

**IN THE FAMILY DIVISION OF THE HIGH COURT AT SUVA
APPELLATE JURISDICTION**

APPEAL NUMBER:	17 of 2014 (Family Case number 07/SUV/0217)
BETWEEN:	RAMEN
AND:	KANTA
Appearances:	Mr. R. Vananalagi for the Appellant Ms. T. Leweni for the Respondent
Date of judgment:	26 May 2020
Judgment of:	Hon. Acting Chief Justice Kamal Kumar
Category:	<i>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 persons is purely coincidental.</i>
Case Citation:	Ramen v. Kanta – Fiji Family High Court Appeal Case Number 14/SUV/0017

JUDGMENT OF THE COURT

Introduction

- [1] On 1 December 2014, Appellant filed Notice of Appeal against the Learned Magistrates decision in Family Case No. 07/SUV/0217 delivered on 4 September 2014.
- [2] Grounds of Appeal are as follows:-
- (a) That the Magistrate erred in fact and in law in finding that the Appellant is in maintenance arrears of \$16,111.25.
 - (b) That the Magistrate erred in fact and in law in finding that maintenance arrears is not a debt within bankruptcy proceedings.
 - (c) That the Magistrate erred in fact and in law in deciding that the Appellant has to pay arrears of maintenance.”
- [3] Appeal was first called in this Court on 6 March 2015, and was adjourned to 1 May 2015, due to non-appearance of Respondent or her Counsel.

- [4] On 1 May 2015, Respondent was advised to seek advice from Legal Aid Commission and Appeal was adjourned to 3 July 2015.
- [5] On 3 July 2015, Appeal was adjourned to 6 August 2015, due to non-appearance of Appellant.
- [6] On 6 August 2015, parties were represented by their Counsel when they were directed to file Submissions and Appeal was adjourned to 28 October 2015, for hearing.
- [7] Both parties filed Submissions, Appeal was heard on 28 October 2015.

Backgrounds Facts

- [8] Parties were married in 1993, and have three children.
- [9] On 30 October 2002, Appellant was ordered to pay spousal and child maintenance at \$50.00 per week.
- [10] On 21 January 2010, Appellant filed Form 5 Application for an Order that maintenance payment be ceased which application was unsuccessful.
- [11] On 22 April 2013, Appellant filed another Form 5 Application.
- [12] Learned Magistrate decided to deal with issue of maintenance arrears of \$16,111.25 for which Respondent had issued Judgment Debtor Summons (“JDS”) before dealing with Form 5 Application.
- [13] On 12 August 2013, Appellant presented a Bankruptcy Petition and a Receiving Order was made in respect to his Estate.
- [14] Appellant informed Court about the Receiving Order.
- [15] Learned Magistrate dealt with pending JDS for maintenance arrears and with issue as to whether maintenance is a debt provable in bankruptcy.

Appeal

- [16] It is interesting to note that Counsel for the Respondent conceded to Ground 2 of the Appeal in “That the Magistrate erred in fact and in law in finding that maintenance arrears is not a debt within bankruptcy proceedings.”
- [17] This Court makes one thing very clear which all Legal Practitioners should take note of the fact that if Counsel for the Respondent in an Appeal concede to the ground of appeal, does not mean that Appellate Court will accept that lower court erred in law or in fact in deciding the issue subject to the ground of appeal.
- [18] In this instance, even though Counsel for Respondent conceded to Ground 2 of the Appeal for whatever reason this Court will need to determine whether Learned Magistrate “erred in fact and in law in finding that maintenance arrears is not a debt provable in bankruptcy”.

Ground No. 1

[19] This Ground is dismissed on the Ground that Learned Magistrate held that the fact that Appellant was in maintenance arrears of \$16,111.25.

[20] This finding is based on admission made by Appellant on 5 June 2012, when he admitted owing \$16, 381.35 (page 94 of Copy Record).

Ground No. 2

[21] Sections 4 and 5 of Debtors Act 1886 provide:-

“s4. Subject to the provisions hereinafter mentioned and to the rules in the Schedule the court may commit to prison for a term not exceeding 6 months or until payment of the sum due any person who makes default in payment of any debt or instalment of any debt due from him or her in pursuance of any order or judgment of any competent court, provided that the jurisdiction given by this section shall only be exercised where it is proved to the satisfaction of the court that the person making default either has or has had since the date of the order or judgment the means to pay the sum in respect of which he or she has made default and has refused or neglected or refuses or neglects to pay the sum. For the purpose of this section, the court may direct any debt due from any person in pursuance of any order or judgment of any competent court to be paid by instalments and may from time to time rescind or vary such order.”

“s5. No imprisonment under section 4 shall operate as a satisfaction or extinguishment of any debt or cause of action or deprive any person of any right to take out execution against the lands, goods or chattels of the person imprisoned in the same manner as if such imprisonment had not taken place.”

[22] Section 5 of the Bankruptcy Act 1944 provide as follows:-

“s5 Subject to the conditions hereinafter specified if a debtor commits an act of bankruptcy the court may, on a bankruptcy petition being presented either by a creditor or by the debtor, make an order, in this Act called a receiving order, for the protection of the estate.”

Sections 8 and 9 of the Bankruptcy Act provide as follows:

“8(1) A debtor’s petition shall allege that the debtor is unable to pay his or her debts, and the presentation thereof shall be deemed an act of bankruptcy without the previous filing by the debtor of any declaration of inability to pay his or debts, and the court shall thereupon make a receiving order.

(2) A debtor’s petition shall not, after presentation, be withdrawn without the leave of the court.

9(1) On the making of a receiving order the official receiver shall be thereby constituted receiver of the property of the debtor, and thereafter, except as directed by this Act, no creditor to whom the

debtor is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the debtor in respect of the debt, or shall commence any action or other legal proceedings, unless with the leave of the court and on such terms as the court may impose.

- (2) But this section shall not affect the power of any secured creditor to realize or otherwise deal with his or security in the same manner as he or she would have been entitled to realize or deal with it if this section had not been passed.”

[23] Order 36 Rule 19 of Magistrate Court Rules provide as follows:-

“19(1) Where, upon the return day of a judgment summons, the judgment debtor satisfies the Magistrate that a receiving order has been made for the protection of his or her estate, or that he or she has been adjudicate bankrupt, or that a composition order has been made against him or her, and that the debt was provable therein, nor order of commitment shall be made.

- (2) Where an order of commitment has been made, and the Magistrate making the same shall thereafter be satisfied that a receiving order has been made for the protection of the estate of the judgment debtor against whom such order was made, or that he or she has been adjudicated bankrupt, or that a composition order has been made against him or her, and that the debt in respect of which the order was provable therein, the order of commitment shall not issue, and, if issued and not executed, shall be recalled. If such order has been executed, the Magistrate, on being satisfied as to the aforesaid facts, shall order the judgment debtor to be discharged.”

[24] Leading case dealing with this issue in Ground 2 is *Woodley v Woodley (No 2)* [1993] 4 All ER 1010.

[25] The facts in **Woodley v Woodley** (Supra) is not much different to this case. In **Woodley** substantial assets were involved and order for maintenance payment was in lump sum.

[26] It is appropriate to state the facts of **Woodley**. In brief:-

- (i) On 12 December 1975, parties got married and had one child. Husband owned the matrimonial home in Devon;
- (ii) In 1984, marriage broke down, parties separated, and agreed through their then Solicitors their matrimonial property which was subject to mortgage be sold with wife receiving net sale proceeds;
- (iii) Matrimonial home was sold for £300,000 and after payment of mortgage debt wife received £6,004.00.

It subsequently transpired that husband did a deal with the Purchaser to receive £71,000 which supposedly was for sale of chattels in the house which he kept secret from his wife.

- (iv) On 1 July 1986, Husband sold his business for £150,000.
- (v) On 31 March 1987, husband filed petition for divorce and on 27 July 1987, Decree Nisi was granted;

- (vi) On 1 December 1987, wife filed application seeking all forms of financial relief.
- (vii) On 24 May 1991, the District Court Judge made following orders:-
 - (a) Husband pay to wife lump sum of £60,000 within 28 days;
 - (b) Husband pay maintenance by periodic payment of £11,200 per annum;
 - (c) Husband pay wife's cost on indemnity basis.
- (viii) Husband's appeal against order of 24 May 1991, was dismissed.
- (ix) On 7 June 1991, Decree Nisi became obsolete.
- (x) On the same day husband presented his bankruptcy petition in person and Bankruptcy Order was made on 29 July 1991.
- (xi) On 8 May 1992, wife issued JDS to enforce payment of £60,000 lump sum and interest.
- (xii) On 10 June 1992, District Court Judge made an order committing husband to prison for six weeks suspended on terms that lump sum be paid by 8 July 1992.
- (xiii) Husband appealed the Order for committal and the appeal was allowed on two (2) grounds:-
 - (1) The Judge had not adopted the correct standard of proof (criminal standard - beyond reasonable doubt) in relation to the provision of s5(2) of Debtors Act 1869(UK).
 - (2) Judge had not considered the effect of husbands bankruptcy.
- (xiv) On 14 July 1992, wife issued a second JDS to enforce lump payment of £60,000.
- (xv) Judge dismissed the Second Judgment Debtor Summons and the wife appealed.

[27] Justice Hunter in his judgment in **Woodley** (Supra) stated as follows:-

“The first and major question I have to answer, and I put it in this way, is the court sure or, to put it another way but coming to the same thing, satisfied beyond a reasonable doubt that the debtor has since the order was made, or has had since the order was made, sufficient resources to satisfy the debt? I put it in that way because the question of standard of proof was considered by the Court of Appeal and that is now an authority for the proposition that in matters such as a judgment summons the court has to be satisfied beyond a reasonable doubt, in other words, the criminal standard of proof applies.”

[28] Justice Hunter further went to state as follows:-

“Now it seems to me that the effect of that is that by operation of law all those hidden assets to which I have referred, which, as I say, I have found beyond a reasonable doubt the debtor has, must by operation of law have vested in the trustee. The trustee, of course, is plainly unaware of them and has not so to speak been seized of them or brought them under his control, but nevertheless they are vested in the trustee, and accordingly, it seems to me that the debtor is not entitled at law to employ those assets, which I find he has, to discharge this judgment debt. I come to this conclusion somewhat reluctantly. It is not a point which has been taken in front of me, but it is a point to which I have been driven on consideration of the [1986] Act and accordingly I must refuse

to make any order under this judgment summons. I could not order this man to be committed because of his failure to do an act which as I say he is not entitled at law to do and accordingly I think I must, very reluctantly, dismiss this judgment summons.”

[29] Wife’s appeal to Court of Appeal was dismissed. Lord Justice Balcombe at paragraph d on page 1021 stated as follows:-

“Before those rules came into force orders for periodical payments were not provable in bankruptcy (see *Linton v Linton* (1885) 15 QBD 239, [1881-5] All ER Rep 867 and *James v James* [1963] 2 All ER 465, [1964] P303), **whereas an order for a lump sum was provable** (see *Curtis v Curtis* [1969] 2 All ER 207 at 209, [1969] 1 WLR 422 at 427, 429).”

Justice Balcombe further stated as follows:-

“In the present case, the wife could have proved in the husband’s bankruptcy and no doubt would have sought to encourage the trustee to take steps open to him to discover what had happened to the husband’s assets; there would have been no need for the present unhappy saga to have occurred.”

[30] In this instance:-

- (i) Appellant on 30 October 2002, was ordered to pay maintenance at \$50.00 per week.
- (ii) Since then, Appellant paid only \$850.00 with last payment of \$20.00 made on 5 July 2012.
- (iii) On 21 January 2010, Appellant filed Application for an Order to cause maintenance payment which application was dismissed on 12 January 2012.
- (iv) Appellant appealed that decision to High Court which resulted in JDS being held pending determination of the Appeal.
- (v) On 15 April 2013, Appellant’s Appeal to High Court was dismissed.
- (vi) On 22 August 2013, Appellant obtained Receiver Order on his own petition.

[31] This Court adopts what has been states in **Woodley v Woodley** (Supra) as the correct approach in deciding whether maintenance payment Ordered by the Court in a family matter is debt provable in bankruptcy.

[32] In this instance Order for payment of spousal and child maintenance was not for payment of lump sum but was to be paid periodically.

[33] Hence, the maintenance payments Order of \$50.00 per week was a periodical order which can be executed by JDS with committal order being made if Court is satisfied that Appellant has means to pay but chooses not to pay.

[34] Respondent if she wishes may proceed with the Judgment Debtor Summons in Magistrates Court.

Ground 3

[35] This ground is dismissed for same reason and this Court finds nothing wrong in the learned Magistrate finding that Appellant do pay maintenance arrears.

Costs

[36] Court takes into consideration that Appellant has a Receiving Order against him and both parties filed Submissions.

Orders

[37] I make following Orders:-

- (i) Appeal is dismissed.
- (ii) Each party bear their own cost of the Appeal.

K. KUMAR
Hon. Acting Chief Justice
At Suva
26 May 2020

R. Vananalagi & Associates for the Appellant
TL Lawyers for the Respondent