

INISE B KOROIWACA v RATU GEORGE R S BAKOSO (HBA0003 of 2004)

HIGH COURT — APPELLATE JURISDICTION

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SINGH J

26 May 2004

10 **Family law — property interests — adjustment — property settlement — matrimonial home — divorce — decree Nisi — irregularity in proceedings — guidelines for resolution of property matters — Matrimonial Causes Act ss 86, 86(1), 93.**

15 The parties were married in 1986 and applied for divorce in 2002. After the petition for divorce was filed, a Decree Nisi was ordered absolute for 40 days wherein the order: (a) granted custody of the children to the Petitioner; (b) required the Respondent payment of maintenance for the children; (c) gave permission to the Petitioner and the children to live in the matrimonial home; and (d) required the matrimonial property to be transferred to the children.

20 Upon the expiration of the 40-day decree, the Respondent asked before the magistrate for a review of the decree. The magistrate's ordered to sell the matrimonial property, pay the mortgage of the matrimonial property, and pay back the Respondent's contribution to the Fiji National Provident Fund and the surplus to be divided equally between the Petitioner and the Respondent.

25 The Respondent appealed against the order and argued irregularity in the proceedings before the Magistrates Court.

Held — The evidence established that no proof was tendered regarding the matrimonial property. In transferring properties it is important to produce the title and examine the same. In this case no copy of the title was presented and the court was not aware if the property was a Crown land, Native Land or freehold. The nature of title is always relevant in Fiji as in the cases of State land, native land and Housing Authority land, the consent to transfer must be obtained from the relevant authorities before transfer of property can be done. The securing of consent from these authorities before any transfer is a statutory requirement which cannot be overridden by the courts. Moreover, the existence of interests in the title must be addressed before any transfer can be ordered.

35 Property settlements are done under s 86 of the Matrimonial Causes Act and the court can make such orders it "considers just and equitable in the circumstances of the case". The section grants the court discretion. Consequently, utmost care should be made to see that the parties fully appreciate the type of orders and their consequences. It must be ensured that the party to be affected is aware of the nature of the orders sought against him and adequate opportunity is given to him/her to present his/her case in opposition to the making of such orders. When an order for settlement of property is sought, it becomes important to decide how and when the property was acquired as these factors might decide whether the property is a matrimonial property. The property settlement orders was set aside and the case to be heard by a different magistrate.

Appeal allowed.

45 **Cases referred to**

Ivan Harold Gibson v Salaseini Nakacia (HBA0017/2001); *Protima Devi v Rajeshwar Singh* (HBA0017/2001), cited.

Sanders v Sanders (1967) 116 CLR 366; [1968] ALR 43; *White v White* [2001] 1 All ER 1, considered.

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E. Veretawatini for the Appellant

V. Maharaj for the Respondent

- Singh J.** “Divorce creates many problems. One question always arises. It
5 concerns how the property of the husband and wife should be divided and
whether one of them should continue to support the others. Stated in the most
general terms the answer is obvious. Every one would accept that the outcome on
these matters, whether by agreement or court order, should be fair, more
realistically, the outcome ought to be as fair as it possible in the circumstances.
10 But every one’s life is different. Features which are important when discussing
fairness differ in each case. And sometimes different minds can reach different
conclusions on what fairness requires. Then fairness like beauty lies in the eyes
of the beholder.” — *White v White* [2001] 1 AC 596; [2001] 1 All ER 1; [2000]
UKHL 54.
15 Counsels in the appeal before me argued with great deal of moderation. They
both concluded that the proceedings in the Magistrates Court were irregular. I
agree and was minded to send the case back for rehearing by another magistrate.
However, they requested that some guidelines are warranted in divorce cases for
resolutions of property matters by magistrates.
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Facts

- The parties were married in April 1986. It appears from ages of children that
the parties had lived in de facto relationship prior to the marriage. The petition
names three children born in August 1983, September 1984 and June 1986. The
25 petition was filed in December 2002 by which time one child was over 19 years,
another over 18 years and third one 16 years.

- On 13 February 2003, Decree Nisi was ordered to become absolute on expiry
of 40 days. The custody of all three children (two of whom were over 18 years)
was granted to the Petitioner with reasonable access to the Respondent. The
30 Respondent husband was ordered to pay maintenance of \$100 fortnightly for the
children, until further order of the court. The Petitioner and three children were
permitted to occupy the matrimonial home. The matrimonial property was
ordered to be transferred to the three children and even though it is not very clear
the Petitioner and Respondent were to be trustees.

- 35 On 24 March 2003, the decree was made absolute. The court records show that
the Respondent/Appellant had agreed to various orders being made including
orders for transfer of property. He was unrepresented.

- On 28 February 2003, the Respondent/Appellant wrote a letter directly to the
magistrate (not the magistrate who had heard the formal proof) asking for review
40 of orders made on Decree Nisi. This application was entertained. The
Respondent’s wife was called to court. Affidavits were ordered to be filed by both
parties. No oral evidence was called for. A fresh order was made in respect of
matrimonial property under which the matrimonial property was ordered to be
sold, mortgage paid off, the Respondent husband’s contribution be paid back to
45 Fiji National Provident Fund and surplus to be shared equally between the
Petitioner and the Respondent.

Need to examine title before making orders

- 50 There are certain features of this case which are quite disturbing. The husband
was unrepresented. He may have consented to the orders but the issue remains
did he really understand the implication of property orders which were going to

be made. The records show that no evidence was led about the matrimonial property. No copy of title was called for. The court was not even aware whether it was Crown Land, Native Land or freehold. Enquiries regarding the nature of title are always relevant in Fiji as in case of state land and native land and

5 Housing Authority land the consent to transfer must be obtained from the relevant authorities before transfer of property can be done. The obtaining of consent to transfer from these authorities is a statutory requirement which cannot be overridden by the courts. At times properties are mortgaged to banks which might oppose certain transfers unless they are paid-off. Their view must be taken

10 instead of only later finding that orders made cannot be put into practice. The court must always insist on counsels or parties producing a certified true copy of a title which shows current endorsements on title as there may be mortgages, charges or caveats against the title and which cannot be ignored when property matters are being dealt with. Existence of such interests on the title must be

15 addressed before transfers to one party or children can be ordered.

The husband's application for review of Decree Nisi by letter is equally disturbing. I was at a loss how the second magistrate had reheard the property matter. It was Mr Vijay Maharaj, counsel for the Applicant who made a copy of that letter available to me. The letter was not part of the record. There might have

20 to be insistence on proper applications as it has implications for the revenue. No filing fees was paid on this letter so the application was not properly before the court. It also appears from the record that the second magistrate was not merely carrying out a variation of the property order but looking at it de novo leaving two seemingly contradictory orders in respect of the matrimonial property on the

25 title. I set aside both the orders so far as they relate to the property at 34 Velau Drive which parties agree is matrimonial property held jointly by the parties.

Parties agree that divorce was properly granted so that is not an issue.

Parties must understand consequences of orders

30 In matrimonial matters the court is not there merely to rubber stamp the wishes of the parties. The court must comply with the requirements of the Matrimonial Causes Act. Facts must be proved to the reasonable satisfaction of the court — see s 93 of the Act and also *Ivan Harold Gibson v Salaseini Nakacia* (unreported, HBA0017/2001) judgment of Scott J where he has gone to great length to explain

35 the requirements of the Act and the need for court to be reasonably satisfied on evidence before making the orders.

Property settlements are done under s 86 of the Matrimonial Causes Act. The court can make such orders it "*considers just and equitable in the circumstances of the case*". The court has a discretion in making such orders. The section grants

40 the court the discretion. Very often both parties or a party in divorce proceedings are unrepresented. They may be tired of a relationship which has turned out to be tumultuous. Their minds may be focused on one thing — to bring an end to that relationship without appreciating other consequential orders. Accordingly great care ought to be taken to see that parties fully appreciate the type of orders and

45 their consequences. The court must ensure that the party to be affected is aware of the nature of the orders sought against him and adequate opportunity is given to him/her to present his/her case in opposition to making such orders. As Barwick CJ in *Sanders v Sanders* (1967) 116 CLR 366; [1968] ALR 43 at 48 put it:

50 Great care ought to be exercised to ensure that opponent parties are fully apprised of what is claimed against him or them before the court's powers are exercised. Substantial

adherence to the Matrimonial Causes Rules will no doubt be the most efficacious way of ensuring both that knowledge and adequate opportunity to meet the claims in fact being made.

5 **Factors to look at**

When an order for settlement of property is sought, then it becomes important to decide how and when the property was acquired as these factors might decide whether the property is a matrimonial property. Factors to look at would be:

- (a) Whether the property was acquired by a party before marriage.
- 10 (b) Whether the property had been inherited by a party by disposition in a will from his parents or a relative. This would suggest that such a property does not form part of the matrimonial property.
- (c) Third, we have situation where property is acquired during marriage but transferred into the name of one party. The Matrimonial Causes Act
- 15 gives no criteria or factors to look at when deciding whether a property is a matrimonial property or when making orders under s 86(1).

Respective contributions can be taken into account in consideration of an appropriate order under s 86(1) — *Protima Devi v Rajeshwar Singh* (unreported, HBA0017/2001). Contribution is not solely confined to financial contribution. It

20 is much more than that. There must also be an end to the obsolete assertion that a breadwinner's contribution weighs heavier than the one who looks after the home. The nature of a breadwinner's and a homemaker's contributions are intrinsically different. Each should be recognised as no less valuable than the other. A wife who stays home and looks after the children contributes in her own

25 special way to the family. Motherhood too is a profession. There is no basis for discriminating between a breadwinner's and a homemaker's contributions. What is expected by legislature is for court to make a fair and just property settlement. The final order is that the property settlement orders in respect of 34 Velau Drive are set aside. The matter is to be reheard by a different magistrate.

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Appeal allowed.

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