JEYASINGHAM

v.

JEYASINGHAM

COURT OF APPEAL.
COLIN-THOME, P. AND ATUKORALE, J.
C. A. APPLICATION (REVISION) 86/81 FAMILY COURT, KAYTS 6345.
JULY 14, 1981.

Maintenance – Issue of warrant of arrest in maintenance proceedings in first instance – Whether Judge of the Family Court empowered to do so without issuing summons – Requirement that reasons be recorded in writing – Whether failure to comply therewith a defect that goes to jurisdiction – Maintenance Ordinance (Cap. 91) as amended by Act No. 19 of 1972, section 15 – Code of Criminal Procedure Act, No. 15 of 1979, section 63 (1) – Interpretation Ordinance (Cap. 2), section 16 (1) – Judicature Act, No. 2 of 1978, as amended by Act No. 37 of 1979, sections 24, 29.

Held

(1) The Family Court is now vested with jurisdiction to hear and determine maintenance cases by virtue of section 24 of the Judicature Act, No. 2 of 1978; and section 29 (2) of the said Act (as amended by Act No. 37 of 1979) enacts that the provisions of the Maintenance Ordinance shall be deemed to apply to the institution and conduct of such proceedings. Accordingly by virtue of section 15 of the Maintenance Ordinance (read with section 16 (1) of the Interpretation Ordinance), the provisions of section 63 (1) of the Code of Criminal Procedure Act, No. 15 of 1979, applies to these proceedings and a Judge of the Family Court has the power to issue a warrant of arrest in maintenance proceedings without issuing summons in the first instance.

(2) In such a case the failure on the part of the Judge to record his reasons in writing before the issue of the warrant does not make it invalid but only amounts to an irregularity in the exercise of a power vested in the Court. It is not a jurisdictional defect which would vitiate the subsequent proceedings in Court.

Case referred to

(1) *Perera v. Commissioner of National Housing, (1974) 77 N.L.R. 361.*

APPLICATION to revise Orders of the Family Court, Kayts.

K. Kanag-Iswaran, with *K. V. Mahenthiran*, for the petitioner.

V. S. A. Pullenayagam, with *S. Navaratnam*, for the respondent.

Cur. adv. vult.

August 18, 1981.

ATUKORALE, J.

The petitioner in this application invokes the revisionary powers of this Court to examine the legality of and to quash the orders made on 7.1.1981 by the learned Judge of the Family Court of Kayts in Case No. 6345 instituted by his wife, the respondent,

praying for an order of maintenance in her favour. The petitioner is a citizen of Malaysia carrying a Malaysian passport. His father is a Sri Lankan citizen who now lives in retirement at Karainagar in Sri Lanka. In August 1959 the petitioner proceeded to the United Kingdom for further studies and has since then been a permanent resident there. He married the respondent (a Sri Lankan housewife) on 11.2.1978 in Sri Lanka. After marriage they lived in Sri Lanka for about 15 months till May 1979 when the petitioner returned to the United Kingdom to continue his studies. The respondent remained in Sri Lanka. The petitioner alleges that the respondent, instigated by her parents, refused to join him in U.K. on the ground, *inter alia,* that he was unemployed and that since then they have been living apart. In December 1980, he states he came to Sri Lanka to visit his aged parents and on 29.12.1980 he went to his parental home at Karainagar. On 6.1.1981 at about 2.30 p.m. whilst he was at his parental home some police officers arrested him and took him to the Magistrate's Court, Kayts, stating that they had a warrant for his arrest. At the court premises they told him that the Magistrate had adjourned court for the day and took him to the police station and detained him there. His request to contact a lawyer was refused by the police officers. He was kept in a cell that night and the following morning (7th) he was produced before the Judge to whom he complained that he had been wrongfully arrested on a warrant and humiliated by being detained in the police cell overnight although he had committed no offence. The Judge then informed him that he had committed a 'criminal offence' and that therefore a 'bench warrant' was issued for his arrest. He inquired from the Judge what the offence was to which the Judge replied 'regarding maintenance'. He then protested to the Judge that it was a 'civil matter' and that he had received no notice of any proceedings at all. Thereupon the attorney-at-law for the respondent made submissions and demanded that he be ordered to pay Rs. 1,000 per month as maintenance. The Judge then ordered that,

(*a*) the petitioner must pay Rs. 700 per month to the respondent,

(*b*) he must deposit a deed in Court in respect of a property worth Rs. 25,000 or cash Rs. 10,000 as security against default of the monthly payment, and

(*c*) he must sign a bond for Rs. 50,000 with his father as surety in case he absconded.

The Judge ordered him to carry out these directives the following day (8th) and to report to Court with his passport. The bond for Rs. 50,000 was signed by him and his father. On the 8th when he reported to Court the Judge examined his passport and told him that he was a foreigner and ordered him to report to Court on the 9th morning. On the 9th morning the respondent's attorney submitted to Court that his passport should be impounded. The Judge then asked him to surrender his passport in the afternoon as the deed had not been deposited by then. The Judge further ordered that the first payment of Rs. 700 to the respondent be made on the 13th. The same afternoon (i.e., 9th) the deed was deposited in Court. The 10th and the 11th were Saturday and Sunday respectively. On the 13th, as previously ordered, the petitioner reported to Court and he had to hand over a sum of Rs. 700 to the respondent before the Judge in his chambers. The judge then ordered him to appear in court on 6.2.1981. He informed the Judge that his visa which was granted for one month expired on 22.1.1981 and that he had to leave the country before that. The Judge then told him that his father should appear in Court on 6.2.1981 to represent him. The petitioner avers in his petition and affidavit that the aforesaid treatment meted out to him, an alien, who was unfamiliar with the judicial system of Sri Lanka, came as a shock and has caused him severe psychological trauma and great pain of mind and distress. In this state of affairs he states that he was advised to seek relief in this Court. With a view to vindicating his name and honour and to remedying the grave injustice caused, he states that he has, with considerable difficulty, obtained an extension of his visa to enable him to represent matters to this Court and to obtain redress.

The petitioner had appended marked B (together with an English translation thereof marked B1) a certified copy of the proceedings of the Family Court in question. He states in his application that he has noted from a perusal of the English translation (B1) that the order for maintenance made by the Judge on 7.1.1981 is recorded as one which has been made with his consent and to which he has subscribed his signature at the end. He avers that he has no recollection whatsoever of having either consented to this order or having signed the record on that day. He further states that "if, however, the petitioner's memory has failed him, such consent and the said signature were not the acts of the petitioner's own free will considering the state in which the petitioner was that morning." In his application to this Court he

has set out six grounds on which he seeks to set aside the orders of the learned Judge made on 7.1.1981. Of them those which, on the submissions made to us by learned cousel appearing for him, appear to be relevant for a determination of the matter in issue before us are as follows:

(*a*) the orders are contrary to law;

(*b*) the Court acted without jurisdiction and was without competence to assume jurisdiction over the petitioner and make the several orders complained of;

(*c*) the proceedings initiated by the issue of the 'bench warrant' without the service of process provided for by law renders the said proceedings null and void and of no effect in law;

(*d*) orders made pursuant to such illegal arrest are themselves illegal and of no force or effect in law.

In her statement of objections the respondent, whilst admitting that the petitioner is now a final year accountancy student, states that his credentials as a student do not disclose that he has ever been a serious student for on his own admission he had ventured upon a course in accountancy in 1959 and remains still a final year student in 1981, at the age of 43 and after a lapse of 22 years. She states that at the time of marriage the petitioner induced her and her parents to believe that he was a fully fledged Accountant and that to this extent he made a false declaration to the Registrar of Marriages at the time of the marriage registration as is evidenced by the marriage certificate (R1) which stipulates the petitioner's profession as 'Accountant'. The respondent further avers that after their marriage the petitioner in April 1979 left for U.K. promising to send her immediately a prepaid ticket to join him. She got her travel documents ready, wrote to the petitioner and kept on writing to him for the prepaid ticket but far from sending the ticket to her, he failed even to reply to any of her letters causing her much dismay and disappointment. In December 1979 the petitioner returned to Sri Lanka and on hearing that he was at his parental home at Karainagar she went to his residence and lived with him till 5.1.1980 when he left again for U.K. refusing to take her with him. He again neglected to reply to any of her letters entreating him not to treat her with indifference and urging him to arrange for her to join him there. She states that his ulterior motive became clear when in July 1980, on his

instructions, his solicitors, Messrs. Davis Campbell & Co. of Liverpool, wrote letter R3 to her stating that it would be possible in May 1981 to file a petition of divorce in England based on the fact that their marriage had broken down irretrievably as, according to her husband, they had not lived together since May 1979 and seeking her consent to a decree for divorce. She replied refusing to consent to a divorce and stating that she would resist any such moves. In December 1980 when the petitioner visited her parents in Sri Lanka the elders in the village met the petitioner on her behalf with a view to persuading him to take her and to make a happy home either here or in U.K. He however bluntly refused to agree and asked them to mind their own business and not to interfere in his family affairs. Feeling desperate and helpless she then sought legal advice as to the remedy she could legally obtain when, on hearing of this, the petitioner with a view to circumventing any legal process made arrangements to leave the country immediately. She avers that on 6.1.1981 she instituted the said Case No. 6345 in the Family Court of Kayts praying for an order of maintenance and also for a warrant of arrest against the petitioner to ensure that the action may not be rendered nugatory by the petitioner's premature departure. The respondent has appended to her statement of objections a certified copy of the application filed by her in Court on 6.1.1981 (the same day as the application for maintenance) praying for the issue of a warrant of arrest against the petitioner. This certified copy is marked R4. The certified copy of the proceedings tendered to this Court by the petitioner—B and B1—do not contain this application for the issue of a warrant. Be that as it may, the respondent states further in her statement of objections that the learned Judge after a consideration of her application and the submissions made by her counsel (Mr. Srikantha) ordered the issue of a warrant of arrest against the petitioner returnable the following day (7th). She further states that the petitioner has in the present application to this Court grossly misrepresented what in fact transpired in the lower Court. According to her, on the 7th when the case was called in Court the petitioner was present and was represented by Mr. Kathiravelu, a senior attorney of the Kayts Bar. The petitioner admitted marriage. The petitioner's attorney stated to Court that his client was willing to pay maintenance to the respondent and requested Court to fix a reasonable amount. As against a sum of Rs. 1,000 per month urged by her counsel, the petitioner, after a brief consultation with his counsel, agreed to pay Rs. 700 per month as maintenance and an order was made

accordingly. Then on an application of the respondent's counsel in view of the fact that the petitioner had admittedly planned to leave the country immediately the learned Judge ordered the petitioner to furnish certified bail in a sum of Rs. 25,000 or cash bail in a sum of Rs. 10,000. As he asked for a day's time to get ready with the deed or cash the learned Judge ordered surety bail in a sum of Rs. 50,000 till next day and his father offered to stand surety which the Court accepted. On the next day (8th) he was given further time to furnish bail till the 9th on which day he finished certified bail. On that day the learned Judge examined his passport to ascertain his nationality. As he indicated to the learned Judge that he intended to leave the country immediately before the expiry of his visa, the learned Judge suggested that he should make and he agreed to make the first payment of Rs. 700 on 13.1.1981. On the latter date the petitioner came to Court after it had adjourned. The Registrar informed the learned Judge accordingly and arrangements were made for the payment to be made by the petitioner to the respondent in chambers. The respondent further states that the petitioner was represented by an attorney-at-law when he signified his consent to pay maintenance by subscribing his signature before the learned Judge and that he is now contriving to retrace his steps and to reduce the entire legal proceedings to a trifling exercise. She thus maintains that the learned Judge has acted within the scope of his jurisdiction and that the orders made by him are in accordance with law and that the petitioner has no valid cause to invoke the revisionary powers of this Court.

Learned counsel for the petitoner submitted to us that the entire proceedings before the learned Family Court Judge were void for the reason that the assumption and the exercise of jurisdiction by him over the petitioner were initially bad and illegal. His contention was that a Judge (whether a Magistrate or a Family Court Judge) possessed no power in maintenance proceedings to issue, in the first instance, a warrant of arrest to compel the attendance of a defendant before him. He referred us to the relevant provisions of the Maintenance Ordinance (Chap. 91, Vol. 4 L.E.C.) and the Judicature Act, No. 2 of 1978, and their amendments, and submitted that maintenance proceedings are civil in nature, the procedure prescribed is a civil method of procedure and the process that can issue by Court in such a case is civil process. The law prescribed that a summons must issue on a defendant in a maintenance case and not a warrant for his arrest

and production in Court. He urged that the learned Family Court Judge by issuing a warrant of arrest to compel the petitioner's attendance in Court had thus acted without jurisdiction and the Court was therefore not competent to assume jurisdiction over the petitioner, and that therefore all proceedings and orders made by the learned Judge are void. He relied on the following passage in the judgement of Tennekoon, C. J. in *Perera v. Commissioner of National Housing* (1) at p. 366:

> "Lack of competency in a Court is a circumstance that results in a judgment or order that is void. Lack of competency may arise in one of two ways. A Court may lack jurisdiction over the cause or matter or over the parties; it may also lack competence because of failure to comply with such procedural requirements as are necessary for the exercise of power by the Court. Both are jurisdictional defects; .....Both classes of jurisdictional defect result in judgment or orders which are void."

Learned counsel for the respondent agreed that the Family Court is now vested with jurisdiction to hear and determine maintenance proceedings by virtue of section 24 of the Judicature Act, No. 2 of 1978. He submitted that section 4 of the Judicature (Amendment) Act, No. 37 of 1979, which repealed section 29 of the principal Act and substituted in its place a new section 29, prescribed the procedure to be followed in the Family Court. Subsection 2 of section 4 set out that the procedure laid down in the Maintenance Ordinance should govern the proceedings that may be instituted in the Family Court for the recovery of maintenance. He then referred us to section 15 of the Maintenance Ordinance which authorised a Magistrate to proceed in the manner provided in Chapters V and VI of the Criminal Procedure Code (Chap. 20, Vol. 1, L.E.C.) to compel the attendance of the defendant before Court. Section 62 (1), contained in Chapter V of the Code, he contended, empowered a Magistrate to issue a warrant for the arrest of any person before the issue of summons if the Court sees reason to believe that he has absconded or will not obey the summons. He pointed out that in the instant case there was an application (R 4) made to the learned Judge on 6.1.1981 (the very day that maintenance proceedings were instituted before him) for the issue of a warrant of arrest against the petitioner which the learned Judge after consideration allowed. Learned counsel for the respondent thus maintained that the

learned Judge acted within jurisdiction and according to law in issuing the warrant.

Learned counsel for the petitioner did not dispute the fact that the application R 4 had been made to the learned Judge for the issue of a warrant against his client. He maintained that even if the learned Judge had the power to issue a warrant, he had failed to record his reasons in writing before issuing it as required by section 62 (1) of the Criminal Procedure Code and that the warrant was bad for that reason.

The questions that arise for our determination are purely questions of law. The main question is whether a Family Court Judge has the power to issue, in maintenance proceedings, a warrant of arrest to compel the attendance of the defendant before him without issuing summons for his appearance in Court. Section 14 (1) of the Maintenance Ordinance as amended by the Maintenance (Amendment) Act, No. 19 of 1972, states that every application for an order of maintenance or to enforce an order of maintenance shall be supported by an affidavit stating the facts in support of the application and the Magistrate shall, if satisfied that the facts set out in the affidavit are sufficient, issue a summons on the defendant to appear and to show cause why the application should not be granted. Section 15 of the Maintenance Ordinance provides that a Magistrate may proceed in the manner provided in Chapters V and VI of the Criminal Procedure Code to compel the attendance of, *inter alia,* the defendant. Section 62 (1) of the Code is one of the sections contained in Chapter V aforesaid. It empowers a Court to issue a warrant of arrest against a person, after recording its reasons in writing, if before the issue of summons the Court sees reason to believe that he will not obey the summons. Section 15 of the Maintenance Ordinance thus in express words makes section 62 (1) of the Code applicable to maintenance proceedings. There is no provision in the Maintenance Ordinance for an order of maintenance to be made in the absence of the defendant *ex parte.* It is therefore very essential that the Court should be clothed with power to compel the defendant to appear in Court to enable it to make a valid and binding order. The provisions of the Maintenance Ordinance would be rendered nugatory but for section 62 (1) of the Code for there will be no way of enforcing the attendance of the defendant in Court.

As pointed out by learned counsel for the respondent, the Judicature Act, No. 2 of 1978 (which came into operation on 2.7.1979—vide Gazette No. 40/16 of 15.6.1979) conferred by section 24, on the Family Court, jurisdiction in respect of maintenance cases. Section 4 of the Judicature (Amendment) Act, No. 37 of 1979 (certified on 6.1.1979—prior to the coming into operation of the principal Act) repealed section 29 of the principal Act and substituted a new section 29 therefor. Subsection 2 of the new section 29 enacts that the provisions of the Maintenance Ordinance governing the institution and conducting of proceedings thereunder shall be deemed to apply to such proceedings that may be instituted in the Family Courts. It is thus clear (and no argument to the contrary was adduced before us) that section 15 of the Maintenance Ordinance applies to maintenance proceedings now instituted in the Family Court.

The Criminal Procedure Code (including the aforesaid Chapters V and VI) was itself repealed by the Administration of Justice Law, No. 44 of 1973, which came into force from 1.1.1974. The provisions of section 62 (1), however, were re-enacted in section 132 of the above Law. Chapters II and IV of this Law (including section 132) were in turn repealed by section 457 of the Code of Criminal Procedure Act, No. 15 of 1979, which came into operation on 2.7.1979. Section 63 (1) of the latter Act No. 15 of 1979, is however identical with section 62 (1) of the Criminal Procedure Code and section 132 of the Administration of Justice Law, No. 44 of 1973. Section 16 (1) of the Interpretation Ordinance (Chapter 2, Vol. 1, L. E. C.) provides that where in any written law or document reference is made to any written law which is subsequently repealed, such reference shall be deemed to be made to the written law by which the repeal is effected or to the corresponding portion thereof. Thus section 63 (1) of the present Code of Criminal Procedure Act would apply to maintenance proceedings by virtue of section 15 of the Maintenance Ordinance. On a consideration of the above matters I am of the view that the learned Family Court Judge had the power under section 15 of the Maintenance Ordinance read with section 63 (1) of the Code of Criminal Procedure Act to issue a warrant of arrest against the petitioner without issuing summons.

There remains for consideration the submission of learned counsel for the petitioner that the failure of the learned Judge to record his reasons in writing before the issue of the warrant

renders it invalid. He stated that the provisions of the section must be strictly complied with. He also submitted that the failure to record the reasons has deprived this Court of the opportunity of scrutinising the reasons for the issue of the warrant and of ascertaining whether the learned Judge did exercise his discretion properly. No doubt it is necessary that the Court must specify its reasons for the issue of a warrant of arrest against any person as required by law. But in my view this will only amount to an irregularity in the exercise of a power which is vested in Court. It is not a jurisdictional defect which would vitiate the subsequent proceedings in Court.

For the above reasons the application is dismissed with costs fixed at Rs. 315.

COLIN THOME, P.—I agree.

Application dismissed.