

IN THE FAMILY DIVISION OF THE HIGH COURT AT SUVA

APPELLATE JURISDICTION

APPEAL NUMBER:	17/SUV/0011 (Family Case Number 16/NAS/0694)
BETWEEN:	NAVLESH APPELLANT
AND:	SHAVANA RESPONDENT
Appearances:	Mr. N. Sharma for the Appellant Mr. A. Chand (LAC) for the Respondent
Date/Place of judgment:	Friday 12 June 2020 at Suva
Coram:	Hon. Madam Justice Anjala Wati
Category:	<i>All identifying information in this judgment have been anonymized or removed and pseudonyms have been used for all persons referred to. Any similarity to any persons is purely coincidental.</i>
Anonymised Case Citation:	Navlesh v. Shavana –Family High Court Appeal Case Number 17/SUV/0011

JUDGMENT OF THE COURT

A. Catchwords:

FAMILY LAW – SPOUSAL MAINTENANCE – The Court must first make a finding that the person claiming spousal maintenance has established a right under the law for an order for spousal maintenance and that the person who is to pay the maintenance is financially able to provide the same.

B. Legislation:

Family Law Act (“FLA”): ss. 155 and 157

1. The husband appeals against the decision of the Family Division of the Magistrates' Court of 25 July 2017, wherein, on the application by the wife for spousal maintenance, the husband was ordered to pay a sum of \$40 per week with effect from 27 July 2017.
2. The parties have lived in a de facto relationship for 26 years. They have two children, both of whom are above the age of 18 years.
3. The order for payment of the maintenance was on the basis that the wife was not employed as she no longer had the tailoring business but is supported by her son and that the husband also contributes by paying half the expenses for the rent, water, electricity and groceries.
4. The complaint on the appeal is that the Court failed to properly analyse and apply the principles of law for spousal maintenance as set out in s. 155 of the FLA. It is also complained that the Court erred in not finding that the wife is in fairly good health to maintain herself using her tailoring business whereas the husband does not have the means to pay the spousal maintenance. It is asserted that there was also error of fact in arriving at the quantum of \$40 a week in spousal maintenance.
5. I am very alarmed at the way the Court has arrived at the question of liability and the quantum in this case. Despite regurgitating the law in determining spousal maintenance, the Court does not follow or apply the same, both in determining whether the wife is entitled to be maintained and whether the husband is reasonably able to do so.
6. It is clear from s. 155 of the FLA that a spouse is not entitled to maintenance as of right. A party who is seeking maintenance must show that he or she meets one of the criterion listed below to entitle him or her for support:

(a) that he or she is having the care and control of a child of the marriage who has not attained the age of 18 years;

(b) that by reason of age or physical or mental incapacity, he or she is unable to find employment; or

(c) that there is any other adequate reason for which he or she is entitled to spousal maintenance.

In determining each criteria, the court must have regard to matters outlined in s. 157 of the FLA. I do not think that repeating those factors at this stage is necessary.

7. Again under s. 155, it has to be established by the party seeking the maintenance that the other party is able to provide for the same.
8. In the matter at hand, the only reason identified why the wife was entitled to be paid the maintenance is that she does not have employment. She used to have a business but does not run it anymore. I understand from the records that the business was a tailoring business.
9. There is gross failure in finding from the evidence that one of the criterion identified above was established. The Court had to make a finding as to why the wife left the employment and whether she could have continued the sewing business. What was the reason for which she was unemployed when she had been earning money all along? Just because the wife was not working at the time the order for maintenance was made, that did not automatically give rise to liability.
10. The Court also failed to have regard that she had about \$5000 in a term deposit, another \$5000 in her FNPF and some monies in her bank account which she says was in the vicinity of \$800. If she continued to work, she would have earned money for herself. She was tailoring and no finding was made that she stopped work for proper reasons. In absence of such finding, the entitlement to seek maintenance is not established.
11. Further to that, her main expenses were looked after by the son and the husband in that the rent, the groceries and the bills were paid for. In that regard, the Court had to make a finding

of which expenses of the wife was left to be attended to and whether she was in a position to cater for that. There is no such analysis and finding of the same.

12. The Court conveniently arrived at a figure of \$40 per week in maintenance. How that sum was calculated was not explained or reasoned out. The amount seems to be plucked from the air.
13. The Court also failed to arrive at a finding that the husband was reasonably able to maintain the wife as required by s. 155 of the FLA. It was the duty of the Court to find out that the person liable to pay has the income and the earning capacity to provide for the other party. The expenses of that person must be considered in light of his income. In this case the Court totally failed to analyse what the husband's income and expenses were.
14. He testified that his annual income was \$4000 a year and that he paid for half the expenses that is, rent in the sum of \$250, electricity and water bills and for groceries as well. He also paid for the youngest son's University expenses as he was in school at the time. This evidence was not contradicted. Prima facie, given his income and expenses, there is hardly any surplus left for the husband to be able to cater for the wife's expenses. He needs money for his survival as well.
15. The Court ought to have thoroughly investigated each party's proper income and earning capacity and proper expenses. After that, if there was a finding that the husband had surplus or could minimize some of his expenses to be able to save \$40 a week to provide for the wife, then the amount would be justified. As it is, there was no such exercise undertaken by the Court. What is the point of highlighting the law to such extent when it was disregarded by the Court? This shortfall in the judgment does not comply with the requirement of the law that it must be found that the husband is reasonably able to maintain the wife.
16. I have examined the records and the evidence tendered in Court. To my mind the evidence is not adequate for me to arrive at a fresh finding. The issues bothering my mind has not been addressed.

17. If I were to conduct the trial, I would require more evidence than that was tendered in Court to arrive at a proper finding. With the flimsy evidence, half of which is not properly recorded, I cannot do justice to the issue.

18. I therefore find that:

(a) *The Court did not properly arrive at a finding of liability and quantum for the spousal maintenance and as such I allow the appeal and set aside the order of the Court below.*

(b) *I order each party to bear their own costs of the appeal proceedings.*

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Hon. Madam Justice Anjala Wati

Judge

12.06.2020

To:

1. *Nilesh Sharma Lawyers for the Appellant.*
2. *Legal Aid Commission for the Respondent.*
3. *File: Appeal Case Number: 17/Suv/0011.*