

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

CIVIL APPEAL NO. ABU 146 OF 2016
(On Appeal from Family Court Division FC 15/APP/005)

BETWEEN : **MOHAN** *Appellant*

AND : **REKHA** *Respondent*

Coram : **Basnayake JA**
Lecamwasam JA
Dayaratne JA

Counsel : **Mr S Kumar for the Appellant**
Mr N Sharma for the Respondent

Date of Hearing : **24 May 2019**

Date of Judgment : **7 June 2019**

Category : *All identifying information and contents in this judgment have been anonymized or removed and pseudonyms have been used for all persons referred to. Any similarities to any persons are consequential*

JUDGMENT

Basnayake, JA

[1] I agree with the reasons and conclusions of Lecamwasam JA.

Lecamwasam, JA

[2] This appeal is preferred against the consent order made by the Family Court Judge at Suva in 2017. The learned Judge made the following orders of consent, both parties being represented by Counsel. Being aggrieved by the said consent order, the appellant appealed it on the following grounds of appeal: -

- “1. *The learned Ladyship failed to fully consider and rule upon all the submissions made on behalf of the Appellant;*
2. *The learned Ladyship erred in law in making an Order which was not part of the Appeal;*
3. *The learned Ladyship erred in law in taking irrelevant consideration into account and left out relevant consideration that the Respondent lady works as a child care provider earning \$70.00 per week, rent from the flat in the sum of \$300.00 per month, gets \$75.00 as maintenance from Appellant and she stays with our sons who provide her with all daily necessities which amounts to unjust enrichment.*
4. *That the learned Ladyship erred in law in failing to consider the Appellants monthly payments are amounting \$6898.00 per month as debts whereas Respondents only pays mortgage payment of the house that is registered under her name which is \$585.00 per month.*
5. *That the learned Ladyship erred in law in failing to consider that the trial Magistrate had erred in law and fact in deciding that the Court was empowered to grant injunctive orders in respect of matrimonial property when the pool of assets had not been determined.*
6. *That the learned Ladyship erred in law in failing to consider that the trial Magistrate has erred in law and in fact in disregarding that the properties so restrained at paragraph 10 of the judgment were the properties with respect to the Appellant’s business and not matrimonial property; that is tool of trade.*
7. *That the learned Ladyship erred in law in failing to consider that the learned trial Magistrate has erred in law and fact in the application of section 202 of the Family Law Act 2003.*

8. *That the learned Ladyship erred in law in failing to consider that the learned trial Magistrate had failed to apply the established legal principles applicable to the granting of injunction.*

9. *That learned Ladyship erred in law in not making a just decision.”*

[3] Despite agitating the Consent order on nine grounds of appeal at the initial stage, the appellant confined his grounds of appeal to four at the stage of arguments. However, I find that the nine initial grounds are subsumed within the subsequent 4 grounds of appeal in their entirety.

[4] This action relates to a family dispute regarding property. As per the consent order made by the High Court, it is evident that the learned High Court Judge issued an injunction against the Appellant to prevent him from **dealing** with two properties, namely

“(a) Property A and

(b) Property B.”

[5] The prohibition on ‘dealing’ is defined in paragraph (d) of the orders as not to “sell, dispose, transfer, gift, deed and any act of similar nature whatsoever”. As per the above definition it is clear that the injunction, while restraining the appellant from alienating these properties, does not prevent him from the use and possession of the same. Therefore, the appellant cannot be heard to say that the injunction restrains him from the use and possession of the properties on which he carries out his business and thereby impedes on his *tools of trade*. In fact, it transpired at the stage of argument before the Court of Appeal that, not only was the appellant in possession of one of the properties but he also receives rentals from it.

[6] Therefore this Court cannot come to the assistance of the appellant at this stage despite his claim of being forced in to the above settlement by the family court. I cannot act on such a serious allegation against a court of law, which carries with it serious ramifications, without being presented with cogent evidence. The appellant has failed to satisfy this court in that regard. Without any evidence to the contrary, I am reluctant to

disturb an order which has been entered into with the consent of parties, who were represented by their respective counsel.

[7] In any event there was a remedy available to the appellant before preferring an appeal to this Court. If there is a change of circumstances the appellant could have brought that by proper procedure to the attention of High Court and sought a variation of that order.

[8] I find no merit in this case for the succinctly albeit comprehensively stated reasons above. Therefore, I dismiss this appeal and order \$5,000.00 as costs payable by the Appellant to the Respondent.

Dayaratne, JA

[9] I agree with the reasons and the conclusions reached by Lecamwasam JA.

Orders of Court:

- 1) *Appeal dismissed.*
- 2) *\$5000.00 as costs payable by the Appellant to the Respondent.*

Hon. Justice E Basnayake
JUSTICE OF APPEAL

Hon. Justice S Lecamwasam
JUSTICE OF APPEAL

Hon. Justice V Dayaratne
JUSTICE OF APPEAL