IN THE FAMILY DIVISION OF THE HIGH COURT [LABASA]	
CASE NUMBER:	001 OF 2021
BETWEEN:	SHAZIA
AND:	MUNAF
Appearances:	Mr Sharma. S. for the Appellant Mr. Dayal. R. for the Respondent
Date/Place of judgment:	Friday, 22 January 2021 at Labasa
Judgment of:	The Hon. Justice Deepthi Amaratunga
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 persons is purely coincidental.*
Anonymized Case Citation:	SHAZIA v MUNAF – Fiji Family High Court Appeal Case number: 21LAB001

JUDGMENT OF THE COURT

Introduction

1. This is an application seeking stay of child recovery order of court below exercising jurisdiction conferred in terms of Family Law Act 2003 (FLA). The child involved is two years of age and lived with the extended family of Respondent since birth. Applicant mother is not employed and was taking care of the child with no evidence of ill treatment and or abuse of child. Respondent is a full time employed with government ministry and alleges that Appellant is experiencing 'split personality disorder'. Appellant had left the place where they lived, and had taken the child along with her. Leaving matrimonial home and taking child away happened on 14.12.2020, with the participation of parents of both parties, in the presence of Respondent. On 17.12.2020 Appellant had filed child maintenance application and subsequent to that on 24.12.2020 Respondent had filed child recovery application on *ex parte* basis. This child recovery application was ordered to be served to Defendant, and it was fixed for hearing, but Appellant did not appear or file an affidavit in opposition hence child recovery order was granted upon perusal of the Respondent's application on 2.12.2020 which contained only a sworn affidavit of Respondent. On the same day Appellant filed *ex parte* application for stay of the order granted on 2.12.2020 and the child recovery order was set aside and stayed *ex parte*. The said *ex parte* application was served to Respondent, and he filed objections. Then viva voce evidence was presented by both parties and having considered evidence a ruling was delivered on 12.1.2021 refusing to stay the earlier child recovery order of 2.12.2020. Appellant had filed an appeal against child recovery order made on 2.12.2020 and also against the refusal of stay made on 12.1.2021, and subsequent to that filed this application seeking stay of child recovery order made on 2.12.2020.

Analysis

2. This is an application seeking orders in terms of Section 202(3) of FLA which reads;

'(3) **A court exercising jurisdiction under this Act** in proceedings other than proceedings to which subsection (1) applies may grant an injunction, by interlocutory order or otherwise (including an injunction in aid of the enforcement of an order), in any case in which **it appears to the court** to be **just** or convenient to do so and either unconditionally or upon such terms and **conditions as the court considers appropriate**.'(emphasis added)

3. At the outset counsel for Appellant state that he does not wish to seek orders sought under Order No 2 of part B of the application (Form 12), hence it was abandoned.

4. So the remaining orders are to stay child recovery order made by Resident Magistrate on 2.12.2020 until hearing of appeal and in the interim custody of child remain with the Appellant.

5. Appellant and Respondent had got married on 22.7.2017 and as a result of that marriage a child born on 5 .12. 2018.

6. Appellant, Respondent and child had lived together till 14.12.2020 with the parents of the Respondent.

7. Appellant had left the residence, along with the child who was two years old. She had left with her parents and Respondents parents were also present when the child was taken and had not objected to it. Her parents arrived on the request of Respondent to take her.

8. When the Appellant and child left he was present and Respondent had stated that he desired to have his wife and child back, hence did not make any application to court till he made child recovery order *ex parte* on 24.12.2020.

9. On 17.12.2020 Appellant had filed an application for child maintenance and 24.12.2020 an *ex parte* application was made by the Respondent to seek recovery of child. This application was served on the directions of court below and Appellant was present *in person*, and the matter was fixed for hearing on 2.12.2020.

10. In the typed proceedings there were no directions given for the Appellant to file any affidavit in opposition. It was not clear whether she understood what she was required to do and or whether she was explained of her rights in a language she understood. In the proceedings there was an order made by Resident Magistrate "interpreter application."

11. On 2.12.2020 when the matter was taken up for hearing only Respondent was present and child recovery order was made. According to typed proceedings it was made '*After hearing the Applicant/Man and considering the basis of application, the court will grant the recovery order'.*

13. There are reasons given for said recovery order made on 2.12.2020. The hearing stated above, presumably confined to consideration of affidavit in support, as there were no other record of oral or written evidence (eg. Official reports such as Psychiatric /medical or social welfare reports etc).

14. There was no order from court below for a report in terms of section 54(2) of FLA from family and child counsellor/welfare officer.

15. According to written ruling dated 2.12.2020 learned RM had referred to affidavit of Applicant and relevant law namely Sections 109 (2), 120 and 121 of FLA. The best interest of the child was mentioned as paramount consideration in terms of Law.

16. According to above ruling, basis of child recovery was that Appellant '*suffers from mental condition* ***that may put the child at risk***.' In the affidavit in support Respondent

has sworn evidence that Appellant had threatened 'to commit suicide and also kill the child'. (emphasis added)

17. On the same day Appellant filed an application with the assistance from Legal Aid Commission, for stay of the said order with an affidavit in support where she denied that she was suffering from any mental disorder. She had also given reason as to why she did not come to court when the matter was heard. She had also said that Respondent had chased her and her son and requested to leave him.

18. There was a second written ruling on 2.2.2020 where learned RM stated 'Recovery *orders granted on 2 December 2020 be stayed and set aside '*(sic) and this application was heard *inter partes* with oral evidence from both parties.

19. At this point it should be noted that if recovery order granted on 2.2.2020 was set aside there was no need to stay the same as there was no order remained to be stayed.

20. From the detailed written ruling handed down on 12.2.2021 it can be deduced that learned Resident Magistrate (RM) was dealing with the application for stay of child recovery order made on 2.12.2020 which was set aside by RM. I leave that to be dealt at appropriate time, in detail, as this was not raised at hearing before me and not stated as ground of appeal filed in Form 26.

21. Oral evidence of both parties were taken. Appellant in her evidence stated that she loves the child and breast fed child. She said she was forced to leave matrimonial home on the request of Respondent. She had also stated that Respondent had told that he would give the child to his sister, and she did not like to give the child to her. Respondent had called her parents to take her and she and child left while he and his family members were present.

22. Under cross examination Appellant had stated her husband abused her requesting money from her. She was unemployed and this was a form of psychological abuse as she was not in a position to earn money as she took care of an infant of two years old.

23. She was not cross examined as to the allegations of threat of suicide and alleged 'split personality disorder'. So her evidence of love and care of the child and her constructive desertion on 14.12.2020 is not challenged and should have been given weight in the analysis of evidence in court below.

24. Respondent did not state in his oral evidence that Appellant had threatened to kill the child and this was never cross examined though stated in the affidavit in support.

25. In the light of above evidence of Appellant, and subsequent conduct of the parties, there was no evidence to the life of child. If so no one would allow the child to go with Appellant on 14.12.2020

26. In the cross examination Respondent stated that he desired to live with Appellant and waited for nearly two weeks indicating there was no serious mental disorder with her, as alleged in his affidavit in support of child recovery application.

27. Section 109 of FLA reads;

> '*Court's power to make recovery order*
>
> **109.-**(1) In proceedings for a recovery order, the court may make any recovery order it thinks proper.
>
> (2) In deciding whether to make a recovery order in relation to a child, a court must regard the best interests of the child as the paramount consideration.'

28. Child is two years old and needs full time taking care and mother is the most suitable person considering the circumstances of this case. It is in the best interest of the child of such tender age to be with mother, unless there are cogent reasons to order otherwise. In this case Respondent's unsubstantiated allegations in the affidavit in support are not sufficient to deprive Appellant's love and care at such a tender age.

29. Section 121 of FLA states;

> How a court determines what is in a child's best interests
>
> '121- (1) Subject to subsection (3), in determining what is in the child's best interests, the court may consider the matters set out in subsection (2).
>
> (2) The court must consider-
>
> (a) any wishes expressed by the child and any factors (such as the child's maturity or level of understanding) that the court thinks are relevant to the weight it should give to the child's wishes;
>
> (b) the nature of the relationship of the child with each of the child's parents and with other persons;
>
> (c) the likely effect of any changes in the child's circumstances, including the likely effect on the child of any separation from-
>
> (i) either of his or her parents; or
>
> (ii) any other child, or other person, with whom the child has been living;

(d) the practical difficulty and expense of a child having contact with a parent and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with both parents on a regular basis;

(e) the capacity of each parent, or of any other person, to provide for the needs of the child, including emotional and intellectual needs;

(f) the child's maturity, sex and background (including any need to maintain a connection with the lifestyle, culture and traditions of the child) and any other characteristics of the child that the court thinks are relevant;

(g) the need to protect the child from physical or psychological harm caused, or that may be caused, by-

(i) being subjected or exposed to abuse, ill-treatment, violence or other behaviour; or

(ii) being directly or indirectly exposed to abuse, ill-treatment, violence or other behaviour that is directed towards, or may affect, another person;

(h) the attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child's parents;

(i) any family violence involving the child or a member of the child's family;

(j) any family violence order that applies to a child or a member of the child's family;

(k) any other fact or circumstances that the court thinks is relevant'

30. The court is not confined to factors stated from Section 121(2)(a)-(j) of FLA as it is practically impossible to state all the factors as it depends on the circumstances of case. It is the overall weight of all such factors in a given circumstances, that needs to be assessed, giving paramount consideration what is best for the child.

31. In this case child's young age of two years, heavily favours need of mother's love and care. She had breast fed the child and no evidence of child being abused in any manner at her hand. Appellant is full engaged with the child as she is unemployed. In her evidence she had stated her mother-in-law was feeble and could not take care of a young child. Respondent is full time employed in day time and cannot take care of child due to work. Though he had indicated chid can be looked after by paternal grandparents their evidence was not taken and in any event Appellant is preferred person considering status quo and tender age of the child.

32. Learned RM in her ruling dated 12.1.2021 stated,

'At this stage the Applicant lady needs to at least undergo mental health checks and medical examination to satisfy the courts she has mental capacity to look after herself let alone her small family'.

33. Though there is no harm in obtaining a medical examination, if done voluntarily, there were no sufficient material for the court to make such an observation. The burden of proof of mental status was with Respondent and Appellant cannot be required to prove negative.

34. Learned RM had stated,

> '…that there are some abnormalities in the actions of the Applicant lady (Appellant) which is contrary to the society (sic) morals and values for a typical farmers wife. The expectations have not been met by the Applicant lady she has shown tendencies to over react on occasions. The court accepts these...'

35. Appellant is a young mother and her educational level is not known. She had got married from an arranged marriage and had lived with in-laws. Since marriage she is not employed hence can be easily subjected to 'economic and or financial abuse'. She had given birth to a child and also continues to live with extended family. In her evidence husband had continuously asked money from her knowing that she was unemployed and full time caregiver to an infant of two years.

36. It would be nearly impossible for Appellant to work in the farm and take care of a child of two years and it is not in the best interest of such a young child to be taken to farm while mother works in farm or leave the child at home. So her refusal to work in the farm is not to be held against as 'abnormal behaviour'.

37. Within a short period of two and half years, Appellant was exposed to a marriage with a stranger and had lived with him with his family and had also given birth to a child and full time taken care of child. At the same time there was unchallenged evidence of economic or financial abuse by Respondent and she had complained that Respondent had not taken due care of her or child. In such an environment, Appellant can be subjected to stress, but this should not deprive her of her child. It will not be in the best interest of the child to deprive loving care of Appellant as she is now with much more comfortable surroundings with her parents. There was no evidence of any strange behaviour or neglect of the child since 14.11.2020. In contrary, Respondent admitted that child was looked after well.

38. In my mind balance of convenience lies with child being with Appellant, at least till the conclusion of Appeal, considering paramount consideration, which is the best interest of child for following reasons.

a. There is no evidence of any physical, mental and or psychological danger to the child when the child was with Appellant and her parents.

b. The burden of proof of any mental status that is undesirable for the child's best interest was fairly and squarely with the Respondent.

c. Respondent had lived with Appellant for more than two and half years and had also decided to have a child from her. After giving birth to the child, they had lived with the extended family for more than two years without even a complain about Appellant's alleged mental condition.

d. Respondent in his evidence admitted that he wanted to have his wife back, indicating there was no serious mental disorder with Appellant

e. There is no evidence of any abnormal behaviour of Appellant to change the status quo of a child of such younger age and grant recovery to Respondent.

f. Respondent is sole bread winner of family who is fully employed during day time and there is no evidence grant parents are capable of giving same love and care to such a young child considering the energy and demands of such a child and grown of such child in future.

39. From the grounds of appeal contained in Form 26 the Appellant is appealing against the order of recovery granted on 2.12.2020 and order dated 12.2.2021.

40. There are merits in the appeal grounds for the reasons stated earlier. The best interest of the child is to remain with Appellant till final determination of this Appeal. There are legal and factual issues to be determined in the appeal.

Conclusion

41. The child is two years of age and had lived with the mother. It is not advisable to separate the child from mother. There was no evidence to suggest that she was not suitable to take care of the child. There is no evidence that Appellant is suffering from mental status that is not suitable to take care of child. In contrary she is now living with her parents which was the environment she was accustomed. According to her evidence she was subjected to 'financial or economic abuse' by her husband who had requested money from her. Respondent had requested Appellant's parents to take her and in his presence she and child had left. According to Respondent's evidence he had expected them to return and waited for nearly two weeks and this alone would indicate there was no immediate danger to child at all. If there was any danger to child the Respondent and or his family members will not let the child to go with appellant and stay in her house for nearly two weeks expecting them to return to him. The child recovery order granted on 2.12.2020 which was set aside by learned RM, but erroneously stated as stayed. Again on 12.1.2020 it was ordered that 'recovery order granted on 2 December 2020 remain'. So in order to avoid any ambiguity it is ordered that any child recovery order made in court below regarding the child is stayed until the determination of Appeal under Notice of Appeal (Form 26) filed on 14.1.2021. If the child was already recovered Respondent is ordered to return the child to Appellant forthwith. Considering the circumstances of the case no order as to the cost is ordered for this application.

Final Order

a. Child recovery orders granted in regard to the child by court below is stayed, till final determination of Appeal.
b. If the child was already recovered by Respondent pursuant to order of court below, child should be returned to Appellant forthwith, by Respondent.
c. Police to assist upon request.
d. No costs.

Deepthi Amaratunga

Judge