IN THE FIJI COURT OF APPEAL

Appellate Jurisdiction

Civil Appeal No. 29 of 1985

Between:

PROTIMA DEVI
d/o Hari Prasad — Appellant

and

RAJESHWAR SINGH
s/o Girwar Singh — Respondent

B.C. Patel & C.B. Young for the Appellant
Dr. M.S. Sahu Khan for the Respondent

Date of Hearing: 9th July, 1985
Delivery of Judgment: 20th July, 1985

JUDGMENT OF THE COURT

O'Regan, J.A.,

The parties to this appeal were formerly wife and husband and for the sake of convenience we shall so refer to them.

In the court below a petition for divorce and a civil action, both brought by the wife, were consolidated, and at the hearing, as the Judge has observed, the outstanding matters at issue were a prayer for her own maintenance and the claims as to property made in her civil claim. In the result an

order for maintenance in the sum of $125 per month was made in her favour but her civil claim was dismissed. In dismissing it the learned Judge said :

> " What the petitioner has asked the court .... is for an order that the respondent is holding the two properties half in trust for her in accordance with her contributions to their acquisition. Unfortunately for her there is no law in Fiji which is the equivalent of section 17 of the Married Women's Property Act, 1882 of the United Kingdom and there is no law in Fiji which is equivalent of the Matrimonial Causes Act, 1973. ..... In the United Kingdom now the Matrimonial Causes Act 1973 gives very wide powers to the courts to divide property belonging to the spouses, taking into account not only specific contributions but for instance the amount that a wife and mother who does not work can be said to have contributed, so as to make a fair and just division among the parties. Similar powers are given to the courts in New Zealand, Australia and many other countries. But no such power exists in Fiji ..... "

And later :

> " ..... the law being what it is there is no way that the court can construe a trust in her favour as prayed ..... "

In her first two grounds of appeal the wife, contends that the learned Judge erred in not holding or inferring or imputing a constructive trust in her favour. In her third ground, she contends that he erred in not exercising the powers conferred upon him by section 86 of the Matrimonial Causes Act.

We find it convenient to consider this latter matter first. Section 86(1) provides :

> " The court may, in proceedings under this Act, by order, require the parties to the marriage, or either of them, to make for the benefit of all or any of the parties

> to, and the children of the marriage, such a settlement of property to which the parties are, or either of them is, entitled (whether in possession or reversion) as the court considers just and equitable in the circumstances of the case. "

Whilst the learned Judge may have been strictly correct in saying that there are no statutory provisions in Fiji equivalent to the Matrimonial Causes Act, 1973 (U.K.) there can be no doubt that the foregoing section bears a close affinity to it and to the statutory provisions obtaining in New Zealand. In fact, it is in terms identical with section 86 of the Matrimonial Causes Act 1949 which was in force in Australia up until its repeal and replacement in 1976. And, as we shall shortly demonstrate, despite the absence of any reference in its text to contributions by the spouses, such may properly be taken account of in exercise of the discretion to order a settlement.

One of the difficulties facing the appellant is that in the proceedings in the court below there was no specific application for an order under section 86 and, in fact, no express reference to it at all. In her divorce petition, under the heading Previous Proceedings (required to be given by section 25(f)) she stated :

> " There have been no previous proceedings in any court with reference to the marriage except Maintenance Case No. 90/80 wherein the respondent was ordered to pay the sum of $40.00 to both the children on the 15th day of January, 1981 and a Supreme Court Action No. 338 of 1981 where the petitioner is claiming her rights as a married woman. "

And, in the prayer of the petition she merely sought an order for maintenance.

The action referred to was instituted on 20th July, 1981, ante-dating the divorce petition by 11 months.

The pleadings relevant to the present matter read :

" .....

4. The plaintiff has been working ever since her marriage and has contributed towards the acquisition of the assets of the family.

5. The defendant purchased C.T. 18354 Lot 2 situated at Lautoka in his own name but it was purchased from the joint income of the plaintiff and the defendant. The defendant has also purchased another piece of land in Suva, title of which has not been issued.

6. .....

7. ..... The plaintiff further alleges that the defendant is holding in trust one half share of the said two properties.

8. The plaintiff also claims as a married woman the rights and her entitlements as having contributed towards the accumulation and acquisition of the assets of the family. "

And in the prayer, she, inter alia, claimed :

" (a) An order that the defendant is holding one half share in both properties in trust for the plaintiff.

(b) .....

(c) .....

(d) alternatively .... an order that as a married woman she be given her share of the property acquired through her contribution. "

The action and the petition were heard together on 11th January, 1984, an order for their consolidation having been made on 8th July, 1983. The record relating to that matter is brief and cryptic. It records counsel as having referred to O.4 r.10 and intimated that the divorce proceedings were in the Surpeme Court. The

Judge's minute reads :

" Order in terms. Two matters. Can appropriately be dealt with together. "

Order 4 Rule 10 (as amended by the Supreme Court Rules 1968 - (Legal Notice No. 186) provides :

" Where two or more causes or matters are pending in the court, then, if it appears to the court -

(a) that some common question of law or fact arises in both or all the proceedings;

(b) that the rights to relief claimed therein are in respect of or arise out of the same transaction or series of transactions;

(c) that for some other reason it is desirable to make an order under this rule;

the court may order those causes or matters to be consolidated on such terms as it thinks just or may order them to be tried at the same time or one immediately after the other ..... "

There is no doubt that the action brought by the wife is "a cause". Section 100 of the Supreme Court of Judicature Act 1873 Imp. (36 and 37 Vict.), which is in force in Fiji (see section 22(2) of the Supreme Court Act) provides that "cause" "shall include any action, suit, or other original proceeding between a plaintiff and a defendant .... ".

The divorce petition does not, at first sight fit comfortably into the phrase "other original proceeding between plaintiff and defendant" in that definition. Neither of those terms finds a place or has currency in the divorce jurisdiction. However, if it is not a "cause" it is clearly a "matter" which, by section 100, is given the meaning of "every proceeding in the court not in a cause" - the court, in the original context being the

one Supreme Court of Judicature constituted by section 3 of the Supreme Court of Judicature Act, 1973 (Imp.) which included as one of "the several courts .... united and consolidated together", the Court for Divorce and Matrimonial Causes. And in Fiji, the Court is the Supreme Court of Fiji (see Rule 3 of the Rules).

It accordingly follows that O.4 r.10 permits the consolidation of a divorce petition with an action if they meet one or other of the prerequisites provided by paragraphs (a) (b) and (c) of the rule. In the present case they clearly do.

Dr. Sahu Khan submitted that the order as to consolidation was made pursuant to Rule 167 of the Matrimonial Causes (Supreme Court) Rules. That rule seems apt enough to have met the situation if invoked but we think it suffices to say that the Court had jurisdiction to make the order by virtue of O.4 r.10 and it, in fact, exercised that jurisdiction. And the effect of the order is that the two proceedings are "combined or united and treated as one cause or matter" - Halsbury 4th Ed. Volume 37 paragraph 69 - and thus overcomes any suggestion that Rule 33 was not complied with.

The consolidation also had the effect that when the matters thrown in issue by the petition for divorce were under consideration the Court was seized of the property claims made in the action. But there was, of course, still no express notice either to the Court or to the husband of any claim pursuant to section 86.

In his final speech in the court below, Dr. Sahu Khan expressly drew the attention of the Court to the fact that there was no express mention of the Matrimonial Causes Act. A precis of what he

said as printed in the record :

> " ..... Action brought by writ of summons and statement of claim. Claim based on contribution - not related to her rights as a married woman. Matrimonial Causes Act has no relevance. No claim of division of property under that Act. "

The emphasis is ours.

Counsel for the wife is recorded as having said in reply :

> " Action consolidated with divorce proceedings with question of maintenance reserved until last. 0.4 r.10 basis of action trust and contributions as married women. "

So it is clear that the case was not presented on the basis that it contained an application under section 86. And it is clear, also, that it was not considered on that basis for the Judge said :

> " If in Fiji there was a law similar to the Matrimonial Causes Act 1973 of the United Kingdom, I would have had no hesitation in awarding her 50% of the house in Lautoka with allowance for mortgage payments and 1/3 of the Suva property. .... "

Section 86(1), as we have already observed, is ipsissima verba with section 86(1) of the Matrimonial Causes Act 1959 which was formerly in force in the Commonwealth of Australia. In Sanders v. Sanders (1968) A.L.R. 43, the High Court had to consider the question whether there was jurisdiction to exercise the powers given by section 86(1) when, as here, there was no greater claim made by the wife appellant, in her petition, than a claim for maintenance - that is without a specific claim for a settlement as the desired means of the provision of such maintenance. It was held that there was. But, at page 48, Barwick C.J.

having so held, went on to say that :

> " Great care ought to be exercised to ensure that opponent parties are fully apprised of what is claimed against him or them before the court's powers are exercised. Substantial adherence to the Matrimonial Causes Rules will no doubt be the most efficacious way of ensuring both that knowledge and adequate opportunity to meet the claims in fact being made. Thus, though, as I think, a claim for maintenance in general terms will in point of power warrant an order for a settlement no such order should be made until the person to be affected is aware either of the claim for such an order, and preferably of the nature of the particular order sought, or of the court's disposition to make it, and adequate opportunity is afforded to that person to present his or her case in opposition to the making of the order. "

We accept and adopt that statement. And we note also that Rule 33 of the Matrimonial Causes Rules lays down the requirement that where a petitioner institutes proceedings for inter alia "settlements" in his petition, that "the petition shall set out the particulars of the order sought in the proceedings". Rule 25(j) is also to like effect. That of course, was not done. However, we note that Part XX of the rules makes provision for relief from or mitigation of the consequences of non compliance with such rules.

In all the circumstances, we do not propose to consider Ground 3 of the appeal - the ground by which it is sought to overturn the judgment of the court below by praying in aid the provisions of section 86. A settlement under that section was not specifically sought and consequently not adjudicated upon in the court below. And it follows that this Court has been deprived of the sine qua non of the appellate jurisdiction - the opinion of the Judge at first instance.

The appeal was also based on the failure of the learned Judge to apply equitable principles applying to—

cases where the title to property is in one of the spouses and contributions towards its purchase price have been made or subsequent improvements have been provided by the other. (Grounds 1 and 2). And as the argument advanced on behalf of the appellant developed in this Court, it became manifest that this part of her case was advanced under two separate bases. First, - and we deal with it on general terms - that when one person has made substantial capital contributions to the acquisition or the improvement of a property in the name of another and when a common intention of shared beneficial ownership is established either by direct evidence or by inference the Court may hold a trust for an appropriate share to exist for the benefit of that other - for an illustration of the application of this principle in the matrimonial context - see generally Pettit v. Pettit (1970) A.C. 777; Gissing v. Gissing (1971) A.C. 886; and secondly, if - in a matrimonial context - there be no evidence of an express or implied intention to create such a trust, the Court is entitled to impute such an intention by forming its own opinion as to what would have been the common intention of reasonable persons in the circumstances obtaining - see Pettit v. Pettit per Lord Diplock (supra) at page 823; Gissing v. Gissing (supra) per Lord Reid at page 897; Rathwell v. Rathwell (1978) 83 A.L.R. (3d) 289.

The first of these two propositions was thrown up for consideration in the court below by the averments in the statement of claim, which by the consolidation order, became part of the pleadings in the case - and in particular by the references, albeit somewhat cursory, to contributions and to trust. And they were advanced by appellant's counsel in his address. But they were not considered. When the Judge held, as we have already indicated, that the courts "could not construe a trust in her favour as prayed in C.A. 332 of 1981" he clearly overlooked the power to hold or infer the existence of a constructive trust in the circumstances postulated above and was thus clearly in error. That alone is

sufficient warrant for the allowing of the appeal.

As to the second proposition, it too, is thrown up by the averments but it was not submitted to the learned Judge that, if he did not find that there was agreement as to common intention, express or implied, he could and should nevertheless impute to the parties an intention to create one, on the bases expounded by Lord Reid, and Lord Diplock in their minority judgments both in Pettit and in Gissing. And, it not having been submitted to him, he understandably did not consider it. And a consideration of it would have involved the high hurdle for a court of first instance - the propriety of its adopting a minority opinion of the House of Lords.

These matters are technically still at large and the question arises whether they should be considered by this Court or by the court below. With a deal of reluctance, we have decided that a proper course is to order a new trial.

First, if we were now to consider and adjudicate upon them, the parties would be deprived of their right to a decision on the matter at the first tier of the judicial hierachy and secondly, we ourselves would be deprived of the benefit of the decision of the court below and its reasons therefor. And in the circumstances of the case, as it now stands, we think it would be quite unrealistic for any consideration to be given to the questions as to equitable relief in isolation from a consideration as to whether orders should be made under section 86 and if so, what orders. In making orders under section 86 the Court is not restricted to the confines of the section. It provides one facet of the answer to the broad general question as to what, in the circumstances, is proper maintenance. It is thus a matter of prudence that such matters should be of prime consideration and that if it eventuates that a resulting or a constructive trust exists, the extent of it and its

subject-matter should be determined along with the questions raised by the prayer for maintenance which, as we will shortly demonstrate encompasses an application under section 86(1).

Section 86 bears a close relationship with section 84 (which authorises the making of maintenance orders) and section 87 (which confers wide powers to the Court on the making of orders under, inter alia, section 84 and section 86). That relationship is discussed by Barwick C.J. in Sanders (supra) in a passage at page 47 which we adopt as our own. He said :

> " Section 86(1), with the great width properly to be given to the word 'settlement', gives an extensive and flexible power to the Court to 'settle' property upon a wife as a means of providing for her maintenance and for that of the children of the marriage. In this respect, in my opinion, it is evidently intended to be and is aptly expressed and so placed in the Act as to be complementary to section 84. .... Section 87, as clearly appears from its terms, is as applicable to the exercise of power under section 86(1) as it is to an exercise of power under section 84. Both powers, in relation to the provision of maintenance, are grounded on the same considerations which earlier in these reasons I have expressed by combining expressions taken from each section. In my opinion, the Court is not limited in the exercise of the power given by section 86(1) to cases where the wife has contributed to the property which it is thought appropriate to settle on her as a means of providing her maintenance, or which it is thought ought to be settled upon her in adjusting as between them the rights or moral claims of the spouses upon the dissolution of their marriage. "

Windeyer, J., at page 50 expressed like views. And at page 51, referring to the various matters for consideration on the hearing of a section 86(1) application, he had this to say :

" One consideration, and in many cases no doubt the main or only consideration, when an order for the settlement of specific property is sought, is how that property came to belong to the party entitled to it. Was it acquired directly or indirectly through the other party? Was it, for example, obtained as a result of a marriage settlement? Was it the result of material contributions or the endeavours or enterprise of the other party? Considerations of this sort may justify an order under s.86(1) notwithstanding that, because of the respective means of the parties or for some other reason, an order for maintenance in the ordinary sense would not be thought necessary. But that these considerations may be cogent does not mean that they alone are relevant. When a decree for dissolution of marriage has been made then, to adopt what was said by Kitto, J., in Lansell v. Lansell, [1965] A.L.R. 153, at page 158; 110 C.L.R. 353, at pp. 361-2 :

' .... a re-adjustment of the property rights of the spouses may be required if consequential injustice to one or both of the spouses and to the children is not to result. The making of a settlement may be a way of carrying to completion, or nearer to completion, the task of dealing fully with the relationship which is the subject of the matrimonial cause. Orders with respect to maintenance are familiar as one means of dealing with an economic situation arising from the granting of substantive matrimonial relief. Orders varying ante-nuptial or post-nuptial settlements, as provided for by s.86(2), provide another example: see Dewar v. Dewar (1960), 106 C.L.R. 170, at p. 174; [1961] A.L.R. 196. The orders which s.86(1) authorizes are more akin to the latter than to the former, for in considering under s.86(1) what is just and equitable in the circumstances the Court is not restricted to considerations relevant to maintenance; but they share with both the character of relief incidental to, because consequential upon, the dissolution of a marriage or the granting of one of the other forms of relief which identify a cause as a matrimonial cause in the ordinary English sense of the expression.' "

(We record that the various sections referred to in these extracts bear the same numbers as their counterparts in the Fiji Act).

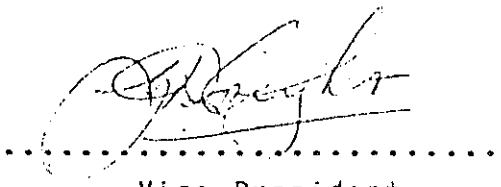
These passages make it clear that contributions can properly be taken account of on a consideration of an appropriate order under section 86(1) and that accordingly there is likely to be a deal of overlapping when, in the same proceedings, the declaration or imposition of a trust is sought. In those circumstances - and they obtain in the present case - it is only right and proper and appropriate that the matters set for consideration by the Legislature should be considered first. And when that is done there may well be little or no room for resort to the general law as to trusts.

In the fourth ground of her appeal, the appellant contended that the learned Judge had erred in not making the maintenance order in her favour effective from the date of separation or alternatively from the date of the issue of the petition. We think that this matter should also be considered at the re-hearing. It involves a further facet of the re-adjustment of the property rights of the spouses involved in the consideration of section 84 and section 86(1) and should quite obviously be considered along with the other relevant material.

We record that during and subsequent to the hearing before us we were provided with what appears to be reliable data concerning the earnings of the parties which is at considerable variance with the material put before the Judge in the court below. We note also that no attempt was made to provide him with the nett earnings of the parties in the relevant years or with material from which he could calculate it. Nor was he provided with a breakdown of the principal and interest content of the amounts paid by the husband in discharge of his liabilities. It seems to us quite untenable that in assessing his annual income the capital portions of the mortgage instalments should be deducted from the gross income. It is well that the new income figures be considered by the Judge and that he be provided with

material to make good the lacks in the evidence to which we have referred.

The appeal is allowed and a re-hearing ordered. In the circumstances disclosed in the appeal, there will be no orders as to costs.



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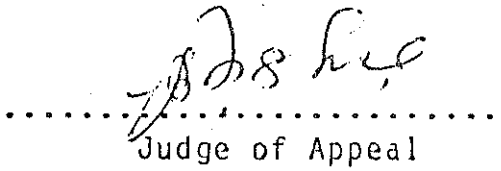
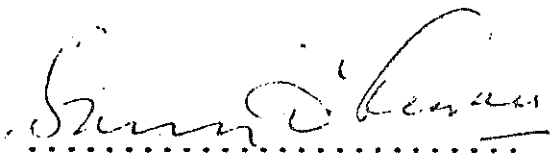


Judge of Appeal



Judge of Appeal