

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

CIVIL APPEAL NO. ABU0073 OF 2006S
(High Court Civil Action No. HBA 017 /05)

BETWEEN:

MOHAMMED JUBAR

Appellant

AND:

FARIDA

First Respondent

RAVIN CHAND

Second Respondent

Coram:

John Byrne, JA
Izaz Khan, JA
Andrew Bruce, JA

Hearing:

Thursday, 3rd July 2008, Suva

Counsel:

G. O'Driscoll for the Appellant
N. Khan for the Respondents

Date of Judgment: Wednesday, 9th July 2008, Suva

JUDGMENT OF THE COURT

1. This appeal was listed for hearing on 26th June, 2008. On that date, counsel for the appellant whose instructing solicitors were in Lautoka informed the court that the submissions for the respondent had not been received. However, the respondent's counsel was able to prove timely service of the submissions, showing that the problem lay with the appellant's solicitors in Lautoka.
2. As the appellant's counsel needed time to respond to the appellant's submissions, a copy of which was made available to him in court, on his application. the hearing

was adjourned with an order that the appellant pay \$2,000.00 costs to 3rd July, 2008 when it was heard.

3. On the petition of the appellant, based on the wife's adultery the husband; Mohammed Jubar applied for divorce and orders relating to the division of property, the learned Resident Magistrate at Lautoka, Mr Ajmal G. Khan ordered the dissolution of the marriage, a 70-40 division of the property in the husband's favour resulting in a \$52,000.00 payment to the wife after proper valuation of the matrimonial assets and the contributions of the parties and ordered that the husband have custody of the two children who were under 21 with reasonable access to the wife.
4. The husband appealed on the order relating to the distribution of the property to the High Court at Lautoka and the appeal was heard by Finnigan J who gave his judgment on 7th July, 2006 dismissing the appeal.
5. There were no issues relating to custody and maintenance.
6. Only two grounds were relied upon by the husband in the appeal before Finnigan J. The first ground was that the wife was not entitled to any property because of her adultery and the second one alleged that there was a lack of direct evidence on the valuation of the matrimonial property
7. Although the first ground was also a ground in the appeal to this court, it was not pressed. However, we think that it might be a good idea for this court to say something about it to clarify the position.
8. Before Finnigan J, it was argued that the decision of Sadal J in an unreported decision in *Singh v Singh & Ors Divorce Action No 6/88 (Lautoka High Court) (Sadal J)* where His Lordship had said: *As to the question of the maintenance of the respondent I do not make any order as, in my view, she is not entitled for any maintenance or settlement of any property because of her adultery applied in his case.*

9. Finnigan J noted in paragraph 4 of his judgment that the submissions filed on behalf of the husband concentrated on the provisions of s. 7 of the ***Maintenance and Affiliation Act Cap 52*** which states:

No order shall be made under the provisions of this Act for the maintenance of a married woman if it shall be proved that such married woman has committed an act of adultery unless the court is satisfied that the husband has condoned or connived at or by his wilful neglect or misconduct conducted to such act of adultery.

The exceptions did not apply in this case.

10. Finnigan J said that s7 of the ***Maintenance and Affiliation Act Cap 52*** only applied to maintenance and not to property matters. He referred to s. 86 of the ***Matrimonial Causes Act Cap 51*** which requires a fair, just and equitable distribution of matrimonial property and wondered why Parliament would take this right away from a spouse by s7 of the ***Maintenance and Affiliation Act Cap 52***. He said that he would refuse to follow Sadal J's dictum.

11. We wholeheartedly agree. In our view, adultery is not a basis for disentitling a wife from the fruits of a property distribution by the court under s. 7 of the ***Maintenance and Affiliation Act Cap 52***.

12. As Finnigan J noted, it might be a major factor in the fair, just and equitable decision regarding maintenance and we leave the decision on that point to another day.

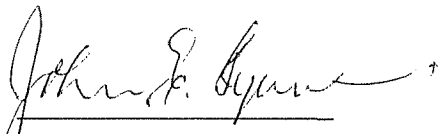
13. On its proper construction s. 7 only applies in maintenance cases and would have no application to property divisions.

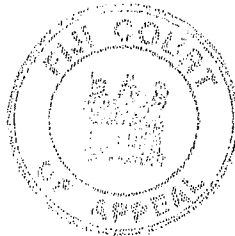
14. The second ground of appeal before this court was that the valuation of the matrimonial property was incorrect. This ground was argued before Finnigan J who said:

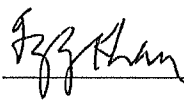
The only other matter advanced in support of the appeal was a lack of direct evidence for the valuation of the matrimonial property. The husband (Appellant) gave his evidence about the value of the property and sought a matrimonial property order. The order was made on the case presented. I cannot see any grounds for his complaint.

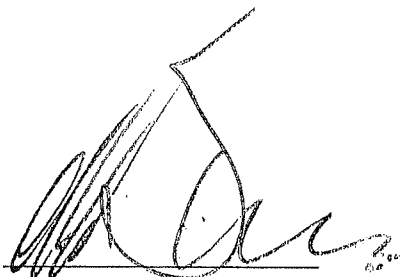
15. We agree and add that the husband presented extensive evidence on the valuation including evidence on the house and two taxis.

16. We do not believe any error was made by Finnigan J in coming to the conclusions he did regarding the valuation of the matrimonial property and we confirm the dismissal of the appeal and order the husband to pay the respondent's reasonable costs as agreed or assessed which orders were made after the hearing on 3rd July, 2008.


Byrne, JA




Khan, JA


Bruce, JA

Solicitors:

Iqbal Khan and Associates, Lautoka for the Appellant
Yash Law, Lautoka for the Respondents