

IN THE HIGH COURT OF FIJI  
HIGH COURT LABASA

Appeal No: LBS 0002 OF 2012

BETWEEN : Sigamani  
Appellant

AND : Suruj Pati  
Respondent

Appearances: Mr Amrit Sen for the appellant  
Ms M. Lemaki for the respondent

Date of hearing: 25 April, 2013

**JUDGMENT**

1. This is an Appeal from a judgment of the Magistrates' Court .
- 2.1 The respondent had filed a Form 5 application in the Magistrates' Court, on 29<sup>th</sup> April, 2010, seeking variation of spousal maintenance from \$10.00 per week to the sum of \$50.00 per week. The basis of the application was that the appellant could afford to pay increased spousal maintenance, since he owns a taxi which he drives, a house and pays FNPF.
- 2.2 The appellant had filed his response -Form 6 on 24 May,2010. He opposed the variation of spousal maintenance claim on the ground that since the marriage of the parties, the respondent had not lived with him.
- 2.3 Meanwhile, the appellant had also filed a Form 5 variation application on 11 March,2009, to cease payment of maintenance .
- 2.4 The Learned Resident Magistrate had decided both applications together with the judgment debtor summons filed by the respondent on 07<sup>th</sup> September, 2009.
- 2.5 The appellant and respondent had testified in support of their respective claims.

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2.6 The Learned Resident Magistrate, in his judgment dated 19<sup>th</sup> October, 2012, held as follows:

- i. *The Respondent (appellant) to pay increase spousal maintenance at the sum of \$25.00 per week with effect from the date the arrears of \$1990.00 is fully cleared.*
- ii. *The spousal maintenance to continue in pursuant to section 165 of the Family Law Act 2003 i.e. until the Applicant/lady party is remarried, living with another person in a domestic relationship or deceased; whichever comes first.*
- iii. *The Respondent (appellant) is to pay the arrears by way of instalment at the sum of \$300.00 per month with effect from the 31<sup>st</sup> of October 2012 and this shall continue every month until the arrears of \$1990.00 is fully cleared. Any default on the repayment of arrears the Respondent (appellant)..shall serve an imprisonment term of 2 months.*
- iv. *I will be reviewing this repayment every month and once the arrears are fully cleared, then the increase maintenance of \$25.00 per week shall take effect.*

### **3. The grounds of appeal**

The appellant has appealed to this court on the following grounds of appeal, namely that,

*“ The Learned Magistrate erred :*

- i. *in law and in fact in holding that the appellant was obligated to continue to pay maintenance to the respondent without failing to take into consideration the following:-*
  - a. *The period of separation/divorce being more than 34 years.*
  - b. *The respondent was capable of earning her own living.*
  - c. *The respondent did not have any dependent child or did not suffer from any disability.*
  - d. *The appellant being of 63 of age and of ill-health was incapable of making any maintenance.*
- ii. *in taking into consideration that the interim maintenance made in favour of the respondent was made 34 years ago under Maintenance Cause Act and thereby considering an increment of maintenance under the present legislation was a serious error amounting to breach of natural justice and rendering the award of maintenance wrong in law.*
- iii. *in refusing to judicially exercise his discretion in cancelling the maintenance order in view of the fact that the Matrimonial Cause Act has been repealed and the provision pursuant to which maintenance was now granted was done so in accordance with the social and economic conditions prevailing at the present time.*
- iv. *in taking into consideration the ill-health of the appellant being age of 63 years and the fact that he will now be committed to prison by reasons of*

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*the order for an offence of getting married to the respondent 34 years ago”.*

4. The appellant seeks that the orders for maintenance and arrears be cancelled and the increment of maintenance order be reversed.

**5. *The determination***

**5.1 *The applicable law***

Section 167 of the Family Law Act enables a party to seek modification of spousal maintenance orders and so far as material to the present application, reads as follows:

*(2) The court must not make an order increasing or decreasing an amount ordered to be paid by an order unless it is satisfied -*

*(a) that, since the order was made or last varied -*

*(i) the circumstances of a person for whose benefit the order was made have so changed;*

*(ii) the circumstances of the person liable to make payments under the order have so changed; or*

*as to justify its so doing:*

*(b) that, since the order was made, or last varied, the cost of living has changed to such an extent as to justify its so doing;*

*(c) in a case where the order was made by consent-that the amount ordered to be paid is not proper or adequate.*

...

*(3) Subsection (2) does not prevent the court from making an order varying an order made before the date of the commencement of this Act if the first-mentioned order is made for the purpose of giving effect to this Part.*

*(4) In satisfying itself for the purposes of subsection (2) (b), the court must have regard to any changes that have occurred in the Consumer Price Index.*

*(5)The court must not, in considering the variation of an order, have regard to a change in the cost of living unless at least 12 months have elapsed since the order was made or was last varied having regard to a change in the cost of living...*

*(10) For the purpose if this section, the court must have regard to the provisions of section 157 or 162 as the case may be. (emphasis added)*

Section 157 provides that in “exercising jurisdiction under section 155, the court may take into account only the following matters-

*(a) the age and state of health of each of the parties;*

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*(b) the income, property and financial resources (including any interest in leasehold or real estate which is inalienable) of each of the parties and the physical and mental capacity of each of them for appropriate gainful employment;*

*(c) ...*

*(d) commitments of each of the parties that are necessary to enable the party to support –*

*(i) himself or herself; and*

*(ii) ...*

*(e) the responsibilities of either party to support any other person;*

*(f) the eligibility of either party for a pension, allowance or benefit under- ..*

*(g) the rate of any such pension, allowance or benefit being paid to either party;*

*(h) a standard of living that in all the circumstances is reasonable;*

.....

*(k) the duration of the marriage and the extent to which it has affected the earning capacity of the party whose maintenance is under consideration;*

*(l) if either party is cohabitating with another person - the financial circumstances relating to the cohabitation;*

*(m) the terms of any order made or proposed to be made under section 161 in relation to the property of the parties. (emphasis added)*

## 5.2 *The first and fourth grounds of appeal*

5.2.1 The first contention advanced by Mr Sen, counsel for the appellant was that the appellant has been paying maintenance for more than 34 years and cannot continue to be bound to pay maintenance, till the end of his life.

5.2.1.1 I agree with the Learned Resident Magistrate, that this contention does not constitute a valid ground to cease paying spousal maintenance. A party is statutorily required to continue to pay maintenance, unless the “*circumstances*” of either party have changed, as provided in section 167(2) read with section 157.

5.2.2 Secondly, it was contended that the respondent was capable of earning her own living and did not suffer from any disability.

5.2.2.1 The respondent had testified before the lower court that the cost of living has increased, since the maintenance order was made 8 years ago. It transpired that she received some financial assistance from the church. The evidence revealed that she continues to be unemployed.

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- 5.2.2.2 The Learned Resident Magistrate thus found that the respondent is not in a position to maintain herself.
- 5.2.3 Next, it was contended that the appellant was incapable of paying maintenance, since he was 63 years and ill. The appellant had testified that his ailments prevented him from driving his taxi. He produced a medical report, which stated that he was suffering from diabetes, pressure and cold.
- 5.2.3.1 Mr Sen valiantly argued that the Learned Resident Magistrate failed to appreciate that the respondent was medically unfit to work. He submitted that the Doctor was not called to testify, since the medical report was not challenged by the respondent. The point is, as noted in the judgment of the lower court, the medical report does not provide that the appellant was incapable of driving his taxi.
- 5.2.3.2 The appellant had said that he does not receive any income from the taxi and the taxi is kept at home, at all times. Then he had said that he was not getting much money from the taxi. He had also said he sold vegetables.
- 5.2.3.3 The Learned Resident Magistrate found the appellant's testimony as regards his income from his taxi, to be contradictory and not credible. The Learned Resident Magistrate was satisfied that the appellant is earning and in a position to maintain the respondent.
- 5.2.4 In making a spousal maintenance variation order under section 167(2), the court is required to consider the criteria laid down in section 157, that are susceptible to change such as *“the age and state of health of each of the parties”*; *“the income, property and financial resources..and the physical and mental capacity of each of them for appropriate gainful employment”* and *“if either party is cohabitating with another person-the financial circumstances relating to the cohabitation”*.
- 5.2.4.1 In my judgment, the Learned Resident Magistrate has considered these criteria vis a vis the evidence and correctly reached the findings that the respondent was not in a position to maintain herself, the increased cost of living necessitated a variation in spousal maintenance, the appellant is earning and in a position to maintain the respondent.
- 5.2.5 As regards Mr Sen's contention at the hearing, that the marriage was of short duration, I agree with the Learned Resident Magistrate that this factor does not arise for reconsideration, in an application for spousal maintenance variation.

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5.3 *The second and third grounds of appeal*

5.3.1 The second ground of appeal takes issue with Learned Resident Magistrate considering an increment of maintenance, when the interim maintenance order was made in favour of the respondent 34 years ago, under the Maintenance Cause Act.

5.3.1.1. It suffices for me to refer to section 157(2). This section states “*the court (is not) prevent(ed) from making an order varying an order made before the date of the commencement of this Act if the first-mentioned order is made for the purpose of giving effect to this Part*”.

5.3.2 The third ground takes issue with Learned Resident Magistrate, refusing to exercise his discretion to cancel the maintenance order made under the Matrimonial Cause Act, since that law has been repealed

5.3.2.1 The short answer to this submission is contained in section 214, which provides that all orders made under the repealed Maintenance Cause Act “*continue in full force and effect*”.

6. For the reasons stated in paragraph 5.2 above, I set aside the ex parte stay of the maintenance orders made by me on 29 November, 2013. I affirm the orders of the Learned Resident Magistrate dated 19<sup>th</sup> October, 2012.

7. In my judgment, there are no merits in the grounds of appeal. The appeal is dismissed. I make no order as to costs.

24th May, 2013

**A.L.B. Brito- Mutunayagam**

**Judge**