

IN THE FAMILY DIVISION OF THE HIGH COURT AT LAUTOKA
APPELLATE JURISDICTION

CASE NUMBER: 005/2015
(Original Case Number: 10/Ltk/0386)

BETWEEN: KUNAL
APPELLANT

AND: HINA
RESPONDENT

Appearances: Ms. Narara for the Appellant.
Mr. Charan for the Respondent.

Date/Place of Written Judgment: Thursday 01 September 2016 at Suva.
Thursday 20 October 2016 at Lautoka.

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: KUNAL v. HINA - FIJI FAMILY HIGH COURT APPEAL CASE
NUMBER: 005 of 2015

JUDGMENT

Catchwords:

FAMILY LAW - VARIATION OF CHILD MAINTENANCE - SURETY BOND- Determining who is the proper surety in the case - any person who is substituting a surety must sign a bond in absence of which the terms of the earlier bond are the terms on which he is substituted which cannot be extended without his consent - obligation of surety to accept application for variation of maintenance under the terms of the surety bond - Surety is entitled to give evidence on behalf of the Principal - principles of law governing grant of variation of maintenance is not absolutely the same as one considered in granting a fresh

order for maintenance. - determining whether the amount ordered on variation is proper.

Legislation:

1. The 2013 Constitution of the Republic of Fiji Islands.
2. The Family Law Act No. 18 of 2003 ("FLA"): ss. 67(3) (a) (i), 90, 91.

1. The surety Suruj Singh has filed an appeal against the decision of the Resident Magistrate ("RM") of 12 June 2015 wherein it was ordered on the wife's application for variation of maintenance for the child of the marriage to be increased from \$75.00 per week to \$150.00 per week.

2. The child of the marriage was born in 1995. He had attained the age of 18 years as at the time of the determination of the application. The need for continued maintenance arose since the child was attending tertiary institution to complete his basic education.

3. With the initial application for child maintenance, the mother of the child had sought a stop departure order against the father of the child which was granted by the Court. The father subsequently applied for the order to be cancelled as he had secured work in Australia for himself.

4. The Court allowed him to travel overseas on the basis that he had provided a suitable surety named Shamal Singh, a secondary school teacher. Shamal Singh entered into a surety bond by executing the same with the appellant.

5. The terms of the surety bond indicated that the surety agreed to enter into a recognizance for the due performance of the order of the maintenance and to receive any application for variation which would be proper service in the circumstances.

6. On 4 June 2013, the surety Shamal Singh had filed an application that he be discharged as the surety and the stop departure against him be uplifted to allow him to travel overseas for holidays.

7. In his sworn affidavit he had proposed that his father be replaced as the surety in lieu. He also indicated in his application that if necessary he can assume his responsibilities after he returned to Fiji.

8. The application was opposed but on 12 September 2013, the Court ordered the existing surety Shamal Singh to be replaced by his father Suruj Singh as the new surety. The outgoing surety Shamal Singh was permitted to leave the country.

9. The Court did not order the new surety to sign a new bond nor did the new surety or his counsel make any effort to sign any. Whether this was a deliberate act on their part not to do so and raise this is an issue later is a matter on which I will comment later at an appropriate time in the judgment.

10. On 21 August 2015, I was faced with this problem raised by Mr. Nazeem Khan that the son Shamal Singh was discharged as the surety and since Mr. Suruj Singh did not accept to be a surety in Court and had not signed any bond, there was no proper surety in place and that either of the sureties was not liable for any maintenance payment.

11. I found it alarming for Mr. Nazeem Khan to take advantage of the slip made by the Court in not ensuring that the new surety enters into a bond and be stopped from leaving the country when it was arranged by them, the son being the former surety and the father being the new surety to the terms proposed and accepted by Court.

12. The Court record does not show that the new surety was present in Court when he was accepted as a reliable person to replace the outgoing surety but immediately after the order, the new surety Mr. Suruj Singh started appearing in Court. Since then, it was never raised in Court that Mr. Suruj Singh was made a surety without his knowledge.

For that to be raised in the High is alarming and definitive of some technical argument having been realized in the last minute to escape liability.

13. Since the argument as to who should be the surety if at all was before me, I had immediately ordered that both the father and the son be stopped from leaving the country and that the son Shamal Singh be issued with a notice to attend Court to clarify why he got his father appointed without his consent.

14. The two sureties realized that this matter was going to be treated very seriously as they both appeared to take undue advantage of the situation created by either one or both of them.

15. When both the sureties appeared before me, it was confirmed that the new surety Suruj Singh had only stepped in after he had agreed to have his son released from the proceedings in his duties as a surety. After that clarification was obtained, the father and son both consented that the father remains the surety. I therefore ordered that the father Suruj Singh enter into a bond on the following terms, which were agreed upon by consent of the parties. The terms were as follows:

1. That Mr. Suruj Singh be the new surety in this case and be bound by the following terms:

(a) That the appellant will pay maintenance to the child in the amount ordered by the Court and that the surety is bound by the orders.

(b) That the appellant and the surety shall be responsible for all applications for variation of maintenance by accepting all applications and defending the same and obliging with the Courts order from time to time on the said application.

(c) There shall be a stop departure against the surety and that he could only travel out of the country with the leave of the court.

(d) That the surety shall enter into a bond including the above terms.

16. The former surety Shamal Singh was discharged as surety and the stop departure against him was discharged. This order was by consent of the respondent and the new surety.

17. On 17 September 2015 I had ordered by consent that part o-f the maintenance to be paid per week be stayed. The amount to be stayed was the amount by which the maintenance had been increased. Specifically, the amount ordered to be stayed was \$75.00 per week leaving the appellant c1nd the surety to pay the initial c1mount of only \$75.00 per week.

18. Against that background, the appeal was heard on written submissions. The surety had raised many grounds of appeal, most of which are repetitive. It is proper that I summarize the issues on the appeal.

19. The first few grounds can be summarized to raise an issue as to whether the father Suruj Singh was the proper surety to be served with the application for variation of maintenance when he did not enter into a surety bond and did not understand the terms of the bond that he was bound by.

20. I have indicated already that the father of the then surety Shamal Singh wished to replace his son as he wanted his son to go out of Fiji for a holiday. The Court had replaced Shamal Singh with his father and there was no surety bond signed by the new surety. The Court record also does not show that he was present in Court that day. However, whenever the matter was subsequently called in court, the new surety was available and took part in the proceedings.

21. Although the new surety did not sign the bond and is not recorded to have appeared in Court, his subsequent appearance in Court and not taking any objections to him being ordered to replace his son as surety indicates that the current surety was joined with his consent. He had agreed that his son be relieved of his obligation and be allowed to leave the country and that he will assume the responsibilities that his son was bound by.

22. The mother of the child had always objected to the surety being replaced and if there is any amiss arising out of the arrangement made by the father and son, the child on behalf of whom she is collecting the maintenance cannot be affected.

23. Although the new surety did not sign the bond, he was fully aware of the terms of the bond, and if he was not, he should not have agreed to become a surety. It was his responsibility to ensure that he asks his counsel or the Court as to what his obligations were. If he was not agreeable to the terms, he should have asked the Court to discharge him and re-appoint his son.

24. If the son had got his father appointed as the surety without consulting him, then the father should have informed the Court when he appeared in Court. The father did not take any such action and was waiting for a suitable time to make a complaint that he has not signed the bond and was not explained the terms. This is a deliberate attempt to disrupt the proceedings of the Court and deprive the child of his right to be maintained by the father of the child who is in fact the brother of the current surety Suruj Singh.

25. The actions of the paternal family shows disregard for the interest of the child. The proceedings indicate that the aim is to deprive the child of any maintenance which will deprive the child of tertiary education. This attempt is not in line with the rights of the child under the 2013 Constitution of Fiji and the FLA.

26. When I questioned both the father and the son as to how the arrangement was made to have the father appointed as the surety, it was very clear to me that it was done with the knowledge of the father. It was even at that point in time that I was prepared to discharge the father and re-appoint the son when both consented that the father remains as the surety. I therefore find that the complaint that he was not the surety who was responsible to safeguard the interest of the child an excruciating statement.

27. The original bond that the surety son had signed had a specific term in it that he will receive any application for variation of maintenance. That is a clear responsibility that was spelt out in the bond. Since the new surety was replacing the old one, his responsibility cannot be any different from that in the original bond unless he was specifically excluded from compliance.

28. In that regard there was no error by the Court to have found that the service of the application on the new surety Suruj Singh was proper service on the appellant. It was thus proper to hear the application in absence of the appellant since he was properly served and he failed to defend the proceedings.

29. The appellant need not be served personally as the person he nominated to be served was Shamal Singh whose responsibility was assumed by Suruj Singh by an order of the Court.

30. The next issue is when the Court failed to consider the oral and affidavit evidence of the surety on the grounds that he was not permitted to defend the proceedings under the bond and that his evidence tantamount to hearsay evidence and as such of no value. It was asserted that having disregarded the evidence of the surety, there was breach of natural justice as the appellant remained unheard when his evidence through the surety was pertinent.

31. The RM had found that the bond did not permit the surety to file a response on behalf of the appellant and to give evidence and therefore the response and his evidence was disregarded.

32. I think the two matters must be looked at separately. The first one is defending the proceeding and the second one is giving evidence in Court. In the circumstances of this case the two actions of the surety of filing the response and defending the proceedings on one hand and the giving of evidence on the other hand could be identified, in the larger interest of justice, as having being done in two different capacities.

33. The Court found that the signing of the response by the surety is not permitted by the bond and a clear abuse of the process of the Court. The response was therefore not considered.

34. In this case the surety had filed a response and not the appellant. It appears from the response that had been filed that the particulars of information endorsed in the response regarding the income and expenses are that of the appellant. For the information to be considered as a sworn and reliable testimony, the appellant ought to have signed the same before a person entitled to administer oath. So far as the validity of information in the response is concerned, the Court was correct in not relying upon it as it was not authenticated by oath through the affidavit or the oral evidence of the appellant.

35. The Court would have been obliged to consider the information before it if the appellant had sworn the affidavit. However, I then turn to the second part of the appellant's concern which is when the Court did not even consider the sworn oral testimony of the surety on the grounds that the bond did not permit the surety to defend the proceedings and that his evidence was inadmissible hearsay.

36. The surety was in fact defending the proceedings and not appearing in Court as a mere witness only. The Court allowed him to cross-examine the respondent. This was however done by a different RM from the one who gave the final determination in the matter. The proper course for the Court would have been to only order the surety to give evidence as a witness in this case on behalf of the appellant .

37. If the appellant wanted to defend the matter, he should have either been in Court in person or nominate a counsel to conduct the legal proceedings. As a party to the case, the appellant is entitled to defend his matter. The surety is only responsible for the appellant's liability. The surety can sue and defend on his behalf if he was legally empowered by the appellant to do so. There was no such contractual arrangement shown to the Court which empowered the surety to undertake such a task.

38. Although, the evidence that the surety extracted through cross-examination of the respondent should be disallowed on the basis that he could not defend the proceedings as he had not shown any authority from the appellant to sue and defend on his behalf, he was in a position to testify as a witness for the appellant regarding the appellant's income and expenditure. As a witness he could be cross examined as well. The appellant has a right to defend the proceedings by asking his witnesses to testify on his behalf and that right is not restricted by his non- appearance in Court.

39. The Court refused the evidence of the surety on the grounds that his evidence on the appellant's financials was inadmissible and that it be disregarded. That finding of the Court is an error of law. The evidence of the witness is admissible in Court. The question for the Court is regarding the probative value of the same.

40. This Court, however, is in an equally competent position to analyse the evidence of the surety and make a finding whether if his evidence was admitted and considered, the Court would have arrived at a different result.

41. I will start with the affidavit evidence of the surety. In his evidence, the surety said that both parents must contribute equally to the child's welfare as the mother was working and remarried.

4. The oral evidence of the surety indicated that the respondent earned \$700 per week after tax and that his expenses were \$700 per week. The surety also testified that he could not verify the expenses but that the appellant was supporting his old parents in Australia.

43. The pay slip of the appellant that was tendered was dated November 2013. The hearing of the matter took place six months post the date in the pay slip. The surety did not know whether the appellant's pay had been increased since the date of the pay slip.

44. In my analysis the appellant had exaggerated his expenses to the same amount as his net pay to avoid liability. The evidence revealed that his weekly expenses were: rent \$350.00; car fuel \$50.00; food \$150.00; and bills/other expenses \$150.00. The appellant can definitely minimize his bill expenses which I find has been exaggerated.

45. For his bill, the appellant can be fairly allocated AUD 200 per month leaving a balance of AUD 400 a month for payment of maintenance. The appellant needs to support his

child as he is attaining his basic education. The order for maintenance is FJD 600.00 per month and if he saves AUD 400 from his bills expenses, he will easily be able to pay FJD 600 per month which is FJD 150 per week .

46. The child's uncontested expenses as outlined in the mother's affidavit sworn on 6 March 2014 post the filing of the application for variation is \$248.82 per week. I find that since the child is going to the University, all his weekly expenses as outlined below were justified:

| | |
|------------------------------|----------|
| • Tuition Fees | \$51.82. |
| • Travelling expenses | \$60.00. |
| • Food | \$70.00 |
| • Clothing | \$7.00 |
| • School stationaries, shoes | \$20.00 |
| • Internet | \$10.00 |
| • Pocket Money | \$30.00 |

47. From the above expenses I do not find any expense to be exorbitant considering the fact that the child is attending the University and requires his needs to be attended to without him having to borrow money from friends and family to ensure smooth stay in the University.

48. Out of the above expenses, the father is only asked to cater for \$150.00 a week, leaving the mother to fund the balance of the child's expenses in the sum of \$98.52. She is only earn in g a sum of \$187 .50 per week. If she provides for the balance of the child's expenses in the sum of \$98.521 she will only be left with \$88.98 to manage her expenses.

49. The father has at his exposure about AUD 600 per week for his expenditure whilst the mother will survive on a meager amount. By any standards, I find that the father has the income and the earning capacity to pay the amount ordered.

50. I do not find that any in justice was done when the Court refused to consider the evidence of the sure t y because even if the evidence was considered, the result would not be any different.

51. The final issue is the amount of the maintenance ordered to be paid in the sum of \$150.00 per week. The complaint in essence is that the Court did not say how the sum was made of when it was supposed to consider ss. 90 and 91 of the FLA.

52. The application before the Court was for variation of child maintenance and the correct provision of the law to consider is s. 67 (3) of the FLA to find whether there is a cause for variation. The order for payment of \$75.00 was made in 2011. The child was then in High School. The order for increment was made in 2015 some 4 years after. The child by then had started attending the tertiary institute where he is a private student. Not only his educational, but, personal expenses have changed as well. I do not think that one can challenge that the cost of living has changed as well. I find that the application justified a need for variation based on the changed circumstances of the child: s. 67(3) (a) (i) of the FLA.

53. The appellant's counsel says that the Court ought to have considered s. 90 and 91 of the FLA. These are matters which should be fully considered when determining a fresh application for maintenance. The application before the Court was for modification and the Court correctly did not cast its mind to ss. 90 and 91 solely and absolutely. The applicable extent to which these sections ought to have been considered was to determine whether the child's expenses have increased and whether the parents have the respective income or earning capacity to meet the increased expenses of the child after proper allowance is made for their expenditure. The Court can also under these sections consider the earnings of the child and any assets in his name which are or are capable of generating income.

54. In my finding the father has the ability to meet the increased expenses of the child and it is only proper that he does pay maintenance in the amount ordered.

55. I find that the amount of child maintenance varied in the sum of \$150.00 per week to be proper and justified.

Final Orders 56. In the final analysis, I find that the appeal has no merits and that the same is dismissed.

57. The appellant must pay maintenance in the sum of \$150.00 per week and it is the responsibility of the surety to ensure that the said amount is paid on time.

58. The order for stay of part of the maintenance is now uplifted and the appellant is liable to pay the amount from the date of the stay.

Judge

20.10.2016

To:

1. *Nazeem Lawyers for the Appellant.*
2. *Legal Aid Commission Person.*
3. *File: Appeal 005/15 (10/ Ltk/0386).*