Court of competent jurisdiction, even if the parties to the two actions

are different. The conflicting approach is to confine issue estoppel to that species of estoppel per rem judicatum that may arise in civil actions between the same parties or their privies....."

The value of the Indian Bay Property was never an issue before Singh J. It was never litigated. As I have said above, the judge mentioned the figure \$150,000 in a very informal way. This therefore could never be the basis of issue estoppel.

I now turn to examine de lasala v de lasala (Supra). In an agreement by Husband and Wife that the husband would not defend his wife's petition for divorce (which contained claims for maintenance, a lump sum and secured payment) and that he would make financial provisions for her by payment to her of the lump sum and payments of Trustees of further sums in trust to buy a residence for her use for life and the furniture for it. It was a term of the agreement that the wife would consent to dismissal of two claims for financial provisions in the petition. The agreed financial arrangements were contained in a deed of arrangements and annexed trust deeds.

On 23rd May, 1970 a judge in the Supreme Court of Hong Kong granted the wife a decree nisi on her petition and on the same date made a consent order approving the parties financial arrangements set out in the deed of arrangement and annexed trust deeds and on the husband's execution of those arrangements dismissed the wife's application for financial relief in her petition. In 1975 the wife applied to the Supreme Court for an order to set aside or vary the consent order of 23rd May, 1970. The Court of Appeal of Hong Kong dismissed the wife's application on the ground that there was no jurisdiction to entertain a subsequent application for financial relief by a wife when her original application had been dismissed by a consent order. The wife appealed to the Judicial Committee of the Privy Council which held that there was no jurisdiction to entertain the wife's subsequent application.

Lord Diplock in giving the advice of the Board at pages 1153 and 1145 said:-

"Under the Matrimonial Causes Ordinances which was in force in 1970, the Court had power to make two different types of orders making financial provisions for a wife (a) periodical payments both secured and unsecured and (b) a lump sum payment: Orders of the former type could be varied or discharged by the Court on subsequent application by either spouse. Lump sum orders were once for all; they could not be subsequently varied. There was however, at that time no power in the Court to make an order for the transfer of property between spouses or for the settlement of property for the benefit of a spouse. The power to make transfer of property orders was conferred on the Court in 1972 S. 6 of the Matrimonial Proceedings and Property Ordinance. Like lump sum payments they are once and for all; there is no power to vary them on subsequent application...."

...In *Minton v Minton* (1979 1 All E.R. 79) the House of Lords decided that the policy of the English Legislation... was to permit parties to the marriage that had been irreparably broken down, to make a "clean break" also as respects financial matters from which there could be no going back. The means provided for achieving this result were for the parties to agree on a once and for all settlement between them and to obtain the court's approval to it and an order of the court either of a once and for all type or dismissing the parties' claim to any court order against one another for financial relief...."

Then at page 1155 he continued:

"Financial arrangements that are agreed on between the parties for the purpose of receiving the approval and being made the subject of the court order no longer depend on the agreement of the parties as the source from which their legal effect is derived. Their legal effect is derived from the Court Order; and the method of enforcing such of their provisions as contained to be executory... is not by action but by summons under the Court Order pursuant to the liberty to apply....In their Lordship's view, there is no relevant maintenance agreement now subsisting which is capable of attracting the jurisdiction of the Court under S. 15 of the Ordinance....where a party to an action seeks to challenge, on the ground that it was obtained by fraud or mistake, a judgment or an order that finally disposes of the issues raised between the parties, the only ways of doing it that are open to him are by way of appeal from the judgment or order of a high court or being a fresh action to set it aside...."

In the instant case, it cannot be said that the settlement by the Appellant was a once and for all settlement. As it turned out, the Appellant was unable, so he says, to transfer the property to the Respondent because Da Silva Holdings Limited would not consent to his doing so.

The instant case is distinguishable from the de Lasala Case. In the latter, the husband had fully executed the financial arrangements. He had honoured the agreement except for the payment of \$50,000 for furniture which had not become due at the time Mrs de Lasala went back to Court to seek a variation of the consent order because she had not yet selected a residence. Whereas in the former, the Appellant has not complied with the agreement. He was unable to comply with part of the consent order. He was unable to convey the Indian Bay Property to the wife as ordered by the Court. In this way, it is my view that

the wife's original application for relief was still before the court. In the instant case, the order was executory. It is not without significance, in my view, that it was the Appellant himself who went to Court, on a fresh application, seeking the Court's assistance saying that he could not comply with the order as it stood and that he should be permitted to pay money's worth for the property in lieu of transferring it to the Respondent.

I agree entirely with Mr. Commissiong, Learned Counsel for the Respondent when he said "He who comes to Equity must come with clean hands." When one looks at the background of this matter and the action of the Appellant, it can hardly be said that he is endowed with this virtue.

When it was brought to his attention that the Respondent was about to commence divorce proceedings, he transferred properties including the Indian Bay Property to the Company, Da Silva Holdings Limited. The learned trial judge said of that transfer:-

"On 27th February, 1976, the plaintiff conveyed to the second named defendant (Da Silva Holdings Ltd) three properties, one of which was the Indian Bay Property.

I think that this is too coincidental. I do believe that the plaintiff was attempting to safeguard property from the second defendant."

In reference to that same company, the learned trial judge found:

"He even had power of almost controlling the second named defendant (the company) from beyond the grave."

In Thwaite v Thwaite 1981 All E.R. 789, Ormond L.J. at page 794 said:

"Where the order is still executory, as in the present case and one of the parties applies to the court to enforce the order, the court may refuse if in the circumstances prevailing at the time of the application, it would be inequitable to do so... Where the consent order derives its legal effect from the contract, this is equivalent to refusing a decree of specific performance; where the legal effect derives from the order itself, the court has jurisdiction over its own orders....We do not think that reference to 'fraud' or 'mistake' in Lord Diplock's judgment in de Lasala v de Lasala 1972 2 All E.R. 1146 at 1155 were intended to confine

powers of the Court in these respects in regard to orders based on consent within narrower limits than those which apply to no-consensual orders.

...(iv) The judge was entitled in his discretion to make a new order for ancillary relief in favour of the wife notwithstanding the refusal of the wife to consent to his doing so. His jurisdiction arose not from the liberty to apply, as he held, but from the fact that the wife's original application for ancillary relief was still before the court and awaiting adjudication. It had not been dismissed since the conveyance had not been executed as part of the order of 30th April 1979, by which her application was dismissed had never come into effect..."

Similarly, in the instant case, as I have said above, the Respondent's application was still before the Court. The conveyance of the Indian Bay Property had never been executed as part of the Order of Singh J. of 30th May, 1986.

In my judgment, I have no doubt that where the order is executory, as it is here, the Court having jurisdiction over its own orders can vary the order.

I have no doubt therefore, that the learned trial judge in her discretion was entitled to vary the order of Singh J. and had the power to make the order (See s. 40 of No. 58/89 Laws of St. Vincent and the Grenadines.)

Was the learned judge correct in her approach in arriving at the value of the Indian Bay Property at \$200,000 and cost of land of \$199,604?

Learned Counsel for the Appellant in his argument stressed that the learned trial judge was in error in that in arriving at the value of the property at Indian Bay she was guided by hearsay evidence. I do not agree.

The record shows that Gurley Alexander Gibson said in cross-examination that he knew the condition of the house and that he was able to assess the condition of the building from his assistant's information. He also said that the value he gave was from report for the company valuation. His son Michael Gibson did all the valuations. However, he did go on to say:

"As an experienced builder, today it would cost about \$200,000 to build a house like that today."

He went on to give a detailed analysis and breakdown of how he arrived at that figure.

The learned trial judge in her judgment at pages 22 and 23 said:

"I turn to consider the evidence of the building contractor, Gurley Gibson. This witness did not take measurements of the property himself, and although he said he checked it over, he could only mean that he checked the calculations and information given to him by his son, Michael Gibson, who was the one who took measurements. However, Gurley Gibson did have a look at the house from the outside, and as an experienced builder of some thirty years, I accept his evidence that it would cost \$200,000 to build a house similar to the Indian Bay Property."

It is quite obvious that the learned trial judge did not depend on the evidence of what Michael Gibson told his father, but arrived at the value of the property by what Gibson told her in evidence as an experienced builder, that it would cost \$200,000 to build a house similar to the Indian Bay Property.

Finally, in relation to the cost of the land, she said at page 23:

"Gurley Gibson's evidence was that the price of land is \$12.00 per square foot. Area of land of Indian Bay Property as shown from Deed No. 396/1976 - 9967 sq.ft. a total cost of \$119,604."

I have no doubt in my mind that the learned judge had the material before her from which to arrive at the valuation for land and Indian Bay Property. I have absolutely no doubt, too, that she used the correct approach and arrived at the correct valuations.

In light of the foregoing, I would dismiss this appeal with costs to the Respondent.

C.M.D. BYRON,
Justice of Appeal

A. REDHEAD,
Justice of Appeal (Ag.)

V.F. FLOISSAC,
Chief Justice