1969 *Present :* **Wijayatilake, J.**

K. M. SENEVIRATNE, Appellant, *and* K. PODI MENIKE, Respondent

S.C. 885/68—M.C. Kandy, 49411

Maintenance Ordinance—Application for maintenance of illegitimate child—Dismissal without inquiry into merits—Power of Court to re-open proceedings in a fit case —Natural justice.

Where an application for maintenance of an illegitimate child is dismissed *ex parte* without an inquiry into the merits, the Magistrate has power in a fit case, on the ground of natural justice, to re-open the proceedings within reasonable time if good cause is shown for vacating the order of dismissal.

As the Magistrate who was hearing the application of the applicant-respondent for maintenance in respect of her illegitimate child was going on transfer, the case was fixed, of consent, for inquiry *de novo* before his successor. The applicant

was absent on the date of inquiry and her application was therefore dismissed She subsequently moved to have the order of dismissal vacated on the ground that she had been ill and unable to attend Court for the inquiry. The Magistrate thereupon vacated his earlier order and re-opened the proceedings. It was shown that because one year had elapsed after the birth of the child, the applicant was not entitled to make a fresh application.

Held, that, although there is no express provision in the Maintenance Ordinance enabling re-opening of proceedings, the order of the Magistrate vacating his earlier order of dismissal was valid, in the circumstances, on the ground of natural justice.

APPEAL from an order of the Magistrate's Court, Kandy.

Mark Fernando, for the defendant-appellant.

S. Kanagaratnam, for the applicant-respondent.

Cur. adv. vult.

July 3, 1969. WIJAYATILAKE, J.—

The question raised in this Appeal is in regard to the jurisdiction of a Magistrate to re-open proceedings in a case filed under the Maintenance Ordinance.

The applicant filed an application for maintenance in respect of the child Chandralatha Menika born to her on 6.8.66. She alleges that the defendant is the father of this child. The defendant denied paternity and the case proceeded to inquiry on 15.9.66, 3.5.67 and 4.6.67 before Mr. Douglas Wijayaratne. It would appear that the applicant has been subjected to a lengthy cross-examination—the type-script being 24 pages.

Thereafter as this Magistrate was going on transfer of consent the case had been fixed for inquiry *de novo* before his successor. When this matter came up for inquiry before Mr. D. E. Dharmasekera on 26.8.67 the applicant was absent and the defendant was present. The applicant was not represented by Counsel, and the learned Magistrate had dismissed the application on 7.9.67. The applicant filed affidavit and two medical certificates and moved to have the order dismissing her application vacated. The Magistrate noticed the defendant and after inquiry delivered his order on 12.3.68 vacating his earlier order and allowed the applicant to re-open proceedings. The present Appeal is from this order.

Mr. Mark Fernando, learned counsel for the appellant, submits that once the Magistrate dismissed the application he became *functus officio* and thereafter he had no jurisdiction to re-open proceedings. He submits that unlike in a civil suit governed by the Civil Procedure Code where there is provision under section 84 and in a criminal action governed by the Criminal Procedure Code where there is provision under section 194—in an action for maintenance there is no provision for re-opening proceedings. He has relied on a series of judgments of this Court which I propose

to discuss. In the case of *Anna Perera v. Emaliano Nonia* and *Justin v. Aiman*[1] the question arose with regard to the applicability of section 194 of the Criminal Procedure Code to Maintenance proceedings. It was held that only those sections of the Criminal Procedure Code which are expressly incorporated in the Maintonance Ordinance are applicable and that section 194 is not one of them. It was also held that where an application for maintenance has been struck out without an inquiry into the merits the applicant has no right of appeal under section 17 of the Maintenance Ordinance but she may make a fresh application, provided the time limit prescribed in the Ordinance has not expired. The judgment of Wendt J. in *Saboor Umma v. Coos Kanny*[2] was disapproved. See also the judgment of Shaw J. in *Beebee v. Mahmood*[3] and the judgment of Ennis J. in *Jeerishamy v. Davith Sinno*[4] which adopted the principle set out in the cases reported in 12 N. L. R. 263. Mr. Fernando has also referred me to the judgment of Abrahams C.J. in *Seethie v. Mudalihami*[5] but it would appear that it was decided on the basis that the case was decided on the merits as the applicant had admitted that she had no witnesses to support the claim. A subsequent application made by the same applicant came up for consideration in the case of *Seethi v. Mudalihamy*[6] where Moseley J. adopted the finding of Abrahams C.J. Counsel for the appellant has also relied on the case of *Piyaratna Unnanse v. Wahereke Sonuttara Unnanse*[7] on the scope of section 189 of the Civil Procedure Code. I do not think this has any application to the situation which has arison in this case.

As Wood Renton J. observed in the case reported in 12 N.L.R. 263 the policy of the Maintenance Ordinance is that applications for maintenance should not be disposed of otherwise than upon an adjudication on the merits. In the instant case the applicant has pursued her application zealously and she had appeared in Court on as many as 12 occasions. Unfortunately on the day in question she had been prevented by the after effects of an attack of typhoid fever from attending Court and she has called medical evidence to show that she was warded in Hospital and she had been discharged only 3 days before the Inquiry date. Some of the witnesses she had summoned for this date were present in Court.

Counsel for appellant submits that, if at all, after her application was dismissed she had only a right to file a fresh application provided it was not time barred. The prescriptive period being one year from the birth of the child and the Court having taken such a long period to dispose of this application she would have been shut out from pursuing a fresh application.

There is no provision in the Maintenance Ordinance to meet a case such as this. In my view in the absence of any statutory provision it is incumbent on this Court to make an order which will promote the ends of justice and not defeat them. I do not think the judgments relied

[1] *(1908) 12 N. L. R. 263.*
[2] *(1909) 12 N. L. R. 97.*
[3] *(1921) 23 N. L. R. 123.*
[4] *(1921) 23 N. L. R. 466.*
[5] *(1937) 40 N. L. R. 39.*
[6] *(1938) 3 C. L. J. 83.*
[7] *(1950) 51 N. L. R. 313 at 316.*

on by Mr. Fernando stand in the way of such a course being adopted. In both the Criminal Procedure Code and Civil Procedure Code there is provision for a situation such as this. Surely, in an application for maintenance where the Court procedure has contributed to the long delay in its disposal some relief should be given to the applicant. As Mr. Kanagaratnam, learned Counsel for the applicant, submitted if this applicant is shut out from showing cause of her absence from Court, this Court will be acting contrary to all principles of Natural Justice.

I am inclined to agree. I can conceive of several situations such as this. For instance, if this woman was prevented from being present at the Inquiry owing to an accident on her way to the Courts would the Magistrate be powerless to give her a hearing as to her absence and if the facts so warrant re-open proceedings, when there is no statutory provision preventing him doing so? Let me give another illustration. For instance, if this woman owing to a bus break down or the derailment of a train got late to attend Court and by that time the Magistrate had dismissed her Application would the Magistrate be precluded from re-opening proceedings? Numerous illustrations can be given to show that it would be quite contrary to all principles of Natural Justice to deprive a Magistrate of this right. I do not think it correct for us to conjure up hurdles when the Legislature has not thought it fit to introduce them.

In my opinion it is the imperative duty of a Magistrate to give a hearing to a party who wishes to show cause and re-open proceedings in a fit case if such application to re-open proceedings is made within reasonable time—in all the circumstances.

I see no reason whatever to interfere with the Order of the learned Magistrate. I would accordingly dismiss the Appeal with costs.

Appeal dismissed.