IN THE SUPREME COURT OF FIJI

In Divorce

Action No. 62 of 1960

Between:

MOHAMMED IQUBAL SHAH Petitioner

v.

ROSEMARY O'BRIEN Respondent

Marriage Ordinance (Cap. 134)—section 22—expiration of special licence before celebration of marriage—only one witness present—whether marriage a nullity.

This was a husband's petition for a decree of nullity upon two grounds, firstly that the special licence, under which his marriage to the respondent had been performed, had expired before the celebration of the marriage, and, secondly, that there was only one witness present at the marriage ceremony. There was no dispute as to these facts.

Held.—Notwithstanding the defects in the special licence, of which all parties were ignorant at the time, and the failure of the officiating minister to insist on the presence of more than one witness, these were not defects fatal to the essential validity of the marriage.

Petition dismissed.

Cases cited:

Greaves v. Greaves (1872) 2 P. & D. 423.

Dormer v. Williams E.R. Vol. 163 p. 301.

Wallace Johnson v. The King (1940) A.C. 231.

Wing v. Taylor E.R. Vol. 164 p. 1004.

F. M. K. Sherani for the Petitioner.

D. N. Sahay for the Respondent.

Hammett, Ag. C.J. (24th February, 1961).

This is a husband's petition for a decree of nullity.

The parties were married on 4th September, 1959 at Suva by one Pastor Saua Fouvi under a special licence issued by the Registrar-General dated 26th August, 1959.

The grounds upon which the decree of nullity are sought are:

(1) That the special licence dated 26th August 1959 had expired before the marriage was celebrated, and

(2) That there was only one witness present at the marriage ceremony.

The facts are not disputed and are as follows:—

On 26th August, 1959, the petitioner obtained a special licence from the Registrar-General. This special licence issued under section 17 of the Marriage Ordinance (Cap. 134) authorized the marriage of the petitioner and the respondent at any time within 7 days from 26th August, 1959. The marriage did not take place in that period and the special licence expired.

On 4th September, 1959, when Pastor Saua Fouvi pointed out to the petitioner and respondent that their special licence had expired, the respondent took it to the office of the Registrar-General where an Assistant Registrar-General, who was not the officer who had issued the original licence, altered it by making it effective for 14 days instead of only 7 days from its original date of issue and initialled the alteration.

This extention of the special licence was not authorized by the Marriage Ordinance. It is clear that it had already expired and ceased to have any legal effect on the expiry of seven days from the date of its original issue. It is however also clear that the Assistant Registrar-General who extended it, the officiating Minister who performed the marriage, and the parties themselves, all believed that the special licence as extended was a lawful and proper special licence which authorized the marriage ceremony, which thereafter took place.

This marriage was performed by Paster Saua Fouvi, a person licensed to perform marriages in the presence of only one witness, namely his own wife.

It is the contention of the petitioner that since at the date of the performance of the marriage the special licence had expired, the marriage was null and void. There is no provision in the Marriage Ordinance whereby a special licence that has in fact expired and ceased to be of any legal effect can later be revived, as it were, by its effective period of validity being extended.

On the other hand for the respondent it is contended, with reference to Rayden on Divorce 7th Edition at p. 84, that a marriage purporting to be by licence is not invalid merely because no licence had in fact been granted prior to the solemnization, *Greaves v. Greaves* (1872) 2 P. & D. 423, nor because the licence was granted by a person having no authority to grant it, *Dormer v. Williams* Vol. 163 of the English Reports at page 301, unless both parties are aware of these irregularities.

These two decisions were based on the provisions of the Marriage Act, 1823 section 22, which were re-enacted by the Marriage Act, 1949 section 49 (*c*) the material part of which reads:

> " If any persons knowingly and wilfully intermarry . . . without a licence having been so issued in a case in which a licence is necessary . . . the marriage shall be void."

In these cases the Courts held that the fact in the one case that no licence had been granted prior to the solemnization of the marriage and in the other case that a licence was granted by a person having no authority to grant it, did not affect the validity of the marriage because the persons being married did not do so " knowingly and wilfully " i.e. they were not aware at the time of the marriage of the irregularities which in fact existed.

There is no saving clause, such as section 22 of the Marriage Act, 1823, in the Marriage Ordinance (Cap. 134). That Ordinance is, with comparatively minor amendments, in the same form as the Marriage Ordinance, 1918, which consolidated all previous enactments on the subject in Fiji and came into force on 1st January, 1920.

The Marriage Ordinance (Cap. 134) purports to contain a full statement of the law in Fiji on the subject and by virtue of the decision of the Privy Council in *Wallace Johnson v. The King* 1940 A.C. 231, " it must be construed in its application to the facts of the case free from any glosses or interpolations derived from any exposition, however authoritative, of the law of England and of Scotland."

In these circumstances I do not think the decisions of *Greaves v. Greaves* and *Dormer v. Williams* are of the same importance that at first seemed likely in this case.

For the respondent it was however pointed out that nowhere in the Ordinance does it expressly state that a marriage that is solemnized contrary to the express provisions of the Ordinance relating to special licences is void. On the other hand if a marriage is solemnized on the strength of a special licence that has in fact expired and is of no effect, it is open to the argument that it was solemnized without the sanction of any special licence or other authority at all and is therefore of no effect.

In the circumstances of this case I have no hesitation in holding as fact that both the parties had no idea that the special licence that had been issued to them was no longer of any legal effect. They entered into this contract of marriage and went through this marriage ceremony unaware of the defects in the special licence and bona fide believing that they were being lawfully married. They both later approbated the marriage by their cohabitation. There is in the case no evidence that they or the officiating minister went through this wedding ceremony " knowingly and wilfully " aware of the defects in the special licence—in fact all the evidence is to the contrary effect.

Since the Ordinance does not contain any express provision concerning the results which follow upon the solemnization of a marriage on the strength of a defective special licence, I have examined the other provisions in the Ordinance to see if they give any assistance on what is the correct construction of the Ordinance by implication arising therefrom. It is quite obvious that as a result of human mistakes and clerical errors a number of marriages in this country must at times be solemnized not strictly in accordance with the terms of the Marriage Ordinance. It would be quite absurd were every slight deviation from the exact and strict words of the Ordinance to result in such marriages being void and the issue thereof illegitimate. Nevertheless, it must also be clear that some departures from the essential requirements of a valid marriage must be regarded as sufficiently serious to render the whole ceremony devoid of any legal effect. For example, section 15 (2) provides that if persons knowingly and wilfully intermarry without a certificate of marriage (unless they have a special licence) the marriage of such persons is null and void. It is of interest to note, by implication, that if persons intermarry without a certificate of marriage (and no special licence)—but do not do so " knowingly and wilfully " the marriage is not null and void but is of full legal effect.

Again section 19 (1) provides that no marriage shall be void by reason only that it was solemnized by a person, not being an officiating minister of religion, if either of the parties did at the time bona fide believe he was an officiating minister.

Where there is such a serious departure from the provisions of the Ordinance as the marriage being solemnized by a person who was not a licensed officiating minister of religion and this is not fatal to the validity of the marriage if either of the parties did at the time believe he was an officiating minister, it is clear that the Ordinance pays as much if not more regard to the bona fide intention of the parties than to the strict letter of the law.

In these circumstances, having regard especially to the provisions of section 15 (2) and to the absence of any provisions to the contrary, I do not consider that defects in a special licence of which the parties were not aware can affect the essential validity of their marriage.

I am fortified in this view by the fact that the argument of Dr. Spinks on these lines in the case of *Wing v. Taylor* reported at page 1004 of Vol. 164 of the English Reports was accepted by the Court in that case (see page 1006).

For similar reasons, I am of the opinion that whilst there is undoubtedly a minor variation between the wording of section 21 of the Marriage Act, 1823 and that of section 22 of the Marriage Ordinance (Cap. 134) as to the number of witnesses of a marriage required, the decision in the case of *Wing v. Taylor* on that point should be followed.

To hold otherwise would lead to what I regard as an absurdity, for these reasons.

The material part of section 22 reads as follows:

> " Every marriage *shall* be solemnized in the presence of two witnesses at least who *shall* sign a certificate which *shall* also be signed by the marriage officer . . . and *shall* be legibly written in the form . . . and such marriage officer *shall* deliver a copy of such certificate immediately after the marriage signed by himself to one of the parties to the marriage and . . . *shall* within one month thereafter transmit the original certificate to the Registrar-General and *shall* further on the last day of March etc. . . . transmit to the Registrar-General . . . a return of all marriages solemnized by him . . . "

If the proper construction of the word " shall " where it first appears in this section is mandatory and is that the presence of two witnesses at least is an absolutely essential condition to the validity of a marriage, as I am invited by the petitioner to construe the word " shall ", then it would appear that it should logically and consistently be so construed throughout that section. This would lead to the conclusion that if the marriage officer forgot or neglected to render his return of the marriage at the proper time the validity of the marriage would be affected. I am not able so to construe the word " shall " wherever it appears in this section. In my opinion whilst the law does require the section to be complied with, failure to do so is not a defect which is necessarily fatal to the essential validity of a marriage freely entered into by the parties in good faith at the time.

For these reasons, and I must confess with not a little surprise and reluctance, I feel compelled to accept the view put forward on the part of the respondent that notwithstanding the defects in the special licence, of which all parties were ignorant at the time, and the failure of the officiating minister to insist on the presence of more than one witness to the marriage of the petitioner and respondent these were not defects that were fatal to its essential validity.

In these circumstances the petition for a decree of nullity is dismissed.