IN THE FIJI COURT OF APPEAL

CIVIL JURISDICTION

CIVIL APPEAL NO. 14 OF 1993
(High Court Civil Action No. 109 of 1989)

BETWEEN:

HASAN RAZA	APPELLANT
-and-	
AIEJA BIBI	RESPONDENT

Mr. H. Lateef and Mr. R. Gopal for the Appellant
Mr. V. Maharaj for the Respondent

Date of Hearing	:	9th February, 1994
Date of Delivery of Judgment	:	17th February, 1994

JUDGMENT OF THE COURT

On the 5th April 1989 the respondent, plaintiff in the Court below, issued an originating summons in terms of the Married Womens Property Act (Cap. 37) seeking an order that certain property situated at Lot 29, Naocovonu Subdivision, Labasa, and contained in Native Lease No. 13940 was owned by her absolutely. She also sought an order that her husband the appellant, first defendant in the Court below, repay to Westpac Banking Corporation his share of the mortgage debt that existed on the property. It may be noted in passing at this point that Westpac Banking Corporation had been joined as second defendant in the proceedings in order that an interim injunction might be obtained to restrain the Bank from exercising any remedies it might have

in respect of the property under its mortgage pending the determination of the originating summons. Such an injunction was granted and that aspect of the matter need not concern us further. Returning to the relief sought in the originating summons it is to be noted that at the commencement of the actual hearing leave was granted by the learned trial Judge to file an amended summons to include a prayer for an account and for the sale of the property. Later, respondent's counsel, at the end of the respondent's case made another application, this time to amend the summons to enable a sale under S.119 of the Property Law Act (Cap. 130) and the Court made an Order that there be an amendment to allow the proper question to be decided by the Court.

We have referred to the form of the originating summons and the amendments made to it with some particularity for it is not without importance in the determination of this appeal in the light of the appellant's submission, in his written argument, that the appellant had sought a declaration that he be declared the beneficial owner of "all assets with or held by the plaintiff (now respondent)". No such formal prayer is noted in the record as having been made by the appellant, nor was leave sought to do so by way of cross summons or by any other proceeding. We add, though, that the appellant did in April 1991 make an affidavit in which he asked the Court to make such a declaration. It is also to be noted that on the 22nd June 1989 Palmer J. had made an order, by consent, that the action "be tried in open Court and the affidavits filed so far be treated as pleadings" but that

order obviously did not apply to this affidavit, it having been made nearly two years later. It is convenient to note at this point that though the appellant is here represented by counsel, in the Court below he conducted his own case. He had been represented by counsel but at the hearing his counsel was given leave to withdraw. The appellant informed the learned trial Judge that he understood counsel's application to withdraw and was quite happy to, as he put it, to defend himself.

The learned trial Judge had before him an extensive affidavit by the respondent in support of the originating summons, an affidavit in opposition by the appellant and one in reply by the respondent. He heard oral evidence from the respondent and her witness, and the appellant and his witness, on the 28th May and the 2nd June and on the 3rd June he heard oral submissions. In his written judgment he made an order that the property be sold on certain terms and that the proceeds after payment of all outstanding charges and expenses, be paid to the parties in equal shares. The learned trial Judge sets out in an admirably clear fashion the facts as he finds them to be. He refers to the relevant statutory provisions. There is little point in repeating in this judgment those findings of fact in full, so it will be sufficient to state only so much as is necessary to deal with the grounds of the appeal which are directed against the order for sale.

The property in question is what became, after some 12 years of marriage, the matrimonial home. It was at the time of

purchase, September 1978, registered in the joint names of both the appellant and the respondent. The learned Judge, in our view correctly, applied S.34 of the Land Transfer Act (Cap.131), to the property. In terms of that section he held that the parties each had an undivided equal share in the property. However, as both parties led evidence directed to establishing that they had not made equal contributions to the acquisition of the property, which we have already noted was the matrimonial home, the learned Judge considered the factual history of the parties as husband and wife and the financial aspects of it's acquisition; he also considered the business dealings of both of them in relation to two restaurant type businesses, Hassan's Cafe and Sinai Restaurant, that they had carried on. He then said this:

> *"I am more than satisfied that the house was purchased at a time when marital relations were good between the parties and was intended to be their matrimonial home. It was registered in their joint names and the mortgage was repaid through the joint efforts of both parties and although there was an attempt on both sides to down play the contributions of the other, I am not at all persuaded that their share in the matrimonial home is anything other than equal and I so find."*

There was ample evidence to support this finding.

The learned Judge then went on to say:-

> *"Suffice it to say for present purposes that I do not propose to deal with such items which are insufficiently proved to be 'matrimonial property' and in any event do not form part of the claim in this instance which relates almost exclusively to the*

single most valuable asset in the marriage, the matrimonial home."

This passage, it will be noted, makes clear that he did not propose to deal with items which were insufficiently proved to be "matrimonial property" and, as he said, do not form part of the claim before him. As we have already noted the originating summons, amended as it was in two respects, does not refer to any property other than the house. The Judge was dealing with the subject matter of the originating summons, that is the house property, in terms of S.20 of the Married Women's Property Act, and having determined that the matrimonial home was owned equally by them he proceeded to consider the domestic situation of the parties to decide, no doubt, whether he should exercise any of the powers available to him in terms of S.20 of the Married Womans Property Act. He determined that the best course was to direct a sale on the terms and in the manner set out in the judgment.

It is we think desirable at this point to consider the terms of S.20 of the Married Women's Property Act which reads as follows:-

"20. In any question between husband and wife as to the title to or possession of property, either party, or any such bank, corporation, company, public body or society as aforesaid in whose books any stocks, funds or shares of either party are standing, may apply by summons or otherwise in a summary way to a court of competent jurisdiction, and such court may make such order with respect to the property in dispute and as to the costs of and

consequent on the application as it thinks fit, or may direct such application to stand over from time to time and any inquiry touching the matters in question to be made in such manner as it shall think fit:

Provided that-

(a) any order of the court made under the provisions of this section shall be subject to appeal in the same way as an order made in a suit in the said court would be;

(b) any such bank, corporation, company, public body or society as aforesaid shall, in the matter of any such application for the purpose of costs or otherwise, be treated as a stake-holder only."

It must be borne in mind that S.20 of the Married Women's Property Act is not an all embracing provision that permits the Court to make such order as it thinks equitable. The Act came into force on the 1st January 1892 and cases in England over the years have pointed to many limitations on the apparent breadth of the words "make such order.....as he thinks fit". J. G. Riddall's "The Law of Trusts 1977 at page 338 after setting out S.17 of the English Married Women's Property Act 1882, which is, for all practical purposes, in virtually the same terms as our S.20 says, this:-

"The fact that jurisdiction is conferred on the judge to make "such order...as he thinks fit" might suggest that the section confers jurisdiction on the court to make an order stating not only to whom the property belongs beneficially, but to whom the judge considers, in the light of all the facts, it would be equitable for the house to belong (e.g. to W because H has gone off with Z). The House of Lords, however, has indicated that the section is to be construed as providing merely a statutory procedure under which the property rights of the parties may be ascertained and declared: the section

does not confer jurisdiction on the court to vary the parties' property rights as it sees fit.

The jurisdiction includes power to assess the value of the property in dispute in money terms and to quantify in money terms a spouse's interest. Section 17 also empowers the court to order a sale of the property in dispute (e.g. so that the proceeds may be divided in specified proportions) and, where a transfer of one spouse's interest to the other is necessary for the sale to be effected, to order that transfer. The section also confers power on the court to order a spouse to transfer his or her interest to the other in consideration of a sum specified by the court; and power to order that property should not be sold, e.g. until H has found W alternative accommodation."

It is as well at this point to make a reference to S.119 of the Property Law Act. The respondent had asked for leave to amend the originating summons to include an order under S.119. Mr. Maharaj, counsel for the respondent, informed the Court that he had submitted to the Court that it had power under S.20 of the Married Women's Property Act to order a sale of the property but had sought the amendment as a precaution in case the Court should hold it did not have power under S.20.

The appellant has urged two grounds in support of his appeal. They are:-

1. The learned Judge erred in law and in fact in finding that the respondent alone owned Sinai Restaurant and not treating it as matrimonial property when deciding on the partition.

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1. The learned Judge erred in law and in fact in finding that the respondent alone owned Sinai Restaurant and not treating it as matrimonial property when deciding on the partition.

2. That the learned Judge erred in fact and in law in not taking into consideration all the matrimonial property including the car and the furniture in the possession of the respondent when deciding to sell and divide the proceeds of the matrimonial home.

The appellant's first broad submission was, as expressed in his written submission, that the respondent brought the action under S.20 of the Married Womens Property Act to "get around the Courts inherent jurisdiction" in relation to matrimonial property, and that it was the Courts duty to deal with the matter as "a property settlement" under its inherent jurisdiction. This submission cannot be sustained. The respondent was entitled to proceed under whatever statutory provision she chose and if the appellant wished to raise what he chooses to call the Court's inherent jurisdiction in relation to matrimonial property he should have either commenced his own proceedings or sought leave from the learned trial Judge to amend the respondent's originating summons in such a way, if that was permissible under the rules, as to enable him to raise the issue. He did neither and the learned Judge made it clear in the passage from his judgment cited earlier that he was not dealing with property other than the house property; and, in our view, he was clearly not under any duty to do otherwise.

The appellant's contention in relation to the Court's inherent jurisdiction was based on a submission that relied upon two English Court of Appeal cases Browne v Pritchard (1975) 3 All

E R 721 and **Williams v Williams** (1977) 1 All E R 28 which have no real application in this country. The proceedings in each of those cases had been commenced on the basis that there was a constructive trust created in respective of the house the subject matter of the proceedings, and the Court of Appeal held in both cases that because it was the matrimonial home then the Matrimonial Proceedings and Property Act 1970 and the Matrimonial Causes Act 1973 applied to it. Those English statutes gave the Court much wider powers after divorce to order the transfer of property than it would have had if it was not matrimonial property. There are no similar legislative provisions in this country and therefore the principles expressed in those cases, to the extent that they depend upon the effect of the two statutes, do not have any application here.

Mr. Gopal, however, went on to submit that he was entitled to rely upon the principles expressed in those cases on the basis that the Court has always had an inherent jurisdiction, coming from convention, to fill gaps left by legislation. He submitted that the inherent jurisdiction might also spring from the law of trusts. In respect of the first proposition we feel obliged to make it plain that it is framed in so broad a way as to make it plainly unsupportable. The High Court does not have an inherent jurisdiction of that nature. It is not desirable for this Court to try and define or limit the extent or nature of the Court's inherent jurisdiction. It may well be that in applying some statutory provision or principle of the common law, the Court must be somewhat creative in its approach to ensure that the

intent of the statute the spirit of the common law is satisfied, but there must be some source in law upon which the creativity depends for an inherent jurisdiction in this sense to arise. Mr. Gopal suggested that S.86 of the Matrimonial Causes Act (Cap.51) might be invoked in some way; just how was not clear but in any event that section could have no application here for it expressly says that it applies to proceedings under that Act and this case was not under that Act. That plainly distinguishes this case from the Court of Appeal judgment in Protima Devi v Rajeshwar Singh (Civil Appeal No. 29 of 1985) helpfully drawn to our attention by Mr. Maharaj. In that case there was a petition for divorce and a civil action in respect of property consolidated by order of the Court, and thus treated as one cause or matter. The Court was thus able to invoke the provisions of S.86 of the Matrimonial Causes Act in relation to the property aspects of the civil action. It is difficult, too to see how the law of trusts would assist. If some constructive or resulting trust were to be suggested it would, in these circumstances, have to be argued that a separate trust was created in respect of each item as they were acquired at separate times. The essence of the appellant's argument, however, is that in determining what should be done about one property, the house, the Court should take into account what happened to other properties, namely, the Sinai Restaurant, the car and the furniture. In result we cannot accept Mr. Gopal's submission based upon some supposed inherent jurisdiction.

Mr. Gopal, who made his submissions well and firmly, went on to say that in substance the appellant's position was that he accepted the equal ownership of the property, as held by the learned Judge, but argued that he should have taken into account what the respondent said the appellant had received from the Sinai Restaurant, the car and the furniture, and then ordered that an appropriate sum in respect of them be deducted from the respondent's share of the proceeds of sale. He argued the learned Judge was wrong in law not to take those items into consideration and he was wrong in fact to hold that the Sinai Restaurant was owned by the respondent alone. We reject those submissions. In our view, as we have already stated, the Judge had no jurisdiction in terms of S.20 of the Married Womens Property Act to vary the respondent's property right in the house in order to make allowances for her conduct in relation to other property even if the Judge had been satisfied that she had already gained a benefit in respect of that other property to which she was not entitled. Further in our view, he was perfectly entitled to disregard those items of property in deciding to direct a sale of the house. In passing, however, we note that he said this about the Sinai Restaurant:-

> *"The undeniable fact remains however that after the matrimonial home was paid off the plaintiff (respondent) opened her own business, in the name of Sinai Restaurant and single-handedly ran it profitably for several years before selling it for a five figure sum."*

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Clearly the learned Judge was of the view that the Sinai Restaurant was not matrimonial property and there was ample evidence, both oral and documentary, though some of it as one would expect was contested, to support that view. Further, in respect of the car and furniture it seems plain there was no acceptable evidence, in the view of the learned Judge, to make it appropriate for him to take them into consideration on the question of whether or when to order a sale. At all events, he determined not to do so and we certainly cannot say he was wrong.

The appeal is accordingly dismissed and the appellant is ordered to pay costs in this Court. The parties to bear their own costs in the Court below.

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Sir Moti Tikaram
Acting President Fiji Court of Appeal

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Sir Peter Quilliam
Judge of Appeal

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Mr. Justice Savage
Judge of Appeal