# MANCHANDA v MANCHANDA

[1995] 2 FLR 590

Court of Appeal

Leggatt LJ and Thorpe J

17 May 1995

*Divorce – Decree nisi granted on wife's petition – Husband applying for decree absolute before entitled so to do – Matrimonial Causes Act 1973, s 9(3) – Husband failing to give wife notice of application for decree absolute – Wife seeking to set aside decree absolute – Whether decree void ab initio or merely voidable*

The wife was granted a decree nisi of divorce on her petition on 27 July 1994. Decree absolute was applied for by the husband on 16 September 1994 and was pronounced on 20 September 1994. On 29 September 1994 the husband went through a ceremony of marriage with another woman. The wife applied to set aside the decree nisi on the basis that the necessary period of time, as provided for by s 9(2) of the Matrimonial Causes Act 1973, had not elapsed before the application by the husband had been made, and that, contrary to r 2.50 of the Family Proceedings Rules 1991, no notice of it had been given to the wife. At first instance, the judge held that since a decree absolute was a judgment in rem, rather than in personam, the decree was not void but merely voidable, and that in the exercise of his discretion, the decree would be upheld. The wife appealed.

**Held** – allowing the appeal – the earliest date upon which the husband, as opposed to the wife, could apply for decree absolute was, pursuant to s 9(2) of the 1973 Act, 3 months from the earliest date upon which the wife could have applied for her decree nisi to be made absolute, ie 8 December 1994. Whilst it was conceded that the application had been made before the husband was entitled to make it, it had been contended for the husband that since a decree absolute was a judgment in rem rather than in personam, the court should treat the decree as voidable rather than as void ab initio. There was, however, a distinction to be drawn between cases in which the court lacked jurisdiction because it had no power to grant a decree absolute, and cases in which the exercise of a jurisdiction enjoyed by the court was flawed: in the former case, the decision would be void, and in the latter merely voidable. In the present case, the effect of s 9(2) of the 1973 Act was that the court did not have jurisdiction to grant the husband's application for decree absolute because the necessary period of time had not elapsed. The case therefore fell in the former category rather than the latter. Moreover, failure on the husband's part to serve a summons on the wife as required by the Family Proceedings Rules 1991 rendered the decree absolute null and void. As such, the wife was entitled to have the decree set aside (see p 595C-E below).

*Woolfenden (Otherwise Clegg) v Woolfenden (Otherwise Clegg)* followed.

## Statutory provisions considered

Matrimonial Causes Act 1973, s 9(2)
Family Proceedings Rules 1991 (SI 1991/1247), r 2.50

## Cases referred to in judgment

*Batchelor v Batchelor* [1984] FLR 188, [1983] 1 WLR 1328, [1983] 3 All ER 618, QBD
*Butler v Butler, The Queen's Proctor Intervening* [1990] 1 FLR 114, FD
*Callaghan v Hanson-Fox (Andrew)* [1992] Fam 1, [1991] 3 WLR 464, [1992] 1 All ER 56, sub nom *Callaghan v Hanson-Fox and Another* [1991] 2 FLR 519, FD
*Craig v Kannsen* [1943] KB 256, 1 All ER 108

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*Dryden v Dryden* [1973] Fam 217, [1973] 3 WLR 524, [1973] 3 All ER 526
*Ebrahim v Ali (Otherwise Ebrahim) and Queen's Proctor (Intervening)* [1984] FLR 95, sub nom *Ali Ebrahim v Ali Ebrahim (Queen's Proctor Intervening)* [1983] 1 WLR 1336, [1983] 3 All ER 615, FD

*Everitt v Everitt* [1948] 2 All ER 545, CA
*F (Infants) (Adoption Order: Validity), Re* [1977] Fam 165, [1977] 2 WLR 488, [1977] 2 All ER 777
*F v F* [1971] P 1, [1970] 2 WLR 346, [1970] 1 All ER 200
*McPherson v McPherson* [1936] AC 177
*Marsh v Marsh* [1945] AC 271
*Nissim v Nissim* [1988] Fam Law 254
*P v P* [1971] P 217, [1971] 2 WLR 510, sub nom *P v P and J* [1971] 1 All ER 616, CA
*Pritchard, Re, Pritchard v Deacon* [1963] Ch 502, [1963] 2 WLR 685, [1963] 1 All ER 873, CA
*Walker v Walker* [1987] 1 FLR 31, CA
*Wiseman v Wiseman* [1953] P 79, [1953] 2 WLR 499, [1953] 1 All ER 610, CA
*Woolfenden (Otherwise Clegg) v Woolfenden (Otherwise Clegg)* [1948] P 27, [1947] 2 All ER 653
*Wright v Wright* [1976] Fam 114, [1976] 2 WLR 269, [1976] 1 All ER 796

*Timothy Scott QC* for the wife
*Paul McCormick* for the husband

**LEGGATT LJ:** On 27 July 1994 a decree nisi of divorce was granted to Donna Barbara Manchanda on her cross-petition. On 16 September 1994 her husband Keith Sajiv Manchanda applied for a decree absolute, and on 20 September 1994 the decree was made absolute. The wife applied to set aside the decree absolute on the grounds that the necessary period of time had not elapsed before the application was made, and that no notice of it had been given to the wife. On 11 October 1994 in the Brentford County Court Judge Hague QC dismissed the application. Against that order by leave of the judge the wife now appeals. She apparently does so because there are contested ancillary relief proceedings, and the financial arrangements for her might be affected by the decree absolute if the husband died before they had been resolved.

By s 9(2) of the Matrimonial Causes Act 1973 (so far as material):

> 'Where a decree of divorce has been granted and no application for it to be made absolute has been made by the party to whom it was granted, then, at any time after the expiration of three months from the earliest date on which that party could have made such application, the party against whom it was granted may make an application to the court ...'

Rule 2.50 of the Family Proceedings Rules 1991, Part II provides that:

> '(2) An application by a spouse for a decree nisi pronounced against him to be made absolute may be made to a judge or district judge, and the summons by which the application is made ... shall be served on the other spouse not less than four clear days before the day on which the application is heard.'

Since the wife had to wait for 6 weeks before applying, the earliest date



on which the husband was entitled to apply was 8 December 1994. Not only did he apply on 20 September 1994 but no summons was served on his wife. It is not suggested that the husband was fraudulent in applying as he did. On 29 September 1994 he went through a ceremony of marriage with another woman.

The judge cited at length from *McPherson v McPherson* [1936] AC 177 in which there was an irregularity of procedure in a divorce case in that the trial was not in open court. The Privy Council, affirming the Supreme Court of Alberta, held that the resulting decrees nisi and absolute were voidable only and not void. From that case the judge inferred that because a decree absolute is a judgment in rem affecting third parties,

such a decree is voidable, not void. That emboldened him to the view that the judgment of Barnard J in *Woolfenden (Otherwise Clegg) v Woolfenden (Otherwise Clegg)* [1948] P 27 is fundamentally flawed because he paid insufficient regard to that principle. In that case, as in this, the party against whom the decree nisi was obtained applied for it to be made absolute and without notice to his wife. Both were statutory requirements. Barnard J referred to *McPherson v McPherson* (above) and to *Craig v Kannsen* [1943] KB 256. He said that in the latter case:

> '... it was held that "failure to serve process where service of process is required renders null and void an order made against the party who should have been served. The court can set aside such an order in its inherent jurisdiction and it is not necessary to appeal from it".Lord Greene, after citing a number of authorities, stated in the course of his judgment:
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> > "Those cases appear to me to establish that a person who is affected by an order which can properly be described as a nullity is entitled ex debito justitiae to have it set aside."'

Barnard J then said laconically:

> 'In view of the fact that the husband has not complied with the statute, I have come to the conclusion that I cannot treat the making of this decree absolute as a mere irregularity, and I must treat it as a nullity.'

It is accepted that that case is indistinguishable from the present case. But the judge, considering himself to be exercising co-ordinate jurisdiction, refused to follow it. The question is whether, not having been criticised in the ensuing period of nearly 50 years except by Judge Hague, *Woolfenden* was correctly decided. The only other case cited by Judge Hague was *Craig v Kanssen* (above). The judge felt able to distinguish that case on the ground that it is clearly dealing with judgments in personam and has no application where the judgment is in rem. But that ignores the fact that in *Everitt v Everitt* [1948] 2 All ER 545 Lord Merriman P, giving the leading judgment in this court, said at p 546H:

> 'It is well settled that a judgment obtained against a party in his absence owing to his not having been served with the process is not merely voidable for irregularity but is void as a nullity: see *Craig v Kanssen,* and the cases there cited. Manifestly, this general principle applies with full force to a judgment affecting the status of the party: *Marsh v Marsh*
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> [1995] 2 FLR 593
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> [1945] AC 271.'

The judge summarised the principle that he was applying by saying that:

> '... in any case where third parties would become involved the decree absolute cannot be set aside simply as a matter of right because it is voidable and not absolutely void.'

He added that if he had a discretion he would exercise it in favour of upholding the decree absolute; and that conclusion is not challenged.

For the wife Mr Timothy Scott QC submitted that a decree of divorce can only be made absolute upon application by a competent party and that before the time appointed by s 9(2) of the 1973 Act the husband in the present case was not competent to make such an application. An order purportedly made by the court pursuant to an application by a party who is not competent to apply under the relevant statutory provisions must be a nullity, because the court has no jurisdiction to grant a

decree absolute if those provisions have not been complied with. He further submitted that the principle of *Craig v Kannsen* is applicable here, and that *Woolfenden* was correctly decided, with the result that the decree absolute purportedly made in the present case was a nullity, and the wife was and is entitled ex debito justitiae to have it set aside. When in breach of the rules a person has been deprived of that protection which service of process was intended to give, as a prelude to the fundamental change of status that is effected by a decree absolute, the decree is void and the court will set it aside.

Mr Paul McCormick, on the other hand, submitted that where a decree absolute was impugned, the court would appraise the circumstances in which it was granted in order to determine whether it should be treated as void or voidable, and if so which. He identified several bases for distinguishing between void and voidable. The court should only categorise something as void if the error or its adverse consequences, unless treated as void ab initio, would be very severe. A judgment in rem because it involves the rights and interests of third parties should for that reason alone be treated as voidable rather than void. He submitted that if an error goes to the start or the root of a proceeding or undertaking it should be treated as void, whereas if it only goes to timetable or procedure or formalities within or during such undertaking or proceeding it should be treated as voidable. Since a decree absolute is a species of court order, failure to comply with it should be treated as voidable, since if it were void it could be treated as a nullity and ignored. The decree absolute is a consequential or derivative step which should not be treated as void where, as here, the decree nisi is valid. Mr McCormick contended that it was for the wife to show the mischief which the relevant legislation was designed to avoid, and that she had failed to show any such serious mischief as would justify or necessitate holding the decree absolute void. Finally, he submitted that because the grant of the decree absolute was the product of a mistake, it should be treated as voidable rather than void. The judge's order was therefore correct.

Both counsel referred to a number of cases, which it is right to mention briefly, although I shall do so by category rather than (as counsel did) chronologically. First came eight cases in each of which the order in question was held voidable. The first three are cases in which though the



court enjoyed jurisdiction, it inadvertently failed to observe a statutory prohibition against the exercise of it. In *F v F* [1971] P 1 the decree nisi was made absolute before the court was satisfied as to the arrangements for care and upbringing of one of the children. Sir Jocelyn Simon P held that, because the failure to comply with the relevant statutory provisions rendered the decree absolute voidable and innocent third parties had acquired rights and interests in pursuance of its ostensible validity, it was too late to set it aside. It is to be noted in reaching that conclusion the President relied heavily on *McPherson v McPherson* (above). Another such case was *P v P* [1971] P 217 in which it was held that the statutory requirement that a decree shall not be made absolute until the court is satisfied as to the arrangements for the children, although mandatory, is a procedural rule, breach of which would not make the resulting decree absolute void. Those two cases were applied in *Wright v Wright* [1976] Fam 114 in which Rees J held that failure to comply with the statutory provision whereby the court has to be satisfied as to financial provision before making a decree absolute rendered the decree voidable and not void. Of *Woolfenden v Woolfenden* Rees J said:

> 'No question seems to have been raised as to the jurisdiction of a judge to make the order sought, and Barnard J made an order setting aside the decree absolute.'

There were five cases in which the order was held voidable for procedural reasons. To *McPherson v McPherson* I have already referred. In *Wiseman v Wiseman* [1953] P 79 the failure of the husband to make a sufficient or candid disclosure in his application for

an order for substituted service was held by this court to render that order voidable. *Woolfenden* was cited as an example of a case in which the order was a nullity because it was made without jurisdiction. In *Dryden v Dryden* [1973] Fam 217 Sir George Baker P held that because the judge had wrongfully exercised his discretion in allowing the decree to be expedited, the decree absolute was voidable. He distinguished *Woolfenden.* In *Re F (Infants) (Adoption Order: Validity)* [1977] Fam 165 this court held adoption orders voidable, citing *Woolfenden* as a case where there was 'a total failure' to comply with the rules relating to service and distinguishing it from *P v P* (above) and *F v F* (above). The last case in which the order was held voidable is *Batchelor v Batchelor* [1984] FLR 188 in which Sir John Arnold P held voidable a decree absolute granted to a respondent after the appropriate period had elapsed but without service of the necessary summons upon the petitioner. It is particularly to be noted that no cases were cited about the effect of non-service of process.

To be contrasted with these cases are eight further cases in each of which the order was held to be void. In the first two the court inescapably lacked jurisdiction. In *Re Pritchard, Pritchard v Deacon* [1963] Ch 502 this court held an originating summons under the Inheritance Act 1938, issued in a district registry which did not have jurisdiction, to be a nullity. Upjohn LJ specifically referred to non-service as giving rise to 'true nullity'. The other such case was *Nissim v Nissim* [1988] Fam Law 254 in which an order transferring divorce proceedings to the county court was held by this court to have been made without jurisdiction and was accordingly void. In *Butler v Butler, The Queen's Proctor Intervening* [1990] 1 FLR 114 Sir Stephen



Brown P after referring to *Woolfenden, Dryden* and *Nissim* expressed himself satisfied that counsel for the Queen's Proctor had correctly stated the position in law when he submitted that by operation of statute a petition presented before the expiration of one year from the date of the marriage is null and void, and a court therefore has no jurisdiction to entertain it. *Woolfenden* was itself a case involving both a fundamental breach of a comparable statutory provision and a failure to serve, and so give notice of, proceedings. There remain four other cases in which through want of service orders subsequently made were held void, examples of what in *Re Pritchard* Upjohn LJ had called 'true nullity'. The first two such cases are *Craig v Kanssen* and *Everitt,* to both of which I have already referred. In *Ebrahim v Ali (Otherwise Ebrahim) and Queen's Proctor (Intervening)* [1984] FLR 95 once again the petition was not served, and Sir John Arnold P in reliance on *Woolfenden* held the resultant decree void. Finally, in *Walker v Walker* [1987] 1 FLR 31 a decree nisi was set aside in this court without citation of authority in another case in which a decree nisi had been pronounced without the respondent having been notified of the hearing.

In my judgment a distinction has to be drawn between cases in which the court lacks jurisdiction because it has no power to grant a decree absolute in the circumstances in which it has purported to do so, and cases in which though the court enjoys jurisdiction, it has through the inadvertence of one of the parties failed to observe a statutory provision against the exercise of it, or there has been a procedural irregularity in the process of exercising it. This case falls within the former category, as is shown by *Callaghan v Hanson-Fox (Andrew)* [1992] Fam 1, sub nom *Callaghan v Hanson-Fox and Another* [1991] 2 FLR 519, in which Sir Stephen Brown P specifically approved *Woolfenden.* In addition, all the cases I have cited relating to service, save for *Batchelor* (above) which is to be doubted, show that the failure to serve a summons on the wife in accordance with r 2.50 renders the decree absolute null and void, and the wife is entitled to have it set aside. The jurisdictional and fundamental procedural irregularities are both fatal. I would allow the appeal and set aside the decree absolute.

**THORPE J:** I agree that this appeal should be allowed and for the reasons stated by my Lord. The present case is indistinguishable on its facts from the case of *Woolfenden (Otherwise Clegg) v Woolfenden (Otherwise Clegg)* [1948] P 27 therefore the petitioner

is entitled to have the decree absolute set aside unless *Woolfenden* is no longer good law. Mr McCormick's efforts to undermine or devalue the decision were quite unpersuasive. The decree nisi is the decree of the party upon whose prayer it was pronounced. The parliamentary intention is clear. That party, after the passage of 6 weeks, has a period of 3 months within which he or she has the sole right to elect whether to apply for it to be made absolute and when to apply for it to be made absolute. The other party's protection against sloth, caprice or strategy is to initiate the application by inter partes summons after the expiration of the 3-month period. Although the grant of a decree absolute is by administrative process, it is the climax and culmination of the proceedings since it is the vital pronouncement that changes status. A review of the authorities over the last 48 years shows that *Woolfenden* has been followed, cited with approval or cited to distinguish in eight cases, several of them in this court. It has never been disapproved.

[1995] 2 FLR 596

The reality is that the decision in *Woolfenden* has been of considerable use over nearly half a century. The rule is easily understood. Practitioners know where they stand. Instances in which court staff make the elementary mistake that was made in this case are fortunately rare. Accordingly there seems to me to be no practical argument for reconsidering its rule. Despite the passage of time the considerations that then applied have not substantially changed. Many petitioners have applications for ancillary relief that are not finally determined until long after the decree nisi. For many reasons they are generally loath to lose their marriage status until financial claims have been settled. If they are to lose that protection it should only be in the exercise of a judicial discretion after they have had a proper opportunity to present their opposition.

*Appeal allowed. Order nisi against the Legal Aid Board. Appellant's contribution assessed as £200. Legal aid taxation. Leave to appeal to the House of Lords refused.*

Solicitors: *Collyer-Bristow* for the wife
*Anderton & Co* for the husband

CHRISTOPHER WAGSTAFFE
*Barrister*