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| IN THE FAMILY DIVISION OF THE HIGH COURT | |
| AT LAUTOKA APPELLATE JURISDICTION CASE NUMBER: BETWEEN: | 06/LTK/0432 SANJAY |
| | APPELLANT |
| AND: | MAMTA |
| | RESPONDENT |
| Appearances: | Mr. S. Sharma of LAC for the Appellant. |
| | Respondent in Person. |
| Date/Place of Judgment: | Thursday, 20 th January, 2011 at Lautoka. |
| Judgment of: | The Hon. 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 similarities to any persons is purely coincidental..</i> |
| Anonymised Case Citation: | - SANJAY v. Mamta- Fiji Family High Court Case Number: 06/LTK/0432. |
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| JUDGMENT OF THE COURT | |

APPEAL -CHILD MAINTENANCE - MODIFICATION - Statutory ground on which maintenance must be modified-the factors to be taken into account-whether the lower court had taken the appropriate grounds into consideration- no error of law or fact shown-appeal dismissed.

Legislation

Family Law Act No. 15 of 2003.

Family Law Rules 2005.

Family Law Regulations 2005.

The Appeal

1. On the 31st day of March, 2010, the appellant filed a notice of appeal against the orders of the Magistrate made on the 3rd day of March, 2010.
2. The Magistrate made an order for variation of child maintenance by increasing child maintenance from \$30.00 per week to \$40.00 per week.

The Grounds of Appeal

3. Mr. Sharma raised 3 grounds of Appeal and they are as follows:-

Ground 1

The Court erred in law in allowing a variation when such a variation was not justified in the circumstances.

Ground 2

The Court erred in law and in fact in not taking into consideration that both parents have the responsibility to look after the child and maintain the child.

Ground 3

The Court erred in law and in fact in not taking into consideration the means of the Respondent to pay for variation as ordered.

The Orders Sought in Appeal

4. The Appellant has sought that the order varying the maintenance be stayed and dismissed.

The Submissions

5. The Appellants Counsel Mr. Sharma submitted as follows:-

- The Court had not looked at the appropriate statutory provisions when considering an order for increase of maintenance. The order for increase is to be made pursuant to s. 97 (3) of the Family Law Act. S. 97 (3) (b) states that if the court is taking into account the change in cost of living then the court must have regard to any changes that have occurred in the Consumer Price Index published by the Bureau of Statistics. The Court failed in taking into account the Consumer Price Index.
 - The expenses of the child was not apportioned and clarified properly to order an increase in the maintenance of the child. For example, the Magistrate took one expense wrongly and that is the expenses from shoe shop which should have been \$51.80 and not \$57.80.
 - There are 2 other children of the respondent, together with whom lives her father. The judgment does not say whether the expenses like groceries are only for the subject child or whether it is for the whole family. The expenses must have been properly distributed per head. His client is made to pay expenses of other children and people, which is not proper.
- o His worship had to undertake some mathematical exercise and must also have looked at the man's income and expenses.

6. The Respondent submitted that she is not working at present. When she was working, - she used to earn \$75.00 per week. She has been taking time off work for court and she has been sent home by the employers. At the time the order for child maintenance was made, the child was an infant and not going to school but she has started school. She is doing her part as a mother and she is always there for the child. She also submitted that her father is working and earning \$70.00 per week. When the application was made, the appellant was engaged in another employment. Now -with his current employment his wages are more than \$70.00 per week. At present she has three children to look after. She made the decision to give the house free to the couple because the lady was looking after her daughter. House girls cost more. She now has given just one room to the couple and she gets \$80.00 per month from the house. She owes -debts as well. The Magistrate did not err in law or fact so the increase is justified.

The Law and the Determination

7. I will deal with each ground in turn.
8. The first ground is that the Court erred in law in allowing a variation when such a variation was not justified in the circumstances.
9. A court has powers to modify a child maintenance order and that modification includes an order to increase or decrease the amount so ordered to be paid: S. 97 (2) (d) (i) of the Family Law Act.
10. The mother's application for increase was made by Form 6 which was her response to the father's application for decrease of maintenance. The mother had in essence made a cross application for increase in maintenance which was filed on the 10th day of March, 2009. The father's application for decrease was filed on the 2nd day of February, 2009.
11. The mothers cross application indicated that she wanted the father to bear all the costs of school expenses.
12. The mother had therefore pleaded a change in the child's circumstances in that the child had started going to school and that is the correct position. The child was -less than four years old when the first order was made in 2006. When the application for variation was made, -the child had started attending school and that is a change in the child's expenses.
13. S. 97 (3) states when the court can make an order to increase or decrease the maintenance. Out of the many grounds, the one ground is if there is change in the circumstances of the child: S. 97 (3) (a) (i) of the Family Law Act.
14. The mother had stated in her evidence that the cost of living was high and that she was looking after two other children. The plea of cost of living having changed cannot be seen or read in isolation from the evidence. One must look at the evidence in a whole where she had indicated about the child's school expenses as well.
15. One cannot just say that her application must fail because the court when considering change in cost of living did not have regard to the changes in the Consumer Price Index as published by the Bureau of Statistics: S. 97 (3) (b), and S. 97 (4) of the Family Law Act. A child cannot be deprived of his right to be maintained by parents because of technical arguments on law. I do not fail to see the evidence in a whole and conclude that the child's circumstances had changed

after three years of the initial order, thereby giving the mother a ground to apply for an increase.

16. His worship had also considered the change in the child's circumstances. His worship said in his judgment:-

"both parties have given evidence under oath in this application and both have set out the reasons for and against variation. The Applicant has given evidence that the expenses of maintaining the child has increased, especially the cost of clothing, uniforms and school fees

In looking at the evidence presented by the Applicant the Court finds that the Applicant has established that there needs to be a variation of the original maintenance order".

17. The above excerpt indicates that his worship had considered that the child's circumstances had changed in that expenses had changed by virtue of school expenses. So it is not proper at all to say that the variation was not justified in the circumstances. There had to be a variation.
18. The issue may be of quantum which I will deal with shortly but there is no merit in ground 1 and it shall be dismissed.
19. The mother gave evidence of the school expenses for the child that she had paid or had to pay immediately because the expenses are of such nature that it cannot be postponed. She testified that the child's school fees was \$60.00, text book cost was \$75, Stationery costs was \$75, School clothes was \$77.27 and footwear costs was \$51.80. His worship took all the costs into consideration except one cost of footwear which he considered at a slightly higher amount of \$57.80 when compared to the evidence of \$51.80. The total costs for school was \$339.07.
20. The husband did not cross examine the mother on any of the child's expenses. His evidence of his income and expenses was that he earned \$70.00 a week. He can afford to pay only \$20.00 a week. The whole family of the respondent was relying on him for maintenance and that the respondent has her house on rent. He did not testify on his expenses.
21. Having considered the financial position of both parties the court ordered that the maintenance be increased to \$40.00 a week.
22. There was no precise mathematical calculation shown in the judgment but the increase was not such erroneous to allow this court to interfere.
23. The child's school expenses are totally new expenses and those are not the only expenses that

have increased. Matters like school clothes and shoes may need attention more than once a year. Other small matters like school stationeries every now and then for a small child will also arise.

24. There is nothing to indicate that the court had not taken into consideration the need for both parents to look after and maintain the child.
25. The mother had always been looking after and maintaining the child. That was established and his worship does not need to say that in his judgment. The failure to say that does not amount to any miscarriage of justice. The court would also not have lost sight of the mothers' commitment when she gave evidence of her expenses as well. She has two other children to maintain and she is fulfilling her obligation towards this child as well. Ground 2 is meaningless and must be dismissed. In any event it is not only the school expenses that a child needs to survive. She must also be using groceries and other utilities at home which all costs money and \$40.00 for a child is not an exorbitant amount at all. It is not enough and the rest the mother would be catering from her pocket.
26. The third ground is that the Court erred in law and in fact in not taking into consideration the means of the appellant to pay for variation as ordered. The husband gave evidence of his income to the court and no evidence of his expenses. He said that he earns \$70.00 a week and in his application he filed on 2nd February, 2009 he had stated that he was unemployed and his expenses were \$135.00 per week. The trial was conducted after 10 months where his position had changed from unemployed to a person who had started earning. He also did not outline his expenses to the court. He failed to satisfy the court why an order for increase but decrease should be made. The court therefore cannot be said to have erred as one of the statutory provisions under child maintenance modification section states that the court must have regard to the provisions of Subdivision A and B to the extent applicable. Subdivision A and B includes matters like duty of parents to maintain children, consideration to be taken into account when ordering maintenance, and likewise. If the appellant wanted any consideration to be taken into account he must testify on that aspect. In light of the evidence and matters before the court, the court had not committed any error of law or fact. The court had considered financial position of the appellant and the judgment states

"...it is now for the Court to determine what an appropriate amount for variation is. The

Applicant has asked for \$60.00 a week and the Respondent has asked the current maintenance remain for \$30 a week.

In looking at the respective financial positions of both parties I find that an appropriate amount for variation is \$40.00 per week, not \$60 as sought by the Applicant..."

27. I must reiterate that although no precise mathematical calculation was given, the order for increase is not unjustified and so unreasonable that this court ought to interfere.
28. The child's increased expenses that the mother had testified would come to a weekly calculation of about \$6.50 per week and that is not the absolute expenses. The court's order for increase in \$10.00 per week is not unreasonable and erroneous.
29. Ground 3 has no merits either and must be dismissed.

Final Orders

30. The appeal is dismissed.
31. The orders of the Magistrate are affirmed.
32. Each party's right to file an application for modification of child maintenance order is not affected by the appeal verdict.
33. Each party must bear their own costs.
34. Orders accordingly.

Anjala Wati
Judge
20.01.2011

1. *Mr. S. Shanna of LAC,
Solicitor for the Appellant.*
2. *Respondent.*
3. *File Number. 06/Ltk/0432.*