IN THE FAMILY DIVISION OF THE HIGH COURT AT SUVA

APPELLATE JURISDICTION

ACTION NUMBER:	**13/Suv/0004** **(Original Case Number: 11/Nas/0418)**
BETWEEN:	**PRASAD** **APPELLANT**
AND:	**RANJANI** **RESPONDENT**
Appearances:	*Ms. Tamanisau for the Appellant.* *Respondent in Person.*
Date/Place of Judgment:	*Tuesday 19 January 2016 at Suva*
Coram:	*Hon. Madam Justice Anjala Wati.*
Category:	*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.*
Anonymised Case Citation:	*Prasad v. Brown - Family Appeal number 4 of 2013*

JUDGMENT

Catchwords:

FAMILY LAW – CHILD MAINTENANCE - Factors to be considered to determine appropriate amount to be paid to child - factors provided for by the statute identified and discussed - procedure before committing a debtor to prison for non-payment of maintenance: there ought to be established the debtors means to pay the debt and willful refusal to pay the same for the order of commitment to be constitutionally valid- powers of the Magistrate to commit a person to prison and the period of commitment.

Legislation:

1. The Constitution of the Republic of Fiji lsland s. 9(2).

2. Magistrates' Courts Act Cap.14 ("MCA"): s. 16 (1) (h).

3. The Magistrates' Courts Rules Cap. 14 ("MCR"): Order XXXVI Rule 9(1).

4. The Family Law Act No. 18 of 2003 (“FLA"): ss 86; 90; and 91.

Cause

1. On 29 November 2012 , the Magistrates' Court found that the appellant was the putative father of a child born in 2000 and a child born in 2005.

2. The father was thus ordered to pay maintenance for the two children of the marriage in the sum of $30.00 per child, a total of $60.00 for both the children with effect from 29 November 2012 until they attained the age of 18 or completed school.

3. It was further ordered that if there was failure to pay maintenance, the amount was to be calculated and issued via a Judgment Debtor Summons ("JDS") and the appellant was to be committed to prison for 10 days for every 100 dollar default.

4. The appellant only appeals against the orders for maintenance. He does not challenge the finding that he is the father of the child.

5. His ground of appeal is that the Court erroneously found that he earned $80.00 per week when he is unemployed due to his medical condition. He is a diabetic person and has hypertension and has been declared medically unfit to work.

6. Although there is no appeal against the default orders, it is my duty to address the constitutional validity of that order and I shall so do when I address the one and only ground of appeal.

Submissions

7. Ms. Tamanisau argued that the Court found that in his response to the application for maintenance, the appellant had stated that he earned $80.00 per week. In fact that finding is factually incorrect.

8. The appellant had stated that he did not earn any money. He had noted that his partner was earning $80.00 per week. On this basis the Courts findings that he had means to pay was incorrect.

9. The appellant is a diabetic and hypertension patient. When he worked, he used to earn $80 - $90 per week. Now he is unemployed and can only afford to pay $5 per week per child.

10. The respondent argued that when the appellant lived with him, he used to do private work. He used to then earn and buy groceries. He now has another wife who has a child as well.

11. The respondent further stated that she has two children to support and she needs to maintain them. Her income is not so much to support them and the father of the children must assist by paying maintenance for them.

Law and Analysis

12. In determining the maintenance of the children, the Resident Magistrate ("RM") found that the appellant was earning $80.00 per week and that it was reasonable that he pays $30 per week for the children. The finding of quantum was only made in one line of the entire judgment.

13. S. 89 (2) of the FLA requires that in order to determine the issue of the maintenance for the child, the court must consider the financial support necessary for the maintenance of the children and determine the financial contribution, or respective financial contributions, towards the financial support necessary for the maintenance of the children that should be made by a party, or by parties, to the proceedings.

14. In considering the financial support necessary for the maintenance of the children, the Court ought to have considered the proper needs of the children and the income, earning capacity, property and financial resources of the children: s. 90(1) (b) and (c) of the FLA.

15. In taking into account the proper needs of the children, the court must have had regard to the age of children, the manner in which the children are, and which the parents expect the children to be, educated or trained; and any special needs of the children: s. 90(2) (a) (I) and (ii) of the FLA. The Court may also have regard, to the extent to which the court considers appropriate in the circumstances of the case, to any relevant findings of published research in relation to the maintenance of children in assessing their proper needs: s. 90 (2) (b) of the FLA.

16. In taking into account the income, earning capacity, property and financial resources of the children, the court must have had regard to the capacity of children to earn or derive income, including any assets of, under the control of or held for the benefit of the children that do not produce, but are capable of producing, income: s 90 (3) (a) of the FLA.

17. In order to determine the amount of maintenance that the appellant ought to pay, his income, earning capacity, property and financial resources were to be assessed: s. 91(1) (b) of the FLA.

18. The Court erroneously made a finding of fact that the appellant earned $80 per week when he did not say that he was working and earning. Even his sworn response stated that he did not earn.

19. What the appellant had stated in his response was that his partner earned that $80.00 per week.

20. The Court ought to have also assessed the commitment of the appellant that was necessary to support himself and any other child or another person that he had a duty to maintain: s. 91 (c) (i) and (ii) of the FLA.

21. The Court ought to have also considered whether the appellant had any assets under his control or for his benefit that do not produce income but are capable of producing income: s. 91(2) of the FLA.

22. The husband had in his sworn response stated that he needed $40 per week for his food. That was not challenged by the respondent.

23. In that case what remained to be worked out was the earning capacity of the appellant. What needed to be examined were the places he had worked and the income he used to derive from the various works he undertook in the past years. From that earning capacity what ought to have been deducted were the necessary commitments that the appellant had.

24. If the Court found that the appellant's income was $80.00 per week then the order for him to pay $60.00 per week for the children is not justified in law and on the facts of the case. His commitment of $40.00 ought to have been deducted from his income as the duty of the parent to maintain a child has priority over all commitments of the parent other than commitments necessary to enable the parent to support himself or herself or any other child or another person that the parent has a duty to maintain: s. 86(2) (b) (i) and (ii).

25. In the appellate court it was admitted by the appellate that when he worked, he earned $80 to $90 per week. The respondent in her evidence in court below had stated that when she stayed with the appellant he used to earn $500 per fortnight. Since there is a dispute as to what actually the appellant used to earn when he worked, the Court has to make a finding of his earning capacity. What has to be also found is whether the appellant as he claims is medically unfit to work.

26. Hypertension and diabetic are common sickness and close to half the people in this country suffer from that ailment. If that were to preclude people from working, most families in Fiji would starve. That is not an ailment which incapacitates people from working. However the Court has to make a specific finding of whether there is any value in the evidence of the husband being medically unfit to work.

27. The medical certificate that the appellant had attached to his sworn response was neither accepted nor rejected in the findings. There ought to have been a finding as to whether the evidence was admissible and what probative value the Court has assigned to it.

28. The report states that the appellant was a known case for diabetic and hypertension and that he had been attending clinic since July 2006 and is on medication. The report further stated that with his age and the chronic condition, the appellant was certified unfit to fully fend for himself and his family.

29 . The report did not state that the appellant could not work at all. It said that the appi llant cannot fully fend for himself and his family. On the face of the report, the appellant can find some work and maintain himself and the family to some extent although not completely. However, like I have said, the issue of admissibility of the report and the probative value that would be assigned to it is a matter for the trial court.

30. The matter needs to be tried again so that a proper quantum is worked out in light of the factors I have identified above. However there ought to be some order for interim maintenance.

31. The appellant has offered $5.00 per week per child. However he said that when he worked he used to earn $80-$90 per week. In the interim it is justifiable to use that as his ability to earn and giving him allowance of $40 per week for his expenses leaves the balance of about $40 per week. He can at least afford interim maintenance in the sum of $15.00 per week per child w hic h makes it a total of $30 .00 per week for the two children.

32. I now wish to comment on the default orders made by the Court. For enforcement proceedings in the Family Court, the MCR will apply. This is by virtue of s. 22(2) of the FLA and Rule 7,11(2) of the FLR.

33. If the JDS is to be issued for enforcement proceedings, it has to be first personally served on the appellant and before any order for committal is made he has to be examined on oath as to his means. He cannot be committed to prison unless it is established that he has means to pay and that he has willfully refused to do so. This is by virtue of s. 9(2) of the Constitution of the Republic of Fiji Islands; s. 16 (h) of the MCA; and Order XXXVI Rule 9 (1) of the MCR.

34. Order XXXVI Rule 9(1) of the MCR provides that "no order of commitment under paragraph (g) of section 16 of the Act shall be made unless a summons to appear and be examined on oath (hereafter in this Order called a judgment summons) has been personally served upon the judgment debtor".

35. S. 16 1(h) of the MCA reads as follows:

" 16.-(1) A resident magistrate shall, in addition to any jurisdiction which he may have under any other Act for the time being in force, have and exercise jurisdiction in civil causes-

(h) to commit to prison for a term not exceeding six weeks, or until payment of the sum due, any person who makes default in payment of any debt or installment of any debt due from him, in pursuance of any order or judgment of the court or any other competent court:

Provided that such jurisdiction shall only be exercised where it is proved, to the satisfaction of the Court, that the person making the default either has, or has had since the date of the order or judgment, the means to pay the sum in respect of which he has made default, and has refused or neglected or refuses or neglects to pay the same ..."

36. S. 9(2) of the Constitution of the Republic of Fiji Islands also states that a person must not be deprived of personal liberty on the ground of failure to pay maintenance or a debt, fine or tax, unless the court considers that the person has willfully refused to pay despite having the means to do so.

37. It was there constitutionally incorrect for an order of committal to be made together with the order for payment without examining the debtor on his means and reasons why payments were not being made.

38. The court also stated that for every $100.00 default, there would imprisonment for 10 days. This may breach s. 16(h) of the MCR which states that committal cannot be beyond six weeks. If the JDS has an amount of $500 as arrears, the imprisonment term on the order would be 50 days which will be beyond 6 weeks and thus in excess of the jurisdiction of the Court.

39. The default order therefore is improper, unconstitutional and prematurely made before examining the means of the appellant. That ought to be set aside.

Final Orders

40. In the final analysis, I allow the appeal and set aside the orders of the Court below ab intio and refer the matter back to the lower Court to re-hear the case and make proper finding on the issue of quantum of maintenance upon the factors identified above pursuant to ss. 86, 90 and 91 of the FLA.

41. There shall be interim maintenance of $15.00 per week per child, a total of $30 per week for the two children with effect from 29 November 2012. There ought to have been some effort on the part of the father to pay the maintenance in this minimal amount but he did nothing to assist his children and obtained a stay of all orders pending the appeal. The children have been left unattended and it is now the duty of the father to pay the decreased amount from the date of the original order. He could have minimized his liability if he had played his part of maintaining the children. Any orders for future interim maintenance without making the order effective from the date of the original order will not be in the best interest of the children and also contrary to the principle that parents have a legal duty to maintain their children. That duty ought not to have been incumbent upon an order of the Court.

42. The Registrar of the Court to allocate a date to this proceeding for fresh hearing before a different RM. The respondent must be notified of the new date in writing as she is unrepresented.

43. Each party is to bear their own cost of the proceedings.

Anjala Wati

Judge

19.01.2016

To:

1. Ms. Tamanisau for the Appellant.

2. Respondent.

3. File: 13/Suv/0004.