

IN THE FIJI COURT OF APPEAL

CIVIL JURISDICTION

CIVIL APPEAL NO. ABU0047 OF 1995
(High Court Civil Appeal No. 0002 of 1995)

BETWEEN:

SAIBAJ KHAN APPELLANT
f/n Rahimtullah

-and-

SARIFAN BI RESPONDENT
f/n Din Mohammed

Mr. A. Kohli for the Appellant
Mr. A. Sen for the Respondent

Date and Place of Hearing : 5 November 1996, Suva
Date of Delivery of Judgment : 13 November 1996

JUDGMENT OF THE COURT

The Respondent in this appeal, who for ease of identification we shall refer to as the Complainant and who in the Magistrates Court and the High Court was referred to as Sharifan Bi, applied to the Magistrates' Court at Labasa for affiliation and maintenance orders in respect of her two children viz Zia Rukshana Khan born on 17 February 1984; and Mohammed Zulfikhar Khan born on 9 November 1985. The Appellant admitted paternity of the two children. The learned Magistrate found as fact that the Appellant had bought a farm in the Complainant's name and transferred a lorry into her name in order to provide for the support of the children. As to the question of maintenance the learned trial Magistrate on 5 January 1995 found as follows:-

"On the evidence adduced in this case. I hold that the defendant has provided more than adequately for the two children, he

have brought into this world through the complainant and consequently discuss (sic) her application for maintenance. Application for maintenance dismissed. Parties to bear their own costs."

From that decision the Complainant appealed to the High Court. On 17 July 1995 the learned appeal judge Fatiaki J delivered a Judgment which concluded as follows:-

"Having carefully considered the evidence, and the submissions of learned counsels on appeal, I am constrained to hold that the learned trial magistrate erred in the exercise of his statutory discretion by giving undue weight to the provisions that had been made or given to the appellant and also in failing to give sufficient weight to the various 'principles' set out in the above cases.

In the circumstances the order dismissing the application for maintenance for the children is set aside and the case is remitted to the learned trial magistrate to assess the nature, method of payment and quantum of maintenance which the respondent is to pay for the children in accordance with the terms of this judgment and the provisions of Section 18 of the Maintenance and Affiliation Act (Cap.52).

In the result, the appellant having succeeded in this appeal is awarded her costs of the appeal to be taxed if not agreed."

It is from that Judgment that the Appellant now appeals to this Court.

We indicated at an early stage of this appeal that we agreed with the learned appeal judge that the question of maintenance is properly an issue for determination by the Magistrates' Court.

However, we were concerned that his directions in that regard could be interpreted as meaning that maintenance was payable, and that it was only a question of assessing what was considered an appropriate amount in the circumstances of this case.

Both Counsel have now assisted in allaying our apprehension in this regard and consent to the remittance back to the Magistrates' Court for determination of what that Court considers as appropriate maintenance, if any, for the two children, in accordance with the provisions of Section 18 of the Maintenance and Affiliation Act (Cap.52).

Counsel agree that it will be necessary for the learned Magistrate to give consideration to the following issues some of which have arisen subsequent to the original Judgment of 5 January 1995:-

1. The farm property is at present subject to a sale agreement to the Complainant's sister for \$60,000. This may or may not establish the value of the property which previously was estimated by the Complainant at \$30,000 and by the Appellant at \$90,000.
2. The mortgage to the Bank we are told is \$50,000 approximately and secures collaterally both the farm and the house in Nasea.
3. The Appellant has been paying and is to continue paying until further order of the court maintenance in the sum of \$12.50 per child per week since an order was made by the Magistrates Court following the Judgment of the High Court.

It was conceded by Counsel for the Complainant that this order was obtained without examination as to means. Both Counsel agree that the sum of \$12.50 per child per week is recognized as the level of maintenance payable which meets general community standards.

- 4. The income received by the Complainant from the farm property for the years 1993, 1994 and 1995.
- 5. The amounts, if any, received by the Complainant from the Bank during the years 1993, 1994 and 1995.
- 6. The current income of the Appellant and his obligations to other members of his family.
- 7. Any other issues that are considered relevant to a proper determination of the maintenance, if any, payable by the Applicant pursuant to the provisions of section 18 of the Act (Cap.52).

These directions will provide the learned Magistrate with the opportunity to re-examine the altered financial position of the Complainant and in particular as to the farm and house properties, and to obtain more detailed information about the Appellant's financial circumstances. As a result the presiding Magistrate will then "..... if he sees fit in all the circumstances of the case, proceed to make an order for the maintenance and education of the child(ren)" (Section 18). We wish to make clear that it is within his discretion under section 18, if he is satisfied that the Appellant has already made provision which is adequate for the maintenance of

the children to the age of 16 years, to decline to order the Appellant to pay any further maintenance. By the same token, if he comes to the conclusion that the provision already made by the Appellant is not wholly adequate for the maintenance of the children, he may order periodic payment of an amount at a rate lower than the accepted rate, if he thinks fit.

The appeal is therefore allowed. Fatiaki J.'s orders, including his order as to costs, are set aside. By consent the proceedings are remitted to the learned trial Magistrate for re-examination of the parties' financial positions in terms of the issues set out above to enable final determination of the Appellant's current obligations to his two children. It is our direction that the Clerk of the Magistrates' Court at Labasa allocate an early fixture for the hearing of this case, after consulting the trial Magistrate.

There will be no order for costs in this Court or the High Court.

Moti Tikaram
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Sir Moti Tikaram
President Fiji Court of Appeal

I. R. Thompson
.....
Mr. Justice I. R. Thompson
Judge of Appeal

J. D. Dillon
.....
Mr. Justice J. D. Dillon
Judge of Appeal