

275

IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU0011 OF 1998S
(High Court Civil Appeal No.HBA 0007 of 1997)

BETWEEN:

SUBINDAR KAUR

Appellant

AND:

BALJEET SINGH

Respondent

Coram:

The Hon. Sir Moti Tikaram, President
The Rt. Hon. Sir Maurice Casey, Justice of Appeal
The Hon. Justice K. R. Handley, Justice of Appeal

Hearing:

Wednesday, 4 August 1999, Suva

Counsel:

Mr. G.P. Shankar for the Appellant
Mr. R. Prakash for the Respondent

Date of Judgment:

Friday, 13 August 1999

JUDGMENT OF THE COURT

The parties in this appeal were married in Fiji on 10 January 1990 shortly before the respondent (who we will describe as the husband) migrated to California in the United States of America. The appellant (who we will describe as the wife) claims that the arrangement between her husband and herself was that she would join him in the United States as soon as he could make the necessary arrangements with the US Immigration Authorities. However on 8 March 1995, while she remained in Fiji, the husband commenced divorce proceedings in the Superior Court of California, county of Stanislaus. Documents filed in the California proceedings purport to establish that on 30 March 1995 the summons, petition, and other court papers were served on the wife in Fiji by the husband's brother Gurdev Singh. No appearance was entered in the California Court on behalf of the wife and on 11 July that court made an order dissolving the marriage with effect from 1 October that year.

The husband returned to Fiji early in 1997 and purported to remarry on 20 January. On 3 February the wife commenced proceedings by complaint in the Magistrates' Court at Ba seeking maintenance from the husband under s.3 of the Maintenance and Affiliation Act (cap 52) (The Act). She was only entitled to commence those proceedings if she was still married to the husband. Her whole case therefore depended on whether the California decree would be recognised in Fiji. An order was made by the Magistrates' Court ex-parte on 4 February preventing the husband leaving Fiji. This order was later vacated upon the husband providing appropriate security for payment should an order for maintenance be made against him.

The husband then applied by notice of motion on 27 February for the wife's application to be struck out on the ground that the court had no jurisdiction because the parties had been validly divorced. This application was dismissed by the Magistrate on 15 April. The husband appealed to the High Court and on 22 January 1998 Lyons J allowed his appeal and made an order "that the Learned Magistrate's finding and orders of 15 April be vacated".

It is not clear whether his Lordship intended that his orders would have the effect of granting the husband's application to strike out the proceedings, or whether he intended that his application should be returned to the Magistrates' Court to be heard and determined according to law. The ambiguity was never clarified, but the wife purported to appeal as of right to this court. Section 12(1)(c) of the Court of Appeal Act confers a right to appeal to this Court from a decision of the High Court in the exercise of its appellate jurisdiction on grounds which involve a question of law only but this right is subject to subsection (2). Section

12(2)(f) provides that, subject to presently irrelevant exceptions, there shall be no appeal from an interlocutory order of the High Court except by leave.

The orders of Lyons J. were clearly interlocutory because they did not finally dispose of the principal cause pending between the parties namely the wife's application under s. 3 of the Act. The orders did not even finally dispose of the husband's application to strike out those proceedings. Leave to appeal was not sought on behalf of the wife but the husband did not object to the competency of the appeal.

The husband later sought leave to cross-appeal out of time for the purpose of seeking an order striking out the wife's proceedings. His application was dismissed by Thompson JA on 27 November 1998. When the appeal was called on for hearing on 4 August before this Court we raised with counsel the question of its competency without leave. Mr. Shankar for the wife initially contended that the appeal was competent but after a short discussion with the Court he made an oral application for the grant of leave. The Court having heard Mr. Prakash for the husband decided to grant leave because questions of substance were involved and the formal orders of the High Court had to be clarified.

The issue raised by the husband's strike out application was whether the California decree would be recognised in Fiji. Section 92(6) of the Matrimonial Causes Act 1985 (cap 51) provides so far as relevant:

"A dissolution...of a marriage shall not be recognised as valid...where, under the common law rules of private international law, recognition of its validity would be refused on the ground that a party to the marriage had been denied natural justice."

The wife would have been denied natural justice in the California proceedings if she was never served with the process of that Court and thus never given an opportunity to be heard in those proceedings. See MacAlpine v. MacAlpine [1958] P.35; Middleton v. Middleton [1967] P.62 and the cases there cited.

The wife's evidence in support of her complaint and against the husband's strike out application was given by her affidavits of 3 and 6 February 1997. In her first affidavit she swore that "so far as I know I did not receive any Divorce paper". The husband's affidavit in support of his strike out application sworn on 6 February contained hearsay evidence that the wife had been served with the process of the California Court on 30 March 1995 and that the California Court had also served her with the Divorce decree by sending a copy of it to her through the post. He annexed copies of the relevant documents in the California proceedings. These included a copy of the declaration by Gurdev Singh filed in the Superior Court which deposed to service of the process on the wife. It was not sworn before any person authorised to administer oaths by the laws of Fiji and contained no details as to the time or place of service. Another unsworn document, apparently signed by Gurdev Singh, and filed with the California Court, but again not sworn before any person authorised to administer oaths by the laws of Fiji, stated that the court process had been served on the wife at her home at Kabisi Sigatoka at 10.30 a.m. on the 30th of March 1995.

The wife's second affidavit sworn on 6 February contained a categorical denial of the husband's hearsay statement that she had been served with the process of the Californian Court on 30 March 1995. She continued "I have never been served with any Divorce and other

papers. Gurdev Singh is brother of the Petitioner and he is lying.”

The case was before the Magistrates' Court on 7 February and on a number of days thereafter in February, March and April, but no affidavit by Gurdev Singh proving service on the wife was filed on behalf of the husband, and the wife was not required for cross-examination on her affidavits. In these circumstances, the husband's strike out application could and should have been dismissed on the simple ground that there was no sworn evidence on behalf of the husband which answered the wife's sworn evidence that she had never been served with Court process

Unfortunately the learned magistrate decided the case on a different basis which had never been argued by the parties or raised with them. He compared the two purported signatures of Gurdev Singh on the Californian Court papers with his signature on a bail security lodged with the Magistrates' Court in Ba, and concluded that they were different and that the signatures on the former documents were not those of Gurdev Singh.

He then commented on the husband's failure to file an affidavit by Gurdev Singh in reply and said:

“In light of the foregoing, I hold that the Complainant was not served with the summons or other papers for dissolution of marriage and consequently I refuse to accept the decree of the Supreme Court of California on the basis of the provision of s.92(6) of Matrimonial Cause Act.” (sic)

He concluded by dismissing the husband's strike out application stating that he would hear the Complainant's complaint.

The learned magistrate had earlier stated:

"There is no evidence before me or any submission made whether I should compare the signature."

Lyons J., correctly in our view, held that the learned magistrate had denied the parties, and particularly the husband, procedural fairness by deciding the strike out application on the basis of his comparison of the relevant signatures when this issue had not previously been raised by either party or by the Court. The husband did not have a fair opportunity of dealing with this issue by evidence or submission. Moreover, as Lyons J. held, the bail bond was not in evidence before the Magistrate on the strike out application, although of course it formed part of the court file.

The learned Judge continued:

"The Learned Magistrate ruled against the motion thus preserving (the wife's) application to another day. Arguably this is not put paid to the (husband's) case ... In reality though, it must be considered that, having lost the motion, (the husband) ...was put in an extremely difficult position concerning the question of liability to pay maintenance. In effect the later trial of (the wife's) application would most likely be in the form of an assessment rather than an argument on liability. In that respect the dismissal of the Motion put an end to (the husband's) case and implicitly meant that (the wife) would succeed in all likelihood on the question of liability ..."

With respect this was not strictly correct. The dismissal of the husband's strike out application was an interlocutory decision which, as a matter of law, did not finally decide any issue in the proceedings and did not create any res judicata estoppel binding on the parties or the

Court at the final hearing. However the learned magistrate purported to make findings in a form which may well have embarrassed the Court and the husband on the final hearing. Thus, as referred to above, he purported to find that the wife "was not served with the summons or other papers for dissolution of marriage" and he refused to accept the Californian decree under s.92(6) of the Matrimonial Causes Act. The magistrate should not have made findings in that form but should simply have dismissed the husband's strike out application for lack of proof.

The Judge in his formal orders purported to set aside "the findings" of the magistrate. This was strictly incorrect. An appeal is a proceeding by which an unsuccessful party seeks to have the formal order of a Court set aside or varied in his favour by the appellate court. An appeal is therefore a means of correcting a judicial act, not the reasons of the lower court as such. See Commonwealth of Australia v. Bank of New South Wales [1950] AC 235, 294.

Lyons J. rightly held that the magistrate had erred in deciding the case on the basis of his comparison of the signatures of Gurdev Singh, and in making what appeared to be ultimate findings on the absence of service on the wife and the non recognition of the California decree. However in our judgment the magistrate's order dismissing the husband's strike out application was correct. The wife's sworn evidence that she had not been served with the process of the California Court was both unchallenged and uncontradicted. The husband's appeal to the High Court should therefore have been dismissed, despite the errors in the reasons of the magistrate.

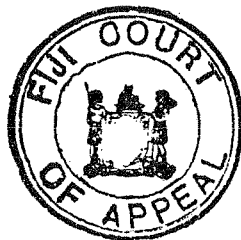
The wife's appeal by leave to this Court should therefore be allowed. The question of costs has occasioned us some difficulties. The husband's strike out application has totally failed and he should not recover costs in respect of that application in any of the Courts. On the other hand the wife's appeal to this court was incompetent without leave, which was only granted at the hearing, but the appeal was necessary to clarify the ambiguous orders of the High Court. We therefore make no order as to the costs of either party in this Court.

In the result the magistrate's ultimate findings on the question of service and the non-recognition of the California decree which were both unnecessary and inappropriate have been corrected, and the ambiguous orders of the High Court have been set aside.

The case can now proceed to a final hearing on all issues in the Magistrates' Court unembarrassed by any of the findings made or reasons given in the interlocutory proceedings. We wish to make it perfectly clear that the Magistrate conducting the final hearing will be entitled and bound to decide the case on the evidence and arguments presented at that hearing, without being bound in any way by what occurred in the course of the hearing of the husband's strike out application in the Magistrates' Court.

The wife has been put to a great deal of expense in resisting the husband's strike out application, but she should not have an order for those costs in the Magistrates' Court and the High Court in any event, but should recover them if she succeeds at the final hearing. The order for costs assessed at \$150 made by Thompson JA in favour of the wife cannot be disturbed and should stand. We therefore make the following orders:-

1. Leave to appeal granted.
2. Appeal allowed.
3. Orders of the High Court set aside and in lieu thereof order that the appeal to that Court be dismissed.
4. The wife's costs of the husband's application in the Magistrates Court to strike out her complaint, assessed at \$400 and her costs of the appeal to the High Court assessed at \$175, in each case inclusive of disbursements, are to be the wife's costs in the cause, so that she will be entitled to those costs if she succeeds on the final hearing of the proceedings in the Magistrate Court.
5. No order as to the costs of the appeal to this court, but the security for costs provided by or on behalf of the appellant is to be paid out to the appellant's solicitors, or delivered up to them for cancellation as the case may be.



Moti Tikaram

 Sir Moti Tikaram
 President

Maurice Casey

 Sir Maurice Casey
 Justice of Appeal

K.R. Handley

 Justice K. R. Handley
 Justice of Appeal

Solicitors:

Messrs. G.P. Shankar and Company, Ba for the Appellant
 Messrs. Mishra Prakash and Associates, Ba for the Respondent