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IN THE COURT OF APPEAL, FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU OO44 OF 2004
(High Court Civil Action No. HBC 153 of 2003

BETWEEN:

MOHAMMED NASEER KHAN

(f/n Mohammed Aziz Tayaib Khan)

Appellant

AND:

ZABEENARA CHAND BEGUM

(f/n Jan Mohammed)

Respondent

Coram: **Tompkins, JA**
Smellie, JA
Scott, JA

Date of Hearing: **Monday, 14 March 2005**

Counsel: **Dr. M.S.D. Sahu Khan for the Appellant**
Mr. S. Maharaj for the Respondent

Date of Judgment: **Friday, 18 March 2005**

JUDGMENT OF THE COURT

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[1] This is an appeal against an order of the High Court at Lautoka (Connors J) striking out the Appellant's action on the grounds that it was vexatious and an abuse of the process of the Court (RHC O 18 r 18).

[2] The Appellant and Respondent who are both Fiji born were married in Fiji in 1984. There are two children of the marriage, both girls, now aged 18 and 14.

[3] After the marriage the parties lived together in Nadi until 1993 when they obtained permanent residence in Australia. In 1997 they emigrated with the children. In December 1998 they bought and moved into a matrimonial home at Penhurst, New South Wales. The house was registered in their joint names.

[4] During 1999 it appears that the parties drifted apart. The Appellant returned to Fiji. In December 1999 the children came to Fiji for a holiday but after the Appellant told the Respondent that he would not allow them to return to Australia the Respondent herself also came back to Fiji and resumed cohabitation with the Appellant. The matrimonial home was rented out. In July 2000 the marriage broke down. The Respondent left the Appellant and returned to Australia.

[5] On 29 January 2001 the Appellant presented a petition for divorce in the Nadi Magistrates' Court. The decree nisi was granted with surprising rapidity on 1 March 2001. Custody of the two children was granted to the Appellant with reasonable access to the Respondent. There was no Section 58 certificate of satisfaction with the arrangements made for the children as is required by the Matrimonial Causes Act (Cap. 51). The Respondent has deposed that she was unaware of the divorce proceedings until after the decree nisi had been granted.

[6] On 15 March 2001 the Respondent commenced her own proceedings in the Family Court of Australia at Sydney. She sought a property transfer order in respect of the former matrimonial home at Penhurst and an order for contact with the children. The Appellant replied to the Respondent's application and was legally represented at the hearing which took place over three days in November 2002.

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[7] On 21 November 2002 Justice M.J.M. Lawrie delivered judgment. She ordered the Appellant to transfer his interest in the former matrimonial home to the Respondent. The judge also made orders in respect of the children: they were to continue to live with the Appellant but were to have defined contact with the Respondent.

[8] An important aspect of the judgment of the Family Court was a finding that the matrimonial home had been acquired out of funds provided by the Appellant and that his claim that the acquisition had been made after loans had been extended to him by other members of his family could not be sustained.

[9] The Appellant has not appealed against the judgment of the Family Court.

[10] In December 2002 the Respondent applied to the Nadi Magistrates' Court for definition of the reasonable access order made in her favour on 1 March 2001. The Court's jurisdiction in relation to custody and access to the children of a marriage is contained in Section 85 of the Matrimonial Causes Act. The power to vary custody and access orders is contained in Section 87 (1) (j) which provides that an existing order may be discharged, modified, suspended or revived.

[11] On December 2002 interim orders were made by the Nadi Magistrates' Court. The Court read affidavits sworn not only by the Respondent but also by the Appellant and heard counsel for both parties, including Dr. Sahu Khan.

[12] On 20 February 2003 the Appellant filed his own application in the Nadi Magistrates' Court seeking a variation of the existing access order in respect of the younger child.

[13] On 5 May 2003 the Appellant commenced the present proceedings by Writ and Statement of Claim. He sought declarations:

(i) that the Family Court of Australia's adjudications in respect of the former matrimonial home and the children of the family were null and void;

(ii) that the orders made by the Family Court of Australia "cannot be recognised" or enforced against the Appellant;

(iii) that the Nadi Magistrates' Court had no jurisdiction to entertain the Respondent's application for variation of the custody and access orders made on 1 March 2001.

[14] The Appellant also sought a permanent injunction :

"to restrain the [Respondent] from bringing any further proceedings with reference to the divorce action and/or the children of the family."

[15] Finally, the Appellant sought damages including exemplary, punitive and aggrevated damages and indemnity costs.

[16] On 13 June 2003 the Nadi Magistrates' Court made a number of orders in respect of the children of the family. We were not provided with a copy of those orders but on 11 July the Appellant filed an appeal in the High Court at Lautoka. The grounds of appeal are not entirely clear but it appears that the Appellant was claiming that the Magistrates' Court at Nadi had no jurisdiction to entertain the variation application first, because the Matrimonial Causes Act did not allow it to do so and secondly, because the present proceedings

(commenced, as already noted on 5 May 2003) were then pending in the High Court.

[17] On 30 June 2004 the High Court struck out the Appellant's action filed on 5 May. The Respondent was awarded $3,000 costs. In his ruling the Judge pointed out that no appeal had been filed by the Appellant against the orders made by the Family Court of Australia. He described the suggestion that the High Court of Fiji would declare as null and void the orders made by the Family Court as "beyond comprehension". So far as the jurisdiction of the Nadi Magistrates' Court was concerned he took the view that the proper course was to pursue the appeal already filed. Unfortunately the judge did not deal with the claim for damages and injunctive relief.

[18] During the course of his submissions to us Dr. Sahu Khan made two important concessions. The first was that the Family Court of Australia clearly had jurisdiction in respect of the former matrimonial home in New South Wales. The second was that the Family Court has jurisdiction to make orders in relation to the children of the family, who are both Australian citizens, at any rate while those children are resident in Australia.

[19] Dr. Sahu Khan's principal contention was that the High Court had wrongly struck out the Appellant's action since there was inconsistency between the orders of the Family Court and the Nadi Magistrates' Court in relation to the children. Dr. Sahu Khan suggested that these inconsistencies raised complex matters of law which the Appellant was entitled to have resolved after trial.

[20] In our view these supposed inconsistencies are more apparent than real. In the first place, it is clear that in absence of a statutory system of registration or recognition, the orders of foreign courts are not enforceable outside their own territory. In Fiji, owing to the limited scope of the Foreign Judgments

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(Reciprocal Enforcement) Act (Cap. 40) recognition of family orders does not appear to extend beyond recognition of foreign decrees of divorce (see also Matrimonial Causes Act – Section 92).

[21] Notwithstanding the above it is obvious that family courts, wherever they are situated, have jurisdiction over and indeed a duty of care towards children actually resident within their territory. That jurisdiction is routinely exercised without problem and with due regard to orders already made overseas.

[22] In the second place, the circumstances of the children have considerably changed since the Family Court of Australia's order dated November 2002. Not only are both children now Australian citizens but the elder, now 18, resides in Australia with the Respondent, with the consent of the Appellant. If there are any remaining difficulties then these appear only to concern access to the younger child. We do not think that the first two declarations sought would be of any assistance in resolving those difficulties.

[23] So far as the Nadi Magistrates' Court's power to vary its own orders is concerned, we agree with the Judge that the proper course is for the challenge to the exercise of that power to be pursued by appeal, not by an application for declaratory judgment.

[24] Mr. Maharaj submitted that the injunction sought by the Appellant was contrary to public policy. Dr. Sahu Khan did not disagree and neither do we.

[25] The claim for damages was not referred to by Dr. Sahu Khan in his submissions, either written or oral. The basis of the claim seems to be the suggestion that the Respondent "was guilty of the tort of abuse of court" (see paragraph 7 (4) of the grounds of appeal). From the papers before us we are satisfied that this claim is wholly without merit.

[26] Dr. Sahu Khan conceded that the Appellant's claims regarding the matrimonial home and the children while resident in Australia could not stand. We find no real conflict between the custody and access orders made by the Family Court of Australia and the Nadi Magistrates' Court. Whether the Nadi Magistrates Court has power to vary its own orders can best be pursued in the appeal already filed. We find the claim for damages to be wholly devoid of merit and the injunctions sought to be contrary to public policy. In these circumstances we cannot fault the decision of the High Court to strike the action out.

[27] The final matter complained of by Dr. Sahu Khan was the award of costs. In his written submissions it was suggested that the award was excessive and unexplained. While the amount awarded is undoubtedly higher than usual we are not satisfied that it was unwarranted. Furthermore, the leave of the court to appeal against the award was not obtained (see Court of Appeal Act – Section 12 (1) (e) and Sherer v. Counting Instruments Ltd [1986] 1 WLR 615). This ground of appeal fails.

RESULT

The appeal is dismissed with costs which we fix at $2,000.

FIJI COURT OF APPEAL

Tompkins J.A.

Smellie J.A.

Scott J.A.

Solicitors:
Messrs. Sahu Khan and Sahu Khan for the Appellant
Messrs. Suresh Maharaj and Associates for the Respondent.