IN THE SUPREME COURT OF FIJI

Appellate Jurisdiction

Civil Appeal No. 6 of 1984

Between:

KAMLA BHAGWANJEE JOGIA Appellant

- and -

DINESH KUMAR J. RANIGA Respondent

Mr. D.C. Maharaj for the Appellant
Mr. V. Kapadia for the Respondent

JUDGMENT

The respondent appeals against the decision of the Magistrate sitting in the Domestic Court dated the 18th April, 1984 whereby he granted the respondent a decree-nisi dissolving the marriage between the parties.

The appellant has at all relevant times been resident at Rajkot in India where the parties were married on the 1st July, 1975.

They lived together at 44 Knolly Street, Suva until the 8th June 1978. They have had no children.

On or about the 8th June, 1978 the appellant left Fiji to go to India. Her husband supplied her with a one way ticket and gave her $400. He sent her no other money.

In Maintenance Case No. 210 of 1981 the respondent commenced divorce proceedings against the appellant which he subsequently withdrew.

The appellant in her affidavit stated she left for India at the request of her husband and she alleges he said he would send her the fare to enable her to return to Fiji. She states she is still waiting for the fare which she cannot pay as her family is very poor. She claims maintenance from her husband.

The appellant filed a similar affidavit in the former action which her husband later withdrew.

The respondent did not write to his wife after she filed the earlier affidavit. He admits he is now aware his wife is still waiting for him to send her her return fare and that she has not got the money to pay for her own fare.

At no time did he write asking his wife to return. He is not now prepared to send her money to enable her to return although fully aware that she is waiting for him to do so. He made it clear to the Magistrate that he will not now accept her back.

While the respondent was cross-examined at some length no witnesses were called on behalf of the appellant. This is not surprising since she resides in India and has no relatives in Fiji.

The Magistrate's findings and order were very brief. They are as follows :

" FINDINGS:

This is a contested husband's petition for dissolution of marriage on grounds of desertion and 5 years separation.

The Petitioner is domiciled in Fiji.

There are no children of the marriage.

There have been no prior court proceedings with regard to the marriage except Matrimonial Cause No. 210 of 1981 which was subsequently withdrawn.

I am satisfied on the evidence of the Petitioner that the ground set out in the petition relating to 5 years separation has been established.

There is no evidence of condonation, connivance or collusion.

ORDER:

1. That the marriage of the Petitioner and Respondent solemnized on 1.7.75 be dissolved. "

The appellant abandoned the first ground of appeal. Her grounds of appeal are as follows :

" (a) The Learned trial Magistrate erred in law in not considering the Affidavit evidence of the Respondent along with the evidence of the Petitioner and his brother thus causing grave miscarriage of justice.

(b) The learned trial Magistrate erred in law in coming to the conclusion that the ground set out in the petition relating to 5 years separation had been established relying only on the evidence of the petitioner and not other evidence before him particularly when there was sufficient evidence that there was reasonable likelihood of cohabitation being resumed between the parties.

(c) The learned trial Magistrate failed to apply his discretion in refusing the Petitioner decree-nisi when there was sufficient evidence before him that he the Petitioner himself was responsible for placing the Respondent in the position in which she finds herself.

(d) The learned trial Magistrate failed to give reasons for his decision thereby causing grave miscarriage of justice.

(e) The verdict is unreasonable and cannot be supported having regard to the evidence adduced. "

The ground on which the respondent petitioned for divorce was section 14 (m) of the Matrimonial Causes Act which is as follows :

" 14. (m) that the parties to the marriage have separated and have lived separately and apart from a continuous period of not less than five years immediately preceding the date of the petition, and there is no reasonable likelihood of cohabitation being resumed. "

That ground is made up of two parts namely physical separation for not less than five years immediately preceding presentation of the petition and secondly that there is no reasonable likelihood of cohabitation being resumed.

One ground of complaint of the appellant is that the learned Magistrate did not consider the second part. If he did it is not evident from his findings.

There are special provisions in the Act relating to separation for over 5 years. The sections are sections 22 and 23 and are as follows :

" 22. - (1) For the purposes of paragraph (m) of section 14, the parties to a marriage may be taken to have separated notwithstanding that the cohabitation was brought to an end by the action or conduct of one only of the parties, whether constituting desertion or not.

(2) A decree of dissolution of marriage may be made upon the ground specified in paragraph (m) of section 14 notwithstanding that there was in existence at any relevant time -

(a) a decree or an order of a court suspending the obligation of the parties to the marriage to cohabit; or

(b) an agreement between those parties for separation.

23. - (1) Where, on the hearing of a petition for a decree of dissolution of marriage on the ground specified in paragraph (m) of section 14 (in this section referred to as "the ground of separation"), the court is satisfied that, by reason of the conduct of the petitioner, whether before or after the separation commenced, or for any other reason, it would, in the particular circumstances of the case, be harsh, and oppressive to the respondent, or contrary to the public interest, to grant a decree on that ground on the petition of the petitioner, the court shall refuse to make the decree sought.

(2) Where in proceedings for a decree of dissolution of marriage on the ground of separation, the court is of opinion that it is just and proper in the circumstances of the case that the petitioner should make provision for the maintenance of the respondent or should make any other provision for the benefit of the respondent, whether by way of settlement of property or otherwise, the court shall not make a decree on that ground in favour of the petitioner until the petitioner has made arrangements to the satisfaction of the court to provide the maintenance or other benefits upon the decree becoming absolute.

(3) The court may, in its discretion, refuse to make a decree of dissolution of marriage on the ground of separation if the petitioner has, whether before or after the separation commenced, committed adultery that has not been condoned by the respondent or, having been so condoned has been revived.

(4) Where petitions by both parties to a marriage for the dissolution of the marriage are before the court, the court shall not, upon either of the petitions, make a decree on the ground of separation if it is able properly to make a decree upon the other petition on any other ground. "

Those sections give the court a discretion whether to grant a decree of dissolution on the grounds of separation.

Another of the appellant's complaints is that the Magistrate did not properly exercise his discretion.

There is nothing in the judgment to indicate that the Magistrate considered subsections (1) and (2) of section 23 nor is there anything in the judgment to indicate that he appreciated he had a discretion and exercised it.

Mr. Kapadia argues that the 5 year statutory period had elapsed before the petition was provided and in the absence of any evidence from the appellant his client was entitled to the decree.

In PEARLOW v. PEARLOW (1953) 90 C.L.R. 70 the High Court of Australia reviewed on appeal the exercise of discretion in a case very similar to the instant case.

It was a divorce action brought by the husband on the grounds of separation for five years with no reasonable likelihood of cohabitation being resumed.

The West Australian corresponding provision to section 14(m) also specifically provides that the court in its absolute discretion may grant or refuse relief. It also contains a proviso that the court is required in every case to see that provision is made for the maintenance of the defendant and any children.

Section 22 (2) of the Fiji Act by the use of the word "may" indicates that the court has a discretion. Section 23(1) is more explicit and indicates that the court can refuse to make a decree in the circumstances stated in the section. The discretion is a wide one.

It does not appear in the instant case that the Magistrate considered section 23 at all.

Dixon C.J. in the Pearlow Case at p. 78 quoted a very lengthy passage from the judgment of Sir John Salmond in Lodder v. Lodder (1921) N.Z.L.R. 876 at pp. 877-879, dealing with the principles on which discretion is exercised in separation cases. The extract bears repeating. In New Zealand the period of separation is three years. Sir John Salmond said :

> " The Legislature must, I think, be taken to have intended that separation for three years is to be accepted by this Court as prima facie a good ground for divorce. When the matrimonial relation has for that period ceased to exist de facto, it should, unless there are special reasons to the contrary, cease to exist de jure also. In general it is not in the interests of the parties or in the interest of the public that a man and woman should remain bound together as husband and wife in law when for a lengthy period they have ceased to be such in fact. In the case of such a separation the essential purposes of marriage have been frustrated, and its further continuance is in general not merely useless but mischievous. The Legislature has recognized, however, that this general principle is subject to exceptions and qualifications, and that these are so dependent on the special circumstances of the individual case that they are not capable of formulation as definite rules of law, the only resource being to leave the matter to the discretion of the Court.

In exercising this discretion the Court is to consider whether there is any special circumstance in the particular case which would render a decree of dissolution inconsistent with the public interest. What, then, is the public danger which the Legislature intended to guard against in thus refusing to make separation for three years a ground of divorce as of right? Clearly this: that divorce granted as of right on such a ground would tend to produce and aggravate the very evils which it was designed to cure. A system of divorce which conferred on each party to a marriage the right to transform separation by mutual consent into divorce a vinculo matrimonii would offer temptations sufficient to destroy many marriages which would otherwise have been happy and successful. The harmony of married life is largely due to the fact that marriage is a permanent tie which can be dissolved only for grave cause and only at the cost of public discredit to one at least of the parties. All divorce is a good thing so far as it frees the parties from an obligation which is no longer based on that mutual affection and esteem in which it had or ought to have had its origin, and restores to them the right to live their own lives and to seek happiness in the way of honour. But all divorce possesses at the same time the possibility of public mischief, inasmuch as it tends to lessen the sense of responsibility with which men and women enter into marriage, and the fidelity and contentment with which they accept and obey the obligations resulting from it. It is for this Court, in the exercise of the discretionary authority which the Legislature has seen fit to entrust to it, to weigh this private benefit to the parties against this possibility of public mischief, and to grant or refuse a dissolution accordingly.

This being so, the chief elements for consideration are the reasons for the separation between the parties and the duration of that separation. Where separation has been based on grave and sufficient grounds there will commonly be no reason of public policy for refusing a divorce. In such a case the marriage has irremediably come to an end de facto, and its purposes have permanently failed. It is otherwise, however, where the separation has been unjustified, being the outcome of mere levity and the wanton disregard by the parties of the obligations of the matrimonial state, or being a mere

> device to secure a dissolution of their marriage by mutual consent. In such a case a decree may be properly refused altogether or granted only after a period of separation substantially in excess of the minimum period of three years established by the Legislature. The longer the duration of the separation the less is the danger of public mischief ensuing from such divorce, inasmuch as the necessary delay reduces the temptation to separate for insufficient reasons or for the purpose of procuring a dissolution of the marriage. "

Dixon C.J. at p. 80 stated that in exercising the discretion conferred by the Act the fact that the separation has been caused by wrongful conduct on the part of the petitioner may be taken into account.

In the instant case the Magistrate did not consider whether it would be harsh or oppressive to the respondent in the circumstances to grant the relief sought by the petitioner. Nor did he consider whether it was just or proper to grant her maintenance.

The instant case is one where the Magistrate's decision may in my view result in injustice being done to the respondent.

Not only did the Magistrate fail to consider whether there was any reasonable likelihood of cohabitation being resumed but he appears not to exercise his discretion at all or if he did it was not a proper exercise. He appears to have totally ignored section 23 the appellant's request for maintenance.

This case is one where there should be proper consideration of the facts and a decision made as to whether relief should be refused or if granted whether or not provision should be made for the maintenance of the appellant.

This can only be done now that the Magistrate has retired by rehearing the action before another Magistrate.

The appeal is allowed. The Magistrate's order is set aside and it is ordered that the action be reheard.

Costs of appeal are to be costs in the cause.

R.G. Kermode

JUDGE

Suva

26 April, 1985.