KUMARI MENIKE
v.
ALUWIHARE

COURT OF APPEAL
A. DE Z. GUNAWARDANA, J.
CA 87/86 – M.C. KANDY (MAINTENANCE) NO. 436/84
NOVEMBER 2, 1989

Maintenance – Application by mother – Right to claim maintenance is a right vested in the child – Child maintained on charity by third party temporarily, does not lose the right to claim maintenance – Who can file application for maintenance for a child – Can maintenance be ordered to be credited to the child's account?

At the inquiry before the Magistrate it transpired that the child is being maintained temporarily by a 3rd party. The Magistrate dismissed the application for maintenance stating that the question of paternity need be decided only if an order for maintenance has to be made.

The requirements for entitlement for maintenance under section 2 of the Maintenance Ordinance are,

(i) that the child is a "legitimate or Illegitimate child"; and

(ii) that such child is unable to maintain itself.

The fact that the child is being maintained by someone else at present does not affect this right.

A child may be said to be able to maintain himself where such child has means of his own from which such child will derive sufficient income to maintain himself. "A child who is dependent on charity cannot be said 'to be able to maintain itself' ".

In the Maintenance Ordinance a person who can make an application on behalf of a child is not specified, so that any person can bring the matter to the notice of the court in the form required in the Ordinance. In such an application, the applicant being the mother or any other, would not be entitled to waive the right to claim maintenance as the right is a right vested in the child by virtue of the provisions of the Maintenance Ordinance.

It is not inappropriate to make an order to credit the monies for maintenance to an account to the credit of the child, if the child is maintained on charity at present.

Cases referred to :

1. *Gunasekera* v. *Ahamath* 33 NLR 241
2. *Tenne* v. *Ekanayake* 63 NLR 544

S.F.A. Cooray with *Edward Rodrigo* for applicant-appellant

Jayampathy Wickremaratne with *Sampath Abeykoon* for defendant-respondent

Cur. adv. vult.

November 30, 1989.

A. DE Z. GUNAWARDANA, J.

The Applicant-Appellant filed an application against the Respondent-Respondent in the Magistrate's Court of Kandy claiming maintenance for her and her illegitimate child Priyangika Kumari. It was alleged in the said application that the Respondent-Respondent was the father of the said child who was born on 28.7.83. This case was taken up for inquiry before the Magistrate, Kandy and in the course of the cross-examination of the Applicant-Appellant it transpired that the child at present is being maintained by someone else. According to her soon after birth the child was taken over by a mid-wife who was working at the hospital. However, the child is not legally adopted by the said midwife. At that stage of the inquiry, the question was raised as to whether the applicant can proceed with this application because the child is being maintained by another party from the date of her birth. The Applicant-Appellant further admitted in cross-examination that she does not incur any expenses for the maintenance of the child, as at present. The Applicant-Appellant also stated that although she had asked for the return of the child from the said person who was maintaining the child at present, that person has refused to hand back the child.

The learned Magistrate has taken the view that the question of paternity need be decided only if an order for maintenance has to be made. Since the child is now maintained by someone else and the Applicant-Appellant is not incurring any expense for the maintenance of the child, the learned Magistrate has decided that an order for maintenance is not necessary and has dismissed the application of the Applicant-Appellant. This appeal is from the said order of the Magistrate dated 25.6.86.

Counsel for the Applicant-Appellant submitted that the right to claim maintenance is a right vested in the child under section 2 of the Maintenance Ordinance, and the fact that the mother had made the application does not entitle the mother to waive that right. It should be noted that the requirements for entitlement to maintenance under section 2 of the Maintenance Ordinance are:

(i) that the child is a "legitimate or illegitimate child" and

(ii) that such child is "unable to maintain itself." The fact that a child is being maintained by someone as at present does not affect this right.

The child may be said to be able to maintain himself where such child has means of his own from which such child will derive sufficient income to maintain himself. This may also be said where the child has a legal right to claim maintenance from another person for e.g. where a child had been legally adopted by another under an order of Court. In such situations it may be argued that maintenance is not payable for such child as he has sufficient means to maintain himself or has a right to claim maintenance on a legal basis from a person other than the natural father. Therefore where no such circumstances are proved by the natural father his liability to maintain the child will persist. In the case of *Gunasekera vs. Ahamath* (1) MacDonell, CJ in considering a case where the child was maintained by charity of a 3rd person has stated that, "A child who is dependent on charity cannot be said to be 'able to maintain itself' ". Thus in this case too, the fact that a 3rd party is maintaining the child as at present, would not deprive the right conferred by the Maintenance Ordinance on an illegitimate child to claim maintenance from his natural father.

In the Maintenance Ordinance the person who can make an application on behalf of a child is not specified, so that any person can bring the matter to the notice of the Court in the form required under the Ordinance; then the Court will be required to make an appropriate order. Any Applicant whether it be the mother or any other, would not be entitled to waive the right to claim maintenance as the right is a right vested with the child by virtue of the provisions of the Maintenance Ordinance. An application for maintenance need not necessarily be made by the mother. Any person interested in the child can do so. In the case referred to above *(Gunasekera vs.*

Ahamath) the application for recovery of arrears of maintenance was made by an uncle of the child who was the brother of the deceased mother of the child. In the case of *Tenne vs. Ekanayake* (2), the application for maintenance was made by the grandfather of the child, who was maintaining the child.

It is important to note here that section 6 of the Maintenance Ordinance requires that an application for maintenance should be made within 12 months from the birth of the child or within 12 months from the father of such child ceasing to maintain such child; unless the father had been out of this country during the preceding 12 months of the said application. If the order of dismissal made by the learned Magistrate of the present application is allowed to stand the child's right to claim maintenance from the alleged father will be lost to him for ever, because in the event that the child wants to claim maintenance on a subsequent date, he would not be able to revive the right since 12 months have passed from her birth and/or from the date the alleged father ceased to maintain her. Therefore, it is necessary that such child should not be deprived of the right to claim maintenance merely because such child is being maintained by the charity of some 3rd person, as at present. Hence it is necessary that the right of the child should be consolidated within the legally specified period, so that the child would be able to fall back on the maintenance payable by the father whenever she needs it. If in fact the child is being maintained from the charity of a 3rd party at present, the court would be entitled to make an order for maintenance to be remitted to an account so that the child can draw on it when the need arises. Such an order had been made by the learned Magistrate in the case of *Gunasekera vs. Ahamath,* and the Supreme Court has approved the said order. In the instant case too, it would not be inappropriate to make an order to credit the monies to an account, to the credit of the child, in the event an order for maintenance is made.

For the above reasons I would accordingly set aside the order of the learned Magistrate dated 25.6.86 and remit the case back for further proceedings to be taken according to law.

The Applicant-Appellant will be entitled to the costs of this appeal.

Appeal allowed.
Case sent back for inquiry to proceed.