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Present : Garvin J.

VELUPILLAI *v.* SANMUGAM.

278—P. C. Point Pedro, 11,940.

Maintenance—Arrears of maintenance—Time limit—Ordinance No. 19 of 1889.

Where an order for maintenance has been made under section 3 of the Maintenance Ordinance there is no limit either to the amount of arrears recoverable or the time within which such arrears may be recovered.

APPEAL from an order of the Police Magistrate of Point Pedro directing the issue a of distress warrant for the recovery of a sum of Rs. 3,730, being arrears of maintenance payable under an order made under section 3 of the Maintenance Ordinance. The order was made on June 22, 1906, on the application of Valliamma, the wife of the appellant, and was to the effect that the husband should pay maintenance at the rate of Rs. 20 per mensem. Shortly after the order, the appellant left for the Straits where he remained till the end of 1927. The Police Magistrate allowed the application authorizing the recovery of arrears at the rate of Rs. 10 per mensem for the wife, and a similar sum for the child.

H. V. Perera (with *Gnanaprakasam*).—The claim is for arrears of maintenance from June 21, 1906, till about December, 1927, at the rate of Rs. 20 per month.

Two points arise for argument: first, whether the order for maintenance passed on June 21, 1906, was for the child or the wife, or for both ; second, whether there is any prescription for arrears of maintenance under the Maintenance Ordinance.

The Maintenance Ordinance says that the monthly maintenance shall be recoverable as a fine under the Criminal Procedure Code. (See 312 (1) (*h*) of the Criminal Procedure Code.) Fines under the above section must be recovered within six years, Similarly arrears of maintenance are not recoverable after six years.

The order of June 21 was only for the child. The wording of the order is vague. Since the defendant was willing to take the wife with him and to maintain her, before granting her any maintenance the Court must be satisfied that the defendant was living in adultery or that he habitually treated the applicant with cruelty. There was no proof of either of cruelty or adultery. The consequent presumption is that the Court acted in accordance with law and did not grant any maintenance for the wife. (See

section 4 of Ordinance No. 19 of 1889.) The order being vague, it must be construed to mean that the maintenance was only for the child.

Under section 8 of the Maintenance Ordinance, there should be no maintenance for the child after the child is fourteen years of age. The child became fourteen years old on October 21, 1915.

Hayley, K.C. (with *Balasingham*).—There is no limitation under the Maintenance Ordinance. Only so much of the Criminal Procedure Code applies to actions under the Maintenance Ordinance as are specifically made applicable by the Maintenance Ordinance. Section 9 says the amount ordered may be levied "in the manner by law provided for levying fines in the Police Courts." This places no bar on the time during which arrears may be recovered.

August 30, 1928. GARVIN J.—

This is an appeal from an order directing the issue of a distress warrant for the recovery of a sum of Rs. 3,730 alleged to be the arrears of maintenance payable by virtue of an order under section 3 of the Maintenance Ordinance, No. 19 of 1889, made on June 22, 1906. That order was made on the application of Valliammai, the wife of the present appellant, who complained verbally to Court on June 19, 1906, that she and her child, a girl then of the age of four years, had been deserted by the appellant who had since failed to maintain them. On June 21, 1906, the day appointed for the hearing the husband appeared and stated: "I am even now maintaining them. I am ready to take her and the child with me." The applicant said: "I am afraid to go with him." An argument then took place between the Counsel for the parties, in the course of which, it was urged that the wife was not entitled to maintenance inasmuch as she was unwilling to return with her husband to the Straits, where he was employed, and that no maintenance should be allowed even for the child since the father wished to take his child with him and maintain her himself.

No evidence additional to the complaint recorded on June 19 was placed before the Court.

On June 22, 1906, the Police Magistrate made order that the husband "do pay maintenance at the rate of Rs. 20 per mensem," a sum of Rs. 10 was to be paid for the month of June, and thereafter Rs. 20 per mensem, commencing July 1, 1906.

A sum of Rs. 10 was paid but nothing more. The husband left for the Straits shortly after the order was made and remained there till he returned to Jaffna at the end of 1927, after his retirement. In the absence of facilities for the enforcement of orders for maintenance made in Ceylon by the Courts of that country every attempt to procure payment proved unsuccessful.

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The Police Magistrate who heard the argument which took place upon the application for a distress warrant authorizing the recovery of all arrears held, that the order of June 22, 1906, required the husband to pay a sum of Rs. 20 per mensem for the maintenance of his wife and child, and that the order must be construed as directing the payment of Rs. 10 per mensem for the maintenance of the child and Rs. 10 per mensem for the maintenance of the wife. He rejected the submission, for which section 312 (1) (*h*) of the Criminal Procedure Code was cited as authority, that no arrears of maintenance can be recovered for more than six years and held that the maintenance payable in respect of the wife at Rs. 10 per mensem up to the date of his order was Rs. 2,610, and the amount payable in respect of the child computed up to the date she attained the age of fourteen years was Rs. 1,120.

I cannot agree with Counsel for the appellant that the Magistrate was wrong in rejecting the contention that the combined effect of section 9 of the Maintenance Ordinance and section 312 (1) (*h*) of the Criminal Procedure Code is to bar the recovery of the maintenance payable for a particular month in six years from the date when it fell due.

Section 9 says that upon failure to comply with an order for maintenance the Magistrate may "for every breach of the order issue a warrant directing the amount due to be levied in the manner by law provided for levying fines imposed by Magistrates in Police Courts . . . ." It is section 312, sub-section (2), alone which relates to the levying of fines; the preceding sub-section and its several sub-clauses contain provisions relating to sentences of fines, but do not prescribe the manner in which they are to be levied. An order to pay maintenance is not a sentence of fine; it merely determines in a particular case the obligation imposed by law on parents to maintain their wives and children and specifies the amount to be paid. It is only the recovery of the amount due which is to be made in the manner by law provided for levying fines. The form of distress warrant prescribed in the schedule to the Ordinance sets out the person by whom and the manner in which the amount is to be levied. It also indicates that one warrant may issue for the recovery of more then one month's maintenance.

Section 9 is not very happily worded. It imposes no time limit of any kind to the amount of arrears recoverable, or any limit of time to the recovery of the allowance for each month, and apparently no limit except that which is set by the number of months for which the allowance remains unpaid to the imprisonment which may be imposed.

In the case under consideration no neglect or want of diligence is ascribable. The allowance could not be recovered so long as the appellant resided in the Straits. Such a case as this is best

dealt with by reciprocal legislation for the enforcement in one part of the Empire of orders made by the Courts of another part. Such legislation now exists—*vide* the Maintenance Orders (Facilities for the Enforcement) Ordinance, No. 15 of 1921, as amended by Ordinance No. 11 of 1922. It is the absence of such legislation at the time this order was made which has given rise to the somewhat extreme case. Under the existing legislation there is no limit to the amount recoverable by way of arrears and no time bar to the recovery of any allowance for any particular month.

It only remains therefore to consider the submission that the order of June 22, 1906, is an order for the payment of maintenance for the child alone, and not for the mother and the child. The judgment of the Police Magistrate embodying the order of June 22, 1906, is as follows :—

ORDER. 22.6.06

The defendant admits that he is the husband of the applicant and the father of the child. He says that he is ready to take them with him to the Straits where he is employed. The wife declines to go. She says : "I am afraid to go with him." The parties have been estranged for some time and recently made friends, only to separate in a few days—and hence this application which is the second applicant has made.

The defendant is bound to maintain the child, who is a girl, and is only about four to five years of age. I decline to accede to defendant's counsel's request to give the child to defendant. She is too young to be left without her mother.

I order that defendant do pay maintenance at the rate of Rs. 20 per mensem. His counsel admits that he is in receipt of a salary of 100 dollars per mensem.

It is to be hoped that the parties will again be reconciled, and that busy bodies who have interested themselves to again estrange husband and wife will now mind their own business and allow the parties to go and live together.

Defendant will pay Rs. 10 for this month and Rs. 20 from July 1, 1906.

(Sgd.) J. PRINS, P.M.,
22.6.06

Delivered in open court this June 22, 1906, in the presence of the applicant and the defendant.

(Sgd.) J. PRINS, P.M.,
22.6.06

The Police Magistrate has not as he should and presumably would have done if he were ordering maintenance both for the wife and the child, specified the allowance payable to the wife or the allowance payable in respect of the child. Nor has he considered the grounds of the wife's refusal to live with her husband as he was bound to do by section 4, which only permits him to make an order in her favour when her husband offers to maintain her on condition of her living with him, if he is satisfied that the husband is living in adultery or has habitually treated his wife with cruelty. Neither

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in the wife's evidence nor in the record of the proceedings is there the slightest indication that the husband was living in adultery, or that he habitually ill-treated his wife.

The Magistrate in his judgment notes the offer of the husband to take his family to the Straits and the refusal of the wife on the ground that she was afraid to go with him. In view of the estrangement between husband and wife her reluctance and even fear to go alone with him to a land beyond the seas is understandable. But it certainly does not justify the suggestion made in these proceedings that the then Magistrate must have regarded it as indicating habitual ill-treatment by the husband. He has not said so, and there is nothing in his judgment to indicate that he was, even as he could not have been, satisfied that this husband had habitually treated his wife with cruelty when it is evident that no such allegation was even made.

Having noted the offer of the husband to take his wife and child to the Straits and the refusal of the wife the Magistrate says: "The defendant is bound to maintain the child, who is a girl and is only about four or five years of age. I decline to accede to defendant's counsel's request to give the child to the defendant. She is too young to be left without her mother. I order the defendant to pay maintenance at the rate of Rs. 20 per mensem."

This excerpt contains the decision of the Police Magistrate. He is dealing with the submission that since the wife was not entitled to maintenance no order for maintenance of the child could be entered upon since the father was willing to maintain it and was entitled to the custody of the child. The Magistrate took the view that he was bound to maintain the child and was having regard to the sex and immaturity of the child not entitled to its custody. The order which follows immediately upon this decision is clearly referable to it and is an order directing the payment of maintenance for the child. The concluding paragraph in which the Judge refers to the busy bodies who have interested themselves to estrange husband and wife is hardly in keeping with the suggestion that he was satisfied that the wife was justified in declining to live with him.

The decision under appeal was obviously influenced by certain words which the Magistrate had written and then scored off. The record shows that the Magistrate wrote the words "for the child at" immediately after the words, "I order the defendant to pay maintenance," and then struck them out repeating the word "at" and then completing the sentence with the words "at the rate of Rs. 20 per mensem." This, it is said, indicates that he intended that the maintenance ordered by him should be for mother and child. Speculations as to the intention with which the Magistrate deleted these words is not a satisfactory method of interpreting

what he has written. It is often extremely difficult to say why a writer in the middle of a sentence deletes certain words and then completes it, as the Magistrate did in this case. Sometimes it is simply a matter of a preference for a different form of expression. In a case such as this, it may be that the Magistrate proceeded, as he must often have done, to frame his order specifying the amount payable to the child as in a case where maintenance is to be paid for the child and for the mother; then realizing that it was not such a case and no order in favour of the mother was to follow he struck out words which he deemed superfluous.

It is impossible to say with any certainty why the Magistrate did what he did.

The language of the order in its final form is at least capable of the interpretation for which the appellant contends. The alternative interpretation suggested results in an order which is manifestly wrong and not justified by the evidence. Even assuming that the latter is a possible interpretation it is a case of ambiguity in which the presumption would be in favour of a right order and hence in favour of the appellant's contention. But for the reasons I have given, I think it is clear that this is an order for the maintenance of the child alone.

The order under appeal will be varied accordingly, and distress warrant will issue for the recovery of an amount computed at the rate of Rs. 20 for each month commencing July, 1906, till the day on which this child attained the age of fourteen years—that is for a total sum of Rs. 2,240.

Order varied.