1966 *Present :* Alles, J.

C. NADARAJAH, Appellant, *and* E. A. NADARAJAH, Respondent

S. C. 834/1964—M. C. Batticaloa, 8554

Maintenance—Application by wife—Her own means not relevant—Maintenance of child—First application made when the child is between the ages of 16 and 18—Incapacity of Court to award maintenance then—Maintenance Ordinance, ss. 2, 7.

The fact that a wife has sufficient means does not preclude her from obtaining an order of maintenance in her favour under section 2 of the Maintenance Ordinance.

Section 7 of the Maintenance Ordinance is a bar to an order of maintenance in respect of a child if the application for maintenance is made for the first time after the child has attained the age of sixteen years.

Thangayagam v. Chelliah (42 N. L. R. 379) not followed.

APPEAL from a judgment of the Magistrate's Court, Batticaloa.

C. Thiagalingam, Q.C., with *J. N. David* and *P. Nagendran*, for defendant-appellant.

C. Ranganathan, Q.C., with *S. C. Crossette-Thambiah*, for applicant-respondent.

Cur. adv. vult.

[1] *(1960) 58 C. L. W. 79.*

February 11, 1965. ALLES, J.—

This is an appeal from the order of the Magistrate of Batticaloa directing the defendant to pay maintenance to his wife, the applicant, and their eight children, the eldest of whom was a girl called Chandradevi who was 17 years of age at the time of the application. The defendant admitted the marriage and the paternity of the children but denied that he had failed and neglected to maintain the applicant and the children, and invited the applicant to live with him. The applicant, however, refused to live with him alleging that life with the defendant had become impossible owing to his frequent assaults and habitual cruelty. The case has been keenly contested and both the applicant and the defendant have been examined and cross-examined at great length. The learned Magistrate in a carefully considered order has come to the conclusion that the defendant had occasionally assaulted the applicant and treated her with cruelty, that the applicant was justified in refusing to continue to live with him and that she was entitled to claim maintenance for herself. He has also held that for a considerable period and more particularly for four months prior to the filing of the plaint, the defendant neglected to maintain the applicant and the children and failed to provide his children with adequate food and clothing and facilities for their studies and that therefore the applicant was entitled to an order for maintenance in favour of the children. He has ordered the defendant to pay a sum of Rs. 75 to the applicant, Rs. 75 to each of the two older children and Rs. 50 each for the other six children amounting in all to a sum of Rs. 525 per month.

The evidence that has been accepted by the Magistrate reveals a very harrowing state of affairs. The Magistrate has described the defendant as a schemer. When he married the applicant in 1945 he gave up his job as a clerk in the Colombo Municipality and migrated to Batticaloa without a job, presumably to look after his wife's properties. Within a short time he succeeded in having a valuable tract of paddy fields in extent about 80 acres transferred in his name, took the income from these fields, appropriated the rents due to his wife from a hotel belonging to her and took up residence in his wife's house with his family leading what has been described by the Magistrate as a "cat and dog life", without taking adequate steps to look after his wife and children. He considered it the duty of a benevolent State to educate his children with little or no effort on his part, he left the task of clothing his children to his wife's relatives and he practically starved his children. They used to go to school in the morning without a square meal and the eldest girl fainted in school on three occasions for lack of nourishment. His wife and children slept on mats without pillows while he enjoyed the luxury of a bed. To quote the Magistrate's own language, the defendant treated his family as if they were beggars asking for alms. His niggardliness was not due to any lack of means on his part because he enjoyed the entire income of his wife's properties amounting to over Rs. 1,000 a month.

It is unnecessary to dwell at length on the findings of fact in this case because counsel for the defendant very properly did not seek to canvass the Magistrate's findings on the facts. He submitted, however, that in law, the Magistrate was in error in ordering his client to pay maintenance in respect of the applicant and the eldest daughter Chandradevi.

His contention that the Magistrate was wrong in making an order for maintenance in favour of the applicant is based on the fact that, admittedly after the institution of proceedings in the case, she commenced to receive the rent of the hotel amounting to Rs. 100 per month. This was brought about as a result of a temporary settlement by the Magistrate, whereby it was agreed between the parties that the rent of the hotel should be paid by the tenant direct to the applicant. It was stated in Court that this settlement was without prejudice to the rights of the parties. Counsel for the defendant submitted that since the applicant was receiving this sum monthly, the order of maintenance made in her favour was not justified. I am unable to agree. The hotel belonged to the applicant and she was rightly entitled to receive the rents from her own property and the fact that the defendant had previously appropriated the rents of the hotel does not relieve him from his liability to pay maintenance for his wife. In *Sathasivam v. Manickaratnam*[1], it has been held that the fact that the applicant had sufficient means does not preclude her from obtaining an order of maintenance in her favour. The first submission of Counsel for the defendant therefore fails and the order of maintenance directing the defendant to pay Rs. 75 per month to the applicant will stand.

The second submission of Counsel for the defendant, however, raises a question of some complexity particularly in view of certain decisions of this Court on this point. Learned Queen's Counsel submits that, under the Maintenance Ordinance, the Magistrate is not empowered to make a first order of maintenance in respect of a child who is over sixteen years of age at the time of the application. I have given careful consideration to the submissions of both Counsel on this question and I have come to the conclusion that Mr. Thiagalingam's contention is entitled to succeed. In view of an apparent conflict of authorities, I have been invited to refer this question to a fuller Bench but I do not think it is necessary to do so because this same problem arose for consideration before Swan, J. in *Hinniappuhamy v. Wilisinduhamy*[2], and the learned Judge, in spite of two apparently conflicting judgments, preferred to take the same view which I propose to take in this appeal.

The Maintenance Ordinance was passed in 1889 and section 3 of the Ordinance is in the following terms :—

> " If any person having sufficient means neglects or refuses to maintain his wife, or his legitimate or illegitimate child unable to maintain itself, the Police Magistrate may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of

[1] *(1962) 66 N. L. R. 355 at 358.* [2] *(1952) 54 N. L. R. 373.*

his wife or such child at such monthly rate, not exceeding fifty rupees, as the Magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct. Such allowance shall be payable from the date of the order."

Section 8 reads as follows :—

"No order for an allowance for the maintenance of any child, legitimate or illegitimate, made in pursuance of this Ordinance shall, except for the purpose of recovering money previously due under such order, be of any force or validity after the child in respect of whom it was made has attained the age of fourteen years, or after the death of such child :

Provided that the Police Magistrate may in the order direct that the payments to be made under it in respect of the child shall continue until the child attains the age of eighteen years, in which case such order shall be in force until that period."

From an analysis of these two sections it would appear that—

(*a*) the monthly allowance that can be decreed in respect of any child shall not exceed Rs. 50 ;

(*b*) the order of maintenance shall be valid only till the child attains the age of 14 ; and

(*c*) the Magistrate may direct in the order that payments shall continue until the child reaches the age of 18.

The provisions of the above sections were considered by the Supreme Court in *Este v. Silva* [1]. In that case, Withers, J. held that under section 8, if a child has to be maintained until he or she attains the age of 18 years, that time must be limited in the original order. As the original order was silent as to the time, it had no validity after the subject of the order reached the age of fourteen years.

By Ordinance No. 13 of 1925 certain amendments to the law were introduced. Under section 2 (which corresponded to the old section 3) the monthly allowance payable was increased to a sum not exceeding Rs. 100 and section 7 which corresponded to the previous section 8 read as follows :—

"No order for an allowance for the maintenance of any child, legitimate or illegitimate, made in pursuance of this Ordinance shall, except for the purpose of recovering money previously due under such order, be of any force or validity after the child in respect of whom it was made has attained the age of sixteen years, or after the death of such child :

Provided that the Magistrate may *in the order or subsequently* direct that the payments to be made under it in respect of the child shall continue until the child attains the age of eighteen years, in which case *such order* shall be in force until that period."

[1] *(1895) 1 N. L. R. 22.*

By 1925 therefore the law was altered in the following respects :—

(*a*) The monthly allowance was increased to a sum not exceeding Rs. 100.

(*b*) The validity of the order of maintenance was extended until the child reached the age of sixteen.

(*c*) The Magistrate could direct in the order that payments shall continue until the child reached the age of eighteen. (This was similar to the old law.)

(*d*) It was open to a party to make an application to extend the period up to eighteen years even after the original order was made, provided it was done before the child attained the age of sixteen.

The alterations in the law which came into operation in 1925 were obviously brought about as a result of changing social conditions which made it necessary to alleviate the rigours of the law as it existed up to 1925 in order to enable the quantum of maintenance to be increased and the period for which maintenance was payable to be extended. It also made it possible for an application to be made subsequently for the extension of the period until the child reached the age of eighteen years even if the original order only fixed the period of validity until the child reached the age of sixteen years, a procedure which was not available as the law stood before 1925.

It seems clear however that unless action was taken under the proviso to either the old section 8 or the new section 7, the period of validity of a maintenance order expired in the one case when the child reached the age of fourteen years and in the other, when the child reached the age of sixteen years. No fresh order for maintenance could be made after a child attained these ages. This is, in effect, the submission that has been made by Counsel for the defendant before me.

Having regard to social and economic conditions today and the necessity for higher education between the years of sixteen and eighteen, it would be difficult for a child to maintain itself until he or she reaches the eighteenth year. Today, children between these ages invariably continue to remain under the tutelage of their parents. There may be a case of genuine hardship where the law does not permit an order of maintenance to be made for the first time in respect of a child who is over sixteen years of age at the time of the application. Counsel for the applicant invited me to apply the test of reasonableness and submitted that it could not have been the intention of the Legislature to deprive children between the ages of sixteen and eighteen of the benefits of the Maintenance Ordinance. I am unable to adopt a wide interpretation to the wording of section 7 without doing violence to the language of the section. If, as a result of changing social conditions, it has again become

necessary to amend the law, the remedy lies with the Legislature. The function of the Courts is to interpret the law and if Judges consider it desirable to extend the law it must only be done in exceptional circumstances and in accordance with fundamental principles. In this connection the observations of Lord Reid in *Myers v. Director of Public Prosecutions*[1] are of special interest. That was a case in which it was sought to extend the principle of hearsay evidence to a larger class of cases. Lord Reid in that connection stated as follows :

> "The common law must be developed to meet changing economic conditions and habits of thought, and I would not be deterred by expressions of opinion in this House in old cases. But there are limits to what we can or should do. If we are to extend the law it must be by the development and application of fundamental principles. We cannot introduce arbitrary conditions or limitations : that must be left to legislation. And if we do in effect change the law, we ought in my opinion only to do that in cases where our decision will produce some finality or certainty. If we disregard technicalities in this case and seek to apply principle and common sense, there are a number of other parts of the existing law of hearsay susceptible of similar treatment, and we shall probably have a series of appeals in cases where the existing technical limitations produce an unjust result. If we are to give a wide interpretation to our judicial functions questions of policy cannot be wholly excluded, and it seems to me to be against public policy to produce uncertainty. The only satisfactory solution is by legislation following on a wide survey of the whole field, and I think that such a survey is overdue. A policy of make do and mend is no longer adequate. The most powerful argument of those who support the strict doctrine of precedent is that if it is relaxed judges will be tempted to encroach on the proper field of the legislature, and this case to my mind offers a strong temptation to do that which ought to be resisted."

I have so far examined the language of section 7 and come to the conclusion that the law as it exists today is an absolute bar to an order for maintenance being made for the first time in respect of a child between the ages of sixteen and eighteen. I shall now proceed to examine the decisions of this Court where the interpretation of section 7, after the amendment of the law in 1925, has been considered.

In *Dona Rosaline v. Gunasekera*[2] Garvin, A.C.J. expressed the opinion that the amendment of section 7 by the addition of the words "or subsequently" did not give a Magistrate jurisdiction to give directions in respect of an order which had ceased to be of any force or validity. According to the learned Acting Chief Justice the legislature did not give a Magistrate power to make a fresh order imposing a fresh liability upon a person whose original liability to pay maintenance had expired. "The word 'subsequently' introduced into the proviso by the amending

[1] *(1964) 3 W. L. R. 145 at 156.*

[2] *(1926) 13 C. L. W. 17.*

Ordinance " he said " meant subseqnent to the making of the order but before the order expired and ceased to be of any validity." This was the case of a child in respect of whom there was a valid order for maintenance in existence but the order expired on the child reaching the required age. In 1941 Soertsz, J. in *Thangayagam v. Chelliah*[1] was dealing with the case of a child in respect of whom a first order for maintenance was being made when the child was over sixteen years of age at the time of the application. He did not disagree with the view expressed by Garvin, A.C.J. in *Dona Rosaline v. Gunasekera* but since the question raised in *Thangayagam v. Chelliah* was in regard to a point different from that raised in *Dona Rosaline v. Gunasekera* he proceeded to examine the wording of section 7 from a different angle. The Magistrate had held that section 7 was an absolute bar to a fresh application for maintenance in respect of a child over sixteen years of age. In the view of Soertsz, J. the Magistrate had come to an erroneous conclusion on the law. After considering the Roman Dutch Law on the subject the learned Judge expressed the view that at common law it was open to a child to ask for maintenance at any age until such time as the child was able to maintain itself. He then considered the provisions of section 7 and sought to deal with the section in two separate parts. Under the main section he conceded " that where an order for maintenance has been given in favour of a child without limitation of the period of maintenance, the order will not be of force once the child has attained sixteen years of age, except so far as arrears of maintenance are concerned, unless the Magistrate makes a fresh order prolonging the period of maintenance for any additional period up to the eighteenth year." He then continues to say that the main part of the section does not deal with the applications of children who had attained their sixteenth year, but it does not say that such applications may not be made if a Magistrate is empowered, in the first instance to order maintenance until a child attains its eighteenth year. He therefore argues that " there does not appear to be any good reason why a first application for maintenance may not be made between the age of sixteen and eighteen." Quoting the words " provided that the Magistrate may in the order or subsequently.....", the learned Judge maintains that these words " do not bar a first order after the sixteenth year, but on the contrary suggest that such an order may be made at any time before the eighteenth year is attained." In interpreting the section in this manner, the learned Judge appears to have been influenced by the common law on the subject and seeks to give the section an interpretation in accordance with the common law. With all respect to the learned Judge, he appears to have failed to consider the words of the entire proviso. Quite apart from the well-known canon of construction that a proviso to a section must be considered together with the principal matter, the words " in the order " and " such order " in the proviso can only have reference to the " order " referred to in the main section. I cannot agree, therefore, that the proviso to section 7 must be considered as distinct from the main

[1] *(1941) 42 N. L. R 379.*

section, to enable it to be applied to an order for maintenance made for the first time in respect of a child between the ages of sixteen and eighteen.

In 1952 an opportunity arose for the Supreme Court to consider the decisions in *Dona Rosaline v. Gunasekera* and *Thangayagam v. Chelliah*. The question was raised in *Hinniappuhamy v. Wilisindahamy* [1]. In that case, the applicant obtained " on 10.9.1951 an order of maintenance for herself and her child Jinadasa. On 31.3.1952 the case was called on a question of arrears. On that date the Proctor for the applicant moved that the order in favour of the child should continue till he attained the age of eighteen. A birth certificate was produced which showed that Jinadasa was born on 9.12.1935. The learned Magistrate made order allowing the extension asked for." The point for decision was whether the Court had jurisdiction to extend the order on that date because it was obvious that on 31.3.1952 Jinadasa had passed the age of sixteen. Swan, J. followed the decision in *Dona Rosaline v. Gunasekera* and agreed entirely with the view expressed by Garvin, A.C.J. He referred to the observations of Soertsz, J. in *Thangayagam v. Chelliah* but did not consider it necessary to examine his views because the facts were different. In *Dona Rosaline v. Gunasekera* and *Hinniappuhamy v. Wilisindahamy* the Court was considering the validity of a maintenance order in respect of which an extension was sought up to the eighteenth year after the validity of the original order had expired. In *Thangayagam v. Chelliah*, like the present case, the first application was made in respect of a child when the subject of the order was over sixteen years of age at the time of the application. For the reasons I have already stated, I am of the view that the case of *Thangayagam v. Chelliah* has been wrongly decided. When an order for maintenance in respect of a child is made for the first time after the child has reached the sixteenth year, it makes no difference that an earlier order was in existence. That order had expired when the child reached its sixteenth year and any order made thereafter would be a first order in respect of which no provision has been made under the Maintenance Ordinance. The decisions in *Dona Rosaline v. Gunasekera* and *Hinniappuhamy v. Wilisindahamy* would therefore be applicable to such a case.

In the result, I agree that the Magistrate had no power to make an order for maintenance in respect of Chandradevi. The wording of section 7 makes this abundantly clear and this view is supported by judicial authority. The order of maintenance in favour of Chandradevi is set aside. Subject to this variation, the appeal is dismissed. There will be no costs of the appeal.

Appeal mainly dismissed.

[1] *(1952) 54 N. L. R. 373 at 374.*