1977 *Present:* **Wijesundera, J. and Vythialingam, J.**

A. J. WEERARATNE, Appellant

and

W. CHANDRAWATHIE PERERA, Respondent

S. C. 23/77-M.C. Panadura 54371

Maintenance—Application by wife for herself and child—Plea that the respondent was of unsound mind—Effect of such plea—Procedure to be followed—Criminal Procedure Code, Chapter XXXIII—Civil Procedure Code, Chapter XXV—Applicability—Medical certificates—Production without calling medical officer—Admissibility—Administration of Justice Law, No. 44 of 1973, section 147.

The applicant sued the respondent (her husband) for maintenance for herself and her child. Counsel for the respondent submitted that the respondent was of unsound mind, produced medical certificates and moved for an adjournment to lead evidence as to the mental condition of the respondent. The Magistrate rejected the medical certificates, refused the application to lead evidence and made order granting maintenance.

Held : (1) That where it is found that a respondent in an application for maintenance is mentally ill steps should be taken to appoint a suitable person as guardian of the person and manager of the estate and the inquiry thereafter proceeded with.

(2) That however the provisions of Chapter XXXIII of the Criminal Procedure Code had no application to these proceedings.

(3) That, therefore, the proceedings in this case should be set aside and the Magistrate directed to inquire into the mental condition of the respondent (the present appellant).

Per Vythialingam, J.—(i) Section 147 of the Administration of Justice Law, No. 44 of 1973 applied to the medical certificates in question and *prima facie* they were admissible in evidence though the medical officers were not called.

(ii) The provisions of Chapter XXV of the Civil Procedure Code were also not applicable here but this did not mean that these proceedings should be stayed merely because a party was of unsound mind. All that is necessary is that he should be properly represented and his interests duly protected.

Cases referred to :

Esanda v. Suruthu, 6 C.W.R. 125.

Dingito v. Singho Appu, 3 C.W.R. 64.

Rasamany v. Subramaniam, 50 N.L.R. 84.

Anna Perera v. Emaliano Nonis, 12 N.L.R. 263.

Fernando v. Fernando, 23 N.L.R. 31.

Subaliya v. Kannangara, 4 N.L.R. 121.

Letchiman Pillai v. Kandiah, 30 N.L.R. 280.

Tenne v. Ekanayake, 63 N.L.R. 544.

Girigoris v. G. Don Jacolis, (1914) 1 Cr. Appeal Reports 4.

Ukku v. Sidoris, 59 N.L.R. 90.

Seneviratne v. Podi Menika, 73 N.L.R. 91.

Public Prosecutor v. Yuvaraj, (1970) A.C. 913 ; (1970) 2 W.L.R. 226.

APPEAL from a judgment of the Magistrate's Court of Panadura.

N. Devendra, for the respondent-appellant.

Applicant-respondent absent and unrepresented.

Cur. adv. vult.

November 23, 1977. WIJESUNDERA, J.

This appeal raises an interesting question of procedure. On the 28th April, 1974, the respondent claimed maintenance from the appellant, her husband, for herself and her child. At the very outset when the claim was made and on a number of subsequent dates the Attorney appearing for the appellant stated to Court that the appellant was mentally unsound. On a number of dates to which the inquiry was postponed the respondent did not

appear. At one stage a warrant was issued and the appellant after being produced by the Grama Sevaka was released on bail. On the next date the learned Magistrate inquired into the claim. The appellant was present and represented by the same Attorney. Only the respondent gave evidence. The respondent stated that he married the appellant on the 13th March 1972 and on the 22nd January, 1973, the child was born to her. On the 13th December, 1973, the appellant deserted her. The Attorney appearing for the appellant objected to the evidence that the parties were married. The cross examination proceeded on the basis that the validity of the marriage was being challenged for more than one reason. On behalf of the appellant no evidence was called, the position of the Attorney for the appellant being that the appellant was mentally unsound. He produced some medical certificates from doctors at the Mulleriyawa Mental Hospital and moved for a date to establish the fact that the appellant was mentally unsound. The learned Magistrate refused the application. On the basis that the income of the appellant was Rs. 300 per month the learned Magistrate granted her maintenance :—Rs. 75 for herself and Rs. 50 for the child, per month. It is not at all clear on the evidence how the appellant derives this income.

If in fact the appellant was insane the order is fundamentally wrong, because there cannot be an inquiry where the parties are a lunatic and a sane person. Hence once the question of unsoundness of mind is raised it should be determined. There is no provision of law which prevents a Magistrate from determining the question of unsoundness of mind of the appellant immediately it is raised. In fact it is necessary to do so for a just determination of the claim. Therefore even at that late stage when the application to lead evidence was made there was a duty on the learned Magistrate to have inquired into it and the least he should have done was to have granted the date applied for, for the appellant to lead the evidence. After that evidence the learned Magistrate should have decided whether at that time the appellant was mentally unsound. If it was found that the appellant was not of unsound mind then he could have proceeded to make the further order regarding maintenance. For this reason alone the order appealed from has to be set aside.

The learned Attorney for the appellant invited this Court to consider what is to be done if the appellant is found to be insane. The Maintenance Ordinance makes no provision as to the procedure to be adopted where a party respondent in maintenance proceedings is of unsound mind. A claim for maintenance is essentially of a civil nature, although certain procedure in criminal proceedings is adopted to ensure the speedy enforcement

and recovery of maintenance. In *Esanda v. Suruthu*, 6 C.W.R. 125, Ennis, A.C.J. stated that a Magistrate has no jurisdiction in maintenance actions to exercise the power under Chapter 33 of the Criminal Procedure Code. The judgment does not say what exactly the order made by the Magistrate was. However the provisions corresponding to Chapter 33 of the Criminal Procedure Code are section 155 *et seq.* of the Administration of Justice Law. The procedure applicable to the recording of evidence for trials in the Magistrate's Court is made applicable by section 16 of the Ordinance to Maintenance Proceedings. The procedure applicable is that for summary criminal trials. Sections 135 *et seq.* of the Administration of Justice Law relate to criminal trials generally and under that heading are the sections 155 *et seq.* Section 156 (1) of the Administration of Justice Law empowers a Magistrate in the ordinary criminal case to inquire into the fact of unsoundness of mind and to postpone the proceedings if the accused is of unsound mind. Sub-section (4) empowers the Magistrate to resume the trial or start it *de novo* once the accused recovers. It cannot be said strictly that the procedure set down in these section relates to the recording of evidence as contemplated in section 16 of the Maintenance Ordinance. So then these sections also cannot be applied.

Since under the Administration of Justice Law a Magistrate's Court is vested with a new Civil Jurisdiction the question will naturally arise, as there is no direct provision, whether the inquiry could not have been proceeded with after appointing a next friend in terms of Chapter 35 of the Civil Procedure Code in operation at that time.

In any other civil claim the Magistrate undoubtedly would have had that power of appointing a next friend and proceeding with the claim. Although there are special provisions regarding enforcement of an order, a claim for maintenance being essentially of a civil nature, I cannot see any thing in any law which prohibits a Magistrate from appointing a next friend and proceeding with the claim. In this connection a case needs consideration. In *Dingito v. Singho Appu*, 3 C.W.R. 64, Schneider J. was of the view that a claim for maintenance from the legal representative of a deceased person cannot be maintained. Sec. 2 of the Maintenance Ordinance states :—" If any person having sufficient means neglects or refuses to maintain *his* wife.... the Magistrate may order *such* person.... " The learned Judge made emphasis on the word " his ". In the instant case the claim was made from the alleged father and husband and for purposes of inquiry a next friend is being appointed. However even then questions can arise when the order if obtained is sought to be enforced.

But these are best considered at that stage. There are then two alternatives. One is to stop further proceedings if the appellant is found to be of unsound mind till such time as he recovers. The other is to proceed with the inquiry after appointing a next friend. However I agree with Vythialingam, J. that the inquiry be proceeded with after the appointment of a next friend, in case the appellant is found to be of unsound mind.

For these reasons I set aside the proceedings before the Magistrate and direct that the Magistrate inquire into the mental condition of the appellant and that the appellant be permitted to place whatever evidence his Attorney wishes to place in proof of the mental condition of the appellant. If thereafter the Magistrate finds him of sound mind he can proceed to consider the claims for maintenance. If he is of unsound mind a next friend will be appointed by Court before he proceeds to consider the claim, if the respondent desires to pursue the claim. There will be no costs of this appeal.

VYTHIALINGAM, J.

In this case the respondent sued the appellant her husband for maintenance for herself and her child. The parties were married on 13th March, 1972 (P1) and the child was born on 22nd January, 1973. She claimed that the appellant had deserted her on the 13th December, 1973 and had not maintained her or the child thereafter. The application was resisted on the ground that by reason of mental illness the appellant was without employment and income. After the close of the respondent's case Attorney for the appellant produced medical certificates D2-D7 and moved for a date to lead evidence as to the mental condition of the appellant. The application for a date to lead such evidence was refused and the Magistrate having rejected the medical certificates on the ground that they had not been proved ordered the appellant to pay Rs. 125 per month as maintenance for the respondent and her child. The appellant has appealed against this order.

Section 147(1) of the Administration of Justice Law, No. 44 of 1973, provides *inter alia* that any document purporting to be a report under the hand of a Government Medical Officer may be used as evidence although such officer is not called as a witness. The proviso to this subsection sets out that nothing in the section shall affect the necessity of proving the identity of the person so examined and reported on. Apparently in the instant case the identity of the appellant as the person examined and reported on did not arise. The medical certificates D2 to D7 all purport to be issued by Government Medical Officers attached to Mulleriyawa Mental Hospital. Subsection 5 of section 147 sets

out that the court may presume that the signature on any document referred to in this section is genuine and that the person signing it held the office he professed to hold at the time he signed it. *Prima facie* therefore all these medical certificates were admissible in evidence although the medical officers, were not called as witnesses.

If the Magistrate either of his own motion or at the request of either party was of the opinion that it was necessary or expedient that one or more of the medical officers who issued the certificates should be present to give evidence such officer could under the provisions of section 147(6) be summoned and examined as a witness at any stage of the proceedings. So that the Magistrate was quite wrong in rejecting the medical certificates out of hand, and so summarily and in refusing to permit the Attorney of the appellant to lead evidence to prove the mental condition of the appellant. For this reason alone the order made by the Magistrate ought to be set aside and the case remitted for further inquiry and to enable the Attorney for the appellant to call evidence in regard to the medical certificates if necessary and to prove that the appellant is unable to work and earn on account of his mental condition.

But the case does raise a much more fundamental question namely as to what is to be done when one of the parties, more particularly the respondent in an application for maintenance, is mentally ill and as to what procedure should be followed in such a case. A plea of insanity in such a case can raise two totally different questions with equally different consequences. Under the Maintenance Ordinance a person who neglects to maintain his wife and children whether legitimate or illegitimate can be ordered to pay maintenance only if he has "sufficient means" to do so. The words "sufficient means" means not only income from all sources and properties but also income from employment and in the latter sense the words have to be given a wide meaning and includes the capacity to earn money—*Rasamany v. Subramaniam,* 50 N.L.R. 84. Quite obviously a person who has no other income and is incapacitated from earning by reason of mental illness is a person who has no "sufficient means".

It was perhaps in this sense that the plea of insanity was taken in the instant case because the Attorney for the appellant did not take up the plea at the very commencement of the inquiry but only did so at the close of the case for the respondent. But in another sense it may mean that the appellant was by reason of his insanity unable to understand the nature and effect of the proceedings being taken against him and therefore not in a

position to defend himself effectively. But I am of the view that in both cases the plea should be taken up at the very commencement of the inquiry because, if it is taken at the conclusion of the case for the respondent it may very well transpire that the appellant was so insane as not to be able to understand the nature and effect of the proceedings.

The question then is what should the Magistrate do when such a plea is taken up. There is express provisions for such a case in Chapter XXXIII of the old Criminal Procedure Code and now in sections 155 *et seq.* in the Administration of Justice Law. But it has been held in the case of *Esanda v. Suruthu*, 6 Ceylon Weekly Reporter 125, that the Maintenance Ordinance gives the Magistrate no jurisdiction to exercise the powers under that Chapter (Chap. XXXIII), in maintenance actions. On the principle of *expressio unius exclusio alterius* it was held in the case of *Anna Perera v. Emaliano Nonis*, 12 N.L.R. 263, that only these sections of the Criminal Procedure Code which are expressly incorporated in the Maintenance Ordinance are applicable to proceedings under the Ordinance and the provisions of section 194 of the Criminal Procedure Code should not be applied to maintenance proceedings.

The above decision was approved and followed by a Bench of three Judges in *Fernando v. Fernando*, 21 N.L.R. 31, which held that the provisions of section 338 of the Criminal Procedure Code which dealt *inter alia* with the time limit for the filing of appeals to the Supreme Court in criminal cases was not applicable to appeals in maintenance cases. Bertram, C.J. observed "The case therefore appear to be a *casus omissus*. There is no time limit to the right of appeal. The matter is one which could only be dealt with by the Legislature". Shortly after the decision in that case the Legislature dealt with the matter by Act No. 13 of 1925 which made sections 338 to 352 (inclusive) of the Criminal Procedure Code applicable to appeals in maintenance cases. We cannot therefore have recourse to the provisions of the Criminal Procedure Code for the solution of the problem before us.

However proceedings under the Maintenance Ordinance are not criminal but civil in their nature. The foundation of the Magistrate's Court in matters of maintenance is the civil liberty already existing under the Roman Dutch Law, the performance of which can be compelled by civil action, and the Maintenance Ordinance merely provides a simpler, speedier and less costly remedy—*Subaliya v. Kannangara,* 4 N.L.R. 121. But after the passing of the Ordinance the common law right of action is no longer available and relief can be claimed only under the Maintenance Ordinance—*Letchiman Pillai v. Kandiah,* 30 N.L.R. 280.

But here again certain provisions only of the Civil Procedure Code are made applicable to proceedings under the Maintenance Ordinance and another Divisional Bench of the former Supreme Court has held that no other provisions of the Civil Procedure Code are applicable. In the case *Tenne v. Ekanayake,* 63 N.L.R. 544, the question was whether section 9 of the Civil Procedure Code could be availed of to determine the question of jurisdiction in maintenance cases and the Court held it could not. Basnayake, C. J. observed "It has been held (*Anna Perera v. Emaliano Nonis*) that it is not permissible to introduce provisions of the Criminal Procedure Code other than those expressly mentioned. By a parity of reasoning it would follow that it is not permissible to introduce provisions of the Civil Procedure Code other than those made applicable by the Ordinance." So that it is not permissible for us to apply the provisions of Chapter XXV of the Civil Procedure Code which makes provisions in the case of actions by and against minors and persons under other disqualification including persons of unsound mind (section 501).

It is true that the Maintenance Ordinance made a common law right into a statutory right and made special provision for enforcing such a right. But the fact that there is no provision in it in regard to any particular matter does not necessarily mean that a party is without a remedy for enforcing such a right. Civil actions or proceedings for the establishment of a right or the enforcement of an obligation are not stayed merely because a party to a proceeding is of unsound mind. All that

is necessary is that he should be properly represented and his interests duly protected. This is done by the appointment of a guardian of the person and manager of the estate.

Where the wife is of unsound mind it would not be necessary for a guardian to be appointed unless the application was made by her personally for any person can make the application for maintenance on her behalf. Thus in the case of *A. Girigoris v. G. Don Jacolis,* (1914) 1 Cr. Appeal Reports 4, it was held that a brother was entitled to make the application under the Ordinance on behalf of his insane sister who was in custody. De Sampayo, J. observed "The Ordinance does not provide for any particular person to make an application but it provides for a Police Magistrate to make an order for maintenance upon proof that the husband or father as the case may be has been negligent in that respect. However, I think that the brother, in whose custody and care the defendant's wife is, is quite entitled to come forward and apply to the Court to make an order against the defendant."

In the case of *Ukku v. Sidoris,* 59 N.L.R. 90, which was a partition action the 1st defendant was a lunatic and after certain preliminary steps had been taken in the case the proctor for the plaintiffs filed papers seeking to appoint the 9th defendant as the manager of the 1st defendant's estate and although notice of this application was issued on the 9th defendant no further steps were taken in that regard. The action proceeded to trial and interlocutory decree was entered. Thereafter the 9th defendant was appointed as the manager of the estate and he made an application to file a statement of claim on behalf of the 1st defendant. The trial judge refused the application on the ground that he had no power to allow the application. In appeal it was held that the interlocutory decree was not regularly entered and that it was not binding on the 1st defendant as at that time he was not properly represented in terms of section 480 read with section 501 of the Civil Procedure Code. The interlocutory decree was accordingly set aside and it was ordered

that the 1st defendant should be permitted an opportunity to file his statement of claim, as the manager had by then been appointed, and that trial should be held in due course thereafter.

If then every other civil right or obligation can be enforced against a person of unsound mind after he is properly represented why should the civil obligation to pay maintenance alone not be similarly enforceable merely because he is of unsound mind though possessed of sufficient means ? It will be a denial of justice and contrary to all principles of natural justice to deny a mother and/or child the right to maintenance in such a case simply because the Maintenance Ordinance makes no provision as to what should be done in such a case.

There is no provision in the Maintenance Ordinance as to what is to happen when an application is dismissed for want of appearance of the appellant on one of the due dates. In the case of *Anna Perera v. Emaliano Nonis* (*supra*) it was held that in such a case where there has been no adjudication on the merits the applicant may make a fresh application provided that the time limit prescribed in the Ordinance has not expired. But what is to happen if owing to the protracted nature of the first proceedings the prescribed time limit has expired by the time the second application is made ?

Such a situation arose in *Seneviratne v. Podi Menike*, 73 N.L.R. 91. The application was in respect of an illegitimate child whose paternity was denied by the respondent. At the inquiry the applicant was subjected to a lengthy cross-examination and the inquiry was fixed for 26.8.1967 *de novo* as the Magistrate was going on transfer. On that date the applicant was absent owing to illness and the application was dismissed. The applicant moved to reopen the proceedings and after inquiry the Magistrate vacated his order dismissing the application and allowed the applicant to reopen the proceedings. The respondent appealed from that order and the Supreme Court held that the Magistrate was right in the circumstances in vacating the earlier order and reopening proceedings.

In that case the prescriptive period being one year from the birth of the child the applicant would have been shut out from pursuing a fresh application. Wijayatilake, J. pointed out in the course of his judgment " 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.... 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 am therefore of the view that it would be unjust and inequitable to stay all proceedings in the case merely because the appellant is of unsound mind and thus deprive the respondent and her child of the right to obtain maintenance from the appellant if he is possessed of sufficient means. As their Lordships of the Privy Council stated in an entirely different context in the case of the *Public Prosecutor v. Yuvaraj*, (1970) A.C. 913. " But no enactment can be fully comprehensive. It takes its place as part of the general corpus of the law. It is intended to be construed by lawyers and upon matters about which it is silent or fails to be explicit it is to be presumed that it was not the intention of the legislature to depart from well established principles of law". Applying these principles I would set aside all proceedings in the case from the date on which the appellant first appeared in answer to the summons and direct the Magistrate to take the following steps :—

(1) The Magistrate should hold a preliminary inquiry in order to satisfy himself as to whether the appellant is of unsound mind or not.

(2) If he is satisfied that the appellant is not of unsound mind he should proceed with the inquiry into the application for maintenance and make an appropriate order.

(3) If he is satisfied that the appellant is of unsound mind he should take steps to appoint a suitable person as guardian of the person and manager of the estate of the appellant and thereafter proceed with the inquiry into the application for maintenance.

(4) If after inquiry he finds that the respondent and her son are not entitled to any maintenance or that though entitled to maintenance they are not entitled to the order for maintenance because the appellant is not possessed of other means and that by reason of his insanity is incapacitated from working and earning an income he will refuse the application for maintenance.

(5) If however he finds that the appellant though of unsound mind is possessed of sufficient other means he will make an appropriate order for maintenance. It may also be that though the appellant is of unsound mind and not possessed of means yet his insanity is such that he is not incapacitated from working and earning an income. In which case also he would make an appropriate order for maintenance.

All proceedings from and including those on 14.5.74 are quashed and the case is remitted to the lower Court for proceedings to be taken as directed in this order. There will be no costs of appeal.

Appeal allowed.