IN THE FIJI COURT OF APPEAL

Civil Jurisdiction

Civil Appeal No. 73 of 1981

Between:

MUNIAPPA REDDY s/o Munsami — Appellant

and

USMUL NISHA d/o Walli Mohammed — Respondent

G.P. Shankar for the Appellant
M.S. Sahu Khan for the Respondent

Date of Hearing: 26th July, 1982
Delivery of Judgment: 30.7.82

JUDGMENT OF THE COURT

Marsack, J.A.

This an appeal from orders for custody and maintenance made in conjunction with a decree nisi of divorce entered in the Supreme Court at Lautoka on 19th October, 1981.

The appellant and the respondent were married at Suva on 11th January, 1971. Both parties are domiciled in Fiji. The parties lived together at Labasa, Sigatoka and Tavua until 2nd December, 1978. Two children were born of the marriage, a boy born on 21st January, 1972 and a girl born on 7th February, 1975. On 2nd December, 1978 respondent left the family home, taking with her both children.

At some date in 1979 the appellant took both children into his custody. This was followed by two actions

brought in Ba Magistrates Court: a maintenance proceedings brought by the respondent and a petition for divorce filed by the appellant. On 29th May, 1980 these actions were withdrawn and an agreement entered into by the parties (complainant being the wife, respondent the husband) in the following terms :

1. The parties agree that :

   (a) custody of the male child Junior Anjaan Reddy be committed and given to the Complainant;

   (b) and that custody of the female child Shabnam Shaleen Reddy be committed and given to the Respondent.

2. The Complainant do have access to the female child Shabnam Shaleen Reddy once a fortnight so that the female child and the male child both stay together with the Complainant during the weekend from Friday 5 p.m. until Sunday 5 p.m. during the relevant weekend.

3. The Respondent do have access to the male child Junior Anjaan Reddy once every other fortnight so that the male child and female child both stay together with the Respondent during the weekend from Friday 5 p.m. until Sunday 5 p.m. during the relevant weekend.

4. No order for maintenance against the Respondent.

5. Neither party shall remove any child out of Fiji.

6. Liberty is reserved to either party to apply.

This agreement was signed by both parties, and witnessed by both counsel acting for the parties.

Both parties are school teachers; and according to the evidence the appellant is earning $9,645 per annum and the respondent $5,226 per annum. One fact of considerable importance in the case is that the parties are not of the

same religion: the appellant is a Hindu and the respondent a Muslim. Each child is being brought up in the religion of the parent with whom the child is living.

On 19th May, 1981, the appellant took divorce proceedings against the respondent on grounds of alleged adultery and desertion. At the hearing the charge of adultery was abandoned by the appellant, and the case was determined on the issue of desertion. On 19th October, 1981 the learned Judge gave a judgment holding that the charge of desertion had been established; and he made an order that the marriage be dissolved on the ground of the respondent's desertion. He made a further order in these terms :

> " That custody of both children shall be granted to the mother and that the petitioner shall have access to the children on Saturdays and Sundays once per fortnight from 8.00 a.m. to 6.00 p.m. each day but that they shall be returned to the custody of the mother each evening.
>
> In the event of either parent being transferred to a distance which makes travelling a serious obstacle the arrangement as to access may be varied by the Supreme Court. "

He concluded by making an order against the appellant for maintenance at the rate of $8.00 per week for each child.

This present appeal is limited to the orders for custody and maintenance. The grant of decree nisi on the ground of desertion is no way affected.

A preliminary point was raised by counsel for the respondent, under section 90 of the Matrimonial Causes Act, Cap. 51, which reads :

> "90. An appeal deos not lie from a decree of dissolution of marriage after the decree has become absolute. "

Counsel contended that, because of this provision, the present appeal should not be considered.

We are unable to accept this argument. In the first place, there is nothing on the file to indicate that the decree has been made absolute. But even if it has, the section merely enacts that no appeal shall lie from a decree of dissolution. There is no such appeal here. Nothing in the section lays down that there should be no appeal from incidental orders, such as those for custody and maintenance. Accordingly this argument fails.

Before this Court the appellant maintained that the learned Judge should not have ignored or overruled the terms of the agreement entered into by the parties on 29th May, 1980 which was still in full operation when the present proceeding for divorce was taken by the appellant. He emphasised that the religions question was one of utmost importance; the girl who had been living with her father for an appreciable time was being brought up in the Hindu faith, and it was definitely contrary to her interests that she should be transferred to a Muslim household.

The argument of counsel for the respondent, asking that the learned Judge's custody order be upheld, was based on a number of authoritive decisions, mainly of the Courts in Great Britain and New Zealand, that it was proper that in all cases young children should be brought up by the mother. But in no case cited to us were present the conditions giving rise to such a serious problem as in the present case: the divergence of religious faith between parents, and the effect of that divergence on the young children.

The generally expressed principle that in cases of this sort, the welfare of the child must be the first and paramount consideration, is a principle to which we fully subscribe. The question for determination here is

thus: Was the order made by the learned trial Judge in the best interests of the children? Or would the interests of the children be better protected by the observance of the terms of the agreement between the parties made on 29th May, 1980?

The learned Judge in the course of his judgment said:

> " The differences in religious training cannot be regarded as likely to improve the brother/sister relationship or to bring the children closer to one another.
>
> Not being a Hindu or a Muslim, I do not have to divorce myself from any religious preference in regard to the custody of the children and am in no way conscious of any personal pressures in deciding this most delicate and emotive of issues.
>
> I am not at all sure that the parents are so concerned about religion as having a share of the children. "

With the greatest respect we are unable to agree with the learned trial Judge on these points. The parents who hold very responsible positions must be credited with a desire to do the best for their children, and with the knowledge enabling them to come to a reasonable decision regarding the welfare of the children. For that reason we think that much greater weight must be given to the terms of settlement between the parties entered into on 29th May, 1980. In this respect attention should be drawn to the evidence of the respondent in the Supreme Court, when she said :

> " I had access to my daughter each two weeks. She seems to be happy."

It is certainly true that later in her evidence she stated:

> " My daughter indicates that she wishes to stay with me. I am prepared to accept the arrangement as to custody of the children. "

220

This however cannot be taken to negative her previous statement that her daughter seemed to be happy with the appellant. In our opinion the present arrangement, that the petitioner retains custody of the girl child and the respondent of the boy child, should not be disturbed.

With regard to maintenance: it is generally accepted that the father is liable for the maintenance of his child. Moreover, in the course of his evidence in the Court below, the appellant said :

> "I was paying $6 per week. I stopped paying. I propose to continue the payments. "

Having that in mind, and noting also the difference in earning capacity between that of the appellant and that of the respondent, we think that it is proper that the appellant pay the amount fixed by the trial Judge of $8.00 per week towards the maintenance of the male child.

For these reasons the appeal is allowed and the order for the custody and maintenance from which this appeal is brought is set aside. In its place there will be the following order.

1. Custody of the male child is hereby granted to the respondent and that of the female child to the appellant.

2. Appellant shall have access to the male child once a fortnight so that both children will stay together with the appellant from Friday 5.00 p.m. till Sunday 5.00 p.m. during the relevant weekend.

3. The respondent shall have access to the female child once every other fortnight so that both children will stay together with the respondent from Friday 5.00 p.m. till Sunday 5.00 p.m. during the relevant weekend.

4. The appellant shall pay to the respondent for maintenance of the male child the sum of $8.00 per week as from the date of this judgment.

5. Neither party shall remove any child from Fiji.

6. If by reason of any change in domestic circumstances of either party it shall be difficult if not impossible to carry out the terms of clauses 2 and 3 hereof then liberty is reserved to either party to apply to the Court for variation of that portion of this order.

There will be no order for costs.

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Vice President

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Judge of Appeal

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Judge of Appeal