

IN THE COURT OF REVIEW

SUVA

APPEAL NO. 9 OF 1980

BETWEEN : JAMILA BIBI F/N RIAKAT ALI

APPELLANT

AND : THE COMMISSIONER OF INLAND REVENUE

RESPONDENT

Mr H K Patel for the Appellant
Mr M J Scott for the Respondent

JUDGMENT

The Appellant is separated from her husband and she has been give a week n custody, by order of the Magistrates Court, of her five children. Her husband pays her \$8 a week maintenance and he pays \$7 per week for each of the five children. The parties have agreed the facts and a statement is filed in Court. It is a pity that the document which is said to be a true copy of the order dated 22nd December 1975 bears the date 20th March 1980. I expect that is the date the order was asked for, but the Court officers should have known better than to prepare it like that, and the Magistrate should not have signed it. The parties agree that the rest of the document correctly sets out the order of the Court. The Commissioner assessed the appellant upon three amounts of income – for \$1236 for 1976, \$2802 for 1977 and \$2,395 for 1978, these amounts being in each case the amounts paid by the appellant” husband for maintenance for both the appellant and her children. The appellant says this is not her income, but she says that it is money payable to her children and thus her children’s income. This argument would appear to depend for its validity upon the terms of the order. The order shows that the appellant’s husband is to pay her \$8 per week for herself and \$7 per week for each of the five children. No attempt was made to divide the amounts received by the appellant as between herself and her children.

The words of the order might be thought to be sufficient by themselves to deal with the appellant’s case. But Mr Hemant Patel, for the appellant, has referred me to five cases and has sought to argue that they are relevant to the appellant’s case. I will deal with them as they arise in point of time. The first is Strvens v Tirard (1939) 25 T C 321: 2K B 41 C (1940) 1 K B 204. There was in that case an order for payment of an amount to a wife who had custody of the three children of the marriage and three separate amounts for the maintenance and education of the three children. It is indeed similar to the terms

of the order under consideration in this case. The husband in making his income tax return claimed a deduction for the amounts paid to his wife, and also claimed the statutory deductions for his children. The income Tax Commissioners disallowed the latter claim, and the husband objected successfully. The Crown appealed, contending that the amounts paid to the wife for the children was income of the children. The appeal failed both in the High Court and in the Court of Appeal, where Goddard D J said

“..... it seems to me that this point is unarguable. It is the mother’s money paid to her to enable her to fulfil a duty which the Court has put upon her, and if she does not fulfil that duty the remedy against her is not to make her account for how she has spent the money which was given to her, but to remove her from being in the position of custodian of the child and the custody of the child together with sum which the Court thinks fit to give for its maintenance is given to somebody else. I confess I do not see how it can be possibly put that this money is the money of the child. It is the mother’s money. She has the spending of it and so is accountable to nobody for it.”

I would add that the Legislature stepped in and took away the power of the husband who had parted with the custody of his children to claim an allowance for their support.

The second case is Spancery Robson (1946) 27 T C 198, in which Stevens v Tirard followed. The third is Yates v Starkey (1951) 32 T C 38, but there husband was ordered to give to its former wife the annual sum of \$100 less tax in trust for each of the three children issue of the marriage..... respondent to claim child allowances.” It was held that the order created a trust in favour of the children and Stevens v Tirard was distinguished. Then Mr Hemant Patel referred me to two South African cases Holley v CIR (1974) 14-15 S A T C 407 and Income Tax case no. 919 (1959) 24 S A T C 250. In both these cases payments were made to a widow out of he husband’s estate upon trusts, and to that extent are distinguishable from Stevens v Tirard and Spencer v Gobson.

I turn now to the law in Fiji as set out in the Income Act (Cap. 201), The proviso section ii reads:-

“Provided that, without in anyway affecting the generality of this section, total income for the purposes of this Act shall include and subsection (h) is alimony and maintenance the and paid under any enforceable legal agreement or an order of a court of competent jurisdiction. That covers the wife’s income making it liable to tax. It is clear from Stevens v Tirard that the term “maintenance” includes payments by way of maintenance for the children.

Then section 19 provides –

“In determining total income no deductions shall be allowed in respect of

- (1) alimony or maintenance other than sums payable under any enforceable legal agreement or an order of a court of competent jurisdiction which a person can establish is paid from income which has borne or is liable to tax in Fiji.”*

That permits the husband to claim a deduction for moneys paid for maintenance.

Then section 25(2) reads-

“(2) In respect of each dependent child of the taxpayer the following allowances shall be deducted:-

- (a) for the first dependent child, two hundred dollars;*
- (b) for the second dependant child, two hundred dollars; and*
- (c) for the third and any subsequent dependent child, one hundred and thirty dollars:*

Provided that –

- (i) the total allowance to a taxpayer under this subsection shall be seven hundred and ninety dollars;*
- (ii) only one allowance may be granted in respect of the same dependent child. Where more than one taxpayer would but for this proviso be satisfied to as allowance in respect of the same dependent child such allowance shall be apportioned between them in such proportions as they agree or in default of agreement equally. For the purposes of this paragraph maintenance which is payable under any enforceable legal agreement or an order of a court of competent jurisdiction and which has been allowed or would qualify as a*

deduction in arriving at total income shall not be regarded as a contribution to a child's support."

This would appear to ensure that the husband cannot claim the child allowance but only the wife and it is clear that she did in fact claim and receives that allowance.

I return hen to the terms of the order. Mr Hemant Patel submitted that the order was to be construed as giving the money to the appellant on trust for her children. I cannot accept that. It seems to me quite clear that the order directs the husband to pay to the wife a sum for the maintenance of each child and that sum therefore forms part of the wife's income as laid down by Stevens v Tirard.

Finally, I think I should notice an observation by Mr Scott on behalf of the Commissioner. He submitted that since the allowance which the taxpayer received was similar to the allowance which her husband would have received had they lived together she suffered no detriment. I cannot accept that for a moment. The amounts allowed to a wife for alimony or maintenance for herself and her family are generally no more that one third of the husband's income so that she is supporting herself and her children on one third of what she and her husband would have if they lived together. Perhaps the Commissioner might be prepared to consider whether a case is not made out for the exemption from income tax of moneys paid to a wife for the maintenance of children. However that may be, there is at present no such exemption and this appeal must fail. There will be no order for costs.

K A STUART
COURT OF REVIEW

November 1981