

**IN THE HIGH COURT OF FIJI**  
**AT LAUTOKA**  
**CIVIL JURISDICTION**

**Civil Action No. HBM 19 of 2009**

**BETWEEN** : **SACHIDA NAND SHARMA** of Road 33, House Number 6,  
Gushan 1, Daka, Bangladesh, General Manager.

**Appellant**

**AND** : **SUSHIL RAJ** of Kermode Road, Lautoka, Unemployed.

**Respondent**

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**Cor: Inoke J.**

**Appearances: Mr. A. Reddy of Counsel for the Appellant**  
**No Appearance for the Respondent**

**Plaintiff's solicitors: Messrs Neel Shivam Lawyers**

**Defendants' solicitors: No Appearance**

**Date of Hearing: 19 June 2009**

**Date of Judgment: 19 June 2009 Ex tempore Judgment.**  
**26 June 2009 Written Judgment delivered.**

**JUDGMENT**

**INTRODUCTION**

[1] This is an application by the Appellant, Sachida Nand Sharma. It came by way of Ex parte Summons pursuant to Order 45 Rule 10 of the High Court Rules 1988 for an order discharging a "stop" order by the Family Magistrates Court restraining the Appellant from leaving the country.

[2] The application came before me on 12 June 2009 and I heard Counsel on whether it should proceed ex parte.

**CONSIDERATION OF WHETHER APPLICATION TO PROCEED EX PARTE**

- [3] I apply the same principles applicable to Order 29 Rule 1(2) of the High Court Rules as to whether this application should be heard ex parte or inter partes. In **Kobee v Public Trustee [2003] FJHC 40**, Justice Scott said:

***"The combined effect of Order 29 rules (1) and (2) and Order 8 rule 2 (2) is that a plaintiff wishing to proceed ex parte must satisfy the Court (a) that two days notice would result in "irreparable or serious mischief" and (b) that anything less than the total abridgement of the two days notice would result in "irreparable or serious mischief"."***

- [4] I would also respectfully add that the two elements of "urgency" and "mischief" must be satisfied and consideration of the likelihood of "irreparable or serious mischief" resulting is to be looked at from both the applicant's and the respondent's points of view.
- [5] The Appellant had filed an Affidavit in Support with his application and Grounds of Appeal against the stop order of the Family Magistrates Court. He said that he would lose his job in Malaysia and be sued for breach of contract if he was not allowed to leave by the following week, hence the need for urgency in having the application proceed ex parte. I accept that there might be such a need, although I have not made up my mind on this point. However, I was not satisfied that irreparable harm will not ensue if the Appellant was allowed to leave. I therefore ordered that the application proceed inter partes and the Appellant serve the Respondent personally and the application be heard today. An Affidavit of Service has been filed, the Appellant deposing to service on the Respondent on 16 June 2009. The Respondent did not appear so I proceeded to hear the Appellant's application to lift the "stop" order.
- [6] I have considered the affidavit material and Counsel's submissions and came to the conclusion that the application should be dismissed and had the matter called and I informed Counsel that I dismiss his application and will publish my reasons on Friday 26 June 2009. I now publish my reasons.

**BRIEF HISTORY OF THE MATTER**

- [7] The reason deposed to in the Appellant's Affidavit for the stop order was that the Respondent had filed an application for maintenance of herself and her daughters against the Appellant. That application will be heard on **26 June 2009** according to the Appellant, i.e. in a week's time.
- [8] The Appellant alleges, inter alia, in his **Grounds of Appeal**, that the learned Magistrate had no jurisdiction to grant such an order and that His Worship refused to hear him in respect of the stop order application by the Respondent in breach of natural justice.
- [9] It was therefore necessary for me to look at the Family Magistrates Court file. I have called for it to be brought to me so that I can verify the Appellant's allegations and to find out the reasons for the learned Magistrate issuing the stop order. Before I proceed to do that there are preliminary matters that I should deal with.

**JURISDICTIONAL ISSUE**

- [10] The Appellant's application is pursuant to **Order 45 Rule 10** of the **High Court Rules 1988**. In other words, the matter is brought before me under the civil jurisdiction of the High Court. This is at a time when the Family Division of the Magistrates Court is still seized of the substantive matter. I would have thought that this application should have been brought in the Family Division of the High Court.
- [11] Counsel explained that in Lautoka, applications such as this, are brought under the Miscellaneous actions of the High Court, Civil jurisdiction. This seems to be the practice as was done in the case of **Sharma v Maharaj** [Misc Action 5 of 2008L]. If this is the practice then this is an irregularity that should be remedied immediately. It is my view that the two jurisdictions, i.e. the family jurisdiction and the civil jurisdiction should not be "mixed up" as it were in this fashion. At the least, the Magistrates Family Court file should

have been brought up together with the Miscellaneous Civil Action file so that the Judge does not have to ask for it himself.

[12] I raised with the Appellant's Counsel this jurisdictional issue when the matter came before me and he referred me to two cases: **Nand & Nand v Chand** [Civil Action 223 of 2007L] and **Sharma v Maharaj** [Misc Action 5 of 2008L]. As I pointed out to Counsel at the hearing, **Nand** is clearly a civil action. There is no family law element in it at all so that this case does not assist the Appellant. Similarly, **Sharma** (supra) does not assist him because the point was not argued in the case and indeed it was assumed that the High Court Judge, Justice Scutt, did have jurisdiction and further, it was also not argued and the case proceed on the basis that the learned Magistrate exercising Family Jurisdiction did have jurisdiction to issue a "stop" order. For present purposes however, I need not decide the point. It should be left to be determined when the appeal proper is heard.

[13] I should also point out that the application as currently stands is misconceived in my view in that Order 45 Rule 10 of the High Court Rules pursuant to which this application is brought does not apply to this case. That Rule applies to judgments or orders of the High Court in its civil jurisdiction that have not been perfected.

#### **EXAMINATION OF THE FAMILY MAGISTRATES COURT FILE**

[14] On examination of the Family Magistrates Court file, I note from the learned Magistrate's notes the following sequence of events:

- a. On 14 May 2009 the Respondent filed a Form 5 Application for Maintenance or Contribution against the Appellant together with a Form 12 Application to restrain the Appellant from leaving Fiji supported by a Form 23 Affidavit in the Family Division of the Magistrates Court in Lautoka. The return date for the Form 5 application is 26 June 2009 and the return date for the Form 12 application was the same as the date of filing.*
- b. On the same day, 14 May 2009, the Respondent appeared before the learned Magistrate, no appearance by the Appellant, and asked*

***for a "stop" order. She was sworn in and gave evidence after which the learned Magistrate granted the application because he was satisfied the evidence that he heard. The file note says: "Stop Order to issue forthwith. Immigration Department to be informed forthwith".***

- c. The Appellant filed a Form 23 Affidavit on 8 June 2009 and has also filed on that day a Form 12 Application for "removal" of the stop order and other relief. That application was returnable on 11 June 2009.***
- d. On 11 June 2009 the Appellant applied before the learned Magistrate to "revoke the stop departure". Mr A Reddy appeared for the Appellant and the Respondent appeared in person. The Respondent did not agree to have the stop order lifted and asked for time to look for a lawyer. The Court granted her 7 days to file a Reply to the motion if she finds a lawyer and the matter was adjourned to 18 June 2009 for mention only.***
- e. "Mr H. A. Shah" had appeared on 18 June 2009 for the Respondent and a "Mr D Gordon for A Reddy of Neel Shivam" had appeared for the Appellant. The Court file notes also show that Mr Shah had asked for time and was granted 7 days to file a reply to the Motion and response to the Maintenance or Contribution application and the other party 7 days thereafter to file his reply. The matter was adjourned to 10 July 2007 for mention.***

[15] In other words the Appellant's application for "removal" of the stop order is yet to be decided by the learned Magistrate. Further, there is nothing on the file that shows that Mr H A Shah is no longer acting for the Respondent. Also, the Appellants allegation that the learned Magistrate refused to hear him is not true.

### **THE APPLICATION BEFORE THE HIGH COURT**

[16] The Appellant now brings this application for a stay and I remind myself that this is not an appeal against the stop order granted on 14 May 2009 despite the wording of the orders sought by the Appellant. His application according

to the Summons filed on 12 June 2009 is for an order that the stop order be **"forthwith rescinded/cancelled/stayed and revoked"** and he be allowed to travel overseas to Malaysia.

- [17] Despite my reservations that this application is misconceived, I will consider Counsel's submissions in fairness to him and his client.
- [18] Firstly, to grant the "stay" asked for by the Appellant would mean that he could leave before the learned Magistrate is able to hear him on exactly the same application now before His Worship. In fact, he had tried to go ex parte before me and I could have well granted what he had asked for in a situation when another court is waiting to hear from him on the exact same application. This is an abuse of process. On this basis alone I dismiss the Appellant's application before me. The Appellant must continue with his application in the Family Division of the Magistrates Court.
- [19] Further, it is abundantly clear from the Magistrates Court file that the Appellant and his Counsel knew that the Respondent was represented by other Counsel yet no mention of that was made in the application before me. This is not acceptable for Counsel to proceed in this way. He should have informed the Court of the Respondent's legal representation and sought an order that her lawyer be served instead. Indeed, I would have thought that as a matter of professional ethics and courtesy, Mr Shah would have been served in any event.
- [20] The need to make full and frank disclosure in such applications has been stressed in several cases in this Court. This was not done in this particular case.
- [21] As I said, I treat this application as a "stay" application. The law in that respect has been cited in the **Sharma** case (supra) but I do not need to apply the law yet as there is really nothing to stay because the learned Magistrate has not yet heard the Appellant. He has not yet abandoned his Magistrate Court application and in that respect I have no jurisdiction as yet. Even if I were required to apply the law on stay application in the present case, I would have found against the Appellant on the grounds that he is not

genuine in pursuing his appeal and that the Respondent and her children would be injuriously affected if a stay is granted, and certainly not without some stringent conditions being attached.

[22] This application is also misconceived in that it should have been brought before the learned Family Court Magistrate in the first instance.

[23] Assuming that I am exercising Family Law jurisdiction, section 29 of the Family Law Act 2003 provides that "Courts having jurisdiction under this Act must severally act in aid of and be auxiliary to each other in all matters under this Act."

[24] For the above reasons I dismiss the Appellant's application filed on 12 June 2009.

### **COSTS**

[25] The Appellant has failed so normally he would have to pay the Respondent's costs. However, the Respondent has not appeared either personally or by Counsel so I make no order as to costs.

### **ORDERS**

**[26] The Orders are:**

- a. The Appellant's application is dismissed.**
- b. There is no order as to costs.**

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**Sosefo Inoke**  
**Judge**

**At Lautoka**  
**26 June 2009**

