

IN THE SUPREME COURT OF FIJI

Appellate Jurisdiction

Miscellaneous Civil Causes

Civil Appeal No. 11 of 1960

Between:

MOHAMMED IQUBAL SHAH

Appellant

v.

ROSEMARY O'BRIEN

Respondent

Separation and Maintenance (Summary Jurisdiction) Ordinance (Cap. 31)—interim order under section 23 (1)—nullity suit in Supreme Court—conflict of jurisdiction.

On 16th July, 1960, the respondent took out, in the Magistrate's Court, a summons against the appellant for an order under the Separation and Maintenance (Summary Jurisdiction) Ordinance (Cap. 31), on the ground of wilful neglect to maintain. On 4th August, 1960, the appellant filed a petition in the Supreme Court for a decree of nullity alleging that his "marriage" to the respondent was void *ipso jure*. On 26th August, 1960, when the summons for maintenance came before the Magistrate's Court, the learned Magistrate adjourned the case pending the determination of the suit in the Supreme Court, but awarded the respondent an interim maintenance order against the appellant under section 23 (1) (Cap. 31). Against this interim order the appellant appealed.

Held.—Under section 23 (1) (Cap. 31) the Magistrate's Court is empowered to order the "husband" to pay the "wife" interim payments. Since, however, the question as to whether the parties were, in law, husband and wife, was the very question before the Supreme Court, there was a conflict of jurisdiction. The hearing in Magistrate's Court must be stayed pending the determination of the action in the Supreme Court.

Cases cited:

Sukhraji v. Kalika Prasad, Fiji Law Reports 1958/59 p. 50.

Higgs v. Higgs (1935) Probate 28.

Knott v. Knott (1935) All E.R. 38.

F. M. K. Sherani for the Appellant.

D. N. Sahay for the Respondent.

KNOX-MAWER, Ag. J. (18th November, 1960)

Before dealing with the issues in this case upon which learned counsel have addressed argument, I should refer to the decision of this court in *Sukhraji v. Kalika Prasad*, Fiji Law Reports 1958/59 at page 50. It was there held that the parties to proceedings under the Separation and

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Maintenance (Summary Jurisdiction) Ordinance (Cap. 31) have no right to require the trial magistrate to state a case under section 38 of the Magistrates' Courts Ordinance. The application by the appellant's counsel, in this instance, for a case to be stated, does not indicate under what provisions of the law it purported to be made. I do not know whether it is contended that section 335 (1) of the Criminal Procedure Code is applicable. As this point was not argued before me, I prefer to treat this as an ordinary appeal against the order of the learned Magistrate.

The facts are as follows. On the 16th July, 1960 Rosemary O'Brien (the respondent) took out, in Suva Magistrate's Court, a Summons, upon complaint, against Mohammed Iqbal Shah (the appellant) for an order under the Separation and Maintenance (Summary Jurisdiction) Ordinance (Cap. 31) on the ground of wilful neglect to maintain. On 4th August 1960, the appellant filed a petition in the Supreme Court for a decree of nullity alleging that his "marriage" to the respondent was void *ipso jure* on account of certain contraventions of the Marriage Ordinance (Cap. 134). On the 26th August 1960, the summons for maintenance under Cap. 31 was called before the learned Magistrate, Suva. Upon the appellant's counsel informing him that proceedings were pending in the Supreme Court, the learned Magistrate stated that he would adjourn the case pending the determination of the suit in the Supreme Court. The respondent's counsel thereupon sought and obtained an interim maintenance order under section 23 (1) of the Ordinance. It is this order which learned counsel for the appellant contends should not have been made.

Counsel has relied in particular upon two English authorities, *Higgs v. Higgs* (1935) Probate 28 and *Knott v. Knott* (1935) All E.R. 38. The headnote to *Higgs v. Higgs* (*supra*) reads as follows:—

"During the pendency of a petition for divorce in the High Court no order for maintenance should be made under the Summary Jurisdiction and Maintenance Acts, 1895 to 1925, by a Court of Summary Jurisdiction. Although the power of the High Court to order a provision for a wife is not an exclusive power, there is an obvious inconvenience in holding that there is a concurrent jurisdiction in the High Court and in justices in the matter of ordering a provision for a wife to be made by her husband if proceedings in the Divorce Division are on foot."

Under section 23 (1) of the Separation and Maintenance (Summary Jurisdiction) Ordinance the Magistrate's Court is empowered to order the "husband" to pay the "wife" interim payments. However, whether, in law, the parties are "husband" and "wife", is the very question which the suit in the Supreme Court is to determine. If the Supreme Court petition succeeds, then the marriage is regarded as never having taken place and no status of husband and wife as ever having been conferred.

I think therefore that the principle laid down in *Higgs v. Higgs* (*supra*) must be applicable in these circumstances. Once the attention of the learned Magistrate had been called to the conflict of jurisdiction this order should not have been made. It will therefore be set aside. The hearing in the lower court will be stayed pending the determination of the action in the Supreme Court.