

17

142

IN THE FIJI COURT OF APPEAL

Civil Jurisdiction

CIVIL APPEAL NO. 16 OF 1982

Between:

SHIU SHANKAR

s/o Kuneal

APPELLANT

- and -

NIRMALA WATI

d/o Ram Kissun

RESPONDENT

B. Bali for appellant
No appearance for respondent

Date of Hearing: 20th July, 1982.

Delivery of Judgment: 30th July, 1982.

JUDGMENT OF THE COURT

Spring, J.A.

This is an appeal by the husband Shiu Shankar ("the husband") against the Order of the Supreme Court dismissing his petition for divorce based upon the alleged desertion by his wife Nirmala Wati ("the wife"). The facts are briefly summarised. The parties were married on 9th June 1972 and after living for a short period at Rakiraki they moved to Nasinu near Suva. There are two male children of the marriage aged 7 years and 3 years respectively. The marriage was not an entirely happy one.

In March 1979 the wife left the matrimonial home and went to live with her mother at Rakiraki; she instituted

maintenance proceedings against the husband out of the Magistrate's Court at Rakiraki. When the case was held in October 1979, the parties reconciled and the wife returned to live with her husband at Nasinu; the wife claimed that the reconciliation lasted until December 1979; the husband stated that it continued until March 1980. In either December 1979, or March 1980, according to whose evidence was accepted, the wife again left the matrimonial home and took with her the children, some furniture and her belongings.

The appellant filed a petition in divorce based on his wife's desertion.

The respondent filed an answer denying desertion.

The petition was heard by the Magistrate's Court in accordance with the procedures laid down in the Matrimonial Causes Act 1968 (hereinafter called the Act). Evidence was given by the husband in support of his petition. He stated that his wife left him as she wished to live at Rakiraki and that he had no intention of returning there to live; he wished to continue living at Nasinu. No other witnesses gave evidence in support of the petition.

The wife gave evidence denying the allegations of desertion and claiming that her husband had told her to go as he no longer wished her to live with him; she claimed also that the husband had assaulted her on occasions. The mother and brother of the wife gave evidence in support of her case.

The hearing was concluded and in accordance with the provisions of the Act, recommendations were made by the

learned Magistrate; these recommendations are subheaded "Findings". The learned Magistrate stated (inter alia) - The Court finds the following facts proved to its reasonable satisfaction - then followed the date of the marriage; the names, and dates of birth, of the children; particulars of the previous court proceedings; and a summary of the evidence. The learned Magistrate decided that a decree nisi in divorce, based on desertion, be refused and that the petition be dismissed.

Mr. Bali in arguing the appeal on behalf of the husband submitted that the learned Judge had erred in law, and in fact, in not giving a considered judgment; that the learned Judge had merely followed the recommendation of the learned Magistrate; Counsel further submitted that it was the duty of the learned Judge to evaluate the evidence and to examine carefully the evidence given by the mother, and the brother, particularly as the learned Magistrate had made insufficient findings of fact.

The wife did not appear at the hearing of the appeal despite the fact that she had been served with notice of the appeal and of the date of hearing; attempts were also made to communicate with her before the appeal commenced.

We agree with Counsel for appellant that it is highly desirable that the learned Magistrate should have given reasons for his recommendation. It would have been a simple matter for him to state the reasons why he concluded that the petition should be dismissed.

Section 69 of the Act requires that a certified copy of the proceedings be forwarded to the Supreme Court for its consideration together with a certified copy of the evidence and copies of all processes and documents, together

with the recommendation of the learned Magistrate. The Supreme Court after due consideration of all the material is required to accept, reject or modify the recommendation of the Magistrate. Section 69 reads :

"69-(1) As soon as possible after the termination of the hearing, the magistrate shall forward to the Court a certified copy of the evidence taken, together with copies of all process and other documents in the proceedings and a statement of his opinion as to the decree, if any, to which the petitioner is entitled, and the Court may, upon consideration thereof, either accept, reject or modify such opinion, or order -

- (i) that further evidence be taken by the magistrate;
- (ii) that the case be reheard by that or another magistrate; or
- (iii) that the case be transferred to itself for hearing.

(2) Unless the Court makes any of the orders specified in subsection (1), it shall decide the case and direct what decree shall be pronounced by the magistrate."

As we have said in Suresh Babulal v. Madhuko Devi & Anor. F.C.A. 5 of 1981:

"The important words in section 70(b) are 'it (the Supreme Court) shall decide the case and direct what decree shall be pronounced by the Magistrate'.

If the Supreme Court directs that a decree be granted then by section 71 the Magistrate must pronounce that decree. It is clear that it is the Supreme Court alone that decides what relief, if any, a petitioner shall obtain and that it is the function of the Supreme Court to consider and pronounce upon the opinion of the Magistrate.

Under the Act the Magistrate is not the final arbiter of the case. He gives no more than an opinion. Section 57 of the Act is explicit that the Supreme Court must determine the ground upon which the petition is based. Section 57 reads :

'Except as provided by this Act, the Court, upon being satisfied of the existence of any ground in respect of which relief is sought, shall make the appropriate decree.'

In this section 'the Court' means the Supreme Court. Section 70(b) (supra) clearly states that the Supreme Court shall decide the case."

The learned Judge made an order on 7th January 1982 in the following terms :

"Record considered. I accept the opinion of the Magistrate. The petition is dismissed with costs to respondent."

This order was pronounced in accordance with the provisions of the Act on the 8th March 1982.

We agree with Mr. Bali that the judgment is couched in economical terms; no reasons are given for the order and while it is acknowledged that the learned Judge did not hear nor see the witnesses it is preferable, in our view, that the learned Judge's decision should not be open to the criticism that the findings of the learned Magistrate have been merely rubber stamped. We believe that the correct procedure is as stated by this Court in Anuradha v. Mato Prasad & Anor. (F.C.A. 60 of 1978) where the Court said :

"The form in which an individual judge minutes a decision or sets out in a formal judgment his particular findings is a matter for him according to the circumstances of each case. In a defended case it is generally advisable, when accepting the opinion of the magistrate, to give some reason or reasons for so accepting the opinion. It may be no more than an adoption and approval of the opinion after a full consideration of the case. Particular matters may arise which ought to be specifically dealt with. Circumstances vary so greatly that we do not feel it proper to take the matter any further except to say that, if

the opinion is rejected or modified it will generally be proper to give full reasons. This, we understand, has been the practice. If the opinion is accepted, then according to the particular circumstances sufficient findings ought to be made."

From our study of the record and consideration of the evidence it is clear that the learned Magistrate concluded that the husband had not discharged the onus of proof which rested upon him. The Magistrate saw and heard the witnesses and assessed their credibility. This Court, like the Supreme Court, did not enjoy that advantage; admittedly the order of the Supreme Court is brief but we are unable to say that the learned Judge was wrong in concluding that the recommendation of the learned Magistrate should be accepted.

For the reasons we have given, this appeal fails and it is dismissed accordingly.

Chad Hearnshaw
.....
(Judge of Appeal)

M. G. Goring
.....
(Judge of Appeal)

J. H. Heighly
.....
(Judge of Appeal)