IN THE FIJI COURT OF APPEAL

At Suva

Civil Jurisdiction

CIVIL APPEAL NO. 30 OF 1991
(High Court Civil Appeal No. 13 of 1990)

BETWEEN:

RISHI RAJ — APPELLANT

-and-

SHIV WATI DEO — RESPONDENT

Mr. G. P. Shankar for the Appellant
Mr. D. S. Naidu for the Respondent

Date of Hearing : 6th August, 1992
Date of Delivery of Judgment : 30th September, 1992

J U D G M E N T

This is an appeal against a decision of the High Court exercising appellate jurisdiction on an appeal from the decision of a Magistrates Court at Nadi. The appeal is brought pursuant to s.12(1)(c) of the Court of Appeal Act (Cap 12).

The respondent filed a divorce action in the Nadi Magistrates Court for the dissolution of her marriage to the appellant (Divorce Action No. 28 of 1985). Apart from other matters, the respondent sought orders for the custody of the three children of the marriage and maintenance for the said children.

On the 4th July 1985 the Resident Magistrate gave an interim maintenance order of $180 per month against the appellant. The appellant appealed against this interim order and the High Court at Lautoka allowed the appeal and remitted the matter back to the Magistrates Court at Nadi for hearing.

The history of the matter from this point on appears on page 30 of the Court Record. It appears from this record that when the matter was relisted on the 14th May 1987, all parties were represented by counsel. On the 4th June 1987, there was no appearance by the respondent and the appellant appeared in person. On the 11th June 1987 the respondent was represented by counsel and the appellant did not appear. On this last mentioned date, the Magistrate fixed this matter for hearing on the 16th June 1987. On this date, the respondent appeared with counsel and there was no appearance by the appellant. The Court proceeded to hear the matter on this date in absence of the appellant. The decree nisi was made on the 11th September 1987. Custody of the three children were awarded to the respondent and order for maintenance was made against the appellant to pay $100 per month.

On the 28th June 1989, almost 2 years later, the appellant filed an application in Nadi Magistrates Court to set aside the order relating to maintenance. This application was finally heard on 20th March 1990. The ground upon which the appellant sought to set the order aside was that the appellant was not made

aware of the hearing dates on 14th May 1987, 4th June 1987, 11th June 1987 and 16th June 1987 and he was not present. He stated in his affidavit that the record in the Magistrates Court is not correct.

Before determining the issues of fact and the merits of the application, the learned Magistrate considered the question of whether he had any power to set aside an order once made.

The learned Magistrate ruled:

> *"This application is akin to setting aside a conviction obtained in absence of accused or setting aside a judgment obtained in absence of Defendant. But in these cases specific provisions are made in Criminal Procedure Code and the Magistrate's Court Rules. No such provisions are found in the Matrimonial Cause Act.*
>
> *In my view therefore in absence of such provisions this Court cannot set aside maintenance order once made in absence of a Respondent."*

The application was dismissed. The appellant appealed to the High Court at Lautoka on the following ground:

> *"That the learned Magistrate was wrong in not setting aside the order for maintenance having regard to the fact that the appellant had no notice of the hearing when the order was originally made."*

The High Court dismissed the appeal. The Court concluded:

> *"The learned Magistrate did not make an order refusing to set aside the order for maintenance.*
>
> *He ruled that he could not entertain the application. There has not been an appeal against the ruling. On that ground alone I would dismiss the appeal."*

The appellant has appealed to this Court on the ground:

> *"That the learned Judge was wrong in law in holding that there was no appeal from the learned Magistrate's decision that he had no powers to entertain the application. Indeed, the grounds of appeal (although general in its nature) was in effect a ground of appeal against the Magistrates holding."*

This ground of appeal relates to the proper construction of the scope of the ground of appeal before the High Court.

Counsel for the appellant in his written arguments submitted that the ground of appeal was in effect against the wrong decision of the Magistrate in that:

(a) he dismissed the application on the grounds that he had no power to set aside the order.

(b) he did not set aside the order having regard to the fact that the appellant had no notice of the hearing when the order was originally made.

Counsel for the respondent did not address this issue at all in his written submissions.

It is true that the ground of appeal in the appeal to the High Court is generally worded and does not clearly set out the various issues. However, we agree with counsel for the appellant that it is possible to argue that the ground of appeal is wide enough to encapsulate the ruling of the Magistrate that he had no power to set aside an order once made.

This is a very narrow ground of appeal and in our view does not resolve the question of law, namely, whether the Magistrate has power to set aside a maintenance order made in a matrimonial causes proceedings.

The appropriate order that would follow from this ground of appeal would be to remit the matter back to the High Court to determine whether the Magistrate has power to set aside the maintenance order.

In our view, it is not necessary to remit this matter back the High Court. It is true that the High Court concluded at the appellant had not appealed against the decision by the istrate's Court that he had no power to set aside the order. ever, in addition, the Court went on to find:

> *"Furthermore, I think the learned magistrate was, in any event, correct in his ruling."*

High Court upheld the ruling of the Magistrate that he istrate) had no power to set aside a judgment once made

The appellant has not appealed against this finding in the appeal before us. Can the Court consider a ground of appeal not stated in the Notice of Appeal? Rule 5 of the Court of Appeal Rules (Cap 12) is relevant:

> *"5. The appellant shall not, without the leave of the Court of Appeal, urge or be heard in support of any ground of objection not stated in his notice of appeal, but the Court of Appeal in deciding the appeal shall not be confined to the grounds so stated:*
>
> *Provided that the Court of Appeal shall not rest its decision on any ground not stated in the notice of appeal, unless the respondent has had sufficient opportunity of contesting the case on that ground."*

The appellant has not sought leave and therefore he is not entitled to rely on this ground. However, this rule empowers the Court of Appeal to determine an appeal on a ground which is not stated in the notice of appeal.

Similar powers are given by Rule 22 of Court of Appeal Rules (Cap 12) and in particular subrule (3) and (4). This is a power which should be exercised in appropriate cases. In this case, the Magistrate was clearly wrong when he ruled that he had no power to set aside the maintenance order. He addressed this issue without any arguments from counsel and as a result, an important provision of the Matrimonial Causes Act (Cap 51) was not drawn to his attention. When addressing the issue, the learned Magistrate concluded:

> *"This application is akin to setting aside a conviction obtained in absence of accused or setting aside a judgment obtained an absence of Defendant. But in these cases specific provisions are made in Criminal Procedure Code and the Magistrate's Court Rules. No such provisions are found in the Matrimonial Causes Act."*

We gave both parties sufficient opportunity to address us on this ground. Under s.63 of the Matrimonial Causes Act (Cap 51), the provisions of the Magistrates' Court Act and rules made thereunder apply to Matrimonial Cause proceedings.

Order 30 rule 5 of the Magistrates' Courts Rule (Cap 14) gives power to set aside an order of the Court which is obtained in absence of a party. It is clear that the Magistrate erred in law.

We would allow the appeal on this ground. The formal ~~words~~ orders of ~~the~~ the Court will be: Appeal allowed, we set aside the order of the High Court as well as the order of the Magistrate that he had no power to set aside the maintenance order. We remit the

matter back to the Magistrates Court at Nadi to consider the merits of the application to set aside the maintenance order.

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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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Sir Mari Kapi
Judge of Appeal