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

CIVIL APPEAL NO. ABU0038 OF 2001S
(High Court Civil Action No. HBC0038 of 2000s)

BETWEEN:

ALICE MARGARET WHIPPY

Appellant

AND:

PETER SPENCER LEE GEE KONG

Respondent

Coram: Reddy, P
Davies, JA
Ellis, JA

Hearing: Tuesday, 12th November 2002, Suva

Counsel: Dr. M. S. Sahu Khan for the Appellant
Mr. H. Lateef for the Respondent

Date of Judgment: Friday, 15th November 2002

JUDGMENT OF THE COURT

The respondent was granted a decree absolute in divorce against his then wife the appellant, in the First Class Magistrate's Court at Suva on 18 June 1997. The grounds were the wife's desertion. By Originating Summons dated 31 January 2000 the appellant sought a declaration that the decree was null and void. That was rejected by Byrne J. in his judgment of 9 May 2001 and the appellant now appeals. The grounds of her appeal are stated in the Notice of Appeal to be 7:

"1. <u>THAT</u> the Learned Trial judge erred in law and in fact in not holding that the Magistrate's Court had no powers and/or jurisdiction to hear the Divorce Petition on the purported ground of Desertion and that the hearing of the purported Petition on the purported ground of desertion was null and void and that the whole proceedings before the Magistrate's Court on 4th day of June, 1997 was null and void.

2. <u>THAT</u> the learned trial Judge erred in law and in fact in not holding that the learned Magistrate had no jurisdiction or powers to hear the Divorce proceedings in the manner he had done.

3. <u>THAT</u> the learned trial Judge erred in law and in fact in not holding that the Decree Nisi granted on the 4th day of June, 1997 is null and void.

4. <u>THAT</u> the learned trial Judge erred in law and in fact in not holding that the Decree Absolute granted on the 18th day of June, 1997 is null and void.

5. <u>THAT</u> the learned trial Judge erred in law and in fact in not holding that the learned Magistrate had no powers or jurisdiction to grant a decree Nisi and/or absolute on the evidence before the Court.

6. <u>THAT</u> the learned trial Judge erred in law and in fact in taking irrelevant matters into account and not taking relevant matters into account particularly when the issues herein pertained to Matrimonial Proceedings and not to an ordinary civil proceedings.

7. <u>THAT</u> the findings and verdict of the learned Trial Judge are unreasonable and cannot be supported having regard to the evidence as a whole."

Before us these grounds were condensed into 3: first that because an amended petition had not been served on the wife respondent, the decrees were void as being made without jurisdiction; second there was a failure by the petitioner to disclose his adultery and so seek the Court's indulgence; and third that the Magistrate had no power to make a decree by consent. As will appear from the petition shortly to be set out, there is no

basis for the second ground and this was not pursued.

The husband's petition related his marriage, set out the names and dates of birth of 4 children and then said:

> *"5. That there was a previous Court proceedings in the Magistrate's Court in respect of the marriage being Maintenance Action No.150 of 1995 and Divorce Action No.457 of 1994 issued but later withdrawn by the Respondent.*
>
> *6. The facts relied on as constituting the grounds specified above are:-*
>
> *(a) During the course of the marriage the Respondent was difficult to live with an unreasonable in not wanting to discuss any matrimonial problems.*
>
> *(b) On one occasion she assaulted the Petitioner with a radio whilst the Petitioner was reading in bed.*
>
> *(c) On another occasion she heated water in a microwave jug and poured boiling water over the back of the Petitioner's hand causing painful burns and blisters.*
>
> *(d) If any arguments developed the Respondent resorted to not speaking to the Petitioner for several days at a time which affected the children and family's well-being as well as causing mental anguish to the Petitioner.*
>
> *(e) Finally the Petitioner left the matrimonial home after the Respondent threatened to kill the Petitioner on various occasions.*
>
> *(f) On 28th January 1995 the respondent went off with the first-named Co-Respondent, Imtiaz Sahu Khan, for 2 days. They went in a four wheel drive vehicle up the Sigatoka Valley alone together. This used to happen frequently after the first such incident.*

(g) *On a date late in 1995 and on various occasions since the Respondent has spent the night with the second named Co-Respondent David Traun at 10 Vatuvia Road Lami.*

(h) *Other facts will be presented at the trial if necessary.*

7. *I have not condoned or connived on the grounds specified above and am not guilty of collusion in presenting this petition.*

8. *The arrangements concerning the children of the marriage are that they live with the Petitioner with reasonable access to the respondent.*

9. *That the Petitioner during his marriage commited adultery with one Gaetane Austin. The Petitioner became involved with Gaetan Austin due to the stress and failure of his marriage. The Petitioner is presently living with Ms Austin and they now have a child."*

and his prayer was in these words:

"(a) That the discretion of the Court be exercised in my favour notwithstanding my adultery during the marriage.

(b) That the marriage be dissolved.

(c) That time for decree absolute be abridged.

(d) That the Petitioner be granted the custody and the Respondent access of the following children of the marrriage namely:-

(i) JADE ADRIENNE born on 27th June 1987

(ii) LANCE MARK born on 10th September 1988

(iii) NICHOLAS PETER born on 3rd September 1992.

(e) As ancillary relief the Petitioner also seeks that the Court determine maintenance and matrimonial property settlement after hearing evidence."

The petition was duly filed and served and the notes from the Court file (as disclosed by the official copy of the record and the search notes of the appellant's

solicitors) show the progress of the matter. In particular they show that on 4 June 1997 the petitioner the present respondent and his solicitor Mr Lateef (not counsel in this Court) and the appellant and her solicitor Mr Jamnadas appeared before the Magistrate and announced a "100% settlement" covering maintenance custody and matrimonial property. A deed was produced showing this was so and this was accepted by the Court. Mr Lateef sought and was granted leave to amend the petition "to desertion in place of adultery." The respondent who had filed an answer to the petition, withdrew her answer. Then it seems later in the day the petitioner gave formal proof noted as follows:

> *"On 2/5/87 I was lawfully married to the Respondent, I being then a Divorcee and Respondent being a Divorcee.*
>
> *Court*
>
> *Marriage Certificate Exhiit 1*
>
> *The Respondent and I have cohabited at 10 Vatuvia Road, Lami till 25/11/94. When we separated Respondent and I are domiciled in Fiji.*
>
> *These are 3 children of the marriage, namely:-*
>
> 1. *Jade Lee*
> 2. *Lance Lee*
> 3. *Nicholas lee*
>
> *Court*
>
> *Birth Certificate of the said children accepted as Exhibit 2, and 4.*
>
> *There have been no previous proceedings in any Court with reference to the marriage or to any children of the marriage, namely:*
>
> *FACTS are as follows:*
>
> *Desertion*

I have not condoned or connived at the grounds specified above and am not guilty of collusion in presenting this Petition.

The arrangements proposed by me concerning the welfare of the said children of the marriage are that.....

I therefore pray:

1. *That the marriage be dissolved.*

2. *That terms of settlement be accepted as for:*

   (a) Maintenance

   (b) Property and

   (c) Custody."

The Magistrate thereupon granted a decree nisi which could be made absolute after 14 days, and accepted the terms of settlement. The decree was made absolute 18 June and the parties uplifted their copies soon afterwards. It is unnecessary to give details of the settlement save to say that it involved substantial asset transfers to the wife, maintenance, and custodial arrangements. The transfers were completed by the end of 1999. However, in October 1999 the wife sought other legal advice and instructed her new solicitor to challenge the decree nisi and also the decree absolute.

The central challenge is that, when the petition was "amended", an amended petition was not served on the appellant. Byrne J. held that as the appellant was present in Court at all material times and was at all times respresented by counsel there was no substance to her claim. He referred to Rule 15 of the Matrimonial Causes Rules which provides that a petition may be amended only by leave, and that the amended

petition be filed and served in accordance with R15(6) which provides:

> *"(6) Unless otherwise directed, a copy of a document (in this paragraph referred to as the relevant document), being a supplemental petition or answer or a petition or answer that has been amended after it has been served, shall be served in accordance with the provisions of rule 13 on every person (other than the party by whom it is filed) who is a party on the record or, not being a party on the record is specified, in accordance with section 32 of the Act, in any document (including the relevant document) that forms part of the record."*

Rule 13 requires personal service. Rule 14 empowers the Court to dispense with service when it is expedient to do so. In the present case the appellant had filed an answer containing an address for service being the office of her solicitors.

Obviously the purpose of the rule is to ensure that an amendment is brought to the attention of the respondent so she may answer if she wishes. In the pesent case Byrne J. relied on a statement by Cooke J. (as he then was) in Carrell v. Carrell [1975] 2 NZLR 441 at page 445:

> *"If counsel appearing for a party informs the Court that he consents to an order on behalf of that party the Court and the other party is entitled to rely on the authority of counsel even if his client is not present. A fortiori it is so if his client is personally present and makes no demur."*

We do not need to traverse the policy protecting decrees in divorce from challenge other than by appeal or the formalities of service as in our opinion the factual position shows that in fact the wording of the petition did not need alteration at all. The grounds

set out in para 6(a)(b)(c)(d) and (e) of the petition were relied on and the two alleged adulteries were not pursued. While the 5 grounds (a) through (e) involve allegations of cruelty they can also support a claim of constructive desertion. S.15 of the Matrimonial Causes Act Cap.51 provides:

> ***"A married person whose conduct constitutes just cause or excuse for the other party to the marriage to live separately or apart, and occasions that other party to live separaely or apart, shall be deemed to have wilfully deserted that other party without just cause or excuse, notwithstanding that that person may not in fact have intended the conduct to occasion that other party to live separately or apart."***

In this case the petition did not state that the grounds (a) through (e) amounted to cruelty or desertion, nor did the prayer. There was in fact no amendment necessary but an agreement not to pursue the allegations of adultery and to proffer the allegation as desertion. There being no amendment necessary there was no need for service and the ground of challenge must fail.

While in our view it becomes hypothetical we consider that if service was necessary the presence of the appellant and her counsel in Court and participating in the hearing and settlement as they did made it abundantly clear that to insist on some further documentation and service was plainly unnecessry and it was expedient not to require it. The cases relied on by Mr Khan are cases where there was no service of a petition with allegations to which the respondent had to be given an opportunity to answer. In short we consider the criticism of the Magistrate's procedure to be unwarranted.

This leaves the challenge on the ground that the Magistrate granted a decree by consent.

The husband petitioner gave brief evidence in support of his allegations which unsurprisingly in the circumstances satsified the Magistrate that desertion was established. There was no evidence in the record of the Magistrate proceeding to grant a decree by consent. What is disclosed is the usual procedure for hearing an undefended petition. In our view there is nothing in this challenge either.

It follows that the appeal must be dismissed.

We feel obliged to add that these proceedings, which were commenced by way of originating summons in the High Court of Fiji seeking a declaration that the Decree Nisi and the Decree Absolute for divorce granted by the Magistrate's Court Suva were null and void, were misconceived.

A final judgment of a court of law binds the parties unless and until the judgment is set aside Halsbury's Laws of England 3rd Ed. Vol.22 from 1660 states, inter-alia: "Subject to appeal and to being amended or set aside a Judgment is conclusive as between the parties and their privies, and is conclusive evidence against all the world of its existence, date and legal consequences."

In furtherance of this principle, the law has developed the principle of res judicata, as applied and Chamberlain v. Deputy Commisisoners of Taxation (1988) 164 CLR 502, the extended principle of res judicata as expounded in Port of Melbourne Authority v. Anshun Proprietary Limited (1981) 147 CLR 589 and the principle of issue estoppel as exemplified in Blair v. Curran (1959) 62 CLR 464.

It follows that, unless and until the Decree Nisi and the Decree Absolute are set aside, they determine conclusvely, as against the parties, and indeed as against any other person or authority, that the marriage between the parties has been dissolved. Unless a decree is set aside, a declaration that it is null and void ought not to be made and, if made, has no effect.

Judgments and decree may be set aside on appeal subject to such conditions as to time or otherwise as the Legislature may have specified. Section 90 of the Matrimonial Causes Act (Cap.51) provides that an appeal does not lie from a decree of dissolution of marriage after the decree has become absolute. The appellant did not appeal from the Decree Nisi and has no right of appeal now that the decree has become absolute. See Meier v. Meier [1948] P.89.

A superior court at least has jurisdiction to set aside a judgment or order on good cause, such as fraud or the discovery of new evidence or a breach of the principles of natural justice, particularly before the judgment or order has been perfected by entry.

However, as has often been observed, the jurisdiction is exercised rarely, care being taken to have proper regard to the importance of the public interest in the finality of litigation. See e.g. Autodesk Inc. v. Dyason (No 2) (1993) 176 CLR 300.

In the present case, no application to set aside was made in the Magistrate's Court and no grounds existed upon which the jurisdiction could have been exercised. The appellant, through her counsel, participated in the proceedings which are now challenged and approved of and encouraged the course taken by the learned Magistrate.

Finally, it may be observed that a superior court, such as the High Court of Fiji, has jurisdiction to grant an order in the nature of certiorari setting aside a judgment or order of an inferior court such as the Magistrates Court. The remedy was described by Brennan, Deane, Toohey, Gaudron and McHugh JJ in Craig v. The State of South Australia (1995) 184 CLR 163 at 175-6, as follows:

> ***"Where available, certiorari is a process by which a superior court, in the exercise of original jurisdiction, supervises the acts of an inferior court or other tribunal. It is not an appellate procedure enabling either a general review of the order or decision or a substitution of the order or decision which the superior court thinks should have been made. Where the writ runs, it merely enables the quashing of the impugned order or decision upon one or more of a number of distinct established grounds, most importantly jurisdictional error, failure to observe some applicable requirement of procedural fairness, fraud and "error of law on the face of the record"***

In the High Court of Fiji, that jurisdiction is exercised under Order 53 of the

High Court Rules as amended by the High Court (Amendment) Rules 1994. Rule 3(1) provides:

> ***"No application for judicial review shall be made unless the leave of the Court has been obtained in accordance with this rule."***

No application for an order of certiorari, which was the only remedy available to her, was made by the appellant. Had leave to institute judicial review been sought, it would have been refused. Orders in the nature of certiorari are discretionary orders. Having regard to the appellant's participation in the divorce proceedings, to the issue of the decree absolute without an appeal being lodged and to the appellant's receipt of the benefits of the properly settlement, it would have been inappropriate for the appellant's challenge to the decrees to proceed. In particular, the Court would have had regard to the policy implicit in s.90 of the Matrimonial Causes Act.

Moreover, the appellant's complaints raise no allegation of jurisdictional error of the type discussed in Craig v. The State of South Australia at 177-8. The complaints made are of matters which, if they amounted to errors, and we think they did not, were mere procedural irregularities, not matters of the type which justify the grant of the exceptional remedy of certiorari.

The order of the court will therefore be that the appeal be dismissed. The appellant must pay the respondent's costs which are fixed at $750.

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Reddy, P

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Davies, JA

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Ellis, JA

Solicitors:

Messrs. Sahu Khan and Sahu Khan, Ba for the Appellant
Messrs. Lateef and Lateef, Suva for the Respondent

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