

IN THE FAMILY DIVISION OF THE HIGH COURT AT SUVA

APPELLATE JURISDICTION

ACTION NUMBER: 13/Suv/ 0022
(Appeal From: 10/Nau/0265)

BETWEEN: -CHAMELI
APPELLANT

AND: --PRAKASH
RESPONDENT

Appearances: Mr. V. Singh for the Appellant.

Mr. S. Kumar for the Respondent.

Date/Place of Judgment: Monday 13 April 2015 at Suva.

Coram: Hon. Madam Justice Anjala Wati.

Category: 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 person is purely coincidental.

-Anonymised Case Citation: Chameli v Prakash Family Appeal Case 0022Suv 2013

JUDGMENT

FAMILY LAW – APPEAL – PROPERTY DISTRIBUTION – HOUSEHOLD ITEMS; JEWELLERY; TOOLS; RENTAL PROCEEDS FROM PROPERTY AND FNPf MONIES INCLUDED IN POOL OF ASSETS: WAS IT PROPER? – ASSESSMENT OF CONTRBUTION OF PARTIES ON EVIDENCE AND CREDIBIITY – IS ASSESSMENT PROPER BY THE LOWER COURT – FUTURE ECONOMIC SITUATION OF PARTIES ASSESSED AND ADJUSTMENTS MADE: WAS IT PROPER FOR THE ADJUSTMENT TO BE MADE AND TO WHAT EXTENT AND IN WHAT CIRCUMSTANCES?

Cases/Texts Referred To:

1. AP v. NOH- [unreported] Fiji Family High Court Appeal Case Number: 13/Suv/0001.
2. FNPF v. RV and JB [unreported] Fiji Family High Court Appeal Case Number: 12/Suv/0017
3. Vaden v. Vaden [2008] FMCAfam 693.

Legislation:

1. Family Law Act No. 18 of 2003 ("FLA"): s 154; 162(2).
2. The Fiji National Provident Fund Decree 2011 ("FNPF DECREE"): s. 141(2).

Cause

1. -In 2013 the Resident Magistrate made orders for alteration of interests in the property of the parties to the marriage.
2. The Court had found that it was just, fair and equitable to divide the property (including adjustments considering the "future needs" factors) at 55 % to the wife and 45 % to the husband.
3. The initial contribution of the husband was found to be 40% but considering the husband's vulnerable economic situation in future, his entitlement was adjusted to 5%. The factor that influenced the 5% adjustment was that the wife was to retain the residential property from which she could derive rental income from 3 flats for all her life. The rental income from the 3 flats at the time of the hearing was \$640.00 per month.
4. The terms of the final orders were:

" i. The wife can retain the residential property;

The wife to pay the husband his share in the matrimonial property [house; FNPF and rent] \$97, 972 plus his share in the household; tools and jewelleries being the sum of \$3, 452 less wife's share in tools \$421 that is a sum of \$3,031.

Payments can be made via lump sum or periodic payment within 6 months of delivery of judgment;

Upon payment of the total sum of \$97,972, the husband shall execute the documents transferring his share in the residential property to the wife;

- ii. *Alternatively, the wife is at liberty to sell her shares in the property to her husband. In this case the husband shall then pay the wife \$119,743 being her share in the matrimonial property [house; FNPF; rent] plus wife's share in tools \$421 that is total of \$120, 164 less husband's share in the household items; tools and jewelleries being the sum of \$3, 452 now standing at \$116, 712.*

Upon receipt of the said sum, the wife shall execute documents transferring her share in the residential property to the husband;

- iii. *In the event the said sum is not paid to the husband as ordered earlier or the husband does not wish to buy the wife's share, than the property can be sold at a price not less than \$175,000.*

From the sale of the property payments are to be made to –the Town Council in the sum of \$3, 247.14 for the town rate as at 2008 and any realizations costs to have the property sold [including the solicitor's fees to prepare transfer documents]. For town arrears after 2008 till the date of sale the wife is liable to pay that herself.

From the balance proceeds, payments are to be made to the wife being 55% and to the husband being 45% ...

The wife will also pay to the husband \$3, 719 [\$3,140 being balance of his share in the household items; and jewelleries less her share \$421 for the tools].

For rental, the wife will pay to the husband his share being sum of \$17, 280.

Further, she will pay \$2,422 being husband's share in the parties FNPF contribution.

- iv. *Unless the parties agree to the contrary, they shall further do all acts and things to sign all documents necessary to sell the property;*
- v. *Either party is at liberty to apply to the court for appointment of an officer of the court to execute the transfer documents if the other party refuses to execute the transfer document;*
- vi. *The wife shall within 21 days from the delivery from this ruling return to the husband*

- 1 x sofa and 3 double beds;
- 1 x hand planner; 1 x sliding cram; tool box with hammer and chisel; 4 x aluminum doors; 1 x crowbar;

vii. ***There shall be no orders for costs against either party for the property distribution application”.***

5. Both the husband and the wife appealed against the orders. The wife raised 5 grounds of appeal as follows:

1. ***The Court erred in fact in finding that the flats in the residential property had earned \$38, 400 during the period of separation of the parties.***
2. ***The Court erred in fact and in law in finding that the wife had made a superior contribution to that of the husband to the extent of 60% to 40% when the contribution by the wife was much higher.***
3. ***The Court erred in fact and in law in failing to give proper weight to the evidence of the parties’ son, Vishal Chand, which evidence was unchallenged by cross-examination.***
4. ***The Court erred in fact and in law in failing to give proper weight to the evidence of the parties that all material for the construction of the residential house had been provided by the wife’s family.***
5. ***The Court erred in fact and in law in allowing certain household items, jewellery and tools claimed by the husband to be added to the pool when there was evidence that such items did not exist or had been taken by the husband.***
6. ***The Court erred in law by distributing the FNPF of the parties.***

6. The husband had filed a cross appeal on the ground that the Court erred in law and in fact when it did not distribute the property between the parties equally based on the evidence and the presumption under s. 162(2) of the FLA.

Submissions /Law and Analysis

7. The complaint in ground 1 is basically that the sum of \$38,400 as rental derived from the property from the date of separation until the date of delivery of judgment should not have been included

in the pool of assets.

8. The Court found that the 3 flats of the residential property as per the wife's evidence earned rental income in 2008. Two flats earned \$180 and the other remaining one earned \$280. The Court did not find the evidence of the wife credible when she claimed that one flat was occupied only for six months and vacated in 2009 and that the two flats had been vacated all the time until 3 months preceding the date of hearing when one of the flats got occupied.
9. The Court found that from the wife's demeanour it was apparent that she did not wish to share any income from the property and that she failed to make full and frank disclosures about the rental income that she had received.
10. Mr. Singh had argued that rental income is not property as it is not property in possession or reversion. He also relied on the case of **Vaden v. Vaden [2008] FMCAfam 693**. He argued that in this case it was decided that rental received from the property should not be included in the pool of assets.
11. Mr. Singh also argued that the wife's evidence was not contradicted that the rental flats were vacant for most of the times. The husband should have provided evidence to show that the flats were rented.
12. It was further contended that the husband himself testified that the rental income was used to pay the loan. There was no evidence when the mortgage by Home Finance Company was paid off so even if rental income was received, it should be applied towards payment of the loans.
13. Mr. Kumar argued that at all times in her written evidence the wife did not state that the property was vacant and not deriving income. This was an afterthought to deprive the husband of his share. Whilst the wife enjoyed the benefit of the house, the husband suffered and survived the ordeal. It was correct that the rental income which the wife received be included in the pool of assets.
14. I will first of all deal with the case of **Vaden** (supra). In that case the contention was whether the rental income should be included in the pool of assets. The husband had argued that the wife had either secretly collected rental income from the property or acted "*recklessly, negligently or wantonly*" so that the value of the property is minimized or reduced. The Court did not find that there was clandestine rental arrangement in respect of the property. The Court found that the wife had not reduced the value of the property but rather failed to utilize to its full potential. Based on the facts of the case the Court decided that it was proper given all the circumstances of

the case to deal with the consequences of the wife's conduct under the second step of the process of distribution, that is, when assessing the parties respective contributions overall. In actually assessing the contributions, the Court found that the parties post separation contribution favoured the husband chiefly in regards to the wife's wastage of the asset.

15. It is on the facts of the case that the Court was satisfied that the rental income from the property should not be included in the pool of assets as there did not appear to be any secret arrangement for rental of the property. **Vaden** does not set down a general principle of law that rental derived from a property must not be included in the pool of assets. Whether or not it should be, depends on the facts of each case.
16. In this case the Court was satisfied that the wife received the rental income both on the facts of the case and on the credibility of the parties' in refusing to believe the evidence of the wife when she said that the property was not gaining rent.
17. On the facts of the case, when the parties were cohabiting, the property was on rent and received rental income. Rental income was also used to pay the debt. If the property was always on rent, there is no evidence to show when and why it stopped generating income. With that fact, the lower Court, having observed the demeanour of the wife disbelieved her evidence which this Court cannot interfere with given the previous history that this property was collecting rent all the time and the income was used to pay the debt.
18. If the wife did not rent the property than she has failed to utilize the property fully. She was occupying the property and it was her duty to find tenants to gain income for the benefit of the parties and not put it to waste.
19. If the rental is not to be included in the pool of assets, the assessment of her contribution would change and that would be in favour of the husband. So either way, the husband will derive a benefit.
20. Mr. Singh further argued that if rental was received, the Court should have found that it was used to pay off the mortgage and not received by the wife. Firstly, I find that the Court was correct in refusing that there was no mortgage on the property, as despite directions, neither party produced evidence of any debt and the extent of it, although the charge was still noted in the memorial of the title. There are times when despite the debt being paid off, the charge remains, if the parties do not pay to seek a discharge of the mortgage.

21. Mr. Singh therefore cannot say that if the rental income was received, it was used to pay the debt. It was his duty to prove that there was an existing debt which needed to be serviced by payment. His client failed to prove that aspect. In fact neither party proved that there was an existing debt and in absence of any such evidence produced in Court, the Court cannot grant the benefit to anyone party. It was proper for the Court to refuse to accept that there was any debt on the property and whatever consequences flowed from that, the parties cannot challenge the findings of the Court on that aspect.
22. Secondly, Mr. Singh's submission in two fold adds to the lower Courts finding on the aspect of credibility that the wife indeed received the rental income from the property. First he says that no rental was received. Then he goes on to say that if it was received then the same should be applied towards the debt.
23. Mr. Singh's hypothetical argument is embarrassing to his client. Even at the appellate stage there is no conviction that no rental was derived from the property. That attacks the credibility of the wife and I find that the Court was correct in refusing her evidence as not being the truth.
24. I must also not overlook to say then when the wife was asked to disclose what mortgages she has on the property in her response, she noted "nil". How can Mr. Singh then flaw the Courts finding that the property did not have any mortgage?
25. I find ground 1 to be without merits and dismiss the same.
26. I turn to grounds 2, 3 and 4 as Mr. Singh had argued them together.
27. The complaint in ground 2 is that the wife had made a higher contribution to the property of the parties to the marriage. I think it is prudent that I deal with the cross-appeal at the same time when dealing with this ground. The wife's contention is that a finding of 80% in favour of the wife and 20% in favour of the husband should have been made. The husband contends that a finding of equal contribution should have been made given the facts of the case and the presumption at law under s. 162(2) that unless it is repugnant to justice, the parties' contributions should be regarded as equal.
28. Grounds 3 and 4 basically state that the lower Court did not give proper weight to the evidence of the parties' son and to the unchallenged evidence that all the material for the construction of the property was provided for by the wife's family.
29. Mr. Singh submitted that the husband had testified that the wife's family had given all the building materials and the wife had testified that her family did give the materials but she also

took loan from her employer for which there was direct deduction from her salary. She used the loan monies to pay the loan and buy the building materials. The husband had testified that the rental income was used to pay the mortgage on the property whilst the wife testified that the rental income was not consistent and she used her salary to pay the loan.

30. Mr. Singh stated that the son's evidence was that his siblings and his tertiary education were paid through the wife's FNPF monies. No maintenance was paid to them by the father and the mother had also managed the household expenses as she did in the past.
31. With all that evidence and the Courts finding that both parties were of almost the same age and that there was no evidence of either having any health problems, the parties entitlement ought to have been worked out at 80:20 between the wife and the husband.
32. Mr. Kumar argued that the husband had worked and brought income to the house. He arranged for all the materials and also constructed the house. He made down payment to secure the loan. He is a joint owner of the property. His income was also used to secure the loan from the Home Finance Company. His contribution and the ownership of the property itself indicate that his contribution ought to be at 50%.
33. The reason why the Court worked out the contribution at 60: 40 between the wife and husband initially was explicitly stated in the judgment that during the initial period of marriage, only the husband worked and earned income. The wife contributed as a homemaker parent. Then the wife engaged in formal employment and she contributed as well financially and to the welfare of the family. The husband also contributed by engaging in constructing the house. The Court rejected the wife's evidence that she obtained a loan from the employer to repay the loan and buy the building materials as there was no evidence of any loan obtained from the employer. The Court found that the rental monies were used to pay the loan. Until that stage the Court said that the contribution was equal. The Court then took into account that when the husband stopped living with the family, it was the wife who paid for two children's education from her FNPF monies although the children were over 18. Due to that contribution of the wife post separation, the Court found the contribution to be 60:40.
34. Indeed this marriage lasted 23 years. The parties both, in the 23 years, contributed in their own way. The husband by earning and providing for the family and the wife by looking after the family and earning. There were periods when both parties did not work. The husband engaged in construction work to build the residential flats whilst the wife earned. Whilst they cohabited, both their contribution was equal. It was the wife's financial contribution to the children's welfare and education post separation that made it equitable that her contribution percentage

be increased which the Court was correct in increasing by 10%.

35. On the aspect of the wife's family giving the material, there was evidence that the parties were living happily when the contribution was made. There is no evidence that the contribution was only made for the wife.
36. There is no evidence that the materials and labour were given on account of the relationship of the wife only for her to claim that it should be worked in her favour. In absence of such evidence, it is only proper that any such contribution be treated as contribution by both the husband and the wife as this was a long marriage and the donors of the materials and those who provided labour had recognized the relationship and made the contribution to the relationship.
37. I do not find that the Court erred in saying that the parties had contributed equally and that since the wife had contributed to the welfare of the family post separation without any form of support from the husband, her contribution was superior in that she contributed 60% and the husband contributed 40%.
38. Mr. Singh has also complained about the 5% adjustment in favour of the husband which the Court made having regard to the "*future needs*" factors. Mr. Singh's complaint is that the reason why the 5% increment was given was that the wife would retain the residential property and derive income from the same. Mr. Singh argued that that adjustment would not be proper if the husband was to receive the property and the wife was to buy her share and/or if the property was sold to distribute the parties' entitlement.
39. The above was not included as a ground of appeal and was sneaked in the submissions under grounds 2, 3 and 4. There should have been a specific ground to this effect to put Mr. Kumar on notice that the 5% adjustment was subject to the appeal. In any event, once again Mr. Singh did not state with any certainty that his client would not be able to pay off the husband's share and would ask him to buy her share off or that there was potential to sell the property.
40. However, I find that whatever arguments would have been presented, it is not fair to give the husband a further 5% adjustment if he was to retain the property. Instead the wife should get the 5% adjustment on the same reasoning of the Court. The percentage entitlement would be wife to husband 65:35.
41. If the property was to be sold then neither party is to get any adjustment in their favour. The percentage entitlement would then be wife to husband 60: 40.
42. Ground 5 states that the Court erred in allowing certain household items, jewelleryes and tools

claimed by the husband to be added in the pool of assets when there was evidence that such items did not exist or had been taken by the husband.

43. Mr. Singh testified that the wife had agreed in her Form 10 that she would return certain items. In her evidence she had stated that the husband had taken some items with him and the son had confirmed this evidence.
44. Mr. Singh argued that the Court erred at paragraph 246 of its judgment when it stated that neither the wife nor the son confirmed to the Court what items were left behind by the husband. Mr. Singh said that this evidence was contained in Form 10.
45. I have perused the Form 10 and I do not find that the wife had stated which items she has with her out of the claim made in form 9. The Court therefore had to depend on the evidence and it decided to accept the evidence of the husband instead of the wife and the son who did not state with any clarity as to which items were taken and which were left behind. The Court also believed that the husband would not make a claim for those items if he had removed it from the house.
46. Given the evidence before the Court, I cannot come to any other finding apart from what the lower Court had arrived at. There is no other evidence for me to disturb the findings of the lower Court.
47. The final ground states that the wife's FNPF should not have been distributed as it is not property of the parties to the marriage.
48. Mr. Singh argued that s. 141 of the FNPF Decree amended s. 154 of the FLA. The effect of the amendment is that monies now standing to the credit of a party's account is not included as property of the parties to the marriage.
49. If that is the amendment, the Court ought not to have included FNPF of the parties to be distributed.
50. In my earlier case of **AP v. NOH- [unreported] Fiji Family High Court Appeal Case Number: 13/Suv/0001** I had said the following:

***“Under the FLA, property included the money standing to the credit of a party in the Fiji National Provident Fund: s. 154. That section was amended by the FNPF Decree 2011 – Decree No. 52 which came into force on 25 November 2011(except for certain provisions mentioned in s. 3). The amending section is 141(2) (a) which states that s. 154 of the Family law is amended to exclude FNPF as property.*”**

If FNPF is not included as property of the party to the marriage, could the Court have frozen the funds in FNPF? I now need to look at s. 136 of the FNPF Decree. This section has some bearing on this matter. Section 136 reads:...

What s. 136 states is that if there is an existing title or right in respect of property or an entitlement in maintenance or property then the FNPF funds of one party can be used to pay of that existing title or right and entitlement of the other party. The entitlement could be a past, present, or future entitlement but must be an entitlement in maintenance or in property.

The FNPF monies cannot be included in the pool of assets to be distributed. That is clear by s. 141(2) (a) of the FNPF Decree. However, under s. 136, the Court can use FNPF monies to pay off a person's entitlement in a property or maintenance claim".

51. In the case of *FNPF v. RV and JB [unreported] Fiji Family High Court Appeal Case Number: 12/Suv/0017* I had followed the above case with an explanation as follows:

"I maintain what I have said in my earlier decision with one more observation that using a member's funds for payment of his maintenance or property claim is in fact beneficial to the member and prevents the member from incurring debt and losing his or her other properties to such claims. The member will not have to take loans to pay off such debts which have been quantified under a maintenance or property claim and will be saved from interest on loans. The member will also be saved his other properties.

I do not find that s. 136 and 141(2) of the Decree are inconsistent. If read carefully, the sections are workable and can be reconciled. What is required is a careful interpretation".

52. No convincing submission has been tendered in Court on why I should not follow the above authorities and given that position I find that the lower Court was incorrect in including the parties FNPF monies in the pool of assets to be distributed.

Effect of the Decision

53. There are two significant findings that I have made which will have the effect of altering the final orders of the lower Court.

54. The first is that if the husband is to retain the property then the 5% adjustment which was made in his favour would cease and go to the wife. If the property is to be sold then the 5% adjustment for the reasons explained above should not be made in favour of anyone. The distribution

between the wife to husband will stand at 65:35 or 60:40 depending on what the parties choose to do at the end of the day.

55. The second is that neither of the parties FNP should be included in the pool of assets. This would affect the final figures to be paid out to the wife and husband respectively.

56. The other grounds of appeal and cross appeal have no merits and are dismissed. It shall not affect the final outcome of the orders of the lower Court.

Final Orders

57. The appeal is partly allowed to the extent identified below.

58. The cross-appeal is dismissed.

59. The orders of the lower Court are set aside to the extent identified in bold and italics beneath each of its orders:

i. The wife can retain the residential property.

The above order/paragraph is affirmed.

The wife to pay the husband his share in the matrimonial property [house; FNP and rent] \$97, 972 plus his share in the household; tools and jewelleries being the sum of \$3, 452 less wife's share in tools \$421 that is a sum of \$3,031.

The above order/paragraph is set aside to the extent that the sum or figure of \$97, 972 is set aside and substituted with a figure of \$94,569. All other words and its effect in the above order shall remain unchanged.

Payments can be made via lump sum or periodic payment within 6 months of delivery of judgment.

The above order shall remain except that the six months period begins from the date of the appeal judgment.

Upon payment of the total sum of \$97,972, the husband shall execute the documents transferring his share in the residential property to the wife;

The above order/paragraph is set aside to the extent that the sum or figure of \$97, 972 is set

aside and substituted with a figure of \$94,569. All other words and its effect in the above order shall remain unchanged.

- ii. Alternatively, the wife is at liberty to sell her shares in the property to her husband. In this case the husband shall then pay the wife \$119,743 being her share in the matrimonial property [house; FNPF; rent] plus wife's share in tools \$421 that is total of \$120, 164 less husband's share in the household items; tools and jewellerys being the sum of \$3, 452 now standing at \$116, 712.

The above order/paragraph is set aside to the extent that all the sums and figures would change using the wife to husband percentage entitlement of 65: 35. The lower Court shall be in a position to calculate the figures precisely and seal the orders. It must be noted that FNPF is not to be included in the pool of assets.

Upon receipt of the said sum, the wife shall execute documents transferring her share in the residential property to the husband;

The above order/paragraph is affirmed.

- iii. In the event the said sum is not paid to the husband as ordered earlier or the husband does not wish to buy the wife's share, than the property can be sold at a price not less than \$175,000.

The above order/paragraph is affirmed.

From the sale of the property payments are to be made to-the Town Council in the sum of\$3, 247.14 for the town rate as at 2008 and any realizations costs to have the property sold [including the solicitor's fees to prepare transfer documents]. For town arrears after 2008 till the date of sale the wife is liable to pay that herself.

The above order/paragraph is affirmed.

From the balance proceeds, payments are to be made to the wife being 55% and to the husband being 45%....

The above order/paragraph is set aside to the extent that 55% is to be substituted with 60% and 45% is to be substituted with 40%.

The wife will also pay to the husband \$3, 719 [\$3,140 being balance of his share in the household items; and jewellerys less her share \$421 for the tools].

The above order/paragraph is set to the extent that all the sums and figures would change using the wife to husband percentage entitlement of 60: 40. The lower Court shall be able to calculate the figures precisely and seal the orders.

For rental, the wife will pay to the husband his share being sum of \$17, 280.

The above order/ paragraph is set aside to the extent that the figure of \$17,280 is set aside and substituted with \$15,360 using wife to husband percentage contribution of 60:40.

Further, she will pay \$2,422 being husband's share in the parties FNPF contribution.

The above order/paragraph is set aside in whole as FNPF is not a property of the parties to the marriage.

- iv. Unless the parties agree to the contrary, they shall further do all acts and things to sign all documents necessary to sell the property.

The above order/paragraph is affirmed.

- v. Either party is at liberty to apply to the court for appointment of an officer of the court to execute the transfer documents if the other party refuses to execute the transfer document.

The above order/paragraph is affirmed.

- vi. The wife shall within 21 days from the delivery from this ruling return to the husband
- 1 x sofa and 3 double beds;
 - 1 x hand planner; 1 x sliding cram; tool box with hammer and chisel; 4 x aluminum doors; 1 x crowbar.

The above order/paragraph is affirmed except that the time period to return the items shall run from the date of the appeal ruling.

- vii. There shall be no orders for costs against either party for the property distribution application.

The above order/paragraph is affirmed.

60. Each party is at liberty to apply to this Court to correct the errors it has made in terms of calculation and to the lower Court to calculate the new figures if the Respondent is to retain the property or if the property is to be sold. I have noted the instances where the lower Court has to

calculate the parties' entitlements in monetary terms.

ANJALA WATI

JUDGE

13.04.2015

To:

- 1. Mr. V. Singh for the Applicant.**
- 2. Mr. S. Kumar for the Respondent.**
- 3. File: 13/Suv/0022.**
- 4. File: 10/Nau/0265.**