

**BIJAY PRAKASH**

v.

**ANJILA PRAKASH**

[HIGH COURT, 1998 (Scott J) 3 December]

## Appellate Jurisdiction

*Family law- respondent's right to claim ancillary relief where petition dismissed. Matrimonial Causes Act (Cap 51) Sections 86 and 89 (4); Married Women's Property Act (Cap 37) Section 20.*

The High Court granted a maintenance order in favour of the children of the family but declined to make a property adjustment order in favour of the wife respondent. It explained the distinction between the assessment of equitable rights in matrimonial property and the adjustment of those rights. It HELD: that when a petition is dismissed and the answer does not claim principal relief as defined there is no power to make a property adjustment order.

## Cases cited:

*Gissing v Gissing* [1971] AC 886

*Pettitt v Pettitt* [1970] AC 777

*Protima Devi v Rajeshwar Singh* (31 FLR 109)

*Saunders v Saunders* (1968) ALR 43

Appeal to the High Court from the Magistrates, Court.

*H.K. Nagin* for the Appellant

*D. Sharma* for the Respondent

**Scott J:**

In a Judgment dated 5 December 1996 I dismissed the Appellants appeal against the dismissal of his petition for divorce by the Labasa Magistrates' Court and also set aside property settlement and maintenance orders made in favour of the Respondent. Rather than remit the matter to the Magistrates' Court I awarded the Respondent interim maintenance for the support of the children and, in exercise of the powers conferred by Section 91 (3) (a) of the Matrimonial Causes Act (Cap 51) (the Act) decided to hear the Respondents application for ancillary relief myself. Under the provisions of Rules 193 and 194 of the Matrimonial Causes (High Court) Rules (Cap 51 - Subs) (the Rules) affidavits of means were ordered.

Three affidavits were filed, two by the Respondent and 1 by the Appellant. These were followed by two bound sets of documents filed by the parties on 21 October 1997. I heard evidence from both parties on 22 October 1997 and on 25 June 1998 on which occasion the Respondent, having dispensed

with the services of Mr. V. Maharaj, represented herself.

A On 23 July 1998 after the appearance of Mr. D. Sharma for the Respondent I heard helpful submissions from Mr. Nagin and also received a carefully researched written submission filed by Mr. Sharma.

As may be seen from the original pleadings in the suit the claims for ancillary financial relief were for the first and only time raised in the Respondent's answer. She claimed:

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“(b) maintenance of the children of the marriage  
(d) property settlement in respect of the property on CT 24711.”

C The power of the Court to make a property settlement order in favour of a party to divorce proceedings is found in Section 86 of the Act and is a power to make, for the benefit of all or any of the parties and the children of the marriage such settlement of property as the Court considers just and equitable in the circumstances of the case.

D As pointed out by the Fiji Court of Appeal in Protima Devi v Rajeshwar Singh (31 FLR 109) Section 86 of the Act is in identical terms to Section 86 of the Australian Matrimonial Causes Act 1959 which was not repealed until 1976.

E Construing the powers conferred on the Court by the Section the High Court of Australia in Saunders v Saunders (1968) ALR 43 explained that the Court was “not limited to cases where the wife has contributed to the property which it is thought appropriate to settle on her as a means of providing her maintenance or which it is thought ought to be settled on her in adjusting as between them the rights or moral claims of the spouses upon the dissolution of their marriage”. The Court went on to say that “a re-adjustment of the property rights of the spouses may be required if consequential injustice to one or both of the spouses and to the children is not to result”. Section 86, in other words, confers on the Court the power to make what has since become known as a “property adjustment Order” properly reflective of the moral claims and physical needs of the parties.

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G All this is in sharp contrast to the “cold legal question” which the Court has to ask itself when exercising its equitable jurisdiction, the procedure there being established not by the Act but by a much more venerable piece of legislation namely Section 20 of the 1891 Married Women's Property Act (Cap 37) which is the Fiji equivalent of Section 17 of the English Married Women's Property Act 1882 (see Gissing v Gissing [1971] AC 886, 901).

As explained by the House of Lords in Pettitt v Pettitt [1970] AC 777, Section 17 of the 1882 Act is purely procedural and does not enable the Court to vary the existing property rights of the parties. The Court, in other words, only endeavours to discover what those property rights are, applying well known

rules of equity. It does not, having discovered those rights, have any power to adjust them.

It is important to be clear that the powers of the Court conferred by Section 86 of the Act are quite different from those conferred by Section 20 of Cap 37. The crucial importance of this difference stems from Section 89 of the Act.

The Court's powers to grant ancillary relief are to be found in Part XIII of the Act of which Section 86 is one section but the procedure is set out in Part XIII of the Rules. One of the important effects of this part of the Rules is to allow a Respondent to claim ancillary relief by answer and without having to cross petition.

Set against this background, it is evident that Section 89 (2) of the Act prohibits the Court from making a property adjustment order in favour of a Respondent under the powers conferred on it by Section 86 where the petition is dismissed and where the answer does not claim "principal relief" within the meaning of Section 89 (4). That this must be so not only follows from consideration of the Act and the Rules but also from consideration of the relief being sought. Whereas in equity the property rights of the parties to the marriage remain the same whether or not the marriage is dissolved, the effect of Section 86 of the Act is to adjust those property rights where necessary following dissolution of the marriage.

In the present case the Respondent, who successfully defended the Appellant's petition in the Labasa Magistrates' Court has throughout adamantly refused to accept that the marriage has irretrievably broken down. Although this Court recommended to the Respondent that she consider allowing the marriage to be dissolved, possibly by undefended cross decrees, she refused to entertain this suggestion. In my Judgment one of the consequences of this refusal is that she has thereby disqualified herself for the time being from obtaining a property adjustment order and accordingly I decline to make any such order in her favour. No proceedings have been initiated under the Married Women's Property Act.

There remains the matter of maintenance. The difficulty here is that by her answer the Respondent did not, as has already been noted, in fact seek any principal relief within the meaning of Section 89 (4). The only claim for principal relief which was dismissed was that of the Petitioner/Appellant. Notwithstanding this difficulty however I am of the view that Section 89, read purposively, gives the Court power in these circumstances to make an award in favour of the children of the family under Section 87. As the only maintenance sought in the answer was, as has been seen, maintenance of the children of the family, any order must be confined to a grant of such maintenance.

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## HIGH COURT

A There is in place the interim order of \$25 per week (\$200 per month) per child i.e. \$1300 per annum per child. On 23 July Mr. Nagin told me that the Appellant had offered to increase this to \$37.50 per week (\$300 per month) i.e. \$1950 per annum. The children are now aged 13 and 8. The Appellant told me on 25 June that he was now earning \$438.00 net per fortnight i.e. about \$220 per week. In my view, having considered all the material before me, the Respondent can reasonably afford to pay \$40 per week per child i.e. a total of \$4160 per annum. I so order.

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*(Appeal dismissed.)*