JAYATILLEKE
v.
CHANDRALATHA

COURT OF APPEAL.
ANANDA GRERO, J.
CA NO. 31/91(M).
MC KULIYAPITIYA NO. 70745.
DECEMBER 11, 1992.

Maintenance – Application for enhanced maintenance – Maintenance Ordinance, sections 10 and 2.

In an application for enhanced maintenance the scope of the inquiry should be limited to the issue whether there has been a change of circumstances of the parties since the making of the maintenance order. This is what section 10 of the Maintenance Ordinance postulates. The " enhancement inquiry " should not be converted into an inquiry under section 2 of the Maintenance Ordinance.

An application under section 10 of the Maintenance Ordinance envisages an alteration in the allowance already ordered under section 2 of the said Ordinance, which could be in the form of enhancement of maintenance

APPEAL from order made by the Magistrate of Kuliyapitiya.

Jayatissa Herath for appellant.

Rohan Sahabandu for respondent.

Cur. adv. vult.

January 29, 1993.

ANANDA GRERO J.

In this case, the applicant-respondent, the wife of the respondent-appellant made an application to the Magistrate of Kuliyapitiya claiming maintenance for herself and the child Thejanamala. On 24.8.84, the respondent-appellant appeared before the said Magistrate, and admitted the marriage and paternity of the aforesaid child.

On 8.2.85, he consented to pay Rs. 400 to the child and Rs. 200 to the respondent-applicant as maintenance. She had agreed to accept the said amount and the learned Magistrate made order directing him to pay Rs. 600 per month as maintenance, to be effective from 1.2.1985.

On 25.8.86, she made an application to Court by way of an affidavit, praying that the payment of maintenance be enhanced. She had asked Rs. 500 for herself, and Rs. 1,000 for the child. The matter was fixed for inquiry and after several dates of inquiry, the learned Magistrate delivered his order on 1.2.91, ordering the respondent-appellant to pay Rs. 500 to the applicant-respondent, and Rs. 1,000 to the child, Thejanamala, who stays with the mother. The said order is to be effective from 1.1.91. Against this order, the respondent-appellant appealed to this Court.

The original or the first application was made by the applicant-respondent under section 2 of the Maintenance Ordinance. Although it was fixed for inquiry, the necessity did not arise to go through a full inquiry as the respondent-appellant consented to pay maintenance in a sum of Rs. 400 and Rs. 200 for the child and for the applicant, respectively.

It appears from the brief, that this enhancement of maintenance inquiry has taken the shape of an inquiry under section 2 of the Maintenance Ordinance, which this Court is of the view, that it is not necessary to go to that extent. The scope of the inquiry into the matter of enhancement of payment of maintenance is limited to the issue whether there has been a change of circumstances of the parties since the making of the maintenance order. (*vide* section 10 of the Maintenance Ordinance). Once an order of maintenance

is made, a long drawn inquiry is not necessary, and what is necessary, is to find out whether the circumstances of the parties have changed in order either to allow the enhancement application or not.

Of consent, the order for maintenance was made as far back as 8.2.85 and there was no necessity to convert the " enhancement inquiry " into an inquiry under section 2 of the Maintenance Ordinance, as could be seen in this case. Section 10 of the Maintenance Ordinance states that on the application of any person receiving or ordered to pay a monthly allowance under the provisions of this Ordinance, and on proof of a change in the circumstances of any person for whose benefit or against whom an order for maintenance has been made under Section 2 the Magistrate may either cancel such order or *make such alteration in the allowance ordered as he deems fit,* provided that the maximum monthly rate under the said section, be not exceeded.

Thus the limitation of the inquiry to make an alteration in the allowance ordered (i.e. ordered under section 2) is confined to the question whether circumstances have changed, since the making of the maintenance order. These circumstances, refer to the parties concerned. At an inquiry for enhancement of payment of maintenance, the applicant has to establish that her circumstances have changed, and as such it has now become necessary to ask for such enhancement. Well the respondent against whom the order for maintenance is in force, could satisfy Court that his financial resources are such that he is not in a position to pay more than what has already been ordered ; or that the applicant is now earning and therefore the necessity does not arise to get an enhancement order in her favour. Likewise certain other grounds could be shown by either party for and against the alteration in the allowance already made under section 2 of the Maintenance Ordinance. But that does not mean that this ' Limited inquiry ' should be extended to an inquiry under section 2 of the Mainenance Ordinance. As earlier stated, that it appears that the enhancement inquiry in this case has gone beyond the limits of such inquiry and got converted somewhat into an inquiry under section 2 of the Maintenance Ordinance.

Although the inquiry in this case has exceeded the scope of the inquiry, yet it appears from the order of the learned Magistrate that he had addressed his mind to the main issue whether the

circumstance of the parties, i.e. the applicant-respondent, her child, and the respondent-appellant have changed which would warrant an alteration (i.e. an enhancement) in the allowance ordered by Court on 8.2.85.

This Court carefully considered the written submissions of the learned Counsel for the respondent-appellant, and is of the view, that most of these submissions are relevant when the Magistrate makes an order under section 2 of the Maintenance Ordinance, and not really relevant to the question of enhancement or alteration of the payment of maintenance. Submissions made by him with regard to the reduction of the income of the respondent-appellant are relevant to the issue in question. The submission with regard to the question of ' means ' of the applicant-respondent is also relevant to the issue before the Magistrate.

In his submissions the learned Counsel for the respondent-appellant has stated as follows :-

> " The learned Magistrate has failed to consider whether the daughter who is living with the applicant-respondent is wilfully refusing to go back to the father without any justifiable cause and whom the respondent claims she could maintain the child on her own " (*Vide* page 12 of the written submissions).

At this inquiry, the child who was 17 years old at that time did not give evidence. There is no evidence before Court, that she herself refused to go with the respondent-appellant (her father). No doubt the respondent-appellant in his evidence had stated that if she was prepared to come back he was willing to maintain her. The applicant-respondent under cross examination has admitted that he claimed the custody of the child. But there is no clear evidence to show when, where, and under what circumstances that such custody was claimed by the respondent-appellant. It was suggested to her by the learned Counsel for the respondent-appellant that he claimed the custody of the child, in the divorce case between the parties, but that action has been dismissed. There was no evidence before Court to show that the child was wilfully refusing to go back to the custody of her father. At the time of this inquiry, the child was in the custody of the mother, and the Magistrate has to consider whether the circumstances of the child have changed so as to allow the application

of the applicant-respondent, and nothing beyond that. Although the learned Counsel in his submission has stated that the applicant-respondent claimed that she could maintain the child on her own, this Court cannot agree with him. Under cross examination, she has specifically stated that she could not maintain her with her maintenance. (*vide* proceedings dated 8.6.90, at page 6). In the circumstances, this Court is unable to agree with the contention of the learned Counsel, that the learned Magistrate has failed to consider the wilful refusal on the part of the child to go back with the respondent-appellant, and the mother's (applicant's) claim to maintain her child.

Could it be said, that the applicant-respondent satisfied the learned Magistrate, that the circumstances of both of them (i.e. the child and herself) have changed? She had given evidence at the inquiry, and her evidence reveals that the child was 17 years old at that time and she was attending the Madya Maha Vidyalaya of Kuliyapitiya. The daughter's requirements are many, and being a school going child she has to spend a lot. According to her ; she has no means of income and the child too does not have income. On the other hand, she has stated that the respondent-appellant earns more than Rs. 10,000 per month and owns rubber lands and petrol filling station. Further, according to her, he owns paddy lands and eight acres of coconut land. Thus taking her evidence as a whole, it is manifest that he is a man of means.

The evidence of the respondent-appellant's Tax Accountant, reveals that his net income for the years 1985/1986 was Rs. 40,750. Then for 1987/1988 it was Rs. 98,570 and for 1988/1989 the income was Rs. 111,587. Thus it could be clearly seen that his income has been increased steadily over the years.

The respondent-appellant too had given evidence at this inquiry and admitted that he pays income tax and Business Turnover Tax. The fact that he pays such taxes shows that he earns an income which is taxable, and such a person could be considered as one who has much means. No doubt he maintains two of his children who are with him. He too has various other commitments. But to pay a sum of Rs. 1500 for a month as maintenance for his wife and child as ordered by the learned Magistrate could not be treated as a heavy burden which is difficult for him to carry. He who agreed

to pay Rs. 600 as maintenance was ordered by the learned Magistrate to pay another Rs. 900 more for a month. The order of the learned Magistrate amply reveals that he was satisfied that the respondent-appellant was in a position to pay such enhanced amount. He had taken into consideration the change of circumstances of the applicant and her child, and also the means of both parties, and finally came to the finding that the allowance which is paid by the respondent-appellant as maintenance should be enhanced. Accordingly he ordered that Rs. 500 and Rs. 1,000 should be paid to the applicant-respondent and the child, respectively. This Court is of the view, that on the basis of the evidence placed before the learned Magistrate about the change of circumstances of the applicant and the child on the one hand, and the position of the respondent-appellant with regard to his capability of paying the enhanced amount and his circumstances on the other hand, the finding of the Magistrate is correct and justifiable.

Learned Counsel for the respondent-appellant contended that he was not receiving an income from the paddy and coconut lands due to severe drought. But it should be stated that apart from the income he gets from the said lands, he has other sources of income. Therefore, even though he may not get an income from such paddy and cocount lands (that also believing only what he has said) yet, it appears from the evidence led in this case, that he gets a comfortable income to meet his financial obligations including the payment of the allowance of maintenance to the applicant and the child.

This Court considered the submissions made by both Counsel with regard to the respondent-appellant's income and sources of income. Also this Court considered the submission made by the learned Counsel for the applicant-respondent about her means of income. It appears from her evidence that she sews for others and gets an income of Rs. 25 to Rs. 30 for a week and during some months she gets an income of Rs. 75 to Rs. 100. During some months she gets no income. In answer to Court she had stated that because of the fact that she could not leave her daugher at home, she did not go in search of a job. But the fact remains, that being at home she is engaged in sewing and earning a little income. It appears from the proceedings dated 8.6.90 (*vide* page 14 of the original case record) that the learned Magistrate had addressed his mind to find

out the 'means' of the applicant. That may be the reason why he questioned the applicant about her failure to find out a job even after the respondent-appellant filed an action for divorce. Although the learned Magistrate has not discussed at length about the means and circumstances of the applicant and the child in his order, yet it cannot be held that he totally failed to address his mind with regard to these two aspects (means and circumstances) as stated in section 2 of the Maintenance (Amendment) Act No. 19 of 1972.

On a consideration of the entire evidence led at the inquiry and the order of the learned Magistrate, this Court is unable to agree with the contention of the learned Counsel for the respondent-appellant, that the Magistrate had come to an erroneous finding both on the question of law and facts in this case.

For the above reasons, the appeal of the respondent-appellant is dismissed with costs of the appeal fixed at Rs. 500. Hence the order of the learned Magistrate dated 17.8.90 is hereby affirmed.

Appeal dismissed.