

Bennett v Bennett

Supreme Court Divorce
Case 31/1989

10 12 October 1989

*Divorce - grounds for divorce - continuous separation for 2 years or more -
effect Divorce (Amendment) Act 1988*

Constitution - retrospective legislation - effect of clause 20 of Constitution

20 The petitioner presented a petition in April 1989 for divorce on the ground that he and his wife had been continuously separated for 2 years or more, since they had been living apart since 1984. The Divorce Act originally provided by section 2(f) that the period of separation to qualify for divorce was 5 years but the Divorce (Amendment) Act 1988 which came into force on 31 January 1989, substituted a lesser period of 2 years. It was argued by the respondent on a motion on a preliminary point of law that the period provided by the Amendment Act only started operating from 31 January 1989, and so had not been completed when the petition was filed in April 1989, because clause 20 of the Constitution prohibited the enactment of retrospective laws which affected rights and privileges.

30 HELD:

Dismissing the motion.

- (i) a law is not retrospective merely because it destroys vested rights, but only if it purports to come into force prior to its date of making.
- (ii) in any event, the respondent had no rights or privileges which had been destroyed by the Amendment Act.

Cases considered:

40 Fulivai v Kaianuanu (1961) II Tongan LR 178

Statutes considered

Constitution of Tonga, clause 20

Divorce Amendment Act 1988

Counsel for petitioner : Mr Macdonald
Counsel for respondent: Mrs Vaihu

Webster J

Judgment:

In this case the Petitioner Karl James (George) Bennett petitions for divorce on the grounds that he and his wife the Respondent Maria Violeta Eloja Bennett have been separated for a continuous period of 2 years or more immediately preceding the presentation of the petition on 20th April, 1989.

The parties are said to have seen living apart since 1984.

The Respondent disputes the petition, among other grounds, on the basis that the Divorce (Amendment) Act 1988 cannot apply in this case. This had been dealt with as a preliminary matter before fixing a date for trial.

This Act amended section 2 (f) of the Divorce Act (Cap.18) to change the period of separation qualifying for divorce from 5 years to 2 years. The new Act was published in the Gazette of 31st January 1989 and came into force on that day. The Respondent therefore claims that effective time under section 2(f) will only start running from that day and accordingly that the required continuous period of 2 years has not been completed.

Mrs Vaihu for the Respondent bases this defence on clause 20 of the Constitution, which states-

"20. It shall not be lawful to enact any retrospective laws in so far as they may curtail or take away or affect rights or privileges existing at the time of the passing of such laws."

In opposing this submission Mr Macdonald for the Petitioner submitted that the Constitution should be read liberally and not word ; that clause 20 simply repeats the common law rule against retrospective legislation, against which there is a presumption; and that exceptions to the common law rule were matters of procedure or evidence or provisions including new remedies. (Halsbury's Laws (4th Edn) Vol 44 paras 921-925).

Mr Macdonald further submitted that the intention of the Divorce (Amendment) Act 1988 was to make it easier for divorces to be obtained, in this case by reducing the required period of separation to 2 years. He said there was nothing in the words of the Act to qualify the period of 2 years in the way put forward for the Respondent.

Mr Macdonald also submitted that the change made in this respect by the 1988 Act was a matter of procedure or evidence, but this cannot be right as the change is clearly a change in the substantive law. In support Mr Macdonald cited 2 English cases, Blyth v Blyth [1966] 1 All ER 93 (CA) per Willmer LJ at 95H, and Carson v Carson and Stoyek [1964] 1 All ER 681 per Scarman J at 686E. However a reading of these cases shows that while they all concerned divorce and the (English) Matrimonial Causes Act 1973, the first 2 cases dealt with proof of matters rebutting condonation and were both clearly procedural, while the third case dealt with the revival of condoned adultery which was a matter of substantive law; so the cases are not on all fours with the present one. A change providing for divorce after 2 years separation instead of 5 years separation is substantive and far from merely a question of evidence or procedure

In the interpretation of clause 20 of the Constitution this Court is bound by the decision of the Privy Council in 1961 in Fulivai v Kaiuananu (2 TLR 178), in which Hammett CJ said -

"It is clear that clause 20 does not forbid the passing of any laws which affect rights existing at the time of their enactment. It would of course be rather unusual if it had done so, because almost all legislation affects the rights of some person or other in

the community. If the Legislature was precluded from passing any enactment that affected the rights of anyone, existing at the time, its law making powers would be severely restricted and limited in a most unusual manner.

Clause 20 of the Constitution does not even forbid the passing of retrospective laws. What it does do however is to forbid the enactment of laws which are both (a) retrospective in effect; and (b) affect the rights of persons which exist at the time the laws are enacted.

It is necessary to examine and consider the wording of the amendment to decide whether it is retrospective in effect."

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The Privy Council then goes on to look at the amendment, which altered the law of succession by giving statutory effect to the Tongan custom on the rights of adopted and blood children. The amendment was not to take effect until the death of the existing holder. Hammett CJ further states -

"(The amendment) does not, therefore, appear to us to have any retrospective effect. On the contrary its effect takes place in the future ... In our view it is not the enactment itself that is retrospective in effect. All that has been done is to enact that in future the line of descent shall be ascertained by reference to certain events that happened in the past. In our opinion legislation of this character does not fall within the meaning of the term "retrospective legislation".

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All of that passage is very relevant in this case, where the Court will have to decide whether a divorce should be granted by reference to certain events in the past. Following this guideline this Court considers that the 1988 Act is not retrospective.

This is fortified by the English case of R v Inhabitants of St Mary Whitechapel (12 QB 127 per Denman CJ and quoted in Master Ladies Tailors v Minister of Labour & National Service [1950] 2 All ER 525 at 527 -

"the statute is in its direct operation prospective, as it relates to future removals only, and that it is not properly called a retrospective statute because a part of the requisites for its action is drawn from time antecedent to its passing."

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Before leaving this question Hammett CJ added -

"In view of our opinion on this matter, it is not really necessary for us to decide what meaning should be attached to the words "rights or privileges" in this amendment in the expression (in clause 20) "curtail or take away or affect rights or privileges existing at the time of passing" of the enactment. Nevertheless, whilst this point was not argued before us, it would appear that the section only refers to "vested" rights and not to "contingent" rights."

In its plain English meaning, "retrospective" means simply "applying to the past".

140 In the well established case of West v Gwynee ([1911] LR 2 CHD 1,11) it was said by Buckley LJ -

"Retrospective operation is one matter. Interference with existing rights is another.

If an Act provides that as at a past date the law shall be taken to have been that which it was not, that Act I understand to be retrospective."

Or in other words a retrospective law is one that states that it shall be deemed to have come into force prior to its date of making, but it does not follow that a law is retrospective merely because it does destroy vested rights.

150 This Divorce (Amendment) Act 1988 does not in any way purport to be in force prior to its date of publication and so it is not retrospective on this test either. So for this reason

and the reason given above, clause 20 of the Constitution does not apply to the 1988 Act.

I should add that I also do not consider - and Mrs Vaihu could not assist me - that the Respondent has any right or privilege which was curtailed or taken away or affected by the 1988 Act. I do not believe that the law can be said to recognise or foster a right to live separately from your husband for up to 5 years without being divorced. The period of separation is not a matter of right but the period which the law recognises as sufficient to establish a ground of divorce.

Therefore for all these reasons the preliminary motion of the Respondent fails and the petition can proceed to trial.

Costs of the hearing of the preliminary motion (to be taxed) are awarded to the Petitioner against the Respondent.