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

CIVIL APPEAL NO.ABU0062 OF 1999S
(High Court Civil Appeal No. HBA0022 of 1998)

BETWEEN: ARMOGAM PADAYACHI Appellant

AND: ANITA DEVI Respondent

Coram: Hon Jai Ram Reddy, President
 Hon Sir Rodney Gallen, Justice of Appeal
 Hon Robert Smellie, Justice of Appeal

Hearing: Tuesday, 27th August, 2002, Suva

Counsel: Appellant in Person
 Mr. A.K. Singh for the Respondent

Date of Judgment: Friday, 30th August, 2002

JUDGMENT OF THE COURT

The Appellant and the Respondent are Primary School Teachers. They were married on the 21st of October 1976 and have four children of the marriage. They are:-

Poonam Pravineeta Padayachi
Yashish Mogam Padayachi
Riteshna Shivam Padayachi
Parheen Pratishna Padayachi

This appeal concerns the youngest child Parheen Pratishna Padayachi (Parheen) born on the 24th of April 1990.

In 1990 the marriage broke up and the Respondent left the matrimonial home with Parheen to live with Latchman Murti, also a school teacher, at Lomawai, Sigatoka. The other three children have lived with the Appellant at Nausori.

In 1997 the Appellant applied to the Magistrates' Court at Nausori for the custody of all the four children of the marriage. After several adjournments, that application was dealt with by the Resident Magistrate Nausori, on the 24th of April 1998. On the date the learned Magistrate made the following Order:-

"Armogam Padayachi is hereby granted the custody of Parheen Pratishna Padayachi, as supported by the Report from the Dept. of Social Welfare herein filed. The mother is given access to the said child."

The Appellant and the Respondent were both present when the Order was made, as was the child Parheen.

It appears that the learned Magistrate did not hear any evidence, before making the Order. The Respondent being aggrieved by that Order appealed to the High Court. On the 2nd of August 1999 Shameem J., allowed the appeal and sent the case back to the Magistrates' Court, Nausori to be heard by another Magistrate. She ordered the Appellant to pay the Respondent's costs of the appeal to be fixed, if not agreed. Furthermore, she ordered that the child Parheen should continue to remain in the custody of the Respondent with access to the

Appellant "every fourth weekend of the month until the hearing is concluded".

The appeal to the High Court was allowed because the learned Magistrate in making the Order did not follow the guidelines set out by this Court, in Rajendra Nath v Madhu Lata, Civil Appeal No. 11 of 1984.

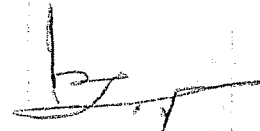
Shameem J. correctly found that both sides to the dispute were not heard. The Respondent was not heard, neither was her new partner. Although the two Welfare Reports were made available to the Court, it was not clear if they were disclosed to the parties. The child Parheen, although present in Court was not interviewed by the Magistrate. Shameem J. correctly observed that the reasons given by the learned Magistrate were "sparse and uninformative", and in particular no reasons were given for ignoring the wishes of the child Parheen who preferred to stay with his mother, the Respondent.

The Appellant appealed from the judgment of Shameem J.

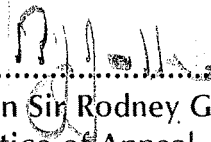
The Appellant told us that the Order made by the learned Magistrate was correct, and should be upheld. We cannot agree. Shameem J. applied the law correctly, and we see no merit in the Appellant's complaints. However, as to costs we allow the appeal, and quash the Order for costs made by Shameem J. We order that each party should bear their own costs of appeal to the High Court and to this Court. We make this Order, because in our view, these proceedings have been prolonged due to the Respondent's non-attendance on numerous occasions when the case was listed for hearing in the Magistrates' Court. Furthermore, she has failed to comply with the access order made by the learned Magistrate in respect of the

child Parheen, and the breach continues.

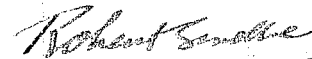
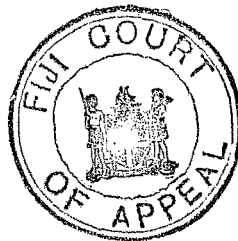
We note with concern that an application made in 1997 for custody of a child remains unresolved to this date. It is in the interests of the parties that the application be dealt with speedily.



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Hon Jai Ram Reddy
President



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Hon Sir Rodney Gallen
Justice of Appeal



.....
Hon Robert Smellie
Justice of Appeal

Solicitors:

Appellant in Person
Messrs A.K. Singh Law, Nausori for the Respondent