[2018] JMSC Civ 89

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2008 HCV 01603

IN THE MATTER OF DIVISION OF PROPERTY known as Lot 71 Murray Close, Cardiff Hall, Runaway Bay in the parish of St. Ann

AND

IN THE MATTER OF an Application for Maintenance of Dana Reid and Hilary O'Connor Reid

BETWEEN	**HILARY O'CONNOR-REID**	**CLAIMANT**
AND	**DOUET GUY REID**	**DEFENDANT**

Ms. Ayanna Thomas instructed by Nunes, Scholefield, DeLeon & Company for the Claimant

Mr. Gordon Steer and Ms. Kayanne Parke instructed by Chambers, Bunny & Steer for the Defendant

Heard: April 26, 2018 and June 1, 2018

Whether the Supreme Court has jurisdiction to declare a consent order a nullity.

WINT-BLAIR, J.

[1] In the case at bar, the parties are married. The claimant commenced proceedings by way of fixed date claim form under the Property (Rights of Spouses) Act ("PROSA") and the Maintenance Act without reference to the Matrimonial Causes Act ("MCA") seeking orders for division of property as well as maintenance of herself as spouse and of the child of herself and the respondent. The matter was settled by the parties by way of mediation and a consent order was filed in this Court on the October 2, 2008 pursuant to Rule 42.7 of the Civil Procedure Rules ("CPR").

[2] On September 23, 2016, a notice of application for commitment to prison for failure to pay child maintenance was filed by the claimant. At the hearing, a preliminary point was raised by Mr. Steer challenging the jurisdiction of the Court to have made the consent order. He argued that the said consent order was a nullity.

[3] In response Ms. Thomas argued that the order having been made by consent some nine years ago was by way of a binding contract and could not simply be set aside except for duress, mistake of fact, fraud or misrepresentation, none of which have been alleged. Further, that the defendant failed to dispute the jurisdiction of the court within fourteen days of being served with the claim pursuant to the CPR and therefore he is deemed to have accepted the jurisdiction of the court and also to have waived any irregularity in procedure. Both sides filed written submissions which I have considered and for which I am grateful. I have not set out all the points raised but only those I used to determine this matter.

[4] The central issue is whether or not this court has the jurisdiction to declare the consent order a nullity and to set it aside.

[5] The claimant argued that the respondent should not have the benefit of disputing the jurisdiction of the Court some nine years after the order was perfected. The respondent argued that this is a failure to comply with a statute as distinct from a technical defect which cannot be cured.

[6] Mr. Steer cited the case of **Re Pritchard** [1963] 1 All E.R. 873 at 883 in which the majority judgment of the court was led by Upjohn, L.J, who set out the following classes of nullity:

> *"The authorities do establish one or two classes of nullity such as the following...(i) Proceedings which ought to have been served but have never come to the notice of the defendant at all. This of, course does not include cases of substituted service or service by filing in default, or cases where service has been properly dispensed with;(ii) Proceedings which have never started at all owing to some fundamental defect in issuing the proceedings; (iii) Proceedings which appear to be duly issued, but fail to comply with a statutory requirement."*

[7] Re Pritchard was affirmed by the Privy Council in **Leymon Strachan v The Gleaner Company Limited and Dudley Stokes** [2005] 1 WLR 3204. In that case, the Board said as follows:

> *"The only question is whether an order of a judge of the Supreme Court made without jurisdiction is a nullity, not in the sense that the party affected by it is entitled to have it set aside as a matter of right and not of discretion (of course he is) nor in the sense that the excess of jurisdiction can be waived (of course it cannot) but in the sense that it is has no more effect than if it had been made by a traffic warden and can be set aside by a judge of co-ordinate jurisdiction.*
>
> *An order made by a judge without jurisdiction is obviously vulnerable, but it is not wholly without effect; it must be obeyed unless and until it is set aside and (as will appear) it provides a sufficient basis for the Court of Appeal to set it aside. On the other hand, since the defect goes to jurisdiction, it cannot be waived; the parties cannot by consent confer a jurisdiction on the court which it does not possess.*
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> *The Supreme Court of Jamaica, like the High Court in England, is a superior court or court of unlimited jurisdiction, that is to say, it has jurisdiction to determine the limits of its own jurisdiction. From time to time a judge of the Supreme Court will make an error as to the extent of his jurisdiction. Occasionally (as in the present case) his jurisdiction will have been challenged and he will have decided after argument that he has jurisdiction; more often (as in the Padstow case) he will have exceeded his jurisdiction inadvertently, its absence having passed unnoticed. But whenever a judge makes an order he must be taken implicitly to have decided that he has jurisdiction to make it. If he is wrong, he makes an error whether of law or fact which can be corrected by the Court of Appeal. But he does not exceed his jurisdiction by making the error; not does a judge of co-ordinate jurisdiction have power to correct it.*
>
> *In the present case Walker J held that he had jurisdiction to make the order he did. If wrong, his decision could be reversed by the Court of Appeal which would be bound without going into the merits to set aside his substantive order as a nullity. As between the parties, however, and unless and until reversed by the Court of*

> *Appeal, his decision (both as to jurisdiction and on the merits) was res judicata. As a judge of co-ordinate jurisdiction Smith J had no power to set it aside."*

Once a consent order is drawn up and sealed, the Court has no power to vary it.[1] It is also well settled that the Court will not interfere with an order made by consent after the order has been perfected.[2]

[8] In **De Lasala v De Lasala** [1980] AC 546 at 561, the Privy Council stated that:

> *"where a party to an action seeks to challenge, on the ground that it was obtained by fraud or mistake a judgment or order that finally disposes of the issues raised between the parties, the only ways of doing it that are open to him are by appeal from the judgment or order to a higher court or by bringing a fresh action to set it aside."*

Ms Thomas has argued that the respondent has not raised duress, mistake of fact, fraud or misrepresentation and she is correct. In all the circumstances of this case, I have arrived at the inescapable conclusion based on the authorities that were I to accept the submission that the consent order is a nullity, this court has no jurisdiction to declare that it is a nullity and to set it aside.

As between the parties, unless and until the consent order is reversed by the Court of Appeal, the consent order (both as to jurisdiction and on the merits) is res judicata.

The following orders are hereby made by the court:

1. The court declares that the undated consent order filed on October 2, 2008 is a valid order.

2. No order as to costs.

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[1] Caribbean Civil Court Practice, note 30.8, p.342
[2] Marsden v Marsden [1972] 3 WLR 136 at 141.