IN THE MAGISTRATE'S COURT, SUVA

R. I. JALAL LLM (Hons) (NZ)

Matrimonial Cause No: 7 of 1980

Supreme Court No: 261 of 1980

BETWEEN

MALTI VATI SINGH d/o Dal Ram Singh PETITIONER

- and -

SATYENDRA PRASAD f/n Ghurahu Prasad RESPONDENT

FINDINGS AND RECOMMENDATION ON ANCILLARY RELIEF

The matter remaining for decision in this case is an application for an ancillary relief under Section 86 of the Matrimonial Causes Act whereby the petitioner seeks -

(a) occupation of the matrimonial home at Nasinu 4 miles, Suva, Fiji;

(b) that an order be made that the respondent transfer a one half share in the matrimonial home to the petitioner and

(c) such further and other relief as may seem just.

Regrettably this matter has had a long career of litigation having been before the Courts since 1980.

By petition filed in February of that year the wife-petitioner sought -

(1) dissolution of marriage on grounds of her husband's drunkenness and cruelty;

(2) custody of the children of the marriage and

(3) the settlements set out above.

The respondent by his answer defended the petitioner's grounds and cross-petitioned on grounds of the petitioner's adultery. He made no answer to the prayers for ancillary relief (see R.194(3) M.C. Rules). After hearing the parties the then learned magistrate recommended -

(1) that the petitioner's prayer for dissolution be dismissed;

(2) that the respondent cross-petition be granted and

(3) custody of the children of the marriage to go to the petitioner together with an order for maintenance of children.

On the question of ancillary relief, the learned magistrate found he had insufficient evidence to make any finding and recommended dismissal of that prayer.

His recommendations were accepted by the Supreme Court and the appropriate decree issued. The petitioner appealed to the Court of Appeal following which an order was transmitted to the magistrate's court that further evidence be taken on the question of ancillary relief. The Fiji Court of Appeal decision and findings were not forwarded to the magistrate's court only the order. Thus it was not then clear to the magistrate that in fact the petitioner's appeal had resulted in her being granted dissolution of marriage on her own petition.

It was under these circumstances that this magistrate found that section 89 of the Matrimonial Causes Act precluded him from making a finding on ancillary relief. When the matter was again referred to the Fiji Court of Appeal that court sent it back to the magistrate in short order.

In the event there has been in fact very little further evidence over and above that tendered in 1980 when the then

learned magistrate declined to make any finding. Counsel for the parties offered only the evidence of the petitioner and respondent recorded prior to the Court of Appeal order. As well, the submissions of counsel while not unhelpful, indicated the uncertainty as to the law in these matters.

Thus, the recent decision of the Fiji Court of Appeal in Protima Devi v. Rajeshwar Singh C/A 29/85 provides a much needed clarification of the law in Fiji on matrimonial property settlements and indicates that courts have indeed wide powers in this field.

In that case the Fiji Court of Appeal was dealing with the powers of the court to hold or infer a constructive trust on the part of a person in whose name property is held, in situations of proven contribution and of a common intention of beneficial ownership express (or in matrimonial situations) imputed Pettit v. Pettit 1970 A.C. 777, Gissing v. Gissing 1971 A.C. 886 and Rathwell v. Rathwell 1978 83 DLR 289 a Canadian case also cited in Hayward v. Giordani 1983 NZLR 140.

The Fiji Court of Appeal also pointed out that Section 86 of the Matrimonial Causes Act (Fiji) also bears close affinity to the 1973 U.K. Matrimonial Causes Act and to the statutory provisions obtaining in N.Z. which as is known give wide powers. It is also in fact word for word with the same numbered section of Australian Matrimonial Causes Act 1959 from which our own Act derives.

The powers under this section and sections 84 and 87 were considered by the High Court of Australia in Sanders v. Sanders 1968 ALR 43. The Fiji Court of Appeal has in Protima Devi v. Rajeshwar Singh 29/85 adopted the statements in Sanders regarding these sections as also stating the law in Fiji.

That decision says that section 86 (and the complementary sections 84 and 87) "gives an extensive and flexible power to the court 'settle' property upon a wife as a means of providing her maintenance and for that of the children". But "the court is not limited in the exercise of the power given by section 86(1) 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 upon her in adjusting as between them the rights or moral claims of the spouses upon the dissolution of their marriage". (emphasis added).

When a decree of dissolution of marriage has been made "a readjustment of the property rights of the spouses may be required if consequential injustice to one or other of the spouses and to the children is not to result". (Lansell v. Lansell 1965 ALR 153 cited in Sanders). Thus the provisions of Part XIII of the Matrimonial Causes Act and the law on constructive trusts provide ample scope for orders of settlement but as is said in Protima Devi's case when an application is made under Part XIII of the Matrimonial Causes Act the width of powers there, may leave little need to resort to the general law as to trusts.

Proceeding then to the facts in this matter, the parties were married in 1962 and first resided in the Respondent's sister-in-law's home with her family of 4 children.

In 1964 the land at Nasinu 4 miles was purchased for £400 and by 1966 the matrimonial home had been completed on this land for a contract price of £2335.00. That was financed by a loan on mortgage of £2325 i.e. £10 short of the total cost of construction.

Additions to the home were made in or about 1969 in the form of an extra bedroom and a flat. The extra bedroom was to help accommodate their family of by then 3 children and the flat to produce additional income and no doubt to enhance the asset value. These additions were financed by a further loan of £4000. Both loans had been paid off by 1979.

Thus, translated into dollars of today, the capital cost of the matrimonial home and the flat was $9471. For the purposes of this case I have made no distinction between flat and matrimonial home as such. They are both part and parcel of the same building and form one asset in fact as well, on the evidence in this case the flat was completed to add to the viability of preserving the matrimonial home. It was valued for the purposes of this application at $55,000. This valuation did in fact include additions by way of a carport and sealing of the driveway carried out subsequent to separation. This was said to have cost some $4000. While appreciating that these improvements might be more or less valuable than cost, in face of no information to the contrary I consider it fair to deduct the whole cost figure of $4000 to establish the value of the house at the time of separation of the parties.

Of course other items, such as the parties savings, the furniture, and the family car could also be taken to form part of matrimonial assets. But the lack specific information before the court as to the value at separation of furniture or car or for example the proportion of the Respondent's superannuation to be added in make it impossible for a finding on these or for consideration of the "other ancillary relief" sought.

For this reason the petitioner's actual prayers regarding the matrimonial home are the only matters on which any recommendation can be made. However such evidence as there is on those other items is relevant to any findings in respect of what order if any should be made regarding the matrimonial home.

The petitioner says that throughout her marriage she had been a wage earner and had contributed to the household expenses. She had bought the children clothes and the household linen. She had paid for or at least contributed substantially to the children's education. She had bought the family furniture and the family car.

As to the house itself, it had been at her instigation that the land was bought and it was she who provided the £400 when conditions were being made to the house, as an employee of M.H. Ltd., she was able to obtain staff discounts on materials.

The Respondent says that it was he who bought and paid for the land, that the house was erected under contract let by and financed by him. His wife made no contributions towards this at all. The Petitioner in fact acknowledged in writing that the house was his (X6). As to household expenses he alone paid the grocery bill just as he contributed his share to the maintenance and education of the children.

Assessing this evidence I find that the parties made full use of their advantage of joint employment. They were thrifty and acquired substantial assets and savings. At separation the wife had $13,000 in savings while the husband had $4,000 in savings but as well, shortly after, a lump sum superannuation of $40,500. He also had the house and flat in his name valued at say $51,000 and the income from the flat.

From the outset it is plain that as a married couple they set out to provide a home for themselves and their family and such other amenities as by their joint efforts they could attain. I find it highly unlikely to say the least that each was even then, reserving to himself or herself exclusive ownership of this item or that. It is plain that by division of the commitments they were able to complement each other's efforts. That is to say, the ability of one partner to undertake a share of the commitments freed the other to take care of the rest.

For example by the petitioner providing or contributing clothing or education for the children, or providing the furniture or family car allowed the Respondent to undertake the commitments under the mortgages with greater facility.

The Respondent says the Petitioner's savings of $13,000 show she was not committed to any joint effort but was setting aside assets for herself. But he himself had savings of $4000 and, would his superannuation contributions have been as substantial or made at all if his wife had not been contributing? (I say this too keeping in mind that his superannuation comprises savings throughout his working life and not just during the course of his marriage).

The fact that the title is in the Respondent's name is of course a relevant factor but not an insuperable difficulty under Section 86 of the Matrimonial Causes Act. Despite this factor and the receipt for the section purchase of the land being in the Respondent's name I also find the Petitioner's claim of putting up the purchase money plausible and worthy of belief.

As to the Petitioner's acknowledgment of the Respondent's exclusive ownership made in 1978, I take note that at the time it was made, reconciliation for the sake of the children was

uppermost in her mind. I accept too her statement that she was not then aware of her matrimonial rights.

Thus, on the basis of contribution alone I would recommend a share in the matrimonial home. But Part XIII of the Matrimonial Causes Act and Section 86 in particular is not dependent on contribution alone Sanders v. Sanders (supra). It empowers the Court to make such settlement of property as it considers just and equitable in the circumstances.

I find then and take into account the following matters in particular. The parties set out to use both their incomes for the best financial advantage for the marriage. They acquired a home for themselves and their family. That home was financed almost totally on borrowed money.

By sharing responsibilities i.e. by their individual contributions those mortgages were paid off substantially if not totally during the course of the marriage. I find that the efforts of the Petitioner and the Respondent in achieving this were equal, and accordingly would recommend that the Petitioner be accorded a half share in the matrimonial home.

I would add that in coming to this conclusion I have also considered that the Respondent took the family car and part of the furniture. There was as I have said no value placed on these though from cost prices of these the value at separation would not I think amount to a large sum. In any case I balance against that, the fact that the Respondent retains housing and the income from the flat.

In her prayer she seeks possession as well. However counsel for the petitioner had advised the court that the petitioner has left Fiji permanently hence that application need not be considered.

Her prayer for a transfer to herself of a half share in the matrimonial home would also therefore seem inappropriate quite apart from the time lapse and additional value that has occurred since separation.

While Section 86 of the Matrimonial Causes Act does not appear to contemplate a mere order of a lump sum payment, it may well in conjunction with Section 87 empower the making of a money settlement as a substitution for the settlement of property or an interest therein where that would otherwise be just and equitable (Smee v. Smee 1966 ALR 258). This seems to me to be such an appropriate situation. Accordingly I recommend that the Respondent pay to the Petitioner half the value of the matrimonial home as at separation in 1979 namely half of $51,000 i.e. $25,500 as full settlement of her interest in the matrimonial home. Such payment to be made within say 3 months.

MAGISTRATE

no date - must be more than 7 yrs - 61c decree after Reg's case