IN THE FIJI COURT OF APPEAL

At Suva

Civil Jurisdiction

CIVIL APPEAL NO. 53 OF 1990
(Divorce Action No. 92 of 1977)

BETWEEN:

ANA FRANCISCA TUPOUNIUA — APPELLANT

-and-

COLIN ERNEST PHILP — RESPONDENT

Mr. R. I. Hanger and Ms. P. Wilson for the Appellant
Mr. B. Sweetman for the Respondent

Date of Hearing : 19th June, 1992
Date of Delivery of Judgment : 18th August, 1992

J U D G M E N T

The outcome of this appeal really turns on one matter only. However, to deal with it and the other submissions made to us, it is desirable to refer to the facts in some detail.

The Appellant (wife) was married to the Respondent husband on 5th August 1967. She was then 23 years old, and her husband was 60. It was her first marriage, her husband's third. He had children by his former marriages, one of whom came to live with the parties, aged about 17 in 1964. Husband and wife have co-habited for about two years before marriage; their first child was born about 1964 or 1965. The husband was a wealthy man, having been a successful architect in Tasmania, and he had

substantial assets. There is no evidence of any assets possessed by the wife. So it can be said that the wife made no capital or asset contribution towards whatever was brought into or acquired during the marriage.

The wife bore 3 children to her husband and, until the parties separated, raised them and looked after their matrimonial household. That was for a period of about 10 years of marriage. The husband was granted a divorce on the grounds of his wife's adultery on 11th October 1977.

In addition to what might be called the matrimonial and domestic duties, the wife assisted the husband in his business activities. The husband had migrated to Fiji and had commenced an architectural practice here, and the wife assisted him with stenographic and secretarial services. At some stage the husband conceived the idea of acquiring land and doing necessary filing and other preparatory work so that a hotel could be constructed. It was, and became the Tradewinds Hotel at Lami; he progressively gave up and then abandoned his architectural practice, and devoted himself entirely to the hotel project. She assisted him in various ways including introductions and lobbying in connection with arranging finance, licenses and so on, and worked in a small office on this site for long hours assisting the husband; she also at one stage worked as housekeeper at the hotel and was paid a normal wage.

It was found as a fact by the learned trial Judge that the husband *"repeatedly asserted that whatever he was doing in the way of acquiring and increasing assets would be for both of them"* (record p 294), *"that whatever was created by their joint efforts, albeit that they might not have been equal, was to be for their joint benefit"* (record p 295) and that the third marriage of the husband was started *"on the basis of working together with his wife and sharing the fruits of their endeavours"* (record p 296).

The husband also told his wife that he would set up a family company which would acquire *"these properties, and then they would jointly benefit"* (record p 295). *"These properties"* was a reference to various matrimonial homes which were acquired during the marriage and which it seems were purchased in the name of the husband alone (record p 295). The Judge goes on: *"I accept that she would have endevoured to look after her own interest in discussing with her new husband what was to be the position as regards ownership of the matrimonial home and what was to be the benefit to the both of them of the endeavours regarding the hotel and other enterprises"* (record p 296). His Lordship goes on: *"What could be more natural than that he would wish to start his new life, his third marriage, on the basis of working together with his wife and sharing the fruits of their endeavours"* (record p 296).

In other circumstances this uncertainty as to what really was discussed between them might have to be resolved, because the wife brought proceedings pursuant to s.86 of the Matrimonial Causes Act seeking a settlement of property. One claim made by

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her was that by reason of the agreements or whatever they were that have been referred to she was entitled to one half of the whole of the assets of the husband which he owned or was entitled to at the relevant time. This would amount to a claim to be entitled to one half of all the assets that the husband had brought into the marriage, as well as any acquired afterwards. No such claim could be sustained on the findings of the learned Judge, and indeed it is doubtful in our minds in the light of what the Judge said whether she could sustain a claim that one half of the last matrimonial home (there were several) had been promised to her. However, we find it unnecessary to decide this matter for reasons that will appear.

The husband claimed that he decided that a company should be set up for another reason entirely. He gave evidence that the marriage had started to fall apart in the early 1970s and that he conceived the idea of setting up a family company to secure benefits for his children in the event of the marriage failing. The learned Judge did not believe that this was the reason. However, as the situation of the company and the rights of the parties with respect to its assets were made central to this appeal, it is necessary to look at the following matters.

A company was incorporated and on 28th January 1971, changed its name to Bilo Ltd. What were called *"new articles"* were adopted by it on 14th October 1971. They made provision for five types of shares, A to E inclusive. The 'A' shares were one dollar 8%

preference shares, the other four categories were ordinary shares. Apart from securing a preferential dividend, and a return upon winding up of the company or reduction of capital of the paid up capital of one dollar a share, the shares *"shall not carry the right to any further participation in profits or assets of the Company"* (record p 355). However, those shares until the death of the husband and wife were the only shares which carried any right to vote at general meetings (ibid). At a directors' meeting on the same day 3 'A' class shares were issued to the husband and one to the wife. Four ordinary shares were issued, one to each of the three children of the marriage and one to the child of a former marriage of the husband (record p 371). Subject to some later increases in the number of 'A' shares (the husband's 'A' shares increased to a total of 6), that position never altered. There is a record that a meeting was held on 26th July 1977, the minutes of which state that the husband was to have the only voting right in respect of 'A' class shares. The minutes of a meeting held on 25th April 1985 record a resolution deleting all rights in respect of 'A' class shares and that the shares be extinguished. However, we note that at a meeting held on 5th November 1987 a representative of the wife was present holding a proxy from her. As we see it this apparent conflict is immaterial. So is the fact that subsequent ordinary shares were issued to the children or in trust for them or their dependants.

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That simply means that neither the husband nor the wife ever held any shares in the company that would entitle them to any interest in the assets of the company.

According to the minutes of the 14th October 1971, the wife was present at the meeting at which the new articles of association were adopted. That probably does not mean much; nor does the fact that she is recorded as having been present at 14 subsequent meetings, although the husband gave evidence that she attended most if not all of the meetings (record p 271). Whether she was aware of it or not, the fact is that she never had any shares that might entitle her to some claim on the assets of the company. Nor did her husband.

The 1971 balance sheet of Bilo Ltd showed that the assets of the company included a residence and all the shares formerly held by the husband in Australia and Fiji as well as having a Sydney bank account credit; it showed as liabilities a bank overdraft and a loan from the husband. So it is clear that his assets, including the house, were transferred to the company against a book entry of a loan by him to enable the company to purchase them. By 1972 its indebtness to him was shown as $576,023.28; we note that by 31st December 1988 it was shown as $87,132.00. It is clear and the evidence is that in the meantime he lived on what would be shown as repayments of capital.

No matter what may have been the belief or expectation of the wife after 1971 the husband did not have any interest in the assets of Bilo Ltd except what might wrongly be called the debt owing to him. The assets of the company were and are owned by the children, some or all of whom must now be sui juris. There is no evidence at all that the children were aware of any claim of the wife to the assets; when the company was formed the youngest child had just been born; he was about 6 at the time of the separation. It is just not possible to hold that the husband had any interest in the assets. The fact that the husband tried or was able to alter the voting rights of the 'A' class shares and then to extinguish those shares does not alter that position. The latter steps were clearly taken to attempt to avoid any problems that the wife's voting rights or being the holder of one share might create. Whether or not the learned Judge believed the husband's evidence as to the reason for setting up the company, the husband did so in a way that achieved exactly what he said he set out to do.

In fact the marriage did start to break up in the early 70s, although how early is not clear. By 1975 she was committing adultery with the person who became the co-respondent, whom she had met in 1972 or 1973 at the latest and whom she married on 30th December 1978; according to her evidence at record p 258, it may well have been earlier. She left the matrimonial house in 1977.

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The various matters that have been canvassed before this Court can be dealt with fairly shortly. On behalf of the husband it was put that the marriage lasted only 10 years. We have just mentioned the conduct of the wife and how it brought the marriage to an end. She brought nothing in the way of assets into the marriage. She has re-married. The husband was granted custody of the three children, who must still have been fairly young at the time - the youngest about 6 at the time of separation. The matter of delay was raised as a factor to be considered adversely to the claim of the wife. In effect she commenced proceedings under the Act seeking a settlement in 1984, some 7 years after the divorce; the matter came on for hearing in 1990, a further six years after commencement. If anything, however, it would seem that this delay could have acted to her detriment, at least so far as the husband's asset being the debt from Bilo Ltd was concerned. The figures show that from 1974 to 1987 the amount owing to the husband from the company was reduced from $508,962.71 to $106,842.00; the figure shown in the balance sheet as at 31st December 1988 was $87,132.00.

As against that, of course, must be considered her contribution to the acquisition of assets by the husband, in her keeping the household, raising the children and working in the business.

It does not seem to us that the learned Judge made any error in considering the various matters we have just mentioned, except

in relation to the assets of Bilo Ltd. In reaching the decision to order a lump sum settlement of $30,000 it is clear that he did so on the basis that either the company in effect belonged to both parties, or some of its assets did, and that the wife had an entitlement to have them considered; in fact he said (at record pp 297-8): *"Having found on the balance of probability that the Respondent did contribute to the family fortunes I find that accordingly a constructive trust in her favour has arisen in the Petitioner's assets".* Although he does not say so, the whole thrust of the Judgment leads to the above conclusion, namely that he took as the husband's assets all or some of the assets of Bilo Ltd. We do not think that His Lordship was intending to mean a constructive trust arose in the true sense, because no such trust could arise from that source that His Lordship mentioned, whether taken alone or with the rest of the evidence. We think that what he meant was that the wife had, from the whole of the facts, an entitlement to have the assets of Bilo Ltd or some of them considered as assets of the husband. For reasons we have given we are satisfied that was not the case. Further, of course, it would have been impossible to treat them as such without at least notice being given to the company and shareholders if any order made by him was likely to require access by the husband to those assets in order to meet it. We emphasise once again, however, that the husband had no interest at all in those assets.

The Judge did not identify or specify what we considered to be the fortune of the husband against which we assessed that a

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settlement of $30,000 to be the appropriate order, although he did say that the husband had the means to satisfy his order without involving the company. He refers to a figure of an amount lent by the husband to Bilo Ltd in 1974 of $576,024; the figures show that as at 31st December 1974 the loan from the company to him stood at $508,962.71. But it cannot be that His Lordship considered it appropriate in 1990 in proceedings commenced in 1984 to have regard to this figure. It may be that His Lordship had regard to the means that the husband had to satify any order.

Be that as it may, the husband filed a cross appeal claiming that the amount awarded was excessive and should be less. In these circumstances we have turned to the evidence in order to decide both appeals, particularly as counsel for the husband submitted that we should have regard to what the evidence disclosed was his financial position at the relevant time.

At pages 209 and 230 of the record, the husband made sworn statements as to what his own assets were in March 1989 and September 1989, including the asset consisting of the debt from Bilo Ltd. There does not seem to have been any challenge to the figures. The total $157,293.00. We see no reason why we should not accept them.

On the basis of these figures and bearing in mind the correct approach that the learned Judge otherwise adopted, we are of opinion that the amount ordered by way of settlement is a very

appropriate amount, and open for a Court to award on the evidence.

We note that a sum of $30,000 has been paid into Court.

Therefore the order of the Court is: appeal and cross appeal dismissed. Order that the sum of $30,000 paid into Court be paid out to the Appellant wife. Each party will bear his or her own costs of this appeal and cross appeal.

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Mr. Justice Michael M Helsham
President, Fiji Court of Appeal

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Sir Moti Tikaram
Resident Judge of Appeal

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Mr. Justice Arnold Amet
Judge of Appeal