

1961

Present : Weerasooriya, J.

GUNADASA, Appellant, and PEMAWATHIE, Respondent

S. C. 247—M. C. Kandy, 13,334

Maintenance—Commencement of inquiry—Procedure relating to examination of applicant—Maintenance Ordinance (Cap. 76), ss. 13, 14, 16—Criminal Procedure Code, ss. 298, 299.

Section 16 of the Maintenance Ordinance applies to the recording of an examination under section 14. Accordingly, the evidence that is recorded in compliance with section 14 of the Maintenance Ordinance prior to issue of summons need not be read over to the applicant in terms of section 299 of the Criminal Procedure Code. Nor need the other provisions of section 299 of the Criminal Procedure Code be complied with.

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

M. M. Kumarakulasingham, with *N. Senanayake*, for Defendant-Appellant.

George Candappa, for Applicant-Respondent.

Cur. adv. vult.

September 5, 1961. WEERASOORIYA, J.—

This is an appeal by the defendant against an order condemning him to pay a sum of Rs. 17/50 a month to the applicant-respondent as maintenance for the latter's illegitimate child, the father of which was held to be the appellant. The appeal was pressed on the facts as well as on the law. I see no reason, however, to interfere with the findings of the Magistrate on the facts as they are supported by the evidence.

The proceedings in this case commenced with an application made by the respondent in terms of section 13 of the Maintenance Ordinance (Cap. 76) for an order of maintenance in respect of the child. Section 14 provides that on an application for maintenance being made under section 13, the Magistrate shall commence the inquiry by examining the applicant on oath or affirmation and that such examination shall be "duly recorded". The Magistrate, purporting to comply with section 14, examined the respondent on affirmation and recorded her evidence. On the law Mr. Kumarakulasingham, who appeared for the appellant, submitted that the evidence as recorded should also have been read over to the respondent in the manner prescribed by section 299 of the Criminal Procedure Code, and the other requirements of that section complied with in regard to such evidence; and that as these additional steps were not taken, the examination of the respondent was not "duly recorded" in terms of section 14 of the Maintenance Ordinance and the order for maintenance was, therefore, null and void.

Section 16 of the Maintenance Ordinance, in so far as is material to the question under consideration, provides as follows: "All evidence taken by the Magistrate under this Ordinance shall be taken in the presence of the defendant, or, when his personal attendance is not required by the Magistrate, in the presence of his pleader, and shall be recorded in the manner prescribed for trials in the Magistrate's Court."

It is to be noted that one of the requirements of section 16 as quoted above is that the evidence shall be taken in the manner prescribed for trials in the Magistrate's Court. But Mr. Kumarakulasingham contended that section 16 does not apply to the recording of an examination under section 14, which is in the nature of a preliminary inquiry for the purpose of deciding whether process should issue or not. In regard to the requirement in section 14 that the examination shall be "duly recorded", he contended that this implied an examination recorded in the manner appropriate to the recording of evidence at an inquiry held under the Criminal Procedure Code, and that, therefore, section 299 of that Code is, by analogy, applicable to the recording of such examination.

In my opinion, the opening words of section 16: "All evidence taken by a Magistrate under this Ordinance. . . ." make it clear that the section applies to an examination recorded under section 14 as well. Mr. Kumarakulasingham, relying on the subsequent words of section 16: "shall be taken in the presence of the defendant, or, when his personal attendance is not required by the Magistrate, in the presence of his pleader . . .", suggested that the application of section 16 should be limited to the taking of evidence after the defendant has appeared in answer to the summons. I see no reason, however, for doing so. I would hold that the section applies to proceedings under section 14.

As regards Mr. Kumarakulasingham's contention that section 14 attracts the provisions of section 299 of the Criminal Procedure Code, an argument on similar lines appears to have been rejected by a bench of two Judges in *Anna Perera v. Emiliano Nonis*¹. Wood Renton, J. (as he then was) expressed the view there that sections 15, 16 and 17 of the Maintenance Ordinance "expressly point out the provisions of the Criminal Procedure Code which are to be applied in maintenance proceedings" and that, except in a case where the Ordinance is unworkable without recourse to such an expedient, it would not be right to incorporate other provisions of that Code by way of analogy. With that view I respectfully agree.

Being of the opinion that section 16 of the Maintenance Ordinance applies to the recording of an examination under section 14, I find no difficulty in construing the words in section 14 that the examination shall be "duly recorded", as meaning that the examination shall be recorded in manner provided in section 16.

¹ (1908) 12 N. L. R. 263.

In the case of *Rupasinghe v. Somawathie*¹, which was referred to a bench of two Judges in view of the conflicting judgments in *Namasivayam v. Saraswathy*² and *Sebastian Pillai v. Magdalene*³, the question that arose was whether the examination of an applicant on oath or affirmation and the recording of such examination in accordance with the requirements of section 14 of the Maintenance Ordinance are conditions precedent to the issue of summons, and whether any proceedings taken without those requirements being observed are thereby rendered invalid. My Lord the Chief Justice who delivered the judgment in that case (K. D. de Silva, J. agreeing) decided the question in the affirmative. He observed further, that the deposition of an applicant who is examined under section 14 " must be recorded as prescribed in section 298 of the Criminal Procedure Code and read over to the witness as required by section 299 (1) of that Code and the other requirements of that section must be complied with ". It seems to me that the first part of the above *dictum* is based on an acceptance of the view that section 16 of the Maintenance Ordinance applies to the recording of an examination under section 14. Section 16 requires that all evidence shall be recorded in the manner prescribed for trials in the Magistrate's Court. Section 298 of the Criminal Procedure Code prescribes the procedure for recording evidence at *inquiries and trials* in District Courts and Magistrate's Courts, while section 299 expressly refers to *inquiries*. If section 16 applies to the recording of an examination under section 14, Mr. Kumarakulasingham was prepared to grant that there appears to be no reason for insisting on compliance with section 299 in regard to such examination. If I may say so with all respect, the second part of the *dictum* of my Lord the Chief Justice would appear to have been expressed *per incuriam*.

In the present case there was substantial compliance by the Magistrate with the provisions of section 298 of the Criminal Procedure Code in recording the examination of the respondent under section 14 of the Maintenance Ordinance.

The appeal is, therefore, dismissed with costs.

Appeal dismissed.

¹ (1959) 61 N. L. R. 457.

² (1949) 50 N. L. R. 333.

³ (1949) 50 N. L. R. 494.