

IN THE FIJI COURT OF APPEAL

Civil Jurisdiction

Civil Appeal No. 6 of 1982

Between:

ALAN GEORGE DEAR

Appellant

and

SHEILA MARY ELIZABETH BELLMAN

Respondent

Anand Singh for the Appellant  
No Appearance for the Respondent

Date of Hearing: 14th July, 1982

Delivery of Judgment: 30.7.82

JUDGMENT OF THE COURT

Gould V.P.,

This is an appeal from a judgment of a Judge of the Supreme Court refusing a decree of dissolution of marriage. The respondent who was named as Sheila Mary Elizabeth Bellman (according to the marriage certificate that was her maiden name) has not appeared at any stage of the proceedings, and in fact was served pursuant to an order for substituted service.

The petitioner adopted a procedure available in Fiji whereby the petition is filed in the Magistrate's Court and the evidence is taken by a Magistrate, who then forwards to the Supreme Court a certified copy thereof. He also forwards a statement of his opinion as to the decree, if any, to which the petitioner is entitled; the Supreme Court has wide powers to deal

with the matter, and unless it thinks fit to make any other order, it decides the case and directs what decree shall be pronounced by the Magistrate.

That was the procedure adopted in this case. By section 11(2) of the Matrimonial Causes Act (Cap. 51 - Edition 1978) proceedings for dissolution of marriage in Fiji are not to be instituted except by a person domiciled in Fiji. The appellant gave evidence that he was so domiciled and as this question has assumed importance in the proceedings we find it convenient to summarize at this stage the whole of the relevant evidence given.

The parties were married in England on the 9th June, 1943; they were both 20 years of age and it seems apparent that England was the domicil of origin of the petitioner though there is no direct evidence as to his birth. They cohabited in England until 1951 and then in cities in Australia until October 1975, when they separated and have not since lived together. The appellant states that there is no likelihood of cohabitation being resumed. There were no children of the marriage.

The appellant's evidence touching the matter of domicil was that he first arrived in Fiji 12 years ago, this evidence being given in October 1981. However, he stated that he had been permanently in Fiji for five years, the record being silent as to his movements during the years unaccounted for. He is now living in a de facto relationship with one Barbara Gibson, who is a Fiji citizen, whom he intends to marry and by whom he has one child, born on the 4th June, 1981.

The petitioner has a work permit in Fiji. There is no evidence as to when it actually expires but he states that when it does he intends to apply for Fiji citizenship. As to this we observe in

passing that one of the matters that a Commonwealth citizen, applying under section 5(1) of the Fiji Citizenship Act (Cap. 87) for Fiji citizenship, must satisfy the Minister upon, is lawful residence in Fiji for seven years immediately preceding the application.

To continue with the evidence, the appellant received permission from the Ministry of Commerce and Industry to invest in Fiji and has invested \$60,000 in Lual Holdings Limited, of which company he is one of two directors. Counsel for the appellant informed us from the Bar that the appellant had since made a further substantial investment in Fiji.

The appellant asked that the discretion of the Court in relation to his adultery with Barbara Gibson be exercised in his favour.

The learned Magistrate made and duly forwarded to the Supreme Court the following findings and recommendations :

"FINDINGS:

1. Parties were married on 9.6.43
2. The Petitioner is domiciled in Fiji.
3. There are no children of the marriage.
4. The parties separated in October 1975 and have lived separately and apart continuously since then and there is no likelihood of cohabitation being resumed.
5. An affidavit of substituted service of the petition has been filed.

RECOMMENDATIONS:

Respectfully recommend:

1. The discretion of the Court be exercised in the Petitioner's favour notwithstanding his adultery during marriage.
2. The marriage be dissolved. "

In the Supreme Court the learned Judge gave careful consideration to the record of the evidence and found himself unable to agree that the appellant was domiciled in Fiji, with the result that the Fiji courts were without jurisdiction in the matter. He therefore dismissed the petition. As we read his judgment we are of opinion that in so doing he was not expressing dissatisfaction with the strength of the evidence as to the appellant's intention to reside in Fiji permanently or for an unlimited time (so as to acquire a domicile of choice there) but giving what he considered appropriate effect to the possible future refusal of work permit renewals and the prospect of refusal of Fiji citizenship, rendering the appellant the possible subject of deportation proceedings.

Having quoted from Joske On Marriage and Divorce (4th Edn) pp. 216-7 his judgment continues :

" The petitioner lives in Fiji under a work permit issued to him under the Immigration Act under which he has a right to remain in Fiji for a limited period only. After the expiration of his work permit the petitioner cannot lawfully remain in Fiji unless his work permit is extended or he applies for and is granted Fiji citizenship, both of which are matters over which the petitioner has no control as they rest in the discretion of the Immigration authorities.

In my view not only must a person have an intention to stay in this country permanently and indefinitely in order to acquire a domicile of choice but he must also have the right to lawfully remain here indefinitely. On the other hand where a person is resident in another country and has a right to remain there indefinitely but is liable to deportation in certain circumstances, for example upon the commission of an offence, such person may acquire a domicile of choice there.

Since the petitioner's right to stay in Fiji under his work permit is at present for a definite and limited period only I am satisfied that he cannot acquire a domicile of choice here. Accordingly I find that he is not domiciled in Fiji and this court has no jurisdiction to deal with this petition. The petition is accordingly dismissed."

In saying that "he must also have a right to lawfully remain here indefinitely" the learned Judge was, we think with respect, putting too high the onus on the appellant. As the learned Judge pointed out, a domicile of choice is acquired by a man by voluntarily fixing his sole or chief residence and true home in a particular place with a present definite intention of residing there permanently or for an unlimited time, with no intention of returning to his former domicile. If he genuinely forms such an intention it may make no difference that his right to remain in the country selected is (to adopt a word favoured by the text books) precarious. Paragraph 437 of Volume 8 of Halsbury's Laws of England (4th Edn) (Title: Conflict of Laws) reads :

"437. Persons liable to deportation. A person may be held to have acquired a domicile of choice in a country despite provisions in the local law as to aliens or immigration making his right to remain there precarious. The court will consider whether, despite the possibility of deportation, the propositus has decided to make that country his permanent home, so far as it is within his power. Similarly, a domicile once acquired will not necessarily be affected by the making of a deportation order, and may survive actual deportation if the propositus intends to return."

We list, without examining in detail, the authorities quoted in respect of this paragraph: Boldrini v. Boldrini and Martini [1932] P.9; May v. May and Lehmann [1943] 2 All E.R. 146; Zanelli v. Zanelli (1948) 64 T.L.R. 556; Szechter (otherwise Karsov) v. Szechter [1971] P.286, 294; Cruh v. Cruh [1945] 2 All E.R. 545.

In Dicey's Conflict of Laws (10th Edn) p.122 Rule 12, it is put :

"A person may lack the animus manendi because his residence in a country, though freely chosen, is precarious, that is, liable to be terminated against his will. This danger may well negative the necessary intent as a matter

of fact, but it does not, as a matter of law prevent the acquisition of a domicile of choice."

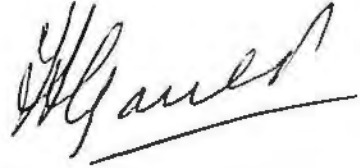
Attention is drawn especially in the text to the case of a person liable to be deported or whose residence permit is liable to be terminated.

In the present case we do not read the findings of the courts below as indicating any lack of the necessary animus manendi on the part of the appellant but as findings that he was prevented by the state of the law from forming such an intention. This is a wrong approach in law.

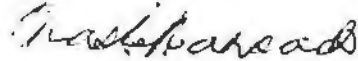
The penultimate paragraph of the passage of the judgment in the Supreme Court which we have quoted is perhaps difficult to follow. Perhaps in referring to the right to lawfully remain indefinitely the learned Judge had in mind that it has been held that a domicile of choice cannot be acquired by illegal residence. Dicey (op. cit. pp. 111-2 Rule 10) continues to say that the reason for this rule is that a court cannot allow a person to acquire a domicile in defiance of the law which that court itself administers. We need only say as to this principle that there is here no question of any breach or defiance of Fijian law. The appellant is quite lawfully in Fiji and capable of forming the requisite intention, in spite of possible future difficulties in its implementation. This point causes no difficulty.

For the reasons we have given we allow the appeal. As we are satisfied that the only impediment to the learned Judge's finding that the requirements of Fiji domicile were satisfied, was a mistaken view of the law on that subject, we do not need to remit the case to the Supreme Court for further consideration. Being satisfied that the Court has the necessary jurisdiction,

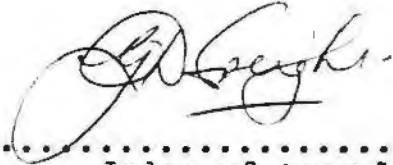
the case is remitted to the learned Judge with the direction that the recommendation of the learned Magistrate that the discretion of the Court be exercised in the appellant's favour and a decree nisi pronounced, be implemented.



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Vice President



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Judge of Appeal



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Judge of Appeal