

IN THE FAMILY DIVISION OF THE HIGH COURT

APPELLATE JURISDICTION

CASE NUMBER: 10/SUV/0003

BETWEEN: VISHWAJEET

APPELLANT

AND: SALOCHNA

RESPONDENT

Appearances: Mr. S. Singh, for the appellant.

Mr. S. Sharma, DLAC, for respondent

Date/Place of judgment: Friday, 23rd December, 2011 at Suva

Coram: The Hon. Justice Anjala Wati.

Category: *All identifying information in this judgment has been anonymized or removed and pseudonyms have been used for all persons referred to. Any similarities to any persons are purely coincidental.*

JUDGMENT OF THE COURT

Catchwords

CHILD MAINTENANCE - father ordered to pay maintenance - father alleges additional payment and settlement of maintenance - payments made need to be given accreditation - terms of settlement of no effect.

Legislation

Family Law Act 2003 ("FLA")

The Cause

1. This is an appeal against the decision of the Magistrates Court, where his worship had ordered the father of the child to pay the arrears of maintenance in the sum of \$461.25 in 3 weeks, in default of which the father was to be imprisoned for 7 days. His worship had further ordered the father to continue paying maintenance in the sum of \$150.00 per month as per the final orders of the Court.
2. The father appeals on the grounds that the Learned Magistrate erred in law and in fact by not considering his application filed on the 26th day of June 2010 before making the above orders. He stated that his application indicated that he wanted the arrears to be cancelled as he had paid some monies which was not officially recorded and that the parties had settled the maintenance issue by signing and acting on the terms of settlement.

The Case Background

3. On the 29th day of January, 2009, the Magistrates' Court had made an order that the father pay child maintenance in the sum of \$150.00 with effect from the first week of February, 2009. The mother filed a Judgment Debtor Summons ("JDS") claiming arrears of maintenance which was struck out on the 29th day of December, 2009, after the mother failed to appear in Court three times, being on 7th August, 2009, 2nd October, 2009 and 29th December, 2009.
4. On the 2nd day of March, 2010 the mother filed an application to cease maintenance on the ground that the parties had entered into an agreement that the father will give lump sum maintenance. The application was listed for hearing on the 16th day of April, 2010. On this day, the mother informed the Court that she did not wish to proceed with her application to cease maintenance as the father had failed to abide by his promise to pay lump sum maintenance in the sum of \$15,000. The Magistrate therefore cancelled the application to cease maintenance and ordered the mother to file fresh JDS, which she did. The JDS was called in Court on 2nd July, 2010. The parties appeared in Court and the father informed the Court that he had already paid the arrears. He also said that he had filed an application by form 12 and 23, which he had

not served on the mother. He said that he had not made any payments after March, 2010.

5. His worship checked the official payment records and stated as follows

"After checking the records,

I find that this is the correct arrears and respondent must pay the same. The respondent ordered to pay the balance arrears of \$461.25 in 3 weeks time in defaults 7 days imprisonment. The respondent is further ordered to pay the arrears and the current maintenance of \$150.00 per month at Lautoka Family Court and Form 'S' to Suva Maintenance section".

6. The father is unhappy with these orders and so he appealed.
7. The application that the father made reference to on the 2nd day of July, 2010 was filed on the 28th day of June, 2010 and listed for hearing on the 2nd day of July, 2007, the same day when the JDS was called and the orders appealed made. The father's application was to strike out the JDS on the basis that he had paid maintenance via Telegraphic Money Order (TMO) at the request of the wife and that the parties had settled the maintenance case in the sum of \$5,000. He also stated in his application that the mother had agreed to discontinue the maintenance case.
8. The terms of settlement that the father is making reference to was dated the 17th day of March, 2010. It appears to have been signed by both the parties and is in the following terms

"The parties agreed as follows:

1. *The applicant had obtained a maintenance order in the sum of \$150,000 per month against the respondent on the 29th day of January 2009 with effect from 1st week of February, 2009.*
2. *That the applicant has now offered to the respondent to settle the maintenance issue by paying \$5000.00 as full and final settlement to her by the respondent.*
3. *The respondent has accepted the applicants offer and has paid the sum of*

\$5000.00 upon execution hereof (receipt of which sum the applicant do hereby admits and acknowledges) and further the applicant declares that she will not enforce the order made on the 29th day of January 2009.

4. *The applicant undertakes and acknowledged that she will have no further maintenance claim and will not file any maintenance application against the respondent. Any application for maintenance filed by the applicant will be barred pursuant to this Terms of Settlement.*
5. *Each party to pay their own costs "*.

The Submissions

9. Mr. Singh submitted that the Magistrate did not deal with the JDS matter appropriately because he failed to deal with the application of the father. If he considered the father's application, he would have realised that some payments have been made vide TMO and via the settlement as well. Mr Singh contended that the Magistrate could have at least asked the lady to respond to the issues raised by the father before dealing with the JDS, which would have clarified the facts existing at the date.
10. Mr. Sharma submitted that his worship did not consider the application at all because it was not served. The application could not be heard to jeopardise the mother's position. His worship asked for Court records, realised that monies owed, as per the records, noted the father's admission that he did not pay any monies from March, 2010, and then made the orders.
11. Mr. Sharma further stated that if there was any terms of settlement, it was not valid as it was never sanctioned by the Court. The terms of settlement had to be approved by the Court. It never was. Further, the father should have followed proper procedures to register the maintenance agreement if he wished the same to be of legal effect.

The Law and the Analysis

12. The appeal can be determined by answering two simple questions

(a) Should the Magistrate have considered the father's application on the day he dealt with the JDS? and

(b) What is the effect of the terms of settlement dated 17th March, 2010?

13. The first question needs to be resolved first. The father's application to have the JDS struck out was made on two basis

(a) That some of the monies were paid by TMO; and

(b) That the entire maintenance case was settled.

14. His worship did not at all consider the father's application and response, perhaps because it was not served. There is no mention of his worship casting his mind to the alleged payments either by TMO or by settlement. His worship just proceeded to check the official record of payments and made the orders. If his worship had at all casted his mind to the application, he may have realised, that his official records needed updating, if he were to hold that indeed the father paid the monies by TMO and settlement. It is another matter that the settlement is not effective. I would come to this later.

15. The proper procedure for his worship was, to ask the mother about the alleged payments. If she admitted, then the payment could have been applied to the arrears and some future maintenance, until the amounts paid was exhausted. If the mother disputed, then it was only fair that the JDS was suspended for evidence to be adduced on the alleged payments and a determination made on the aspect; irrespective of whether or not the mother was served.

16. The father's application was not something on which the mother needed legal advice or preparation as she just had to advise the Court of the hue facts. The father may have filed a separate application but in fact the contents of his application was basically a response under oath to the JDS proceedings with which he was served. There is no form by which a party can response to JDS proceedings and as such the JDS was properly responded to by form 12 and form 23.

17. The father was therefore only prejudiced to the extent that the payments he had allegedly made had not been given any credit. It is not too late for this exercise to be undertaken. I will discuss this again.
18. On the validity of the terms of settlement, no parent can contract out of the obligation to maintain the child without the sanction of the court. The maintenance of the minor was settled and the Court had not approved the settlement. As such, the terms of settlement is of no effect to the extent that it bars any claim for maintenance or overrides the order for payment of maintenance. However the alleged payment in the terms of settlement needs to be explored together with the payments made vide TMO's.
19. There are procedures provided for by the Family Law Act as to how parties can arrive at maintenance agreements and the procedure to make it legally effective. That has to be followed and without that, any settlement is null and void.
20. This matter needs to be referred to the Magistrates Court for determination of whether or not the father has paid monies by TMO and under the settlement. If the Court finds that indeed the payments were made, then the same should be given credit.

Final Orders

21. The appeal is allowed on the basis that the father's alleged payments and settlement payment must be given due consideration by his worship. His worship is therefore to hear the father's application/response by form 12 and 23 as this application/response remains unheard. If payments by TMO and settlement are established, then the same must be credited to the payment card.
22. The Registrar is to finalise a date before the Magistrates Court and advise the parties of the same for the exercise in paragraph 21 to be undertaken.
23. The terms of settlement dated 17th March, 2010 is otherwise of no effect.
24. Orders accordingly

ANJALA WATI
Judge
23.12.2011

1. *Mr. S. Singh, counsel for Appellant*
2. *Mr. S. Sharma, DLAC, counsel for Respondent*
3. *The Registrar, Family Division of the High Court, Suva.*
4. *File Number: TO/Suv/0003.*