

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

**CIVIL APPEAL NO.ABU 0033 of 2016**  
**(High Court of Suva in a Family Appeal No. 0001 of 2014)**

**BETWEEN** : **BIJMA WATI** *Appellant*

**AND** : **GAYA PRASAD** *Respondent*

**Coram** : **Basnayake JA**  
**Almeida Guneratne JA**  
**Jameel JA**

**Counsel** : **Mr. M. Fesaitu with Ms. C. Choy for the Appellant**  
**Ms. M. Rakai for the Respondent**

**Date of Hearing** : **17 August 2017**

**Date of Judgment** : **14 September 2017**

**JUDGMENT**

**Basnayake JA**

[1] The appellant filed a notice of appeal (pgs. 2 to 4 of the Record of the High Court (RHC)) against the judgment (Pgs. 21 to 34 of RHC) of the learned High Court Judge (pgs. 5 to 9 RHC) dated 21 March 2016. By this judgment the learned Judge had dismissed the applicant's appeal with costs at \$ 1000/- on the ground that the appeal is out of time.

- [2] The learned High Court Judge had observed that the notice of appeal filed was on 11 July 2014. The order of the Magistrate appealed against was made on 14 December 2012. As per Rule 11.01 of the Family Law Rules 2005 an appeal shall be filed within one month after the day on which the order appealed from was made. The notice of appeal should be in accordance with Form 26 (vol. 14 pg. 133,881). Part “C” of Form 26 requires a copy of the order appealing against to be attached to such notice. As the notice of this appeal was filed more than one month after the date of the judgment, the appeal was dismissed with costs.
- [3] It is not disputed that the appellant has filed a copy of the judgment with the notice of appeal. The date of that judgment is 13 June 2014. This judgment carried six orders in alphabetical order as a, b, c, d, e and f.
- [4] The notice of appeal contained four parts as Part A, B, C and D. Part “C” requires information about the orders that the applicant is seeking to challenge. Under this part the applicant had mentioned orders a, b, c, d and e as orders to be set aside. Part “D” of the notice of appeal requires the grounds of appeal to be mentioned. Four grounds have been mentioned. Ground No. 2 is as follows: “The learned trial Magistrate erred in law and in fact when she dismissed the maintenance application without any cogent evidence”. This ground is concerning order “e” of the judgment of the learned Magistrate dated 13 June 2014. It is under order “e” that the maintenance application was dismissed. No such order was made in the purported order dated 14 December 2012.
- [5] It is the Judgment dated 13 June 2014 that carried six orders alphabetically numbered as a, b, c, d, e, and f. The notice of appeal filed on 11 July 2014 has specified that the orders appealed against are:- a, b, c, d, and e. The purported order dated 14 December 2012 neither contained six orders nor had the alphabetical identification. Therefore there is no doubt about the identity of the judgment appealed against. Considering the fact that the appeal was filed against the judgment dated 13 June 2014, the notice of appeal filed on 11 July 2014 is within time. Therefore I am of the view that the learned Judge had erred in dismissing the appeal on the ground that it was time barred.

[6] It appears that the confusion or misunderstanding mischief was caused by ground No. 1 mentioned under part “D” of the notice of appeal. It states thus, “*The appellant was prejudiced due to lack of legal representation which led to her decision to forego her appeal in respect of court order dated 14<sup>th</sup> of December 2012*”. The pronouncement dated 14 December 2012 does not appear to be an Order. Instead, it appears to be part of a record of the court proceedings. A portion of that dialogue is as follows: (pg. 383 RHC)

*Respondent: The children turned 18 in 2009.*

*Applicant: The court order was on 8/4/11 for respondent man.*

*Respondent: The children graduated with their first Tertiary qualification and if they want to continue they should continue on their own.*

*Applicant: They have qualified with their first qualification. She has applied Form 5 to continue with maintenance.*

*Court: **Maintenance stops when they obtain their first tertiary Qualifications** (emphasis added).*

[7] It appears that the learned Magistrate expressed her opinion as to when the law operates. However this has no bearing on the question involved in this case, namely, the order against which the appeal was preferred.

### **Jurisdiction of the Court of Appeal**

[8] In passing, I consider it appropriate to refer to the jurisdiction of the Court of Appeal in view of the fact that the Revised Laws of Fiji have left out section 12 (1) ( c ) of the Court of Appeal Act. In terms of section 3 (4) of the Court of Appeal Act, an appeal lies to the Court of Appeal from the final judgments of the High Court given in the exercise of the appellate jurisdiction only on questions of law. The section reads as follows:-

Section 3 (1), (2) and (3) are not reproduced.

(4). *Subject to.... appeals lie to the court on a question of law only from final judgments of the High Court given in the exercise of the appellate jurisdiction of the High Court.*

[9] There is a plethora of authoritative judicial precedents interpreting as to what constitutes a question of law. Chunilal Mehta v Century Shipping and Manufacturing Co. Ltd (1962) 1 AIR (SC) 1314, Chand v Fiji Times Ltd (2011) FJSC 2 (8 April 2011), Bulu v Housing Authority (2005) 1 FJSC 1 (8 April 2005), South Sea Cruises Limited v Samsul Mody (CBV 0009 of 2014 (23 April 2015)), Sen v Khan (CBV 0008 of 2014 (23 April, 2015)), Collettes v Bank of Ceylon (1982) (2) Sri LR 514, Lakshman v Estate Management Services Ltd [2015] FJCA 26 (27 February 2015). Simeli Bili Naisua v The State (CAV 0010 of 2013 (20 November 2013)) citing Robinson (1953) Cr App R 95, Pagett (1983) 76 Cr App R279, R v Majewski [1975] 3 All ER 296, Lemon [1978] 67 Cr App R 70, R v Thomson [1984] 3 All ER 565, Skipper v R [1979] FJCA (29 March 1979). Considering the principles set out by many authorities, the question whether a tribunal has misdirected itself on the law or on the facts, or has misunderstood them or has gone fundamentally wrong in certain other respects, would amount to a question of law which empowers this court to hear this appeal.

[10] Section 12 (1) (b) is another section that needs to be considered. It is as follows:

*12 (1) Subject to the provisions of subsection (2), **an appeal shall lie under this part in any cause or matter**, not being a criminal proceedings, to the Court of Appeal-*

*(a) Not reproduced.*

*(b) **From any decision of the [High Court] under the provisions of the [Family Law Act]** (emphasis added).*

This provision too empowers the Court of Appeal to entertain this appeal, being one filed under the provisions of the Family Law Act (Ravi Chand v Anmol Wati [2006] ABU 76 of 2005 (24 March 2006) where a maintenance appeal was entertained). The jurisdiction of the Court of Appeal is thus clearly established.

[11] I am of the view that the learned High Court Judge has misdirected himself on the identity of the judgment appealed against and had thus gone fundamentally wrong. For the foregoing reasons I am of the view that this judgment of the learned Judge cannot stand, and must be set aside. The dismissal by the learned High Court Judge was not on

the merits. Therefore the appeal has to be sent back to the High Court for a re-hearing. I order that the case be sent back to be heard a fresh before another Judge. I also direct that this case be given priority. The order as to costs too stands dismissed. In view of the facts of this case I am of the view that the parties should bear their own costs in this appeal.

**Guneratne JA**

[12] I have read the judgment of Basnayake JA and agree with the findings and conclusion.

**Jameel JA**

[13] I have read the judgment of Basnayake JA and agree with the findings, reasons and proposed orders.

**The Orders of the Court are:**

1. *Appeal allowed.*
2. *Judgment dated 21 March 2016 set aside.*
3. *The Record to be sent back for a fresh hearing before another Judge.*
4. *Parties to bear their own costs.*



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**Hon. Justice E. Basnayake**  
**JUSTICE OF APPEAL**

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**Hon. Justice Almeida Guneratne**  
**JUSTICE OF APPEAL**

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**Hon. Madam Justice F. Jameel**  
**JUSTICE OF APPEAL**