

**IN THE FAMILY DIVISION OF THE HIGH COURT
APPELLATE JURISDICTION**

CASE NUMBER:	14/Ltk/0025
BETWEEN:	Manish
AND:	Saras
Appearances:	Mr. S. Sharma for the Appellant Mr. J.K Sharma for the Respondent
Date/Place of judgment:	Wednesday 20 th July 2016 at Lautoka
Judgment of:	The Hon. Justice Anjala Wati
Coram:	
Category:	<i>Pseudonyms have been used for all persons referred to in this judgment. All other identifying information about the parties has been anonymized or removed. Any similarities to any persons are purely coincidental.</i>
Anonymised Case Citation:	Manish v Saras - Fiji Family High Court Appeal: 14/LTK/0025.

JUDGMENT OF THE COURT

Catchwords:

FAMILY LAW – SPOUSAL MAINTENANCE – Wife seeks order for spousal maintenance – physical incapacity to work alleged – wife working on some days – whether ailments alleged to be suffered incapacitated the wife physically from finding gainful employment – liability not established- order for spousal maintenance quashed.

1. This is the husband's appeal against the decision of the Resident Magistrate ("**RM**") of September 2014 wherein it was ordered that he was liable to pay to his wife spousal maintenance in the sum of \$70.00 per week with effect from the date of the application for spousal maintenance.
2. It is not clear from the order as to what is meant by the *date* of the application for spousal maintenance, whether it was the date on which the application was sworn or the date of filing of the same: *the two dates are different*.
3. The application was sworn on and dated 20 June 2011 and filed on 18 July 2011. There is a difference of one month between the dates. The amount of maintenance payable will vary depending on the date on which the order is to take effect.
4. Apart from the above lack of specificity by the RM, there is a question of the veracity of the order made retrospective, an issue which has not been made subject to the appeal, but so glaring a question in law that this Court will deal with the same on its own motion.
5. The court found in law, and quite correctly, that the liability on spousal maintenance was not automatic. It was dependent upon satisfaction of two matters being that the applicant seeking maintenance had to establish that she was unable to support herself due to the matters arising in s. 155 of the FLA and that the husband was reasonably able to do so.
6. S. 155 (a) to (c) of the FLA stipulates that a person can be found to be incapable of adequately supporting himself or herself if he or she is:
 - (a) ***having care and control of a child of the marriage who has not attained the age of 18 years;***
 - (b) ***by reason of age or physical or mental incapacity not able to be gainfully employed; or***

(c) any other adequate reason.

7. In terms of s. 155 of the FLA, the trial Court also had regard to s. 157 factors in determining the question of liability. S. 155 of the FLA requires that s. 157 factors be given regard to.
8. So far as the issue of law is concerned, I do not find any error in applying the principles of it in determining the issue of liability. The issue is whether the Court had correctly assessed the facts to make a finding of liability. The appeal largely centers on the issue of liability to receive spousal maintenance.
9. The court affirmatively found that the wife was unable to support herself adequately. In making that finding, it accepted that the wife was taking some medications as she had shown the medications to the Court. The Court opted to believe her evidence on this aspect of taking medication over the evidence of the husband.
10. The physical presence of the medication with the wife led the Court to make a finding that she was suffering from medical conditions and thus unable to support herself. I find this assessment to be astonishing to say the least.
11. The wife stated that the medicine that she was taking was for arthritis and headaches. She had said in her evidence that she had been suffering from arthritis for the past 15 years and that her headaches were due to the many physical abuses she received at the hands of the husband when she was cohabiting with him.
12. The threshold in such cases is that the applicant must prove that she has ailments which are serious enough to incapacitate her physically from finding gainful employment. In this case it was presumed that because the wife was taking medication she had a medical condition serious enough to incapacitate her from undertaking any gainful employment.

13. There was no finding of fact that the ailments described by the wife incapacitated her from finding any work or work enough to cater for her adequately. I must not overlook to say that there are people with similar ailments of arthritis and joint pains who undertake physical work.
14. In the case of the wife, if her ailments affected her from finding work, she should have at least provided medical reports to the effect that she cannot or is unable to work to a standard to find adequate support for herself.
15. What the Court accepted was only the wife's contention that she was taking medication and that because of her ailments she cannot work. This evidence of the wife was given improper weight.
16. What cut through the evidence of the wife was that with all the ailments she said was having, she was working three days a week at the temple kitchen for which she was paid for two days. She stated that for the two days she managed to secure \$30. She was even providing voluntary service for 1 day to the temple and not charging any money.
17. If the Court found that the wife was physically incapable of finding work, then what remain unsolved and not given the appropriate consideration was the fact she was actually working for 3 days a week.
18. She stated in her evidence that she worked because she wanted to calm her mind. That may be so but her evidence that her sickness did not allow her to work was contradicted by her own evidence that she works to calm her mind. If she could work for 3 days in a week, there was no evidence why she could not work full time and find a gainful employment.
19. Together with the evidence of her existing employment, there was evidence that before the separation, she worked almost for the whole week which caused a lot of disharmony

which the parties. The husband wanted the wife to only work 5 days a week when she also wanted to work in the weekends. The husband said that her work in the weekends disrupted the family as she was not there for the children and the other family members.

20. In light of the undisputed evidence that the wife used to be in full time employment at some stage before the separation, I do not find that her medical condition is to an extent which will preclude her from finding full time employment as she was in before the separation. I say this on the wife's evidence that she has been suffering from arthritis for the past 15 years. If that is an ongoing ailment, her evidence of the medical condition precluding her from working is untenable once again.
21. On the available evidence, I do not find that it was available to Court to make a finding or draw an inference that the sickness that the wife complained of physically incapacitated her from finding work.
22. If the wife were to work for at least five days a week, she would have in her possession a sum of \$75.00 in a week. Let me analyse her evidence on her expenses to see whether the income from the work that she is currently undertaking is enough to maintain her adequately.
23. The wife stated in her evidence that she was supported by her son who was not married and living with her at the time. She had further stated in her evidence that she cannot rely on the son. The wife and son are living on the property of the parties to the marriage. It is the husband who does not have the benefit of the house and paying the mortgage on the same from the income he receives from the farm on which the house is built and occupied by the wife and the son. In this regard I give consideration to the fact that she has her expenses subsidized from the earnings of the son.
24. I have read the record and I only find the wife to have said that she needs \$15 per week for her medication which is a pain killer and some vitamins. I will not delve into whether

she has been consuming these medications but there was no evidence that she was purchasing these medications. These are medications which are easily provided by the hospitals for the citizens and if the wife was purchasing these medications, the onus was on her to establish that she used her income to buy these medications. She failed to establish that this is an expense that she has to necessarily cater for from her income or in other words that is a necessary expenditure.

25. She also stated that she paid the utility bills. She has a son living with her to assist her in the payment of the bills. There was insufficient evidence to make a finding that these utility bills could not be catered from her income if she worked full time and with the assistance or the support from her son.
26. I must mention s. 157 of the FLA which requires the court to examine the income, property and financial resources of each of the parties. The wife is also occupying the property of the parties to the marriage which is capable of generating income. From the evidence it was apparent that at least there are two rooms which can be let out except for the fact that one of the rooms is leaking and needs maintenance.
27. Since the wife is in physical control of the matrimonial property, she could have, if she wanted, to least let one room out to generate income for herself.
28. There is no evidence that the husband precluded her from renting the property or that he would cause an impediment to her in obtaining the necessary consents to secure the property for rent. If he did or there was potential that he would do that, then the wife could have always resorted to Court for an order that he secures the necessary consent for the property to be let out. There is property proceeding on foot between the parties and to obtain an order to that effect should not be difficult. I do not think that on a balance of convenience, an order requiring the husband to secure the necessary consent from the Director of Lands for the wife to let the property out would be refused.

29. At the submissions stage, the counsel for the wife addressed the Court that the wife could perhaps be given the taxi business and the farm. These are matters for the Court to make a finding on in the property distribution proceedings but so far as the question of maintenance is concerned there was insufficient evidence to make a finding on liability.
30. It is certain that given her contributions in the marriage, the wife will be entitled to orders in her favour for alteration of interests in the property. The extent to which she will get an alteration is not an exercise I would endeavor to undertake save to say that under the law, her contribution to the property is presumed to be equal unless it can be shown that it would be repugnant to justice to uphold the presumption.
31. The parties have had a long marriage and given the potential of her securing orders in her favour, she could perhaps make the necessary applications for distribution in accordance with the submissions made in this Court.
32. In absence of her establishing that she qualifies for maintenance, there is no requirement to consider the second limb that the husband is reasonably able to provide for her.
33. I now refer to the order of the Court to make the maintenance liability retrospective. There is no specific provision in the law which allows the Court to make a maintenance order retrospective. There is specific provision which gives the Court powers to make a discharge order or an order decreasing the maintenance retrospective. If that is a specific provision of the law, then I will not hesitate to say that if the legislature intended to make the fresh substantive orders for maintenance retrospective, then it would have clearly specified that in the law.
34. In this case if the Court was of the view that the wife was entitled to maintenance from the days she filed the application for maintenance, the Court ought to have considered

the question of interim maintenance especially when the wife had filed the application for the same.

35. The Court did not give any heed to the question of interim maintenance and allowed the issue to be left in abeyance. Then it wrongfully allows the substantive maintenance action to continue to be postponed for three years.

36. The application for maintenance is summary in nature and if the Court cannot hear it summarily then it ought to have considered the question of interim maintenance. Having allowed the proceedings to be dragged for three years, it cannot punish the husband by ordering the liability to be backdated.

37. There was no finding made as to whether the husband is in a position to pay more than 12,000 as backdated maintenance. There was no examination on his means to pay that apart from the question of liability. To impose on him such liability is unconstitutional and unfair. He had not been heard on the aspect of retrospectively of the orders and the impact it will have on him financially.

38. I find that the wife was not able to establish on the balance of probability any factors outlined in s. 155 to establish that she was not able to support herself adequately for her to qualify for spousal maintenance.

39. I therefore allow the appeal on the question of liability and set aside the judgment of the Court. This does not mean that if the circumstances of the wife changes, she cannot apply for fresh maintenance for herself.

40. In terms of final orders:

(a). *The appeal is allowed on the issue of liability to pay spousal maintenance.*

- (b). ***I find that the wife was not able to establish that she was unable to adequately support herself by virtue of matters arising in s. 155 of the FLA which was to be decided in reference to factors set out in s. 157 of the FLA.***
- (c). ***The order for maintenance against the husband is set aside.***
- (d). ***Each party shall bear their own costs of the appeal proceeding.***

Anjala Wati

Judge

20.07.2016

To:

- 1. Samusamuvodre Sharma Law for the Appellant.**
- 2. Janend Sharma Lawyers for the Respondent.**
- 3. File: 14/Ltk/0025.**