IN THE FIJI COURT OF APPEAL

Civil Jurisdiction

Civil Appeal No. 62 of 1980

Between:

MALTI VATI SINGH d/o Dal Ram Singh — Appellant

and

SATYENDRA PRASAD s/o Ghurahu Prasad — Respondent

H.K. Nagin for the Appellant
G.P. Lala & J. Singh for the Respondent

Date of Hearing: 19th March, 1981
Delivery of Judgment: March, 1981

JUDGMENT OF THE COURT

Henry J.A.

Appellant issued a petition in the Magistrates Court for the dissolution of her marriage on the ground that her husband was guilty of persistent cruelty and was an habitual drunkard for a period of not less than two years. The husband filed an answer seeking a decree on the ground of adultery. In the event adultery was admitted by the appellant on oath before the Magistrate who accepted the admission and recommended the grant of a decree nisi on husband's answer. The Magistrate found that the allegations in the petition had not been proved and recommended a dismissal of the petition. Custody of the children was granted to the wife. It was held that the evidence was insufficient to decide a settlement of the matrimonial property. The matter came before Madhoji J. who stated that he had perused and considered

the record. The husband was granted a decree nisi and the petition was dismissed. Custody was granted in accordance with the recommendation. The property settlement was not mentioned.

The wife lodged an appeal against the dismissal of the petition and also for an order that one-half of the matrimonial home be transferred to her and that she be granted occupation thereof. The grounds of appeal are :

> "1. The learned Judge erred in law and in fact in dismissing the Appellant's Petition and in proceeding to adjudicate only on the basis of the Answer filed.
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> 2. The learned Judge erred in law and in fact in not considering the issue of the matrimonial home and the occupation thereof especially in view of the fact that the same was pleaded in the Appellant's Petition.
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> 3. The learned Judge erred in law and in fact by not granting to the Appellant the occupation of the matrimonial home and right to one half ownership therein."

The spouses were married on May 17, 1962 and lived together until January 1979 when the wife left the matrimonial home. There are three children of the marriage, namely,

(i) LYNETTE MALA PRASAD a female child born on the 24th day of November, 1962

(ii) JOHN ARUN SATYENDRA PRASAD a male child born on the 19th day of November, 1963; and

(iii) LINDA VEENA PRASAD a female child born on the 23rd day of January, 1966.

The wife claimed that her husband's conduct made her life intolerable and that she was forced to quit her home. She formed an association with the co-respondent.

She said :

> "The main reason to leave him became from violent conduct. He would bash up children. These combined treatment of violence forced me to leave matrimonial home. Leslie James Gardiner came to my rescue. I have been very unhappy for years. I had no love and affection from my husband. My husband introduced me to Leslie Gardiner who showed love to me. This was much inducive nature. In February 1979 I fell in love with him, the love that I wanted. I ask Court to exercise discretion in my favour notwithstanding my adultery. This was induced by Respondent's conduct."

The wife gave detailed evidence in support of her petition. The only other witness she called was a house-girl who worked for the spouses for 7 years. She gave clear evidence in corroboration. The only cross-examination and re-examination recorded is as follows :

> "Cross-Examination:
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> Only worked in the day time. Left work at 5.00 p.m. I would not know what happened. Worked from 7.00 a.m. to 5.00 p.m. They were working in the daytime.
>
> Re-Examination:
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> I saw what I said. Fighting took place in my presence. The incidents in the mornings and in the afternoon."

In evidence in chief the husband said :

> "We had arguments. She did not listen to me. Had arguments about her relationship with Leslie Gardiner. I confronted her. She stayed away for weeks after weeks. Saw her riding with Leslie Gardiner in his car. I did not beat her. I drink normally. I did beat her after her relations with Leslie Gardiner.
>
> I hit her at her kaka's (her uncle's) place. I often saw her in Leslie Gardiner's car. I ask for damages against Leslie Gardiner. I am not sleeping with Subhadra. I have a housegirl."

The only cross-examination recorded is :

"I am a social drinker.

I know Joseph Swamy as a friend. He has a reformed alcoholic club. He runs alcoholic annonymous.

I did not get involved into excessive alcohol. I have not become violent under the influence of drinks.

I hit her when she began to go around with Mr. Gardiner.

In 1978 I did not beat her in the leg and left at scene there.

I did not break her eye glasses. I did not knock down her tooth. I don't remember whether I beat her before she began to live with Gardiner. I was warned by police not to assault her. She reported me to the police. Have never ordered her out of matrimonial home. She walked away on her own. Leslie Gardiner was my friend. Have known him for 30 years. Even before I got married.

He entrusts his car with us when he goes on a leave. He became a family friend. No prior arrangement to pick Leslie Gardiner on his return from overseas.

I was on a break at that time when he returned. Accidentally I met Petitioner at the door of my office. I asked her where she was going. She said she was going to Post Office. She went to pick Leslie Gardiner. She has a gold tooth. I did not knock it down."

On the question of cruelty the Magistrate did not analyse the evidence and made no reference to the evidence of the house-girl. The finding was short. It was :

" On the evidence of the Petitioner and her witness I find that she has failed to establish the acts of cruelty committed on her by the Respondent. There is no medical evidence to support the physical injuries she has sustained at the hand of the Respondent."

Counsel for respondent claimed that there were two separate findings and that the first sentence was a complete finding in itself. We do not agree. The wife did not say whether or not she had consulted a doctor. If all the Magistrate meant was that because she had not done so the injuries she received could not have been very serious there can be no quarrel with the observation: vide Hudson v. Hudson [1965] 2 All E.R. 82, 86. If the view was that there must be such injury as would require medical attention then this would be a wrong approach. In Hudson's case (supra) page 86 Faulks J. said :

> " In Mulhouse v. Mulhouse [1964] 2 All E.R. 50, 56 Sir Jocelyn Simon, P., said :
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> '.... it must be proved that there is a real injury to the health of the complainant or a reasonable apprehension of such injury. Of course, if there is violence between the parties the court will not stop to inquire whether there is a general injury to health; but in the absence of acts of violence which themselves cause or threaten injury, the law requires that there should be proved a real impairment of health or a reasonable apprehension of it.' "

On the question of habitual drunkenness the Magistrate said :

> "There is insufficient corroborative evidence of respondent being a drunkard."

This indicates that there was some but it was insufficient. It is thus the quality of the evidence and not the lack of it which was being referred to. But the house-girl gave quite sufficient evidence if she is believed. It was sought before this Court to show that the house-girl was disbelieved and that her evidence on its face was valueless. The Magistrate did not say so. Counsel based his contention on the cross-examination which has already been set out. This by no means requires a

construction that the house-girl had no opportunity of observing the husband's behaviour. The Magistrate would surely have said so if that were his opinion. The witness was not sufficiently cross-examined for counsel to draw the conclusion he asks this Court to draw from the record.

As part of his case the husband put in two letters written by the wife. Both appear to have been written in 1978 - the first from Auckland and the second from Sydney. The wife discussed her association with the co-respondent and the position of her children. An important passage in the first letter is :

> " I have told you that it is a long time since I've been suffering and I shall never be able to live a normal life with you ever again so please try and understand and work out a good solution that will not harm the children in any way."

In the other letter she wrote from Sydney as follows :

> " I am definitely coming home as I realize that I can't live without my own children. I am going to put my happiness aside for their sake.
>
> So please don't worry and let things get you down. I knew given time, I would always make my children the first in my life forever and always.
>
> Us two will decide re our own selves later on I guess.
>
> Lots and lots of love."

We are satisfied that the Magistrate did not make any proper findings on the evidence when he made his recommendation that the petition should be dismissed. The finding of the Magistrate ought not to have been simply accepted without a proper examination of the evidence and the application of the relevant law. The duty of the Judge is that set out in Section 70 of the Matrimonial Causes Act 1968 which provides :

"70(a) As soon as possible after the termination of the hearing, the magistrate shall forward to the Court a certified copy of the evidence taken, together with copies of all process and other documents in the proceedings and a statement of his opinion as to the decree, if any, to which the petitioner is entitled, and the Court may, upon consideration thereof, either accept, reject or modify such opinion, or order -

(i) that further evidence be taken by the magistrate;

(ii) that the case be reheard by that or another magistrate; or

(iii) that the case be transferred to itself for hearing.

(b) Unless the Court makes any of the orders specified in the last preceding paragraph, it shall decide the case and direct what decree shall be pronounced by the magistrate."

None of the orders referred to in subsections (1), (ii) or (iii) were made so it became incumbent on the learned Judge to decide the case. He was in no better position than this Court is in deciding the case because the matter is determined on the record.

In our opinion the learned Judge was in error when he accepted the opinion of the Magistrate. He should have carefully considered the evidence itself for the purpose of deciding the case. In that event findings should be made in respect of the matters in which the Magistrate is either in error or where he has failed to make sufficient findings. Upon appeal the powers of the Court of Appeal are defined in Section 92(2) which provides :

"92(2) Upon such an appeal the Court of Appeal may affirm, reverse or vary the decree, the subject of the appeal, and may make such decree as, in the opinion of that court, ought to have been made in the first instance, or may, if it thinks fit, order a rehearing on such terms and conditions, if any, as it thinks just."

In dealing with the discretionary bars to relief the Magistrate simply addressed his mind to the question whether the wife was "compelled to involve herself in sexual relationships" with the co-respondent and whether there were "compelling circumstances" which led her to commit adultery. This was a very unsatisfactory method of determining the question which arises under Section 28 of the Act which deals with discretionary bars to the making of a decree. Since no appeal has been lodged against the grant of a decree to the husband we say no more on this topic.

This is not a matter which should go back to the Magistrate (he has retired) or be re-heard either by another Magistrate or by the Supreme Court. There is a decree nisi already in existence so the marriage will be dissolved and the only question is whether the wife is entitled to a simultaneous decree. Upon a careful perusal of all the evidence we are of opinion that the proper finding is that the husband has been guilty of habitual cruelty. We do not find it necessary to make a finding on the issue of habitual drunkenness. It is sufficient to say that the consumption of drink has been a contributory factor to the acts of cruelty.

In the exercise of its powers in divorce a court has power to issue simultaneous decrees: Blunt v. Blunt [1943] 2 All E.R. (H.L.) 76, 81; Hall v. Hall 21 N.Z.L.R. 251 (C.A.); Halsbury's Laws of England 3rd Edn Vol. 12 p.313 para. 625, and Joske's Matrimonial Causes and Marriage Law and Practice 5th Edn p.761. We have cited the 3rd Edition of Halsbury's Laws of England because fault was no longer a ground for divorce when the 4th Edition was published. By Section 92(2) of the Matrimonial Causes Act this Court has power to make such decree as in its opinion the Supreme Court ought to have made. A decree nisi is pronounced in favour of appellant on the ground of

habitual cruelty. We fix a period of 28 days from the date of this judgment when the decree will become absolute. The special circumstances for so fixing the time are that the decree in favour of respondent will become absolute at that time and justice requires that there should be simultaneous decrees.

The appeal is allowed and the order for dismissal of the petition is set aside. A decree nisi is pronounced to become absolute as above stated. This Court is not in a position to deal with ancillary questions concerning the matrimonial home. Such questions are remitted to the Supreme Court for such further action as the parties may be advised to take.

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Vice President

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Judge of Appeal

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Judge of Appeal