1951 *Present :* **H. A. de Silva J.**

PUNCHI, Appellant, *and* TIKIRI BANDA, Respondent

S. C. 1,192—M.C. Kandy, 8,580

Maintenance—Withdrawal of application—Institution of second suit—Res judicata.

Where an applicant in an application for maintenance in respect of an illegitimate child withdrew her case on the date of trial stating that she had not enough evidence to prove paternity and subsequently made a second application in respect of the same child—

Held, that the order of dismissal in the first suit operated as bar to the second application.

[1] *(1950) 52 N. L. R. 193.* [2] *(1950) 51 N. L. R. at p. 421.*

APPEAL from a judgment of the Magistrate's Court, Kandy.

P. Somatilakam, for the applicant appellant.

G. E. Chitty, with *S. C. E. Rodrigo* and *K. Sivasubramaniam*, for the defendant respondent.

Cur. adv. vult.

May 15, 1951. H. A. DE SILVA J.—

This is an appeal by the applicant-appellant who sued the defendant-respondent for maintenance for her child named Pema, aged eight months. The appellant alleged that the defendant-respondent was the father of the child. The appellant states in her affidavit submitted to Court that she was the mistress of the defendant-respondent. The defendant-respondent denied paternity. When the case came up for trial defendant-respondent's proctor raised a preliminary point of law and argued that the order in M. C. Kandy No. 6,416 between the same parties operated as *res judicata*. A certified copy of the proceedings in that case has been produced. The learned Magistrate upheld the contention of the defendant-respondent's proctor and dismissed the application. The appeal is now from that order of dismissal.

It would appear that the applicant-appellant applied for an order for maintenance in M. C. Kandy No. 6,416 against the same defendant. The affidavit supporting that application is dated 3rd November, 1949. On the summons returnable date, in that case, namely, 7th January, 1950, both applicant and defendant were present. The defendant denied paternity and the matter was set down for inquiry for the 15th February, 1950. After various postponements the case ultimately came up for trial on the 5th of June, 1950. On that date both applicant and defendant were represented by lawyers and the parties too were present. The lawyer appearing for the applicant made the following statement to Court :—" Mr. Silva states that his client is withdrawing the case as she has not enough evidence to maintain paternity ". The Magistrate accordingly dismissed her application. Subsequently in the same month and the same year the applicant has made the present application which has been dismissed, and from which order of dismissal the present appeal is taken. The ground on which the present application has been dismissed was that the order in the previous application operated as a bar to the present one. Learned Counsel for the appellant has urged that the dismissal of her application in the present suit is wrong.

Various authorities have been submitted to me by learned Counsel who have argued the case before me. I may at this stage make mention

of the fact that it is not the appellant's case that the lawyer who appeared for her in M. C. Kandy No. 6,416 was not instructed by her to make the statement that he made to Court and that he had no authority to make that statement. So that, whether that statement was made to Court by her personally or through her proctor makes no difference whatsoever. If I understood the learned Counsel for the appellant correctly, he conceded that if the woman got into the witness-box and stated on oath or affirmation what her proctor stated to Court in that case, the order of dismissal in the present suit by the learned Magistrate is correct. But as the statement was made at the bar table by her proctor on instructions from her the position is different. I am afraid I cannot see the distinction that is sought to be drawn between the two. It was argued by the appellant's counsel that inasmuch as the merits were not gone into in the previous application, the order made does not bar the entertainment of a subsequent application. Various authorities have been submitted to me bearing on the matter under consideration. *Rankiri v. Kirihattena* [1]. This was a case decided by a full bench of this Court as then constituted. It was there held that the dismissal of a previous charge, whether for insufficiency of evidence or upon any other defect in the case, is a decision upon the merits and such decision bars a second application. In *Jainambo v. Izzadeen* [2] Maartensz J. followed the principle enunciated in *Rankiri v. Kirihattena* (supra) and also *Gunahamy v. Arnolis Hamy* [3]. In *Laisa v. Gardner* [4]. Soertsz J. in the course of his judgment has made the following observation :— " There are circumstances in which an applicant may make a second or third or later application for maintenance in respect of the same child, provided she comes into Court on every such occasion within the twelve months. See *Beebee v. Mahmood* [5] ; *Jeeris Hamy v. Davith Sinno* [6] ; *Ana Perera v. Emiliano Nonis* [7]. But this case is not one of those cases and moreover in this case the subsequent application is not within the statutory twelve month period ". This judgment of Soertsz J. has been cited here as an authority which supports the appellant's contention. But when one reads the judgment, it is really an authority which supports the contention of the defendant-respondent's Counsel.

In *Ana Perera v. Emaliano Nonis* (supra), the facts are that an application for maintenance was struck out without any inquiry into the merits and this Court held that the applicant may make fresh application provided the time limit set by section 7 has not expired. In *Beebee v. Mahmood* (supra) Shaw J. held that where an application made by a mother was not heard on the merits, but was dismissed as she was not ready with evidence and subsequently an application was made by the grandmother the previous application was no bar to the subsequent application. He, in his judgment, referred to *Ana Perera v. Emaliano Nonis* (supra). In *Seethy v. Mudlihamy* [8], the facts are these :—On the day fixed for hearing the applicant informed the Court that she had no

[1] *(1891) 1 C. L. Reports 86.*
[2] *(1938) 10 C. L. W. 138.*
[3] *(1895) 3 N. L. R. 128.*
[4] *(1936) 5 C. L. W. 73.*
[5] *(1921) 23 N. L. R. 123.*
[6] *(1921) 23 N. L. R. 466.*
[7] *(1908) 12 N. L. R. 263.*
[8] *(1937) 40 N. L. R. 39.*

witnesses present to supply the necessary corroborative evidence in support of her claim and the application was dismissed. Later the applicant petitioned the Court alleging that she brought no witnesses as the respondent had proposed certain terms of settlement which he had failed to fulfil. The Magistrate thereupon fixed the case for trial at which the respondent undertook to pay as maintenance such sum as the Court thought reasonable. The Magistrate accordingly fixed the sum. Abrahams C.J. before whom the appeal came up held that the Magistrate had no power to re-open the case and he distinguished the facts in *Beebee v. Mahmood* (supra) from those considered by him. Abrahams C.J. makes the following observation :—" He then makes the ingenious suggestion that the proceedings should be treated not as a re-opening of the case but as a fresh proceeding in maintenance and cites the case of *Beebee v. Mahmood* where Shaw J. held that fresh proceedings in maintenance could be instituted even by a party whose case has been dismissed, provided that the case had not been dismissed on the merits. But the respondent's case had been dismissed on the merits as she admitted she had no witnesses to support her claim, not that she had witnesses, but had been unable to bring them on the day of trial, whereas, in *Beebee v. Mahmood* (supra), it would appear that there were witnesses, but they had not been brought. The implication in the petition that the respondent had witnesses, but had been induced by the appellant's promises not to bring them ought not to be permitted to prevail over the statement in the first case that she had no witnesses present. Had she intended to inform the Magistrate that there were witnesses, but that she had not brought them for some reason or other, she would surely have said as much." I have quoted the observations of Abrahams C.J. rather at length, because his observations have a large bearing on the facts of this case. In the earlier application, that is M. C. Kandy No. 6,416, the applicant did not say through her lawyer that her witnesses had not come, but what she got her lawyer to tell the Court was that she was withdrawing the case as she had not enough evidence to maintain paternity. If I may say so, with respect, I agree with the observations of Abrahams C.J.

I am, therefore, of opinion that the dismissal of the applicant-appellant's application in M. C. 6,416, under the circumstances in which that order came to be made, operates as a bar to the present application.

The appeal is therefore dismissed.

There will be no costs of appeal.

Appeal dismissed.