

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

APPEAL NUMBER:	20 OF 2019 (LAUTOKA)
BETWEEN:	RAVEEN
AND:	SEEMA
Appearances:	Mr Wasu Pillay for the Appellant Ms Jowen Singh for the Respondent
Date/Place of judgment:	Wednesday 02 December 2020 at Lautoka.
Judgment of:	The Hon. Justice Jude Nanayakkara
Category:	<i>All identifying information in this judgment have been anonymized or removed and pseudonyms have been used for all persons referred to. Any similarities to any persons are purely coincidental.</i>
Anonymized Case Citation:	RAVEEN V SEEMA – Family High Court Appeal Number 20 of 2019

JUDGMENT OF THE COURT

(A) INTRODUCTION

- (01) This is an appeal against the decision of the Learned Magistrate at Lautoka, delivered on 27th September 2019. In its decision, the Magistrate Court overruled the preliminary objection raised by the appellant.
- (02) The essence of the matter before the lower court stemmed from an application filed by the respondent – applicant seeking property distribution, by way of Form 9 filed on 21.11.2017. The appellant filed his response on 09.02.2018.
- (03) After the conclusion of the preliminary steps, the application for property distribution was listed for hearing on 29.03.2019. On the hearing of the application, Counsel for the appellant raised preliminary objections; inter alia, the following; (verbatim)
- *In pursuant to the paragraph 13 and 14 of the consent orders entered between the same parties in the case 0211/2009 at the Ba Magistrate court, the applicant lady does not have jurisdiction to proceed any matrimonial claim against the respondent man.*

- *The consent orders were signed before the Legal Aid Commission. They have also given a statement of independent legal advice where they declared that they have independently explained the rights and entitlements to the applicant. The lady has signed it before another lawyer. Therefore, as per the **Order 10, Subdivision 10.1.3 of the Family Law Rules 2005**, the consent order dated 08th June, 2010 made under this division take to be the same force and validity as if it had been made after hearing by the court.*
- *Therefore, the application of the applicant lady and the entire proceedings in this case is incompetent for res judicata and court of parallel jurisdiction is functus-officio. Further, the same act as a complete bar to subsequent matrimonial proceedings.*

(04) The learned Magistrate overruled the preliminary objections and held, inter alia, the following; (Reference is made to paragraph 14, 15)

(14)
I am of the view that since the property rights of the parties have not been dealt with by the consent orders entered on other matrimonial issues of the parties. Therefore, the same cannot be considered as bar to subsequent proceedings on matrimonial property between the same parties. Since distribution of matrimonial property was not part of the consent order, the doctrine of res judicata has no any force in this instance. Therefore, the same cannot be considered as an adjudicated matter between the same parties.

(15) *Further, there cannot be any agreement or consent order which override the statutory rights of the parties. As discussed in the paragraph 10, parties were married and living together when orders consent were granted. Issue of property rights arose with the divorce. The applicant lady filed the application for property distribution exercising her legal rights on the matrimonial property within two years of the dissolution of the marriage. Therefore, the above clauses in the consent order entered 6 years prior to the dissolution of the marriage cannot be absolute bar to the applicant lady in exercising her legal rights with regard to the matrimonial property provided under the Family Law Act.*

(05) There are three (3) grounds of appeal set in the notice of appeal filed on 16/10/2019. The grounds of appeal are;

1. *The Learned Magistrate erred in law and/or in fact in applying rule 10.1.3 of the Family Rules 2005 when although she held that at paragraph 7 and 8 that “this mean that, when a court sanction an agreement with judicial seal, all the issues between the parties will be deemed to have been disposed-off, finally. The consent order is deemed as it was judicial determination on the merits. Therefore, it will be covered by the doctrines of res judicate and estoppel.” She went on to contradict the principles pronounced at paragraph 10 when she said*

“however, property rights of the parties were not dealt with by the consent orders.”

2. *The Learned Magistrate erred in law and/or in fact when she misinterpreted the consent orders, specifically paragraph 13 which says “that the applicant Seema shall have no further claims or demands against the respondent in respect of their marital relationship till to date” and paragraph 14 which says “that the parties declare the terms of the consent orders herein may be pleaded in bar to any action, suit or proceedings whether civil or otherwise hereafter commenced by her” which is plain, clear and unanimous as it precludes the respondent from filing any further action, suit or proceedings whether civil or otherwise.*
3. *The Learned Magistrate erred in law and/or in fact when she misinterpreted the principle of res judicata.*

(B) Background

(01) In the Magistrate Court of Ba on the 23.12.2009 the respondent filed an application for residence and contact of her two children and for child and spousal maintenance.

(02) On 03.06.2010, the parties to proceedings have filed a written minute of orders the terms of which are agreed by the parties pursuant to Rule 10.07 of the Family Law Regulation 2005. The agreement is in the following terms;

1. *THAT a final order be made that the child A of the parties born on 9th of April 2003 remain and continue schooling at Lautoka Primary School.*
2. *THAT a final order be made that Child A born on 9th April 2003 and Child B born on 7th July 2006 reside with their father Raveen at the matrimonial home.*
3. *THAT a final order be made that custody of Child A born on 9th April 2003 and Child B born on 7th July 2006 is granted to their father Raveen.*
4. *THAT the application for a stop departure order against the Respondent Raveen is withdrawn and cancelled.*
5. *THAT the application for a child and spousal maintenance order against the Respondent Raveen is withdrawn and cancelled.*
6. *THAT the Applicant withdraws all allegations of child abuse and any other allegation against the Respondent and confirms that such allegations were without basis and unfounded.*
7. *THAT the current interim orders for child and spousal maintenance against the Respondent Raveen is cancelled.*

8. *THAT the Applicant Seema is to return to her matrimonial home at Lautoka and reside with the Respondent Raveen.*
9. *THAT the Applicant will allow and grant her mother-in-law reasonable access to the children of the marriage.*
10. *THAT should the Applicant Seema leave the matrimonial home in the future, she agrees only to leave by herself and not to take with her the children of the marriage unless she first obtains an inter-parte order of the court allowing her to take the children of the marriage.*
11. *THAT should the Applicant in future seek to make further applications to the court, she agrees to do so on an inter-parte basis with at least 7 (seven) days' notice to the Respondent.*
12. *THAT the costs of this action till to date are reserved in favor of the Respondent Raveen and the Respondent be at liberty to seek a summary assessment of costs till to date against the Applicant Seema for the Applicant to pay such costs before further proceeding with this matter if the Applicant breaches terms of the consent orders herein or if the Applicant commences further proceedings in relation to the matters of this suit.*
13. *THAT the Applicant Seema shall have no further claims or demands against the Respondent in respect of their marital relationship till to date.*
14. *THAT the parties declare the terms of the consent orders herein may be pleaded in bar to any action, suit or proceeding whether civil or otherwise hereafter commenced by her.*
15. *THAT both parties seek that the proceedings be terminated with liberty to restore on 7 (seven) days inter-parte notice.*

(03) The Learned Magistrate on 08.06.2010 had made an order upon the written minute as follows;

“Order in terms of the consent orders”

(04) It does not appear on the face of the order that it is an order by consent. As a matter of good practice, a consent order should state on its face that it is a consent order. Has the court sanctioned the arrangement between the parties to the action? I seriously doubt. Besides the purported consent order has not be drawn up and sealed.

(C) **Consideration and the determination**

(01) I propose to consider ground (3) before I turn to ground (1) and (2).

Ground 3

The Learned Magistrate erred in law and/or in fact when she misinterpreted the principle of res judicata.

This ground is not particularized. It is in general terms. How did the Magistrate misinterpret the principles of res-judicata? How did the Magistrate err in law? How did the Magistrate err in fact? They have not been particularized. The ground is unintelligible and vague and difficult to respond to. The issues that are stated in the appellant's Counsel's submissions are not stated in the ground of appeal. On the appellant's ground of appeal No.3, it is difficult to discern any serious issues. It is not only placing an unnecessary burden on the Court to ask it to search through the transcript of hearing to find out what they may be to be complained of, but it is also unfair to the respondent who is entitled to know what case she has to meet.

The ground (3) is dismissed.

(02) As to ground (1) and (2), on the hearing of the appeal, Counsel for the appellant submitted;

- ❖ *The consent order deals with child custody, child maintenance, spousal maintenance, stop departure, abuse of children, residence of the child.*
- ❖ *Except for what is stated in paragraph (10) of the consent order as to matters that can be re-litigated i.e. custody of the children, all other issues including property distribution is barred.*
- ❖ *The consent order is intended to put a stop to litigation between the parties except for custody of the children if the respondent leave the matrimonial home.*
- ❖ *The consent order is based on agreement between the parties that;*
 - (A) *The applicant Seema shall have no further claims or demands against the respondent in respect of their marital relationship till to date.*
 - (B) *The consent order is a bar to any action, suit or proceeding whether civil or otherwise hereafter commenced by her.*
- ❖ *The only remedy available to the respondent is to apply to set aside the consent orders which she has not done to-date.*

(03) On the other hand, Counsel for the respondent submitted that;

- ❖ *The consent order did not deal with the issue of matrimonial property.*

- ❖ *The consent order is not specific and hence it is ambiguous. Counsel relied on **Kelly v Fiji Development Bank (2004) FJHC 526; Tevita v Teniza (2020) FJHC 20.***
- ❖ *Clause 13 and 14 of the consent order is in direct contravention with Clause 11.*
- ❖ *Clause 13 and 14 are not specific. It does not say “a bar to matrimonial property”.*
- ❖ *The consent order was made in 2010, when the parties were married. They divorced in 2016. After the dissolution of the marriage, she has a right under the law to come to court to apply for distribution of matrimonial property.*

(04) The primary consideration which falls for my consideration in the appeal is, “**in respect of what matters is this consent order conclusive?**” The following matters were the **subject of the litigation** before the Magistrate’s Court of Ba;

- ❖ child custody
- ❖ child maintenance
- ❖ spousal maintenance
- ❖ stop departure
- ❖ abuse of children

(05) Now the next task of the court is to discover from the consent order itself what the order says and means. The consent order reads as follows;

1. *THAT a final order be made that child A of the parties born on 9th of April 2003 remain and continue schooling at Lautoka Primary School.*
2. *THAT a final order be made that Child A of the parties born on 9th April 2003 and Child B born on 7th July 2006 reside with their father Raveen at the matrimonial home.*
3. *THAT a final order be made that custody of Child A of the parties born on 9th April 2003 and Child B born on 7th July 2006 is granted to their father Raveen.*
4. *THAT the application for a stop departure order against the Respondent Raveen is withdrawn and cancelled.*
5. *THAT the application for a child and spousal maintenance order against the Respondent Raveen is withdrawn and cancelled.*
6. *THAT the Applicant withdraws all allegations of child abuse and any other allegation against the Respondent and confirms that such allegations were without basis and unfounded.*

7. *THAT the current interim orders for child and spousal maintenance against the Respondent Raveen is cancelled.*
8. *THAT the Applicant Seema is to return to her matrimonial home at Lautoka and reside with the Respondent Raveen.*
9. *THAT the Applicant will allow and grant her mother-in-law reasonable access to the children of the marriage.*
10. *THAT should the Applicant Seema leave the matrimonial home in the future, she agrees only to leave by herself and not to take with her the children of the marriage unless she first obtains an inter-parte order of the court allowing her to take the children of the marriage.*
11. *THAT should the Applicant in future seek to make further applications to the court, she agrees to do so on an inter-parte basis with at least 7 (seven) days' notice to the Respondent.*
12. *THAT the costs of this action till to date are reserved in favor of the Respondent Raveen and the Respondent be at liberty to seek a summary assessment of costs till to date against the Applicant Seema for the Applicant to pay such costs before further proceeding with this matter if the Applicant breaches terms of the consent orders herein or if the Applicant commences further proceedings in relation to the matters of this suit.*
13. *THAT the Applicant Seema shall have no further claims or demands against the Respondent in respect of their marital relationship till to date.*
14. *THAT the parties declare the terms of the consent orders herein may be pleaded in bar to any action, suit or proceeding whether civil or otherwise hereafter commenced by her.*
15. *THAT both parties seek that the proceedings be terminated with liberty to restore on 7 (seven) days inter-parte notice.*

(06) Counsel for the appellant argued that “except for what is stated in the consent order relating to matters that can be re-litigated all other issues are barred from any and all future litigation.”

(07) Counsel for the appellant further submits that as a result of the consent order the respondent is estopped instituting the proceedings for property distribution.

With respect, this is a startling proposition.

(08) The truth is, the order by consent is intended to put a stop to litigation between the parties in relation to the following matters which were the subject of the litigation before the Magistrate Court at Ba;

- ❖ Child custody
- ❖ Child maintenance
- ❖ Spousal maintenance
- ❖ Stop departure
- ❖ Abuse of children

- (09) It is clear to me from the proceedings in the Magistrates Court at Ba, that the consent order that was made on 01.06.2010 was made at some time she left the husband due to his adulterous behavior during the marriage and as a result she was struggling financially to support herself and the two children of the marriage in her custody. Later she changed her position, returned to matrimonial home and resumed cohabitation after she has been lulled into a false sense of security that matters were resolved and at rest. On 19.12.2014, she again left the matrimonial house terminating the relationship with the appellant due to his adulterous conduct and the marriage was dissolved by the court in August 2016.
- (10) Therefore, the financial and property relationship between the spouses was not a live issue before the Magistrate when the consent order was made on 01.06.2010. In **N.K. Rajgarhib v Madharir Plantation Ltd and others** (2006) (2) AIR 49 the court held that *“an order of a court of law and, in particular, a consent order, must be read in its entirety for the purpose of ascertaining its true intent and purpose”*.

In **Rekha Muherjee v Ashish Das and Anr** (2004) AIR 443 it was laid down that, *“the intention of the parties need to be considered by reading the whole of the consent order and not isolated sections or clauses”*. And I think therefore, it would be very mischievous to use clause (13) and (14) of the consent order to deny the respondent the right to litigate her claim for settlement of property.

The financial relationship between the spouses should wherever possible be brought to finality within a reasonable time after the dissolution of the marriage. The respondent’s legal right to litigate her claim for settlement of property arises upon the dissolution of the marriage. Then, how could there be a contractual term or agreement (if any) regarding a renunciation of claim for settlement of property during the marriage? The right of action for settlement of property did not exist at the time the consent order was entered on 01.06.2010. The right of action for property settlement accrued to the respondent in August 2016. Then, how could there be a contractual term (if any) on 01.06.2010 renouncing a claim for settlement of property?

- (11) **The respondent has a right to litigate her claim for settlement of property upon the dissolution of the marriage. It is not open to the appellant to rely on clause (13) and (14) of the consent order to argue that the wife did not propose to make a claim for settlement of property or renounced her claim. As I said in paragraph (10), a legal claim for settlement of property did not exist when the consent order was made during the marriage. Then how could she renounce a non-existent legal**

claim? How could the respondent on 01.06.2010 renounce a claim for property settlement which actually accrued in August 2016?

It would be very mischievous to use clause (13) and (14) of the consent order to deny the respondent the right to litigate her claim for settlement of property.

On the other hand, from a perusal of the consent order, it would be evident that there is no express clause in the consent order renouncing the respondent's claim for settlement of property. There is nothing on the face of it to show the abandonment of claim for settlement of property.

- (12) The case of **Harris v Caladine (1991) 172 CLR 84** makes it clear that the court must always exercise its own discretion on what order should be made under an application for distribution of the property of the parties to the marriage. This is so even if the parties seek a property order by consent. The court cannot ignore the requirement to assess that the orders which are proposed by the parties are just and equitable. The Learned Magistrate in paragraph (14) and (16) of the ruling has made reference to this non-existent claim. Therefore, the order of the Learned Magistrate is just and I do not see any reason to overturn the order. The ground of appeal No. (1) and (2) lack merits.

ORDERS

- (1) The appeal is dismissed.
(2) I make no order as to costs.

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Jude Nanayakkara
[Judge]

High Court - Lautoka
Friday, 22nd January 2021.