IN THE FIJI COURT OF APPEAL

Civil Jurisdiction

Civil Appeal No. 47 of 1985

Between:

DINESH KUMAR JAMNADAS RANIGA
s/o Jamnadas Lalji Raniga — Appellant

and

KAMLA BHAGWANJEE JOGIA
d/o Bhagwanjee Hansraj Jogia — Respondent

Date of Hearing: 4th November, 1985
Delivery of Judgment: 8th November, 1985

H.K. Nagin for Appellant
D.C. Maharaj for Respondent

JUDGMENT OF THE COURT

O'Regan, J.A.

The parties to this appeal were married on 1st July, 1975 at Rajkot in India and lived together as husband and wife until 8th June, 1978. At that time they were living in Suva. On that date the respondent went back to her family home in India and has since resided there continuously. The appellant paid her air fare to India and in evidence he deposed that he also provided her with the equivalent of F$400 in cash but he has not remitted any funds to her since.

On 26th July, 1983 the appellant filed a petition for divorce. His petition was founded upon section 14(m) of the Matrimonial Causes Act (Cap. 51) which provides :

> "14. Subject to this Part, a petition under this Act by a party to a marriage for a decree of dissolution of marriage may be based on one or more of the following grounds :
>
> .....
>
> (m) that the parties to the marriage have separated and have lived separately and apart for a continuous period of not less than five years immediately preceding the date of the petition, and there is no reasonable likelihood of cohabitation being resumed. "

The respondent did not file an answer to the petition but when the matter was first called on 12th September, 1983 in the Magistrate's Court, Mr. Maharaj appeared on her behalf - apparently without objection from counsel for the appellant and obviously without disapproval of the Court. He informed us from the bar, that, on such appearance, he applied for leave to adduce evidence by affidavit and sought an adjournment for a month to enable such to be done. The record bears a cryptic note of the event :

> "Maharaj:
>
> Need an adjournment of 1 month to file affidavit.
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> Court:
>
> Adjourned to 17.10.83 for mention. "

The respondent's affidavit was duly filed and it is clear from the record that it was read. Mr. Nagin, of counsel for the appellant, submitted to us that it should not have been read and that the magistrate, in so allowing, erred in law. Mr. Nagin did not appear for the appellant in the Court of first instance and accordingly had no first hand knowledge of the course of events in that Court and when he made his submission to us he had not heard Mr. Maharaj's statement from the bar, given, as it was, in the course of his submissions for the respondent.

We, of course, accept Mr. Maharaj's statement in the matter. We all know from experience, instances where, because of the brevity of the Judge's note on a particular matter, it has appeared that it has been dealt with imperfectly or ambiguously. In those circumstances often explanation of counsel is the only way of elucidating the imperfection or the ambiguity. Such a course is invariably accepted - see the observations of Lord Robson in Khoo Sit Hoh v. Lim Thean Tong (1912) A.C. 323 at p.325.

The present case had been preceded by an earlier petition in which the respondent had filed an affidavit. Those proceedings were withdrawn on 5th May, 1983 and the present proceedings instituted almost immediately. Mr. Maharaj was counsel for the respondent in those earlier proceedings and although the instant case was a distinct and separate proceeding for him - and no doubt for his opponent - it was but a continuation of litigation in which they had been engaged since September 1981. That could well have coloured the approach to the present case when it was first called and the application made.

In the circumstances disclosed we think that the respondent's affidavit was regularly before the Court and we accordingly reject the submission.

The gravamen of respondent's opposition to the making of a decree is contained in the following passage from her evidence :

"4. .... I came to India on 8th June, 1978 at the request of my husband the petitioner.

5. My said husband said to me that I was only going on holiday to India and that he will send me fares to return home once I had visited my relatives.

6. I am still waiting for my husband the petitioner to pay my fares to get me back to Fiji as I came from a very poor family and cannot afford to pay my fares.

7. I also seek an order for maintenance as I have no means of support. "

In evidence the appellant said that the respondent had no relatives in Fiji and had been eager to return to her parents' home in India. He said that the arrangement was that she was to write informing him when she was intending to return and that he was then to provide her with passage money but he had never heard from her. He claimed that if she had written he would have remitted the fare. He said that he himself had written her about half a dozen times but had not written since he read her affidavit filed in the first set of proceedings.

The learned magistrate pronounced a decree nisi. Before so doing, he stated himself as "satisfied on the evidence of the petitioner that the ground set out in the petition relating to 5 years' separation has been established".

In her appeal to the Supreme Court the respondent contended that the magistrate erred in law in so finding. The learned Judge held that the magistrate failed to consider the second limb of the ground for divorce specified in

paragraph (m) of section 14 as to there being no reasonable likelihood of cohabitation being resumed.

In our view the learned Judge was not warranted in reaching that conclusion. Bearing in mind what we have already said concerning the consequences sometimes accruing from the brevity of a Judge's note, we are disposed to think that the relevant passage from the learned magistrate's judgment which we have set out above, on a fair reading, encompassed both limbs of paragraph (m). He spoke of "the ground set out in the petition". What was set out in the petition was a paraphrase of the whole of paragraph (m). In any event, the appellant's evidence to the effect that he would not have the respondent back even if she came to Fiji, rendered it patent that there was no reasonable likelihood of reconciliation. In McCrostie v. McCrostie (1955) N.Z.L.R. 631 where the word "reconciled" in the corresponding New Zealand provision was under consideration, it was held that "all that is required is that it must be unlikely that the parties should ever be reconciled in the sense of mutually consenting to live together again". We think that like considerations apply to the words "likelihood of cohabitation being resumed" in paragraph (m) of section 14 and that accordingly a unilateral declaration on oath in Court, precluding as it does the requisite mutuality of consent, suffices to establish the second limb of paragraph (m).

The principal ground of appeal had to do with the provisions of subsections 1 and 2 of section 23 of the Act which provide :

> " (1) Where, on the hearing of a petition for a decree of dissolution of marriage on the ground specified in paragraph (m) of section 14 (in this section referred to as 'the ground of separation'), the court is satisfied that, by reason of the conduct of the petitioner, whether before or after the separation commenced, or for

any other reason, it would, in the particular circumstances of the case, be harsh, and oppressive to the respondent, or contrary to the public interest, to grant a decree on that ground on the petition of the petitioner, the court shall refuse to make the decree sought.

(2) Where in proceedings for a decree of dissolution of marriage on the ground of separation, the court is of opinion that it is just and proper in the circumstances of the case that the petitioner should make provision for the maintenance of the respondent or should make any other provision for the benefit of the respondent, whether by way of settlement of property or otherwise, the court shall not make a decree on that ground in favour of the petitioner until the petitioner has made arrangements to the satisfaction of the court to provide the maintenance or other benefits upon the decree becoming absolute. "

The magistrate in his reasons for judgment made no reference to these provisions. The Judge was of the opinion that the circumstances of the case were such that they should have been considered and adjudicated upon, and he remitted the case for a rehearing in which the questions whether, first, on a consideration of the matters set forth in subsection (1) a decree should be refused and secondly, whether it is just and proper in the circumstances of the case that appellant should make provision by way of maintenance for the respondent.

The appeal to this Court, insofar as it relates to these matters, was advanced in the following terms :

"2. That the learned Judge erred in law in holding that the learned trial magistrate had failed and/or improperly exercised his discretion under section 23 of the Matrimonial Causes Act.

3. That the learned Judge erred in law in holding that the respondent had discharged the burden resting on her to sufficiently

raise section 23 of the Matrimonial Causes Act for the learned trial magistrate to consider. "

As to the first of these grounds, section 23 does not confer a discretion. The Judge, however, did proceed on the basis that it did. As to the second ground, the Judge did not expressly hold that the respondent had discharged any such burden as is therein described. However, it must be taken by implication from his finding that section 23 should have been considered by the magistrate, that the matter was a proper one for his consideration. We think we do the draftsman of the grounds of appeal no injustice or the appellant any disservice when, having heard the argument advanced, we distil the two grounds of appeal down to the single ground that the Judge erred in law in holding that the magistrate had erred in not considering and adjudicating upon the matters set forth in section 23 of the Act.

Mr. Nagin submitted that the burden of proving that the grant of a decree will be harsh and oppressive to the respondent is on the respondent. In support of that submission he cited Joske on Matrimonial Causes and Marriage Laws and Practice, 5th Edition, p.452 where such is stated to be the situation and Lamrock v. Lamrock (1963) A.L.R. 784 given as authority for the proposition.

We asked Mr. Nagin whether any such onus lay with a petitioner as to the other limb of subsection (1) dealing with conduct "contrary to the public interest". He knew of no authority on the matter but submitted that the Lamrock decision should by analogy be applied.

We have considered the Lamrock judgment. In our view it is not authority for the proposition stated in Joske. We are of the opinion that there is no onus resting on a

respondent in respect of either limb of subsection (1). We think that if there is material before the Court by way of proven facts concerning a petitioner's conduct which call for a consideration of the Court's duty ("shall refuse") to dismiss the petition if such conduct is, either "harsh and oppressive" or "contrary to the public interest", then Court must proceed to consider such even in the absence of opposition from or application by the respondent. That position obtains in other fields of law where the public interest has been infringed. For instance, the Court will take cognisance of illegality and refuse relief whether illegality be pleaded or not pleaded. "Where the illegal purpose has been wholly or partly performed the law allows no locus poenitentiae" - see Alexander v. Rayson (1936) 1 K.B. 169.

Our view of the matter accords with that of Monahan J. in Judd v. Judd 3 F.L.R. 207 who, when dealing with the corresponding section of the Australian Act, had this to say (at p.210) :

> " It is clear that s.37(1) is not restricted in that way and that the discretion may be exercised on the basis of any evidence from wherever it may come which satisfied the Court, that it would be harsh and oppressive to the respondent or contrary to the public interest, to make the decree sought and this despite the absence of any opposition to the making of the decree by the respondent. It seems to me that the discretion must be exercised a fortiori where the respondent opposes the making of the decree and puts before the Court the evidence to justify the exercise of the discretion ... "

That passage is blemished by the references to "the discretion" and the exercise of discretion when in fact, the Australian section, like the Fiji section, does not confer a discretion at all but renders it mandatory that a decree be refused if the Court is satisfied as to

the matters in the section mentioned. However, the opinion of the learned Judge on the issue we are discussing is abundantly clear and subject to the gloss necessary to correct the error to which we have just referred, we approve and adopt the passage.

Mr. Nagin submitted that first there was no evidence before the magistrate to warrant a finding that the conduct of the appellant was either "harsh or oppressive" or "contrary to the public interest" and secondly that counsel for the respondent did not at the hearing, make any submission that the decree should be refused pursuant to the power conferred by subsection (1) of section 23 and that accordingly, the learned magistrate had no occasion to consider them.

Mr. Maharaj acknowledged that neither before the magistrate nor the Judge did he raise the issue that the conduct of the appellant was "harsh or oppressive". He said, however, that he did raise the "contrary to the public interest" limb of the section. The record shows that he did raise the latter issue before the Supreme Court but the note of his submissions to the magistrate is silent on the topic.

Having regard to the views we have expressed, whether or not the issues were raised by counsel is of no moment. And for the same reasons, Mr. Nagin's second submission must be rejected.

With regard to evidence germane to section 23(1) the appellant himself said that since 8th June, 1978 when he gave her $400 some of which doubtless was expended on the journey to Rajkot in India, via Brisbane, he had not provided her with any moneys for her maintenance and support; that he knew that she herself could not afford the return fare; that he did not send her a return ticket

because she had not written asking for it; that he was unaware until the hearing on 29th November, 1983 that she had deposed in an affidavit in the earlier proceedings sworn in 1982, that she was waiting for her return ticket to be sent to her; that at the date of hearing, when he allowed that he then knew she was awaiting the return ticket, he was not prepared to provide the same.

There was thus a deal of evidence from the respondent touching upon his conduct. It was not considered by the learned magistrate and it should have been. We gave consideration to appraising it ourselves, in the light of the provisions of section 23(1), in the interests of bringing to an end this protracted litigation, but in the end we decided not to take that course. To do so would be to deprive the appellant - in the event that there was a finding adverse to him - of his right not only to a hearing at first instance but also to two appeals. In our view he should not be so deprived.

As to subsection (2) of section 23, Mr. Maharaj acknowledged that he did not raise any issue as to maintenance or a settlement pursuant to that subsection nor did he advance submissions thereon. And it is clear from the record that he did not elicit information from the appellant as to his income or his means. We do not think that those factors conclude the matter. The subsection is in mandatory terms and it imposes a duty on the Court, in appropriate cases, to mitigate the hardships accruing to a respondent from the making of a decree in circumstances involving no matrimonial fault when sometimes there might be grievous fault on the one hand and little or none on the other. And we think that duty arises even if the issue is not pleaded or raised by way of submission - see generally the observations of Selby J. in Whittle v. Whittle (1963) 80 W.N. (N.S.W.) 739 at p.740 with which we are in substantial agreement.

All in all, we think that the learned Judge was right in deciding to remit the matter to the Magistrate's Court for a rehearing and we concur with the orders he made. The appeal is accordingly dismissed and the appellant is ordered to pay the respondent's taxed costs.

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Vice President

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Judge of Appeal

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Judge of Appeal