1937

Present: **Abrahams C.J.**

SEETHI *v.* MUDALIHAMI.

481—P. C. Avissawella, 13,836.

Maintenance—Failure to produce witnesses at the trial—Dismissal of application—Petition to reopen case—Agreement to pay maintenance by respondent—Jurisdiction of Court.

In maintenance proceedings, on the day fixed for hearing, the applicant informed the Court that she had no witnesses present to supply the necessary corroborative evidence in support of her claim, and the application was dismissed.

Later the applicant petitioned the Court, alleging that she brought no witnesses as the respondent had proposed certain terms of settlement which he had failed to fulfil.

The Magistrate thereupon fixed the case for trial at which the respondent undertook to pay as maintenance such sum as the Court thought reasonable. The Magistrate accordingly fixed the sum.

Held, that the Magistrate had no power to reopen the case.

Beebee v. Mahmood (23 N. L. R. 123) distinguished.

APPEAL from an order of the Police Magistrate of Avissawella.

H. V. Perera, K.C. (with him *J. A. T. Perera*), for appellant.

P. A. Senaratne, for respondent.

Cur. adv. vult.

October 4, 1937. ABRAHAMS C.J.—

The respondent instituted proceedings against the appellant in the Police Court, Avissawella, for the maintenance of her three illegitimate children of which she alleged the appellant was the father. On the date fixed for the trial, the respondent did not appear. The learned Magistrate instead of dismissing the case as he should have done, took the amazing course of issuing a warrant for her arrest. The parties both appeared on the day next fixed for the hearing and the case came on before another Magistrate. The respondent said she had no witnesses present, who could supply the necessary evidence corroborative of her claim that the appellant had fathered the children. The case was quite properly dismissed.

Some days later the first Magistrate returned and the respondent transmitted a petition to him alleging that when the case had been first called the appellant approached her and suggested a settlement promising on consideration of her withdrawal of the case to give her Rs. 100 and to transfer to her a piece of land, and in consequence of this promise she brought no witnesses with her to the trial of the case. She stated she had received Rs. 50, and a promise of the balance of the money within a few days, but no further mention had been made of the piece of land, which the appellant had agreed to transfer. She therefore, prayed the learned Magistrate to cause the appellant to fulfil this promise.

The Magistrate made an order fixing the case for trial. The respondent gave evidence claiming maintenance as before and adding a claim in

respect of a fourth child of which she alleged the appellant was the father though she had at his request registered the child in the name of another man. During the proceedings discussions relating to a settlement were entered into and at one time the appellant said he was willing to purchase a certain piece of land for Rs. 500, which would serve to maintain the four children. The negotiations for purchase apparently failed and the appellant undertook to pay such sum for maintenance as the Court might consider reasonable. The Magistrate fixed the monthly sum of Rs. 40, and made an order accordingly.

The appellant contends the order is invalid and in any event the amount is excessive.

It is obvious that the learned Magistrate had no power to reopen a case once dismissed whatever might be his anxiety to do justice. Counsel for the respondent admits that this re-hearing was illegal, but makes the somewhat faint submission that the appellant cannot complain as he accepted the jurisdiction of the Court in the matter and indeed offered to abide by the decision of the Magistrate as to the amount of maintenance, which he agreed to pay. But the agreement of parties to submit to the decision of a Court which has no jurisdiction cannot confer jurisdiction. He then makes the ingenious suggestion that the proceedings should be treated not as a reopening of the case but as fresh proceedings in maintenance and cites the case of *Beebi v. Mahmood* [1], where Shaw J. held that fresh proceedings in maintenance could be instituted even by a party whose case had been dismissed, provided that the case had not been dismissed on the merits. But the respondent's case had been dismissed on the merits as she admitted she had no witnesses to support her claim, not that she had witnesses, but had been unable to bring them on the day of trial, whereas in *Beeby v. Mahmood* (*supra*), it would appear that there were witnesses, but they had not been brought. The implication in the petition that the respondent had witnesses, but had been induced by the appellant's promises not to bring them ought not to be permitted to prevail over the statement in the first case that she had no witnesses present. Had she intended to inform the Magistrate that there were witnesses, but that she had not brought them for some reason or other, she would surely have said as much. Further, the request of the respondent in her petition was not for the grant of a maintenance order, but for some order or direction to the appellant calculated to cause him to fulfil his promise to pay money and to transfer a piece of land.

The appeal must succeed. When the case stood dismissed the Court was *functus officio*. The respondent might have (I do not say she has) some cause of action against the appellant, but the Magistrate had no power to reopen a dismissed case for that purpose. Magistrates must proceed according to law even if they feel they cannot do justice according to their notions by an adherence to prescribed procedure.

The appeal is allowed with costs.

Set aside.

[1] *(1921) 23 N. L. R. 123.*