Settlement of Matrimonial Disputes In Case of Divorce: A Case Comment on Civil Appeal No.2133/78

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Introductory Note:-

The litigation between the divorced parties in the case of Bruktawit Gebru v. Alebachew Tiruneh[1] did not involve just one matter. It pertained to several questions, such as the custody and maintenance of children and the division of household furniture. The parties also disputed the ownership of a dwelling house and the Supreme Court was called to decide on issues affecting diverse matters.

However, this commentary focuses on that part of the decision relating to the dispute over the dwelling house.

The commentary consists of two parts: Analysis of the provisions of the Civil Code relevant to the case and assessment of the decision in light of these provisions. It is made with a view to making a modest contribution towards a better understanding of Ethiopian matrimonial law.

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1 Decided by the supreme Court on Hidar 30, 1981; Please note that in this commentary, unless otherwise indicated, all dates are given according to the Ethiopian Calendar.

1. Background.

1.1. Preliminaries

When divorce spells the end of a marriage, more often than not disputes over ownership of property are likely to ensue. According to Ethiopian matrimonial law, adjudication of such disputes is usually a matter left to the discretion of the family arbitrators.[2] Under prescribed conditions, though, these disputes may come before ordinary courts for a final disposition.[3]

The answer to the question of how to resolve disputes over the division of the matrimonial estate upon the termination of marriage appears to be quite simple. The settlement may be made on the basis of either,

(i) what the former spouses have validly agreed on the pecuniary effects of their conjugal union; or,
(ii) the relevant provisions of the Civil Code.

The spouses may regulate the pecuniary effects of their union by a contract of marriage. Such a contract may be drawn up before the celebration of their marriage.[4] It is also possible for them to enter into an agreement of this sort after their wedding, provided that they obtain the approval of the family arbitrators or the court.[5]

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2 In this commentary, unless mention is made otherwise, all articles cited are those of the Civil Code of Ethiopia
Art. 728-Disputes arising out of divorce.
(1) Disputes arising out of divorce shall be submitted to the arbitration of the arbitrators who have pronounced the divorce.

Ordinarily, it is the family arbitrators who shall pronounce the divorce upon receipt of a petition to that effect from one or both of the spouses. (arts. 666, 668 and 678).
However, it is possible for parties to agree to have recourse to the arbitration of persons other than the family arbitrators as mentioned in art. 728 (2)

3 Art 736-Appeal to court against decisions of arbitrators. The decisions made by the arbitrators...may only be impugned before the court by alleging the corruption of the arbitrators of fraud in regard to third person or the illegal or manifestly unreasonable character of such decision.
Consult also art. 350 (4) and 351 of the Civil Procedure Code of Ethiopia.

4 Art. 627-Contract of marriage.
(1) The spouses may, before their marriage, regulate by a contract of marriage the pecuniary effects of their union.

5 Art. 633-Contracts between spouses.
(a) Contracts made between spouses during marriage shall be of no effect under the law. Unless they have been approved by the family arbitrators or by the court.

Where the spouses have a valid agreement on the pecuniary effects of their marriage, it shall govern their property rights.[6] When their marriage is terminated, the matrimonial assets and liabilities shall be divided between the formerly married couple in accordance with what they have validly agreed. If disputes arise between them, they shall be resolved by giving effect to the terms of their agreement.[7]

In default of such a contract of marriage, the property relations between the spouses shall be governed by Articles 647-661 of the civil code[8] and when their marriage is terminated, the relevant provisions determine the manner in which the matrimonial estate shall be divided between the former spouses.[9]

Bruktawit Gebru v. Alebachew Tiruneh is one of the latter sort. The formerly married couple concluded no agreement on the pecuniary effects of their conjugal union. It is, therefore, expedient first to bring into focus those points of law that need to be kept in mind while going through this comment on the case.

1.2. Personal and Common Property Distinguished

The provisions of the Civil Code on the pecuniary effects of marriage provide for the personal property of each of the spouses and the common property, of the matrimonial estate. But only a circumspect, between-the-line reading of articles 647 and 648 together with article 652 affords a sure grasp on what the law regards as personal property, on the one hand, and common property, on the other. An explanatory annotation in point is made here:-

1.2.1. To begin with what seems simple, the law holds all the income and salaries of spouses to be as common property [10] The rule applies to all

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6 No contract of marriage exists without adherence to its formal requirements.
Art. 629-Form of Contract.
A contract of marriage shall be of no effect unless made in writing and witnessed by four witnesses, two for the husband and two for the wife.
The right of the spouses to regulate their pecuniary effects of their conjugal union does not mean that they have absolute contracutal freedom. It is restricted by the mandatory provisions of the law. Some of such provisions are found in arts. 628, 629, 631, 633, 690(2) and 691 - 695.

7 This is inferred from the reading of arts. 690 (1) and 683 (1) conjointly.

8 Art. 634-Legal regime.
Where there is no contract or the provisions of the contract of marriage or the contract made between the spouses not valid, the following provisions shall apply.
The words "the following provisions" as used in the above article mean the provisions on personal and pecuniary effects of marriage, (Arts. 635 - 646 and 647 - 661, respectively).

9 See arts. 690 (1) in conjunction with art. 683 (2).

10 Art. 652-common property.
(1) The salaries and the income of the spouses shall be common property.
see also art. 656

financial receipts of a recurrent nature, whether they originate from labour, capital or a combination of both.[11] It applies regardless of which one of the spouses is the actual recipient of the income or salary.[12]

1.2.2. Whatever belonged to either of the spouses on or before their wedding day shall remain in the real, of personal property.[13] The rule covers both immovables and movables whose acquisition predates the marriage including financial receipts. Thus, one may not treat as common property say, a flour mill, which was owned by the husband or the wife before the celebration of the marriage on the sheer ground of conjugal union.

Although the flour mill remains the personal property of the spouse in question, the income arising from its operation may not be treated as such. It falls within the domain of common property because it is an income within the scope of Article 652.[14]

1.2.3. Gifts and bequests that come to the spouses may be regared as either personal or common property, depending on what is stipulated in the act of donation or will.[15] If the act indicates in a clear and unequivocal manner the exclusion of one of the spouses from the liberality, the gift or bequest shall be the personal property of the other. Conversely, the absence of a clear and unequivocal stipulation to that effect warrants

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11 The word "income" may be defined as "the return in money from one's business, labour or capital invested; gains, profits or private revenue; the gain derived from capital, from labour or effort, or both combined, including profit or gain through sale or conversion of capital" - Blacks Law Dictionary.
If this definition is adopted, the sum which one of the spouses may get by chance such as lottery, may not be regarded as common property.

12 Normally, the spouses receive their respective earnings and salaries (art. 654). But it is also possible for one of the spouses to receive the salaries and income of the other upon authorization. (art. 655).

13 Art. 647-Personal property not acquired by onerous title. The property which the spouses posses on the day of their marriage... shall remain their personal property.

14 Though such income falls in the domain of common property, its administration comes under personal property.
Art. 649- Administration of personal property - 1. Principle.
(1) Each spouse shall administer his personal property and receive the income thereof.
See also art. 656 (1).

15 Art. 647-property not acquired by onerous title.
The property which the spouses...acquire after their marriage by succession or donation shall remain their personal property.
The foregoing has to be read in conjunction with art. 652 (3) which runs as follows:-
Property donated or bequeathed conjointly to the two spouses shall be common unless otherwise stipulated in the act of donation or will.

the inclusion of the gift or bequest in the province of common property.[16]

Where doubts exist, the benefit must go to the spouse who asserts that the gifts or bequests are part of the common property. The reason for favouring such an approach is quite plain; the measure safeguards the material interests of both the spouses on equal terms.

1.2.4. Whatever is acquired by an onerous title during marriage, shall come under the realm of common property unless it is declared to be the personal property of either of the spouses by the family arbitrators.[17]

This rule is contained in article 652 (2) of the Civil Code.[18] The provision is of special significance as it dispels all doubts which could have otherwise arisen in connection with the interpretation and application of article 648 (1) of the Code.

1.2.5. Article 648 (1) speaks of acquisitions made by an onerous title of a personal nature during marriage.
Personal property may be acquired by onerous title in one of the following ways:-

First, a certain item of property personally owned by one of the spouses could be exchanged for another.

Second, such property could be sold and the proceeds therefrom could be used for the procurement of another property

Third, Monies belonging to one of the spouses personally may be paid for that purpose.[19]

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16 In the law of obligations, the word "act" conveys two meanings:-
First it may connote legal operation; and Second it may refer to a writing that verifies certain facts. The word "act" as employed in art. 652 (3) conveys the latter of the two meanings.

17 A thing is said to be acquired by onerous title when one becomes owner thereof in return for valuable consideration such as payment of money or rendition of services.
(Black's Law Dictionary).

18 Art. 652-Common Property.
(2) all property acquired by the spouses during marriage by an onerous title and which has not been declared by the family arbitrators to be personal property shall be common.

19 Art. 648-2. Property acquired by onerous title.
(1) property acquired by an onerous title by one of the spouses during marriage shall also be personal property of such spouse where such acquisition has been made by exchange for property owned personally or with Monies owned personally or deriving from the alienation of property owned personally

According to the Civil Code, no property acquired in one of the ways described above may be personal unless it is designated as such by the family arbitrators at the request of the spouse concerned.[20] Hence, where no declaration to that effect is made by the family arbitrators, it shall be ipso jure part of the common property.

The above assertion is not without legal foundation. Not only by means of a contrario reasoning implicit in the language of article 648 (2) may one be able to make that out. It can also be easily learned form the explicit provision of article 652 (2) as noted at 1.2.4 above. The following illustration may throw more light on the matter.

Suppose, H. the husband of W. appropriated thirty thousand birr thanks to D's act of donation which contained an unequivocal stipulation excluding H's wife from the liberality. So long as H put aside the sum, it would remain his personal property. But if H expended it on building a dwelling house, he would not be entitled to call it his own just because the house had been constructed with his money. The house would be the personal property of H only if the family arbitrators declared it to be so. Otherwise, the house would be part of the common property of H and W.

Or, suppose, W, the wife of H was the owner of a flour mill on the day she married H. The mill would continue to be her personal property. But should she exchange the mill for a mini-bus, she would not automatically become the sole owner of the mini-bus. The mini-bus would be treated as common property of H and W until she managed to secure from the family arbitrators a declaration to the effect that it was her personal property.

1.3. A Note On The Presumption of Common Property.

Article 653 (1) of the civil Code lays down the presumption which may be regarded as the legal linchpin of the property aspects of the institution of marriage. Because of this provision all matrimonial property shall be deemed to be common unless one of the spouses produces proof that he or she is the sole owner thereof.[21]

The comprehensive nature of the presumption hardly calls for an elucidation. The relevant provision begins with the words "all property" and contains no subsequent qualification restricting the generic character of the phrase. Thus all movables and immovables, no matter how and when they are acquired, fall within the scope of the presumption.

The significance of this cardinal presumption for the settlement of disputes of a proprietary nature arising from the termination of marriage need in no way be overlooked. It serves as a point of departure in the adjudication of all disputes over the division of matrimonial estate.

The presumption must be allowed a full application in the disposition of such disputes. This is assured only by complete observance of the rules implicit in the presumption. They are outlined here regardless of their simplicity

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20 Art. 648-2 Property acquired by onerous title.
(2) The provisions of sub-art (1) shall not apply unless the family arbitrators, at the request of one of the spouses, have decided that the property thus acquired shall be owned personally by such spouse.

21 Art. 653- Presumption.
(1) All property shall be deemed to be common unless one of the spouses proves that he is the sole owner thereof.

First, one need not look for evidence in favour of "common property" as the presumption makes it totally unnecessary. Proof is a condition of personal property and not vice versa.

Second, it is only the spouse who asserts sole ownership of a given property who has the legal duty to adduce evidence in support of his or her claim. There is no onus of proof on the spouse maintaining that the property is common. He must not be called upon to produce evidence in support of his assertion.

Third, statements of the spouse who maintains that a given property is common need not be used as a pretext to derogate from the presumption unless such statements amount to a clear admission that the property in question is personal.

Fourth, the standard of proof to rebut the presumption must be the preponderance of the evidence. Only persuasive arguments on the strength of proof must bar its enforcement. In all other cases, its application must remain unaffected.

1.4. Proof In Relation To Personal Property

As has already been stated, everything in the matrimonial estate is presumed to be the common property of the spouses. Hence, a claim to personal property has to be substantiated with proof. This is absolutely necessary

From the preceding discussion, one can easily learn that there are several grounds on which a claim to personal property may be made.[22] Either of the spouses may assert sole ownership of a given item of property by alleging that.

A. It was owned by him or her on or before the day on which the marriage was celebrated.
B. It was donated exclusively to him or her after the marriage was celebrated.

C. It was bequeathed exclusively to him or her after the marriage was celebrated.

D. It was acquired by means of exchange of property which belonged to him or her personally.

E. It was purchased with money owned by him or her personally, or,

F. It was acquired with money derived from the alienation of property owned by him or her personally.

Whatever be the grounds, a claim to personal property requires the production of proof. There is no personal matrimonial asset where there is no evidence to that effect.[23]

The evidence required to substantiate such a claim may not always be of the same sort. For instance, if H, the husband of W, alleges that he is the sole owner of a dwelling house on the ground that it was owned by him before their wedding day, he will be called

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22 See Arts. 647, 648 and 652 (3).

23 This is apparent from art. 653 (1) quoted at 21 supra.

upon to adduce proof to establish the fact that the house belonged to him prior to the celebration of the marriage. But on the other hand, if H makes the claim on the ground that the dwelling house was bequeathed for his exclusive advantage, he will be required to produce the will that established this fact. Consequently, what the claimant must be called upon to adduce as evidence has to be determined in light of the grounds for the allegation having due regard to the provisions of articles 647, 648 and 652 of the Civil Code.

1.5 The Ordinary Rules For Liquidating pecuniary Relations Between The Spouses[24]

The ordinary rules according to which the pecuniary relations between the former spouses shall be liquidated upon the dissolution of marriage are contained in articles 684, 685 and 689 of the Civil Code. They are summarised below.

1.5.1. Reclaiming Personal Property

Upon the termination of marriage, each spouse is entitled to reclaim (retake) in kind the property owned by him or her personally.[25] The right is, however, hinged upon the requirement to adduce appropriate evidence to that effect. In the absence of such evidence, it remains unenforceable.

1.5.2. Compensatory Withdrawal

Where the proceeds from the sale of an item of personal property is claimed to have been absorbed in the common property, the spouse who proves such an allegation shall, upon the dissolution of the marriage, be entitled to withdraw from the common property money equal to the price of the personal property in question or things of value corresponding to it.[26] In the event both the spouses put in such a claim simultaneously, the wife shall make her withdrawal before the husband. Here again, one need not lose sight of the fact that the production of appropriate evidence is a requisite to the enforcement of the right.

1.5.3 Allotment of the Common Property

Each of the spouses shall be entitled to one half of the value of the common property upon the dissolution of the marriage. Here it is worthy of note that the rule applies not only

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24 These rules are called "ordinary" because the family arbitrators may set them aside in exceptional situations. Where a petition for divorce is made by one of the spouses only or where it is ordered for a serious cause imputable to one of them, the family arbitrators may award the other spouse a greater portion or even the whole of the common property They may also award to the latter property belonging to the former so long as the value of the property so awarded does not exceed one third of the estate from whom it is taken. (arts. 692-694). Desertion of the conjugal residence under the conditions prescribed by the law and commission of adultery constitute serious causes of divorce imputable to a spouse. (art. 669).

25 Art. 684- Retaking Personal Property.
Each spouse shall retake in kind the property which is owned personally by him where he shows that he is the owner thereof.

26 Art. 685- Withdrawal beforehand from common property.
(1) If one of the spouses proves that any of his personal property has been alienated and that the price therof has fallen in the common property, he shall withdraw beforehand there from money or things of a value corrsponding to such price.
(2) The wife shall make her withdrawal before the husband.

to the property which has been admitted by the spouses as common but also to that property which has not been proved to be under the personall ownership of either of them.[27]

A moment's reflection on the rules described above reveals that they are more or less expressions of the presumptions of common property. What has been stipulated in article 653 (1), as regards the requirement of proof in relation to the existence of personal property in the matrimonial estate, is reaffirmed by the provisions of article 684 and 685 in the context of liquidation of pecuniary relations between the spouses.

2. The Decision of the Supreme Court

2.1. Summary of Facts.

The Supreme Court was drawn to Bruktawit Gebru v Alebachew Tiruneh by an appeal made against the decision of the High Court. The latter reversed the decision which had been rendered by the family arbitrators in favour of the appellant wife.

The litigants were married on Hamle 22, 1968. Their marriage ended on Megabit 21, 1976. It was terminated by a judgement of divorce rendered by the family arbitrators. Although the dissolution of the marriage occurred in 1976, the litigants had been living apart since 1972.

The property in dispute was a dwelling house. Construction began in 1973 and was completed in the following year. The cost of building the house was estimated to be forty thousand birr The appellant wife asserted that the house was an item of common property while the respondent husband called it exclusively his own.

2.2. Arguments of the Litigants

The respondent claimed to be the sole owner of the house alleging that it was built with money that had been donated to him by a certain Miss Margaret Mattern, a resident of Zurich, Switzerland.

According to a letter from the Commercial Bank of Ethiopia money was remitted from Switzerland in the name of the respondent husband on five different occasions between 1972 and 1976. The total of the advances was 31,050.82 Birr

The appellant, on her part, asserted that the house was part of the common property on the ground that it was not designated by the family arbitrators as the personal belonging of the respondent pursuant to Article 648 (2) of the Civil Code. She maintained that the respondent had failed in his duty to petition the family arbitrators to that effect on the basis of the foregoing provision, and could not be the sole owner of the house.

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[27] Art. 689-Partition of Common Property

(1) Without prejudice to the provisions of the preceding articles and unless otherwise provided in the contract of marriage or in a contract validly concluded between the spouses, common property shall be divided eqully between the spouses.

According to the appellant wife the house was constructed with money saved from the salaries of the litigants and receipts from the sale of books that had been published under the authorship of the respondent husband during their marriage. She described the donation as a mere fabrication of the respondent and Miss Margaret Mattern as a donor of his own creation.

2.3. Ruling And Reasoning of The Court

The court ruled that the appellant could not challenge the respondent with the contention that the house belonged not to him personally but to both of them. Its reasoning consists of inquiries made into three questions.

The first inquiry of the court was into what the litigants had contributed towards the construction of the house in terms of labour. It sought an answer to the question, "Was the house built through the joint effort of the litigants? or was it a result of the personal effort of one of them?

Its conclusion was that no labour or effort of the appellant went into the building of the house despite her allegation that the construction was executed in her presence at the site.

The court denied the appellant's allegation chiefly on the basis of what she had said before the family arbitrators. While the case was pending before the arbitrators, the appellant had declared initially that she could summon witnesses who would testify that she and the respondent had built the house jointly. But after the family arbitrators had ordered her to summon the witnesses, the appellant declined arguing that it was unnecessary for her to furnish evidence on the foregoing point since the order was inappropriate.

In this connection, the court pointed out that the house was constructed after the litigants had begun living apart, albeit prior to the pronouncement of the judgement of divorce. It also underscored the appellant's inability to adduce evidence in support of her allegation that she and the respondent were reconciled after they had commenced living separately.

The second inquiry of the court was into the source of the money paid for building the house. It sought an answer to the question, "Where did the money spent on the construction of the house come from?

The court concluded that the house was built with the money sent by Miss Mattern from Switzerland as a donation to the respondent.

The court took the foregoing position in reliance upon the letter from the Commercial Bank of Ethiopia. It noted the appellant's failure to show the existence of savings made by the litigants jointly prior to the commencement of construction of the house with a view to reinforcing its ruling on this point. Further, the court underscored her inability to state the amount of the sum derived from the sales of the books as well as that portion of the sum used for the construction of the house.

The third inquiry of the court involved the question of whether the house and the money with which it was built constituted common property. In short, it sought an answer to

the question "Could the appellant challenge the respondent's assertion that he is the sole owner of the house on the basis of article 648 (2) of the Civil Code?"

The court held that the requirement laid down in article 648 (2) does not apply to the respondent as the donation occurred while the litigants were living apart and rejected the appellant's contention on this score.

The court maintained that it is only where the spouses live in cohabitation that each of them shall be under a duty to make a petition to the family arbitrators so that the latter may declare him or her to be the sole owner of a given item of property.

By way of justifying its position the court stated that article 648 (2) has no application in the case where the spouses live separately because the spouse who makes a petition to the family arbitrators to be designated as the sole owner of property will find it impossible to secure the appearance of the other before the arbitrators as the latter will always be unwilling to comply with the summons to discuss the matter.

The court used the appellant's remarks about the donation to buttress its position, too. It maintained that the appellant had shown her reluctance to accept the donation in light of Art. 2436 (1) of the Civil Code when she called it fictitious.[28]

2.4. Critique

As noted above, the appellant asserted that the house was an item of common property while the respondent characterised it as personal property. The court was called upon to decide which of the two assertions was tenable at law.

2.4.1. To begin with, the court's inquiry relating to the question "Did the appellant and the respondent expend joint effort on the construction of the dwelling house?" represents an exercise in futility. This is because whatever its outcome, the question has no legal significance for resolving the issue of ownership over the house which was built while the litigants were still married.

The content of the Ethiopian matrimonial law in its present form does not reflect even a tenuous connection between the so-called "joint effort" notion and the conception of "common property of the spouses". No provision in the Civil Code enunciates that only such items of property as are acquired by means of the joint effort of the spouses shall be treated as common. Nor is it prescribed anywhere in the law that a piece of property acquired durinmarriage by the exclusive effort of one of the spouses shall belong to the spouse in question personally.

The appellant was within her right when she asserted that it was unnecessary for her to submit proof showing that she and the respondent had jointly built the house. It was indeed inappropriate to require her to furnish such evidence since the "joint effort" notion has no legal significance for the disposition of the case.

2.4.2. As regards the source of the money with which the house was built, the following criticisms may be made against the court's ruling. First and foremost the court may be said to have accepted what the respondent had alleged without sufficient cofroborating evidence.

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[28] Art. 2436- Acceptance by donee.
(1) A contract of donation shall not be compelete until the donee has expressed his intention to accept the liberality.

As stated earlier, the respondent asserted that the house was built with money which he had received from Miss Mattern as a personal gift. This assertion imposed on him the burden of proving two facts successively.

1. He had to establish the existence of an act of donation consisting of money made by Miss Mattern.[29]
2. He had to show that all the expenses of putting up the house were covered with the money obtained form the donation.

In the case the respondent did not discharge his burden of proof. One may ask, "What about the letter from the Commercial Bank of Ethiopia?" True, this letter may be regarded as proof of the fact that money was sent from Switzerland in the name of the respondent. But it does not by any stretch of the imagination constitute an act of donation. The letter from the Commercial Bank is not an instrument creating a liberality made by Miss Mattern.[30] Hence, its probative value can by no means be extended to the point of establishing the fact that the money which came from Switzerland hand originated from an act of donation. The sum could as well have been sent in consideration of something done by the respondent for Miss Mattern. The court has given credence to the respondent's allegation quite liberally to the neglect of the Code's stringent demand for the production of convincing proof in relation to claims the object of which is personal property.

Second as explained at 1.4. above, proof is not a condition of common property. Rather, it is a requisite to the existence of personal property in the matrimonial estate. Hence, it was incorrect for the court to attach weight to the appellant's inability to substantiate the allegation she made concerning the source of the money with which the dwelling house was built. The fact that she could not manage to adduce evidence in support of her allegation should not have been taken by the court as something which could make up for the respondent's failure to discharge his burden of proof in respect of his claim to personal property.

Third, it is apparent from the decision that the court's ruling relating to the second question was influenced to a degree by the difference between the figures pertaining to the money sent from Switzerland and the estimated construction cost of the house. Even on this score, the court appears to be in the wrong. The gap between 31,000- and 40,000.- is so wide in the context of the dispute that it becomes impossible to subscribe to the view that the whole expenditure for the construction of the house came from Switzerland. The sum which remained unaccounted for is quite substantial; it represents nearly 25, percent of the estimated construction cost of the house.

2.4.3. Next attention is drawn to the court's ruling on the question of whether article 648 (2) of the Civil Code was applicable to the respondent.

a) The applicability of the provision of article 648 (2) to the respondent must have been determined with the dwelling house as a frame of reference. But the court seems to have overlooked this point. Its discussion shows that it looked at the question with reference to the money that came from Switzerland whereas the dispute between the litigants pertained to the ownership of the house, not the money.

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[29] Art. 2447- Proof of donation
(1) whosoever alleges that a donation has been made shall prove its existence.

[30] See note 16 supra.

Article 648 (2) lays down the procedure that has to be followed by one of the spouses for the purpose of establishing himself or herself as the sole owner of property acquired during marriage by an onerous title. The house was such property no matter how great the differences between the litigants overthe source and characterisation as common or personal of the money used to cover the cost of its construction. Hence, it was a mistake for the court not to have clearly taken the house as its frame of reference in answering the question of whether article 648 (2) was applicable to the respondent.

b. As a corollary to the above, the court appears to have entertained the erroneous view that donations fall within the scope of article 648 (2) of the Civil Code. As mentioned above, the court maintained that the money was a liberality made for the exclusive advantage of the respondent. With such a view one would expect the court to declare only that the money was outside the scope of article 648 (2). But the court went further and ventured to supply justification for holding the position that the respondent had no duty to request the family arbitrators to designate him as the sole owner of the sum which the court had already called a liberality. Thus, the way thecourt treated the whole question may mislead one into believing that donations and bequests come under article 648, whose application is, in fact, limited to acquisitions made by an onerous title.

c. In pronouncing its ruling on this question, the court mentioned the fact that the litigants were living separately when the money came from Switzerland and construed article 648 (2)as applying only to those spouses who live in cohabitation.

It is erroneous to hold the view that this provision is inapplicable to the spouses when they are living separately. There is nothing in the law suggestive of such a restrictive interpretation of article 648 (2).

No doubt, husbands and wives are expected to live in cohabitation as a a general rule. This does not mean that they are proscribed from agreeing to live separately, however. In fact the law accords recognition to their right to make such an agreement in explicit terms.[31] Such being the case, the way the court construed article 648 (2) lacks legal foundation.

Obviously, one may not legally equate the separation of the spouses with the termination of their marriage.[32] Hence the mandatory provisions on the pecuniary effects of marriage, including article 648 (2), shall apply to the spouses irrespective of whether they are living in cohabitation or separately. They remain in force so long as the conjugal union exists.

d. The court made a statement to the effect that the spouses will be unwilling to comply with the summons which the family arbitrators may issue in the case where they live separately and it is on this ground that it construed the provision in question in the manner described above.

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31 Art. 642-separation by agreement.

(1) The spouses may agree to live separately for a definite or indefinite period of time.

(2) An agreement made to this effect may be revoked at any time by one of the spouses, provided such revocation is not arbitrary.

32 The causes that bring about the termination of marriage are specified in the law. They are:-

a) the death of one of the spouses,
b) court decision of dissolution and
c) divorce. (Art. 663).

This kind of reasoning hardly justifies the interpretation adopted by the court. Indeed it can not be maintained that the spouses who live in cohabitation shall always comply with the summons issued by the family arbitrators just because they live in cohabitation. The same may be said with regard to the assumption that the spouses who live separately will always refuse to honour such summons.

The reasoning of the court does not sit well in view of the judicial competence which the law accords to the family arbitrators over such affairs. After all, they are not barred by the law from considering the matter in the absence of the spouse in question and rendering the decision that they see fit.

e. As shown above, the court maintained that the appellant's description of the donation as bogus was a manifestation of her reluctance to accept the liberality in light of art. 2436 (1) of the Civil Code. This commentator fails to comprehend how the court could imagine that such an argument would butters its ruling on the question of whether art. 648 (2) was applicable to the respondent, after having already concluded that the donation was a liberality for the husband's exclusive advantage.

The article cited as a basis of the argument is entitled, "Acceptance by donee".

It reads impart:- "A contract of donation shall not be complete until the donee has expressed his intention to accept the liberality."

This provision is designed to help determine the time at which the contract of donation is formed. What it says, in effect, is this:- when one makes an offer to donate a thing to another, there shall be no contract of donation until the latter expresses his intention to accept the offer.

In contract law, it is in respect of an offer that one may speak of acceptance. A proposition made by one person to another with a view to concluding a contract will not acquire the character of an offer until it comes to the knowledge of the latter. So long as such proposition is uncommunicated, it shall remain, in the language of the code, a mere "declaration of intention".[33] Obviously, one is in no position to express his willingness or unwillingness to accept a proposition that has not come to his notice.

From the foregoing, the mistake of the court should become evident. The court must have first established the fact that an offer of donation was made to the appellant before affirming that she was reluctant to accept the liberality the existence of which it had already maintained. As stated in the decision, the money sent from Switzerland in the name of the respondent was realised while the litigants were living separately. Hence, it is not improbable that the appellant was kept in the dark about the remittances. There seems to be no way for her of knowing that an offer of donation existed in her favour, if at all it did.

If such is the case, it is inappropriate to say that the appellant had been unwilling to accept the liberality of which she had not been aware.

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[33] Art. 1687 - Declaration of intention.

No person shall be deemed to make an offer where:-

a) he declares his intention to give, to do or not to do something but does not make his intention known to the beneficiary of the declaration;

The case of "public promise of a reward" represents the only exception to the foregoing rule, (Art. 1689).

2.5. Concluding remarks

It should be remembered that the construction of the house over which the litigants were at odds took place while they were still married. From this follows the incontrovertible assertion that it constituted what the law describes as property acquired by an onerous title during marriage. According to the Ethiopian Civil Code, such property shall be common. It shall be held as personal only upon the production of the prescribed convincing evidence to that effect.

It is the family arbitrators who are vested with the discretion to designate property of the above description as personal at the request of one of the spouses. A request for such designation is decisive in that the property may not be called personal in its absence.

The spouse who makes such a request clearly aims at the establishment of personal property in the matrimonial estate. Therefore, the onus of proof is on that spouse. Consequently, the family arbitrators must be furnished with convincing evidence showing that the acquisition was made with onerous title of a personal nature.

The spouse who makes the request has to rebut the presumption of common property with such evidence. Inability to adduce the required proof entails the application of the presumption.
Thus, wherever the spouse cannot discharge the burden of proof, his or her request need not be granted.

The other cardinal point that has to be kept in mind in handling cases of this sort relates to the time at which the request has to be made to the family arbitrators. This commentator holds the view that it has to be while the marriage is still in existence. If such request is put forth subsequent to the termination of the marriage, it has to be dismissed as a request not made by a spouse; and the property to which it relates must be held as common.

According to this commentator, the disposition of the dispute in Bruktawit v Alebachew Tiruneh primarily turned on the question of whether the respondent made a request to the family arbitrators to be designated as the sole owner of the dwelling house while the marriage was in existence and managed to secure a decision in his favour

The history of the litigation as recapitulated in the first part of the court's decision contains nothing indicative of this fact. The respondent made no such request to the family arbitrators prior to the pronouncement of the divorce,

It was thereafter, when the dispute over the partition of the matrimonial estate arose that he first brought the matter up. Even then the family arbitrators did not uphold his claim. This was because of his failure to prove the fact that the dwelling house was built with the money that he had alleged to have acquired from Miss Mattern as a donation.

The Supreme Court's decision on the dispute relating to the ownership over the house looks hardly tenable.

Serious legal errors were committed in adjudicating the case. The import of the cardinal presumption of common property was overlooked. The stringent requirement of proof in relation to a claim to personal property was disregarded. Provisions were misconstrued and misapplied.