GUNARATNE MENIKE
v.
JAYATILEKE BANDA

SUPREME COURT
G. P. S. DE SILVA, C.J.,
KULATUNGA, J.,
RAMANATHAN, J.
S.C. APPEAL 67/94
C.A. 29/91/(M)
M.C. KEGALLE 10824
DECEMBER 13, 1994.

Maintenance – Application by Mother on behalf of an illegitimate child – Order for maintenance made – Confirmed by Court of Appeal – Voluntary withdrawal of application - Respondent discharged – Cancellation of withdrawal – Validity of Magistrates' Order allowing same – Order made per incuriam.

An application for maintenance by the mother on behalf of an illegitimate child was made on 27.1.1976. After inquiry the Magistrate made Order awarding Rs. 50/- per month as maintenance for the child from the date of the application. The defendant respondent preferred an appeal to the Court of Appeal, which was dismissed on 3.3.1981. The appeal preferred to the Supreme Court was withdrawn on 13.11.1981

The Appellant on 18.9.81 filed an affidavit voluntarily withdrawing the maintenance case. The Magistrate on 8.6.1982 made order allowing the withdrawal and discharging "the accused."

Later on 15.1.1991, the applicant filed another affidavit and averred that she withdrew the maintenance case on a promise of marriage made by the defendant and the defendant had gone back on the promise and married some one else on 27.12.1990. The magistrate made order on 10.6.91, directing the defendant to pay maintenance in terms of the original order dated 13.01.1977.

On appeal, the Court of Appeal took the view that the Magistrate was in error in restoring the case to the trial roll and enforcing the order for maintenance made on 12.1.1977 as the application for maintenance, had already been "voluntarily withdrawn."

Held:

(i) As the application for maintenance was inquired into and order for maintenance had been made in favour of the child, there was no application before the Magistrate's Court to withdraw.

(ii) Furthermore, the Order made on the merits was affirmed by the Court of Appeal (on 3.3.1981) which was binding on the Magistrate.

(iii) The order made subsequently on 8.6.1982 discharging "the accused" – is an order made per incuriam.

(iv) Right of maintenance is personal to the child; it is not open to the mother to compromise the child's claim.

Per G. P. S. de Silva, C.J.

> "The principle laid down in a decision must be read and understood in the light of the nature of the action, and the facts and circumstances the court was dealing with."

(v) The effect of the Order of 8.6.1982 was no more than to suspend the enforcement of the Order for maintenance made on 12.1.1977; the order dated 10.6.1991 to enforce the original Order for maintenance is a valid order.

Cases referred to:

1. *Shanmugam v. Annamuttu* – 69 NLR 63 at 64.
2. *Jane Hamy v. Darlis Zoysa* – 12 NLR 70.
3. *Seethi v. Mudalihami* – 40 NLR 39.
4. *Paulusz v. Perera* – 34 NLR 438.

Appeal from the Judgment of the Court of Appeal.

Daya Guruge with *D. P. Abeysiriwardane* for Applicant-Appellant.
Faiz Musthapha P.C. with *S. Jayawardene* for Defendant-Respondent.

Cur. adv. vult.

January 10, 1995.
G. P. S. DE SILVA, C.J.

An application for maintenance was made on 27th January 1976 to the Magistrate's Court by the mother of an illegitimate child. The matter proceeded to inquiry and the Magistrate made order directing the defendant to pay a sum of Rs. 50/- per month as maintenance for the child, from the date of the application. The order of the Magistrate was on 12th January 1977. The defendant preferred an appeal to the Court of Appeal. The appeal was considered and dismissed on 3rd March 1981. The defendant then preferred an appeal to this court. The appeal, however, was withdrawn and was accordingly dismissed by this Court on 13th November 1981.

The applicant filed in the Magistrate's Court an affidavit dated 18th September 1981 wherein she averred that she was "voluntarily" withdrawing the "maintenance case." The Magistrate thereupon made the following order (as translated) dated 8th June 1982: "File of record the affidavit. The case is withdrawn. The accused is discharged."

The matter did not rest there. On 15th January 1991 the applicant filed another affidavit in the Magistrate's Court. In this affidavit she averred that she withdrew the maintenance case on a promise of marriage made by the defendant; the defendant had gone back on his promise and had married someone else on 27th December 1990. The Magistrate having considered this affidavit made order on 10th June 1991 directing the defendant to pay maintenance in terms of the original order dated 12th January 1977, referred to above.

The defendant preferred an appeal to the Court of Appeal against the aforesaid order dated 10th June 1991. The Court of Appeal took

the view that the Magistrate was in error in restoring the case to the trial roll and enforcing the order for maintenance made on 12th January 1977, since the application for maintenance had already been voluntarily withdrawn by the applicant. Accordingly, the Court of Appeal set aside the order dated 10th June 1991. The applicant has now preferred an appeal to this court against the judgment of the Court of Appeal.

Mr. Daya Guruge for the applicant-appellant submitted that the order of the Magistrate dated 8th June 1982 permitting the applicant to withdraw the application for maintenance and "discharging" the respondent was one made per incuriam. It seems to me that this submission is well founded. In the first place, there was no application pending before the Magistrate's Court which the Magistrate could have permitted the applicant to withdraw. The application had been inquired into and an order for maintenance had been made in favour of the child. It was an order made on the merits. What is more, **the order for maintenance made by the Magistrate was affirmed by the Court of Appeal.** Therefore it was an order which was **clearly binding on the Magistrate.** Thus the subsequent order of the Magistrate "discharging" the defendant from the proceedings was an order made by a manifest mistake or oversight. The order being one made per incuriam, it was open to the Magistrate to set aside his order. This he did by his order of 10th June 1991.

Secondly, the right of maintenance is personal to the child in whose favour the order was made; it was not open to the mother to compromise the child's claim. As succinctly stated by Savitri Goonesekera in her book. **The Sri Lanka Law on Parent and Child,** "An award of maintenance under the statute is not a personal benefit to the mother ... for the legal right to claim maintenance is vested in the child (page 422). One of the cases cited by the learned author in support of this principle is *Shanmugam v Annamuttu* [1], where Manicavasagar J., stated with reference to an order made under section 2 of the Maintenance Ordinance that, " the allowance ordered is personal to the child and the latter should not suffer even temporarily for the folly of the mother ....."

Jane Hamy v. Darlis Zoysa [2] was also a case where the defendant was ordered to pay maintenance for his illegitimate child. Hutchinson C.J., in his judgment pithily expressed himself thus: "The provisions of the Ordinance No.19 of 1889 for the maintenance of illegitimate children by their fathers are obviously **not intended purely for the benefit of the mother.** They can be enforced by the court, even if the mother takes no steps for that purpose or she is dead; and if an application has been made for that purpose by the mother and has been compromised by an arrangement between her and the father, that cannot deprive the Court of the power to afterwards ordering the man to make provision for maintaining the children if he neglects to do so."

On a consideration of the matters set out above, I hold that the order of the Magistrate dated 8th June 1982 purporting to terminate proceedings was one made per incuriam. Having regard to the crucial fact that the order for maintenance dated 12th January 1977 had been affirmed by the Court of Appeal on 3rd March 1981, it seems to me that in truth the effect of the order of 8th June 1982 was no more than to suspend the enforcement of the order for maintenance made on 12th January 1977. On 10th June 1991, the Magistrate rightly made order enforcing the original order for maintenance dated 12th January 1977.

Mr. Musthapha for the defendant-respondent placed strong reliance on the case of *Seethi v. Mudalihami* [3]. That case is clearly distinguishable from the case before us. That was a case where on the **date of trial** the applicant had informed the court that "she had no witnesses present, who could supply the necessary evidence corroborative of her claim that the appellant had fathered the children." (page 39). Thereupon the Magistrate had dismissed her application for maintenance. The significant fact is, as observed by Abrahams C.J., the case was dismissed **"on the merits** as she admitted that she had no witnesses to support her claim ..." (at page 40). It was in these circumstances that the Learned Judge took the view that the Magistrate had no power to re-open a case that was dismissed.

Mr. Musthapha next relied on the following passage in the judgment of de Silva, A.J., in *Paulusz v. Perera* [4] at 440:

"The principle of law that a court may not set aside its own order is well established and rigorously enforced. It is a very important principle as on it depends the finality of judicial decisions. If a Judge can review his own decision, there is no limit to the number of times upon which he might to do so or upon which he may be invited by the parties so to do ...". The court was here concerned with the question whether the District Judge had the power to set aside his own order dismissing a **partition action.** It is to be noted that a partition decree "creates rights in rem" (at page 441). The Learned Judge proceeded to make this important observation: "The proposition that a District Court does not have the right to set aside an order of dismissal made by it is not only good law but necessary for the proper working of partition actions. The plaint in a partition action has to be registered. The right of a person entering into a transaction affecting the land who has examined the record and found an order of dismissal as the last order might be gravely prejudiced, if not defeated, by a subsequent order of a District Court setting aside its own order of dismissal." thus it is seen that the principle enunciated was in the context of a partition action and is of little assistance in the appeal before us. The principle laid down in a decision must be read and understood in the light of the nature of the action, and the facts and circumstances the court was dealing with.

For these reasons, the appeal is allowed, the judgment of the Court of Appeal is set aside and the order of the Magistrate dated 10th June 1991 is restored.

The defendant-respondent must pay the applicant-appellant a sum of Rs. 1000/- as costs of appeal.

KULATUNGA, J. – I agree.

RAMANATHAN, J. – I agree.

Appeal allowed.