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**AISHA BI
and
ARUF DEAN**

v

MOHAMMED FIDA HUSSAIN

[HIGH COURT, 1995 (Pathik J), 19 May]

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Appellate Jurisdiction

Family- appeal against grant of decree nisi of divorce- standard of proof of adultery-claim for ancillary relief-whether matrimonial jurisdiction of Magistrates limited by their civil jurisdiction- Magistrates Courts Act (Cap 14) Section 16 - Matrimonial Causes Act (Cap 51) Section 11(1) (b).

C The Magistrates Court declined to entertain an application for ancillary relief on the ground that the value of the matrimonial property exceeded the limit imposed by the Magistrates Courts Act. HELD: The matrimonial jurisdiction of Magistrates was not confined to the limits of their civil jurisdiction.

D Cases cited:

Benmax v. Austin Motor Co. Ltd [1955] 1 All ER 326
Blyth v. Blyth (1966 1 All ER 524)
Briginshaw v. Briginshaw (1930) 60 CLR 336
Cramp v. Cramp and Freeman [1920] P158

E *Henderson v. Henderson and Crellin* [1944] AC 49
Jamisha Ali v. Hasiman Nisha FCA 52/76
Paul Nagaiya v. James Subhaiya 15 FLR 212
Riches v. Riches and Clinch 35 TLR 141
Rita Shakuntala v. Shiu Kumar Karan 24 FLR 87
Rutherford v. Rutherford Richardson [1923] AC 1

F *Tilley v. Tilley* [1949] P.240
Watt (or Thomas) v. Thomas [1947] 1 All ER 582
Weinberg v. Weinberg (1910) 27 T.L.R. 9.
Wright v. Wright (1948) 77 CLR 191

Appeal against grant of decree and refusal of claim for ancillary relief.

G *M. Sadiq* for the Appellant
A. Sen for the Respondent
 Co-Respondent In person

Pathik J:

This is an appeal by a wife against the decision of the Magistrate's Court.

Labasa on 16 December 1993 granting decree nisi on the ground of adultery. It will be convenient to call the parties "the petitioner" (Respondent-original petitioner), "the respondent" (appellant-original respondent) and "the co-respondent" (the original co-respondent).

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The parties were married on 6 January 1980 and there are four children of the marriage. The petitioner alleged that the respondent committed adultery with the co-respondent (petitioner's sister's son aged 25 years) from March 1991 up to 29 January 1993. In 1991 the co-respondent came to petitioner's farm to transport his cane; in 1992 he helped petitioner build his house; on 22 January 1993 co-respondent was seen by petitioner coming out of his house and it was then that he found that his wife's lower lip was swollen. The co-respondent was called by him but he did not come. The petitioner said that he cannot remember whether he slept with his wife on 22 January 1993 or not. Evidence was adduced by the Petitioner through his witnesses to prove the respondent's close intimacy with the co-respondent. The learned Magistrate has dealt with their evidence fully in his judgment.

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The respondent denied the allegations about "affairs" with the co-respondent. She said that their sex life was happy and that even on 23 January 1993 they had sex.

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The co-respondent had also denied the allegation of adultery when the Petition was read out to him. After his first and the only appearance on this occasion i.e. 8 April 1993 he made no other appearances in this case.

In his judgment the learned Magistrate has carefully analysed the evidence adduced in this case and he believed the evidence of the petitioner and his witnesses. He held that the petitioner "has proved to the satisfaction of Court to the real standard that adultery had taken place between the respondent and co-respondent" (page 129 of Record). He further found that "there is no allegation of condonation or connivance attributed to the petitioner and there is no evidence to that effect either" (page 129 of Record).

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The learned Magistrate then made the following orders (as contained in his judgment - page 131 of record):-

"In the circumstances I make order as follows:

1. I order that the marriage be dissolved and that order nisi be issued forthwith to become absolute on the expiry of 28 days.
2. I order that the custody of the two children viz Naushal Hussein and Tofim Irfan Hussein be given to the petitioner with reasonable access to the respondent

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- A and that the custody of Shabana Nirshaad Bi and Riaz Hussein be given to the respondent with reasonable access to the petitioner. The petitioner and the respondent are to exchange the children for the weekend.
- B 3. I order that the petitioner do pay maintenance for the two children who are with the respondent at the rate of \$12.50 per week until they attain the age of 18 years.
4. I order that the correspondent pay a sum of \$500.00 to the petitioner as damages for the break up of his marriage.”
- C There are six grounds of appeal as follows:-
- D “1. THAT the verdict of the Learned Magistrate is unreasonable and cannot be supported having regard to all the evidence adduced in the said case.
2. THAT the maintenance Order of \$12.50 per week for each of the two children is most unreasonable having regard to the total income of the Respondent/Petitioner.
3. THAT the Learned Magistrate failed to give due consideration to the inconsistencies and contradictions in the Petitioner’s case and thereby erred in law and In fact.
- E 4. THAT the Learned Magistrate erred in law and in fact in holding that the Magistrate’s Court had no jurisdiction regarding the distribution of property.
- F 5. THAT the Learned Magistrate erred in law and in fact by dispensing with the filing of the amended Petition in Court and the service which is Contrary to the Provision of Matrimonial Causes (Magistrate’s Court) Rules.
- G 6. THAT the Learned Magistrate failed to consider the question of condonation and thereby erred in law.”
- Arguing the appeal Mr. Sadiq said that he will deal with all the grounds together.

In his submissions he dealt with a number of matters. On standard of proof in adultery he said that the learned Magistrate had applied a wrong standard of proof; he discussed the matter of confession; he argued that there was condonation on the part of the petitioner by an isolated act of sexual intercourse:

he dealt with jurisdiction of Magistrate's Court in regard to settlement of property; and finally he made submission on maintenance and custody of children. A

The Respondent had filed an Answer to the Petition seeking the dismissal of petition, custody of all the children and maintenance for them and herself and settlement of property.

I shall now deal with the Grounds of Appeal. Both counsel made oral and written submissions. B

Dealing first with grounds 1 and 3. The learned counsel for the appellant is in these grounds attacking the findings of fact by the trial Magistrate. In large measure the decision in this case rests mainly on the credibility of witnesses.

I am being asked to review the findings of fact by the learned Magistrate. It has been an accepted fact that very rarely would an appellate Court be justified in interfering unless the findings of fact could not be supported on the evidence or law or any other proper ground. The principles to be applied by an appellate Court in this regard are laid down in the well-known and oft-quoted case of Watt (or Thomas) v. Thomas [1947] 1 All ER 582 and Benmax v. Austin Motor Co. Ltd (1955) 1 All ER 326 at 329. Also in Paul Nagaiya v. James Subhaiya 15 FLR p.212 FCA it was held that: C
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"2. An appellate tribunal is reluctant to interfere with findings of fact made in the court below, particularly those based on the credibility of witnesses but it is less reluctant to interfere when the findings, or some of them, are inferences drawn from accepted evidence." E

As stated hereabove the learned trial Magistrate on the issue of credibility accepted the evidence of the petitioner and his witnesses and rejected that of respondent and her witnesses. He found the allegation of adultery proved to his satisfaction as required under section 93 of the Matrimonial Causes Act Cap 51 (hereafter referred to as the "Act"). F

On the material before him I find that the learned Magistrate's findings on credibility were made with a correct appreciation of his task and that they are borne out by a careful analysis of the evidence before him.

Having accepted the fact that the credibility was properly found, I shall now deal with his findings on adultery. G

The general rule as to proof of adultery is set out in Halsbury's Laws of England 3rd Ed. Vol 12 para 446 p.237 as follows:-

"Direct evidence of adultery is rare. In nearly every case the

- A fact of adultery is inferred from circumstances which by fair and necessary inference lead to that conclusion. There must be proof of disposition and opportunity for committing adultery, but the conjunction of strong inclination with evidence of opportunity does not lead to an irrebuttable presumption that adultery has been committed, and likewise the Court is not bound to infer adultery from evidence of opportunity alone.
- B The Court will closely scrutinise a case where only a single witness is called to prove a charge of this nature, particularly if that witness is a loose woman with whom the adultery is alleged to have been committed, and it looks with strong suspicion on the evidence of paid detectives.”
- C I have already stated that the learned Magistrate has correctly determined the credibility and I further find that the evidence supports a finding of adultery.

As to question of proof section 93 of the Act states thus:

- D “93. (1) For the purposes of this Act, a matter of fact shall be taken to be proved if it is established to the reasonable satisfaction of the Court.
- (2) Where a provision of this Act requires the court to be satisfied of the existence of any ground or fact or as to any other matter, it is sufficient if the court is reasonably satisfied of the existence of that ground or fact or as to that other matter.”
- E (underlining mine)

As to the meaning of the terms “satisfied” and “reasonably satisfied” Dixon J in Briginshaw v Briginshaw [1930] 60 CLR 336 at 362 stated it thus:

- F “But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters “reasonable satisfaction” should not be produced by inexact proofs, indefinite testimony, or indirect inferences. Everyone must feel that, when, for instance, the issue is on which of two dates an admitted occurrence took place, a satisfactory conclusion may be reached on materials of a kind that would not satisfy any sound and prudent judgment
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if the question was whether some act had been done involving grave moral delinquency.”

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On the issue of adultery Dixon J. in Briginshaw (supra) 368-9, said:

“Upon an issue of adultery in a matrimonial cause the importance and gravity of the question make it impossible to be reasonably satisfied of the truth of the allegation without the exercise of caution and unless the proofs survive a careful scrutiny and appear precise and not loose and inexact. Further, circumstantial evidence cannot satisfy a sound judgment of a state of facts if it is susceptible of some other not improbable explanation. But if the proofs adduced, when subjected to these tests, satisfy the tribunal of fact that the adultery alleged was committed, it should so find.”

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Further on standard of proof in adultery Dixon J considered it in Wright v Wright [1948] 77 CLR 191 when he said at 210:

“While our decision is that the civil and not the criminal standard of persuasion applies to matrimonial causes including issues of adultery, the difference in the effect is not as great as is sometimes represented. This is because, as is pointed out in the judgments in Briginshaw v. Briginshaw (1) the nature and gravity of an issue necessarily determines the manner of attaining reasonable satisfaction of the truth of the issue and because the presumption of innocence is to be taken into account.”

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This passage was approved by Lord Denning in Blyth v Blyth [1966] 1 All ER 524 at 536 H.L). Hence it is abundantly clear that as was said by Lord Denning in Blyth (supra) at p.536 that “the analogies and precedents of criminal law have no authority in the divorce court, a civil tribunal. It is wrong therefore to apply the analogy of criminal law. We should not say that adultery must be proved with the same strictness as is required in a criminal case. We should simply say that it must be proved to the satisfaction of the court”. Lord Denning goes on to say:

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“So far as the standard of proof is concerned, I would follow the words of Dixon, J., which I have quoted and which I elaborated in Bater v. Bater with the approval of the Court of Appeal In Hornal v. Neuberger. In short it comes to this: so far as the grounds for divorce are concerned, the case, like any civil case, may be proved by a preponderance of probability, but the degree of probability depends on the subject-matter.

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In proportion as the offence is grave, so ought the proof to be clear.”

A The learned Magistrate had to analyse all the evidence adduced before him and to find corroboration but the court may act on uncorroborated evidence as was said In Jamisha Ali s/o Meer Mohidin v. 1. Hasiman Nisha 2. Hamid Khan (Civil Appeal No. 52/76 FCA) thus:

B “It is the practice of divorce courts generally to require corroboration although a court may act on uncorroborated evidence after carefully scrutinising the circumstances and bearing in mind the nature of the charge made. Admissions, even when made by a party on oath, are considered with caution and care and in the light of the circumstances in which they were made. In Briginshaw v. Briginshaw (supra) Dixon J. said at p. 367 :-

C “Although confessional evidence has been the subject of special or independent treatment in the authorities, the result has been to establish no different measure of persuasion. Corroboration should be looked for, but
D “the true test seems to be whether the court was satisfied from the surrounding circumstances in any particular and exceptional case that the confession is true” (per Sir Samuel Evans P., Weinberg v. Weinberg (1910) 27 T.L.R. 9.”

E In considering the learned Magistrate’s approach to the issues of standard of proof and corroboration I have not lost sight of the fact that he was in a better position to assess the credibility of witnesses than the appellate court which has not had the opportunity of hearing and seeing the witnesses.

F Mr. Sadiq laid great stress on the fact that there was condonation on the part of Petitioner because he alleged that there was sexual intercourse with the Respondent on 22 January 1993 (within the period of alleged adultery); but the learned Magistrate (at p.129 of Record) stated that “there is no allegation of condonation and connivance attributed to the petitioner and there is no evidence to that effect either”.

G The Petitioner in his petition stated that there is no condonation in presenting the petition. He said in his evidence that he “can’t recall whether I slept with her or not” on 22 January 1993 and on 23rd he went to work. Then on 25th he questioned his brother Johit Hussein who lived close to him as to whether he knew anything about Petitioner’s “affair” with the Co-respondent. He said that he did not know anything about it. Thereafter he questioned the Petitioner and when she told him that the co-respondent had been coming and sitting with her he slapped her. Later that night she was taken away by her parents.

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This and other evidence in the record are not indicative of condonation.

As far as condonation is concerned it is stated in Latey on divorce 15th Ed. para 2. 255 p.157:

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“On a petition for divorce it was the duty of the Court to inquire whether there had been any condonation by the petitioner and if the court was satisfied on the evidence that the proved adultery or cruelty was not condoned it had to pronounce a decree, but if not so satisfied dismiss the petition.

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The court was bound to act on evidence of condonation even if it is not pleaded. (Tilley v Tilley [1949] 240 C.A.)”.

In this case in the Answer of the Respondent condonation is not pleaded. Nor was the Petitioner cross-examined by Mr. Sadiq on this aspect except to elicit from the Petitioner about his sex life with the Respondent. In any case there is specific provision as follows in section 25 of the Act in regard to condonation which provides for rebuttal of presumption of condonation “by evidence sufficient to negative intent to condone”:

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“25. - (1) A decree of dissolution of marriage shall not be made upon a ground specified In any of paragraphs (a) to (k), inclusive, of section 14 if -

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- (a) the petitioner has condoned the ground and the ground has not been revived; or
- (b) the petitioner has connived at the ground.

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(2) For the purposes of this section and of any provision of this Act referring to condonation, any presumption of condonation that arises from the continuance or resumption of sexual intercourse may be rebutted on the part of a husband, as well as on the part of a wife, by evidence sufficient to negative intent to condone.”

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The Petitioner denied that he had sexual intercourse close to the time before and after he saw the Co-respondent coming out of his house leading to the events and incidents stated above. This is not a case coming within the rule in Cramp v. Cramp and Freeman [1920] P158 at p.171 that a husband, who has sexual relations with his wife after knowledge of her adultery, must be conclusively presumed to have condoned her offence. In condonation as was said by Viscount Simon in Henderson v Henderson and Crellin [1944] AC 49 quoting from Latey (supra) at p.158:

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A “The essence of the matter is (taking the case where it is the wife who has been guilty of the matrimonial offence) that the husband with knowledge of the wife’s offence should forgive her and should confirm his forgiveness by reinstating her as his wife”.

B It is further stated In Latey that the “the Lord Chancellor pointed out that whether reinstatement went to the length of connubial intercourse depended on circumstances; there might be cases where the wife had been received back into the position of wife in the house, though further intercourse had not taken place”.

C I find that on the evidence before him the learned Magistrate adopted the correct approach to the question of condonation in this case and found that the offence had not been condoned. The standard of proof has been properly borne in mind by him. As was stated by Lord Denning in Blyth (supra) p.537

D “so far as the bars to divorce are concerned, like connivance or condonation, the petitioner need only show that on balance of probability he did not connive or condone or as the case may be”.

E There is one further matter that has been raised by Mr. Sadiq in his submission and that is in regard to the confession statement wherein the Co-respondent admitted (in writing) adultery to Girwar Prasad a law clerk of 20 years standing who also testified in Court of the circumstances in which the confession was taken. Mr. Sadiq said that the learned Magistrate erred when he attached a lot of weight to the confession.

F The learned Magistrate who had the advantage of seeing and hearing the witnesses and observing their demeanour looked at the evidence of Girwar Prasad in the light of all the other evidence (see p.129 of Record) and he accepted the evidence of the petitioner and his witnesses. It is not that he looked at the confession alone and decided on credibility of witnesses. It is to be borne In mind though that:

G “Admission or confessions of adultery by a party are not per se admissible evidence against the person with whom the adultery is said to have been committed unless the confessing party gives evidence to the same effect.” (Rutherford v Rutherford Richardson [1923] AC 1, 6 (quoting from Latey (supra) 2.950).

Latey (supra) at 2.951 goes on to state further:

“A petitioner may succeed merely on confessions of an accused spouse or co-respondent (Riches v Riches and Clinch 35 TLR 141),

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but the court usually requires corroboration from surrounding circumstances.”

In Jamisha Ali (supra), Henry JA in his judgment stated that:

“However, more than one confession may, according to the circumstances in which each is made, assist in concluding that it is, in fact, true. This requires a careful evaluation of the surrounding circumstances in which each confession is made. Not only must the fact of making of the confession be proved but the Court must also after considering the circumstances in which it was made, be satisfied that it is true”.

To sum up, for the reasons given hereabove the learned Magistrate had applied the correct standard of proof and has given proper considerations to the matter of condonation and confession on the whole of the evidence before him and reached the correct conclusion on the issue of adultery on the part of the Respondent.

I therefore see no merit in these grounds of appeal and they fail.

Ground 2 deals with the order for payment of maintenance to the two children. The order says that “the petitioner do pay maintenance for the two children who are with the respondent at the rate of \$12.50 per week until they attain the age of 18 years”.

Mr. Sadiq says that this order is “too low” and should be increased to \$15.00 per week per child (as per his Skeleton Argument).

The matter of maintenance is always subject to variation and orders in respect thereof are constantly varied according to the change in circumstances of the parties.

On the evidence of the parties’ financial situation before the Court, it is not unreasonable to ask for the increase sought without in any way suggesting that the learned Magistrate applied the wrong principle. I therefore vary the order for maintenance for each of the two children to \$15.00 per week with effect from the date of this judgment.

In ground 5 Mr. Sadiq complains that the learned Magistrate erred in law and in fact by failing to order the filing and service of the order following amendment to the petition.

On 5 August 1993 Mr. Sen sought an amendment to paragraph 6 of the Petition by adding “from March 1991 up to 29th January 1993”. The Petitioner and Respondent were present with their respective counsel but the co-respondent was not. The learned Magistrate allowed the amendment stating “service on the co-respondent dispensed with”. (page 67 of Record).

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A When the amendment was allowed, there was no objection from Mr. Sadiq nor did he raise the matter of filing and service which he is raising now in this appeal although he is not appearing for the co-respondent.

It is pertinent to note that the co-respondent, apart from appearing on 8 April 1993 when the petition was read out to him and he denied the allegation of adultery, he has not appeared after that date. The petition was heard without him and decision given.

B In these circumstances I cannot see how the Appellant is affected by the course adopted by the learned Magistrate. If the co-respondent was affected by this order he is the one who should have raised his objection at the appropriate time. As far as the appellant is concerned she did not object through her counsel and therefore quiescence is acquiescence on her part. In answer to my question Mr. Sadiq said that he raised the matter but "did not want to take further time to file amended answer". This is not recorded by the learned Magistrate. I can only go by the Record. Mr. Sadiq therefore cannot raise it on appeal.

C I therefore find that the order made has not contravened any of the provisions of the Act or the Rules made thereunder in regard to the filing and service of the amended petition as alleged by the learned counsel for the appellant.

D This ground of appeal therefore has no merit and it fails.

Ground 4 concerns the jurisdiction of the Magistrate's Court to deal with settlement of property.

E Mr. Sadiq submits that the Magistrate's Court has jurisdiction in such matters but the Magistrate has held otherwise.

In his judgment (at page 131 of Record) the learned Magistrate stated that:

F "It is obvious that all this property is worth much more than \$15,000 which exceeds the jurisdiction limit of the Court. Hence as regards the property settlement the respondent should seek her remedy in the proper forum".

G I have given serious consideration to the matter and in doing so I have considered fully Mr. Sadiq's lengthy submission in this regard. I have not discovered any direct authority on the point and I therefore endeavour to embark upon ascertaining the true position in the light of the provisions of the Matrimonial Causes Act.

The civil jurisdiction of magistrates is derived from s.16 of the Magistrates' Courts Act Cap.14 which insofar as it is relevant provides:

"16. (1) A resident Magistrate shall, in addition to any

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jurisdiction which he may have under any other Act for the time being in force, have and exercise jurisdiction in civil causes - “ (underlining mine for emphasis).”

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Then under 16(1)(a)(i) and (ii) “In all personal suits arising out of any accident” and “In all other personal suits, whether arising from contract, or from tort, or from both” respectively, the claims are for limited amount, namely, \$15000.

Thereafter in the proviso to s.16(1) it is stated, inter alia:

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“Provided that a magistrates’ court shall not exercise jurisdiction -

- (i)
- (ii)
- (iii)
- (iv) except as specifically provided in the Matrimonial Causes Act or any other Act for the time being in force, in suits wherein the validity or dissolution of any marriage is in question; or
- (v)” (underlining mine for emphasis)

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The above therefore are the relevant provisions relating to limitations as to amount (S16(1)(a)(i) & (ii)) and specific powers as to hearing of suits for dissolution of marriage for which provision is “specifically” made in the Matrimonial Causes Act.

Under s.19 of the Act the Chief Justice “may, by order under his hand ... authorise an increased jurisdiction in civil causes and matters to be exercised by the magistrate named in the order”. But this provision has no relevance to the matter in hand in view of the specific provisions in the Act to which I shall refer later.

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That leads me on to a consideration of the powers vested in the Magistrate under the Matrimonial Causes Act.

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In 1982 the Matrimonial Causes (Amendment) Bill, 1982 was introduced in Parliament which brought about major amendments to the Act. It was passed and became effective on 14 February 1983. Hitherto the Magistrate’s Court, inter alia, had limited jurisdiction in divorce matters. The “objects and Reasons” in the Bill, which is as follows, explains the situation that existed before the said amendments and also what is proposed in the Bill.

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“This Bill is intended to give magistrates’ courts (other than the District Officer’s Court, Rotuma) concurrent jurisdiction with the Supreme Court as respects the hearing and determination of

- A proceedings for a decree of dissolution of marriage or for a decree of judicial separation and of proceedings ancillary to such proceedings. At present magistrates' courts only have jurisdiction to hear such proceedings but not to determine them. The Supreme Court is uniquely competent to decide whether or not a decree should be made. After the completion of the hearing, the magistrate is required to forward to the Supreme Court a certified copy of the evidence with a statement of his opinion as to the decree which should be made. The Supreme Court may, on consideration of the magistrate's opinion, either accept, reject or modify it, and then direct what decree shall be pronounced by the magistrate." (underlining mine)
- B
- C The forerunner of the present Act (Matrimonial Causes Act Cap. 51) was Matrimonial Causes Ordinance 1968 (No. 22 of 1968) where "the Court" was defined as "the Supreme Court of Fiji" (now High Court) and "Magistrate's Court" meant "a court established under the provisions of the Magistrates' Courts Ordinance ...". The matrimonial proceedings were then handled by the then Supreme Court (now High Court) and the Magistrate's Court.
- D Now by Act No. 6 of 1982 the definition of "the Court" has been deleted but "Magistrate's Court" is defined and which is the same as above. This is because of specific references to the Magistrate's Court under the Matrimonial Causes Act. But "court" is defined as "any court of Fiji of competent jurisdiction" in Interpretation Act Cap 7 s 2(1).
- E Under "PART X1 - PROCEEDINGS BEFORE MAGISTRATES' COURTS" of the Act provision is made for the extension of application of provisions of Magistrate's Courts Act to proceedings under this Act by s 63 which provides:
- F "63. Subject to the provisions of this Act and of any other written law and subject to such modifications, exceptions and adaptations as may be prescribed by the rules, the provisions of the Magistrates' Court Act shall apply in relation to proceedings under this Act in a magistrate's court as they apply in relation to any civil proceedings." (underlining mine for emphasis)
- G Now by s11 of the Act jurisdiction in Matrimonial Causes is given to the Magistrate's Court. The said section insofar as it is relevant provides as follows:-
- "11. - (1) Subject to the provisions of this Act, a person may -
- (a) institute in the Supreme Court any matrimonial cause under this Act;

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- (b) institute in a magistrate's court, other than the District Officer's Court, Rotuma, any matrimonial cause, except - A
- (i) proceedings for a decree of nullity of marriage, restitution of conjugal rights or jactitation of marriage;
- (ii) proceedings of a kind referred to in paragraph (b) or paragraph (e) of the definition of "matrimonial cause" in subsection (1) of section 2; and B
- (iii) without the leave of the Supreme Court, any proceedings of a kind referred to in paragraph (c) or paragraph (d) of that definition which are proceedings in relation to proceedings instituted in the Supreme Court before or after the 14th day of February 1983". C
- (underlining mine) D
- Hence by virtue of the above provision any matrimonial cause subject to exceptions stated therein may be instituted in a magistrate's court. E
- What is a "matrimonial cause" is defined under Section 2(1) of the Act. This covers in 'c' of that definition "settlements" with which I am concerned in this case under this ground of appeal. The said section (c) provides (inter alia): F

"Matrimonial causes" means -

- (a)
- (b)
- (c) proceedings with respect to the maintenance of a party to the proceedings, settlements, damages in respect of adultery, the custody or guardianship of children of the marriage or the maintenance, welfare, advancement or education of children of the marriage, being proceedings in relation to concurrent, pending or completed proceedings of a kind referred to in either G

A of paragraphs (a) or (b), including proceedings of such a kind pending at, or completed before, the commencement of this Act;

- (d)
 (e)"

B And under s55(2) of the Act the Respondent "may in the answer to the petition seek any decree or declaration that the respondent could have sought in a petition or any relief referred to in paragraph (c) of the definition of "matrimonial cause" contained in subsection (1) of section 2" (referred to above and which includes "settlements").

C The case for a magistrate to hear settlement of property is further strengthened by the provision in s55(4) that:

"The court shall, so far as is practicable, hear and determine at the same time all proceedings instituted by the petition".

D The word "Court" in this section includes the Magistrate's Court as amended by Act No. 6 of 1982.

E The said sections 55(2) and 55(4) enable the Respondent to seek the relief sought, namely, in this case, settlement of property. By providing as in 55(4) the legislature did not intend that the settlement aspect in the petition could not be dealt with by the Magistrate's court. If it was so intended it would have been specifically provided as it was done in the 1968 Act in regard to jurisdiction and procedure in the hearing and determination of matrimonial causes. The Act No. 6 of 1982 gave a magistrate's court concurrent jurisdiction with the High Court subject to exceptions provided in the Act referred to hereabove.

F To conclude, S86 gave the Court (without stating which court - whether the magistrate's court or the High Court) powers in proceedings with respect to settlement of property. The said s86 provides, inter alia, as follows:-

G "86. - (1) The court may, in proceedings under this Act, by order, require the parties to the marriage, or either of them, to make, for the benefit of all or any of the parties to, and the children of, the marriage, such a settlement of property to which the parties are, or either of them is, entitled (whether in possession or reversion) as the court considers just and equitable in the circumstances of the case.

- (2)
 (3)"

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For the above reasons I find that the learned Magistrate had ample powers to deal with settlement of property in this case.

In this case the Petitioner succeeded in his petition, but the learned Magistrate did not consider the Respondent's ancillary relief on settlement of property on the ground as stated by him that he had no jurisdiction in the matter.

However, having found that the learned Magistrate has jurisdiction, he ought to consider the relief sought. Even the Fiji Court of Appeal In Rita Shakuntala v Shiu Kumar Karan 24 FLR (1978) p. 87 held that "the filing of an Answer, whether or not the Petition be dismissed, entitles the respondent to be heard in all matters in respect of which relief is sought". There settlement of property was involved as in the present case. In Rita (supra) under the past practice, the Supreme Court had ruled that the effect of the dismissal was to terminate the wife's right to continue to seek ancillary relief by way of her Answer but the Appeal Court disagreed.

Despite what I have held in regard to this subject, there is ample provision in the Magistrates' Courts Act Cap. 14 in section 32 enabling the Magistrate to report cases for transfer to the High Court which "shall direct in what mode and where the cause or matter shall be heard and determined". The said section provides:

"32. Subject to the provisions of the Criminal Procedure Code, a magistrate may, of his own motion, or on the application of any person concerned, report to the Supreme Court the pendency of any cause or matter which in the opinion of such magistrate ought for any reason to be transferred from his court to any other magistrates' court or to the Supreme Court. The Supreme Court shall direct in what mode and where the cause or matter shall be heard and determined." (References to "Supreme Court" should now read "High Court"-underlining mine)

To conclude, for the above reasons the Respondent's appeal is dismissed on all the grounds except ground 4 on which she succeeds. The matter in ground 4 is accordingly remitted to the Magistrate's Court and I order that the learned Magistrate take such further action as may be just in accordance with the claims for ancillary relief made by the Respondent in her Answer for settlement of property.

The Respondent is Ordered to pay the costs of this appeal to the Petitioner which is to be taxed if not agreed.

(Appeal partly allowed.)

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