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# Judges:- Kifleyesus Wolde Michael, Dr. Kifle Tadesse, Tesfaye Haile Mariam, 

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After having examined the file, we have rendered the following decision.

## Decision

The manner in which the appeal has come before this Court is as follows:-
In adjudicating the dispute between the present appellent and respondent, the family arbitrators held: that; although the present respondent alleged that the house was built with the money sent to him by Miss Margaret Mattern, he was unable to show that said money was spent on the construction of the dwelling house; a spouse may not say that he is the sole owner of property granted as a liberality unless the matter is brought to the attention of the family arbitrators and the property designated as personal in pursuanice of art. 648 of the Civil Code; that there is no third party that has made a request for the return of money given as a liberality according to art. 691 of the Code; and that, consequently, the family arbitrators dismissed the foregoing allegation of the respondent as a made-up story concocted for the purpose of retaining the property for himself to the exclusion of his wife.

They also held that, although the present respondent alleged that he had sold a house in Gondar as well as motorcar and had household furniture, he could not prove that these took place before he got married with the appe!lent.

Taking account of the fact that the petition for the divorce was made jointly, the arbitrators decided that the present respondent pay to the present appellant Birr 58,365.-- as the estimated value of the property listed in the appellant's application was .-- Birr 116,730. Alternatively, they decided that, all their property be sold by the execution officer and the proceeds be equally divided between the parties, should the respondent think that paying of the sum mentioned above to the appellent is prejudicial to him.

Regarding the custody of the children born of the marriage, the family arbitrators decided that they live with their mother and that their father see them at his pleasure as it will be hardly conceivable that it will be better for them to be in the hands of the latter than in the hands of the former. The present respondent appealed to the High Court against this decision.

The High Court heldthat the then appellent may not demand that the children be entrusted to him just because he is their father. It maintained that he may make such request only upon proving that living with their mother will be detrimental to their health and moral welfare. Thus the Court upheld the ruling of the family arbitrators on this point, too.

In making its ruling concerning the dwelling house, the High Court noted that the net aggregate amount of the monthly salaries of the parties does not exceed birr 700.--. It maintained that it is hard to imagine that there could be extra money left for building the house at a cost of -- Birr 40,000 out of this sum which may go no further than covering their monthly consumption. One finds that this is specially so if one takes into account the brevity of the period during which the parties had lived together.

The High Court further pronounced that, although the respondent made an oral submission to the effect that the then appellent had sold books and brought money with him upon his return from England, she was unable to substantiate her allegation. It also maintained that the issue had not been raised before the family arbitrators.

Concerning the appellant, the High Court said that it was furnished with evidence showing that Birr 31,05778 was sent to him from abroad and held that the fact that this sum was a personal donation was known. The Court stated that this sum was used for the construction of the dwelling house as it can easily be deduced from comparing the time during which the money was realized and the time during which the construction took place.

The High Court decided that the dwelling house is the personal property of the then appellent, holding that a donation made to one of the spouses after marriage is personal property pursuant to art. 647 of the Civil Code. Accordingly, it revised the decision of the family arbitrators and, declared that the litigants bear their respective legal costs and expenses.

Aggrieved by the decision of the High Court, the then respondent submitted to this Court an appeal written on Hamle $7 / 1978$.

In her appeal, she alleged that it was inappropriate for the lower Court to have heard the appeal taken from the decision of the family arbitrators as it was in contravention of art. 357 of the Civil Procedure Code and as the juriseliction over such matters belongs to the Supreme Court. She stated that the lower Court heard the appeal despite her objection and requested that its decision be quashed for want of jurisdiction.

Alternatively, the present appellent pleaded with this court that the decision of the High Court be quashed since what the family arbitrators decided was not impugned before said Court on any one of the grounds specified in art. 351 of the Civil Procedure Code.

Further, the present appellent pointed out that the High Court made its ruling with regard to the dwelling house without going over file No. $572 / 74$ which relates to the previous litigation between her and the respondent and maintained that the Court would have understood the whole matter if it did so. She stated that the Court would have realized how the present respondent tried to disown his own child and would have discovered all the mishchiefs he did with intent to make the motorcar purchased in her name his personal property including his attempt at simulation for the purpose of showing the existence of a debt in respect of the motorcar if it had looked into the file mentioned above. She asserted that the impropriety of the respondent's conduct in these matters is a clear manifestation of his ill design to appropriate the dwelling house for himself on the basis of false allegations.

The present appellent made mention of the High Court's ruling to the effect that the aggregate amount of the monthly salaries of the litigants may not be said to be sufficient to cover
the construction cost of the dwelling house and stated that it was wrong for the Court to hold such a view having regard just to the smallness of the amount of their salaries and to the span of time during which they had lived together. She argued that she and the respondent had lived until Megabit 21/1976 as husband and wife ever since they got married by mutual consent and in accordance with the spirit of the law. She submitted that the statement which the High Court made in order to show that the dwelling house belongs personally to the respndent and its ruling on this point wholly alters the decision it rendered as regards Civil Appeal file No. 572/74 as well as that decision of the Supreme Court concerning Civil Appeal File No. 212/76.

The present appellent reiterated that she and the respondent got married on Hamle $22 / 1968$. That the house was built in 1973 and that their marriage was terminated on Megabit 21/1976 by divorce.

The appellent maintained that the house was built by the joint effort of both of them as her labour was expended on its construction and the income derived from the works executed by the respondent including from the sale of his books' were used for that purpose.

The appellent alleges that there was nothing that had been designated as property acquired by donation made for the exclusive advantage of the respondent during their marriage. She maintained that an alleged woman, quite unknown, was, subsequently pretended to have donated money to the respondent to defraud of her interest. She contended that no inquiry was made into the question of whether the woman who allegedly made the donation and whose words are said to have been reduced in writing was an actual or fictitious person. Thus she maintained that it was in contravention of the law that the High Court held the house belonged to the respondent personally on the ground that it was built with moncy acquired by donation made subsequent to the termination of their marriage.

The present appellent contended that a spouse may not be the sole owner of an item of property acquired by donation unless the spouse in question secures from the family arbitrators a declaration to that effect pursuant to art. 648 of the Civil Code. She maintained that the property shall be the common property of the husband and the wife in the absence of such declaration.

The appetlent stated that the High Court rendered the decision without having had no regard to the facts and the law. She requested for its reversal and pleaded that the decision of the family arbitrators be confirmed.

The respondent submitted a reply written on Hidar 20/1979. He stated that there was nothing wrong in appealing to the High Court as it had competence to hear the case.

The respondent asserted that the files mentioned by the appellent were not examined by the Court because they were irrelevant to and had no connection with the case.

He asserts that arts. 647 and 648 of the Civil code do not stipulate that money acquired by donation may not be personal unless so declared by the family arbitrators. He maintained that no provision in the law supports the appellent's statement to the effect that testimony and other means of proof are inadmissible in such cases.

The respondent pointed out that he had proved that he had got the money as a donation from Switzerland while the appellent was unable to refute this fact. He also pointed out that she
neither claimed to be the beneficiary of the donation nor showed that the aquisition of the money was attributable to othereauses.

The respondent contended that the house was constructed only with the money he got as a donation as he had neither savings in the bank nor had taken a loan therefrom for the purpose. He further stated that the aggregate amount of the net monthly salaries of the litigants was not more than Birr 700 within the short period within which they lived together.-- and that it was only sufficient to cover the expenditure relating to house rent, food, maintenance of children and medical costs. He argued that it is obvious that there could be no extra money left from their monthly salaries for building the house whose estimated construction cost is Birr 40,000.

The respondent also pointed out that the house was constructed while he and the appellent had been living separately, albeit before the termination of their marriage. He stated that the appellent was nowhere at the cite of the construction while the work was underway and maintained that the appellent's allegation to the effect that she had expended labour on its construction is totally false.

The respondent asserted that he had no income other than his salary. He admitted that he had written books but alleged that he made no profit or gain out of them as they were published by his employer (the Ministry of Education) for teaching purposes.

The respondent called attention to what the appellent said in relation to her participation in the construction work before the family arbitrators. He pointed out that, on , 2/2/1977, she orally declared before the arbitrators that she could call witnesses to testify as to her participation in the work and on 8/3/1977, declined, arguing that she was under no obligation to submit evidence on this point.

In conclusion, the respondent pleaded for the confirmation of the decision of the High Court asserting that the appellent is submitting her appeal only with the intention to get enriched unlawfully.

The appellent on her part, has submitted a counter-reply written on Tahsas 28/1979.
The respondent in his cross-appeal of Hidar 671979 requested for the reimbursement of the legal costs and expenses he had incurred as well as the fee he had paid to a lawyer, stating that this point was unduly skipped over by the High Court.

He further requested that either his children be entrusted to him as they are more than 5 and 10 years old or his obligation to pay for their maintenance be terminated should the appellent refuse to entrust them to him.

The respondent stated that it was inappropriate for the High Court to let the appellent have equal share in the matrimonial estate on the ground that she did not submit to the Court a list showing the items of property. He pleaded that this ruling be reversed.

The appellent in her written reply of Megabit $2 / 1980$ maintained that the cross-appeal dealt with issues which had not been raised in previous litigations and requested for its dismissal on this ground. She argued that his grievance relating to legal costs and expenses must not be
considered since he should have submitted the matter following the appropriate appeal procedure rather than by way of cross-appeal.

With regard to the custody of their children, the appellent stated that they are well looked after under her tutorship and their grandmother's guardianship receiving their lessons, at St. Joseph School and contended that they must not be entrusted to the respondent.

The appellent maintained that this court must not entertain the respondent's grievance concerning the division of property. She asserted that an inventory was taken and the items of property listed were attached pursuant to the order of the Awraja Court and that the respondent raised no objection over the list upon the institution of this suit. Thus, the appellent pleaded for the rejection of the cross-appeal.

The foregoing presents the arguments of the litigants and we have examined the file. First of all we shall consider the appellent's contention which purports that the dwelling house is common property and not the personal belonging of the respondent.

The facts that the appellent and the respondent got married on Hamle 22/1969 and that they were divorced on Megabit $21 / 1976$ by the decision of the family arbitrators are known. Nevertheless, as confirmed by the oral admission both of them made before this Court during the hearing held on Meskerem 20/1981, they had began living separately as of the month of Tahsas, 1972.

According to the appellent's version she and the respondent were reconciled after they had begun living separately, she had to live with her parents only because the house in which the respondent used to reside was too small and only until they could manage to build their own dwelling house.

The appellent stated that she had secured a letter which indicated the amount of her monthly salary in consequence of their plan to build a dwelling house although no deduction was made from her salary on that account.

According to her allegation, the appellent was present at the construction site throughout the duration of the work and used to pay wages to the labourers whenever the respondent was in the provinces on account of field work.

The respondent maintained that it was in 1973 that the construction of the house commenced and this was not denied by the appellent.

From the foregoing we learn that the construction of the dwelling house begun while the appellent and the respondent had been living separately owing to the misunderstanding that arose between them. We learn that the misunderstanding subsisted until the divorce was pronounced without the appellent returning to the conjugal residence.
… The appellent has alleged that she and the respondent were reconciled. Nevertheless, she was unable to substantiate this allegation. It is, therefore, held that the construction of the dwelling house began while the parties had been living separately though before the pronouncement of the divorce.

Even if that was so, it becomes important to find out whether this house was built by the joint effort of the appellent and the respondent or by the exclusive effort of one of them.

The appellent has made an oral submission that the house was constructed under her supervision. Nevertheless, as the respondent pointed out in his reply, she did not summon withesses who could testify in favour of her participation in the construction of the house in spite of the family arbitrators' instruction to that effect. During the hearing held on Hidar $8 / 1977$ by the arbitrators, the appellent contended that the instruction issued on this point was inappropriate as she had no duty to call withesses to verify her participation in the construction work. Thus what the appellent declared before the arbitrators renders her allegation unacceptable.

Having ascertained that the appellent made no contribution toward the construction of the house in terms of labour, we shall next go on to examine the source of the money with which the house was built. The appellent's allegation is that it was built with the income obtained from the salaries of the litigants and the sale of books published the author of which is the respondent. Nevertheless, she could not furnish evidence showing the existence of savings which had been made by the litigants conjointly prior to the commencement of the construction of the house. Neithercould she tell the exact amount of the income derived from the sale of books nor state how much of said income went in to the construction.

On the other hand, money was sent in the name of the respondent from Zurich, Switzerland on five different occasions and a total of Birr $31,057.82$ was paid to him by the Commercial Bank of Ethiopia after the appellent and the respondent had begun living separately. The Bank's letter that established this fact is dated 12/4/77 and bears on it the reference (IFPC /588/84). According to the respondent, then, it is with this money which came from Switzerland that the house was constructed.

As has previously been stated, the appellent asserted that the house was constructed with income derived from the salaries of the litigants. She maintained that both the donation and the woman who allegedly sent the money under the name Margaret Mattern were fictitious.

We have also noted the appellent's argument that the house may not be the personal property of the respondent since, pursuant to art. $648 / 2 /$ of the Civil Code, money acquired by donation may not be personal unless it is so declared by the family arbitrators at the request of one of the spouses.

As shown above, the house was not built with money that had been accumulated by the litigants conjointly, It was not built with money obtained from the sale of the books or a loan taken from the bank by the litigants conjointly either. If such is the case, the house, the construction of which is estimated to cost Birr. 40,000 .-- may in no way be imagined to have been built with money-other than that which was sent from Switzerland in the name of the respondent.

Having held that the house was constructed with the money that came from Switzerland as a donation, we shall now proceed to consider the question of whether it is possible for the appellent to challenge the respondent arguing that both the house and the money with which it was built constitute common property by reason of having not been designated as personal.

According to the appllent's assertion, the respondent may not be the sole owner of the money which was realized during their marriage as it was not declared to be his personal property by the family arbitrators at his request in pursuance of art. 648/2/ of the Civil Code. Nevertheless, it is in the case where the spouses live in cohabitation and a personal donation occurs that the spouse in question shall, according to art. $648 / 2 /$, make a request to the family arbitrators so that they may designate the donation as his or her personal property. There is no such requirement in the case where the spouses. live separately and a personal donation occurs. Where the spouses live separately, the one to whom the donation has not been made may not be willing to appear before the family arbitrators even if the other requested that the former be summoned so that the donation may be designated as personal. The appellent, who would have been unwilling to discuss the request which the respondent could have brought before the family arbitrators as regards the donation which occurred while they were living separately, may not now be able to challenge the respondent, arguing that both the house and the money with which it was constructed constitute common property on the ground that the money acquired by donation was not declared to be the personal property of the respondent by the family arbitrators at his request. In fact, the appellent's assertion that the house was not built with money arising from an act of liberality and her allegation that both the donation and the doneress, Margaret Mattern were fictitious demonstrate her refusal to accept the donation in pursuance of art. 2436/1/ of the Civil Code. They show that she has no right to raise all the arguments that she has raised in this connection. There is, therefore, no reason for censuring the High Court's ruling to the effect that the respondent is the sole owner of the dwelling house which was constructed with the moneýd donated to him personally.

The respondent had contended that the children who have attained 5 and 10 years of age be entrusted to him. But here is no reason for taking them away from the appellent since nothing detrimental has been alleged as regards their living condition and since they learn at so nice a school as St. Joseph.

With regard to the respondent's grievance over the partition of the property, we hold that it has not been made appropriately. At the time the appellent submitted her list of items of property, the respondent alleged in general terms that she had included pieces of property which did not exist in the matrimonial estate. In lieu of this, the respondent ought to have specifically mentioned the items which the appellent included in her list despite their non existence in the matrimonial estate. Therefore, he may not complain on the ground of no redress with respect to what he has failed to deny in specific terms. The grievance he raised on this point is unacceptable.

If the respondent alleges that it is to his prejudice to make the payment in cash, there is no difficulty in apportioning the property.

The respondent has pointed out that his request for the reimbursement of his legal costs and expenses as well as the fees he paid to a lawyer was skipped over by the High Court.

Nevertheless, the Court declined to give a ruling on this question having regard to the 'fact that the litigation is one of family matter. Even if it granted the request, it would have only meant that the payment had to be made out of what would go to feed the mouths of the respondent's own children for whose upbringing the appellent is entrusted. Thus, the High court may not be criticized for having not tendered a ruling on the question of reimbursement of the legal costs, expenses and fees.

In conclusion, we hold the decision of the High court as appropriate and we confirm it in accordance with art. 348/1/ of the Civil Procedure Code.

Let the parties bear their respective legal costs which they have incurred in consequence of the litigation that has taken place before this Court.
*Unless otherwise mentioned, all dates in the case are according to the Ethiopian (Julian) Calendar

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