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IN THE SUPREME COURT OF FIJI

Appellate Jurisdiction

Civil Appeal No. 3 of 1984

Between:

RIGAMOTO KAMOE

Appellant

and

ANITA RUDRA WATI KAMOE
d/o Uday Prasad Gautam

Respondent

Mr. Anand K. Singh for the Appellant
Mr. Anil Singh for the Respondent

J U D G M E N T

This is an appeal against an order made on the 29th March, 1984 by Mr. M.J. Sheehan which awarded interim custody of the infant child of the appellant to its mother, the respondent.

The parties were married on the 18th February, 1983. The marriage soon ran into difficulties and by the time the respondent went into hospital for her confinement the couple were no longer on speaking terms. On the 7th February, 1984 the respondent gave birth to a female child, Teronu. She was in hospital for 3 days during which she breast-fed the child. Her husband did not visit her at all. On the 10th February she was collected from the hospital by an aunt of the appellant. According to the respondent the aunt took away the baby while it was the appellant's case that the mother deserted the child.

On the 8th March, the respondent issued a summons under the Maintenance and Affiliation Act, 1971 in which she alleged, inter alia, desertion by her husband and wilful neglect to provide reasonable maintenance. She sought an order for the return of her baby. On the 16th March, the parties appeared in the Magistrate's Court with their respective solicitors. It was agreed that a welfare officer's report should be obtained. The matter came up before Mr. Sheehan on the 29th March and he decided to hear evidence on the application for interim custody. Mr. Anand Singh appeared for the present appellant and submitted that the court should hear the substantive application as there was no provision for interim orders of custody contained in the Maintenance and Affiliation Act. The magistrate thought otherwise and having heard both the husband and wife he brought the proceedings to an end and made an order for interim custody stating :

" I have no hesitation in ordering interim custody to the mother. The defendant's behaviour has been appalling. It was heartless, ridiculous and quite indefensible more important it shows a total disregard or ignorance of the best interests of the child. "

Interim maintenance was fixed by agreement at \$25 per week.

The petition contains two grounds of appeal as follows :

- " a) That the learned trial Magistrate erred in law in making an order for interim custody in favour of the Complainant in as much as the learned trial Magistrate had no jurisdiction to make such an order;
- b) That the learned trial Magistrate erred in law in restricting your Petitioner's Counsel in the cross-examination of the Complainant and in making the order before your Petitioner had closed his case. "

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It is unfortunate that the magistrate did not find the time on the 29th March to hear the substantive application because if he had done so, he might well have reached the conclusion that the present respondent was entitled to the permanent custody of her baby. He did the next best thing, which was to make an interim order which had the effect of putting an immediate end to an intolerable situation in which a mother was being separated from her new born child.

However, there is nothing in the Maintenance and Affiliation Act which empowers a magistrate's court to make such an order. Section 14 provides that a court may order interim payments of maintenance when an application is adjourned, but, that is not sufficient authority to enable a magistrate to order interim custody. It may be that the magistrate had jurisdiction under some other statute to make the order which he made, but, as he did not invoke any such authority, I am reluctantly obliged to hold that he exceeded his powers in making the order, even though he did so for the best possible motive.

In his petition of appeal the appellant has omitted to set out any prayers for relief. That being the case this Court will not grant him any relief.

I do not think this appeal should ever have been brought before the Supreme Court. The only order I am prepared to make is that the appellant shall pay the respondent's costs.

(F.X. Rooney)
JUDGE

Suva,

6th December, 1984