

EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS].

**NOTE: PURSUANT TO S 169 OF THE FAMILY PROCEEDINGS ACT 1980, ANY REPORT OF THIS PROCEEDING MUST COMPLY WITH SS 11B, 11C AND 11D OF THE FAMILY COURT ACT 1980. FOR FURTHER INFORMATION, PLEASE SEE**

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**IN THE FAMILY COURT  
AT CHRISTCHURCH**

**I TE KŌTI WHĀNAU  
KI ŌTAUTAHI**

**FAM-2021-095-004757  
[2022] NZFC 2155**

IN THE MATTER OF	THE FAMILY PROCEEDINGS ACT 1980
BETWEEN	[SANTOSH DAYAL] Applicant
AND	[SALANI BADA KAR] Respondent

Hearing: 9 March 2022

Appearances: Applicant appears in Person  
Respondent appears in Person

Judgment: 11 March 2022

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**RESERVED JUDGMENT OF JUDGE P W SHEARER**

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[1] This is a defended application under the Family Proceedings Act 1980 for a dissolution order. Following an initial Judicial Conference on 17 February 2022 I presided over a 30 minute submissions-only hearing on 9 March, and now issue my reserved decision.

## **Background**

[2] The applicant (Mr [Dayal]) and respondent (Ms [Badakar]) are both Indian and were married in India on [date deleted] 2005. There are two children of the marriage, [Tivra], aged 15, and [Komal], aged 10. Each party is self-representing.

[3] On 19 July 2021, Mr [Dayal] filed a one party application for an order dissolving the parties' marriage. In his supporting affidavit he deposed that the parties had ceased living together on 6 January 2019.

[4] Also on 19 July 2021 Mr [Dayal] filed an application for substituted service. It was in that application that he explained that Ms [Badakar] left for India in August 2019. He said that she lived at his parents' house initially, for a month, and then left to live away. He said he did not know her current whereabouts or landline phone number and can only communicate with her by email. He said he was blocked from contacting Ms [Badakar] by social media and sought to serve her by email.

[5] The application for substituted service was granted by the registrar and Mr [Dayal] subsequently filed an Affidavit of Service sworn on 5 August 2021 confirming that he had emailed the service documents to Ms [Badakar] on 4 August 2021.

[6] Ms [Badakar] filed a handwritten Notice of Defence and a signed, but unsworn, affidavit dated 6 September 2021.

[7] Ms [Badakar] stated that she and the parties children returned to India in May 2019 (not August 2019 as Mr [Dayal] had stated in his application) and would have returned to New Zealand in May 2020 but for the COVID-19 pandemic and resulting travel and border restrictions. She deposed that *"our booked flights got cancelled by the airline. And from then we are stucked[sic] here and was trying hard to return back to New Zealand"*.

[8] Ms [Badakar] then said *"When it became more than two years span of physical separation my husband [Santosh Dayal] filed the application to dissolve our marriage"*.

[9] Ms [Badakar] deposed that she had confirmed flights and an MIQ booking to arrive in Auckland on 11 October 2021. She stated that there was no verbal agreement to separate in January 2019 and that she had not blocked Mr [Dayal] on social media.

[10] The Court then directed (on 11 October 2021) that a Judicial Conference be allocated and a conference was subsequently scheduled (on 15 October 2021) for 17 February 2022.

[11] On 20 January 2022 Ms [Badakar] filed a memorandum advising that she was living in Auckland with the parties' two children. She said she could not afford to travel to Christchurch for the Judicial Conference and asked to attend by video. Ms [Badakar] also filed a request for an interpreter, saying that her first language is Hindi. Both applications were granted. An interpreter was approved and Ms [Badakar] was granted leave to attend the Judicial Conference by telephone.

[12] At the Judicial Conference on 17 February I endeavoured to explain to Ms [Badakar] that in New Zealand the sole ground for dissolving a marriage is that the marriage has broken down irreconcilably.<sup>1</sup> As I noted in my minute that day, which was subsequently emailed by the Court to each party, irreconcilable differences is established in law if, and only if, the Court is satisfied that the parties to the marriage are living apart and have been living apart for a period of two years immediately preceding the filing of the application. I commented that on the face of the evidence filed, the parties had been living apart for something like three years at that point.

[13] Ms [Badakar] was not willing to consent to an order dissolving the marriage and maintained that she did not know or consider that the parties were separating when she went to India in 2019. I directed that a submissions-only hearing be allocated and that each party was to file an updating affidavit within 14 days. I granted leave for Ms [Badakar] to attend the hearing by telephone.

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<sup>1</sup> Family Proceedings Act 1980, s 39.

## Updating Evidence

[14] Ms [Badakar] filed a sworn affidavit dated 2 March 2022. Mr [Dayal] did not file an updating affidavit.

[15] Ms [Badakar] provided further information in her updating affidavit and said that after the parties were married in India in 2005, Mr [Dayal] moved to New Zealand in 2015. He got a resident's visa in 2018 and Ms [Badakar] and the children then came to New Zealand in September 2018. She said that when she arrived in New Zealand Mr [Dayal] told her he was in a relationship with another woman, but he was not sure with whom he should continue a relationship. Ms [Badakar] said that he asked her to give him some time to think and decide and that she agreed. She said that Mr [Dayal] then started treating her badly.

[16] Ms [Badakar] said *"I asked [Santosh] to tie knot again for some religious reasons and we tied knot again in February 2019"*.

[17] Ms [Badakar] also said that in India she was living in her in-law's home where [Santosh] used to live when he was in India *"so it should not be taken as physical separation"*. She then said:<sup>2</sup>

[Santosh]'s intention behind filing divorce here in New Zealand is just to escape from expenses he might have to pay if he seeks divorce in India. And to prevent my children from their ancestrals' property. He already sold property under his name before coming to NZ which I came to know last year when I was in India. He is acting according to his plan...

[18] She went on to say:

I can give consent to this dissolution of marriage but I just want some kind of financial securities for my children...

## Submissions-only hearing

[19] Each party self-represented at the submissions-only hearing and, to some extent, we went round in circles. Neither party accepts what the other says and gradually they each got more emotional.

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<sup>2</sup> Affidavit sworn 2 March 2022, pg 4.

[20] Ms [Badakar]'s position, in summary, is that she did not know and did not consider that the parties were separating when she and the children went to India in May 2019. She repeated and confirmed her affidavit evidence that the parties had lived apart from 2015 to 2018, and that Mr [Dayal] was then with another woman when she and the children arrived in New Zealand in September 2018, but she said they got married again in February 2019. She said Mr [Dayal] was confused and needed some time in 2018 and she gave him time.

[21] Ms [Badakar] said that *"he dropped me to the airport in 2019"* and there was *"no mention of going for divorce"*. She said *"I was calling him every day"* but she then said *"he started abusing me on the phone and I stopped calling him"*. She was adamant, however, that *"I didn't block him. What he is saying is lies"*.

[22] Ms [Badakar]'s position was that the parties have not been separated for two years and that the two year period should start from now.

[23] Mr [Dayal], in reply, said that when he phoned Ms [Badakar] in India he was never talking to her as a husband, but was *"phoning to talk to my kids"*. He said *"I love my kids. I booked tickets for my kids, so I can see my kids"*.

[24] Mr [Dayal] said that it was Ms [Badakar]'s decision to go to India in 2019 and that Ms [Badakar] only gave him two days' notice. He said the reason she went back to India was because he told her he did not want to live with her. He said he had been working as a [profession deleted] in [another city in New Zealand] from late 2018 and only came back to Christchurch to see the children. Mr [Dayal] said he went to the marriage ceremony in February 2019 because Ms [Badakar] told him that they *"had to go to the temple and do some ritual"*.

[25] Ms [Badakar] interjected at that point and said *"I was going to move to [the other city]. He refused me...he had some plan in his mind. He was with another lady then."*

[26] Mr [Dayal] confirmed that. He said he had another lady in his life and when he told Ms [Badakar] he did not want to leave her (his new partner) she (Ms [Badakar]) went to India.

### **Analysis**

[27] I cannot resolve and do not need to resolve the factual disputes or, more particularly, each party's different perspective about what happened in 2018 and 2019. It seems to me, however, that the legal position is clear-cut.

[28] As I mentioned in my minute of 17 February, the sole ground for an order dissolving a marriage<sup>3</sup> is established if the Court is satisfied that the parties have been living apart for the period of two years immediately preceding the filing of the application. The question, therefore, is whether I am satisfied that Mr [Dayal] and Ms [Badakar] had been living apart for two years prior to Mr [Dayal]'s application dated 19 July 2021. The answer to that question is unequivocally "yes", and for a number of reasons:

- (a) Both parties acknowledge that Ms [Badakar] lived in India from May 2019 until she returned to Auckland, in October 2021, during which time Mr [Dayal] lived in Christchurch. Not only were they living apart but they lived in different countries.
- (b) Had Ms [Badakar] genuinely considered that the parties were still married or, if she was still wanting to continue the marriage, I would have expected that she and the children would return to Christchurch rather than staying in Auckland, given that Mr [Dayal] has been resident in Christchurch, once they were able to fly back to New Zealand and exit MIQ in October last year.
- (c) Mr [Dayal]'s evidence is that the parties were already living apart even before Ms [Badakar] left for India. Ms [Badakar] acknowledged that Mr [Dayal] was seeing another woman and was "*confused*" about who

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<sup>3</sup> "that the marriage has broken down irreconcilably".

he should continue a relationship with when she and the children arrived in New Zealand from India in September 2018. Mr [Dayal] said that Ms [Badakar] only went back to India in May 2019 because it was then that he told Ms [Badakar] that he did not want to continue the marriage.

- (d) Whilst Ms [Badakar] has a different version of events and maintains that the parties did not separate emotionally at that time, I find that Mr [Dayal] did separate emotionally. He had clearly “checked out” of the marriage at that time.

[29] Numerous Court decisions have considered the phrases “living apart” and “living together” in the context of different statutes relating, inter alia, to benefit fraud prosecutions, dissolutions and relationship property. One of the leading High Court authorities is that of *Excell v Department of Social Welfare* where Fisher J said:<sup>4</sup>

A legally married husband and wife have a legal duty to cohabit. Cohabitation ceases only while there is an intention by either spouse to repudiate the obligations inherent in the matrimonial relationship and a manifestation of that intention by conduct.

[30] The relevant point, in my view, is that it only takes one party to opt out of the marriage. The other party does not have to agree, because the other party can act unilaterally. In this case that was Mr [Dayal]. He wished to separate and acted on that wish. Even if Ms [Badakar] did not want to separate and considered that the parties were still a married couple when she was living in India and Mr [Dayal] remained here in New Zealand, Mr [Dayal] had verbalised that he was leaving the marriage. He had “repudiated the obligations inherent in the matrimonial relationship”, to use the words of Fisher J. Legally the parties were still married, so Ms [Badakar] was correct to that extent because they remain married until the marriage is legally dissolved, but I find that it is clear in the factual circumstances of this particular case that the parties were living apart from at least May 2019 when Ms [Badakar] returned to India, and if not earlier. Arguably, they had been living apart since 2015.

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<sup>4</sup> [1991] NZFLR 241 at pg 246.

[31] As such, the parties had been living apart for a period of two years immediately preceding the filing of the application for a dissolution order.

### **Section 45 – arrangements for welfare of children on dissolution of marriage**

[32] Section 45 of the Act states that:

- (1) The Family Court shall not make an order dissolving a marriage or civil union unless it is satisfied that—
  - (a) arrangements have been made for the day-to-day care, maintenance, and other aspects of the welfare of every child of the marriage or civil union who is under the age of 16 years (or, in special circumstances, of or over that age) and those arrangements are satisfactory or are the best that can be devised in the circumstances; or
  - (b) ...
  - (c) there are special circumstances justifying the making of an order dissolving the marriage or civil union, notwithstanding that the Court is not satisfied that any such arrangements have been made.
- (1A) ...
- (2) The Family Court shall not make an order dissolving a marriage or civil union, in reliance on any special circumstances referred to in subsection (1)(c), unless it has obtained a satisfactory undertaking from either or both of the parties to the proceedings to bring before the court within a specified time the question of the arrangements for every child of the marriage or civil union.

[33] It is clear that the parties' children have been in Ms [Badakar]'s care continuously since she and the children returned to India in May 2019, although there are no court orders or written agreements. At the hearing on 9 March Ms [Badakar] advised that the children are living with her and attending school in Auckland. Mr [Dayal] deposed in his affidavit of 19 July 2021 that:

I am paying \$700NZ monthly to [Salani Badakar] (mother) along with some amounts for extra expenses sometimes while she is in India...

[34] Whilst Mr [Dayal] has not seen the children since May 2019, he stated at the submissions-only hearing that he was moving to Auckland that day and will be filing an application for a parenting order so that he can see the children. I understand that Mr [Dayal] intends to seek day-to-day care.



[35] Whilst they are not agreed care arrangements, I am satisfied that arrangements have been made for the day-to-day care and maintenance of the children. The children are attending school and are in the care of their mother.

[36] Mr [Dayal]'s emphatic statements to the Court on 9 March that he was leaving for Auckland that day and will immediately apply for a parenting order, amount, in my view, to an undertaking to bring before the Court the question of arrangements for the children. As such, I find that there are special circumstances justifying the making of an order dissolving the marriage even if I was not clear that satisfactory arrangements for the children have been made.

[37] Presiding over the hearing it was abundantly clear that the parties now have irreconcilable differences and that neither wishes to continue the marriage.

### **Decision**

[38] I make an order dissolving the parties' marriage that took place in India on [date deleted] 2005. The order may be sealed and released immediately.

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Judge P W Shearer  
Family Court Judge | Kaiwhakawā o te Kōti Whānau  
Date of authentication | Rā motuhēhēnga: 11/03/2022