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

CIVIL APPEAL NO. ABU 120 of 2017
High Court Civil Action No. HBC 254 of 2016

BETWEEN	:	**RAM DEVI**
		Appellant
AND	:	**PRANIL ASHWIN NAIDU** **YOGENDRAN NAIDU** **KALPANA WATI NAIDU**
		1st Respondents
AND	:	**THE MANAGER, FIJI NATIONAL PROVIDENT FUND**
		2nd Respondent
Coram	:	**Lecamwasam , JA** **Almeida Guneratne, JA** **Jameel, JA**
Counsel	:	**Mr R P Singh for the Appellant** **Ms A Chand for the 1st Respondent** **Ms L Seibouma for the 2nd Respondent**
Date of Hearing	:	**13 February, 2020**
Date of Judgment	:	**28 February, 2020**

JUDGMENT

Lecamwasam, JA

[1] I agree with the reasons and conclusions arrived at by Guneratne, JA.

Almeida Guneratne, JA

[2] This is an appeal against the judgment dated 11 July, 2017of the High Court of Lautoka. By that judgment the High Court allowed an application made by the 1st named Respondent to have the balance of the pension conversion amount standing to the credit of his deceased father's Fiji National Provident Fund (FNPF) (which had been paid to the High Court of Fiji) be released to him for the reasons stated in his affidavit filed in support of the originating summons. (vide: pages 19 – 23 of the Copy Record).

[3] The judgment of the High Court is at pages 5-18 of the Copy Record and the Notice and Grounds of Appeal are contained in pages 1 to 4 of the said Record.

[4] In that background it became necessary to peruse the affidavit in opposition filed by the Appellant contained at pages 49 – 52 of the Copy Record.

Undisputed and Established Facts

[5] Having looked at the aforesaid background history of this dispute, what is relevant for purposes of this appeal are the established facts of this case.

[6] Those facts were re-capped by the learned High Court Judge. I shall refer only to those facts which I consider to have been established.

> *"(i) Ram Devi abandoned Naidu and the children for some twenty years or so,*
> *(ii) and throughout that time, had played no role in the children's upbringing,*
> *(iii) or later, in fulfilling her role as mother during the marriage of her children,*
> *(v) that she had left Naidu for another man, and uninterruptedly cohabited with that other man since the time she left Naidu."*
>
> (vide: page 16 of the Copy Record).

[7] The explanation given by the Appellant for leaving her spouse is at paragraph 12 of her Affidavit in Opposition. (vide: page 51 of the Copy Record). That explanation may well have been justification for leaving her spouse. But the bottom line is, the marriage had

irretrievably broken down, the broad ground on which either party might have been entitled to a dissolution of the marriage as per Section 30(1) of Family Act of 2003 by section 214 which repealed the Matrimonial Causes Act (Cap.51) by which had recognized the concept of Matrimonial fault, constituted by adultery or desertion as pleaded by the Respondents, or even by constructive desertion which appears to have been suggested by the Appellant in her pleadings (pages 49 to 52 of the Copy Record).

[8] On either basis, as I said earlier the bottom line for consideration was that the marriage had broken down irretrievably.

[9] Given all that legislative history and the changed socio-moral legislative attitude in the Fijian law, the contention of Appellant's Counsel in assailing the judgment of the High Court was that, as at the date of the death of the deceased (12 January, 2015), the Appellant remained the "surviving spouse" in the eyes of the law which entitled her to her shares and interests in the FNPF and arguments based on ethical considerations as urged by the 1st Respondent's Counsel were rendered irrelevant.

[10] Thus, the matter stood reduced to a question of law and its interpretation. I looked at the judgment of the High Court and the reasoning of the Judge in holding in favour of the 1st Respondent in my endeavour to see whether it bears scrutiny.

The High Court Judgment

[11] The learned Judge reasoned and concluded thus:

> *"53. I prefer a robust definition of 'surviving wife' to mean a widow who was still legally married to the deceased intestate at the time of his death and who, during the marriage, had not engaged in any (proven) conduct of such nature repugnant to and defiant of the obligations which are inherent in the sanctity of marriage, sufficient to disentitle her from any expectation of any benefit in the intestate deceased husband's estate. To adopt a narrow view would be contrary to the policy of the intestacy provisions which Dr Burns outlines.*

> *54. As a side comment, a valid will that makes provision even for a deserting and adulterous spouse must be respected because, at the end of the day, it is the wishes of the testator which must prevail.*
>
> *55. However, when it comes to whether a surviving, deserting and adulterous spouse should inherit from the deceased spouse's estate in terms of the intestacy laws under section 6 of the Succession, Probate and Administration Act, different considerations must apply.*
>
> *56. Accordingly, I rule that the FNPF funds standing in the account of the late Naidu should only be distributed in terms of section 6(1)(d) of the Section 6(1)(c) and (d) of the Succession, Probate and Administration Act."*
>
> (Page 18 of the Vol. 1 of the Copy Record)

Does that Reasoning and Conclusion bear scrutiny in the light of the relevant / applicable Statutory Provisions?

[12] Was it permissible for the learned Judge to prefer "a robust definition" as to who is a "surviving spouse"?

[13] Was that definition in accord with the relevant statutory provisions decreed by the legislature?

[14] In that regard I felt it necessary to lay down the said relevant impacting statutory provisions.

The Relevant Impacting Statutory Provisions

[15] I begin by referring to Section 6 of the Succession, Probate and Administration Act which the learned Judge hinged his conclusion to.

> *"Section 6 (1) (c) if the intestate leaves issue, the surviving wife or husband shall, in addition to the interests taken under paragraph (a), take one-third only of the residuary estate absolutely, and the issue shall take per stirpes and not per capita the remaining two-thirds of the residuary estate absolutely;*
>
> *(d) if the intestate leaves issue, but no wife or husband, the issue of the intestate shall take per stirpes and not per capita the whole estate of the intestate absolutely."*

[16] Reading the said provisions I was respectfully, at a loss to comprehend as to how the learned Judge could have reached that conclusion for the reason that, Section 6 (1)(c) is clear. The Appellant remained the "surviving wife" of the deceased at the time of his death.

[17] If so, how could the learned Judge have gone to Section 6(1)(d) by-passing Section 6(1)(c)?

[18] In that regard I looked at **Section 2** of the Family Law Act (2003) which defines property in relation to the parties to a marriage or either of them, as meaning property within or outside Fiji to which these parties are, or that party is entitled …". I looked at Section 2 of the Succession Probate and Administration Act which states that *"property includes real and personal property, any estate or interest in any property real or personal, and in any debt, and anything in action and any other right or interest."*

[19] However, **Section 154** of the Family Law Act defines property of a party as "not including amounts standing to the credit of the party's FNPF fund."

The maxim "*Generalia Specialibus Non Derogant*"

[20] Section 6(1)(c) being contained in an enactment in the year 1970 (Cap 60) and Section 154 of the Family Law Act being in an enactment in the year 2003, on the application of that maxim which has hardened into a rule of law I felt no necessity to refer to authorities, and accordingly was driven to the view that, the Appellant was not entitled to a share in the said FNPF fund of the deceased.

[21] Consequently, the submissions made by Counsel for the Appellant and the Respondents based on their oral as well as their written submissions focusing on the interpretation as to who is a "surviving spouse" whether on the literal or purposive tests (or even on the golden rule) stood, in my view, as being misconceived.

[22] I do not feel constrained to say that, the learned Judge, though failing to address the aforesaid matter (supra: paragraph [20] of this Judgment), in his conclusion, that the Appellant was not entitled to shares in the funds of the FNPF of the deceased stood as bearing scrutiny. I could not find anything in the Marriages Act (Cap 50), the Inheritance Act (Cap 61) or the Family Law Amendment Decree of 2012 that could have swerved me to any other view.

Jameel, JA

[23] I agree with the proposed orders of Almeida Guneratne JA.

Conclusion and the Final Determination of this Appeal

On the basis of the reasons adduced above, I conclude by dismissing this appeal and proceed to make my proposed orders as follows:

Orders of Court

1. *The Appeal is dismissed.*
2. *There shall be no costs taking into consideration the parties involved in this litigation.*

Hon. Justice S. Lecamwasam
JUSTICE OF APPEAL

Hon. Justice Almeida Guneratne
JUSTICE OF APPEAL

Hon. Justice F. Jameel
JUSTICE OF APPEAL